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THE HUMAN RIGHTS-BASED APPROACH TO WATER IN SOUTH AFRICA: A MODEL FOR NIGERIA

Oluwabunmi NIYI-GAFAR*

Abstract

Premised on the problem of access to water all over the world, the General Committee on Economic Social and Cultural Rights stated under General Comment 15 that water is a human right. South Africa has before the affirmation of the human right to water recognised water as a right in their 1996 Constitution. Coupled with the recognition of the right to water, the South African water laws were also reviewed to put into operation the provision of the 1996 constitution. The Water Services Act specifically provides the framework on which the recognised human right to water is applied – this is in tandem with the human rights-based approach. Conceivably, this approach has a positive influence on the increase of access to water in South Africa. This article conceptualises the human rights-based approach to water, examines the application of this approach in South Africa and examines how this approach can be made applicable to improve access to water in Nigeria.

1 Introduction

Before the inception of the human right to water, South Africa had recognised the right to water in their 1996 constitution.¹ Activities surrounding access to water in South Africa such as publication of general household statistics survey,² review of water policies³ and court litigation⁴ shows that South Africa has followed a human rights based-approach and also that South Africa is working towards ensuring

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The 1996 Federal Republic of South African Constitution (hereafter 1996 Constitution). The 2010 South African statistical release P0318 general household survey showed there was a remarkable increase of people with access to water in 2010, while in 2002 only 56% of South Africans had access to drinking water, in 2010 the percentage of people with access had risen to 89.3%. See South African Statistical Release P0318 General household survey (2010) www.statsa.gov.za/publications/P0318/p0318june2010pdf accessed 12 February 2014.

The National Water Policy review of 2013 No. 36798 is the most recent. The general notice (Notice 888 of 2013) issued by the Department of water affairs, was to call for comments from the general public on the updated policy set out to overcome water challenges and also to improve access to water.

Mazibuko and others v City of Johannesburg and others (CCT 39/09) (2009) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) (6) BCLR 625 (W).

access to water for all its citizens, arguably, in line with the concept of universality of rights. Although access to water is still a problem in South Africa this is found basically amongst the poor and those living in the rural areas, in spite of this there has been a significant progress in the increase in number of South Africans with access to water.

One of the aims of the human right-based approach is to extend water to those who do not have the means to access adequate clean water for their needs – the poor, women and children as well as persons with disabilities. And the human right to water suggests that the right must be progressive. This in other words means that in the long run, everyone should have the basic access to water. The right to water in the 1996 Constitution is not just there as an appeal to what is good or desirable but a justifiable claim and commitment on the part of the South African government towards ensuring same as the constitution of any country is the supreme law to which all other laws must conform.⁵

It is unclear, the type of approach that Nigeria has adopted in ensuring access to water for her citizens. This is premised on the fact that the Nigerian constitution does not recognise water as a right and the only provision of water in the constitution makes it unjusticiable.⁶ Furthermore the provision of the Water Resources Act⁷ which is the principal water law in Nigeria does not contain adequate provisions on the right to water for domestic use. It is suggested in this paper that Nigeria should adopt the model of South Africa and recognise water as a human right. Perhaps, better access to water in Nigeria may be realised for a larger number of Nigerians.

2. What is the Human Right to Water?

In October 2010, the United Nations agreed that the right to water, derived from the right to an adequate standard of living, is a human right.⁸ Even though several of the international human rights instrument did not have an express provision on the right to water, the right to *adequate standard of living* is found in several human rights

⁵ D Bilchitz, 'Does balancing adequately capture the nature of rights?' (2012) in S Woolman & D Bilchitz (eds) "Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South Africa Constitution" (2012) 269 Pretoria.

⁶ Section 18 of the Nigerian 1999 Constitution provides for water under the environmental objectives of government. Also section 6 (6) (c) of the Nigerian 1999 Constitution makes unjusticiable the provisions of chapter two of the constitution which has the 'Fundamental objectives and directive principles of state policy'.

⁷ Water Resources Act 101 of 1999.

⁸ United Nations Human Rights 'UN united to make the right to water and sanitation legally binding' found <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E> accessed 16 February 2015.

instrument.⁹ This right to *adequate standard of living* includes every resource that enables a human being to live a life of human dignity. This includes food, water, housing, social security, sanitation and education.¹⁰

The right to water was derived from the interpretation of articles 11 and 12 of the ICESCR. Article 11 provides that

the state parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing and to the continuous improvement of living conditions....

