

# **Right to Water as an Emerging Human Right: The Legal Ramifications**

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Table of Contents

<b>ACKNOWLEDGEMENTS</b> .....	<b>IV</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>V</b>
<b>CHAPTER ONE. INTRODUCTION</b> .....	<b>1</b>
<b>1.1 BACKGROUND TO THE RESEARCH</b> .....	<b>1</b>
<b>1.2 PROBLEM STATEMENT</b> .....	<b>2</b>
<b>1.3 THESIS OBJECTIVES</b> .....	<b>4</b>
<b>1.4 CONCEPTUAL CLARIFICATIONS</b> .....	<b>4</b>
<b>1.5 CHAPTER BREAK-DOWN</b> .....	<b>6</b>
<b>1. CHAPTER TWO</b> .....	<b>8</b>
<b>2. THE HUMAN RIGHT TO WATER UNDER INTERNATIONAL LAW</b> .....	<b>8</b>
<b>2.1 INTRODUCTION</b> .....	<b>8</b>
<b>2.2 THE RIGHT TO WATER CHALLENGES UNDER INTERNATIONAL LAW</b> .....	<b>10</b>
2.2.1 WATER AS A SELF-STANDING RIGHT AGAINST A DERIVATIVE RIGHT .....	10
2.2.2 ENFORCING THE RIGHT TO WATER.....	12
2.2.3. ADMINISTRATIVE LAW AS AGAINST HUMAN RIGHTS PERSPECTIVE .....	14
2.2.4 HORIZONTAL EFFECTS – NON-STATE ACTORS .....	14
<b>2.3 THE LEGAL BASES OF THE RIGHT TO WATER UNDER INTERNATIONAL LAW</b> .....	<b>15</b>
2.3.1 DIRECT REFERENCE TO RIGHT TO ACCESS TO WATER .....	15
2.3.2 IMPLIED REFERENCE TO THE RIGHT TO WATER .....	17
<b>2.4 EVOLUTION OF THE INTERNATIONAL CONSENSUS ON THE HUMAN RIGHT TO WATER</b> .....	<b>18</b>
2.4.1 THE 1970’S ERA.....	20
2.4.2 DECLARATION ON THE RIGHT TO DEVELOPMENT .....	22
2.4.2.1 <i>From an economic good to a human right</i> .....	22
2.4.3 POST HUMAN RIGHTS COMMITTEE COMMENT 15.....	25
2.4.3.1 <i>The Rights based approach to water</i> .....	29
2.4.3.2 <i>The impact of advocacy on the right to water</i> .....	31
2.4.3.3 <i>The Build-Up to the UN 2010 Resolution</i> .....	32
2.4.3.4 <i>The Independent Expert</i> .....	33
2.4.3.5 <i>The 2010 UN Resolution on the Human Right to Water.</i> .....	34
<b>2.5 INTERNATIONAL LITIGATION ON THE RIGHT TO WATER</b> .....	<b>35</b>
<b>2.6 HUMAN RIGHTS VALUES AND THE RIGHT TO WATER</b> .....	<b>36</b>
<b>2.7 THE PRINCIPLE OF NONDISCRIMINATION ACCESSING WATER</b> .....	<b>38</b>

<b>2.8 THE RELATIONSHIP BETWEEN RIGHT TO ACCESS TO WATER AND OTHER HUMAN RIGHTS</b>	<b>38</b>
2.8.2 THE RIGHT TO LIFE	40
2.8.3 ACCESS TO WATER AND THE RIGHT TO HEALTH	42
<b>2.9 INDEPENDENT RECOGNITION OF THE RIGHT TO WATER</b>	<b>43</b>
<b>2.10 STATE OBLIGATIONS ON THE RIGHT TO WATER</b>	<b>44</b>
2.10.1. GENERAL OBLIGATIONS	44
2.10.2 CORE OBLIGATIONS ON THE RIGHT TO WATER	46
2.10.3. ACCESS TO WATER AS A SOCIO-ECONOMIC RIGHT	47
<b>2.11 SUBSTANTIVE COMPONENTS OF THE RIGHT TO WATER</b>	<b>48</b>
2.11. 1 AVAILABLE WATER	49
2.11.2 WATER QUALITY	49
2.11.3 ACCESSIBLE WATER	50
<b>2.12 REGIONAL STANDARDS ON HUMAN RIGHT TO WATER</b>	<b>51</b>
2.12.1 AFRICAN STANDARDS ON THE RIGHT TO WATER	51
2.12.2 AFRICAN COMMISSION INTERPRETATION OF THE RIGHT TO WATER	53
<b>2.13 IS THERE A MINIMUM CORE ON THE RIGHT TO WATER?</b>	<b>55</b>
<b>2.14 CHAPTER CONCLUSION</b>	<b>56</b>
<b>CHAPTER THREE: REALIZING THE RIGHT TO ACCESS TO WATER AT THE NATIONAL LEVEL: WATER LITIGATION DILEMMAS</b>	<b>58</b>
<b>3.1 INTRODUCTION</b>	<b>58</b>
<b>3.2 THE INFLUENCE OF INTERNATIONAL STANDARDS ON THE NATIONAL IMPLEMENTATION OF THE RIGHT TO WATER</b>	<b>59</b>
<b>3.3 COUNTRY EXPERIENCES: SOUTH AFRICA</b>	<b>60</b>
3.3.1 CONTEXTUAL BACKGROUND	60
3.3.2 A DEMOCRATIC CONSTITUTION	61
3.3.3 CONSTITUTIONAL PROVISIONS	63
3.3.3.1 <i>Section 27 of South African Constitution</i>	63
3.3.3.2 <i>The Constitutional Court Approach to Socio-Economic Rights</i>	64
3.3.3.4 <i>Judicial Interpretation of the Right to Water</i>	68
3.3.3.5 <i>Limitations on the Right to Access to Water in South Africa</i>	71
3.4 ISSUES ARISING OUT OF MAZIBUKO	72
3.4.1 <i>Factual background</i>	72
3.4.2 <i>The High court and the Supreme Court Decisions</i>	73
3.5 LESSONS AND RECOMMENDATIONS	75
<b>3.6 INDIAN JURISPRUDENCE AND THE RIGHT TO WATER</b>	<b>76</b>
3.6.1 CONTEXTUAL BACKGROUND	76
3.6.2 JUDICIAL ACTIVISM OF INDIAN SUPREME COURT	77

3.6.3 IS ACCESS TO WATER A FUNDAMENTAL RIGHT?.....	78
3.6.4 THE PUBLIC TRUST DOCTRINE AND THE RIGHT TO WATER.....	80
3.6.5 LESSONS FOR INDIA.....	81
<b>3.7 THE REPUBLIC OF BOTSWANA .....</b>	<b>81</b>
3.7.1 CONTEXTUAL BACKGROUND .....	81
3.7.2 SOCIO-ECONOMIC RIGHTS IN BOTSWANA .....	82
3.7.3 INDIGENOUS GROUPS IN BOTSWANA.....	83
3.7.4 THE BACKGROUND TO SESANA CASE.....	85
3.8 THE APPLICATION OF THE UN RESOLUTION 2010 .....	86
<b>3.9 CHAPTER CONCLUSION.....</b>	<b>87</b>
<b>CHAPTER FOUR OBSERVATIONS AND CONCLUSIONS .....</b>	<b>89</b>
<b>4.1 GENERAL OBSERVATIONS.....</b>	<b>89</b>
<b>4.2 CONCLUSIONS.....</b>	<b>90</b>
<b>5.1 BIBLIOGRAPHY .....</b>	<b>93</b>

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## Executive Summary

The international community has almost come to a conclusion that access to safe drinking water is one of the life-guarding necessities that are crucial for human survival. Evident to this, is the growing international consensus on the recognition of water as a human right in the past years to date. Despite this international hue and cry, the multitudes of the world's population continue to die from water-bourne diseases. Millions of children continue to die on daily basis due to lack of clean water, while women in rural Africa continue to walk miles to draw water from the streams or wells where animals and birds also quench their thirst.

In the meantime, the urban poor also suffer a great deal of water problems as they are the number one victims of pre-paid water systems in the townships. These urban poor are always at logger-heads with the local authorities due to the arbitrary cut-off of water provision as a result of payment arrears.

The only workable solution to this global concern is a shift towards a more rights-orientated approach to access to water for all. To respond to these topical challenges the right to water has attracted a lot of academic scrutiny due to the controversial legal status it has acquired at the international level. Because this right is not explicitly mentioned in the international bill of rights and other pertinent core human rights treaties, the protection and fulfillment of this right in the national jurisdiction is clouded with uncertainties.

This thesis therefore confronts this reality by discussing the implications of recognizing a right to water as a legally binding human right both under international law and the national law from selected countries. It analyses the evolution of an independent human right under the international soft law and unpacks the content as authorized by General Comment 15. The thesis here advances an argument that access to water is a human right and that the international consensus for its recognition and national judicial enforcement should be used to protect the plight of the most vulnerable groups of the society. Therefore the current non-recognition of a legally binding human right to water should not be used as an excuse to avoid accountability as far as provision of water to the poor is concerned.

More particularly, the thesis concludes by the general observations from country perspectives and to what extent can the international legal framework be useful for the operationalization of the right to water at the national level. The countries to be examined are South Africa, India and Botswana accordingly.

## Chapter One. Introduction

“Of all the social and natural crises we humans face, the water crisis is the one that lies at the heart of our survival and that of our planet (UNESCO Director General Koichiro Matsuura 2003)”<sup>1</sup>

### 1.1 Background to the research

It has been reported that, more than half of the world’s population lack access to clean water resulting in many deaths as a result of water-borne diseases<sup>2</sup>. Seemingly, this is a global challenge, but research has also shown that Africa, Asia and Latin America comprise the most severely affected regions<sup>3</sup>. This perhaps is largely due to the salient population increase that has been seen in those regions. Because of these salient global challenges surrounding the right to water, this thesis argues that this right should be afforded legal recognition as a solution to such. Given this factual background on the state of the right to water in the world, the legal ramifications of the right to water are still glaring because ‘questions remain unanswered as to the appropriateness of the approach and its scope in international law’<sup>4</sup>. Notably, however, there

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<sup>1</sup> A quote from Filmer-Wilson E, “The Human Rights-Based Approach to Development” Vol.23/2 *Netherlands Quarterly of Human Rights*, (2005) p- 228.

<sup>2</sup> UNICEF. (2006) *Progress for Children: A Report Card on Water and Sanitation*. New York, p22. For example, Maude Barlow, a Canadian renowned activist on the ‘right to water’ has mention on a plethora of forums that water is at the heart of human existence and therefore represents an ‘origin and basis of life’ hence its access has unequivocally been globally recognised as a fundamental human right; see also Larrain S. ‘Conflict Over Water in Chile: Between Human Rights and Market Rules’ *Chilean Government Report*. Available at [www.blueplanetproject.net/resources/reports/chilewaterreport-0411.pdf](http://www.blueplanetproject.net/resources/reports/chilewaterreport-0411.pdf).

<sup>3</sup> Khadka A.K. “The Emergence of Water as a ‘Human Right’ on the World Stage: Challenges and Opportunities” *International Journal of Water Resources Development* Vol. 26 Issue: Number 1 (2010) p37-40.

<sup>4</sup> Richard A.H. “Pro-Justice Ethics, Water Scarcity, Human rights” *Journal of Law and Religion*, Vol.25, (2010) p-532.

has been very little theoretical reflection with regard to the practical legal implications of enforcing the right to water.

## 1.2 Problem Statement

Although not featured expressly into writing, the right to water finds protection under the economic, social and cultural rights as encapsulated in the International Covenant on Economic, Social and cultural rights (ICESCR)<sup>5</sup>. Relevant to this study, is Article 11 of this Covenant that member states recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”<sup>6</sup>. It has been acknowledged that the right to water can be construed as an integral part of the criteria for realizing a sufficient “standard of living, particularly since water is one of the most fundamental conditions for survival”<sup>7</sup>.

At the outset, it is noteworthy that just like any other socio-economic right; the right to water belongs to the historical classification of being referred to as a “second and third generation”, hence non-justiciable in our legal system. Arbour has dismissed this classification as “an unhelpful categorization of rights” belonging to the past especially now that economic, social

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<sup>5</sup> Salman M.A. ‘The Human Right to Water’ Legal and Policy Dimensions (Law, Justice and Development Series) *World Bank Publications*, (2004) p-56. See Also Tully S. “A Human Right to Access to Water? A Critique of General Comment No.15” 23 *Netherlands Quarterly of Human Rights* (2005) p-35.

<sup>6</sup> Article 11(1) of the International Covenant on Economic Social and Cultural Rights 1966.

<sup>7</sup> See above Salman at p-57.

and cultural rights stand on the same footing with civil and political rights as acknowledged in a raft of international, 'regional human rights systems and constitutions'<sup>8</sup>.

Be that as it may, unlike the right to housing, food, social security and other social and economic rights, the right to water has not been specifically mentioned but been implied from other social and economic rights and therefore states are required to also give attention to this right in realizing other rights<sup>9</sup>. This non-inclusion of the right to water in the major international instrument has been labeled 'startling' by scholars like Matthew Craven<sup>10</sup>. Subsequent human rights instruments to the International Bill of Rights, with the key treaties being the Convention on the Elimination of Discrimination Against Women (CEDAW) and Convention on the Right of a Child(CRC), have specifically recognized the right to water as a human right, especially recognizing the vulnerable groups<sup>11</sup>. However, the states have been reluctant to afford this right to water some necessary legal protection. The Committee of the ICESCR, therefore saw it fit to introduce a further standard of "an immediate" realization of the right to water above the progressive realization.<sup>12</sup>

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<sup>8</sup> Arbour L. 'Economic and Social Justice for Societies in Transition' speech delivered at the *Second Annual Transitional Justice Lecture* hosted by New York University School of Law Center for Human Rights, (25th October 2006), p- 4.

<sup>9</sup> McCaffrey S.C. "A Human Right to Water: Domestic and International Implications", *Geo. Int'l Env'tl. L. Review* Vol.1 (1992)p-8.

<sup>10</sup> Craven M, "Some Thoughts on the Emergent Right to Water" in Eibe Ridel et al "The Human Right to Water" 37 *Berliner Wissenschafts-Verlag* (2006) p-39.

<sup>11</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW),*CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38*, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [accessed 1 November 2012]

<sup>12</sup> Richard A.H. "Pro-Justice Ethics, Water Scarcity, Human rights" *Journal of Law and Religion*, Vol.25, (2010) p-532.

### **1.3 Thesis Objectives**

The overall objective of this thesis is to unpack the legal ramifications of the right to water. The thesis seeks to achieve this objective by analyzing the right to water from the international arena as well as its practical implications at the national level, where it matters most. This thesis will therefore unpack, dissect and grapple with the legal issues that arise in the practical enforcement or realization of the right to water. At the domestic level, it inquires of three countries whether the courts have sought to develop a consistent clear content of the right to water, which strategies and legal resources they have engaged and the extent to which they have managed to succeed.<sup>13</sup>

The premise of this work, as will be evident through-out the discussion is that the right to water can be legally enforced at the national level through ‘the approach of derivation and inference’<sup>14</sup>. Perhaps this approach is at the heart of driving the justiciability of the right to water as it recognizes that human rights are related to each other and one right triggers the existence of another right. Hence, a clear objective of this study is to provide a critical appraisal of the practical legal implications of recognizing water as a human right both at the national and international level.

### **1.4 Conceptual Clarifications**

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<sup>13</sup> South Africa, Botswana and India will be the three countries that will be focused on, for the reasons adduced in the chapter break-down part.

<sup>14</sup> See above Salman at p-56.

What does the right to water refer to? From this juncture, it must be clarified that ‘the right to water’ does not refer to ‘water rights’<sup>15</sup>. The former will be the main focus of this work. It is not straight forward at this stage to define with absolute precision, the definition of the ‘right to water’. Though of course, that is not to deny the possibility of defining certain basic elements of this right which could be referred to as “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”<sup>16</sup>. It has also been acknowledged under international law that the right to water goes hand in hand with sanitation, but for purposes of our limitations, we will not dwell into ‘sanitation’ in this thesis.

This part will therefore unpack the meaning and content of the “right to water” as provided for in a plethora of international instruments. General Comment 15 will receive special focus, as the first international document to have alluded to the legal implications of the right to water and also state obligations accruing there from. The World Health Organization definition will also be invoked and analyzed<sup>17</sup>.

