

Pipe Dream or Progress? Implementing the Human Right to Water in South Africa and Kenya

by

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Abstract

Water is essential for all life. It is one of the most abundant resources on the planet, and yet one billion people worldwide lack a safe, clean supply of water. Development initiatives, like the Millennium Development Goals, aim to improve access to water with a rights-based approach. In 2002, the United Nations issued General Comment No. 15, which declared water a basic human right. This paper examines the effect that the human right to water has in improving access to water resources. The paper uses the cases of South Africa and Kenya, two countries that have attempted to implement a human right to water. The human right to water is secondary to improving water access, and not the ultimate cause for improvements. Financial and economic capabilities are much more instrumental. The right may influence improvements, but only when including such variables as proper accountability mechanisms, institutions, and governance structures.

Keywords: human right to water; water scarcity; rights-based approach; access to water

To Miwako,

For your love, patience and understanding.

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Table of Contents

| | |
|---|-----------|
| Approval..... | ii |
| Abstract..... | iii |
| Dedication..... | iv |
| Acknowledgements..... | v |
| Table of Contents..... | vii |
| List of Abbreviations and Acronyms..... | ix |
| 1: Introduction..... | 1 |
| 1.1 Research Question..... | 2 |
| 1.2 Argument..... | 2 |
| 1.3 Methodology..... | 3 |
| 1.3.1 Case Studies..... | 4 |
| 1.3.2 Data..... | 7 |
| 2: Global Water Issues..... | 8 |
| 2.1 Water Scarcity..... | 9 |
| 2.2 Poverty and Health..... | 10 |
| 2.3 Water Management..... | 12 |
| 2.4 Water as a Commodity..... | 14 |
| 2.5 Conclusion..... | 15 |
| 3: The Rights-Based Approach to Development..... | 16 |
| 3.1 What is the Rights-Based Approach?..... | 16 |
| 3.2 Rights vs. Needs..... | 17 |
| 3.3 Limitations..... | 19 |
| 3.4 Rights-Based Approach and Water..... | 21 |
| 3.5 Implications..... | 22 |
| 4: The Human Right To Water..... | 24 |
| 4.1 International Human Rights Declarations..... | 24 |
| 4.2 UN General Comment No. 15..... | 26 |
| 4.3 Limitations of the Human Right to Water..... | 29 |
| 4.3.1 Accountability..... | 29 |
| 4.3.2 Financial Responsibilities..... | 30 |
| 4.4 Conclusion..... | 31 |
| 5: South Africa: Enshrining Entitlements..... | 32 |
| 5.1 Water in South Africa..... | 33 |
| 5.2 Policies, Legislation and Institutions..... | 34 |

| | | |
|-----------|--|-----------|
| 5.2.1 | Historical Policies | 34 |
| 5.2.2 | 1994 Constitution and the Promise of Social Equity | 36 |
| 5.2.3 | Commercialization and Privatization of Water Services..... | 37 |
| 5.2.4 | Free Basic Water 2002 | 38 |
| 5.3 | Accountability: Constitutional Claims for the Human Right to Water | 40 |
| 5.3.1 | <i>The Government of the Republic of South Africa v Grootboom</i> | 40 |
| 5.3.2 | <i>The Residents of Bon Vista Mansions v Southern Metropolitan Local Council</i> | 41 |
| 5.3.3 | <i>Manqele v Durban Transitional Metropolitan Council</i> | 41 |
| 5.3.4 | <i>Mazibuko v the City of Johannesburg</i> | 42 |
| 5.4 | Implications | 44 |
| 6: | Kenya: Progress Delayed or Progress Denied? | 47 |
| 6.1 | Current Water Resources in Kenya | 47 |
| 6.2 | Policies and Legislation | 49 |
| 6.3 | The Emergence of Water Rights: The 2002 Reforms..... | 52 |
| 6.4 | Outcomes | 54 |
| 6.4.1 | Accountability..... | 55 |
| 6.4.2 | Privatization..... | 57 |
| 6.5 | Implications..... | 58 |
| 7: | Conclusion | 60 |
| 7.1 | Are Kenya and South Africa better off with a Human Right to Water? | 60 |
| 7.2 | A Case For <i>and</i> Against the Human Right to Water | 62 |
| 7.3 | Future Implications | 64 |
| | Reference List | 67 |

List of Abbreviations and Acronyms

| | |
|-------------------|---|
| ANC | African National Congress (South Africa) |
| CEDAW | UN Convention on the Elimination of all forms of Discrimination Against Women |
| CESCR | UN Committee on Economic, Social and Cultural Rights |
| COHRE | Centre on Housing Rights and Evictions |
| CP rights | Civil and Political rights |
| DWAF | Department of Water and Forestry (South Africa) |
| ESC rights | Economic, Social, and Cultural rights |
| FBW | Free Basic Water program (South Africa) |
| IWRM | Integrated Water Resource Management |
| MDGs | Millennium Development Goals |
| MWI | Ministry of Water and Irrigation (Kenya) |
| NGOs | Nongovernmental Organizations |
| NWA | National Water Act (South Africa) |
| NWSS | National Water Service Strategy (Kenya) |
| RBA | Rights-Based Approach |
| RDP | Reconstruction and Development Program (South Africa) |
| UN | United Nations |
| UNDP | United Nations Development Program |
| WHO | World Health Organization |
| WRMA | Water Resources Management Authority (Kenya) |
| WSA | Water Services Act (South Africa) |
| WSRB | Water Services Regulatory Board (Kenya) |
| WWAP | World Water Assessment Programme |
| WWC | World Water Council |

1: Introduction

Water is the key ingredient for all life on the planet. It is the foundation for economic, social and cultural activity. It is also a unique element, both finite and renewable. However, despite its importance for life, water is distributed unevenly. Water scarcity is becoming an increasingly bigger issue among developing and developed nations. Access to clean water is beyond the reach of many people. Currently, close to 1 billion people lack access to safe drinking water, and approximately 2.6 billion people do not have access to adequate sanitation. These people are predominantly in the developing world of Africa and Asia (WHO 2004; UN/WWAP 2009; UNDP 2006). Water scarcity has serious implications on how communities and nations manage the resource. Public provision of water has given way to private provision with the aim of conservation and efficiency. However, the inequalities and lack of access to water have resulted in a growing movement embracing water as a basic human right. While this is hailed as a triumph by civil society organizations, the impact that a human right to water has on improving access to water service is unclear. This idea frames the basis for my research and hypothesis, which details the relationship between improving access to safe, clean water and the implementation of a human right to water.

1.1 Research Question

In September 2000, the United Nations released what have come to be known as The Millennium Development Goals (MDGs). As the crux of life on the planet, water is only mentioned once specifically, in Target 10, which states “Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation”(UNDP 2004, p.4). Then in 2002, the United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) issued General Comment No. 15, which declared water a basic human right. With heightened international awareness regarding water scarcity, and a broad rights-based approach to development, several countries across the world have implemented a right to water into their constitutions. Has this made an impact? Does legislating a human right to water translate into improved access to water supply?

1.2 Argument

Turning legislation into action and results is not easy. I will argue that the legislation of a human right is often too limited, confusing and contradictory in legal ramifications, and is contingent on other political and economic arrangements. Therefore it is not sufficient, and possibly not even necessary to improve the access to quality water supply. In that case, what *does* matter? The economic and political capabilities of the state are likely to be more instrumental in delivering improved access to water and sanitation than the legislation of a human right. The underlying cause for improved access is secure property rights and well-organized governance structure that has a clear vision for improving

water supplies. The guarantees that are attached to a human right to water are likely to be a result of a state's efforts to improve access.

Yet development agencies and civil society groups insist that a focus on human rights can translate into improving welfare. While the human right may allow for a greater degree of 'voice' and 'accountability' by increasing participation in local community water groups and other nongovernmental organizations, this may not be the underlying cause for improvements. This leads to the following questions: *when* does the human right to water affect people's ability to access water? How does it affect people's ability to organize, manage and lobby government with regard to water issues? A human right to water is likely to be unproductive in addressing poor access to water unless it is bundled together with other entitlements and rights, such as the right to information or the right to organize.

1.3 Methodology

This paper will examine the literature on the human right to water. The beginnings of this human right to water, and how the human right to water has been implemented both internationally and domestically are traced to its origins in the human rights declarations. Moreover, the origins of the rights-based approach are discussed, as this development perspective has supplanted the previous needs-based developmental approach. These literature reviews provide the basis to address the two case studies and to examine the relationship between the right to water and greater access to water.

The application and implementation of the human right to water has been examined in two country cases from Sub-Saharan Africa. The first case is South Africa, which has this legal right to clean, affordable water written into its constitution. To compare and contrast the South African experience, I will also incorporate evidence from Kenya, another Sub-Saharan African country that experiences water scarcity and poor access. Both have adopted a rights-based approach to water sector reform in recent years and have developed water sector policies that promote universal access to water. These countries share some other important characteristics. Mainly, both suffer from water scarcity, have or have had large informal settlements without proper access to water, have a mainly arid to semi-arid climate, and were former British colonies. While differences in culture, politics and the size of the economy will undoubtedly affect the outcomes of this human right to water, the cases share key similarities that will allow me to analyze the impact this human right to water has had. Much evidence is available from South Africa, where government legislation, civil participation and court cases have occurred with regards to human rights claims and water access. The case of Kenya is important, as its experience in implementing a human right to water is far from complete.

1.3.1 Case Studies

A case study approach has several advantages as a methodology for examining the human right to water. As the literature reflects a broader international trend in development, that of the rights-based approach and the human right to water, a case study may strip away some of the layers and

identify the factors that are involved. At its core a case study should allow the researcher to locate the intermediate factors that come between 'cause' and 'effect' (Gerring 2007). As the research question posed here is causal in nature, the case study will ideally lead to the identification of the causal mechanisms that connect variables *X* and *Y*. Causal mechanisms are the processes and intervening variables through which an explanatory variable exerts a causal effect on an outcome variable (Mahoney 2003).