Furthermore, article 12 provides that the covenant recognizes the "...right of everyone to the enjoyment of the highest attainable standard of physical and mental health"

It is from these provisions and possibly the phrases 'adequate standard of living' and 'highest attainable standard of physical and mental health' that the human right to water was derived. To live a life of good health and dignity cannot be possible without adequate clean water.¹¹ To be in good health consumption of polluted water is a necessity especially amongst children who are one of the greatest recipients of disaster when polluted water is consumed.¹² As rights are interrelated, the human right to water is related to all other rights such that it is difficult if not impossible to enjoy any of these other rights without water. For example, the right to life¹³ as broadly interpreted by Trindade means that one should not be deprived of his life and all that is needed to sustain that life.¹⁴ The human right to water was not derived from the provisions of the International Covenant on Civil and

⁹ Article 25 of the Universal Declaration of Human Rights 1946; article 11 of the International Covenant on Economic, Social and Cultural Rights. In addition to the phrase standard of living the Convention on the Elimination of all forms of discrimination against women (CEDAW) provides for access to water albeit for rural women. See section 14(2) (h).

¹⁰ SL Murthy "The Human Rights to Water and Sanitation: History Meaning and The Controversy Over Privatization" *Berkeley Journal of International Law* 31, (2013): 95.

¹¹ S Heleba 'Realising the right of access to sufficient water in South Africa: Progress and Challenges' *Economic and Social Rights Review* 10, (2009): 7-11.

¹² World Health Organisation and UNICEF (2006) 'Meeting the MDG Drinking water and sanitation target the urban and rural challenge of the decade' http://www.who.int/water_sanitation_health/monitoring/jmpfinal.pdf accessed 23 February 2015 17.

¹³ Article 6 of the ICCPR provides that everyone has the right to life which must be protected by law.

¹⁴ Trindade (1991) 13 *Revista IIDH* 51-52 also at <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/13/dtr/dtr3.pdf> accessed 23 June 2014.

Political Rights¹⁵ however based on the interpretation that human rights are interrelated and connected jurisdictions that have not recognised water as a human right have interpreted it as a derivative right from the right to life.¹⁶ The South African Constitutional Court too, notes the importance of water to human life when it emphasised that water itself is life without which all would die.¹⁷

General Comment 15 interprets the human right to water as 'sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses.'¹⁸ The implication of this elucidation is that water for domestic use must be clean and adequate to take care of basic domestic needs of everyone.¹⁹ This separates the meaning of the human right to water from the mere recognition of the right to water as stated in some water laws.²⁰ This interpretation is not however without contestations. Terms, such as sufficient have been argued to be vague as people differ in body size, in health and even in religion and so the quantity of water each person needs would vary.²¹ In other words when one thinks of a human right to water, one has to

¹⁵ Hereafter, ICCPR.

¹⁶ The Indian Constitution as modified up to the 1st of December 2007 provides under article 21 that no one shall be deprived of his life except in accordance with the provision of the law. The court in determining the right to water in the case of *Attakoya Thangal v Union of India* 1990 (1) KLT 580 states that the right to sweet water and the right to free air attributes to the right to life for they are the basic elements which sustain life itself. The supreme court of India also in the case of *M C Mehta v Union of India* (2004) 12 SCC 118 stated that the excess overuse of ground water and the duty of state to maintain basic level of water was a fulfilment of the constitutional right to life. See also V Maheshwari "Article 21 of the Constitution of India – the expanding horizon" available at <http://www.legalserviceindia.com/articles/art222.htm> accessed 23 June 2014.

¹⁷ *Lindiwe Mazibuko and others v City of Johannesburg and others* (2009) CCT 39/09 ZACC28 paragraph 1.

¹⁸ United Nations Committee on Economic, Social and Cultural Rights (hereafter UN CESCR) twenty-ninth session Geneva, 11-29 November 2002. E/C.12/2002/11 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" (hereafter General Comment no. 15.)

¹⁹ 'Adequate' in this regards means that the clean water available for personal use will keep a person from dehydration and reduce the risk of waterborne diseases. Also consumption and sanitation requirements are expected to be covered by the adequacy. See General Comment 15, n 18 above.

²⁰ The Nigerian water law states that everyone has the right to water. It further explains that the right to water means the right to take from any river or stream, water for domestic use. This does not cover the interpretation of the human right to water which states that water must be clean. Rivers and streams in Nigeria have been known to contain pollutants and chemicals which make it unfit for human consumption. See Section 2 Nigerian Water Resources Act 1990.

