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UNQUENCHED THIRST: THE NEED FOR A CONSTITUTIONALLY RECOGNIZED RIGHT TO WATER IN GHANA

Tia Crosby*

ABSTRACT

The practice of privatizing water is often discussed as the leading method for improving access to adequate water in developing countries. Notably, this method has a cost that frequently impedes access to water in the developing world, while exploiting the profitability of a natural resource that is vital to human life. In Ghana, the failure of water privatization initiatives and the growing scarcity of adequate water have caused a public health crisis that necessitates a quick and efficient solution. As demonstrated in South Africa, the codification of the right to water in its constitution has improved access to adequate water, sparked government concern and action on water and sanitation issues, and provided citizens with various avenues to compel government adherence to the constitutional right. Is constitutional recognition of the right to water an adequate alternative to privatization of water? If so, can such recognition solve Ghana's water woes? This paper examines how constitutional recognition of the right to water in Ghana can successfully encourage the substantive realization of access to adequate water to all Ghanaians and an efficient procedural process that assures government accountability in water governance.

1. INTRODUCTION

The aroma of fresh fish in the air, the taste of mango on the tongue, and the myriad of exotic fabrics catch the gaze: this is the beauty of Ghana. For many, the Republic of Ghana is a tourist attraction. The country is filled with beautiful beaches, picturesque mountains and plush forests. However, amidst Ghana's beautiful natural landscape lies a murky problem.

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From the rural plains to the crowded cities, Ghanaian residents are battling against contamination, poor health, and powerful foreign investors. The cause of this “war” is water. Although Ghana is saturated with abundant water bodies, urbanization, hazardous waste dumping, and poor maintenance of public works have severely limited clean water access. This paper seeks to provide a solution to the water crisis in Ghana. To promote public health, economic growth, and development in Ghana, the Ghanaian government should implement a constitutional right to water, similar to the one implemented in South Africa, consistent with international and regional human rights obligations.

This paper addresses public health and development concerns that stem from inadequate water supply and sanitation in Ghana. Part I explores the current issue of water scarcity and poor sanitation in the developing world, and addresses the commercialization and privatization of water as a remedy to water access in developing countries. Part II examines the state of water rights in Ghana and considers Ghana’s international, regional and domestic obligations on water rights. This section also discusses the emerging “right to water” in international human rights commentary. Part III reviews access to water challenges that limit the right to water in Ghana, while uncovering shortcomings in water and sanitation governance, such as poor utility infrastructures, disproportionalities in water access, and lack of community involvement. Part IV proposes a possible solution to alleviate challenges to access to water in Ghana. Specifically, it advocates for parliamentary action to recognize water rights and promotes usage of the “South Africa Model” to promote substantive and procedural rights to water in Ghana.

2. WATER SCARCITY AND THE COMMERCIALIZATION OF WATER RESOURCES

A Thirsty World: The Water Problem

Our economy is burdened with a major energy and water crisis. [...] We are working hard to bring this crisis to an end, and every bit of assistance will take us one step closer to that goal.¹

1. Cephas Larbi, ‘We’re working hard to end the energy and water crisis-Mahama’ *Ghanaian Agenda* (Accra, March 7, 2013) <<http://www.modernghana.com/news/450656/1/we-are-in-crisis-8211-mahama-declares.html>> accessed November 14, 2013 (statement by President John Mahama).

Water is vital to life.² Thus, water is essential for the survival of all living things.³ Its importance in global relations is evident in skirmishes resulting in internal and external armed conflict, political instability, economic stagnation, and food shortages.⁴ Today, there is enough water to facilitate the world's seven billion inhabitants.⁵ Observably, population growth, pollution, depletion and climate change place an extreme burden on the access to clean water and sanitation.⁶ Consequently, water scarcity results from natural and anthropogenic influences that create physical and economic constraints.⁷ In the industrialized, developed world, access to clean water and sanitation is virtually guaranteed.⁸ Yet, in the developing world, access to clean water and sanitation is a challenge that is bound to increase as the global population as well as urbanization rise.⁹

The world's poor disproportionately encounter challenges to water access and sanitation.¹⁰ Of the 1.6 billion people suffering from economic water shortages due to insufficient water supply infrastructures, the majority live in sub-Saharan Africa.¹¹ The World Health Organization (WHO) estimates that sub-Saharan Africa and Asia contain the vast majority of the 2.6 billion people living without access to improved sanitation.¹² The impact of poor sanitation and access to water causes many to use contaminated water for drinking, bathing, and cleaning their homes and clothing.¹³ Unsafe water supply and sanitation are attributable to typhoid fever and diarrhoeal diseases such as cholera.¹⁴ Annually, diarrhoeal disease contributes to the

2 See Leanne Watrous, 'The Right to Water - from Paper to Practice' (2011) 8 Regent J. Int'l L. 109.

3 Peter Tyson, 'Life's Little Essential' (January 4, 2004) *PBS Nova* <<http://www.bs.org/wgbh/nova/evolution/liquid-of-life.html>> accessed November 15, 2013.

4 See, e.g., Doug Donoho, 'Some Critical Thinking About a Human Right to Water' (2012) 19 *ILSA J. Int'l & Comp. L.* 91, 92; see also Andrew Quinn, 'U.S. Intelligence Sees Water Conflict Risks Rising' *Reuters*, (Washington, 22 March 2012) <<http://www.reuters.com/article/2012/03/22/us-climate-water-idUSBRE82L0PR20120322>> accessed September 18, 2013.

5 'UN International Decade for Action "Water for Life" 2005-2015: Water Scarcity' (*UN Water*, 5 September 2013) <<https://www.un.org/waterforlifedecade/scarcity>> accessed September 20, 2013.

6 *ibid.*

7 *ibid.*

8 D. Donoho, 'Some Critical Thinking About a Human Right to Water' (n 4) 92.

9 *ibid.*

10 See Emilie Filmer-Wilson, 'The Human-Rights Approach to Development: Right to Water' (2005) 23 *Neth. Q. Hum. Rts.* 213, 235.

11 'UN International Decade for Action "Water for Life" 2005-15: Water Scarcity' (n 5).

12 World Health Organization, 'WHO/UNICEF joint monitoring report 2010: Progress on Sanitation and Drinking Water' (*WHO*) <http://www.who.int/water_sanitation_health/monitoring/fast_facts/en/index.html> accessed September 20, 2013.

13 D. Donoho, 'Some Critical Thinking About a Human Right to Water' (n 4) 92.

14 World Health Organization, 'Burden of Disease and Cost-effectiveness Estimates' <http://www.who.int/water_sanitation_health/diseases/burden/en/index.html> accessed September 20, 2013.

deaths of 1.8 million people throughout the world.¹⁵

Despite the problems resulting from access to water and sanitation, trends show that a higher percentage (89%) of the world population uses an improved drinking water source.¹⁶ Since 1990, approximately 1.9 billion people gained access to an improved sanitation facility¹⁷ and 2.1 billion people gained access to improved drinking water sources.¹⁸ Nonetheless, the global water crisis is so substantial that extensive international and regional efforts and reforms are required to curb water scarcity.¹⁹ The United Nations Department of Economic and Social Affairs (UNDESA) estimates that by 2025, “1.8 billion people will be living in countries or regions with absolute water scarcity” and that “two-thirds of the world’s population could be living under water stressed conditions.”²⁰ The increasing demands of a growing global population, riddled with climate change and industrialization woes, requires active dialogue and reforms concerning water rights to encourage global water security.

B. The Commercial Nature of Water

An understanding of international and domestic recognition of the right to water necessitates background dialogue concerning the privatization of water resources in the developing world, specifically sub-Saharan Africa. In the 1990s, the World Bank advocated and required developing countries to privatize their water resources as a condition for receiving economic assistance.²¹ The reasoning behind this policy was the failure of governments and nongovernmental organizations (NGOs) to reach the goal of universal water supply during the International Water and Sanitation Decade (1981-

¹⁵ *ibid.*

¹⁶ “Improved drinking-water source” is a water source that by the nature of its construction adequately protects the source from outside contamination, in particular from fecal matter; See World Health Organization, ‘WHO/UNICEF joint monitoring report 2010: Progress on Sanitation and Drinking Water’ (n 12).

¹⁷ “Improved sanitation facility” is a facility that hygienically separates human excreta from human contact. See ‘UN International Decade for Action “Water for Life” 2005-15: Water Scarcity’ (n 5).

¹⁸ World Health Organization, *Progress on Sanitation and Drinking-Water Update 2013*, <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed September 21, 2013.

¹⁹ See D. Donoho, ‘Some Critical Thinking About a Human Right to Water’ (n 4).

²⁰ “Water stress” occurs when annual water supplies drop below 1,700 m³ per person; See ‘UN International Decade for Action “Water for Life” 2005-15: Water Scarcity’ (n 5).

