



**REALISING THE HUMAN RIGHT TO WATER IN MALAWI
THROUGH COMMUNITY PARTICIPATION**

**A thesis submitted in fulfilment of the requirements for the degree of Doctor Legum
(LLD) in the Faculty of Law of the University of the Western Cape**



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Plagiarism Declaration

I, Ngcimezile Mbano-Mweso, declare that **Realising the Human Right to Water in Malawi Through Community Participation** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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Abstract

Lack of universal access to water is one of the fundamental failures of development in the 21st century. Women not only disproportionately bear the burden of lack of safe water but also have the least opportunity to take part in decisions regarding water services. This is a manifestation of the global water crisis caused by unequal relations of power, poverty and inequality related to gender, geographical location, class and race. Those who lack power find themselves at the peripheral of advantage from governance of water services.

This thesis thus argues that the iconic slogan ‘water is life’ must be understood in both a biological and social sense. The social sense entails participatory living of citizens as equals in a community with others. The human right to water guarantees such living by recognising people as agents who must have power to affect outcomes through genuine participation.

Participation is not a new thing especially in development approaches such as market-centred approaches of 1980s were different forms of participation in projects and programmes by states and development partners were advanced. These approaches resulted in participation as a tyranny, a mechanism of co-optation and legitimising the exercise of unjust power that perpetrates inequalities by sidelining the majority.

The thesis identifies capability approach and the human right based approach to development as offering the best conception of participation away from concentration of power and pursuit of profit in the hands of a few elite. Capabilities and human rights treat people as human beings with the dignity and respect owed to every human being as a moral being and understand development as the development of certain human abilities or capabilities. This development of people and communities, as opposed to goods and services, is only possible if people participate effectively in the governance of development processes. Their emphasis is to go beyond ensuring the benefit of ‘having’ for instance water to also embrace the benefit of ‘being’ an equal citizen, sharing the benefits of ‘participatory living’ in a community of equals.

The advantage of the human right based approach is that it has a strong foundation in law that compels states to act in a certain way to ensure legally recognised claims. The thesis establishes that there is a legally protected claim to water under the human right to water which is binding on states although the human right to water is unenumerated in the mainstream human rights treaties except for specified groups and situations. The claim to

water under this human right is both in terms of a substantive normative standard and a procedural normative standard that guarantees beyond the human mode of ‘having’ into ‘being’ i.e. being a full member of society. These claims are legally binding and therefore enforceable against states. The human right to water requires states to adopt legislative and other non legislative measures that result in adequate and accessible water of good quality for all. States must take immediate, deliberate and concrete steps that include the formulation and implementation of national water policies and strategies in a transparent and non-discriminatory manner to realise the human right to water. The formulation and implementation of national policies and strategies must ensure participation, human agency and dignity of all those affected by such decisions.

The recognition of the human right to water in Malawi will provide an effective way of overcoming the lack of power and the ‘tyranny of participation’ which characterise water services in rural and peri-urban areas.



.Key Words

Accountability

Claiming rights

Community

Good governance

Governance

Human rights

Malawi

Participation

Right to water

Water

Water resource management

Women



List of Abbreviations

CEDAW	-	Convention on the Elimination of Discrimination against Women
CESCR	-	UN Committee on the International Convention on Economic,
CPR	-	Civil and Political Rights
CRC	-	Convention on the Rights of the Child, 1989
GA	-	General Assembly
GC	-	General Comment
HDI	-	Human Development Index
HRC	-	United Nations Human Rights Committee
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
KMU	-	Kiosk Management Unit
UWC	-	Utility Water Company
WHO	-	World Health Organisation
WPC	-	Water Point Committees
WUA	-	Water Users Association

List of Tables

Table 3.1 Level of service and likely level of access or quantity collected	78
Table 5.1 Summary on Legislative Recognition of the Human Right to Water.....	193
Table 6.1 Categories of Respondents	218
Table 6.2 Factors Contributing to or Inhibiting Community Voice	240
Table 6.3 Women Representation in WUA Boards.....	248



List of Figures

Figure 5.1 Map of Malawi 165

Figure 6.1 Map of Malawi Showing Study Areas229

Figure 6.2 Peri-urban WUA Model.,238



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Dedication

To NyaPhakati, NyaMbizi and NyaUzembe who were here...

And to my daughter Thumelo who is here now.



Table of Contents

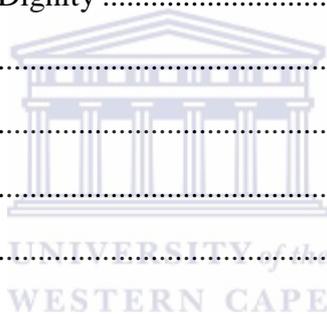
Cover Page	i
Plagiarism Declaration.....	ii
Abstract.....	iii
Key Words	v
List of Abbreviations	vi
List of Tables	vii
List of Figures.....	viii
Acknowledgements.....	ix
Dedication.....	x
Table of Contents.....	xi
	
Chapter One: Introduction	0
1.1 Water is life!	0
1.2 Three Models of Water Governance.....	4
1.3 Overcoming the ‘tyranny of participation’	10
1.3.1 The Capability Approach to Development	10
1.3.2 The Human Rights Based Approach to Development.....	14
1.4 Research Objectives and Questions	189
1.5 Research Methodology	20
1.6 Chapter Outline.....	20
Chapter Two: The Emergence of an International Human Right to Water	212
2.1 Introduction.....	21
2.2 Emergence of the Human Right to Water under the United Nations	223
2.2.1 Incremental Evolution.....	23

2.2.2 Ongoing Opposition and Critique.....	34
2.2.3 Clarifying the Legal Foundations: Teleological Interpretation	35
2.2.4 The Indivisibility of Economic, Social and Cultural Rights and Civil and Political Rights	42
2.2.5 Convergence and Consensus.....	48
2.3 The Human Right to Water in the African Regional Human Rights System	50
2.3.1 Emergence of the Human Right to Water in Africa	50
2.3.2 The Human Right to Water under the African Charter.....	51
2.4 The Human Right to Water as Part of Customary International Law	56
2.5 Conclusion	61
Chapter Three: Substantive Content of the Human Right to Water	65
3.1 Introduction.....	65
3.2 Definition and Terminology	66
3.3 Substantive Content	72
3.3.2 Availability	73
3.3.3 Accessibility.....	75
3.3.3.1 Adequate Quality	73
3.4 State Obligations: Tripartite Typology	77
3.4.1 Obligation to Respect.....	80
3.4.2 The Obligation to Protect.....	80
3.4.3 The Duty to Fulfil	82
3.5 Nature of Positive State Obligations.....	83
3.5.1 Progressive Realisation.....	84
3.5.1.1 Maximum Available Resources	85
3.5.1.2 Duty to Take Steps.....	86
3.5.1.3 Not to Take Retrogressive Steps.....	87
3.5.1.4 Non-Discrimination and Protection of Vulnerable Groups	88
3.5.2 Identifying Immediately Enforceable Entitlements	90
3.5.2.1 Reasonableness Approach	90



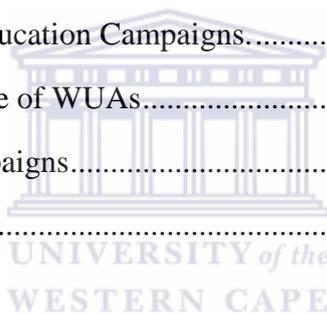
3.5.2.2 Minimum Core Obligations	96
3.5.2.3 Integrating Reasonableness and Minimum Core	101
3.6 Duty Bearers in Realising the Human Right to Water.....	102
3.7 What Does the Human Right to Water Mean for the Poor?	105
3.8 Conclusion	106
Chapter Four Participation and Agency in Realising the Human Right to Water	108
4.1 Introduction.....	108
4.2 General Comment 15 and Participation in Water Governance.....	109
4.3 The Right to Participate in International Human Rights Law	114
4.3.1 The UN Human Rights System.....	114
4.3.2 African Regional Level.....	120
4.3.3 Foundations of the Human Right to Participate: Rights to Dignity and Equality	124
4.3.3.1 Human Dignity.....	124
4.3.3.2. Equality and Non-discrimination.....	128
4.3.4 Domestic Legal Enforcement	136
4.4 Conceptualising the Participatory Component of the Human Right to Water	146
4.4.1 Involving People in Setting out the Terms of Engagement	147
4.4.2 Creating Space for Participation	149
4.4.3 Enabling People to Access Participatory Processes.....	152
4.4.4 Guaranteeing Free and Safe Participation.....	153
4.4.5 Ensuring Access to Information.....	154
4.4.6 Providing Reasonable Opportunity to Influence Decision-Making.....	155
4.5 Conclusion	158
Chapter Five: Human Right to Water in Malawi.....	159
5.1 Introduction.....	159
5.2 Situating Malawi: Hydrological, Economic, and Political Context.....	160
5.2.1 Geographical/ Hydrological Background	160

5.2.2 Economic and Social Context.....	161
5.2.3 Political Context.....	164
5.2.4 Water Services	173
5.2.4.1 Peri-urban Areas	174
5.2.4.2 Rural Area.....	177
5.3 Legal and Policy Framework: Human Right to Water	178
5.3.1 International Law as Source of Law	178
5.3.2 The Constitution and the Bill of Rights	180
5.3.2.1 The Right to Development.....	181
5.3.2.2 Justiciability of the Right to Development and Water.....	183
5.3.2.3 Nature of Positive Obligations.....	187
5.3.2.4 The Right to Human Dignity	189
5.3.2 Policy Framework.....	190
5.3.3 Legislative Framework	191
5.4 The Right to Participate	196
5.4.1 The Constitution	196
5.4.2 Policy Framework.....	197
5.4.3 Legislative Framework	197
5.5 Participatory Water Governance.....	199
5.5.1 Historical Context: Shift from Government to Governance.....	199
5.5.2 Free, Active and Meaningful Participation.....	203
5.5.2.1 Availability	203
5.5.2.2 Accessibility.....	206
5.5.2.3 Quality.....	206
5.5.3 Women and Participation.....	208
5.5.3.1 Women’s Role and Inclusion in Governance of Water Services.....	208
5.5.3.2 Measures to Substantive Equality.....	210
5.6 Conclusion	214



Chapter Six: Field Research on Community Participation in Water User Organisations	216
6.1 Introduction.....	216
6.2 Research Process.....	217
6.2.1 Stages in the Research	217
6.2.1.1 Phase One: Human Rights, Gender and Water Governance Research Project..	217
6.2.1.2 Phase Two: Progressive Uncovering of the Human Right to Water and Participation through Grounded Research	218
6.1.2 Methodological Approach	219
6.2.3 Site of Investigation for Primary Data Collection and Analysis.....	223
6.2.3.1 Zomba East	224
6.2.3.2 Chagwa	225
6.2.3.3 Mtandile	226
6.2.3.4 Nkolokoti-Kachere.....	227
6. 3 Access to Water: Issues and Challenges.....	228
6.3.1 Water as a Human Right.....	228
6.3.2 Duties and Duty Bearers	229
6.3.2.1 Government as Primary Duty Bearer.....	229
6.3.2.2 Members of Parliament as Duty Bearers	231
6.3.2.3 Individuals and Community Members as Duty Bearers	232
6.3.3 Awareness is Key.....	233
6.4. Findings on Participation and Agency.....	233
6.4.1 Bringing People Together to Solve Water Problems	233
6.4.2 Opportunity to Participate: Accessibility and Affordability.....	240
6.4.2.1 Open and Inclusive	240
6.4.2.2 Access to Information	243
6.4.2.3 Meeting Opportunity Costs.....	244
6.3.2.4 Strengthening Capacities	245
6.4.3 Participatory Parity	246
6.4.4 Empowerment and Agency.....	251

6.4.4.1 Forging New Relations	252
6.4.4.2 Personal Economic Benefit.....	253
6.4.4.3 The Real Benefit	2534
6.5 Discussion and Conclusion.....	233
Chapter Seven: Conclusion.....	257
7.1 Development and the Crisis in Water Services	257
7.2 The Human Right to Water at the Heart of People Centred Development.....	259
7.3 Community Participation and the Human Right to Water in Malawi	262
7.4 The Way Forward in Realising the Human Right to Water in Malawi through Community Participation	265
7.4.1 Law reform.....	265
7.4.2 Public Awareness and Education Campaigns.....	265
7.4.3 Institutional Independence of WUAs.....	266
7.4.4 Strategic Litigation Campaigns.....	266
Bibliography	Error! Bookmark not defined.



Total Word Count of Thesis 120, 134

Chapter One

Introduction

1.1 Water is life!

The significance of water for human beings across the world can be summarised in the phrase ‘water is life’. This iconic phrase is ordinarily interpreted to mean that water is necessary for biological survival, growth and flourishing.¹ Indeed it is. Water is a critical resource for human survival, health, growth and development. First of all, drinking water is an important contributing element to nearly every bodily function, including waste disposal and the healthy functioning of the immune system.² Without water, the human body cannot survive for more than a few days.³ Secondly, water is required for proper human health and hygiene to prevent and eradicate diseases, like diarrhoea, that take a heavy toll on human lives, particularly on children.⁴ Access to water, sanitation and hygiene are recognised as preventative measures which are crucial in improving public health.⁵ Thirdly, water is essential for food production in order to prevent starvation and malnutrition.⁶

Water is also important for economic activities such as agriculture, industry, energy and transport. It thus contributes to social well-being, growth, sustainable development and

¹ *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 1: “Cultures in all parts of the world acknowledge the importance of water. Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die” (per O’Regan J).

² Curry E ‘Water scarcity and the recognition of the human right to safe freshwater’ (2010) 9 *North Western University Journal of International Human Rights* 103. The human body is composed of more than 60 percent water. The blood is 92 percent water, while the brain and muscles are 75 per cent water, and bones consists approximately 22 per cent water. Water Facts available at <http://www.waterinfo.org/resources/water-facts> (accessed 9 November 2011).

³ World Health Organisation (WHO) ‘Right to water’(2003) available at http://www.who.int/water_sanitation_health/en/righttowater.pdf (accessed on 12 November 2011).

⁴ Pruss-Ustun A, Bartram J, Clasen T et al ‘Burden of disease from inadequate water, sanitation and hygiene in low- and middle-income settings: a retrospective analysis of data from 145 countries’ (2014) 19:8 *Tropical Medicine and International Health* 894 – 905 stating that inadequate drinking water, sanitation and hygiene cause diarrheal which approximately 2,300 people per day. It is the second leading cause of child death in the world. See WHO ‘Diarrhoea : why children are still dying and what can be done’ (2009) available on http://www.unicef.org/health/files/Final_Diarrhoea_Report_October_2009_final.pdf (accessed on 2 March 2011) see also WHO Water supply, sanitation and hygiene development available at http://www.who.int/water_sanitation_health/hygiene/en/ (accessed 8 November 2011).

⁵ See Bartram J & Cairncross S ‘Hygiene, Sanitation and Water: Forgotten Foundations of Health’ (2010) 7:11 *PLoS Med* available at <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1000367> (accessed on 5 April 2014).

⁶ UN-Water ‘Water and Food’ (2014) available at <http://www.unwater.org/topics/water-and-food/en/> (accessed 16 December 2014).

poverty reduction.⁷ This suggests that the iconic phrase ‘water is life’ also has a broader meaning which is not ordinarily highlighted. Water is indispensable for establishing communities and leading a communal life worthy of human dignity and human well-being. As a basic social or public good, water is life to, or the lifeblood of, every democratic political community. Water is the basis of ‘participatory living’.⁸

This thesis is dedicated to this second meaning of the phrase ‘water is life’. It explores how the struggle for equitable access to water can give life to community through mobilisation and participation, not simply as an instrumental necessity, but as the driving spirit or ‘telos’ and thus the realisation of the human right to water itself. Water is a cross-cutting element that constitutes an intrinsic and extrinsic element in realising human rights.⁹

Although ‘water is life’ in both senses of the term, it is not always protected, developed, shared or utilised as a common good with universal access as priority.¹⁰ The world is experiencing a water crisis. Up to 750 million people in the world lack access to improved sources of water.¹¹ As a result of this, more than 840,000 people die every year from water related diseases due to reliance on unsafe water to meet human needs.¹² Up to 82 per cent of those without access to safe water are the poor living in rural areas and nearly half of these are in Sub-Saharan Africa.¹³ Lack of access to safe water is closely related to poverty as two in three people who lack access to water survive on less than \$2 a day and one in three on less than \$1 a day.¹⁴ Distribution of wealth mirrors distribution of access to water. Access to piped water into the household averages about 85 per cent for the wealthiest 20 per cent of the population, compared with 25 per cent for the poorest 20 per cent.¹⁵ The convenience of having improved and convenient access to water services within the household, translates

⁷ See generally United Nations Development Programme (UNDP) *Human Development Report 2006 Beyond Scarcity: Power, poverty and the global water crisis* (2006).

⁸ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 92 (per Froneman J).

⁹ See UN Committee on Economic, Social and Cultural Rights General Comment No 15, Right to Water (2002) UN Doc E/C.12/2002/11 (GC 15).

¹⁰ Petrella R *The Water Manifesto: Argument for a World Water Contract* (2001) 6. *Mazibuko v City of Johannesburg* para 2: “Although rain falls everywhere, access to water has long been grossly unequal” (per O’Regan J).

¹¹ World Health Organization and UNICEF Joint Monitoring Programme (JMP) *Progress on sanitation and drinking-water - 2014 update : Executive Summary* (2014) 6.

¹² Pruss-Ustun A, Bartram J, Clasen T *et al* ‘Burden of disease from inadequate water, sanitation and hygiene in low- and middle-income settings: a retrospective analysis of data from 145 countries’ (2014) 19: 8 *Tropical Medicine and International Health* 894. See also Water.org. ‘Millions Lack safe water’ available at <http://water.org/water-crisis/water-facts/water/> (accessed 12 February 2015).

¹³ JMP (2014) 7, 29.

¹⁴ UNDP (2006) 7.

¹⁵ UNDP (2006) 7.

into adequate access to water for human needs and well-being.¹⁶ This access goes hand in hand with many benefits, including better health, increased productivity and better education, among others.

Globally, the urban poor living in low-income, informal settlements and other peripheral areas or towns are typically less likely to access safe water.¹⁷ Women disproportionately bear the burden of the lack of accessible water, both in terms of time and distance to collect water and because the onus is on the women to provide water for cooking and cleaning within the household, caring for family members, and tending to those who suffer from diseases such as HIV and AIDS.¹⁸ The stark geographic, socio-cultural and economic inequalities in access to water indicate that the global water crisis is overwhelmingly a crisis for marginalised social groups.¹⁹ This is also the case in Malawi, where the attention of this thesis is focussed.

The UNDP argues that, around the world, unequal relations of power, poverty and inequality are at the root of the current water crisis. Imbalances of power, poverty and inequality keep the poor from demanding better water policies and better water governance.²⁰ Mollinga argues that it is the lack of focus on the political aspect of water, or the second sense of the phrase ‘water is life’, that contributes to poor water governance.²¹ He states that politics is about the acquisition of power.²² Francis and Firestone make a similar point when they state that without power, the financial and technology resources necessary to establish infrastructure for water services are granted to those with vested interests, while communities that need these resources the most do not benefit from them.²³ Unless the poor gain the ability, through community mobilisation and participation, to change the fundamental power

¹⁶ UNDP (2006) 7.

¹⁷ JMP (2014) 14 -30.

¹⁸ UNDP (2006).

¹⁹ JMP (2014) generally; UNDP (2006) 7.

²⁰ See JMP (2014) vi & 20; UNDP (2006) v; World Water Assessment Programme(WWAP), *United Nations World Water Report: Water for People, Water for Life* (2003) establishing that the crisis is a governance crisis due to social, economic and political challenges; See Gupta J ‘An essay on global water governance and research challenges’ in Van der Valk MR & Keenan P (eds) *Principles of good governance and Different Water Governance Levels* (2011) 5, 5- 12, arguing that the crisis is as a result of failure of institutions (informal and formal norms, principles, rules and structures

²¹ Mollinga PP ‘Water, politics and development: framing a political sociology of water resource management’ (2008) *Water Alternatives* 7, 8.

²² Mollinga PP (2008) generally. See also Gupta J, Pahl-Wostl C & Zondervan R ‘Glocal’ water governance: a multi-level challenge in the anthropocene’(2013) 5 *Current Opinion in Environmental Sustainability* 573 -580 also pointing out that the water crisis is deeply a political challenge that cannot simply be addressed through technocratic and depoliticised management and engineering process.

²³ Francis R & Firestone L ‘Implementing the human right to water in California's Central Valley: Building A democratic voice through community engagement in water policy decision making’ (2010-2011) 47 *Willamette Law Review* 495, 518 -519.

imbalance in water governance and influence the processes and actors that determine the distribution of water services, there is no hope for justice in water governance.

In this thesis ‘water governance’ is understood broadly as ‘the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different levels of society.’²⁴ Water governance is thus a unifying concept that ‘encompasses laws, regulations, and institutions but it also relates to government policies and actions, to domestic activities, and to networks of influence, including international market forces, the private sector and civil society.’²⁵ The scope of the thesis is limited to a study of the governance of water services in rural and peri-urban contexts.

Unfortunately, over the past few decades, the water sector has not focused on opening up the governance of water services to the poor to articulate and exercise their demands, if not basic human right, to access water.²⁶ Domestic water users in poor communities have typically fallen prey to the exclusionary effects of state bureaucracies, profit driven private companies, and co-opting strategies of community involvement. The recent history of water governance can, at the risk of over-simplification, be described as a shift from modernisation in the 1960s, State intervention in the 1970s, market liberalisation in 1980s, and community participation and empowerment in the 1990s.²⁷

1.2 Three Models of Water Governance

During the 1970s, the focus in the water sector had been on developing top-down engineering solutions and top-down bureaucratic allocations.²⁸ Over the past decades, spearheaded by the International Decade on Drinking Water and Sanitation in 1980s, this approach gradually lost

²⁴ Global Water Partnership ‘Governance and water’(2002) available at <http://www.gwp.org/en/ToolBox/CROSS-CUTTING-ISSUES1/Governance-and-Water/> (accessed 22 May 2015).

²⁵ Rogers P & Hall AW ‘Effective governance’ (2003) *Global Water Partnership Technical Committee Background Paper* 7 4. See also Franks T ‘Water governance and poverty: a framework for analysis’ (2007) *7Progress in Development Studies* (2007) 291, 292.

²⁶ Plummer J & Slaymaker T ‘Rethinking governance in water services’ (2007) *Working Paper* 284, Department for International Development (DFID) *Governance, Development and Democratic Politics: DFID’s Work in Building More Effective States* (2007) 6.

²⁷ Ellis F and Biggs S ‘Evolving Themes in Rural Development 1950s- 2000s’ (2001) 19 (4) *Development Policy Review* 437.

²⁸ Katko TS, Kurki VO, Juuti PS et al *Water services management and governance lessons from a sustainable future* (2013) generally. See also Razzaque J ‘Public participation in water governance’ in Dellapenna JW & Gupta J (eds) *The Evolution of the Law and Politics of Water* (2009) 353, 354-356.

its legitimacy and feasibility.²⁹ Disappointing results from (often inappropriate) investment in technological innovations and infrastructure development, led to new questions regarding how decisions were made and who the decision makers were.³⁰ This coincided with the global trend away from strong centralised state ‘government’, to more decentralised and democratic ‘governance’. In the latter, the focus fell on people and the social and natural environment on which they depend.³¹ The initial idea was to bring people closer to government and government closer to the people, so that the principles of democracy and inclusivity could be more easily applied.³²

According to Stoker, this shift from a strong central government to decentralised and democratic governance removed government as the single source of decision-making authority.³³ In governance, government adopted a new governing style where multiple actors interact and influence each other.³⁴ These actors were often drawn from, but also beyond, government. New relationships of people, power and politics resulted from this shift, moving away from the command and control approach, without necessarily empowering water users.³⁵

The neoliberal refrain of the 1980s challenged the older state-centric governance options. However, because of its emphasis on markets and market power, the poor, who do not have the power to enter into these markets, remained largely excluded. Neoliberalism was and is mainly advanced as a solution to economic growth, social equity and environmental problems inspired by the notion of the free market developed in North-Atlantic states (Europe or the West).³⁶ The state is perceived as inefficient and the call is for the state to retreat, allowing free market mechanisms to foster economic development.³⁷ Economic growth is measured

²⁹ Kemerink J, Mbuvi D & Schwartz K ‘Government shifts in water services sector: a case study of the Zambia water services sector’ in KatkoTS, Juuti PS & Schwartz K (eds) *Water services management and governance lessons from a sustainable future* (2013) 3, 5 See also Bardhan P ‘Decentralisation of governance and development (2002) *Journal of Economic Perspective* 185.

³⁰ Tropp H ‘Water governance: trends and needs for new capacity development’ (2007) 9 *Water Policy* 19, 20.

³¹ Razzaque J (2009) 355.

³² Goldin, J, ‘Water Policy in South Africa: Trust and Knowledge as obstacles to reform’ (2010) 42:2 *Review of Radical Political Economics* 195 – 212.

³³ Stoker G ‘Governance as theory: five propositions’ (1998) 50 *International Social Science Journal*, 17, 21.

³⁴ Stoker G (1998) 17 & 19.

³⁵ DFID (2007) 6.

³⁶ Rogers P & Hall AW (2003) 12 See also Harvey D *Brief History of Neoliberalism* (2005) generally.

³⁷ Munck R ‘Neoliberalism and politics, and the politics of neoliberalism’ in Saad-Filho A & Johnston D (eds) *Neoliberalism: A Critical Reader* (2005) 60, 61 – 63. See also Friedman M *Capitalism and Freedom* (1962) 11 arguing that the State’s role must be confined to fostering competitive markets, regulation and enforcement of law and order to

as the Gross National Product (GNP) per capita and is heralded as the proxy for well-being. Neoliberalism pursues efficiency and productivity in the use of natural resources, such as land and water and social services, while treating non-profitable equity concerns as subsidiary.³⁸ Neo-liberalism is strongly associated with privatisation of public services and the State's withdrawal of subsidies and involvement in the provision of social goods.³⁹ With regards to water, the newly discovered markets and efficiency considerations skewed allocation in favour of those with the means to pay, thus trading off equity against efficiency goals.⁴⁰ Market-led government relied and continues to rely on price as a mechanism that allows millions of people to make decisions for themselves, but also face up to the full cost and consequences of decisions made.⁴¹

However, markets do not promote equal access to power or participation in governance. In fact, market or pricing mechanisms undermine social goals related to promoting poor people's access to power.⁴² It emphasises inclusion of more non-state actors in governance, without guaranteeing influence or meeting the normative requirements of levelling the playing field for equal participation of all stakeholders, most notably water users.⁴³ Further, according to Munch, neoliberalism approaches politics just like any other commodity, thereby undermining participation and equity.⁴⁴ The rules of the market apply to politics, with money becoming the means to political influence. Osborne and Gaebler warn that markets are impersonal, unforgiving, and, even under the most structured circumstances,

preserve and protect freedom.

³⁸ See generally Shiva V *Water Wars* (2002); Kohl BH & Farthing LC *Impasse in Bolivia Neoliberal Hegemony and Popular Resistance*.(2006); Lobina, E & Hall, D *Water Privatization and Restructuring in Latin America* (2007). See also Williamson J 'Democracy and the "Washington Consensus"' (1993) *World Development* 1329-1336.

³⁹ Harvey D *Brief History of Neoliberalism* (2005) generally; Teubner G 'After privatisation? The many autonomies of private law' (1998) 51 *Current Legal Problems* 393, 393; McDonald DA & Ruiters G 'Theorising water privatisation in Southern Africa' in McDonald DA & Ruiters G(eds) *The Age of Commodity: Water Privatisation in southern Africa* (2005) 13 -42, Bakker K 'Neoliberalizing nature? Market environmentalism in water supply in England and Wales' (2005) 95:3 *Annals of the Association of American Geographers* 542,543; Chirwa DM' Privatisation of water in Southern Africa: a human rights perspective' (2004) 4 *African Human Rights Law Journal* 218, 221.

⁴⁰ Roa-García, M.C. 'Equity, efficiency and sustainability in water allocation in the Andes: Trade-offs in a full world' (2014) 7:2 *Water Alternatives* 298, 299.

⁴¹ Osborne D & Gaebler T *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1993) 285.

⁴² Lemos MC & Agrawal A 'Environmental governance' (2006) 31 *Annual Review of Environment and Resources* 297,311.

⁴³ Lemos MC & Agrawal A (2006) 313.

⁴⁴ Munch R (2005) 66; McCorquodale R & Fairbrother R 'Globalization and human rights' (1999)21*Human Rights Quarterly* 735, 754.

inequitable. Markets should therefore be balanced against society centred governance.⁴⁵ This is because the minimalist State shifts the balance of power from the public interest or common good to private interests or goods; with grave impact on the State's ability to promote democracy and even human rights.⁴⁶ Muzur, reinforcing this argument, notes as follows:

The state changes from being an active policymaker to a passive unit of administration, the capacity of people to participate in defining a political agenda that expresses a genuine concern for human rights and human dignity declines.⁴⁷

Hence the new market-led governments of the 1980s, just like the old state centred governments of the 1970s, were also non-participatory. Market freedom simply did not translate into political freedom. This suggests a third alternative to water service management: society or community centred governance.

Society-centred governance emphasises shared governance through networking and partnerships with a wide range of non-state and non-market actors, such as civil society associations, NGOs and multi-stakeholder interest-groups.⁴⁸ Although the role of the State is minimised, this approach typically does not suggest a complete withdrawal of the State but rather emphasises the limits of the State's capacity and authority.⁴⁹ An example is co-management in environmental governance, involving sharing power and responsibilities between the state and communities or user groups.⁵⁰ It is based on the notion that the people most affected by environmental decisions must take part in such decisions. Effective dialogue and participatory democracy is promoted in this formalised arrangement which is accompanied with institution and capacity building and knowledge sharing.⁵¹ This, it is claimed, leads to an increase in justice, equity, and empowerment.⁵² Biermann and others have argued that environmental problems are inherently political, hence they require effective

⁴⁵ Osborne D & Gaebler T (1993) 302.

⁴⁶ Mazur RE 'Realization or deprivation of the right to development under globalization? Debt, structural adjustment, and poverty reduction programs' (2004) 61 *GeoJournal* 61.

⁴⁷ Mazur RE (2004) 65.

⁴⁸ See generally Pierre J & Peters GB *Governance, Politics and the State* (2000); Stoker G (1998).

⁴⁹ Pierre J & Peters GB *Governance, Politics and the State* (2000) 25; Stoker G (1998)17 stating that 'the essence of governance is its focus on governing mechanisms which do not rest on recourse to the authority and sanctions of government.

⁵⁰ Berkes F 'Evolution of co-management: Role of knowledge generation, bridging organizations and social learning (2009) 90:5 *Journal of Environmental Management*, 1692; Lemos MC & Agrawal A (2006) 311.

⁵¹ Berkes F (2009) 1692.

⁵² Berkes F (2009) 1692, Lemos MC & Agrawal A (2006)311.

voice and choice for local communities; to choose policies that they see as both equitable and effective.⁵³ This increases the legitimacy of decision, and when coupled with greater transparency and information disclosure, empowers individuals and communities to hold government accountable.⁵⁴

In spite of the promise of society centred co-government, the track record of this third alternative has also been weak regarding poverty reduction and the empowerment of the marginalised. In fact, the shift to society has ironically resulted in the reinforcement of local elites, or the strengthening of state control.⁵⁵ What went wrong?

The concept of effective participation became associated with liberal good governance practices linked to neoliberalism underpinnings. Involving users in management is understood as a means to an end. This starting point inhibited participation that could otherwise be empowering and transformative of power relationships. A good example of this is community participation in the governance of water services in rural areas. Society based development approaches demanded that poor people must have a major role in development.⁵⁶ According to Goldin, it was Chambers and his contemporaries who cemented participation during the 1990s within the development pantheon.⁵⁷ Introducing phrases such as ‘putting the last first’ he and others emphasised the need for new approaches to ensure voices of the poor in development practice. International development organisations, governments and non-governmental organisations (NGOs) all adopted this participatory approach during the 1990s as part of their projects and programmes, especially in rural development. As regards rural water supply projects, participatory approaches were used to support and engage communities in the design and implementation of water supply systems.⁵⁸

⁵³ Biermann F, Abbott K, Andresen S *et al* ‘Transforming governance and institutions for global sustainability: key insights from the Earth System Governance Project’(2012) 17 available at http://www.ieg.earthssystemgovernance.org/sites/default/files/files/publications/ESG-WorkingPaper-17_Biermann-et-al.pdf (accessed on 12 August 2013).

⁵⁴ Biermann F, Abbott K, Andresen S *et al* (2012) 16.

⁵⁵ Berkes F (2009)1692.

⁵⁶ See Harvey PA & Reed RA ‘Community-managed water supplies in Africa: Sustainable or dispensable? (2007) 42:3 *Community Development* 365 -378 See also Moriarty P, Smits S, Butterworth J *et al* ‘Trends in rural water supply: towards a service delivery approach’ (2013) 6:3 *Water Alternatives* 329 -349.

⁵⁷ For example Chambers R *Rural development - Putting the First Last* (1983); Cernea MM *Putting People First: Sociological Variables in Rural Development* (1985); Salmen LF *Listen to the people* (1987). Nelson N & Wright S ‘Participation and power’ in Nelson N & Wright S (eds)*Power and Participatory Development : Theory and Practice* (1995)1, 6 stating that the grassroots organisations at the United Nation Economic Commission in Africa conference held in Arusha in 1990 calls for popular participation and transformation partly contributed to initiation of participation in development.

⁵⁸ Moriarty P, Smits S, Butterworth J *et al* (2013) 331.

Community participation was ideally meant to empower poor communities through opportunities to take part in decisions regarding the planning and implementation of water supply projects.⁵⁹

However, when the new discourse on participation was linked to the neoliberal approach to governance, the result was the demand responsive approach (DRA) championed by the World Bank.⁶⁰ The DRA emphasised cost recovery and brought water users into the process of selecting, implementing and, ultimately financing the long term delivery of water services. This model involved a number of elements. Initially there is an expression of demand for water, which is basically an expression of willingness to pay for the type or level of water supply service. This is followed with informed involvement in technological choice and location selection. Then the community must provide labour and materials as their contribution to investment costs (sweat capital). The community must also make financial contributions to and assume responsibility for the operation and management costs. The community therefore must select a management system mainly involving user committees that set and collect the water tariffs and manage or implement operation and maintenance activities.⁶¹ This soon became the preferred approach to rural supply, because it promoted greater responsibility on the community as the end users of the system to draw on commonalities and sustain the service benefits.

However, due to questionable assumptions, tools and techniques relied upon, and pragmatic policy concerns in view of withdrawal of the State from the provision of public services, these community participation expectations have generally not resulted in processes that offered empowerment or opportunity for real change in lives.⁶² The main source of the problems in facilitating this approach was underlying assumptions based on cultural idealisation of rural communities and interest in maintaining status quo of dominant political structures.⁶³ Assumptions such as ‘community cohesion, sense of ownership being meaningful proxy for legal ownership, and willingness and ability to form institutions and volunteer time to manage the technical systems’ all proved to be myths.⁶⁴ The lack of engagement with power structures and barriers, led to an emphasis on form rather than

⁵⁹ Harvey PA & Reed RA (2007) 368.

⁶⁰ Harvey PA & Reed RA (2007) 369; Moriarty P, Smits S, Butterworth J *et al* (2013) 331.

⁶¹ Harvey PA & Reed RA (2007) 369; Moriarty P, Smits S, Butterworth J *et al* (2013) 331.

⁶² Harvey PA & Reed RA (2007) 367-368; see Nelson N & Wright S (1995) generally.

⁶³ Harvey PA & Reed RA (2007) 367-368; Moriarty P, Smits S, Butterworth J *et al* (2013) 331; Leal PA (2011) 76.

⁶⁴ Moriarty P, Smits S, Butterworth J *et al* (2013)331; Harvey PA & Reed RA (2007) 367-368.

substance, hence resulting in diluting and depoliticising participation not to disturb centralised frameworks or dominant power interests.⁶⁵

Goldin contends that participation soon became a liberal co-optation mechanism, whereby new actors were brought on board as a means of averting any threats to its stability and ‘business as usual’ activities. People were brought in from the margins to the mainstream without the intention of hearing and responding to their voices and demands.⁶⁶ Participation became a means to facilitate the illegitimate or unjust exercise of power that perpetuates structures of inequality and oppression.⁶⁷ Hence, at the end of the 1990s, scholars such as Cooke, Kothari and Williams, concluded that participation had become ‘tyrannical’.⁶⁸

Thus the problem became how to address the ongoing marginalisation of poor communities in water governance, given the failures or limitations of state power, market exploitation and community co-option?

1.3 Overcoming the ‘Tyranny of Participation’

As the pathologies of the three approaches mentioned above began crystallising during the 1970s, 1980s, and 1990s, two alternative approaches to development were slowly gaining prominence. Known as the capabilities approach to development and the human rights approach to development, respectively, these approaches promised to place people first. The insistence on the primacy of people and their well-being as a central focus of development, presented community participation as an end in itself and valued for its intrinsic value.⁶⁹ These two approaches shared a concern for equity and justice, although they advanced different normative understandings of just and equitable development and water governance.⁷⁰

⁶⁵ Goldin JA ‘The participatory paradigm: anathema, praise and confusion’ in Harris LM, Goldin JA & Sneddon C (eds) *Contemporary Water Governance in the Global South: Scarcity, Marketization and Participation* (2013) 181; Leal PA (2011) 76.

⁶⁶ Goldin JA (2013) 181.

⁶⁷ Cooke B & Kothari U ‘The case of participation as tyranny’ in Cooke B & Kothari U *Participation: The New Tyranny?*(2001) 1, 4; Leal PA ‘Participation: the ascendancy of a buzzword in neo-liberal era’ in Cornwall A (ed) *The Participation Reader* (2011) 70, 75.; Midgley J ‘Community participation: history, concepts and controversies’ in Cornwall A (ed) *The Participation Reader* (2011)175, 178.

⁶⁸ See generally Cooke B & Kothari U (2001); Williams G ‘Evaluating participatory development: tyranny power and (re) politicization’ (2004) 25:3 *Third World Quarterly* 557 -578.

⁶⁹ UNDP *Human Development Reports 2000: Human Rights and Human Development* (2000) 2

⁷⁰ UNDP (2000) 2.

1.3.1 The Capability Approach to Development

The capability approach, also known as the capabilities or human development approach, emerged as a new way of defining development in terms that differed dramatically from the neoliberal conception of market growth. This new conception involved a shift from market commodities to human capabilities; from a focus on market generated profits, to the ability or capability of ordinary people to flourish as human beings. Sen, credited as pioneer of the capability approach, argued that the focus of development should be the real opportunities available to each person, to enhance the lives people lead and the freedoms they enjoy.⁷¹ Freedom is conceived not in liberal terms but as capabilities; which Sen argued was the best way of thinking about the goals of development.

Capabilities represent the opportunities a person has to pursue different lifestyles and the process of choice about which opportunities to pursue.⁷² According to Sen, different contexts and situations will require different primary goods to ensure enjoyment of freedoms and therefore well-being. He states that there are ‘a plurality of different features of our lives and concerns’ which include being able to avoid starvation, undernourishment, being literate and more complex activities or personal states, such as taking part in the life of the community and having self-respect.⁷³ Development through participation must coordinate what primary goods must be prioritised to ensure the different activities, or what Sen also calls a series of human ‘functionings’.⁷⁴ Participation in public reasoning and scrutiny based on processes which are open to a diversity of voices and open-ended discussion helps in arriving at what is just.⁷⁵

Participation, according to Sen, has both instrumental and intrinsic value. Its instrumental value includes ensuring that there is policy response, conceptualisation of needs and assessing and understanding social needs.⁷⁶ Its intrinsic value may be understood in terms of agency which refers to the freedom to set and pursue one’s own goals and interests, which may also include furthering the well-being of others.⁷⁷ Individuals are ‘agents who have

⁷¹ Sen A (1999) 1. See Sen A ‘Development as Capability Expansion’ 46 available at http://morgana.unimore.it/Picchio_Antonella/Sviluppo%20umano/sviluppo%20umano/Sen%20development.pdf (accessed on 12 July 2012). Sen states that ‘the value of the living standard lies in the living, and not in the possessing of commodities, which has derivative and varying relevance.’

⁷² Sen A *Idea of Justice* (2009) 228.

⁷³ Sen A (2009) 233.

⁷⁴ Sen A (1999) 36.

⁷⁵ Sen A (2009) 408-409.

⁷⁶ Sen A (1999) 153.

⁷⁷ Sen A ‘Well-Being, Agency And Freedom The Dewey Lectures 1984’ (1985) LXXXII(4) *The Journal Of Philosophy* 203.

diverse valued goals and commitments on behalf both of themselves and of their society'.⁷⁸ It requires that development policy or evaluation methods must take into account the aspiration and needs of the people affected. They are not to be treated as patients but active agents of change in their individual and communal lives.⁷⁹ Sen avers that 'a person prevented from speaking freely, or from participating in public debates and decisions, is *deprived* of something that she has reason to value.'⁸⁰

Tyranny, censoring, coercion and generating a climate of apprehension is contrary to participation and agency, as it deprives people of their freedom or choice.⁸¹ Sen holds that participation is thus associated with democracies which encompass opportunities of political dialogue on policies and laws, on the one hand, and determining who should govern, guiding principles of governance and holding governors accountable, on the other.⁸² Through elections, multiparty politics, other political rights and investigative journalism, development is advanced as the government has the right political incentive and information to act.⁸³ He points out that the ballot is an inadequate means of expressing public views as it can easily be manipulated or captured.⁸⁴ He advocates for broader democracy, participatory democracy that results in 'government by discussion' through public dialogue and interaction.⁸⁵ This is an important aspect of an enabling environment which is able to bring people's needs to attention and to demand appropriate government responses.⁸⁶

The capability approach has been celebrated for its contribution to our understanding of the link between development and human well-being and thus the design of policies for

⁷⁸ Sen A *Development as Freedom* (1999) 19.

⁷⁹ Ibrahim SS 'From Individual to Collective Capabilities: The Capability Approach as a Conceptual Framework for Self-help' (2006) 7:3 *Journal of Human Development* 400. The writer looks at self help initiatives as an important social structure for expanding poor people's capabilities. He explores the concepts of collective freedoms and collective agency for collective capabilities through Capability approach complimented with literature on collective action, institutions and social capital.

⁸⁰ Sen A (1999) 36-37.

⁸¹ Sen A (2009) 327, Sen A (1999) 152.

⁸² Sen A (1999) 38, 150 -151, 178 -188 stating further that 'governmental response to the acute suffering of people often depends on the pressure that is put on the government through exercise of political rights such as voting, criticising and protesting.

⁸³ Sen A (1999) 178-188.

⁸⁴ Sen A (2009) 324.

⁸⁵ Sen A (2009) 326.

⁸⁶ Sen A (1999) 3 stating that development must remove social unfreedom such as poverty, dictatorships, social and economic deprivation and neglect of public facilities. See Maboloc CRB *The Concept of Human Development: A Comparative Study of Amartya Sen and Martha Nussbaum* (unpublished MA thesis, Linköpings Universitet, 2008) 74-75 stating that Democracy provides the enabling and most conducive environment for people to realise their human potentials because democratic participation gives meaning and substance to the fact that people are the primary stakeholders in development.

sustainable social change.⁸⁷ However, it has also been criticised on different fronts, but mainly that Sen's capability approach is vague and difficult to operationalise in practice.⁸⁸ Comim states that the capability approach does not provide clear practical guidelines to development practitioners and requires simplification and specification.⁸⁹ Similarly Anand, Hunter and Smith point out that Sen has not specified 'how to weight different capabilities, and how to decide which are basic.'⁹⁰ Robeyns writes that it is a framework of thought, a normative tool, but it is not a fully specified theory that gives us complete answers to all our normative questions'.⁹¹ A further drawback is data limitations which would enable an assessment of available capabilities or opportunities, which are difficult to observe unless one acts on them.⁹²

Nussbaum's capability approach goes a long way towards addressing the criticisms against the abstract capability approach developed by Sen.⁹³ Her capability approach introduces the idea of a threshold level of capabilities applicable as an institutional framework for guiding policy and as a basis for constitutional principles.⁹⁴ Citizens can demand from government the basic capabilities which represent real opportunities for well-being based on personal and social circumstances.⁹⁵ Nussbaum has argued that a list of basic capabilities is necessary to ensure human flourishing and human dignity which are prerequisites for a person's ability to develop and realise human power.⁹⁶ The ten capabilities she identifies are life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play and control over one's environment. She argues that this list is open-ended for more specified conception in different backgrounds but provides a common ground that can be agreed on across many traditions.⁹⁷ She therefore defends her list as a set of timeless

⁸⁷ Robeyns, I 'The capability approach'(2011)*The Stanford Encyclopaedia of Philosophy* available at <http://plato.stanford.edu/archives/sum2011/entries/capability-approach/> (accessed on 23 May 2013).

⁸⁸ Comim F 'Operationalizing' Sen's capability approach' (2001) 2 Paper prepared for the Conference, Justice and Poverty: examining Sen's Capability Approach, Cambridge Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.110.4430&rep=rep1&type=pdf> (accessed on 3 October 2012).

⁸⁹ Comim F (2001) 2-3.

⁹⁰ Anand P, Hunter G, Smith R 'Capabilities and Well-Being: Evidence Based on the Sen-Nussbaum Approach to Welfare' (2005) 74 : 1 *Social Indicators Research* 9, 13.

⁹¹ Robeyns I 'Sens Capability Approach and Gender Inequality: Selecting Relevant Capabilities'(2003) 9 :2-3 *Feminist Economics* 61, 64.

⁹² Comim F (2001) 9.

⁹³ Nussbaum, M *Women and Human Development* (2000) 12.

⁹⁴ Nussbaum M (2000) 14.

⁹⁵ Nussbaum M (2000) 2, 78 – 80.

⁹⁶ Nussbaum M (2000) 72.

⁹⁷ Nussbaum M 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 273, 286. See also Nussbaum M *Frontiers of Justice* (2009) 296.

values, open to democratic deliberation and decision regarding implementation in different contexts.⁹⁸

Nussbaum, like Sen, emphasises effective political and social participation in order for people to gain voice to claim economic needs and to lead a good life. This, according to Nussbaum, is one of the basis for capabilities recognised as part of being in control over one's environment. She explains that one of the capabilities is practical reason. This involves the following human capability:

Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.⁹⁹

Nussbaum states further that:

The core idea is that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a 'flock' or 'herd' of animal. A life that is really human is one that is shaped throughout by these human powers of practical reason and sociability.¹⁰⁰

The Human Development Reports (HDR) and the component of Human Development Index (HDI) developed in the 1990 further operationalised the capability approach. The HDI, through a list of capabilities for inter-country comparisons and assessment of public policy within a country, measures the quality of human life around the world.¹⁰¹ The HDR defines development as the process of enlarging people's choices, such as to live a long and healthy life, to be educated and to have access to resources needed for a decent standard of living.¹⁰² Instead of relying on narrow economic metrics, such as growth in GDP per capita, it relies on qualitative indicators to measure development. Such indicators include life expectancy, knowledge and command over resources needed for a decent life.¹⁰³ The HDR highlights the need for pro-poor policies, promotion of broader participation, and equity including the gender dimension.

⁹⁸ Nussbaum MC 'On hearing women's voices: a reply to Susan Okin'(2004) 32: 2 *Philosophy and Public Affairs*193, 197 -201.

⁹⁹ Nussbaum MC 'Capabilities as fundamental entitlements: Sen and social justice' (2003)9 : 2-3 *Feminist Economics* 33, 42.

¹⁰⁰ Nussbaum MC (2000) 72.

¹⁰¹ Each year since 1990, a report is produced on average achievement of development through the list of capabilities that are universally valued and basic to human survival and subject to review and change over time. See generally Fukuda-Parr S 'The human development paradigm: operationalizing Sen's ideas on capabilities' (2003) 9: 2-3 *Feminist Economics* 301 -317.

¹⁰² UNDP *Human Development Report 1990* (1990) 1- 16.

¹⁰³ UNDP (1990) 11 -12.

The focus of the capabilities approach on equity or justice, and the primacy of people and their capacities for human flourishing or well-being, address the issues at the heart of the global water crisis and set the capabilities approach apart from the first three approaches discussed above.¹⁰⁴ The second alternative approach, the human rights based approach to development (HRBA), shares in the pursuit of development that is people centred and that specifically addresses inequalities, discriminatory practices and unjust power relations.¹⁰⁵ It has the potential advantage of utilising the legal enforcement mechanisms of legal rights in order to compel states to advance participation that ensures access to power, or decisions that guarantee equity in access to water services.¹⁰⁶

1.3.2 The Human Rights Based Approach to Development

The HRBA provides a legal basis for claims against government and other actors that impact the enjoyment of rights through greater opportunity to participate in decisions.¹⁰⁷ Although the Charter of the United Nations (UN Charter) had recognised both human rights and development in 1945,¹⁰⁸ it was the UN Declaration on the Right to Development (the Declaration) in 1986 that formally brought human rights to development.¹⁰⁹ First, the Declaration recognised development as a comprehensive economic, social, cultural and political process, aimed at constant improvement of the well-being of all people.¹¹⁰ The well-being of the people is understood in terms of economic, social, cultural and political development and not merely economic growth.¹¹¹ The Declaration stated that when any of the human rights, whether civil, political, economic, social and cultural rights were violated, development was hindered.¹¹² Indivisibility and interdependence of all human rights is thus recognised with calls made for their equal and urgent implementation, promotion and

¹⁰⁴ UNDP (2000) 2.

¹⁰⁵ Sengupta A 'Right to development as a human right' (2001) 36:27 *Economic and Political Weekly* 2527, 2534-2536 Sengupta A 'On the theory and practice of the right to development' (2002) 24: 4 *Human Rights Quarterly* 837, 848.

¹⁰⁶ See UNDP (2006) 2.

¹⁰⁷ See Uvin P 'From the right to development to the rights-based approach: how 'human rights' entered development', (2007) 17 *Development in Practice* 597. See also generally Sitta A 'The role of the right to development in the human rights framework for development' (2010) Paper prepared for the Human Development and Capabilities Approach association available at <http://hd-ca.org/> (accessed on 3 May 2012).

¹⁰⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI art 55.

¹⁰⁹ UN General Assembly, *Declaration on the Right to Development : resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

¹¹⁰ See Declaration on the Right to Development preamble.

¹¹¹ Declaration on the Right to Development art 1(1).

¹¹² Declaration on the Right to Development preamble.

protection.¹¹³ Full realisation of all human rights is ultimately part of the progressive improvement of the well-being of all people.¹¹⁴ Development itself is recognised as an inalienable human right.¹¹⁵ The Declaration defines development as follows:

[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting....¹¹⁶

As a human right, development is no longer based on charity or need but legal claim or entitlement with specific duty bearers including the State as the primary one.¹¹⁷ Further, development as a human right is centred on the human person, both as an active participant and beneficiary in development.¹¹⁸ Thus active, free and meaningful participation is established as constituent element of development, together with equity, which is defined as ‘the fair distribution of the benefits’ of development.¹¹⁹ Sengupta states that ‘participation and equitable distribution of benefits are characteristics of a process that may be called “rights-based”, meaning consistent with human rights standards’.¹²⁰

There are five advantages that the HRBA brings to development namely: (a) reliance on legal mechanisms (b) State as primary duty bearer, (c) accountability (d) participation and (e) equity and non-discrimination.¹²¹ Human rights law directly and indirectly contributes to development outcomes and processes through the definition, enforcement and operational guidance or principles of rights and obligations.¹²² The law provides a basis for citizens to make claims on their States and hold them accountable as primary duty bearers to realise human rights.¹²³ International cooperation or partners also have a duty where they have appropriate means to building capacity of States in developing countries in particular to meet

¹¹³ Declaration on the Right to Development art 6(2).

¹¹⁴ Declaration on the Right to Development art 1(1) See Cornwall A & Nyamu-Musembi C ‘Putting the rights-based approach to development into perspective’ (2004) 25: 8 *Third World Quarterly* 1415, 1426; Tremblay H ‘A clash of paradigms in the water sector? Tensions and synergies between integrated water resources management and the human rights-based approach to development’ (2011) 51 *Natural Resources Journal* 307, 311.

¹¹⁵ Declaration on the Right to Development art 1(1).

¹¹⁶ Declaration on the Right to Development See preamble.

¹¹⁷ Declaration on the Right to Development art 3.

¹¹⁸ Declaration on the Right to Development art 2(1).

¹¹⁹ Declaration on the Right to Development art 2(1) &(3).

¹²⁰ Sungupta A ‘The human right to development’ (2004) 32: 2 *Oxford Development Studies* 179,180.

¹²¹ Tremblay H (2011)318.

¹²² Gready P ‘Rights-based approaches to development: what is the value-added?’(2008) 18: 6 *Development in Practice* 735, 737 -138.

¹²³ Cornwall A & Nyamu-Musembi C (2004) 1416. See also Declaration on the Right to Development art 4(1).

their obligations and right-holders to claim their rights.¹²⁴ Filmer-Wilson states that through accountability and transparency, both State and non-state actors, who are compelled to adhere to human rights standards, are induced to act.¹²⁵ Accountability can be through legal enforcement mechanisms and/or political mechanisms, such as administrative mechanisms, international name and shame, open discussion and mobilisation of grassroots.¹²⁶ According to Sitta, the human rights treaties, covenants and international instruments, as well as the interpretations, recommendations and guidelines provided by treaty bodies, United Nations (UN) agencies and other international mechanisms, are a great tool to enhance accountability and transparency.¹²⁷ He holds that this, together with the clarity and consensus that human rights bring to development programmes, is among the most relevant added value.

Gready points out that the HRBA re-politicises development work 'as being based on rights rather than on benevolence or charity (or needs-based or involving essentially technical assistance)' and re-claims key concepts such as participation from domestication.¹²⁸ He states the HRBA provides the following in this regard:

[A]n opportunity to re-politicise concepts such as participation which have been domesticated by the neo-liberal mainstream and institutions such as the World Bank. Rights-based participation implies a re-framing of participation, from assessing needs as a way of more efficiently implementing development projects (i.e. seen in technical and managerial terms) to a focus on advocacy and mobilisation that potentially nurtures inclusive problem solving, citizenship, and political activism. This kind of participation, often most concretely achieved via a linkage with agency and empowerment, is sometimes termed 'transformative'.¹²⁹

Participation as a mechanism for agency and empowerment is a means through which otherwise excluded vulnerable and marginalised groups can assert their rights in resources for equitable distribution.¹³⁰ The HRBA draws attention to the most vulnerable and marginalised

¹²⁴ Tremblay H (2011) 311 Although from a human rights based approach the development partners must also constitute individuals in relations to them as right-holders.

¹²⁵ Filmer-Wilson E (2005) 213, 217.

¹²⁶ Uvin P (2007) 603 -604; Filmer-Wilson E (2005) 213.

¹²⁷ Sitta A (2010) 4.

¹²⁸ Gready P (2008)742.

¹²⁹ Gready P (2008)742.

¹³⁰ Sengupta A 'Development cooperation and the right to development'(2003) 7 available at http://tanzaniagateway.org/docs/Development_cooperation_and_the_Right_to_Development.pdf (accessed on 22 May 2013).

to ensure they equally benefit with others in decision making processes and outcomes of development.¹³¹

For the reasons mentioned above, this thesis explores the human rights based approach to development, in general and the governance of water services, in particular. It does so while accepting the capabilities approach as complimentary to the HRBA. These two approaches are similar in goal, but different in strategy, so that they reinforce each other. Whereas a human right to development, and even a human right to have access to water, is easily institutionalised into law, the capability approach is an evaluative tool which can investigate the moral merits of policies and find ways of identifying and advancing human rights claims.¹³² The capability approach can highlight ways in which social arrangements can effectively ensure well-being and how these can be incorporated into public policy and reflected in individual action.¹³³

Human rights and reliance of the law has the advantage of transforming claims for well-being into legal obligations, showing the urgency to such claims and strong resolve for universal application.¹³⁴ Nevertheless, as Nussbaum argues, the capabilities language is a useful way of thinking about rights, as it clarifies the underlying purpose of the human rights discourse. According to Nussbaum, 'to secure a right is to put them in a position of capability to function in that area.'¹³⁵ She explains this further by stating:

[B]y defining the securing of rights in terms of capabilities, we make it clear that a people in country C don't really have an effective right to political participation, for example, a right in the sense that matters for judging that the society is a just one, simply because this language exists on paper: they really have been given a right only

¹³¹ Sengupta A (2003) 7; Gready P (2008)742.

¹³² UNDP (2000) 2. See generally Fukuda-Parr S 'The metrics of human rights: complementarities of the human development and capabilities approach'(2010) *WorkingPaper* 14.

¹³³ Sen A 'Rights and agency' (1982) 11:1 *Philosophy and Public Affairs* 3-39; Sen A 'Consequential Evaluation and Practical Reason', (2000) XCVII: 9 *The Journal of Philosophy*, 477-502; Sen A 'Culture and Human Rights' in Sen A *Development as Freedom* 227-48. See also Anand PB *Scarcity, Entitlements and the Economics of Water in Developing Countries* (2007) 28; Nussbaum 2003: 4 -9. Nussbaum is of the view that capability approach is a superior approach to human rights because it has clearer goals and origins among other things. However she holds that when complimented with the capability approach the main shortfalls of human rights are overcome. Through her list for instance she states feminist criticisms of human rights lacking an emphasis on reproductive and other bodily rights can be addressed. See further Nussbaum, M *Women and Human Development: The Capabilities Approach* (2000) generally.

¹³⁴ Cornwall A & Nyamu-Musembi C (2004) 1418. See generally Nussbaum M (2003); Robeyns I 'Sen's capability approach and gender inequality: selecting relevant capabilities' (2003) 9 *Feminist Economics*, 61,70 argues that overemphasising the legal aspects of rights may run the risk of inducing policy makers to being contented when they have strictly followed the rules that a limited interpretation imposes on them.

¹³⁵ Nussbaum MC (2003) 37.

if there are effective measures to make people truly capable of political exercise. Women in many nations have a nominal right of political participation without having this right in the sense of capability: for example, they may be threatened with violence should they leave the home. In short, thinking in terms of capability gives us a benchmark as we think about what it is really to secure a right to someone. It makes clear that this involves affirmative material and institutional support, not simply a failure to impede.¹³⁶

The UNDP also accepts that there can be significant reward in integrating the two approaches. According to the UNDP, the two approaches both ‘facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general.’¹³⁷ They are both ideal in understanding and contributing to resolving the global water crisis at the heart of which are issues of deprivation, inequality and power.¹³⁸

Deprivation can be resolved through economic structures that reduce disparities between people through specific attention to the vulnerable and poor who must benefit from public goods and services. Social ordering within a HRBA will ensure that everyone enjoys equal status and access based on their dignity as human being. Through political voice and participation, power will be challenged to ensure water policies and programmes reflect the needs of those previously excluded.

1.4 Research Objectives and Questions

Within this context, the thesis seeks to identify the value of the human right to water within the broader human rights based approach to development.

My thesis is that the recognition of the human right to water in Malawi will provide an effective way of overcoming the problem of lack of power and the ‘tyranny of participation’.

The over-all aim of the study is thus to establish whether the human right to water can effectively contribute to the transformation of community participation and the role of women in the governance of water services in rural and peri-urban areas in Malawi.

In order to proof the thesis, two things need to be accomplished. The first is to establish and define the human right to participate in the governance of water services as a legally enforceable entitlement in Malawian law. The second is to evaluate water governance in

¹³⁶ Nussbaum MC (2003) 37.

¹³⁷ UNDP (2000) 19.

¹³⁸ UNDP (2006) 2.

Malawi in order to establish how far this right is honoured by the law in the books and the law in action.

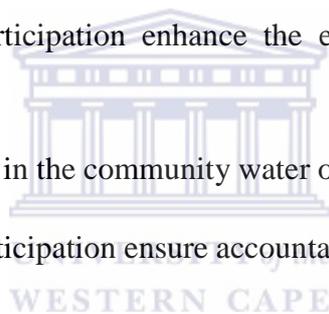
From this follows two main research questions:

Question 1: is there a human right to water in international law and, if so, what is the content of the right as far as the substantive and procedural obligations on the State are concerned?

Question 2: is the human right to water part of Malawian law, and if so, to what extent has the human right to water impacted on the role of women in the governance of water services in rural and peri-urban areas in Malawi?

These two broad questions incorporate a number of sub-questions, some of which can usefully be listed here:

- What does the human right to water mean for Malawians?
- How can community participation enhance the enjoyment of the human right to water?
- What role do women play in the community water organisations?
- How does community participation ensure accountability, equality and influence?



1.5 Research Methodology

The study combines traditional desk top or library research, and field work or qualitative research methods. The desk top research involves an in-depth examination of different international instruments, journals, books, and case law. The field work and qualitative research methods clarify the conceptual analysis of the human right to water and especially investigate whether the participatory dimension of the right have had any impact on the role of women on the ground. The qualitative research methods are discussed in more detail in chapter six below.¹³⁹ The strength of the thesis is its reliance on empirical evidence from a number of rural and peri-urban sites in Malawi to clarify the meaning of participation within the governance of water services.

1.6 Chapter Outline

Having sketched the background to the research problem and having identified the basic research questions in this Introduction, I set about to answer the first research question in Part

¹³⁹ Chapter six section 2.2 below.

I of the thesis. Part I therefore provides a normative clarification of the human rights approach to water governance and consists of three chapters. Chapter 2 traces the evolution of the human right to water at the global and African level. I argue that international human rights law recognises a self-standing human right to have access to water for domestic purposes. The right entails both substantive and procedural entitlements. Chapter three proceeds to investigate the substantive dimension of the right to have access to water. It asks what a legally binding human right to water means for the poor and disadvantaged that have no access to water. Chapter four discusses the procedural component of the right to have access to water. The chapter argues that the participatory component of the human right to water is a legally enforceable obligation that guarantees equal participatory power to everyone directly affected. It is this participatory dimension that moves the human right to water from guaranteeing access to water, to guaranteeing access to citizenship or democratic living.

Having established that international law recognizes a right to water and having clarified the substantive and procedural content of the right, Part II proceeds to apply the normative content of the right to the governance of water services in Malawi. Part II is divided into two chapters. Chapter five explores whether the human right to have access to water forms part of the Malawian legal and policy framework. It does so by providing an overview of the Malawian Constitution and various pieces of domestic legislation. The chapter concludes that the right to have access to water is indeed binding on Malawi and that all legislation applying to water governance must be reviewed against this right. Chapter six documents the field research I undertook in Malawi and establishes how far the law in action deviates from the law as it is defined in the Malawian statute book. The chapter identifies a number of factors which continue to impede the equal participation of women in water governance. Chapter seven concludes the thesis with a summary of its findings and recommendations for future legal reform.

Chapter Two

The Emergence of an International

Human Right to Water

2.1 Introduction

Whereas many may agree that access to water is a basic human need, responsibility and liability for securing access to water is contested. Although the existence of human rights are not dependent on recognition by individual states, to become legally enforceable every human right depends on the commitment of individual states through policies, laws and customs.¹ As mentioned in the previous chapter the human rights based approach to water considers government to be the primary bearer of responsibility and liability in this field. A legally binding human right to water imposes obligations on states to prioritise and accelerate access to water to those who lack it, and empowers individuals and communities to challenge water injustices as a result of inequitable access to water services.² Some states, for instance the United States and Canada, have traditionally contested this primary responsibility by denying the existence of an internationally recognised human right to water.³ Opponents of the right to water cited the lack of textual authority, erroneous interpretative approaches and the questionable content and value of the human right to water as reasons to reject that a legally binding independent human right to water exists.⁴ Other opponents of the right to

¹ McGraw GS Water for life: the challenge posed by the un-codified human right to water in International law' (2010) 1:39 *The University for Peace Law Review* 39, 42.

² See Boyd DR 'No taps, no toilets: first nations and the constitutional right to water in Canada' (2011) 57:1 *McGill Law Journal* 81, 122. See also generally Clack C 'The centrality of community participation to the realisation of the right to water: the illustrative case of South Africa' in Sultana, F and Alex Lofus (eds) *The Right to Water: Politics, Governance and Social Struggles* (2011) 174-189; Bourquain K *Freshwater Access from a Human Rights Perspective* (2008) 1, 55; Murthy SL 'The human right(s) to water and sanitation: history, meaning, and the controversy over-privatization' (2013) 31:1 *Berkeley Journal of International Law* 89, 89 & 114; Gupta J, Ahlers R & Ahmed L 'The human right to water: moving towards consensus in a fragmented world' (2010) 19:3 *Review of European Community & International Environmental Law* 294, 297.

³ See General Assembly Adopts Resolution Recognizing Access To Clean Water, Sanitation As Human Right, By Recorded Vote Of 122 In Favour, None Against, 41 Abstentions (Voting explanation) (2010) GA/10967 available at <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm> (accessed on 7 March 2014); Thor EM 'The human right to water in the United States: why so dangerous?' (2013) 26 *Global Business & Development Law Journal* 315 – 341 where he criticises the United States for not declaring a human right to water and stating that the arguments advanced regarding legal ramifications and cost implications are weak justification.

⁴ For instance see Tully S 'A human right to access water? a critique of general comment no. 15' (2005) 26 *Netherlands Quarterly of Human Rights* 35-63; Dennis MJ & Stewart DP 'Justiciability of economic socio-cultural rights: should there be an international complaints mechanisms to adjudicate rights to food, water, housing and health' (2004) 98 *American Journal of International Law* 462, 494.

water hold that even if the right exists, it is at best as a subordinate right to other enumerated rights with a limited scope regarding legal implications.⁵

This chapter responds to these traditional denials of an independent human right to water and aims to establish the legal basis of the human right to water. I argue that the case for an independent human right to water is supported by prior recognition, teleological interpretation and the centrality of water for other codified human rights.⁶ Section 2 traces the incremental evolution of the human right to water and its legal foundations under the UN human rights system. This is followed with a more detailed discussion of the criticisms and debates over the existence of an independent human right to water. The section concludes that, although the right is unenumerated, it exists within the UN human rights regime that states have committed to.⁷ The emergence of the human right to water in the African human right system is the focus of section 3, where a narrow legal basis for the right is established. States that are not bound by human rights treaties at either the UN or the regional level might still incur responsibilities under a customary international human right to water. Such a customary international right has even wider implications than a treaty based right, because it imposes binding obligation on all states regardless of overt commitment to it. The existence of such a customary law right is investigated in section 4. The chapter concludes that, as at the end of 2014, a human right to water has legally emerged as an independent right under international law. As this chapter essentially focuses on the contested legal basis of this right, a discussion of the substantive and procedural content of the right to water is postponed to chapters three and four respectively.

2.2 Emergence of the Human Right to Water under the United Nations Human Rights System

As mentioned above, the human right to water has emerged as a new right among members of the UN amidst a lot of criticism and controversy.⁸ For some, there is a lack of an express provision within the main human rights instruments and it is for this reason that this right might be seen to be dubious.⁹ Similarly, the process that declares or recognises this right in

⁵ Cahill A 'The human right to water – a right of unique status': the legal status and normative content of the right to water' (2005)9: 3 *The International Journal of Human Rights* 389-410.

⁶ See UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 15, Right to Water (2002) UN Doc E/C.12/2002/11 (GC 15).

⁷ See generally Bulto TS 'The emergence of the human right to water in international human rights law: invention or discovery?' (2011)12 *Melbourne Journal of International Law* 290.

⁸ See Bulto TS (2011) 291; Bulto TS *The Extraterritorial Application of the Human Right to Water in Africa* (2014) 25.

⁹ Bulto TS (2011) 291 stating that the right sits at the lowest rung of already marginalised socioeconomic

international law is labelled as dubious or as a ‘short-cut around the serious work of formulating, articulating and upholding universal rights’.¹⁰ However, after decades of debate and contestation, two resolutions on the human right to water were finally adopted by consensus¹¹ by the UN Human Rights Council (HRC) in 2010, 2013 and 2014 respectively.¹² These recent resolutions indicate a winding down of the earlier debates about the existence of the right to water in international human rights law.¹³ Although the resolutions of the HRC are not binding legal documents, they not only memorialise the international consensus and desire for a legally binding obligation regarding water but also support and commit to an already emergent right in international human rights law.¹⁴ The section below chronologically highlights some selected resolutions, instruments and events in the evolution of the human right to water with the view to dispelling any remaining reservations about the legal basis of the right.

2.2.1 Incremental Evolution

The human right to water is not mentioned in the Universal Declaration of Human Rights of 1948,¹⁵ however the 1949 humanitarian law concerning the protection of civilians and combatants during armed conflict recognised an individual right to water.¹⁶ Although the

rights creating a hierarchy within a hierarchy. See also Bourquain K *Freshwater access* (2008) 1; McGraw GS ‘Defining and defending the right to water and its minimum core: legal construction and the role of national jurisprudence’ (2011)8:2 *Loyola University Chicago International Law Review* 127,132.

¹⁰ United States Mission to the United Nations ‘Explanation of vote by John F. Sammis, U.S. Deputy Representative to the Economic and Social Council, on Resolution A/64/L.63/Rev.1, the human right to water’ (US vote explanation) (2010) available at <http://usun.state.gov/briefing/statements/2010/145279.htm> (accessed 2 May 2014).

¹¹ Rather than deciding by a formal vote, thus strengthening support for the decisions.

¹² See UN Human Right Council (HRC) The human right to safe drinking water and sanitation (2010) A/HRC/RES/16/2; UN HRC *Human Right to Safe Drinking Water And Sanitation*(2013) A/HRC/24/L.31;

UN Human Right Council *Human Right to Safe Drinking Water And Sanitation* (2014) A/HRC/27/L.11/REV.1.

¹³ See Barlow M *Blue Future* (2013) 9.

¹⁴ Meier SM, Kayser GL, Amjad, UQ *et al* ‘Implementing an evolving human right through water and sanitation policy’ (2013)15 *Water Policy* 116, 123.

¹⁵ UNGA *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Although not binding, it is a significant document with many of its provisions considered to be customary international law and reasserted in many international legal instruments. See Ghandhi PR ‘Universal Declaration of Human Rights at fifty years’ (1998) 41 *German Yearbook of International Law* 206, 242; Gleick PH ‘The human right to water’ (1999) 1:5 *Water Policy* 487, 490-491 arguing that the whole document has attained the status of customary international law.

¹⁶ Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention) Adopted 12 August 1949 and entered into force 21 October 1950, arts 20, 26, 29, 46; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) Adopted 12 August 1949 and entered into force 21 October 1950, arts 85, 89, 179. See also *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, (1977) Adopted 8 June 1977 and entered into

humanitarian law is different from, and is not based on a human rights principle,¹⁷ it provides recognition of the need to protect water as a right when under threat and recognises its importance for an adequate standard of living for health and well-being. During the 1940s, water was not a major concern and the perception prevailed that it was infinite. Further, the human demand for water was not high, hence there was only recognised protection of this resource when in times of scarcity that accompanied conflict. In the 1970s there was a radical change as human activities and increases in population and demand for water brought about the new realisation, manifested at the 1972 United Nations Conference on the Human Environment, held in Stockholm, of water as a scarce resource.¹⁸ The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) began the conversation on the human right to water by recognising water together with air, land, flora and fauna as natural resources that should be safeguarded for the benefit of the present and future generations through careful planning and management.¹⁹ This was followed by the Mar del Plata Action Plan adopted at the United Nations Water Conference in 1977 that included a number of recommendations and resolutions.²⁰ Of great significance is Resolution II on 'Community Water Supply'. The Resolution recognised water as a right for the first time by declaring that:

All peoples, whatever their stage of development and social and economic conditions, have the right *to have access to drinking water in quantities and of a quality equal to their basic needs.*²¹

The Conference further agreed and dedicated 1981 to 1990 as a period when governments would adopt policies and programs that would focus on universal access to water and sanitation (the so-called international decade of water).²²

force 7 December 1979, art 54.

¹⁷ See Winker IT *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012) 62 -64 on the differences of humanitarian law and human rights.

¹⁸ See UNGA *Report of the United Nations Conference on the Human Environment*, 5-6 June 1972, A/CONF.48/14/Rev, Ch I *Declaration of the United Nations Conference on the Human Environment* Declaration of the United Nations Conference on the Human Environment principle 2.

¹⁹ See UN *Report on the United Nations Conference on Water, Mar del Plata Water Conference*, (Mar del Plata Water Conference Report,) 14-25 March 1977, E/Conf.70/29. Although the 1972 United Nations Conference on Human Environment identified water as one of the natural resources that needed to be safeguarded, it is the Mar del Plata conference that is recognised as a milestone and for being the first United Nations conference to exclusively deal with water issues. See Salman SMA & Mcinerney-Lankford S *The Human Right To Water: Legal and Policy Dimensions* (2004) 7 - 16 for detailed discussion of the Mar del Plata Action Plan and other UN resolutions and declarations on water. See also See Salman SMA 'United Nation General Assembly Resolution: International Decade for Action, Water for Life, 20005 -2015' (2005) 30:3 *Water International*1.

²¹ See Mar del Plata Water Conference Report, Resolution II(a) 66 (my emphasis).

²² Mar del Plata Water Conference Report, Resolution II (a) 66. The UN General Assembly later

In 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted. In line with the growing recognition of the right to water, it explicitly guaranteed a human right to water for women and specifically for rural women.²³ The CEDAW as a whole does not create new rights but rather aims to address or eliminate discrimination in areas already guaranteed by pre-existing human rights.²⁴ The recognition of women's right to water therefore arguably was drawn from an understanding that there was already an existing human right to water in international law.²⁵ Further, the focus on rural women was merely to highlight the rural and urban divide as a basis of disadvantage or discrimination and to seek to improve the situation of women living in these less developed areas.²⁶ Article 14(2) (h) therefore specifically obliges state parties to ensure that rural women have the right:

[T]o enjoy *adequate* living conditions, particularly in relation to housing, sanitation, electricity and *water supply*, transport and communication.²⁷

Ten years later, in 1989, the Convention on the Rights of the Child (CRC) also recognised a human right to water for children.²⁸ The CRC, just like the CEDAW, may be presumed to draw on general human rights already existing in human rights treaties and only seeks to guarantee that children benefit from the already existing right to have access to water. The CRC provides that for the right to health which includes obligations on state parties to fight disease and malnutrition. Further, this obligation entails:

[T]he provision of *adequate* nutritious foods *and clean drinking-water*, taking into consideration the dangers and risks of environmental pollution.²⁹

declared the period the 'International Drinking Water Supply and Sanitation Decade'. See UNGA *Proclamation of the International Drinking Water Supply and Sanitation Decade*, 10 November 1980, A/RES/35/18.

²³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Adopted 18 December 1979 and entered into force 3 September 1981. Art 14.

²⁴ Winkler IT (2012) 60.

²⁵ Winkler IT (2012) 60; Bulto TS (2014) 34 pointing out other than the indication of an existing human right to water, the CEDAW has limited value as regards its implication on addressing general access to water for other groups due to its restriction in personal and substantive scope; Bourquain K (2008) 123. See also Firtzmaurice M 'The human right to water'(2007) 18 *Fordham Environmental Law Review* 537, 543.

²⁶ Pruitt LR 'Deconstructing CEDAW's article 14: naming and explaining rural difference' (2010-2011) 17 *William and Mary Journal of Women and Law* 347, 351 -352; Burrows N 'The 1979 Convention on the Elimination of All Forms of Discrimination Against Women'(1985) 32 *Netherlands International Law Review* 419, 446-48 447.

²⁷ CEDAW art 14(2)(h).

²⁸ Convention on the Rights of the Child. Adopted 20 November 1989 and entered into force 2 September 1990, (CRC) art 24.

²⁹ CRC art 24(2)(c) (my emphasis).