²¹ JA Smith 'How much water is enough? Domestic Metered Water Consumption and Free Basic Water Volumes: The Case of Eastwood, Pietermaritzburg' Water SA 36.5 (2010) 596.

consider the persons who would be using the water to ascertain the estimated quantity an individual would need.²²

The human right to water means that the water is accessible. Accessibility to water refers to the distance and the quantity of water obtainable at the water source. United Nations International Children Funds (UNICEF) and the World Health Organisation (WHO) have stated that such distance is less than one kilometre from its place of use and at least twenty litres can be obtained per member of a household per day.²³

Access to water thus refers to the quantity of water, the quality of the water and the distance covered to obtain the water.²⁴ It is safe then to say that when a distance covered to obtain clean water is over one kilometre, then the human right to water is threatened by the distance. Furthermore, when the water accessible is not clean or clean and insufficient, then access to water, according to the definition by the WHO and UNICEF then the human right to water is questionable in such an instance. The human right to water is an improved drinking water source. These are household connection, public standpipe, borehole or protected well or spring and rainwater. Any water source not protected from air or environmental contamination is not an improved source of water and therefore not a human right to water.

3. What does a Human Rights-Based Approach to Water Entail?

To enable an effective change through the application of human rights-based approach to water one has to effectively understand what it means as there can be no ample change without understanding.²⁵ If the human rights-based approach to water is not thoroughly understood, how then can it be applied to make a change in an environment where it is applied? What then is a human rights-based approach?

Firstly, countries that have agreed to human rights and are signatories to any of the human rights instrument have a legal and moral obligation to ensure realization of such rights for their citizens. Secondly, there is no specific method a country has to follow to ensure

²² Howard and Bartram "Domestic water quantity service level and health" WHO/SDE/WSH/03.02 (2003) http://www.who.int/water_sanitation_health/diseases/WSH03.02.pdf accessed 12 February 2015 3-6.

²³ UNICEF and WHO Joint Monitoring Programme (2012) 'Progress on drinking water and sanitation'

²⁴ WHO and UNICEF Joint Monitoring Programme (2000)

²⁵ Ogunsanya "Makers and Breakers of Cities" *Fifty Ninth Inaugural Lecture Delivered At the University Of Ilorin, Nigeria* (2002)

access to water for its citizens.²⁶ However, it is only fair that a method of application be defined and ascertained towards ensuring the realisation of these rights. Human rights-based approach sets out the principles to be adopted and considered in realizing human rights. The human rights-based approach can therefore be described as a framework which sets out the guidelines to be used and applied towards ensuring the realization of rights. It is also safe to say that the human rights-based approach aims at strengthening the ability of the 'moral duty bearers' to fulfil their obligations to the people.²⁷

The human rights-based approach sets out the principles to be adopted and considered in realizing human rights. The human rights-based approach can therefore be described as a framework which sets out the guidelines to be used and applied towards ensuring the realization of rights. It is also safe to say that the human rights-based approach aims at strengthening the ability of the 'moral duty bearers' to fulfil their obligations to the people. A scholar has posited that the evolution of the human rights-based approach is as a result of the failure of structural adjustment programmes which was due to non-accountability²⁸ of government and as a result people pressed for good governance and democracy.²⁹ Academic writers in various disciplines have applied (in theory) the human rights-based approach to their disciplines. London, who wrote on the human rights-based approach to health has described the human rights-based approach as involving holding states and other 'moral duty bearers'³⁰ accountable; developing policies and programmes that are consistent with human rights and facilitating legal redress in cases of violation to health.³¹

There is no one clear definition of the human rights-based approach especially when it is applied to different disciplines. However, the United Nations Development Group (UNDG) adopted a 'Common Understanding' to ensure consistency in the application of the human

²⁶ G Cano "The Recommendations of the United Nations Water Conference (Mar Del Plata 1977) and Related Meetings On National Water Laws" *Journal of Hydrology* 51, (1981): 389.

²⁷ A moral duty bearer refers to 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.

²⁸ Accountability is one of the important principles of the human rights-based approach. This is discussed under this section of the article.

²⁹ P Uvin "From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development" *Development in Practice* 17, (2007): 597.

³⁰ N 9 above.

³¹ L London "What Is a Human-Rights Based Approach to Health and Does It Matter?" *Health and Human Rights* 10, (2008): 65.

rights-based approach by the various United Nations agencies.³² The human rights-based approach is a contemporary framework of the United Nations. This approach was formulated to be applied basically for the purpose of development of human rights issues such as health, development, education, sanitation and water. The human rights-based approach is a conceptual framework for the process of human development. This framework is based on human rights standards and directed towards human right promotion and protection.³³

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

The human rights-based approach is based on human rights principles. Human rights principles are the fundamental norms which represent the standard by which a person or community is guided. Human rights are rights which are inherent in everyone irrespective of status, age, gender or culture. In essence they are universal, inalienable, interdependent, indivisible, equal and non-discriminatory.³⁴ Although there are contestations as to whether socio-economic rights are human rights at all,³⁵ there are however no contentions about water being a necessity for any human survival or its relationship with other human rights.³⁶ Although there have been classifications of human rights into generations, human rights are indivisible irrespective of the class they belong to as the improvement of one right facilitates the advancement of the others.³⁷

³² "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.