²¹ Jamie Knotts, ‘Privatization When Public Goes Private’ *On Tap Mag* (2003) <<http://www.nesc.wvu.edu/ndwc/articles/OT/SP03/Privatization.html>> accessed October 2, 2013.

1990).²² Advocates of privatization (“the transfer of ownership of water supply systems to private companies”) and other private sector entities (“the construction, operation and management of publicly owned water supply systems to private companies”) in water supply and sanitation in developing countries posit that the private companies through superior management and efficiency can provide lower prices, improved performance, increased cost recovery, and water to those who current lack access.²³ However, opponents of water privatization view the private sector involvement in water supply incompatible with promotion of water access in the developing world.²⁴ In a private sector involvement model, unlike public water management, the private sector governs the management of water supply and sanitation, and is held accountable by shareholders, not by citizens.²⁵

1. *Privatizing Water*

A conceptual reading of the privatization of water suggests either complete private ownership of water supplies or a laissez-faire regulation of the private sector.²⁶ However, in reality, privatization of water involves an assortment of different public-private partnerships with “degrees of governmental control and oversight of water resources and infrastructure.”²⁷ There are four types of water privatization that have been utilized: (1) joint arrangement or mixed management, (2) concession, (3) split ownership, and (4) divestitures.²⁸ The method of privatization primary used in Ghana was joint arrangement or mixed management, yet it failed to have staying power in Ghana.

22 Karen Bakker, ‘Commons Versus Commodities, Debating the Human Right to Water’, in Farhana Sulana and Alex Loftus (eds), *The Right to Water, Politics, Governance and Social Struggles* 25 (2012).

23 *ibid.*

24 *ibid.* 26.

25 Michael Nichola, ‘Thirsty for a Solution: Using the Rural Electrification Administration Model to Resolve the Failure of Privatization of Water Utilities in Bolivia?’ (2013) 8 Fla. A&M U. L. Rev. 351, 358.

26 Amy Miller, ‘Blue Rush: Is an International Privatization Agreement a Viable Solution for Developing Countries in the Face of an Impending World Water Crisis?’ 16 Ind. Int’l & Comp. L. Rev. (2005) 217, 228.

27 *ibid.*

28 Nichola, ‘Thirsty for a Solution: Using the Rural Electrification Administration Model to Resolve the Failure of Privatization of Water Utilities in Bolivia?’ (n 25) 358.

2. *The Failure of Privatization in Ghana*

Water privatization created several problems in Ghana, and today the scars it left still affect water utility practice. In Ghana, the International Monetary Fund (IMF) and the World Bank endorsed privatization projects.²⁹ These projects began in the 1980s, when the World Bank and IMF created conditional loans, which required developing countries to allow the Bank and IMF increased latitude in the reconstruction of their economies.³⁰ This practice, in Ghana, led to foreign water companies, such as Vivendi, Suez, and Saur, to take over the supply of water.³¹ However, these multi-national water corporations did not view water as a right, but as a commodity. Thus, under the regulations of these companies, poverty-stricken communities were unable to pay for the increasingly high cost of water.³²

Privatization of water in Ghana was inconsistent with environmental human rights. This was reflected in the 2005 agreement between the public Ghana Water Company (Ghana Water) and the Dutch-South African company, Aqua Vitens Rand Ltd., concerning the management of water and sanitation services in the urban communities.³³ While Aqua Vitens Rand operated in Ghana, the company failed to decrease the amount of unaccounted water, enhance the water production and distribution process in the country.³⁴ Ultimately, Ghanaian citizens were burdened with paying high prices for water and deterioration in public health ensued.³⁵ In 2011, the Ghanaian government did not renew its contract with Aqua Vitens Rand and Ghana Water regained control of urban water and sanitation services.³⁶ This paper does not seek to advance notions of privatization in alleviating water scarcity, as privatization in Ghana failed to advance the human rights issues that this paper aims to promote.

29 George M. Ogendi and Isaac M. Ong'oa, 'Water Policy, Accessibility and Water Ethics in Kenya' (2009) 7 *Santa Clara J. Int'l L.* 177, 191.

30 Moses M. Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' *Bloomberg Businessweek*, 11 April 2013 <<http://www.businessweek.com/articles/2013-04-11/a-water-crisis-threatens-ghanas-economic-growth>> accessed October 5, 2013.

31 Ogendi, 'Water Policy, Accessibility and Water Ethics in Kenya' (n 29).

32 *ibid.*

33 Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' (n 30).

34 *ibid.*

3. THE CURRENT STATE OF GHANA'S WATER RIGHTS

While privatization of water resources failed to promote water rights in Ghana, the current state of international, regional, and domestic laws and policies can be interpreted as recognizing the human right to water. This section seeks to define Ghana's current obligations in advancing water rights in the (1) international and regional sphere, and (2) domestic arena.

A. International Recognition of the "Right to Water" and Ghana's International Obligations

The United Nations General Assembly has explicitly recognized the right to water as a human right,³⁷ and other international instruments have generally indicated a nonbinding right to water.³⁸ These instruments include (1) the Geneva Convention, which provides a right to water for prisoners of war and civilians during armed conflict,³⁹ (2) the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food,"⁴⁰ and has been interpreted to include the right to water,⁴¹ and (3) Article 24 of the UN Convention on the Rights of

35 Ogendi, 'Water Policy, Accessibility and Water Ethics in Kenya' (n 29).

36 Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' (n 30).

37 The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010) available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292>.

38 Comm. on Econ. Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); G.A. Res. 57/44 art. 16, U.N. Doc. A/RES/57/44 (Jan. 17, 2003); U.N. Secretary-General, Report of the World Conference on Human Rights: Rep. of the Secretary-General, U.N. Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993); Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 14.

39 Geneva Convention Relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135. See, e.g., International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3; Geneva Convention Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, 75 U.N.T.S. 135.

40 International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 G.A. Res. 2200A (XXI), art. 11-12, U.N. Doc A/6316 (December 16, 1966).

41 Svitlana Kravchenko and John Bonine, *Human Rights and the Environment: Cases, Law, and Policy* 119 (2008).

the Child that provides an explicit right to water for children⁴² and calls for the availability for drinkable water for children to have the “highest attainable standard of health.”⁴³ To date, Ghana has signed and ratified the Third Geneva Convention on the Treatment of Prisoners of War, and the Fourth Geneva Convention on the Protection of Civilian Persons in Times of War, the ICESCR, and the U.N. Convention on the Rights of Child.⁴⁴ These instruments subject the Commonwealth Republic of Ghana to the soft law recommendation of water as a human right, pursuant to which state governments must treat and protect water supplies while providing access to drinkable water to everyone as necessary.⁴⁵

Prior to 2010, General Comment No. 15 on the right to water from the Committee on Economic, Social and Cultural Rights was the most compelling argument for the recognition of the right to water as a human right.⁴⁶ General Comment 15 provides the persuasive argument that Ghana, and other parties to the ICESCR, have a legally binding obligation deriving from Articles 11 and 12 of the ICESCR to protect the right to water.⁴⁷ It holds state parties responsible for protecting water from contamination, protecting and fulfilling the right to water, and taking necessary measures to ensure that the right to water is available to everyone.⁴⁸ Although Comment 15 is merely a soft law recommendation to states, it is compelling as it explicitly

42 Convention on the Rights of the Child, G.A. Res 44/25, Art. 24(2)(c), U.N. Doc A/44/49 (September 2, 1990).

43 *ibid.*

44 ‘Ratification of International Human Rights Treaties-Ghana’ (*University of Minnesota Human Rts Library*) <<http://www1.umn.edu/humanrts/research/ratification-ghana.html>> accessed September 30, 2013. See e.g., Geneva Convention Relative to the Treatment of Prisoners of War P 26, Art. 20, August 13, 1949, 6 U.S.T.S. 135; Geneva Convention Relative to the Protocol of Civilian Persons in Time of War, Art. 85, 89, 172, August 12, 1949, U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 G.A. Res. 2200A (XXI), art. 11-12, U.N. Doc. A/6316 (December 16, 1966); Convention on the Rights of the Child, G.A. Res 44/25, Art. 24(2)(c), U.N. Doc A/44/49 (September 2, 1990).

45 See e.g., Comm. on Econ. Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15, U.N. Doc. E/C.12/2002/11 (January 20, 2003); G.A. Res. 57/44 art. 16, U.N. Doc. A/RES/57/44 (January 17, 2003); U.N. Secretary-General, Report of the World Conference on Human Rights: Rep. of the Secretary-General, U.N. Doc. A/CONF.157/24 (Part I) (October 13, 1993); Convention on the Rights of the Child, adopted November 20, 1989, 1577 U.N.T.S. 3.

46 See e.g., Comm. on Econ. Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); see also Watrous, ‘The Right to Water - from Paper to Practice’ (n 2).

47 See Comm. on Econ. Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15, U.N. Doc. E/C.12/2002/11 (January 20, 2003).