Last but not least, the thesis will adopt a working definition of the ‘human right to water’ which will guide the whole discussion. This study will robustly and continuously argue that the

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<sup>15</sup> For an in-depth discussion of ‘water rights’, see Gould, G.A. “Water Rights Transfers and Third-Party Effects” *Land and Water Law Review*, Vol.23;1 (1988) p1-41; also see Zetland D. “Water Rights and Human Rights: The Poor Will not Need Our Charity if We Need Their Water”, (February 01, 2011). Available at SSRN:<http://ssrn.com/abstract=1549570>.

<sup>16</sup> General Comment No.15 of The UN Committee on Economic, Social and Cultural Rights (CESCR); *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*; (Doc E/C.12/2002/11, 20 January 2003).

<sup>17</sup> The World Health Organisation has published a lot of articles on the ‘drinking water guidelines’ and reports. Available at [http://www.who.int/water\\_sanitation\\_health/dwg/en/](http://www.who.int/water_sanitation_health/dwg/en/).

recognition of the right to water as an independent human right is a discrete and important aspect of the general socio-economic rights which will easily translate into state realizable obligations. This can be termed the ‘legal ramification’ of the right to water as unpacked in this study.

The research methods that will be used here are the desk top based research on the literature thus far and the legal instruments as well as the case law. The jurisprudence as developed from the international standards and national standards will be critically analyzed.

### **1.5 Chapter Break-down**

The point of departure in this work is to investigate the legal implications of the right to water at the international and national level, deriving these rights from other fundamental human rights. To this end, the current study will be divided into four main coherent chapters. The first part is this introductory part which has provided a foundational discussion and all the theoretical reasons and research questions. The second chapter will serve as a spring-board into the international sphere on the right to water. It will investigate the rise of right to water as a human right under international law. Additionally, it will provide the legal bases of this right under international law.

We will further proceed into chapter three which will then pay a visit to three countries namely South Africa, Botswana and India to unpack how they have sought to judicially enforce this right to water. In so doing each country’s context and legal system will be unpacked and analyzed

with specific lessons drawn from their case law. These countries have been specifically chosen because of their varied constitutional texture on the social and economic rights. That is to say in South Africa, the right to water is provided for in the constitution and the constitutional court has been very active in the enforcement of general socio-economic rights. In India, socio-economic rights are not enforceable even though mentioned in the Constitution, but the Supreme Court there has resorted to judicial activism to enforce these rights. While Botswana does not even mention these rights in the constitution, hence it will draw a lot of insights from the other country experiences.

Last, but certainly not least, our chapter four will mirror the problems as raised in the first chapter, but this time around accompanied by recommendations and observations. At the same time, this final chapter will wrap up by rendering the summary of our main arguments as evidenced through-out the thesis.

## 1. Chapter Two

### 2. The Human Right to Water under International Law

#### 2.1 Introduction

The international standards on the right to water are instrumental towards informing effective regional and national policies on water<sup>18</sup>. However, the current situation at the international level has seen the recognition of the human right to water mostly under the soft law as opposed to the legal binding international instruments<sup>19</sup>. This presents a problem of enforceability as such a right in its current form cannot be used to guard against the plight of the vulnerable groups because it does not raise the co-relative obligations of promotion, fulfillment and protection on the part of the state<sup>20</sup>. However, only a few legally binding instruments like the CEDAW and the CRC have sought to protect the access to water for marginalized groups, though in a not comprehensive manner<sup>21</sup>.

As this chapter will demonstrate, for the right to water to make practical sense to those who cannot access it at the grass roots, then it must “be protected by the rule of law”, right from the

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<sup>18</sup> Bourquain K. ‘Freshwater Access from a Human Rights Perspectives’: A Challenge to International Water and Human Rights Law (International Studies in Human Rights) *Martinus Nijhoff Publishers*,(2008) p-12.

<sup>19</sup> Tully above.

<sup>20</sup> Megret F, “Nature of Obligations” in Daniel Moeckli et al, “International Human Rights Law” *Oxford University Press*, (2010) p-131.

<sup>21</sup> CEDAW article 14(2)(h) and CRC. These only apply to women and children only, other groups are therefore excluded.

international level<sup>22</sup>. Having laid a foundation in the introductory chapter, the current chapter on international standards serves as a spring-board into the discussion on the realization of the right to water under domestic experiences which is due in the next chapter. Its main objective is to unpack and dissect the evolution of access to water as a human right under international law, both hard and soft law. The chapter starts off with an overview of the topical challenges associated with the right to water under international law. To this end, the chapter will trace the historical development of the right to water as a human right under international human rights law as well as its legal bases.

After outlining the legal framework within which the right to water has been protected, both implied and explicit, the chapter analyses the underlying values likened to the right to water as well as the substantive content as developed by international jurisprudence. Following this analytical and logical discussion, the chapter wraps up by concluding that what transpires at the international level can be used to inform the content of the right to water at national level and thus making the enjoyment of this right a reality as opposed to an empty rhetoric. Before the conclusion the chapter will highlight the ensuing state obligations on the right to access to water.

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<sup>22</sup> Universal Declaration of Human Rights, 1948. Available at <http://www.un.org/en/documents/udhr/>. See also McGraw G. "Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence" *Loyola University Chicago International Law Review* Vol.8,(2011),p102.

## 2.2 The Right to Water Challenges under International Law

### 2.2.1 Water as a self-standing right against a derivative right

With the foregoing in mind, it is almost axiomatic that there exists a wide difference of opinions between the right to water as an independent right and it being inherent in other rights. With an attempt to adopt a standard interpretation, the Committee on the International Covenant on Economic, Social and Cultural Rights pointed out that in order to interpret this right, its meaning can be derived from Article 11 which provides for a standard of living necessary for human survival<sup>23</sup>. Additionally the Committee saw it fit to infer the human right to water in Article 12 of the Covenant which obliges member states to promote and protect the right to “the enjoyment of the highest attainable standards of physical and mental health”<sup>24</sup>. Put differently, despite the right to water not being explicitly mentioned in most international conventions, the Committee somehow viewed this right as a precursor to the well being and life of every person<sup>25</sup>.

With regard to understanding the scope of the right to water, Salman argues that international scholars and academics have developed the jurisprudence by deriving this right from other socio-economic rights through “the approach of derivation and inference”<sup>26</sup>. A notable aspect of this

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<sup>23</sup> Article 11(1) of the Covenant obliges members states to ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’

<sup>24</sup> See above, General Comment 15, para 3.

<sup>25</sup> Ibid Para. 1 of General Comment 15.

<sup>26</sup> Salman M.A. ‘The Human Right to Water’ Legal and Policy Dimensions (Law, Justice and Development Series) *World Bank Publications*, (2004) p-57; for discussion on access to water as derivative right see Gleick P. ‘The

approach is that it re-affirms one of the foundational characteristics of human rights that human rights are inter-related and inter-dependent and existence of one right triggers the existence of another right. Be that as it may, it is still vague as to which specific right is the right to water aligned to as other scholars have postulated that the right to water cannot be enjoyed in isolation with the right to a safe environment<sup>27</sup>.

However, critics of the abovementioned derivation approach are numerous and some base their criticisms on the exclusion of the so called 'right to water' in the International Bill of Rights<sup>28</sup>. Scholars like Richard Hiskies have questioned the very existence of this right, given its derivative nature<sup>29</sup>. Nonetheless, the recent declarations and resolutions of the right to water under international law speak to the independent recognition of this right<sup>30</sup>. Amongst other was the comment by the UN Expert on the right to water, who mentioned that this right "is a human right, equal to all other human rights, which implies that this right should be justiciable and enforceable"<sup>31</sup>. At the same time the UN High Commissioner has alluded that there is a controversy as to whether right to water "is a right on its own" or whether it is derived from

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Human Right to Water' *Water Policy*, Vol. 1 (1998) p-492; see also McCaffrey S. 'The Human Right to Water. In 'Fresh Water and International Economic Law' *Oxford University Press* (2005) p-93-115.

<sup>27</sup> Rodriguez-Rivera L. 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source', *Colorado Journal of International Environmental Law and Policy*, Vol.1 (2001) p-12.

<sup>28</sup> Bourquain K. 'Freshwater Access from a Human Rights Perspective': A Challenge to International Water and Human Rights Law (International Studies in Human Rights) *Martinus Nijhoff Publishers* Vol.1, (2008) p-13.

<sup>29</sup> Hiskies P. "Missing the Green: Gold Course Ecology, Environmental Justice and Local 'Fulfillment of the Human Right To Water'" *32 Human Rights Quarterly*, (2010), p-327.

<sup>30</sup> Bluemel, 962-968

<sup>31</sup> HRC press conference on the passing of the UN Res.

others<sup>32</sup>. In the view of the High Commissioner, this non-clarity should not impede the recognition of this right by the states<sup>33</sup>.

### **2.2.2 Enforcing the right to water**

Putting aside for the now the status of water as a right under international law, we also want to make reference to the enforcement problem of the right to water. Like any other socio-economic right, the content of this right in terms of quantity and quality deserves a special investigation. It would seem that there is no uniform global approach or standard in terms of the quality or quantity of water. The General Comment 15, the WHO and the Special Rapportuer all put emphasis on the personal and domestic uses of water and accessibility of such<sup>34</sup>.

According to Bluemel, despite its specific recognition of the right to water as a fundamental human right, the General Comment does not clearly allude to the “legal weight” created by this right<sup>35</sup>. This is simply because, like any other General Comment, it is merely meant to suggest better reporting procedures as well as to assist the implementation of the right in question by state parties as set out in the Covenant.<sup>36</sup> It did not dwell into exactly what states should do to

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<sup>32</sup> UNHCHR 2007 para. 46.

<sup>33</sup> Ibid at 49.

<sup>34</sup> Gleick P “Basic Water requirements for Human Activities” (1996) *Water International*, Vol. 21. p.84

<sup>35</sup> Bluemel 973.

<sup>36</sup> UNCESCR. (1989) (3<sup>rd</sup> Session). *Report of the Committee on Economic, Social and Cultural Rights- Supplement NO.4* UN Doc E/1989/22 annex III (Introduction: The purpose of General Comments)

“satisfy their legal obligations under the international law”<sup>37</sup>. In this discussion we will therefore unpack the enforcement of the human right to water at the national level.

Furthermore, since the right to water is not specifically mentioned in the international bill of rights, it becomes difficult for national courts to invoke international law in the interpretation of these rights<sup>38</sup>. Additionally, this has led to unclear and inconsistent jurisprudence in the adjudication of this right where a violation occurs in several states of the world as their violation stems from another right<sup>39</sup>. It is in the best interest of the citizens, especially the most vulnerable to bring some clarity into the right to water as a human right because “human rights generally, represent a basis for survival in most poverty-stricken countries of the world”<sup>40</sup>.

Moreover, in acknowledging the lacuna regarding the dilemma in the legal practical implications, the UN Human Rights Council extended and revised the mandate of the Special Rapporteur on the right to water to specifically “give emphasis to practical solutions with regard to its implementation” at the domestic level<sup>41</sup>. Hence, it is more than necessary to traverse the state obligations and the legal ramifications of recognizing the right to water as an independent human right.

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<sup>37</sup> See Bluemel p-974.

<sup>38</sup> Chapman, A, in “Violations Approach” for monitoring the International Covenant on Economic and social and cultural rights” *Human Rights Quarterly*, John Hopkins University Press, 18.1 (1996) 23-66.

<sup>39</sup> Gupta J. “The Human Right to Water: Moving Towards Consensus in a Fragmented World”, *Review of European Community & International Environmental Law*, Vol 19:3 (2010) 294, p- 297.

<sup>40</sup> See Khadka above p-37.

<sup>41</sup> UN Human Rights Council Resolution on “*The Human Right to Safe Drinking Water and Sanitation*”, (UN Doc. A/HRC/RES/16/2) April 2011, para 5(a). accessed at <http://daccessddsny.un.org/doc/RESOLUTION/GEN/G11/124/85/PDF/G1112485.pdf?OpenElement>

### ***2.2.3. Administrative law as against human rights perspective***

Another dilemma associated with the right to water is the difference of standards between the administration law and the rights based approach. This is simply because the administrative principles demand that as long as rules of natural justice and fairness are abided by, the decision will be justified. For instance in a South African case the court remarked that:

“Courts have often emphasised that what constitutes a ‘fair’ procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.”<sup>42</sup>

While on the other hand the human rights perspective prioritizes the plight of the most vulnerable and poor communities as far as provision of the water is concerned. It is noteworthy that this difference of approach cannot be overlooked as most of water provision is administered in accordance with administrative law. With such an approach, the plight of poor and vulnerable communities is not an issue as such, what matters is the lawfulness of the procedure.

### ***2.2.4 Horizontal effects – Non-state actors***

One of the apparent challenges have been brought about by the privatization of water. There has been a growing trend of public water services being ceded to the non state actors and this is normally accompanied by those actors putting profit at the hem of their service provision<sup>43</sup>. A great accountability problem is fuelled by the fact that non state actors are not signatories to the

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<sup>42</sup> *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC). Para 35-36

<sup>43</sup> Shepherd H “Implementing the Human Right to Water in the Colorado River Basin” 2011 *WLR* (2011) p-30.

international obligations on socio-economic rights, hence not usually receptive to a rights based approach. Companies or non-state actors might be bound by the due diligence principle and corporate responsibility, but these might lack or run short of the fundamental obligation of ensuring a progressive and realization of access to clean water. Having highlighted these overarching challenges of the right to water, it is befitting to look into the international instruments which have explicitly recognized water.

## **2.3 The Legal Bases of the right to water under international law**

### ***2.3.1 Direct reference to right to access to water***

The independent human right to water has found an explicit mention in about three of the core international human rights treaties thus far. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has particularly recognized that rural women are vulnerable and marginalized in accessing basic needs, as compared to their fellow urban women<sup>44</sup>. Article 14(2)(h) therefore specifically stipulates that state parties have an obligation to ensure that these rural women are afforded the right “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and

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<sup>44</sup> Pruitt. L "CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up" *Baltimore Law Review* 41 (2011): 263. Available at: [http://works.bepress.com/lisa\\_pruitt/29](http://works.bepress.com/lisa_pruitt/29) (accessed on the 15<sup>th</sup> February 2012).

communications”<sup>45</sup>. That notwithstanding, this Convention is seen by others as not sufficient because it does not specify the exact amount of water which should be provided to women.<sup>46</sup> However another perspective to this could be that the urban women could feel left out even though they may face different challenges like the arbitrary cut off from the provision of water. In this regard the CEDAW is not all encompassing in its protection as its relevance is limited to access to water in the rural areas only.

Moreover, the plight of children as a vulnerable group in accessing water is also alluded to in the Convention on the Rights of a Child which obliges state parties to implement children’s rights to health by taking appropriate measures to fight “disease and malnutrition” in the provision of health care services<sup>47</sup>. It explicitly requires that “readily available technology should be applied and that adequate nutritious food and clean drinking water should be provided, taking into consideration the dangers and risks of environmental pollution”<sup>48</sup>. Since women and children form a larger part of the vulnerable groups across the spectrum, the protection from these instruments should be commendable given the obscure recognition of a human right to water under international law. The most recent instrument to explicitly mention this right was the Convention on the Rights of Persons with Disabilities (CRPD), which particularly obligates state

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<sup>45</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [accessed 18 March 2012]

<sup>46</sup> Woodhouse M. “Threshold, Reporting, and Accountability for a Right to Water under International Law”<sup>8</sup> *University of Denver Water Law Review* (2004), p-173.

<sup>47</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 18 March 2012]

<sup>48</sup> *Ibid* Article 24 (1) (c).

parties to “ensure equal access by persons with disabilities to clean water services”<sup>49</sup>. In general, the element of equality has stood out very strong in the above mentioned conventions.

### ***2.3.2 Implied reference to the right to water***

Further to the above international documents, the United Nations Committee on Economic, Social and Cultural has also derived the right to water from other rights in the following manner:

“article 11, paragraph 1 of the Covenant specifies a number of rights emanating from, and indispensable for the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The use of the word ‘including indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living”<sup>50</sup>

The Committee seems to have adopted a purposive interpretation to article 11, in the sense that the list therein was not exhaustive and still accommodated other rights which were not spelled out like the right to water. However this reasoning has been criticized as unfounded since it was not supported by records or statements<sup>51</sup>.

