

# A HUMAN RIGHTS-BASED APPROACH TO WATER IN KENYA

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## ABSTRACT

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

## I. INTRODUCTION

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

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

<sup>2</sup> *ibid.*, at p. 7.

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

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

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

## II. A HUMAN RIGHTS-BASED APPROACH TO WATER

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

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<sup>3</sup> *ibid.*, at p. 8.

<sup>4</sup> Article 43 (d), the Constitution of Kenya, 2010 (hereafter the Constitution, 2010).

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

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

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

social approach to water has been framed in human rights terms<sup>8</sup> which in turn have culminated into a human rights-based approach.<sup>9</sup> Human rights-based approaches consider the steps or range of systems necessary both at the national and international levels to promote, protect, respect and fulfil human rights by all people and used as a basis for human development.<sup>10</sup> This approach also incorporates human rights standards into national law and integrates human rights principles into public administration and education in human rights and responsibilities.<sup>11</sup> In other words a human rights-based approach focuses on social structure, rule of law, empowerment and structural change in favour of everyone most especially the vulnerable and the most deprived.<sup>12</sup>

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

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<sup>8</sup> Langford, M. "The United Nations Concept of Water as a Human Right: A new paradigm for old problems?" 21(2005) *Water Resources Development*, pp. 274-275; Miranda, L., Hordijk, M., Rommy K., Molina, T. "Water Governance Key Approaches: An Analytical Framework" 4(2011) *Literature Review*, pp. 9-12, available at <[http://www.chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publications/Chance2Sustain\\_-\\_Literature\\_Review\\_No.4\\_-\\_Water\\_Governance\\_Key\\_Approaches\\_An\\_Analytical\\_Framework.pdf](http://www.chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publications/Chance2Sustain_-_Literature_Review_No.4_-_Water_Governance_Key_Approaches_An_Analytical_Framework.pdf)> (Last visited on December 06, 2018).

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

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

<sup>11</sup> *ibid.*

<sup>12</sup> Uvin, P. *Human rights and Development*, Bloomfield, 2004, at p. 131.

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