³³ E Filmer-Wilson "The Human Rights-Based Approach to Development: The Right to Water" *Netherlands Quarterly of Human Rights* 23, (2005): 217.

³⁴ United Nations Human Rights Office of the High Commissioner for Human rights "What Are Human Rights?" <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 12 February 2015.

³⁵ D Brand described socio-economic rights as those rights which create entitlements for human welfare, such as the right to education, food, housing and health. See, D Brand "Introduction to socio-economic rights in the South African constitution" in Brand & Heyns (eds.) *Socio-Economic Rights in South Africa* (2005): 3.

³⁶ It has been established severally that no human being can survive without a substantial amount of clean water. Furthermore access to water can promote a life of human dignity UN doc E/C 12/2002/11 para 1 see also Heleba *ESR Review* 10, (2009): 7.

³⁷ United Nations Human Rights (Office of the High Commissioner for Human Rights) <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> accessed 21 June 2014.

Simply put, a human rights-based approach to water is a theoretical and conceptual framework which sets out five key principles against which the human right to water can be analysed and realised. Filmer-Wilson identifies these human rights based principles; participation, accountability, non-discrimination, empowerment and legal redress (PANEL) as values of the human rights based approach.³⁸ Furthermore, a human rights-based approach to water establishes the claims and the obligations to 'respect, protect and fulfil' and commits all water management system towards the guarantee of the basic human need for water and provides the single water user with the instrument to enforce this interest. Human rights-based approaches considers the steps or range of systems necessary both at the national and international levels to protect, respect and ensure enjoyment of human rights by all people as a basis for human development.³⁹ Also this approach incorporates human rights standards into national law and integrates human rights principles into public administration and education in human rights and responsibilities.⁴⁰

4. Principles of the Human Rights-Based Approach

The PANEL principles which are Participation accountability, non-discrimination, empowerment and legal redress are principles which set out the guidelines on which the application of the human rights based approach to water is placed. These principles are identified and discussed separately on how they are applied to the human right to water.

Participation: The principle of participation under the human right-based approach, allows everyone irrespective of their status or gender to make contributions and partake in the water discourse that may affect their lives. This principle is based on two criteria; participation on decision making process and access to relevant information. It perhaps is not in the interest of a poor person with disability for a rich person without disability to participate in decisions that would affect the poor person with disability. Naturally, it is not all the time that we think of others or remember them when we make general decisions for everybody. The aim of participation here is to allow even the disabled persons, who alone understand how difficult it is to acquire water the way people without disabilities would acquire water. A blind person that has to go up and down hill or on rocky paths to retrieve water would

³⁸ n 22 above 217-219.

³⁹ J Hausermann 'A Human Rights Approach to Development: Some Practical Implications for Water Aid's Work' (2003) 10 Water Nepal 131.

⁴⁰ n 29 above.

find it more difficult than a person who does not have such a disability. Allowing persons with disabilities to make contributions to access to water in a community does two things. One it allows their own opinion to be heard and two, the outcome of the decision will incorporate the joint decision of even the minorities in the society.

Participation as earlier stated also includes the access to relevant information. When information about water is made in a society without considering the language with which it is made for example, not everyone would be able to participate as what is been stated about water would not be understood. In allowing people to participate adequately, information has to be passed in a language they understand. Not forgetting persons with disabilities such as those that are hearing impaired, when information is passed through announcements these minorities should also be considered. People without access to information or relevant information about water cannot participate in decision making process.

The principle of *accountability* under the human rights-based approach is grounded on identification of the duty bearers and the right holders.⁴¹ The duty bearers in this instance are persons saddled with the responsibility of providing the water. The principle of accountability suggests that the people in charge should be identified and be held accountable.

Non-discrimination; the whole essence of human rights is universality and non-discrimination. There is no doubt that water is unequally distributed on the surface of the earth. People living in water rich areas should not be the only persons to enjoy potable water as everyone needs same for survival and good health. Based on this principle, the human rights-based approach seeks to prohibit discrimination and it requires that all people be given sufficient water for their needs.⁴²

Empowerment principle raises the consciousness in people and gives them power to claim their rights. Empowerment of the people comes about when there are laws that provide for their needs and protect their interest. It also involves the right to information about water. The human rights based approach gives people the voice to ask the knowledge to claim and access to information. 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 and apportion or clearly

⁴¹ N 3 above. The right holders on the other hand are the recipient of the water, the water users to whom the duty bearers have a moral duty towards.

⁴² C de Albuquerque 'The human right to safe drinking water and sanitation in law and policy- a sourcebook' (2012) Wash United, Berlin 12.

stating their duties; there must also be access to information such that the people know about the issues that concern them. *Legal redress* this principle of human rights based approach give people the opportunity to seek legal remedy when they are denied their rights. The court serves as an avenue where such issues can be set right. Legal redress is a very important principle of the human rights-based approach in that where other principles of the rights based approach are denied, then the opportunity to set it right in a court can be approached.