48 *ibid.*

identifies the need for a general human right to water.⁴⁹

Although Ghana has not signed a treaty providing for an explicit human right to water, in 2010 the Ghanaian delegation voted in favor of U.N. General Assembly Resolution 64/292, a draft resolution on the human right to water and sanitation.⁵⁰ Resolution 64/292 explicitly recognizes the right to water by stating that “[s]afe and clean drinking water and sanitation is a human right essential to the full enjoyment of life and all other human rights.”⁵¹ The resolution request that states and international organizations provide financial resources, technology and effort to providing “safe, clean, accessible and affordable drinking water and sanitation for all.”⁵² This may be interpreted as Ghana’s recognition of at least a moral if not legal obligation to promote the human right to water discourse.

B. Regional Recognition of the “Right to Water” and Ghana’s Regional Obligations

Sub-Saharan Africa is disproportionately affected by water scarcity and inadequate sanitization. Thus, at the regional level, African states have entered into agreements to protect the right to water: (1) the African Charter on the Rights and Welfare of the Child, which obligates states to ensure safe drinking water for children;⁵³ (2) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, which obligates states to ensure safe drinking water for women;⁵⁴ and (3) the African Convention on the Conservation of Nature and Natural Resources, which requires States to adhere to a plan providing potable water and protecting water resources.⁵⁵ Ghana is a party to the following treaties: (1) the African Charter on Human and Peoples’ Rights, (2) the African Charter on

49 Kravchenko *Human Rights and the Environment: Cases, Law, and Policy* (n 41) 119-21.

50 Press Release, Sixty-fourth General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favor, None Against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010) <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>>.

51 See ‘UN International Decade for Action “Water for Life” 2005-2015: Water Scarcity’ (n 5).

52 The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (August 3, 2010) , <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292>.

53 African Charter on the Rights and Welfare of the Child, art. 14, 1990, OAU Doc. CAB/LEG/24.9/49 art. 14 (entered into force Nov. 29, 1999), <<http://www1.umn.edu/humanrts/africa/afchild.htm>> accessed September 10, 2013.

54 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003, art. 15, <<http://www.achpr.org/instruments/women-protocol/#15>> accessed September 10, 2013.

55 African Convention on the Conservation of Nature and Natural Resources, adopted 11 July 2003, available at: <<http://www.africancourt.org/en/images/documents/Sources%20of%20Law/Conservation%20of%20Nature/nature%20eng.pdf>> accessed September 10, 2013.

the Rights and Welfare of the Child, and (3) the African Convention on the Conservation of Nature and Natural Resource. These instruments are non-binding on States, but still place regional soft law recommendations on Ghana to protect its citizen's right to adequate water and sanitation.

While these instruments are non-binding, a recent ECOWAS Community Court of Justice (ECCJ) opinion may provide binding regional law on the human right to water. On December 14, 2012, the ECCJ ruled against the Federal Republic of Nigeria in *SERAP v. The Federal Republic of Nigeria*, ordering Nigeria to remedy the environmental damage in the Niger Delta, protect the delta from further environmental damage, and hold perpetrators of environmental damage accountable.⁵⁶ The case concerned oil companies contaminating local rivers and creeks while operating within Nigeria.⁵⁷ Relying on Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance, the court ruled on violations of outside international human rights obligations of ECOWAS Member States.⁵⁸ The court then focused on Articles 1⁵⁹ and 24⁶⁰ of the African Charter on Human and Peoples Rights to justify its holding.⁶¹ The ECCJ ruling imposes a duty on all Member States to protect their citizens against environmental degradation that hinders human rights by the private sector, requires Member States to enforce human rights and environmental regulations against companies operating within its jurisdiction, and holds Member States accountable for human rights violations, including those tied to the environment, of the private sector entities operating within the State.⁶²

56 Brittany West, 'ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations by Oil Companies' *Hum. Rts. Brief* (March 7, 2013) <<http://hrbrief.org/2013/03/ecowas-community-court-of-justice-holds-nigerian-government-liable-for-human-rights-violations-by-oil-companies>> accessed September 9, 2013.

57 *ibid*.

58 *SERAP v. The Federal Republic of Nigeria*, ECOWAS Community Court of Justice (Dec. 2012) available at <http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf>.

59 African Charter on Human and Peoples' Rights art.1, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 59 (1982) ("The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them").

60 *ibid* art. 21 ("All peoples shall have the right to a general satisfactory environment favorable to their development").

61 *SERAP v. The Federal Republic of Nigeria*, ECOWAS Community Court of Justice (Dec. 2012) available at <http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf>.

62 Brittany West, 'ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations by Oil Companies' (n 56).

C. Ghanaian Laws Governing the Maintenance of Water Supply and Sanitation

A combination of traditional and imperial legal traditions of Ghana have influenced the development of a national water and sanitation policy and the statutory institutions that deliver and regulate Ghanaian water supply and sanitation. The 1992 Ghanaian Constitution contains no express provision providing the right to water, healthy environment or adequate standard of living.⁶³ The strongest constitutional provision in support of the right to water is Art. 35, which states that “The State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law.”⁶⁴ Thus, the State has an obligation to promote access to those water facilities and services that are provided under Ghanaian law.⁶⁵ A recent court case sought an injunction to prevent Public Utility and Regulatory Commission (PURC) from raising rates on utilities.⁶⁶ The plaintiffs, The Truth and Accountability Forum, made an Art. 35 argument, that PURC and its affiliates have failed “to fulfill their mandate to customers.”⁶⁷ “However, the court dismissed case as “waste of the court process.”⁶⁸ Although the Ghanaian legal system stems from common law principles of judge-made law, there are limited judicial remedies for Ghanaian citizens to seek redress for limited access to water and inadequate sanitation.

The Ghana Water and Sewerage Corporation Act was the primary Ghanaian legislation that governed domestic water supply and sanitation issues post-independence.⁶⁹ Under the act, the Ghana Water and Sewerage Corporation (GWSC) was established as a public corporation to provide, distribute and conserve water for domestic, public, and industrial purposes.⁷⁰ In practice, the GWSC has concentrated on managing water and sanitation services in urban areas.⁷¹ This concentration on urban water and sanitation services was transferred to Ghana Water Company Ltd. (Ghana Water) in 1999, when the Ghana Water and Sewerage Corporation Act was amended

63 CONSTITUTION OF GHANA (1992).

64 *ibid* art. 35.

65 *ibid*.

66 ‘Court Dismisses Case Against PURC’ *Modern Ghana*, (August 20, 2013) <<http://www.modernghana.com/news/467654/1/ghanas-sanitation-paradox.html>> accessed November 10, 2013.

67 *ibid*.

68 *ibid*.

69 THE GHANA WATER AND SEWAGE CORPORATION [1965](Act 310).

70 *ibid*.

71 *ibid*.

to transform the public GWSC into Ghana Water, a limited liability company aimed at facilitating partnerships with the private sector in urban water supply.⁷²

Initially, the Ghana Water and Sewerage Corporation Act provided for GWSC to manage water supply and sanitation services throughout Ghana, including the rural areas.⁷³ However, practice showed that GWSC failed to provide water to the rural areas of Ghana.⁷⁴ Thus, in 1998, *the Community Water and Sanitation Agency Act* created the Community Water and Sanitation Agency (CWSA), an institution separate from the GWSC (and subsequently Ghana Water) that promotes and facilitates safe drinking water and related sanitation services in Ghanaian rural communities and small towns.⁷⁵ The CSWA works corroboratively with district assemblies,⁷⁶ communities and Non-Governmental Organizations aiming to achieve the realization of safe water and sanitation services in rural areas.⁷⁷ The act allows district assemblies and communities ownership and managerial interests in advancing and increasing access to sustainable potable water.⁷⁸ Also, the CSWA manages the National Community Water and Sanitation Program (NCWSP), a policy that was implemented in 1994, which focuses on ensuring a sustainable supply of drinking water, beneficiary capital cost contribution, private sector participation, and cost-recovery water tariffs.⁷⁹

Similar to other legislation implemented during the Fourth Republic of Ghana,⁸⁰ most water supply and sanitation laws are largely based on extensive policy provisions.⁸¹ The key policy instrument in this respect is *The 2005 National Water Policy*.⁸² The policy consolidates existing policies and strategies from the CSWA, Ghana Water, and WRC in to a single national

72 Joseph B. Agyenim and Joyeeta Gupta, 'The Evolution of Ghana's Water Law and Policy' (2011) 19(3) RECIEL 330, 346.

73 THE GHANA WATER AND SEWAGE CORPORATION [1965](Act 310).

74 *ibid.*

75 Nicholas Fielmua, 'The Role of the Community Ownership and Management Strategy Toward Sustainable Access to Water in Ghana (A Case of Nadowi District)' (2011) 4 J. Sustainable Dev. 172 (2011); Community Water and Sanitation Agency Act 564 (1998).