Both the CEDAW and CRC are therefore the earliest formulations of a binding human right to water, however they are limited in scope. First by virtue of targeting only women and children in their protection but also because the content of the right guaranteed has remained largely undefined under these instruments.³⁰

The International Drinking Water Supply and Sanitation Decade came to an end in 1990, having failed to achieve its goal for universal access to water, hence the need for more concerted efforts towards addressing water problems.³¹ This is evident in the numerous resolutions, strategies and action plans adopted after the period. For instance, in 1992 at the United Nations Conference on Environment and Development (UNCED) ‘Agenda 21: Programme of Action for Sustainable Development’ (Agenda 21) was adopted.³² The Agenda 21 recognised that water is needed in all aspects of life and called for the maintenance of adequate supplies of water of good quality for the entire population on the planet.³³ The Agenda 21 stated further that the declaration made in the Mar del Plata Action Plan on the right to water for basic necessities was the commonly agreed premise and enjoined states to prioritise satisfaction of basic needs when developing and using water resources.³⁴ Earlier in that same year, the United Nations International Conference on Water and the Environment was held, and the Dublin Statement and Principles on Water (Dublin Statement) was issued.³⁵ The Dublin Statement addressed issues of water management and development on the basis that it is ‘the basic right of all human beings to have access to clean

³⁰ See Woodhouse M ‘Threshold, reporting, and accountability for a right to water under International Law’ (2004-2005) 8 *University of Denver Water Law Review* 171, 173 stating that both the CEDAW and the CRC lack explicit definition regarding States’ obligations. See also Cahill A (2005) 122 & Winkler IT (2012) 56 arguing that article 24(2)(c) does not provide for an independent right to water but rather that the right to health guarantees positive obligations regarding access to water as an underlying determinant to health.

³¹ Winkler IT *The Human Right to Water* (2012) 83; Salman SMA ‘From Marrakech through the Hague to Kyoto: has the global debate on water reached a dead end? Part One’ (2003) 28:4 *Water International* 493. The initiative failed to achieve its goal however many lessons were learnt including how water infrastructure requires high capital investment and the need for multiple actors in the sector beyond government. See Kemerink J, Mbuvi D & Schwartz K ‘Government shifts in water services sector: a case study of the Zambia water services sector’ in Katko TS, Juuti PS & Schwartz K (eds) *Water services management and governance lessons from a sustainable future* (2013) 3, 5. See also Bardhan P ‘Decentralisation of governance and development (2002) *Journal of Economic Perspective* 185 -205, 185.

³² See UNGA *Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26/Rev.1* (Vol 1), Annex II, Agenda 21, Ch 18 para 18.47.

³³ The Agenda 21 has been adopted by many states and arguably influences efforts towards prioritising access to water for basic needs. The implementation of the Agenda 21 at national level is reported periodically to the Commission on Sustainable Development. See national implementation of Agenda 21 country profiles available at <http://www.un.org/esa/agenda21/natlinfol/> (accessed on 27 January 2012).

³⁴ Agenda 21 para 18.47.

³⁵ See *The Dublin Statement on Water and Sustainable Development* (Dublin Statement), International Conference on Water and the Environment, 26-31 January, 1992 Dublin, Ireland.

water and sanitation at an affordable price.³⁶ It contains four principles covering the holistic, institutional, gender and economic dimensions of water.³⁷

Two UN development conferences on population and development and human settlements in 1994 confirmed that ‘people have the right to an adequate standard of living... including adequate food, clothing, housing, water and sanitation.’³⁸ These attempts to derive the right to water from the right to “an adequate standard of living” were significant. The right to “an adequate standard of living” was already contained in the International Covenant on Economic Social and Cultural Rights (ICESCR). In the ICESCR the right is not further disaggregated to include a right to adequate water, as it was done during the development and human settlement conferences.³⁹ The idea that the right to “an adequate standard of living” implies a right to “adequate water” would become the foundation of the international human right to water by the turn of the 20th century.

While the UN was trying to secure acceptance for a right to water during the 1990s, the idea that water might be a profitable commodity also gained prominence. The economic dimensions of water introduced market mechanisms, such as full cost recovery, as a means to finance and distribute water services as well as conserve water as a resource.⁴⁰ The Dublin Statement in 1992 in principle 4 had stated that water is an economic good and should be managed in this way to achieve ‘efficient and equitable use’ and conservation and protection of water resources.⁴¹ This provided a guide to development agencies and international donors who adopted this approach. Thus during this period, the World Bank compelled developing countries to adopt policies that would ensure recovering of costs from users and thus attracting private sector investment in water.⁴² This was in line with the neoliberal approach to development highlighted in chapter one above, whereby states were increasingly under pressure to privatise and outsource their water service obligations.⁴³ Further efficiency and

³⁶ See Dublin Statement principle 4.

³⁷ Salman SMA (2003) 493.

³⁸ UN International Conference on Population and Development: Programme of Action (1994) UN Doc A/CONF.171/13/Rev.1 principle 2 para 15; United Nations Conference on Human Settlements (Habitat II) (A/C.2/49/L.27) para 11.

³⁹ International Covenant on Economic Social and Cultural Rights (ICESCR) Adopted 16 December 1966 and entered into force 3 January 1976.

⁴⁰ See for instance Rogers P, Bhatia R & Huber A ‘Water as a social and economic good: How to put the principle into practice’(1998) 2 *Global Water Partnership Technical Advisory Committee Background Paper* 1 – 35.

⁴¹ Dublin Statement principle 4.

⁴² See Bayliss K ‘Financing water in Africa’ (2013) 182 *SOAS Department of Economics Working Paper Series* 1, 3.

⁴³ Chapter one section 1.2.1.

productivity in the use of water and social services was emphasised contrary to a human right based approach and/or concerns of equity.⁴⁴ Human rights based approach as established in chapter one focuses on primacy on people, their well-being and equity.⁴⁵ This is why it was pointed out by Winkler, it ‘requires a prioritisation of human needs regardless of the economic impact’ or productivity.⁴⁶ One major criticism of the neoliberal approaches therefore is its equity-efficiency trade off when it rigidly excludes attempts to improve distribution of wealth or take into account those unable to pay for services.⁴⁷

The tentative recognition of the human right to water within the UN was also not endorsed by the World Water Council that was established in 1996. The Council is an international water policy think-tank that hosts annual World Water Forums to set direction for global water policy and financing.⁴⁸ Declarations issued from such gatherings that involve water experts, private interests and government officials have merely recognised the necessity of water in terms of a human need, and not as a human right.⁴⁹ Similarly, the all important United Nations Millennium Declaration of 2000 containing the Millennium Development Goals, such as to reduce by half the proportion of people without sustainable access to safe drinking water, were also formulated void of human rights based framework.⁵⁰

⁴⁴ See Gore, C. G. Social Exclusion, Globalization, and the Trade-Off Between Efficiency and Equity in Köhler, G and others, *Questioning development: essays in the theory, policies and practice of Development interventions* (1996) 103 -116. See also Williamson J ‘Democracy and the “Washington Consensus” (1993) 21 (8) *World Development* 1329 -1336.

⁴⁵ Chapter One section 1.2.2, 1.2.3 & 1.2.4.

⁴⁶ Winkler IT (2012) 144.

⁴⁷ See Johnston D ‘Poverty and distribution: back on the neoliberal agenda?’ in Saad-Filho A & Johnston D (eds) *Neoliberalism: A Critical Reader* (2005) 135-141. See also Saad-Filho A ‘From Washington to Post -Washington Consensus: Neoliberal Policy Prescription for Poor Countries’ in Saad-Filho A & Johnston D (eds) *Neoliberalism: A Critical Reader* 113-119.

⁴⁸ So far World Water Forums have been held in Marrakech, Morocco 1997; Hague, the Netherlands, 2000; Kyoto, Japan, 2003; Mexico City, Mexico 2006; Istanbul , Turkey, 2009; Marseille, France 2012. See www.worldwatercouncil.org for declarations and other documents from the forums. See Barlow M ‘Our right to water: a people’s guide to implementing the united nations’ recognition of the right to water and sanitation’ (2012) 9 available at www.right2water.eu/sites/water/files/righttowater-0611.pdf accessed on 23 February 2014).

⁴⁹ Barlow M (2013) 9 stating that the distinction has implication on the privatisation of water services. She asserts that ‘one cannot trade or sell a human right, or deny it to someone on the basis of inability to pay. Therefore the World Water Council promote the concept of water as a need that can be filled by private as well as public operators in line with their endorsement of private, for profit water delivery systems. The 6th World Water Forum however endorsed the United Nations resolutions on the human right to water. See The Ministerial Declaration of the 6th World Water Forum available at <http://www.worldwaterforum6.org/en/news/single/article/the-ministerial-declaration-of-the-6th-world-water-forum/> (accessed 5 March 2014).

⁵⁰ See UNGA *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2. See also Alston, P. ‘Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium

In spite of this resistance, in 1999 the UN General Assembly made a strong and unambiguous statement of recognition of the human right to water in the resolution on the Rights to Development.⁵¹ The resolution provided that:

[T]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community.⁵²

However, many other conferences, action plans, statements, declarations and resolutions around this period (and thereafter) did not follow this stance. Although the importance of water for human needs and development was recognised, few articulated the call for action in terms of human rights obligations.⁵³

Outside the many conferences and forums, calls for the human right to water to be recognised as an inherent human right were being made by people who were struggling to access water to meet their basic needs.⁵⁴ The plea for the recognition of the human right to water became a mobilising tool by civil societies in countries that experienced lack of access to water for large proportions of the populations often due to policies where there was a market value to water and imposition of full cost recovery to improve services and access.⁵⁵ The human right to water proposed water as a public good and called on government to reconsider privatisation of water services and where exorbitant tariffs were imposed.⁵⁶ As briefly mentioned in chapter one, although water for basic human needs had been prioritised and was recognised in international protocols as well as national legislation, this had failed to

⁵¹ Development Goals.' (2005) 27:3*Human Rights Quarterly*, 755–829.
⁵² UNGA *The Right to Development* A/RES/54/175. See Salman SMA & Mcinerney-Lankford S *The Human Right To Water* (2004) 12.

⁵³ The Right to Development para 12(a).

⁵⁴ See Salman SMA (2003) 491-500. See also Salman SMA 'From Marrakech through The Hague to Kyoto: Has the global debate on water reached a dead end?' Part Two (2004) 29:1 *Water international* 11 – 19 Salman provides a comprehensive list and a critical analysis of the many global conferences and forums discussing water problems. He concludes by questioning the efficacy of such gatherings and the numerous resolutions and declarations adopted due to lack of agreement, specific measurable actions and programs and the political will to implement them. See also Gleick PH 'Large international water meetings: time for a reappraisal' (2005) 30:3 *Water International* 410 – 414.

⁵⁵ Barlow M (2013) 9. A human right to water was advocated for to ensure that water was viewed as a public good not a economic good and to establish government obligation ensure equitable access to water services. See Bluemel, EB 'The implications of formulation a human right to water' (2004)31:4 *Ecology Law Quarterly* 963 -64 stating that the calls for a human right to water emanated from equity concerns under full recovery cost and high prices of water services due to privatisation.

⁵⁶ See generally Barlow M (2013); Bluemel, EB (2004)

See Meier SM and others 'Implementation an Evolving Human Right Through Water and Sanitation Policy' (2012) 00 *Water Policy* 5; Vietz M 'Water Struggles in Argentina: International Policies, NGOs, and Civil Society in the Pursuit of Water Rights'(2013) Undergraduate thesis, University of Pittsburgh.

guarantee access to water for millions of people.⁵⁷ To counter the neoliberal approach to water services, the right to adequate water was proclaimed as a human right and water justice was aimed at economic equity, equitable access to public resources and the attainment of social justice for all.⁵⁸

The year 2002 marked a significant moment in the on-going struggle between UN agencies, civil society organisations, and reluctant policy makers about the existence of an independent human right to water. During its 29th session held in Geneva from 11 to 29 November 2002, the Committee on Economic, Social and Cultural Rights (CESCR) debated the existence and content of the right to water. The CESCR is a supervisory body with a mandate to interpret the ICESCR and set standards for realising the rights contained in it.⁵⁹ The 29th session of the CESCR concluded with General Comment 15 (GC15) in which the CESCR authoritatively accepted that the ICESCR included an implied right to water. GC 15 was issued amidst growing concerns over lack of access to portable water in the developing world and a lack of consensus on how this problem should be addressed and what financial arrangements could be agreed upon. The GC 15 is an authoritative interpretation of existing legal obligations under the ICSECR from which the human right to water is derived.⁶⁰ The CESCR established the human right to water as an independent right within international human rights law and, as will be seen below, derived the right from articles 11 and 12 of the ICSECR (the right to an adequate standard of living and the right to health respectively).⁶¹ The CESCR formulated the human right to water as follows:

The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. ... *The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.*⁶²

⁵⁷ See Winkler IT (2012)142 -148.

⁵⁸ See Moyo K 'Water as a human right under international human rights law: Implications for the privatisation of water services' (LLD thesis, Stellenbosch University,2013) for a comprehensive analysis of the implication and implementation of privatisation of water services.

⁵⁹ See Office of the High Commissioner for Human Rights (OHCHR) *Economic and Social Council Resolution 28 May 1985, 1985/17*. The CESCR in its mandate to monitor the implementation of the ICESCR receives and reviews States parties' reports on the implementation of the rights contained in the ICESCR. The CESCR is also authorised to make suggestions and recommendations on the issues arising from States' reports through Concluding Observations and General Comments. The General Comments are issued to assist and promote States implementation of the ICESCR by providing insights drawn from the many reports reviewed and clarification or interpretation of provisions of the ICESCR. See Committee on Economic, Social and Cultural Rights, Report on the Third Session, 6-24 February 1989, E/C.12/1989/5, Annex III, para 3. See also Winker IT (2012) 40.

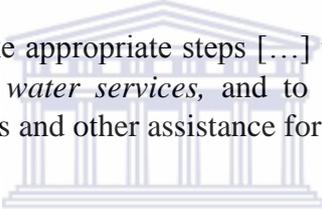
⁶⁰ McGraw GS (2010) 42.

⁶¹ GC 15 para 3.

⁶² GC 15 para 1 & 2 (my emphasis).

GC 15 is regarded as the most exhaustive and authoritative elaboration of the human right to water.⁶³ It has significant legal and political weight,⁶⁴ although it is not a legally binding document. This is because General Comments are issued as a legal interpretation of the ICESCR, based on state reports submitted under articles 16 and 17 of the ICESCR and ‘constructive direct dialogue between State party representatives’ and the CESCR.⁶⁵

The GC 15 was followed by several developments in the UN that supported the existence of an implied human right to water as recognised in GC15. The most notable developments include the issuance of ‘Guidelines for the Realization of the Right to Drinking Water and Sanitation’ by the Sub-Commission on the Promotion and Protection of Human Rights in 2006.⁶⁶ In the same year, the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities was adopted. Following the spirit of CEDAW and CRC, it explicitly included a right to water for persons with disabilities as part of the social protection proclaimed in article 28(2) (a).⁶⁷ The section provides as follows:


State Parties [...] shall take appropriate steps [...] to ensure *equal access* by persons with disabilities *to clean water services*, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.

In 2007 the UN High Commissioner for Human Rights, following a request by the Human Rights Council, issued a report on ‘the scope and content of the relevant human rights obligations related to *equitable access to safe drinking water and sanitation* under international human rights instruments.’⁶⁸ The report traced the evolving human right to

⁶³ Salman SMA & Mcinerney-Lankford S (2004) 43.

⁶⁴ Winker IT (2012) 41.

⁶⁵ Salman SMA & Mcinerney-Lankford S (2004) 9.

⁶⁶ See U. N. Sub-Commission on the Promotion and Protection of Human Rights, *Guidelines for the Realization of the Right to Drinking Water and Sanitation*, 11 July 2005, E/CN.4/Sub.2/2005/25.

⁶⁷ Convention on the Protection and Promotion of the Rights of Persons with Disabilities (CRPD) Adopted on 13 December 2006 and entered into force on 3 May 2008 art 28 provides as follows:
1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.

⁶⁸ U.N. High Commissioner for Human Rights, ‘Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General: Report of the United Nations High Commissioner for

water in international law and recommended that the time had come for access to safe drinking water and sanitation to be considered as a human right outside the confines of the ICESCR. The Human Rights Council responded to this recommendation in 2008 by creating the position of an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation.⁶⁹ Catarina de Albuquerque took up the position in November 2008 and in 2011 her mandate was renamed Special Rapporteur on the right to safe drinking water and sanitation.⁷⁰ She occupied this position until the end of 2014 and played a key role in the further clarification of the right to water.

After decades of incremental recognition and varying levels of commitment to the human right to water,⁷¹ the fragmented consensus was finally put to the test at the UN General Assembly in 2010.⁷² A total of 163 countries were given an opportunity to make clear to the world their stance as regards this basic right. Although 41 countries, led by United States, Canada, Britain and Australia, abstained from the vote and expressed both procedural and substantive objections, 122 countries voted in support of formally recognising the human right to water.⁷³ The 122 countries in favour of the human right to water represented 5.4 billion people as opposed to 1.1 billion people represented by those who abstained.⁷⁴ This signalled a wide acceptance and political support for the human right to water. The UN General Assembly recognised:

The right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.⁷⁵

Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments' 16 August 2007, U. N. Doc. A/HRC/6/3 (my emphasis).

⁶⁹ Human Rights Council *Human Rights and Access to safe drinking water and sanitation* (2008) A/HRC/Res/7/22 the mandate of the special mechanism includes conducting research and country missions to promote access to safe drinking water and sanitation. See also See Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, (2009) U.N. Doc. A/HRC/10/6.

⁷⁰ Human Rights Council '*Human Rights and Access to safe drinking water and sanitation*'(2011) A/HRC/Res/16/2.

⁷¹ McGraw GS (2011)144 stating that by 2010 every member state of the UN had acknowledged the human right to water at least once whether by national legislation, declaration, treaty signature or membership in a supportive international organisation.

⁷² See UNGA *The Human Right to Water and Sanitation* 3 August 2010 A/RES/64/292, (Resolution on water).

⁷³ UNGA Voting explanation (2010).

⁷⁴ M Blue (2013) 12.

⁷⁵ UNGA Resolution on water para 1.

This was the first General Assembly resolution specifically dealing with the human right to water.⁷⁶ The resolution was introduced to the General Assembly by a Bolivian representative but was developed and co-sponsored by a small group of developing countries. It received a vote of 122 to 0 for its adoption however 41 countries abstained from voting while 29 were not present.⁷⁷ The significant number of states supporting this resolution is evidence of a global endorsement of the human right to water.⁷⁸ Those who supported the resolution explained that the human right to water existed under international law as a component of other rights such as the rights to adequate standard of living, health, food, housing and life.⁷⁹

The calling of a vote and the doubts expressed regarding the legal basis of the right in international law coupled with the high number of states which abstained or were absent was a reflection of the fragmented global consensus around the human right to water. The resolution on human right water nevertheless was and remains of great political significance as it rendered support to the GC15 by formally acknowledging that a human right to water already exists in international law.⁸⁰ It also demonstrated that the majority of states supported a human right to water.⁸¹ Some authors have attributed the resistance of the minority to trepidation regarding cost and accountability under this right and also the role of privatisation in water services.⁸² It is noted that most countries that opposed this right all favour market-based economies and privatisation of water services.⁸³ Perhaps this is because

⁷⁶ Winkler IT (2012) 77.

⁷⁷ See UNGA Voting explanation (2010). Countries such as United States, Brazil, Canada and Egypt opposed the recognition of the human right to water while Malawi was among the countries that were not present. See also Pardy, B. 'The dark irony of international water rights' (2011)28 *Pace Environmental Law Review* 907–920 stating that countries such as US and Canada choose not to support the resolution although only procedural concerns were raised.

⁷⁸ Moyo K (2013) 73; Gupta J, Ahlers R & Ahmed L (2010) 298.

⁷⁹ See UNGA Voting explanation (2010) explanations from representatives from Spain, Hungarian, Brazil, and Australia.

⁸⁰ Winkler IT (2012) 78. See also OHCHR 'UN expert welcomes recognition as a human right of access to safe and clean drinking water and sanitation' 30 July 2010 available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10240&LangID=E> (accessed on 7 March 2014). The UN Independent Expert on human rights, water and sanitation, Catarina de Albuquerque stated that 'the fact that the right to water and sanitation was recognized, demonstrates that the General Assembly, instead of creating a new right rather formally acknowledged its existence. Hence the existing human rights framework, in particular the International Covenant on Economic, Social and Cultural Rights, fully applies in this context.'

⁸¹ In 2013 the UNGA adopted another resolution on the human right to water with consensus affirming the first resolution and HRC resolutions. See UNGA 'Resolution on the human right to safe drinking water and sanitation (2013) A/RES/68/157.

⁸² Murthy SL The human right(s) to water and sanitation (2013) 90; Pardy B The dark irony of international water rights (2011) 907–920.

⁸³ See Barlow M (2013) 9-10; Barlow M & Clarke T *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (2002) where it is argued that privatisation of water services is not aimed at meeting world water needs but to control and benefit from a common heritage that has no substitution; Shiva V *Water Wars: Privatisation, Pollution, and Profit* (2002) generally advancing that water should

the human right to water is associated with the protests against privatisation in Latin America, where, as stated earlier, this right was a mobilising tool for equity calls against full cost recovery and high water prices of water. The primacy of equity and pro poor guarantees of water regardless of a person's ability to pay goes against certain elements of privatisation and reliance on market mechanisms (however, the human right to water is not in conflict with privatisation of water services per se).⁸⁴ Whatever the real motivation of the minority might have been, in spite of the growing consensus within the UN about the existence of an independent right to water, a strong enough counter-position remained among enough states and academic scholars to be taken seriously.

2.2.2 Ongoing Opposition and Critique

The 41 countries that abstained from voting opposed recognising water as a human right, mainly based on a procedural objections regarding the negotiation process of the resolution. For instance, the delegate from United States stated that the process lacked transparency and inclusiveness in drafting the resolution and attempted to take a short cut around the serious work of formulating, articulating and upholding universal rights.⁸⁵ Further, the United States raised the concern that the resolution was premature as the issue regarding a human right to water under international law was already being considered by the Human Rights Council in another process. Substantive objections were also raised, questioning the legal basis of the right to water in international law.⁸⁶ The main argument against a generic and free-standing right to water is that such a right is not mentioned in either the ICSECR or the ICCPR. The right is only included in a few binding treaties, like the CEDAW, CRC and the ICRPD, but these instruments target specific groups and hence form a questionable basis to claim a general human right to water for groups that are not women, children or persons with disabilities. The scope of the protection rendered within these instruments is also limited. Firstly, because it has not yet been defined as regard the exact entitlement a person can claim. Second, the recognition of the human right to water is not a self-standing or independent right per se, but is a derivative or dependent right based on other self-standing rights, like health or

⁸⁴ be recognised as a human right in view of prevailing inequalities as a result of water privatisation. See GC 15 generally which does not assign any particular model of water governance to achieve the human right to water and neither does it require that water should be made available for free

⁸⁵ See US vote explanation (2010). See also Crook, J. R 'United States abstains on General Assembly resolution proclaiming human right to water and sanitation'. (2010) 104, *American Journal of International Law* 672–673.

⁸⁶ UNGA Voting explanations (2010) explanations by US, UK & Canada.

social protection. For this reason, it has been argued that the human right to water is not an independent right but at best operates as a subordinate right.⁸⁷

Although many scholars and advocates find that the CESCR accurately recognised an existing or implied right,⁸⁸ critics have found such recognition by the CESCR to be judicial creativity (not activism).⁸⁹ Denis and Stewart object to the derivation of a separate human right to water as being without precedent.⁹⁰ They argue that the CESCR unduly rewrote provisions of the ICESCR and expanded the liability of states in a way that is neither supported by the text of the ICESCR nor the history of its negotiation.⁹¹ Their review of the drafting process indicates that the human right to water was not mentioned and that adequate standard of living was not intended as a basis for free standing rights. Tully states that the CESCR over stepped its bounds to introduce a new right and with it new obligations for states and that it had no authority to do so.⁹² He and others have emphasised that the legislative mandate lies with the UN General Assembly and not the CESCR. Tully further argues that ‘intuitive affirmation of the existence of the right as critical for human survival’ is contrary to ‘state centric mechanics of the international legal system’ which emphasises states voluntary surrender to rules of law binding them.⁹³ He further contends that because the term ‘including’ is imprecise, there would be no end to what could be included in the list of components for an adequate standard of living.⁹⁴ Furthermore, he argues that inference is not the best way to render the human right to water but rather through an amendment by states parties themselves.⁹⁵ Inference, he states, undermines the legal security of the treaty and the right.

2.2.3 Clarifying the Legal Foundations: Teleological Interpretation

In response to these criticisms, Salman and Lankford argue that GC 15 did not create new obligations for the states parties to the ICESCR, but rather extrapolated the nature of their existing obligations.⁹⁶ As already discussed, the CESCR exercised its mandate and merely

⁸⁷ See Cahill A (2005)391.

⁸⁸ Murthy SL (2013) 101; Bulto TS (2014) 29; Salman SMA & Mcinerney-Lankford (2004) generally.

⁸⁹ See for instance McGraw GS (2010)generally.

⁹⁰ Dennis MJ & Stewart DP ‘Justiciability of Economic Socio-Cultural Rights: Should there be an International Complaints Mechanisms to Adjudicate Rights to Food, Water, Housing and Health’ (2004) 98 *American Journal of International Law* 494.

⁹¹ Dennis MJ & Stewart DP (2004) 494.

⁹² Tully S (2005)37.

⁹³ Tully S (2005) 42.

⁹⁴ Tully S (2005) 37.

⁹⁵ Tully S (2005) 37.

⁹⁶ Salman SMA & Mcinerney-Lankford S (2004) 5.

elaborated upon rights and obligations acceded to by states parties.⁹⁷ Langford, responding to Tully's critique of GC 15, states that the CESCER is mandated to interpret the ICESCR, which was drafted between 1948 and 1966, in the context of present circumstances.⁹⁸ In order to render effective protection of human rights, treaties cannot be viewed as static or unchanging but rather as constantly evolving to address new challenges in line with the object and purpose agreed on.⁹⁹ When states enter into an agreement under international law, they are bound to the obligations under the agreement but also the rules applicable to governing interpretation and enforcement of the obligations in the event that there are new circumstances that must be considered.

The status of the human right to water in international law, thus boils down to the correct approach to the interpretation of the text of the ICSECR and the ICCPR. The interpretation of all international agreements is guided by the Vienna Convention on the Law of Treaties (Vienna Convention) which permits inference of implied rights as long as this is done in good faith, based on both the text and object of the treaty.¹⁰⁰ Bulto points out that this is what the CESCER in GC 15 achieved, by relying on a teleological approach, it promoted the human rights guaranteed in the ICESCR and also filled the gap in the protective regime relating to the human right to water that had been missing from the explicit terms of the ICESCR.¹⁰¹ He counters Tully's argument that the gap should have been filled through an amendment by the states by stating that the reliance on the word 'including' was in order. He explains that law-making bodies use the word 'including' as an indicator to an illustrative and not exhaustive list of rights or behaviours that are being regulated.¹⁰² According to Craven, the concept of 'an adequate standard of living' is broad and some rights necessary for such a standard not mentioned in the provision should therefore be identified by the CESCER.¹⁰³ Water is equally or even more essential for attaining a sufficient standard of human well-being and basic

⁹⁷ Salman SMA & Mcinerney-Lankford S (2004)78.

⁹⁸ Langford M 'Ambition that Overleaps itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water' (2006) 24 *Netherlands Quarterly of Human Rights* 434, 435. Treaties are living documents just like constitutions which must be interpreted generously and purposively having regard to changing circumstances. See Chirwa DM, *Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* (LLD thesis, University of Western Cape, 2005) 374.

⁹⁹ See Vienna Convention on the Law of Treaties (Vienna Convention) Adopted 29 May 1969 and entered into force 27 January 1980 art 31. See also Salman SMA & Mcinerney-Lankford S (2004) 60; Bulto (2014) 35.

¹⁰⁰ Vienna Convention art 31.

¹⁰¹ Bulto TS (2014) 36.

¹⁰² Bulto TS (2014)37-38.

¹⁰³ Craven MCR (1995) 351; Bourquain K (2008) 138.

survival.¹⁰⁴ As will be seen below, Tully's arguments in support of a restrictive interpretation of the treaty is not supported by international law or by the practice in international courts such as the African Commission as well as domestic courts that rely on teleological interpretation.¹⁰⁵

The Vienna Convention on the Law of Treaties (Vienna Convention) provides for treaty interpretation as agreed by states. In article 31 it is stated that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms of the treaty* in their *context* and in the light of its *object and purpose*.' Three approaches can be inferred from this provision, a textualist, contextualist and a teleological interpretation.¹⁰⁶ The textualist approach calls for reliance on the text for a literal interpretation of treaties.¹⁰⁷ The contextual approach posits that interpretation aims to ascertain the intention of the parties and this may require going outside the text.¹⁰⁸ The teleological approach asserts that the object and purpose of a treaty is the starting point and interpretation must give effect to it.¹⁰⁹

The textualist approach applied alone would indeed result in the exclusion of any unenumerated rights in the human rights treaties. Devenish states that this approach however, is now universally recognised as problematic and outdated.¹¹⁰ He explains that this is because 'words do not have intrinsic meaning in language, but their meaning is invariably determined by the concatenation of contextual factors.'¹¹¹ Dworkin argues that treaties, just as constitutions, cannot decide all matters in all detail but contain a moral or principled content which must be used to fill apparent gaps in the law.¹¹² Furthermore, treaties are living documents which constantly evolve and hence the text cannot be the only authority during interpretation.¹¹³ The Vienna Convention recognises that the text and its ordinary meaning is merely the starting point of the process of interpretation as context and the object

¹⁰⁴ Bulto TS (2014) 36; Winkler IT (2012) 44.

¹⁰⁵ Bulto TS (2014) 39.

¹⁰⁶ Jonas DS & Saunders TN 'The object and purpose of a treaty: three interpretive methods' (2010) 43:3 *Vanderbilt Journal of Transnational Law* 565, 577.

¹⁰⁷ Jonas DS & Saunders TN (2010) 577.

¹⁰⁸ Jonas DS & Saunders TN (2010) 577-578.

¹⁰⁹ Jonas DS & Saunders TN (2010) 578.

¹¹⁰ Devenish GE *Interpretation of Statutes* (1992) 26 stating it is an equitable interpretation mechanism allowing the interpreter to extend or restrict the operation of the text in light of the object and purpose of the treaty at 39 quoting Corry 'Administrative Law and the Interpretation of Statutes (1935 -36) 1 *University of Toronto Law Journal* 286, 296.

¹¹¹ Devenish GE (1992) 26.

¹¹² Dworkin R 'Unenumerated Rights: Whether and How *Roe* Should be Overruled' (1992)59 *University of Chicago Law Review* 181, 183 -189.

¹¹³ Langford M (2006) 24. See also Chirwa DM, *Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* (LLD thesis, University of Western Cape, 2005) 374.

and purpose of the treaty are equally relevant.¹¹⁴ Mechlem states that the overarching object and purpose of human rights treaties is the protection of the rights of individuals and therefore treaty interpretation must be sufficiently favourable to the effective protection of individual rights.¹¹⁵ This may require going outside the text in order to determine how best to protect the rights guaranteed. The teleological approach therefore qualifies the textual approach as it allows consideration of material even outside the treaty, such as annexes, material related to concluding the treaty, subsequent agreements and practice of states.¹¹⁶ Similarly the contextual approach as already stated allows reliance of material outside of the treaty to determine the intention of the parties however as Jonas and Saunders avers, the object and purpose is ‘a unitary concept referring to the goals that the drafters of the treaty hoped to achieve.’¹¹⁷ The intention of drafters is protection of human rights and this is given effect in emerging circumstances through teleological interpretation.¹¹⁸

The CESCR, in order to give effect to the human rights guaranteed in the ICESCR, relied on a teleological interpretation to infer a human right to water from the right to an adequate standard of living.¹¹⁹ Article 11 (1) provides as follows:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The CESCR reasoned that the list of rights is not intended as an exhaustive list but merely symptomatic of what rights would ensure an adequate standard of living.¹²⁰ This is because early human rights instruments were written in general terms and did not explicitly define all possible implied rights.¹²¹ McGaw states that the omission of water from the list in article

¹¹⁴ Jacobs FG ‘Varieties of approach to treaty interpretation: with special reference to the Draft Convention on The Law of Treaties before the Vienna Diplomatic Conference’ (1969) *International and Comparative Law Quarterly* 318,337 - 338. He argued that the textual approach to interpretation has been qualified as evident in the requirement for consideration of the object and purpose of the treaty and also the absence of the requirement to ascertain and give effect to the intention the treaty was or is to serve.

¹¹⁵ Michelm K ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt Journal Of Transnational Law* 905,912.

¹¹⁶ Vienna Convention art 32.

¹¹⁷ Jonas DS & Saunders TN (2010) 578.

¹¹⁸ See Bulto TS The emergence of the human right to water (2011) 298; Bulto TS *The Extraterritorial Application of the Human Right to Water* (2014) 35.

¹¹⁹ GC 15 para 3. See also Salman SMA & Mcinerney-Lankford S 2004) 56- 58; Bulto TS (2011)297-298; Bulto TS (2014) 42 -43.

¹²⁰ GC 15 para 3. See also Kok A & Langford, M ‘The right to water’ in Brand, D & Heyns, C (eds) *Socio-Economic Rights in South Africa* (2005) 191-208.

¹²¹ Hardberger A ‘Life, liberty, and the pursuit of water: evaluating water as a human right and the duties and obligations it creates’ (2005) 4:2 *Northwestern Journal of International Human Right* 331,332; McGraw GS (2011)149.

11(1) is as a result of using the language from a similar article in the Universal Declaration of Human Rights (UDHR), article 25, which focused on social security in the event of lack of livelihood and not a delineation of all the elements essential to life.¹²² Murthy attributes the omission to the fact that the article was intended to be broad, as evidenced by the ICESCR *travaux preparatoires* that indicate that drafters had considered water and other rights like transport.¹²³ He asserts that perhaps it was not included because it was thought that water was so essential to life that mentioning it would be redundant.¹²⁴ He also argues that the three elements mentioned, rights to food, clothing and housing were only meant to be illustrative of the essentials for livelihood. The omission of the human right to water in article 11(1), but also generally in the ICESCR and the inclusion of arguably lesser essential rights,¹²⁵ is attributed to the context within which the ICESCR was drafted. Water scarcity was not yet a concern,¹²⁶ and more broad environmental issues had not yet attained political consideration (1950s and 60s).¹²⁷ Both these factors have now propelled the claim for a human right to water as water scarcity and environmental degradation have gained global attention due to the threat they pose to human life.¹²⁸ However the fact that the human right to water did not make it in the final draft after having been brought up in discussion remains the basis for a conflicting conclusion. The human right to water was deliberately excluded from the text and can thus not be read back into the text after the fact, behind the backs of the contracting state parties as it were.¹²⁹

In response to this argument it must be remembered that the Vienna Convention establishes that the history of a provision or the original intention of the drafters is a secondary or

¹²² McGraw GS (2011) 149; Craven MCR (1995) 293.

¹²³ Murthy SL (2013) 92.

¹²⁴ Murthy SL (2013) 92.

¹²⁵ Gleick PH (1999) 491. While analysing the Universal Declaration on Human Rights (UDHR) which is the basis for the ICESCR and contains, Gleick contended that the right to water was explicitly included in the UDHR by virtue of the other rights included. He points out the framers would not have consciously excluded the right to water while including other lesser essential rights such as the right to work, to protection against unemployment, to form and join trade unions and to rest and leisure in arts 23 & 24 of UDHR. See similar arts 6 and 8 ICESCR..

¹²⁶ Winker IT *The Human Right to Water* (2012) 42; Murthy *The Human Right(s) to Water and Sanitation* (2013), 92.

¹²⁷ Marques DF Book Review of *The Human Right to Water: Significance, Legal Status and Implications for water Allocation* by IT Winker (2013) 35 *Human Rights Quarterly* 791. See also Salman SMA & Mcinerney-Lankford S (2004) 7. The 1970s saw emerging concern and recognition of the importance of the environment and all its elements especially water, leading to the first ever recognition of a right to water and the call to safeguard the environment. See section 2.1.2 below.

¹²⁸ McGraw GS (2011) 130 – 13.

¹²⁹ See Thielbörger P 'Re-Conceptualizing the human right to water: a pledge for a hybrid approach' (2015) *Human Rights Law Review* 1, 3 emphasising that the evidence in the preparatory work (*travaux préparatoires*) of the circumstances of the drafting processes is ambivalent.

subordinate means to interpretation.¹³⁰ As already stated, the primary goal is to ensure that a provision is given meaning that ensures the protection of the right to adequate standard of living, the law must be adapted therefore to the changing circumstances within which it applies.

The CESCR has asserted the existence of the human right to water under article 11(1) by arguing that water is vital to human life and well-being as it is one of the most fundamental conditions for survival. It hence falls within the category of guarantees essential for securing an adequate standard of living.¹³¹ The human right to water is therefore part and parcel of the right to an adequate standard of living as without it, such a right cannot be fully comprehended or realised. Accordingly, as Bulto puts it, an independent human right to water is discovered (not invented) as an unnamed sibling under article 11 of the ICESCR.¹³² This is in reliance to a teleological or purposive approach to interpretation.

Granted, the pronouncements of the CESCR, including the interpretation of the ICESCR provisions, do not constitute binding international law.¹³³ However, because the CESCR is the main interpreter of the ICESCR and its general comments, through which interpretations of provisions are provided, enjoy wide acceptance, they carry significant legal authority.¹³⁴ Bourquain contends that where the CESCR interpretation of the provision is done in a dialogical process and the states accept the interpretation, such consent would make the interpretation mandatory.¹³⁵ This is usually through unchallenged or even conceded violations of rights that a treaty body finds through review of reports. Ssenyonjo states that state reports usually demonstrate states commitment and recognition of the rights they are reporting on.¹³⁶ Therefore, the reporting system provides some evidence of states parties' concurrence with the CESCR's interpretation of the ICESCR.¹³⁷ The CESCR has on several occasions before the issuance of GC 15, raised concerns about the inequitable enjoyment of the human right to water (33 out of 114 of concluding observations since 1993).¹³⁸ None of

¹³⁰ Vienna Convention art 32. See also Bourquain K (2008) 128-130 stating joining states might not identify with the historical will of the founders hence reliance on it is a subordinate means of interpretation.

¹³¹ GC 15 para 3.

¹³² Bulto TS (2014) 64.

¹³³ Bourquain K (2008) 220.

¹³⁴ Winkler IT (2012) 40, Bourquain K (2008)224.

¹³⁵ Bourquain K (2008) 223.

¹³⁶ Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2009) 30.

¹³⁷ Salman SMA & Mcinerney-Lankford S (2004) 50.

¹³⁸ See COHRE *Legal Resources For The Right To Water and Sanitation* (2011) for a comprehensive list of concluding observations by the committee with regards to water.

the states in question that the committee has raised such concerns challenged the existence of the human right to water and its obligations.¹³⁹ In examining state reports, the CESCR has on several occasions dealt with the human right to water in terms of the living standards of citizens in states party to the ICESCR. For example, in its concluding observations to Azerbaijan in 1997, the CESCR expressed alarm due to declining living standards evident in a large proportion of the population living without safe drinking water and requested that the government address the matter be dealt with in utmost urgency.¹⁴⁰ Concluding observations for Cameroon in 1999 urged the government to make safe drinking water accessible to the entire population - having noted the lack of access by the majority of populations.¹⁴¹ In their concluding remarks to Benin after reviewing their report, the CESCR noted with concern disparities in living standards between urban and rural areas. People living in rural areas had considerably less access to drinking water, sanitation and electricity and the privatisation of water and electricity were leading to a rise in costs.¹⁴² The above examples, and many other reports and concluding remarks by the CESCR,¹⁴³ demonstrate the recognition and commitment towards a human right to water for all. States provided information on their efforts towards realising the human right to water even before the GC 15. The interpretive step taken by the CESCR therefore culminates from the sufficient and separate recognition of states of the human right to water as evidenced by the provision of information on it as they report on their duties to realise the human right to water.¹⁴⁴

Further, the tacit acceptance of states to recommendations made by the CESCR is arguably indicative of these State assents to the interpretation by the CESCR that the right to water exists in the ICESCR.¹⁴⁵ However, as Bulto points out, this is a weak indicator on its own of

¹³⁹ Langford M & King JA 'Committee on Economic, Social and Cultural Rights' in Langford M (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (2008) 477, 509-14.

¹⁴⁰ Concluding observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan. 22/12/97. E/C.12/1/Add.20 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/5e2712360d12fd9d8025656b00459de5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5e2712360d12fd9d8025656b00459de5?Opendocument) Accessed on 2 September 2011).

¹⁴¹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon. 08/12/99. E/C.12/1/Add.40. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.40.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.40.En?Opendocument). (accessed on 2 may 2013).

¹⁴² Concluding Observations of the Committee on Economic, Social and Cultural Rights: Benin 05/06/2002. E/C.12/1/Add.78 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.78.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.78.En?Opendocument). (accessed on 2 may 2013).

¹⁴³ See Report of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch I ('Declaration of the United Nations Conference on the Human Environment') principle 2.

¹⁴⁴ Langford M (2006) 437.

¹⁴⁵ Bulto TS (2014) 45.

states' acceptance of the right.¹⁴⁶ He explains that the unchallenged allegations or concerns raised by the CESCR may be due to the nature of the reporting procedure and of the Concluding Observations.¹⁴⁷ The reporting procedure is non- adversarial and the Concluding Observations are mere recommendations with no possibility of enforcement. However, there is evidence of further consent around the interpretation, indicating that there is no complaint or explicit disavow to the CESCR mandate.

2.2.4 The Indivisibility of Economic, Social and Cultural Rights and Civil and Political Rights

The human right to water also finds its legal basis through the indivisibility of human rights and centrality of water to many other rights.¹⁴⁸ Whereas during the Cold War there was a prevailing view to distinguish civil and political rights (CPR) and economic social and cultural rights (ESCR) their indivisibility and interdependence is now widely accepted. The Declaration on the Right to Development is one of the initial indications for a growing move away from this traditional distinction by declaring that all human rights and fundamental freedoms are indivisible and interdependent.¹⁴⁹ However it is the Vienna Declaration and Programme of Action adopted at the second UN World Conference on Human Rights that truly reflects the consensus on this and the realisation that implementing CPR without ESCR is futile.¹⁵⁰ Paragraph 5 of the the Vienna Declaration and Programme of Action provides that:

All human rights are universal, indivisible and interdependent and interrelated. The international, community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.¹⁵¹

The way this works in reality has been explained by Scott, who advances the idea of 'permeability' to explain the legal effect of interdependence and indivisibility of human

¹⁴⁶ Bulto (2014) 45-46.

¹⁴⁷ Bulto TS (2014) 45.

¹⁴⁸ GC15 para 3.

¹⁴⁹ UN General Assembly, *Declaration on the Right to Development* A/RES/41/128 (1986) para 6(2). See also UN General Assembly *Effective Enjoyment of Human Rights and Fundamental Freedoms* A/RES/32/130 (1977); UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* A/RES/41/117 (1986); UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1987) A/RES/42/102 & UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1988) A/RES/43/113.

¹⁵⁰ UN General Assembly, *Vienna Declaration and Programme of Action*, (1993) A/CONF.157/23.

¹⁵¹ Vienna Declaration para 5.

rights.¹⁵² He states that through permeability, a treaty of one category of human rights can have its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights.¹⁵³ As regards specific rights, he explains that interdependence may be organic or related interdependence.¹⁵⁴ In organic interdependence, ‘one right forms a part of another right and may therefore be incorporated into that latter right’.¹⁵⁵ The core right then justifies the other derivative right as the two rights are inseparable or indissoluble and the protection of one will mean directly protecting the other.¹⁵⁶ In related interdependence, the rights are mutually reinforcing or mutually dependent but distinct.¹⁵⁷ The rights are equally important although separate and to protect one entails protecting the other indirectly.¹⁵⁸

The CESCR applied this understanding in finding that the human right to water also finds its legal basis in other human rights, such as the right to food, housing, health, life and dignity.¹⁵⁹ Water is so central to these rights and many others such that without it, such rights would be left devoid of any practical effect.¹⁶⁰ The human right to water forms part and parcel of other rights and hence justifies deriving it from these explicitly recognised rights.

Scholarship on the human right to water and reliance on organic interdependence as its legal basis have, however, pointed out that it is subsumed under a subordinate right that has only certain aspects protected or implemented.¹⁶¹ For instance, Bulto, using the concept of ‘parent rights’, argues that the human right to water becomes a small subset and of the parent right it is derived from and enjoys protection based on its utility to this ‘parent right’.¹⁶² Its utility might not cover all aspects of the human right to water i.e. safe sufficient and reasonably accessible water that prevents dehydration and risk to water borne diseases when used for consumption, cooking, personal and domestic hygienic requirements.¹⁶³ The main concern is that the different ‘parent rights’ do not define the scope of the right to water envisaged under

¹⁵² Scott C ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ (1989) 27 *Osgoode Hall Law Journal* 711, 769

¹⁵³ Scott C (1989) 711.

¹⁵⁴ Scott C (1989) 779.

¹⁵⁵ Scott C (1989) 779.

¹⁵⁶ Scott C (1989) 779- 780.

¹⁵⁷ Scott C (1989) 782 – 783.

¹⁵⁸ Scott C (1989) 783.

¹⁵⁹ GC 15 para 3.

¹⁶⁰ Salman SMA From Marrakech through The Hague to Kyoto (2004)58

¹⁶¹ Cahill (2005) 394; Bulto TS (2014) 98.

¹⁶² Bulto TS (2014) 98.

¹⁶³ See GC15 para 2. See also Chapter three on the normative content of the right to water

it. Therefore the concern that other aspect may not be given as much attention as they deserve when realised through another right.¹⁶⁴

The inadequacy of ‘parent right’ conception can be best illustrated by an argument deriving the human right to water from the right to food. The right to food is specifically enlisted in article 11(1) as a component of an adequate standard of living. According to the UN Special Rapporteur on the right to food, Olivier de Schutter, the right to food ‘protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it.’¹⁶⁵ Access to water is necessary as liquid food,¹⁶⁶ but also for food production and food preparation, including cooking and cleaning of necessary utensils. However, unlike water, malnutrition was already identified as a big problem during the time the ICESCR was being drafted, hence the right to food was included in the list of enumerated rights.¹⁶⁷ Tully argues that the right to food offers the best basis for the human right to water, as it is also linked to the right to health and both rights have been well clarified and defined in General Comments besides the right to an adequate standard of living.¹⁶⁸ Langford disagrees by pointing out that the right to food does not sufficiently cover the human right to water.¹⁶⁹ He argues that although GC 15 illustrates how water is linked to food, the right to food only covers consumption uses of water and not beyond.¹⁷⁰ The human right to water entails other uses of water, such as personal sanitation and household hygiene. Further, such uses of water may compete for priority with other uses covered under the right to food, such as water for agriculture.¹⁷¹ It may be noted that food and water are substantially different in terms of infrastructure requirements but they both contribute to human survival. Whereas different foods can easily be substituted to fulfill the right to food, water has no substitute. These arguments have led to a conclusion that the two rights should thus be distinguished and regarded as separate rights for optimum realisation and effective implementation.¹⁷² For instance, some treaties such as the Geneva Convention and the CRC make the distinction between water and food and guarantee these rights separately.

¹⁶⁴ Langford M (2006) 442-444.

¹⁶⁵ De Schutter O ‘The right to food’ available at <http://www.srfood.org/en/right-to-food> (accessed 8 March 2014).

¹⁶⁶ Commission on Human Rights ‘The Right to Food, Report by the special Rapporteur on the Right to food, Mr Jean Ziegler, submitted in accordance with Commission on Human Rights Resolution 2000/10, 7 February 2001, E/CN.4/2001/53 para 33.

¹⁶⁷ Bourquain K *Freshwater Access* (2008) 137.

¹⁶⁸ Tully S A? (2006) 40 & 41.

¹⁶⁹ Langford M (2006) 442.

¹⁷⁰ Langford M (2006) 443. See GC 15 para 7 & also paras 3, 5 & 12.

¹⁷¹ Winkler IT (2012) 153 -168, Cahill A *The Human Right to Water* (2005) 397.

¹⁷² Cahill (2005)397; Winkler IT (2012) 46.

The potential and limits of the indivisibility argument also surface in the case of numerous other ‘parent rights’. The right to housing does not simply entail having a roof over one’s head but rather it is broad enough to ensure the ‘right to live somewhere in security, peace and dignity.’¹⁷³ The right to housing, as derived from the right to adequate standard of living, cannot be fully enjoyed or realised without water and sanitation, not only for adequate personal and household hygiene, but also building of the structures.¹⁷⁴ The CESCR hence regards water as a necessary aspect within the concept of adequate housing.¹⁷⁵ The first Special Rapporteur on adequate housing also acknowledged that the ‘full realisation of the right to adequate housing is closely interlinked with and contingent upon fulfilment of other rights and services, including access to safe drinking water and sanitation’¹⁷⁶ For instance lack of water within the home may mean that the residents must go to shared latrines or open spaces to defecate. Privacy and physical security especially of women and children in such cases is under threat as they are vulnerable to harassment, attacks, violence or rape.¹⁷⁷ Langford points out that because water is just one among many services necessary under the right to the housing i.e. adequacy of housing also requires access to energy, means of food storage, refuse disposal, site drainage and emergency services; it might not get the critical attention it deserves. Further he points out that the General Comment on the right to housing does not define the obligations of states as they relate to water and thus offer limited protection to all aspects of the human right to water.¹⁷⁸

GC 15 recognises that the human right to water is also inextricably related to the right to the highest attainable standard of health guaranteed in article 12(1) of the ICESCR.¹⁷⁹ Although the article does not mention water as one of its elements, Cahill and others hold that the right to health is the most obvious existing right linked to the right to water.¹⁸⁰ This is in light of the fact that access to safe and potable water is necessary to prevent death from dehydration

¹⁷³ CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, (GC 4) para 7.

¹⁷⁴ GC4 para 7.

¹⁷⁵ GC 4, para. 8(b). Water is necessary for the maintenance of healthy household through washing of hands, bodies, dishes, cooking implements, clothing, linens and floors. See Wescoat JL, Jr & White G.F *Water for Life: Water Management and Environmental Policy* (2003) 6.

¹⁷⁶ Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr. Miloon Kothari, U.N. ESCOR, (2002) para. 56, U.N. Doc. E/CN.4/2002/59.

¹⁷⁷ World Health Organization (WHO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Centre on Housing Rights Evictions (COHRE) et al *The right to water* (2003) Fact sheet No.35 13 Available at <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf> (accessed on 11 May 2013).

¹⁷⁸ Langford M (2006) 444.

¹⁷⁹ See GC15 para 3. Art 12 of the ICESCR ; (GC 14) para 11.

¹⁸⁰ Cahill A (2005) 395.

and to reduce the risk of water-related disease.¹⁸¹ General Comment 14 on the right to health states that this right is not limited to a right to health care services but includes underlying determinants of health, such as access to water.¹⁸² The CRC also recognised the intrinsic link between water and health, when in article 24(c) it specifically obliged member states to implement the right to the highest attainable standard of health through provision of adequate food and clean drinking water, so as to combat disease and malnutrition.¹⁸³ The right to health also requires the assurance of environmental hygiene that entails among other things that states ensures protection of water resources from toxic water conditions. The human right to water can therefore be derived from the right to health. However, as was the case with other ‘parent rights’, because the right to health is not primarily concerned with water, again the right to water may not get adequate protection as the right to health has other equally important elements such as ensuring health services. Each right should rather also be deemed as a separate right to ensure full definition or scope and its protection.

McCaffrey, who may be considered to be among the first scholars to consider a human right to water, advanced the centrality of water to life as one of the reasons for the existence of a human right to water.¹⁸⁴ He wrote, in 1993, stating that ‘water is essential for life, crucial for relieving poverty, hunger and disease and critical for economic development.’¹⁸⁵ Lack of access to safe and potable water leads to substantial, unnecessary and preventable human suffering, such as death due to dehydration, as human beings cannot live for more than a few days without water; poor health and even death from diarrhoeal diseases; constrained development and poverty alleviation and impaired dignity as a result of poor personal and domestic hygiene.¹⁸⁶ Hence the improper use of water as a political weapon by governments in places like Sudan and Israel and poor management in many other countries are grave

¹⁸¹ GC15para 2. See also Petrova V ‘At the frontiers of the rush for blue gold: water privatisation and the human right to water’ (2006) 31 *Brooklyn Journal of International Law* 580 stating that sixty per cent of the world’s illnesses are linked to water.

¹⁸² GC 14 see also See UN Commission on Human Rights Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (2002) UN Doc E/CN.4/2002/L.11.

¹⁸³ Water is also required for proper human health and hygiene to eradicate diseases like diarrhoeal that take a heavy toll on human lives, particularly on children, WHO Water supply, sanitation and hygiene development available at http://www.who.int/water_sanitation_health/hygiene/en/ (accessed on 6 July 2013) UNDP Human Development Report (2006) 49; WHO and SIWI, Driving development by investing in water and sanitation (2005) 3, See also of the International Convention on the Elimination of All Forms of Racial Discrimination art 5 (e) (iv) adopted 21 December of 1965 and entered into force 4 January 1969. See also CEDAW art 11.1 (f) and 12.

¹⁸⁴ See generally McCaffrey SC ‘Human Right to Water: Domestic and International Implications’ (1992-1993) 5 *Georgetown International Environmental Law Review* 1- 24.

¹⁸⁵ McCaffrey SC (1992-1993) 5.

Gleick PH (1999) 488; WHO *The Right to Water* (2003) 6-7, available at http://www.who.int/water_sanitation_health/en/righttowater.pdf (accessed on 12 July 2011).

concerns for human life.¹⁸⁷ Water is not only central to human life but other forms of life and the ecosystem that supports all forms of life. This argument is significant because it means that even states which are not parties to the ICSECR have obligations attached to a derived right to water under the ICCPR.

The right to life is guaranteed in the ICCPR and was initially interpreted narrowly as referring only to the negative obligations of the State to refrain from arbitrary deprivation of life.¹⁸⁸ However, the Human Rights Committee (HRC) has established that this right should be understood to include positive obligations on the State, including towards guaranteeing basic necessities appropriate for sustenance and to support a decent standard of living.¹⁸⁹ A human right to water can thus be derived under the right to preserve life, by preventing death from dehydration, reducing the risk of water related diseases and providing water for basic cooking and hygiene. Water is life.

The human right to water is also intrinsically linked to leading a life with human dignity.¹⁹⁰ The UDHR states that all human beings are born free and equal in dignity and rights.¹⁹¹ Dignity is the minimum definition of what it means to be human in any morally tolerable form of society.¹⁹² For one to lead a life of dignity, one has to enjoy a certain level of sanitation and also command a certain amount of water for survival. Lack of water results in denied opportunity to live in dignity, as one is unable to live without positive humiliation or degradation.¹⁹³ Liebenberg argues that with no opportunity to live in dignity, a person cannot develop other capabilities, including participation in different activities such as work,

¹⁸⁷ McCaffrey SC (1992-1993) 6. See also Gleick PH 'Water and Conflict: Fresh Water Resources and International Security' (1993) 18:1 *International Security* 79 -112 for detailed outline on water and conflicts between different countries with shared water resources and its increasing risk of becoming a political tool for war.

¹⁸⁸ International Covenant on Civil and Political Rights (ICCPR) Adopted 16 December 1966 and entered into force 23 March 1976 art 6(1). See UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 para 1 & 5

¹⁸⁹ See GC 6 para 5: McCaffrey SC (1992-1993) 9, Haleba S 'Access to sufficient water in South Africa: how far have we come?' (2009) *Research Paper* 4; Bourquian K (2008) 133; Gleick PH (1999) 493. GC 15 para 1.

¹⁹⁰ UDHR art 1, ICCPR art 10, ICESCR art 13.

¹⁹¹ HRC Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Independent Expert *on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, (2009) 57 U.N. Doc. A/HRC/12/24 (Jul. 1, 2009). See Chapter Four, section 4.4.2.1 on a discussion defining dignity

¹⁹³ Liebenberg S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal of Human Rights* 1, 2-3. See also *Minister of Home Affairs and Others v Watchenuka and Another* 2004(2) BCLR 120 (SCA), para 32 where it was stated that a restriction on a person's capacity for self-fulfilment is also a restriction upon his or her ability to live without positive humiliation and degradation.

education and social life where they would be able to realise their full potential.¹⁹⁴ Therefore a person has to have access to a certain amount of water to attain a level of sanitation and survival that enables them to live without shame or humiliation, and to develop physically, morally and mentally.

2.2.5 Convergence and Consensus

Given the analysis in the preceding section, the human right to water forms a central element of international human rights law as codified in the ICCPR and ICSECR. Once these instruments are interpreted relying on teleology and/or on the basis of the indivisibility of rights, there can be little doubt that independent human rights to water is a necessary implication of the commitment to respect, protect and promote the rights to human life and dignity. Attempts by states to rely on legalistic arguments based on the wording of these instruments and the original intention of the drafters should no longer be regarded as valid reservations about the sound legal foundation of the right to water. The opposition to the 2010 UN General Assembly Resolution on the right to water lacked any sound legal basis and, as mentioned above, seems to have been motivated by strategic considerations. Since the adoption of the 2010 Resolution, the HRC has adopted a number of further resolutions regarding the human right to water. These resolutions have been hailed as clear evidence of the coming of age of the human right to water and the broad global consensus over this right.¹⁹⁵ It may be noted that many countries have acknowledged a human right to water through these resolutions (and even prior to their adoption in the many other different resolutions, declarations, instruments or national legislations).¹⁹⁶

A few months after the adoption of the disputed UN General Assembly resolution in 2010, the HRC introduced its own resolution which was adopted by consensus within the Council. It confirmed that the human right to water is derived from the right to an adequate standard of living and inextricably related to the rights to the health, life and human dignity'.¹⁹⁷ The subsequent resolution by the HRC won over the dissenting voices, by affirming the existence of the human right to water and by providing greater detail about the legal basis of this right

¹⁹⁴ Liebenberg The value of human dignity (2005) 2 See also Anand PB *Scarcity, Entitlements and the Economics of Water in Developing Countries* (2007) 231, Craven MR (1995) 293 & Winkler IT (2012) 43.

¹⁹⁵ Gupta J, Ahlers R & Ahmed L (2010) 298; Meier SM, Kayser GL, Amjad, UQ *et al* ' (2013) 123.

¹⁹⁶ Gupta J, Ahlers R & Ahmed L (2010) 298; McGraw GS (2011) 144 stating that every member state of the UN had already acknowledged a human right to water at least once in the different documents or through membership in a supportive international organisation; Meier SM, Kayser GL, Amjad, UQ *et al* (2013) 123 stating that few continue to doubt the legitimacy of the human right to water.

¹⁹⁷ HRC (2010) para 3.

in International law.¹⁹⁸ This resolution demonstrated that consensus had increased and that countries were accepting a legal obligation regarding water and access to it.¹⁹⁹ Further, as discussed above, Catarina de Albuquerque, the special rapporteur on the human right to water concluded the consensus within the HRC meant ‘that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding.’²⁰⁰ The treaties in question included both the ICSECR and the ICCPR.

On 23 September 2013 the HRC reaffirmed that the human right to water is derived from the right to an adequate standard of living and that it is inextricably related to the right to health, the right to life and human dignity.²⁰¹ The resolution commends the commitments made by states to the human right to water and the progress made on reducing the number of people without access to improved water sources.²⁰² It also, however, raises concerns about the limited progress made regarding equity, equality and non-discrimination issues within increased access to water. Finally, on 24 September 2014, the HRC adopted another resolution, without the necessity of a vote, on the human right to water. All parties supported it and thus it was adopted by consensus. The latest resolution by the HRC further consolidates the legal consensus and wide-spread political support for the human right to water.²⁰³ The new resolution reaffirms the legal basis and definition of the human right to water, by including a full definition in line with the CESCRC. As will be seen in more detail in the next two chapters, the resolution also focuses on violations and remedies of this right.

In conclusion, although negotiations over the formal acknowledgement or recognition of the human right to water took place over several decades, they have finally culminated in convergence and support within the UN of an independent human right to water. The only remaining challenge at the end of 2014 is to ensure the enjoyment of this right.²⁰⁴ Before moving on to this challenge, it is first necessary to explore whether the consensus within the

¹⁹⁸ See UN Human Rights Council (HRC) Human Rights and Access to Safe Drinking Water and Sanitation (2010) A/HRC/15/L.14.

¹⁹⁹ See United States statement explaining their support to the resolution where they indicated that it was "proud to take this significant step of joining consensus on this important resolution regarding the right to safe drinking water and sanitation which is to be progressively realised" quoted in Gleick P *The Human Right to Water, At Last*, San Francisco Chronicle (Oct. 26 2010) Available at http://www.sfgate.com/cgi-bin/blogs/gleick/detail?entry_id=75517 (accessed on 17 March 2015)

²⁰⁰ UN Human rights *A landmark decision to make the right to water and sanitation legally binding*(6 October 2010) Available at <http://www.ohchr.org/EN/NewsEvents/Pages/RightToWaterAndSanitation.aspx> (accessed on 17 March 2015).

²⁰¹ HRC (2013) para 1.

²⁰² HRC (2013) para 2.

²⁰³ HRC (2014)

²⁰⁴ Barlow M (2013) 1.

UN also extends to other regional human rights system. For the purpose of this study, the focus will be limited to the African Charter on Human and Peoples' Rights and its enforcement mechanisms.

2.3 The Human Right to Water in the African Regional Human Rights System

2.3.1 Emergence of the Human Right to Water in Africa

Early indications for a human right to water in the African regional system can be traced back to the African Convention on the Conservation of Nature and Natural Resources of 1968 (Convention on Nature).²⁰⁵ The Convention on Nature provides that utilisation and development of natural resources must be for the best interests of people.²⁰⁶ Specifically regarding water, the Convention on Nature requires states to establish national policies that 'guarantee for their populations a sufficient and continuous supply of suitable water'.²⁰⁷ To ensure that the water is suitable, the Convention on Nature further requires that states put in place measures to prevent and control water pollution. This binding instrument can be relied on for a claim of a human right to water as it obliges states to provide water in terms that are in line with the core content of the human right to water.²⁰⁸ In 2003, Convention on the Conservation of Nature and Natural Resources was revised to specifically include a provision on access to water as a state obligation. The Convention on Nature provides that State parties have an obligation to guarantee for their populations a sufficient and continuous supply of suitable water.²⁰⁹ Although this later addition is not yet in force, hence not legally binding, such articulation renders force to the emerging human right to water and contributes to the enjoyment of the right.²¹⁰

²⁰⁵ African Convention on the Conservation of Nature and Natural Resources (Convention of nature) Adopted 15 September 1968 and entered into force 16 June 1969. Although in 1985 it was described as the 'most comprehensive multi-lateral treaty for the conservation of nature yet negotiated' it has not been particularly successful in terms of implementation, effectiveness and contributions. See Lyster S *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (1985) 115; Van der Linde M 'A review of the African Convention on Nature and Natural Resources (2002) 2 *African Human Rights Law Journal* 33 -59.

²⁰⁶ Convention of Nature art II.

²⁰⁷ Convention of Nature art V.

²⁰⁸ Bulto TS (2014) 78-79

²⁰⁹ The African Convention on the Conservation of Nature and Natural Resources (Revised Version) adopted 11 July 2003. Article VII.

²¹⁰ See also the Senegal River Water Charter agreed on by Mali, Mauritania and Senegal in 2002. This treaty declares the fundamental human right to healthy water for the population. See Senegal River Water Charter (2002) art 4(3).

In 1990, the human right to water was explicitly recognised in the African Charter on the Rights and Welfare of the Child (African Children's Charter).²¹¹ It provides that state parties are required to take measures to 'ensure the provision of adequate nutrition and safe drinking water' to realise highest attainable state of physical, mental, and spiritual health.²¹² As per the similar provision in the CRC, this provides for a narrow basis for the human right to water as it only regulates the quality of water necessary for attaining a healthy living.²¹³

In 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was also adopted.²¹⁴ The Women's Protocol provides for the human right to water within the right to food security. It guarantees women the right to nutritious and adequate food. In this regard it requires that state parties take appropriate measures to 'provide women with access to clean drinking water.'²¹⁵ As noted before, group specific instruments seek to guarantee already existing human rights for the particular group they target hence they are not establishing a new right all together.²¹⁶

The states in Africa made a statement in support of the human right to water in the Abuja Declaration at the Africa-South American Summit of 2006.²¹⁷ A commitment was made to 'promote the right of our citizens to have access to clean and safe water and sanitation'.²¹⁸ At the national level, many countries have further recognised the human right to water in various forms, as elaborated in 2.3.4.1 below. Further to national recognition, 32 African states voted in favour of the UN General Assembly resolution on the human right to water.²¹⁹ All this renders support for finding a human right to water under the African Charter by the African Commission.

2.3.2 The Human Right to Water under the African Charter

In 1995, the African Commission on Human and Peoples' Rights, (African Commission) first pronounced on the human right to water in *Free Legal Assistance Group and Others v*

²¹¹ African Charter on the Rights and Welfare of the Child (African Children's Charter) (1990) Adopted 11 July 1990 and entered into force 29 November 1999.

²¹² African Children's Charter art 14.

²¹³ Bulto TS 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341,344;
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) Adopted on 11 July 2003 and entered into force 25 November 2005.

²¹⁵ Women's Protocol art 15(a).

²¹⁶ See section 2.1.1 above.

²¹⁷ Abuja Declaration adopted at First Africa-American Summit, 26-30 November 2006 (Abuja, Declaration) art 18.

²¹⁸ Abuja Declaration para 18.

²¹⁹ UNGA voting explanation (2010).

Zaire.²²⁰ The African Commission is the monitoring and enforcement body of the African Charter on Human and Peoples' Rights (the African Charter).²²¹ The African Charter, the main human rights instrument of the African Union, provides for both CPR and ESCR but does not explicitly guarantee a human right to water. The African Commission inferred the human right to water from the rights to dignity, life, health and healthy environment in the African Charter.²²²

The African Commission, in article 45, is mandated to promote and protect the rights guaranteed under the African Charter. Under this mandate the African Commission has several functions such as to set standards and formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and freedoms. It also has the mandate to interpret the provisions of the African Charter in order to protect and promote the enjoyment of rights in Africa. The African Commission, as a monitoring treaty body, also receives states' reports on meeting legal obligations,²²³ and also receives and examines allegations from individuals, non-governmental organisations and states of violations of the human rights set out in the African Charter.²²⁴ As a quasi-judicial body, it has therefore promoted and protected the human and people's rights in the African Charter through its interpretation in numerous cases that are presented before it.

The African Commission has issued guidelines on how to implement the human right to water together with other ESCR in the African Charter.²²⁵ In the 2011 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights' (Guidelines) a human right to water was recognised. The African Commission held that although the human right to water is not directly protected in the African Charter, it is implied in the protection of other rights, including but not limited

²²⁰ *Free Legal Assistance Group and Others v Zaire* (Joined) Communications 25/89, 47/90, 56/91, 100/93, 9th Annual Activity Report (1995-1996) para 47.

²²¹ African Charter on Human and People's Rights (1981) Adopted 27 June 1981 and entered into force 21 October 1986.

²²² African Charter arts 5,16, 24 See *Bulto* TS (2014)70.

²²³ See African art 62 requiring States to submit reports on he legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed in the African Charter every two years.

²²⁴ See African Charter arts 47 & 55.

²²⁵ See African Commission on Human and People's Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights' (Guidelines)(2011).

to, the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment.²²⁶

The main basis of the human right to water espoused by the African Commission is the right to health which requires states parties to ‘take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.’²²⁷ The African Commission has established that the right to health includes health determinants, such as access to safe and portable water.²²⁸ Hence in *Free Legal Assistance Group and Others v Zaire* the Commission found that the ‘failure of government to provide basic services such as safe drinking water and electricity and shortage of medicine’ was a violation of the right to health.²²⁹ The communication alleged a number of violations such as torture, arbitrary detentions, extrajudicial executions, exclusion from access to education, mismanagement of public finances and failure of the government to provide basic services. From the facts presented, the African Commission found serious and massive violations of the African Charter provisions including the right to health. By connecting the right to health with the human right to water, the African Commission rendered protection to this right through permeability but also for the first time a latent human right to water was revealed. This was followed by the much celebrated case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, as case dealing with the contamination of water sources by state or non-state actors, which was also found to violate the right to health and the right to a satisfactory environment.²³⁰ These rights were held to obligate governments to desist from directly threatening the health and environment of their citizens.²³¹ The government of Nigeria had failed in this regard.²³² It had allowed the exploitation of oil with no measures to protect the environment, water resources or the health of the people. Hence the toxic wastes from the exploitation of oil were disposed into the environment and local waterways. There were also oil spills to the nearby villages, with incidences of environmental degradation and serious health problems. The government forces were used to attack, burn and destroy

²²⁶ Guidelines (2011) para 87.

²²⁷ African Charter art 16.

²²⁸ Joined) Communication 279/03, *Sudan Human Rights Organisation v The Sudan and Communication 296/05, Centre on Housing Rights and Evictions (COHRE) v The Sudan, (COHRE v Sudan)* 28th Annual Activity Report (2010) Para 208-209.

²²⁹ *Free Legal Assistance Group and Others v Zaire* para 47.

²³⁰ SERAC case para 49 – 57& 66.

²³¹ See *SERAC case* para 50 -54.

²³² The African Commission also found the government of Nigeria to have violated the rights to housing and food which are not explicitly provided for but inferred from the corollary of the combination of the provisions protecting rights to life, property, health, family and the right to economic, social and cultural development in arts 14, 16,18 and 22.

villages and homes in response to protests against environmental degradation. Apart from holding that rights recognised in the African Charter, such as health and a healthy environment, had been violated, the African Commission found the government of Nigeria to have violated other implied rights in the African Charter. It held that the rights to housing and food which are not explicitly provided for but inferred from express rights to life, property, health family life and development had also been violated.²³³ These two rights were read into the African Charter before a pronouncement on their violations was made. The African Commission did not pronounce an independent human right to water, but rather a subordinate right based on its centrality for realising other rights.²³⁴ Bulto points out that the African Commission diverted from its jurisprudence of employing purposive interpretation to explicate implicit rights in the African Charter, as it did for the rights to food and housing.²³⁵ The rights to food and housing were established as independent and free standing although they are derived from other explicitly recognised rights.²³⁶

In *Centre on Housing Rights and Evictions v The Sudan*, the African Commission affirmed its earlier pronouncements on water being a health determinant but again missed an opportunity to espouse on the human right to water.²³⁷ The complainants in the case requested the African Commission to declare an independent human right to water by reading together the rights to life, health and economic, social and cultural development in the African Charter.²³⁸ The Commission failed or refused to do so. The Commission confined violations in the case, including those involving the right to water, to the other rights specifically included in the African Charter.²³⁹ The case alleged massive human rights violations by the government of Sudan in the Darfur region, which included looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying people access to water sources.²⁴⁰ The African Commission stated that the right to health included healthy conditions, such as access to safe and portable water and that the right to health had been violated as a result of poisoning of water sources and exposing victims to serious health

²³³ *SERAC paras 60, 64-65*; see also African Charter 4, 14, 16,18 and 22.

²³⁴ Bulto TS (2014)71 -73.

²³⁵ Bulto TS (2014)74-75.

²³⁶ See *the Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria*, 15th Annual Activity Report (2001-2002) (SERAC case) paras 60 & 64-65 establishing the rights to food and housing in the African Charter.

²³⁷ *COHRE v Sudan para 212* See also Communication 292/2004, *Institute for Human Rights and Development in Africa v Republic of Angola*, 24th Activity Report (2008) Para 51.

²³⁸ *COHRE v Sudan paras 125 – 126*.

²³⁹ *COHRE v Sudan Para 228*.

²⁴⁰ *COHRE v Sudan Para 207*.

risks.²⁴¹ No pronouncement of a violation based on the human right to water alone as an independent right was made.²⁴² The African Commission only found violations of the human right to water that fell under the right to health.²⁴³ As per the discussion above, clearly a derivative approach creates a subordinate human right to water dependent on the primary right for enforcement.²⁴⁴

Bulto correctly concludes thus that the human right to water under the current African human rights system ‘lacks an independent or free-standing status on its own right and its realisation per se cannot be demanded by the right holders’.²⁴⁵ Different aspects of the human right to water are protected under different primary rights, thus providing a shaky legal basis located in different rights, depending on the type of violation before the African Commission.²⁴⁶

In summary then, through the exercise of an interpretive mandate to clarify provisions of the African charter and promote human rights, a human right to water has been inferred in the regional system as forming part of rights recognised in the African Charter. It places obligations on member states who are signatories to the African Charter to realise the human right to water based on rights to life, dignity, health and development of a person. Water is central to all these rights, hence it is recognised as an auxiliary to human rights provided in the African Charter. At the UN level, the human right to water finds its legal basis in the ICESCR and the ICCPR and similarly places obligations on member states to these instruments. Interpretation of existing human rights is also relied on to find a human right to water. The centrality of water to other human rights and the indivisibility of all human rights are the main considerations in ensuring effective promotion of human rights and giving life to the provisions of these instruments.

The consensus that has been demonstrated at the UN level and the regional level within the African Union confirms that the human right to water is considered as a legal obligation. Where state practice is considered as emanating from a legal obligation, such practice becomes a customary international norm that binds all states in the world regardless of treaty

²⁴¹ COHRE v Sudan Para 12.

²⁴² See COHRE Submissions in support of the communication to the African Commission on Human and Peoples’ Rights (2004 para 79 – 88 Available http://www.escr-net.org/sites/default/files/Sudan_Petition_%28Main%29.pdf (Accessible 20 March 2015).

²⁴³ COHRE v Sudan para 211.

²⁴⁴ Cahill A (2005) 394.

²⁴⁵ Bulto TS (2011) 347; Bulto TS (2014) 72.

²⁴⁶ Bulto TS (2011) 348; Bulto TS (2014) 73.

commitment or not on the matter. The following section will explore whether a customary human right to water has also emerged in view of global consensus on this matter.

2.4 The Human Right to Water as Part of Customary International Law

Customary international law (CIL), apart from treaties, is the other primary form of international law.²⁴⁷ CIL is an unwritten law that evolves from long standing practice accepted as law among nations.²⁴⁸ For a norm to be recognised as customary international law, there has to be state practice undertaken with belief that it is legally binding.²⁴⁹ State practice according to the International Court of Justice (ICJ), must be widespread and uniform to be considered as contributing toward the formulation of CIL.²⁵⁰ State practice is defined as ‘behaviours respecting a particular issue that amounts to direct action by, or has a direct effect on, the State whose behaviour is in question.’²⁵¹ All that states can do or omit to do will fall under the behaviour of the State and hence can be classified as state practice.²⁵² A wide range of national actions are considered as state practice such as policy statements, national constitutions and legislation, diplomatic correspondence, UN resolutions and other non-binding statements and resolutions by multilateral bodies.²⁵³ The State practice is required to be consistently followed over a period of time by a sufficiently extensive and representative number of states.²⁵⁴

The second element for the formulation of CIL is that states must conform to a rule due to a sense of legal obligation or *opinio juris*.²⁵⁵ In the *North Sea Continental Shelf* cases it was stated that it is not enough that an act amounts to a settled practice but there must also be

²⁴⁷ Goldsmith JL & Posner EA ‘Theory of customary international law’ (1999) 66 *The University of Chicago* 1113, 1116 (. See also Viljoen F *An Introduction to International Human Rights Law* (2012) 28.

²⁴⁸ See Art 38 of the United Nations, *Statute of the International Court of Justice*, 18 April 1946.

²⁴⁹ *North Sea Continental Shelf Cases* (F.R.G. v. Denmark; F.R.G v. Netherlands 1969 I.C.J. 3 (Feb. 20).

²⁵⁰ See *North Sea Continental Shelf Cases* (F.R.G. v. Denmark; F.R.G v. Netherlands 1969 I.C.J. 3 (Feb. 20). See also *Nicaragua v USA* (Merits) *ICJ Reports* 1986 *ICJ Reports* 97 The International Court of Justice (ICJ) is the UN principle judicial organ whose decisions are persuasive evidence of what law is See UN Charter art 92. See also Weisburd AM ‘The International Court of Justice and the concept of state practice (2009) 31: 2 *Journal of International Law* 295, 296.

²⁵¹ Weisburd AM (2009) 303.

²⁵² Kammerhofer J ‘Uncertainty in the formal sources of international law: customary international law and some of its problems’ (2004) *European Journal of International Law* 523,525.