The argument I have laid forth is a causal argument. I will explain what causes, or what is necessary to improve, access to water in these two cases. The explanatory variable I have chosen is the human right to water. The objective is not to describe how the human right to water works (although that will be a key part of developing the historical context and determining the causal relationship). Rather, it is to determine whether the recognition of such a right can explain why there is improvement or not. In order to make a causal argument, the causal mechanisms that operate within this argument must be identified. This argument must incorporate how the rights-based approach and human rights have interacted with development agencies and governments to form or create policies that affect water service.

What other variables interact and allow for greater access to water? Citizen participation, access to information, well-defined property rights, accountability mechanisms, and governance are of critical importance. The existence of these variables has been traced back through the development of a right to water, as well as the water delivery systems of Kenya and South Africa.

Other important variables are the role of international and domestic NGOs and development agencies, the court system and how it operates, government policy, international human rights, political systems, and social and cultural norms and beliefs.

These two case studies allow an analysis of the variance in cause and effect. By tracing the evolution and implementation of the human right to water, this project has been able to move beyond simple correlation and try to establish a causal mechanism. Process tracing is often useful when working with a small number of cases in order to avoid mistaking a spurious correlation for a causal association. The problem of spuriousness arises when two correlated variables appear to be causally related but in fact result from another variable that occurred before them (Mahoney 2003; King, Keohane, and Verba 1994). Process tracing is also useful in identifying the causal mechanisms that appear through the interaction of variables. However, this method may not lead to the most simplistic or parsimonious answers, and by nature it is focused more on the 'micro' than the bigger picture (Checkel 2008).

While there are downsides to process tracing, this method is extremely useful in dealing with the multiple variables and will allow me to confirm or eliminate the hypothesized causal relationships and associations. Is the law itself actually responsible for causing greater access to water? Or is it another variable prior to the law that allows for the government to create policy and commit to the people?

1.3.2 Data

This research is based upon document analysis and literature reviews. Primary resources consulted were used to interpret international agreements such as the United Nations General Comment 15, the South African and Kenyan Constitutions, and other government documents. The United Nations, the World Bank, the World Health Organization and other international organizations publish regular reports and papers that address access to basic water and sanitation programmes. These documents were useful in tracing the implementation of water policies internationally and domestically. The South African Department of Water Affairs and Forestry publishes annual reports on the status of the nation's water and sanitation services, as does the Kenyan Ministry of Water and Irrigation. These statistics were useful in interpreting improvements in domestic water services.

Secondary sources consulted were useful in interpreting how the human right to water has affected each country. Apart from the various academic papers, this research examines studies that quantified the actual improvements in South Africa's Free Basic Water program and Kenya's recent water reforms. Other sources examined include the Centre on Housing Rights and Evictions (COHRE) website and publications to give potency to social activism and non-governmental organizations. Finally, publications regarding recent court cases within South Africa, where the Free Basic Water program and the right to water have been a central issue, were invaluable to establish the legal implications of this right.

2: Global Water Issues

Water is one of the most important and strategic of natural resources. It provides the foundation for economic development, as well as guaranteeing our sustenance. It provides the basis for agriculture, industry, commerce, transportation, energy production, and recreation. In many countries, domestic water resources are strained to meet the demands for its use. These demands in turn impact social and economic capabilities of individuals, families and communities. Climate change and global population growth have also begun to impose new challenges on global water resources. This chapter will explain some of the pressing global water issues, namely water scarcity, poverty and health, and water management strategies.

To begin, three concepts are worth mentioning and discussing to establish some context: water availability, water access, and water usage. Water availability is the amount of water supply within a particular region. It is dependent upon such factors as ecology, geography and population. Water access refers to the household control of the commodity. Modes of distribution and demand play a role in how much a household can 'take home'. Access is also affected by income, location, and social status. Water usage refers to individual entitlements, the difference between water as a public good or private good. These concepts are useful in determining water security; the ability of

individuals to access at all times enough safe water for a healthy and productive life and sustainable livelihood (Webb 2006).

2.1 Water Scarcity

The term 'water scarcity' refers to the point at which supply of water cannot meet the demand for the resource (Anand 2007; UN-Water 2007). In technical terms this is when the availability of water in a country or region is below 1000 m³ per person per year (Pereira, Cordery, and Iacovides 2009). This is merely a guideline, and much care should be taken to incorporate other information to determine the extent of a region's water availability. For instance, if a region has little use for farming and large-scale irrigation is unnecessary, then small per capita water volumes may suffice.

Even though withdrawals are increasing at a global level, the world still has sufficient aggregate levels of water. However, freshwater is unevenly distributed; for example, Canada enjoys 120,000 m³ per capita, while Jordan struggles with 330 m³ per capita. Many regions experience similar water scarcity and shortages. Sub-Saharan Africa has a dozen water-scarce countries, and has the lowest share of population that has access to clean water and sanitation. The problem is not simply one of water resource supply – it is equally about accessibility to supplies, appropriate usage once accessed, and management of potential risks (Webb 2006).

There are various reasons that shortages of water occur. Water scarcity can be attributed to the environment, population growth, lack of proper

investment, or to the failure of institutional arrangements. Water scarcity is also a social and political construct, and how it is perceived leads to particular policy choices. Since the causes of scarcity vary, through effective management, as well as proper investment and infrastructure, it is capable of being remedied or alleviated. It is not simply a lack of physical resources; a lack of entitlements means people are unable to access water (Anand 2007; Sen 1999).

2.2 Poverty and Health

The relationship between water scarcity and poverty is a complex one. Without access to safe, clean water, people will be incapable of being productive. They will struggle to grow food, struggle to feed themselves, and struggle to stay healthy. However, those very same conditions will also prevent them from gaining access to safe, clean water. In this sense the reciprocal nature of water and poverty can often leave people in poverty traps.

It is no coincidence that many developing nations struggle to provide basic services to a large proportion of the population. Poverty can go hand in hand with a lack of clean water and sanitation. The United Nations Development Program (UNDP) regards poverty as a denial of human rights, good health and adequate nutrition, literacy and employment (UNDP 2004; UNDP 2006). In addition, water is vital for food production and industry. Farming without adequate rainfall or irrigation is a challenge.

Inadequate water resources are the major cause of health problems in the developing world. Disease and illness flourish without clean water. Lack of clean,

fresh water is one of the primary reasons for adverse health outcomes. Water-borne diseases, such as diarrhea, typhoid and cholera, increase infant and child mortality as well as morbidity and mortality among adults. Lack of water also impairs general hygiene and contributes to spread of other contagious diseases such as malaria, Japanese encephalitis, schistosomiasis, trachoma, and hepatitis (Kulindwa and Lein 2008; WHO 2004).

The number one killer of children in the developing world is diarrhea. Diarrhea is treatable, yet if the victims had access to clean and safe drinking water, these treatments would be unnecessary. 1.8 million people die every year from diarrheal diseases such as cholera; over 90% are children under the age of 5. According to the WHO's *Water, Sanitation and Hygiene Links to Health* fact sheet, almost 90 % of these diarrheal cases are caused by poor water conditions, inadequate sanitation, and poor hygiene (WHO 2004, p.1). There is ample evidence that improved water and sanitary conditions can improve the health and well-being of people directly affected by these health care problems. Hand washing and hygiene education can reduce diarrheal cases by 45%. Improved sanitation reduces morbidity by over 30%. Improved water supply can reduce morbidity up to 25%. Using an integrated approach of all the examples above, a significant reduction in diarrheal deaths is possible (WHO 2004, p.1).

Not only inadequate resources but also unequal resources contribute to poverty. According to the UNDP, a poor rural farmer is likely to pay much more than the wealthier members of society for the same amount of water, either through money or labour. His opportunity costs are much higher. Water scarcity

affects poor people very differently from the wealthy. For the poor, it is much more about the institutional arrangements and entitlements to water that affect their lives rather than physical water scarcity (UNDP 2006).

Inadequate and unequal access to water is both a result and a cause of poverty. However, the main problem is in how to manage and organize water resources so that the poor can gain access. The image of water shortages comes to mind, but many countries have sufficient amounts of water available. Africa, for example, has more water available per capita than Europe (Hemson 2008). The trick is in providing it to the people. The problem remains the distribution of resources to allow poor people proper access.

2.3 Water Management

How people have managed water resources over the past several decades is of central concern to this argument. Many societies that have faced serious water shortages and scarcity have successfully developed organizational and institutional mechanisms that manage the resource (Pereira, Cordery, and Iacovides 2009).

Traditional or customary laws often used common property regimes, in which the community organized the rules of access and usage. More recently, water has been regarded as either state property or private property, where the ownership, availability and access are determined either by the state, or by the individual who owns it. However, the realization of unsustainable water practices in recent years has prompted a new strategy: Integrated Water Resource

Management (IWRM). IWRM is a simple concept with complex implications. It is a 'process, which promotes the development and management of water, land, and related resources in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems' (Grover 2006, p.233).

The IWRM approach was most clearly expressed in Agenda 21, a chapter prepared by the United Nations conference on environment and development, for the 1992 Earth Summit in Rio de Janeiro. This agenda promotes social equity, economic development, and environmental sustainability (Lenton and Muller 2009). This means that water management must incorporate the efforts of multiple professionals such as economics, hydrology, ecology, and other disciplines to ensure the sustainable development and use of water resources. The method of implementation is not universal, and each country's policy and framework may differ, but the underlying principles of equity, sustainability and development should be preserved. At the Johannesburg Earth Summit in 2002, governments were encouraged to prepare and outline formal IWRM policies to be used in conjunction with the Millennium Development Goals (Lenton and Muller 2009).