76 "District assemblies" are the highest political and administrative district authorities responsible for ensuring adequate and potable water is distributed throughout the district.

77 *ibid.*

78 *ibid.*

79 Agyenim, 'The Evolution of Ghana's Water Law and Policy' (n 72).

80 "Fourth Republic of Ghana" refers to the country's fourth attempt at republican democratic government since independence in 1957. It was established in 1993, when the 1992 Ghanaian constitution was effected. Since this period the nation has been relatively stable.

81 *ibid.*

82 National Water Policy [Ghana], (2007) <http://docs.watsan.net/Downloaded_Files/PDF/Ghana-2007-National.pdf> accessed October 3, 2013.

policy aimed at “[facilitating] access to potable water without discrimination; and [enhancing] the management and development of water resources in a manner which, as first priority, safeguards that the entire population, particularly the poor and vulnerable, will have access to adequate and potable water.”⁸³ The policy is based on principles derived from the Ghana Poverty Reduction Strategy (GPRS), the Millennium Development Goals (MDGs) and the “Africa Water Vision” of the New Partnership for Africa’s Development (NEPAD).⁸⁴ The principles are therefore instructive in understanding this regulatory framework and include, among others:

1. The fundamental right of all people without discrimination to safe and adequate water to meet basic human needs;
2. Ensuring a minimum water requirement for the maintenance of health and wellbeing is assured;
3. The principle of subsidiarity in order to ensure participatory decision-making at the lowest appropriate level in society;
4. The principle of meeting the social needs for water as a priority, while recognizing the economic value of water and the goods and services it provides; and
5. The principle of solidarity, expressing profound human companionship for common problems related to water.⁸⁵

From the principles stated in the policy, two observations result: (1) compared to previous water legislation, the policy is indicative of a dramatically progressive direction in Ghana’s approach to water supply and sanitation services, by recognizing water as a fundamental right; and (2) it attempts to balance the notion of “water as a commodity” against the notion of “water as a priority,” a balance that may prove highly problematic and improbable in practice. While the National Water Policy specifically recognizes the fundamental right to water, in practice this goal is merely aspirational than plausible.

83 IRC International Water and Sanitation Centre, *Lessons for Rural Water Supply: Assessing Progress Towards Sustainable Service Delivery* (IRC & Aguaconsult, 2011) 7-9.

84 National Water Policy [Ghana], (2007) <http://docs.watsan.net/Downloaded_Files/PDF/Ghana-2007-National.pdf> accessed October 3, 2013.

85 *ibid.*

4. STRUCTURAL DEHYDRATION: KEY CHALLENGES IN RECOGNIZING THE RIGHT TO WATER IN GHANA

While international and domestic laws and policies have recognized the right to water, in practice this right is not often realized. This section aims to illustrate the key challenges to the right to water, while using various narratives of government officials, private sector participants and ordinary individuals. Overall, this portion of the paper seeks to allow those that are voiceless in the decision-making process the opportunity to present their stories.

A. Inadequate Water and Sanitation Infrastructure

“It’s very difficult here. There is a pipe but the water isn’t flowing.”⁸⁶
“I have to walk for at least seven minutes to go and queue [wait] at the nearest public toilet.”⁸⁷

One major barrier in delivering access to drinkable water and adequate sanitation throughout Ghana is the government’s failure to provide sufficient monitoring, maintenance, and regulation of water and sanitation infrastructures. While there are good arguments for deficient economic and physical resources preventing Ghana Water, CWSA, and WRC from providing sufficient monitoring and maintenance of Ghana’s water supply infrastructures, this fails to negate the fact that many foreign investors, such as Deny, contribute up to US\$438 million for water supply and sanitation construction efforts.⁸⁸ The severity of improper maintenance and inadequate infrastructure of Ghana’s water sector is evinced by the adverse health effects suffered by the population, such as the 3,000 child deaths that occur annually due to unsafe water and sanitation. This demonstrates a glaring problem in Ghanaian water and sanitation regulation, which requires significant attention and reformation to achieve the realization of access to potable water and adequate sanitation for all Ghanaians.

86 Lucy Hooker, ‘Ghana’s daily struggle for water’ *BBC News* (December 3, 2008), <<http://news.bbc.co.uk/2/hi/business/7761588.stm>> accessed September 5, 2013 (statement Abiba).

87 Jamila A. Okertchiri, ‘Ghana’s Sanitation Paradox’ *Modern Ghana*, (June 8, 2013) <<http://www.modernghana.com/news/467654/1/ghanas-sanitation-paradox.html>> (statement of Kwaku Nyarko).

88 Dzawu, ‘A Water Crisis Threatens Ghana’s Economic Growth’ (n 30).

Despite the Ghanaian government's goal of providing and distributing clean water to its residents, there are fatal flaws in the country's deteriorating water distribution infrastructure. In 1912, the first water supply system was constructed in Ghana, what was then the British colony, Gold Coast.⁸⁹ Over the years, there has been limited maintenance and overhaul of the nation's network of aging pipes to meet the increasing demands of Ghana's growing population, especially in the Greater Accra region. Thus, only 17 percent of the total Ghanaian population has piped water service and 65 percent of the population relies on standpipes and water points.⁹⁰ Even in areas that receive piped water, there are still burdens that cause customers to receive intermittent water supply. The pipes, some of which date back to 1914, are burdened with numerous leaks, bursts, and illegal siphoning for commercial and domestic uses.⁹¹ Although Ghana has met its 2015 Millennium Development Goals for water with 86 percent of the total population with access to adequate drinking water,⁹² intermittent water distribution has caused 75 percent of Accra residents to be without 24-hour access to water.⁹³ "Supply cannot meet the increasing demand," says Kweke Botwe, the managing director of Ghana Water, where 55 percent of its water supply is unaccounted.⁹⁴ Botwe further noted that the effort to provide water is a difficult initiative "being fought by 3,000 people [Ghana Water employees] against 25 million Ghanaians."⁹⁵

Similar to the challenge to provide access to potable water to all Ghanaians, the Ghanaian government has struggled to tackle the increasing demand for adequate sanitation infrastructures. According to UNICEF, a staggering 84 percent of the total Ghanaian population lacks access to improved sanitation.⁹⁶ Lack of basic sanitation facilities, such as toilets, coupled with poor management of solid and liquid waste, has resulted in an increase of 7

89 John O'Hanlon, 'Ghana Water Limited: Testing the Waters' *Bus. Excellence*, (18 July 2012), <<http://www.bus-ex.com/article/ghana-water-company-limited>> accessed October 3, 2013.

90 Water and Sanitation Program, *Water Supply and Sanitation in Ghana: Turning Finance into Services for 2015 and Beyond* (WSP-Country Status Overviews: Ghana, 2011) 8, <<http://www.wsp.org/sites/wsp.org/files/publications/CSO-Ghana.pdf>> accessed October 3, 2013.

91 Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' (n 30).

92 'Ghana at a glance' (UNICEF) <http://www.unicef.org/infobycountry/ghana_statistics.html>

93 'UN Water Country Brief: Ghana' (*UN Water*, 2013) <<http://www.unwater.org/Water-CountryBriefs.html>> accessed October 10, 2013.

94 Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' (n 30).

95 Peter Sawyer, 'Water System in Ghana's Capital Limp Along' (*Pulitzer Center*, February 17, 2012) <<http://pulitzercenter.org/reporting/ghana-accra-government-water-system-potable-illegal-water-tapping-poly-tanks>> accessed 10 November 2013.

96 *Ghana at a glance*, UNICEF, <http://www.unicef.org/infobycountry/ghana_statistics.html>; 'Where We Work: Ghana' (*WaterAid*) <<http://www.wateraid.org/us/where-we-work/page/ghana>>.

million Ghanaians without access to proper sanitation than in 1990.⁹⁷ Some Ghanaian residents, such as Gabriel Mododzi, have to walk approximately a kilometer (approximately 0.6 miles) to reach a public toilet.⁹⁸ Mododzi believes that the distance and cost associated with using toilets has led many people to use the cheaper and more convenient option: open defecation.⁹⁹ Mododzi is not alone in this rationale. Kwaku Nayako, who lives in a compound with 40 other tenants, claims that he defecates in the gutter to avoid the long walk to the nearest public toilet.¹⁰⁰ Nearly 4.8 million Ghanaians have no latrines at all and practice open defecation.¹⁰¹ The program officer of the Environmental Health and Directorate of the Ministry of Local Government and Rural Development, Kwaku Quansah, attributes the problems with poor sanitation and open defecation throughout the country to the lack of toilets in many Ghanaian homes.¹⁰²

However, perhaps the most disturbing issue contributing to poor sanitation in Ghana is the government's failure to properly treat and dispose of liquid and solid waste. The Accra Metropolitan Assembly (AMA), responsible for solid waste management in Accra, lacks the capacity to collect all waste produced in the city and, as a result, about 25 percent of waste ends up in dumps, water bodies, beaches, and storm drains.¹⁰³ Until June 2013, approximately 250,000 gallons of untreated human waste were dumped directly into the ocean at Lavender Hill, located in western Accra, by municipal and private waste management services.¹⁰⁴ Problems surrounding the management of sanitation have effectively hindered public health and sanitation issues in Ghana. Thus, it is anticipated that Ghana will fail to meet the 2015 Millennium Development Goal of 53 percent of the total population with improved sanitation.