In a similar manner the International Covenant on Civil and Political Rights, which is another legally binding instrument also implicitly alludes to the right to water. Article 6 of the ICCPR provides for the ‘inherent right to life’ and this right should be given a broad interpretation to

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<sup>49</sup> Article 28(2)(a) of the *Convention on the Rights of Persons with Disabilities*, G.A. Res 61/106, Supp. No. 49, at 65 available at <http://www2.ohchr.org/english/law/disabilities-convention.htm>

<sup>50</sup> General Comment no. 15 para. 3

<sup>51</sup> Gronwall J. “Access to Water: Rights, obligations and the Bangalore Situation” P-215

include the obligation to protect against arbitrary and intentional denial of provision of clean water<sup>52</sup>.

## **2.4 Evolution of the International Consensus on the human right to water**

Despite the above discussed reference to right to water as a human right under the legally binding international instruments, seemingly this right got much attention through non-binding declarations and resolutions<sup>53</sup>. The right to water has always been excluded from the ambit of protections, right to from the beginning, as article 55 of the United Nations Charter did not specify it as one of the social ills of those times<sup>54</sup>.

A closer look at the UN Charter comes to show that both civil and political rights and socio-economic rights are afforded protection without distinction or hierarchy whatsoever<sup>55</sup>. Perhaps one of the reasons might be that, during the drafting of the international Bill of Rights, water shortages, droughts and access to water were not matters of concern to the international community and therefore did not require explicit mention. It was only in the wake of water-borne diseases, malnutrition and deaths resulting from dirty water that the international community began to talk about rights based approach to access to water<sup>56</sup>.

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<sup>52</sup> Gleick P. p-592.

<sup>53</sup> Supra Scalon at p-6.

<sup>54</sup> Articles 55(a) to 55(c) of United Nations, *Charter of the United Nations*, 24 October (1945), 1 UNTS XVI

<sup>55</sup> Ibid.

<sup>56</sup> Gleinck P.

The recent human rights landscape has seen the emergence of the right to water as an independent socio-economic right, from a subordinate right which was used to support other rights<sup>57</sup>. Perhaps the chronological events of this transition will give a broader picture of the birth of this right under international law. The tracing of the historical development of the right to water as a human right will reveal that the ideas about the status of this right at the international level was hotly debated in the era between 1980s and the period following post General Comment no.15 in 2002<sup>58</sup>.

Moreover, the historical evolution of the right to access to water can be mapped in two ways, to wit, as an international obligation giving rise to legal implications, as well as a policy response to a growing international call of the necessity of access to water as a basic human right. However, these seemingly divergent approaches are clamped together in this chapter when tracing the historical background of the right to water. McGraw effectively summarized the transition of the right to water as a human right in the international sphere when he said:

“National and international political agendas began to reflect a growing concern for water issues in the mid-1970s. By the early 2000s, the international focus on water began to shift from management, technology and economics to a more rights-based approach. Today, recent polls suggest that the global freshwater crisis is the world’s most pressing environmental problem, and international declarations have begun utilizing rights-based language as they shift to reflect this growing consensus.”<sup>59</sup>

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<sup>57</sup> Hardberger A. “Life, Liberty and the Pursuit of water: Evaluating Water as a Human Right and the Duties and Obligations it Creates” *Northwestern Journal of International Human Rights* (2006) vol 4, p-340.

<sup>58</sup> Russell A. “International Organisations and Human Rights: Realizing, Resisting or Repackaging the Right to Water” *Journal Of Human Rights*, Vol 9, Issue 1(2010) p-4.

<sup>59</sup> See above McGraw p113-114.

### 2.4.1 The 1970's Era

The 1970's era saw the beginning of the right to water discussions both on the international level as well as the national level. Unlike the rest of the contemporary human rights that emerged in the aftermath of the World War II, the right to water and the issues surrounding it came to the fore a bit late<sup>60</sup>. Perhaps, the reason being that, at that time, the main concern for the international community was maintenance of peace and restoration of the international stability<sup>61</sup>.

Interest was building at the international level which saw the right to water gaining and acquiring legal recognition as introduced by 1972 Stockholm Conference Declaration<sup>62</sup>. The 1977 United Nations Water Conferences followed suit and added more impetus to this right by making a resolution that “all peoples ... have the right to have access to drinking water in quantities and of quality equal to their basic needs” , regardless of their country's economic status<sup>63</sup>. These agreements were very ground-breaking articulations by the international community, even though they did not form part of the law since they are not binding on state parties. In Biswas Asit's accurate assessment:

“There is no doubt that the Water Conference sensitized the international community to the problems and complexities of efficient water management... Its timing fortuitously turned out to be right. When it was first proposed in 1971, its proponents little realized the severity of the emerging food and energy crises, the first natural, due to the widespread droughts, and the other manmade and the global problem of the availability of clean drinking water for all.”<sup>64</sup>

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<sup>60</sup> Para 2 of the UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>61</sup> Ibid.

<sup>62</sup> Petrella R. “The Water Manifesto: Arguments for a World Water Contract” *Zed Books (2001)* 135, p-6

<sup>63</sup> UN Water Conference, Mar del Plata, preamble, G.A. Res. 32/158 (1977).

<sup>64</sup> Biswas A.K. “United Nations Water Conference Action Plan: Implementation over the Past Decade” *International Journal of Water Resources Development*, 4 (1993) p-148.

Thus, the general global challenges of water at that time indirectly contributed to the emergence of water shortages as a topical issue deserving international attention. Hence, these various international forums commenced the discussion on access to water as a possible solution to address global destitution<sup>65</sup>.

Furthermore, in 1977 the international humanitarian reaffirmed the rights of prisoners of war which were previously reflected in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War<sup>66</sup>. To name but a few documents, the Geneva Conventions stated that during the time of conflict, the prisoners of war as well as civilians should be afforded drinking water and sanitation to maintain their good health<sup>67</sup>. While at the same time, Article 54 of the Additional Protocol 1 states that the parties to the conflict are barred from attacking and destroying the “objects indispensable to the survival of the civilian population” inclusive of those which supply water to the people<sup>68</sup>.

It could be argued that, by this repetitive mention of the access to water by most of these international forums, the international community was coming to terms with the right to water as a human right deserving international protection. Even in some of the standards that we being adopted, access to water was featured therein, for instance the non-binding Standard Minimum

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<sup>65</sup> Ibid p-148.

<sup>66</sup> Articles 54(2) and 5 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

Rules on the treatment of prisoners also make it an obligation for the prison wardens to ensure that people deprived of their liberty are afforded water to drink whenever they so wish<sup>69</sup>.

## **2.4.2 Declaration on the Right to Development**

With passage of time the implicit right to water was gaining momentum in the international arena, which saw it making its way also into the right to development. This can be supported by the UN General Assembly which adopted the Declaration on the Right to Development in 1986, and defined it as “inalienable human right by virtue of which ... all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”<sup>70</sup> Furthermore, the 1992 International Conference on Water and the Environment introduced an economic aspect to water when it perceived it as “an economic good” which should be availed to its users “at an affordable price”<sup>71</sup>. In essence even though this conference recognized water as a human right, it did not overlook the economical implications of this right.

### **2.4.2.1 From an economic good to a human right**

The uncertainties between the human right to water as against access to water as a commodity dates back to the earlier times when economic development was preferred at the expense of

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<sup>69</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.

<sup>70</sup> UN General Assembly, *Declaration on the Right to Development : resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, available at: <http://www.unhcr.org/refworld/docid/3b00f22544.html> [accessed 20 March 2012].

<sup>71</sup> See Bluemel at p-963.

human dignity<sup>72</sup>. According to Anna Russell, in those times it was justifiable to prioritize economic development at the expense of human dignity because it was believed that the fruits of that arrangement would ultimately “trickle down to individual rights holders, and the realization of human rights would start to look after itself”<sup>73</sup>. This understanding might be true, but at the same-time it seemed to overlook the inherent characteristics of economic development that it is not rights-driven, and usually individual autonomy does not count in as much as the face of economic development does not recognize human dignity.

It was only during the UN leadership of Kofi Annan that the rights based approach gained momentum<sup>74</sup>. The introduction of this approach during these times seemed to have ousted the economic-thinking of water to a more rights-orientated approach<sup>75</sup>. The philosophy behind this approach is “not simply in terms of society’s obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as a charity”<sup>76</sup>. It nevertheless becomes clear that sometimes provision of water and its accessibility requires some infrastructural and engagement, hence the paying of such services by the water recipients.

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<sup>72</sup> Russell A. “International Organisations and Human Rights: Realizing, Resisting or Repackaging the Right to Water” (2010) , vol. 9 *Journal of Human Rights*, p-2. (Routledge Taylor & Francis Group).

<sup>73</sup> Ibid.

<sup>74</sup> Filmer W supra p-216.

<sup>75</sup> Para. 173 of the *UN Annual Report of the Secretary General*.

<sup>76</sup> Ibid, 174.

The World Health Organisation has also remarked that the provision of water to the people “is never free; the water needs to be collected, stored, treated and distributed”<sup>77</sup>. While on the other hand, The General Comment seems to have advocated for water as a social good rather than an economic good, which therefore seems to bring a controversy as the practical situation is otherwise.<sup>78</sup>

Similarly, in 1993, the Vienna Declaration also mentioned that the right to development should also be viewed as a “universal and inalienable right” of other basic rights<sup>79</sup>. Giving meaning to this article, the General Assembly echoed its interpretation by observing that “the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for international community”<sup>80</sup>. However, this Declaration could not command States to act in accordance with it, but it only remained as source of international community’s aspiration just like any other Declaration.<sup>81</sup> Other non-binding documents included the Millennium Development Goals of 2000, where global leaders outlined targets to be achieved by 2015, amongst those was a goal to halve “the proportion of the population without sustainable access to safe drinking water and basic sanitation”<sup>82</sup>.

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<sup>77</sup> WHO p-1.

<sup>78</sup> The General Comment 15, para 11 and 12.

<sup>79</sup> Vienna Declaration and Programme of Action, GA/CONF.157/23, article 1(10).

<sup>80</sup> Declaration on the Right to Development, G.A. Res. 41/128, art. 1, U.N. Doc A/41/53 (1986).

<sup>81</sup> Brownlie I, “Principles of Public International Law”, 5th ed. *Oxford University Press*, (1998), 307-8

<sup>82</sup> UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 35, The Right to Water*, August 2010, No.35, available at: <http://www.unhcr.org/refworld/docid/4ca45fed2.html> [accessed 15 March 2012].

### **2.4.3 Post Human Rights Committee Comment 15**

Following some slow, though promising developments on the international level, General Comment no.15 (herein after: the Comment), was a next big step in the evolution of a human right to water. According to Russell, the General Comment 15 has been very instrumental in stirring up global debate on the right to water which ultimately gave birth to efforts in “trying to afford practical meaning” to such a right<sup>83</sup>. Although the Comments are not binding per se, they are very instrumental in advising state parties on how to implement the rights enshrined in the ICESCR<sup>84</sup>. They give more detail and elaboration of what a right entails.

Because of its in-depth analysis of the right to water, Comment no. 15, sparked the global debate on access to water as a human right. It was in 2002 when the Committee issued this Comment which boldly affirms the right to water as one of the guarantees which are at the heart of securing an adequate standard of living.<sup>85</sup> This General Comment has been very significant as it elaborates on the criterion that has to be satisfied towards the realization of the right to water and the ideal interpretation of this right under international law<sup>86</sup>. With regard to the content of the right to water, the General Comment 15 points out that the “human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal

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<sup>83</sup> Russell A. “International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?” *Journal Of Human Rights* , Vol. 9, Issue 1, (2010) p-4.

<sup>84</sup> UNCESCR. (1989) (3<sup>rd</sup> Session). *Report of the Committee on Economic, Social and Cultural Rights- Supplement NO.4* UN Doc E/1989/22 annex III (Introduction: The purpose of General Comments)

<sup>85</sup> Article 11 of the General Comment 15

<sup>86</sup> Ibid General Comment 15.

and domestic uses<sup>87</sup>. Further to this, according to this Comment, states parties to the Covenant are obligated to take steps in a progressive manner towards realizing the right to water with the maximum available resources<sup>88</sup>.

Amongst others, the Comment managed to introduce a new dimension to the right to water by serving as an interpretative instrument of articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights<sup>89</sup>. By so doing it postulates that the right to water is inextricably related to the right to health, as such creating a direct nexus between these two rights.<sup>90</sup>

After outlining a raft of international documents, treaties and declarations which provide for the right to water, the Committee added that safe and sufficient drinking water is a prerequisite for the achievement of all other human rights<sup>91</sup>. Arguably, therefore, General Comment did not create a new right by providing detail, but it merely provoked a discussion about the right to water at the international level. unpacked and elaborated what was already in the ICESR even though not explicitly mentioned.

Most importantly, the General Comment 15 triggered a very rich jurisprudence on the right to

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<sup>87</sup> UNCESCR para 2...

<sup>88</sup> Ibid General Comment.

<sup>89</sup> Scalon J. et al. "Water as a Human Right" *IUCN Environmental Policy and Law Paper No.51* (2004) p-5.

<sup>90</sup> Ibid Article 12.

<sup>91</sup> Ibid.

water as it unpacked the legal obligations emanating from the right to water<sup>92</sup>. Other scholars writing on the right to water, including Melvin Woodhouse have observed that this General Comment “significantly begins the process of crystallizing the substantive legal obligations of nations and the international community in the context of human rights and water”<sup>93</sup>.

It is worth emphasizing that, even though General Comment no. 15 introduced this rich reading on the right to water, it has also been met with criticism as far as its enforcement is concerned. According to Bluemel, despite its specific recognition of the right to water as a fundamental human right, the General Comment does not clearly allude to the “legal weight” created by this right<sup>94</sup>. This is simply because, like any other General Comment, it is merely meant to suggest better reporting procedures as well as to assist the implementation of the right in question by state parties as set out in the Covenant.<sup>95</sup> In addition, it was clear that the Comment was still not sufficient on the content of the right to water because subsequent UN bodies like the Human Rights Council still made further efforts to request for further studies on how this right could be implemented<sup>96</sup>.

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<sup>92</sup> *Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights, General Comment 15 The Right To Water*, U.N. ESCOR, 29th Sess., Agenda Item 3, U.N. Doc. E/C.12/2002/11 (2002), <http://www.unhchr.ch/html/menu2/6/gc15.doc>.

<sup>93</sup> Woodhouse M. “Threshold, Reporting and Accountability for A Right to Water Under International Law”, *University of Denver Water Law Review*, Vol. 8 (2004) p-3.

<sup>94</sup> Bluemel 973.

<sup>95</sup> UNCESCR. (1989) (3<sup>rd</sup> Session). *Report of the Committee on Economic, Social and Cultural Rights- Supplement NO.4* UN Doc E/1989/22 annex III (Introduction: The purpose of General Comments)

<sup>96</sup> *Supra* note 33.

For this reason, the debate on the scope of the right to water still continues.<sup>97</sup> Other commentators, like Scalon have opined that there is a ‘self-standing’ human right to water as laid down by the General Comment paragraph 3<sup>98</sup>. He further observed that “lifting the right to water from the shadow of other associated rights could be seen as awarding it long overdue standing to be considered as a self standing right”<sup>99</sup>. Other scholars have even suggested that the current problem related to the recognition of the right to water, could only be solved by introduction of a specific convention which will directly speak to the international legal framework on the right to water<sup>100</sup>.

This might be a workable solution, but it might take ages before such Convention could be adopted by the states, and in the meantime, the multitudes will continue to die from lack of access to water. One would therefore argue that, the existing legal bases on the right to water could be explored to secure access to water for the most vulnerable and marginalized groups of the society.

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<sup>97</sup> See above, Bourquain.

<sup>98</sup> Scalon et al p-20.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid

### 2.4.3.1 The Rights based approach to water

Arguably the talk of a human right to water could be attributed to the emergence of a rights based approach in the international community<sup>101</sup>. Perhaps this right to water was triggered by the increasing water scarcity and the mismanagement of the natural waters which accompanied development<sup>102</sup>. The human rights language and the development jargon were two different agendas driven by opposite strategies and objectives, the call for the merging of these two approaches then resulted in what we may now call “a rights based approach”<sup>103</sup>. This approach was therefore introduced and driven by the UN to ensure that the international community adopts it, both the state and international agencies<sup>104</sup>. Therefore, the approach demanded that both states and international agencies should align their strategies to be human centered, participatory, transparent and accountable<sup>105</sup>.