While sustainable development is key to the future of the resource, it does introduce controversial components such as ownership and pricing mechanisms to recover the costs of resource management.

2.4 Water as a Commodity

While necessary for human existence, water is not a public good. Unlike air, it is possible to exclude individuals from gaining access and benefiting from its productive capacities. It is also much more difficult to distribute than other resources; it is heavy, and transporting it is problematic. For these reasons, water is a 'natural monopoly' and an 'uncooperative resource', which has traditionally meant state control. However, with increased awareness of water shortages worldwide, the international community attempted to establish conservation measures and minimize waste. This change in values and perceptions was accompanied by international declarations, such as the 1992 Dublin Principles, which established that water should be an 'economic good'. In order to manage and sustain this precious resource, value had to be attached to it. Most water policies following this resulted in treating water as a commodity and focusing on 'full cost recovery'. Pricing schemes and market mechanisms also needed to be introduced and protected (Bluemel 2004; Cahill 2005; Salman and McInerney-Lankford 2004).

Treating water as an economic good, and following a practice of 'full cost recovery' can lead to inequities. Led by international financial institutions, many nations were encouraged to privatize water utilities. Pricing poor people out of water markets led to protests over the commercialization of water in countries such as Bolivia, India and South Africa (Olivera 2004; Barlow 2007; McDonald and Ruiters 2005). Further input from civil society organizations and social

movements has pushed the international community at large to shift perspectives to a rights-based approach (WHO 2003; UNDP 2006; UN/WWAP 2009).

2.5 Conclusion

Water is vital to our survival. It is an important cornerstone in human activity, and yet there are a myriad of issues that prevent a significant proportion of the world's population from accessing its potential. Water scarcity is a problem that is closely linked to income and food scarcity, since it hinges on issues of inequitable resource distribution (Webb 2006; Grover 2006). We cannot simply make more water available. It is not water availability, but institutional and management failures that account for the low rates of water services. It is this view of water scarcity that lays the basis for my argument. Access to water is about rights. Who decides how to use this precious resource, supply and demand, and the control over this tug of war? The lack of entitlements has led to people being unable to access water. The next chapter will explain how development approaches have been attempting to overcome these challenges within the water sector, and how promoting a human right to water and a rights-based approach can help to challenge the problems caused by institutional water scarcity.

3: The Rights-Based Approach to Development

Over the years, development approaches have attempted in many ways to improve the lives of those less fortunate. From early on, economic growth and macroeconomic policies drove both governments and international organizations in their pursuit of poverty alleviation. Either by addressing poverty through trickle-down economics, redistribution policies, or through strategic needs-based targets, development approaches have often failed to live up to their full potential. While some of the goals have been achieved, critics of these needs-based approaches argue that people need to exercise their rights in order to fulfill development goals. This chapter will analyze the rights-based approach to development and how it can be used to address the water related issues of poverty and health.

3.1 What is the Rights-Based Approach?

The rights-based approach (RBA) has its origins in the Universal Declaration of Human Rights in 1948, followed by the covenants on Civil and Political Rights (CP rights), and Economic, Social and Cultural Rights (ESC rights) in 1966. These international declarations provide the foundation for which the rights-based approach has been able to pursue its goal: the achievement of human rights as an objective of development. Early work focused mainly on the CP rights, while recently a great amount of effort has placed ESC rights at the

head of the agenda (Gready and Ensor 2005, p.15-16). A rights-based approach builds on the belief that all human beings have certain rights that cannot be taken away from them and which enable them to make claims on others when their rights are being denied or violated. This creates a framework for a more inclusive, participatory way of undertaking development (Hansen and Sano 2003, p.40-42). It stresses the accountability of governments and other development actors to fulfill obligations and responsibilities toward their citizens according to international commitments (Chapman 2009, p.175).

Apart from accountability and the expression of inherent rights, this approach encourages the participation and empowerment of communities and peoples. A rights-based approach is inclusive and aims to promote non-discrimination of vulnerable groups and minorities (UN 2006, p.16). These international commitments are featured in various treaties, covenants and laws, both internationally and nationally. This emphasis on legality is important, as the rights-based approach works to incorporate human rights into laws and policies to build alternatives and change ideas and attitudes (Chapman 2009).

3.2 Rights vs. Needs

Development work materialized following the Second World War, where actors and states aimed to rebuild and revitalize Europe and other parts of the world. In its early days, development work concentrated on needs, such as food, jobs, and health. The paradigm of the 1970s was very much focused on an anti-poverty approach, aimed at alleviating the conditions that people lived in and attempting to deliver their basic needs. These needs-based programs often

focused on achieving set development goals. Within this paradigm, even partial goals were satisfactory, and there was no effort to establish obligations or duties (Hickey and Mitlin 2009; Andreassen and Marks 2006). However, these approaches often did not tackle the root causes of poverty. The real problem was not simply that people did not have food or jobs, but that they lacked the necessary rights and conditions necessary to fulfill these needs. The difference between meeting a goal and realizing a goal was the action and participation of the people. Needs were met through charity and goodwill, while rights could be realized through organization, participation and knowledge. By the 1980s there was a change in perspective across a range of international NGOs. The focus moved from a needs-based and service-driven approach, to a more strategic approach, where rights were more closely incorporated. This shift in strategy, popularized by Amartya Sen among others, introduced the notions of freedom, agency, capabilities and entitlements. Development as freedom has played a central role in the emergence and acceptance of the important relationship between human rights and development (Gready and Ensor 2005, p.19; Sen 1999, p.227). Over time, people and organizations have broadened the traditional needs-based vision of development by expanding and reframing needs such as food, jobs, health and respect into components of human rights.

There was more to this movement than simply a shift away from a needs-based approach. During the same period, neoliberalism, a dominant political and economic order, had transformed global politics and incorporated itself into the vision of modernity and development. Neoliberalism was the driving force behind

approaches to poverty reduction. During the 1980s, stabilization packages and structural adjustment programs became the solution to many developing countries' woes. These programs focused on long-term (or medium-term) recovery, but ignored many social services and benefits such as health and education that are vital to society (Hickey and Mitlin 2009).

The rights-based approach was a response to this neoliberal order. For many in the rights-advocacy arena, this neoliberal paradigm did little to alleviate the root causes of underdevelopment. The rise in popularity of 'rights' in international development can therefore be understood as a product of the need to address tensions within and between experiences of neoliberalism and political transformation (Archer 2009). The 'rights' movement placed an emphasis on participation and empowerment, a response to reclaim power and agency from the neoliberal paradigm. Rights-based approaches stressed the need for accountability and responsibility of government and NGOs to their target groups (Laban 2007). Ultimately, the rights-based approach was designed to offer a better system to address root causes of inequalities and poverty. It was believed that people lacked entitlements, which hindered their capabilities and outcomes. The rights-based approach could give the people their entitlements.

3.3 Limitations

While many development agencies and governments today focus on a rights-based approach, there are certain shortcomings that need to be mentioned. The rights-based approach is not a panacea for development efforts,

and organizations still need to be cautious when implementing programs based upon human rights issues.

First, the RBA changes how problems and solutions are perceived among development actors. Development issues become much more politicized by nature and therefore shape and determine the various issues differently than issues of economics. Humanitarianism is thus painted in political terms, and can sometimes become a surrogate for political activism. Human rights advocates often urge 'moral' objectives that conflict with 'legal' realities. One of the consequences of this results in subordinating sovereignty to human rights, blurring the responsibilities of governments and humanitarian agencies (Archer 2009, p.23; Gready and Ensor 2005, p.29). Second, rights-based approaches have been criticized for being 'western' and Eurocentric. Development does not necessarily have to occur along the same trajectory in both developing countries and developed countries. Third, since a rights-based approach is universal or all-inclusive, actors and discourse tend to be very rigid in terms of dealing with rights infringements. The rights-based approach does not allow for trade-offs or compromises and this can be a detriment in certain circumstances. Sometimes long-term gains will outweigh short-term losses, and public benefits may be just as, or more important than individual rights. Finally, there are challenges with how to prioritize issues and resources. If all rights are equally important, do financial resources get divided equally? Certainly there are cases where some issues need to be classified as more urgent than others (Hickey and Mitlin 2009, p.213-214).

The balance between civil society participation and state action is also important. Legislation, action and intent are directed from the state. While civil society participation and action may encourage a rights-based platform, ultimately it is the state that will take action to implement the development programs and goals. Since the state is at the forefront of the development initiative, a strong and effective state is required to protect the people. If the state does not deem a rights-based approach in its best interest, then there is little recourse for civil society to take action. Granted, citizens can organize through national or transnational organizations, but without the intent directed from the state, accountability is not guaranteed. It involves both a push from the ground up as well as direction from the top down. Active participation and dissemination of information are crucial in ensuring the rights-based approach achieve its goals.

3.4 Rights-Based Approach and Water

While it is important to be wary of the disadvantages that this rights-based approach brings, international development and aid agencies that promote poverty reduction can incorporate a rights-based approach into their mandate in order to increase people's capabilities and expand their entitlements (UN/WWAP 2009; UNDP 2006).As this paper argues that water scarcity is largely a function of the lack of entitlements, incorporating an understanding of the rights-based approach is vital. By using this approach in the water sector, it will give people an opportunity to exercise and realize their right to access water.

A central feature of the RBA is to provide equality, universality and freedom from discrimination. Extending this concept to water, exclusion from

water services on the basis of poverty, ability to pay, or group membership is therefore a violation of the human right to water (UNDP 2006, p.60). Nationally this requires the development of laws, policies, and institutions that will realize this right. Providing acceptable amounts of safe water, as well as creating the mechanisms for accountability is critical. The RBA is important in the development of sustainable and efficient water resource management. Empowerment, end-user participation, and accountability create the necessary conditions for good governance required to ensure equitable access (Laban 2007).