97 Okertchiri, 'Ghana's Sanitation Paradox' (n 87).

98 *ibid.*

99 *ibid.*

100 *ibid.*

101 Water and Sanitation Program, *Economic Impacts of Poor Sanitation in Africa: Ghana* (2012) 1, <<https://www.wsp.org/sites/wsp.org/files/publications/WSP-ESI-Ghana-brochure.pdf>> accessed October 7, 2013.

102 Okertchiri, 'Ghana's Sanitation Paradox' (n 87).

103 Vincent Nartey et al., 'Assessment of the Impact of Solid Waste Dumpsites on Some Surface Water Systems in the Accra Metropolitan Area, Ghana' (2012) 4 *J. of Water Resources & Protection* 605, 606.

104 <<http://www.psfk.com/2012/03/reinventing-sanitation.html>>; Jessica C.M. Lokko, 'Poop power: Ghana turning human waste into energy' *Toronto Star* (September 15, 2013) <http://www.thestar.com/news/world/2013/09/15/poop_power_ghana_turning_human_waste_into_energy.bb.html> accessed September 19, 2013.

Unfortunately, Ghana's crumbling water and sanitation infrastructure is causing not only public health and human rights implications, but is affecting the nation's overall economic development as well. The World Bank's Water and Sanitation Program estimates that poor sanitation causes the Ghanaian government to lose US\$212.12 million annually.¹⁰⁵ Seventy-one percent of the costs are attributed to annual premature deaths of 19,000 people due to poor sanitation.¹⁰⁶ Bloomberg claims that water shortages have the potential to slow Ghana's economic growth.¹⁰⁷ Thus, to further economic development, the Ghanaian government must use stringent measures to monitor existing water and sanitation infrastructure.

B. Limited Access to Drinking Water in Poor and Rural Areas

*"We usually go to the pipe at 6am. Because of the distance we only go once a day." "When treated water and proper sanitation arrive the people will play the bau bau [drums] very much and dance their hearts out."*¹⁰⁸

While structural problems demonstrate the challenges of the Ghanaian water utility industry in providing adequate water to all residents, poor and rural residents are overwhelmingly burdened with limited access to potable water than their counterparts residing in affluent, urban areas. A 2006 study revealed that 87 percent of Ghana Water customers with direct piped water access were "well-connected officials in the public sector or otherwise high-standing individuals in the private sector."¹⁰⁹ This statistic clearly demonstrates inequitable water distribution between socioeconomic classes in Ghana. Unfortunately, slum residents in Ghana pay private vendors up to eight times the local public utility prices and nearly twenty times more during drought periods to secure drinkable water and to mitigate the

105 Justice L. Adoboe, 'Improved sanitation will trigger reduction in child mortality – Water Aid Ghana' *SpyGhana* (19 August 2013) <<http://www.spyghana.com/improved-sanitation-will-trigger-reduction-in-child-mortality-water-aid-ghana>> accessed October 6, 2013.

106 'Ghana's economy loses 90 million dollars annually due to poor Sanitation' *Tv3 News* (9 August 2013) <<http://tv3network.com/Travel-News/ghanas-economy-loses-90-million-dollars-annually-due-to-poor-sanitation.html>> accessed Oct. 19 2013.

107 Dzawu, 'A Water Crisis Threatens Ghana's Economic Growth' (n 30).

108 'Transforming lives in Ghana' *HSBC* (January 18, 2013) <<http://www.hsbc.com/news-and-insight/2013/transforming-lives-in-ghana>> accessed Nov. 10, 2013 (statement of Gladys Bobobi).

109 Justin Stoler et al., 'Satchet drinking water in Ghana's Accra-Tema Metropolitan area: past, present and future' (2012) 2 *J. of Water, Sanitation & Hygiene for Dev.* 223, 224.

disproportionalities of public water distribution.¹¹⁰ In rural areas, dispersed populations and dilapidated, sometimes non-existent, water supply infrastructures leave 20 percent of the rural population without access to potable water, compared to 9 percent of the urban population.¹¹¹ Although the Ghanaian National Water Policy advocates for a fundamental right to water free from discrimination, government practice presents a different reality of evident bias against poor and rural communities in public water distribution.

Since 1965, Ghana has experienced rapid urban population growth and the public water utility industry has been ill equipped to handle the increasing demand.¹¹² According to the 2010 Population and Housing Census, 50.9 percent of the total Ghanaian population lives in urban areas,¹¹³ and about 28 percent of the urban population lives in poverty.¹¹⁴ The urban water sector has instituted a water-rationing program to ensure equitable distribution of water.¹¹⁵ However, some urban residents are skeptical that “equitable distribution” is actually occurring in practice. For example, only 16 percent of low-income communities have connection to the public water supply.¹¹⁶ Those that are connected to the public water supply are unconvinced that the government has met its water goals among the poor. “I have lived in Adentan [a Greater Accra community] for over 10 years and I have never got my taps running,” says resident Richard Kotey, “It is weird how this is going to be solved before 2015”¹¹⁷ The situation is even more precarious for those without water connection and private takers to store clean water.¹¹⁸ “Those with no room to store water, who are mainly the poor, pay more for it,” Beatrix Allah-Mensah, a World Bank development specialist, declares.¹¹⁹ Alas, public water supply initiatives fail to reach an overwhelming majority of the urban poor, resulting in disparate water distribution.

110 *ibid.*

111 ‘UN Water Country Brief: Ghana’ (n 93).

112 See Kweku G. Ainuson, ‘Urban Water Politics and Water Security in Disadvantaged Urban Communities in Ghana’ (2010) 11 *Afr. Stud. Q.* 59, 61.

113 ‘More than half of Ghana’s population live in urban areas’, *GhanaWeb* (June 6, 2013) <<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=276110>> accessed November 3, 2013.

114 Ainuson, ‘Urban Water Politics and Water Security in Disadvantaged Urban Communities in Ghana’ (n 112) 61.

115 Francis Kokutse, ‘The Curse of Water Shortages in Ghana’ *African Review* (April 20, 2011) <<http://www.africareview.com/News/-/979180/1147874/-/hp6y5bz/-/index.html>> accessed November 10, 2013.

116 ‘Urban sector Assessment Report, Ghana’ (*WaterAid*,) <<http://www.wateraid.org/~media/Publications/urban-sector-assessment-report.pdf>> accessed September 10, 2013.

117 Kokutse, ‘The Curse of Water Shortages in Ghana’ (n 115).

118 ‘Urban Sector Assessment Report, Ghana’ (n 116).

119 Kokutse, ‘The Curse of Water Shortages in Ghana’ (n 115).

Scarce water access has led the urban population to seek alternative sources of clean water, such as sachet water.¹²⁰ Similar to other water vending initiatives through sub-Saharan Africa, sachet water is a “privately vended, water sealed, single use, plastic sleeve” that is a significant source of drinkable water to Ghana’s urban poor.¹²¹ Although sachet water is a convenient alternative to piped or well water in Ghana’s urban communities, there are public health risks associated with its use. A 2007 medical study found that 77 percent of 27 different sachet water samples contained pathogenic parasitic organisms, which are known to cause a variety of diarrhoeal infections and diseases.¹²² Also, the use of sachet water in urban communities results in the accumulation of non-biodegradable plastic bags in poor neighborhoods.¹²³ In many poor, urban communities, the plastic bags flood drains, which increase the population’s risk of exposure to untreated sewage, animal waste, and agricultural runoff.¹²⁴

The perilous combination of “questionable” potable water and disease among the urban poor has almost become commonplace in these communities. In the village Kubekro, just outside of Accra, the chief nonchalantly states that some residents get sick from using the contaminated stream that runs through the village, but that they are accustomed to it.¹²⁵ Notably, the village desires and requests pipe-borne water from the city; “The MP [Member of Parliament] said he was bringing pipes for the pipe-borne water, but we have not seen anything of that sort,” the Kubekro chief laments.¹²⁶ This situation is not merely exclusive to the urban poor. Ghanaian rural communities suffer from limited access to safe, drinkable water and often must resort to risky water sources to drink, cook and bathe.¹²⁷

120 Justin Stoler *et al.*, ‘Drinking Water in Transition: A Multilevel Cross-sectional Analysis of Sachet Water Consumption in Accra’, (June 2013) 8 (6) PLoS One 1.