On the face of it, the right based approach therefore places at the fore, the rights of people who are vulnerable and the state obligations arising there from. In an effort to theorize this approach, the UNDP in 2003 defined the rights based approach in the following manner:

“A clear understanding of the difference between right and need. A right is something to which one is entitled solely by virtue of being a person. It is that which enables an individual to live with dignity. A right can be enforced and entails an obligation on the part of the government. A need on the other hand, is an aspiration that can be quite

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<sup>101</sup> Filmer-Wilson

<sup>102</sup> Ibid

<sup>103</sup> Ibid at p-214.

<sup>104</sup> Ibid.

<sup>105</sup> See above Wilmer.

legitimate but it is not necessarily associated with an obligation on the part of the government to cater to it.”<sup>106</sup>

It is therefore clear that the merging of the human rights and development had implications for the states as they undertook their national priorities. For instance in 2006, the outcome of the UNDP Human Development Report was that “at national level adherence to a rights-based approach requires the development of laws, policies, procedures, and institutions that lead progressively to realization of the right to water”<sup>107</sup>. What was most striking about this report is how it responded to the skeptics on whether water is a human right or not:

“some commentators see the application of rights language to water and other social and economic entitlements as an example of rhetorical loose talk. That assessment is mistaken. Declaring water as a human right clearly does not mean that the water crisis will be resolved in short order. Nor does a rights framework provide automatic answers to difficult policy questions about pricing, investments and service delivery.”<sup>108</sup>

At the heart of a rights based approach to water is that no one should be discriminated in terms of access to water just because of their inability to afford for such water<sup>109</sup>. Even further to this, the approach demands that priority in accessing water should be given to those individuals and communities who do not have access.

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<sup>106</sup> United Nations Development Programme (2003) p-1.

<sup>107</sup> P-60 of the UNDP 2006 Report.

<sup>108</sup> Ibid p- 60.

<sup>109</sup> Ibid p-61.

### 2.4.3.2 The impact of advocacy on the right to water

Current international developments of the right to water are chiefly owing to a lot of advocacy on water as a human right which was done by several stakeholders. The non-governmental scholars, the academic centers as well as scholars took part by issuing out report and guidelines in the right to water as a human right<sup>110</sup>. Amongst others, are the important roles played by the Centre on Housing Rights and Evictions (COHRE) which did a lot of advocacy on the right to water and it also consolidated a Manual on the Right to Water and Sanitation which was aimed at helping policy makers to implement this right<sup>111</sup>.

Additionally, Maude Barlow and Peter Gleink are some of the said scholars who engaged in endless efforts which were geared towards ending water poverty in the world. These efforts in solidarity with the most affected communities by lack of water culminated into the UN Resolution on the Right to Water in July 2010<sup>112</sup>. Maude Barlow has always been well known through her “Blue Covenant” movement which was famous for this slogan, “No one should watch their child or mother die because of a waterborne disease, while someone is making profit out of water”<sup>113</sup>. Arguably, therefore, it could be claimed that her advocacy at the UN level contributed to the recent UN 2010 Resolution.

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<sup>110</sup> Ibd 62.

<sup>111</sup> Available at [http://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](http://www.un.org/waterforlifedecade/human_right_to_water.shtml).

<sup>112</sup> Maude Barlow, presentation to the United Nations General Assembly, on the 22nd of April 2009. Available at [http://www.canadians.org/about/Maude\\_Barlow/UN/UNEarthDay-april09.pdf](http://www.canadians.org/about/Maude_Barlow/UN/UNEarthDay-april09.pdf).

<sup>113</sup> Ibd.

### 2.4.3.3 The Build-Up to the UN 2010 Resolution

But, before the 2010 historical UN Resolution there had been several UN build-up activities towards the right to water. In 2004 the UN Sub-Commission issued guidelines on the practical implementation of the right to water at the national level by elaborating more on the right to water and sanitation<sup>114</sup>. These Guidelines could be referred to as a complete replica of the General Comment 15, but even more important, they brought in a ground breaking clarification of “sanitation” as a subset of the right to water<sup>115</sup>. It was also acknowledged that there was still some clarity needed on the specific obligations that arise out of the right to water, hence the UN saw it fit to appoint an independent expert to compile those obligations in 2008, thus beginning the “Geneva process” on the legal status of the right to water and sanitation<sup>116</sup>. However, our main focus is on the right to water, not sanitation, as previously mentioned.

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<sup>114</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Final report of the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation*, 14 July 2004, E/CN.4/Sub.2/2004/20. In 2007 Human Rights Council Advisory Committee replaced this Commission.

<sup>115</sup> *Legal Resources for the Right to Water and Sanitation: International and National Standards*, 2<sup>nd</sup> ed (GENEVA: COHRE, 2008) p-9.

<sup>116</sup> See Macgraw p-118 above.

#### 2.4.3.4 The Independent Expert

The appointment of the UN Independent Expert was one of the clear steps that the international community was moved by the recognition of a human right to water<sup>117</sup>. The UN Human Rights Council (HRC) through its Resolution 7/22 introduced an Independent Expert who was to focus on a rights based approach to safe drinking water<sup>118</sup>. The HRC appointed Catarina de Albuquerque whose main mandate was to monitor and report on the international observance of the right to water, of course guided by the Comment and the UN Sub-Commission Guidelines for the Realization of the Right to Drinking Water and Sanitation. The expert was particularly impressed about the 2010 Resolution on the right water, when she mentioned that :

“The recognition of the right to water and sanitation is a breakthrough, but it is only a first step. The real challenge is to implement this right and turn it into reality for the billions of people who still lack access to water and sanitation.”<sup>119</sup>

The Independent Expert was therefore concerned that there is still a long way to go towards ensuring the operationalisation of the right to water. Merely declaring and resolving it as a right is just but a baby step.

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<sup>117</sup> Human Rights Council, “*Human Rights and Access to safe drinking water and sanitation*” HRC Res 7/22, (2008)

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### 2.4.3.5 The 2010 UN Resolution on the Human Right to Water.

Amongst all the periods, the 2010 era was the most victorious year for recognition of the right to water under international law. Notably, this year saw the United Nations General Assembly on the 28<sup>th</sup> July, adopting a Resolution which explicitly recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”<sup>120</sup>. The passing of this Resolution was a historical turning point as it had a very strong political support from the country representatives with 122 recorded votes and 42 abstentions with nil against<sup>121</sup>.

It really did not come as a surprise when the Human Rights Council echoed this by concluding that the human right to water and sanitation, just as was seen by the General Comment 15, emanates from the right to life, right to mental health as well as the underlying human dignity<sup>122</sup>. While both the General Assembly Resolution 64/292 and the Human Rights Council have reaffirmed the right to water and sanitation, the latter is not within the scope of this thesis as was previously mentioned.

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<sup>120</sup> The Human Right to Water and Sanitation, G.A. Res. 64/L.63, U.N. Doc. A/64/L.63/Rev.1 (July) 28, 2010). Available at <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>

<sup>121</sup> Ibid.

<sup>122</sup> Para 3. Human Rights Council.

The above Resolutions do not form part of legally binding international law as such, but they are very particular in that they represent an international consensus on the recognition of the right to water as an independent human right which is interrelated with other human rights. Even more striking, is its explicit mention of the right to water, as opposed to the previous efforts falling under soft law.

## **2.5 International litigation on the right to water**

The UN Human Rights Committee was confronted with a communication which involved the waste which was dumped by the Canadian authorities next to Port Hope.<sup>123</sup> The complainant alleged that the dump site was a danger to the environment and also hazardous to people living close by. The Committee remarked that the case was inadmissible due to procedural defects of lack exhaustion of domestic remedies but the issues prevalent in the communication were clearly affecting article 6 which provides for the right to life<sup>124</sup>.

Likewise the Inter-American and the European approach seem follow the derivative approach to the right to water. In 1997 the American Commission on Human Rights in its report on Ecuador made a finding that the residents were endangered by the oil exploitation that had muddied the

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<sup>123</sup> *E.H.P v. Canada, Communication No. 67/ 1980*. U.N. Doc CCPR/C/OP/1 p-20. Available at [http://www.bayefsky.com/pdf/114\\_canada67\\_1980.pdf](http://www.bayefsky.com/pdf/114_canada67_1980.pdf)

<sup>124</sup> *Ibid.*

water which was used for domestic purposes<sup>125</sup>. While the European Court jurisprudence saw the right to water being read into the right to property and the right to one's private life. This was observable in *Zander v. Sweden* case, where the European Court held that the nearby well belonged to the close by communities and should not be contaminated as it was used for drinking water<sup>126</sup>. Even though this was a pollution case, the court's reasoning and finding was based on the violation of the right to property<sup>127</sup>.

The litigation of a human right to water helps to thrash out what this right entails as well as the legal claims on which it could successfully be asserted. Above all, this helps especially in ensuring access to water by the most vulnerable. The idea behind this protections stems from the human rights values themselves as demonstrated below.

## **2.6 Human Rights Values and the Right to Water**

If access to water is indeed a fundamental human right as debated under the international human rights discourse, then it goes without saying that its provision should be based on the fundamental values of equality, equity and of course respect. This assertion is supported by the 2002 General Comment 15 of the United Nations Committee, when it stated that, 'The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the

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<sup>125</sup> Inter-Am. C.H.R, *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96 Doc. 10 p-87.

<sup>126</sup> *Zander v. Sweden*, ECHR (1993), Series A, No. 279B. p- 61

<sup>127</sup> *Ibid.*

realization of other human rights.”<sup>128</sup> It went further to point out that this right “falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”<sup>129</sup>. Even more important, was when it featured in, the dignity element and linking it to “other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life”<sup>130</sup>. In this light the components “of the right to water must be adequate for human dignity, life and health”.<sup>131</sup>

Furthermore, in Peter Gleick’s accurate assessment, lack of access to safe drinking water leaves an individual exposed to a variety of risks: dehydration, diarrhea, cholera, poor personal hygiene and severe discomfort<sup>132</sup>. Over and above this, it undermines the inherent dignity and respect which is to be afforded to all members of humankind.

Inevitably then, the right to water and the interpretation attributed to it should be aimed at upholding these abovementioned values. In essence, for poor communities to have their life in dignity, they should be given a fair access to water. As MCgraw puts it, these communities “require local access to this international legal standard developed for the protection of their

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<sup>128</sup> Ibid Para 1.

<sup>129</sup> Ibid para 2

<sup>130</sup> Ibid Para 3.

<sup>131</sup> Ibid Para 11.

<sup>132</sup> Gleick P. “Dirty Water: Estimated Deaths from Water-Related Diseases 2000-2020” *Pacific Institute Research Report* August 15, 2002 p- 3. Available at [http://www.pacinst.org/reports/water\\_related\\_deaths/water\\_related\\_deaths\\_report.pdf](http://www.pacinst.org/reports/water_related_deaths/water_related_deaths_report.pdf).

dignity”<sup>133</sup>. Put differently, a commitment by a state to address lack of access to clean water, in which there will be human dignity and equality for all, a sufficient access to clean drinking water is a minimum requirement<sup>134</sup>.

## **2.7 The principle of nondiscrimination accessing water**

In the context of the above discussion on the human rights values, an element of equality which recognizes the plight of the vulnerable groups. Of particular importance is the CEDAW which was highlighted above<sup>135</sup>. This Convention is quite important because of its provision on an the equal access to water by the rural women. In remarking on the plight of rural women, Caroline Penn observed that women living in rural areas suffer most as they usually have to walk long distances to fetch water for the household<sup>136</sup>. She further remarked that the time spend walking miles to access that water could be used in a productive manner to improve the lives of those women<sup>137</sup>.

## **2.8 The relationship between right to access to water and other human rights**

The above discussion has demonstrated that the right to access to water is founded on a plethora of human rights values. Far more useful is to consider as to which other rights is the right to

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<sup>133</sup> McGraw 107.

<sup>134</sup> Hardberger A. “Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it creates” 4 N.W.J. *International Law Journal*. (2006) p-541

<sup>135</sup> Explicit mention of the right to access to water by the rural women.

<sup>136</sup> Penn C. “Water, Sanitation and Poverty Reduction” Development Issue, *Water Aid* (1999), p13.

<sup>137</sup> Ibid.

access to water linked to. Perhaps, this issue is of paramount importance because, when people are barred from accessing water, a wide range of human rights are also implied<sup>138</sup>. As previously mentioned in this discussion, though the right to water was not explicitly mentioned as an independent human right under international human rights, it has nonetheless been protected to achieve other rights, for instance, the right to life, the right to housing and healthcare<sup>139</sup>. As such the lack of access to water by poor communities brings to the fore a variety of conundrums affecting these other rights.

According to Salman, the UDHR and other subsequent human rights conventions had created a gap in not specifying water as a human right<sup>140</sup>. He adds that, international legal scholars developed the jurisprudence about this right by using “the approach of derivation and inference” that is, deriving this right of water from other socio-economic rights<sup>141</sup>. Be that as it may, it is still vague as to which specific rights is the right to water aligned to. The derivative interpretation of the right to water will therefore depend and vary according to which right is being supported at that time.

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<sup>138</sup> See above foot note.

<sup>139</sup> See above Hardberger p-534.

<sup>140</sup> Salman M.A. , ‘The Human Right To Water’ : Legal and Policy Dimensions (Law, Justice and Development Series) *World Bank Publications*, (2004) p-57

<sup>141</sup> Salman p-57.

## 2.8.2 The right to life

It is almost impossible to imagine life without water, as such the right to water is at the heart of the right to life. A further glance at several international treaties and conventions leads to a conclusion that the founders and drafters observed water as basic necessity. According to Bluemel, the right to water has a close relationship only two rights under the International Bill of Rights, namely, “the right to life and the right to health”<sup>142</sup>. He adds by saying the right to life cannot stand alone but has to be grounded on “fundamental conditions necessary to support life.”<sup>143</sup> More so, it is an undeniable fact that other rights like food, health and life cannot be realized without provision for access to clean water, which therefore makes it a centric to other rights. This view is supported by the general international explicit articulations on the right to water, including the Resolution of 1977 at the United Nations Water Conference which provided as follows:

“All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.”<sup>144</sup>

It is therefore noteworthy that water is at the heart for human survival, which then follows that if people are barred from accessing water, then a wide range of human rights are also sacrificed. As Giuese remarked in his report, insufficient access to water “endangers the lives of millions of

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<sup>142</sup> Bluemel p-968

<sup>143</sup> Supra p- 968.

<sup>144</sup> Ibid p-968.

people who are consequently not guaranteed their right to life”.<sup>145</sup> He further correctly pointed out that no human being can survive without water for several days as death might result from dehydration<sup>146</sup>.

Furthermore, a raft of international documents has also explicitly alluded to the link between the right to water and the right to life. The Human Rights Committee have sought to clarify the content of the right to life as provided for in article 6 of the International Covenant on Civil and Political Rights, by requiring state parties to take initiatives in an effort to “reduce infant mortality, increase life expectancy..” and general well being of their populations<sup>147</sup>. In a similar manner, the Convention on the Rights of a Child, also has a provision on the right to life, which obligates states parties to guarantee to “the maximum extent possible the survival of the child”<sup>148</sup>. To give more weight to this obligation, Article 24(2)(c), explicitly requires State Parties to take both legislative and policy measures “to combat disease and malnutrition...through inter alia the...provision of adequate nutritious foods and clean drinking water”<sup>149</sup>. In this light, it is strikingly clear that access to water lies at the heart of the right to life, therefore making these two rights mutually exclusive.

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<sup>145</sup> Giusee H., “The Right of Access of Everyone to Drinking Water Supply and Sanitation Services”, *Special Rapporteur under Sub-Commission Resolution 1997/18, Working Paper E/CN.4/SUB.2/1998/7*, para. 21

<sup>146</sup> Ibid.

<sup>147</sup> General Comment No.6 UN Human Rights Committee, The Right to Life , para.5 U.N. Doc. HRI/GEN/1(1982).

<sup>148</sup> Article 6 of the Convention on the Rights of a Child, adopted November 20, 1989, GA. Res. 44/25, annex 44 U.N.

<sup>149</sup> Ibid Article 24(2) (c).