²⁵³ Goldsmith JL & Posner EA ‘Theory of customary international law’ (1999) 1117; Brownlie I, *Principles of Public International Law* (2003) 6; Malanczuk P Akehurst’s *Modern Introduction to International Law* (2005) 39. See also Restatement of the Law, Third, the Foreign Relations Law of the United States (1987) §102(2).

²⁵⁴ International Law Association, Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law, (2000), Weisburd AM (2009) 301.

²⁵⁵ Brownlie I (2003) 6 -12.

evidence that the act is carried out with belief that it amounts to a legal obligation.²⁵⁶ It must therefore be shown that state practice is the function of a legal obligation, not simply a moral one.²⁵⁷ This psychological component of CIL refers to an attitude or belief as such it is difficult to prove separately from evidence presented as state practice.²⁵⁸ In *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, the ICJ stated that *opinio juris* can in certain circumstances also be deduced from UN General Assembly resolutions, just like state practice, depending on the content, the circumstances of its adoptions and on whether *opinio juris* existed regarding the resolution's status.²⁵⁹ *Opinio juris* will not be inferred if the resolution relied on was not adopted with support from a significant number of states who either voted against it or abstained from voting.²⁶⁰ Other than an attitude of general approval of General Assembly resolutions, *opinio juris* may be inferred from statements of important government officials and ratification of a treaty with a norm similar to the emerging customary norm.²⁶¹ National behaviour is both the basis of deducing state practice as the objective element and also the guide as to what states believe to be law.²⁶² Therefore, *opinio juris* may be implied from a state's conduct.²⁶³ The two elements indicate an express or tacit expression of consent that a rule qualifies as customary international law. Once this international custom has been established as law, it is recognised as obligatory and binds all states except those that have persistently objected to its emergence or the process of its formulation.²⁶⁴ The UDHR is the most significant human right document and it is perceived to have attained the status of CIL.²⁶⁵ The human right to water is not mentioned in its provisions, however, the fundamental rights and freedoms included provide some measure of justification for such a right.²⁶⁶ Specifically article 22 on the right to realisation of the economic, social and cultural rights necessary for a person's dignity and the free development

²⁵⁶ North Sea Continental Shelf, para 77.

²⁵⁷ Brownlie I (2003) 8-9.

²⁵⁸ Goldsmith JL & Posner EA (1999)1118.

²⁵⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) 255.

²⁶⁰ Legality of the Threat or Use of Nuclear Weapons 1996

²⁶¹ Goldsmith JL & Posner EA (1999)1118.

²⁶² Kammerhofer J (2004) 525 -526.

²⁶³ Moyo K (2013) 65.

²⁶⁴ Anglo-Norwegian Fisheries Case (United Kingdom v Norway) 1951 ICJ Reports 116-278., Asylum Case (Colombia v Peru 1950 ICJ Reports 266 – 331. Brownlie I (2003) 6 1, Malanczuk P (2005) 48.

²⁶⁵ Ghandhi PR 'Universal Declaration of Human Rights at fifty years' (1998) 41 *German Yearbook of International Law* 206, 242; Gleick PH 'The human right to water' (1999) 490 – 491 A number of scholars however reject the view that the whole UDHR can be considered to be customary international law. They assert rather that only some of its provisions have achieved the status of customary law. See Winkler IT (2012) 74.

²⁶⁶ Harvard Law Review 'What Price For The Priceless?: Implementing The Justiciability of the Right to Water (2007) 102 *Harvard Law Review* 1073.

one's personality, and article 25 on the right to an adequate standard of living. Water is essential for the realisation of these rights.

As regards the human right to water, documentary evidence points to state practice and *opinion juris* towards an emerging rule of customary international law. Gleick argues that a human right to water exists as evidenced by state practice through constitutional recognition, the numerous proclamations and the submission to the CESCR reviews demanding accountability in this regard.²⁶⁷ Bates asserts that the human right to water is a principle of CIL after analysing explicit and implicit statements recognising the human right to water, national legislation and constitutions that provide both state practice and *opinion juris*.²⁶⁸ She asserts that this claim requires formal recognition by the ICJ.²⁶⁹ The opposite view is expressed by Hardberger who argues that the unclear scope of the human right to water indicates that the right has not 'risen to the level of customary international law'.²⁷⁰ He states that the actual content of the right is not clear, especially whether it is limited to drinking water, or other essential uses such as hygiene and agriculture. Moyo also contends that even though there is evidence of recognition and endorsement of a human right to water in domestic legislation and a considerable number of non-binding but persuasive soft law instruments, it is still premature to conclude that a customary human right to water exists.²⁷¹ This is in view of the fact that the right is yet to attain the requisite general and consistent practice for an establishment of a customary rule. Bederman also argues that while there may be increasing state recognition of the right, one indication that the human right to water is not yet a customary rule is the current global water crisis.²⁷² He argues that the failure by many governments to ensure water access to all citizens impedes the development of CIL.²⁷³ This is because generalised state practice is a necessary element of CIL. However the existence of a human right, even in a legally binding treaty, does not always result in the full enjoyment or realisation of the right. There are so many rights, such as the right to food or the right to life that are violated by states, although the State in question might have made binding

Gleick PH (1999) 494, COHRE *Legal Resources For The Right To Water and Sanitation* (2011) 45 - 52.

²⁶⁸ Bates R, 'The road to the well: an evaluation of the customary right to water' (2010) 19: 3 *RECIEL* 282 -293.

²⁶⁹ Bates R (2010) 293.

²⁷⁰ Hardberger (2005) 345.

²⁷¹ Moyo K (2013) 77.

²⁷² Bederman DJ *International Law Frameworks* (2001) 15 See also Williams M ' Privatization and the human right to water: challenges for the new century' (2006-2007) 28 *Michigan Journal of International Law* 478.

²⁷³ Bederman DJ *International Law Frameworks* (2001) 15.

commitments towards their realisation. This does not in itself make it less of a right, for compliance alone cannot be an accurate test for its existence or non-existence.²⁷⁴ As already alluded to, state practice required for formation of customary law does not need to be worldwide or universal but rather be it must be extensive or widespread. This (state practice) coupled with the belief that it is legally binding, results in customary rule in international law.

Resolutions, declarations, statements and such other documents discussed above that are adopted by states although not legally binding provide 'evidence of crystallising rule of customary international law'.²⁷⁵ They are regarded as precursors for legal norms representing a step towards traditional law-making.²⁷⁶ According to Gleick, this is because 'they offer strong evidence of international intent and policy that inform the views of states.'²⁷⁷ Furthermore, as stated above, they are both a source for deducing state practice and also a belief that such practice is legally binding depending on the content and process of adoption. These numerous documents adopted by member states provide evidence for international acceptance and consensus surrounding the human right to water in international law.²⁷⁸ The adoption of resolutions at the UN General Assembly and HRC as already discussed, go a long way to memorialise this consensus on the understanding of states legal obligations in the human right to water but also points to state practice and effort towards realising this right.

National constitutions are another important source of state practice. However, court cases and other legislation in a country can also be an important indication of both state practice and the belief as regards legal obligations. A growing number of states are recognising the human right to water in their constitutions, while others do so in other national legislation or instruments. Other countries have no express human right to water, however this right is derived by courts from other recognised rights in the constitution. The Centre for Housing Rights & Evictions and Water, Sanitation and Hygiene (WASH) have compiled a

²⁷⁴ Langford M (2006) 448 states that human rights should not be measured by the level of compliance.
²⁷⁵ Higgins R *Problems and Process: International Law and How We Use It* (1995) 25. COHRE (2008) 41 stating that 'they may be seen as indications of overall trends in the development of international customary law.'
²⁷⁶ Blutman, L 'In the Trap of a Legal Metaphor: International Soft law' (2010) 59 *International and Comparative Law Quarterly* 605,617.
²⁷⁷ Gleick PH The human right to water (1999) 493 Soft law instruments also contribute to establishing frameworks and guidelines to implementation of states obligations under binding treaties. See Salman SMA & Mcinerney-Lankford S (2004) 12. COHRE (2011) 14–15.
²⁷⁸ Bates R (2010) 285.

comprehensive analysis of national instruments that recognise the human right to water presented below.²⁷⁹

A select number of constitutions that guarantee a human right to water demonstrate the diverging wording of this right. The Constitution of South Africa is regarded among the most progressive in entrenching justiciable socioeconomic rights and includes a human right to water. The Constitution provides that ‘everyone has the right to have access to sufficient water’.²⁸⁰ The Ethiopian Constitution provides that ‘[e]very Ethiopian is entitled, within the limits of the country's resources, to ... clean water’.²⁸¹ The Gambian Constitution states ‘[t]he State shall endeavour to facilitate equal access to clean and safe water’²⁸² while Zambian Constitution provides that ‘[t]he State shall endeavour to provide clean and safe water’.²⁸³ The Kenyan Constitution asserts that ‘[e]very person has a right to water in adequate quantities and of reasonable quality’.²⁸⁴ The Constitution of the Democratic Republic of the Congo provides that the State shall guarantee the right to access to potable water.²⁸⁵ The Constitution of Uganda provides for a right and opportunities and access to clean and safe water.²⁸⁶ The Constitution of the Republic of Nicaragua states that the population has an inalienable right to have access to water services and obliges the State to promote, facilitate and regulate the provision of the basic public services.²⁸⁷ Similarly the National Constitution of Panama asserts that the State has the primary responsibility to develop the accessibility of drinking water.²⁸⁸ The Constitution of Mauritania declares that water is a fundamental right.²⁸⁹ In the same way the Constitution of the Republic of Ecuador confirms that ‘[t]he human right to water is essential and cannot be waived’.²⁹⁰ The Constitution of Bolivia not

²⁷⁹ See COHRE (2011) 58-222 See also WASH United *The Human Right to Safe Drinking Water and Sanitation in Law and Policy – A Sourcebook* (2012). See also WaterLex database available at <http://www.waterlex.org/waterlex-legal-database/index.php?r=search%2Fsearch&q=national+law> (accessed on 12 March 2012).

²⁸⁰ Constitution of the Republic of South Africa Act, No. 108 of 1996 Section 27(1)(b). See also section 24 providing for a right to an environment that is not harmful to health and wellbeing.

²⁸¹ Ethiopian Constitution of 1998 art 90(1). Art 191 provides for a right to a clean and healthy environment.

²⁸² Gambia Constitution of 1996.

²⁸³ The Constitution of Zambia of 1996 art 112.

²⁸⁴ The Kenyan Constitution of 2005, art 65.

²⁸⁵ The Constitution of the Democratic Republic of the Congo of 2005, art 48.

²⁸⁶ The Constitution of Uganda of 1995, art 14.

²⁸⁷ The Constitution of the Republic of Nicaragua 1987 art 105.

²⁸⁸ The Constitution of the Republic of Panama of 2004, art 106. The state is also under duty to ensure a healthy environment, and water quality that meets the appropriate standards for the development of human life- see art 114.

²⁸⁹ The Mauritania Constitution of 1991, art 57. See also Water Code, Law No. 2005- 030, art 2 that further recognises the right to water and states that the object of States policy is to guarantee access to potable water to the populations.

²⁹⁰ The Constitution of Ecuador of 2008.

only recognises the human right to water but also the right to universal and equitable access to the basic service of potable water.²⁹¹

Many other countries have provisions that explicitly provide for the human right to water and/or the judiciary have established it among other existing rights in constitutions or international instruments ratified. Malawi, for instance, provides for the right to development that requires the State to take all necessary measures for the realisation of the right to development including equality of opportunity for all in their access to basic resources.²⁹²

Evidence of state practice on the human right to water is also demonstrated in ordinary legislation apart from the Constitution. Countries such as Angola²⁹³ Madagascar²⁹⁴ Algeria²⁹⁵ Peru²⁹⁶ France²⁹⁷, Cameroon²⁹⁸ Central African Republic²⁹⁹, Costa Rica³⁰⁰, Guinea³⁰¹ all recognise that access to water is a right with ensuing obligations on the State in the national legislation. This is further evidence of the opinion and practice by states regards a human right to water.

2.5 Conclusion

The aim of the chapter was to dispel any doubts about the legal foundation of the right to water in international and regional human rights law. The conclusions of the various sections can be briefly restated here:

(i) After years of debate and dispute, GC 15 (in 2002) and the recent resolutions adopted by the UNGA (2010) and HRC (2013, 2014) on the human right to water have significantly

²⁹¹ The Constitution of Bolivia of 2009 arts 16 & 20.

²⁹² The Constitution of Malawi of 1994 art 30. See also *Masangano v The Attorney General* Constitutional Case No 15 of 2007.

²⁹³ Water Act, 2002 art 9 provides that ‘the right of citizens and legal entities to water’ should be one of the principles for management of water resources. Art 10 confirms States obligation to provide the population with potable water for domestic and hygienic uses in a continuous and sufficient manner.

²⁹⁴ Water Code, Law No. 98- 029, Art 37 asserts that the state has the obligation to provide a minimum quantity and a minimum service of potable water.

²⁹⁵ Water Law No. 05-12, 2005 Article 3, recognises the right to access water and sanitation to satisfy the basic needs of the population.

²⁹⁶ Water Resources Act No.29338 of 2009 art declares that access to water for the satisfaction of basic human needs is a fundamental human right.

²⁹⁷ Law on Water and the Aquatic Environment No. 1772 of 2006, art 210 provides for a right to access drinking water.

²⁹⁸ Water Code, Law No. 98-005 of 1998 art 2 guarantee access to water for all.

²⁹⁹ Water Code, Law No 06.001 of 2006 art 40 recognises citizen’s right to access water to fulfil the basic needs and demands of a personal life and dignity.

³⁰⁰ Law on Water Resources (proposal No. 14585 - 2005) art 2 confirms that access to water is a human right.

³⁰¹ Water Code, Law No. L/94/005/CTRN of 1994 art 6 declares that ‘everyone has an inalienable right to access water resources and a right to use them for domestic purposes.’

contributed to bringing this right from the shadows into mainstream international human rights law. The CESCR with authority to interpret the ICESCR has established that an independent human right to water exists within art 11(1) as a crucial component for an adequate standard of living and realising other rights such as the rights to life, human dignity, health, food and housing.

(ii) The African Commission has unfortunately not yet recognised a free standing human right to water within the regional system. A human right to water is only acknowledged as part of other human rights and only protected indirectly under explicitly recognised rights.

(iii) Given the strong demonstration of consensus on this issue by states, political commitments to formally recognising this right, and efforts towards its realisation, a customary international human right to water is also crystallizing.

This chapter dispelled the objection that the recognition of a human right to water exceeded the interpretive mandate of bodies such as the CESCR, the HRC, and the African Commission. Before concluding this chapter, it is necessary to briefly introduce two remaining reservations about the legal character and foundations of an independent human right to water. The first objection to the human right to water is that, as with all socio-economic rights, it is vague with no clearly defined content. The second objection is that the right is practically unenforceable.³⁰² In short, the right to water cannot operate as a right. According to these concerns, the indeterminacy of the human right to water fails to establish what amount, quality, access, affordability and allocation is guaranteed to a person sufficient to achieve an adequate standard of living.³⁰³ This critique is premised on the latitude of the implied language regarding the obligations under the ICESCR, which leaves it difficult to determine precisely what the achievement of any ESCR right entails. The indeterminacy of ESCR, however, is overstated.

As I indicate in the next chapter, even though ESCR subject to the progressive realisation and availability of resources and that these are culturally and geographically relative, they are not left void of any content.³⁰⁴ The CESCR has provided broad guidelines through the normative content to the human right to water together with a minimum legal content or entitlement which is a necessary benchmark against which governments programmes can be temporally

³⁰² Larson RB 'The New Right to Water' (2013) 70 *Washington & Lee Law Review* 2281, 2209-2236

³⁰³ Larson RB 'The New Right to Water' (2013) 2215.

³⁰⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990.

directed and assessed.³⁰⁵ The General Comments issued by the CESCR, the work and thematic reports of the Special Rapporteur on water and the multitude of additional literature on the ICESCR in general and specifically on the human right to water, has significantly contributed to making the content of the ESCR, including water more concrete.³⁰⁶

In the next chapter I explain that it is possible to specify the volume, quality and perhaps even tariff, within a given context or in a given case, especially with regard to the essential minimum levels based on basic human interests for survival.³⁰⁷ In any case, the normative and jurisprudential development of the ESCR will also be greatly enhanced since the coming into force of the Optional Protocol to the Covenant on Economic Social and Cultural Rights which has established an individual complaint and inquiry mechanism.³⁰⁸ Regarding justiciability, courts can hear and decide a case on the human right to water having the above considerations in mind, as well as the many instances of adjudication in a variety of jurisdictions.³⁰⁹ The outcomes might well vary depending on the different approaches adopted, such as the minimum content approach or the reasonableness test approach.³¹⁰

These reservations about the content and justiciability of the right to water raise important questions which deserve fuller attention than these cursory comments. The next two chapters of the thesis are specifically dedicated to these questions and their answers. Chapter three explores whether the right to water has any determinate and legally enforceable substantive

³⁰⁵ See chapter three. See also Young KG 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2004) 33 *The Yale Journal of International Law* 113, 114

³⁰⁶ Thielbörger P *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (2014) 102.

³⁰⁷ For instance the jurisprudence from Argentina and India discussed chapter three. See also COHRE *Legal Resources For The Right To Water and Sanitation* (2008) 277 -315; McGraw GS *Defining and defending the right to water* (2011) 167 -201 starting that the amount of water required under the human right to water is determinable. He reviews cases from different jurisdictions that have pronounced on amount, quality and affordability of water. See also Winkler IT 'Judicial enforcement of the human right to water – case law from South Africa', Argentina and India (2008)1 *Law, Social Justice & Global Development* 1-19.

³⁰⁸ UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Adopted 5 March 2009 and entered into force 5 May 2013.

³⁰⁹ Thor EM *The human right to water in the United States* (2013) 337.

³¹⁰ See *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009] ZACC 28 cf *Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A Ciudad de Córdoba, Juez Sustituta de Primera Instancia* 51 *Nominación en lo Civil y Comercial: Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A., Acción de Amparo*, (8 April 2002). Translated and reported in Centre on Housing Rights and Evictions (COHRE) (2008) 312. See also *Marchisio José Bautista y Otros In Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial: Marchisio José Bautista y Otros, Acción de Amparo* (Expte. No. 500003/36, 19 October 2004). Discussed in chapter three.

content. Chapter four does the same with reference to the procedural obligations imposed by the right.



Chapter Three

Substantive Content of the Human Right to Water

3.1 Introduction

In the previous chapter I argued that an independent human right to water is implied in both the International Covenant on Civil and Political Rights (ICCPR),¹ and International Covenant on Economic Social and Cultural Rights (ICESCR),² even though neither of the foundational human rights instruments explicitly includes a human right to water. Towards the end of the chapter I noted the criticism that, in the absence of a textual definition, the content of the right to water must necessarily be too vague and indeterminate to give rise to legal obligations. I dismissed this concern as insufficient reason not to recognise the existence of a right to water. In this chapter I return in more detail to the criticism that the human right to water is indeterminate and therefore of questionable value or status. The interpretive problem that needs to be resolved is how to define the content of the right in the absence of a textual definition. The solution lies in the purposive or teleological approach to interpretation.

In this chapter I rely on the purpose of the right to water within the context of the human rights approach to development, to derive the nature and scope of the State's legal duties under the right.³ A human rights approach to water has two main concerns: substantive and procedural.⁴ The substantive content, which is the main focus of this chapter, concerns the goal of improving water services so that everyone has access to safe, sufficient and acceptable water to enable them to live a healthy and dignified life in community with other. The procedural content will be discussed in the next chapter and entails a right to participate in the governance of water services.

The starting point of any attempt to specify the substantive content of the right to water must be GC 15 of the ICESCR. The GC reflects the complexity of the right to water. Traditionally the right to water has been classified as a so-called 'socio-economic' right. This

¹ International Covenant on Civil and Political Rights (ICCPR) Adopted 16 December 1966 and entered into force 23 March 1976.

² International Covenant on Economic Social and Cultural Rights (ICESCR) Adopted 16 December 1966 and entered into force 3 January 1976.

³ Bourquain K *Freshwater Access from a Human Rights Perspective* (2008) 55 -57. See also generally Vandenhoe W & Wielders T 'Water as a human right-water as an essential service: does it matter?' (2008) 26:3 *Netherlands Quarterly of Human Rights* 391-424.

⁴ See generally UN Committee on Economic, Social and Cultural Rights General Comment No 15, Right to Water (2002) UN Doc E/C.12/2002/11 (GC 15). See also Bourquain K (2008) 56; Murthy SL 'The human right(s) to water and sanitation: history, meaning, and the controversy over-privatization' (2013) 31:1 *Berkeley Journal of International Law* 89, 112.

classification sought to capture the seemingly unique nature of socio-economic rights when compared to civil-and political rights. The former was assumed to give rise to entitlements to goods, while the latter gave rise to individual freedoms; the former was supposed to give rise to positive obligations, the latter only to negative obligations; the former to legally unenforceable policy objectives, the latter to legally enforceable rights.

GC 15 rejects this traditional classification and conceptualisation of the human right to water. It employs a number of alternative distinctions in order to undermine the traditional claims about the unique nature of socio-economic rights. The GC 15 divides the human right to water *itself* into entitlements and freedoms, positive obligations and negative obligations, and into a tri-partite analysis of duties to respect, protect and fulfil. It proceeds to define the core minimum quantity and quality of water to which every human being on the planet should have access on a daily basis as a matter of right.

The CESCR did not try to integrate the various approaches to the content of the right to water in GC 15. For the purposes of this thesis it is also not necessary to do so and to arrive at a new conceptualisation of the right. It is sufficient to establish that the content of the right can be specified with enough detail to refute the claims about the inherent vagueness and indeterminacy of the right.

The first part of the chapter begins by clearing up the terminological confusion generated by different definitions of the human right to water in different international human rights instruments. Having proposed a definition of the right, the rest of the chapter systematically explores the different duty bearers and substantive duties entailed by the right.

3.2 Definition and Terminology

The first issue to be settled is whether the right to water should be defined narrowly or broadly. Where the right does appear in international human rights instruments it is generally very narrowly defined.⁵ For example, article 24 of the CRC speaks only about the provision of ‘clean drinking water’.⁶ The human right to water is also referred to as the right to ‘drinking water’ by different United Nations (UN) bodies and resolutions. For instance, the

⁵ See Chapter 2 for detailed examples.

⁶ Convention on the Rights of the Child (CRC) (1989) Adopted 20 November 1989 and entered into force 2 September 1990. See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art 14 (h). See also Woodhouse M ‘Threshold, reporting, and accountability for a right to water under International Law’ (2004-2005) 8 *University of Denver Water Law Review* 171, 173 stating that both the CEDAW and the CRC lack explicit definition regarding states’ obligations.

Human Rights Council uses the phrase ‘the human right to drinking water and sanitation’ hence the special mechanism on issues of water was initially established as the ‘Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation.’⁷ This was changed to the ‘Special Rapporteur on the Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation (Special rapporteur on water)’.⁸ Similarly, the Special Rapporteur to the UN Economic and Social Council, El Hadji Guissé, used the term ‘right to drinking water supply’ before proposing the use of the term ‘right to water’ for the sake of consistency.⁹

Regardless of the terminology used, it is clear from GC 15 that the human right to water does not simply denote the right to drinking water, but, at the very least, also includes other domestic and personal uses, such as bathing, cleaning, cooking and sanitation.¹⁰ GC15 defines the substantive content of the human right to water as follows:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water *for personal and domestic uses*. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.¹¹

GC 15 defines personal and domestic use to mean drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene.¹² It goes further to elaborate on these uses by stating that drinking entails water for consumption, sanitation is disposal of human excreta (water is only necessary where water-based means are adopted), food preparation includes water for cooking or food hygiene, and hygiene means cleanliness.¹³

⁷ Human Rights Council(HRC) *Resolution on human rights and safe drinking water and sanitation*, 28 March 2008, A/HRC/RES/7/22, para 2.

⁸ HRC *The human right to safe drinking water and sanitation*, 8 April 2011, A/HRC/RES/ 16/2.

⁹ UN Economic and Social Council (ECOSOC) *Realization of the right to drinking water and Sanitation. Report of the Special Rapporteur, El Hadji Guissi*, UN Doc. E/CN.4/Sub.2/2005/25, 11 July 2005, Annex - Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, para 1.1.(Sub-Commission Guidelines) See also United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Promotion of the realization of the right to drinking water and sanitation*, Res. 2006/10 (2006) adopting the Draft Guidelines for the realization of the right to drinking water and sanitation (2005), UN Doc.E/CN.4/Sub.2/2005/25 (United Nations Sub-Commission on the Promotion and Protection of Human Rights, Res. 2006/10, Promotion of the realization of the right to drinking water and sanitation, 24 August 2006, UN Doc. A/HRC/Sub.1/58/L11, adopting the Draft Guidelines for the realization of the right to drinking water and sanitation (2005), UN Doc.E/CN.4/Sub.2/2005/25).

¹⁰ GC 15 para 2.

¹¹ GC 15 para 2.

¹² GC 15 para 12.

¹³ GC 15 footnote 13.

This definition of what constitutes personal and domestic uses is still narrow, as it seems to exclude water for other uses, although these uses are often acknowledged as part of the human right to water.¹⁴ However, GC 15 also includes the following statement:

[w]ater is required for a range of different purposes, *besides personal and domestic uses*, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.¹⁵

GC 15 thus seems to include both a narrow and a broad definition of the human right to water. The narrow definition is limited to water for personal and domestic use; the broad definition includes water for food production, environmental protection, generating a livelihood, and performing cultural practices. Which of the two definitions should be adopted?

Although many agree that water for personal and domestic uses is essential, the narrow definition of the right has been criticised by Van Koppen and others.¹⁶ It is argued that this domestic approach overlooks the benefit of productive uses of water that are essential for poor households.¹⁷ This is also known as the ‘domestic-plus’ approach or ‘multiple uses’ approach to the right to water. For instance, it is pointed out that productive uses of water at household level that comprises small scale economic activities, including small home gardens

¹⁴ See for instance GC 15 para 15 recognising that people may not be deprived of its means of subsistence.

¹⁵ GC 15 paras 6. See also GC 15 para 7 providing that ‘a people may not be deprived of its means of subsistence in line with art 1 paragraph 2 of the ICESCR. It also makes reference to the United Nations Convention on the Law of Non-Navigational Uses of Watercourses, which declares that, in determining vital human needs in the event of conflicts over the use of watercourses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation. Women farmers must be guaranteed access to water for food production.

¹⁶ See Hall RP, van Koppen B, van Houweling E ‘The human right to water: the importance of domestic and productive water rights’ (2014) 20:4 *Science and Engineering Ethics* 849-868.

¹⁷ See Thompson J Porras IT, Tumwine JK et al *Drawers of water II: 30 years of change in domestic water use and environmental health in east Africa* (2001) 31 arguing that productive uses of water is beneficial for to rural households for both health and livelihood; Hall RP, Vance EA & van Houweling E ‘The productive use of rural piped water in Senegal’ (2014) 7: 3 *Water Alternatives* 480, 492 revealing that in rural Senegal three quarters of household engaged in water-based economic activities that contributed to half the household income, see also van Koppen B ‘Multiple-use water services to advance the millennium development goals’ *International Water Management Institute: Research Report No. 98* (2006) 9, 11.

for vegetables and fruits, rearing livestock, brewing beer and brick-making, contribute to household income and livelihood for many poor people.¹⁸ Women, in particular, rely on home gardens as a source of nourishment and through the sale of the produce as a supplement to sources of income.¹⁹ Empirical evidence shows that, in practice, even when water facilities are designed for a single use, rural communities use their facilities for productive activities that contribute to food security and/or income.²⁰ It is accordingly argued that an expanded understanding of what ‘domestic’ use entails will ensure that the human right to water does not just ‘keep the heads of the people above the water’ but also guarantee adequate supplies of water that support livelihoods for the poor.²¹ This, according to Hellum, would ‘capture the integrated way in which water is used for a multiplicity of livelihood purposes’ from a rural or semi-urban household perspective.²²

GC 15 does recognise that people should not be deprived of their subsistence and even calls on states to ensure that water for subsistence farming, for instance, should be guaranteed especially for women.²³ This would suggest that GC 15 supports the ‘domestic-plus’ approach. However, according to Winkler, recognising or prioritising such uses would unduly broaden and undermine the human right to water, which should be limited to address direct human needs for water.²⁴ Whereas drinking, cooking, washing and personal hygiene cannot be substituted, and require direct access to water by each person, food or livelihood needs can be met through a variety of means, other than subsistence farming, and do not require everyone to have direct access to water.²⁵ Winkler concludes that priority must be given to needs that exclusively rely on water.²⁶ Another factor to consider in this debate about the narrow or broad definition of the human right is that non-domestic uses require

¹⁸ See van Houweling Hall, RP, Sakho Diop, A et al ‘The role of productive water use in women’s livelihoods; evidence from rural Senegal’ (2012) 5:3 *Water Alternatives* 658.

¹⁹ van Houweling Hall, RP, Sakho Diop, A et al (2012) 658; van Koppen B (2006) 9-10.

²⁰ See Hall RP, van Koppen B, van Houweling E (2014) generally; van Koppen B (2006) 2 stating that the single-use approach is based on the assumption that other sectors will take care of the other needs or uses of water. see also Mokgope K & Butterworth JA ‘Rural water supply and productive uses: a rapid survey in the Sand River Catchment’ (2001) *WHIRL project Working Paper 4*, 1-21.

²¹ Mokgope K & Butterworth JA (2001) 2.

²² Hellum A ‘Engendering the Right to water and sanitation: taking the lived realities of women and girls as starting point’ Russel A and Landford M (eds) *The Right to Water: Theory, Prospects and Practice* (2016) (forthcoming).

²³ GC 15 para 7.

²⁴ Winkler IT ‘A human right to water for food production?’ (2008) Paper presented to the 13th IWRA World Water Congress, Montpellier, France from 1-4 September.

²⁵ Winkler IT (2008) 3–4; Winkler IT (2012) 130, 158 – 167 arguing that the State has a variety of policy options regarding how to realise the right to foods other than provide direct access to water

²⁶ Winkler IT (2008) 3–4; Winkler IT (2012) 129-131.

higher quantities of water than the personal and domestic uses.²⁷ For instance, whereas the WHO has established that between 50 and 100 litres per capita per day are sufficient for domestic purpose, at least 2,000 litres per capita per day are required for producing food.²⁸ It is therefore argued that including a human right to water for growing food would be guaranteeing claims to large quantities of water.²⁹ Winkler argues as follows against the domestic-plus approach of van Koppen and others:

[i]f water for producing food for basic consumption were taken to be guaranteed by the right to water, from a normative perspective there would be no reason not to include water for food production more broadly. It would be difficult to draw a line between subsistence farming and agriculture on a larger scale. The same relates to water used in a range of livelihood activities, water used for cultural and religious practices, water for energy production or other water uses that aim at fulfilling basic human requirements. All water uses necessary to realise any human right would be conflated under a single, all-embracing human right to water. As such, the concept of the human right to water would risk being undermined by broadening its scope and letting it become less tangible and focused.³⁰

Bulto who also argues for a narrow definition states that ‘the human right to water does not seek to entitle individuals and groups to as much water of acceptable quality as they would like, but “merely to the bare necessities of life, no more”’.³¹ He posits that states cannot deliver water for all conceivable uses.³² He explains that critics of GC 15 as beings being restrictive do not understand the purpose that it seeks to achieve by defining the right so narrowly. The purpose, he states, is to ‘identify that amount of a non-derogable bare minimum amounts of water per se and the related implementation duties of states.’³³ He argues further that GC 15 prioritises water for personal and domestic uses, but does not preclude the possibility of claiming water for the other recognised uses, such as for food production, culture and livelihood.³⁴

²⁷ For instance whereas the WHO has established that 100 litres per capita per day is sufficient for domestic purpose, at least 2,000 litres per capita per day are required for producing food. See Winkler IT (2008) 3-4.

²⁸ Howard G & Bartram J *Domestic water quantity, service level and health* (2003) 22. See also World Water Assessment Programme (WWAP) *Water, a shared responsibility* (2006) 247.

²⁹ Winkler IT (2008) 3-4.

³⁰ Winkler IT (2012) 130.

³¹ Bulto TS *The Extraterritorial Application of the Human right to Water in Africa* (2014) 56.

³² Bulto TS (2014) 56.

³³ Bulto TS (2014) 60, 61-62 He argues further that prioritising water for personal and domestic has been part of ‘long-standing state practice’.

³⁴ Bulto TS (2014) 60 .

Perhaps the tension in GC 15 can be resolved without having to choose between the narrow and broad definition. It should be accepted that all the water uses included under the broad definition are part of what the human right to water entails, that is, the human right to water guarantees even the large amounts of water needed for food production and generating a livelihood (excluding commercial and industrial uses). However, priority should rightly be given to personal and domestic uses.³⁵ The personal and domestic uses are prioritised to prevent disease and the narrow definition is best understood as forming the minimum core content of the human right to water, as will be elaborated further below. Non domestic uses are guaranteed under the human right to water, to be realised progressively after meeting the domestic water requirements. Basically, where resources permit, states must move beyond the narrow domestic approach to the broader domestic-plus or productive use approach. An expanded domestic approach which goes beyond simply providing water for consumption, cooking and cleaning has everything to do with the progressive realisation of the right. This conceptualisation of the right will be further clarified below.

Thus from the above discussion, the full definition of the human right to water is to guarantee water for both domestic and productive uses (food production, health, livelihood, life and dignity), however, the priority or the starting point is to guarantee water for personal and domestic uses. I endorse this narrow focus as a starting point, because it guarantees the survival of a person, but it should not be an end in itself. This is the core content of the right, an absolute entitlement of the right, but states must move progressively to satisfy other aspects of the right, such as food security, income generation, environmental protection and culture practice.³⁶

The narrow focus of the human right to water, however, will be the basis for analysis in this thesis, as it is concerned with an entitlement under the human right to water which a state party would be considered to be in violation of if not realised. In other words, although the human right to water is properly defined to include multiple water uses, the scope of this thesis only allows a detailed study of the human right to water for domestic and personal uses.

A second related issue concerning the definition of the human right to water is the different terminology used to refer to the human right to water. First, the CESCR uses the terms ‘the

³⁵ See GC 15 para 37 (a). See Chapter two for the elaboration of the links with the human right to Water.

³⁶ Bulto TS (2014) 57.

right to water’ and ‘the right to access to water’ interchangeably in GC15. In fact, the two terms mean two different things.³⁷ The right to water entails individual ownership and entitlement, as these rights are owed to you and belong to you.³⁸ The right to access water is a right of use and not ownership or entitlement.³⁹ Although access to water is a critical element for enjoying the human right to water, it is the phrase the ‘right to water’ that best captures the essence of the human right to water, an entitlement to water and it is used more consistently than the latter.⁴⁰

Having derived a definition of the right to water, it is now necessary to determine the substantive content of the right.

3.3 Substantive Content

As already stated, GC 15 establishes that, at the very least, ‘the human right to water entitles everyone to *sufficient, safe, acceptable, physically accessible and affordable* water for personal and domestic uses.’ GC 15 elaborates further as follows:

[t]he right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supply. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.⁴¹

The freedoms mean negative obligations and the entitlements mean positive obligations on the State. These are the two sides of the same right as will be elaborated further subsequently. Two things can be deduced from the provision above. First GC 15 establishes that water for basic needs is a human right and this entails claims related to water supplies and positive protection from interference with access to such supplies.⁴² Secondly the human right to water guarantees the existence of systems of water supply and management, an

³⁷ See generally GC 15. The terms may also indicate different obligations of the State such as a right to water may entail obligation on state to provide water, the right to access may only entails creating the conditions and opportunity to ensure that people have access. See Kok A & Langford, M ‘The right to water’ in Brand, D & Heyns, C (eds) *Socio-Economic Rights in South Africa*, 191, 200.

³⁸ Tully S ‘A Human right to access water? A critique of General Comment No. 15’ (2005) 26 *Netherlands Quarterly of Human Rights* 35, 60.

³⁹ Anand PB *Scarcity, Entitlements and the Economics of Water in Developing Countries* (2007) 354.

⁴⁰ See GC 15 generally.

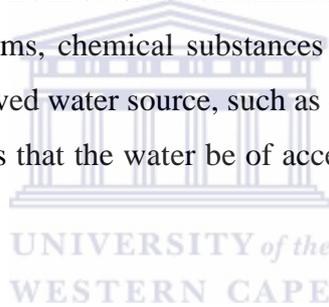
⁴¹ GC 15 para 10.

⁴² Fisher D *The Law and Governance of Water Resources* (2009) 86; Miroso O & Harris LM ‘Human right to water: contemporary challenges and contours of global debate’ (2012) 44:3 *Antipode* 932, 942; Hu D *Water Rights: An International and Comparative Study* (2006) 35.

entitlement that ensures that people can obtain water to meet basic needs.⁴³ As Bulto stated, the approach adopted by GC 15 is to focus on the priority use of water, hence definition and elaboration on the right is restricted to these preferred uses although other uses under rights linked to water are not excluded. Hence in trying to understand further what the human right to water means for poor people, I begin by looking at what is ‘sufficient, safe, acceptable, physically accessible and affordable water’ as far as personal and domestic use is concerned.⁴⁴

3.3.1 Adequate Quality

Adequate quality of water refers to safe and acceptable water that causes no threat to a person’s health.⁴⁵ The WHO guidelines for drinking water quality defines safe water as water that has no or reduced constituents that are known to be hazardous to health.⁴⁶ The quality of water is likely to be protected with improved water sources that are usually covered and thus protect the water source from outside contamination.⁴⁷ However, to ensure that the water is free from micro-organisms, chemical substances and radiological hazards requires much more than having an improved water source, such as chemical treatment and prevention of pollution. GC 15 also requires that the water be of acceptable colour, odour and taste for each personal or domestic use.



3.3.2 Availability

According to GC 15, water supply for each person must be sufficient and continuous for personal and domestic uses.⁴⁸ ‘Adequate’ or ‘sufficient’ amount of water refers to the amount of water a person requires to avert threats to health and death from dehydration.⁴⁹ The CESCR endorses the WHO guidelines which provide the minimum thresholds necessary for a person.⁵⁰ The WHO recommends that 50 -100 litres of water per person per day would

⁴³ Fisher D (2009) 86.

⁴⁴ It is beyond the scope of this thesis to define and clarify the obligations of states as regards the productive uses identified in the broad definition of the human right to water as stated, the thesis primarily concentrates on personal and domestic uses.

⁴⁵ GC15, para 12(b).

⁴⁶ World Health Organisation *Guidelines for Drinking Water Quality* 3 ed (2008) ch 1.

⁴⁷ The best water source in terms of quality is a household connection to a networked supply. See United Nations Special Rapporteur on the human right to safe drinking water and sanitation ‘*On The Right Track: Good Practices In Realising The Rights To Water And Sanitation* (2010) 137.

⁴⁸ GC 15 para 12(a).

⁴⁹ GC 15 para 2.

⁵⁰ GC 15 para 12(a) See Gleick ‘Basic water requirements for human activities: meeting basic needs’, (1996) 21 *Water International* 83-92. He states that although the amount of water required for survival depends on a person’s surrounding environmental conditions and personal physiological character, the overall variability is quite small. He further states that 50 litres per person per day is the internationally

be sufficient to meet the most basic needs.⁵¹ The minimum quantity of water required for health is placed at 20 litres per person per day.⁵² Such amounts are provided as standards to ensure that relevant authorities have a base for goal setting and monitoring progress to meet water requirement for survival and health consideration. However, the actual amount of water required for meeting basic human needs varies depending on context and personal circumstances, such as health, climate, and work conditions. These may require a person to have amounts of water above the stipulated standard.⁵³ The amount of water available to a person is influenced by many factors, such as the existing (or lack of) improved water delivery systems in place, the distance between the user and the source and the balancing of competing interests and uses of water.⁵⁴ Reliability of water services is another important factor in determining availability of water supply. Poor maintenance and general functionality of facilities undermines continuity of water supply with some facilities only providing water supply for a few hours a day or a few days a week.⁵⁵ The cost of water, as will be discussed later, is another factor influencing availability of water.

Poor people in rural and peri-urban areas usually do not access water in adequate amounts due to long distances that they have to walk to collect it. Even where they have facilities close by, they face challenges due to intermittent flow of water or dilapidated and unmaintained water facilities. This reduces the overall amount of water that they access overall and therefore also the benefits accruing for adequate supply of water, such as personal hygiene which is crucial for prevention of diseases, like diarrhea.⁵⁶ To ensure availability, therefore, states need to invest in extensive and practical water delivery systems that are within easy reach of users and that provide adequate water supply.⁵⁷ Different levels of water

recognised minimum standard in a poor, urban context for basic human needs namely drinking water for survival, water for human hygiene, water for sanitation services, and modest household needs for preparing food.

⁵¹ Howard G & Bartram J (2003) 22.

⁵² Howard G & Bartram J (2003) 22-23.

⁵³ GC 15 Para12(a).

⁵⁴ Howard G & Bartram J (2003) 17 -21.

⁵⁵ Lee EJ & Schwab KJ 'Deficiencies in drinking water distribution systems in developing countries.' (2005) 3:2 *Journal of Water and Health* 109 -127; Vairavamoorthy K, Gorantiwar SD & Mohan S 'Intermittent water supply under water scarcity situations.' (2007) 32:1 *Water international* 121-132.

⁵⁶ Pruss-Ustun A, Bartram J, Clasen T et al 'Burden of disease from inadequate water, sanitation and hygiene in low- and middle-income settings: a retrospective analysis of data from 145 countries' (2014) 19:8 *Tropical Medicine and International Health* 894 – 905 stating that inadequate drinking water, sanitation and hygiene causes diarrheal which approximately 2,300 people per day. It is the second leading cause of child death in the world.

⁵⁷ Langford M 'Ambition that overleaps itself? A response to Stephen Tully's critique of the General Comment on the right to water' (2006) 24 *Netherlands Quarterly of Human Rights* 434, 447-448,

services will determine the quantities of water collected and used by households.⁵⁸ The human right to water requires that the State must guarantee optimum access to water, however it allows State time to realize this gradually in recognition of resource constraints around a given available resources. It also requires that water for basic needs must be prioritised over other uses and that the State must prevent over-consumption of water through efficient and sustainable use.⁵⁹

3.3.3 Accessibility

Accessibility has been divided into four categories namely physical, economic, non-discrimination and information accessibility.⁶⁰ Physical accessibility entails access to water within or in the immediate vicinity, of each household, educational institution and workplace. The water facilities must be in a secure location to prevent threats to the physical security of people particularly women collecting water.⁶¹ It must also have reasonable number of outlets so that the waiting time for collection of water is less than 30 minutes. Economic access or affordability is a requirement to ensure that the cost of water does not exclude people from accessing water. Accessibility implies that people are able to gain right of use without having to compromise their capacity to acquire other essential goods and services, including food, housing, health services and education.⁶² The cost of water should not be more than 3-5 per cent of an individual income.⁶³ Both the direct and indirect costs of securing water are no excuse therefore to exclude others from enjoying this human right to water. Unlike Agenda 21 which states that water for basic needs should be free, GC 15 has avoided making a pronouncement either way on pricing water.⁶⁴ However, although CG 15 has avoided imposing on states how to set tariffs for users, it nonetheless supports low cost water and/or

Winkler IT (2012) 36 states that domestic uses compete with agriculture and industry that seem to have economic advantages and often enjoy greater political priority on competing uses.

⁵⁸ See Howard G & Bartram J (2003) 22 Table 6.

⁵⁹ Sub-Commission Guidelines para 4.2 provides that States must prevent over-consumption and promote efficient water use and prioritise essential personal and domestic uses among other measure availability; UN General Assembly *Annual Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque* (2013)A/HRC/24/44 generally.

⁶⁰ GC 15 para 12(c).

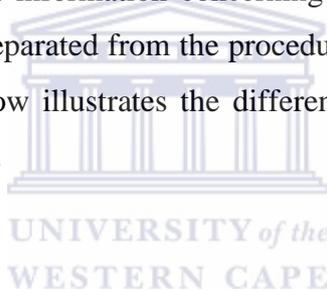
⁶¹ GC 15, paras. 12(c)(i), 29; Sub-Commission Guidelines para. 1.3(a)-(c).

⁶² GC 15, para 12(c) (ii); Sub-Commission Guidelines, para 1.3(d).

⁶³ Bluemel, EB 'The implications of formulation a human right to water.' (2004)31:4 *Ecology Law Quarterly* 957, 963 -64 stating that the calls for a human right to water emanated from equity concerns under full recovery cost and high prices of water services due to privatisation.

⁶⁴ See UN Report of the United Nation Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26/Rev.1 (Vol I) Annex II, Agenda 21; Langford M 'The United Nations concept of water as a human right: a new paradigm for old problems?' (2005) 21:2 *International Journal Water Resources Development* 273, 277.

free water.⁶⁵ The CESCR insists on affordability and obliges states to make special provisions for those who are unable to pay to access water.⁶⁶ This could be through the provision of a specified amount of free water, subsidies or social assistance to the poor.⁶⁷ One advantage of human rights is that it goes beyond averages to look at the groups that are suffering or are likely to suffer to ensure provision is made for them. It challenges the economic and social injustices by recognising the inherent dignity of every person without distinction. This is why any discrimination which has the intention or result of affecting or impairing the equal exercise of the human right to water is prohibited.⁶⁸ Everyone must be ensured access to water, including vulnerable and marginalised groups without distinction or restrictions based on their status.⁶⁹ Furthermore, individuals and groups must be given full and equal access to information concerning water, water services and the environment held by authorities or third parties.⁷⁰ Access to information is an integral part of procedural rights that act to safeguard equity and accountability in realising the human right to water.⁷¹ Everyone is guaranteed the right to seek, receive and impart information concerning water issues. For this reason the ideas of accessibility cannot be separated from the procedural rights that will be discussed in the next chapter. Table 3.1 below illustrates the different levels of services and potential amounts of water one may access.



⁶⁵ GC 15 para 27 Langford M (2005) 277, Salman SMA & Mcinerney-Lankford S *The Human Right To Water: Legal and policy dimensions* (2004) 70.

⁶⁶ GC 15 para 27 states that '[t]o ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.' See also para 15.

⁶⁷ For example South Africa provides 6 kilolitres of water for free to everyone per household every month. Beyond this amount, water used must be paid for. See South Africa Department of Water Affairs *Free Basic Water Implementation Strategy - Version 2* (2002) available <https://www.dwaf.gov.za/.../FBW/FBWImplementStrategyAug2002.pdf> (accessed on 22 March 2012) In Chile, water subsidies are granted to poor according to the Subsidy Law No.18.778. Similarly Colombia under the Public Residential Services Law of 1994 provides subsidised water to poor users.

⁶⁸ See International Covenant on Economic Social and Cultural Rights (ICESCR) Adopted 16 December 1966 and entered into force 3 January 1976 art. 2 (2).

⁶⁹ GC 15, paras. 12 (c)(iii), (13), (16); Sub-Commission Guidelines para 3.

⁷⁰ GC 15 paras 12(c)(iv) & 48.

⁷¹ See Chapter four.

Table 3.1 Level of service and likely level of access or quantity collected.

Level of access	Level of service
No access: not sufficient to meet the basic human needs such as consumption and hygiene	water facility is more than one kilometer or more than 30 minutes round trip resulting into less than 5 liters per person per day collected
Basic access: meeting basic human needs like consumption but may compromise hygiene	water facility is within 1 kilometer or within 30 minutes round trip and approximately 20 liters per person per day
Intermediate access: both consumption and hygiene promoted	Point source e.g. a tap on the plot where one resides with an average of 50 liters per person per day of water collected
Optimal access: consumption and hygiene including laundry promoted	Piped connection into house with multiple taps within a house with an average of 100 – 200 liters per person per day available for use

Source: Howard & Bartram.⁷²

Having established the scope of the human right to water and having clarified the quantity and quality of water that the right guarantees for the personal and domestic use of each human being, I now proceed to analyse the different duties implied in the right.

3.4 State Obligations: Tripartite Typology

The human right to water imposes three specific types of obligations on states; the obligations to respect, protect and fulfil. The concept of the tripartite typology was first developed by Henry Shue in 1980 with the aim of breaking the hierarchy between CPR on one hand and ESCR on the other.⁷³ Although both CPR and ESCR were accorded equal status in the UDHR, translating the provisions into legally binding instruments got entangled

⁷² Howard G & Bartram J (2003) 22.

⁷³ Shue H *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1980) 52. See also Koch EL *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands under the European Convention on Human rights* (2009) 16.

with ideological differences linked to ongoing geopolitical conflict during the cold war.⁷⁴ As mentioned in the introduction above, the CPR were considered as negative rights that asserted immediate obligations on the states. The ESCR, however, were deemed as mere directives concerned with policy, benefits and welfare rather than accepted legal entitlements for immediate realisation.⁷⁵ The language for implementation of ESCR was therefore full of caveats and in practice the responsibilities were neglected while greater emphasis was accorded to the CPR.

Shue rejected the argument that CPR entails negative duties while ESCR requires positive duties by establishing that both categories of rights require a combination of both duties.⁷⁶ He established that human rights impose three obligations namely 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'.⁷⁷ These three types of duties were later translated by Asbjorn Eide into the terminology of the duty to respect, the duty to protect and the duty to fulfill.⁷⁸

The tripartite typology has contributed to a better understanding of the normative character of ESCR rights and CPR by pointing out that there is no difference between the two sets of rights.⁷⁹ Further, the typology makes it clear and easy to assess compliance with commitments to human rights.⁸⁰ Another advantage identified by Schutter is that it has brought a focus on states' obligation regarding ESCR 'away from their initially "programmatically" nature to becoming enforceable rights, determinate enough for a 'violations' approach to become plausible.'⁸¹

⁷⁴ UN General Assembly, *Universal Declaration of Human Rights*, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

⁷⁵ Ssenyonj M *Economic, Social and Cultural Rights in International Law* (2009) 4. See also Whelan DJ and Donnelly J 'The West, Economic and Socialist Rights and the Global Human Rights Regime: Setting the Record straight' (2007) 29 *Human Rights Quarterly* 908-949.

⁷⁶ Shue H (1980) 52. See Sepulveda MM & Carmona MMS *The Nature of the Obligations Under the International Covenant on Economic* (2003) 116-133 also arguing that both ESCR and CPR require states to invest resources to implement obligations. See also Eide A 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 36.

⁷⁷ Shue H *Basic Rights* (1980) 52.

⁷⁸ Asbjørn Eide originally introduced the terminology in 1987 but has continued to develop the typology and at some point added a fourth duty namely the duty to facilitate, however, this fourth level has now been incorporated in the duty to fulfill. See Eide A 'The right to food as a human right', 7 July 1987, E/CN.4/Sub.2/1987/23. See Sepulveda MM & Carmona MMS *The Nature of the Obligations* (2003) Chapter V 157, 161 – 162. The South African Constitution, 1996 refers to the duty to 'respect, protect, promote and fulfil' the right to have 'access to sufficient water' (sec 7(2) read with sec 27(1)).

⁷⁹ Koch IE 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5: 1 *Human Rights Law Review* 82 for a critique of the typology.

⁸⁰ Sepulveda MM & Carmona MMS (2003) 172.

⁸¹ De Schutter O 'Economic, social and cultural rights as human rights: an introduction' in De Schutter O (ed) *Economic, Social and Cultural Rights as Human Rights* (2013) 7.

The above efforts alongside others, culminated in the recognition by the UN General Assemblies of the interdependence, indivisibility, interrelatedness and universality of human rights in 1993.⁸² This furthered an understanding of the equal nature of the two sets of rights as it is now accepted that all rights must be treated in an equal manner. This is because the satisfaction of ESCR is a guarantee for the enjoyment of CPR.⁸³

The tripartite typology has been approved by many scholars and has even been endorsed and adopted by the CESC, the African Commission and National Constitutions like that of South Africa.⁸⁴ It provides a good starting point for elaborating states' duty but does not provide all the answers.⁸⁵ This section begins the elaboration on the implementation of the human right to water, relying on this typology, before engaging further with other aspects that contribute to an understanding of the nature, scope and content of the human right to water.

3.4.1 Obligation to Respect

The obligation to respect is essentially a negative obligation requiring states not to disturb or deprive individuals of existing levels of enjoyment of a particular right.⁸⁶ This primary level obligation, according to the African Commission on Human and People's Rights (African Commission), entails restraint by the State from interfering with the right-holders freedom, autonomy, resources and liberty.⁸⁷ As regards the human right to water, the African Commission holds that the duty to respect means that the State should not interfere with the

⁸² UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 para 5 provides that 'All human rights are universal, indivisible and interdependent and interrelated. The international, community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'. See also UN General Assembly *Effective Enjoyment of Human Rights and Fundamental Freedoms* (1977) A/RES/32/130, UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1986) A/RES/41/117, UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1987) UN GA A/RES/42/102 & UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1988) UN Doc A/RES/43/113.

⁸³ See the Preamble, African Charter on Human and People's Rights (1981) Adopted 27 June 1981 and entered into force 21 October 1986. The African Charter is hailed for entrenching the indivisibility of human rights and providing for both CPR and ESCR in the instruments on an equal footing. See also Agbakwa SC 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, 180 stating that the realisation of CPR is dependent on realisation of ESCR.

⁸⁴ See Chirwa DM 'African regional human rights system : the promise of recent jurisprudence on SER' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 -338. The African Commission stratifies these duties in four levels, the duties to respect, protect, promote and fulfil. Promote and fulfil are covered under one duty in the tripartite typology. See Bulto TS (2014) 89 – 99.

⁸⁵ Koch EL (2009) 20-21.

⁸⁶ Bulto TS (2014) 90.

⁸⁷ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v Nigeria* Communication No 122/1996 para 45 (*SERAC case*).

free use of water resources owned or at the disposal of an individual or community for the purpose of meeting rights related needs.⁸⁸ The CESCR gives further examples of respecting the human right to water among other things such as:

refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water...⁸⁹

Where people already enjoy an aspect of the human right to water, such as access to water services, the State is prohibited from limiting access to such services through destruction of water facilities, arbitrary disconnection of a water service or discriminatory or unaffordable water tariffs.⁹⁰ Some have argued that this duty does not require enormous resources from the State, as all it needs to do is to abstain from actions that will result in undermining prevailing benefit of access to water.⁹¹ However, keeping State agencies from undermining this right will require guidance and education on the content of the right and establishing institutional mechanisms such as administrative and judicial bodies for recourse when the right is breached and implementing this right.⁹² This therefore shows that it is not a negative obligation void of positive action on the part of the State. However, as pointed out by Bulto, it is a minimalist undertaking with no resource redistribution and reallocation and consequently therefore it does not change the situation of those that have no access to water.⁹³

3.4.2 The Obligation to Protect

The duty to protect requires the State to prevent third parties from depriving people the enjoyment of their human right to water. Unlike the previous duty, this is a positive duty highlighting an active role of the State in implementing the human right to water.⁹⁴ For instance, it requires the State to adopt laws for regulation, administrative mechanisms for

⁸⁸ *SERAC case* para 45. See also Bulto TS (2014) 91 For example the National Water Act of South Africa provides that water resource situated on or forming part of a land of a person without requirements for permits if it's used for personal and domestic needs including needs for animals and small gardening.

⁸⁹ GC para 21.

⁹⁰ GC15 para 10, & 21. See also Fisher D (2008) 86.

⁹¹ Gorsboth M & Wolf E 'Identifying and addressing violations of the human right to water: Applying the human right to water approach'(2008) 11 Available at <http://www.right2water.eu/sites/water/files/violations%20of%20the%20Human%20Right%20to%20Water.pdf> (accessed on 19 October 2012).

⁹² Koch EL (2009) 17 -18 questions the expediency of the tripartite typology especially in asserting that the obligation to respect is a negative obligation when in reality it also requires positive action from the state. See also Craven M 'The International Covenant on Economic, Social and Cultural Rights ' in Hanski and Suski M (eds) *An Introduction to the International Protection of Human Rights : A Textbook* (2002)109, Bulto TS (2014)92.

⁹³ Bulto TS (2014)92.

⁹⁴ Bulto TS (2014)93.

monitoring and legal and other procedures to punish or redress abuses of the human right to water by third parties.⁹⁵ According to the African Commission, states must create and maintain an atmosphere through effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.⁹⁶ It is thus discharged when individuals, groups, corporations and other entities or agent acting with states' authority are restrained from interfering with individual opportunity, ability to realise and enjoy the human right to water.⁹⁷ Such interference can be in the form of denying equal access to adequate water, polluting and inequitably extracting from water resources.⁹⁸ The CESCR establishes that the State violates this obligation by failing to put in place sufficient regulation against acts or conduct that undermines the enjoyment of the human right to water.⁹⁹

In circumstances where a state relies on private actors to provide water services, it has the duty to ensure that such private actors do not compromise equal, affordable, and physical access to sufficient, safe and acceptable water.¹⁰⁰ Effective regulatory systems must be established through public participation of individuals or groups whose human right to water will be affected by the private sector participation.¹⁰¹ Further such regulatory systems must include independent monitoring as well as penalties where it is not complied with. Private participation in water services, although permitted under the human right to water, is usually criticised for undermining vulnerable and marginalised group's enjoyment of this right.¹⁰² The commonly cited example is the water wars in Cochabamba, Bolivia where a foreign, multinational, profit-driven company was granted a concession to supply drinking water and sewerage services.¹⁰³ An excessive increase in water tariffs led to massive protests as the

⁹⁵ GC 15 para 24; Bulto TS (2014)93.

⁹⁶ *SERAC case* para 46.

⁹⁷ GC 15 para 24.

⁹⁸ GC 15 para 23 For instance in *Permatty Grama Panchayat v state of Kerala*, 2004 (1) KLT 731 the High Court of Kerala established that the state must protect its water sources from over-extraction of ground water by regulating private individuals or companies use of the ground water.

⁹⁹ GC15 para 43.

¹⁰⁰ GC15 para 24. See also Williams M 'Privatisation and the human right to water: challenges for the new century' (2007) 28 *Michigan Journal of International Law* 467, 487 noting that the duty to protect contemplates that water services may be provided by private actors but also possible abuses and steps to correct or prevent such abuses. See also Murthy SL (2013)119 stating that although the Committee on ESCR is critical of some of the elements of privatisation, it has not gone so far as declaring them incompatible with the human right to water.

¹⁰¹ GC15 para 24 & 48.

¹⁰² See generally Shiva V *Water Wars: Privatization Pollution and Profit* (2002); Bakker K 'The "commons" versus the "commodity": alter-globalization, anti-privatization and the human right to water in the Global South' (2007)39 *Antipode* 430 -455; Bluemel E (2004) 957.

¹⁰³ William M (2007)496 -, Shultz J 'Bolivia: water wars widens' (2003) available at <http://www2.fiu.edu/~hudsonv/Shultz.pdf>(accessed on 12 April 2013).

See generally Bonnardeaux D 'The Cochabamba "water war": an anti-privatisation poster child?' (2009) available at <https://fcpp.org/pdf/09-03-23-Cochabamba.pdf> (accessed on 12 April 2013). See

poor could not afford to pay for the services. Their human right to water was thus undermined.¹⁰⁴ The contract was subsequently cancelled and new inclusive and participatory processes for new legislation and policies were established to address concerns of a weak regulatory framework, corruption and lack of public engagement in the processes of engaging the private sector in water services.¹⁰⁵

3.4.3 The Duty to Fulfil

The duty to fulfil is a duty to ensure necessary conditions for everyone to enjoy the human right to water.¹⁰⁶ In order to do that, states must take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the human right to water.¹⁰⁷ Rajan states that this is the most difficult to implement because the positive steps the State has to take often have long-term implications on issues such as resource allocation and policy choices.¹⁰⁸ The duty to fulfil is divided in three facets, the duty to facilitate, the duty to promote and the duty to provide.¹⁰⁹

The duty to facilitate, according to the CESCR, requires states to take positive measures to assist individuals and communities to gain better access to water.¹¹⁰ This duty recognises that individuals are agents on behalf of themselves and of their society and therefore a state must support individual or collective efforts toward fulfilment of this human right to water.¹¹¹ Enhancing the ability of people to help themselves affirms human dignity which, according to Waldron, is essentially a status of a person based on the recognition by others of their agency to shape their own life.¹¹² Kant states that human dignity is to recognise the capacity in people to make their own decisions, setting their own goals and guiding their conduct by

also Subramaniam M 'Neoliberalism and water rights: the case of India' (2014) 62:3 *Current Sociology* 393 -411.

¹⁰⁴ William M (2007) 496 stating that water tariffs went up to 35 % and for some even 200%. The amount paid for water services took 20 -15 % of the monthly income for many people.

¹⁰⁵ See also Finnegan W, Murdock D & Zinoman A 'Bolivia: Leasing the Rain- Timeline: Cochabamba Water Revolt, PBS Frontline World' (2002) Available at <http://www.pbs.org/frontlineworld/stories/bolivia/timeline.html> (accessed on 12 April 2013).

¹⁰⁶ William M (2007) 486.

¹⁰⁷ GC15 para 27 -28.

¹⁰⁸ Pejan R 'The right to water: the road to justiciability' (2004) 36 *George Washington International Review* 1181, 1187.

¹⁰⁹ GC 15 para 25.

¹¹⁰ GC 15 para 25.

¹¹¹ Sen A *Development as Freedom* (1999) 19.

¹¹² Waldron 'How Law Protects Dignity' (2011) *Public Law & Legal Theory Research Paper Series Working Paper No. 2* 11-83 See also Waldron J 'Dignity, Rank and Rights' the Tanner Lectures on Human values, delivered 2009 available at http://tannerlectures.utah.edu/documents/a-to-z/w/Waldron_09.pdf (accessed 12 July 2014).

reason.¹¹³ Facilitating human agency therefore includes ensuring participation of individuals and communities in decisions about water resources and water services that impact them.¹¹⁴ Where individuals have failed or are unable to secure the human right to water themselves, the State has an obligation to fulfil (provide) the right.¹¹⁵ Providing the right may entail actual water provision to individuals or groups who lack access and are unable to secure such access themselves. The State must recognise the human right to water nationally to ensure that people without access to water are legally empowered to hold government to account.¹¹⁶ The State also has the duty to promote appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. The information is to enable people to realise the right.¹¹⁷ The duty to promote, according to Bulto, also requires reviewing of laws to remove obstacles for the legal implementation of the human right to water.¹¹⁸

In spite of the fact that the human right to water includes both freedoms and entitlements, embraces both negative and positive obligations, and encompasses the duties to respect, protect and fulfil, it remains true that critics of the right are concerned with the legal enforceability of the positive state obligations imposed by the right. For this reason, the rest of this chapter seeks to clarify the nature of these obligations.

3.5 Nature of Positive State Obligations

Article 2 (1) of the ICESCR addresses the nature of the positive obligations emanating from ESCR such as the right to water:

[e]ach State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹¹⁹

¹¹³ Rachels J 'Kantian Theory: The Idea of Human Dignity' 1 available at http://public.callutheran.edu/~chenxi/phil345_022.pdf (accessed on 22 December 2014).

¹¹⁴ GC 15 para 17, 24, 37(f) & 48. See Chapter four on participation and agency. See also Francis R & Firestone L 'Implementing the human right to water in California's Central Valley: Building A democratic voice through community engagement in water policy decision making' (2010-2011)47 *Willamette Law Review* 495, 518 – 523.

¹¹⁵ GC 15 para 25.

¹¹⁶ GC 15 para 27.

¹¹⁷ McDonald DA & Ruiters G Theorising water privatisation in Southern Africa in McDonald D & Ruiters G

(eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 10, 62.

¹¹⁸ Bulto T S(2014) 95.

¹¹⁹ ICESCR art 2(1).

There are several intertwined and mutually reinforcing components in this provision that work together to define the positive obligations of states, including the recognition of resource dependence and progressive effort, as opposed to immediate full realisation.¹²⁰ Craven states that article 2(1) was adopted principally as a compromise satisfying those who wished to establish binding State obligations as regards the ESCR, while maintaining necessary flexibility due to resource constraints that might impede the immediate full realisation of the rights.¹²¹ He goes ahead to criticise the provision as being unsatisfactory for being poorly drafted or organised, making it ‘virtually impossible to determine the precise nature of the obligations.’¹²² This makes it difficult to evaluate and monitor states’ compliance with the provision or progress toward the full realisation of the rights.¹²³ Progressive realisation in particular, has been criticised as weakening the obligation of states towards ESCR, as it allows states time to ensure full enjoyment of the rights.¹²⁴ The CESCR has addressed some of the concerns raised by clarifying this provision.

3.5.1 Progressive Realisation

The concept of progressive realisation encapsulates the fact that all ESCR are resource intensive.¹²⁵ This has two policy implications.¹²⁶ First, it allows for a delay in the strategy for human rights fulfillment.¹²⁷ For instance, the quality of the services and goods implied by the full realisation of the right will be attained over a period of time.¹²⁸ This is in

¹²⁰ Sepulveda MM & Carmona MMS (2003) 313; Craven MCR *The International Covenant on Economic, Social and Cultural Rights* (1995) 151.

¹²¹ Craven MCR (1995) 151.

¹²² Craven MCR (1995) 151.

¹²³ Chapman AR ‘A “violations approach” for monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18 *Human Rights Quarterly* 23.

¹²⁴ See Young K *Constituting economic and social rights* (2012) 101-104; GC 3 paras.1 & 9; Sepulveda MM & Carmona MMS (2003) 312.

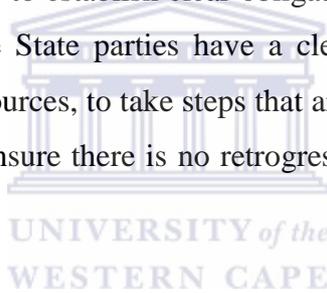
¹²⁵ Alston & G Quinn —The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights (1987) 9 *Human Rights Quarterly* 72.

¹²⁶ RE Robertson ‘Measuring State Compliance with the Obligations to Devote the ‘Maximum Available Resources to realising Economic, Social and Cultural Rights (1994)16:4 *Human Rights Quarterly* 693. 703 -713. See also UN Office of the High Commissioner for Human Rights (OHCHR) *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, para 49, available at: <http://www.unhcr.org/refworld/docid/46ceaf92.html> (accessed on 22 February 2012); de Albuquerque, C & Roaf, V *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation* (2012) 32 stating that progressive realisation is to ensure that States do not attempt to meet their international obligations with empty promises and half-measures.

¹²⁷ Office of the High Commissioner for Human Rights (OHCHR), *Draft Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2003) para 49

¹²⁸ OHCHR (2003) para 49; UN CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 para 9; Craven MCR (1995) 133 this applies to both developed and developing states; Chapman A & Russell S *Core Obligations: Developing a Framework for Economic, Social and Cultural Rights* (2002) 4 stating that progressive

consideration of the difficulties of the real world as regards availability of resources required for these rights. Such acknowledgement, however, does not mean that states are justified when they ignore or neglect complying with their positive obligations. Secondly, it allows for setting priorities and considering tradeoffs towards full enjoyment of a right as resources may not permit pursuing all aspects of a right simultaneously or with equal vigor.¹²⁹ Hence, as discussed above, regarding water uses it may not be possible to ensure that both domestic and productive uses are equally realised, where there are resource constraints, states are permitted therefore to prioritise domestic uses while moving expeditiously and effectively as possible towards guaranteeing water for other uses.¹³⁰ Hall, van Koppen and van Houweling posit that although this is the case this far, there has been no movement to operationalise the provision of water beyond the basic domestic requirement.¹³¹ This is unfortunate, as progressive realisation does not allow states to drag its feet or defer its obligations indefinitely.¹³² Progressive realization must be understood within the overall objective and purpose of the ICESCR, which is to establish clear obligations for state parties to realise the full extent of the rights.¹³³ The State parties have a clear obligation within this flexible device to maximize available resources, to take steps that are immediate and tangible towards the realisation of rights, and to ensure there is no retrogressive steps and non-discrimination in the measures adopted.¹³⁴



3.5.1.1 Maximum Available Resources

Article 2 (1) also requires states to devote the maximum of its available resources in realising the rights in the ICESCR. This obligation engenders states to expend resources available efficiently. Whelan and Donnelly argue that ‘social spending is the single best general

realisation does not mean the gradual increase in the number of people who enjoy the right but rather the gradual improvement of the level of enjoyment of the right for all. See Bilchitz D *Poverty and Fundamental rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 198.

¹²⁹ OHCHR *Draft Principles and Guidelines* (2003) para 49 -50.

¹³⁰ GC 3 para 9. See also UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')*, 8 January 1987, E/CN.4/1987/17, principle 21 (Limburg Principles) See also International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, guideline 8 (Maastricht Guidelines) The Maastricht Guidelines state that progressive realisation does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible.

¹³¹ Hall RP, van Koppen B, van Houweling E *The human right to water* (2014) 857.

¹³² Robertson RE (1994) 703 -13. See also de Albuquerque, C & Roaf, V (2012) 32.

¹³³ GC 3 para 9.

¹³⁴ GC 3 para 9.

measure of societal and governmental effort on behalf of economic and social rights.¹³⁵ This is also echoed by Robertson who states that State allocation of resources to their maximum intent towards implementation of the ESCR signifies devotion and substantial or total compliance with article 2.¹³⁶ Robertson further points out that the resources referred to in this provision are not limited to financial resources but include natural, human, technological and informational resources as well.¹³⁷ The CESCR has stated that available resources are both resources ‘within a State and those available from international community through international cooperation and assistance’.¹³⁸ Article 2 (1) enjoins all states in a position to assist others in realising the ESCR to undertake the obligation of cooperation and assistance.¹³⁹

3.5.1.2 Duty to Take Steps

There is a distinction between the immediate effect of the right, which gives rise to an immediate obligation and the realisation of the full scope of the right.¹⁴⁰ Steps towards the full realisation of all rights, according to the CESCR, must be taken within a reasonably short time of ratifying the ICESCR.¹⁴¹ The obligation to take steps is immediate requiring states to move as expeditiously as possible towards the full realisation of the human right to water.¹⁴² ‘Taking steps’ requires states to take positive action to execute or implement the rights.¹⁴³ The steps undertaken by the State must be deliberate, concrete and targeted but also necessary and feasible.¹⁴⁴ States generally have a discretion on what measures they may prefer and the CESCR states that it will respect this margin of appreciation.¹⁴⁵ However, this discretion is qualified with the requirement that the actions must be appropriate.¹⁴⁶ What is

¹³⁵ Whelan DJ & Donnelly J ‘The reality of western support for economic and social rights: a reply to Susan L. Kang (2009) 31 *Human Rights Quarterly* 1030, 1035.

¹³⁶ Robertson RE (1994) 697 *Maastricht Guidelines* 15(e) stating that the failure to utilise the maximum of available resources toward full realisation of the Covenant is a violation of state obligation.

¹³⁷ Robertson RE (1994) 695-97.

¹³⁸ GC 3 para 13.

¹³⁹ GC 3 para 13-14 This provision is based on arts 1(3) and 56 of the United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI which declares international cooperation as one of the purposes of the United Nations in order to ensure better living standards, elimination of poverty and related problems and the enjoyment of human rights and freedoms for all.

¹⁴⁰ McGaw GS ‘Defining and defending the right to water and its minimum core: legal construction and the role of national jurisprudence’(2011)8:2 *Loyola University Chicago International Law Review* 127, 155.

¹⁴¹ GC 3 para 2.

¹⁴² GC 3 para 9.

¹⁴³ Craven MRC (1995) 115.

¹⁴⁴ GC 3 para 2GC 15 para 40.

¹⁴⁵ See CESCR *An Evaluation of the Obligation to take Steps to the “Maximum Of Available Resources” Under An Optional Protocol to the Covenant Statement* U.N. DOC E/C.12/2007/1(2007) para 12.

¹⁴⁶ ICESCR art 2(1).

appropriate will be assessed in reference to the obligation flowing from the rights in the ICESCR.¹⁴⁷ The CESCR has stated that it will assess measures according to how deliberate, concrete and targeted they are towards the fulfillment of rights; compliance with non-discrimination; allocation of resources; whether the policies chosen are ones that least restrict the rights; the time frame in which the steps were taken and demonstrated consideration of the most desperate and prioritisation of grave situations or situations of risk.¹⁴⁸ The test for what is appropriate is ultimately what is reasonable and adequate while respecting States' margin of appreciation to take steps and adopt measures most suited to their specific circumstances.¹⁴⁹

Langford and King criticise the CESCR for adopting the margin of appreciation approach as it is has not coherently been developed to ensure appropriate criteria for what is reasonable; as such it may have negative consequences on enforcing rights.¹⁵⁰ They argue that giving states further discretion in the implementation of rights, waters down provisions of the ICESCR which are already weak in spelling out obligations for states.¹⁵¹ They argue further that the word 'appropriate' already accommodates flexibility that States need to implement ESCR.¹⁵² Whether states are given too much leeway or not is a contention within the two main approaches when enforcing the ESCR under either the reasonableness approach or minimum core. I return to this point in more detail below.

3.5.1.3 Not to Take Retrogressive Steps

In order to discourage abuse of the progressive realisation mechanism, states are prohibited from deliberately taking retrogressive measures.¹⁵³ According to the Special Rapporteur on the human right to water, retrogressive measures can be any action or omission that directly or indirectly leads to backward steps in the enjoyment of human rights.¹⁵⁴ She cites raising the price of services disproportionately with negative effect on access to water by the poor, or

¹⁴⁷ CESCR (2007) para 8.

¹⁴⁸ CESCR (2007) para 8.

¹⁴⁹ CESCR (2007) para 11. see Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted 5 March 2009 and entered into force 5 May 2013.

¹⁵⁰ Langford M and King JA 'Committee on economic, social and cultural rights' in Langford M (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477,500.

¹⁵¹ Langford M and King JA (2008) 500.

¹⁵² See *Lansman v Finland (No.2)* Communication No. 671/1995 para 10.5 where the HRC, the treaty body monitoring the ICCPR rejected the appreciation of margin.

¹⁵³ GC 3 para 9 provides that deliberate retrogressive measures need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

¹⁵⁴ see also Human Rights Council 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque' A/HRC/24/44 11 July 2013.

infrastructure deterioration due to lack of sustainable investment. Craven contends that there may be situations where retrogressive measures can be inevitable.¹⁵⁵ For instance, where a country is experiencing an economic crisis, even the utilization of the maximum available resources may result in deterioration of the enjoyment of rights. However, he further states that where there is evidence of any retrogression resulting from deliberate policy and absence of justification, this should be considered as prima facie a violation of the States' obligation.¹⁵⁶ The chairperson of the CESCR in his speech at the UNGA 2012, while acknowledging rising public deficit and poor economic growth, stated that retrogressive measures are contrary to the obligations under the ICESCR.¹⁵⁷ The Special Rapporteur on the human right to water posits that this is an indication of a strong presumption that retrogressive measures are prohibited.¹⁵⁸

3.5.1.4 Non-Discrimination and Protection of Vulnerable Groups

Finally, although States can implement their obligations progressively, they must ensure the widest possible enjoyment of the right with special measures to protect vulnerable and disadvantaged groups of society as a priority.¹⁵⁹ Chenwi explains that 'the obligation on the State is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalised groups'¹⁶⁰ The ICESCR requires that states implement the rights enunciated 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'¹⁶¹ This is an immediate and cross-cutting obligation.¹⁶² The CESCR defines discrimination as 'any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or

¹⁵⁵ Craven MRC (1995) 131 -132.

¹⁵⁶ Craven MRC (1995) 132. See also Maastricht Guidelines 14(e).

¹⁵⁷ Statement by the Chairperson of the Committee on Economic, Social and Cultural Rights, at the sixty-seventh session of the General Assembly, New York, 23 October 2012.

¹⁵⁸ UN General Assembly *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque A/HRC/24/44* (2012) para 13.

¹⁵⁹ GC 3 para 11 &12.

¹⁶⁰ Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance ' (2013) *De Jure* 742, 746.

¹⁶¹ ICESCR art 2(2) see also art 1(3), 13(1)(b); UN Charter art 55(c)& 76; UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A art 2 & 7; ICCPR art 2(1) &26; Convention on the Rights of Persons with Disabilities (CRPD) Adopted 24 January 2007 and entered into force 3 May 2008 art 5.