121 *ibid.* (“[I]n lieu of abject poverty, sachets may still be a discretionary, but increasingly attractive, choice to younger, poorer urban residents.”); See also, Stoler, ‘Sachet drinking water in Ghana’s Accra-Tema Metropolitan area: past, present and future’ (n 124) (“Fifty percent of households in a sample of Accra’s slum neighborhoods reported using sachets as their primary drinking water source in a 2009–2010 study, and these households tended to be the poorest within these slum communities”).

122 G. Kwakye-Nuako *et al.*, ‘Sachet Drinking Water in Accra: The Potential Threats of Transmission of Enteric Pathogenic Protozoan Organism’ (2007) 41(2) Ghana Med. J. 62, 62–64.

123 See also, Stoler, ‘Sachet drinking water in Ghana’s Accra-Tema Metropolitan area: past, present and future’ (n 109).

124 *ibid.*

125 Peter Sawyer, ‘Water System in Ghana’s Capital Limp Along’ (*Pulitzer Center*, February 17, 2012) <<http://pulitzercenter.org/reporting/ghana-accra-government-water-system-potable-illegal-water-tapping-poly-tanks>> accessed November 15, 2013.

126 *ibid.*

127 See Franklin Cudjoe, ‘IMANI Alert: Has Ghana enough water to share with citizens on World Water Day?’ (*Joy Online*, 21 March 2013) <<http://opinion.myjoyonline.com/pages/comment/201303/103183.php>> accessed October 7, 2013.

The rural areas, specifically those located in Northern Ghana, contain cases of the most extreme poverty throughout Ghana.¹²⁸ Northern Ghana has a poverty rate two to three times higher than the national average.¹²⁹ Thus, it is not surprising that the CSWA, NGOs, and other entities have worked diligently to create strategies and initiatives to promote access to water in these regions.¹³⁰ Under the CSWA framework, some small towns receive piped water, through former Ghana Water infrastructures, and other areas have Water and Sanitation Committees (WATSANs), which are set around one point source, such as a handpump, that is used by the entire community.¹³¹ In theory, WATSANs are ideal for rural communities, because (1) they are managed by District Assemblies with consultation from the community, and (2) they are cheaper than piped water systems. Observably, in practice, rural communities still face barriers to clean water under this model.¹³² Rural residents may drink contaminated and dirty water due to (1) the WATSANs inability to maintain the water point, which can lead to a nonfunctional water point, and (2) residents' inability to pay for water at the water point.¹³³ A female resident of Nadowli presents a poignant account of her decision to fetch water from a dugout:

Before they brought the water system I was asked to pay about GH¢3.00 (US\$2.40). To me, to pay GH¢3.00 and get water throughout your life is good. But upon installing the system, I never fetched water free and I cannot continue to pay GHp5.00 per basin. So I resorted to drinking from a well (Unimproved). After all, a similar water source was our only source of water in a farming community in Brong Ahafo Region.¹³⁴

128 International Fund for Agricultural Development, *Enabling Poor Rural People to Overcome Poverty in Ghana*, (2010) 2 <<http://www.ifad.org/operations/projects/regions/pa/factsheets/gh.pdf>>.

129 Yan Sun et al., *Opportunities and Challenges of Community-Based Rural Drinking Water Supplies: An Analysis of Water and Sanitation Committees in Ghana* (IFPRI Discussion Paper 01026, 09/2010) 1, <<http://www.ifpri.org/sites/default/files/publications/ifpridp01026.pdf>> accessed October 23, 2013.

130 *ibid.*

131 IRC International Water and Sanitation Centre, *Lessons for Rural Water Supply: Assessing Progress Towards Sustainable Service Delivery* (n 73) 14.

132 See Cudjoe, 'IMANI Alert: Has Ghana enough water to share with citizens on World Water Day?' (n 127).

133 Fielmua, 'The Role of the Community Ownership and Management Strategy Toward Sustainable Access to Water in Ghana (A Case of Nadowli District)' (n 75) 179-180.

134 *ibid.*

This tale reveals the obstacles that many rural, and urban, residents face in their quest for clean water. The community of this resident was building a water system, yet the resident was financially unable to continuing paying for potable water and resorted to obtaining water from an unsafe water source. Sadly, many poor residents must balance the cost of fetching clean water and the financial convenience of fetching unsafe water.

Some rural communities still lack pipe systems and/or water point sources, and residents must make long journeys for clean water or settle with unsafe water.¹³⁵ Mabel Konadu recalls her daily trips to the nearest water point source in her community, “[i]t can take us from 5 am to 11 am to collect water. There are times when we even sleep at the water point.”¹³⁶ Mabel is not alone in her experiences at the water point, as Ghanaian women are disproportionately burdened with gathering water in rural communities.¹³⁷ Approximately 64 percent of rural Ghanaian women fetch water and 2.6 percent of women spend more than 50 hours a week on this activity.¹³⁸ For Joyce Aning, waking up at 4:30 am every morning and walking six kilometers (Approx. 3.7 miles) to fetch water for her family before attending school is a daily task. The Ntronang community, where Joyce fetches water, only has access to unsafe water.¹³⁹ Thus, Joyce, like many rural women, is at risk for catching numerous water-borne diseases from the contaminated water.¹⁴⁰ Another female resident from the rural community, Ntoronang Zongo, spoke of fetching water at her community water point,

[s]ometimes we find dirt, germs in the water when we fetch, which we allow [to] settl[e] and then [strain] before use.¹⁴¹

With only 17 percent of Ghana’s total population with access to piped water,¹⁴² it is expected that direct-piped water to all areas of Ghana cannot

135 *ibid.*

136 ‘Transforming lives in Ghana’ (n 108).

137 Joana Costa et al., ‘The Implication of Water and Electricity Supply in Ghana for the Time Allocation of Women’ (International Policy Centre for Inclusive Growth, Working Paper No. 59, 2009) 10, <<http://www.ipc-undp.org/pub/IPCWorkingPaper59.pdf>> accessed November 11, 2013.

138 *ibid.*

139 ‘Transforming lives in Ghana’ (n 108).

140 Costa, ‘The Implication of Water and Electricity Supply in Ghana for the Time Allocation of Women’ (n 137).

141 Cudjoe, ‘IMANI Alert: Has Ghana enough water to share with citizens on World Water Day?’ (n 127).

142 Water and Sanitation Program, *Water Supply and Sanitation in Ghana: Turning Finance into Services for 2015 and Beyond* (n 90).

be achieved within a couple of years. However, poor and rural populations confront several obstacles to accessing safe water than affluent populations residing in urban areas of Ghana. Consistent with the National Water Policy, it is imperative that substantive and procedural changes occur to promote equitable distribution of water irrespective of socioeconomic status.

C. Challenges to Information Dissemination and Community Participation Initiatives

“They [the city authorities] don’t see us to be part of Accra. Nobody cares about us... B]ut do I have a choice? One just has to suffer it.”¹⁴³

The unstable water and sanitation infrastructure, and the inequitable distribution of clean water to poor and rural communities, reveal an underlying hurdle to the realization of the right to water in Ghana: substantive and procedural deficiencies in Ghanaian water and sanitation governance thwart information dissemination and community participation. The National Water Policy aims “to ensure participatory decision-making at the lowest appropriate level in society,”¹⁴⁵ but in practice some communities lack the ability to participate in the water and sanitation decision-making process.¹⁴⁶ This is especially true in the urban context, where urban migratory movements have resulted in rapid growth of squatter and migrant communities on formerly undeveloped land; these residents live in dilapidated homes with nonexistent public works and face tremendous public health risks.¹⁴⁷ These communities are often unconnected to the national water and sanitation grid,¹⁴⁸ and have difficulty receiving information and participating in water and sanitation decision-making.¹⁴⁹

143 Anthony Baabereyir et al., ‘The Dumping on the Poor: The Ecological Distribution of Accra’s Solid-Waste Burden’, (2012) 44 (2) *Env’t and Plan. A* 297, 304.

145 National Water Policy [Ghana], (2007) <http://docs.watsan.net/Downloaded_Files/PDF/Ghana-2007-National.pdf> accessed October 3, 2013.

146 See Lelia M. Harris and Cynthia Morinville, *Improving Participatory Water Governance in Accra, Ghana* (The Centre for International Governance Innovation: Africa Initiative, Policy Brief No. 7, 2013) 3-5 <<http://www.africaportal.org/sites/default/files/Africa%20Initiative%20Policy%20Brief%20No.7.pdf>> accessed November 11, 2013.