The human rights-based approach has over the years been described by different people and organisations.⁴³ The history of the human rights based approach was founded in development. However what is important in this discourse is not development but rather the principle of the approach and as it is applied to water. Furthermore, the importance of development in this instance is the outcome of the application of the human rights-based approach to water which in its self, promotes development.

5. Application of the Human Rights Based-Approach to Water In South Africa

The human rights-based approach in South Africa has been applied in two obvious ways recognizable to the world. First, there is a legal framework which sets the approach out and secondly there have been litigations which have prompted the courts to interpret the human right to water and also pass judgements enforcing the human right to water.

5.1 Legal Framework

After the apartheid in South Africa, there was a modification of the Constitution.⁴⁴ The new constitution welcomed socio-economic rights which amongst other rights included the right to water.⁴⁵ The Water Services Act (WSA) was created to address quickly the issues of access to water especially for those who did not have access to it, during the apartheid.⁴⁶ The WSA is focused on potable water and sanitation services. It also contains rules about how municipalities should provide water supply and sanitation. The complementary nature of the WSA to the 1996 Constitution is seen in section three of the WSA where it

⁴³ C Nyamu-Musembi & A Cornwall "What is the Rights Based Approach All About? Perspectives from International Development Agencies" *England* (2004):12.

⁴⁴ D Brand & C Heyns "Introduction of Socio-Economic Rights in the South African Constitution" *Law Democracy and Development* 2, (1998): 155.

⁴⁵ Sec 27 (2) 1996 Constitution.

⁴⁶ Act 108 of 1997.

provides that every person has a right to basic water supply and every water services institution must take reasonable measure to realize these rights.⁴⁷ Water authorities are also expected to set out the development plan and measures to realise the right to water.

The National Water Act (hereafter NWA) contains a general provision for water resources.⁴⁸ This includes rivers, dams and groundwater. It contains rules about how these waters are protected used and controlled in an integrated manner. The act, following and supporting the provisions of the 1996 Constitution and the WSA ensures that water for basic human need is reserved before water is allocated for other uses.⁴⁹ There exists a blend amongst the South African water laws which shows the actual need for access to water to be made available for South African citizens. From the provisions of these laws, one can actually see some of the principles of the human rights based approach.

5.2 Judicial Application of the Human Rights Based Approach

There are several cases on the right to water in South Africa. Most of the decisions in these cases have been in the favour of the litigants seeking an enforcement of their constitutional right to water. Some examples are found in the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* wherein the court held that the state had breached the existing rights of the applicant when it disconnected water supply.⁵⁰ It in essence upheld their right to water as protected under the 1996 Constitution.

Again, in *Federation for Sustainable Environment and others v Minister of water Affairs and others*,⁵¹ the applicants alleged there was a breach of their right to water which was occasioned by the acid mine water contamination. Although the municipal made efforts to bring water tankers to supply water to the community the court ordered that the respondents in this case must engage actively with the applicants to ensure that drinking water was supplied communicating the place,

⁴⁷ See section 3 WSA.

⁴⁸ Act 36 of 1998.

⁴⁹ For a detailed explanation see generally the Guide to the National Water Act published by the Department of Water Affairs and Forestry (DWARF). See also *The Right to Water and Sanitation in National Law*. Found at <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/> accessed 15 June 2013.

⁵⁰ (2002) (6) BCLR 625. Find a summarised version of this case at <http://communitylawcentre.org.za/projects/socio-economic-rights/Cases/South%20African%20Cases/high-court-cases/residents-of-bon-vista-mansions-v-southern-metropolitan-local-council-2002-6-bclr-625-w> accessed 9 March 2015. See also O Gbadamosi (2011) 12 University of Botswana Law Journal 53 at 69-70.

⁵¹ (2012) ZAGPHC 128.

time, and quantity. And as a follow up the court also ordered that the respondents should report back to it within a month on the methods they have adopted to ensure the supply of water services.⁵²

Perhaps the cliché 'you win some, you lose some' is apt in describing the judicial decisions surrounding access to water in the constitutional court case of Mazibuko where the applicants lost at the Constitutional Court which is the apex court in constitutional matters in South Africa.⁵³ There are several cases arising from the constitutional provision of the right to water. Only one of these cases – Mazibuko – went as far as the Constitutional Court wherein the case was lost to the government. The Mazibuko case was thus a blow to many South Africans as the case stood out for determining the justiciability of the constitutional provision of socio-economic rights in South Africa and in particular the right to water.⁵⁴