¹⁶² GC 3para 7.

exercise, on an equal footing, of Covenant rights.’¹⁶³ To ensure prohibition of discrimination and to achieve equality requires an approach dealing with both *de jure* (formal) and *de facto* (substantive) discrimination and inequality.¹⁶⁴ Formal equality ensures that rules and procedures are applied consistently while substantive equality ensures positive action to people who have been discriminated so that they can equally take advantage of opportunities.¹⁶⁵ Non-discrimination is both a negative and positive obligation by requiring that states refrain from discrimination on the basis of forbidden grounds and also that it eradicates existing discriminatory laws and practices.¹⁶⁶ Eradicating discrimination requires states to go beyond the relation between an individual and the State, to the private sphere where there are relations between private individuals.

In sum, regarding progressive realisation of the human right to water, the ICESCR imposes various obligations which are of immediate effect.¹⁶⁷ First, states have an immediate obligation to adopt effective measures or take steps to realise, without discrimination, the human right to water for everyone.¹⁶⁸ Such steps must be deliberate, concrete and targeted towards the full realisation of the right to water. With regards to vulnerable groups, states must ensure equitable allocation, distribution and access of water and services on a non-discriminatory basis.¹⁶⁹ Special attention should be paid to those who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.¹⁷⁰ Finally, states must not take *retrogressive* measures in relation to the right to water.¹⁷¹

In addition to the duty to immediately take steps, the CESCR has further countered the seemingly aspirational spirit of the positive duty to ‘progressively realise’ socio-economic

¹⁶³ GC 3 para 7. This based on similar definition in art 1 of Convention Against Racial Discrimination Adopted 21 December 1965 and entered into force 4 January 1969, art 1 of CEDAW Art 1 See GC 15 para 13 that lists the prohibited grounds to include race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status. In para 16 (c) the CESCR states further that no household should be denied the right to water on the grounds of their housing or land status.

¹⁶⁴ GC19 para 7, GC 20 para 8.

¹⁶⁵ See chapter four section 4.3.3.2 for detailed discussion of formal and substantive equality.

¹⁶⁶ ECOSOC Report of the High Commissioner for Human Rights on the Implementation of Economic, Social and Cultural Rights, E/2009/90, (8 June 2009) para 18.

¹⁶⁷ GC 15 para 17.

¹⁶⁸ GC 15 paras 1 & 17.

¹⁶⁹ GC 15 para 17.

¹⁷⁰ GC 15 para 16.

¹⁷¹ GC 15 para 19.

rights by establishing minimum essential levels of each right which states must immediately provide or fulfil.¹⁷² Although this is meant to concretise the obligation within the progressive realisation framework, some scholars have opposed such an approach as leading to excessive abstraction.¹⁷³ The next section of the chapter is devoted to the longstanding and ongoing debate between the minimum core approach of the CSECR and the reasonableness approach, most notably developed by the South African Constitutional Court.

3.5.2 Identifying Immediately Enforceable Entitlements

3.5.2.1 Reasonableness Approach

Defining and enforcing ESCR is faced with disputes over adopting a universalist approach or a jurisdictional or contextual approach.¹⁷⁴ Universalists advance transcendental components of ESCR developed from a comparative analysis of rights in different jurisdictions that is deemed applicable generally. Tushnet argues that this method of identifying underlying principles is flawed, as it leads to excessive abstraction.¹⁷⁵ He endorses a contextual approach that grounds development of such components in a particular institutional, doctrinal, and cultural context.¹⁷⁶ Generally, ESCR are confronted with disputes over development of the normative content and enforcement due to concerns regarding democratic self-governance and suitable institutions.¹⁷⁷ Matters of social policy and progressive realisation within resources are prerogatives of legislative and executive branches of national government, which represent the will of the people.¹⁷⁸ Scholars, such as Tushnet, therefore posit that the elected branches of government should have the final word on the content and realisation of these rights. He argues for adopting weak social economic rights that are either non justiciable or justiciable rights that allow the legislature an extremely broad range of discretion on how to provide them and their interpretation.¹⁷⁹ Adjudication bodies must

¹⁷² GC 3 para 10. Limburg Principles, principle 25, which provides that ‘State Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’.

¹⁷³ Tushnet M *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009) 9; Porter B ‘The Crisis of economic social and cultural rights and strategies of addressing it’ in Squires J, Langford M & Thiele B (eds) *The Road to a Remedy: Current Issues in the Adjudication of Economic, Social and Cultural Rights* (2005) 43,52.

¹⁷⁴ See generally Tushnet M (2009); Porter B (2005).

¹⁷⁵ Tushnet M (2009) 9; Porter B (2005) 52.

¹⁷⁶ Tushnet M (2009)10.

¹⁷⁷ Tushnet M (2009) generally. See also Dixon R ‘Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited (2007) 5:3 *International Journal of Constitutional Law* 391-418.

¹⁷⁸ Langford M ‘The Justiciability of Social Rights: From Practice to Theory’ Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008)1,31.

¹⁷⁹ Tushnet M (2009) 242.

undertake a procedural interpretation of these rights and defer substantially to the legislative judgment when enforcing them.

The South African jurisprudence on ESCR exemplifies a weak rights regime through the adoption of a reasonableness review mechanism when enforcing ESCR. This mechanism, according to Quinot and Liebenberg, is 'process oriented' and pays little regard to developing the substance of a normative content and obligation imposed by ESCR.¹⁸⁰ When a Court is adjudicating a case alleging a violation of a positive obligation, a set criterion is used to review whether the alleged action is reasonable, while deferring to the legislature and the executive the determination of what an appropriate measure would be in the circumstances.¹⁸¹ Further, although a Court is willing to find some programmes adopted by government in efforts to achieve ESCR as unreasonable, it does not guarantee an individualised relief.¹⁸² The Constitutional Court of South Africa has asserted that an individual entitlement under the ESCR is reasonable state conduct toward progressively realising the rights within available resources.¹⁸³ The Court further established that the positive duty of the State is to act reasonably in realising the rights within the progressive realisation and available resources framework. The State has a large margin of appreciation on what programmes it can adopt in line with this obligation. This, according to Tushnet, is characteristic of weak substantive social economic rights.

The reasonableness test is illustrated by the case of the *Republic of South Africa and Others v Grootboom*.¹⁸⁴ Poor residents living in deplorable living conditions with no water, sewer and other services brought an application against government to address their problems as they waited for permanent housing provision. They specifically sought adequate temporary

¹⁸⁰ Quinot G & Liebenberg S 'Naming the band : reasonableness review in administrative justice and social economic rights jurisprudence in SA' in Liebenberg S & Quinot G *Law and Poverty: Perspectives from SA and Beyond* (2012) 197.

¹⁸¹ See Brand D 'Judicial deference and democracy in socio-economic rights cases in South Africa in Liebenberg S & Quinot G *Law and Poverty: Perspectives from SA and Beyond* (2012)172 – 194 arguing that through judicial deference, the issues of democratic illegitimacy of unelected branch of government making policy decisions is avoided, the Court's integrity is maintained by not making orders that may not be implemented and it steers clear of dealing with controversial and contested social and political questions may threaten institutional security. It allows political questions may threaten institutional security. The concern of lack of capacity or expertise to prescribe policy choices is also avoided.

¹⁸² Tushnet M 'New forms of judicial review and the persistence of rights- and democracy-based worries' (2003) 38 *Wake Forest L. Rev.* 813, 822 -824; Roach K 'The challenges of crafting remedies for violations of socio-economic rights in Langford M(ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008)46.

¹⁸³ See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 (*Grootboom case*); *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15 (*TAC case*).

¹⁸⁴ *Grootboom case* para 41

shelter or housing as well as adequate basic nutrition, healthcare, and social services as guaranteed by the South African Constitution. The Court established the reasonableness test as follows:

[i]n any challenge based on section 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.¹⁸⁵

The reasonableness of a government programme in dealing with ESCR will include a look at several factors such as an assessment into the social, economic and historical context of the problem before the Court; the capacity of institutions responsible for implementing the programme; how balanced and flexible the programme especially regarding making appropriate provision for short, medium and long term; the programme must undergo continuous review.¹⁸⁶ Where policy falls short of meeting the standard developed, it is declared unreasonable. In the *Grootboom case*, a policy on housing was found to have failed to address the needs of the most desperate and thus declared unreasonable.¹⁸⁷ If the policy is found to be reasonable, claimants alleging violation are unsuccessful.

It is an interpretation of the progressive realisation requirement that, according to Chenwi, reflects aspects of progressive realisation and the availability of resources and minimum core obligations.¹⁸⁸ Traces of minimum core obligations can be identified in the requirement that the needs of the most desperate people must be addressed as a priority.¹⁸⁹ As will be shown below, the minimum core obligation requires the adoption of interim relief or measures to

¹⁸⁵ *Grootboom case* para 41. Article 26(2) states that “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. See also Porter B ‘The Reasonableness of article 8(4): adjudicating claims from the margin’ (2009) 27:1 *Nordic J Human Rights* 39, 49.

¹⁸⁶ *Grootboom case* para 43. See Kent R ‘The challenge of crafting remedies for violation of social economic rights’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 46,85-90 for a comprehensive list of the criteria and discussion.

¹⁸⁷ *Grootboom case* para 44.

¹⁸⁸ Chenwi L (2013) 757.

¹⁸⁹ See for instance *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009] ZACC 28 para 76 stating that In most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied. Chenwi L (2013) 757.

address the needs of the most in need at the very minimum.¹⁹⁰ Therefore, apart from looking at policy failure and only enforcing the entitlement to a reasonable policy framework, the reasonableness review must emphasise short term relief regarding essential goods and services as an immediate obligation.

However, this is not the approach the Constitutional Court favoured in the case of *Mazibuko v City of Johannesburg* where the Court explicitly rejected the minimum core approach in favour of its reasonableness approach in a case dealing with the right to have access to sufficient water (section 27(1) of the South African Constitution).¹⁹¹

The Constitution of South Africa guarantees everyone the right to have access to water and places an obligation on states to progressively realise this right through reasonable and legislative measures.¹⁹² In the case the central question was determination of the scope or content of the right of access water. The applicants were poor residents of a township called Phiri that had enjoyed unlimited access to water at a flat rate. Coming from a background of boycotts through non-payment for such services during apartheid, most residents had accumulated arrears. The City of Johannesburg sought to recover costs and minimise water wastage and leaks through prepaid meters. These meters were programmed to dispense 25 litres of free water per person per day or six kilolitres per household each month. After this free amount, resident would require water credit to get water supply, otherwise the water would cut until the next month for the free supply. The High Court ruled that the 25 litres was not sufficient and therefore unreasonable. It therefore established that the residents were entitled to 50 litres of water per day as a sufficient amount. The Supreme Court of Appeal reduced the amount to 42 litres. However, when it came before the Constitutional Court a different approach was enforced. The Court rejected the adoption of a quantified standard determining the content of the right.¹⁹³ It explained that this would mean adopting a minimum core content of the right to have access to water. This attempt to define a minimum quantity of available water was rejected, because the Court held that it was institutionally incapable to determine precisely how much water the local government should make available to each resident.¹⁹⁴ The Court explained the entitlement under the right to have access to water as follows:

¹⁹⁰ Bilchitz D (2007) 149.

¹⁹¹ *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC) (*Mazibuko case*).

¹⁹² The Constitution of the Republic of South Africa s27(1) & (2).

¹⁹³ *Mazibuko case* para 55. Relied on earlier judgement in *Grootboom case* para 38.

¹⁹⁴ *Grootboom case* para 33.

[T]he right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.¹⁹⁵

[T]he City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right.¹⁹⁶

The Court therefore rejected consideration of the WHO guidelines on sufficient water for human life or expert evidence on the matter. Having rejected the minimum core content, the Court went ahead and applied the reasonableness test and found the introduction of pre-paid water meters as part of the city's overall water policy reasonable. The policy was found to be comprehensive, flexible and constantly reviewed, and taking into account the needs of different people, including those subject to the risk of fires and other emergency needs. Quinot and Liebenberg criticise the Court for not taking into account that more people than the average envisaged per household were accessing the 6 kilolitres.¹⁹⁷ The proportionality analysis required greater judicial activism in the face of this serious deprivation, having in mind the nature of the right, the normative purposes and values it seeks to promote.¹⁹⁸

Weak rights and particularly the reasonableness approach has been heavily criticised by many scholars who state that it operates as an obstacle to effect social change.¹⁹⁹ The perceived strengths are also its weaknesses. First, the weak rights and/or reasonableness approach offer no real remedy to individuals who present a claim to social goods or services that ESCR may entail. The adjudicating bodies can only offer weak remedies (systemic programmatic and legislative) that may require policy amendment but nothing substantial or immediate towards the substantive content of the right.²⁰⁰ Brand points out that this is as a result of the deference to legislative judgement that leads to courts' refusal to decide claimants' issues or where such

¹⁹⁵ *Mazibuko case* para 50.

¹⁹⁶ *Mazibuko case* para 85.

¹⁹⁷ Quinot G & Liebenberg S (2008) 216.

¹⁹⁸ Quinot G & Liebenberg S (2008) 214 & 216.

¹⁹⁹ Brand 'The proceduralisation of South African Socio-Economic Rights Jurisprudence, or What are Socio-Economic Rights For?' in Botha H, van der Walt A, van der Walt J *et al* (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33-56, Pieterse M, Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the south african experience' (2004) 26:4 *Human Rights Quarterly* 882 -905; Bilchitz D 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence, (2003)19 *South African Journal of Human Rights* 1, 2.

²⁰⁰ Brand D (2008) 179.

matters lead to indirect, generalised relief.²⁰¹ However, Liebenberg posits that ‘it does not follow that the courts should avoid developing a substantive interpretation of socio-economic rights.’²⁰² The deliberate refusal to engage with the nature and scope of the ESCR and consequently the weak remedies on offer when violation is alleged, leads to the loss of faith in the courts and foreclosure on opportunities for courts to serve as institutions apt for deliberation and a real contribution on the meaning of the rights.²⁰³ Further, Brand is of the view that this greatly impacts impoverished people’s capacity for political action as the judicial process depoliticises the issues of poverty, need and social provisioning that arise in ESCR cases.²⁰⁴ He further argues that the institutional legitimacy concerns of courts are misplaced, as these concerns are based on a conception of representative democracy that is instrumental or procedural, privileging the legislature and executive as embodying the will of the people.²⁰⁵ Participatory democracy values more opportunities for direct participation of the people themselves beyond elections. Thus the courts can be a platform for the promotion of direct participation of citizens who voice their needs and deliberate on the content of ESCR in litigation. By taking up such a role, not only do courts fulfil their mandate but also champion democracy by acting as alternative forums in which individuals and groups can be heard.²⁰⁶ Further, through the involvement of a wide range of stakeholders in litigation, including those with prerequisite technical expertise and political representation, court can deal with technical and complex matters and thereby address the concerns of capacity, integrity and security.²⁰⁷

The dissatisfaction among South African constitutional scholars suggests that a conception of strong ESCR are to be preferred over the weak conception associated with the reasonableness approach. Strong ESCR rights can be contrasted with weak rights as they have a strong standard of review and remedies for violation.²⁰⁸ Furthermore, unlike weak rights, strong rights do not require judicial restraint in enforcing them; strong rights empower adjudicating bodies, like courts, to make final and irreversible judgements whenever it concludes that the

²⁰¹ Brand D (2008) 179.

²⁰² Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 40 – 41, 180 states that Court should seek a participatory strategy but remain in control of the process and identify the normative content of rights however the content should not be final but always contingent and incomplete.

²⁰³ Liebenberg S (2010) 176.

²⁰⁴ Brand D (2008) 184.

²⁰⁵ Brand D (2008) 184.

²⁰⁶ Brand D (2008) 187 stating that the courts judgements can become political currency in political struggle.

²⁰⁷ Brand D (2008) 192.

²⁰⁸ Tushnet M (2009) 245 -252.

legislature has failed in its obligation. The scope and nature of the rights is established to ensure that there is a standard against which governments' efforts can be measured.²⁰⁹ This entails developing minimum core obligations for each right. The CESCR pronouncement on this can be a good starting point as it emanates from long standing experience in dealing and developing the rights. Langford states that courts can benefit from comparative and international jurisprudence when setting context specific minimum standards.²¹⁰ He argues that such jurisprudence, or in this case the pronouncements of the CESCR, can help shape the development of national standards and contribute to consensus on interpreting human rights.²¹¹ The universalist approach should thus be understood as a starting point of understanding the norms that shape development and protection of rights at the comparable international level towards clearer consensus.²¹²

3.5.2.2 Minimum Core Obligations

The concept of a minimum core obligation has gained currency among practitioners and academics as a way of establishing concrete state obligations within the progressive realisation framework of the ICESCR.²¹³ The concept defines and ensures the enforcement minimum essential levels or minimum entitlements,²¹⁴ or minimum legal thresholds,²¹⁵ or the most urgent survival needs,²¹⁶ of every ESCR.²¹⁷ The CESCR defines the minimum core obligation as follows:

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not

²⁰⁹ See Brand D (2008) generally on lack of such a measure in reasonableness and approach and therefore the difficulty to enforce the rights.

²¹⁰ Langford M (2008) 12.

²¹¹ Langford M (2008) 12.

²¹² Langford M (2008) 12.

²¹³ McGaw GS (2011)155.

²¹⁴ Alston P, 'Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 352-353.

²¹⁵ Young, KG 'The minimum core of economic and social rights, a concept in search of content, (2008) 33 *Yale Journal of International Law* 123.

²¹⁶ Bilchitz D 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 2 & 11

See also Pieterse, M 'Eating socio-economic rights: the usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796.

²¹⁷ GC 3 para 10.

to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.²¹⁸

This establishes that there is a minimum legal content of each of the rights in the ICESCR.²¹⁹ This includes the human right to water. Further, it establishes that the failure to satisfy this minimum legal content is *prima facie* a violation of the obligations in the ICESCR.²²⁰ The CESCR in GC 15 states that a state party cannot justify its non-compliance of the minimum core obligations as they are non-derogable.²²¹ Bulto states that the minimum core content is the epicentre of a right and if it is limited, derogated from or violated, the right becomes meaningless.²²²

There are several advantages to having the minimum core entitlements. First, it defines the entitlement that one has, regardless of the qualification of progressive realisation and availability of resources and at the same time it clarifies state's obligations regarding ESCR. The minimum core compels the state to prioritise and do something towards realising the basic needs for survival, even within limited resources, and to prevent undue delay or procrastination. The minimum core content entails an individual entitlement that can easily be enforced through litigation when the government fails to meet its obligations. As stated by van Bueren, the minimum core provides determinacy and certainty to ESCR and therefore establishes a standard to measure government's efforts.²²³ Court will easily be able to review the alleged violation and enforce the right against government. Further, it makes crafting individual relief for violation easy, thus resulting in a tangible benefit for claimants.²²⁴ The minimum core obligations also act to guide and even compel government to act.²²⁵ The minimum core clarifies government's obligations under the ESCR which are usually framed

²¹⁸ GC 3 para 10.

²¹⁹ Bilchitz D (2003)5-6, 11-12; Langford M (2008)13.

²²⁰ Langford M & King JA (2008) 492

²²¹ GC 15 para 40

²²² Bulto TS (2014) 57

²²³ van Bueren G 'Alleviating Poverty through the Constitutional Court', (1999)15 *South African Journal of Human Rights* 57.

²²⁴ Pieterse M, Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience' (2004) 26: 4 *Human Rights Quarterly* 882 -905 stating that otherwise ESCR will be merely rhetorical. See also Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?'(2002)6 *Law, Democracy & Development* 159 stating that in order that ESCR amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity.

²²⁵ Chowdhury, J, 'Judicial Adherence to a minimum core approach to socio-economic rights – a comparative perspective' (2009) 27 *Cornell Law School Inter-University Graduate Student Conference Papers* 1. See also Bilchitz D (2003) 10 stating that There is a need for the Court to clarify the state's obligations imposed by socio-economic rights. This would entail that the state is not left with an amorphous standard with which to judge its own conduct, but would be able to assess its conduct against clear benchmarks.

in general terms. The minimum core will thus provide guidance for governments in realising the rights but also ‘safeguard against government use of the progressive realisation as a clutch not to do something, citing resources as the excuse’.²²⁶ The CESCR has explained that the minimum core content has been developed after extensive experience gained through examination of Reports from State parties.²²⁷

The minimum core content includes but is not limited to the most basic essential needs that are shared by all humanity, regardless of context, culture or history.²²⁸ The basic essential level of rights speaks to the ‘survival interests’ or most urgent needs such as to prevent starvation, however the minimum core goes beyond survival level.²²⁹ For instance, it guarantees water related to human dignity in terms of water necessary for personal hygiene, washing and cleaning. Wesson argues that the minimum core overlooks the complicated relationship between core and non-core needs which needs to be balanced, thus he criticises the prioritisation of survival needs over other needs as being counterproductive, because resources are diverted to mere emergency relief, which might not be the most effective way of allocating scarce resources.²³⁰ In response, Lehmann rightly questions what basis would inform such allocations, other than the utilitarian sacrifice of individual lives and interests to the collective.²³¹ Liebenberg contends that the minimum core content can inhibit efforts beyond the threshold, trapping programmes to focus only on survival.²³² She also points out that the distinction between core and non-core needs in reality is not clear-cut.²³³ She argues that people might have other important needs that do not meet the threshold of survival but warrant prior consideration based on dignity, equality and freedom.²³⁴ Further she holds that the minimum core stifles dialogical processes between the three branches of government as well as broader civil society, as it seeks to establish normative standards which are beyond contestation and debate.²³⁵ It is also argued that the process to determining the basic essential

²²⁶ Chowdhury J (2009)6.

²²⁷ GC 3 para 10.

²²⁸ Winkler IT (2012) 153 cf Bilchitz D (2002) 489.

²²⁹ Winkler IT (2012) 153.

²³⁰ Wesson ‘Grootboom and beyond: Reassessing the social economic rights jurisprudence of South Africa’ (2004) 20 *South African Journal of Human Rights* 284, 303-304.

²³¹ Lehmann K In defense of the constitutional court: litigating socio-economic rights and the myth of the minimum core (2006)22: 1 *American University International Law Review*163,191 -193.

²³² Liebenberg S ‘Socio-economic rights :revisiting the reasonableness review/minimum core debate in Woolman S & Bishop *Constitutional Conversations*(2008)303.

²³³ Liebenberg S (2008)316.

²³⁴ Liebenberg S (2008) 317.

²³⁵ Liebenberg S (2008) 312 -313.

entitlements is complex and has implications on budgetary allocations and policies, hence the executive and the legislature are the most suited for such decisions.²³⁶

As Brand points out, however, the process is not as complex as it is made out to be.²³⁷ Brand criticises the South African Constitutional Court for deferring complex policy issues to the other branches of government. He explains how the Argentinian Supreme Court, by contrast, has initiated public hearings in which a range of stakeholders and NGOs participate, in order to assist the Court when dealing with socio-economic rights claims. Brand suggests that this ‘participatory approach to judicial decision-making’ provides one way to deal with the much vaunted lack of capacity of courts.

Furthermore, the determination of the minimum core obligation, as Liebenberg explained, is about having regard of the needs of the most vulnerable group who are entitled to the protection of the right under determination.²³⁸ She states further that the circumstances of each case brought will be the basis of such a determination. The determination need not be prescriptive of the precise services to be offered as remedy, but need merely indicate the broad parameters of what is required to remedy the breach to ensure a margin of discretion for the State to determine the most appropriate measures.²³⁹ Bilchitz argues that the minimum core merely provides the universal standards and that government is left to determine the policy or measures to meet the standards.²⁴⁰ Courts and adjudicating bodies have the mandate to interpret rights, hence setting the standards will be in exercise of such mandate and will not be encroaching on the role of the elected branches of government.²⁴¹ Regarding clarity, Lehman concedes that the minimum core as developed by the CESCRC is still too abstract with no clarity of the actual parameters of the obligations and is in fact impossible to deliver. However, Lehman argues, greater normative clarity and specificity will emerge from further processes of application in the domestic context.²⁴²

There are other concerns that having minimum core content will stifle dialogue and meaningful debate in courts.²⁴³ Pieterse, responding to Liebenberg’s concerns that minimum

²³⁶ *Grootboom case* para 32 and 33.

²³⁷ Brand D ‘The South African Constitutional Court and livelihood rights’ in Viljoen F (ed) *Transformative Constitutionalism* (2013) 414, 426.

²³⁸ Liebenberg S (2010) 16.

²³⁹ Liebenberg S (2010) 16.

²⁴⁰ Bilchitz D ‘Giving Socio-economic Rights Teeth: The Minimum Core and its Importance’ (2002) 1:19 *South African Law Journal* 484.

²⁴¹ Langford M (2008)32.

²⁴² Lehmann K (2006) 181.

²⁴³ Liebenberg S (2010) 33-34.

core stifles dialogue because it is ‘once off, top-down imposition,’ states that it does not have to be so.²⁴⁴ He points out that courts can foster dialogue under the minimum approach through a gradual open ended, context specific and contingent process of case to case elaboration of the minimum content of rights.²⁴⁵ This will ensure that claimants approaching courts will be able to get immediate relief which is not the case under the current reasonableness approach.

Regarding the minimum core resulting in a bare minimum and nothing else, Chowdhury reminds us that the minimum core obligations are established within a framework of progressive realisation of the full right as the ultimate goal.²⁴⁶ One final criticism particularly directed at the minimum core of the human right to water is that it requires States to guarantee everyone some amount of water immediately, which is an impossible task.²⁴⁷ McCaffrey and Nash argue that most governments have no capacity to meet this obligation.²⁴⁸ However, as already suggested, a dialogical approach must be adopted within a specific context and through this process the different government institutions and other key players facilitated by the courts will debate and determine the specifics of the needs and necessary capacity to meet the agreed on norms. The universal minimum core does not have to be rigidly followed because specificity will emerge from further processes of application in domestic contexts. Minimum core obligations are therefore an essential starting point that can be developed further to include different needs, as they are both flexible and comprehensive, leaving room for further specificity and implementation by governments.

The CESCR has established that states must, at a minimum, ensure that people have reasonable access to sufficient and safe water for personal and domestic uses and that this must be provided on a non-discriminatory basis.²⁴⁹ As already discussed above, this entails that people must have sufficient, safe and regular water within practical distance from their household that does not require long waiting in queues or threaten personal security.²⁵⁰ According to Table 3.1, basic access to water entails a facility within one kilometer or within

²⁴⁴ Pieterse M ‘Reply on ‘dialogue’, ‘translation’ and ‘voice’: a reply to Sandra Liebenberg’ in Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) 331.

²⁴⁵ Pieterse M (2008) 340 & 346.

²⁴⁶ Chowdhury J (2009) 6.

²⁴⁷ McCaffrey SC & Neville KJ ‘Small capacity and big responsibilities: financial and legal implications of a human right to Water for Developing Countries’ (2008 -2009) 21 *Georgetown International Environmental Law* 679, 685-686.

²⁴⁸ McCaffrey SC & Neville KJ (2008 -2009) 686.

²⁴⁹ GC 15 para 37(a), (b) & (c).

²⁵⁰ GC 15 para 37(c) & (d).

30 minutes and collection of 20 liters of water per person per day.²⁵¹ The State must put in place systems of water supply that makes water available within the immediate vicinity of the people as a minimum requirement, while working towards the ultimate goal of in-home services for all citizens.²⁵² The immediate applicable obligations to provide minimum essential levels of water are consistent with the obligation of good faith when implementing treaties.²⁵³ The State is further required under this obligation to adopt a National Water Strategy and a Plan of Action addressing the whole population, but with special attention to the disadvantaged and marginalised groups to ensure equitable distribution of water facilities and services.²⁵⁴ The process of adopting and implementing the national strategy must be participatory and transparent, in line with good governance, which the CESCR has recognised as essential to the effective implementation of human rights.²⁵⁵

3.5.2.3 Integrating Reasonableness and Minimum Core

Another approach is to combine or integrate the minimum core and the reasonableness approaches when enforcing ESCR by the courts. Chowdhury defends this combined approach. He states that this does seem desirable and possibly the best path to realise ESCR.²⁵⁶ He explains that in the combined approach, the minimum core would provide rights with clarity, while the reasonableness approach would allow a margin of appreciation for flexibility in implementing the rights.²⁵⁷ Similarly, Liebenberg holds that combining the two approaches will mean that policy must reflect the high priority established by the minimum core approach and this will provide a means for evaluating the reasonableness of the measures taken by states in realising ESCR.²⁵⁸ The Court would have to balance individual and community needs against government constraints. The Court would start off by determining the minimum threshold of every right as the substantive content of the right to guide government on its obligations. However, a claim of violation of the ESCR would not entail enforcing the minimum core obligation directly but rather a review of government's

²⁵¹ Table 3.1 Level of service and likely level of access or quantity collected. The GC 15 endorses WHO Guidelines including the table referred to. See art 12 (a)

²⁵² GC 15(c)(i).

²⁵³ Petrova V 'At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Rights' (2005-2006) 31 *Brook Journal of International Law* 600.

²⁵⁴ GC 15 para 37 (e) & (f).

²⁵⁵ GC 15 para 37 (f) & 49.

²⁵⁶ Chowdhury J (2009) 19. See also Yeshanew SA 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317, 329 -30.

²⁵⁷ Chowdhury J (2009) 19.

²⁵⁸ Liebenberg S (2010) 173.

policy to determine whether there is reasonable progress towards meeting the obligation. That is to say, the minimum core obligation will be the scale to measure how well government is doing, and as long as it may be shown that government efforts is moving towards the core obligation even if not yet attained, Court will find such action as reasonable. The further on the scale away from the core obligation, the stricter the Court will be on state to prove that their action is reasonable. When there is no progress in improving the enjoyment of the right, the Court will find states action as unreasonable. Thus, the content of the right will be established but courts will allow a leeway on how government discharges its duty while at the same time having a measure against which to review the actions or omissions of the State.

The combined approach of Chowdhury and Liebenberg is an improvement on the pure reasonableness approach but still suffers from the lack of any immediately enforceable entitlement and must thus give way before the minimum core approach.

3.6 Duty Bearers in Realising the Human Right to Water

GC 15 identifies State parties to the ICESCR as the primary duty bearer. The State parties must first guarantee the right to water to all people within its jurisdiction.²⁵⁹ State parties also have a duty to refrain from violating the right to water, not just for their citizens, but also for foreigner; states must even prevent their own citizens from doing so.²⁶⁰ Extra-territorial application of the human right to water is necessary, especially because of shared water courses which enable one state to violate the right of another state through reduction of water volume and pollution.²⁶¹ States must therefore respect the enjoyment of the human right to water in other countries, by not interfering directly or indirectly with other states' ability to realise the right to water for persons within its jurisdiction.²⁶² State parties with adequate resources have a further obligation to facilitate realisation of the right to water in other countries through international cooperation and assistance.²⁶³ This is through provision of water resources, financial and technical assistance and aid.

²⁵⁹ See GC 15 part III on States Parties obligations.

²⁶⁰ GC 15 para 31 – 33.

²⁶¹ Bulto TS 'Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly of Human Rights* 491, 500.

²⁶² GC 15 para 31.

²⁶³ GC 15 para 30 & 34.

The CESCR also recognises the role of international organisations in implementing the right to water.²⁶⁴ UN agencies, international financial institutions and other international organisations concerned with water and trade have an obligation to cooperate with states to promote the enjoyment of the right to water.²⁶⁵ The UN resolution on the human right to water and sanitation calls upon them to provide financial resources, capacity-building and technology transfer in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.²⁶⁶ These different agencies, international and development partners and donor agencies are required to adopt a human rights-based approach when designing and implementing global efforts through national water policy.²⁶⁷ This global water governance, as Meier and others contend, can provide a basis on which agreed upon norms can be set to guide national water policies.²⁶⁸

Human rights advocates, NGOs and civil societies are recognised in their role of assisting vulnerable and marginalised groups to realise the right to water.²⁶⁹ Such organisations have an ability to reach out to large groups of people and assist in human rights efforts.²⁷⁰ Clohesy and Kuraz assert that they ‘play a crucial role in enabling people to recognise, articulate, and struggle to realise human rights within their own governments and societies.’²⁷¹ They also contribute to realising the right to water by placing pressure on governments to create policies on water in line with obligations placed on states by this right.²⁷²

Salman and Mcinerney-Lankford point out that GC 15 is silent on the issue regarding the duties or obligations of those upon whom the right to water is conferred.²⁷³ However, GC 15 recognises that individuals and communities have a role to play in ensuring the enjoyment of

²⁶⁴ GC15 part VI on obligations of actors other than States.

²⁶⁵ GC 15 para 60.

²⁶⁶ UN General Assembly, *The human right to water and sanitation* (2010) A/RES/64/292 para 2.

²⁶⁷ UN Human Rights Council Resolution on Human Rights and Access to Safe Drinking Water and Sanitation(2010) A/HRC/RES/18/1 para 10. See also Meier SM, Kayser GL, Amjad, UQ *et al* Implementing an evolving human right through water (2013) 8 – 9.

²⁶⁸ Meier SM, Kayser GL, Amjad, UQ *et al* (2013) 8 - 9 stating that the global governance necessitates Multi-sectoral partnerships that result in collaboration to enhance enhance information sharing between stakeholders, reduce redundancies in programs, establish best practices and facilitate negotiation processes. It is contended that the WHO must lead such a partnership as it has long explored multisectoral partnerships for water and sanitation through several initiatives based on a human rights approach.

²⁶⁹ GC 15 para 59.

²⁷⁰ Salman SMA & Mcinerney-Lankford S *The Human Right to Water: Legal and policy dimensions* (2004) 39.

²⁷¹ Clohesy WW & Kuraz KA ‘Realizing rights: a reaffirmation of human rights and their vital grounding in NGOs’ (2000) 36. Paper presented Dublin, Ireland. July 5-8 available https://www.istr.org/resource/resmgr/working_papers.../clohesy.pdf (accessed 12 May 2014).

²⁷² Salman SMA & Mcinerney-Lankford S (2004) 39.

²⁷³ Salman SMA & Mcinerney-Lankford S (2004) 74.

the right to water. First, the CESCR recognises that under the State's duty to fulfil, individuals and communities must be assisted or supported to enjoy the right to water.²⁷⁴ This could mean that individuals and communities are given a hand in their own efforts to enjoy the right to water. There is no articulation, however, in terms of obligation or duty on individuals or communities to establish water facilities or water delivery systems. This is the duty of the state, which is recognised to have control over resources required for realising this right.²⁷⁵ Individuals could be said to have a duty once water delivery systems are established, to make an effort to access the water for themselves and their family. Secondly, the role of individuals is also recognised in determining national policies and strategies on water and their implementation. States are required to formulate and implement national water policies in a participatory manner. The Guidelines on Realising the Right to Drinking Water states that everyone has the right to participate in decision-making processes that affect their human right to water, including determining the type of service and whether to manage their own services.²⁷⁶ This recognises individuals' ability to help themselves through voice, influence and collective action in forging goals, making choices and policy. People are not to be treated as passive recipients but as active agents of change in their individual and communal lives because of an inherent worth of every human being and their ability to make individual choices in pursuit of self-realisation and fulfilment.²⁷⁷ Agency is the freedom to set and pursue one's own goals and interests, which may also include furthering the well-being of others.²⁷⁸ I return in more detail to these points in the next chapter.

Individuals and communities have also got a role to play in asserting or enforcing this right through all legal means available. The human right to water is a powerful mechanism as it establishes obligations globally that include legislative requirement with remedies and recourse procedures.²⁷⁹ It provides an enforcement mechanism against which governments

²⁷⁴ GC 15 para 25.

²⁷⁵ GC 15 para 18.

²⁷⁶ Sub-Commission Guidelines para 8.1 & 8.2.

²⁷⁷ Ibrahim SS 'From Individual to Collective Capabilities: The Capability Approach as a Conceptual Framework for Self-help (2006) 7 (3) *Journal of Human Development* 400. See UDHR art 25. See also *Minister of Health NO v New Clicks South Africa (Pty)Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 (1) BCLR 1 (CC) para 627 where the Constitutional Court of South Africa states that 'the right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity...'

²⁷⁸ see generally Sen A 'Well-being, Agency and Freedom' (1985) 82 :4 *Journal of Philosophy* 169
Kabeer N 'Resources, agency, achievements: reflections on the measurement of women's empowerment' (1999) 30 *Development and Change* 438.

²⁷⁹ GC 15 paras 46 & 50.

are held accountable when they take no tangible steps towards realising the right.²⁸⁰ GC 15 provides that individuals or groups denied their human right to water should have access to effective judicial or other remedies both at the national and international levels and should receive reparation.²⁸¹

Another implicit duty of individuals and communities is to ensure efficient use of water.²⁸² This is in order that the enjoyment of the right to water for the present and future generations is guaranteed. However the CESCR does not articulate this as a duty for the users, but for the State to ensure that it increases the efficient use of water by end-users.

3.7 What Does the Human Right to Water Mean for the Poor?

As already stated, the human right to water empowers poor people to claim water as of right. The problems that affect poor people in having safe water are specifically addressed in term of legal obligations on states. For instance, the CESCR specifically recognises unequal distribution of water services as a problem.²⁸³ As already stated in chapter one, the water crisis is a crisis for the poor. Water systems in place are unequally distributed resulting in exclusion of the poor from the opportunity to have safe water.²⁸⁴ Hence the human right to water addresses this by guaranteeing universal access to water as a legal obligation on government which must establish systems of water supply and management for equal opportunity to access and/or have water.²⁸⁵ As already discussed, the human right to water prohibits discrimination and advances equity and water justice for all. The CESCR also identifies interference with existing access to water and threats to the sustainability of water supplies.²⁸⁶ Arbitrary disconnection is usually associated with failure to pay for water services which is disproportionately a poor person's problem. However the human right to water guarantees poor people secure and affordable access to water at no cost for those who cannot pay.²⁸⁷ Miroso and Harris explain that the human right to water refers to 'the idea that all people, regardless of citizenship, location, or ability to pay should be assured access to water needed for life, basic needs, and human dignity.'²⁸⁸ They further point out that the

280 WHO (2003) 9 & 10.

281 GC 15 para 4 & 55.

282 GC 15 para 28.

283 GC 15 para 1.

284 See Chapter 1 Introduction. See also generally UNDP Human Development Report 2006 *Beyond Scarcity: Power, poverty and the global water crisis* (2006).

285 GC 15 para 10.

286 GC 15 para 15 & 25.

287 GC 15 para 12(c)(ii).

288 Miroso O & Harris LM (2012) 945.

human right to water is a mechanism to push forward goals related to water access and equity for all.²⁸⁹ For McGaw, the human right to water involves the creation of a legal identity for a claim based in sociological reality arising from the need to protect the dispossessed given the increasing inequalities in access to water.²⁹⁰

The human right to water further guarantees sustainability of water services and water resources by requiring states to ensure that there is continuous access to water through prevention of overuse and depletion of water resources. Overall, the human right to water guarantees poor people equitable, secure and sustainable access to water. It creates a legal obligation for government to secure access to water on a non-discriminatory basis through water services and management according to international standards that guarantee universal access to water adequate for health, dignity and life.²⁹¹ .

3.8 Conclusion

The human right to water in its narrow formulation entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. This is the substantive content of the human right to water. Personal and domestic uses include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. States have the obligation to realise this right through the establishment of water service systems that guarantee equal opportunity for all to access water. The water services must be physically and economically accessible to everyone and ensure that water of adequate quality is available on a continuous base. The poor and marginalised must be specifically protected from exclusion of services even when they are unable to pay for services. Although market mechanisms may be relied on in the distribution of water, equity is emphasised as the goal at all times. The State has the primary responsibility to realise this right, however, it has a discretion regarding how water services are managed.

In order to discharge duties from the human right to water, States must adopt legislative and other non-legislative measures that result in adequate and accessible water of good quality for all. State parties must take immediate, deliberate and concrete steps that include the formulation and implementation of national water policies and strategies in a transparent and

²⁸⁹ Miroso O & Harris LM (2012) 944.

²⁹⁰ McGaw GS (2011)138; Hu D (2006) 140.

²⁹¹ Meier SM, Kayser GL, Amjad, UQ *et al* 'Implementing an evolving human right through water and sanitation policy' (2013)15 *Water Policy* 116, 117.
See also Gupta J, Ahlers R & Ahmed L 'The Human Right to Water: Moving Towards Consensus in a Fragmented World' (2010) 19 :3 *Review of European Community & International Environmental Law* 294.

non-discriminatory manner to realise the human right to water. The formulation and implementation of national policies and strategies must ensure participation, human agency and dignity of all those affected by such decisions. The full realisation of this right is, however, subject to available resources; hence it is accepted that it will take a long time to fully realise or achieve this. Although progressive realisation of the human right to water is accepted, states parties have an immediate obligation to meet the minimum essential requirements of water for human survival and dignity for everyone. The State has the obligation to efficiently utilise all available resources at its disposal to implement this right.



Chapter Four

Participation and Agency in Realising the Human Right to Water

4.1 Introduction

The previous chapter established that the human right to have access to water has both substantive and procedural components. The participatory right to water or the human right to participate in water governance is among the procedural components of the human right to have access to water. This chapter critically analyses participation as an empowering tool for social transformation through the promotion of human agency in governance of water services. The core questions are: what is participation and what factors support meaningful participation and agency. The more specific focus is to determine whether and in what ways community participation in governance of water services could be better facilitated.

The chapter argues that participation within the human right to water goes beyond a limited focus on ‘things’ (safe water of a certain quantity). The human right to water reaches beyond the human mode of ‘having’ into ‘being’ i.e. being a full member of society.¹ As the German political theorist Hannah Arendt would have said, the human right to water provides the bridge between the private world of ‘labour’ (bodily survival) and the public world of ‘action’ (political participation and good judgment).² Or as the South African Constitutional Court might describe it, the human right to water not only guarantees individual life; it also forms part of the ‘pervasive demand for participatory living’ in a community of equal citizens.³

In this context, the first section analyses General Comment No 15 on water (GC 15) in which the participatory right to water is formulated. The GC15 establishes this right as a legal

¹ See Fromm E *To have or to be?* (1976) for a discussion of these terms and the modes of human existence each encapsulates from a social-psychological perspective.

² Arendt H *The Human Condition* (1958) describes three types of human behaviour: ‘labour’ is what is needed to sustain bodily processes, ‘work’ creates a place of permanence and a world of things around the body, and ‘action’ creates a human world or community through storytelling and collective judgment. Arendt claimed that liberalism and consumer society is essentially a culture of ‘labour’ without permanent things. She yearned for a return to politics and a culture of ‘action’ as the only way for modern humanity to avoid the nihilism that comes from the incessant concern with the body and its processes of consumption and decay. Arendt dismissed the liberal culture of subjective rights and freedoms as an ethic of labour. She herself never understood that human rights, especially socio-economic rights like the right to water, could also constitute an ethic of action, politics and collective action.

³ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 92 (per Froneman J). The Court borrowed the phrase “pervasive demand for participatory living” from Amartya Sen *The idea of Justice* (2009) 322.

entitlement within the human right to water itself. In order to clarify the meaning of this right, I then investigate the possible enforcement of this right by drawing on relevant and comparable international and domestic guarantees of the human right to participate. This is followed by a look at how the participatory right to water can be operationalised relying on the framework developed by the special rapporteur on water.⁴ The final section concludes with a discussion of governance in water services that guarantees poor communities and women especially, effective participatory power in decision-making processes. In the process I investigate how participatory power is understood by feminist theorists.

Overall, the chapter seeks to demonstrate that a participatory component to the human right to water is crucial in addressing the inequalities in access to water. The discussion in this chapter will set the context for an analysis of community participation in Malawi (see Part II below).

4.2 General Comment 15 and Participation in Water Governance

GC 15 recognises both substantive and procedural elements of the human right to water. The procedural component is concerned with the designing and implementation process accompanying the right to have access to safe water for domestic purposes. The participatory right to water is part of the minimum essential element of the human right to water. It is thus immediately binding on State parties and not subject to progressive realisation.⁵

The participatory component of the human right to water is evident in several sections of GC 15. The GC 15 establishes that individuals and groups have a right to informed public participation in defining, reviewing and implementing policies and strategies towards universal access to water.⁶ It further establishes that attention or priority should be given to

⁴ United Nations General Assembly (UNGA) *Annual Report of the Special Rapporteur on the human right to safe drinking water and sanitation A/69/213* 31 July 2014 (Special Rapporteur Report on Water). See also UNGA *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona A/HRC/23/36* 11 March 2013 (Special Rapporteur Report on Poverty).

⁵ Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 15 The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (2002) para 37(f) (GC 15).

⁶ GC 15 paras 37(f) & 48. The CESCR has recognised a similar participatory component as regards other social economic rights, such as the rights to health, food, housing and social security: CESCR *General Comment No 14 The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000) para 54 CESCR, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) para 23, CESCR *General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (Sixth Session 1991) U.N. Doc. E/1992/23(1991) para 9, CESCR *General Comment No. 19 The right to*

disadvantaged and marginalised groups, both in participatory processes and the content of the policies and strategies.⁷ The Committee on Economic Social Culture Rights (CESCR) explains what States must do as follows:

[t]o adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; ... the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.⁸

The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.⁹

Participation in this sense is a continuous transparent process, whereby the State provides opportunity to disadvantaged and marginalised people to take part in the formulation and implementation of policies, so that they can hold government to account for the efforts to realise the human right to water. This is an important safeguard for the disadvantaged and marginalised, as it provides a platform where they can act as their own agent to influence efforts towards universal access to water.¹⁰ Francis and Firestone recognise the ability to influence decisions as power, the most vital component of the human right to water.¹¹ They explain that this is a vehicle to ensure equitable, secure and sustainable access to water through water services and management.¹² It should be remembered that to realise access to water as a human right requires both substantive and procedural aspects. The substantive aspect establishes the normative standard or entitlement pertaining to access to water and involves finances, technologies and capacities toward production of water services. The procedural aspect establishes norms for the process of developing water services and

social security (art. 9) (Thirty-ninth session 2007) UN, Doc. E/C.12/GC/19(2008) paras 26 & 69.

⁷ GC 15 paras 37(f) & 48.

⁸ GC 15 paras 37(f).

⁹ GC 15 para 48.

¹⁰ Clark C 'The centrality of community participation to realisation of the right to water :the illustrative case of South Africa' in Sultana F & Loftus A (eds) *The Right to Water: Politics, Governance and Social Struggles* (2012) 174, 181.

¹¹ Francis R & Firestone L 'Implementing the human right to water in California's Central Valley: Building A democratic voice through community engagement in water policy decision making' (2010-2011) 47 *Willamette Law Review* 495, 518; Clark C (2012) 177, 182-183.

¹² Francis R & Firestone L (2010-2011) 518.

management through legal, policy and standards of service decisions including coordinating, financing, enabling and regulating producers.¹³ The ability of influence entails power to determine how the legal, policy and standards of services decisions meet the needs of the people. Guaranteeing this power to disadvantaged and marginalised groups means that they can act as their own agents in realising the human right to water. Agency is exercised through the practical experience of taking part in considering options and making decisions. Agency may also entail taking action alone or collectively with others in realising the human right to water. Every human being has the right to apply their faculty of reasoning to make choices and act upon them to influence and shape their lives. This right is grounded in dignity which is inherent in all human beings.¹⁴ I will return to elaborate on the right to human dignity later. For now it may be noted that participation is constitutive of dignity as recognition of every human being's inherent capacity to help themselves and to make decisions that affect their everyday lives.¹⁵

Writing on participation in realising ESCR, Chenwi also makes the point that participation ensures that people 'are active stakeholders rather than just passive recipients of socio-economic goods and services.'¹⁶ She finds that the inability or limited opportunities for participation negatively impacts realisation of ESCR especially at grass roots level.¹⁷ She explains that lack of participation results in development plans and services that are not relevant to local needs and conditions.¹⁸ She further points out that the lack of participation undermines democratic accountability which is essential for effective enforcement of ESCR.¹⁹ Brand, who holds the same view that democracy reinforces ESCR, and he states that realising ESCR depends on among other things enhancing the political capacities of poor people and enlarging the space for them to participate in determining policies, strategies and plans to shape their life.²⁰

¹³ Allen A, Davilla JD & Hofmann P *Governance of Water and Sanitation Services for the Peri-urban Poor: A Framework for Understanding and Action in Metropolitan Regions* (2006) 48.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights* (UDHR) Resolution 217 A (III) (1948)

¹⁵ Nussbaum *Women and Human Development - The Capabilities Approach* (2000)72, Waldron 'How Law Protects Dignity' 2011 *Public Law & Legal Theory Research Paper Series Working Paper No.* 11-83 2.

¹⁶ Chenwi L 'Meaningful engagement' in the realisation of socio-economic rights: the South African Experience' (2011) 26 *SAPL* 128, 129.

¹⁷ Chenwi L (2011) 128.

¹⁸ Chenwi L Meaningful engagement (2011) 128-129.

¹⁹ Chenwi L 'Democratising the socio-economic rights-enforcement process' in Garcia HA, Klare K, Waters GJ et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178, 178.

²⁰ Quoted in Chenwi L (2014) 178.

The CESCR specifically advances a participatory right to water in line with the primacy of equity in the struggle to secure access to water. Participation is thus regarded as an empowerment right to challenge inequality. Further evidence for this can be seen in the requirement of participation in establishing a regulatory system for service providers to prevent them from ‘compromising equal and affordable access to sufficient and acceptable water’.²¹ GC 15 thus states that:

To prevent such abuses [i.e. compromising equal and affordable access to water] an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, *genuine public participation* and imposition of penalties for non-compliance.²²

As noted in chapter one, the human right to water emerged as a reaction to inequitable access to water services and became a mobilising tool for equity and justice demands against states.²³ Struggles for water justice in the Latin American countries exposed the implication of excluding people in decisions that directly affect them, especially as regard the type of water services offered.²⁴ One fundamental issue in the resistance of privatisation was the withholding of information and lack of opportunity to be heard when entering into agreements with multinational companies.²⁵

What is involved here is not simply nominal participation but genuine participation, based on the opportunity for disadvantaged and marginalised people to have their needs reflected in policies and laws. The CESCR establishes this right to participate as a procedural safeguard for poor and marginalised communities. It secures the political space to demand inclusive and equitable water policies and services.²⁶ The focus once again is to empower have-nots in society to effect social change and share in the benefit of society by voicing their needs.²⁷

²¹ GC 15 para 24, 37(f) & 48.

²² GC 15 para 24.

²³ Miroso O & Harris LM ‘Human right to water: contemporary challenges and contours of global debate’ (2012) 44:3 *Antipode* 933. See Murthy SL ‘The human right(s) to water and sanitation: history, meaning, and the controversy over-privatization’ (2013) 31:1 *Berkeley Journal of International Law* 89. See also Gupta J, Ahlers R Ahmed L ‘The human right to water: moving towards consensus in a fragmented world’ (2010) 19 :3 *Review of European Community & International Environmental Law* 29.

²⁴ See generally Shiva V *Water Wars* (2002); Kohl BH & Farthing LC *Impasse in Bolivia: Neoliberal hegemony and popular resistance* (2006); Lobina, E & Hall, D *Water privatization and restructuring in Latin America* (2007).

²⁵ See O’Neill T ‘Water and freedom: the privatisation of water and its implications for democracy and human rights in developing world’ (2006) 17 *Colorado Journal of International Environmental Law and Policy* 357, 380 referring to the Bolivia government and Cochabamba water case.

²⁶ Clark C *The centrality of community* (2012) 181.

²⁷ Special Rapporteur Report on Poverty para 14, GC 15 paras 16,24 & 37(f).

The CESCR also emphasises that before any action is taken that might undermine the enjoyment of the human right to water; the impacted people must be given a genuine opportunity to participate in decisions in this regard. The General Comment provides as follows:

[b]efore any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant and that comprises:

(a) Opportunity for genuine consultation with those affected.²⁸

The terms 'genuine' public participation, 'genuine' consultation are all used in support of the type of participation envisaged within the human right to water. As already stated, participatory right to water is power, whether as individual or community power. In the risk of repeating myself, power is the ability to influence decisions. Chenwi states that the use of the qualification 'genuine' is to imply 'meaningfulness' or 'effectiveness' which involves the fostering of a long-term relationship between the State and citizens or non-citizens influencing policy making, priority setting and access to goods or services.²⁹

It should be highlighted that the CESCR identifies women particularly as requiring special attention in accessing participatory processes and their needs to be reflected in outcomes:

[w]hereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated.³⁰

This again emphasises the empowering potential of participation in prioritising the needs of those most disparate and in need of water. Five points may be highlighted from the statements establishing a participatory component of the human right to water: (1) this right is applicable both to individuals and groups, (2) only 'genuine public participation' is in line with the human right to water (3) that this entails equity in accessing decision making processes with specific attention on enabling women, (4) the ability to influence decisions,

²⁸ GC 15 para 56.

²⁹ Chenwi L Meaningful engagement (2011) 129-130 she holds that this is the essence of meaningful engagement as developed in the South African Constitutional Court jurisprudence.

³⁰ GC 15 para 16.

and (5) equity must be reflected in outcomes. Participation from a human right to water perspective is therefore about disadvantage and marginalised groups having power to effect equitable outcomes in decisions. These five points reflect the concerns and challenges from the broader historical context within which participation emerged and human right based standards that the CESCR advances.

However, the problem with GC 15 is that, although it recognises this participatory component and establishes the legal concepts of ‘genuine public participation’, it does not make clear whether and how this component of the right to water is justiciable. Perhaps the CESCR felt no need to do so, because the concept of participation already acquired meaning outside the GC 15, especially in the human right to participate recognised in international human rights law. The next section explores this human right to participate in international human rights law as the broader context in which the right to water is situated by the CESCR.

4.3 The Right to Participate in International Human Rights Law

4.3.1 The UN Human Rights System

Participation is a basic human right that was recognised as early as 1948 in the Universal Declaration of Human Rights (UDHR), formulated as a right to take part in government.³¹ This right became legally binding through the International Covenant on Civil and Political Rights (ICCPR) in 1976.³² Article 25 provides that everyone has the right and the opportunity without discrimination and unreasonable restrictions to ‘take part in the conduct of public affairs, directly or through freely chosen representatives’. The human right to participate is a broad right, covering all exercises of political power by government or nongovernmental organisations concerned with public and political life of the country, whether at the international, regional, national or local level.³³

Water services and management fall within this understanding of public affairs and are subject to the political exercise of power. It follows that the human right to participate in public affairs is the basis of a participatory component of the human right to water.

³¹ Art 21 UDHR.

³² International Covenant on Civil and Political Rights (ICCPR) Adopted 16 December 1966 and entered into force 23 March 1976.

³³ See United Nations Human Right Council General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service: . 12/07/96. CCPR/C/21/Rev.1/Add.7para 5 (GC 25)

According to the Human Rights Committee (HRC) the human right to participate lies at the core of democratic government based on consent of people.³⁴ The word democracy comes from the Greek words *demokratia* which means the ruling power (kratos) resides with the people (demos) or rule of the people.³⁵ The much celebrated words by Abraham Lincoln perhaps best captures the kind of government system envisaged by democracy, ‘... a government of the people, by the people, for the people ...’ This is what democracy is about - self-government through a system where the sovereign authority to rule comes from the people who exercise agency on matters that directly affect them.³⁶ Michelman formulates this basic idea as follows:

[d]emocracy serves self-government by providing each individual with a reason to identify his or her political will or “agency” with the lawmaking and other acts of collective institutions, or to claim such acts as his or her own.³⁷

The HRC also links the human right to participate to political self-determination. The right to self-determination entails freedom of choice, whether regarding political status or government or pursuing development.³⁸ The International Court of Justice defines the right to self-determination as ‘the need to pay regard to the freely expressed will of peoples’³⁹ and explains that it ‘requires a free and genuine expression of the will of the peoples’.⁴⁰ This is why the right to self-determination is linked to the right to participate in the democratic process of government.⁴¹ At the core of self-determination or self-government is the exercise of choice or free will. The HRC established that taking part in public affairs is exerting influence or choice. It explains that this could be through public debates with freely chosen representatives or directly through organisations or associations with others.⁴² To facilitate such self-mobilisation and therefore participation, the HRC requires that the rights to freedom

³⁴ GC 25 para 1.

³⁵ See Held D *Models of Democracy* 2006 generally.

³⁶ Michelman F.I *Brennan and Democracy* (2005) 11 -12.

³⁷ Michelman (2005) 12.

³⁸ See GC 25 para 2; The right to self determination is provided for in the art 1 ICCPR, United Nation *Charter of the United Nations* (UN Charter) 24 October 1945, 1 UNTS XVI, the International Covenant on Economic, Social and Cultural Rights (ICESCR) Adopted 13 December 1996 and entered into force 3 January 1976. ICESCR art 1 provides as follows :

‘All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’

³⁹ *Western Sahara*, Advisory Opinion, (1975) ICJ Reports 12 para 33.

⁴⁰ *Western Sahara* (1975) para 32.

⁴¹ See Committee on the Elimination of Racial Discrimination [General Recommendation No. 21 on right to self-determination](#) para 14 linking self determination with the taking part in government as well as in the conduct of public affairs at any level without discretion.

⁴² GC 25 para 8.

of expression, assembly and association must be respected.⁴³ It further requires states to create opportunities for direct participation through referendums and other electoral processes, popular assemblies which have ‘the power to make decisions’ or bodies established to represent citizens in consultation with government. The emphasis throughout General Comment No 25 (GC 25), the basic document where the HRC elaborates on the human right to participate, is the exercise of power or choice.⁴⁴ The human right to participate also emphasises the need to eliminate discrimination in opportunity to participate and requires the State to ensure legislative and other measures towards this goal.⁴⁵ I will look at this in more detail below.

The HRC, however, does not specify the means or modes of participation; suffice to say it might be directly or indirectly through representatives. The HRC elaborated on this in *Marshall v Canada* where it stated that the human right to participate ‘cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs.’⁴⁶ This case dealt with an alleged violation of the human right to participate when representatives on behalf of the Mikmaq people were refused a permit to attend a constitutional conference.⁴⁷ The constitutional conference was to discuss matters affecting aboriginal peoples of Canada, including identification and the definition of the rights of those peoples. There were several conferences over a number of years in which representatives of four national associations representing 600 aboriginal groups participated.⁴⁸ The authors of the complaint had sought direct participation of a representative of the Mikmaq people, however the State refused to grant their request. The Mikmaq people argued that this was an unreasonable restriction as their interest was not well represented by the aboriginal associations that had been invited. They further stated that attempts to influence the conference through other indirect means had failed, yet discussion would involve issues directly affecting treaties the tribe had entered into with government.⁴⁹ The HRC found no violation of article 25 on the human right to participate. It stated that the State had discretion to provide for the modalities of participation and held further that to extrapolate a right to direct anticipation by citizens from article 25

⁴³ GC 25 para 8.

⁴⁴ GC 25 para 6 -8.

⁴⁵ see ICCPR arts 2 & 25.

⁴⁶ *Marshall v Canada* Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991) para 5.5.

⁴⁷ *Marshall v Canada* paras 3.1 & 3.2.

⁴⁸ *Marshall v Canada* para 2.2.

⁴⁹ *Marshall v Canada* Para 4.2.

would be going beyond its scope.⁵⁰ The HRC stated that in a democratic state, representatives may be relied on in the conduct of public affairs where matters affect the interests of large segments of the population or the population as a whole.⁵¹ However, when matters affect the interest of more specific groups of society, this should be accompanied with prior consultations, such as public hearings with these specific groups.⁵²

In addition to the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises a human right to participate specifically in cultural life.⁵³ In interpreting this right, the CESCR has stated that to participate means the right to act freely or to choose.⁵⁴ Once again freedom of choice and influence are recognised as central tenets of the human right to participate. In article 13 the ICESCR establishes education as an important element enabling people to participate effectively. The CESCR confirmed that education is an empowerment right, ‘the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.’

Group specific human rights instruments, like the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),⁵⁵ the Convention on the Rights of the Child (CRC),⁵⁶ and the Convention on the Rights of Persons with Disabilities (CRPD),⁵⁷ all call upon State parties to put in place special measures to ensure effective participation of women, children and persons with disabilities in all matters that affect them on an equal basis with others.⁵⁸ These instruments guarantee a human right to participate in such matters as the life

⁵⁰ *Marshall v Canada* Para 5.5.

⁵¹ *Marshall v Canada* Para 5.5.

⁵² *Marshall v Canada* Para 5.5.

⁵³ ICESCR art 15(1).

⁵⁴ CESCR, General Comment on the Right to Take Part in Cultural Life as recognized in Article 15 of the Covenant, 11 December 1992, UN Doc. E/C.12/1992/SR.17 (1992) para 14 & 15(a).

⁵⁵ Arts 7, 8, 13 & 14 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Adopted 18 December 1979 and entered into force 3 September 1981.

⁵⁶ Convention on the Rights of the Child (CRC) Adopted 20 November 1989 and entered into force 2 September 1990 arts 12 & 31.

⁵⁷ Convention on the Protection and Promotion of the Rights of Persons with Disabilities (CRPD). Adopted on 13 December 2006 and entered into force on 3 May 2008 arts 3, 4, 29 & 30.

⁵⁸ See CEDAW articles 7, 8, 13 & 14, CRC article 12 & 31 and CRPD articles 3, 4, 29 & 30. Other instruments at the global level include the International Convention on the Elimination of All Forms of Racial Discrimination arts 5(c), & (e)(vi), The International Convention on the Right of All Migrant Workers and Members of their Families, arts. 41 and 42.2, CRPD arts. 3(c), 4.3, 9, 29 & 30, and The United Nations Declaration on the Rights of Indigenous Peoples (2007) (A/61/L.67 and Add.1) arts. 5, 18, 19 & 41. These provisions establish the right to participate in political, public, economic, social and cultural life of a state plus in recreation and leisure.

and administration of local communities, formulation and implementation of government policy and legislation,⁵⁹ judicial and administrative proceedings affecting a person,⁶⁰ and recreational activities, sports and all aspects of cultural life.⁶¹

As already stated, women are accorded special recognition as a group with the least opportunity to participate. The CEDAW is the leading instrument on women's rights aimed at the elimination of discrimination against women.⁶² CEDAW accepts that because of discrimination women have limited power to control decisions that affect their lives. Discrimination is defined as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶³

The CEDAW goes ahead and guarantees the right of women to participate by obliging states to address the problem of discrimination against women. It provides that states must:

eliminate discrimination against women in political and public life of the country' and ensure that women enjoy on equal terms with men the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; [and] to participate in non-governmental organizations and associations concerned with the public and political life of the country.⁶⁴

The CEDAW makes specific guarantees for women in rural area.⁶⁵ CEDAW obliges states to 'take into account the particular problems faced by rural women' as well as the 'significant roles that rural women play in the economic survival of their families.' It further goes on to provide for their right to participation as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women,

⁵⁹ CEDAW 7(c) & 14(2)(a), Women's Protocol art 19 (b).

⁶⁰ CRC art 12(2); ICCPR art 14.

⁶¹ CEDAW 13(c); CRPD art 30; CRC art 31; ICESCR art 15 (a); CRWC art 12. See also General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights 2009.

⁶² Pruitt LR 'Deconstructing CEDAW'S article 14: naming and explaining rural difference' (2010-2011) 17 *William and Mary Journal of Women and Law* 347, 351 -352; hails CEDAW for recognising the rural and urban divide as a basis of disadvantage or discrimination. Burrows N 'The 1979 Convention on the Elimination of All Forms of Discrimination Against Women'(1985) 32 *Netherlands International Law Review* 419, 446- 448.

⁶³ CEDAW art 1.

⁶⁴ CEDAW art 7.

⁶⁵ Pruitt LR (2010-2011) generally.

which they participate in and benefit from rural development and, in particular, shall ensure to such women the right to participate in all community activities.⁶⁶

International environmental law generally provides indirectly or directly for public participation in environmental and/or water matters, such as the Convention on Biological Diversity.⁶⁷ However, the development of the human right to participate in governance of water services can be traced back to non-binding international environmental instruments. For instance, the Mar del Plata Action Plan of 1977 called for participation of communities at all levels of water services provision, such as planning, construction, operation and maintenance.⁶⁸ This was echoed in 1992 in the Dublin Statements on Water and Sustainable Development, which also provided for participatory water development and management involving users, planners and policy-makers at all levels.⁶⁹ It specifically provides for women's participation in principle:

[w]omen play a central part in the provision, management and safeguarding of water. This pivotal role of women as providers and users of water and guardians of the living environment has seldom been reflected in institutional arrangements for the development and management of water resources. ... this principle requires positive policies to address women's specific needs and to equip and empower women to participate at all levels in water resources programmes, including decision-making and implementation, in ways defined by them.⁷⁰

Similarly the Agenda 21: Programme of Action for Sustainable Development calls for full participation of women, youth, indigenous people and local community communities in water management policy making and decision-making.⁷¹ It also provides that such participation must be 'genuine involvement of all social groups.'⁷² The Bonn Declaration in 2001 also

⁶⁶ CEDAW art 7.

⁶⁷ Convention on Biological Diversity (1992) Adopted 5 June 1992 and entered 29 December 1993.

⁶⁸ UN Mar del Plata Water Conference Report, 14-25 March 1977, U.N. Doc. E/Conf.70/29 (1977) para A 4.

⁶⁹ See Dublin Statement on Water and Sustainable Development (Dublin statement) (1992), International Conference on Water and the Environment, Dublin, Ireland 26-31.

⁷⁰ Statement on Water and Sustainable Development (1992) Principle 4.

⁷¹ See Report of the UN Conference on Environment and Development, Rio de Janeiro UN Doc A/CONF.151/26/Rev.1 (1992) principle 10, Agenda 21 : Programme of Action for Sustainable Development , Chapter 18 para 18.9(c) see also The Ministerial Declaration adopted at the International Conference on Freshwater in Bonn in 2001(January 1992) , Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992), The Right to Development UN Doc. A/Res/54/175 The Human Right to Water and Sanitation UN DOC. A/RES/64/292.

⁷² Preamble to *Agenda 21*, ch. 23.

provides for a participatory approach to water resources management with equal voice for men and women in managing sustainable use and sharing of benefits.⁷³

GC 15 was issued in 2002, after all these strong commitments to participatory approaches towards water development and management. This was followed by the statement of the International Law Association (ILA), a non-governmental organisation in 2004, which holds that the participatory right to water is a rule of international customary law.⁷⁴ Thus far the evidence is weak, although as ILA rightly points out, states have made commitments to participatory approaches in international human right law and environmental management principles.

The Berlin Rules on Water Resources (Berlin Rules) adopted by the ILA is still useful in understanding this right. The ILA explains that the general human right to participate must now apply in water matters to ensure legitimacy of decisions. The Berlin Rules provide that states have a duty to guarantee public participation to all people affected by water management decisions and processes.⁷⁵ This means at least that they should be provided with a reasonable opportunity to express their views on plans, programs, projects or activities relating to water.⁷⁶

In sum: the human right to participate is therefore a right to exercise power or influence or choice. The human right to water incorporates the participatory turn in international human rights law. Participation can take place directly, in forums that have the power to make decisions, or indirectly, by exerting influence through public debates with freely chosen representatives. However, where public affairs directly affect the interest of more specific groups of society, reliance of representatives must be supplemented with other modes of direct participation.

4.3.2 African Regional Level

The human right to participate as recognised in several of the African human rights instruments also provides a basis for a participatory right to water. The African Charter on Human and Peoples' Rights (African Charter), the main human rights instrument of the African Union recognises participation in government directly or through chosen

⁷³ Ministerial Declaration adopted by ministers meeting in the Ministerial Session of the International Conference on Freshwater Bonn, 4 December 2001.

⁷⁴ International Law Association *Berlin Rules on Water Resource in Report of the Seventy-First Conference of the International Law Association* (2004).

⁷⁵ Berlin Rules on Water Resource arts 4 7 18.

⁷⁶ Berlin Rules on Water Resource art 18.

representatives as a human right.⁷⁷ The African Commission on Human and Peoples' Rights (African Commission) held in the *Jawara v The Gambia* case that the right to participation is linked with the right to self-determination (following the position of the HRC).⁷⁸ The complainant alleged several violations of rights emanating from a military coup that overthrew his government in the Gambia. The complainant was a former president of the Gambia who argued that the military coup had violated the right to self-determination for the people of the Gambia.⁷⁹ He stated that the military has imposed itself on the people, contrary to the right of the people to freely choose and determine their political stance. The African Commission agreed, holding that the military had taken over power by force, albeit peacefully, thus undermining peoples' right to choose. The African Commission explained that the ballot was the means of exercising political choice.⁸⁰

The meaning of participation as choice and influence is evident in the case of the *Centre for Minority Rights Development and Others v Kenya (Endorois case)*.⁸¹ This case involved the displacement of the Endorois community from their ancestral lands and the failure to adequately compensate them. They had entered into an agreement with government for compensation for relocating 400 families to pave way for a game reserve. The agreement also included an undertaking that 25 percent of the proceeds from the game reserve would be given to the Endorois people. None of this had happened.⁸² Further, for the remaining people in the lands, government was denying them access to a lake located in the game reserve which was intrinsically linked to their health, livelihood, religion and culture.⁸³ They also alleged lack of participation in crucial decisions affecting their lands. They explained that the government had refused to register their welfare committee, a representative body of the Endorois community, thereby denying them the right to fair and legitimate consultation. The government only consulted with individuals they handpicked to lend their consent 'on behalf' of the community.⁸⁴ They therefore alleged that consultations that took place were not

⁷⁷ African Charter on Human and People's Rights (1981) Adopted 27 June 1981 and entered into force 21 October 1986, art 13.

⁷⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) Para 73.

⁷⁹ *Jawara v The Gambia* Para 72.

⁸⁰ *Jawara v The Gambia* Para 72 – 73.

⁸¹ *Centre for Minority Rights Development and Others v Kenya (Endorois case)* (2009) AHRLR 75 (ACHPR 2009) 289.

⁸² Endorois case Para 7 – 11.

⁸³ Endorois case Para 15 -17.

⁸⁴ Endorois case Para 20.

in good faith or with the objective of achieving agreement or consent.⁸⁵ Regarding participation, the African Commission held as follows:

[t]he African Commission agrees with the Complainants that the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.⁸⁶

The African Commission found that giving illiterate people documents to read was unreasonable and not helping them to participate on an equal basis. It stated as follows:

[t]he community representatives were in an unequal bargaining position, an accusation not denied or argued by the Respondent State, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.⁸⁷

The African Commission established that this was therefore inadequate and ineffective participation. It went on to establish that participation must be active, free and meaningful, as established in the UN Declaration on Development.⁸⁸ This would require fair and legitimate consultation with the affected parties through legitimate representatives of their choice, who are informed or enabled to appreciate the matters and consequences of different decisions.⁸⁹ Finally, there must be opportunity for choice and influence of decisions. In the circumstances of the communication, the African Commission held that the consultation by the government of Kenya with the Endorois people was not sufficient.⁹⁰ It was not conducted in a manner that effectively involved the Endorois people, leaving them 'feeling disenfranchised from a process of utmost importance to their life as a people.'⁹¹ The government of Kenya had

⁸⁵ Endorois case para 274.

⁸⁶ Endorois case p281.

⁸⁷ Endorois case para 282 & 292.

⁸⁸ *Endorois case* para 283. see U.N. *Declaration on the Right to Development*, U.N. Doc. A/RES/41/128 (1986) Art 2.3.

⁸⁹ *Endorois case* Para 282 & 292.

⁹⁰ *Endorois case* Para 290.

⁹¹ *Endorois case* Para 297.

manipulated the Endorois people, hence ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.⁹²

Discrimination in participation is also prohibited by the African Commission which explains that discrimination occurs when the State puts in place measures that deliberately seek to exclude people from participating in the democratic processes of their country. This kind of exclusion was held to violate article 13 of the African Charter in *Legal Resources Foundation v Zambia*.⁹³ The complainant alleged that the government of Zambia had amended its Constitution to deliberately ‘take away the accrued rights of other citizens, including the first President, Dr Kenneth Kaunda’ to contest for or hold the office of President. The amendment provided that a person wanting to contest for presidency must prove that both his and her parents are/were Zambians by birth or descent. The African Commission held that this was discriminatory, excluding a section of the citizenry from participating in the democratic processes.⁹⁴ The African Commission, emphasising the effect of such discrimination on the right to have freely chosen representatives, stated as follows:

[t]he Charter makes it clear that citizens should have the right to participate in the government of their country “directly or through freely chosen representatives...” The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin but that the rights of the citizens of Zambia to “freely choose” political representatives of their choice, is violated.⁹⁵

The Women’s Protocol similarly provides for women’s right to participate in all decision-making processes without any form of discrimination.⁹⁶ It provides for equal participation of women as follows:

States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that women participate without any discrimination in all elections; women participate without any discrimination in all elections; women are represented equally at all levels with men in all electoral processes; women are equal partners with men at all levels of development and implementation of State policies and development

⁹² *Endorois case* Para297.

⁹³ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) (Legal Resource Foundation case).

⁹⁴ *Legal Resource Foundation case* Para 64.

⁹⁵ *Legal Resource Foundation case* Para 72.

⁹⁶ See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) Adopted 13 September 2000 and entered into force 25 November 2005, art 9 & 19(b) (Women’s Protocol). See also The African Charter on the Rights and Welfare of the Child. Adopted 11 July 1990 entered into force 29 November 1999 , art 12.

programmes. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.⁹⁷

Just like the participatory right to water, the African human rights system recognises that participation must provide real power in affecting the outcome of decisions and that disadvantaged and marginalised groups, like women, must be enabled to take part on an equal basis with others. This is important to ensure that the interests of everyone, especially the disadvantaged groups, are represented in decisions. Hence the African Charter for Popular Participation in Development and Transformation defines participation as:

in essence the empowerment of the people to effectively involve themselves in creating structures and in designing policies and programmes that serve the interests of all.⁹⁸

The discussion above has illustrated that the right to water forms part of a broader trend towards a participatory approach to human rights in general. The focus fell on specific provisions which refer to the right to participate in the definition and implementation of public affairs, in general, and other rights, in particular. However, it is best not to approach the right to participate as a free-standing or independent right, but rather as an inherent dimension of the idea of human rights. For this reason I now proceed to elaborate further on the right to dignity, which lays the foundations of the requirement for people to freely choose or exercise their will, and then on the right to equality. The right to participate is an inherent dimension of the fundamental human right duty to treat every citizen with equal concern and respect which key theorists of human rights, such as Ronald Dworkin,⁹⁹ and Nancy Fraser,¹⁰⁰ regard as the essence of the human rights approach to social justice.

4.3.3 Foundations of the Human Right to Participate: Rights to Dignity and Equality

4.3.3.1 Human Dignity

Human dignity is the foundation of all rights and is inherently linked to the right to participate within the human right to water. Both the right to dignity and the right to water emphasise that people should be treated as agents capable of shaping their lives in community with others. The UDHR provides that ‘all human beings are born free and equal in dignity

⁹⁷ Women’s Protocol art 12

⁹⁸ UNECA The African Charter for Popular Participation in Development and Transformation adopted in February 1990 at the "International Conference on Popular Participation in the Recovery and Development Process in Africa para 11.

⁹⁹ Dworkin R *Taking rights seriously* (1977) 180.

¹⁰⁰ Fraser N *Scales of Justice: Reimagining Political Space in Globalizing World* (2009) 5, 27 describes participatory parity as the essence of social justice and the core of the whole human rights discourse. See further below.

and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’¹⁰¹ The right to dignity is also recognised in the ICCPR and ICESCR, providing that all human rights derive from the inherent worth of a person. These Conventions then prohibit certain actions that contravene dignity, while calling for positive actions that enhance dignity.¹⁰² The African Charter similarly recognises that dignity is inherent in all human beings and must be respected.¹⁰³

Dignity is notoriously difficult to define.¹⁰⁴ This is partly because there is no definition in international and national law.¹⁰⁵ It has also been argued that the concept ‘is too rich to be encapsulated’ into a precise definition.¹⁰⁶ Most literature on the subject cites Kant’s elaboration of dignity, in which dignity is the recognition of human beings as ends in themselves.¹⁰⁷ Kant states that to treat people as ends is to recognise the capacity in them to make their own decisions, setting their own goals and guiding their conduct by reason.¹⁰⁸ He further explains that it is this distinct capacity that prohibits any conduct that instrumentalises others, as objects or merely means to another’s end. According to Botha, treating human beings as objects is to deny their capacity to shape themselves and their environment.¹⁰⁹ For Waldron, dignity is essentially a status of a person based on the recognition by others of their agency to shape their life and requires that this status be respected.¹¹⁰

Human dignity therefore requires that people be treated as autonomous individuals able to choose their own destiny in community with other. As discussed above, participation as a human right is basically about the exercise of free will and agency to shape one’s life; and therefore is an expression of dignity. It enables individuals to shape themselves and the society they live in by ensuring that people take part in public affairs on an equal footing

¹⁰¹ UDHR art 1.

