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An Analysis of the Legal, Policy and Institutional Frameworks
on the Right to Water in Uganda

Author:

Agaba Daphine Kabagambe

Master:

University of Pretoria,
LLM/MPhil Human Rights
& Democratisation in Africa



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Right to Water in Uganda**

**Submitted in partial fulfilment of the requirements of the Master of
Philosophy in Human Rights and Democratisation in Africa**

By

Agaba Daphine Kabagambe

Student Number: 13414608

Prepared under the supervision of

Dr Ebenezer Durojaye

**Community Law Centre, University of the Western Cape, South
Africa**

31 October 2013

DECLARATION

I, **Agaba Daphine Kabagambe** declare that the work presented in this dissertation is my original work. It has not been presented to any other University or Institution. Where the work of other people has been used, it has been clearly acknowledged. Therefore, I declare that this work is originally mine and thus it is hereby presented in partial fulfilment of the requirements for the award of the MPHIL in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Dr Ebenezer Durojaye

Signature.....

Date.....

DEDICATION

This dissertation is dedicated to my family for supporting me throughout this journey.

ACKNOWLEDGMENT

I would like to extend my sincere gratitude to the Centre for Human Rights, University of Pretoria for having selected me for this unique programme.

I am grateful for the staff and management of the Community Law Centre at the University of the Western Cape for ensuring my smooth and enjoyable stay in South Africa. Special thanks go to Debbie Gordon, the office manager at the Community Law Centre.

I extend special thanks to my supervisor, Dr Ebenezer Durojaye for the insightful and comprehensive guidance while undertaking the study. It was a great privilege working with you.

LIST OF ABBREVIATIONS

- AIDS- Acquired Immune Deficiency Syndrome
- CEDAW-Convention on Elimination of all Forms of Discrimination Against Women
- CESCR-Committee on Economic Social and Cultural Rights
- CRC-Convention on the Rights of the Child
- CRPD-Convention on Rights of People with Disabilities
- DWD- Directorate of Water Development
- HIV- Human Immunodeficiency Syndrome
- HRBA-Human Rights-Based Approach
- ICCPR-International Convention on Civil and Political Rights
- ICESCR-International Convention on Economic Social and Cultural Rights
- JSR-Joint Sector Review
- JWESSP- Joint Water and Environment Sector Support Programme
- JWSSP-Joint Water Supply and Sanitation Programme Support
- MDGs-Millennium Development Goals
- MWE -Ministry of Water and Environment
- NDP-National Development Plan
- NGP-National Gender Policy
- NWSC-National Water and Sewerage Corporation
- PEAP-Poverty Eradication Action Plan
- PRSP-Poverty Support Reduction Programme
- UNCED-United Nations Convention on Environment and Development
- UNGA-United Nations General Assembly
- VCLT-Vienna Convention on Law of Treaties
- WHO-World Health Organisation
- WPC-Water Policy Committee

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Water is indispensable to human existence as every human being requires, at the very least, a minimum amount of water daily for their survival.¹ Water is required to prevent dehydration, for individual hygiene, food preparation and house cleaning.² Access to safe water thus enables one to live a healthier life and to participate effectively in the political, social, religious, cultural and economic sphere.³ However, 78 million people in the world currently do not have access to improved water sources.⁴ Every day, over 3600 children die from preventable water-related diseases, which is more than deaths from malaria, HIV/AIDs and measles combined.⁵ Worse still, water sources are becoming more scarce as the use for water both for individual and commercial purposes multiplies, coupled with the ever increasing population growth rates.⁶ It is estimated that in 2050, one in four people will live in a country faced with the challenge of chronically insufficient amounts of clean water.⁷ Water scarcity has also led to an increase in ‘water wars’ as was seen in the Middle East and more water conflicts are speculated to occur in the future.⁸

These worrying trends have led to increased discussions on how to maximise water uses, cater for the needs of the marginalised and preserve water for future uses thus calling for the need for the prioritization of the human right to water.⁹ The recognition of the right to water can be traced from the 1977 UN Mar del Plata conference which emphasised that ‘all people 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

¹ De Albuquerque & Roaf *On the Right track: Good practices in realising the right to water and sanitation* (2012) 19.

² De Albuquerque & Roaf (n1 above) 19.