### 2.8.3 Access to Water and the right to health

Turning to the right to health, it has been for mentioned and logically follows that anyone who is denied access to safe drinking water will end up having health complications. The connection between the right to water and right to health has been made in several provisions of international treaties, as it has been recognized that the right to water is a necessary component for the fulfillment of the right to health<sup>150</sup>. Amongst others, this is observable from the General Comment no. 14 which unpacked the ingredients of Article 12 of the ICESR to include the “underlying determinants of health, such as access to safe and portable water”<sup>151</sup>.

Not only that, but also the famous General Comment 15 has come out very clear on the connection between the rights in questions when it provided that individuals have a right to enjoy their access to clean water and sanitation and that this right is “inextricably related to the highest attainable standard of health”<sup>152</sup>. In addition, this Committee has pleaded with states to prioritize the challenges of access to safe drinking water in order minimize malnutrition, hygiene and water-related diseases<sup>153</sup>. Erik’s Bluemel has elaborated on this connection by adding another perspective when he said:

“The right to health thus ensures not only access to clean and safe water to drink, but also water to assist in the disposal and cleanup of waste and the protection of existing bodies of water from contamination.”<sup>154</sup>

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<sup>150</sup> Bluemel 968.

<sup>151</sup> UN Committee General Comment Number 14.

<sup>152</sup> General Comment 15 , para 3.

<sup>153</sup> Ibid, para-55.

<sup>154</sup> Bluemel p-970.

So from the above discussion on the relationship of water and other rights, it continues to be affirmed that human rights are indivisible, interrelated and interdependent<sup>155</sup>. Similarly, the Report of the UN Special Rapporteur also long concluded that the right to water has full international recognition and it is also a necessity to realize and assist the implementation of other human rights<sup>156</sup>. All these, is tangible evidence of the interdependence and indivisibility of the categories of rights and thus assumes no hierarchy of rights in international law. However, the call for an independent recognition of a human right to water has numerous benefits to the rights holders, especially the most marginalized.

## **2.9 Independent Recognition of the Right to water**

To begin with, the importance of the indivisibility of human rights have been alluded to above and therefore will not be repeated here. But the independent recognition of the right to water has undoubtedly proven to hold more impact in terms of enforcing this right and holding the state to account<sup>157</sup>. Scanlon has correctly remarked recognizing the right to water as an independent human right will afford it more protection, as courts of law will be ready to adjudicate on this right on behalf of the vulnerable groups, as a result a more clearer jurisprudence will emerge out

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<sup>155</sup> The Vienna Declaration and Programme of Action adopted on 25<sup>th</sup> June 1993 by the World Conference on Human Rights.

<sup>156</sup> UNITED NATIONS COMMISSION ON HUMAN RIGHTS (UN CHR), Sub-Commission on the Promotion and Protection of Human Rights, Economic, social and cultural rights, *Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation. Final report of the Special Rapporteur*, El Hadji Guissé, E/CN.4/Sub.2/2004/20, 2004, para. 23.

<sup>157</sup> Scanlon p-21.

of it as opposed to it being subsumed under other rights<sup>158</sup>. In her own words, she points out to the direct benefits in the following manner:

“...by making water a human right, it could not be taken away from the people. Through a rights-based approach, victims of water pollution and people deprived of necessary water for meeting their basic needs are provided with access to remedies.”<sup>159</sup>

In essence, since access to water raises economic capacity, it seems that the most destitute are affected most. Therefore an independent recognition of the right to water will serve as strategy to guard against the plight of the poor communities, as their need should be prioritized in the provision of water<sup>160</sup>.

## **2.10 State obligations on the right to water**

### ***2.10.1. General Obligations***

Having identified and unpacked the relevant international human rights documents which either directly or indirectly allude to the right to water, for our purpose it becomes important that we determine the extent to which obligations on this right are imposed on the states. It is noteworthy that, even though a raft of international treaties and declarations have not recognized a distinct human right to water, the very same documents have incorporated and set out specific obligations for providing access to clean drinking water.<sup>161</sup>

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid p-21 &22.

<sup>160</sup> Ibid Wilmer p-236.

<sup>161</sup> Ibid note 53.

As a general rule, each and every government bears the basic responsibility to ensure the promotion and protection of the rights of the inhabitants of its territory or jurisdiction<sup>162</sup>. Additionally, it has always been acknowledged under both national and international law that a legal right gives rise to an obligation, therefore that should also be true in relation to the right to water<sup>163</sup>.

However, Shue has sought to go beyond the above understanding by suggesting that every basic right gives rise to three duties, namely, “the duty to avoid deprivation, the duty to protect from deprivation and the duty to aid the deprived” accordingly<sup>164</sup>. This assortment is consistent with the notion of the negative duty to protect rights, the positive duty to fulfill rights, as well as the intermediate duty to prevent others from interfering with rights as developed by the International Covenant on Economic Social and Cultural Rights<sup>165</sup>. Be that as it may, the question whether the right to water under international law, contains all three correlative duties as described by Shue, will be construed here-under. Hence, at this juncture it is necessary to determine the types of legal obligations which lie with the states towards the realization and fulfillment of the right to water.

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<sup>162</sup> Janis M et al. “European Human Rights Law: Text and Material” 3<sup>rd</sup> ed, *Oxford University Press*, p-153.

<sup>163</sup> Alston P, “Making Space for New Human Rights: The Case of the Right to Development” (1998) 1 *Harvard Human Rights Year Book* 3, 33

<sup>164</sup> Fredman S. “Human Rights Transformed: Positive rights and positive duties”, *Oxford University Press* ( 2008) at 69.

<sup>165</sup> *Ibid.*

### *2.10.2 Core obligations on the right to water*

Since the state is a guardian of its citizens rights, there are certain minimum obligations that accrue out of this relation. These duties have been termed core obligations by the Covenant. Generally for all other socio-economic rights, there has to be a progressive realization by the state, but in the view of the General Comment, obligations of water have to be realized immediately by the state, as per the following paragraphs:

- “To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- To adopt and implement a national water strategy and plan of action addressing the whole population...should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored.”<sup>166</sup>

All in all, the member states are obliged to respect, protect and fulfill the right to water, as per the General Comment<sup>167</sup>. In this context, ‘respect’ means not to interfere with the enjoyment of the right to water either directly or indirectly, while ‘protect’ refers to the state protecting the right to water from third party interference<sup>168</sup>. The General Comment encourages state parties to fulfill the right to water by implementing national strategies on water as well as action plans which are aimed at ensuring affordability to the marginalized and vulnerable groups of the society<sup>169</sup>. Furthermore, where the states delegates the provision of water services to a third party, that does not mean the state is then relieved from its duties, it still bears the responsibility to

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<sup>166</sup> General Comment 15 at para. 37(a), (f).

<sup>167</sup> Ibid para. 20.

<sup>168</sup> Ibid para. 20-21.

<sup>169</sup> GC para. 26.

ensure that such non-state actors afford “minimum essential water to the people”.<sup>170</sup> Moreover, the member states also have an international obligation

### ***2.10.3. Access to Water as a socio-economic right***

One of the most important international instruments when it comes to obligations of socio-economic rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since the right to water falls under the cluster of rights which deal with livelihood, being a socio-economic right, its obligations stem from Article 2 of this Covenant<sup>171</sup>. The States parties therein have undertaken legally binding obligations to take steps, to the maximum of available resources, to ‘achieve progressively’ the full realization of the economic and social rights in the Covenant.<sup>172</sup>

To understand these obligations, it is necessary to comprehend the distinction between a state’s inability and its lack of political will. A state cannot postpone its obligations under the guise of ‘progressive realization’, if such a state claims lack of resources, then it bears the burden of

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<sup>170</sup> Ibid, paragraphs 42 and 43.

<sup>171</sup> ICSECR

<sup>172</sup> Nolan et al, “Article 2(1) ICESCR and States Parties’ Obligation: Whither the Budget?” *European Human Rights Law Review*, Vol.3,(2010) p280.

proof.<sup>173</sup> The High Commissioner viewed the obligations with regard to water in the following terms:

“It is up to each country to determine what this sufficient amount is, relying on guidance provided by WHO and others... States should take steps to ensure that this sufficient amount is of good quality, affordable for all and can be collected within a reasonable distance from a person’s home”<sup>174</sup>.

In essence the above obligations give discretion to states to determine the kind of measures and steps they take in realizing this right to water. The Committee of Economic, Social and Cultural Rights unpacked the concept of ‘progressive realisation’ to refer to the fact the states generally cannot be able to realize the economic and social rights immediately, but over a prolonged period of time.<sup>175</sup> Now, we need to pay closer attention to the specific elements of the right to water.

## **2.11 Substantive components of the Right To Water**

It may therefore be asked, what is the content of the right to water? The answer is found in the General Comment 15, which pointed to three components, namely that, “water must be adequate for human life; it must be safe and available...on a non-discriminatory basis”<sup>176</sup>. As seen above, for the Committee, “adequate water” goes beyond safe drinking water, to include usage for domestic and personal purposes to prevent disease and poverty. Put differently, the Committee postulates that for water to be sufficient to survive on, it must cater for all domestic and

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<sup>173</sup> Maastricht Guidelines on Violation of Economic Social and Cultural Rights 1997 par 13 (reprinted in Urban Morgan Institute for Human Rights 1998 *Human Rights Quarterly* 691).

<sup>174</sup> UNHCHR (2007) at paragraph 47.

<sup>175</sup> Committee on Socio-economic rights

<sup>176</sup> General Comment no.15.

individual uses and even the most poorest should be able to access it.<sup>177</sup> further these aspects can be broken into “availability, quality and accessibility” as demonstrated below.

### **2.11. 1 Available water**

According to the General Comment no. 15, water will be assumed as available where it is enough to take of the daily individual and household uses without any arbitrary tampering from the authorities.<sup>178</sup> In other words every member of a house hold either individual or collectively should be able to drink , cook or bath from water whenever they so wish. However, the General Comment did not specify tha exact amount of water an individual or a household is entitle to, it just mentioned that such water supply should be commensurate to the guidelines as set out by the World Health Organisation<sup>179</sup>. As such the minimum core was missing from the Comment text in this regard.

### **2.11.2 Water Quality**

Just as it was discussed above that the right to health falls within the ambit of the right to water, the Committee emphasized that the water that should be availed to the people has to be free of contamination, meaning that it must be safe and clean<sup>180</sup>. From this, it could be understood that

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<sup>177</sup> Para 2. Of the General Comment n.15.

<sup>178</sup> Ibid para 12.

<sup>179</sup> Ibid.

<sup>180</sup> Para 12 (b).

General Comment no.15 introduces a negative duty on the state and non state actors not to pollute or dilute the water that is due to the people for domestic and personal uses<sup>181</sup>.

### **2.11.3 Accessible Water**

Of even greater importance, is the requirement of ‘accessibility’ as it goes to the very roots of the values of ‘equality’ as discussed above, since it requires that water should be availed to all without direct or indirect discrimination. At the heart of this accessibility requirement is the duty of “physical, economic as well as based on the principle of equality. According to paragraph 12 of the Comment no.15, water should be physically accessible so much that people do not walk for many kilometers to draw water<sup>182</sup>. As to the economic accessibility, the Comment requires access to water to be affordable to even the most poorest of the communities<sup>183</sup>. Lastly the element of equality requires water to be accessible to everyone including the minority groups and the most vulnerable groups<sup>184</sup>.

In addition, from the South African jurisprudence, Jaap de Visser has argued that the right to water raises two different but connected obligations for any country:

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<sup>181</sup> Bulto S “The Human Right to water in the corpus and jurisprudence of the African Human Rights System”, vol 11 *African Human Rights Law Journal*(2011),p-365.

<sup>182</sup> Ibid para 12.

<sup>183</sup> Ibid paragraph 12 © (ii)

<sup>184</sup> Ibid General Comment, paragraph 25.

- All people should be afforded “physical access to water”. For Visser, this means that the water supplies should be closer where they can be easily be accessible by all people, especially the marginalized and vulnerable.
- Water provision should be economically accessible, which implies, low cost which accommodates even the poorest of the poor.<sup>185</sup>

Furthermore, the office of the High Commissioner has sought to elaborate on the “obligations to respect, protect and fulfill” the right to water<sup>186</sup>. These obligations apply both to the rural and urban supplies of water in a given community<sup>187</sup>.

## **2.12 Regional standards on human right to water**

### ***2.12.1 African standards on the right to water***

In the African context, the starting point is that African Charter on Human and Peoples Rights recognizes socio-economic rights on the same footing as civil and political rights<sup>188</sup>. The African Charter therefore reaffirms the indivisibility and interrelatedness of these rights, by its provision

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<sup>185</sup> Visser J, et al. “The Free Basic Water Supply Policy: How Effective is it in Realising the Right?” *ESR Review*, Vol7, No.1, July 2003. Available at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-transformation-20March.pdf/>

<sup>186</sup> UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 35, The Right to Water*, August 2010, No.35, available at: <http://www.unhcr.org/refworld/docid/4ca45fed2.html> [accessed 15 March 2012].

<sup>187</sup> *Ibid.* p- 28.

<sup>188</sup> De Vos “A New Beginning? The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples Rights”

that protection of civil and political rights necessitates the promotion of socio-economic rights.<sup>189</sup> Despite this commendable texture of the African Charter, the majority of African Citizens continue to be subjected to abject poverty and lack of access to water<sup>190</sup>. This is very important because, even African states which have signed and ratified this Charter could be held accountable even though they have not included these rights in their national Constitutions.

The human right to water has also received attention in some regional provisions through implication. To name but a few, the African Charter of Human and People's Rights provides that "every individual shall have the right to enjoy the best attainable state of physical and mental health"<sup>191</sup>. In a similarly manner, Article 14(1) of the African Charter on the Rights and Welfare of the Child, afford every child the right "to enjoy the best attainable state of physical, mental and spiritual health"<sup>192</sup>. While Article 14(2)(c) became more explicit by saying:

"State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water"<sup>193</sup>.

In a similar token, the rights of women in relation to access to water have been recognized by the Protocol to the African Charter on the Rights of Women which provides that the

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<sup>189</sup> See Preamble to the African Charter on Human and Peoples Rights, para.8.

<sup>190</sup> *UN Millennium Development Goals Report* (2009), p-46. Available at [http://www.un.org/millenniumgoals/pdf/MDG\\_Report\\_2009\\_ENG.pdf](http://www.un.org/millenniumgoals/pdf/MDG_Report_2009_ENG.pdf)

<sup>191</sup> Article 16(1) of the African Charter of Human and People's Rights (Banjul 1981); also

<sup>192</sup> Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> [accessed 19 March 2012].

<sup>193</sup> *Ibid* Article 14(2)(c); See also Article 15 of the Protocol to the African Charter on the Rights of Women in Africa states that, women should be afforded "the right to nutritious and adequate food...access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food".

African states have an obligation to “provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food.”<sup>194</sup> Similar to the CRC and CEDAW, protection in this regard is only limited to women and children, other groups who also face lack of access to water are not catered for here.

### ***2.12.2 African Commission interpretation of the Right to Water***

To ensure effective observance of the abovementioned rights as stipulated under the African Charter, a quasi-judicial body was set up to monitor the states compliance with the Charter<sup>195</sup>. De Vos has observed that the African Commission jurisprudence has come to show that in considering whether a state is in violation of socio-economic rights, the applicable test is reasonableness<sup>196</sup>. Seemingly this approach of the Commission follows the line of reasoning as stipulated under the General Comment 15. That is to say, the Commission has also derived the unwritten right to water from other specified human rights<sup>197</sup>. For instance in the case of *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehova v Zaïre*, the commission came to a finding that “...the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine” is tantamount to a violation of the right to health.<sup>198</sup>

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<sup>194</sup> Article 15 of the Protocol

<sup>195</sup> Article 30 of the African Charter.

<sup>196</sup> De Vos, supra p-20.

<sup>197</sup> Bulto T. “The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System” *African Human Rights Law Journal* (2011) vol.11, p-

<sup>198</sup> *Free Legal Assistance Group v Zaïre* ACHPR Comm No 25/89, 47/90, 56/91, 100/93 (1995) Communication 19th Sessiion 155/96, African Journal of Legal Studies, available at

Similarly, in a more recent case the African Commission on Human and Peoples Rights alluded to the implicit human right to water by holding that “the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells”, constituted a violation of Article 16, which is a provision for the right to health.<sup>199</sup> A more recent decision on the right to water by the African Commission involved the government of Sudan, where the Commission made a ruling that even though the right to water is not specified in African Charter, its protection can be derived from the right to health, right to life, development as well as the international jurisprudence.