¹⁰² ICCPR preamble, art 7 & 10 torture is prohibited as undermining dignity while calling for humanity in treatment for persons whose liberty has been deprived. See also ICESCR art 13 .
¹⁰³ African Charter Art 5.

¹⁰⁴ Botha H ‘Human Dignity in Comparative Perspective’ (2009) 20 *Stell LR* 171, 182.

¹⁰⁵ Andorno R ‘International Policy and a Universal Conception of Human Dignity’ in Palpant NJ & Dilley S (eds) *Human Dignity in Bioethics: From Worldviews to the Public Square* (2013) 127, 130.

¹⁰⁶ Andorno R (2013) 130.

¹⁰⁷ Kant I ‘Groundwork for the Metaphysic of Morals (1785) Available at <http://www.earlymoderntexts.com/pdfs/kant1785.pdf> (accessed on 12 October 2014).

¹⁰⁸ Rachels J ‘Kantian Theory: The Idea of Human Dignity’ 1 available at http://public.callutheran.edu/~chenxi/phil345_022.pdf (accessed 12 October 2014).

¹⁰⁹ Botha H Human dignity (2009) 183.

¹¹⁰ Waldron ‘How Law Protects Dignity’ 2011 Public Law & Legal Theory Research Paper Series Working Paper No. 11-83 2 See also Waldron J ‘Dignity, Rank and Rights’ the Tanner Lectures on Human values, delivered 2009 available at http://tannerlectures.utah.edu/documents/a-to-z/w/Waldron_09.pdf accessed 12 July 2014.

without exploitation or other forms of instrumental and strategic abuse. People are thus not objects of political processes or beneficiaries of state policy, but are treated as autonomous beings capable of self-determination, self-government and self-realisation.¹¹¹

As the African concept of 'ubuntu' makes clear, human dignity is maintained through guaranteed participation in political community with others. As Arendt pointed out after the devastation of the Second World War, human beings require a public space in which they can develop their full potential by acting, speaking and engaging with others.¹¹² This is why participation is essential for marginalised groups; it is constitutive of their dignity and also an affirmation that they are part of the society in which they live. As stated in *Doctors for Life International v Speaker of the National Assembly*:

Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to.¹¹³

It enables individuals to shape themselves and the society they live in by ensuring an opportunity to take part in decisions that affect them. When people take part in decisions that affect them, their dignity is respected as they are thus not objects but subjects of the process and treated as autonomous beings capable of reason, self-determination, or self-realisation.¹¹⁴ Further, according to Wood, where an individual or group is treated in a manner that degrades or humiliates them, or treated as inferior in status to others or made subject to the arbitrary will of others, or to be deprived of control over their own lives or excluded from

¹¹¹ Joseph Raz, "The Rule of Law and its Virtue," in his collection *The Authority of Law: Essays on Law and Morality* (1979), 221.

¹¹² Helis J 'Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights' (2008) 1 *Journal of Politics and Law* 75 analyses Arendt's conception of human dignity, which she argued to be the basis for the right to membership in a political community. Arendt struggled with the question why human rights, as natural and inalienable individual rights, failed during the second world war. She advanced that the only way to secure rights is by being a member of a political community (the right to have rights).

¹¹³ *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (SA CC), para 234.

¹¹⁴ Joseph Raz, (1979), 221. See Schachter O 'Human dignity as a normative concept' (1983) 77 *American Journal of International Law* 848, 850 explaining that respect for the dignity and worth of person in political context emphasises will and consent of the governed which is contravened when coercive rule by government to impose beliefs and attitudes on people is exercised or when government extends authority into private or personal matters of a person.

participation in the collective life of human society to which they belong, their human dignity is undermined.¹¹⁵

Similarly, in *Law vs Canada*, the Supreme Court of Canada held that dignity is harmed when individuals and groups are marginalized, ignored, or devalued and denied their full place in society.¹¹⁶ In this case dignity was defined as individual or group feeling of self-respect and self-worth and that it is concerned with physical and psychological integrity and empowerment. Hence, in *Coetzee v Comitis* the Constitutional Court of South Africa set aside a decision regarding a transfer of a player from one football club to another negotiated without his participation.¹¹⁷ The court stated that this amounted to objectifying him.

Human dignity ensures respect of a person's capacity as an agent to make one's own free choices as regards personal development¹¹⁸ Autonomy is essential to ensure that personal development and fulfilment are possible.¹¹⁹ Sen states that 'greater freedom enhances the ability of people to help themselves, and also to influence the world.'¹²⁰ Freedom, for Sen, has two aspects namely 'well-being freedom' and 'agency freedom'.¹²¹ The well-being freedom is the person's achievements and opportunities, while agency freedom is the ability to pursue and realise goals that they value.¹²² Individuals are considered as 'agents who have diverse valued goals and commitments on behalf both of themselves and of their society'.¹²³ Respect for autonomy of persons affirms the equal value, dignity and moral rights of each individual.¹²⁴ However, material conditions necessary to enable people to exercise agency must also be guaranteed. As Liebenberg states, autonomy means nothing without the necessities of life; hence dignity requires marshalling resources to redress the conditions that

¹¹⁵ Wood A 'Human dignity, right and the realm of ends' (2008) *Acta Juridica* 47, 52.

¹¹⁶ *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 *SCR* 497.

¹¹⁷ *Coetzee v Comitis* (2001) 1 SA 1254 (C), (2001) 4 BCLR 323 (CC).

¹¹⁸ Brownsword R 'An interest in human dignity as the basis for genomic torts (2003) 42 *Washburn Law Journal* 413, 416.

¹¹⁹ See *Ferreira v Levin NO* 1996 (1) SA 984 (CC): 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity'.

¹²⁰ Sen A *Development as Freedom* (1999) 18–19.

¹²¹ Sen A *Inequality re-examined* (1992) 57.

¹²² Sen A 'The Standard of Living' (1987) 58. Sen A *Development as Freedom* (1999) 19, Deneulin S & Shahani L(eds) *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (2009) 37.

¹²³ Sen A *Development as Freedom* (1999) 19.

¹²⁴ Brownsword R 'An Interest in Human Dignity (2003) 413.

perpetuate marginalisation.¹²⁵ In sum, government has an obligation to respect, protect and fulfil the participatory implications of the rights to dignity and the right to access water. Government may not treat people as passive objects but must respect their agency; government must protect people from being objectified and subjected to the arbitrary will of others or deprived of control over their own life; and government must facilitate and promote the ability of each person to participate effectively in community.¹²⁶ People affected by decisions must have the opportunity to voice their views as this constitutes dignity.¹²⁷ Through participation in political and public life, a person's interests, needs and preferences can be expressed thereby influencing decisions and social arrangements that will impact one's personal development.¹²⁸ Conditions necessary to ensure that no one is reduced to being a mere object for the purpose of others must be fostered to support the individual agency to fulfil autonomous potential. Dworkin famously described the essence of constitutional democracy as the right to be treated with 'equal concern and respect'.¹²⁹ Up to now I briefly introduced the meaning of 'respect' as an element of dignity. In the next section I turn to the other element of the phrase: equality.

4.3.3.2. Equality and Non-discrimination

Equality and non-discrimination are intrinsically linked, as equality is tantamount to non-discrimination. These two principles are widely recognised in international human rights instruments. For instance, article 3 of the ICESCR provides that states must ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.¹³⁰ Similarly, equality is recognised in the African Charter which provides that every individual shall be entitled to enjoy all the rights guaranteed in the Charter without distinction as to race, sex, political belief, religious belief and other status.

¹²⁵ Liebenberg S 'The value of human dignity in interpreting socioeconomic rights' (2005) 21 *South African Journal on Human Rights* 1. See *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65 the African Commission found that lack of food undermined the Right to participate.

¹²⁶ Wood A (2008) 52; Liebenberg S (2005) 6.

¹²⁷ *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 (1) BCLR 1 (CC) para 627 See also *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) where Sachs J discussing dialogue and mediation between disputing parties wrote that this promotes respect for human dignity and underlines the fact that we all live in a shared society.

¹²⁸ See *Purohit and Another v The Gambia*, communication 241/2001 (2003) AHRLR 96 (ACHPR 2003).

¹²⁹ Dworkin, R *Taking rights seriously* (1977) 180.

¹³⁰ ICESCR art 3.

In *Legal Resource Foundation v Zambia* discussed above, the African Commission stated that lack of equality affects the ability to participate and enjoy many other rights.¹³¹

Equality and non-discrimination are core principles to participation that imply that everyone should have equal and effective opportunities for voicing their views to other members of society, and to be part of and to influence outcomes of decisions.¹³² According to Verba, equal voice and influence in decision-making processes is essential in conferring a sense of selfhood, of agency, of belonging to the polity and building community through cooperative activity toward shared goals and benefit.¹³³ She states that two aspects of equality are most important in participation, equal capacity to influence and equal voice or consideration. Both these elements are based on the recognition that each person is capable of reasoning and choice in pursuit of their own development and that of others.¹³⁴ The right to participate implies equal consideration of interests of all citizens and governmental responsiveness to the interests.¹³⁵

The right to participate guarantees every human being the opportunity to take part and have their voices heard, including the marginalised, the poor and those who have suffered gross inequalities.¹³⁶ In order to achieve this, three aspects of equality must be attended to. First is the prohibition of discrimination which entails that ‘irrelevant characteristics such as gender or race be removed from the decision making process.’¹³⁷ Article 2 of the ICCPR enjoins States Parties to the Covenant to respect and to ensure the rights recognised for all individuals without distinction of any kind, such as race, colour, sex, language, religion, a political or other opinion, national or social origin, property, birth or other status.

The right against discrimination constitutes the negative protection of equality, prohibiting differentiation in treatment that has the effect of imposing burdens, obligations or

¹³¹ See *Legal Resource Foundation case* generally.

¹³² Pateman C *Participation and Democratic Theory* (1970) 9 Young IM *Inclusion and Democracy* (2000) 7.

¹³³ Verba S ‘Thoughts about political equality what is it? Why do we want it?’ (2001) 3 - 4 Available at <https://www.russellsage.org/sites/all/files/u4/Verba.pdf> (accessed on 22 May 2012).

¹³⁴ Verba S (2001) generally.

¹³⁵ Schlozman KL, Verba S & Brady HE ‘Civic engagement and the equality problem’ in Skocpol T, Fiorina M (eds) *Civic Engagement in American Democracy* (1999) 427, 430.

¹³⁶ ICCPR art 25 provides that everyone shall have the right and the opportunity, without any distinctions and without unreasonable restrictions to take part in public life, to vote and be elected into public office and to have access, on general terms of equality, to public service.

¹³⁷ Bell M *The right to equality and non-discrimination* (2003) 92.

disadvantages on such individual or group not imposed on others or limiting access to opportunities, benefits and advantages available to other members of society.¹³⁸ Discrimination results in people having power over others through institutional or cultural bias, stigma, stereotyping or prejudice that treats one group as privileged or superior, and another as inferior.¹³⁹ . Discrimination consequently constrains the individual or group's ability to participate and influence decisions that affect them. This is contrary to human dignity and the right to participate, which entail equal opportunity to take part and consideration of needs. Hence, gender inequality, for instance, is contrary to participation as a human right as in hinders equal opportunity to exercise agency or power to make and act on choices.¹⁴⁰

The second aspect is equality before the law, which means that everyone is entitled to the impartial application of the law, having regard to both formal and substantive equality. Laws must be neutral and not target particular individuals, they must offer equal and effective protection against discrimination, especially against marginalised people and finally it must ensure remedy for victims in the event of violations and punishment for perpetrators of discrimination.¹⁴¹ States have an obligation to identifying factors that impede people from

¹³⁸ *Andrew v Law Society of British Columbia* [1989] 1 SCR 143, 157 In *Van Oord v The Netherlands*, the HRC established that differentiation of treatment is permissible if the goal is to achieve a legitimate purpose and the criteria for such treatment are reasonable and objective.

¹³⁹ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* where the court criminalising of sexual intimacy between gay men was held as unconstitutional Sachs J stated as follows At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.

¹⁴⁰ Kabeer N Gender equality and women's empowerment: a critical analysis of the third Millennium Development (2005) 13 *Gender and Development* 13,13 -14.

¹⁴¹ Chirwa DM *Human Rights Under the Malawi Constitution* (2011) 149 – 150 See *Zimbabwe Lawyers for Human Rights and another v Zimbabwe* where the African Commission stated that '[t]he most fundamental meaning of equality before the law or equality under the law is a principle under which each individual is subject to the same laws, with no individual or group having special legal privileges. On the other hand, equal protection of the law under article 3(2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness. (2008) AHRLR 120 (ACHPR) para 124.

accessing opportunities with others to build capacity and gain voice, removing such barriers or taking measure to compensate and neutralise their impact.¹⁴²

This leads to the final aspect of equality, an obligation on states to adopt strategies designed to eradicate forms of domination and material disadvantage that affect access to opportunities which allow people to develop capacity and voice for participation.¹⁴³ This is substantive equality, where social and economic circumstances and opportunities needed to put individuals in a position to participate fully in society and develop their full human potential are fostered.¹⁴⁴ It requires addressing historic legacies of inequality and disadvantage and the duty to facilitate improved access to resources and services, such as education, income and water that are necessary for developing capacity and voice.¹⁴⁵

Equality and non-discrimination have been recognised in the CEDAW and Women's Protocol as particularly important rights for women.¹⁴⁶ Both instruments call for equality between women and men and prohibit practices that may perpetuate women's inequalities.¹⁴⁷ Equality is not conceptualised as simply demands that women be treated in same way as men, but goes beyond the male norm requiring substantive equality which entails change to social institutions.¹⁴⁸ Formal equality is treating women in the same way that men are treated.¹⁴⁹ According to Farha this would only make sense where women and men are situated identically in the world. In reality, women experience different and often disadvantageous conditions, so that a merely formal conceptualisation of equality is insufficient.¹⁵⁰ Fredman, who reinforces this call for substantive equality, explains that formal equality has several

¹⁴² Bell M *The right to equality and non-discrimination* (2003) 94.

¹⁴³ Liebenberg S 'The interrelationship between equality and socio-economic rights' (2007) 23 *South African Journal on Human Rights : Substantive Equality : Special Issue* 2 335, 342.

¹⁴⁴ Albertyn C 'Equality' in Cheadle H, Davis D & Haysom N (eds) *South Africa Constitutional Law: The Bill of Rights* (2002) 4-5, Liebenberg S Equality and Socio-economic rights (2007) 343.

¹⁴⁵ Liebenberg S (2007) 343.

¹⁴⁶ CEDAW & Women's Protocol art 1.

¹⁴⁷ CEDAW art 3 provides

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

¹⁴⁸ See also art 5 CEDAW; of the Women's Protocol on prohibition of harmful practices. Art 3 Fredman S 'Engendering Socio-economic rights' in Hellum A, Aasen HS (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) 217,223-228

¹⁴⁹ Farha L 'Committee on Elimination of Discrimination Against Women: women claiming economic, social and cultural rights- the CEDAW potential' in Langford M 'Social Rights Jurisprudence: Emerging Trends in International and Comparative Law' (2008) 553, 561.

¹⁵⁰ Farha L (2008) 561.

limits because it does not address the gender specific factors causing women disadvantage.¹⁵¹ First, formal equality expects women to conform to male-oriented social structures without challenging the structures themselves.¹⁵² If women cannot act or do as men, then they are excluded from equal treatment. There is therefore no recognition of difference, which in this case works to the disadvantage of women. She states that formal equality assumes that the aim is to treat everyone on their merits regardless of gender and thereby ignoring the disadvantages women experience based on gender.¹⁵³ The disadvantages based on gender may require that there should be treatment in favour of women to accommodate differences.¹⁵⁴ Substantive equality, as already explained, is transformative in the sense that social institutions or the State is required to address the needs that are relative to the disadvantaged.¹⁵⁵ Fredman identifies four dimensions of substantive equality that are essential in achieving participatory parity.

Redressing disadvantage

First is the redistributive dimension which seeks to redress disadvantage both in terms of material and social aspects of disadvantage. Women's subordinate position in family and reproduction, paid workforce and in other relations of power must be redressed. Fredman's views on redressing disadvantage are shared by other feminist scholars, most notably Iris Young and Nancy Fraser. According to Young, the disadvantages in this regard emanate from the politics of difference which privileges some groups while oppressing others.¹⁵⁶ She conceptualises justice as the elimination of institutionalised dominance and oppression which are obstacles to self-determination.¹⁵⁷ Domination, according to Young, is defined as the concentration of power in a few hands.¹⁵⁸ Oppression is conceptualised as the different systems that constrain specific groups and place limits on their freedom. Oppression has five faces, namely exploitation, marginalisation, powerlessness, cultural imperialism and violence which are experienced in social groups and emanate from social structures.¹⁵⁹ Fraser, like Young, holds that there are systemic obstacles that prevent women to participate on par with others. She also identifies economic arrangements as a source of inequality. Where there is

¹⁵¹ Fredman S (2013) 223.

¹⁵² Fredman S (2013) 224.

¹⁵³ Fredman S (2013) 224.

¹⁵⁴ Farha L (2008) 561.

¹⁵⁵ Farha L (2008) 561; Fredman S (2013) 225.

¹⁵⁶ Young IM *Justice* (1990) 3.

¹⁵⁷ Young IM (1990) 15.

¹⁵⁸ Young IM (1990) 33.

¹⁵⁹ Young IM (1990) 43 -61.

exploitation, for instances, due to economic structures resulting in some lacking resources, there cannot be parity in participation.¹⁶⁰ Maladministration is the economic structure that institutionalises deprivation, exploitation and gross disparities in wealth resulting in class differentiation. It results in some being denied resources necessary to interact with others as peers.¹⁶¹ She therefore calls for redistribution of resources, which includes income to address wage differences and to mitigate poverty, together with removing arrangements that institutionalise deprivation, exploitation and gross disparities in wealth, income and leisure time. For example, such as reorganising the division of labour and challenging gender meanings that code low paying service occupations.¹⁶² However, as Young points out, redistribution of resources has its limitations and cannot in itself achieve the goal. This is because distribution is mainly about material goods and positions only and does not extend to other issues of institutional organisation, power and opportunity.¹⁶³ Opportunity is a chance but also a condition of enablement which usually involves configuration of social rules and social relations as well as individual's self-conception and skills.¹⁶⁴ This is also taken up by Fraser who identifies that cultural norms also play a big role in inhibiting parity as discussed under the second dimension of substantive equality.

Redressing recognition wrongs

Fredman's second dimension of substantive equality is recognition, which includes redress to stigma, stereotyping, humiliation and violence on grounds of gender.¹⁶⁵ Fraser's conception of recognition is the best elaboration on this, as she explains that gender inequalities in this regard, or misrecognition, emanates from status hierarchies in society whereby women are considered inferior to men. Fraser further explains that this is rooted in cultural imperialism that institutionalises social subordination. Cultural injustice is an institutionalised relation of social subordination. She calls this being misrecognised and explains that it is 'to be denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem.'¹⁶⁶ Misrecognition, as an institutionalised pattern is perpetuated in a variety of ways through

¹⁶⁰ Fraser N *Scales of Justice: Reimagining Political Space in Globalizing World* (2009) 5, 27.

¹⁶¹ Fraser N (2009)5, 27.

¹⁶² Fraser N 'Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice' (2007) 1:1 *Studies in Social Justice* 23, 30.

¹⁶³ Young IM (1990) 8.

¹⁶⁴ Young IM (1990) 26.

¹⁶⁵ Fredman S (2013) 226 -227.

¹⁶⁶ Fraser 'Rethinking justice' (2000)3 *New Left Review* 107, 113 -114.

social institutions that regulate interactions.¹⁶⁷ It may be through formal means, such as codification in laws, policies, administrative codes or professional practice. Fraser also states misrecognition can be institutionalised informally through associational patterns, longstanding customs or sedimented social practices of civil society. She explains that this is a violation of justice that requires redress in terms of the social status of individual group members in social interaction and not through recognition of group specific identity.¹⁶⁸ Fraser states that where there is misrecognition, a claim of recognition can be made to establish the subordinated party as a full member in social life. She asserts that ‘redressing misrecognition means changing social institutions or, more specifically, changing the interaction-regulating values that impede parity of participation at all relevant institutional sites.’¹⁶⁹

Embracing differences

Fredman’s third dimension of substantive equality is closely related to the second as it requires accommodation of differences.¹⁷⁰ Farha states that substantive equality does not require that women conform to male norms, but the differences be respected and accommodated. The right to equality is thus the right to be different. Young illustrates this in her criticisms of norms of deliberation advanced by theorists of deliberative democracy.¹⁷¹ Deliberative democracy calls for strengthening the public reasoning and debate in solving common problems in society. Deliberation is preferred because decisions are made through reason and persuasion as opposed to just will or power.¹⁷² Young points out that deliberative theorists assume that the bracketing of political power and economic power is sufficient to make speakers equal.¹⁷³ However, she states that this assumption is misguided as it fails to take into account social differences and the way power sometimes enters speech itself, elevating some people’s style of speech while devaluing those of others.¹⁷⁴ She explains this as follows:

Speech that is assertive and confrontational is here more valued than speech that is tentative, exploratory or conciliatory. In most actual situations of discussion, this

¹⁶⁷ Fraser N (2007) 25 -26, Fraser N (2000) 114.

¹⁶⁸ Fraser N (2000) 107 -120.

¹⁶⁹ Fraser N (2000) 15.

¹⁷⁰ Fredman S (2013) 227.

¹⁷¹ Young IM ‘Communication and the other: beyond deliberative democracy’ in Benhabib S *Democracy and Difference: Contesting the Boundaries of the Political* (1996)121.

¹⁷² Michelman F ‘Bringing the law to life: A plea for disenchantment’(1989) 74:2 *Cornell Law Review* 256, 257.

¹⁷³ Young IM (1996) 122.

¹⁷⁴ Young IM (1996) 122 – 123.

privileges male speaking styles over female. A growing literature claims to show that girls and women tend to speak less than boys and men in speaking situations that value assertiveness and argument competition. When women do speak in such situations, moreover, they tend to give information and ask questions rather than state opinions or initiate controversy.¹⁷⁵

She thus criticises the tendency of restricting democratic discussion to arguments, as this leads to exclusion. By contrast, Young suggests that the notion of deliberative democracy must be replaced with communicative democracy to capture the need to ensure that alternative speech cultures are accommodated, most notably, the speech culture of women which may include rhetorical speech, storytelling, dance, song etc.¹⁷⁶

Enhancing voice and influence

Fredman's fourth and final dimension of substantive equality is the participative dimension, which attaches importance to women's agency and voice.¹⁷⁷ This dimension overlaps with the other dimensions discussed above but nevertheless deserves separate attention. Fraser explains that women are usually excluded from participation or having political voice due to political boundaries that are drawn to exclude them or rules that result in their exclusion.¹⁷⁸ Substantive equality or justice, as Fraser puts it, requires that everyone affected by a decision must be accorded the opportunity to participate in structures that make the decisions. Hence women's lack of political power must be addressed to ensure that they equally influence decisions by having their voices heard. Young also explains that the procedural issues, such as political institutional organisation, public action, social practice and cultural meanings, must be addressed.¹⁷⁹ She states that social equality, which constitutes among other things equality in opportunity, treatment and participation for all, recognises and affirms differences among groups.¹⁸⁰ Hence, substantive equality also pays attention to diversity of women voices recognising that there might be possible disjuncture between those who speak and those who are affected and the need to ensure that even the least vocal are heard.¹⁸¹ As discussed above on accommodating difference, substantive equality requires that the spaces of participation be restructured to accommodate women.¹⁸² Affirmative action, recognised in

¹⁷⁵ Young IM (1996) 123.

¹⁷⁶ Young IM (1996) 122, 129-132.

¹⁷⁷ Fredman S (2013) 227.

¹⁷⁸ Fraser N (2009)7-8.

¹⁷⁹ Young IM (1990) 34.

¹⁸⁰ Young IM (1990) 34.

¹⁸¹ Fredman S (2013) 227 -128.

¹⁸² Fredman S (2013) 228.

both the CEDAW and the Women's Protocol, is an example of positive obligation imposed on the State in this regard.¹⁸³

In sum, participatory parity is essential in ensuring the ability of disadvantaged groups to gain participatory power and influence decisions that directly affect them. International human rights law recognises a human right to participate in all matters directly affecting an individual and his or her community. This right was traditionally recognised as a free-standing political right, often equated with the right to vote and reserved for citizens only. However, once the right to participate is conceptualised through the prisms of the rights to dignity and substantive equality, as I tried to do above, then the right to participate assumes a far broader significance. This significance is revealed with the shift in the international human rights discourse from a focus on the negative obligations of those in power (to respect and protect human rights) to the positive obligations of those in power (the duty to fulfil human rights); or the shift from civil and political freedoms to socio-economic goods and entitlements. The right to water forms a key part of this shift. It is thus not surprising to find that the right is conceptualised in General Comment 15 as a participatory right to have access to water.

Once it is accepted that the right to water includes a procedural or participatory dimension the obvious question that arises is whether this dimension is legally enforceable as a justiciable right. The abstract nature of the conceptual analysis of the right to access water that was undertaken above did not provide an answer to this question. In order to find an answer it is necessary to turn away from the abstractions and aspirations of international human rights law. The human rights discourse of post-apartheid South Africa is characterised by an attempt to enforce the participatory dimension of socio-economic and other rights through litigation. I explore these attempts in more detail in the next section.

4.3.4 Domestic Legal Enforcement

The South African Constitutional Court (The Court) and its jurisprudence on meaningful engagement has enforced a right to participate in the policy design and implementation of ESCR as envisaged in the international human right to water discussed above. This jurisprudence contains valuable lessons about the justiciability of the participatory dimension of the right to have access to water identified above.

¹⁸³ See article 4 CEDAW; Women's Protocol art 9(1).

The core concept in this regard is the notion of “meaningful engagement” as it developed in the context of housing rights.¹⁸⁴ The Constitution of South Africa recognises the right to housing, which includes the right not to be evicted without a court order made after considering all the relevant circumstances.¹⁸⁵ Meaningful engagement is based on this section, together with the established duty of the State to take reasonable legislative and other measures to progressively realise the right to housing.¹⁸⁶ It was conceived in *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*, a case on the right to have access to adequate housing for people facing eviction from a run-down building.¹⁸⁷ The City of Johannesburg sought to evict 400 occupiers from an unsafe buildings and was further looking to implement a strategy that would evict an additional 67 000 people from 235 similarly dilapidated and poorly maintained buildings. The 400 occupiers applied for leave to appeal against a decision of the Supreme Court of Appeal authorising their eviction. The Court heard the case but before passing judgement on the issue of whether an eviction could stand the test of constitutionality if it resulted in homelessness, it first made an interim order for meaningful engagement.¹⁸⁸ It ordered that:

The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of citizens concerned.¹⁸⁹

The Court explained that ‘it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement.’¹⁹⁰ Meaningful engagement was defined as a ‘two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.’¹⁹¹ The Constitutional Court handed down its judgement after the parties had reached an agreement which included commitment to render the buildings safer and habitable and for relocation to alternative accommodation. The Court

¹⁸⁴ Chenwi L ‘A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others’ 2.

¹⁸⁵ The Constitution of the Republic of South Africa, 1996 s 26 (3).

¹⁸⁶ The Constitution of the Republic of South Africa, 1996 s 26 (2).

¹⁸⁷ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Olivia case)*.2008 (3) SA 208 (CC).

¹⁸⁸ *Olivia case* para 5.

¹⁸⁹ *Olivia case* para 5.

¹⁹⁰ *Olivia case* para 22.

¹⁹¹ *Olivia case* para 14.

approved the agreement and made an order in line with what the parties had agreed.¹⁹² It thus established meaningful engagement as part of the criteria for determining whether evictions are reasonable or not.¹⁹³ This is similar to the GC 15 requirement for interfering with individuals human right to water, as pointed out, there must be genuine consultation with those who will be potentially impacted before any action is taken.¹⁹⁴

Meaningful engagement, like the participatory right to water, goes beyond consultations just before eminent actions threatening a right. It requires that meaningful engagement should be a long term ongoing process to influence policy. This is evident from the ruling of the Court that the engagement should have begun long before the eviction process started:

[i]t is common cause that the implementation of the City's Regeneration Strategy is an important reason that founded the decision to evict. That strategy was adopted in 2003. If structures had been put in place with competent sensitive council workers skilled in engagement, the process could have begun when the strategy was adopted.¹⁹⁵

There are several key elements to meaningful engagement that can be identified from the Court's anti-eviction jurisprudence. First, the process of engagement must be approached in good faith and both parties must act reasonably. The Court in the *Olivia case* stated that an intransigent attitude or making non-negotiable, unreasonable demands would nullify the engagement process.¹⁹⁶ Further, top-down approaches have no place in meaningful engagement nor prejudice or stereotyping as will be elaborated in cases below. This therefore points to a process where the parties come to the table 'in a proactive and honest endeavour to find mutually acceptable solutions'¹⁹⁷ Secondly, as already pointed out, the process

¹⁹² *Olivia case* para 27.

¹⁹³ See Chenwi L 'A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' (2009) 2 *Constitutional Court Review* 371, She writes that meaningful engagement is 'a progressive and effective remedy that is capable of promoting social transformation and enhancing participatory democracy and transparency and accountability in the delivery of socio-economic goods and services'.

¹⁹⁴ GC 15 para 56.

¹⁹⁵ *Olivia case* para 19.

¹⁹⁶ *Olivia Case* para 20.

¹⁹⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC). para39 providing that

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

This was an earlier case also underscoring meaningful engagement although it did not properly define the process until in *Olivia Case* hence the latter is the leading case.

requires that there should be structures in place with competent sensitive council workers skilled in engagement.¹⁹⁸ This is particularly so where many people will be involved or where the action to be discussed will affect many people. The Court explained that:

Indeed the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. Ad hoc engagement may be appropriate in a small municipality where an eviction or two might occur each year, but is entirely inappropriate in the circumstances prevalent in the City.¹⁹⁹

The circumstances of a particular case will therefore dictate the way the engagement should precede. The Court in the *Olivia case* took cognisance of the fact that people, especially the poor and vulnerable, might be unwilling or unable to participate hence the government needs to take steps to enable them. This is what the Court had to say:

People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.²⁰⁰

Meaningful engagement requires that there should be individual and collective participation with an emphasis that the poor be enabled to participate. This is a third element. The power imbalance between the government and the vulnerable people under threat of eviction in this case, should be addressed and mitigated to ensure mutually acceptable solutions. Both parties must be able to influence each other, although it is stated that ‘ultimately, the decision lies with the government.’²⁰¹ In addressing the power imbalance, it might be necessary to have civil society represent the poor and vulnerable as established by the court. The goal is that government must enable the poor and disadvantaged to take part in decisions that affect them. This involves far more than merely a duty to respect the rights of others to be heard. The duty, especially when it comes to poor and vulnerable communities, is to facilitate the ability or capability of effective participation. As explained above, more is needed than the creation of formally equal opportunities for participation.

¹⁹⁸ *Olivia Case* para 19.

¹⁹⁹ *Olivia Case* para 19.

²⁰⁰ *Olivia Case* para 15.

²⁰¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 244 (hereinafter *Joe Slovo case*).

The fourth element is that the process must be transparent. The Court stated that ‘secrecy is counter-productive to the process of engagement.’²⁰² Part of being transparent will require that there should be a complete and accurate account of the process of engagement, including at least the reasonable efforts of the government.

After the *Olivia case*, the Court has enforced and affirmed meaningful engagement in many other cases. In *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* the residents appealed against a High Court ruling that had rejected their application for restoration, having been dispossessed of their homes (unlawfully occupied flats) in circumstances of urgency.²⁰³ The Court upheld their appeal, finding that they were entitled to occupation of their homes as soon as reasonably possible. In this case the Court elaborated further on the concept of meaningful engagement, stating that meaningful engagement is a requirement inherent in many rights and this entails ‘substantive involvement and engagement of people in decisions that may affect their lives’.²⁰⁴ It stated that meaningful engagement required that the process must not be approached with negative preconditions about the worth and dignity of those participating i.e. faceless anonymous squatters automatically to be expelled as obnoxious social nuisances.²⁰⁵ Such stereotyping, it was said, would contravene the Constitution which recognises dignity as a right and seeks justice and equity for all. As for the poor and landless, it echoed the requirement in *Olivia case* that they should be enabled to participate and not regard ‘themselves as hopeless victims, lacking the possibility of personal moral agency’.²⁰⁶ The Court went further to state that meaningful engagement requires that everyone be treated as equal based on their inherent dignity.²⁰⁷

The Court then analysed the engagement between the residents that had taken place before the appeal to the Constitutional Court and found that it was inadequate, because it was preceded on a top-down premise.²⁰⁸ The City had come up with a plan as a basis for an agreement or discussion with the residents, which virtually left all decisions to the City i.e. to determine when, for how long and ultimately whether at all, the applicants would return to their homes. The Court further found that the attitude of the City toward the residents was

²⁰² *Olivia Case* para 19.

²⁰³ *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* Case CCT 23/12 [2012] ZACC 26 (*Schubart case*).

²⁰⁴ *Schubart case* para 43.

²⁰⁵ *Schubart case* para 46.

²⁰⁶ *Schubart case* Para 46.

²⁰⁷ *Schubart case* para 49.

²⁰⁸ *Schubart case* para 50.

negative based on accusation that some residents had contributed to crime, lawlessness and other social ills. Stereotyping them was condemned by Court while noting that particular individuals involved in crimes should be dealt with according to law.

The case of *Ntombentsha Beja v Premier of the Western Cape* demonstrates the need for having equitable outcomes after meaningful engagement, another aspect emphasised in the participatory right to water.²⁰⁹ The case was brought by residents of an informal settlement alleging violation of their constitutional right by the City of Western Cape (City) for providing them with open toilets. The City had undertaken to upgrade the applicants' informal settlements which included building communal toilet at a ratio of one toilet per five families.²¹⁰ The installation of communal toilets began in 2007 and before all the toilets were constructed, the community demanded that they wanted an individual toilet for each erf.²¹¹ The upgrade halted. The City alleged that in November of 2007 they had a meeting with the community where it was agreed that they would build the individual toilets per erf, but that the community would have to enclose these toilets themselves.²¹² Two years after the alleged meeting the City started installing the unenclosed toilets. Whereas some residents in two areas in the settlement were able to enclose the toilet themselves, residents in one area only managed to enclose some of the installed toilets.²¹³ The community then approached the South African Human Right Commission to complain about the open or unenclosed toilets and later approached the Court. The City, meanwhile, attempted to enclose the toilets but were met with violent residents who destroyed the new enclosures. The City reacted by removing some toilets altogether from the area.

The Court's inspection of the area found that, although most toilets were enclosed, this was unsatisfactory to meet requirements of dignity and privacy and even the communal toilets that had been built were found to be in deplorable state undermining the dignity of the people.²¹⁴ As regards the agreement, the Court considered whether an enforceable agreement was reached through engagement with the affected community. The Court found that the engagement was insufficient and that the subsequent agreement could not be upheld. First, there was inadequate notice about the meeting, as residents were merely given four day

²⁰⁹ *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011) (*Beja case*).

²¹⁰ *Beja case* para 11-12.

²¹¹ *Beja case* para 16.

²¹² *Beja case* para 17.

²¹³ *Beja case* para 18.

²¹⁴ *Beja case* para 29 -30.

notice to the date of the meeting.²¹⁵ Further, the notice to the meeting included two agendas, none of which were about the toilets or sanitation. Secondly, the Court did not have evidence before it about who attended the meeting on behalf of the community. There were no minutes of the meeting to prove this. The alleged number of 60 members of the community could not be verified and in any case was found to be inadequate representation for the 6000 residents in the area.²¹⁶ The Court was of the view that the meeting did not have representative status.²¹⁷ Thirdly, the court found that there was no evidence to support an inference that members of the community who attended the meeting agreed to enclose the toilets themselves. And even if they did, the Court found that it could not uphold such an agreement which made no provision for those who were unemployed and poor and could not fund the enclosure of their own toilets.²¹⁸ The Court states as follows:

The conclusion of agreements with communities for the purposes of giving effect to socio- economic rights is commendable. These agreements, to be enforceable, ought to at least satisfy four minimum requirements; (i) it must be concluded with duly authorised representatives of the community; (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies, (iii) it must be properly minuted and publicised. (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement. None of these requirements were met in this matter.²¹⁹

The Court went further to state that:

[e]ven if an agreement satisfies all four requirements, an agreement cannot be a vehicle through which a majority within a community approve arrangements in terms of which the fundamental rights of a vulnerable minority within that community will be violated.²²⁰ A collective agreement of this nature, alleged by the City, cannot amount to a waiver of individual fundamental rights to dignity and privacy.²²¹

The City was heavily criticised for not making provision for those who could not provide for themselves and for not considering the gender impact on women and girls of such a decision having regard to their biological needs and the vulnerability to gender based violence.²²² The case makes the strong point that participation should have outcomes that are equitable, and

²¹⁵ *Beja case* para 80.

²¹⁶ *Beja case* para 81.

²¹⁷ *Beja case* para 99.

²¹⁸ *Beja case* para 102.

²¹⁹ *Beja case* para 98.

²²⁰ *Beja case* para 99.

²²¹ *Beja case* para 102.

²²² *Beja case* para 102.

should also have requirements that ensure the poor and vulnerable have the opportunity and power to effect outcome of decisions.

These powerful instances of the judicial enforcement of the right to participate in realising ESCR demonstrate that the interest of the poor is safeguarded where they are given the opportunity to gain control of decisions that affect them. The cases capture the essence of the participatory component of socio-economic rights, such as the right to housing and sanitation, but also illuminate on how this right can be enforced or operationalised.

Unfortunately, however, even the South African Constitutional Court has found it difficult to consistently and strictly enforce the standards and requirement of meaningful engagement. This fact should serve as a warning for those who might wish to place too much hope on the justiciability of the right to participate in water governance. For instance, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* the Court found no value in meaningful engagement because the government had come up with plans that took ‘the best interest of the people’ into consideration.²²³ The case involved the eviction of a large informal settlement to facilitate housing development as part of upgrading the settlement.²²⁴ The new subsidised houses were to be allocated to qualifying former residents. Although some residents had voluntarily relocated to the new waiting area to pave way, the majority refused to move due to hardship faced by those who had left and the failure by the City to honour promises it had made.²²⁵ The community also alleged that they were not fully consulted about the relocation process. The Court had to decide whether the relocation of the applicants was justified or reasonable, given the failure to properly involve the community in the process.

The Court noted that the government did hold meetings but only to inform the residents of the plans and impeding relocation.²²⁶ The Court noted further that various officials addressed the residents and so created misunderstanding and confusion as different and often conflicting messages were conveyed about the project.²²⁷ Not only was there major failures in

²²³ *Joe Slovo case* para 138 where the ‘grandiose national scheme to end informal settlements’ in which the residents themselves stood to benefit by way of permanent and adequate housing for themselves weighed heavily in favour of disposing with requirements of meaningful engagement. See Matsotso K ‘How has the Constitutional Court developed the doctrine of ‘meaningful engagement’ regarding the right to adequate housing? Available at http://www.inkundlajournal.org/inkundla/2015-inkundla-6#_ftn43 (accessed on 23 May 2015).

²²⁴ *Joe Slovo case* para 108.

²²⁵ *Joe Slovo case* para 31 -32.

²²⁶ *Joe Slovo case* para 246.

²²⁷ *Joe Slovo case* para 247.

communication, the Court also noted that there was frequent use of a top-down approach by government.²²⁸ In view of all this, and Court found that the government did not engage fully and meaningfully with the applicants.²²⁹ However, the Court nevertheless went on to approve the eviction order, regardless of these inadequacies. Adopting its own patronising and top-down approach, the Court celebrated the ‘goals of the meritorious Project’ as justification.²³⁰

Sachs J for instance stated that:

[t]he inadequacies of the engagement towards the end appear to have been serious, but would not necessarily have been fatal to the whole process. What mattered was the overall adequacy of the scheme as it unfolded.²³¹ There may well have been serious faults in the mode of engaging with the residents. Indeed unilateral decision-making on important questions concerning who would in fact be able to return to the newly-built homes appears to have caused a great deal of uncertainty. Yet, manifestly meritorious plans were well on track.²³²

O’Regan J stated:

[f]air process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.²³³

The Court essentially separated the substantive and procedural aspects of the right to have access to adequate housing. The applicants were reduced to the passive beneficiaries of a process in which they had no say, thus undermining the attempt to reduce the objectification of human subjects mentioned above. The contrast with the *Olivia Road* case should be clear. Pillay explains that the *Olivia case* had ordered meaningful engagement as a means to enforce the right to participate in housing upgrades, but the case also addressed the substance of the notion of adequate housing available to the unlawful occupiers.²³⁴ This is so because the outcome was that the people didn’t have to move immediately and eventually received alternative accommodation.²³⁵ Pillay argues that this highlights that the two aspects, substance and procedure, cannot be separated but are both intrinsically linked to the values of

²²⁸ *Joe Slovo case* para 376.

²²⁹ *Joe Slovo case* para 301.

²³⁰ *Joe Slovo case* para 381.

²³¹ *Joe Slovo case* para 380.

²³² *Joe Slovo case* para 384.

²³³ *Joe Slovo case* para 296.

²³⁴ Pillay A ‘Toward effective social and economic rights adjudication: the role of meaningful engagement’ (2012) 10:3 *International Journal Constitutional Law* 732, 744,

²³⁵ Pillay A (2012) 747.

dignity and equality.²³⁶ This link was diluted in the *Joe Slovo case*.²³⁷ The means cannot justify the means when people's dignity and equality are involved.

The most notorious failure of the Court to effectively enforce the participatory dimension of socio-economic rights happened in a case involving the right to have access to sufficient water under section 27 of the South African Constitution. In *Mazibuko v City of Johannesburg* an appeal was brought to determine the adequacy of participation during the processes of introducing prepaid water meters.²³⁸ The City of Johannesburg (the City) had introduced prepaid meters, ending the previous system of unlimited water supply at a flat rate.²³⁹ The metered supply provided an allocation of free water amounting to six kiloliters per household each month before cutting off the water supply, unless the consumer bought water credit. The City introduced the meters as a credit control measure, as many of the residents in question had been in arrears.²⁴⁰ Acceptance of prepaid meters was dangled with the benefit that accumulated arrears would be written off. However, the applicants alleged that they were not sufficiently given an opportunity to influence the development of the policy or adequately consulted about its implementation. For instance, they stated that the City did not hold a public enquiry or a notice and comment procedure before implementing the decision to introduce the pre paid meters.²⁴¹ Further, the automatic disconnection of water after the six kilolitres was challenged as unlawful as it did not comply with the requirement of being given notice and opportunity to make representation before disconnection as provided in the law. The High Court held that the process was unreasonable as no adequate participation of the community took place. Engagement with the community was no more than a publicity drive.²⁴²

The Court disagreed. The Court held that the decision to implement prepaid meters was an executive decision and not an administrative decision subject to the right to be heard. However, as Clark rightly posits, this was an overly broad construction of executive powers in an attempt to draw a curtain around significant areas of public policy.²⁴³ The Court also

²³⁶ Pillay A (2012) 747.

²³⁷ Pillay A (2012)747.

²³⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) (*Mazibuko case*).

²³⁹ *Mazibuko case* para 10 – 18.

²⁴⁰ *Lindiwe Mazibuko & Others v. The City of Johannesburg & Others* 2008 High Court of South Africa (Witwatersrand Local Division) Case No. 06/13865 para 19(*Mazibuko High Court judgement*).

²⁴¹ *Mazibuko High Court judgement* para115-121.

²⁴² *Mazibuko High Court judgement* paras 121-122.

²⁴³ Clark C The centrality of community (2012) 177.

found that the information campaign about the process and choices available to consumers met the standard of meaningful engagement (clearly contrary to the decisions mentioned above)²⁴⁴

The Court's lack of consistence in upholding meaningful engagement undermines the goal of fostering agency in public policy participation which is central to the right to participation within the human right to water. However, the jurisprudence demonstrates that where meaningful engagement is enforced, it not only results in equitable solutions but also empowerment of the poor to claim their rights and place in society. These are the potential benefits from enforcing the participatory right to water. However, the limitations and dangers are also evident. The Court's jurisprudence blurs the lines between instrumental and intrinsic participation and at times the Court is willing to conclude that the end sometimes justifies the means.

Having established that the participatory dimension of the right to water indeed constitutes a workable and fully justiciable legal requirement, albeit one that is qualified by the urgency of the demand for basic substantive good, such as housing and water, I return to the international law framework to further clarify the meaning of participation in the context of the right to have access to water. In order to do so I rely on the recent work on the topic by the Special Rapporteur on Water.

4.4 Conceptualising the Participatory Component of the Human Right to Water

GC 15 did not provide detailed guidance on the normative content and application of the participatory component of the human right to water; it nevertheless laid down strong foundations for elaboration. As already noted, GC 15 established that participation must be genuine. In addition it must ensure equity in opportunity to participate and equity in power to affect outcomes of participation. The Special Rapporteur on Water has taken on the task to operationalise these principles in her annual report of July 2014.²⁴⁵ Earlier in 2013, the Special Rapporteur on extreme Poverty had also taken up the challenge of mapping the obstacles to meaningful participation in public policy and to provide guidance on the meaning of participation for people living in poverty.²⁴⁶ This greatly influenced the Special Rapporteur on Water's guidance in the context of water.

²⁴⁴ *Mazibuko case* paras 133 & 167.

²⁴⁵ Special Rapporteur Report on Water generally.

²⁴⁶ Special Rapporteur Report on Poverty.

Genuine participation is defined as being ‘active, free and meaningful’. In this context the Special Rapporteur identifies six elements that address different structural, social, economic and political barriers to attaining genuine participation. While I adopt this six fold elaboration of the right to participate in the governance of water services, I need to highlight to possible caveats.

First, the elaboration does not link back to or even make mention of GC 15 or the ICSCR within which this participatory right to have access to water emerged. Although the participatory right to water is intrinsically linked to the human right to participate, engaging with the specific context in which the former emerged would have provided further clarification of the unique meaning of participation around water governance. Second, the elaboration might suggest that the component of participation under the human right to water is a separate free-standing right, independent from the human right to water. It must again be stressed that this is not the case. Separating the substantive component from the procedural component undermines the spirit of the human right to water.²⁴⁷ GC 15 does not provide for two independent rights. Francis and Firestone explain the necessity of both components by stating that although in the short run, the substantive component can guarantee supply of water, true water justice can only be achieved together with the procedural component required for sustainability.²⁴⁸ They state further that water justice ‘necessitates that impacted residents become empowered to assert themselves in the water policymaking arena and to influence decisions about water resources and water services that impact their community’

The two components together therefore constitute the human right to water and cannot be separated. In spite of these two caveats, I adopt the clarification developed by the Special Rapporteur as the most recent and authoritative statement of the law. The duty to respect, protect and fulfil the right to active, free and meaningful participation in the governance of water services involves the following six overlapping but distinct elements:

4.4.1 Involving People in Setting out the Terms of Engagement

Facilitating community participation must begin with the people themselves in determining the terms, scope and rules of procedure and modes of participation.²⁴⁹ This is a good starting point as communities have different needs, abilities and backgrounds that must inform the

²⁴⁷ Scalon J, Cassar A, Nemes N *Water as a Human Right?*(2004) 30.

²⁴⁸ Francis R & Firestone L *Implementing the human right to water* (2010 -2011) 519.

²⁴⁹ De Albuquerque C *Realising the Human Right to Water and Sanitation: A Handbook* (2014) 57; Special Rapporteur Report on Water para 19.

terms of engagement. Further, as discussed in the previous section, advancing a one size fit all model across communities results in flawed community engagement and therefore no or little power to influence to challenge dominant power structures.²⁵⁰ The Special Rapporteur makes a pertinent observation when she notes that the choice of mode of engagement determines whether people will be willing and able to participate. This is because setting the terms for participation in the preliminary stage influences the meaning and form of participation that will follow.²⁵¹ Where the terms, for instance, include selection of a particular dominant language, this might result in vulnerable groups such as foreigners being excluded from such processes.

This was recognised in the case of the *Saramaka People v Suriname* before the Inter-American Court of Human Rights (IACHR).²⁵² The case involved the Saramaka people, descendants of self-liberated African slaves who lived in a traditional way, fishing, hunting and woodworking in their traditional territory in Suriname. The Suriname government granted mining and logging concessions on their lands, without their full and effective consultation. The Saramaka brought an application to challenge the granting of logging and mining concessions within their traditional territory. The IACHR found that the Saramaka had a right to use and enjoy the natural resources within their traditional territory,²⁵³ but also that the State had the right to restrict the enjoyment of the natural resources as long as such restriction did not amount to a denial of their survival as a tribal people, and observed three safeguards:

First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.²⁵⁴

²⁵⁰ Harvey PA & Reed RA 'Community-managed water supplies in Africa: Sustainable or dispensable?' (2007) 42:3 *Community Development* 365, 367.

²⁵¹ Barnes J 'Who is a water user? The politics of gender in Egypt's water user association' in Harris L, Goldin JA & Sneddon C (2010) 185, 192-191.

²⁵² Case of the *Saramaka People v. Suriname*, IACHR Series C No 185 (2008).

²⁵³ *Saramaka People v. Suriname* para 118 -122.

²⁵⁴ *Saramaka People v. Suriname* para 129.

The *Saramaka* judgment remains one of the cornerstones of the participatory turn in international human rights law. It incorporated the right to effective and culturally appropriate participation into the right to development. Culturally appropriate modes and terms of engagement are particularly important in ensuring that women who have been excluded in decision making processes are able to access them and have their voice heard. As already discussed, one key consideration in the participatory right to water is the quest of equity. States have the obligation to ensure that women participate on equal terms with men who have dominated decision making processes for a long time. Equal terms of participation requires reconstituting rules of engagement through dialogue among actors, constantly reviewing them to ensure women's presence is not merely tokenistic and reasserting domination or subordination.²⁵⁵ As pointed out, accommodating difference might mean that song and dance be accepted as modes of communication in these spaces and not just deliberation.

4.4.2 Creating Space for Participation

The Special Rapporteur on water establishes that states have the duty to provide opportunity for engagement either through formal (for instance, referendums or public inquiries) or informal mechanisms.²⁵⁶ This she recognises as part of the broader democratisation process with direct engagement as key. She states that 'periodic elections are a blunt instrument for achieving public participation, let alone for ensuring inclusion.'²⁵⁷ For instance, Ferrara questions the impact of one vote among tens or hundreds of millions of voters or in the case of India a billion of voters.²⁵⁸ He points out that periodic elections as an accountability mechanism is limited due to 'institutional complexity of contemporary societies — where the diverse layers of representation, from local to national, make it difficult to grasp the relation between one's vote and its real political consequences.'²⁵⁹ He states that it has now become difficult to understand who is to be considered responsible for what and to assess what policies the vote is contributing to. Further limitations due to structural and contextual

²⁵⁵ See Hicks J 'Strengthening women's participation in local governance: lessons and strategies' (2011) 46: 51 *Community Development Journal* 36, 43 Paying attention to details such as the seating arrangements, language used and rules of engagements or decision making may also impact positively on women's voice or contribution.

²⁵⁶ Special Rapporteur Report on Water para 21.

²⁵⁷ Special Rapporteur Report on Water para 33.

²⁵⁸ Ferrara A 'Judging democracy in 21st century: crisis or transformation' (2013) 10 *No Foundations* 1,2.

²⁵⁹ Ferrara A (2013) 2.

problems of elections are pointed out by Ackerman.²⁶⁰ First, he states that elections only hold accountable the elected officials but not the majority of bureaucrats who are also involved in the day to day running of government.²⁶¹ Secondly, elections are held only once every few years and require that the diversity of opinions and evaluation be reduced into a single ballot. This does not amount to real accountability to the individual office bearers.²⁶² Thirdly, he states that most politicians are elected by a small portion of the population which results in patronage and corruption to reward this small portion. He thus argues that accountability can only be achieved when spaces of co-governance are created and society is invited into the inner chambers of the State.²⁶³

The Special Rapporteur on Water agrees with these sentiments and critiques representative democracy. She notes that realising human rights is a dynamic process that requires more than regular elections or representative democracy. Representative democracy is characterised with little activity by the polity in between elections, hence the special rapporteur on water states that participatory processes must complement representative democracy and allow for more direct influence by the public.²⁶⁴ Hence it is necessary to create new spaces, where groups of people can take up opportunities to decide whether and in what ways they would like to transform society and their lives.²⁶⁵ Pateman contends that direct participation in decisions ensures accountable and responsive government, as people have an opportunity to influence decision and exert pressure on leaders in between elections.²⁶⁶

The Special Rapporteur on Water endorses participatory democracy, which opens up the government for agent accountability as there is more opportunity for people as principal and government as agent to interact, influence actions and demand accountability in the process of governing.²⁶⁷ There is better opportunity for exchange of information and transparency regards plans and actions to be undertaken and also giving of instructions or communication

²⁶⁰ Ackerman J 'Co-governance for accountability: beyond 'exit' and 'voice' (2004) 32:3 *World Development* 447,448 – 449.

²⁶¹ Ackerman J (2004) 448.

²⁶² Ackerman J (2004) 448. See Waldron J 'Accountability: fundamental to democracy' (2014) 23- 24 states that elections have no accountability in a situation where the tenure in office is term-limited.

²⁶³ Ackerman J (2004) 450.

²⁶⁴ Special Rapporteur Report on Water para 33.

²⁶⁵ Pateman C (1970) 31, 37.

²⁶⁶ Pateman C (1970) 8 -9.

²⁶⁷ Waldron J 'Accountability: fundamental to democracy' (2014) 14-13 *New York University School of Law, Public Law & Legal Theory Research Paper 2*.

of interests to be considered in the carrying out of mandate.²⁶⁸ Because decisions are made in a participatory manner, there is also greater vertical power, beyond electoral sanctioning, through well-constituted forms of intermediate accountability as decisions are more inclusive and thereby helping people otherwise powerless over leaders or rules to gain power.²⁶⁹ Of course, institutionalising proper power relations also requires other formal arrangements protecting accountability through guarantees of freedoms of opinion, speech, expression, and press.²⁷⁰

Direct engagement fosters ability for people to help themselves and their society through collective action in solving common problems. The state has a duty to facilitate individual efforts in realising the right to water by providing such opportunity for engagement. In ensuring women's participation, for instance, states might have to create or facilitate separate spaces for women. This can be a training ground for better articulation and engagement in other forums. In such separate spaces, women may be more comfortable than in front of men to formulate and discuss ideas. This can help them enter other spaces with more confidence and ability to assert themselves. Fraser calls such spaces subaltern counterpublics, and explains that these constitute 'parallel discursive arenas where members of subordinated social groups invent and circulate counter discourses, which in turn permit them to formulate oppositional interpretation of their identities, interest and needs.'²⁷¹ These are spaces for withdrawal and regrouping but they can also serve as a training ground.²⁷² These spaces provide an opportunity for collective understanding and agency as a group, based on the reflective understanding of the collective experience and interest.²⁷³ This can also help ensure that the few women who are elected or nominated in participatory bodies really represent the interests of fellow women, rather than other interests. Merely having women in such bodies does not guarantee that they will represent fellow women's interest. Solidarity and consensus should not be assumed. The spaces where women only interact, however, can help shape consensus and unified voice for representatives to carry to other public forums.

Other than the duty to fulfil, the State also has the duty to respect and protect this right by not interfering and/or preventing others from interfering with the right, through censoring or

²⁶⁸ Waldon J (2014) 5-8.

²⁶⁹ Waldon J (2014)26-27.

²⁷⁰ Waldon J (2014)27.

²⁷¹ Fraser N 'Rethinking the public sphere: a contribution to a critique of actually existing democracy' (1990) *Social Text* 56, 67.

²⁷² Fraser N Rethinking the public sphere (1990) 68.

²⁷³ Young IM *Justice* (1990) 184.

repressing participation.²⁷⁴ This is particularly so in invited and institutionalised spaces which tend to be at risk of co-option.

4.4.3 Enabling People to Access Participatory Processes

Creating spaces for participation is not enough. Hence states have a duty to enable people to access such spaces.²⁷⁵ The Special Rapporteur on Water notes that men, majority ethnic groups, wealthier and more educated households, and people with higher social status tend to participate to a disproportionate degree.²⁷⁶ Physical, economic, institutional, attitudinal and social factors are some of the sources of obstacles that limit inclusive access to participatory processes.²⁷⁷ Women, for instance, enjoy the least opportunity to participate due to such barriers. Physical barriers, such as meeting times and child care limits or prevent them from taking up opportunities to participate with others.²⁷⁸ The burden of domestic and productive workloads, the opportunity cost of time to attend meetings and do other work also act as barriers for women to access participation.²⁷⁹ Attitudinal and social barriers that include prejudices and stereotypes that do not recognise women as equals with men also undermine their access to such spaces. However, the CESCRC specifically requires that states should take steps to ensure that they are not excluded from decision-making processes concerning water resources and entitlements.²⁸⁰ Addressing such barriers will require paying attention to the status ordering of society and confronting, entrenched hierarchies and patterns of inequalities.²⁸¹ The substantive equality discussed above would be most crucial here in enabling women. It must also look at the way that women ‘feel’ and as Goldin declares, if there are feelings of shame – rather than trust, for instance – then it is unlikely that the participatory spaces are levelling the playing fields as intended.²⁸²

²⁷⁴ Special Rapporteur Report on Poverty para 83.

²⁷⁵ Special Rapporteur Report on Water (2014) Paras 22 & 41 relying on an interpretation of the right to be heard in CRC by Laura Lundy who explains that child must be given the opportunity to express a view (space) and must also be facilitated to express their views (voice). Lundy L “Voice” is not enough: conceptualizing article 12 of the United Nations Convention on the Right of the Child’ (2007) 33: 6 *British Educational Research Journal*, 927, 933-936.

²⁷⁶ Special Rapporteur Report on Water para 41.

²⁷⁷ Special Rapporteur Report on Water para 45.

²⁷⁸ Special Rapporteur Report on Water para 45.

²⁷⁹ Meinzen-Dick R and Zwartveen M *Gender Participation In Water Management: Issues And Illustrations From Water Users' Associations in South Asia* (1998) 341.

²⁸⁰ GC 15 para 16.

²⁸¹ Special Rapporteur Report Water para 41.

²⁸² Goldin JA ‘Water policy in South Africa: trust and knowledge as obstacles to reform’ (2010) 42:2 *Review of Radical Political Economics* 195, 200 – 202; Goldin, J A ‘Washing away the sins of the past’ (2003) 26: 6, *International Journal of Public Administration*, 711-

The Special Rapporteur on Water identifies culture of low expectations and cynicism, held among both individuals and public officials, as a persistent barrier to participation.²⁸³ Public officials must be trained and rewarded to ensure that they facilitate genuine participation.²⁸⁴ Training people is also essential in enhancing their capacities to take up opportunities to participate.²⁸⁵ Goldin states that water networks, where there is inadequate knowledge about water management issues, remain closed to water users who are unable to participate meaningfully.²⁸⁶ Therefore, the capacity of participants to understand technical knowledge and to make their contribution must be addressed through appropriate training and financial support.²⁸⁷

4.4.4 Guaranteeing Free and Safe Participation

Participation must be free from any form of coercion, inducement, manipulation or intimidation, whether directly or indirectly.²⁸⁸ The Special Rapporteur on Water note that marginalised groups often exercise self-censorship, being intimidated either by the presence of others with ‘higher’ status or formal procedures.²⁸⁹ Participation spaces bring together heterogeneous set of people due to differences, for instance, in land tenure, sex, caste, religion or tribe among others. This results in diversity in interests and also power relations which must be acknowledged and dealt with.²⁹⁰ The Special Rapporteur suggests the participatory process should begin with homogenous groups and particular issues. For example, groups of women or of young people should discuss single issues. The task is then to integrate these issues and groups into a broader process of interaction and integration.²⁹¹ This can be a training ground for better articulation and engagement around concerns. This suggestion relates to Fraser’s idea of subaltern counter republics and can help marginalised

730 generally.

²⁸³ Special Rapporteur Report on Water para 23.

²⁸⁴ Special Rapporteur Report on Water para 23.

²⁸⁵ Goldin JA ‘It takes two to tango: Steps towards change in water sector?’ in Hemson D, Kulindwa, K & Lein H (eds) *Poverty and Water Explorations of the Reciprocal Relationship* (2008) 47 55.

²⁸⁶ Goldin JA (2008) 55.

²⁸⁷ Diamond J ‘Local regeneration initiative and capacity building : whose “capacity” and “building for what?”’ 2004 39:2 *Community Development Journal* 177-189 provision of resources for transport, a stipend or meals.

Special Rapporteur Report on Water para 25. Definition taken from United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (UN-REDD) Programme ‘Guidelines on Free, Prior and Informed Consent (2013) 18 providing for indigenous people’s participation.

²⁸⁹ Special Rapporteur Report on Water para 43.

²⁹⁰ Cohen J & Uphoff (1980) 48.

²⁹¹ Special Rapporteur Report on Water para 43.

groups to enter other spaces with more confidence and ability, to challenge domination and assert themselves.

Participation is threatened by manipulation, intimidation and coercion from the side of government where participation is secured through intimidation, extortion, bribery or the promise of a reward.²⁹² Arnstein, who has developed the idea of a ladder in which eight rungs are used to demonstrate the different levels of participation from low to high, labels this as non-participation.²⁹³ At the bottom rung of the ladder there is the distortion of participation into a public relations vehicle by power holders.²⁹⁴ At the bottom of the ladder participation is simply a façade that lacks substance as the intention is not to enable people to participate but to demonstrate that relevant proponents are ‘doing something.’²⁹⁵ The middle section of Arnstein’s ladder has informing, consultation and placation representing some degree of tokenism but also partial participation.²⁹⁶ The last three rungs represent citizen control or power through partnership, delegation and full control of decisions.²⁹⁷ This is the ultimate goal of participation as will be discussed further below.

4.4.5 Ensuring Access to Information

This element is based on transparency and accountability and it requires states to provide people with information relevant for meaningful participation.²⁹⁸ Access to information must be on an equal basis and must ensure that it is clear and understandable by everyone by presenting it in different formats and appropriate language.²⁹⁹ It must also be objective and comprehensive, covering all aspects or elements of positive and negative impacts of measures being considered.³⁰⁰ Information held by public bodies must be freely disclosed, except where legitimate aims justify exceptions and where disclosure may cause substantial harm that outweighs the public’s interest in having the information.³⁰¹ Information must be usable to foster participation.

²⁹² Special Rapporteur Report on Water para 25.

²⁹³ Arnstein SR ‘A Ladder of citizen participation’ (1969) 34:4 *Journal of the American Institute of Planners* 216-222.

²⁹⁴ Arnstein SR (1969) 218.

²⁹⁵ Arnstein SR (1969). See also White SC Depoliticising development: the uses and abuses of participation (1996) 6: 1 *Development in Practice* 142, 144.

²⁹⁶ Arnstein SR (1969) 216 – 222.

²⁹⁷ Arnstein SR (1969) 216. See also Pateman C (1970) 68-71.

²⁹⁸ Special Rapporteur Report on Water para 27.

²⁹⁹ Special Rapporteur Report on Water para 27.

³⁰⁰ Special Rapporteur Report on Water para 28.

³⁰¹ Special Rapporteur Report on Water para 29. See also Article 19 ‘The public's right to know principles on freedom of information legislation’ (1999) principle 1 &4 available at

4.4.6 Providing Reasonable Opportunity to Influence Decision-Making

As mentioned above, there are three forms of participation in the top echelon of Arnstein's ladder: 'partnership' where there is power shared between citizens and government through negotiation; 'delegated power' where the citizens have dominant decision-making authority over a particular plan or programme; and 'citizen control' where people demand and take full charge of policy and managerial aspects, or to govern a program or an institution.³⁰² Pateman similarly distinguishes three forms of participation, namely 'pseudo participation' where people are persuaded to accept decisions that have already been made, 'partial participation' where there is influence from the people but final decision making power rests in government, and 'full participation' which gives individuals equal power to determine the outcome of decision.³⁰³ Pretty presents a similar categorisation with seven levels of participation moving from manipulative, passive, consultation material incentive, functional, interactive participation to self-mobilisation as the highest level. Whereas the lower and middle forms of participation are instrumental and tokenistic, the final two, interactive and self-mobilisation, entail power sharing which are desirable. The International Association for Public Participation (IAP2) also categorises different forms of participation based on the purpose involved: to inform, consult, involve, collaborate and/or empower.³⁰⁴

The Special Rapporteur on Water requires that participation should be empowering, allowing people to influence the outcomes of the process.³⁰⁵ Public bodies must be responsive and accountable by justifying the decisions made based on reasoning that incorporates the views obtained.³⁰⁶ Further, it must balance technical expertise and knowledge gained through experience by the people.³⁰⁷ Technical decisions involve value choices that must be open to influence by the people hence experts must facilitate synthesizing and communicating expert knowledge and enable people to make informed decisions.³⁰⁸ Participation at all levels must be meaningful and actually influence decision-making.³⁰⁹ The HRC holds that the essence of the human right to participate is the ability to have voice and influence decisions that affects a

<http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> (accessed on 27 May 2015).

302 Arnstein SR (1969) 221 -222.

303 Pateman C (1970)68 -71.

304 The International Association for Public Participation(IAP2) 'Spectrum of public participation '(2007) available at www.iap2.org (accessed on 31 May 2015).

305 Special Rapporteur Report on Water para 30 -31.

306 Special Rapporteur Report on Water para 30.

307 Special Rapporteur Report on Water para 35-36.

308 Special Rapporteur Report on Water para 35.

309 Special Rapporteur Report on Water para 37.

person.³¹⁰ In *Aspirana Mahuika v New Zealand*, the HRC held that the opportunity for voice and influence was evident as the representatives of the Maori people were engaged in a participatory process and influenced the determining of fishing rights. Where participation does not guarantee reasonable opportunity for influence, participation is not genuine according to human rights standards. This was evident in the *Endorois case*.³¹¹ The processes government argued were participatory were found by the African Commission merely to inform the community of an impending decision and not to provide an opportunity to shape the policies or their role in a new development project. The African Commission stated that this is because ‘the community were merely informed of the impending project as a *fait accompli* and not given an opportunity to shape the policies...’³¹² Further, the representative body of the Endorois community were refused registration and the government handpicked individuals among the members to act on behalf of the people so as to rubber stamp the proposals.³¹³

Donnelly identifies the human right to participate as one of the empowerment rights and states that it ensures that people are not mere objects of State policy but are subjects able to choose their own conceptions of good life.³¹⁴ Empowerment is the ultimate goal of participation from a human rights perspective.³¹⁵ A human right to participate ensures that participation is not extractive or instrumental, but that it builds capacity, social capital, confidence, rights awareness and knowledge.³¹⁶ Participation as empowerment is closely interrelated to agency, which represents the processes by which choices are made and put into effect.³¹⁷ This is what the normative content of participation in water has been elaborating on, to ensure that people act as their own agents in realising the human right to water.

Several authors have defined empowerment in terms of agency. Narayan, for instance, defines empowerment ‘as increasing poor people’s freedom of choice and action to shape their own lives’.³¹⁸ Also, Bertelsen & Holland also define empowerment as ‘the process of enhancing an individual’s or group’s capacity to make purposive choices and to transform

³¹⁰ GC 25 para 2.

³¹¹ *Endorois case* para 289.

³¹² *Endorois case* para 228.

³¹³ *Endorois case* para 280.

³¹⁴ Farer TJ, Donnelly J, Wilde A et al (1988) 507.

³¹⁵ Special Rapporteur Report on Poverty para 71.

³¹⁶ Special Rapporteur Report on Poverty para 71.

³¹⁷ Kabeer N Gender equality (2005) 14.

³¹⁸ Narayan, D ‘Conceptual framework and methodological challenges’ in Narayan, D (ed) *Measuring Empowerment: Cross-Disciplinary Perspectives* (2005) 4.

those choices into desired actions and outcomes.³¹⁹ Similarly Ibrahim & Alkire who documented over 30 uses of empowerment in their literature on missing dimensions of human well-being, linked empowerment to the idea of agency.³²⁰ They conclude that empowerment is an expansion or increase of agency and involves the ability to effect the change that one values. For Sen, human development and well-being is defined by increased freedom and the agency to make choices and to set and pursue one's own goals and interests.³²¹

The preconditions of agency are an individual's or a people's asset endowment,³²² or resources.³²³ Assets or resources include material resources (such as land, housing, savings) and various human resources (such as good health, information, education) and social resources (such as social belonging, identity, voice, organisation, representation).³²⁴ Further, human dignity in terms of self-esteem, self-confidence, aspiration (or what Alsop, Bertelsen & Holland also call 'psychological conscience') is an important asset that is usually not highlighted among the preconditions that help a person become an agent or exert agency.³²⁵ Goldin considers emotional well-being to be an essential ingredient.³²⁶ Her focus is in particular on the domain of shame which is the antithesis of empowerment. A person who experiences shame will be silent, withdraws or exits. Different assets, emotions or resources interact and interplay in enhancing agency but also engender further assets and resources.³²⁷ Thus resources, both tangible material goods but also intangible goods, such as emotions, are a prerequisite of empowerment.³²⁸ The requirements discussed above on enabling voice and

³¹⁹ Alsop R, Bertelsen M & Holland J *Empowerment in Practice: From Analysis to Implementation* (2006) 1.

³²⁰ Ibrahim, S and Alkire, S 'Agency and empowerment: A proposal for internationally comparable indicators' (2007) *35 Oxford Development Studies* 379, 383.

³²¹ Sen A 'Well-being, agency and freedom: The Dewey Lectures 1984' (1985) *82 The Journal of Philosophy* 169, 203.

³²² Alsop R, Bertelsen M & Holland J *Empowerment in Practice* (2006) 11.

³²³ Kabeer, N 'Resources, agency, and achievements: reflections on the measurement of women's empowerment' (1999) *30 Development and Change* 435, 448.

³²⁴ Narayan D (2005) 5-6 Kabeer N (1999) 438 Ibrahim S & Alkire S (2007) 385.

See also Samman E & Santos ME 'Agency and empowerment: a review of concepts, indicators and empirical evidence' (2009) Report prepared for the 2009 Human Development Report in Latin America and the Caribbean. Available at <http://www.ophi.org.uk/wp-content/uploads/OPHI-RP-10a.pdf> (accessed on 27 July 2012).

³²⁵ Alsop R, Bertelsen M & Holland J *Empowerment in Practice* (2006) 11 – 12 Kabeer N (1999) 448.

³²⁶ Goldin GA (2010) generally.

³²⁷ Alsop R, Bertelsen M & Holland J J *Empowerment in Practice* (2006) 11.

³²⁸ Uphoff N, 'Analytical issues in measuring empowerment at the community and local level in Narayan D (ed) *Measuring Empowerment. Cross-Disciplinary Perspectives* (2005) 219, 224-225.

influence through the many different measures are a means of increasing the resource base of a person and are prerequisites when considering the human right to water.

4.5 Conclusion

Two terms summarise the right to participate within the human right to water - opportunity and influence, or as Fraser would put it legitimacy and efficacy.³²⁹ Legitimacy or opportunity is concerned with who is participating. There must be capacity and quality in opportunity to participate to meet the standard of participation envisaged in the human right to water. Efficacy or influence is the power or political force in determining decisions. Where participation in water governance does not guarantee power – or at least platforms to express or act in an empowered way should one value that or choose to do so – it violates the human right to water.

The human right to water has established that the process within which the State crafts strategies, policies and laws to ensure the right standards and norms to meet the goal of universal access, must be undertaken in collaboration with people. It particularly requires that poor and disadvantaged and marginalised groups be given an equal opportunity to take part and influence such processes.³³⁰ Hence a right to participate specifically within the human right to water is established. Being listened to and engaging with others regardless of wealth or gender constitutes the essence of living. This moves the human right to water from being about having water to being a full member of society who can determine and shape their life and that of their society. As full members of society and as agents for personal well-being, the human right to water moves from being merely a right to meet basic biological needs to a right to self-actualisation and citizenship.

Part I of this thesis established the existence and content of the right to have access to water in international human rights law. The remainder of the thesis is devoted to a case study. Part II of the thesis describes and evaluates the governance of water services in rural and peri-urban Malawi against the normative standards incorporated in the rights to have access to water as elaborated above.

³²⁹ See Fraser N ‘Transnationalising public sphere: on the legitimacy and efficacy of public opinion in a post-westphalian world’ in Nash K *Transnationalizing the Public Sphere* (2014) 8- 37 for an elaboration on this.

³³⁰ As discussed in 4.1 above.

Chapter Fiv

Human Right to Water in Malawi

5.1 Introduction

Thus far, the thesis has looked at the legal basis of the human right to water in international human rights law and what this right guarantees for those without access to water. It has been argued that the human right to water establishes access to water as a legal entitlement. It has also established that the human right to water entails a human right to participate in water governance. This transforms the human right to water from a right aimed at meeting the biological requirements or survival interests of a person, to a right empowering people to become agents and to shape their own lives and the society they live in. In order to achieve this transformation from biological life (survival) to political living, the human right to water obliges states to ensure that the political, economic, social and cultural systems in place enable every person, especially the marginalised and disadvantaged, to meaningfully participate in decisions towards realising the human right to water. Further, it requires that states, through a transparent governance framework, ensure equitable, secure and sustainable access to water for all.

Having these standards in mind, this chapter will analyse the water governance framework within which the human right to water must be realised in Malawi. This chapter, after looking at the global and African context, will take a specific look at the Malawian context. It will provide the contextual examination of the practical application of the human right to water. I consider whether and in what ways a human right to water is recognised as binding and whether there are mechanisms in place that are sufficient to ensure the realisation of the right. In line with the emphasis of the human right to water on equity and justice for all through participation, the chapter will also focus on participatory spaces that do or do not provide an opportunity for community engagement in the formulation and implementation of policy or strategies around the access to water. Of particular interest is the attention accorded to disadvantaged and vulnerable communities and specifically to women and the obstacles that hinder their opportunity to take part in decisions that affect them.

The first section of the chapter sketches Malawi's hydrological, political and socio-economic context and the types of water services available. This provides the background within which water governance is situated, together with achievements and challenges thus far. This is followed by an analysis of the legal and policy framework for the recognition of the human right water, and more particularly, for participation in the context of water governance. This section seeks to establish whether the human right to water is an enforceable right in Malawi. The final section zooms in on the specific participatory approaches and spaces that offer rural and peri-urban communities an opportunity to take part in governance of water services. It considers what mechanisms are in place to ensure free, active and meaningful participation for all. In this regard, opportunities for women's agency and the broader context of Malawian politics are explored.

5.2 Situating Malawi: Hydrological, Economic, and Political Context

5.2.1 Geographical/ Hydrological Background

Malawi is a landlocked country in Southern Africa generally considered to be relatively rich in water resources. It shares both its borders and water resources with Tanzania, Zambia and Mozambique.¹ The country covers an area of 118, 484 square kilometres of which 20 percent is water.² The main water resources come from lakes and aquifers accounting for both surface and ground water. Lake Malawi is the largest water body, covering an area of 28, 750 square kilometres; it is the third largest freshwater lake in Africa and the eleventh worldwide.³ Malawi water resources are rain dependent. As a result, the levels of water in rivers and lakes vary from time to time based on season and geography.⁴ Deforestation in recent years has resulted in reduced precipitation and widespread scarcity of water resources as a number of rivers dry up in the months of July through November.⁵ Furthermore, the growing frequency,

¹ Food and Agriculture Organisation (FAO) 'Aquastat: Malawi' (2006) unnumbered. Available at http://www.fao.org/nr/water/aquastat/countries_regions/malawi/index.stm (accessed on 3 August 2011).

² FAO (2006).

³ FAO (2006). There is also Lake Chilwa and Malombe which cover an area of 683 square kilometres and 303 square kilometres respectively. Malawi has also got rivers and many spread over the country and marshes. See also Government of Malawi *The National Water Policy* (2005).

⁴ Department of climate change and metrological services available at <http://www.metmalawi.com/climate/climate.php> (accessed on 5 October 2011) Predominantly 95% of rains fall between November to April, while 90 percent of the runoff in major rivers occurs between December and June.