147 Ainuson, ‘Urban Water Politics and Water Security in Disadvantaged Urban Communities in Ghana’ (n 112) 60.

148 *ibid.*

A 2013 survey conducted in metropolitan Accra showed that 57 percent of respondents “strongly agreed” that water-related issues were of concern to their communities, but that 90 percent of respondents were “not aware” or “d[id]n’t know” of water-related meetings to voice their concerns to government officials.¹⁵⁰ The survey further found that 67 percent of respondents felt that they could make contributions to water governance-related decisions.¹⁵¹ Overall, 56 percent of survey respondents “wish they could participate more in community meetings,” and 95 percent stated that they “would feel comfortable talking with government officials about water issues.”¹⁵² This survey provides a convincing illustration of the lack of information and decision-making ability that the urban poor possess during water and sanitation governance. A significant number of survey respondents, like many others living in urban Ghana, are concerned about water and sanitation issues affecting their communities, and desire to make contributions to water and sanitation governance. Notably, the survey demonstrates that government officials are not engaging these communities and that their voices are often unheard.

Generally, most rural communities have access to community participation and decision-making initiatives through the CSWA and functioning WATSANs. WATSANs allow rural communities to “achiev[e] sustainability through community investment and commitment to their schemes, and specifically through the mechanism of village water committees.”¹⁵³ However, an International Food and Policy Research Institute assessment found that rich, highly educated individuals in the rural Ghanaian Volta Basin had a higher likelihood of participating in water and sanitation initiatives than poor residents.¹⁵⁴ The study found that many of the rich in the area possessed a high amount of bargaining power in participatory water and sanitation governance.¹⁵⁵ Despite having a higher likelihood of exposure to unsafe drinking

149 See Baabereyir, ‘The Dumping on the Poor: The Ecological Distribution of Accra’s Solid-Waste Burden’(n 143) 311. (“In Accra there is an urgent need to engage with all (formal and informal) stakeholders in the waste sector so that their roles can be better recognized and supported.”).

150 Harris, *Improving Participatory Water Governance in Accra, Ghana* (n 146) 5. (Survey was conducted in Teshie, Nima and Ayidiki communities, where local water boards are present but are plagued with issues of responsibility, accountability and transparency).

151 *ibid.*

152 *ibid.*

153 Fielmua, ‘The Role of the Community Ownership and Management Strategy Toward Sustainable Access to Water in Ghana (A Case of Nadowi District)’ (n 75).

154 Stefanie Engel et al., *Improved Water Supply in the Ghanaian Volta Basin: Who Uses it and Who Participates in Community Decision-Making?*(International Food Policy Research Institute, EPT Discussion Paper No. 129, 2005) 36.

155 *ibid.* 34.

water, poor women had the lowest amount of bargaining power of those surveyed.¹⁵⁶ Thus, socioeconomic status, education level and gender are influential factors in predicting the likelihood of participation and the amount of bargaining power in community water and sanitation governance. While rural communities have the ability to participate in water and sanitation governance issues of their own communities, a political bias in favor of urban metropolitan areas at the national level may undermine community decision-making achievements at the local level.¹⁵⁷

The inextricable links between public health; water and sanitation policy-making often imply that those affected by water and sanitation issues have knowledge of this correlation. Observably, Ghana's water and sanitation troubles disproportionately affect poor and rural residents, who may have limited to no knowledge of potential health threats. In rural areas, some traditional and cultural beliefs have encouraged many to avoid using latrines.¹⁵⁸ It is of great importance that information is disseminated to these populations to alert them of healthy water and sanitation practices. A thorough understanding of the healthy water and sanitation practices in poor and rural communities has the potential to circumvent disease and save lives.

5. A PROPOSAL TO ALLEVIATE WATER SCARCITY IN GHANA

The combination of poor maintenance water and sanitation governance, disparate water distribution, and limited participatory governance in communities has effectively hindered access to safe and adequate water in Ghana. This section aims to provide a solution that encourages access to water in Ghana, while allowing government flexibility to model the processes in the manner that it chooses. With respect to specific challenges that exacerbate water scarcity in Ghana, this section advocates for the Ghanaian government to extract lessons from the South African model of constitutional recognition of water rights.

156 *ibid.*

157 See Micheal Boateng, 'Ghana's Democracy Handicapped By Political Influence' *The Chronicle*, (17 September 2013), <<http://allafrica.com/stories/201309171447.html>> accessed November 10, 2013.

158 'Ghana' (*Water.org*) <<http://water.org/country/ghana>> accessed November 10, 2013.

A. Establishing a Constitutional Right to Water

Adhering to common law tradition, the 1992 Ghanaian Constitution is the “supreme law of the land,” with powerful provisions that establish governmental authority and competency.¹⁵⁹ In Ghana, the constitution has been a powerful tool for protecting basic fundamental human rights and freedoms, as well as a mechanism for government accountability. Fundamental human rights are inalienable and directed at preventing gross violations to human dignity.¹⁶⁰ The current water and sanitation crisis in Ghana exhibits a gross violation to human dignity. Poor water and sanitation regulation, disproportionate access to potable water, and defective involvement of the community in the decision-making process are signals of a conscious disregard by the government that strips a vulnerable, disease-stricken population of its political and economic rights.¹⁶¹ Thus, it is imperative that constitutional reform addresses human rights concerns revealed by Ghana’s water and sanitation disaster. This paper proposes that the Ghanaian parliament amend the current constitution to recognize the fundamental human right of all people without discrimination to safe and adequate water and sanitation, and to confer an obligation that all, including the government, take reasonable measures to protect, to promote, and to refrain from interfering with such right.

A Ghanaian constitutional right to water and sanitation can be particularly beneficial in furthering human and environmental protection for a variety of reasons. For one, constitutional recognition of the right to water and sanitation provides additional support to existing water and sanitation legislation. Water and sanitation laws in Ghana have been largely ineffective at alleviating water scarcity in the country.¹⁶² Although the National Water Policy strives to advance the fundamental right to water, it is merely a national objective that requires strong political and legal support to achieve its initiatives.¹⁶³ A constitutional right to water provides a default provision that resolves gaps left by existing legislative and regulatory frameworks.¹⁶⁴

159 CONSTITUTION OF GHANA (1992), art. 2.

160 Universal Declaration of Human Rights, art 1.

161 See ‘Make Water, Sanitation a Constitutional Right to Citizens’ *Ghanaian Times*, (August 26, 2011), <<http://edition.myjoyonline.com/pages/news/201109/73590.php>> accessed October 5, 2013.

162 See Peter Sawyer, ‘Water System in Ghana’s Capital Limp Along’ (*Pulitzer Center*, February 17, 2012) <<http://pulitzercenter.org/reporting/ghana-accra-government-water-system-potable-illegal-water-tapping-poly-tanks>> accessed September 3, 2014.

163 See ‘Policy Definition’, (*merriam-webster.com*) <<http://www.merriam-webster.com/dictionary/policy>> accessed November 13, 2013.

164 Carl Bruch *et al.*, ‘Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa’ (2001) 26 *Colum. J. Envtl. L.* 131, 134.

Overall, a Ghanaian constitutional right to water can work in tandem with the existing National Water Policy to provide strong positive and negative obligations on national water and sanitation governance.

Furthermore, recognition of a constitutional right to water would raise water supply and sanitation concerns from secondary status to an equivalent, if not greater, status with other national priorities, such as economic development.¹⁶⁵ For instance, the realization of water rights as a fundamental human right and freedom protected expressly by the Ghanaian Constitution confers additional protections and engagement from government agencies, such as the Commission of Human Rights and Administrative Justice (CHRAJ). The CHRAJ investigates complaints of human rights violations and corruption by public officers in the exercise of their duties, and “seeks remedies in respect of such acts or omissions.”¹⁶⁶ Thus, the constitutional establishment of the right to water and sanitation yields additional grassroots opportunities for ensuring government accountability for water supply and sanitation injustices. As a result, public officials would face greater liability for their actions and inactions regarding their duty to protect and facilitate adequate water and sanitation distribution. Also, individuals, regardless of socioeconomic status, gain zealous advocates that are better situated to initiate negotiations and compromises between the parties. The creation of a fundamental right to water in Ghana would strengthen the population’s ability to obtain judicial redress, while empowering civil society.

Finally, constitutional recognition of the right to adequate water and sanitation grants the judiciary authority to review legislative acts, government compliance, and interpret unenumerated “penumbral” rights, those rights not expressly mentioned in the constitution, which are consistent with access to clean water principles.¹⁶⁷ The Ghanaian Constitution expressly grants the High Court jurisdiction to “enforce the Fundamental Human Rights and Freedoms guaranteed by” the Constitution.¹⁶⁸ In 2008, Ghanaian Chief Justice, Georgina Wood, created the Human Rights Division of the High Court, which granted the specialized tribunal exclusive jurisdiction

165 *ibid.*

166 THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE ACT (1993) [Act 456] (Ghana).

167 See Bruch, ‘Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa’ (n 164) 138-42.

168 CONSTITUTION OF GHANA (1992), art. 140(2).

over all recognized human rights matters.¹⁶⁹ Thus, the realization of adequate water as a fundamental right allows individuals and communities greater access in achieving judicial remedies in court. Also, these individuals have stronger arguments under rights enumerated in the Ghanaian constitution to withstand the “sufficient test” for establishing *locus standi*.¹⁷⁰ Hence, it is logically sound to presume that the establishment of a constitutional right to safe and adequate water in Ghana would allow individuals greater capability to use judicial review and enforcement principles for the protection of human life or health.