It could therefore be argued that the Commission’s approach to the right to water is in consonance with the international jurisprudence and the derivative interpretation of the General Comment 15. However, the remaining challenge is that no normative content has been given on the human right to water from the Commission’s jurisprudence. In a similar manner, Bourquain has correctly observed that there still exists a rather fluid concept of what the “right to water” refers to under international law<sup>200</sup>. Therefore it becomes of necessity to investigate and work towards the gist of this right by looking into the state duties that accrue out of this right as provided for under international law.

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<http://africalawinstituteorg.web.siteprotect.net/ajls/vol1/no2/Nwobike.pdf> (accessed on the 15<sup>th</sup> February 2012).

<sup>199</sup>*Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication 296/2005*, African Commission on Human and Peoples’ Rights, ACHPR/LPROT/COMM/279/03 & 296/05/674.09 (29 July 2009).

<sup>200</sup> See Bourquain above, p-19.

## 2.13 Is there a minimum core on the right to water?

Having discussed both the international and regional provisions of the right to water and thus identified gaps, it becomes compelling to find the best interpretation that maximises the state obligations, so that the protection and the promotion of the right to water finds optimum application. In other words we want to investigate whether the content on the right to water has been concluded, in terms of quality and quantity. As far as this is concerned, the General Comment 15, the Special Rapporteur and subsequent reports bring this issue up. Arguably this will be identified as the “minimum core” of the right to water. The “minimum core” as a concept in international law, comes from General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights which provided as follows:

“it is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.”<sup>201</sup>

With regard to the minimum core of the right to water, McGraw sought to provide a clarification by investigating into the international instruments as well as the writings of

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<sup>201</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para.1, of the Covenant)*, 14 December 1990, E/1991/23, Para. 10. Available at: <http://www.unhcr.org/refworld/docid/4538838e10.html> [accessed 17 March 2012].

several scholars including the World Health Organisation<sup>202</sup>. He summarised his findings and concluded that, the minimum core of the right to water would be:

‘an individual right to sufficient, safe, acceptable, physically accessible and affordable water to meet vital human needs at all times, distributed in a non-discriminatory way, acknowledged by the home government, and reinforced by deliberate, concrete and targeted state actions toward the enjoyment of the right’s full scope, where a failure to do any of these things requires justification with reference to the maximal use of available resources<sup>203</sup>’.

Furthermore, despite its promising emergence under international realm, the right to water remains to be faced by a numerous challenges which render these milestones an empty victory. McGraw, advances two major reasons, the first being the “national enforcement challenges stemming from an absence of authoritative transnational case law”, while the second one is related to the judicial interpretation of this right as “national courts are left with an open, conceptual space for content-giving,” because this right has not been singled out as an independent right under international law<sup>204</sup>.

## 2.14 Chapter Conclusion

This chapter has considered in more detail the ambit of the right to water as per the regional and international law and the journey it has traversed to acquire its current status as a human right even though not legally binding. The chapter clearly demonstrated that the right to water gained

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<sup>202</sup> The World Health Organisation was suggesting 2 litres per capita a day is most likely adequate for cooking needs, while an International water expert Peter Gleick believed 10 litres is required on average. See: Howard G. “Domestic Water Quantity, Service Level and health” *World Health Organization* (2003).

<sup>203</sup> McGraw p-137.

<sup>204</sup> McGraw 108.

much popularity through the soft laws and actions plan. General Comment 15 as the most authoritative interpretation of the right to water has received much attention as it was dissected to understand the content of the right to water. Moreover, the chapter looked into the regional and international ramifications of this right, where it was discovered that the right is not yet ripe to be considered a human right under international law as there is no independent recognition.

This has been visible from both the international instrument and the judicial approach. Since the main discussion was on the right to water under international instruments, a few major conclusions can be drawn. First, despite its non-mention in the foundational human rights document, the right to water has managed to develop a niche in the international human rights law through implication. In particular, this right achieved this small victory as an international obligation under the soft law. As unenforceable as it is, it might be helpful to blow content for the regional and national implementation of the right to water.

## Chapter Three: Realizing the Right to access to water at the national level: Water litigation dilemmas

### 3.1 Introduction

It has been observable from the previous chapters that gaps still exist in as far as providing the necessary content to the right to water under international law is concerned<sup>205</sup>. The current chapter therefore makes an inquiry into whether domestic judicial approaches have managed to close that perceived gap, and if yes, how. The chapter commences by unpacking how the international standards influences domestic judicial approaches to the right to water, and the chapter also offers comparative insights into the judicial approaches to right to water in South Africa, Botswana and India.

In this context, the chapter discusses the right to water and its implementation at the domestic level. The main aim of the chapter is to glean experiences of the judicial approaches in three selected countries, and how these approaches have been used to secure the plight of the vulnerable groups at the country level. At the heart of this chapter is a discussion of how abject poverty and other factors are of importance to access to water litigation and how courts from South Africa, Botswana and India have interpreted this right to protect marginalized groups. Throughout this chapter, it will be evident that though steps are taken by these countries with

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<sup>205</sup> The shortcomings of General Comment 15 were thrashed out in the previous chapter.

regard to policy and practical implementation, a big difference of judicial approach still prevails on how to interpret the existing international law as well as whether this right is justiciable.

### **3.2 The influence of international standards on the national implementation of the Right to Water**

The previous chapter dealt with the right to water as perceived under international law, but now we want to look into the operationalization of such right on the ground. We want to unpack the extent to which international law in this regard has influenced the domestic thinking of the right to water. Important to this objective is how national courts have taken judicial notice of the human right to water and challenges in this regard. Through-out the discussion in this chapter, it will be evident that, the national courts have been instrumental in closing the gap by implying the right to water in other rights, and even securing this right for vulnerable and marginalized communities. Perhaps as a starting point, it is noteworthy that the domestic recognition of a human right to water matters most, because that is where a country displays its political will and also accountability is easily enhanced. This could also be supported by the General Comments which stated as follows:

“in accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize all appropriate means, including particularly the adoption of legislative measures in the implementation of their Covenant obligations.”<sup>206</sup>

The Comment further points out that state parties should also ensure that their current legal systems have provisions on the right to water, if not they should adopt new policies and laws which are consistent to provisions of the Covenant. It is therefore in this light that we want to determine to what extent have the three selected countries below implemented these obligations arising from the international law. We first look into experience from South Africa.

### **3.3 Country Experiences: South Africa**

#### ***3.3.1 Contextual Background***

South Africa has been praised and continues to be praised for being one of the progressive countries on the jurisprudence of general socio-economic rights. A lot of this is due to the transformative texture of the South African Constitution<sup>207</sup>. Even before the current mention of human rights in the South African Constitution, the Freedom Charter could arguably be regarded as one of the foundational documents which had mentioned human rights specific to the context of South Africa<sup>208</sup>. The Freedom Charter was a response to the apartheid policies which used to

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<sup>206</sup> General Comment 15 at para.45.

<sup>207</sup> 1996 Constitution of South Africa.

<sup>208</sup> Davis, D. “The Freedom Charter: A Challenge and Bequest” in N. Steyter “The Freedom Charter and Beyond. Founding Principles for a Democratic South African Legal Order, p-15. See also Jordan P “Socialist Transformation and the Freedom Charter” [available at archive.lib.msu.edu](http://archive.lib.msu.edu)

characterize South Africa<sup>209</sup>. At the heart of this document was the call for equality, non-discrimination and inclusion and recognition of the rights of the black population in order to oust apartheid. Therefore the Charter made a demand for both civil and political rights and socio-economic rights like the right to land, the right to housing and health care<sup>210</sup>. The apartheid policy rendered South Africa a country where there was a huge gap in terms of access to socio-economic rights between the white people and the black people. Even beyond the categorization of race, there was still a disparity in terms of access to these rights between the urban and rural populace.<sup>211</sup> The face of apartheid resulted into segregation of townships where the black communities were mostly concentrated in townships with no houses but shacks while the other rich people stayed in suburbs with economic resources and good services<sup>212</sup>.

### ***3.3.2 A democratic Constitution***

In 1994, a democratic constitution was crafted with the sole intention of making the rest of South Africans feel accommodated and to outlaw the oppression that had been common during the apartheid era<sup>213</sup>. Since the 1994 Constitution was only transitional, the 1996 has been praised world wide because it emerged out of intensive negotiations during the transitions from

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<sup>209</sup> Ibid p-16

<sup>210</sup> Davis at p-17..

<sup>211</sup> Report by the dwaf in South African human rights commission  
[http://www.sahrc.org.za/socio\\_economic\\_report\\_main.pdf](http://www.sahrc.org.za/socio_economic_report_main.pdf) .

<sup>212</sup> Khoza S. " Introducing Socio-Economic Rights in South Africa" 8 *ESR Review* (2007) 8, p-9.

<sup>213</sup> Ibid p-10.

oppression to freedom<sup>214</sup>. The 1996 Constitution of South Africa outdid itself in trying to speak out the language of the poor and previously disadvantaged communities<sup>215</sup>. A distinct feature of this constitution is the provision in the Bill of Rights of a series of socio-economic rights alongside their civil and political rights counterparts<sup>216</sup>. The underlying values of these rights was dignity, equality and the right to administrative action so as to curb arbitrariness<sup>217</sup>. To emphasize the importance of these values, Section 39(1)(a) of the Constitution orders that in adjudicating on the Bill of Rights, courts should “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”<sup>218</sup>.

Even more striking was the similarity of thrust with which socio-economic rights were recognized on the same level as civil and political rights. The South African Constitution has even gone beyond the ambit of the socio-economic rights protected by the ICESCR<sup>219</sup>. But of course this is not to say that the sailing was smooth when it came to the judicial enforcement of these rights. The following part is an excursion of the Constitutional framework of the socio-economic rights and how South African Constitutional Court gave an interpretation to these rights and the challenges they had to deal with.

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<sup>214</sup> Goldstone R. “A South African Perspective on Social and Economic Rights’ *Human Rights Brief* (2006)p-4.

<sup>215</sup> Preamble to the South African Constitution.

<sup>216</sup> The novel approach in the constitution was the provision for socio-economic rights on the same footing with civil and political rights, not separately. This is because, socio-economic rights were not included in the Interim Constitution, and they were only written into the Constitution for the first time in 1996.

<sup>217</sup> Ibid Khoza p-25.

<sup>218</sup> 1996 Constitution of South Africa.

<sup>219</sup> The socio-economic

### **3.3.3 Constitutional Provisions**

#### **3.3.3.1 Section 27 of South African Constitution**

Section 27 of the Bill of Rights provides for a "right to have access to" health care, food, water and social security<sup>220</sup>. However this right runs along with a qualified obligation as hereunder discussed. First and foremost, the 'access to' qualification means that the government of South Africa has a positive obligation towards only those who have no means to ensure access to health care, social security, food and water.<sup>221</sup> An assumption is that those who have means are logically able to provide for themselves and hence their access to health care, food and water is without a hassle.<sup>222</sup> A further qualification as encapsulated in Section 27(2) is for the state to "take reasonable legislative and other measures, within its available resources", to achieve the progressive realization of each of these rights<sup>223</sup>.

Seemingly, 'reasonableness' forms critical criteria of which every measure whether legislative or otherwise has to be tested against. The 'measures' being referred to here could either be administrative measures, national, provincial or local government legislation. The Constitutional Court in the *Grootboom case*, when looking into section 26 of the constitution remarked that the first step is to identify the needs and privileges of enjoying the right before determining the threshold of the progressive realization.<sup>224</sup>

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<sup>220</sup> Ibid South African Constitution.

<sup>221</sup> Ibid *Grootboom at* paragraphs 21, 35 and 38.

<sup>222</sup> Liebenberg "Socio-economic rights" 41-44.

<sup>223</sup> Ibid.

<sup>224</sup> *Ibid Grootboom at* para 32.

There is no guiding feature in the South African Constitution as to the meaning of ‘sufficient water’, perhaps the court is adequately positioned to pronounce whether the measures adopted are reasonable. The discussions on the case of Mazibuko will provide a further insight about the approach taken by the Constitutional court on the minimum core of the right to water within the South African context.

### **3.3.3.2 The Constitutional Court Approach to Socio-Economic Rights**

Since the right to water is one of the socio-economic rights, the South African Constitutional court has had an occasion to deal with the enforcement of socio-economic rights on a number of occasions. Arguably, the right to water in South Africa could only be more understood in the context of the general obligations to socio-economic rights and how the Constitutional Court has interpreted those. One of the approaches was the one taken by the Constitutional court in the case of *Soobramoney v. Minister of Health*, where it had to determine the reasonableness of the state’s in action<sup>225</sup>. In this case the appellant was terminally ill from a chronic renal failure and hence was seeking treatment from a government hospital, where he was rendered not eligible for kidney transplant. In reviewing the steps that were taken or not taken, the court reasoned that the socio-economic rights to housing, water and others are subject to the state’s available

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<sup>225</sup> 1998 (1) SA 765 (CC).

resources.<sup>226</sup> This was when the court was dealing with obligation of progressive realization<sup>227</sup>.

The court then held that:

“a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters”<sup>228</sup>.

One of the landmark cases was the *Grootboom* cases where the court pronounced itself that socio-economic rights are justiciable<sup>229</sup>. This case involved a group of homeless people who were claiming that their situation is in violation of their right to housing as stipulated in the South African Constitution<sup>230</sup>. In response to the appellants claim, the court’s attitude was that it is not for the judiciary but for the legislature and executive to make a determination of measures to be taken in fulfilling the right to housing<sup>231</sup>. However, the court also added that such measures should at least prioritize the needs of the most vulnerable and the neediest of all<sup>232</sup>. On this note, it would seem the court shied away from providing an exact threshold for the criteria of the right to housing, but rather only guiding principles on how to address similar situations<sup>233</sup>.

The subsequent case which also dealt with these rights was the *Treatment Action Campaign*, where the court had to decide whether a government policy on the provision of anti-retroviral

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<sup>226</sup> Para. 11.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid at paragraph 29.

<sup>229</sup> *The Government of South Africa and others v. Grootboom 2000 (11) BCLR 1169 (CC)*. See also *Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC)* par 77-78.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid at paragraph 41.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid at paragraphs 66-69.

drugs to pregnant women was an unreasonable or reasonable one<sup>234</sup>. According to this policy, the drug which reduced mother to child transmission of HIV aids was not availed to the public health sector<sup>235</sup>. The court held that the government's reasoning for such action was not convincing and therefore was a violation of the right to access to health care<sup>236</sup>. Just like the previous decided cases, the court did not allude to the minimum core on the fulfillment of socio-economic rights. The court reasoned that in considering compliance of the state action, the court will look at the specifications presented by each case and that the minimum threshold could not be identified.<sup>237</sup>

A further landmark case on the justiciability of socio-economic rights was that of *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others*.<sup>238</sup> The court gave the interpretation of the bill of rights. It made a distinction between permanent residents on the one hand and temporary residents with regard to the right to access social assistance and found the former to have a stronger link with the country as opposed to the latter<sup>239</sup>. Permanent residents reside legally in the country and may have done so for a considerable lengthy period of time; like citizens, they have made South Africa their home, while temporary residents could be excluded as they only have a tenuous link with the Country. In using the purposive approach, the court reasoned that

“the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country” and in the absence of any indication that section 27(1) is restricted

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<sup>234</sup> *Minister of Health and others v. Treatment Action Campaign and Others* 2002 (5) SA 72, para 99.

<sup>235</sup> *Ibid* at paras 26.

<sup>236</sup> *Ibid* at paras 26 to 39.

<sup>237</sup> *TAC* para. 34 AND 39.

<sup>238</sup> 2004 (6) *BCLR* 569 (CC).

<sup>239</sup> *Ibid*.

to citizens as in other provisions in the Bill of Rights, the word “ everyone” cannot be construed as referring only to citizens.”<sup>240</sup>

In this case the Constitutional Court remarked that the State cannot rely on lack of resources for not providing for an excluded group.<sup>241</sup> The court reasoned that it will not suffice for the state to claim lack of financial capacity for not providing for permanent residents<sup>242</sup>. The court found the provisions excluding permanent residents from social assistance to be unconstitutional. Their exclusion from the social security system must therefore pass the constitutional test of reasonableness.<sup>243</sup>

The above mentioned trend in socio-economic rights adjudication by the Constitutional Court is very crucial in giving perspective to the enforcement of the right to water as will be seen below in the decision of *Mazibuko*<sup>244</sup>. This is because the court also took the approach that the minimum core on the content of water will not be specified as this might vary from time to time depending on varying circumstances<sup>245</sup>. Seemingly the court started off by using the rationality standard of review to proportionality review as witnessed in *Khoza*. The constitutional court of South Africa even though it has developed a niche on the adjudication of socio-economic rights, there seems to be a lack of a uniform approach in its reasoning.