⁵ Ng'ong'ola DH 'Policies influencing patterns of use of water resources in Malawi' (1999) 8 & 9 available at http://pdf.usaid.gov/pdf_docs/PNACL424.pdf (accessed on 5 October 2011) Malawi was previously heavily forested, approximately 67 percent in 1967, to less than 47 percent in 1992 and

intensity and magnitude of adverse climatic hazards (particularly droughts and floods) also impacts on water security and quality.⁶ This affects millions of lives, especially in the rural communities, due to the country's dependence on run-of-the river water for different uses, including hydropower, irrigation and water supply.⁷ Hence Malawi has been identified as one of the countries to experience major water crisis or scarcity by 2025.⁸ Ferguson and Mulwafu state that this will be as a result of infrastructure and distributional problems, rather than actual scarcity.⁹ The human right to water therefore can contribute to preventing such a crisis by defining government obligations and providing the norms and standards towards efforts of averting such a crisis.

5.2.2 Economic and Social Context

Malawi has an agro-based economy which accounts for more than one-third of the Gross Domestic Product (GDP).¹⁰ Tobacco, tea and cotton are the main exports, however the World Health Organisation's ban on burley tobacco in 2010 has adversely affected Malawi's export base and therefore the country's GDP per capita which is already ranked among the lowest world-wide.¹¹ Malawi requires up to 40 percent economic assistance from donors, like the IMF and the World Bank, to supplement the national budget.¹² Although Malawi has enjoyed good donor support for a long time, in the last five years, especially during Bingu wa Mutharika's reign and also currently in Peter wa Mutharika's term, the country has experienced major aid withdrawal due to poor governance and bad foreign policy.

around 27 percent in recent times. Wood is the main source of fuel with 95 percent of homes using it or charcoal for cooking.

⁶ Ng'ong'ola DP (1999) 9 Before 2001, only 9 districts were classified as flood prone. In 2001, 16 of Malawi's 28 districts were affected, and 14 were affected in 2002. By the end of January 2003, there was localized flooding in 22 districts, causing eight deaths, damaged homes, and crop; UNDP Malawi 'Drought and Flood Relief Assistance' available at <http://www.undp.org/cpr/disred/documents/publications/corporatereport/africa/malawi.pdf> (accessed on 19 October 2001).

⁷ The 'Malawi Investment Brief 2008' available at <http://www.sirtewaterandenergy.org/docs/reports/Malawi-Draft2.pdf> (accessed on 19 October 2011)

⁸ Ferguson AE & Mulwafu WO 'Decentralisation, participation and access to water resources in Malawi (2004) 3. Available at http://pdf.usaid.gov/pdf_docs/PNADE758.pdf (accessed 13 April 2011).

⁹ Ferguson AE & Mulwafu WO (2004)3.

¹⁰ CIA World Fact book and other sources 'Malawi Economy' (2011) available at <https://cia.gov/library/publications/the-world-factbook/geos/mi.html> (accessed 25 September 2011).

¹¹ USAID 'Malawi Property Rights and Resource Governance' available 3 at <http://usaidlandtenure.net/usaidltp/products/country-profiles/malawi> (Accessed on 23 September 2011).

¹² Government of Malawi *Aid Atlas* 2010.

The country is among the least developed countries ranked at 174 out of 187 in the Human Development Index 2014.¹³ Poverty is widespread and severe as 40 percent of the population lives below US\$1.25 per day.¹⁴ Although 80% of the population are subsistence farmers, food security and especially nutritional status is a big challenge as up to 15 percent of the population is reported to be unable to meet daily food needs.¹⁵ Malnutrition is estimated at 49 percent, while 47 percent of children under five are stunted which affects cognitive development.¹⁶ Up to 2.4 million people lack access to water and over 3,500 children die every year as a result of unsafe water and poor sanitation.¹⁷

High population growth exacerbates poverty together with environmental degradation. Malawi is among the most densely populated country in Africa with 139 inhabitants per square kilometre.¹⁸ Its population is approximately 16 million people with an estimated growth rate of 2.7% in 2011.¹⁹ Although only 20 percent of the population resides in the urban areas while the rest of the population resides in the rural area, the country is fast urbanising at an estimated rate of 5.3 percent.²⁰ The rapid population growth, urbanisation and dependency on agriculture adversely impact the economy and the environment. For instance water quality and quantity has been negatively affected by this through heavy deforestation, sedimentation of rivers and reservoirs, catchment encroachment, agrochemical pollution, improper effluent disposal and over exploitation.²¹ Environmental degradation also results in soil erosion decreased fertility and extreme climatic variations affecting land productivity and therefore economic growth.

Inequalities in access to resources, services and opportunities in Malawi is high as reflected in the Gini index of 43.9, inequality in life expectancy is estimated at 40 percent, inequality

¹³ UNDP *Human Development Report 2014 Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (2014)159.

¹⁴ National Statistical Office of Malawi (NSO) 'Statistical information from the Malawi Welfare and Monitoring Survey 2008' (2008) 12.

¹⁵ NSO (2008) 13.

¹⁶ NSO *Malawi Demographic and Health Survey* (2010)133. World Bank 'Education System in Malawi' (2010) *Working Paper No. 182* 4.

¹⁷ WaterAid 'Malawi' (2015) available at <http://www.wateraid.org/where-we-work/page/malawi> (accessed on 29 June 2015).

¹⁸ NSO *Malawi Housing and Population Census 2008* (2008)10.

¹⁹ Malawi Demographics Profile (2011) available at http://www.indexmundi.com/malawi/demographics_profile.html (accessed on 3 August 2011).

²⁰ Women's fertility rate is also among the highest at 6.3 in 2008. See FAO (2006).

²¹ Malawi Demographics Profile (2011).

²¹ Kaluwa PWR 'Water resources policy and management in Malawi' (1998) 55 available at http://www.who.int/water_sanitation_health/resources/malawib.pdf (accessed on 14 August 2011).

in education at 30 percent and income inequality at 24 percent.²² Gender inequality is also high as Malawi is ranked at 131 out of 187 countries with an index of 0.591.²³ Decent and well paid jobs which are essential to improving living standards, are dominated by men who have a higher rate of employment than females; 86 percent compared to 74 percent respectively with 0.32 percent of males in senior and middle management compared to 0.07 percent of females.²⁴ Although 84 percent of women compared to 81 percent of men participate in the labour force, up to 50 percent are not paid compared to 38 percent men.²⁵ Further, women fair worse than men in political participation with only 16 percent women elected into parliament in 2014, down from 22 percent in 2009.²⁶

Gloppen and Kanyongolo state that political weakness greatly contributes to the patterns of social and economic exclusion which is related to gender (as demonstrated above) but also to geographical location, class and race.²⁷ They state that exclusion from decisions on distribution of resources and power reinforces marginalisation which entails ‘deliberate location of a political, economic, or social group at the periphery of material advantage or power by those with political or legal resources.’²⁸ These authors point out that donor dependency and neoliberalism reforms in Malawi have worsened the social position of women and other marginalised and vulnerable groups.²⁹ Gloppen and Kanyongolo argue that donor dependency causes an ‘outward orientation among the political elite, delinking it economically and politically from the poor majority.’³⁰ Neoliberalism and the emphasis on privatisation and state withdrawal from public service provisioning does not take into account specific social realities of women and other marginalised groups.³¹ As discussed in chapter one, neoliberalism is impersonal and perpetuates inequalities, it is more concerned with profit

²² UNDP (2014) 170. In the Gini coefficient measure 0 represents absolute equality while 100 absolute inequality.

²³ UNDP (2014) 174. Gender inequality index range is 0 representing inequality and 1 being 100 percent equality.

²⁴ NSO *Malawi Labour Force Survey 2013 :Key Findings Report* (2014) 3- 5 This is mostly employment in the agriculture sector which accounts for 64 percent. See UNDP Malawi ‘Promote gender equality and empower women: where we are?’ (2013) available at <http://www.mw.undp.org/content/malawi/en/home/mdgoverview/overview/mdg3/> (accessed on 04 December 2014).

²⁵ NSO (2014) 3-4.

²⁶ UNDP (2014) 174. See also NSO (2014) 223

²⁷ Gloppen S & Kanyongolo FE (2007) 261-262.

²⁸ Gloppen S & Kanyongolo FE (2007) 261.

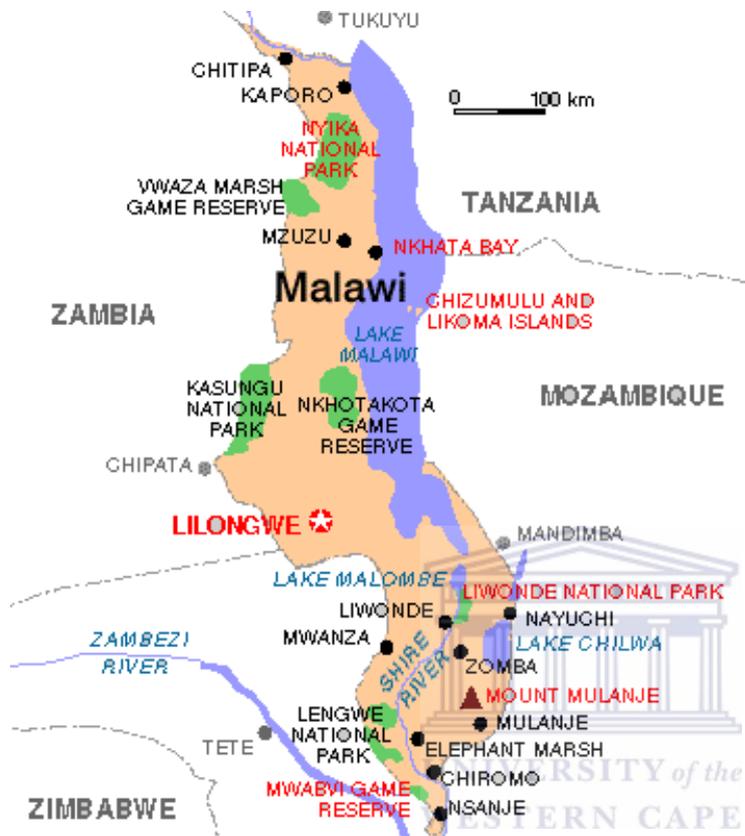
²⁹ Gloppen S & Kanyongolo FE (2007) 262.

³⁰ Gloppen S & Kanyongolo FE (2007) 262.

³¹ Gloppen S & Kanyongolo FE (2007) 262.

with little or no regard to promoting equal access to power or participation through the levelling of the playing field.³²

Figure 5. 1 Map of Malawi



5.2.3 Political Context

Malawi gained independence from British colonial rule in 1964 and soon slid into a dictatorial state ruled under a one party system of government led by Dr Kamuzu Hastings Banda for 30 years. This rule was characterised by massive human rights abuses due to violence and repression used in order secure loyalty to the regime.³³ Further, Banda relied on patronage by purposely blurring private and public interests so that state machinery was used to award personal favours, both within government and society through public sector jobs and contracts or projects respectively for loyalty.³⁴ Bratton and van de Walle label Banda’s type of leadership as neopatrimonial personal dictatorship.³⁵

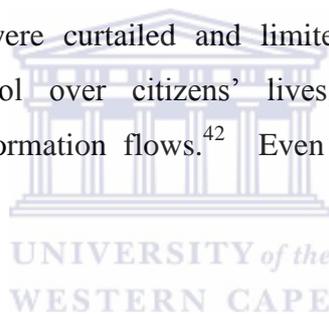
³² See Chapter one section 1.1.

³³ Phiri K & Ross K’ Introduction: from totalitarianism to democracy in Malawi in Phiri K & Ross K (eds) *Democratisation in Malawi: A Stocktaking* (1998) 9, 10 -11.

³⁴ Bratton M & van de Walle N ‘Neopatrimonial regimes and political transition in Africa’ (1994) 46:4

Upon being challenged by his ministers three months into this dictatorial leadership, he fired and forced them out of the country due to threats on their lives. This in turn led to a cabinet crisis.³⁶ Banda entrenched his political hegemony in the new Constitution adopted in 1966, by abolishing the multiparty system of government and omitting the Bill of Rights previously provided for in the earlier Constitution that established Malawi as a Republic.³⁷ Subsequent amendments and provisions in the Constitution established him as the life president of Malawi, with power to dissolve Parliament, appoint and dismiss the Speaker of Parliament and power to appoint 15 people into Parliament as nominated members.³⁸ He further established two youth organisations, the paramilitary Malawi young pioneers and league of Malawi youth within his party, in order to silence dissenting voices.³⁹

Public participation in public affairs was basically non-existent. Banda took exclusive charge of policy-making and handpicked those who would run as Members of Parliament (MP) and also those who took up positions at the local level to represent the people.⁴⁰ Nkhata states that avenues of participation were curtailed and limited to agreeing with government policies.⁴¹ He exercised control over citizens' lives, including livelihood practice, discussions, affiliations and information flows.⁴² Even within the MCP no meaningful



World Politics 553, 458.

³⁵ Bratton M and van de Walle N (1994) 474 Personal dictatorship is characterised as follows: 'It is highly exclusionary because the strongman rules by decree; institutions of participation exist in name only and cannot check the powers of the chief executive. The regime disallows even a semblance of political competition, for example, by physically eliminating or indefinitely incarcerating opponents. The strongman may even pre-empt his own removal from office by declaring himself "president for life.'

³⁶ Meinhardt H & Patel N 'Malawi's process of democratic transition: an analysis of political developments in Malawi between 1990 and 2003' (2003) available at http://www.dr-heiko-meinhardt.de/blocked_democracy.pdf (accessed on 12 December 2012). See also Banda J 'The Constitutional change debate of 1993-1995 in Phiri K & Ross K (eds) *Democratisation in Malawi: A Stocktaking* (1998)316, 318.

³⁷ See Republic of Malawi (Constitution) Act No. 1 of 1966. Cf Republic of Malawi (Constitution) Act No. 20 of 1994 The Constitution was provisionally adopted on 16 May 1994 and came into force on 18 May 1995.

³⁸ See Constitution of Malawi 1966 ss 9, 20, 25(1) & 45 (2).

³⁹ Meinhardt H & Patel N (2003) 4. See also Englund H, 'Introduction : the culture of chameleon politics' in Englund H (ed) *A Democracy of Chameleons: politics and culture in the New Malawi* (2002)1, 13.

⁴⁰ Bratton M and van de Walle N (1994) 475, Cammack D & Kelsall T 'Developmental patrimonialism? The case of Malawi' (2010) *Africa Power and Politics Programme Working Paper No.12* 13 ,15.

⁴¹ Nkhata MJ 'Rethinking governance and constitutionalism in Africa : the relevance and viability of Social trust-based governance and constitutionalism in Malawi, (Unpublished LLD thesis, University Of Pretoria, 2010)119.

⁴² Cammack D & Kelsall T (2010) 14.

participation in political processes existed as Banda used it to control and repress active members.⁴³

In 1993 Malawi became a multiparty democracy after national and international pressure led to a referendum which approved multiparty rule. An interim Constitution was adopted in 1994 to facilitate general elections, while the final Constitution was adopted in 1995 by Parliament. The Constitution establishes a new political order based on recognition of human dignity, human rights and the people of Malawi as the source of all legal and political power of the State.⁴⁴ The exercise of state power is required to be based on continued trust of people and in their interest. Further, this liberal democratic Constitution established several checks and balances of state power through the separation of powers, a Bill of Rights, regular competitive elections and institutions to ensure accountability, transparency and compliance with human rights obligations.⁴⁵ The new multiparty constitutional democracy was ushered in under the United Democratic Front (UDF), led by Bakili Muluzi which won the first elections after ending the dictatorial rule of Banda. Muluzi ruled for two terms of five years each in accordance with the constitutional presidential limits. His attempts to amend the Constitution to extend his term in office by standing for the third term failed. In 2004, the UDF led by Bingu wa Mutharika won elections again. However, Mutharika soon fell out with his sponsoring party and formed his own party in the second year of his first term. He won elections again in 2009 under the Democratic Progressive Party (DPP), however he died in office in 2012. Joyce Banda, who was then the vice president, became president and led the government with her party, the People's Party that she had formed after falling out with Mutharika in DPP. In 2014, Peter wa Mutharika, a brother to Bingu wa Mutharika, won the elections and now leads a DPP government.

The democratic rule this far has been characterised by a continuation of some of the features of the legacy of dictatorship and/or neopatrimonial thinking, where private interests, especially regarding self-enrichment and winning elections, dominate. Elections, as observed by Meinhardt and Patel, are not contested based on policies but on personalities.⁴⁶ This has resulted in leaders siphoning public resources for personal and political ends, such as distributing to people to buy votes or maintain support, making appointments of loyalists to

⁴³ Meinhardt H & Patel N (2003)7.

⁴⁴ Constitution of Malawi 1995 s 12 on Constitutional principles.

⁴⁵ See Constitution of Malawi 1995 chaps I, IV, VI – XI.

⁴⁶ Meinhardt H & Patel N (2003)23.

different positions in government or the civil service and having large cabinets to include more cronies.⁴⁷

On-going patronage, nepotism and clientelism has not only weakened accountability institutions, and hindered the fight against corruption, but also the enjoyment of many rights including political participation.⁴⁸ Subversion of democratic principles is common, especially under the principle of pluralism which ensures power to the people and claims that it should not be concentrated in one person.⁴⁹ The coming into power of different leaders, including the first women president, Joyce Banda has merely been a transition without transformation as a hegemonic neopatrimonial presidency persists.⁵⁰

Some of the political problems in Malawi are attributed to the Constitution. First, the Constitution-making process itself is brought into question for not having involved participation of the public that is broad-based. The interim Constitution, for instance, is said to have been drafted within a short time with input by participants at a seminar predominantly drawn from the political parties and foreign experts.⁵¹ The Constitution was therefore drafted in haste, with limited popular participation restricted to elites and significant influence of foreign experts which also substantially influenced the content of the Constitution. This therefore resulted in ownership problems, limited awareness by the people and limited impact on democratisation.⁵² Kanyongolo also points out that the Constitution lacks the potential to fully empower the powerless because among other things, it unduly restricts the full exercise of the people's right to participate in political activity and undermines the enforcement of the duty of government to be accountable to the people.⁵³ One limiting factor to direct participation by ordinary people, especially women, is the requirement that a member of

⁴⁷ Cammack D & Kelsall T(2010) 30.

⁴⁸ Transparency International 'Overview of corruption in Malawi' (2014)1 available at <http://www.transparency.org/country> (accessed on 12 December 2014) See also Shawa LB 'The big-man syndrome as a security threat in Malawi: a critical theory perspective' (2012)1 *Southern African Peace and Security Studies* 44 -56; Ott M 'Malawi between internal factionalism and external pressure. Coping with critical junctures'(2013) 11 *Working Paper Series of the Graduate Centre Humanities and Social Sciences of the Research Academy Leipzig* 1-16.

⁴⁹ See Booth D, Cammack D, Harrigan J et al 'Drivers of Change and Development in Malawi' (2006) *Africa Power and Politics Programme Working Paper* no. 261 14.

⁵⁰ Ott M (2013) 7.

⁵¹ Ng'ong'ola C 'Judicial mediation in electoral politics in Malawi' in Engrund H (ed.) *A Democracy of Chameleons: Politics and Culture in the New Malawi* (2002)63, 64 It took four months to draft and adopt the interim Constitution. See also Chirwa DM 'Democratisation in Malawi 1994–2002: Completing the vicious circle' (2003) 19(2) *South African Journal on Human Rights* 316, 317

⁵² Nkhata MJ (2010)127 -129, Kanyongolo FE 'The limits of liberal democratic constitutionalism in Malawi' in Phiri K & Ross K (eds) *Democratisation in Malawi: A Stocktaking* (1998) 353, 371.

⁵³ Kanyongolo FE (1998) 366.

parliament be fluent in English.⁵⁴ It is estimated that only 61 percent of adults above the age of 15, women being at 51 percent compared to 72 for men, can read, write and understand English.⁵⁵

Similarly, the enforcement of the government duty to be accountable is affected by presidential powers to appoint judges and remove or reassign them to other duties in civil service.⁵⁶ Such powers undermine judges' security of tenure and therefore also their independence.⁵⁷ The reassigning of judges to other duties may also undermine independence due to lured separation of powers, where a judge can take up position in the executive arm of government. For instance, two High Court judges were appointed to the office of Attorney General, which serves to advise the executive. This undermines the independence and integrity of the judges concerned but also violates separation of powers.⁵⁸

The enforcement of accountability is also hindered by a narrow interpretation and application by the judiciary of the requirement of *loci standi*. Section 41 provides for the right to access justice and legal remedies, while section 46 guarantees enforcement of rights and freedoms in the Constitution. For instance, section 46(2)(a) provides for the right to challenge government as follows:

[a]ny person who claims that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened shall be entitled to make an application to a competent court to enforce or protect such a right or freedom.

This provision guarantees public litigation, however, the Court have relied on another provision in the Constitution on individuals seeking remedy for violations personally suffered, to restrict the right to hold government to account.⁵⁹ Section 15 provides as follows:

(1). The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

⁵⁴ Constitution of Malawi 1995 s 51(1)(b).

⁵⁵ See World Bank 'World Development Indicators' (WDI) (2014) (available at <http://data.worldbank.org/data-catalog/world-development-indicators> (accessed on 8 November 2014)).

⁵⁶ Constitution of Malawi 1995 s119.

⁵⁷ Kanyongolo FE (1998)367.

⁵⁸ Chirwa DM Malawi tainted judiciary: why urgent reform is needed' (2013) *Nyasa times* available at <http://www.nyasatimes.com/2013/04/16/malawis-tainted-judiciary-why-urgent-reform-is-needed/> (accessed on 22 March 2014).

⁵⁹ Chirwa DM *Human Rights Under the Malawian Constitution* (2011)76.

(2). Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.

The Supreme Court of Appeal has established that, based on section 15 (2) only a direct victim of a violation or a breach of the Constitution has a right to approach the courts.⁶⁰

In *President of Malawi & another v Kachere & others* where proactive citizens brought an application to challenge among other issues the procedure for amending the Constitution adopted by the legislature, presidential appointments made contrary to the Constitution and failure by president and his cabinet to declare their personal assets as required under the Constitution.⁶¹ The Supreme Court of Appeal held that the citizens did not have sufficient interest because they had not shown that they had been directly affected as a result of the alleged breaches of the Constitution.⁶²

Litigation and the use of courts therefore, as noted by Gloppen and Kanyongolo, are limited due to a legal culture that is predominantly formalistic and conservative'.⁶³ Kanyongolo argues that the courts should remove the barriers to public litigation by attributing to every citizen sufficient interest in matters of declaratory orders regarding the Constitution.⁶⁴ Chirwa, making the same point, explains that this is because public interest litigation is not for purposes of rewarding a particular remedy to an individual to redress a particular harm. He explains that public interest litigation is to hold public functionaries accountable, to defend the Constitution and promote participatory democracy.⁶⁵ He thus also states that standing should be recognised in matters such as constitutional amendments and alleging disregard of the rule of law, as these matters raise issues of general public interest.⁶⁶

⁶⁰ *The President of the republic of Malawi v Kachere* MSCA Civil Appeal No. 20 of 1995, (SCA) (*Kachere case*); *Attorney General v Malawi Congress Party & others* [1997] 2 MLR 181 (SCA); *The State v The Registrar General ex parte Civil Liberties Committee* MSCA Civil Appeal No 12 of 1999 (unreported). See Nkhata MJ 'Public interest litigation and *locus standi* in Malawian constitutional law: have the courts unduly fettered access to justice and legal remedies?' (2008) 2:2 *Malawi Law Journal* 209, 216 – 217.

⁶¹ *Kachere case* 2-3.

⁶² *Kachere case* 9.

⁶³ Gloppen S & Kanyongolo FE 'Courts and the poor in Malawi: economic marginalization, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* 258.

⁶⁴ Kanyongolo FE (1998)367.

⁶⁵ Chirwa DM (2011)76.

⁶⁶ Chirwa DM (2011)76.

With regards to the lack of awareness of the Constitution and entrenching democracy, Kanyongolo suggests that there should be civic education of both state officials and the public and that there should be engagement in a lateral, not top down, exchange of ideas on power, people centred governance, and rights.⁶⁷ This is supported by Kamchedzera and Banda who conducted research on the quality of life in rural Malawi and found that human rights education and opportunity for community participation in decision making processes indeed holds a lot of promise in ensuring accountability.⁶⁸ Success was demonstrated under a joint initiative between government and United Nations Development Programme (UNDP) aimed at promotion of capacities to demand realisation of the right to development.⁶⁹ Under this initiative, nongovernmental organisations (NGOs) and quasi-public organisations facilitated human rights education for identified marginalised communities and engagement with public officials and other service providers. According to Kamchedzera and Banda, strides were made towards enjoyment of the right to development through, for example, acquiring a public clinic and a bridge as a result of dialogues with the said public officials and service providers.⁷⁰ Accountability was enforced but also human rights outcomes were gained.

Lack of political will is another major problem in ensuring accountability. For instance, although the Constitution guarantees the right of people to have access to information in order to enforce accountability, there are several Acts that limit this right and therefore limit transparency and people's ability to enforce accountability in participatory spaces. Laws such as the Official Secrecy Act, the Preservation of Public Security Act, the Police Act and the Parliamentary (privileges and immunities) Act, among others, restrict access of information on rules and regulations regulating the conduct of public officials.⁷¹

Another problem contributing to lack of accountability is the non-observance of constitutional clauses, like the requirement of functioning local governments. The Constitution provides for the establishment of a local government system for promotion of local democracy, transparency, accountability and participation.⁷² The local government

⁶⁷ Kanyongolo FE (1998) 372.

⁶⁸ Kamchedzera G & Banda C (2009) 97-99.

⁶⁹ Government of Malawi and UNDP *Democracy Consolidation Programme Phase II: 2002–06: Programme Support Document* (2002).

⁷⁰ Kamchedzera G & Banda C (2009) 97-98.

⁷¹ See Chirwa W, Patel N & Kanyongolo FE ' (2003) 22 available at <http://www.idea.int/publications/sod/upload/Malawi.pdf> (accessed on 22 June 2011) stating that public official operate in a culture of bureaucratic secrecy.

⁷² Constitution of Malawi 1995 s146. The National Decentralisation Policy of 1998 and the

system entails having decentralised political and administrative authorities, primarily to democratise state power and ensure participatory democracy and decision making at the grassroots level.⁷³ In this system, for instance, water and other services must be managed at the lowest level possible to ensure that democratic principles of accountability, transparency and participation of all people in decisions and development processes become a reality.

The local government political structure composed of elected officials or councilors links government and the people at the local level.⁷⁴ Their functions include making policy decisions, consolidating and promoting democracy and promotion of infrastructural and economic development.⁷⁵ The full potential of the local governments in advancing accountability however has been hampered for years due to lack of local government elections. Malawi had first democratic local government elections in 2000 but when it was time for the next elections to be held in 2004, government failed to hold the elections up until 2014. The lack of elections for 10 years means that there was not only limited government accountability but also the gap between central government and the people remained wide.⁷⁶ The lack of elections, according to Chiweza, was due to the lack of political will and commitment to decentralisation.⁷⁷ This has meant that the political body comprising of councilors and its functions including a legal mandate to make crucial decisions have for years been suspended.⁷⁸ O'Neil and Cammack point out that although political decentralisation was suspended, both administrative and fiscal decentralisations were rolled out albeit in a disjointed manner.⁷⁹ This has resulted in local government authorities being characterised by 'an absence of unity of purpose, poor coordination among central government ministries, by resistance, subversion and delays, and by the informal and formal

Local Government Act No 42 of 1998 operationalised the constitutional provision. See Chiweza AL 'A review of the Malawi decentralization process: lessons from selected districts' (2010) 16 A Report from a joint study of the Ministry of Local Government and Rural Development and Concern Universal available at <http://tilitonsefund.org/wp-content/uploads/2013/05/A-Review-of-the-Malawi-Decentralization-Process-2010.pdf> (accessed on 2 August 2011) stating that decentralisation is advanced as a vehicle for poverty reduction in terms of better service delivery.

⁷³ Local Government Act s 3. See also Chasukwa MHM & Chinsinga B 'Slapping accountability in the face: observance of accountability in Malawi's local governments in the absence of councilors' (2013) 36 *International Journal of Public Administration*, 354-366, 357.

⁷⁴ Local Government Act s5(1) The political assembly also includes traditional authorities or leaders, Members of Parliament and special interest groups however only councilors have decision making power.

⁷⁵ Local Government Act s6.

⁷⁶ Chasukwa MHM & Chinsinga B (2013) generally.

⁷⁷ Chiweza AL (2010) 29.

⁷⁸ Chiweza AL (2010) 29.

⁷⁹ O'Neil T, Cammack D, Kanyongolo E *et al* 'Fragmented governance and local service delivery' (2014) *Policy and Development* ii.

recentralisation of power and functions.’⁸⁰ There is high level executive intervention in local level politics and function which undermines the autonomy of local governments and turns them into implementing agencies for central government.⁸¹ Further, as pointed out by Chasukwa and Chinsinga, downward accountability is undermined resulting in unchecked abuse.⁸² In 2014 the government held local government elections. There is a renewed hope therefore that the decentralisation process, democratic participation and public accountability will be restored.

Service delivery at the local level is affected by the logistics and politics at the national level.⁸³ This is characterised by high levels of corruption and patronage politics through appointments, offers of lucrative contracts, and enticement of party loyalists and opposition party members with cash.⁸⁴ This results in unpredictable and poor quality and inefficient services.⁸⁵ Furthermore, the ruling party affiliates dominate different levels of government and use their positions to advance party and personal interests rather than national interests. For instance, over US\$250 million disappeared from government coffers to private accounts of persons linked to the ruling party in 2013.⁸⁶ Local government’s responsibility of awarding borehole construction contracts is the most abused in water service delivery. Such contracts are given to non-existent contractors or contractors who do not carry out the contracted work.⁸⁷ In 2004 for instance, 50 percent of boreholes that the government had budgeted for were never constructed although money was paid out for construction. Where

⁸⁰ O’Neil T, Cammack D, Kanyongolo E *et al* (2014) ii –iii.

⁸¹ Dulani B ‘The status of decentralization in Malawi’ (2005) 3 Power and Politics Programme Research Report 45 available at <http://community.eldis.org/.59ee456c/The%20status%20of%20Decentralisation%20in%20Malawi.pdf> (accessed on 2 March 2012).

⁸² Chasukwa MHM & Chinsinga B (2013) Their research found that due to suspended local government elections, resources from the Constituent Development Fund which is an allocation to implement development needs identified by political organ was abused by Members of Parliament who virtually controlled it to advance political interests and goals unchecked.

⁸³ see generally Cammack D ‘Peri-urban governance and the delivery of public goods in Malawi, 2009-11’ (2012) *Africa Power and Politics Programme research report No 03*.

⁸⁴ Ferguson AE & Mulwafu WO (2004) 21. See also Hussein M ‘Combating corruption in Malawi’ (2005) 14 *African Security Review* 91, 93 -101 He argues that in Malawi economic, social, political and administrative factors tend to provide an environment that is conducive to corrupt practices. Specific factors include high poverty levels, political and economic liberalisation, cultural norms and practices advancing ethnicity and communal or traditional values linkages or networks

⁸⁵ Ferguson AE & Mulwafu WO Decentralisation (2004) 21.

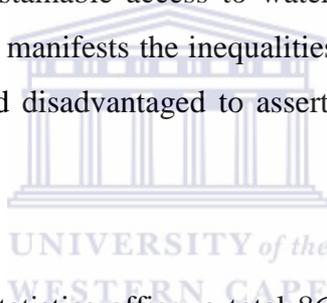
⁸⁶ McCormick TY ‘Climate of corruption’ *Foreign Policy* 27 January 2014 available at <http://foreignpolicy.com/2014/01/27/climate-of-corruption/> (accessed on 21 November 2014)

⁸⁷ See ‘Join Ruling DPP or Perish’ *Nyasa Times* 12 February 2012 available at <http://www.nyasatimes.com/malawi/2012/02/13/join-ruling-dpp-or-perish-says-kaliati/> (accessed on 4 April 2012) Cabinet minister publicly called on government authorities to award development contracts only to the ruling party affiliates as a reward for helping the party get into power in the 2009 elections.

boreholes were constructed less than 30 percent of the constructed boreholes were functioning.⁸⁸ Patronage also results in unequal distribution of goods and services for development. Through a water point mapping system initiated by an NGO between 1998 and 2004, distribution of water facilities was found to be inequitable as it was mainly based on the links an area had with the ruling party.⁸⁹

The political context in Malawi therefore points to serious accountability problems and lack of popular participation in public affairs, including the adoption of the guiding norm in society, the Constitution. The weak political context provides a thriving neopatrimonial presidency where self-enrichment and distribution of benefit in line with political interests goes unchecked.

From the discussion of the hydrological, economic and political context, it can be concluded that Malawi needs transformation or reform in its strategies and approaches so as ensure that there is equitable, secure and sustainable access to water for everyone. The overview of water services in the next section manifests the inequalities already highlighted and the need to empower the marginalised and disadvantaged to assert their claim to water as a human right.



5.2.4 Water Services

According to Malawi National Statistics office, a total 86.2 percent of household members use improved sources of water; with urban areas at 99 percent and rural areas at 84 percent in 2014.⁹⁰ The joint monitoring programme by World Health Organisation (WHO) and the

⁸⁸ See also Kalua B 'The impact of privatisation in Malawi, the Privatisation Commission Report Zomba' (2000) 7 stating that economic liberalisation and privatisation has not alleviated the vulnerability of the majority to poverty but has largely benefitted the political class.

⁸⁹ Ferguson AE & Mulwafu WO (2004) 19 stating that this is not surprising as throughout history, a strong link has existed between political power and the control of water as a valuable resource in Malawi. See Welle K 'Learning for Advocacy and Good Practice WaterAid Water Point Mapping' (2005) 9 available at http://www.wateraid.org/documents/plugin_documents/waterpointmappingmalawitanzaniaweb.pdf (accessed 3 November 2011) Water mapping is a technical exercise whereby the geographical positions of all water points in a district are gathered together with all management, technical and demographical information. This is then entered into a geographical information system and correlated with official demographic and physical data (population density, administrative boundaries, roads, etc). The information is displayed via digital maps. See Mulwafu, WO 'Does water have a history? Water use and management in Malawi' in Tempelhoff JWN(ed) *African Water History: Transdisciplinary discourses* (2005) 5. See also Rusca M & Schwartz K 'A historical perspective on participation in the provision of water supply and sanitation services in developing countries in Katko TS & Others (eds) *Water Services Management and Governance Lessons for a Sustainable Future* (2013)113, 114 stating that in Malawi in the colonial period, water services were mainly limited to colonial elite while in the post colonial era it became a political tool to affirm acquired role and authority.

⁹⁰ NSO (2014) 9

United Nations Children's Fund (UNICEF) places estimates of access to water at 85 percent (up from 42 percent in 1990).⁹¹ This is disaggregated to include figures for piped water onto premises for urban areas (at 33 percent) and rural areas (at 3 percent) while other improved sources such as community water kiosks, boreholes and wells stand at 62 percent in urban areas and 80 percent in rural areas.⁹² These figures do not reflect the state of water facilities. UNICEF reported in 2010 that up to one third of community water facilities were not operational at any point in time.⁹³ These are facilities in the peri-urban and rural areas that face challenges to access water as will be evident in the explanation below.

5.2.4.1 Peri-urban Areas

Peri-urban areas are informal settlements, also known as 'squatters' or 'slums' or 'low income settlements' and are 'a site of poverty unnatural hazards, and poor public goods delivery.'⁹⁴ They are home to between 40 percent and 70 percent of the urban population.⁹⁵ They range from long standing high density, squalid inner city tenements to spontaneous, peri-urban settlements responding to urban expansion lacking legal recognition.⁹⁶ They commonly face challenges in access to water services and infrastructure, partly attributed to the high rate of urbanisation resulting in high density and the haphazard layout and /or geographical and environmental conditions. These conditions pose practical challenges for planning and the establishment of services or infrastructure.⁹⁷ Further, a large percent of the urban poor in these settlements cannot afford a private water connection and hence the main water supply system is through communal kiosks.⁹⁸

⁹¹ World Health Organization and UNICEF Joint Monitoring Programme (JMP) 'Malawi: estimates on use of water sources and sanitation facilities(1980 -2012)' (2014) available at <http://www.wssinfo.org/> (accessed on 22 November 3014) (Malawi)

⁹² JMP Malawi (2014).

⁹³ UNICEF 'Malawi water sanitation and hygiene promotion' (2010) available at http://www.unicef.org/malawi/wes_3975.html (accessed on 29 May 2013).

Cammack D Peri-urban governance and the delivery of public goods in Malawi 2009 -2011'(2012) Africa Power and Politics Programme research Paper 03 7.

⁹⁵ Water Utilities Partnerships for capacity building in Africa (WUP) *Better Water and Sanitation for Urban Poor : Good Practices from sub-Saharan Africa* (2003) 9.

⁹⁶ WUP (2003) 9.

⁹⁷ Cammack D Peri-urban governance (2012) 8; WUP *Better Water and Sanitation for Urban Poor* (2003) 9.

⁹⁸ Zeleza-Manda MA *Water and Sanitation in Urban Malawi: Can the Millennium Development Goals be met?* (2009) 28. See also Jimu IM 'Stakeholdership and Contested Management of Water Kiosks in Nkolokoti, Blantyre (Malawi): case of MASAF and Nkhomano Kiosks' (2007) 1 Paper prepared for presentation at the 8th WaterNet/WARFSA/GWP-SA Symposium (31 Oct – 2 Nov 2007, Lusaka, Zambia) available

<http://www.waternetonline.ihe.nl/downloads/uploads/symposium/zambia-2007/Water%20and%20Society/Jimu.pdf> (accessed on 11 December 2014).

There are several advantages to communal kiosks. First, they provide an opportunity for flexibility for low income households in accessing water. Water can be purchased in amounts they can afford at a given time. This is an advantage but may also be disadvantage for those who do not have money at hand every day to buy water. The more affluent areas enjoy access to water on credit, settled at the end of the month. However, the urban poor must pay before they can access their water. Secondly, communal kiosks serve multiple households. This makes supply easy where there is no capacity for connections to individual households. They offer the best low cost alternative meeting health and hygiene considerations since boreholes and wells are considered unsafe in such places.⁹⁹ The boreholes and well are unsafe due to potential risk of faecal contamination due to lack of adequate protection and treatment of water sources.¹⁰⁰

Prior to 1981, peri-urban areas had no proper regular water supply. In that year government launched the Urban Communal Water Point Project, with financial and technical assistance from the United Nations Capital Development Fund (UNCDF) and WHO. This programme brought about dramatic changes.¹⁰¹ Under this project 600 water points in 50 urban settlements were constructed and provided water to the urban poor at a small fee collected by committees from the communities.¹⁰² This project was replaced by the Piped Supplies for Small Communities (PSSC) Project in 1988 which catered for both rural and peri-urban areas and also focused on the management aspect of the service. The new project was tasked to address the management of the water points as users had become unwilling to pay for services.¹⁰³ Although this problem was resolved over time, the crisis of management took new forms under the new projects: elite capture and misappropriation of revenue collected by the water committees.¹⁰⁴ As part of the larger decentralisation processes encouraged by development partners within neoliberal reforms the task of revenue collection previously carried out by water utility company employees was handed over to development or water committees comprised of community members.¹⁰⁵ The Water Board sellers were replaced with new sellers who were loyal to the ruling party and water provision became a strong point

⁹⁹ Jimu IM (2007) 4.

¹⁰⁰ Cammack D & Kanyongolo E 'Local governance and public goods in Malawi' (2010) Working Paper no.11 31-32.

¹⁰¹ Kwaule F 'Piped supplies for small communities programme Malawi:final report (1993) 1 available at <http://www.ircwash.org/sites/default/files/262.0-93PI-10970.pdf> (accessed on 12 August 2012).

¹⁰² Kwaule F (1993)1.

¹⁰³ Kwaule F (1993)1.

¹⁰⁴ Cammack D (2012) 11.

¹⁰⁵ Cammack D (2012) 11.

for political campaigning in the new multiparty system of government.¹⁰⁶ Zeleza-Manda reports that under this management scheme consumers were overcharged while money collected was used for private or political interests and not payment of water bills.¹⁰⁷ The huge unpaid water bills crippled the ability of Water Boards to provide water as they were forced to run on a deficit.¹⁰⁸ Eventually water was turned off for the communal water kiosks in most peri-urban areas.¹⁰⁹

As a way to resolve this problem, water users associations were introduced to manage water services in peri-urban areas. The success of Kabula Development Association (KDA), established in 1994 by Jan-Jaap Sonke, a member of parliament in a low income area, inspired the idea of water users associations.¹¹⁰ Kabula, like many poor urban areas, had faced water problems due to political interference, elite capture and misuse of funds. The introduction of the KDA largely solved these problems and prevented further abuse while improving water services.¹¹¹ The organisational structure of KDA included Board of Trustees comprised of three chiefs, three church leaders and Mr Sonke, an elected management Board and a secretariat comprised of water sellers, monitors and a small administrative staff. This model of management, where the water users would be responsible for their own water delivery systems and constituting management term through elections, was soon favoured by international donors and development organisations as a way to address domination by political party members and curbing abuse of funds.¹¹² Water users associations are today widely recognised as the ideal community water supply management institutions to operate as mini Water Boards and tackle communal water provisioning.¹¹³

Other than water kiosks, peri-urban areas have boreholes and hand pump fitted wells, mainly provided by NGOs, religious organisations and politicians especially in areas where there are

¹⁰⁶ Cammack D (2012) 11-12.

¹⁰⁷ Zeleza-Manda MA (2009) 30.

¹⁰⁸ Kwacha Jimu IM (2007) 11 stating that In Blantyre alone, the commercial city, unpaid bills from water kiosks amount to over 50 million Malawi Kwacha.

¹⁰⁹ WaterAid *Managing Communal Water Kiosks in Malawi: Experiences in water supply management in poor urban settlements in Lilongwe* (2008)2-3 on huge debts from communal kiosks owed to utility company in LL over 20 million Malawi Kwacha.

Government of Malawi *Private Sector Participation in the Distribution and Management of Water Services: A Study of Low Income Areas in Blantyre and Lilongwe* (2007) 45.

¹¹¹ Government of Malawi (2007) 46.

¹¹² Cammack D (2012)11 Water user associations were formally adopted as part of central government policy in 2010 under the Market Centre and Rural Piped Water Supply and Sanitation Programme and are now legally recognised in the Water Resource Act of 2013 which will be discussed in subsequent chapter.

¹¹³ Ministry of Irrigation and Water Development (MoIWD) *Guidelines for Establishment of Water Users Association in Malawi* (2010) viii.

no water kiosks.¹¹⁴ Boreholes have water point committee that operate and manage them to ensure revenue for repairs.

5.2.4.2 Rural Area

Piped water in rural areas is provided through gravity fed schemes (GFS) constructed in the late 1960s and 1970s.¹¹⁵ Gravity fed schemes were established with several committees composed of community members on a voluntary basis to ensure maintenance and operation.¹¹⁶ Among the committees were water point committees (WPC), repair teams and scheme committees.¹¹⁷ The WPC had a number of responsibilities, including protection of the facilities against theft and robbery, reporting faults, and collection of user fees (often used to purchase small worn out parts).¹¹⁸ A repair team, trained by government, was on standby to carry out small technical faults in the scheme, while government monitoring assistants within the areas, supported by supervisors at regional or central offices, carried out more technical and complex repairs.¹¹⁹ The government was also responsible for major spare parts that would be required to maintain the schemes. Over time however, government neglected their role in the repairs and the communities also failed to continue their voluntary role. The schemes were simply too large and attending to them became too taxing.¹²⁰ Poor maintenance and rapid population growth far exceeding the envisaged user population resulted in the dilapidation of schemes and/or non-functioning water points.¹²¹ Government is now in the process of rehabilitating GFS and introducing water user organisations to ensure ownership and shared responsibilities of operation and maintenance. Government also sinks boreholes and builds hand fitted wells to ensure access to improved water facilities in the rural areas.

¹¹⁴ Jimu IM (2007) 1.

¹¹⁵ Kleemeier E The impact of participation on sustainability: an analysis of the Malawi rural piped Scheme Program (2000)28:5 *World Development* 929.

¹¹⁶ Water and Sanitation Program 'Rural piped water supplies in Ethiopia, Malawi and Kenya: Community Management and sustainability' (2002)Field Note 13, 4 available at https://www.wsp.org/sites/wsp.org/files/publications/328200711859_RuralPipedWater.pdf (accessed on 28 April 2014).

¹¹⁷ Msukwa LAH *Institution Building for the Maintenance of Rural Piped Water Schemes* (1986)10 – 12 A caretaker is a person either employed or on voluntary basis charged with taking care of the water Facility.

¹¹⁸ Msukwa LAH (1986)10 – 12. The communities were also asked to contribute a small fee towards the honorarium of the resident repair teams however this failed and the teams were hence left with no incentive and usually not enough material for repairs.

¹¹⁹ Water and Sanitation Program (2002) 4

¹²⁰ Baumann E & Danert K (2008) Mixed messages on who is responsible are also attributed to community confusion and subsequent withdrawal of roles in schemes.

¹²¹ Kleemeier E (2000) 929.

It is within this context that government has an obligation under the human right to water to ensure equitable, secure and sustainable access to water services through participatory processes that privilege women's agency and voice. The core question is whether the recent attempts by the government to rehabilitate water services complies with the obligations included under the human right to water. The rest of this chapter is devoted to an analysis of the constitutional and statutory framework of water service delivery in Malawi. The starting point is to establish whether the human right to water forms part of Malawian law.

5.3 Legal and Policy Framework: Human Right to Water

5.3.1 International Law as Source of Law

The human right to water as expounded in Chapters Two, Three and Four above forms part of Malawian law as a result of Malawi's treaty obligations. Treaties ratified by Malawi after the adoption of the Constitution become binding on Malawi after being domesticated by an Act of Parliament.¹²² This requirement establishes Malawi as a dualistic state where international law does not automatically become part of the binding law domestically.¹²³ However the Constitution provides a different rule regarding agreements entered into prior to the adoption of the Constitution (18 May 1994). Such agreements according to section 211 (2) automatically became binding on Malawi unless otherwise provided for by an Act of Parliament.¹²⁴ According to Mwaungulu J in *S Kalinda v Limbe Tobacco Limited* 'section 211(2) stresses the non-requirement of domestic legislation for international law prior to commencement of the Constitution.'¹²⁵ The Malawi Supreme Court of Appeal approved Mwaungulu's dictum by holding that dualism was only adopted in the 1994 Constitution; hence all treaties entered into before then were automatically part of Malawian law, without the need for domestication.¹²⁶

¹²² Constitution of Malawi 1995 s211(1).

¹²³ *Chihana v Republic* MSCA Criminal Appeal No.9 of 1992(unreported) stressing that a treaty ratified By Malawi requires domestication through an Act of Parliament to become binding domestically. See also Brownie I *Principles of Public Law* 7th ed (2008).

¹²⁴ Constitution of Malawi 1995 s211(2) considers domesticated all ratified international agreement Before the commencement of the Constitution whether they were actually domesticated by an Act of Parliament or not. See Maluwa T *International Law in Post-Colonial Africa* (1999) chap 6 on protecting human rights in the constitution of Malawi, (specifically 153 -159).

¹²⁵ *S Kalinda v Limbe Tobacco Limited* Civil Cause No 542 of 1995(unreported) Mwaungulu J further points out that if this was otherwise, it would have been expressly provided for in section 211(2) having been omitted in section 222(1).

Malawi Telecommunications Ltd v Makande & Omar MSCA Civil Appeal No 2 of 2006 (unreported) his case overruled earlier case that had held that the agreements entered into prior to 1994 required domestication and ere therefore not automatically part of the law of Malawi. See *Chihana v Rep* MSCA Criminal Appeal No 9 of 1992 and *JGR Guwende v AON Malawi Ltd* Miscellaneous Civil

International agreements ratified prior to 1994 include the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²⁷ the International Covenant on Civil and Political Rights (ICCPR),¹²⁸ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),¹²⁹ the Covenant on the Rights of the Child (CRC),¹³⁰ and the African Charter on Human and People's Rights (Africa Charter).¹³¹ Because these instruments form part of domestic law, they can all be invoked during litigation and have the same status as any other domestic legislation passed by Parliament.¹³² The rights guaranteed in these instruments are thus binding rights in Malawi. As discussed in chapter two, the human right to water has been established within the right to an adequate standard of living in the ICESCR (interpreted in the context of the protected rights in the ICCPR). Further, as already noted the CEDAW and the CRC have specifically guaranteed the right to water for women and children respectively. Based on these instruments, therefore, a human right to water forms part of Malawian law and is binding on the Malawian government.

Another basis of the human right to water in Malawi is customary international law. As discussed in chapter three, the human right to water is crystallising into a customary international norm through state practice and *opinio juris*. The Malawian Constitution provides that customary international law is part of the law in Malawi unless it is inconsistent with the Constitution or an Act of Parliament.¹³³

International law can also be relied on in interpreting the Constitution even if it is not binding on Malawi because the State has not ratified it, or the instrument itself is soft law and therefore not binding (e.g. General Comments issued by the CESCR).¹³⁴ Unfortunately there has been limited reliance on internationally recognised human rights as an aid to the interpretation of the Constitution or legislation.¹³⁵ Lack of reliance on international law is

Cause No 25 of 2000.

¹²⁷ Acceded to 22 December 1993.

¹²⁸ Acceded to 22 December 1993.

¹²⁹ Ratified 12 March 1987.

¹³⁰ Acceded to 2 January 1992.

¹³¹ Ratified 17 November 1989.

¹³² In *S Kalinda v Limbe Tobacco Limited* the court held that international law human rights are not supreme over the Constitutional guaranteed rights. This is because the Constitution is the supreme law of the land and the international agreement became part of the domestic law at the same level of other Acts of Parliament. See section 48(2) of the Constitution, providing for primacy of an Act of Parliament over all other forms of law, but subject to the Constitution.

¹³³ Constitution of Malawi 1995 s211(3).

¹³⁴ Constitution of Malawi 1995 s 11.

¹³⁵ Chirwa DM (2011) 30.

attributed to lack of training material and literature for both the judges and legal practitioners.¹³⁶

Government has also not been accountable to international human rights bodies in submitting periodic reports on progress in realising human. Thus far it has submitted state reports under different instruments like the UN Committee on the Elimination of Discrimination Against Women since 1990,¹³⁷ in 2012 to the UN Human Rights Committee¹³⁸ and to the African Commission on Human and Peoples' Right in 2014.¹³⁹

The fact that Malawi's international law obligations, including the human right to water, have not achieved the status in domestic law and litigation promised by section 211 of the Constitution is disconcerting. It raises serious doubts about the likelihood that the international law right to water will have a far-reaching impact on water governance in the foreseeable future. For this reason I turn in the next section to the Malawian Constitution and Bill of Rights to explore whether the right to water can be placed on a more secure foundation in Malawian law.

5.3.2 The Constitution and the Bill of Rights

Malawi's Constitution is the supreme law of the land.¹⁴⁰ It contains a Bill of Rights binding all organs and agencies of the State and natural and legal persons.¹⁴¹ The Bill of Rights includes a long catalogue of civil and political rights (CPR) but very few ESCR. Most notably it does not explicitly provide for the human right to water.¹⁴² The Bill also does not include a right to an adequate standard of living or a right to basic health care. It is thus not possible to simply apply the argument that the ICSECR includes a right to water to the Malawian Bill of Rights. Fortunately, the Malawian Bill of Rights contains a broadly worded right to development. The right to development guarantees all people, individually and collectively, the right 'to the enjoyment of economic, social, cultural and political

¹³⁶ Hansen TT, 'Implementation of international human rights standards through the National Courts in Malawi' (2001) 46: Journal of African Law 31, 42.

¹³⁷ See Office of the United Nations High Commissioner for Human Rights *Committee on the Elimination of Discrimination against Women – Sessions* available at <http://www2.ohchr.org/english/bodies/cedaw/sessions.htm> (accessed on 12 December 2014).

¹³⁸ See Office of the United Nations High Commissioner for Human Rights *Human Rights Committee* available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (accessed on 12 December 2014).

¹³⁹ African Commission on Human Rights and People's Rights available at <http://www.achpr.org/>

¹⁴⁰ Constitution of Malawi 1995 s 5.

¹⁴¹ Constitution of Malawi 1995 ss 15 - 42 (Chap IV).

¹⁴² The ESCR included are family and marriage rights in s 22, the right to education in s 25, cultural Rights in s26, the right to property in s28, the right to economic activity in s29 & the right to development in s30.

development.¹⁴³ I argue below that the human right to water is included in the Malawian Bill of Rights under the right to development (read in light of the right to dignity).

5.3.2.1 The Right to Development

The right to development is contained in section 30 of the Malawian Constitution in the following broad terms:

1. All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
2. The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
3. The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
4. The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.¹⁴⁴

Chirwa points out that this right encompasses all the economic, social and cultural rights that have not been expressly recognised and can be the basis for enforcement of the human right to water.¹⁴⁵ First, the human right to water may be implied in the right to development based on the calls for equal access to resources and services or infrastructure.¹⁴⁶ Under the human right to water, as discussed in chapter three, water resources and services must be managed in a way that allows for equal access and sustainability so that it takes care of the needs of both the present and future generations.¹⁴⁷ Infrastructure is necessary to ensure that there is a system of water distribution that offers equality in opportunity to access water for all people.

¹⁴³ Constitution of Malawi 1995 s 30(1).

¹⁴⁴ Constitution of Malawi 1995 s30.

¹⁴⁵ Chirwa DM (2011) 259, Chirwa DM 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 207, 225 arguing that the right to water and other rights such as social security, adequate standard of living, and the highest attainable standard of health are implicitly recognised. Chirwa, however, holds that the approach of protection of ESCR in the Constitution is based on 'half better than none' without giving 'full effect to the notion of the indivisibility of all rights and is not good enough for a poor country which is also in transition to democracy.' at 212. See also Mbazira C 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution' (2007) 1*Malawi Law Journal* 220 224 criticising Malawi for failing to include a comprehensive list of ESCR in the Constitution.

¹⁴⁶ Constitution of Malawi 1995 s30 (2).

¹⁴⁷ See UN Committee on Economic, Social and Cultural Rights General Comment No 15, Right to Water (2002) UN Doc E/C.12/2002/11 para1& 28 (GC 15).

The right to development obliges the government to address distributional or infrastructural problems that are projected to intensify in 2015.

The aim of the right is the constant improvement of the well-being of the entire population. The human right to water is central to well-being both in terms of survival interests and livelihood. The right to development recognises the indivisibility and interdependency of all human rights. Hence it states that the right to development entails ‘the enjoyment of economic, social, cultural and political development’.¹⁴⁸

The provision in the Malawian Constitution resembles article 8 and other aspects of the UN Declaration on the Right to Development.¹⁴⁹ Article 8 guarantees equality in opportunity for basic resources and services and also obliges states to eradicate social injustices and ensure popular participation especially women in realising the right. The Declaration on the Right to Development encapsulate indivisibility and interdependency on human rights in the right to development by stating failure to observe civil and political rights together with economic, social and cultural rights is an obstacle to development.¹⁵⁰ Interpreting the right to development in section 30 in a way that would exclude the access to water as one of the guarantees, would be contrary to rules of interpretation that require that legal provisions should be construed broadly and purposively.¹⁵¹ The Supreme Court of Appeal has recognised teleological interpretation in *Gwanda Chakuamba v The Attorney General* as the approach established in the Constitution.¹⁵² The Court ruled as follows:

Section 11 of the Constitution expressly empowers this court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public

¹⁴⁸ Constitution of Malawi 1995 s30(1).

¹⁴⁹ See UN General Assembly, *Declaration on the Right to Development*, 4 December 1986, A/RES/41/128 art 8 provides as follows:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

¹⁵⁰ Declaration on the Right to Development art6 (3). See also Chapter one section 1.1.2.

¹⁵¹ Chirwa DM (2005) 125.

¹⁵² *Gwanda Chakuamba & Others v. The Attorney General & Others*, M.S.C.A. Civil Appeal No. 20 of 2000 (Unreported) (*Chakuamba case*).

international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi.¹⁵³

The approach of the Malawian courts is in line with the purposive approach to interpretation adopted by the Committee on Economic Social and Cultural Rights (CESCR) and the African Commission on Human and People's Rights (African Commission) discussed in chapter two. In line with the human right to water, the right to development is concerned with inequality and justice. The right recognises the need to prioritise the needs of the marginalised and disadvantaged groups, including women and children.¹⁵⁴ The argument that the right to development includes the right to water rests on the assumption that the right to development is fully justiciable under Malawian law. This is a contested assumption which needs to be carefully scrutinised.

5.3.2.2 Justiciability of the Right to Development and Water

Although the right to development holds a lot of promise, it has not yet formed the basis of a claim been adjudicated on to enforce the duty of the State to enhance people's well-being. Chirwa therefore states that the 'the potential of this right is yet to be exploited'.¹⁵⁵ Such potential would be to challenge policies and claim equal access to resources and services. This right to development is justiciable according to section 15(2), which provides for enforcement of all human rights recognised in the Constitution.¹⁵⁶ More specifically, however, section 30(4) according to Chirwa, 'juridicialises' policy making by requiring the State to justify its policies according to its obligation under the right to development.¹⁵⁷ The Court is mandated under this provision to question State policies by reference to the right to development.¹⁵⁸ Where policies do not measure up to the ultimate goal of development, which is the advancement of the human person, a Court can require the State to review its policies accordingly. For instance, Chirwa states that where policies seeking to meet economic objectives results in social hardship for the majority of the population, they may be

¹⁵³ *Chakuamba case 4.*

¹⁵⁴ Constitution of Malawi 1995 s30 (1).

¹⁵⁵ Chirwa DM (2005) 224.

¹⁵⁶ Constitution of Malawi 1995 s 15 (2).

¹⁵⁷ Chirwa DM (2011) 267.

¹⁵⁸ Chirwa DM (2011) 267.

challenged as violating the right to development.¹⁵⁹ Chirwa explains the role of the courts in such circumstances as follows:

The role of the courts in this regard is not to create or dictate policies but rather to serve as a disinterested arbiter... on the narrow issue of whether given policy accords with the requirements of the right to development.¹⁶⁰

The Court unfortunately has failed to take on this role stating that the judiciary is unsuited for policy questions. Consider the following statement by Mwaungulu J in *State v Ministry of Finance, Ex Parte SGS (Malawi) Ltd* where applicants had challenged the tendering process by government for Pre-shipment Inspection Services for Malawi:

[m]any epitaphs delineate [as] non-justiciable ... 'matters involving social and economic policy', 'matters involving competing policy considerations', 'questions of social and ethical controversy'. Generally these are matters where, if involved, courts would be in, in the words of Lord Diplock in *Butees Gas v Hammer*, a 'judicial no-man's land'..... These decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with. ... [D]ecisions of this kind involve a polycentric task. The concept of a polycentric situation is perhaps most easily explained by thinking of a spider's web:

'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.'¹⁶¹

Government had opted for a supplier that was more expensive while cheaper options existed. Although the case was not directly dealing with ESCR, but rather with a private law issue, it addressed the role of the Court in examining public policy and questions of social and ethical controversy. The Court held that it should exercise utmost restraint in such matters. In *State v Minister of Finance and Another, Ex Parte Bazuka Mhango* the Court approved and reconfirmed this position:

[t]his very Court reiterated the fact that courts have little capacity to deal with matters of, inter alia, policy. Such matters, we thought, should be left to those best suited to deal with them namely the people's elected representatives and their permanent advisors, ie the civil servants. We would therefore be the first to wash our hands off this case if it raised issues only of policy or required this Court to evaluate socio-economic policy or allocate scarce economic resources.¹⁶²

¹⁵⁹ Chirwa DM (2011) 267.

¹⁶⁰ Chirwa DM (2011) 267.

¹⁶¹ *State v Ministry of Finance, Ex Parte SGS (Malawi) Ltd* [2003] MWHC 41.

¹⁶² *State v Minister of Finance and Another, Ex Parte Bazuka Mhango and Others* Miscellaneous Civil Cause 163 of 2008 (HC, MR, unreported).

These cases make it clear that the Malawian courts are reluctant to review policy decisions taken by other branches of government. This is problematic as examining policy does not necessarily mean choosing policy options for government. Kapindu states that ‘it is fundamentally wrong for courts to make such sweeping assertions that they cannot deal with policy issues’ as it is contrary to their mandate in section 30(4).¹⁶³ In addition, such an approach stultifies the transformative potential of the new constitutional order in Malawi.

Fortunately, a more progressive approach can be found in the case of *Gable Masangano v Attorney General* where the court refused to endorse this hands-off policy ‘where there is a complaint of violation of prisoners’ rights or human rights.’¹⁶⁴ In the *Masangano case* the application alleged that the prisoners were subjected to insufficient or total lack of basic necessities such as hygiene, food, clothing, medical attention, cell equipment (such as blankets, mats and eating utensils) but also lack of adequate space or housing due to overcrowding.¹⁶⁵ The respondents raised many objections to the application, including that social economic rights are not justiciable. In addressing this objection the Court stated that ‘modern legal and judicial thinking has significantly diminished the importance of such an assertion.’¹⁶⁶ It then went on to quote with approval cases from South Africa and Lesotho dealing with prison conditions, but also with the justiciability of social economic rights.¹⁶⁷

The Court concluded as follows:

Clearly therefore matters of prisoners’ [socio-economic] rights are matters that this Court can deal with just like the South African Constitutional Court has dealt with the various matters of socio-economic rights.¹⁶⁸

It then went on to deal with the directive principles of national policy and established that they are of great importance in enforcing ESCR:

The reference to section 13 of our Constitution on principles of national policy and section 14 of the same Constitution on the application of the said principles of national policy that they are directory in nature as a basis for saying that the present matters are non-judiciable does not provide a sound basis for the argument. In any event, section 14 of the Constitution further provides that ‘[c]ourts shall be entitled to have regard to them in interpreting and applying any provisions of this Constitution or

¹⁶³ Kapindu RE Courts and the enforcement of socio-economic rights in Malawi: jurisprudential trends, challenges and opportunities (2013) 13 *African Human Rights Law Journal* 125, 143.

¹⁶⁴ *Masangano case* 19.

¹⁶⁵ *Masangano case* 3-5.

¹⁶⁶ *Masangano case* 31.

¹⁶⁷ For instance approved *Mothobi V Director of Prisons and Another* (duplicate of A0770020 (CIV/APN/252/96) [1996] LSCA 92 (16th September 1996) where the Court ordered water toilets for Prisoners.

¹⁶⁸ *Masangano case* 32.

any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution.

This case therefore establishes the justiciability of ESCR and the significance of the principles of national policy which can be relied on to explain the content of the ESCR guaranteed in the Bill of Rights. The *Masangano case* went on to hold that prisoners' social economic rights had been violated by government's failure to provide adequate accommodation and abet overcrowding, provide adequate food, clothing, hygiene and medical service. The Court ordered the State to take appropriate measures such as reducing overcrowding and improving the provision of goods and services to prisoners. The Court went further to order appropriate measures to ensure realisation of these rights by requiring the State to take steps to reduce overcrowding in prisons within 18 months and improve conditions through adequate provision of financial resources.

The *Masangano* judgment provides proof that ESCR, such as the right to development and the right to water, are fully justiciable rights (and not mere policy objectives). Courts have a duty to engage with policy where human rights violations are alleged. For instance, in an application under the right to development, courts must enforce section 30 of the Constitution as understood in light of the policy principles in section 13 of the Constitution. Section 13 provides different measures or goals that policy must meet in order to promote the welfare and development of the people of Malawi. Such goals include gender equality, health, environment and nutrition. I highlight the three goals that are crucial to a human right to water.

Section 13 (a) provides for gender equality including the need for women's participation in all spheres of society and governments redress of their disadvantage through measures to ensure substantive equality. Chapter three and four established that women must be enabled as agents in realising the human right to water through specific attention to structural and other factors that inhibit their opportunities to influence decisions. State policy that does not address gender equality therefore will not have complied with the right to development and the right to water. Another policy principle deals with rural life and provides that the State must:

enhance the quality of life in rural communities and to recognize rural standards of living as a key indicator of the success of government policies.

As already discussed, the rural places in Malawi are neglected in water services, this section therefore can be relied on in measuring State policies and compelling it to ensure equality in services. Lastly States obligation to ensure that neoliberalism does not neglect the needs of the poor is another important criterion in examining State's policy. Section 13(n) provides that:

A sensible balance between the creation and distribution of wealth through the nurturing of a Market economy and long-term investment in health, education, economic and social development Programmes.

The *Masangano case* however was not based on the right to development which, as already stated is the best avenue of enforcing ESCR not expressly provided for. It was based on the right to dignity and life that I will elaborate on this subsequently however I will now look at the nature of positive obligations emanating from the ESCR in Malawi.

5.3.2.3 Nature of Positive Obligations

Recognition of ESCR in the Malawian Constitution is not accompanied by the usual notion of 'progressive realisation' and 'within available resources' as is the case with the International Covenant on Economic Social and Cultural Rights (ICESCR) and many other national Constitutional guarantees.¹⁶⁹ The lack of this qualification means that the ESCR in Malawi impose immediate obligations on government. Given the state of the economic development within Malawi, such an unqualified guarantee is laudable but not realistic.¹⁷⁰ Moreover, the country has already shown that it is falling far behind in realising the right to development and other ESCR due to the low level of economic grow, frequent food shortages and recurrent natural disasters.¹⁷¹

Chirwa draws attention to the African Charter on Human and Peoples' Rights (African Charter)¹⁷² which similarly does not include the recognition of progressive realisation. The African Commission on Human and Peoples' Rights (African Commission), the monitoring

¹⁶⁹ International Covenant on Economic Social and Cultural Rights adopted 16 December 1966 and came into force 3 January 1976.

¹⁷⁰ Chirwa DM (2005) 228.

¹⁷¹ See Banik D 'Implementing human rights-based development: some preliminary evidence from Malawi (2007) 6 Paper presented at the Expert seminar: Extreme poverty and human rights, Geneva, 23-24February 2007 available at http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf (accessed on 22 March 2013).

¹⁷² African Charter on Human and People's Rights (1981) Adopted 27 June 1981 and entered into force 21 October 1986.

body of the African Charter has stated that that the omission of the terminology does not mean the duty is not qualified:

[w]hile the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.¹⁷³

This clearly demonstrates that although there may be no explicit reference in the Malawian Constitution to the progressive realisation of the right to development, the right might well be qualified. Consider the case of *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria in which the Commission* read a ‘reasonable measure’ requirement into article 24 of the Charter.¹⁷⁴ Article 24 states that ‘[a]ll people shall have the right to a general satisfactory environment favourable to their development.’¹⁷⁵ The African Commission stated that this right imposes obligations on the State ‘to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’.

Although the *Masangono case* does not elaborate on this, it does endorse a minimum core obligation approach as discussed in chapter three. It thus approved and enforced Prison Regulations in the Prisons Act that had established minimum standard for prison provision of meals, clothing and accessories:

[t]he law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the minimum requirement. The framers of the law setting the minimum standards surely must have known that the minimum standards are achievable and must be achieved. No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law and fulfill their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the Respondents have a responsibility to comply with the minimum standards set in the Prison Regulations by providing the minimum number of clothing and accessories as specifically stipulated in the Regulations.

We would like to reaffirm that prisoners’ rights include right to food, clothing, accessories and cell equipment to the minimum standards as set out in the Prisons Act

¹⁷³ African Commission on Human and Peoples (African Commission)’ Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2011) para 14.

¹⁷⁴ *The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria* Communication 155/96 (2001) AHRLR 60 para 52.

¹⁷⁵ African Charter art 24.

and Prison Regulations. Going below the minimum standards runs the risk of duty bearers not providing anything at all and coming up with seemingly plausible and seemingly convincing excuses.¹⁷⁶

The following conclusions can be derived from the discussion of the *Masangano case* judgment above: (i) the right to development (and therefore also the right to water) impose a positive duty on the State that must be realised ever progressively, (ii) although the full realisation of the right may be gradual, a minimum core content of these rights must be established in line with international norms and standards in this regard. (iii) the minimum core content imposes immediate obligations on the State which cannot use resources as an excuse to justify failure in this regard. If Courts can consistently enforce ESCR as it did in the *Masangano case*, then ESCR will go a long way in ensuring that government meets the needs of the people who can challenge exclusion or inaction towards ensuring enjoyment of their rights.

5.3.2.4 The Right to Human Dignity

The interpretation of the right to development in the Malawian Constitution to include a justiciable right to water is reinforced by the human right to dignity.¹⁷⁷ In the *Masangano case* the Court displayed a willingness to interpret the right to human dignity to require positive social economic obligation on government.¹⁷⁸ Recall that the applicant alleged deplorable prison conditions, including the lack of sufficient food, shelter, clothing, and hygiene violated their human rights.¹⁷⁹ The Court held that the failure to provide prisoners with basic socio-economic rights violated their right to dignity and amounted to inhuman treatment:

[p]risoners have the right not to be subjected to torture and cruel treatment. In this case we hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore unconstitutional.¹⁸⁰

The right to dignity is the recognition of the inherent worth of every person by virtue of being human. As discussed in chapter four, it is the basis of all human rights and means that every human being should be perceived as an end in him or herself and never merely as a means. Although human dignity is inherent in every person, in order to enjoy it, certain conditions

¹⁷⁶ *Masangano case* 59.

¹⁷⁷ Constitution of Malawi 1995 ss 16 & 19.

¹⁷⁸ *Masangano case* generally.

¹⁷⁹ *Masangano case* 3.

¹⁸⁰ *Masangano Case* 60

are required. As such the ESCR guarantee a dignified life through access to resources and services so that one can flourish as a human being. The human right to water can be included in the basic necessities for a dignified life.

To conclude the discussion above: Malawian law includes a justiciable human right to water, either as a result of the monistic approach to international law followed towards pre-democratic treaties, or as a result of the inclusion of the right to development in the Malawian Bill of Rights. Having established that the Malawian government is bound to the various obligations encapsulated in the right to water, it is necessary to explore the legislative and policy framework which have been enacted to give effect to these obligations.

5.3.2 Policy Framework

The current National Water Policy adopted in 2005, and revised in 2007, guides water resource management, development and service delivery.¹⁸¹ The 25 page document is also the basis for the newly promulgated National Water Resources Act that was adopted in March 2013, repealing the Water Resources Act of 1969. The policy embraces the government's development objectives of poverty reduction and economic prosperity, while at the same time attempting to conform to regional and global trends.¹⁸² Meeting the UN Millennium Development Goals that includes halving the number of people without access to basic water by 2015 is specifically mentioned.¹⁸³ Its over-all vision is 'water and sanitation for all, always'.¹⁸⁴ Although no mention is made of the human right to water, the overall policy goal of providing water of acceptable quality and of sufficient quantities for every Malawian is a reflection of the essence of the human right to water.¹⁸⁵

The policy also claims that it aims to ensure sustainable water management and development to ensure readily available and equitably accessible water by all Malawians.¹⁸⁶ As regards water services specifically, the aim is to ensure that they are equitably accessible and used for individuals and entrepreneurs for socio-economic development at affordable cost.¹⁸⁷ The protection and use of water resources for domestic purposes is accorded the highest priority over other uses, however there is no express duty to make provision to those who are unable

¹⁸¹ The National Water Policy (2005) 2.

¹⁸² The National Water Policy (2005) 2.

¹⁸³ The National Water Policy (2005) 2.

¹⁸⁴ The National Water Policy (2005) 4.

¹⁸⁵ The National Water Policy (2005) 4. See also para 3.3.3 stating that the specific objective is to ensure people's access to water in sufficient quantity and quality all the time within convenient distance

¹⁸⁶ The National Water Policy (2005) 3.

¹⁸⁷ The National Water Policy (2005) 3.

to access it.¹⁸⁸ The policy states that water management and development must recognise and implement Malawi's obligations under international agreements, qualified by the requirement that this must not compromise the country's integrity, security and sovereignty.¹⁸⁹ The policy, therefore, recognises Malawi's obligation under the international human right to water, without specifically mentioning the right or any of its elements. As a result, no strategies or standards are in place to implement the right to water.¹⁹⁰ That being said, the policy to prioritise equitable access to water for domestic uses for all is essentially formulating a right to have access to water.

5.3.3 Legislative Framework

There are two main pieces of legislation directed to water in Malawi, the Water Resources Act of 2013,¹⁹¹ providing for the management, conservation, use and control of water resources and the Waterworks Act of 1995,¹⁹² providing for water services in urban areas. The Water Resources Act of 2013 repealed the Water Resources Act of 1969;¹⁹³ however the new Act has yet to be fully operationalised as of May 2015.¹⁹⁴ The government must first set up the institutional framework to start implementing the new Act. Both the old Act of 1969 and the new Act of 2013 will be discussed below as part of the legal framework. The problem is that both these Acts had limited or no direct application to water governance during the five-year period of the research (2011-2015). The old Act had limited direct application to the study because although it provides for WUAs, (which are the main interest in the study), and stipulates that the required regulation must be adopted by the Minister responsible for water, this never happened. Policies adopted prior to the new Act elaborated on WUAs and gave the needed direction on the matter. The new Act as already stated is yet to be operationalised as institutional framework is still under way. As a result, the 1969 Act essentially represents the history where Malawi is coming from, and the 2013 Act the future it is hoping for. The regulation of water services in the present is largely attributable to the Water Policy and the regulatory demands of donor agencies and NGOs operating in the field

¹⁸⁸ The National Water Policy 2005 para 3.4.11. See Nalivata P & Matiya G 'Reaching out to the excluded: Exclusion study on water, sanitation and hygiene delivery in Malawi (2008) Water Aid report available at www.wateraid.org (accessed on 22 February 2012) pointing out that although the policy emphasises equity, it does not address vulnerable and poor groups and how they can be helped to benefit from services especially if they cannot afford the services offered.

¹⁸⁹ The National Water Policy 2005 paras 4.1.6, 4.2.16.

¹⁹⁰ See Nalivata P & Matiya G (2008) generally.

¹⁹¹ Water Resources Act No 2 of 2013 (came into force 1 Dec 2013).

¹⁹² Waterworks Act No 17 of 1995.

¹⁹³ Water Resources Act No 15 of 1969.

¹⁹⁴ Information form Ministry of Irrigation and Water Development, 30 April 2015.

of water services in Malawi. As explained in chapter one, water services in Malawi thus represents a classical example of the shift from government to governance, accompanied by a shift away from formal or legislative sources of law.

The table below presents the three main legislative frameworks and their integration of the human right to water.

Table 5.1 Summary on Legislative Recognition of the Human Right to Water

	Water Resources Act 1969	Water Works Act 1995	Water Resources Act 2013
Human right to water	Implied <ul style="list-style-type: none"> • Right to public water for domestic purposes (ss 2(1) & 6) 	Implied <ul style="list-style-type: none"> • Water utility companies to prioritise water for domestic purposes (ss19 & 21) 	Implied <ul style="list-style-type: none"> • Water for domestic uses accorded priority (ss 2(1)& 38) • Establishes institutions to implement international law on water binding on Malawi

As is evident from the table above, there was no provision in the Water Resources Act of 1969 for the human right to water. Further the Act did not place any positive duty on the State to ensure access to water; however, there was recognition of a right to use public waters on one's land or on public land for domestic purposes.¹⁹⁵ One can deduce at least the duty to respect access to water recognised under the human right to water. The Act placed a negative obligation on government not to prevent or interfere with a person's right to access public water; however, there is no positive duty to facilitate such access. It allows those with the necessary means available to facilitate such access, without having to seek a permit.¹⁹⁶ Access to water for domestic uses on ones land or public land had an implied automatic permit, whilst all other uses required an application for such permit. Domestic purposes were defined as including 'the provision of water for household and sanitary purposes and for the

¹⁹⁵ Water Resources Act 1969 s 6.

¹⁹⁶ Water Resources Act 1969 s10.

watering and dipping of stock.¹⁹⁷ Significantly, the Act included water for livelihood as part of the priority uses. At the time the recognition of water as part of the right to a livelihood arguably went further than the narrow recognition in the ICSECR of a right to an adequate standard of living which does not prioritise productive uses that are essential for poor household's income and food security.¹⁹⁸ This is therefore commendable, however as already noted, it merely placed a negative duty on government and not positive in terms of ensuring access to such water.