³ De Albuquerque & Roaf (n1 above) 19- 20.

⁴ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, *Progress on Drinking Water and Sanitation: 2012 update* 5.

⁵ De Albuquerque & Roaf (n1 above) 20.

⁶ SC Mccaffrey ‘Human Right to Water: Domestic and International Implications’ (1992) 5 *The Georgetown International Environmental Law Review* 3-4.

⁷ MA Salman & SA Mclnerney-Lankford *The human right to water: Legal and policy dimensions* (2004) 1.

⁸ AT Wolf “‘Water wars’ and water reality: conflict and cooperation along international water ways’ in SC Lonergan (ed) *Environmental change adaptation and security* 1999 251-252.

⁹ Salman & Mclnerney-Lankford (n7 above) 1-4.

basic needs'. The conference also established the 'International Drinking Water Supply and Sanitation Decade (1981-1990).¹⁰

Several other conferences, declarations and resolutions continued affirming the right to water such as the 1992 International Conference on Water and Environment (Dublin Conference), 1992 UN Conference on Environment and Development (UNCED, Rio Summit), and the 1999 General Assembly Resolution on the Right to Development.¹¹ In 1997, the UN General Assembly (UNGA) adopted the UN Convention on the Law of Non-Navigational Uses of International Water Courses.¹² The Convention was different from the resolutions and declarations due to its binding nature, however, it did not emphasise the right to water but regarded water as an important human need.¹³ Additionally, in the early 2000s, the UNGA adopted several resolutions pertaining to water, which included a resolution declaring 2003 as the 'International Year of Fresh Water' and another one declaring the period 2005-2015 as the 'International Decade for Action, Water for Life'.¹⁴

However, the numerous documents that were adopted wavered between treating water as a basic need and as a right.¹⁵ Even those that acknowledged the right did not elaborate on its contents until the adoption of the General Comment No. 15 on water by the Committee on Economic Social and Cultural Rights (CESCR).¹⁶ This was supplemented by the 2010 United Nations General Assembly Resolution recognising the human right to water.¹⁷

Furthermore, water is a socio-economic right and thus its recognition as an enforceable human right cannot be divorced from the evolution of socio-economic rights. Socio-economic rights have often lagged behind civil and political rights despite their importance and the interdependent nature of rights as emphasised by the Vienna Declaration.¹⁸ This general ambivalence to socio-economic rights has meant that a small number of countries explicitly provide for them as fully justiciable rights and others, such

¹⁰ Salman & McLnerney-Lankford (n7 above) 7-9.

¹¹ Salman & McLnerney-Lankford (n7 above) 7-12.

¹² Salman & McLnerney-Lankford (n7 above) 12-14.

¹³ Salman & McLnerney-Lankford (n7 above) 13-14.

¹⁴ Salman & McLnerney-Lankford (n7 above) 15.

¹⁵ Salman & McLnerney-Lankford (n7 above) 15-16.

¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.2002/11. Available at <http://www.refworld.org/docid/4538838d11.html> (accessed 16 October 2013) .

¹⁷ United Nations General Assembly Resolution, The Human Right to Water and Sanitation, 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010).

¹⁸ 'Vienna Declaration and Programme of Action' Para. 5 U.N. Doc A/CONF.157/23 (July 12,1993) World Conference on Human Rights, June 14-25,1993.

as Uganda, have relegated them to the directive principles of state policy, which are usually non-justiciable.¹⁹

Additionally, the emergence of neo-liberalisation policies has further undermined the status of socio-economic rights on the African continent. In Africa, structural adjustment programmes were adopted by most of the countries to revive their failing economies.²⁰ Despite bringing about economic growth, the policies pursued took the attention of the governments away from public welfare to private investment leading to substantial budgetary cuts to social sectors such as the water, education and health sectors, further undermining the development of socio-economic rights.²¹ Therefore, it is in this complex global, regional and national framework that the challenge to the realisation of the right to water in Uganda is situated.

1.2 Problem Statement

Uganda is considered to be endowed with several freshwater sources such as lakes, rivers and wetlands, which cover about 18% of the total surface area of the country.²² The most important water source for Uganda is Lake Victoria, the second largest freshwater lake in the world as well as the source of the Nile, the longest river in the world.²³ However, the water sources are unevenly distributed and also largely rely on the climatic changes. This calls for an urgent need for their sustainable management to ensure that they benefit all Ugandans.