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<sup>240</sup> Ibid.

<sup>241</sup> *Khoza* para 62.

<sup>242</sup> Ibid para. 82.

<sup>243</sup> See above *Khoza*.

<sup>244</sup> *Mazibuko and Others v. City of Johannesburg and Others* (2009) ZACC 28.

<sup>245</sup> Ibid at para. 60

This approach by the Constitutional Court has attracted a lot of criticism from many scholars<sup>246</sup>. Amongst others, Linda Steward has observed that the court has been hesitant to pronounce itself on the “normative clarity to the content of the different socio-economic rights”<sup>247</sup>. She further opines that the main reason why the court has not been consistent is probably because each case presented its peculiar and different context therefore calling for a specific approach<sup>248</sup>. Even beyond the reason of cases being different, the Constitutional Court has been very careful not to venture into the areas of the executive and the legislature by unpacking the normative content of the socio-economic rights. In this regard the concept of separation of powers becomes very crucial for the South African judiciary. Be that as it may, from the above case-law, it seems that, the plight of the poor and vulnerable has been at the helm of the court when reviewing the government policies. This is a very important lesson as it also throws light into the way the same court has approached the right to access to water as one of the socio-economic rights.

### 3.3.3.4 Judicial Interpretation of the Right to Water

It is very rare to have a constitutional mention of a right to water across many countries of the world. This fact therefore makes South Africa one of the unique countries which have specifically mentioned the right to water as a human right in the Bill Of Rights. Because of this right being mentioned therein, the South African Government has afforded each and every

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<sup>246</sup> Bilchitz D. “Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance” 119, (2004) *South African Law Journal*, p- 496. See also Pieterse M. “ Coming to Terms with Judicial Enforcement of Socio-economic rights” 383 (2004) *South African Journal of Human Rights*, p- 387. Also Chirwa D, “Privatisation of Water in Southern Africa: A Human Rights Perspective” (2004) 4, 2 *African Human Rights Law Journal*, p 219-241.

<sup>247</sup> Steward L. “Adjudicating Socio-Economic Rights Under a Transformative Constitution” (2010), Vol.28:3 *Penn State International Law Review* p- 493.

<sup>248</sup> Ibid at p-495.

citizen access to sufficient food and water through the enabling acts, to wit, the Water Services Act and the National Water Act, respectively.<sup>249</sup>

Furthermore, the judicial adjudication of the right to water, like any other right in the Bill of Rights has also been based on the aspirations of the South African people of healing divisions of the past and a focus on a society grounded on “democratic values, social justices and fundamental human rights”<sup>250</sup>. The Preamble of the South African Constitution continues to be the guiding factor as it made a declaration that:

“We, the people of South Africa, recognize the injustices of our past, and believe that South Africa belongs to all who live in it, united in our diversity.”<sup>251</sup>

This understanding is strikingly clear in the generic interpretation of other socio-economic rights. It also draws on the insights of a research undertaken by a South African Professor named Sandra Liebenberg. For Liebenberg, the jurisprudential analysis of equality and the intensive evaluation of socio-economic rights should aim to achieve social justice in South Africa<sup>252</sup>. She also postulates that, the same should be the case with other constitutional values like “human dignity, equality, freedom, accountability, responsiveness and openness”<sup>253</sup>.

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<sup>249</sup> *Water Services Act* 108 of 1997 and the *National Water Act* 36 of 1998.

<sup>250</sup> Preamble to the South African Constitution.

<sup>251</sup> *Ibid.*

<sup>252</sup> Liebenberg S. “Needs, Rights and Transformation: Adjudicating Social Rights” 17 *Stellenbosh Law Review* 5 (2006) p-6.

<sup>253</sup> *Ibid* p7-.

It is not only Liebenberg who ascribed to the values underlying the provision of general social and economic rights or rather what has been simply termed “purposive approach” to a right<sup>254</sup>. In line with this approach the following court remark in *Soobramoney* is also pertinent:

“...and many do not have *access to clean water* or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”<sup>255</sup>

Moreover, a similar approach was also observable from the Botswana Court of Appeal, which decided in favour of the indigenous community called the Basarwa on the issue of water supply in the Central Kalahari Game Reserve (CKGR).<sup>256</sup> The Court opined that the government of Botswana has violated the Botswana Constitution by denying them access to water which is contrary to the constitutional provision protecting individuals from inhuman and degrading treatment<sup>257</sup>.

It is therefore befitting to understand how these aspirations driving the South African implementation of human rights have been used to operationalize the right to water.

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<sup>254</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 9 to para 10.

<sup>255</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para 8.

<sup>256</sup> Court of Appeal of the Republic of Botswana *Matsipane Moselelhanyane & Ors v The Attorney General* (2011) Civil Appeal No. CACLB-074-10 held at Lobatse. [http://www.escri-net.org/usr\\_doc/bushmen-water-appeal-judgement-jan-2011.pdf](http://www.escri-net.org/usr_doc/bushmen-water-appeal-judgement-jan-2011.pdf) (accessed 14th February 28, 2012).

<sup>257</sup> *Ibid* at para 19.

Before the Mazibuko decision, there was *The Bon Vista Case* which involved the right to water, after the Bon Vista resident had a water supply disconnected due to unpaid arrears<sup>258</sup>. The High Court made a ruling that courts have a duty to make reference to the international law in trying to interpret the Constitution, and therefore the International Covenant on Economic, Social and Cultural rights obligations were helpful in giving content to the constitutional right to water<sup>259</sup>. The court once again But at that time the General Comment 15 was not yet operational.

### 3.3.3.5 Limitations on the Right to Access to Water in South Africa

It is common cause that the fundamental rights and freedoms are subject to limitations. The main limiting factors will be the existence of the rights of others and the needs of other people in a democratic society. As a general rule and according to Section 36 of the South African Constitution, the tenets of limitation of human rights include public order, safety, health, democratic values and security.<sup>260</sup>

In the *Grootboom case*, the Constitutional Court did not make application of the clause on limitation of rights.<sup>261</sup> Even though the court held that the state's housing programme did not satisfy the obligations imposed by section 26(2) of the Constitution, the opportunity of justifying these shortcomings on the reliance of section 36 was not touched upon. Perhaps one the reasons for taking such a route could be the difficulties of applying a 'two-stage' analysis of a right and

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<sup>258</sup> *Residents of Bon Vistas Mansions v. Southern Metropolitan Local Council* (2002) (6) BCLR, 625.

<sup>259</sup> *Ibid* at 629.

<sup>260</sup> The General limitation clause of the Constitution.

<sup>261</sup> *Ibid*.

justification for the limitation of that right to section 27.<sup>262</sup> The similar problems in the limitation of socio-economic rights presented themselves in the adjudication of the right to access to water as presented by the *Mazibuko* case, hereunder discussed.

### **3.4 Issues Arising out of *Mazibuko***

#### **3.4.1 Factual background**

The case of *Mazibuko* is one of the recent cases of South Africa which unpacked the jurisprudence on the right to water<sup>263</sup>. It involved the residents of Phiri, a small township outside Johannesburg, who were challenging a Johannesburg policy on the supply of water to this township. This township was characterized by water leakages and most of the residents here were unemployed as opposed to other Johannesburg suburbs. The Phiri households were subjected to a charge of flat rate piped water on a monthly basis for the 20 liters consumed per household<sup>264</sup>.

It so happened that the actual consumption exceeded the prepaid 20 liters and therefore residents had to be disconnected. Obviously, given their socio-economic status, residents were unhappy with this arrangement and hence they challenged it in court citing procedural irregularities of the

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<sup>262</sup> For details on a two stage analysis See Webb H "The Constitutional Court of South Africa: Rights Interpretation and Comparative Law" *Journal of Constitutional Law* vol.2 (1998), p-208 to 210.

<sup>263</sup> *Mazibuko*

<sup>264</sup> *Ibid.*

policy and the violation of Section 27(1)(b) of the Constitution which guaranteed the right to sufficient water.<sup>265</sup>In other words they argued that water was part of life which should be provided to them for free and that there was no proper consultation by the government when introducing the new pre-paid water systems. Furthermore, they argued that given the nature of their extended families, the free six liters per household that the government was giving was not enough<sup>266</sup>.

### 3.4.2 The High court and the Supreme Court Decisions

A closer look at the High Court and Supreme Court in trying to give content to the right to water reveals the reliance on international standards, especially the General Comment 15. Both the courts decided the matter in favor of the applicants with some differences on how much more ‘free water’ the residents should be entitled to. In essence the High Court and the Supreme Court agreed that water was so essential, and it had to be considered as closely related to the right to life. Unfortunately however the Constitutional Court fundamentally differed with the lower court on provision of the minimum core. The court rejected the minimum core as it did in the previous cases of Treatment Action Campaign and Grootboom. It repeated that it is

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<sup>265</sup> *Mazibuko v. City of Johannesburg* (2008) at para 108, available at [www.saflii.org.za/cases/ZAGPHC/2008/106.PDF](http://www.saflii.org.za/cases/ZAGPHC/2008/106.PDF)

<sup>266</sup> *Ibid.*

“Institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realization of the right”.<sup>267</sup>

What is more striking about the above reasoning of the court is the fact that the court did not dispute the justiciability of the right to access to water, but perhaps it deemed it fit for the legislature and executive to be the proper arms to determine the ‘sufficient water’ due to the residents. In this way the Constitutional court differed from the High Court and Supreme Court who were adamant on providing a normative content on the right to water as encapsulated in Section 27(1)(b) even before they could dwell unto to the reasonableness of the measures as per section 27(2)<sup>268</sup>. According to the Constitutional Court here, what matters most is to consider the “reasonableness of the measures” taken by the government as opposed to providing the exact minimum core standards on the provision of water<sup>269</sup>. The court added that, this is mandated by the Constitution itself and the role of the judiciary in a democratic state<sup>270</sup>.

However, the two previous courts are commendable for their reliance on international law in giving perspective to the right to water by alluding to the minimum core of the CESCR<sup>271</sup>. This approach has been very common from the South African Courts as they are also mandated by Section 39 of the Constitution to seek guidance from the international standards in their

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<sup>267</sup> Ibid, at paragraph 61.

<sup>268</sup> Ibid Steward at p- 497.

<sup>269</sup> Mazibuko, para. 56-57.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid para. 76.

interpretation of the law<sup>272</sup>. Furthermore these courts paid allegiance to the General Comment 15 which had stipulated that:

“The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights”<sup>273</sup>

Therefore according to these courts, this is where the transformative character of the South African Constitution comes in, to ensure that the plight to the poor communities is prioritized by the state and that people are availed water on the principle of equality and dignity respectively.

### ***3.5 Lessons and Recommendations***

The above mentioned judicial trends, especially from the Constitutional Court come to show that courts can adjudicate on socio-economic rights without dwelling unto the budgetary implications by the government<sup>274</sup>. Furthermore the Mazibuko decision gives an impression that in searching for the standards on the judicial enforcement of the right to water, the constitutional implications will take precedence over the international standards. This was evidence in the above case when the court decided to insist on the reasonableness of the measures mandated by section 26 of the Constitution as opposed to providing the normative content on the right to water<sup>275</sup>.

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<sup>272</sup> S v. Zuma 1995 (2) SA 642 (cc). See also S v. Makwanyane 1995 (3) SA 391 (CC)

<sup>273</sup> See above, Mazibuko at paragraph 124.

<sup>274</sup> See above, *Minister of Health v. Treatment Action Campaign and Others* 2 (2002) 5 SA 721.

<sup>275</sup> 1996 Constitution of South Africa. See also *Mazibuko*.at 50.

## 3.6 Indian Jurisprudence and the right to water

### 3.6.1 Contextual Background

The historical back ground of the Colonial India which was characterized by gender disparities, inequities, social imbalance and class divisions have been at the heart of the Indian contemporary human rights approach<sup>276</sup>. The interpretation of the law and human rights in India has been guided by the call to remedy the social ills of the colonial India<sup>277</sup>. Therefore the ideal vehicle to achieve this has been through judicial activism of the supreme court of India. Two striking facts about the Indian Supreme court approach, is its purposive interpretation of the human right to water and its maximum reliance on international law in adjudication of social and economic rights<sup>278</sup>. Nonetheless, the Supreme Court has received criticism for being rhetoric in its judgments and not influencing the state to abide by the international instruments by taking legislative and administrative measures to implement these instruments.

So if the courts are not that practical in their approach as mentioned above, that means the people at the grass-roots shall continue to face arbitrary cut-off from water and vulnerable groups will forever be subjected to inequalities as regards access to water. The international reports have documented India as one of the most highest countries with bad human rights record on peoples access to water and serious illness which are related to lack of clean drinking water. Bluemel opines that this state of affairs has been caused by at least three factors namely “the legal system

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<sup>276</sup> Narian V. “Water as a Fundamental Human Right: A Perspective from India”,

<sup>277</sup> Ibid.

<sup>278</sup> Bluemel E. p-957.

of regulating water, the pressure to develop, and urban migration”<sup>279</sup>. This is despite the commendable adjudication on the right to water of ‘reading it in’ on the right to life. The Indian legal system is characterized by riparian rights and the public trust doctrine as will be unpacked below.

### ***3.6.2 Judicial Activism of Indian Supreme Court***

The concept of judicial activism has characterized the Supreme Court of India from time immemorial<sup>280</sup>. The case law from India shows that the Supreme Court has been very consistent in interpreting the right to life in a very broad manner to include other socio-economic rights<sup>281</sup>. This right has been explicitly mentioned in Article 21 of the India Constitution to the effect that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. The right to water in the Indian context has been attributed to this provision and all the necessary obligations that emanate from it<sup>282</sup>. In other words the right to water has been implied through the right to life by interpretation, as socio-economic rights have only been recognized as directive principles of state policy with no legal enforcement.<sup>283</sup> These principles are only relevant as far as assisting in the formulation of policies and laws accordingly. The

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<sup>279</sup> Bluemel 981.

<sup>280</sup> Bluemel E. “Implementing the Right to Water: Domestic Experiences” 31 (2004) *Ecology Law Quarterly* p-957.

<sup>281</sup> *Unni Kkrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645 at 730.

<sup>282</sup> *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420 India.

<sup>283</sup> Article 37 of the Indian Constitution.

Indian Constitution under article 39(b) also mandates the Indian government to distribute resources for the benefit of the whole of Indian people<sup>284</sup>.

The Supreme Court in its landmark case of Maneka Gandhi extended the meaning of the right to life in a broad manner by the following words:

“The fundamental rights in Part III of the constitution represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent”<sup>285</sup>.

The above case therefore provided a lee-way as the court in subsequent cases dealing with water followed the above-mentioned reasoning. In 1990 the High Court recognized the implied right to water when it made an observation that “the right to sweet water and the right to free air are attributes to life” as they are very crucial for sustaining life<sup>286</sup>.

### ***3.6.3 Is access to water a fundamental right?***

The main question though, is whether access to water is a fundamental human rights despite its non explicit mention in the India Constitution. This non-mention of the right to water was impliedly adjusted in the leading case of *Bandhua Mukti Morcha* which involved the working

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<sup>284</sup> Ibid.

<sup>285</sup> Maneka Gandhi AIR (1978) SC p-621.

<sup>286</sup> *Attakoya Thangal v. Union of Indian* (1990) 1 K.L.T, p -583.

conditions of labourers in a stone mining<sup>287</sup>. The court remarked that the poor working conditions which included drinking dirty water from the stream by the labourers was a violation of the right to life. Further the court mentioned that drinking dirty water has a negative impact on the life of employees and therefore the employer is obligated to ensure access to clean water<sup>288</sup>.

In essence, the effect of this decision was to reaffirm a right to water as a fundamental human rights even though it is not explicitly written down in the constitution. Even more important, was the declaratory orders and directives issued by the court ordering the authorities(central and local) to provide clean water to employees so as to enable them to live a dignified living<sup>289</sup>. A further more striking judgment by the Supreme Court was that of *Subhash Kumar v. State of Bihar*, where the court held that;

“the right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life”<sup>290</sup>

It therefore became a precedent in the Indian case law to take judicial recognition of the right to water as a human right, as subsequent decisions followed suit in this line of reasoning<sup>291</sup>. Therefore we could argue that the right to water has attained the status of a human right through article 21 of the Indian Constitution. The cases that followed *Subhash Kumar*, also has a pattern

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<sup>287</sup> *Bandhua Mukti Morcha v. Union of India* (1984) SCC, 3, p-161.