A rights-based approach allows NGOs and citizens to challenge the market driven paradigm of neoliberalism that has taken hold among governments and international financial institutions. Water privatization is among the most hotly-debated topics, and a rights-based approach can help citizens claim and demand ownership and accountability over water resources. This approach gives them the tools to fight price increases and rights violations that may occur through privatization (Barlow 2007; Bond and Dugard 2008a).

3.5 Implications

Water is intricately linked to poverty and health issues in developing countries. A rights-based approach to water services is important to provide these people with the opportunity to improve. As discussed in the next chapter, the adoption of rights-based approach to development in the water sector can help balance the management and administration of an increasingly contested commodity. How should water be treated: an economic good, a private good, or

a public good? A rights-based approach has clarified to some extent how water availability, access and usage be managed in both the developed and the developing world.

Is this the future for water-related issues? Economic, social and cultural rights are increasingly becoming recognized as poverty is regarded as a denial of human rights. A rights-based approach has advantages over a needs-based approach, but it will have to reconcile differences with a neoliberal and market oriented approach. Water provision requires an emphasis on financial and economic responsibility, and sustainable water management, so rights cannot be the only concern. But the addition of socio-economic rights to the policies and frameworks are likely to improve governance and democratization. Human rights claims and development interventions must make sure to incorporate accountability, empowerment, participation and non-discrimination.

4: The Human Right To Water

Advocates for a human right to water have been around for quite some time. In the 1970s international rights groups began debating the concept of water as a human right, and since then international water conferences have wavered between water as a basic human right or a basic human need (Gleick 1998; Salman and McInerney-Lankford 2004). Advocates insist it is vital to lead a life of dignity, and to eradicating inequality and poverty. With more than a billion people in the developing world without safe, clean water, it is imperative to address the right to basic water services. The human right to water exists both explicitly and implicitly in numerous international declarations. This chapter will trace the existence of the human right to water, from historical international agreements and declarations to the United Nations' General Comment issued in 2002. The content and components of the human right to water will be clarified. Finally, I will illustrate some of the problems related to declaring water a human right, particularly the issues of financial responsibility and accountability.

4.1 International Human Rights Declarations

Partly in response to the events of World War II, the United Nations adopted the Universal Declaration of Human Rights in 1948, establishing a global standard for the recognition of rights and freedoms. The International Bill of Human Rights is comprised of the Universal Declaration of Human Rights and

the two human rights treaties that grew out of it: the International Covenants on Civil and Political Rights, and Economic, Social, and Cultural Rights (McCaffrey 2005). Although these two documents, finalized in 1976, are not binding international laws, they raise awareness of certain moral and political standards (Hardberger 2005). The human right to water is not explicitly stated in the International Bill of Rights, however it can be inferred from the wording of the 1948 document, where it states 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...' (UN 1948). Since water is essential for health and well-being, and the presence of 'food' implies that water is necessary for sustenance, the right to water is contained within these rights. More interestingly, although a right to water is only inferred through other rights in the covenants, several treaties and declarations expressly provide an obligation for states to provide an adequate drinking water supply, such as the conventions that deal with the rights of the child, protection of women, and the protection of prisoners (McCaffrey 2005).

The first official debate regarding water as a human right took place at the 1977 Mar del Plata Conference in Argentina, which resulted in the resolution declaring 'that all peoples have a right to access of sufficient quantity and quality of drinking water' (UN 1977; Hardberger 2005). This declaration gave the rights movement the motivation to expand further the concept of water as a human right. NGOs, the UN, and individual governments have worked hard to promote and incorporate this right into international agreements ever since.

The UN issued the first human rights treaty to explicitly mention a right to water in 1979, the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW). The key passage requires that governments ensure adequate living standards particularly in relation to access to water. Equally important was the drafting of the Convention of the Rights of the Child in 1989. While not explicitly declaring access to water a right, the document implicitly places water as a crucial component in the health and welfare of a child (Gleick 1998; Hardberger 2005; McCaffrey 2005). Considering women and children are generally responsible for collecting water in most developing countries, these documents were a crucial component in expanding awareness of water issues.

The UN has also taken the initiative to issue two General comments with regards to a human right to water, first in 2000 and again in 2002. The UN Committee on Economic, Social, and Cultural Rights issued General Comment No. 14, connecting the access to safe and potable water with the right to health, and followed that two years later with Comment No. 15 (Hardberger 2005). So while several documents mention in passing the importance of water as a human right, only recently has the international community been able to reach an agreement on an explicitly stated right and its components.

4.2 UN General Comment No. 15

With an increasing shift towards privatization following the neoliberal policies of the 1980s and 1990s and growing civil society pressure to reshape our understanding and uses of water, there has been a renewed interest in viewing water as a necessity and as a right. These two opposing movements

have influenced a rights-based approach to water service delivery, and in 2002 the United Nations delivered its General Comment No .15, which argues that water is 'indispensable for leading a life in human dignity' (UN 2002). The comment addresses the availability, quality and accessibility (both economically and physically) of water. It states: 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses' (UN 2002, Article 2). To address the first issue of availability, the comment clearly articulates that 'water must be available in sufficient quantity for personal and domestic needs' (UN 2002, Article 12(a)). According to the World Health Organization and others, a person needs somewhere between 20 and 50 litres of water per day in order to meet his or her basic needs requirements (WHO 2003, p.12; McCaffrey 2005, p.108; Gleick 1998, p.496). With regards to accessibility, the comment states: 'water, and adequate water facilities and services, must be within safe physical reach for all sections of the population' (UN 2002, Article 12(c)i). Further, people are not to be discriminated against; equal access is guaranteed under the right. Countries with poor infrastructure and minimal financial resources are unable to create these necessary conditions, however, as mentioned earlier, the institutional and management capabilities leave many people without enough water for daily needs.

The other key elements of the right address the affordability of water. The comment also states: 'the direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the

realization of other Covenant rights' (UN 2002, Article 12(c)ii). The Committee declined to state that water should be free; rather it declared that it should be affordable. Access, under the human right, does not equal free provision of water. The human right still makes it clear that water can be subject to fees, but it should not be priced so as to remove people from the market. Those who cannot afford it are guaranteed access through government subsidies, for example, and governments that have implemented this right offer a graduated tariff system to ensure cost recovery (Langford 2005).

The mistrust and fear of treating water as an economic good, and the problems with 'full cost recovery', enabled civil society to pressure the international community into declaring water a right. Along with the Millennium Development Goals, a broad rights-based approach to development and poverty reduction was deemed crucial to achieving better health and life. To date, several countries have legislated human rights to water or written explicit rights into their constitutions. These countries include Belgium, Colombia, Democratic Republic of Congo, Ecuador, Ethiopia, Gambia, Kenya, Panama, Philippines, South Africa, Spain, Uganda, Uruguay, Venezuela and Zambia (Anand 2007; World Water Council 2010). In some cases access has improved, while in others development of infrastructure clearly lags behind the MDGs' targets of reducing the number of people without water and sanitation services. Also, countries may lack the necessary institutional capacity to enforce these rights. Countries may lack stable political and judicial systems, or they may not have the financial wherewithal to provide a basic amount to each individual.

4.3 Limitations of the Human Right to Water

4.3.1 Accountability

The scope of this human right is problematic, as the human right to water may only exist within other human rights, such as the right to life, the right to food, or the right to housing. The complexity of ordering and contextualizing this particular human right has seen much disagreement, and the legal and economic implications are problematic enough to prevent most countries from recognizing it (Bluemel 2004, p.1005). At present, the United Nations has still not formally adopted it into its charter.

This brings into question the broader implications that human rights have in general. There has been some debate as to the overall effectiveness of human rights norms. How valid are human rights? Are they successful in bringing about significant change? For many people, human rights are the apex of morality, not only development. Why do governments feel the need to declare something a human right? Do they face political pressure from domestic sources? One of the main reasons governments choose to accept international treaties and legislate human rights is that they create accountability. The treaty or law serves notice to the citizen that the government is committed to that concept of a human right. This allows citizens to believe they can change government behaviour, or to have 'voice'. Recent work on the role of socialization of human rights norms suggests that when a government endorses a particular human right, it creates a certain pattern of behaviour that is consistent with that human right (Risse and Sikkink 1999, p.7; Simmons 2009, p.12). Governments that operate at a limited definition

of democracy ('free' elections) often have a hard time creating the conditions to socialize human-rights norms. Yet, they are among the states that adopt and ratify human rights. So how effective are these international human rights in delivering change?

4.3.2 Financial Responsibilities

Another problem is the financial responsibility it places on the duty bearers. Governments that may not have the financial wherewithal to provide universal access to water supplies would be legally bound to ensuring everyone has sufficient water. This places an incredible burden on countries resources, and as mentioned earlier, a rights-based approach doesn't allow easily for trade-offs (Rosemann 2006). If the human right to water is enacted on a domestic level, then the government is required to provide adequate resources, but what of countries that suffer from water scarcity and cannot physically meet their needs? Are there international obligations as a result of the UN general comment? Would we then require richer nations to address the deficiencies and help provide the required water supplies? This has been a recurring theme in the news media recently, after several key UN discussions led to another declaration of water as a human right. Many wealthier nations resisted formally declaring a human right to water on the basis that it infringes upon the sovereignty over natural resources.

The burden of financing this right has also led governments to hand over management and delivery responsibilities to private corporations or public-private partnerships. As mentioned earlier, the right to water does not translate into 'free'

water, and charging fees for water service is still permitted. The human right to water states that water be 'affordable', but without proper state regulations, low income residents are at a serious disadvantage.