The Waterworks Act is the leading legislation mandating Public Utility Companies or Water Boards, as sole water service providers in designated urban areas.¹⁹⁹ There is no legislation directly providing for similar water services in rural areas. As regards the mandate to provide water in urban areas, the Act creates a positive duty on the Water Boards to prioritise water services for domestic purposes.²⁰⁰ Domestic purposes is defined as including 'every kind of ordinary household purpose' but does not include uses connected with business, garden, use of engine and machines or flushing of any sewer. The demarcation between ordinary household uses excluding water for sanitation is contrary to the human right to water, which includes water for sanitation in the definition of domestic uses. Although water for flushing of any sewer is not part of the priority mandate when supplying water, the Act specifically mandates the Water Boards to install waterborne sewerage sanitation schemes.²⁰¹ The cost of services to be rendered by the Water boards must be borne by the owner of a premise who must initiate the process by making a request.²⁰²

Rural water provision is not specifically provided for in any Act. In practice it is mainly the responsibility of the Ministry of Irrigation and Water Development (MoIWD).²⁰³ A specific departure in the MoIWD is that it is designated to supply water services to the rural

¹⁹⁷ Water Resources Act of 1969 s2(1).

¹⁹⁸ See Chapter three section 3.4.

¹⁹⁹ Waterworks Act ss. 2, 4, 6 & 20. Responsible Minister declares an area to be a water- area of a board and s/he has also power to alter, amend, reduce or extend the boundaries of a water-area.

²⁰⁰ Waterworks Act of 1995 s19. The secondary uses include water for public and businesses purposes for the extinction of destructive fires, for cleansing streets, lanes, gutters and sewers.

²⁰¹ Waterworks Act of 1995 s20.

²⁰² Waterworks Act of 1995 ss23, 24, 34,&35.

²⁰³ Baumann E & Danert K 'Operation and Maintenance of Rural Water Supplies in Malawi: Study Findings' (2008) 47 See also Matamula S 'Community based management for sustainable water supply in Malawi' (2008) paper presented at the 33rd WEDC International Conference, Ghana available at http://wedc.lboro.ac.uk/resources/conference/33/Matamula_S.pdf (accessed on March 2013). See also USAID 'Malawi Water and Sanitation Profile' available at http://www.vub.ac.be/klimostoolkit/sites/default/files/documents/malawi_water_sanitation_profile_usaid.pdf (accessed on 22 March 2014).

communities and supervise the Water Boards in urban areas.²⁰⁴ The Waterworks Act did not provide for such services, probably because it was not deemed as a viable commercial investment for the Water Boards. The commercial bases on which they operate means only areas that are viable business options are prioritised. The services offered to the urban and rural are accordingly also different and the rural areas enjoy lower levels of services and coverage compared to the urban areas. The human right to water is thus an important tool to ensure that the rural and urban poor are not neglected in ensuring access to water, as the right advocates for equity and justice. The lack of legislation regarding services in the rural areas already shows a lack of commitment to ensure access to safe water for these areas. It treats water predominantly as an economic good (private) and not a social good (public or common). Poor people's ability to negotiate or claim water is therefore an uphill task as no one is legally mandated to provide the services to such areas.

The Water Resources Act was passed in 2013 after the United Nation General Assembly and the Human Rights Council declared a human right to water and called on States to recognise and implement this right. However, no provision in the Act explicitly mentions the human right to water and defines its content. Even so, access to water for domestic purposes is prioritised and guaranteed as a right. A strong right to have access to water is implied in two provisions that make provision for reservation of water resources and abstraction of water for domestic purposes, without requirement of a permit. First, the Act establishes that the State may reserve part of or all of flow of a watercourses for domestic uses and maintenance of a healthy environment.²⁰⁵ This guarantees availability of water for meeting State's obligation of ensuring availability of water under the human right to water. The Act defines domestic uses as including 'the provision of water for household and sanitary purposes and for the watering and dipping of stock'.²⁰⁶ This is an improvement on the definition in the former Act, and even on the human right to water as espoused in General Comment 15 as it takes a broader 'domestic plus' approach to water. Second, the Act provides that a person having lawful access to water resource may abstract water for domestic use without obtaining a licence.²⁰⁷ The water abstracted must be for personal use and not for supplying to others for

²⁰⁴ Government of Malawi 'Departments of the Ministry of Irrigation and Water Development' (2013) available at https://www.malawi.gov.mw/index.php?option=com_content&view=article&id=13&Itemid=99 (accessed on 12 May 2014).

²⁰⁵ Water Resources Act of 2013 s37. See also s2(1 defining 'reserve' as quantity and quality of water required for satisfying human needs for all people and to protect aquatic ecosystems.

²⁰⁶ Water Resources Act of 2013 s2(1).

²⁰⁷ Water Resources Act of 2013 s38 (1).

their domestic use.²⁰⁸ This section is similar to the provision in the old Act that also gave permission to people with access to public waters within their land (or public land or with permission through private land) to use the water for domestic purposes. To use includes to withdraw, pump, extract, take or to divert for the purpose of using or reusing water.²⁰⁹

The automatic permit for water for domestic use is a positive step towards ensuring access to water to traditional sources. However, this falls short of the requirements under the human right to water which requires that water delivery systems must be in place for the enjoyment of the right. The new Act also grants the Minister responsible for water affairs powers to establish bodies to implement international agreements relating to water management and development.²¹⁰ Such bodies, once established, may operationalise the human right to water through management and development of water resources that prioritise universal access to water. The recognition of international agreements in this context is a positive step towards fulfilling the obligations that require legislative measures for implementation. It can only mean that the international law right to have access to water is incorporated into domestic legislation. The new Act thus provides an additional legal source for the human right to water in Malawian law (in addition to the monistic approach to old international law obligations and the Bill of Rights).

That being said, the right to have access to water, as discussed in Part one of this thesis, is a complex socio-economic right that incorporates a number of substantive and procedural obligations. The failure to specifically mention the right to have access to water in the Constitution or quasi-constitutional legislation is a serious flaw. It has potentially serious consequences for the participatory elements of the right. In line with the objective of the thesis as a whole, the rest of the Chapter turns specifically to this aspect of the Malawian legal and legislative framework. In the absence of a comprehensive statutory or constitutional definition of the right to water, the participatory dimension of the right is best understood as part of a broader right to political participation in Malawi (qualified by the comments made above about the Malawi's dominantly patrimonial political culture). Once situated in that context, the institutions within the statutory framework assume their proper significance.

²⁰⁸ Water Resources Act of 2013 s38(4).

²⁰⁹ Water Resources Act of 2013 s2.

²¹⁰ Water Resources Act of 2013 s141.

5.4 The Right to Participate

5.4.1 The Constitution

The right to participate in public life is recognised as an important aspect that ensures the democratisation of society in Malawi. The Malawian Constitution provides that every person shall have the right ‘to participate in peaceful political activity intended to influence the composition and policies of the Government.’²¹¹ Further, Constitutional principles provide that all state power is to be exercised on sustained trust through open, accountable and transparent government and informed democratic choices.²¹² According to Chirwa, the Constitutional principles envisage that public participation would subject those in power to continuous scrutiny between elections.²¹³ Principles of national policy also urge government to introduce measures that are effective and visible to guarantee accountability and transparency that will strengthen confidence and trust in public institutions.²¹⁴ These principles go further and specifically provide that women and persons with disabilities should be provided with the fullest possible opportunity to participate in all spheres of Malawian society based on equality with others.²¹⁵ Although the principles are not binding, but mere policy guides, when read together with the guaranteed right to participate, they show commitment to wide public participation in matters that affect society. The right to participate is further entrenched by recognition of such rights as freedom of association, freedom of expression, access to information and freedom of assembly that facilitate participation in public life.²¹⁶

As already stated, Malawi is party to the main international treaties and these treaties form part of Malawian statutory law by virtue of the fact that the Constitution automatically integrates pre-1994 treaties into national law. As discussed in chapter four, the right to participate is recognised in the ICCPR, ICESCR, CEDAW, CRC and the African Charter.²¹⁷ As part of the law in Malawi, the right to participate in these treaties is applicable and enforceable in Malawi. Further, the requirement espoused by the CDESCR for the participatory implementation of the right to water is an obligation that Malawi must comply with as the human right to water is binding on Malawi.

²¹¹ Constitution of Malawi 1995 s40 (1) (c).

²¹² Constitution of Malawi 1995 s12 (1).

²¹³ Chirwa DM (2011) 380.

²¹⁴ Constitution of Malawi 1995 s13(o).

²¹⁵ Constitution of Malawi 1995 s13(a).

²¹⁶ Constitution of Malawi 1995 ss32, 35, 37 & 38.

²¹⁷ See chapter four section 4.2.

5.4.2 Policy Framework

The National Water Policy recognises public participation in water resource management and development as essential in ensuring access to water for all.²¹⁸ It specifically provides that the public must have opportunity to participate in the enactment and implementation of local, regional and international obligations and agreements regarding exploitation and management water resources.²¹⁹ Further the policy requires that rural communities must be empowered to own, invest and manage their own water services.²²⁰ Women's active participation and other vulnerable persons is advanced as a specific strategy in rural water supply services.²²¹ The policy framework provides for a strong foundation for participatory water governance in line with the human right to water. Participation in international, regional and local agreements would influence policy makers in their efforts to realise the human right to water. Further recognition of the agency of rural people and the duty to enhance it, is line with the human right to water that seeks to empower otherwise excluded members of society to claim access to water as a human right. The National Water Policy provides for the establishment of a National Water Resources Authority as the institutional framework linked the creation of spaces for engagement.²²²

5.4.3 Legislative Framework

The Water Resources Act of 1969 recognised participatory water governance, however, in a limited way. First of all, it required the relevant Minister in the Ministry responsible for water to facilitate the formation, function and conduct of WUAs.²²³ Other than this indirect recognition of WUAs, the Act did not provide any other details on the WUAs and their role in policy formulation and implementation. No regulations were ever adopted regarding WUAs under this Act. The Act provided for a Water Resources Board (WRB) with the mandate to oversee the implementation of the Act, mainly as regards the granting of the water rights. Under subsidiary regulation, the WRB was required to make certain applications public to allow for public comment before deciding on the application.²²⁴ The WRB would

²¹⁸ The National Water Policy 2005 6.

²¹⁹ The National Water Policy 2005 4.

²²⁰ The National Water Policy 2005 4 -5 Local resource mobilisation is to be supplemented with public investment while community based management is to be carried out in consultation with local government.

²²¹ The National Water Policy 2005 12.

²²² National Water Policy 2005 17.

²²³ Water Resources Act of 1969 s24(e).

²²⁴ Water Resources (Water Pollution Control) Regulations No.39 of 1997 s6(1) on considering application for discharge any waste or effluent. Under Water Regulations No 40 of 1997 similar

have to publish the notice in one of the papers and allow 30 days for written objections and then an opportunity for the objector to make oral presentations.²²⁵ Once a decision had been made the RWB would have to inform the objector of the outcome.²²⁶ Interested parties to specific applications under such regulations were accorded an opportunity to influence decisions. As discussed in the previous chapter, public consultation is required specifically where there is a threat to the enjoyment of a person's or people's human right to water. Such ad hoc engagement is not enough to ensure participatory water governance. The latter must ensure wide participation, especially of the marginalised and disadvantaged, and must do so on a continuous basis.

The new Water Resources Act of 2013 has taken participation to a new level by providing for three established opportunities for public participation in water governance. First, the Act makes provision for Catchment Management Committees (CMC) where different stakeholders can take part in influencing decisions by the National Water Resource Authority (NWRA), the regulatory body under the Act.²²⁷ The function of CMCs is to advise the NWRA regarding water resource conservation, use and allocation, permits and overall management of water resources.²²⁸ The NWRA is responsible for developing principles and guidelines for water resources allocation, deciding on permits, enforcing compliance with the Act, liaise with different stakeholders on regulation and management of water resource among other things.²²⁹

The CMCs is to be composed of representatives of public bodies and regional development authorities responsible for water resources within a catchment area, representatives of farmers, the business community, non-governmental organisations within the catchment area and individuals with competence in management of water resources.²³⁰ The role of the CMCs is providing local knowledge about local resources that influence larger systems and institutions in management of resources for the benefit of the people.²³¹ This is in line with the move to make decision-making more based on bottom up strategies that bring together local users through participatory forums such as the CMCs.

requirement was provided for all applications under the Act however the qualified. Only where the WRB deemed it fit to do then it could proceed to

requirement was consult the public.

²²⁵ Water Resources (Water Pollution Control) Regulations ss7-9.

²²⁶ Water Resources (Water Pollution Control) Regulations s11.

²²⁷ Water Resources Act of 2013 s25 & 29.

²²⁸ Water Resources Act of 2013 s29.

²²⁹ Water Resources Act of 2013 s10.

²³⁰ Water Resources Act of 2013 s28.

²³¹ Water Resources Act of 2013 s29. See also Goldin JA 'Water Policy in South Africa: Trust and Knowledge as Obstacles to Reform' (2010) XX *Review of Radical Political Economics* 1-18, 3.

More important for this study, the Act also provides for the establishment of a Water Users Association (WUA) at the initiation of a grouping of water users or by government through NWRA.²³² The purpose of a WUA is to manage, distribute and conserve water, operate water services, including collection of water user charges and fees, and to represent the special interests and values arising from water used for a public purpose.²³³ The WUA is an opportunity for people to manage their own water service according to their needs and interest. It is an opportunity for participation in water governance.

Finally the Water Resource Act regulates administrative decisions within the context of water governance. The Act provides for the obligation of public consultation before a decision relating to applications or action proposed to be taken under the Act.²³⁴ Any person acting under the Act must notify the public through publication in the gazette, newspaper, and local radio about an application or proposed action being considered.²³⁵ The details of the application or proposed action must be made available to the public for inspection at a designated place. On request, further information that is in possession of the relevant person in charge of the application or proposed action must also be available to the public at a reasonable cost.²³⁶ The public must be able to give comment on or objections to the application or the proposed action within a period of no less than thirty days after the call for public consultation. The comments or objections may be written or orally presented in meeting where such comments are also invited.²³⁷ The relevant person making the decision must consider all presentations made regarding the application or the proposed action before arriving at a decision. Once a decision has been made, the public must be informed and documentation on the decision must be made available detailing the decision arrived at and the reasons for the decision.²³⁸

The Water Resources Act of 2013 therefore recognises the right to participate in water governance and provides how this can be facilitated. The next section begins by tracing the historical context within which participation in water governance emerged.

5.5 Participatory Water Governance

5.5.1 Historical Context: Shift from Government to Governance

During Malawi's colonial period, basic water services for local people were provided for by Christian missionaries while sophisticated infrastructure was reserved for the colonial population by the government.²³⁹ After independence, the government directly provided

²³² Water Resources Act of 2013 s10 s131(1) The National Water Resource Authority is the statutory body responsible for developing principles and guidelines for water resources allocation, granting water permits, liaise with different stakeholders on regulation and management of water resource among other things. See s 10.

²³³ Water Resources Act of 2013 s131(1).

²³⁴ Water Resources Act of 2013 s156.

²³⁵ Water Resources Act of 2013 s156(2) & (3).

²³⁶ Water Resources Act of 2013 s156(4).

²³⁷ Water Resources Act of 2013 s156(5).

²³⁸ Water Resources Act of 2013 s156(6).

²³⁹ Rusca M & Schwartz K (2013)114.

water services, especially in the rural areas, through a ‘supply driven approach.’²⁴⁰ This was based on an understanding that water is a basic need for human survival and for livelihoods and that it was a prerequisite for poverty alleviation. The provision of water was a humanitarian necessity contributing towards improved productivity for the poor.²⁴¹ Rusca and Schwartz also point out that for the newborn states, water services also became a political tool for asserting new roles and a new authority.²⁴² They state that the government of Malawi emphasised public funding of services to ensure that local people previously excluded from government services, received the service.

Malawi benefited from the UN International Drinking Water and Sanitation Services Decade between 1980s and 1990s in terms of financial support and investment.²⁴³ The rural sector particularly greatly benefited through the construction of gravity fed schemes that extended water access to a vast population area.²⁴⁴ The government, through donor aid, continued its prominent role in water supply through direct funding or subsidies.²⁴⁵ Although community participation was introduced, it was mainly to ensure cost sharing in the maintenance and operation of water schemes.²⁴⁶ Community participation was through contribution to the initial cost of establishing the water scheme and operation and maintenance. The type of participation advanced was what Morinville and Harris noted as involving ‘downloading of responsibility to communities, constituting a significant burden for marginalized groups’.²⁴⁷ The rural poor and marginalised groups were expected to commit both time and resources to maintain schemes that frequently broke down due to construction errors and system overload because of rapid population growth.²⁴⁸ Kleemeier holds that community participation enjoyed a limited success initially, but due to limited financial support from government to communities, up to 50 % of the facilities became non-functional.²⁴⁹ The peri-urban areas also received donor funding for construction of communal water kiosks that were

²⁴⁰ Kleemeier E (2000) 929.

²⁴¹ Kleemeier E (2000) 929 Blantyre Waterworks Act of 1962 and the Lilongwe Waterworks Act of 1987. These Acts were repealed by the Waterworks Act 1995. See also Msukwa, LH (1986) generally.

²⁴² Rusca M & Schwartz K A (2013) 114.

²⁴³ Kleemeier E ‘The role of government in maintaining rural water supplies: caveats from Malawi’s gravity schemes’ (2001) 21 *Public Administration and Development* 245-247.

²⁴⁴ See Kleemeier E (2001) 247; Kleemeier E (2000) 932-933.

²⁴⁵ Kleemeier E (2001) 246.

²⁴⁶ Msukwa L (1986) 5 – 13; Kleemeier E (2000) 932 -934.

²⁴⁷ Morinville C & Harris LM ‘Participation’s limits: tracing the contours of participatory water Governance in Accra, Ghana’ in Harris LM, Goldin JA & Sneddon C (eds) *Contemporary Water Governance in the Global South: Scarcity, Marketization and Participation* (2013) 218.

²⁴⁸ Kleemeier E (2001) 254.

²⁴⁹ Kleemeier E (2001) 250 – 256 See Kafakoma R & Silungwe C ‘Water Ownership and Access Rights in Malawi: Customs, practice and statutory laws’ (2003) Operational Research Report to Community Water, Sanitation and Health Project (COMWASH) Malawi 8.

implemented with the involvement of the people through labour contributions, maintenance works and collection of fees for water use.²⁵⁰

Due to the failing services and the declining economy and increasing poverty in the post-1980 period, the World Bank and International Monetary Fund (IMF) required government to reduce its role in service provision and to adopt structural adjustment processes.²⁵¹ Malawi joined many countries in adopting neoliberalism and advancement of market-led governance models.²⁵² Policies on water began reflecting concerns of the limited financial resources and high cost of delivering water services, while adopting cost recovery and financial viability in water services as a solution.²⁵³ For instance, the 1994 National Water Resource Management Policy and Strategies (NWRMPS) stated that water was a social and an economic good.²⁵⁴ The 1999 Water Resources Management Policy and Strategies provided that the pricing of water should aim at the reduction of government financial support to the sector over time, especially for urban areas.²⁵⁵ Furthermore, the policy transferred responsibility of water provision for urban places from Government to Water Boards that would deliver water at market value having established water as a commodity.

Amidst vigorous opposition from unions and civil society, Malawi entered into a private sector service contract with two Dutch companies, Vitens and Evides to improve water supply in low income areas within the two cities of Lilongwe and Blantyre.²⁵⁶ The companies are tasked to improve the performance capacity of the Water Board through restructuring and reinforcement.²⁵⁷ Conditional loan agreements towards the water services

²⁵⁰ Kwaule F 'Piped Supplies for Small Communities' (PSSC) Project Malawi '- final report by (1993)
²⁵¹ Kleemeier E (2001) 246. See also Chirwa D 'Privatisation of water in Southern Africa: a human rights perspective', (2004) 4: 2 *Africa Human Rights Law Journal* 224.

Bayliss K. & Hall D. 'Privatisation of water and energy in Africa' A report for Public Services International (PSI) September 2000, 1. Goldman M 'How 'water for all' policy became hegemonic: the power of the World Bank and its transnational policy network' (2007) 38 *Geoforum* 786 -800, 794
²⁵² Constitution of Malawi 1995 s13(n).

²⁵³ Kaluwa PWR (1998) 64.

²⁵⁴ The 'Water Resource Management Policy and Strategy' (1999) 4 The policy clearly recognised water as a social and an economic good. See also Chipeta L 'The water crisis in Blantyre city and its impact on women: the cases of Mabyani and Ntopwa, Malawi' (2009) 10 *Journal of International Women's Studies* 6

²⁵⁵ It was provided that the pricing of water should aim at the reduction of government financial support to the sector over time especially for urban areas. See The 'Water Resources Management Policy and strategies' 1999.

²⁵⁶ Hall D 'Malawi -water –a battle of ideas: business or solidarity?' (2010) available at <http://www.psir.org/node/15295> (accessed on 06 December 2014).

²⁵⁷ See Vitens-Evides International Malawi factsheet available at <https://www.vitens.nl/english/international/Documents/VEI%20Malawi-factsheet.pdf> (accessed on 10 December 2012).

in the two cities coupled with propaganda by the World Bank drove this arrangement.²⁵⁸ However, other than the above arrangements in specified areas, the government has continued to actively provide water supply services especially to the rural areas through the ‘District Water Supply Project’ rolled out in different phases and supported by different development partners.²⁵⁹

Other than the efforts driving privatisation, decentralisation has been the other reform effort shaping water governance. Decentralisation has the potential of ensuring that decisions are made at the lowest level. The necessary transfer of decision-making authority, financing and management to representatives and local government has not happened. These difficulties are not unique to the water sector, as there is lack of capacity at the local government level. This has resulted in central government staff being posted at the local level to administer programs; thus deconcentration rather than devolution takes place.²⁶⁰ District water officers from central government are located within local government structures, yet accountability is to the MoIWD. Secondly, because of recentralisation of political authority, local processes are bypassed as decisions are made by national government. Many of these decisions are not even made through proper government structures, but by top party officials or the President. Ministers for instance may insist that certain development programmes be implemented in one area and not another to serve political goals regardless of what relevant agencies had decided through proper channels.²⁶¹ Advancing political and personal interests are the main considerations.²⁶² Elite capture of the available spaces is another major problem in decentralisation efforts in Malawi.²⁶³ As already pointed out, the development committees entrusted to manage water services on behalf of the communities were taken over by ruling party representatives who misappropriated funds.

²⁵⁸ See Hall D (2010) pointing out that for instance in June 2000 World Bank under a ‘Malawi: privatisation and utility reform project’ paid a consultant firm to build consensus for private involvement in the two main cities of Malawi, Blantyre and Lilongwe. See World Bank Malawi: *Privatisation and Utility Reform Project* (2000).

²⁵⁹ See Malawi District Water Supply Project, Phase III, Malawi available at <http://www.watertechnology.net/projects/malawi/> (Accessed on 10 December 2014).

²⁶⁰ Water Partnership Program(WPP) Water sector governance in Africa 20.

²⁶¹ see generally See ‘Join Ruling DPP or Peris (2012) .

²⁶² WPP (2012) 21.

²⁶³ Maria Rusca, M, Schwartz, K, Hadzovic, L and Ahlers, R ‘Adapting Generic Models through Bricolage: Elite Capture of Water Users Associations in Peri-urban Lilongwe’ (2014) *European Journal of Development Research* 1.

The government and development partners have adopted the WUAs for both rural and peri-urban areas as new and different spaces for participation particularly in service provision governance.²⁶⁴ This will be the focus in the next section.

5.5.2 Free, Active and Meaningful Participation

5.5.2.1 Availability

Policy frameworks state that government holds that it has an obligation' to improve the efficiency and effectiveness of managing water supply systems in order to ensure long-term sustainability and enjoyment of water services by all Malawians.²⁶⁵ As far back as 1969, government had recognised WUAs as spaces for participation.²⁶⁶ Such spaces can either be invited or claimed spaces where the users themselves can mobilise and create spaces to solve common water problems. The creation of WUAs is a government obligation in order to 'improve the efficiency and effectiveness of managing water supply systems... [and] ensure long-term sustainability and enjoyment of water services by all Malawians.'²⁶⁷ Policy documents envisage WUAs as membership based organisations for the purpose of operating and maintaining water supply and sanitation system.²⁶⁸ According to the WUA formation guide, the process should involve wide participation through numerous public meetings where people can engage and discuss whether to form WUA or not.²⁶⁹ Further, it is required that the Constitution for a given WUA be adopted in consultation with user communities.²⁷⁰ This is essential to ensure that regardless of whether the WUA is 'invited' or 'created' it would nonetheless reflect members' aspirations, choice and influence. This is an important aspect in ensuring that participation modalities and the mandate of the WUA is tailor made to the capacities and needs of the people who participate. The willingness and ability to participate is dependent on a process of wide consultation. The WUA Constitution is an operational guide that includes the aims and objectives of the association, institutions

²⁶⁴ Other spaces such as the catchment management committees or community organisations for farmers will not be analysed as the main focus of the thesis is access to water for personal and domestic purposes through water services and management.

²⁶⁵ see Malawi Government *Water 'Users' Association Training Manual* 2009) xii See also Malawi Government 'Market Centre And Rural Piped Water Supply And Sanitation Programme: Guidelines For Establishment Of Water Users Association In Malawi'(2010) 1.

²⁶⁶ See Water Resources Act of 1969.

²⁶⁷ See Government of Malawi (2009) xii. See also Government of Malawi (2010) 1.

²⁶⁸ See also Ministry of Irrigation and Water Development(MoIWD) *Guidelines for Establishment of Water Users Association in Malawi* (2010) 3.

²⁶⁹ Government of Malawi(2010) 2.

²⁷⁰ Government of Malawi (2010) 5.

governing it including roles and functions, financial management rules and overall rules and regulations governing the operations and management.²⁷¹

The WUA can take two forms, either as a legally constituted trust under the Trustee Incorporation Act,²⁷² or as a Cooperative under the Cooperative Act.²⁷³ As a trust, a WUA is a voluntary civil organisation addressing the common need of water.²⁷⁴ A trust or association operates as a non-profit making organisation rendering water services to the members.²⁷⁵ A cooperative is a voluntary business organisation formed to meet common economic and social needs of its members.²⁷⁶ Devoted primarily to the promotion of the economic and social welfare of its members, water services would be provided under a community based business with members contributing to the working capital and sharing in profits.²⁷⁷ The government recommends the trust and not cooperative as the preferred way of managing water services. The cooperative is said to be complex and may compromise the provision of water service due to an interest in economic gain.²⁷⁸ Further, it points out that providing share capital might be problematic for low income earners. Under both of these options, WUA can enter into contracts with service providers and hold property.

Under the new Water Resources Act, WUAs are legally provided for, empowering community users to make decisions and take actions towards water supply through a system of their choice.²⁷⁹ Just as in the case of the policy framework described above, the Act recognises both as an invited and created space at the instance of the community itself. The

²⁷¹ See also Government of Malawi (2010) 5.

²⁷² Trustee Incorporation Act No. 5 of 1962. The main objective of Association is to provide services and any income made must then be reinvested in the association.

²⁷³ Cooperative Society Act No. 36 of 1998. The main objective is for co-operative to make profits that are then distributed amongst members as dividends.

²⁷⁴ Government of Malawi (2009) 3.

²⁷⁵ Government of Malawi (2009) 3.

²⁷⁶ Cooperative Act of 1998 s2.

²⁷⁷ Government of Malawi (2010) 3 Government of Malawi (2009) 4.

²⁷⁸ Government of Malawi (2009) 5-6, Government of Malawi (2010) 12 -13.

²⁷⁹ Water Resources Act 2013 S 131(1) provides as follows

An association of water users (hereinafter called an “association”) may be established by the agreement of the simple majority of a group of water users, at their initiative or also at the initiative of the Authority, for one or a combination of the following purposes—

- (a) to manage, distribute and conserve water from a source used jointly by the members of the association;
- (b) to manage groundwater resources in a Groundwater Conservation Area established under Part VI;
- (c) to acquire and operate an abstraction licence or a discharge permit under this Act;
- (d) to resolve conflicts between members of the association related to the joint use of a water resource;
- (e) to collect water user charges and fees on behalf of the Authority; and
- (f) to represent the special interests and values arising from water used for a public purpose, such as in an environmental or conservation area.

functions may include to plan, implement, operate, maintain and manage their own piped water delivery systems in an area. Through WUA, community users may establish or influence the water services they want collectively. The WUA as a concept is thus in line with the duty of the State to facilitate the right to water, first by enabling people to realise the right for themselves.²⁸⁰ The Act recognises community users' right to participate in water provisioning which can be claimed and enforced against government. Government can therefore be held to account when it fails to ensure enjoyment of this right by user communities.²⁸¹

Further, the Act provides clarity about the nature and purpose of WUAs, hence contributing towards the prevention of manipulation. Members are made aware of what the organisation is about, and government officials who are required to engage with these organisations know what is expected of them. As discussed in chapter four, there must be disclosure of the objective and scope of participation when creating space for engagement. The previous chapter emphasised that the terms of engagement must be agreed on by those who will take place in the engagement. In this regard the Act provides that a Constitution must be adopted detailing the objectives of the association, including defining the institutions governing it, the roles and functions, financial management rules and overall rules and regulations governing participation.²⁸² The Act requires that the formulation of the Constitution must be through wide participation to ensure that it reflects members' aspirations.

In making the WUAs available to diverse actors, both the Water Policy and the new Act provides for an organizational structure for WUA which includes the General Assembly (GA) as the supreme decision making organ. The policy on constituting the GA requires that two representatives, being male and female, be nominated or elected to the GA and hold office for a period of time.²⁸³ The Act requires direct participation of all water users in the GA. This is progressive, as it provides a space of decision making in the WUA which is open to every water user.²⁸⁴ The other organs within the WHU management model include the general membership, local government (to oversee service provision, mainly in rural areas), Boards of Trustees and Executive Committees.

²⁸⁰ General Comment 15 para 25.

²⁸¹ Chapter four section 4.2.

²⁸² See Water Resource Act 2013 s132(4), the model constitutions in Schedule. See also Malawi Government (2010) 5.

²⁸³ Government of Malawi (2010) . Under the Local Government Act different development areas are as development areas and these demarcations must be relied on in nominating representatives to the General Assembly.

²⁸⁴ Water Resource Act 2013 Schedule –Model Constitution of an association of water users

5.5.2.2 Accessibility

In trying to enable people to access participation spaces, the government has developed training manuals on different topics including the institutional framework of a WUA to ensure that participants make informed choice of the most appropriate organizational arrangement; principles of community based management to ensure that user communities gain knowledge and skills to effectively control or influence the development of their water system; and group organisation and gender mainstreaming to ensure solutions to gender issues and concerns.²⁸⁵ As already alluded to, gender issues are of utmost importance in WUAs, evident in policy requirements for 50:50 representation in order to ensure women's access to such processes.

Building capacities is an import aspect of accessibility. So is access to information and guaranteeing free and safe participation (as discussed in the Chapter four). Another important aspect is the provision of financial resources and technical support. The guidelines on WUA require that government must facilitate participation by ensuring financial and technical support, including policy guidelines and expert knowledge and skills to improve access and the ability of the community to function in such spaces.²⁸⁶ It is envisaged that through partnership between local governments and WUAs, such necessary resources will be accessed or made available.

5.5.2.3 Quality

This deals with the opportunity to influence decisions. The WUA is under the responsibility of the local government which has the obligation to provide services within its jurisdiction and also to formulate policy. This offers an opportunity for all stakeholders to influence policy formulation and strategies on water services through the partnership with the government. The influence can be channelled through the District Coordinating Teams (DCT) that plan and coordinate water supply and activities on a district level.²⁸⁷ The DCT is responsible for overall investment planning, management of contracting process and providing technical support while promoting community based management of water.²⁸⁸ For the purpose of facilitating participation and local development planning, there are four

²⁸⁵ Government of Malawi *Training Manual* (2009).

²⁸⁶ Government of Malawi *Market Centre and Rural Piped Water Supply* (2010) 7.

²⁸⁷ See also Local Government Act s14 that provides for service committees to discharge different functions of the local government authority.

²⁸⁸ The 'Devolution of Functions to Assemblies: Guidelines and Standards' November 2002 13.

decentralised sub-district structures recognised.²⁸⁹ First, there is the District Executive Committee (DEC) that is composed of representatives from all government line Ministries, statutory corporations and Non-Governmental Organisations (NGOs) working in the district plus heads of council directorates.²⁹⁰ The DEC facilitates natural resource management.²⁹¹ Its functions include indentifying and prioritising feasible community needs, training committees at lower levels, giving technical advice on local development and policies.²⁹² There are other committees such as Area District Committees (ADC), a representative body of Village Development Committees (VDC) working in different traditional authorities.²⁹³ The ADC is responsible for monthly general meetings for identifying and prioritising community needs for submission to DEC. It is also responsible for community resource mobilisation and supervision as well as monitoring and evaluation of projects at the Traditional Authority level.²⁹⁴

The VDC is where the communities present their priority needs and mobilise resources for participation in self-help activities.²⁹⁵ They facilitate planning and development at the grassroots level. The communication and engagement between WUA and local authorities is through these structures and hence the link and opportunity for real influence beyond the type of service level to be provided in an area. The WUA is thus a space that not only has potential to influence the services within its immediate area but may influence overall government policy though the engagement with the local government on water needs and challenges. This, in the ideal, has the potential to bring government closer to the people.

Another channel for realising such potential is the direct link between community organisations such as the WUAs and the Water Supply and Sanitation Department (Department) in the MoIWD. The Department oversees the formulation of sector policies, and the setting of technical standards and procedures for the provision of services; planning, designing and construction of water supply scheme. It is also responsible for training

²⁸⁹ Chiweza AL A (2010) 24.

²⁹⁰ Chiweza AL A (2010) 40. See Gama J, Chiunda C & Simwaka C 'Consultancy Services for linking the National and District planning and budgeting systems' (2003). Final report Environmental Affairs Department, (2010).

²⁹¹ Environmental Affairs Department, (2010).

²⁹² Chiweza AL (2010) 40.

²⁹³ Environmental Affairs Department, Malawi Clearing House Mechanism Community participation and awareness (2010) available at <http://www.chmmw.org/mwbiobiodiversity/community.html> (accessed on 12 October 2011) See also Gama, J., Chiunda, C and Simwaka, C. 2003., Consultancy Services for linking the National and District planning and budgeting systems. Final report submitted to the Acting Programme Manager, decentralisation Secretariat, Lilongwe.

²⁹⁴ Chiweza AL (2010) 42

²⁹⁵ Chiweza AL A (2010) 41

communities. Where there is an opportunity to engage, this would foster policy formulation with input from the communities.

Transformative spaces must offer a platform where water users have an opportunity to gain power and control over decisions that affect their access to water as active agents in shaping their own lives and that of their community. The WUA provides an opportunity for communities to be empowered to control and make their own decisions.²⁹⁶ Furthermore, the WUAs provide long term participatory spaces in line with a transformative agenda. WUAs are not spaces for passive beneficiaries but real opportunity to influence decisions regarding water services and also to hold government accountable.

5.5.3 Women and Participation

5.5.3.1 Women's Role and Inclusion in Governance of Water Services

Whereas the National Water Policy requires the promotion of the active participation of women and other vulnerable groups,²⁹⁷ it does not elaborate on the strategic approach in ensuring this.²⁹⁸ However, the guidelines and training manuals for the WUA formation and management go further in recognising women's roles and require that gender equality should be a major factor in electing committee members into positions.²⁹⁹ These policy documents require 50:50 representations of women and men elected as representatives to the General Assembly. Other than this specific provision of reserved representation and the call for gender equality, the training manual and guidelines for WUA formation documents also require that 'some' women should be in leadership positions.³⁰⁰

The training manual includes specific concerns about women's discrimination and their lack of participation due to their subordinate position in the community and household. Misrecognition of women as inferior to men is indeed a prevailing problem in Malawi as reported by Government to the UN Committee on the Elimination of Discrimination against Women.³⁰¹ It is stated that this results in discriminatory treatment at all levels in society,

²⁹⁶ Government of Malawi *Training Manual* (2009) 31 See also Government of Malawi 1993

²⁹⁷ National Water Policy 2005 11 - 12 paras 6.2.1.6, 6.2.2.7

²⁹⁸ WaterAid *Reaching out to the excluded Exclusion study on water, sanitation and hygiene delivery in Malawi* 2008 13.

²⁹⁹ Government of Malawi (2010) 5 Government of Malawi *Training Manual* (2009)13.

³⁰⁰ Government of Malawi *Market Centre and Rural Piped Water Supply* (2010) 5 Government of Malawi *Training Manual* (2009)13.

³⁰¹ See UN Committee on the Elimination of Discrimination Against Women (Committee on CEDAW) *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women Sixth periodic report of States parties*

beginning in the family and public life; restricting women's access to resources, rights and opportunities to well being. Harmful cultural practices and stereotypes against women are the main source of misrecognition of women.³⁰² The Malawi Human Rights Commission catalogues cultural practices that promote the notion of inferiority of women and thus misrecognition, including rites of passage involving practical sex orientation, funeral rites requiring widows to have sex with a man a week after her husband's death, inheritance laws, female genital mutilation and forced marriages.³⁰³ Such practices infringe on the rights to health, education, liberty and dignity. They also entrench subservience of women to men and thereby hinder them from having the status of full partners in social interactions.³⁰⁴ Most importantly they impact negatively on the realisation of the right to water.

Economic challenges have also been identified as contributing to discrimination and undermining women's ability to exercise their right to participate in society, in general, and water governance, in particular.³⁰⁵ In Malawi, women, especially rural women, are subject to deprivation, exploitation and gross disparities in wealth leading to high levels of poverty which in turn undermine their ability to take up spaces of participation and influence society.³⁰⁶ For instance, although subsistence agriculture is predominantly a women's domain (with estimation that 80 percent of food producers and 70 percent of agriculture workers are women) these women earn less (78 percent) than their male counterparts.³⁰⁷ Further, there are major disparities and discrepancies in women's access, control and ownership of land.³⁰⁸ Land and enjoyment of property is mainly through men who ultimately benefit from exploiting and abusing this position to the disadvantage of women.³⁰⁹ It is

:Malawi 20 October 2008, CEDAW/C/MWI/6 (CEDAW Concluding observation on Malawi state report) See also Committee on CEDAW *Consideration of reports submitted by States parties under article 18 of the Convention* :Malawi 15 July 2014, CEDAW/C/MWI/ (CEDAW Concluding observation on Malawi state report).

³⁰² CEDAW Concluding observation on Malawi state report (2014) 9-10 See also Government of Malawi *Report to African Commission on Human And Peoples' Rights: Implementation of the African Charter on Human and Peoples Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women 2005-2013* (2014)88 para 189.

³⁰³ The Malawi Human Rights Commission 'Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi' (2007) 10 -11, 77-92 available at http://www.medcol.mw/commhealth/publications/cultural_practices_report.pdf (accessed on 22 October 2013).

³⁰⁴ Fraser 'Rethinking justice' (2000)3 *New Left Review* 107113 -114 see also Fraser N *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (1997) 15

³⁰⁵ Fraser N *Feminist Politics in the Age of Recognition* (2007) 25, 30.

³⁰⁶ Committee on CEDAW *Malawi state report* Malawi (2014) 28 para 127.

³⁰⁷ Government of Malawi *Gender and Development Index* (2011) 24.

³⁰⁸ Kathewera –Banda M, Kamanga-Njokho V , Malera G and others 'Women's access to land and household bargaining power: a comparative action research project in patrilineal and matrilineal societies in Malawi' 2011.

³⁰⁹ CEDAW Concluding observation on Malawi state report (2014) 32 para 148.

common for women to lose property to men through property grabbing upon death of a spouse or father or upon dissolution of marriage.³¹⁰ The Malawi Government has reported that women face discrimination in employment as well due to their maternal role, losing employment or benefits due to pregnancy.³¹¹ Although female headed households are more likely to require start-up capital than male headed households, women often lack access to capital due to limiting factors such as requirement of collateral and security guarantees and the involvement of a male reference point in order to give full access to financial facilities.³¹² The limited access to capital, property and employment means that women remain in the lower cadres of society, reducing their negotiating and bargaining power and visibility where it counts.³¹³

Women are underrepresented in most relevant decision making bodies in society, including the National Assembly.³¹⁴ On top of the factors discussed above, most political institutions remain patriarchal and often practice measures ‘that although seemingly fair, are intrinsically biased.’³¹⁵ For instance, the requirement by law that members of Parliament should be able to read and write would greatly affect women who have lower literacy rate than men. The way a campaign is conducted (requiring one to invest a lot of money in order to ensure votes through hand outs) greatly affects women who are economically or financially more disadvantaged than men.³¹⁶ Although in water management platforms, women’s role is held as important, the lack of clear and specific strategies to enhance women representation may contribute to low participation of women in these spaces.

5.5.2.2 Measures to Substantive Equality

The Constitution recognises both substantive and formal equality and particularly the need to obtain gender equality through full participation of women in all public affairs.³¹⁷ Firstly,

³¹⁰ CEDAW Concluding observation on Malawi state report (2014) 32 para 148 see also The Women and Law in Southern Africa Research and Educational Trust (WLSA-Malawi) & The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) ‘Parallel Report To The United Nations Human Rights Committee: Malawi’ 2014.

³¹¹ CEDAW Concluding observation on Malawi state report (2014) 21 para 97.

³¹² CEDAW Concluding observation on Malawi state report (2014) 27 para 124 Government of Malawi *State report to African Commission* (2014)106 para 229.

³¹³ CEDAW Concluding observation on Malawi state report (2014) 34 para 163.

³¹⁴ CEDAW Concluding observation on Malawi state report (2014) 7 para 18.

³¹⁵ CEDAW Concluding observation on Malawi state report (2014) 7 para 18.

³¹⁶ This involves posters, billboards, advertisement in media, door to door canvassing, motorcades and cash or gift distribution. See Musuva C ‘Chapter 7: Malawi’ in Kadima D and Booyesen S (eds) *Compendium of Elections in Southern Africa 1989 – 2009: 20 years of Multiparty Democracy*(2009) 231-233.

³¹⁷ Constitution of Malawi 1995 ss 12, 13 20 & 24.

fundamental principles underlying the Constitution provide for equal status of all persons before the law in section 12(v) and specifically gender equality in section 13.³¹⁸ All policy is required to strive towards gender equality through participation of women on a basis of equality with men in all public affairs, implementation of non-discrimination principles and other necessary measures and address social issues affecting women such as domestic violence, economic exploitation and rights to property.

Section 20 guarantees equality by prohibiting discrimination, guaranteeing protection of the law and establishing an obligation to take positive measure to eliminate inequalities.³¹⁹ It provides as follows:

[d]iscrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.³²⁰

In the *Marinho v SGS (Blantyre) Pvt Limited*, the High Court explained that:

[i]t must also be born in mind that any type of discrimination is forbidden. Its practice must really have been detested by framers of the Constitution that right in the Constitution they provided for two things that underline the attitude that this court must have when faced with this sort of matter. First, the Constitution makes the right non-derogable. Secondly, the Constitution allows affirmative action by legislators to punish violators and to pass laws that promote respect for equality.³²¹

For the State to address inequalities in society as provided for above, it must go beyond formal equality and treating people the same.³²² Substantive equality must be adopted and pursued. This has been recognised in *R v Chinthiti (I)* where it was stated that this section ‘does not require mere formal or mathematical equality, but a substantial genuine equality in fact.’³²³ It was further explained that ‘to achieve true equality, it will frequently be necessary

³¹⁸ Constitution of Malawi 1995 s12 provides for Constitutional principles while section 13 is principles of national policy.

³¹⁹ Chirwa DM (2011) 142.

³²⁰ Examples of cases include *O Asuputo Marinho v SGS Blantyre (Pty) Ltd* Civil cause No 508 of 1996 (unreported where the plaintiff was not promoted at work due to her race and sex) see also *Banda vs. Dimon (Malawi) Limited* (2008) Malawi Labour Law Reports (MLLR), 92, *Phiri vs. Smallholder farmers Trust* (2008) MLLR, 482 and *Chisowa vs. Ibrahim Cash 'n' Carry* (2008) MLLR, 385. In *David Nyangulu vs Export Trading Co. Ltd* Civil Cause No. 514 of 2007(Unreported) & *Banda vs. Lekha* 2008) MLLR, 338 held that HIV status is a prohibited ground under other status

³²¹ *Marinho v SGS (Blantyre) Pvt Limited*, Civil Cause No. 508 of 1996, unreported.

³²² Chirwa DM (2011) 151.

³²³ *R v Chinthiti & Others (I)* [1996] MLR 244, 299 -300 (HC).

to make distinctions.³²⁴ The distinction must be justified for otherwise it will be contrary to freedom from discrimination recognised in the section. The freedom from discrimination entails that any form of distinction between people must be justifiable and must not be based on prohibited grounds.³²⁵ The section above strikes a balance between ensuring equality and the prohibition of discrimination. The law must not discriminate but it must also address the disadvantage suffered by specific groups.³²⁶

Women's rights are specifically promoted in section 24, which reemphasises the equal status of women and men before the law and prohibits discrimination based on gender. Women's right to hold property and freedom from discriminatory practices based on law or action are also guaranteed.³²⁷ The government has adopted several statutes addressing harmful cultural practices and other gender-based violence that violate women's rights and gender equality. These Acts include the Protection against (Prevention of) Domestic Violence Act,³²⁸ the Deceased Estate (Wills, Inheritance and Protection) Act,³²⁹ and the Gender Equality Act.³³⁰ The latter Act is of particular relevance here. The Act was adopted to ensure equal integration, influence, empowerment, dignity and opportunities for men and women in all functions of society.³³¹ It also provides for the prohibition and redress of sex discrimination, harmful practices and sexual harassment. The Act prescribes treating a person less favourably based on their sex with the effect or purpose of impairing or nullifying their recognition, enjoyment or exercise of rights and fundamental freedoms.³³² This amounts to sex discrimination which is an offence punishable with a fine of one million Kwacha (approximately US\$2 000) and imprisonment for five years.³³³ Similarly harmful practices and sexual harassment are offences with one million kwacha fine and five years imprisonment.³³⁴ The Act also provides for equal opportunities in employment and establishes quotas for employment in public service stating that no less than 40% and no

³²⁴ *R v Chinthiti & Others (I)* 299.

³²⁵ Constitution of Malawi 1995 s 20 (1).

³²⁶ See chapter four section 4.3.3.2.

³²⁷ Constitution of Malawi 1995 s24 (1)(a) &(b).

³²⁸ Protection against (Prevention of) Domestic Violence Act No 5 of 2006.

³²⁹ Deceased Estate (Wills, Inheritance and Protection) Act No 14 of 2011.

³³⁰ Gender Equality Act No 49 of 2013.

³³¹ Gender Equality Act.

³³² Gender Equality Act s4(1)..

³³³ Gender Equality Act s4(2).

³³⁴ Gender Equality Act ss5 &6 Harmful practice is defined as a social, cultural or religious practice Which on account of sex, gender or marital status undermines the dignity, health or liberty of a person or result in physical, sexual, emotional or psychological harm –s3.

more than 60% of the either sex should be employed.³³⁵ None compliance with employment quotas can be challenged in court to compel a recruiting authority to observe them.³³⁶ Furthermore, the Act establishes equality in access to education and training including equal access to scholarships.³³⁷ Finally, to ensure wide application and observance of these laws, the Act provides for civic awareness programmes enlisting traditional leaders and NGOs to promote gender equality in all spheres of life.³³⁸ These provisions, if implemented would contribute to recognition of women as equal members in participatory forums, redistribution of wealth through better access to employment and with better education better representation in different forums through knowledge and skills acquired.

As discussed above, Malawi has also committed to international instruments on gender equality, including CEDAW, the Optional Protocol to the CEDAW, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, the Beijing Declaration and the Platform for Action and the Southern African Development Cooperation (SADC) Declaration on Gender and Development. The CEDAW forms part of the law in Malawi while some of the provisions of the Women's protocol have even been included in the new gender legislation.³³⁹ The Government's commitment to discharging its obligations under these instrument is evident through submission of periodic progress reports to the relevant monitoring bodies of the instruments The CEDAW and African Protocol together with the other - although not binding - laws, act as a guide to policy and to all other efforts made to ensure gender equality and the enjoyment of women's rights.

Other than the legislative measures, campaigns and training to ensure cultural modification and women's empowerment the government has also put in place other positive measures to contribute to the goal of promoting equality of men and women. Such measures include social cash transfers to reduce poverty among the ultra-poor, financial support to aspiring women members of parliament in order to increase women leadership in politics, provision of subsidised farm input such as fertilisers to address lack of equal access to resources for

³³⁵ Gender Equality Act s 11.

³³⁶ Gender Equality Act s12.

³³⁷ Gender Equality Act Ss14 & 15.

³³⁸ Gender Equality Act s 21.

³³⁹ See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) Adopted 13 September 2000 and entered into force 25 November 2005, arts 14; Gender Equality Act of 2013 s19 .

farming and positive discrimination in allocating bursaries for education and selection into higher education institutions.³⁴⁰

Recognition, redistribution and representation are advanced by the government of Malawi through the different mechanisms discussed above. However even within this progressive constitutional order, impressive legal mechanisms and positive action towards equality of men and women, discrimination against women persists and their exercise of agency is inhibited.³⁴¹

5.6 Conclusion

The Constitution, national legislation and policy on water do not explicitly recognise the right to water. However, through derivation, a human right to water can be implied in other human rights recognised in the Constitution, especially through the right to development, the right to life and the right to human dignity. Furthermore, through international law incorporated as part of the domestic law, Malawi is bound to recognise and implement the right to water recognised in the ICESCR by the CESCR and derived from other human rights. Malawi's national and policy framework demonstrates recognition of the human right to water through prioritising water for domestic purposes and provisions couched in terms of human rights to water standards. An explicit and comprehensive formulation of the right to water would better advance the enjoyment of the human right to water. Such a statutory and constitutional right could readily be relied on in court to hold government accountable. This would greatly enhance human rights litigation and the realisation of the right to water in all its complexity.

The right to participate is recognised in the Constitution and in water governance. Community users are empowered to manage their own water services through water user organisations. Although women's role is recognised as essential, their exercise of agency may be hindered because of misrecognition, maladministration and misrepresentation in spite of numerous government measures to address these injustices. The Constitution has progressive gender equality provision and this has been translated into different laws addressing discrimination of women in society. Further, the government has undertaken specific positive measures remedying social problems that exacerbate women's subordinate position in society. Despite these measures, women continue to face discrimination both in access to resources and in opportunities to participate in public affairs. However, in water

³⁴⁰ Malawi State report to African Commission 29 , 104.

³⁴¹ See Malawi State report to African Commission 2014 and Malawi CEDAW State report (2014) both point to major challenges in making progress in this regard.

provision management, government must adopt specific measures that enable women to take up opportunities to influence decisions.

The National statistics on access to water reflect a wide enjoyment of the right to water as an estimated 86 percent of people have access to improved water facilities. The participatory forums have the potential to advance agency and empowerment however, due to their impulse to operate under principles of neoliberalism, the focus on using them as mini Water Boards may inhibit this potential especially in the peri-urban areas. I have considered the context for participatory practices in Malawi and the following chapters will analyse how the potential for participatory spaces work in practice.



Chapter Six

Field Research on Community Participation in Water User Organisations

6.1 Introduction

The previous chapter demonstrated that the human right to water is binding on Malawi, despite the fact that it is not explicitly provided for in the Constitution. As a legally binding right, government can be called to account and justify its policies with reference to the goals, norms and standards embodied in this right. Government has the obligation towards the people of Malawi to ensure that everybody has equitable, secure and sustainable access to water services. However, as demonstrated in the previous chapter, rural and peri-urban areas face numerous challenges in accessing water particularly infrastructural and distributional problems.

Policy frameworks and government initiatives have established participatory approaches to water governance to address some of these problems. Policy frameworks further recognise the importance of enabling women and other marginalised groups to take part in decisions as a means of ensuring equitable, secure and sustainable access to water services. Water User Associations (WUAs) have thus been adopted as participatory, bottom-up spaces for communities to influence and contribute to governance of water services. They offer hope as spaces for gaining power and voice for rural and peri-urban areas otherwise excluded from decision making processes and benefit from governance of water services.¹ However the previous chapter also highlighted that entrenched cultural imperialism and a legacy of neopatrimonialism result in gender inequality, weak public accountability, poor participation and, in general, a lack of oversight and transparency in the way that the government operates. This is notwithstanding the strong constitutional guarantees for an open, accountable and transparent government that will take into account the views of all individuals in promoting their own welfare and development trajectory.²

How WUAs operates and whether and in what ways they are able to foster the opportunity for communities to gain power over decisions that affect the enjoyment of the human right to water is the focus of this chapter. The chapter will thus explore participatory governance in water services in WUAs in particular. The field research takes place in several communities

¹ Chapter five section 5.2.4.

² Constitution of Malawi of 1995, ss 12 & 13, see Chapter 5 generally.

in rural and peri-urban areas in Malawi, with a focus on agency, particularly the agency of women in WUAs. This is based on the understanding that a participatory right to water provides an environment in which, in the ideal, marginalised communities are able to hold their government accountable when considering decisions around policy and services. In the case of this study, I also consider whether and what ways the human right to water is able to nurture the more ‘intangible’ attributes of human wellbeing such as equality and agency. The chapter commences with a presentation of the methodological approach to the field research which was conducted in several phases as a multi-methods design was adopted. The chapter then presents findings from the field. It begins with a presentation on the findings regarding knowledge about the human right to water in general and the challenges that the communities face in accessing water. This is followed by a more specific look at the participation experiences and the factors contributing to agency and voice in the water user organisations. The discussions on the findings are lodged within the context of participatory practice and it considers the way in which this practice is – or is not – able to promote human well-being.

6.2 Research Process

6.2.1 Stages in the Research



The research process had two clearly distinguishable stages or phases.

WESTERN CAPE

6.2.1.1 Phase One: Human Rights, Gender and Water Governance Research Project

As a young lecturer in University of Malawi, Faculty of Law, I was privileged to work as a research assistant in and benefit as a LLD candidate from the Human Rights, Gender and Water Governance Research Project. The research project, with funding from the Norwegian Research Council, explored water governance from a human rights and gender perspective through empirical case studies from South Africa, Zimbabwe, Malawi and Kenya from 2010 - 2013. Having conducted a pilot study on water governance structures and access to water in underserved communities, an interest to understand women’s participation and specifically agency in realising the human right to water was ignited. The pilot study was undertaken between March and April 2011 through documentary review and interviews with government, non-government organisations (NGOs) and local water users that tapped into perceptions and practices in local water governance. This preliminary field research involved 35 people, 20 women and 15 men through semi-structured individual face-to-face interviews (2) and focus group discussions (7). Through this research the tensions between the ideal of democratic participation in water governance and its practical application became clear. I

was particularly interested in the gender dimension of this research. Further research was required to investigate the intersection between the human right to water, gender equality and participation through decentralised water governance mechanisms.

6.2.1.2 Phase Two: Progressive Uncovering of the Human Right to Water and Participation through Grounded Research

Three main things happened between 2011 and 2015. First, a critical review and synthesis of literature on the human right to water and participatory water governance from international, regional and national law was undertaken. From the literature review, a human right to water was established, entitling everyone, especially the disadvantaged communities, to a just allocation of water as a legal claim. Further, a human right to meaningful participation was also established as a core component of the right to water. The objective of meaningful participation is to empower disadvantaged communities to assert themselves in water policy making and to influence decisions about water services that impact directly on them.

A field research visit was undertaken from August to October 2012 and provided most of the data for this research. Two subsequent field trips were undertaken in December 2012 to January 2013, and April to May 2015, as follow up visits. The aims of these further visits were to collect further data, disseminate the findings to prior participants in the research, and to validate the findings through community members. During the three field visits semi-structured individual interviews (9) and focus group discussions (12) were conducted with different respondents, as presented in the table below.

Table 6.1 Categories of Respondents

Community	No.	External Agencies	No.	Women (%)
Leaders	3	Government officials	6	60
Water users	34	Utility Company officials	2	
WUA representatives & employees	48	Nongovernmental organisations	3	

Another source of data was the attendance of conferences or workshops (3), colloquiums (6) and seminars (2). These academic events provided an opportunity to present my research and

consult with or exchange ideas with different academics and professionals on a wide range of issues concerning human rights, water governance and research experience. For instance, attending the 6th Global South Doctoral Workshop held in November 2011 and the Gender, Human Rights and Water Governance Conference in September 2013, helped me engage and learn from other scholars and experts doing research on water. These conferences lodged my study in broader debates concerning the human right to water. There was also an opportunity to consult with experts in the field doing similar research and this encouraged me to look at new issues as and when they emerged.³ A validation workshop in one of the communities also provided a valuable source of feedback.

6.1.2 Methodological Approach

Qualitative research is well suited to an inquiry that aims at understanding the nuances of community participation within water user organisations and the consideration of opportunities that promote agency especially the agency of women. Denzin and Lincoln define qualitative research as a multi-method approach for studying natural settings so as to better interpret a phenomenon in terms of the meanings people bring to them.⁴ They further state that ‘it involves the studied use and collection of a variety of empirical materials... that describe routine and problematic moments and meaning in individuals' lives.’⁵ Creswell states that it is a process of inquiry into a social or human problem which involves the collection of data based on multiple methods and making sense of it through complex inductive or deductive logic.⁶ The application of these approaches enables a researcher to investigate the meaning of a social phenomenon through people’s views, perspectives, connected expectations as well as their lived experiences and behaviours within their natural settings.⁷ Qualitative research enables the researcher to better understand participants through proximity with them, allowing for what Geertz calls ‘thick description’; something that

³ Creswell JW *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (2013) 196

⁴ Denzin NK & Lincoln YS ‘Introduction: The Disciplining practice of qualitative research in Denzin NK & Lincoln YS (eds) *The SAGE Handbook of Qualitative Research* (2011) 1, 3. See also Denzin NK & Lincoln YS ‘Introduction: The discipline and Practice of Qualitative Research in Denzin NK & Lincoln YS (eds) *Strategies of Qualitative Inquiry* (2008) 1, 3.

⁵ Denzin NK & Lincoln YS ‘The disciplining practice’ (2011) 3-4.

⁶ Creswell JW *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (2013) 44 - 45.

⁷ Bryman A *Social Research Methods* (2012) 408; Savin-Baden M & Major CH *Qualitative Research: The Essential Guide to Theory and Practice* (2013) 11; Flick U *An Introduction to Qualitative Research* (2014) 12-13; Strauss A & Corbin J *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (1998) 11.

quantitative research cannot achieve.⁸ It also allows for greater spontaneity and adaptation during interaction. Participants are allowed to respond in their own words and the researcher has an opportunity to probe for further information or redirect the interview in order to gather pertinent data.⁹

The reliance on multi-methods or triangulation in qualitative research has several additional advantages. Triangulation results in rich and deep data which is important when seeking answers for research questions.¹⁰ It adds rigor, breadth, complexity, richness and depth to the inquiry by offsetting weaknesses that might emerge from one particular method by using another method as validation or simply to gather new data.¹¹ There is corroboration of information as different information is gathered from the various methods resulting in enhanced knowledge and understanding on a given issue.¹² It does not, however, result in validity and objectivity of interpretation of data because of the subjective lens of the researcher. Objectivity in qualitative research is impossible.¹³ This is a weakness particularly, but not only, of qualitative research where it is difficult to demonstrate, assess and maintain rigor due to the subjective nature of the inquiry.¹⁴ Researcher's subjectivity, however, is mitigated through the rigour of triangulation and reliance on evidence to support conclusions.¹⁵ In any case, a researcher's subjectivity, either because of assumptions framed within a particular discipline and expertise, theoretical proclivities or/and research interests are part of the research process and form a point of departure.¹⁶

By keeping a field diary with recordings about the research process, personal intuitions and biases, I was able to be self-critical and consider whether and in which ways my own, personal lense could be distorting evidence.¹⁷ This period of reflection after each contact with

⁸ Geertz C *The Interpretation of Cultures: Selected Essays* (1975) 7; Bryman A *Social Research Methods* (2012) 408. See also Flick U *An Introduction to Qualitative Research* (2009) 13.

⁹ Bryman A (2012) 408.

¹⁰ Flick U 'Triangulation in Qualitative Research' in Flick U & others (eds) *A Companion to Qualitative Research* (2004) 179. See also Denzin NK & Lincoln YS (2008) 7.

¹¹ Denzin NK & Lincoln YS (2008) 7.

¹² Flick U (2014) 14; Babbi ER *Introduction to Social Research* (2010) 287.

¹³ Denzin NK & Lincoln YS (2008) 7.

¹⁴ Strauss A & Corbin J (1998) 43; Flick U (2004) 179.

¹⁵ Bryman A *Social Research Methods* (2012) 405. See Denzin N & Lincoln YS (2011) 3.

¹⁶ Strauss A & Corbin J (1998) 44-46; Charmaz K 'The search for meaning: grounded theory in Smith J A, Harre R, Van Langenhove L (eds) *Rethinking Methods in Psychology* (1996) 27, 33.

¹⁷ Charmaz K (1996) 27-33. See also Charmaz K 'Grounded theory: objectivist and constructivist' in Denzin N & Lincoln YS (eds) *Strategies of Qualitative Inquiry* (2003) 256.

¹⁷ Creswell JW (2013) 182; Savin- Baden *Qualitative Research* (2013) 75 – 76 identifying three types of reflections that were relied on : prospective reflection involved meditation before meeting respondents, considering how I would conduct myself, the approaches and methods of getting data within the particular context. During the interviews and field trips, reflections as they occurred were recorded as

the field, also provided an opportunity to put aside a priori assumptions and biases, so as to be more attentive to participants' accounts.¹⁸ The reflections and observations in the field diary provided another source of data where changing thoughts and ideas, formed through field contact, were adjusted, refuted or confirmed.¹⁹

Qualitative methods that were applied included semi-structured face-to-face interviews, participant observation during community meetings and other opportunities to observe the everyday reality of respondents. It also included secondary data collection in the form of a review of documents which was part of the strategy to get real and credible data, so that reliable data could be used to answer research questions. Despite the advantages of qualitative methodologies as discussed above, there are other limitations – not unique to qualitative work – in terms of the expense and time spent in gathering information from respondents. After enrolling as a doctorate student at the University of Western Cape, South Africa, and planning field work, it was clear that time in the field would be restricted because of available funds and time which did not allow for long periods in the field in Malawi.

The aim of the field work was to collect rich data that would inform the research regarding relations of power, inclusion/exclusion and voice in governance of water services. Charmaz defines 'rich data' as detailed, focused and as providing solid material that contributes to a significant analysis.²⁰ She further stated that rich data reveals the participant's views, feelings, intentions, and is able to consider the context and structures within which respondents lived.²¹ The fieldwork, therefore, relied on a pragmatic grounded approach that would reflect on how social structures and processes influence participation and agency in water user associations.

Grounded theory was first developed by Glaser and Strauss who noted that research in social science was limited to ideas of early theorists.²² They proposed the discovery of theory through a general method of comparative analysis of data, before confronting existing

part of the field notes. Similarly observations and ideas or thoughts emanating from the interactions and activities were noted. Finally after a field day, retrospective reflection on the performance of the day, missed opportunities and further issues to pursue were considered.

¹⁸ Starks H & Trinidad SB 'Choose your method: a comparison of phenomenology, discourse analysis, and grounded theory' (2007) 10 *Qual Health Res*:1372, 1376.

¹⁹ Cutcliffe JR 'Methodological issues in grounded theory' (2000) 31:6 *Journal of Advanced Nursing* 1476- 1484.

²⁰ Charmaz K *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (2006) 14; Charmaz K (2014) 23.

²¹ Charmaz K (2006) 14; Charmaz K (2014) 14.

²² See Glaser B & Strauss A *The Discovery of Grounded Theory* (1967) 11.

literature on the topic.²³ However, when explaining how to identify new concepts and hypotheses or relevant data, these authors acknowledged the need to rely on useful existing theoretical terms.²⁴ Glaser has remained faithful to a purist grounded theory approach, emphasising that theory should emerge from the data and not vice versa. This is achieved by ignoring literature in the study area, until the emergence of theoretical categories and propositions from empirical data. Strauss, however, also using grounded theory, takes a more liberal view on a use of literature.²⁵ He recognises the researcher as a social being whose previous experiences form part of the data and proposes that literature can be a base of gaining perspective on data.²⁶ This pragmatic grounded theory guided and informed this study.

For a novice researcher, pragmatic grounded theory is helpful in emphasising the need for rich data.²⁷ It provides a systematic method for collecting and analysing data in order to explain and predict a phenomenon of interest, especially where a new point of view on a familiar topic emerges.²⁸ It elicits stories through semi-structured interviews and probing that elaborates on details of the lived realities.²⁹ The semi-structured questionnaire gives space for adjusting and adding – or ignoring – some of the questions if they do or do not fit a particular respondent. The outcome is that spontaneous narratives emerged; in particular a verbal protocol - especially from women respondents - where their concerns, fears, frustration or achievements in the realm of water management, were brought to my attention.³⁰

Atkinson, Coffey and Delamont state that a ‘woman interviewing women, [is] aligned with a distinctive sensibility for women's lives and experience, [and] confers an especial affinity between feminism and qualitative research.’³¹ The theoretical frame of feminism was helpful in directing certain questions and in picking up gestures and expressions that women were

²³ Glaser B & Strauss A (1967) 37.

²⁴ Glaser B & Strauss A (1967) 46.

²⁵ Strauss A & Corbin JM *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (1990) 56 stating that ‘all kinds of literature can be used before a research study is begun...’ See also Charmaz K (2014) 7-12 detailing the development of grounded theory both from a purist and pragmatist view.

²⁶ See Strauss A & Corbin JM (1990) generally. See also Jeon YH The application of grounded theory and symbolic interactionism (2004) 18 *Scandinavian Journal of Caring Sciences* 249-256.

²⁷ Charmaz K (2006) 2.

²⁸ Milliken, P *Grounded theory* in Salkind N (ed) *Encyclopaedia of Research Design* (2010) 549-554.

²⁹ Charmaz K (2014) 26.

³⁰ See Atkinson A, Coffey A & Delamont S *Key Themes in Qualitative Research: Continuities and Changes* (2003) 80.

³¹ See Atkinson A, Coffey A & Delamont S (2003) 80 See also DeVault ML & Gross G ‘Feminist interviewing: experience, talk, and knowledge in Hesse-Biber SN (ed), *Handbook of Feminist Research : Theory and Praxis* (2007) 173, 174.

sharing. Questions were asked about gender equality, everyday experiences and viewpoints of women.³² I was particularly attentive to expressions of inequality, power imbalances or expressions of positive attributes that emerged as women were able to level the playing fields and where, as a consequence, there was a space for expressions of pride, respect and dignity.³³

6.2.3 Site of Investigation for Primary Data Collection and Analysis

Four communities were selected for the study, two in the rural areas and two in the peri-urban areas. Rural and peri-urban areas both represent underserved areas. These sites were chosen so as to contextualise debates around a human right to water that are particularly pertinent when in places where there is no, or only limited, access to water. The sites were also selected because there is differentiated access to water through water points. These sites are also ideal when considering issues of inclusion/exclusion because these are places where women meet and where they are, or are not, involved in decisions within water user associations (WUA) and where participatory governance is very relevant. The particular WUAs included in the study, Zomba East, Chagwa, Mtandile and Nkolokoti-Kachere, were chosen not only because these are among the forerunners but because they also have unique characteristics relevant to the study. Accessibility, budget limitations, willingness of participants and the factor of time also influenced the choice of the sites.

Before approaching the field, I established contact with key informants who could provide preliminary data and, more importantly, provided a point of entry into the four communities where this study took place. I used the snowball method to identify stakeholders. In line with ethical requirements, each interview began by presenting the research and introducing myself. I also informed the respondents that they could stop the interview at any point if they felt uncomfortable or were unwilling to answer a given question. The respondents were told that the interview is entirely voluntary and that their identity would not be disclosed. This furthered the feminist goal of promoting women's interest by ensuring that women were able to discuss freely the institutions and processes that shaped their experiences without possible

³² See DeVault ML & Gross G (2007) 174 -178, arguing for privileging women's experience through iterative interviewing.

³³ Terry M 'Feminism, gender and women's experiences: research approaches to address postnatal depression' (2014) 13 *International Journal of Innovative Interdisciplinary Research* 19, 24-25.

reprisal.³⁴ The respondents were thus treated as subjects and not merely object of this research.³⁵

Data obtained was first coded as part of the process of analysis. The narratives were analysed using the technique of keywords and phrases that resonated with certain aspects of the research or appeared repeatedly when subjected to a comparative analysis. Observations were also categorised and organised. Shared characteristics, differences and similarities across the different WUAs were captured. The different WUAs in the study are situated in different backgrounds and contexts as presented below.

6.2.3.1 Zomba East

Zomba East is a rural community located around Songani, a few kilometres from the former capital city of Malawi, Zomba. It has a gravity fed system (GFS) established in 1978 to provide piped water. With a growing population and lack of institutional capacity for repairs and maintenance, the functionality of this system declined considerably over time. In 2009 only 11 out of the 852 taps initially established were working.³⁶ The Zomba East Water User Association (ZAEWUA) was established by the Ministry of Irrigation and Water Development (MoIWD) under the National Water Development Programme (NWDP) in 2009.³⁷ Within the framework of the NWDP, the government undertook rehabilitation and construction works on eight rural piped water supply schemes and established WUAs as a new approach to sustainable water service provision. The ZAEWUA is among the first WUA alongside seven others that were set up as government initiatives to create participatory spaces and to improve water services in rural areas.³⁸ ZAEWUA has a targeted population in Zomba of 150 000 – 200 000 people across 36 villages that are governed by four Traditional

³⁴ DeVault ML & Gross G (2007) 187 warning of 'erasure of their existence' due to use of pseudonyms.
³⁵ DeVault ML & Gross G (2007) 187. See also Maynard M' Methods, practice and epistemology: the debate about feminism and research' in Maynard M & Purvis J (eds) *Researching Women's Lives Form A Feminist Perspective* (1994) 23. See also Bryman A (2012) 379.

³⁶ See Zomba East Water User Association (ZAEWUA) *Business Plan* (2009) 10.

³⁷ The National Water Development project in the Ministry of Irrigation and Water Development (MoIWD), receives grants from different development partners to finance development of the country's rural and urban water supply activities with the aim of improving national water resource management and increasing sustainable water supply and sanitation services. The project is currently in its second phase and includes support for the establishment of water user associations responsible for facilitating and overseeing water supply services in rural areas. Information from interviews with Ministry of Water officials, Lilongwe 5 January 2013.

The other Water User Associations (WUAs) were established in Lufilya in Karonga, Nkhamanga in Rumphu, Likoma in Likoma, Ntonda in Ntcheu, Mpira/Balaka in Ntcheu, Balaka and part of Neo and Mangochi, and Chikhwawa East Bank in Chikhwawa.

Authorities (T/A).³⁹ The WUA has four main structures within the community, namely the General Assembly (GA), the Board of Trustees (Board), the Secretariat and Water Point Committees (WPC). Farming is the main economic activity and there is a vibrant market centre at Songani where farm produce is sold.⁴⁰

6.2.3.2 Chagwa

Chagwa is another rural area, 35 kilometres from Zomba, in the Machinga District. It also has a GFS providing piped water to 40 villages under two traditional authorities. The GFS was established in 1974 and, like most GFS, it aged and got dilapidated resulting in only 17 taps working out of the initial 83 in 1999.⁴¹ In 1998 the community mobilised and requested assistance from a government social fund through the local government in Machinga to support rehabilitation. This appeal was unsuccessful. In 2001 WaterAid, an international non-governmental organisation, was approached by the Machinga District Assembly (the local government) to support the Chagwa scheme rehabilitation works.⁴² A partnership was established between the local government, WaterAid and the community for rehabilitation works. The community was required to raise part of the initial capital for the repairs as a sign of commitment. The required US\$2,000 was raised in three years. Rehabilitation works were carried out and the scheme was handed over to the users for maintenance and operation. An institutional arrangement, where there was a water committee and repair team, was put in place to collect revenue for repairs and would receive small honorarium. In 2005, after community members had received training and after they were given an opportunity to visit the different organisations in Malawi, but also in Ethiopia, the option of a water cooperative society was chosen and formally registered in accordance with the law. The Chagwa water cooperative society (CWCS) was to provide and manage water services in the area but was also expected to promote business ventures.⁴³ The idea was that local residents would invest so as to buy shares in a business of their choice. This had not happened during the period of

³⁹ ZAEWUA (2009) 10. The Traditional Authority, or Chief is a traditional leadership system in Malawi which is also used to describe geographical locations in rural areas.

⁴⁰ See Government of Malawi *Zomba District socio - economic profile 2009 - 2012* (2009) 13 stating that unpaid agricultural labor is not only the major source of income, but also likely the most profitable source of income for the people.

⁴¹ Interview with WUA member and former chair person of repairs team 1990-98, Chagwa 12 October 2012.

⁴² WaterAid *Transitions in community management of Chagwa gravity-flow system in Malawi* (2006) 5-6.

⁴³ Focus Group Discussion with Board members and Secretariat, Chagwa 12 October 2012.

the study. However, the provision of water has been successful and 350 taps have been provided as well as rehabilitations and extension works that began in 2012.⁴⁴ In 2006, CWCS won the Nelson Mandela Trust Award valued at US\$5,000 for outstanding work in water provision.⁴⁵

The CWCS structures have evolved over time and it now has four main structures, the GA, the Board, the Secretariat and WPC. In this area too, the livelihood of the communities is largely through small scale farming and produce selling.

6.2.3.3 Mtandile

Mtandile-Mtsirizani Township is one of 16 low income areas, five kilometres from the capital city of Malawi, Lilongwe. Water provision in this area falls under the mandate of Lilongwe Water Board (LWB), the public utility company; however the City of Lilongwe, the local government authority also provides water as a service provider through communal water kiosks in the city. Due to unpaid bills, the LWB disconnected the community kiosk in the area in 2004. Community committees were responsible for collecting and remitting user fees to the LWB but they fell short of their duty and hence owed in unpaid bills up to US\$ 1,000,000. The community then approached WaterAid for help. WaterAid established a partnership with LWB and a local NGO to solve the water problems. It should be noted that WaterAid provides the funding, and a local NGO facilitates some aspects of WUA formulation and establishment, whilst the LWB as the primary service provider has a direct relationship with WUAs.⁴⁶ Apart from carrying out rehabilitation and extension works, through the established Kiosk Management Unit (KMU) within the LWB, the utility company oversees water supply and revenue collection in WUAs.

Mtandile WUA (MWUA) was among the first of six WUAs established under this partnership in 2004 as a new approach by WaterAid that included a focus on community participation in water delivery system.⁴⁷ Six low income areas were the initial target for WaterAid intervention and all chose the WUA as the best way to manage water. Other options included direct management by LWB or private operators.

⁴⁴ Focus Group Discussion with Board members and Secretariat, Chagwa 12 October 2012.

⁴⁵ WaterAid *Transition in community management* (2006) 14.

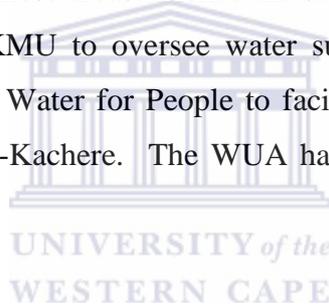
⁴⁶ WaterAid *Managing communal water kiosks in Malawi* (2008) 4; Interview with official at Kiosk Management Unit, Lilongwe 23 September 2012.

⁴⁷ WaterAid *Managing communal water kiosks in Malawi: experiences in water supply management in poor urban settlements in Lilongwe* (2008).

The MWUA was established in 2006 and covers an estimated population of over 35, 0000 people who are mainly engaged in farming, small income generating activities and unskilled labour for the neighbouring suburb.⁴⁸ It has a structure that includes the GA, Board, Executive Committee and the Secretariat.

6.2.3.4 Nkolokoti-Kachere

Nkolokoti-Kachere is one of the 21 low income areas in Blantyre and just as was the case in Mtandile unpaid water bills up to approximately US\$11,000 resulted in water disconnections in 2009.⁴⁹ Nkolokoti-Kachere WUA was established as a pilot by Blantyre Water Board (BWB) in partnership with Water for People, an international NGO and Blantyre City Assembly, the local government authority in 2009 after the formation of successful WUAs under the LWB.⁵⁰ The low income areas in Lilongwe, which previously owed millions of money in water bills, were paying back the arrears and paying bills on time under the successful WUAs established in these areas. Hence the same concept was adopted by BWB which also then established a KMU to oversee water supply and revenue collection. It sought, however, the services of Water for People to facilitate the establishment of WUAs under a pilot study in Nkolokoti-Kachere. The WUA has a targeted population of 20,000 people.