Conceivably the most famous water case in South Africa is the Mazibuko case which went through the hierarchy of courts up till the apex.⁵⁵ The High Court, in which the Mazibuko case began, stated that prepaid metres were unlawful and ordered the municipal to remove them. On the issue of adequacy, the court stated that 25 litres was not sufficient and stated that the quantity of water to be made available to each individual should be 50 litres. Not pleased with the decisions of the high court, the city of Johannesburg appealed the decisions of the High Court. The Supreme Court of Appeal upheld the decision of the high court on prepaid metres but reduced the quantity of water supply to 42 litres per person based on the evidence of experts. Still not satisfied with the decisions of court, the city of Johannesburg appealed to the Constitutional Court. There, prepaid meters were said to be lawful and the quantity of water to a person was also reduced to 25 litres.⁵⁶

⁵² Section 26 (4) of the case.

⁵³ *Mazibuko and others v City of Johannesburg and others* (Centre on Housing Rights and Evictions, Amicus Curiae) Constitutional Court of South Africa (CCT 39/09) (2009) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA1 (CC) 8th October 2009: cited in note 17 above.

⁵⁴ J Dugard "The Phiri water case (*Mazibuko and others v City of Johannesburg and others*): Can human rights traverse the commercialization of water in South Africa?" *Paper for the Social Movements and /in Postcolonial Conference University of Nottingham* 24-25 June 2008. Available at http://www.nottingham.ac.uk/shared/shared_cssgi/Documents/smp_papers/Dugard.pdf accessed 9 March 2015.

⁵⁵ note 17 above.

⁵⁶ S Heleba "The Right of Access of Sufficient Water in South Africa: How Far Have We Come?" *Law, Democracy and Development* 15, (2011): 15

6. Challenges of the Human Rights-Based Approach to Water in South Africa

The human rights-based approach to water in South Africa, though successful on a general note of increased access with many more South Africans having access to water than before the constitutional provisions and the emergence of the water laws - NWA and WSA,⁵⁷ has been criticised to further marginalise the poor people in South Africa especially those who live in the rural areas. Perhaps the human rights based-approach has not served them well in the area of participation.⁵⁸ The principle of the human rights-based approach expects that everyone must participate; states and all moral duty bearers must be accountable; the minority and the poor must be attended to in this regard; and the right to go to court if need be.

Based on the 2014 report of the South African Human Rights Commission (SAHRC), Mirugi-Mukundi draws an analysis which shows a disparity between access to water in theory and access to water in practice.⁵⁹ The SAHRC report showed that many poor communities lack access to water and women and children and persons with disabilities were the most affected. Although there is a Free Basic Water Policy in South Africa, it was stated that most of South Africa's water is used by industries for agricultural, mining and business. One of the ways to improve access to water is by governance from a human rights-based approach.

The problems of access to water is found amongst black communities and schools which in retrospect mirror apartheid spatial geography. Contrary to the belief that over ninety percent of South African has access to water, fourteen percent of households living in KwaZulu-Natal have never had access to water.⁶⁰ The SAHRC report found that a lack of Human Rights Based approach to water delivery existed. As a result

⁵⁷ The statistics show that many more people have access to water in South Africa than they did during the apartheid era.

⁵⁸ Participation which includes the right to information and the need to be educated on issues surrounding access to water, delivery, water pollution and water issues generally.

⁵⁹ G Mirugi-Mukundi "South African Human Rights Commission, 2014 Report on the rights of access to sufficient water and Sanitation" *Economic and Social Rights Review* 15, (2014): 12.

⁶⁰ See the South African Statistical survey found at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=OCB0QFjAA&url=http%3A%2F%2Fwww.statssa.gov.za%2FCensus2011%2FProducts%2FProvinces%2520at%2520a%2520glance%252016%2520Nov%25202012%2520corrected.pdf&ei=LEj9VM-UGszsUttFg_AK&usg=AFQjCNE-jszV-1f1e1mQ3BNWmxfg5JT-VA&sig2=6s6rJnlNEtSldZDyXU6Z0A&bvm=bv.87611401,d.d24 accessed 9 March 2015.

of this participation, transparency and access to information which are clear principles to be applied in the human rights-based approach were absent.

7. An Overview of Access to Water In Nigeria

Nigeria is considered to be abundantly blessed in water resources.⁶¹ These waters are found in the form of rain water⁶² and major rivers in addition to being bordered by the Atlantic Ocean. A large number of Nigerians in spite of this do not have access to potable water for their domestic use.⁶³ Meeting the domestic needs of water for Nigerians remain a great issue.⁶⁴ It is an accepted fact that water for basic human use in Nigeria is insufficient and inaccessible. This continued lack of water for domestic use is however unacceptable as life is dependent on clean water.