Whoever defines the development goals and investment objectives determines how successful this human right and its application will be. Is the government setting goals and objectives and properly consulting communities? Is participation encouraged and organized? Is the state providing accurate information on a timely basis? The realization of this human right depends on these key factors. Once the state has clarified its intentions and implemented legislation, the development goals should be a result of the collaboration of the state and civil society.

4.4 Conclusion

Simply assuming that water is included in an existing human right will not create the recognition necessary, nor will it develop the mechanisms, to enable and protect that right. Providing rules and creating accountability through enforcement mechanisms is often the only way to enforce change. The UN General Comment No. 15 does not have any legally binding enforcement mechanisms, since it is an international communiqué. It does create considerable state responsibility by clearly defining the quality, quantity and accessibility of water (Hardberger 2007). A right to water is thus a product of state intention and civil action. The next two chapters will examine the efforts of South Africa and Kenya, and analyze the political and civil actions that have attempted to implement the human right to water.

5: South Africa: Enshrining Entitlements

Following years of *apartheid* rule, South Africans finally turned the corner with democratic elections in 1994, ushering in the first black government in the nation's history. The country aimed to address the severe inequities and injustices that had torn it apart for the better half of the century. One of the priorities was addressing economic and social welfare concerns, of which water was a key issue. In 1994, more than a quarter of the country did not have access to basic water requirements, and many could not afford to pay for any type of service. This chapter will examine the impact that a human right to water has had on South Africa since the new constitution in 1994. Water supply has been a hotly contested issue in South Africa. Pre-paid meters and private delivery systems have led to confrontations and demonstrations over privatization, commercialization and commodification of the country's water. In this chapter, I will review the condition of current water resources and the evolution of the legislative framework that allows for a right to water. I will discuss some of the outcomes of this legislation, namely the Free Basic Water program and privatization, and conclude with an analysis of recent court cases regarding the right to water.

5.1 Water in South Africa

South Africa is a semi-arid, water scarce country. In many cases demand outstrips the capacity of the water system to supply its users. In addition, the operation and management of water resources is affected by fluctuations in the climate, with wet or dry seasons stretching out over years (Hallowes, Pott, and Döckel 2008). The total water availability per capita is roughly $1,099\text{m}^3$, marginally over the $1,000\text{m}^3$ threshold for water scarcity (Backeberg 2005). The problem, of course is that the water is not spread evenly, and though lower quantities exist here, South Africa does have enough to provide its citizens. With population growth, frequent droughts and the impact of pollution, natural sources of water are in danger of being depleted. Three quarters of the population rely on surface water: mostly rains, rivers, and lakes (UN/WWAP 2006a). This places considerable strain on the country, both economically and socially. It highlights the importance of effectively managing a constrained and competitive resource.

The solution is catchment, storage, and distribution infrastructure and systems. These are crucial to providing universal and equal access to water. Recent investments in water systems in South Africa have improved the access to water considerably over the past 15 years, and according to the Department of Water Affairs and Forestry, 96% of the population now have access to basic water services (DWAF 2009). While these improvements are commendable, access to water varies from region to region, based on socio-economic classes, and allotment and tariff schedules that restrict water delivery through pre-paid meters. Effective access to basic service is more than simply building

infrastructure; it involves proper management and making the service affordable and convenient to users (Muller 2006, p.7).

5.2 Policies, Legislation and Institutions

5.2.1 Historical Policies

The legacy of *apartheid* rule and two centuries of European colonialism left South Africa with historic inequalities between blacks and whites. Under apartheid rule, the central government was responsible for managing and providing water services. Not surprisingly, water laws were highly discriminatory and favoured the white population, with little development of infrastructure going to rural black populations. Well-funded and heavily-subsidized infrastructure and services were made available to white communities, while both urban and rural black communities were neglected (Conteh et al. 2008). Apartheid clearly played a crucial role in the poor functioning of the water service sector that exacerbates existing conditions. Black townships and neighbourhoods suffer from lack of services, poor infrastructure and are much more prone to disconnections. While South Africa is classified as a middle-income country, these inequalities continue to divide a nation. Poverty is a huge issue, as well as AIDS and other health related issues. Black communities have significantly higher rates of disease. The need for safe water supplies is a pressing concern that could help the country achieve the Millennium Development Goals (COHRE 2008a; COHRE 2009).

Prior to 1993 all changes in water policy and legislation reflected development related factors. The previous government's concerns were mainly

economic growth, industrialization, agriculture, and improving urban areas. The focus on social inequalities was not their concern (Backeberg 2005). In fact prior to 1993 South Africa did not have a bill of rights, which meant that blacks did not have any method or means of challenging the authority of the *apartheid* government (Mubangizi 2007).

The African National Congress (ANC), born in 1923, led black South Africans resistance to apartheid rule. In 1955 it created its own charter of freedoms, laying the foundation for a movement rooted in social justice and the protection of rights and freedoms. And in the late 1980s and early 1990s, when the National Party began negotiations with the ANC for a transition of power, it was these values of social justice and equality that influenced the formation of a new country (Backeberg 2005; Stalk and Alexandersen 2004).

During the transition phase, the new government created the Reconstruction and Development Program (RDP) in 1994. This set out several goals that were to be achieved in the water sector, namely, short- and medium-term goals in water delivery, and improved sanitation and supply to rural homes (Bond and Dugard 2008a). However, the implementation of these reforms only gradually progressed as the government began its transition from apartheid rule to constitutional democracy. Hampered by ineffective organization and management, more tangible policies and legislation were necessary if real improvements were going to be made (Backeberg 2005).

5.2.2 1994 Constitution and the Promise of Social Equity

With its transition from Apartheid in the 1990s, South Africa seized the opportunity and rewrote its constitution, implementing one of the most progressive legal frameworks in the world. The 1994 constitution legally entitles all South Africans to a basic amount of water. Under Article 27, labelled *Health care, food, water and social security*, the constitution states '27(1) Everyone has the right to have access to ... (b) sufficient food and water', as well as health care and other social services, and '27 (2) The state must take reasonable legislative and other measures ... to achieve the progressive realization of each of these rights' (Republic of South Africa 1996).

After enacting the new constitution, the government began to compile and create a new framework for dealing with water services. New water policy legislation was passed in 1997, in the form of the Water Services Act and again in 1998 with the National Water Act, in which 'everyone is guaranteed the right to have access to ... sufficient food and water' (Republic of South Africa 1998). The NWA creates a comprehensive legal framework for the management of water resources, clearly articulating that the National government is responsible for the equitable and sustainable allocation of water. The WSA is the primary legal instrument relating to accessibility and provision of water services and its objective is to provide for the right of access to basic water supply (Conteh et al. 2008; Stein and Niklaas 2002). These legal frameworks have put in place a comprehensive agenda for a rights-based approach to delivering universal water supply through the entire country.

Water availability, access and safety, the cornerstones of the human right to water were accounted for within these new policies. Water infrastructure was to be upgraded and expanded to reach those who did not have proper access. Water management and delivery systems were upgraded to ensure water quality was safe. However, the costs to implement such a strategy were substantial, and therefore affordability became another issue.

5.2.3 Commercialization and Privatization of Water Services

One of the outcomes of these policies was the continued emphasis on market-oriented supply systems and cost recovery. Despite the creation of these new policies, and their history of advocating for nationalization of key sectors of the economy, the ANC aligned itself with the commercialization of the water sector. Financial constraints and the need to expand infrastructure and service, made the decision to partner with private corporations much easier. The Water Services Policy of 1994 and the subsequent legislation were not incompatible with a market-oriented approach, and the government believes that this method will ultimately serve the peoples' interests (Bond and Dugard 2008a; McDonald and Ruiters 2005).

Water resources are owned by the state, and the national government is responsible for the overall regulation and governance through the Department of Water Affairs and Forestry (DWAF). However, actual primary responsibility and management of water services is distributed to local governments (Muller 2006; DWAF 2009). Local governments implement cooperative government structures, but provision of water services can be subcontracted to private companies

(McDonald and Ruiters 2005). This in turn led to several contracts being signed with large multinational water companies to provide water services, mainly by installing pre-paid meters on communal water pumps. These pumps had previously delivered free water, and now many people could not afford to pay for their use of water and were cut off from water supply (Stalk and Alexandersen 2004). These disconnections contributed to a severe cholera outbreak in 2000, and forced the government to reconsider how to treat user-fees, since the constitution clearly required the government to ensure access to safe, affordable water supplies.

5.2.4 Free Basic Water 2002

Since 2002, the government of South Africa has promoted a Free Basic Water (FBW) policy that aims at delivering universal access to water and sanitation services. The minimum supply recommended by the national government is 6000 litres of clean water per household per month, but since water services are determined at the local level this measure may vary. The policy aims at poor households, and is achieved by installing a meter that regulates the amount of water each household consumes. Free service is based on monthly household income levels in which households that earn less than R800 per month (\$110Cdn/mth) are able to qualify (DWAF 2009).

According to the Department of Water Affairs and Forestry (DWAF 2009), this has had tremendous success. In 2009 the government reported that access to water had increased to reaching 96% of the population, up from 59 % in the year 1994. Further, 86% of South Africans enjoy the Free Basic Water service

(DWAF 2009). But the extent to which this success can be linked to the 'right to water' is limited. Prior to 1994, South Africa was already making water service a priority for social and economic development. The technical and institutional capacities necessary to improve service already existed under *apartheid*, and only the discriminatory policies of the previous government prevented better water allocation. Further, subsidizing free water provision was possible because of South Africa's level of economic development (Bluemel 2004, p.979).