Overall, a constitutional amendment instituting a fundamental human right of all Ghanaians, without prejudice, to safe and adequate water would curb existing challenges to safe water and sanitation access in Ghana. The proposed amendment would open courts to citizens to enforce their water rights, strengthen judicial redress, empower individuals and communities, and foster an atmosphere of governmental accountability.¹⁷¹ While the issue of legal enforceability and practicality remain a key argument against international recognition of the human right to water,¹⁷² South Africa provides a national constitutional model that demonstrates the influence that a constitutionally recognized right to water has on improving equitable distribution of adequate water to citizens.

B. Realizing the Constitutional Right to Water in the Law-making Process: The South African Model

South Africa serves as a compelling example of how the establishment of an explicit constitutional right to water has increased clean water availability to population. During apartheid-South Africa, gross disparities in water distribution existed.¹⁷³ The colonial and apartheid regimes in South

169 ‘Justice in Profile’ (*Int’l Jud. Monitor*) <http://www.judicialmonitor.org/archive_fall2009/justiceinprofile.html> accessed November 1, 2013; E. Gyimah-Boadi & Victor Brobbey, Countries at the Crossroads 2012 Ghana 6 (unpublished manuscript) available at <http://www.freedomhouse.org/report/countries-crossroads/2012/Ghana>; Saikou Ceesay, ‘MFWA Welcomes The Proposed Human Rights Court In Ghana’ *Gambia Affairs* (July 19, 2008) <<http://gambiaaffairs.blogspot.com>> accessed November 1, 2013.

170 *New Patriotic Party v. Attorney-General* [1996 – 97] SCGLR. 729, 784 (Ghana). (“It is axiomatic that a citizen of Ghana needs no locus standi to defend the Constitution”); ‘Judicial Colloquium on Locus Standi in Administrative Justice and Human Rights Enforcement’ (*IHRDA*, 27 May 2001), <<http://www.ihrda.org/2001/05/judicial-colloquium-on-locus-standi-in-administrative-justice-and-human-rights-enforcement>> accessed October 10, 2013.

171 Bruch, ‘Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa’ (n 164) 133.

172 See Stephen C. McCaffery and Kate J. Neville, ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of A Human Right to Water for Developing Countries’ (2009) 21 *Geo. Int’l Envtl. L. Rev.* 679, 680.

173 Robyn Stein, ‘Water Law in a Democratic South Africa: A County Case Study Examining the Introduction of a Public Rights System’ (2004-2005) 83 *Tex L. Rev.* 2167, 2168.

Africa distributed water in a racially biased manner, and black South Africans were often left with little access to water.¹⁷⁴ Even today, the need for available clean-water sources is evident in South Africa to prevent the spread of water-borne diseases, with overwhelming effects on women and children.¹⁷⁵ In 1994, 37 percent of South Africa's total population and 80 percent of the rural residents lacked access to water.¹⁷⁶ In response to these disparities, post-apartheid South Africa established a human right to water in its 1996 Constitution and enacted a Free Basic Water policy that provides poor residents with a basic amount of water for free.¹⁷⁷ By 2004, 27 million, or 60 percent of the South African population had access to basic water through the Free Basic Water policy.¹⁷⁸

Similar to the proposed Ghanaian constitutional right to water, the right to water is enshrined in South Africa's Bill of Rights (analogous to Ghana's "fundamental rights and freedoms" clause).¹⁷⁹ Under this provision, the South African government has an obligation to provide the right of access to "safe and sufficient" water, and must take reasonable measures in achieving the realization of this right.¹⁸⁰ While legislative and policy measures, such as the National Water Policy and National Water Act, have been implemented in furtherance of South Africa's constitutional right to water provision,¹⁸¹ plaintiffs have used the South African courts as "avenues of last resort" to enforce and promote the realization of access to water goals.¹⁸² This was revealed in the South African Constitutional Court's decision in *Mazibuko v. City of Johannesburg* (also known as the "Phiri case"),¹⁸³ where five residents of the Phiri township brought suit against the City of Johannesburg, Johannesburg Water (a company wholly owned by the City), and the national Minister for Water Affairs and Forestry for disconnecting the township's unlimited water supply and limiting the amount of free water supply to "twenty-five liters per person per day, or six kiloliters per household per month."¹⁸⁴ The suit

174 *ibid* 2169.

175 *ibid*.

176 Kravchenko, *Human Rights and the Environment: Cases, Law, and Policy* (n 41) 130.

177 *ibid*.

178 Sarah I. Hale, 'Water Privatization in the Philippines: The Need to Implement the Human Right to Water' (2006) 15 Pac. Rim L. & Pol'y J. 765, 786.

179 Stein, 'Water Law in a Democratic South Africa: A County Case Study Examining the Introduction of a Public Rights System' (n 175) 2172.

180 *ibid*.

181 Kravchenko, *Human Rights and the Environment: Cases, Law, and Policy* (n 41) 130.

182 McCaffery, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of A Human Right to Water for Developing Countries' (n 127) 680 n.3.

183 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

184 McCaffery, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of A Human Right to Water for Developing Countries' (n 172) 686.

stemmed from the Johannesburg Water's 2003 "Operation Gcin'amanzi" (to save water) initiative, which sought to abandon the fixed flat rate policy of water distribution in Phiri and install pre-paid meters.¹⁸⁵ The South African Constitutional Court found that the meters and City's free basic water policy of twenty-five liters per a person per day to be reasonable under section 27(1) of the Constitution, the right to water provision of the South African Constitution.¹⁸⁶

While the judgment in *Mazibuko* case was not favorable to the plaintiffs, the case demonstrates that under South African law (1) the constitutional right to water can be "claimed, contested and [...] realized by [the government's] continual review and adjustment of its water policies in response to ongoing public interest litigation," (2) the government and legislation can be held accountable via the court system, (3) and the participatory democratic process is strengthened by the "constitutional contestation of economic and social rights."¹⁸⁷ These lessons from South Africa can be transferred to the proposed Ghanaian constitutional right to water. The South African model shows that a country with a emerging economy, relatively new constitution, and overwhelmingly impoverished population can establish a tangible, not merely aspirational, right to water and improve access to water through constitutional provisions. While this model may impose positive and negative obligations on the Ghanaian government, they are necessary to remedy the unstable water and sanitation infrastructure, and the inequitable distribution of clean water to poor and rural communities.

Following the example of South Africa, the Ghanaian government should institute a constitutional right to water and create legal and political measures to aid in the fulfillment of this right. The current management and monitoring of Ghana's water and sanitation sector impedes safe, and adequate water and sanitation access. Often the poor and marginalized experiences and needs concerning water rights are not heard or advanced by those in positions of power. The *Mazibuko* case serves as an example of a poor woman, Lindiwe Mazibuko, expressing and fighting for her constitutional right to access to safe water.¹⁸⁸ Without the constitutional right to

185 Peter Danchin, 'A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case' (*Blog of the Eur. J. Int'l L.*, January 13, 2010) <<http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court's-decision-in-the-mazibuko-case>> accessed November 11, 2013.

186 *ibid.*

187 *ibid.*

188 McCaffery, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of A Human Right to Water for Developing Countries' (n 175) 686.

water expressed in the South African Constitution, Mazibuko's voice may have been stifled. Those living without access to adequate water in Ghana deserve to be heard, and a constitutional right to water can grant Ghanaian citizens an active role in assuring governmental accountability in regards to distribution of safe and adequate water. It is important to note that South Africa's institutional and technical capacities place the nation in a better position to implement a free water policy, and less-developed nations lack the financial and institutional resources to mimic such as policy.¹⁸⁹ Nonetheless, the South Africa model of providing water access to a majority of its population and ensuring that poverty does not bar access to safe water provides guidance in addressing water issues in Ghana.

6. CONCLUSION

A popular idiom states, "you can bring a horse to water, but you cannot make it drink." This idiomatic statement is reversed in the Ghanaian context: Ghana is saturated with natural water resources, yet urbanization, contamination, and governmental nonfeasance have blocked the people's ability to drink. International human rights law may grant an ability to drink, yet domestic constitutional recognition of the human right to water provides greater avenue for access to water. This paper has proposed a solution to "bringing safe water" to the entire Ghanaian population: Parliamentary amendment to the current Ghanaian Constitution that includes a fundamental human right to water to all people irrespective of their status. The South African model serves as an example of the procedural process and substantive realization that constitutional recognition of the right to water can encourage. This paper has outlined a proposal that attempts to provide a feasible option for the Ghanaian government to incorporate principles of distributive and procedural justice to ensure an active right to water.

189 Kravchenko, *Human Rights and the Environment: Cases, Law, and Policy* (n 41) 130.