While research has shown that in the North-eastern part of Nigeria about 80 percent of households do not have access to improved source of water supply, it is difficult to ascertain the percentage of people without access to potable water in the whole of Nigeria.⁶⁵ There is uncertainty as to the exact number of people without access to potable water, however, the Nigerian government, as reported by Ameto, estimates that by 2015, 75 percent of Nigerians would have access to water.⁶⁶ The United Nations, on the other hand, as represented by their agencies⁶⁷ reported in 2010 that Nigeria is one of ten countries with the largest population without access to an improved drinking water source⁶⁸. According to their 2012 update on the progress on drinking water and sanitation by UNICEF and World Health Organisation, Nigerians without access to potable water are approximately 66

⁶¹ National Water Policy (2004) 3.

⁶² According to Aladenola and Adeboye (2012) 24 Water Resources Management, an estimate of 74.0m³ of rainwater can be harvested annually per household. They argued that water needed for laundry and flushing was estimated to be a total of 60m³ annually. HT Ishaku et al also agreed with this position when they stated in their paper that there is sufficient rainwater to supplement the need of communities if the existing mechanism is improved. See HT Ishaku et al *Water Resource Management* 26, (2012): 295 -305 at 295.

⁶³ <http://www.wateraid.org/ng> accessed on the 12th of November 2012.

⁶⁴ OB Akpor and M Muchie *Journal of Environmental Science and Technology* 4, (2011): 480.

⁶⁵ HT Ishaku et al *Water resource Management* 26, (2012): 295 at 298.

⁶⁶ Ameto Akpe *Business Day* published 30th March 2012 found at <http://www.businessdayonline.com/NG/index.php/analysis/features/35265-president-promises-water-slashes-budget> This can also be found at <http://pulitzercenter.org/reporting/nigeria-water-sanitation-millennium-development-goals-budget-cuts-president-goodluck-jonathan> accessed on the 9th of October 2013.

⁶⁷ UNICEF and World Health Organisation are some of the Agencies of the United Nations.

⁶⁸ www.unicef.org/media/files/JMPreport2012.pdf accessed on the 21st of May 2013

million.⁶⁹ Drinking water in rural areas for example is less than 50 percent of the Nigeria population.⁷⁰ The proportion of people with improved sanitation in Nigeria was projected to be less than 50 percent, and the report showed that 109 million people in Nigeria do not have access to improved sanitation.⁷¹ It was noted by those agencies that Nigeria was off track for the Millennium Development Goal sanitation target as coverage rate in 2010 was the same or lower than the rate in 1990.⁷²

The government of Nigeria has tried (unsuccessfully too) to improve access to water supply in Nigeria especially in the Northern part of Nigeria where lack of potable water seems to be most crucial.⁷³ This method or provision has not served sufficiently as some of them yield little to no water during the dry season and some of these machines even break down with usually no repairs carried out on them. Furthermore, there has been a decrease of water and sanitation budget from 112 billion naira in 2010 to 62 billion naira in 2011 and 32 billion naira in 2012.⁷⁴

The Nigerian government should consider other means of providing adequate water supply for its citizens. It is contended here that the continued failure of access to potable water in Nigeria is due to the failure of government to consider water as a human right, which is a core contribution of this article. It is no longer sufficient to acknowledge the inadequacy of water supply to Nigerians; it is now necessary to recognise a human right to water in Nigeria and also to adopt this under the Nigerian legal system.

Nigeria is a signatory to the international law instruments which guarantee the human right to water such as the Convention on Elimination of all Discrimination Against Women (CEDAW)⁷⁵; the Convention on the Rights of a Child (CRC);⁷⁶ and the African Charter on the Rights and Welfare of the Child (ACRWC).⁷⁷ These instruments place specific duties on state governments to make access to potable

⁶⁹ UNICEF and WHO 2012 Report page 9 fig8.

⁷⁰ UNICEF and WHO 2012 Report page 13 fig 11.

⁷¹ UNICEF and WHO 2012 Report page 19 fig 20.

⁷² Fig 15 pg 16 JMP Report 2012.

⁷³ Unsuccessfully, because the Nigerian government has provided hand-operated boreholes and wells.

⁷⁴ Found at

⁷⁵ <http://www.businessdayonline.com/NG/index.php/analysis/features/35265-president-promises-water-slashes-budget> accessed on the 9th October, 2013.

⁷⁶ 1979 art 14(2).

⁷⁷ 1990 art 24 (1) (c).