<sup>288</sup> Ibid 161.

<sup>289</sup> *Bandhua* 162.

<sup>290</sup> *Subhash Kumar v. State of Bihar* AIR 1991 SC 420, paragraph 7.

<sup>291</sup> *Narmada Bachao Andolan* AIR (2000) SC 3751 paragraph 248.

of making reference to the international standards on the right to water and the United Nations Resolutions, to wit, the General Comment 15 and 1977 Mar del Plata Action Plan<sup>292</sup>.

### ***3.6.4 The Public Trust Doctrine and the right to water***

A very significant aspect of the right to water in India is that the right to water has been said to be held in trust for the whole of Indian populace. The Supreme Court has held that water is a communal resource held in trust by the State on behalf of every Indian, and the government has an obligation to distribute such on the basis of equity<sup>293</sup>. In this case the Supreme Court remarked that the Indian legal system having its roots in “English Common law includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources...Public at large is the beneficiary of the seashore, running waters, air, and forests...These resources meant for public use cannot be converted into private ownership”<sup>294</sup>.

Moreover, along these lines, a further development in the Indian jurisprudence on the right to water was when the Supreme Court also recognized a state duty not to pollute the water or over use the water from under-ground, as such water should be reserved for the whole of society and their collective agricultural uses<sup>295</sup>.

The public trust doctrine will go a long way to secure rights to access to clean water for the poor people if it is empowered or operationalized by a state legislative action. India should therefore

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<sup>292</sup> Ibid.

<sup>293</sup> See *M.C. Mehta v. Kamal Nath* AIR (2000) SC p-34.

<sup>294</sup> Ibid.

<sup>295</sup> *M C Mehta v. Union of India* (2004) 12, SCC p-118.

close that apparent gap between the judicial pronouncements and the actual implementation of such decisions.

### ***3.6.5 Lessons for India***

Despite the commendable judicial activism of the Supreme Court, the World Health Reports continue to show that, millions of Indians are still left without clean water on daily basis, death toll is also kept at a high rate resulting from water-borne diseases. The statutory framework and policies on the right to water in India is rather fragmented despite the wonderful judicial activism on the right to water by the Indian Supreme court.

In essence, the positive efforts that are displayed by the Indian Supreme Court end up being an “empty victory” because of lack of the political will to practically realize the right to water for the multitudes on the ground. India should continue to make use and take advantage of the public trust doctrine to secure the respects of the right to water and probably to strike a balance between group interest, state interest and individual interests.

## **3.7 The Republic of Botswana**

### ***3.7.1 Contextual Background***

Since gaining its Independence in 1966 Botswana has emerged as one of the African countries with a good human rights record in the context of civil and political rights which have been

explicitly recognized in the Botswana Constitution.<sup>296</sup> Because of its fairly clean record and good governance, Botswana has occasionally been referred to as the “African exception”<sup>297</sup>. This is in contrast with other Sub-Saharan countries which have been haunted by political instability and riots<sup>298</sup>.

### **3.7.2 Socio-economic rights in Botswana**

In Botswana, socio-economic rights have no Constitutional guarantee, they have not even been mentioned as principles of state policy as is the case with most African constitutions<sup>299</sup>. However, Chapter II Botswana’s Constitution provides for the protection of civil and political rights as the Bill of Rights, including the right to land<sup>300</sup>. All these rights contained in this chapter can be enforced through a court of as opposed to the socio-economic rights who are not included in the constitution<sup>301</sup>. At the same time, it could be argued that those rights could be brought in court through the window of the international and regional documents that Botswana has signed and ratified.<sup>302</sup> To name but a few, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples’ Rights.

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<sup>296</sup> Ibid Quansah p-122.

<sup>297</sup> Lewis S. “Explaining Botswana’s Success” in Harrison et al “*Developing Cultures: Case Studies*” 3, 3 (2006) p- 2.

<sup>298</sup> Fawcus P. “Botswana: The Road to Independence” *Pula Press*, (2002), p-100. See also Leith J.C. “Why Botswana Prospered”, *McGill-Queen’s University Press* 3 (2005) p-13.

<sup>299</sup> To mention but a few, Lesotho, Swaziland, Malawi, Namibia and Ghana have socio-economic rights articulated as directive principles of state policy which are only guiding to the formulation of policies.

<sup>300</sup> 1996 Constitution, section 5 to 15.

<sup>301</sup> Section 18 of the High Court of Botswana. The High Court has original jurisdiction to adjudicate on the violation of rights under chapter II.

<sup>302</sup> Quansah E, “Law, Religion and human rights in Botswana”, (2008) 8 (2) *African Human Rights Journal* 486, 491.

Be that as it may, the Interpretative Act of Botswana provides that international law can only be invoked where the national law is vague<sup>303</sup>. And therefore, because of its dualist nature, the state of Botswana only recognizes international law if it has been promulgated into national law.<sup>304</sup> This therefore means that the international treaties of which Botswana is a member to, are not binding without domestication<sup>305</sup>. In the case of *Amadou Oury Bah v Libyan Embassy*, the High Court of Botswana remarked that customary international law will be invoked to an extent that it is not contrary to statutory law.<sup>306</sup>

### ***3.7.3 Indigenous Groups in Botswana***

Furthermore, peculiar to Botswana, is the ethnic group called “*Basarwa*” or ‘bushmen’, who are the indigenous and the oldest inhabitants of the country and have been facing marginalization because of their special situation as a minority group<sup>307</sup>. Because of their isolation as people living in the bush, their access socio-economic rights like education, food, land and water have received much attention from the international community and local civil society actors<sup>308</sup>. The

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<sup>303</sup> Ibid.

<sup>304</sup> *Kenneth Good v. The Attorney General*, [2005] 1 BLR 462.

<sup>305</sup> Olivier and Mpedi, *the Extension of Social Protection to Non-formal sector workers-Experience from SADC, the Caribbean and South Pacific*, Paper presented at the 5<sup>th</sup> Asian Regional Congress of the International Industrial Relations Association (IRRA) in Seoul, Korea, June, 2004 at 7.

<sup>306</sup> (2006) 1 BLR 22 (IC) 25.

<sup>307</sup> 1996 *Constitution of Botswana* available at <http://www.elaws.gov.bw>.

<sup>308</sup> Ibid p-11.

San people have been subjected to serious poverty, marginalization and denial of access to some of the basic necessities of life, which makes them the most poorest of all<sup>309</sup>.

However, the Botswana's socio-economic status of its indigenous groups has been criticized for being poor<sup>310</sup>. In other words, "the San" or *Basarwa* as a minority group of Botswana has been exposed to serious hardships in terms of access to land and general social and economic rights as opposed to other Botswana nationals<sup>311</sup>. The land laws of Botswana and policies deny the San a right to use land for hunting gathering as they used to in the olden days, as such land is strictly used for commercial, harvesting or for purposes of agriculture.<sup>312</sup> The plight of the San people could be summarized in Jeremy Sarkin's words as follows:

"Even if the San wanted to apply for land under these restrictions, many do not have access to information...language skills with which to negotiate, or the funds necessary to proceed. These types of obstacles essentially force the San to shun their traditional lifestyle and shift toward livelihoods more generally accepted by the Tswana."<sup>313</sup>

Indeed this explains a lot in terms of giving a general picture of the kind of conditions which the San people have been exposed to in their country.

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<sup>309</sup> Sylvain R. "Land, Water and Truth: San Identity and Global Indigenism" 104 *American Anthropologist*, (2002), p-1074.

<sup>310</sup> Good K. "Bushmen and Diamonds: Un-civil Society in Botswana" *Nordiska Afrikainstitute* (2003) p-8.

<sup>311</sup> *Ibid* p-9.

<sup>312</sup> *Supra* note 222.

<sup>313</sup> Sarkin J et al, "The Human Rights of the San of Botswana- The Clash of the Rights of Indigenous Communities and their Access to Water with the Rights of the State to Environmental Conservation and Mineral Resource Exploitation" vol. 20 *Journal of Transnational Law and Policy- Fletcher School of Law* (2011), p-11

Perhaps one the reasons could be the fact that this minority group lived in the bush where the government identified some diamonds which led to the removal of the San from the land they had occupied for ages<sup>314</sup>. The removal of the San from this place gave rise to a fierce legal war between the San and the Botswana government which culminated in 2010, as will be demonstrated here-under.

### ***3.7.4 The Background to Sesana Case***

The case arose out of a constitutional challenge by the San people of their removal from the Central Kalahari Game Reserve in 2002<sup>315</sup>. Amongst their claims was the restoration of the services which the government had provided to them in the bush. Further that the San be allowed to use that land and enter it. The San main claim was based on the fact that, they are the indigenous people there and as such that land belonged them and the Government of Botswana should leave them alone to practice their way of life there<sup>316</sup>. The High Court found in favour of the San people, even though the government did not comply with the ruling. The government continued to bar the San people from going back to game reserve and denied them a hunting permit<sup>317</sup>.

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<sup>314</sup> Mokhawa G et al. "Not forever: Botswana, Conflict Diamonds and the Bushmen" in *African Affairs* (2003) 102 p-261.

<sup>315</sup> Ibid Sarkin note 312 at p-24.

<sup>316</sup> Gilbert J. "Historical Indigenous People's Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenuos Title" vol.56 *International & Comparative Law Quarterly*, (2007) p-588.

<sup>317</sup> Sarkin p-28.

The element of access to water for the San people presented itself when the government closed an existing borehole in the camping relying in the High Court decision that the government did not have an obligation to continue with the provision of basic services to the san at the game reserve.<sup>318</sup> On this issue the High Court of Botswana decided that the San people had brought this situation unto themselves by moving away from the services and facilities where the government was obliged to supply water to the rest of the people.<sup>319</sup>

### ***3.8 The Application of the UN Resolution 2010***

Victory presented itself to the “Basarwa” community when the Court Of Appeal of Botswana decided in their favour in and overturned the course of events<sup>320</sup>. The appellants had requested the court to determine their right to use water for domestic purposes at their own expense<sup>321</sup>. The court therefore held on behalf of the appellants and remarked that:

“lawful occupiers of land such as the appellants must be able to get ground water for domestic purposes, otherwise their occupation would be rendered meaningless”<sup>322</sup>.

What was even more striking about the Court of Appeal decision in this case, was when it invoked the international obligations of Botswana and the international consensus on the right to

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<sup>318</sup> Tran M. “Kalahari Bushmen to Appeal Against Court Ban on Well in Game Reserve, “ *Guardian*, (2010). Available at <http://www.guardian.co.uk/world/2010/jul/22/kalahari-bushmen-bostwana-well-court-appeal>.

<sup>319</sup> Sarkin p-31.

<sup>320</sup> *Matsipane Moselelhanyane & others v. The Attorney General*, (2011) CACLB-074-10.

<sup>321</sup> *Ibid* para 16.

<sup>322</sup> *Ibid* para 16.

water. The court therefore made reference to a report submitted to the Committee on Economic, Social and Cultural Rights which is stated that “the human right to water is indispensable for leading a life in human dignity...”<sup>323</sup>

### 3.9 Chapter Conclusion

This chapter has managed to unpack the textual groundings of the right to water in three jurisdictions, namely South Africa, India and Botswana. The analysis of the case law on this right was considered and lessons drawn from each of them. The South African development of the socio-economic rights jurisprudence was traced from the arrival of the democratic Constitution which placed human rights values at the fore. Furthermore the constitutional approach to socio-economic rights was unpacked, which revealed that the South African court still did not give the minimum core of the content of water. In its cases on the right to water, the court therefore rejected the approach of General no. Comment no. 15.

The discussion was also elevated to India, which revealed that the judicial activism played a significant role in the purposive interpretation and enforcement of the directives principles of state policy which were nonetheless enforceable. In so doing, the Indian Supreme court seems to be relying on the importance of international in this regard. Last but not least, the context of Botswana was dissected and the finding was that Botswana cannot escape liability for the

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<sup>323</sup> Ibid para 19.

promotion of socio-economic rights just because they absent from its constitution. The international and regional treaties that Botswana has signed and ratified are there to inform content of the national standards on socio economic rights.

## Chapter Four Observations and Conclusions

### 4.1 General Observations

In its current form, the legally binding international law has crafted the right to water clouded under other socio-economic rights. Because it has been excluded from the text of the major human rights treaties, this right has been given independent recognition due to the practical situation of water crisis across the globe.

The purposive approach to the right to water that has been observable from the General Comment no. 15, the African Commission as well as some national courts is not a surprise. This approach has long been applied under the international human rights law as well as the law on the interpretation of treaties which makes an emphasis on the object and purpose of a treaty<sup>324</sup>. As such giving the right to water a legal protection is not tantamount to creating a new right since its protection could be achieved through other rights. That does not mean the right to water could only be enforced through these other rights, it does not at all depend upon the violation of the other rights. In adjudicating on this right, we should keep in mind the indivisibility and interrelatedness of the fundamental human rights.

However, the consensus that has been clearly building up strictly posits for a more independent recognition of a self-standing human right to water. The adoption of the 2010 UN Resolution on

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<sup>324</sup> Brownlie I, "Principles of Public International Law" *Oxford University Press* (1998), p-635.

the human right to water says is all. For instance as seen above, during the passing of this Resolution, only a few states abstained from voting which clearly shows that the international community is concerned about its citizens access to water.

However, more concerted efforts are required at the international level to ensure that the right acquires legal enforcement as a self standing human right. Secondly, the above discussion demonstrates that at international law, the legal ramification of the right to water remain glaring as they is no common approach on the scope of this right. This therefore renders this right a political concept as we as a legal concept. This is simply because a rights-based approach attests to the relationship between an individual and the state as far as water provision is concerned. Finally, the State should not be able to escape its obligations towards the fulfillment of the right to water simply because there is no clear approach in international law.

## **4.2 Conclusions**

We can safely conclude that the right to water is a fundamental human right which has been affirmed by the United Nations and also received implied and explicit recognition in regional documents, both binding and non-binding. The African Commission has also sadly left the normative content of the right to water vague. Perhaps it is because of the socio-economic rights and more specific, the right to water has budgetary implications there tribunals and courts do not want to be seen to be against the concept of separation of powers by pronouncing themselves on the necessary state action.

This role of the courts is very peculiar as there may exist a very thin line between granting enforceable judgments and protecting the legitimacy of the courts as democratic institutions. Be that as it may, courts should not shy away to continue to adjudicate on the socio-economic rights on behalf of the poor and vulnerable, marginalized communities as has been the trend in South Africa and perhaps Botswana

The Experience from India offers that it is not impossible to enforce socio-economic rights through the civil and political rights. In other words, the fact that socio-economic rights have not been mentioned as enforceable rights in the constitution does not mean they can be ignored. Be that as it may, an implication maybe that, these set of rights are not able to stand on themselves rather their legitimacy or enforceability could be derived from civil and political rights.

Generally from the national experiences, it seems almost difficult or impossible to adjudicate on a right which is not legally binding under international. In such circumstances the justiciability of such a right depends too much on country specific context and situation since there is no uniform approach under binding international law. However, the judicial experiences like the South African one could be exported to other countries which have this right entrenched in national constitutions. But in such countries where there is no constitutional provision on the right to water, the Indian approach of purposive interpretation is very helpful in this regard.

The debate on whether access to water is or not a human right, has outlived its relevance, the main focus now should be towards adopting a more uniform approach on the normative content of this right and its national implementation. In this way, the states will be easily held accountable for non-fulfillment of this right as the core obligations would be clearly spelled out.

Recognition of the right to water as a human right could be a strategy used by the vulnerable and marginalized groups to hold the state answerable. This has been observable from poor communities or the destitute in South Africa, to the minority groups of Botswana. A lesson from South Africa shows that it might be more idealistic to claim a right to water as a positive right, as opposed to the Indian approach where it is read into article 21. However, the advantage offered by the Indian approach is that where there is no explicit right from the constitution, the judiciary plays a supportive role through judicial activism. Certainly recognition of the right to water could not be expected to solve the global crisis of water overnight, but it could be a very powerful tool and strategy that could be availed to the poor and vulnerable groups to claim and access their fundamental right to water.

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