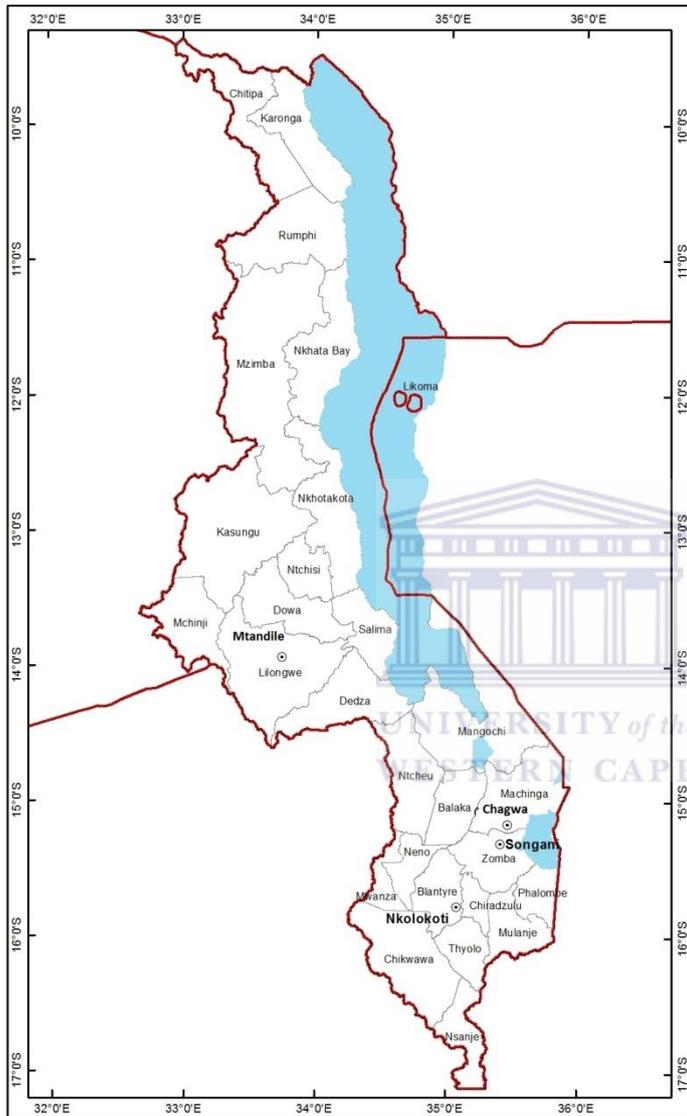


⁴⁸ See Government of Malawi *Lilongwe District socio - economic profile 2009 - 2012* (2009).

⁴⁹ Interview with Blantyre City Council official 17 April 2011.

⁵⁰ Interview with Blantyre Water Board official 8 April 2011.

Figure 6.1 Map Showing Study Areas



6. 3 Access to Water: Issues and Challenges

6.3.1 Water as a Human Right

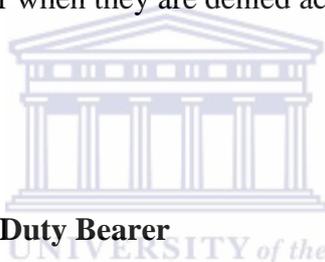
When interviewing WUAs and community members, I asked whether access to water was a human right. The response was an overwhelming affirmative. A human right to water was acknowledged on the basis of the centrality of water to human life, dignity, health and livelihoods. ‘Water is life and without it no one can have life hence it is a human right’ was a

common phrase repeated by respondents.⁵¹ For example, one woman, a Chairperson of a water point committee, stated:

Water is a human right because water is life. Without it there is nothing one can do to survive. Life and water are not separate. It is required for many things. Lacking water is the greatest poverty one can experience.⁵²

A community leader in Zomba East also reported that living without water resulted in dire poverty and impairing dignity. Her community had no water facility and relied on a neighbouring village's borehole where they paid higher user fees than the residents of the village but also received insults for putting pressure on the facility meant for this village. She explained that because there had been no other option, as traditional sources and other facilities were too remote, they accepted that the price they had to pay to have access to water was to endure insults and be treated like beggars. According to her:

Everyone has a human right to water which is violated when people have no facilities to provide water to them or when they are denied access to available facilities.⁵³



6.3.2 Duties and Duty Bearers

6.3.2.1 Government as Primary Duty Bearer

Although all respondents recognised or declared that water is a human right, there was no knowledge of the justiciability of such a right in Malawi. A few respondents expressed strong belief or resolve that the Constitution 'should have' a guarantee on the human right to water, however there was generally a lack of knowledge on formal laws relevant to the access to water. Over 93 percent of the respondents (82) in the communities were not aware of any laws on water in Malawi or elsewhere.

The primary duty bearer was identified as government, with the obligation to provide functioning water facilities with a continuous supply of water. Water facilities referred to were communal taps or kiosks and boreholes. There was emphasis on the duty regarding continuous water supply because of low assurance of supply in facilities, especially in peri-urban areas. For instance, in Nkolokoti, although the number of kiosks has increased over the years, a common problem is intermittent flow of water resulting in dry taps for most times of

⁵¹ For instance, respondents during focus group discussion with male users, Kachere- Nkolokoti Area 4 April 2011; interview with water users Zomba East 20 August 2012.

⁵² Interview at Zomba East, 30 August 2012.

⁵³ Interview at Zomba East, 17 September 2012.

the day and sometimes for even longer periods. Having improved sources of water is only as good as the water that flows from them. As discussed in chapter three, the standard under the human right to water is that water must be available on a continuous basis in order that it is sufficient to meet the basic human needs.⁵⁴ Hence, although considerable efforts have been made to establish improved water facilities, the fact that there are more often than not dry taps, compromises the attainment of universal access to water as defined under the human right to water.⁵⁵ The lack of reliable water supply forces women to look for alternatives and this might mean that they have to travel long distances, expose themselves to areas where they are not safe, pay higher fees or accept a poorer quality water where there are health risks and hazards. Generally in peri-urban areas where there is a kiosk, the next closest facility would be private taps, whether in-house or in-yard water connections. These may belong to private individuals or religious institutions within the area. Access rules may include allowing only religious affiliates or demanding higher user fees than those paid at kiosks. Seemingly less expensive sources, such as boreholes or wells, are usually inaccessible because it is policy that these are not allowed in low income areas and/or near kiosks. The rationale is that there is a danger in low income areas of contaminated water as a result of untreated human waste in pit latrines.

Problems of access are exacerbated because of the lack of capacity to supply water.⁵⁶ Furthermore, where there is water the flow is often low because of pressure problems.⁵⁷ In both the rural and peri-urban zones, government is expected to attend to these problems. One respondent explained the situation as follows:

The government is ultimately the duty bearer, through the District Assembly. They must bring water and development to people but this is not done because they move only where there is incentive, or allowances for the officials. [...] Officers are unwilling to fix pipes or taps without being given a stipend for their work. When called, they only come where they can justify or get allowances. We have been reporting different problems to them especially when the water is not reaching places

⁵⁴ Chapter three section 3.2.1

⁵⁵ See generally Manda MAZ 'Water and sanitation in urban Malawi: Can the Millennium Development Goals be met? A study of informal settlements in three cities' (2009) *Human Settlements Working Paper Series on water* 7, 1-87

⁵⁶ Maoulidi M 'Water and sanitation needs assessment for Blantyre City, Malawi' (2012) 27 *Millennium Cities Initiative Social Sector Working Paper series* 15 stating daily production capacity is less than daily demand for growing population. See also Cammack D 'Peri-urban governance and the deliver of public goods in Malawi, 2009-11' (2012) *Power and Politics Programme Research Report* 13 -14.

⁵⁷ Focus group discussion with Blantyre City Council officials responsible for water 5 April 2011.

where we have laid the pipes for new facility. They don't come with their expertise to check what the problem could be.⁵⁸

Driven by their awareness of their human right to water, community members actively seek out solutions by lobbying community representatives or leaders to take concerns to 'government.' Another avenue is also to approach NGOs in the area that are able to supply water.

6.3.2.2 Members of Parliament as Duty Bearers

Members of Parliament (MPs) in the study areas were unreliable and lacked commitment to solving water problems. The rural communities in the sites of investigation unanimously emphasised that water problems are best resolved by the WUA and that there is no role for MPs. The experience of the rural communities was that MPs were unhelpful, good at making promises but with no intention to keep them. The Chairperson of Chagwa explained that MPs undermine their work because they promise to bring water for free to people and that this results in users expecting the same free service to be delivered by the WUA. ZAEWUA also claims that MPs are unresponsive to calls to intervene in water problems.⁵⁹

On the other hand, within the peri-urban context, the WUA emphasised the helpful role that an MP could play in establishing a WUA and in helping to solve water problems. In Nkolokoti, the MP of the area in 2012 was praised for facilitating the establishment of the WUA and for being instrumental in establishing water facilities, such as boreholes or wells in areas where the BWB had failed to extend its service. Most respondents identified their MP as the most likely person they would approach with water problems 'because he is a good man and carries out development works.' Similarly in Mtandile, the MP had an important role to play in the WUA in 2012, as the Constitution of the WUA made provision for the MP and three main political parties in the area to be represented in its structure. Subsequently Mtandile changed its Constitution to exclude political parties and MPs from being active members of the WUA. A board member from Mtandile explained as follows:

The GA decided, after recommendations from the WUA Board, that politicians who were part of the executive committee of WUA and MPs who had a position in WUA Board must no longer be part of it. They caused a lot of problems especially those belonging to the ruling party [...] they wanted to dominate in meetings and demonstrate to people that they have power by coming to meetings with party supporters [...] singing their praises and dancing. We asked that they no longer be

⁵⁸ Focus group discussion at with WUA representatives at Chagwa 12 October 2012.

⁵⁹ Interview with Board member ZAEWUA 14 September 2012.

given the platform in WUA to advance political agendas. The general assembly approved our recommendation and they are no longer welcome.⁶⁰

It is not so simple to exclude MPs because, as duty bearers, they represent people in government and they can therefore, in the ideal, present the concerns raised by communities to influence policy. The system of representative democracy, as discussed in the previous chapters, is flawed because MPs do not seem to have that sense of duty to the people they represent and MPs, in most instances, are more concerned with personal or party interests. Participatory spaces are essential for the deepening of democracy and for getting government to respond by directly engaging with government representatives at different levels. However co-option and capture are a high risk where spaces for engagement do not guarantee free and safe participation, as discussed in chapter four.⁶¹ Asserting autonomy from elite or political capture is a manifestation of agency and the will to dismantle structures of domination which stifle the voices of the marginalised. This provides evidence for participation as empowerment which in turn fosters the opportunity to gain power or influence in decisions on resources or services.

6.3.2.3 Individuals and Community Members as Duty Bearers

Another category of duty bearers identified were individuals themselves and or community members. Whilst government is said to be responsible for providing water facilities, operating and maintenance of the facilities is the duty of the communities. This duty was emphasised in the rural communities where, for instance, the Chair of the Board of ZAEWUA stated:

When a person is given a (battery operated) radio, the person must buy the batteries to operate it. Government has the duty to provide water to us hence we get water facilities through WUA however people in the communities also have the duty to take care of the water facilities and to contribute to maintenance and operation .

The duty includes paying user fees, protecting and taking care of water facilities and respecting the human right to water of other people. This is achieved by, for instance, preventing and reporting vandalism or faults. Rural communities are expected to work together and not only demand water but also provide necessary finances and ‘sweat equity’ in securing water facilities. In the informal settlements, or peri-urban sites, the idea of sweat equity is not common as the users pay an elevated fee for the reticulation systems that allow for water access.

⁶⁰ Interview with Board of Trustee representative , Mtandire 21 April 2015.

⁶¹ Chapter four section 4.2.4.

6.3.3 Awareness is Key

Awareness of the human right to water raises expectations. Even though there is no knowledge of justiciability of the right in Malawi, it becomes a social tool to demand access to water. Francis & Firestone claim that the human right to water embedded in international law resonates with the ideas and expectations that exist in the collective hearts and minds of community residents who are deprived of these rights.⁶² Although it is the legally recognised human right to water that can best be the basis for holding government accountable for providing access to water, community consciousness is also a powerful social tool that drives community members to claim this right for themselves. This awareness is empowering as communities engage with government not as ‘mere supplicants’ but rather as right holders who can challenge the inertia of the State or its interference of enjoying the right that is their due.⁶³ This will be demonstrated further in the findings of participation and agency in the next section.

6.4. Findings on Participation and Agency

6.4.1 Bringing People Together to Solve Water Problems

Community participation in governance of water services is now being promoted through WUAs. This is facilitated by government and NGOs promoting access to water. The WUA provides a space where different agents of change voice their demands, fears or worries regarding access to water and where they are able to foster a sustainable solution to the provision of water. WUAs have the potential to ensure efficient, reliable and sustainable water supply and sanitation systems at the lowest appropriate level.⁶⁴ The WUAs operates as a ‘mini water board’ to manage the operations and maintenance of the facilities. Water users, who fall under the jurisdiction of a WUA, are expected to meet full operation and maintenance costs whilst at the same time putting away sufficient resources to replace – or expand – on existing structures that provide water. The emphasis, however, is on ensuring that participating communities are empowered so that they plan, own, operate, maintain and

⁶² Francis R & Firestone L ‘Implementing the human right to water in California’s Central Valley: Building A democratic voice through community engagement in water policy decision making’ (2010-2011) 47 *Willamette Law Review* 495, 511.

⁶³ Boyd DR ‘No taps, no toilets: first nations and the constitutional right to water in Canada’ (2011-2012) 57 *McGrill Law Journal* 81, 87. See also Francis R & Firestone L (2010-2011) 518 -519.

⁶⁴ Government of Malawi *Guidelines for Establishment of Water Users Association In Malawi* (2010) 2.

manage their own water supply and sanitation services.⁶⁵ WaterAid, one of the international NGOs promoting WUAs, states that the aim of WUAs is to provide sustainable, affordable and safe water to the poor while embracing full service cost recovery.⁶⁶ WaterAid further states that it is a management system that is based on a business principle of cost recovery and that, in order for it to be sustainable it must be making a profit.⁶⁷ Water for People, another International NGO working with BWB, suggests that WUAs are established to manage communal water kiosks and to increase sustainable water access:

[p]rogress in universal supply of water can only be achieved if there is 100 percent cost recovery plus profit to ensure sustainability and expansion of the supply to other areas. No subsidies must be offered and in fact we reject proposals for grants that include subsidies for water.⁶⁸

Financial sustainability and community buy-in are required in order for a WUA to fulfil its mandate. This mandate is to make sure that there is a sustainable water supply to the peri-urban and rural areas and this should be achieved through capacity building of community members and through creating opportunities for meaningful community participation. The conflict or tension evident is the balance between full cost recovery and equitable outcomes which ensure that even those who cannot pay have access to water as required under the human right to water.

For the local people the WUAs mandate is to hear the voice of all water users that fall under its jurisdiction in resolving water provision problems. One Board member explained this by stating:

[t]he WUA brings us together, people with a common problem putting together knowledge, skill and time in finding ways to improve our access to water but also our lives.⁶⁹

This mandate is in line with the idea of participation envisaged within the human right to water. The human right to water promotes the agency of people because the realisation of this right is a process that not only guarantees access to water but also acts as a catalyst for community mobilisation. This enhances a sense of belonging and increases the opportunities for an individual to learn and develop through interactions and engagement on what works

⁶⁵ Government of Malawi *Guidelines for WUA* (2010) viii.

⁶⁶ WaterAid (2006) 8.

⁶⁷ WaterAid (2006) 6.

⁶⁸ Interview with programme manager, Water for People Blantyre 5 April 2011. See Water for People 'Status-Blantyre' (2013) available at <https://reporting.waterforpeople.org/blantyre> (accessed on 10 May 2014). See also WaterAid (2006) 6.

⁶⁹ Focus group discussion at Chagwa WUA 13 October 2012.

and what does not work. The emphasis on participation or agency in realising the human right to water is premised on human dignity and equality and requires that every place must have an opportunity to influence the decisions that affect them.

However, for the spaces to be available to people and ensure that all affected parties are brought together to resolve water problems, community members need to engage in decision making processes around the process itself: who are they are going to engage with, when, how often and so forth. Setting out the terms of engagement is an important starting point in ensuring both willingness and ability to participate. As discussed in chapter four, choice in modalities of participation is central in ensuring meaningful participation in line with the needs of the participants.⁷⁰ The evidence on the ground supports this assertion although, all too often, the process itself is not intact because decisions are taken on behalf of community members.

Choice was evident for instance, when the WUAs in peri-urban areas were asked to chose how water kiosks would be managed. The communities decided to manage the water kiosks themselves. This would mean that they would play a role in selling water from the kiosks which would otherwise have been taken by private operators or the public utility company.⁷¹ Despite such autonomy, mostly the decisions about how the WUA would be constituted and what areas of jurisdiction the WUA would enjoy, were taken without input from community members. In the case of the Nkolokoti WUA, the Board members stated they were not happy with their Constitution and the way in which the WUA related with BWB, the water utility company. As already stated and discussed in chapter five, the water utility companies enjoy a monopoly in providing water services in urban and peri-urban areas.⁷² They provide water services at market value, determining the tariffs and but also directly engaging with and overseeing the functions of WUAs. Although representatives of the Water Utility Companies in the KMU in both peri-urban WUAs meet regularly and liaise with the community representatives, the representatives felt they had no say in the pricing of water services. (See Figure 6.2 on organisational structure). The Water Utility Companies prescribed water rates to these communities, which included recovering outstanding debts as well as profits to cover the operation costs. There was no meaningful two-way flow of information on this matter and as a result, the WUAs felt disempowered and unable to address the needs of users under

⁷⁰ See chapter four section 4.4.1.

⁷¹ WaterAid *Managing communal water kiosks in Malawi* (2008) 6.

⁷² See Waterworks Act no 17 of 1995.

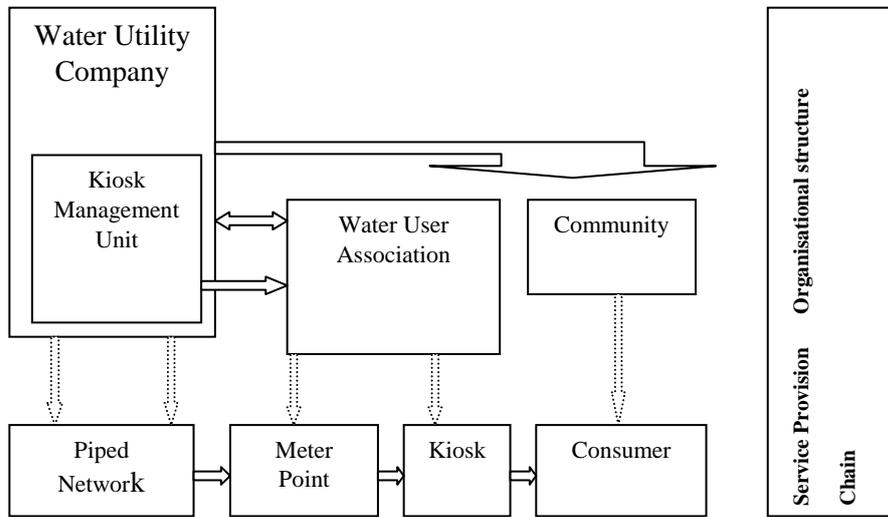
their jurisdiction. The Water Utility Companies stated that the tariffs are set not only according to affordability but also to ensure adequate cost recovery and to make sure there are savings for maintenance and repairs.⁷³ This results in high water tariffs.⁷⁴ The regulation of tariffs without consulting the affected communities undermines the WUAs mandate to ensure access to water for all and to ensure the needs of the poor and marginalised are taken into account. It is especially a big problem when the WUAs are seen as agents of the Water Utility Companies through the direct management of revenue collection.

The discussion that follows provides further insight into the conflict and tension. As mentioned before, the peri-urban areas had accumulated arrears in payment of water bills due to abuse of funds by revenue collection committees from the communities. WaterAid intervened after many water kiosks were closed down as a result of the arrears that affected the capacity of Lilongwe and Blantyre Water Boards. They (WaterAid) mediated an agreement with the Lilongwe Water Board to build their capacity in managing community water kiosks by establishing KMU and also facilitated the establishment of WUAs. The WUAs were given different management options to choose from in managing the operation of water kiosks. They choose to manage kiosks themselves, which ordinarily involves collection of water fees by placing water vendors at each kiosk. The kiosks are metered and they are thus able to quantify the exact amount of water that is sold from a particular kiosk and how money must be collected for this water. Where the relationship between WUA and the Water Utility Company is not managed well, WUA management or operation of kiosks means that the WUA itself becomes a service provider and is accountable to the Water Utility Company, rather than being accountable downwards, to the water users themselves. Residents who need water but do not have the money to pay for it, are denied access to the water by WUAs. The emphasis is on the collection of user fees, thus those who are already marginalised (the poorest of the poor) are denied the human right to water because they can't pay for it. A democratic platform for solving such problems is unavailable as WUA is powerless in ensuring the balance between water as an economic good and water as a public or social good.

⁷³ Interview with official at Blantyre Water Board 12 April 2011.

⁷⁴ Rusca M, Schwartz K, Hadzovic L et al Adapting generic models through bricolage: elite capture of water users associations in Peri-urban Lilongwe' (2014) *European Journal of Development Research* 1, 10 &12.

Figure 6.2 Peri-urban WUA Model



Adapted from Rusca M, Schwartz K, and Hadzovic L et al (2014)⁷⁵

Data from the field confirmed the tensions inherent in this arrangement. In a focus group discussion with the Nkolokoti WUA Board, the Executive Committee and the Secretariat felt that they could not do justice to the needs of the water users as they had not been involved in the setting of tariffs and they were unable to influence the decisions taken about these prices.⁷⁶

The engagement of the community is not simply a ‘nice to have’ because it is crucial to ensure sustainability of water services. As already discussed in chapter four, community participation must also promote agency and voice in providing spaces where communities are able to assert themselves to claim their human right to water. Engagement with the community means that the community is not simply a recipient of decision making around water supply but that it can contribute meaningfully to ensure a sustainable provision of water and the progressive realisation of the human right to water.⁷⁷ The process of engaging the community, and the creation of enabling spaces where community voice can be heard, depends on the recognition that it is insufficient to simply provide water but that there is a process that must be followed where communities themselves are able to claim their human

⁷⁵ Rusca M, Schwartz K, and Hadzovic L et al (2014) 9.

⁷⁶ Focus group discussion at Nkolokoti 12 April 2011.

⁷⁷ Francis R & Firestone L ‘Implementing the human right to water (2010-2011) 520.

right to water. Financial sustainability is an important aspect of water provision but the empowerment of communities is more crucial to equitable, secure and sustainable provision of water that is established under the human right water.

In remote rural settings, WUAs have a different experience to that of the peri-urban WUAs because they are able to influence decisions, at least decisions concerning tariffs and cost recovery. A representative of ZAEWUA secretariat explained the process as follows:

[w]ater users have power over all WUA decisions, including tariffs. They must have a say when we intend to raise the tariffs and their word is final. This is because the WUA is a service and not a commercial venture; it must therefore ensure that it meets the needs of the people. The government, in 2012, when we were charging Malawi Kwacha (MK) 30 per month asked us to raise it to MK 500 which was communicated to general assembly representatives. The general assembly members consulted with the respective communities they represent by conducting meetings and finally approved Mk 100 as the rate in 2013. Now this is not enough to meet the cost and expenses of water provision, so we will be recommending MK 200 as new tariff through the same process.⁷⁸

There are several factors that contribute to a rural WUA's ability to influence tariffs. Firstly, there is an absence of a Water Utility Company and thus the insistence of full cost recovery without adequate support for those unable to afford the water. In these instances, community voice is likely to resonate more loudly, whereas in instances where the Water Utility Company is exercising its authority over the WUA, the voices of the constituency are more likely to be muted. Second, there is continued financial support to the WUAs in the rural areas, at least like in ZAEWUA. This helps mitigate the shortfall from inadequate finances in ensuring access to water. As will be shown further below, the peri-urban WUAs are more financially sustainable than the rural WUAs, however the needs of the communities are best met in the rural WUAs, because they get assistance resulting in a balance between equity and efficiency. There is also high reliance on voluntarism in rural areas and collective action that mitigates the cost of water, and thus more power in taking the needs of the poor into account. As already alluded to, other than paying for the water, sweat equity or/and maintenance and operation of the infrastructure is seen as crucial form of participation in WUA. Awareness campaigns are carried out, reminding residents how GFS became dilapidated and driving home the message for payment of user fees and contribution through labour in acquiring a facility or helping others acquire a facility.⁷⁹ Social networks between villages are activated

⁷⁸ Interview at ZAEWUA 29 April 2015.

⁷⁹ Focus group discussion in Chagwa 10 October 2012; focus group discussion in Zomba East 15 September 2013.

when acquiring a facility or when a facility is broken. A given community might approach a neighbouring community when mobilising labour for digging trenches necessary for pipe work in order to establish a water facility. Or there may be a request for the use of their facility when their own is in disrepair and until it is once more functional. This reciprocity depends on trust – but trust is broken when the sharing is not reciprocated. In this way, water is a vector of peace and good will between different villagers. Such collective action is altruistic ‘as water is a necessity for everyone and helping to achieve this for others is humanity itself.’⁸⁰

Table 6.3 Factors Contributing to or Inhibiting Community Voice

Rural WUAs	Peri- Urban WUAs
<ul style="list-style-type: none"> • Absence of Water Utility Companies in the production of water • Many opportunities for direct engagement among users in WUAs and therefore better chances to record the needs of the people • Better mechanisms of accountability of representatives who are elected or nominated in consultation with the people they represent and continuously engagement with and get feedback from the users in their area • inclusive criteria for membership into decision making organs 	<ul style="list-style-type: none"> • Presence of Water Utility Companies with sole mandate in production of water • Limited engagement with the wider population of user and therefore lack of appreciation of the full extent of the problem • Weak structure in terms of ensuring downward accountability to the people due limited influence on representatives choice • Rigid and restrictive criteria for membership into decision making organs. • Previous amounts of unpaid bills

⁸⁰ Focus Group discussion with water users at a water point in Songani 15 September 2012.

6.4.2 Opportunity to Participate: Accessibility and Affordability

6.4.2.1 Open and Inclusive

For a WUA to be inclusive and to promote agency, representation must be based on diversity and equal opportunities for all segments of the population. Where the opportunity to participate is restrictive and exclusive, the WUA is prone to abuse by elites who amass power and benefits for themselves. The MWUA provides insights into the way in which the poor are marginalised and how there has been elite capture of spaces that should be inclusive because of restrictive criteria for participation in decision making organs.

The composition of the Board of Trustees, for instance, includes representatives from among chiefs in the area, the clergy from the main Church denomination, a Muslim clergy representative, a representative of all businesses in the area and the Kiosk Unit manager.⁸¹ These categories are restrictive and elitist. They are restrictive in the sense that only a small defined population in the community has opportunity to take part and represent others in this organ. Their inclusion in WUA is mainly because WaterAid wanted to ensure smooth functioning of the WUA by co-opting and appeasing the most prominent members in society.⁸² In earlier research into the issue Rusca, Schwartz, and Hadzovic found the following:

the model implemented by WaterAid ensured first and foremost the support and approval of local elites, by granting them a number of privileges ranging from key positions within the Associations, to authority in decision making, to financial benefits and increased status within the community. In particular, rather than addressing the challenge of misappropriation of funds by local elites, the practice of embezzlement was institutionalized by incorporating the perpetrators in the WUAs: *now they are no longer playing their games in the low-income areas. We have them in the Board, we have them in the Executive Committees.*⁸³

Elite capture and political interference resulted in misappropriation of user fees and thus unpaid water bills. These are the same elites that are included in the Board of Trustees. Further the elites may be removed from the reality of the local water users and they are likely to further their own interests and the interest of an elite few rather than all. There are financial and other benefits for taking part in such a capacity. The Board of Trustees not only get a monthly honorarium, but they also have fringe benefits, such as funds to cover funeral costs

⁸¹ Mtandire WUA Policy and Procedure Statement (2009).

⁸² Rusca M, Schwartz K, Hadzovic L et al (2014) 9-10.

⁸³ Rusca M, Schwartz K, Hadzovic L et al (2014) 9-10.

and weddings. These benefits are not accrued by WUA employees.⁸⁴ The issue of fringe benefits is a fraught one because elite groups such as politicians, community leaders and religious leaders enjoy fringe benefits whilst ordinary members pay tariffs that oil the corridors of power and are to the benefit of elite members. The inequitable share of financial incentives, extracted from the high tariffs that the poor are expected to pay for water, undermines community efforts taken to solve their water problems.

The Board has 7 members who have the mandate to make strategic decisions on behalf of the WUA, including the establishment of policies, rules, regulations and budgets.⁸⁵ It is through such decision-making power that benefits are allocated to the exclusion of ordinary water users. The Constitution for MWUA invests in the Board of Trustees considerable power, unlike all other WUAs in the survey where GA constitutes the supreme organ of the WUA making final decisions on policies and regulations.⁸⁶ The MWUA Constitution merely provides that the GA shall review and approve financial reports, amendments to the Constitution among other things.

The Board in MWUA is responsible for constituting the GA which meets annually. Although the Constitution proves that all water users must be invited to the GA⁸⁷, the practice is that the Board only invites representatives from a few select categories of water users.⁸⁸ Only two names of ordinary water users from each area surrounding a water kiosk are sent to the Board of Trustees who then randomly compile the final list of ordinary users to attend the GA. Although one Board member admitted that those picked are often relatives of the water sellers or vendors, the water vendors are, on the whole, trusted. Each year new nominations must be made and this does mean that a different set of users are able to take their turn in influencing decisions within the WUA. Despite these measures, accountability of these representatives is difficult to enforce. The opportunity for the broader water user population to contribute to decision making processes are limited because there is no opportunity for the ordinary water user to share views with the GA representative simply because the identity of the person who is going to be appointed, remains confidential until the appointment has been made.

⁸⁴ See Mtandile *Conditions for Service* (2009), see also Rusca M, Schwartz K, Hadzovic L et al(2014) 10-12.

⁸⁵ See Mtandile WUA Constitution art 6.1.1 & 6.1.2

⁸⁶ See for Instance Nkolokoti WUA Constitution art 7.1 7.2

⁸⁷ See Mtandile WUA Constitution art 6.1.1 & 6.1.2

⁸⁸ Interview with Board member, Mtandile 14 April 2015

The limited opportunity for ordinary members to participate in the WUA means that a few elites are invested with considerable power to make decisions as they choose. This jeopardises the opportunity for voices from the marginalised and disadvantaged groups. It also increases tensions between those who are included and those who are not.⁸⁹ The issue of gender is completely sidelined. All seven members of the Board are men and there is no requirement for gender consideration in nominating ordinary members to GA or other categories of stakeholders that attend. The question of gender will be discussed more fully below but it suffices to say here, that women, who constitute the majority in the lower organs of WUA by virtue of the fact that they are main water users and the water sellers/vendors, have very little opportunity to influence others; neither do they have fringe benefits.

The MWUA can be contrasted with the wider and more direct opportunities for ordinary members' participation in ZAEWUA described below.

The rural WUAs use a different approach for filling positions for the Board of Trustees and the GA generally. The ZAEWUA is used as an illustration on how this is done. The GA members are nominated by the village leadership in consultation with villagers in the area under the jurisdiction of the WUA. Two people are nominated, one male and one female so as to ensure a 50:50 gender representation.⁹⁰ This provides a greater opportunity for ordinary water users to participate in WUA decisions as, in the case of rural WUA's, there are no rigid categories to be filled. The only prerequisite is that there be a fair (50/50) gender balance. Members of the GA hold their position for a three year term. This means that there is an opportunity for consultation before the GA where the views of multiple stakeholders (not only those with power) are taken into consideration. Once a date is fixed for the General Assembly, the agenda is distributed so that water users know what is going to be discussed before hand and they have an opportunity to prepare and present their case. The GA members are also involved in the activities of the WUA and speak to users regularly. This provides a space for dialogue, debate, discussion and dissent,⁹¹ all of which are attributes of a good democracy and of good water governance.

The GA members are responsible for electing among themselves members to the Board. The requirement is that the board membership must have at least 30% females. Apart from this

⁸⁹ Goldin, J 'Transformation in the Water Sector' (2013) 26: 6 *International Journal of Public Administration* 711 -731.

⁹⁰ Government of Malawi *Guidelines for WUA* (2010).

⁹¹ See generally Goldin J (2003).

requirement any person from the GA can become a board member. The membership to the Board is also therefore flexible and more inclusive than the case in the Mtandile as described above. These members are ordinary members of the community and not per se elite, as for instance the chiefs are not included in the structures of WUA. This factor distinguishes the rural and peri-urban areas WUAs and perhaps contributes to greater influence from the water users: there is constant engagement between representatives and ordinary members who are directly involved in nominating or influencing the choice of representatives. Openness and inclusiveness requires that there should be generally opportunity for everyone affected by decisions to take part and influence the outcome of such processes.

6.4.2.2 Access to Information

There is a blanket covering out interaction between WUA and government. We just see people contracted to carry out works in our area without providing us with information or involving us.⁹²

This lack of information makes it difficult for communities to hold government accountable, to ensure oversight and to contribute to decisions meaningfully.⁹³ Community members cannot participate meaningfully without having pertinent information on hand so that they can give informed input around water issues. An example of lack of information is evident in the provision of material from government to local communities. The lack of information means that the opportunity to hold public officials to account is lost. Malawi has high levels of corruption but armed with the correct information, communities would be better able to hold their government structures accountable:

[c]orruption in government prevents real progress in improving water systems. There is a lot of money given for rural gravity fed schemes and extension works however government fails us... pays off contractors even when they do poor work... pipes are never enough but there is no knowing as government does not involve us in such things... Where do we go to report such things? We do our part in accounting for what we get as we were taught but then not government.⁹⁴

A member of the Board explained what had happened:

[i]nitially government provision of material especially pipes was through the Ministry where it would be stored and given to us when we need it. However there was no

⁹² Interview with Board chair, Zomba East 27 April 2015.

⁹³ Francis R & Firestone L (2010-2011) 518.

⁹⁴ Interview with a Board member at Songani 10 October 2012.

record of exactly how much material was received and often the material would not even be there when going for collection on subsequent visits as the material would be sold or stolen by the officers. The WUA Board decided to challenge government for more autonomy in handling such material through the local government and approached the district commissioner. We simply went to the district commissioner's office and presented the problem of lack of accountability when pipes are given and now the government gives such pipes directly to WUA for safe keeping. We now have autonomy in this regard and safeguard our materials.⁹⁵

6.4.2.3 Meeting Opportunity Costs

Peri-urban WUAs make a substantial amount of money in comparison with their rural WUAs counterparts. The WUA in the peri-urban area is also able to pay a far better honorarium to its members than the rural WUAs. For instance, in 2012, ZAEWUA's income generated from user fees was so low that it was not possible to fill all relevant positions in the newly established Secretariat, nor was it possible to pay an honorarium to representative members of ZAEWUA. The survival of the WUA was dependant on the good will and voluntary contribution of its members who not only gave of their time without remuneration but also carried the burden of travelling long distances to attend meetings and then also to attend to demands from their users when a utility has been vandalised or is dysfunctional. The frustration but also the goodwill of ZAEWUA members is reflected in the extract below:

I work 7 days a week [...]going around advising water point committees on repairs or visiting sites with broken pipes due to vandalism. I have a team of people trained to do the repairs in the areas however usually the reports also come to me and I have to run around getting spare parts or help with identifying the problem if the problem is complex.. I want people to have their water. That is important [...] and it brings me joy to be of service. There is no money to pay for all this running around [...] although the distances are long and I spend many hours travelling and doing this work. But when the problems are sorted and people have a functioning facility I feel good that I sacrificed my time and helped.⁹⁶

In Chagwa, after establishing the Secretariat, some Board members who were instrumental in certain responsibilities such as accounts and overseeing maintenance work took up positions

⁹⁵ Report back session at Zomba East 29 April 2015.

⁹⁶ Interview with Board member ZAEWUA 6 October 2012.

where they were paid, albeit a very modest remuneration. The Chairperson explained as follows:

[f]inancially we are still weak however there is a lot of work to be done and people who on a voluntary basis have been carrying out technical work like repairs for a long time as members of the Board of Trustees are moved to the Secretariat so that they can get their monthly token of appreciation. It is not really a salary as the amounts are small [...] but it's better than nothing. Most people really do far much more than the amounts they get because they are committed to ensuring better access to water for the people in the area.⁹⁷

Apart from those in the Secretariat, other representatives are also entitled to small allowances that are given when a meeting is held. This is unlike Mtandile where remuneration is on a regular monthly basis. Although the members do not enjoy the same benefits as the peri-urban WUAs, the burden placed on water users who would have to then pay higher fees to cover the monthly allowances, is minimised. Other logistics, such as booking venues or spaces for holding meetings, are taken care of in the case of all the WUAs as they have offices that have either been secured by money recovered from the users or otherwise donations from government or donors. These logistics are crucial because they ensure that participation by water users is secured.

6.3.2.4 Strengthening Capacities

Efforts to establish a business of their choice and acquire resources for it by Chagwa WUA have proved difficult, due to several factors including lack of capacity and/or dependency. Meaningful engagement and community power is not possible when the locus of power is located outside the spaces of engagement. Some level of autonomy is necessary for the WUA to be able to function and have an impact within the communities it is situated not merely as an extension of facilitating agency.

Agency was inhibited in Chagwa when their proposal for or request for assistance towards drafting an application for grants was rejected by relevant government officials and the implementing NGO in the area. The Chagwa WUA was established as a cooperative which was to operate as a business producing bottled water to sell nationwide although it would also provide water at no profit to people. The business aspect has not materialised, although WaterAid and Participatory Development Initiative (PDI) had promised to facilitate this at its

⁹⁷ Focus Group discussion at Chagwa 12 October 2014. Similarly in ZAEWUA, all technical works are now carried by salaried employees in the secretariat who include former Board members who were carrying out the work on a voluntary basis before the WUA was able to pay for such services. The financial boost was as a result having properly established user fee collection and establishing many water points but also financial assistance from WaterAid for secretariat.

inception. There were attempts to approach other organisations for grants to kick start business ventures but the capacity to write proposals was lacking. The frustration of WUA members was evident:

[w]e have no freedom to pursue or run the business of our choice. We are tied to their plans which they now say are impossible because we have no electricity. If they had not put us up to a water bottle business we would have done our own initiative where we would have put together money and invested in chickens or something like that to get money but they discouraged us always. They block us. If our business took off, we would have had the shares for people to invest in by now and this would have made a difference here in people's lives.⁹⁸

Yet another participant complained as follows:

[w]hy we have not started is because WaterAid and PDI are not meeting their end of the bargain. We feel so frustrated and hopeless because our plans are being obstructed. We are like a bridge, anyone can step on it. They promised to give us money as part of the capital but to date that money has not come even though we have complied with their request to open a bank account. WaterAid is no longer supporting us money wise yet they also do not allow us to write proposals to other organisations.⁹⁹

Capacity building in WUAs is mainly focused on ensuring the ability for communities to keep the water system running efficiently. Hence the training provided by government and development partners or NGOs covers topics on technical aspects on maintenance and operation and managerial and financial aspects regarding revenue collection, budgeting and accounting among others. Capacity building is essential not only in specific water issues but also for people to build their community's capacity in order to contribute in fostering self help initiatives or collective agency. This can be done by allowing the WUAs to develop within specific contexts and respond to the particular needs and interests of the people in the communities.

6.4.3 Participatory Parity

Higher positions in a WUA are predominately filled by male members and this is especially true when it comes to representation on the Board. In all cases, the Board members were predominantly male. The table below demonstrates that few women make it into the higher structures of the WUA.

⁹⁸ Focus group discussion at Chagwa 20 September 2012.

⁹⁹ Focus group discussion at Chagwa 20 September 2012.

Table 6.3 Women Representation in WUA Boards

	Men	Women	Total	Women's representation (%)	Chair person
Zomba East WUA	10	3	13	23	male
Nkorokoti WUA	6	3	9	33	male
Chagwa WUA	6	5	11	45	male
Mtandile WUA	7	0	7	0	male

The higher numbers of women in the WUA Boards in the table may be attributed to the 50:50 representations in the GA membership. It guarantees at the very least an opportunity of access to participatory spaces however as noted in chapter four, beyond access, women must be able to influence decisions.

For instance, in rural areas women are very well represented in the grassroots WPC which provides a space for women's to engage with water concerns. Users living in the village where the facility has been installed form part of the WPC. The WPC has 6 elected members. It holds regular meeting with its water users. In principle, the gender ratio in these committees is 60:40, with women in the majority. In reality most positions held in the WPCs are filled by women with just one man at times; who is often inactive and ineffectual. Although a WPC has a limited mandate, they provide what Fraser would call a *subaltern counterpublic* or counterpublics where the marginalised women are able to gain experience and practice to articulate their problems among fellow women before entering the other spaces they are normally excluded from. It is a space where women discuss and plan around immediate issues of access to water, user fees and so forth. For instance, in ZAEWUA one Water Point Committee had decided to raise the user fees collected in order to keep part of the money for the development of the facility and a small home garden. In another village, where the women are into subsistence farming, the WPC collects produce soon after harvest and sells it to cover fees for the whole year. The WPC therefore provides an ideal space for women to talk to one another about water issues and to make decisions that address specific needs and interests and that directly impact on their everyday access to water. Regular

meetings are held with the water users where rules of access are agreed on as well as management and monitoring the performance of the facility.¹⁰⁰

In peri-urban areas there are no WPCs. Individual water vendors take the place of WPCs. Women dominate as vendors while very few find a seat at the high tables on decisions of policy and regulation of WUA. Further, there is limited meaningful engagement between the water vendors and the water users as the vendors' primary obligation is fulfilling their contractual work obligations in extracting fees. Hence compared to the water committees in rural areas, there is no real engagement. Money mediates the relationship of 'client' and 'agent/provider', whereas in rural places the relationship is that of 'representatives' and 'constituencies'. Whereas the sellers' accountability is upwards to the Water Utility Company or WUA Secretariat rather than downwards to the users on the ground, the WPC's accountability is mainly to the people that elect them to engage with WUA on their behalf in ensuring continuous access to water.

Gender bias and discrimination are evident in the social perceptions and behavioural norms in WUAs. For instance in a focus group discussion on elections and positions at Chagwa WUA, one member expressed the way in which women were marginalised:

[i]magine this guy was beaten in elections by a woman! Luckily afterwards the lady accepted to give up her Chairperson position to him and took up the position he was elected to, as Secretary to the Board.¹⁰¹

In another interview with a female Board member of Zomba East WUA, it was clear that the above statement is not exceptional and one woman who served on the Board felt that she was constantly undermined by the male Board members simply because she is a woman.¹⁰² She explained an incident when she was entrusted to lead a delegation in an area to replace a GA member after the previous holder had left the area. Several names were put forward from the community. The favourite in the meeting, which comprised of two members of the Board and community leaders, did not qualify as he had not lived in the area for at least a year nor had he had training, like most of the other candidates. The woman in question could not accept him as a member because she felt that he was not qualified. Her fellow Board member shouted at her stating that she is 'just a woman with no brains and cannot therefore be listened to.' The Board member went over her head and approved the 'unqualified' person as a GA representative of the area.

¹⁰⁰ Focus group discussion at Jokala, Zomba East 25 September 2012.

¹⁰¹ Focus group discussion at Chagwa with Board members 3 October 2012.

¹⁰² Interview of female Board member at Songani, Zomba East 20 August 2012.

These utterances show how deep cultural norms and values about gender roles are entrenched in the hearts and minds of people; how serious concerns of gender bias and discrimination are manifest; and how they silence the voices of women and make meaningful participation by women very difficult. This was also evident during a focus group discussion, I observed that one member of an Executive Committee in Nkolokoti was too inhibited to raise her voice in the meeting and was only comfortable with whispering her ideas to another male member sitting next to her when questions were asked. When questions were directed to a woman, male members more often than not answered on behalf of women. At meetings organised either by the WUA or by community leaders regarding water problems, men also dominated. The sitting arrangement also reflected a hierarchy, with women sitting on a mat on the ground and men occupying the available seats. This reflects cultural norms, which require a woman to give up her seat to a male as a sign of respect to the man. This according to Nkonya is a sign of submission and restricts women's voice in these participatory spaces.¹⁰³ Similarly Agarwal who observed such gendered behaviour observed that it makes participation less effective as men are easily recognised to make contributions and even receive higher priority.¹⁰⁴ Women are invisible and rarely speak to make contributions and even when they do, they do not carry the same weight. Cultural norms are known to inhibit women's voices to express their views.¹⁰⁵ Membership itself does not guarantee the equal opportunity to debate, discuss and decide on issues related to water it is thus essential that attention is paid to the dynamics of power that might mute the voices of some and amplify the voices of others.¹⁰⁶ Typically, at a meeting organised by the WUA Board to address concerns of vandalism of water pipes, men volunteered their opinion and suggested solutions whereas women had to be prompted to give an opinion on the matter. The Chief present at the meeting remarked on this and said 'Women where are you? Don't these matters being discussed affect you?'

¹⁰³ Nkonya LK Rural Water Management in Africa: The Impact of Customary Institutions in Tanzania (2008) 219-220.

¹⁰⁴ Agarwal B 'Participatory exclusions, community forestry, and gender: an analysis for South Asia and a conceptual framework' (2001) 29:10 *World Development* 1623, 1628 & 1638.

¹⁰⁵ See for instance UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 23: Political and Public Life*, 1997, A/52/38. See also Fraser N 'Feminist politics in the age of recognition: A two dimensional approach to gender justice' (2007) 1 *Studies in Social Justice* 23.

¹⁰⁶ See generally Goldin J Transformation (2003); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 23: Political and Public Life*, 1997, A/52/38; Fraser N 'Feminist politics in the age of recognition: A two dimensional approach to gender justice' (2007) 1 *Studies in Social Justice* 23 establishing that cultural norms inhibit women's voices to express their views.

One woman promptly stood up to make her contribution. As she began to speak, the Chief spoke again asking her to sit down and speak while seated like the rest of them (men) had done. What constitutes good deliberation by men may not be in line with the way a woman chooses to participate and the way a woman is compelled to participate may impact her ability to communicate or articulate her views. It might need to be quite different from the way in which men participate and this may also have been what prevented the women from contributing as highlighted in chapter four.¹⁰⁷ Argumentative, assertive and confrontational discussion, as was the case here because of the recurrent problem of vandalism in the same village, may have been a contributing factor to women not contributing.¹⁰⁸ As Young argues, women may fail to speak in public because of the difference in style of speech from men; women might prefer non-argumentative modes like storytelling and greeting. Women's speech culture must be considered and fostered to ensure that they are not excluded from airing their views in seemingly participatory forums.¹⁰⁹ Different forms of deliberation should thus be recognised as legitimate parts of deliberation.

As a result of the Chief's prompting, three of the five women present at the meeting of 46 people raised their voices. The Chief paid attention to the voice of the women, recognising that they might be able to contribute to a better understanding of the reason for vandalism and to help find solutions to counteract this. At another meeting, the Chief expressed his discontent that women, despite the fact that they might be in leadership position, were marginalised or insulted. The Chief urged women to report to him secretly if they experienced any form of harassment and he chastised one of the traditional leaders who had insulted female leader with defamatory remarks such as 'you are uneducated' despite the fact that she was, in fact, better at her job than he was.¹¹⁰ One of the women leaders responded to the Chief's call to report in 'secret' and stated:

[n]o we won't come in secret because then there will not be transparency in dealing with the issue. We will come in the open so that everyone knows we have reported and can see how you deal with the issue.¹¹¹

This progressive standpoint that the Chief adopted was uncommon. The women's resilience to claim their rightful place in voicing their needs and asserting equality was evident.

¹⁰⁷ Chapter 4 section 4.3.3.2.

¹⁰⁸ Young IM 'Communication and the other: beyond deliberative democracy' in Benhabib S Democracy and Difference: Contesting the Boundaries of the Political (1996)121.

¹⁰⁹ Young IM Communication and the other (1996) 122.

¹¹⁰ T/A Mwambo at meeting in Zomba East 10 October 2012.

¹¹¹ Mindano Meeting 14 October 2012.

However, many were inhibited by the structural and cultural obstacles, especially in shared spaces with men. Hence even though they were present in these spaces, there was need for challenging these cultural norms inhibiting their voice. The ability to bring about positive change will require addressing the factors identified, such as gendered behavioural norms, social perception that undermine women's ability to participate on an equal basis with men. This will entail laws and regulations, awareness and other mechanisms to challenge cultural imperialism but also addressing women's resource base in terms of material and none material endowment to ensure they are placed in a position of equality with men or they are able to challenge and assert their equality as discussed in chapter four.

6.4.4 Empowerment and Agency

During the data collection phase, the Regional Water Officer considered one of the main problems with the WUA to be that government was only very slowly implementing its decentralisation process. He stated that:

[t]he Ministry has compiled manuals and other write ups on best practices and guidance on how to provide water to a community. But these best practices are not always followed. There is a lot of violation of these practices and such other rules and regulations. Enforcement of the law is generally weak. Donors dominate in the provision of water to the communities. Ninety seven percent of the water in the communities is provided with the help of donors. As such there are times when the desire by the NGOs to try to conform to conditions set by their donors may bring them into conflict with the Ministry's set standards. At times, the Ministry may itself deviate from its own set standards.¹¹²

The decentralisation process in Malawi stalled for years, resulting in weak local government institutions and an inability to ensure democratic participation to the lowest level. The newly created spaces, such as the WUA, are also weak in fostering community empowerment because they themselves do not have the capacity or sufficient knowledge about laws, policies and activities affecting the communities' access to water. Although overall meaningful participation is limited, there are many gains through the limited opportunity to take part in the different levels that actually foster influence and equitable outcomes as seen in the discussion below.

¹¹² Interview with regional water officer 13 April 2011. In the previous chapter, it was stated the MoIWD is the lead institution in water policy development and oversight.

6.4.4.1 Forging New Relations

The WUA is a vehicle that has the potential to foster new relations between people – both horizontally (community to community, government to government) or/and vertically (community to government, community to WUA and so forth). These relationships are critical for water users because there are information flows between people, and organisations, that booster knowledge and nurture positive attributes such as agency and empowerment. Benefits are tangible (improved taps, improved water access and water materiality, better water quality and the positive health spin-offs that comes with reduced waterborne diseases) and intangible (improved relations between people etc). There are also positive spinoffs in terms of time, – particularly relevant for women, –and closer distance to the water point. Other positive spin-off include co-operation and voluntary networks that are strengthened during the phase of ‘sweat equity’ as people work together to improve water infrastructure. In this way, trust is brokered and there are then ‘credit slips’ where one neighbour is able to draw on this trust knowing that at a later stage he/she will be able to reciprocate.

An example of a site where trust was brokered is in ZAEWUA. Here there are two neighbouring villages who had been rivals for water before the WUA was established. There was a well in one of the villages but residents did not want to share it with their neighbours because they did not consider that their neighbours had a legitimate claim to the water. When the neighbouring village mobilised labour so that they could benefit from the installation of a water tap with the help of the WUA, their ‘rivals’ did not support their efforts. They also did not want to use the water from the tap once it had been built. They did not approach their neighbours even when their own well had become contaminated. At a funeral ceremony, members of the village with a WUA tap discovered the desperate water problem faced by their neighbour and offered them a few buckets of water for free. Following on from this gesture, a delegation was sent to that village to apologise for the hostile relations that had been perpetuated. One Water Point Committee member explained:

[w]hen they apologised, we asked the other water users to allow them to come and use our facility as the WUA had taught us that water is life and we must assist others in accessing it.¹¹³

¹¹³ Focus Group Discussion at Jokala 18 September 2014.

In this case water was a vector for peace and rival villages buried their differences and talked to one another about water concerns – sharing water and recognising a commonality that water is life.

6.4.4.2 Personal Economic Benefit

The WUA has also contributed to improving the economic status of users, especially women who constitute, as has been shown above, over 90 percent of those employed in the WUA Secretariat in peri-urban areas. The impact of such employment was explained by one seller who stated that:

[i] now get a stable income that I use for myself and my family. Being a water seller has also helped me to take better care regarding personal hygiene and how I dress. I used to stay home with unkempt hair and the same clothes for days, now every day I have clean clothes on and my hair is either combed or breaded. My husband says I am now a presentable person and he would gladly go with me to different places.¹¹⁴

6.4.4.3 The Real Benefit

The real benefit from these experiences is not the number of taps nor is it the revenue collected but the ability to address inequalities and put the needs of the most vulnerable people first, enhancing their agency and their ability to be heard. To date there is only partial representation by the poor in WUAs, particularly in peri-urban areas. The challenge is to level the playing fields around who participates, how they participate and whether the participation is meaningful. The human right to water is not simply about providing access to water itself, but is a process about how this access is negotiated. It is only through meaningful participation that the human right to water can be addressed. It is through this process that the voice of the ordinary water user can be heard and that inequalities can be addressed.

6.5 Discussion and Conclusion

The field research has demonstrated that WUAs have opened up spaces for communities to engage and resolve water problems that affect them, including managing their own water services. Several things emerge or confirm earlier notions of participation from the data. First, it is interesting to note that there is awareness of the human right to water, although partial awareness as it is not grounded in the laws of Malawi or international human rights. The understanding of water as a human right is accompanied with aspirations and

¹¹⁴ Interview with water seller at Nkolokoti 6 April 2011.

expectations from government, to meet water needs but also reciprocity among the members in the rural areas particularly to advance the enjoyment of the human right for everyone. This confirms that human rights are empowering, they are both a social and legal tool in enhancing people's lives. The second theme addresses what the platforms offer women and communities as regards the enjoyment of the human right to water. The WUAs bring together community members to resolve common problem and this fosters agency. Different people have the opportunity to contribute to better access to water by rendering their service, time and resources to WUA. The more opportunity there is for this, the better the chances for agency and therefore equitable results. This emerged in the field especially contrasting the rural and peri-urban WUAs, there was a marked difference in this regard but also on ensuring the voice of people was heralded. In rural areas there was wide participation of membership through the different structures, regular meetings, and when rendering labour help to communities getting a water facilities. These opportunities were used for engagement in solving concerns of water or WUA as they emerged. Women, although mainly excluded from the main organs of WUA, create spaces for themselves in rural areas to engage and advance each other's lives especially through the WPC.

The separate space for women, in WPC offers more benefits and meaningful participation as the parties are equals. The WPC are a place to discuss access to water, daily care and hygiene of around the facilities, resolve conflicts and plan around better services. The women are able to talk freely and hold those in position to account on matters that affect them. Hence although they may have limited opportunity in completion with men, in these small spaces they dominate and draw benefit although in limited ways.

Such a space is not available for peri-urban women where gender equality in filling position has limited value. Women are mainly sellers of water and benefit economically however as regard real power to influence water decisions in WUA, this is limited. The agency individually or collectively is also limited.

Agency and equitable outcomes are inhibited where the locus of power resides outside WUA. For instance the locus of power over tariffs is not shared or amenable to influence by peri-urban WUAs' as discussed in the specific instance in this study. The focus on ensuring that ideals of cost recovery are rigidly implemented stifling the voices of the marginalised. In such cases participation becomes a mechanism for downloading functions of the State to the lower level and remains an empty token devoid of substance. The peri-urban WUAs lack of

power over tariffs means that the voices of the communities in this regard are not taken into account leaving the WUA as merely an instrument to implement decisions by Water Utility Company. Their value as a platform for the voice of the people is inhibited and so is their ability to ensure equitable outcomes.

The peri-urban WUAs especially the experience of one of the WUAs demonstrates that the risk of elite capture is more likely in spaces where decision making power resides in a few hands. In Mtandile the participation of ordinary WUA members and even awareness of WUA was very low. Most decisions were made by a small group of representatives who did not adhere to requirements of consultation prior to important decisions being taken. Although this WUA did manage to assert autonomy from political elite capture, by deciding to exclude them altogether in WUA processes the voices of the poor were still stifled due to limited spaces or opportunity to participate.

Finally, accountability both within WUA and of government is key in ensuring that the voices from the poor are heralded. The WUA structure is linked with the local government which is responsible for water services however as noted in the context of Malawi this potential is not fully utilised. The decentralisation process in Malawi stalled for years resulting in weak local government institutions and an inability to ensure democratic participation at the lowest level. However in the ideal, once the local government system is back on track, WUAs have great potential for greater enforcement of accountability. Better accountability enforcement is necessary to ensure that government has the incentive to act. However in the context of Malawi, there is no incentive as money and political power is exclusive to a few people and systems in place ensure that this is not disturbed.

As already alluded to, in all the WUAs there was a short supply of accountability however evidence from the rural WUAs were at least downward accountability of the WUA representatives was enforced, better decisions and responsiveness to the people was evident. The position holders were directly accessible to people and consulted regularly with people. Further they were nominated by the people hence and hence had a specific responsibility towards them. Finally the three year term meant that for re-election in the position, one had to perform well in order to gain approval for a second term from the people. Thus there was further incentive for accountability. The peri-urban areas had weak accountability internally because the position holders are almost permanent members of WUA and they have a lot of power within WUA to decide on issues even without consultation with the ordinary members.

The specific categories that are recognised to represent water users are rigid and curtail opportunity for ordinary members to hold such positions. Further the lack of wide participation and engagement with water users through meetings or similar structures like water point committees in the rural areas means that the ordinary members have limited opportunity to influence decisions and enforce accountability.

Having identified the challenges facing water governance on the ground, the next and final chapter provides a summary of the main finding of the thesis regarding the role and value of community participation in realising the right to water in Malawi.



Chapter Seven

Conclusion

7.1 Development and the Crisis in Water Services

The development of poor communities in rural and peri-urban areas is a pressing global concern. The provision of basic water services is the starting point and lifeblood of any sustainable development process. For this reason I suggested in Chapter one that the iconic slogan ‘water is life’ must be understood in both a biological and social sense.¹ In spite of the centrality of water to human development, many areas of the world are experiencing a water crisis. Malawi is no exception.

Apart from having 2.4 million people without access to safe water, there is the risk of other crisis imminent in 2025 due to infrastructural and distributional problems. Although the official statistics place water supply coverage at 85 per cent, this does not reflect the reality on the ground for rural and peri-urban areas, where more than one third of the facilities are not operational at any given time.² Corruption and theft of public resources further undermine efforts towards achieving equity in access to water. For instance, in 2004 nearly half of all the boreholes that the government had budgeted for were never constructed and less than 30 per cent of the constructed boreholes were functioning.³ The available water services are unequally distributed. Patronage, nepotism and clientelism are common place. In more affluent urban areas, legally recognised service providers provide water services on a profitable basis. By contrast, no provision is made for the rural poor, as the provision of water services in rural and peri-urban areas it is not a viable business venture with guaranteed profits.

The radical difference in water services within Malawi is normatively problematic as a matter of social justice, and reveals the limits of some of the dominant development approaches, in general, and approaches to the development of water services, in particular. In Chapter one I explained how the attempts to find an alternative to state-centred development, led to market-centred development approaches, and resulted in the ‘tyranny of participation’. The different levels of water services in Malawi are a legacy of these attempts. Where profitable, as in

¹ Chapter one section 1.1.

² Chapter section 5.1.4.

³ Chapter three section 5.1.2.

urban areas, water services are generally provided and properly serviced; where not, water services are largely neglected.

The crisis in water services in Malawi, as in most developing countries, reflects unequal relations of power, poverty and inequality linked to gender, geographical location, class and race.⁴ Marginalised and disadvantaged groups are being placed at the periphery of material advantage or power by those with political or legal resources.⁵ Women disproportionately bear the burden of poverty and the lack of water services in rural and peri-urban Malawi. Women who live in conditions of poverty enjoy the smallest opportunity to control decisions that affect them, because of the status ordering in society, lack of resources due to feminised poverty, lack of restricted access to economic, social and cultural rights (ESCR) and also exclusion from participation with others. The crisis of water services is a crisis of women's voice and participation.

In Chapter one I suggested that two alternative approaches to development promise to avoid and correct this state of affairs in a more equitable and efficient manner.⁶ These approaches claim not to be power-centred, or profit-centred, but people-centred. The alternative approaches in question are the capabilities approach and the human rights approach. I argued that the two approaches are complimentary but decided to focus my attention on the human rights approach to development, because of the benefits the approach offers water users as far as legal enforcement is concerned. Only the human rights approach to development gives rise to specific legally enforceable rights claims.⁷

In this context I postulated the following hypothesis: The recognition of the human right to water in Malawi will provide an effective way of overcoming the lack of power and the 'tyranny of participation' which characterise water services in rural and peri-urban areas, by contributing to the transformation of community participation and the role of women in the governance of water services.⁸

⁴ See Chapter one 1.1 & 1.2. See also generally United Nations Development Programme (UNDP) *Human Development Report 2006 Beyond Scarcity: Power, poverty and the global water crisis (2006)*. See also Chapter one generally.

⁵ Gloppen S & Kanyongolo FE 'Courts and the poor in Malawi: economic marginalization, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* 258.

⁶ See chapter one section 1.1 & 1.3; chapter five 5.2

⁷ Chapter one sections 1.3.2.

⁸ Chapter one generally.

7.2 The Human Right to Water at the Heart of People Centred Development

As the study progressed, it soon became clear that the biggest benefit of the human rights approach to development might also turn out to be its biggest challenge or drawback. Unlike the capabilities approach, the human rights approach offers little outside legally recognised rights claims. It is thus seemingly fatal to the approach that the right to water is not specifically recognised in the foundational international human rights instruments, such as the ICCPR and ICSECR (except for specific target groups in specific situations). In the absence of a right to water, the human rights approach to development seems severely compromised and without the ability to address the development challenges around water services in rural and peri-urban Malawi.

In Chapter two I traced the historical development to establish how this puzzling state of affairs arose. Having regard to the recent work of the CESCR and the HRC, I concluded that the ICCPR or ICSECR must be interpreted to include a right to water as an implied or unenumerated right.

The fact that the right to water is an unenumerated right, gives rise to specific interpretive problems when it comes to the definition and content of the right. I addressed these difficulties in Chapters three and four. Chapter three explored the substantive content of the right to water. Adopting a purposive approach, I argued that the right to water should be defined as a right to water for both domestic (personal) and productive uses, but that it does not extend to commercial or industrial uses. Given the limited scope of this thesis, I decided to limit my focus on the right to water for personal and domestic uses.⁹

The human right to water for personal and domestic use entails that, as a minimum, water of a adequate quality and quantity must be available and accessible to every person. States have the tripartite obligation to respect, protect and fulfil this right. I explored whether the positive state obligation to provide water could be claimed as a subjective or individual right. Adopting the minimum core approach against the reasonableness approach, I concluded that the right to sufficient safe and clean water for drinking, eating, washing and cleaning purposes is not simply a policy directive but an enforceable legal entitlement.¹⁰ The legal obligation contained in the right is only met if every person can safely collect sufficient clean water from a water point within 30 minutes from his or her home.¹¹ This is the core content

⁹ Chapter three section 3.2

¹⁰ Chapter three generally.

¹¹ three Table 3.1.

of the right to water. Failure to provide and maintain this level of service is a violation of the human right to water. States will be hard-pressed to provide a justification for this violation. Only if the right to water is defined in this strong sense, does the people-centred human right approach to development gain true advantage over the power- and profit-centred approaches.

However, the human right to water is not limited to this minimum core. It includes the right to the ‘progressive realisation’ of water services beyond the minimum core. Relying on the typology suggested by Howard and Bartram, I argued that this implies progressive improvement in water services beyond the basic levels of domestic use to optimal levels of domestic use, and eventually also to productive use for subsistence purposes.¹² Thus: full realisation of the human right to water as a right to development would be a water point or tap in every house, providing sufficient safe and clean water for the basic subsistence needs of the inhabitants (drinking, eating, washing, cleaning and subsistence farming). States have a legal obligation under the right to water to immediately draft and begin implementing a comprehensive policy and plan which would in time guarantee the full realisation of the right to water. This concluded the conceptual analysis of the right to water as the right to life in the biological sense.

One of the key problems with the earlier approaches to development is that development was understood exclusively in terms of the production or availability of goods and services, often measured as economic values (GDP). Capabilities and human rights treat people as human beings with the dignity and respect owed to every human being as a moral being and understand development as the development of certain human abilities or capabilities. This development of people and communities, as opposed to goods and services, is only possible if people participate effectively in the governance of development processes. As a true alternative to the power- and profit-centred approaches to development, the human right to water must thus also include the participatory element necessary to achieve empowerment. The human right to water must go beyond ensuring the benefit of ‘having’ water to also embrace the benefit of ‘being’ an equal citizen, sharing the benefits of ‘participatory living’ in a community of equals.¹³

The human right to water must empower community members to act individually and collectively through the right to participate in governance of water services. Chapter four established that the right to water recognises people as agents who must have power to affect

¹² Chapter 3.3.3.

¹³ Chapter 1.1.

outcomes through genuine participation.¹⁴ It is through power within water governance that they can act as agents for themselves and others to ensure equitable, secure and sustainable access to water. This demonstrates that participation is valued for its own sake and not for its instrumental value. The primacy concern is people, and ensuring equity and justice for all. This can be contrasted with participation or lack of it under state-centred governance, where people are mere suppliants of State policy and in market-centred government, where instrumental participation is advanced, with no real power to affect outcomes. The Chapter highlighted how non-participation or instrumental participation is a thriving enterprise to legitimise the interests of few people while side-lining the majority.

As noted in Chapter one, in the absence of a human right to water, participation can become a co-optation mechanism, to ensure smooth running of projects while disinvesting participation of any form of empowerment. Chapter four underscored that not all participation is equal, only real or genuine participation is power. Where participation is a co-optation mechanism or means to facilitate the exercise of unjust power it perpetuates inequalities and oppression. Where it is a mechanism to hear the voices of the marginalised and disadvantaged and find equitable solutions and enhance their ability to flourish, participation is power.

On the assumption that the human right to water holds the key to the latter, this study began with the optimism that the human right to water would reclaim participation from being tyrannical to being empowering of the marginalised and poor who find themselves on the peripheral advantage in water governance. My initial contact with community organisations involved in water governance rested on the assumption communities could solve their water problems by making use of ‘available spaces’ to clearly articulate their claims and demanding that government, including Members of Parliament (MPs) and local government, respond accordingly.

As the study unfolded, it became clear that the concept of ‘meaningful participation’ is extremely complex and will have to be further conceptualised. Participation as a concept cuts across disciplines and requires the integration of insights beyond the narrow confines of legal analysis. An even bigger challenge is posed by the fact that ‘participation’ is not an established legal category within liberal legalism (outside the political right to vote). I argued in Chapter four that the right to vote and to elect local government is simply not sufficient to ensure efficient, equitable and empowering water governance. The challenge faced by any

¹⁴ Chapter 4.2.

defender of the human rights to water is thus to establish that the participatory or procedural dimension of the right is equally as justiciable as the substantive dimension.

In Chapter four, I relied on the work of the Special Rapporteur on the Right to Water to define genuine participation as ‘active, free and meaningful’ participation.¹⁵ I then turned to the jurisprudence of the South African Constitutional Court to illustrate how the right to ‘meaningful participation’ can indeed be legally enforced. The Court is rightly celebrated for its attempt to enforce community participation, via the notion of ‘meaningful engagement’, in the context of housing developments and the upgrading of informal settlements and inner-city slums. However, attempts to legally enforce the right to participate in the context of water services, as in the *Mazibuko* case, have been less successful. This should be a cause of concern about the willingness of even progressive Courts to embrace the right to water. Given the limited jurisprudence around the right to water, I turned in the rest of Chapter 4 to the work of feminist scholars to further clarify what the notion of effective participation might mean for women in poor communities who are faced with the public power of the State and the private power of profiteering multi-national companies. Participation means involving women in setting out the terms of engagement; creating cultural and gender appropriate spaces for participation; enabling women to access participatory processes given their other roles in the family and community; guaranteeing free and safe participation; ensuring access to information; and providing reasonable opportunity to influence decision-making. This concluded the analysis of the right to water as the right to life in the social sense of the term.

7.3 Community Participation and the Human Right to Water in Malawi

In Part II of the thesis I turned my attention away from the conceptual clarification of the international human right to water and its legal implications, to investigate how far the right has been domesticated in Malawi and has impacted on the development agenda in Malawi. My hypothesis was that the domestic enforcement of the human right to water will ensure more equitable and efficient water services for rural and peri-urban communities through the effective participation of women as primary water users. For the human rights approach to have this impact, the human right to water must first be recognised as part of Malawian law. The immediate problem is that the right to water is not explicitly included in the Malawian Constitution; it is also not explicitly mentioned in legislation or the national water policy. I

¹⁵ Chapter 4.4.

argued in Chapter five that the right to water nevertheless forms part of Malawian law, primarily because the ICESCR has the status of national legislation in Malawi.

This conclusion gave rise to the question whether the Malawian government is complying with its tri-partite duties under the right? Given the specific focus and limited scope of the thesis, I decided to concentrate my attention in this regard on the duty to respect, protect and fulfil the participatory dimension of the right, with special attention to the right of women to participate in water governance. The first question was whether the legislative and policy framework make sufficient provision for effective community participation in the governance of domestic water services as defined in Chapters three and four. This was the topic of Chapter five. I concluded that, although the recent Water Resources Act, 2013 does not make mention of the right to water, it does formulise the Water Users Associations (WUAs) and, if property implemented, could provide meaningful opportunities for community participation in domestic water services in rural and peri-urban areas.

The next and final question that needed investigation was how far women living in rural and peri-urban communities framed their struggle for participation in the governance of domestic water services in terms of the human right to water, on the one hand, and whether greater recognition of the right would enable women to overcome their marginalised position in water governance, on the other. Chapter six contains the results of field research which was undertaken to answer the latter two questions. The field research revealed that potential of the WUAs to serve as a meaningful forum of participation differed sharply between rural and peri-urban WUAs. This is mainly due to three factors:

(i) The rural WUAs tend to be more active as participants in the community, while the peri-urban WUAs function more as purely representative decision-making bodies.

In rural areas, there was wide participation of membership through the different structures, regular meetings, and when rendering labour to help communities getting water facilities. These opportunities were used for engagement in solving concerns as they emerged. Another benefit only noticed in rural areas, is forging new relationship and networks as water became a catalyst for peace between rival villages. There was also far more evidence of collective agency because of wider participation of the community members but also because payment of services is not solely through cash but also 'sweat equity' which brings people together around a common cause. The study of the peri-urban WUAs revealed that the risk of elite

capture is more likely in spaces where decision making power only resides in the hands of a few representatives.

(ii) The rural WUAs place less emphasis on cost recovery, while the peri-urban WUAs are driven to prioritise full cost recovery.

The focus on ensuring that ideals of cost recovery are rigidly implemented comes at the risk of stifling the voices of the marginalised. In addition to this, when the locus of power is located outside these ‘participatory’ spaces, the potential for these spaces to contribute to realising human right to water for all becomes restricted. Participation becomes a mechanism for downloading functions of the State to the lower level and remains an empty token devoid of substance. The peri-urban WUAs lack of power over tariffs means that the voices of the communities in this regard are not taken into account, leaving the WUA as merely an instrument to implement decisions by the Water Utility Company. In the rural areas the urgency of cost recovery is less visible and there appears to be more support from government and donor agencies to ensure that user fees are kept within the reach of everyone. This is an important aspect of community participation, the continued support, financially or in other ways, ensures that communities are able to participate meaningfully. The tension between financial sustainability of WUAs and equity under the human right to water is resolved in the rural areas in favour of equity.

(iii) Rural WUAs exclude and marginalise women to a far smaller degree than peri-urban WUAs.

The women in both rural and peri-urban WUAs still enjoy limited or restricted access to participatory spaces. Cultural imperialism is evident in WUAs and this undermines the agency of women. However, the presence of Water Point Committees (WPCs) in rural WUAs offers the potential of meaningful participation as the parties are equals. The WPC is a place to discuss access to water, daily care and hygiene around the facilities, resolve conflicts and plan around better services. The women are able to talk freely and hold those in position to account on matters that affect them. Hence, although they may have limited opportunity in completion with men, in these small spaces they dominate and draw benefit although in limited ways. In peri-urban WUAs these spaces are not available. Women are mainly sellers of water and benefit economically. However their power to influence water decisions is limited.

7.4 The way forward in Realising the Human Right to Water in Malawi through Community Participation

The thesis established that the human right to water is binding on Malawi and stipulated what the right entails as far as the governance of water services for domestic uses is concerned. The analysis of the policy and legislative framework in Malawi, as well as the field research at four sites in Malawi, identified clear traces of the right in Malawian law and practice. A stronger conclusion cannot be drawn. It is too early to conclude whether the enforcement of the right to water will change the development trajectory in Malawi and ensure more efficient, equitable and empowering water governance. The new Water Resources Act still remains to be fully implemented. What is clear is that the traces or elements of the right to water which already exist in Malawian law and practice must be further enhanced. To that end I make the following recommendations:

7.4.1 Law reform.

The right to water must be explicitly recognised and formulated in binding legal instruments at international, regional and national level. I therefore recommend the adoption of an optional protocol to the ICESCR establishing the human right to water as a numerated right in international treaty law. The same recommendation applies to the African Charter on Human and Peoples' Rights.

The Malawian Constitution must be amended to include a right to water as a justiciable right and not merely as a directive principle. The same applies to the new Water Resources Act, which still does not include a formal definition of the right to water. Such reform will require further research into the outer scope of the right to water and the potential tension between domestic and productive uses. If this recommendation is adopted it would provide a strong statement on Malawi's commitment to realise the human right to water. It would also provide a clear guide for strategies to meet State's obligations which thus far are not fully captured in the law.

7.4.2 Public Awareness and Education Campaigns.

The extensive law reform recommended above should be used as the opportunity to launch an equally extensive public awareness and education campaign. The human right to water is the basis on which people become subjects and not merely objects of State policy and therefore also agents in realising the human right to water. However, unless people are aware that they

can make claims for water based on a legal entitlement, participation in such spaces may not realise its full potential. Entering the spaces as right holders will ensure that they negotiate with government in an empowered manner. Public awareness is also necessary for communities to understand the roles in WUA and hold representatives accountable. This is of particular importance in peri-urban areas where the most common interaction with a WUA is through payment of fees at a water facility. For this reason, many people do not recognise it as their representative body but rather an agent of the Water Utility Company. This is exacerbated due to rules and procedures that do not guarantee wide community engagement in a WUA. Greater public awareness of the right to water and the institutional role of WUAs is necessary.

7.4.3 Institutional Independence of WUAs

Government must also ensure that the WUAs operate as independent entities with real opportunity to influence decisions. Independence does not solely depend on financial independence but independence through a system of participatory modalities that guarantee wide participation to ensure the voice of the poor is heard. Promoting genuine participation will also require a necessary institutional frame that links the WUAs and government and accountability mechanisms so that there is an incentive for government to act. For this reason, the linkage between local government and the WUA is critical. WUAs could be an ideal structure to ensure participatory democracy at the lowest possible level.

7.4.4 Strategic Litigation Campaigns

The human rights approach to development has the benefit of giving rise to justiciable rights claims. A large part of the thesis was devoted to establish that this right exists in Malawian law. The human right to water must be used by people as the basis of a strategic litigation campaign. I recommend that NGOs actively pursue this possibility. Such a campaign will not only generate much needed jurisprudence around the right but will also enhance public awareness of the right and might even stimulate law reform around the issue. The recommendation would require further research into the accessibility of Malawian courts to poor and marginalised communities.

In the final analysis it can be concluded that ‘water is life’ and ‘participation is power’. On the basis of these two slogans, the findings of this thesis and the recommendations listed above, clearly point to the way forward in realising the human right to water in Malawi through community participation.

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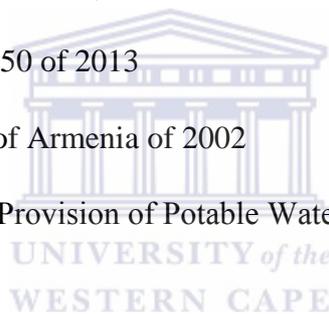
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