While the FBW program seems to be somewhat of a success, there have been cases where service has been stopped and water meters disconnected for lack of payment (Danchin 2010; McDonald and Ruiters 2005). Pre-paid meters automatically disconnect service after the FBW allowance of 6,000 litres per month has been delivered and no credits have been purchased. Since the Free Basic Water program is based on service per household, and not per individual, the allocation of water supplies does not necessarily meet the basic requirements. Many households that rely on the FBW program are large, multifamily residences. Other households that are serviced by the prepaid meters are shared multiunit dwellings. In these cases one meter is shared among 10 or more people and the amount of water per individual significantly decreases (Dugard 2010). These issues have been contested in several court cases in the past decade, putting the human right to water in the spotlight.

5.3 Accountability: Constitutional Claims for the Human Right to Water

With the human right to water written into the constitution, South Africa created a mechanism by which civil society could challenge the government to support and promote its policy of expanding social justice. By allowing the judiciary to evaluate and apply the laws and rules of the legislature, socio-economic rights may be protected.

5.3.1 The Government of the Republic of South Africa v Grootboom

In 2000, a group of adults and children that had been evicted from their informal settlements took the local government to court in an attempt to have them provide temporary shelter and basic social services. The residents had been removed from their settlements in order to facilitate the construction of low-cost housing. In its ruling, the court held that the state was required to provide temporary shelter and basic social services, something it was unprepared to do. The court decided that the state had failed to meet and honour its obligations under section 26 of the constitution, which guarantees everyone the right to adequate housing (Constitutional Court of South Africa 2000; Fitzpatrick and Slye 2003; Mubangizi 2007).

While not directly related to water, the case did touch upon claims of providing the applicants basic social services, something that is guaranteed under the same section of the constitution as water rights. This case set a precedent in regards to social and economic rights that would be tested numerous times.

5.3.2 *The Residents of Bon Vista Mansions v Southern Metropolitan Local Council*

Also in 2000, a group of residents took action against city council after their water was disconnected. The claimants' service had been disconnected since payments had ceased and their accounts were in arrears. However, the group claimed that the disconnection was an infringement of section 27 of the constitution. The judge ruled that 'the act of disconnecting the supply was *prima facie* in breach of the Council's constitutional duty to respect the right of access to water' and 'the Constitution mandate the state to "respect, protect, promote and fulfil" the rights enumerated in the Bill of Rights' (Choma 2009, 48)

The ruling was also significant for establishing that a person should not be denied access to water services for non-payment if that person can prove that he or she is unable to pay (Kothari 2006). When considered along with the previous case, these judgments create important precedents in terms of the legal protection of the human right to water.

5.3.3 *Manqele v Durban Transitional Metropolitan Council*

The claimant in this case had their water supply disconnected because of non-payment. The argument put to the court declared the disconnection unlawful beyond the scope of powers under the Water Services Act. The disconnection resulted in denial of access, and ultimately the denial of the rights accorded under both the constitution and in the water services act. Complicating the ruling though, was the fact that the applicant had exceeded the free basic water limit. The Judge, while granting that the disconnection was unconstitutional and a

denial of the claimants rights, ultimately ruled against the claimant as the provisions within the Water Services Act are not as clear as those in the constitution. Under the Water Services Act, each local municipality determines the content of 'the right to water'. The council in this case argued that it had yet to formalize any regulations for a 'basic' water supply and therefore no content existed on the right to water. On the other hand the constitution clearly establishes the content and the obligations of the right (Kothari 2006, p.9; Mubangizi 2007, p.7).

The differing outcomes in the previous two cases have created some doubts as to the willingness of the courts to protect the right to access water. This contradiction has led to another challenge, this one concerning whether the existence of the prepaid meters is constitutional.

5.3.4 Mazibuko v the City of Johannesburg

Finally, in the most relevant case to date regarding the human right to water, the claimants challenged the constitutionality of the prepaid meters. In the township of Phiri, part of Soweto, pre-paid water meters have been installed which guarantee the allotted 6,000 litres of water per household. However, unlike meters in other areas of Johannesburg, these meters are not operated on a credit basis, and are automatically disconnected once the Free Basic Water limit is reached and payment has not occurred. Other areas offer disconnection notifications and allow for users to pay their arrears post-use. In Phiri, Soweto, this basic amount of water is not enough to sustain the average household for the entire month. Indeed, the 6,000 litres is often used quickly and then residents

must go without water for days because they are unable to afford the rates to turn the water pumps back on (Bond and Dugard 2008b; Dugard 2010; Williams 2009).

This has led to a recent court case, *Mazibuko v Johannesburg*, in which residents challenged the constitutionality of the pre-paid meters. The claim was sparked by the death of several residents in a house fire, where the claimants attempted to extinguish the fire, but could not get access to the water pump because the monthly allotment had already been used. The five claimants, bolstered by the support of human rights NGOs, were able to advance a rights-based approach to water, countering the governments' approach of treating water as an economic commodity (Dugard 2010; Williams 2009). The applicants hoped to challenge both the forced installation of the prepayment meters, and the one-size-fits-all Free Basic Water allotment. In Phiri, the FBW allotment was per household, and not per individual, which meant that larger households had significantly less water per individual. This method of allotment, they claimed, discriminated against the urban poor because these households have larger numbers and are often separated into multi-unit dwellings. In some cases up to 8-10 people can share the 6,000-litre allotment from the Free Basic Water (Bond and Dugard 2008b; Williams 2009).

The original High Court ruling favoured the claimants, and the court ruled that the prepaid meters were unlawful and unfair. The Free Basic Water policy was unreasonable and it should provide, in accordance with the WHO standards, 50 litres of free basic water per day to the applicants and other residents in Phiri.

While hailed as a success from NGOs and human rights groups, the City of Johannesburg appealed to the Supreme Court, which in turn lowered the daily allotment of free water to 42 litres and ordered the city to rectify its policies and By-laws within two years. Upon further appeal, and a final hearing in the Constitutional Court of South Africa, the court set aside the previous decisions and declared that the meters were lawful and that the city's policies were not unconstitutional. This decision, issued late 2009, ended the first direct challenge of the human right to water (Constitutional Court of South Africa 2009; Danchin 2010).

5.4 Implications

Clearly this is a set back for the proponents of a rights-based approach and a human right to water. The right is explicitly granted in the constitution, yet judicial support from the highest court in the country was not forthcoming. However, human rights advocates should notice that social and economic rights were successfully claimed, challenged and realized. Part of the process was the mobilization of citizens around a rights-based model of water delivery, and challenging the government to be accountable. In that sense the claimants of these cases were successful, at least partially. The cases have garnered not only national, but also international attention, and have forced all three levels of government to re-evaluate their water policies.

The efforts the government of South Africa has taken are remarkable. The policy and legislative frameworks have provided the country with a clear vision for improving water service and availability. In most cases the efforts have been

successful, although not without some concerns. Privatization continues to be a contentious issue in South Africa, and civil society organizations and NGOs are continuing to be active in the fight for the human right to water. The existence of disconnected service proves that implementing and guaranteeing a basic and fundamental human right to water is much more complicated in practice than it is in policy.

Without the human right, would results have been any different? The human right has been a well-publicized right in South Africa. The people are aware of their rights and are regularly challenging the authorities to provide and guarantee those rights. Without the constitutional and legislative frameworks the country would not have seen the level of community participation and involvement. On the other hand, the involvement of private companies and joint public private partnerships may lead to the conclusion that the improvements may not have as much to do with the human right as with an economic model the government clearly followed.

A mid-income country like South Africa is clearly at an advantage economically and financially compared to other developing nations. And while it does not have an abundance of water resources, the ability to invest, build and maintain infrastructure is a significant factor in the governments' ability to provide its citizens water, even if it is privately funded. The inclusion of this right to water in the constitution is only relevant as it pertains to holding the government accountable. For this to actually guarantee and enforce a human right to water, a strong, independent judiciary is necessary. South Africa has this, and the several

cases that were examined show that there is support for the human right. It is not complete, as the rulings have not always been in favour of the human right. Yet, the government has shown strong commitment, the financial wherewithal and the aptness to include both civil society participation and private enterprise.

6: Kenya: Progress Delayed or Progress Denied?

While not having the same political and social divides that have plagued South Africa, Kenya is also a former colony that continues to struggle to reduce poverty and improve health issues. Poverty, poor management of resources and population growth have hindered economic production in Kenya for the past several decades. Water scarcity consists not only of a physical shortage of water resources, but also of the inability of the government to provide infrastructure and services. This chapter will examine the role that the human right to water has played in Kenyan water sector. First, I will explain the state of current water resources in Kenya, then review the government's commitment to water sector reform based on current and historical policies and legislation. Finally, I will analyze some of the outcomes and implications that these legislative frameworks have on the commitment and accountability of the government.

6.1 Current Water Resources in Kenya

Kenya is a water scarce country in East Africa. Physical conditions are similar to those of South Africa in that Kenya is also a mostly arid and semi-arid country with highly unreliable rainfall that results in frequent droughts or floods. Degradation of water resources through pollution, overuse and poor infrastructure complicate an already precarious situation. Water availability has

been recorded as 647 m³ per capita, lower than the 1000 m³ per capita water scarcity threshold (COHRE 2008a; COHRE 2009).

Kenya has a population of 32 million people, and over half of the population lives below the poverty line. The poor reside predominantly in the arid and semi-arid areas, as well as in the urban, informal settlements. These naturally water-scarce regions and the poverty level exacerbate the health and welfare problems these people face. Child mortality rates and disease prevalence are high.