1990 art 14.

water achievable. General Comment 15⁷⁸ interprets the human right to water from article 11 (adequate standard of living) and Article 12 (the right to health) of the International Covenant on Economic Social and Cultural Rights, affirms the implied existence of the right to water. This comment states 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.' This comment recognizes the fact that water is essential to a 'life of human dignity.'⁷⁹

8. Nigerian Water Laws

The relevant Nigerian laws that should address the issue of access to potable water include the 1999 Constitution of the Federal Republic of Nigeria (CFRN). This is the Supreme Law of Nigeria. Section 1 (1) of the Constitution provides that the Constitution is supreme and has binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 6 (6) (c) of the Constitution limits the powers of the Judiciary in adjudicating upon issues or questions relating to the fundamental objectives and directive principles of state policy which is set out in Chapter Two of the Constitution. Section 20 under chapter two of this Constitution embodies the environmental objectives and the only mention of water here is that it shall be safeguarded. This Section simply reads, 'the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'. Furthermore, Chapter Four of the Constitution houses the bill of rights but does not make any provision for the provision of water. Water as used in the Constitution may or may not refer to potable water and if it in fact refers to or includes potable water, such provision does not adequately address the issue of access to potable water. Section 16 seems to address the issue of food albeit inadequately when it states that 'the state shall direct its policy towards ensuring suitable and adequate food for all citizens'.⁸⁰ It however cannot be enforced as it also falls under Chapter Two of the Constitution which is not justiciable. Other laws include; the 1990 River Basins Development Act (RBDA), the 1994 National Water Resources Institute Act (NWRI) and the 1993 Water Resources Act (WRA). There also exists a proposed Water

⁷⁸ This comment was adopted by the United Nations committee on Economic Social and Cultural Rights at its 29th session in November 2002. The general interpretation of this comment points to the importance and existence of the right to water.

⁷⁹ <http://www.righttowater.info/progress-so-far/general-comments-2/> accessed on the 9th of October 2013.

⁸⁰ Sec 16 (2)(d) of the 1999 CFRN.

Resources Bill.⁸¹ This draft bill comprises of 15 parts and 107 sections. There is not a part of this section which addresses the issue of the human right to water. The proposed bill recognises the constitutional provision which delegates the issue of water supply services to the states. A section of the proposed bill mentions one of the functions of the commission is to 'promote the supply of safe drinking water including that required for basic human needs...'⁸² This provision is interpreted to mean to support or encourage water supply but not to provide it. A deep analysis of these laws shows that they do not sufficiently address the issues of access to potable water as they do not incorporate the elements laid out by General Comment 15 stated above.

The 1999 Constitution of the Federal Republic of Nigeria does not in any section of its provision mention potable water. Chapter Two of the Constitution embodies the fundamental objectives and directive principles of state policy and Section 20 of the chapter addresses the environmental objective of the nation. On the whole, the Nigerian government has only tried to provide wells and boreholes in some rural areas in Nigeria. This is not sufficient in ensuring that access to water is realised. As a step to realising this right, government should make domestic laws or policies which would address this problem.

9. Recommendations and Conclusion

South Africa started on a good note when it incorporated a rights-based approach to the water legal system. This approach has been adopted and applied in various parts of South Africa the outcome of which has shown a massive increase in access to water. One characteristic of the human right to water and this approach is that the government is expected to adopt measures that depict a progressive realisation of the right and as such there must be no retrogression. Where it has been shown that there is no progressive realisation, the recipients and water users could go to court to seek an enforcement of their rights. In areas where access to water has failed, it is as a result of the fact that a human rights-based approach was not applied. Also an understanding of what a human rights-based approach is all about is the law that empowers the water users to demand the service from water providers. One positive thing about adopting a human rights-based approach is that it incorporates a legal justification for which the people may assess and exercise their rights. In other words, the people

Draft copy of the proposed bill (on file with the author) is the third draft submitted to the National Assembly since December 2008. This has yet to be passed into law.
Sec 18 (1) (d) of the proposed National Resources Bill.

enjoy a legal backing in demanding their right to water. Although not all South African have access to water today, this is not a justification that the human rights based approach to water has failed rather there is a progressive realisation of the right which makes it a continuous duty of the government to provide..Even though the minority that is supposed to benefit in this instance have not been adequately accommodated under the approach, the existence of an laudable legal framework⁸³will ensure that there is a progressive realisation of the right to water. To improve access to water in Nigeria, there is the need to reassess the legal framework which guarantees access to water. The institutional framework also needs to be structured in such a way that the duty bearers and those responsible for water supply and delivery are identified. Duties have to be defined so that they are not overlapping. The people also have to be empowered and one of the ways of empowering them is to guarantee that water is a necessity and a right each individual or water user has the right to ask for. In cases where water is polluted there should be stringent laws put in place to address such acts and also punish adequately perpetrators of such acts. Following the South African model of recognising a human right to water and adopting a human rights-based approach to water will certainly improve access to water in Nigeria.

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J Dugard 'Urban Basic Services: Rights, Reality and Resistance' in M Langford, B Cousins, J Dugard T Madlingozi (eds) *Socio-Economic Rights in South Africa Symbols or Substance* (2014).