The Ministry of Water and Irrigation (MWI) estimates that 47% of water resources were piped in 2006. When broken down between different sectors, the access to water in urban areas is 60%, 20% in informal settlements, and 40% in the rural areas. Only 57% of households have access to safe, clean water. This number, while still less than half of the population, is a slight improvement since 2002, when the number of people with access to safe water was around 20-30% (Anand 2007; MWI 2007a; UNDP and UNDP Water Governance Facility 2007). Much of the problem is poor infrastructure. Leaks and illegal connections account for up to 60% of water supply loss. The number of informal settlements and poor infrastructure grows. Piped connections are extremely expensive, and so water kiosks and water trucks are used in many cases, especially the informal settlements and in rural settings, as they are much more economical option. The inability to develop and maintain proper infrastructure is a legacy of poor management.

The colonial legacy has also plagued Kenya and its neighbours in regards to water management. National boundaries were drawn without regard for geographic, social or cultural considerations. As a result, Kenya shares half of its water resources, namely lakes and rivers, with its neighbours. This requires joint action, management and cooperation and has implications for security and future development goals (World Bank 2004).

Steady decline in economic performance has led to an increase in poverty over the past two decades, and this is exacerbated by the poor condition of the Kenyan water service sector (UN/WWAP 2006a). With the combination of population growth, water resources degradation and poor economic performance, Kenya faces a tough challenge to curb the current trends and reduce the incidence of poverty. For Kenya to achieve the Millennium Development Goals in water and sanitation, the government will need to increase the nationwide coverage of safe water to 80%, almost double its current coverage. This is a daunting task, but one that the government declares itself committed to. In the 1990s there was a significant shift in policy to correct the declining access and availability, but progress has been slow.

6.2 Policies and Legislation

These current problems have not always existed. But the growing inadequacies in the water service sector have stemmed from previous governments' inability and poorly enacted policies. In 1963, the year of Kenyan independence from colonial rule, the government's policies shifted focus to socialism and the elimination of illiteracy, disease, and poverty. These policies

were written up in Sessional Paper No. 10 of 1965. Prior to independence, natural resources were under control of the colonial authorities, but with the shift to a socialist government, the belief turned to making water free and available to all Kenyans (Wymann von Dach 2007). The government took centre stage in managing water resources as well as responsibility for financing infrastructure development and service provision (Nilsson and Nyanchaga 2008). Government policy was firmly focused on promoting development of all sectors of the economy, and for this water was of primary importance (Akech 2008). The young nation was determined to develop its resources and eradicate poverty.

A more formal declaration with regard to water services was released in the mid-1970s. The National Water Master Plan of 1974 established the government's commitment to ensure potable water supplies to all households by the year 2000. To fulfill these requirements laid out in the Master Plan, the government began to invest heavily in the late 1970s and into the 1980s. This was an ambitious goal, which required the creation of an independent Ministry of Water, as well as a government corporation designed to provide water service to the public (UN/WWAP 2006b).

Under severe budget constraints in the 1970s and 1980s, the government decided to rethink its strategy of providing water for free. There was a need to shift from the basic needs strategy to a solution for recovering the increasing costs of providing service. The management and maintenance of water services became increasingly funded through external sources, mainly the World Bank and foreign governments. And with the Sessional Paper No.1 of 1986 the

government stated a clear policy-shift towards recovering costs, and a payment for service framework (Nilsson and Nyanchaga 2008).

In 1988, the National Water Conservation and Pipeline Corporation was established to run and control the nation's water supply systems on a commercial basis (Hayanga 2007; Ngigi and Macharia 2006). However, by this time, the government realized that financial constraints made their year-2000 targets unlikely to be realized.

This led to a shift in policy in the late 1980s and into the 1990s where the government began a process of 'handing over' responsibility of water provision (Ngigi and Macharia 2006). This allowed the local authorities to take over the responsibility of operating and maintaining water supply systems, freeing the central government from a huge financial obligation. In 1997 a manual was published providing the guidelines for 'handing over' rural water supply systems. No longer was the central government responsible for direct service provision. However, it would be responsible for regulatory and enabling functions (Wymann von Dach 2007).

By the year 2000, Kenya had developed both piped urban water systems and piped rural water supply systems; however, less than half of the rural population and only two-thirds of the urban population had access to reliable potable water supplies (Mumma 2005). The goal of delivering water supplies to all Kenyans had fallen far short.

6.3 The Emergence of Water Rights: The 2002 Reforms

In 2002 Kenya underwent a series of reforms in the water service sector that reflects their commitment to a new approach towards improving and achieving the Millennium Development Goals, as well as the international framework of the United Nations. The country enacted a new Water Act in 2002 that attempted to transform the institutional framework of the water sector.

Realizing a need to improve their water supply services, the new reforms of 2002 introduced a dramatic change in water-management institutions. Much earlier, the government had realized that it did not have the resources to fulfill its ambitious goals, not to mention the governing capabilities. One of the biggest shifts was the accountability mechanism. No longer was the national government responsible; the new laws clearly shifted responsibility of water policy and regulations to the local level (Republic of Kenya 2002; UNDP and UNDP Water Governance Facility 2007). The new Water Act created several institutions for management, including the autonomous Water Resources Management Authority (WRMA) and the Water Services Regulatory Board (WSRB). These two bodies are the main regulatory agencies, protecting the resource and supervising allocation (Akech 2008).

With regards to accessibility, the new water strategy aims to reduce water collection time to an average of 30 minutes in urban areas and to reduce the distance travelled in rural areas to 2 kilometres. In many areas, piped water services have been introduced, but due to expensive infrastructure costs, many areas are still serviced by water kiosks, private delivery of water supplies,

concessions. Many poor residents are unable to pay regular monthly bills that would accompany piped service; therefore, water kiosks are much more useful in the informal settlements (Gulyani, Talukdar, and Kariuki 2005).

Further consideration was given to reform the pricing of water supplies to make it affordable. The introduction of a 'social block' tariff introduced a scaled pricing scheme that allows for poor households to receive a subsidy of up to 70% (COHRE 2008a).

Under the Water Act 2002, there are various policies that are consistent with the human right to water. The Act, and the policies that preceded it, include provisions for water availability, water quality, participatory management, and sustainable and affordable use of the resource (MWI 2007a; UNDP and UNDP Water Governance Facility 2007). And while the right to water and sanitation is not explicitly included in the Kenyan constitution, the government is a signatory to several key international agreements on the human right to water. It has ratified international agreements such as the Universal Declaration of Human rights, 1948, The International Covenant on Economic, Social and Cultural rights, 1966, and the African Charter of Human and People's Rights, 1981 (Mumma 2005; COHRE 2008a; COHRE 2009). These charters and declarations include provisions that guarantee the right to life, the right to food, and the right to affordable and safe housing. The human right to water is often included implicitly within these rights.

In the 2007 National Water Services Strategy (NWSS) report, the importance of water for health, welfare, and economic development was

recognized, as the report states: 'Safe water and basic sanitation must be regarded as a basic human right and should therefore be accessible and affordable to all' (MWI 2007b, p.ii).

These agreements signal the government's obligation in taking responsibility to provide the right to water. Further, although it is not explicitly written, the human right to water has been included in proposed drafts for a new Kenyan constitution (Republic of Kenya 2005). This shows that the intention of government and opposition forces to follow a rights-based approach to governance of water supplies is important. Despite not being included in the current constitution, water policy reforms and legislative proposals clearly show that there is demand for a greater effort to implement a legally binding framework. The language proposed by the government in policy, although not explicitly written in the constitution, aims to harness the power of the RBA and Human rights. The problem, as in many cases, is the implementation process.

6.4 Outcomes

Nearly half of Kenyans are unable to access water through a piped service. This means that most people rely on informal service provision. In spite of changes through the water sector reform, there are constraints that discourage and even prohibit local authorities and utility companies from providing basic access to water within informal settlements. There are no legal, institutional and regulatory frameworks that define the activities and responsibilities of independent small-scale water providers. They are not regulated through the Water Act. Until this is rectified, there are no feedback or accountability

mechanisms for consumers (citizens) in these areas to challenge the state or local authorities (UNDP and UNDP Water Governance Facility 2007).

Another shortcoming is that the legislation fails to establish clear legal principles for how to regulate market mechanisms. Cost recovery is still fundamental in the government's policy, but many fear that without any guidelines operators will be able to exploit water resources, preventing equal and sustainable distribution (Akech 2008).

In fact, some see the well-publicized policy shifts as merely rhetoric, and insist that very little has changed with the reforms. The organizational structure that has resulted is still quite centralized, and the institutions that are in place are weak and ineffective. This is evidenced by the poor access to information at local levels (K'Akumu 2008).

6.4.1 Accountability

The adoption of a rights-based approach to water service sector in Kenya has had significant problems. Key among the reforms was the improvement of accountability mechanisms. Addressing the delivery of information is key, as many people are unaware of the rights that they have, and therefore the duty bearers (government) are not being held accountable.

Regarding participation and access to information, two cases within Kenya provide alternate views of the effectiveness of civil society in challenging the government and holding it accountable. Firstly, in Nairobi, there have been poor efforts by the city to communicate or publish local regulations or policies. New

city by-laws and regulations were only published in a limited number of newspapers, and local community members were not asked to be part of city council meetings to discuss issues related to water services. The lack of effort by the local city councils reflects the inconsistency of the actual implementation of the policies. Under these circumstances, it is not surprising that the benefits of the water reforms are yet to be realized (Umande Trust, COHRE, and Hakijamii Trust 2007; COHRE 2008b).

Another case, though, does represent some hope. In the village of Bondo, villagers have begun to organize to discuss water issues and how they can settle their concerns with the local water service providers. They do this through traditional dance and dialogues. It has been part of a program funded by the UNDP and the UNDP Water Governance Facility at the Stockholm International Water Institute, and implemented with the help of Water for Health Organization, a local NGO. This program has seen a large increase in the number of participants, and action at the local level. These dialogues and dances engage and educate community members in the rights they can claim. It also brings the community together with water-service providers in order to discuss issues and problems that need to be rectified. It has been such a success that it is being introduced in other regions of Kenya (Rahman 2010).

This case may be unique, and overall, groups who stand to gain the most from these water reforms have little to no information that would enable them to participate. It is this crucial component that is missing from allowing the rights based approach to fulfill its promise in the Kenyan example.

While there have been slight improvements since the 2002 water reforms, there is still a long way to go in securing safe potable water to the majority of the population. The Water Act 2002 encourages the participation of all relevant stakeholders; this includes NGOs and civil society. However there are inadequate data- and information-sharing mechanisms to ensure that actors understand and are aware of the water policies and strategies in their communities (UNDP and UNDP Water Governance Facility 2007).

6.4.2 Privatization

Another problem that arises is the costs associated with the implementation of infrastructure. Further, the commodification of water resources through private companies, while not incompatible with the rights-based approach, places significant pressures on local civic organizations to lobby and make claims against the government. Further, the costs of building and repairing infrastructure are a burden on a relatively poor nation like Kenya. It is clear that the government cannot afford to deliver universal access, and so how to prioritize this issue is a problem. Tariff structures have been introduced through the 2002 reforms, but they still only deliver a discount, up to 70%, for service (Mumma 2005). There is no free water program similar to South Africa.

Since cost recovery has been explicitly stated in nearly all water policy and legislation since independence, commodification of water resources has become an issue of importance which some say conflicts with the human right to water (Nilsson and Nyanchaga 2008). The new policy, while addressing a rights-based approach, has also laid the groundwork for private companies and private

provision of water resources. Are these incompatible? Not necessarily, but there is debate. Advocates for the poor suggest that privatization will deny the poor access to water, as they will be priced out of the market.

As mentioned earlier, the 2002 water reforms have also made it more difficult for small-scale water providers to operate. These providers are extremely important to the poor, delivering low cost solutions to those in informal and rural areas that are not serviced by piped connections or more mainstream service providers. The reforms also require providers to apply for and obtain a water supply license, not an unreasonable request for a large corporation, but to a small independent this could be burdensome and prohibitive (K'Akumu 2004).

The commitment to a rights-based approach to water is in question, as the policy and legal frameworks are there. But who will pay for the improvements that are necessary? Are accountability measures available that can guarantee service to rights holders? And who will protect the poor if they are unable to afford payment for water supplies?

6.5 Implications

The reforms have been in place for less than a decade, but the slow progress shows that there are still problems. The Kenyan experience with the human right to water has yet to yield significant results, or is it too early to tell? There has been progress on the institutional and legislative front, but in actual physical delivery, improvement of infrastructure and accountability mechanisms that civil society can use to claim violations, the latest reforms have fallen short.

And while the government officially claims to be committed to improving and providing better access, the lack of clear accountability mechanisms indicates that it has a long way to go. In this instance the legislated aspect of a human right to water is not providing any tangible improvements. The commitment of the government is tied more closely with financial and political capabilities. Ultimately in Kenya, financial wherewithal trumps social equity and without the funds to improve it could be a long time before Kenya sees anything close to universal access.

Would things have been any different without a RBA approach? Since cost-recovery has been a constant theme, remaining in place from colonial times, it appears that there may not have been much of a difference. In addition, despite the carefully constructed reforms and attempts to decentralize management structures, centralized authority remains. Lack of finances, as well as mechanisms for legal redress and judicial involvement, impede the progress of not only improved access, but of a meaningful implementation of a human right to water.

7: Conclusion

7.1 Are Kenya and South Africa better off with a Human Right to Water?

These are not the only two countries that have adopted the human right to water, but they were useful to interpret how the rights-based approach has affected water service. In the cases of South Africa and Kenya, there have been varying degrees of improvement to water availability and access. Of the two, Kenya still has much work to do in order to fully realize universal access to water supplies; however, this is also a reflection of the country's relative wealth. South Africa, a middle-income country that inherited a more well-developed water service sector from the *apartheid* era, is nearing closer to its goal of providing water for all. This is tempered with the evidence that there are still disconnections, which means that the human right to water is not guaranteeing that civil society has the means to hold the government completely accountable.

Both countries have clearly established policies and legislative frameworks that have required their government to provide for a basic requirement of available water. The fundamental causes for a shift to a rights-based approach were different in each case. In South Africa's case, there was need to address the deep social and economic inequalities stemming from *apartheid* rule. In Kenya, entrenched poverty and poor macro-economic

conditions triggered a shift in focus. In both cases they turned to a method that would incorporate social equity and justice.

But have these policies made any difference? Absent these policy frameworks, would water availability and access have been any different? These questions are difficult to answer. On the surface, it may be easy to assume that they have played a significant role in providing for the means to improve water service systems. South Africa has improved its water provisions, while Kenya lags far behind its targets. South Africa has a legally binding right to water embedded in the constitution; Kenya does not. But beyond these simple correlations, the evidence shows that even declaring a commitment to a human right to water is not enough. Kenya has adopted rights-based policies regarding water and has still struggled to deliver services. South Africa and Kenya are both key supporters of a market-oriented approach to dealing with water supply and demand, and the financial capabilities of the state have proven significant to the implementation and delivery of water resources. The mechanisms these governments have developed for water delivery and management are based more on a cost-recovery orientation than on a social-justice basis.

While the constitutional protection that exists in South Africa is not the instrumental cause in improved service, it does provide benefits that do not exist in Kenya. Designating these rights as justiciable has allowed civil society to challenge any possible violations. For this to fully function the country needs a strong judiciary independent of the other branches of government. South Africa

has accomplished this, but it requires a whole new level of commitment that Kenya has been unprepared, or unwilling, to take on.

Are these cases transferable? Not exactly, since each country has unique political, cultural and social characteristics. But they do shed light on the struggles and problems that countries face in trying to improve water management and provision. They show that declaring a human right to water and implementing an effective system to actually realize that right are separate and distinct.

7.2 A Case For *and* Against the Human Right to Water

In reviewing the argument and research question that were set forth at the start then leads to an inconclusive result. It appears that the human right to water is able to improve the availability and access of water sources. However, this human right is the result of government and civil society action that has worked to form and shape this right into a legal framework, and then act upon the guarantees that it provides. The underlying cause for improvements is something else, as implementing a human right to water does not necessarily create the conditions necessary to actually provide access to water. From this then, the human right is secondary to the realization of water services; improvements to water service are not directly related to the human right.

So what does matter? It is conceivable that the human right to water is one of several variables to affect the outcome of water management and delivery. Commitment is important, and if the government has the intention of

doing it then it will begin to create the circumstances for that action or program to work. Primarily though, the financial capability of the state is far more critical in delivering safe potable water. In this case, the view of water as an economic good and as a commodity far outweighs the universal right of access. For a government that is responsible for building and maintaining infrastructure and operating the delivery systems, recovering the costs of the operation are extremely important. And while this view is not incompatible with a rights-based approach, it does complicate matters. Further, well-established property rights, institutions, and governance mechanisms create the foundations for dealing with water scarcity and inadequate access. In sum, the financial and political capabilities of each particular state are extremely vital to delivering the needs of the people.

For the human right to water to be fully effective, it needs the following criteria to be recognized by the state: citizenship, property rights, proper housing, effective judiciary, legal representation, access to information, and the ability to organize. Without these components, the human right to water is unlikely to make substantial impact in improving water services. These are intricately linked, and it is therefore just as likely that a government with a clear objective and the financial capacity could bring water service to the people without the human right. In fact it could be easier.

A rights-based approach to development that incorporates accountability, participation, and information, allows the human right to water to provide for the realization of improved access. Both in South Africa and Kenya, local community

participation and involvement of NGOs have mobilized efforts to realize and improve their water services. However, it is also clear that communities suffer from poor information and organization regarding these issues. Only when accountability, empowerment, participation, and non-discrimination are linked will the human right to water succeed in improving access. At the moment, it is difficult to align all these issues together, as well as accommodate the differences due to costs of infrastructure creation and maintenance.

7.3 Future Implications

The human right to water has become a part of the broader rights-based approaches, and is supported not only by human rights NGOs and non-profit organizations, but also through such influential international organizations as the United Nations and the World Health Organization, as well as several governments around the world. However, simply naming a human right to water does not guarantee that it will be realized. The difficult part is in the implementation and operation of this right. Without the coordinated efforts of the state and civil society human rights are unlikely to become realized. This is no different for the human right to water. It must be bundled with other rights and mechanisms that enable people to understand their situation and hold someone accountable. Otherwise it is just words on paper.

Legislating the human right to water is responsible for addressing not just water issues, but allowing people to organize and deepen democratic processes and functions. In both South Africa and Kenya, villages and communities have

begun to take part in effective campaigns to challenge the government and attempt to hold them accountable.

There are clear implications for policy and for how countries that suffer from water scarcity can address their situation. This rights-based approach to water scarcity can clearly give governments and civil society the platform in which to address future water entitlements. Further implications are that if a human right to water only arises once a certain level of development has been achieved, then what does this mean for other human rights? Are human rights only relevant once society has reached a certain level, when a country has the capacity to formulate political and judicial systems that can guarantee access? Most importantly, this argument can serve to address the debate over how we can best manage our most important natural resource. The implications for social, economic and political development are key, and the efficacy of this human right should have ramifications not only on people's entitlements, but also the capabilities that they derive from those entitlements.

The debate on whether the human right to water is effective in alleviating inequalities due to water scarcity and promoting social and economic development continues. The argument set forth in this paper leads to the conclusion that social, political, and economic conditions of a country are likely to be more instrumental in delivering better access to water services than adopting a human right to water. While the human right to water may empower communities and local organizations, it will have little effect if the state does not

show a commitment to address the underlying institutions, or the legal and political systems.

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