Uganda is party to the numerous binding and non-binding documents recognising the right to water. Furthermore, the 1995 Constitution of Uganda provides for the right to safe water in the directive principles.²⁴ However, the notion that water is a human right, to which every Ugandan is entitled, has not yet been fully appreciated by lawmakers, political leaders and researchers. The issue of water in Uganda is approached as a need and not as a right. Therefore, the laws and policies governing water usage in Uganda are

¹⁹ E Wiles 'Aspirational Principles or Enforceable Rights? The Future of Socio Economic Rights in National Law' (2006) 22 *American University International Law Review* 51&37.

²⁰ A Adepoju (Ed) *The Impact of Structural Adjustment on the Population of Africa: Implications for education, health and employment* (1993) 2- 3.

²¹ Adepoju (n20 above) and J Oloka-Onyango 'The Problematique of Economic Social and Cultural Right in Globalized Uganda: A conceptual review' (2007) Human Rights and Peace Centre (HURIPEC) working paper No 3 11-12.

²² National Water Development Report, Uganda *Water a shared responsibility*, UN-WATER/WWAP/2006/9. Prepared for the 2nd UN World Water Development Report (2006) xiv.

²³ National Water Development Report (n22 above) xiv.

²⁴ The Constitution of the Republic of Uganda (1995): *Implementation of Objectives National Objectives and Directive Principles of State Policy*.

principally geared towards the economic benefits that accrue from this resource. For instance, the Water Statute 1997 and the National Water Policy 1999 were developed based on the guiding principles of the UN Conference on Environment and Development held in Rio de Janeiro 1992.²⁵ One of the most fundamental principles that were embedded in both documents was the recognition of water as an economic good with an economic value that should be considered while distributing it.²⁶

As a result, despite the overall improvement in the access to water in Uganda, there are still huge disparities with access being concentrated in the urban centres. This leaves a bigger part of the population without access to an improved water source as it is estimated that 85.2% of the Ugandan population reside in rural areas.²⁷ For instance, in 2012, access to safe water within 1km in the rural areas was 64% while access to safe water in the urban areas within 0.2km stood at 69%.²⁸ Access to water for hand washing after latrine usage was at 27% in rural areas compared to 85% in urban areas.²⁹ Such statistics however usually do not effectively depict the deep inequalities in access to water.

The effects of lack of access to water are far-reaching as they affect the sanitation sector, health sector, education sector and several others. For instance, in rural parts of Eastern Uganda, women spend 15-17 hours a week collecting water and some have to walk over 10 kilometres during the dry season.³⁰ This translates to an average of 660 hours a year spent collecting water thus reducing their time for doing other productive work and resting, thus affecting their income.³¹ The issue of water scarcity also compromises the children's capacity to access quality education as they spend a lot of time fetching water and end up missing school or arriving late.

Furthermore, fast population growth, increased industrialisation as well as rapid urbanisation pose an ever-increasing threat to the water sources.³² This rapid urbanization has led to increased informal settlement, increasing poverty levels and an acute shortage

²⁵ The Republic of Uganda, 'National Water Policy' Ministry of Water, Lands and Environment (1999) 5.

²⁶ National Water Development Report (n22 above).

²⁷ Government of Uganda: Ministry of Water and Environment 'Water and Environment Sector Performance Report' October 2012 ii.

²⁸ Sector Performance Report 2012 'Foreword' (n27 above).

²⁹ Sector Performance Report 2102 'Foreword' (n27 above).

³⁰ Human development report 'Beyond Scarcity: Power, Poverty and the global water crises' (2006) United Nations Development Programme 47.

³¹ Human Development Report (n30 above) 47.

³² D Migereko 'Foreword' in 'Uganda National Urban Profile' United Nations Human Settlements Programme (2012) 6.

of resources.³³ About 49% to 64% of the total urban population live in slums and the capital city, Kampala, accounts for 63%.³⁴ In most slum settlements, public water points are privately owned thus 82.3% of water points are paid for.³⁵ The rest of the water sources are open wells whose water is mixed with a lot of unclean substances thus putting the slum dwellers at risk of contracting water borne diseases.³⁶

Therefore, this study examines the need for the incorporation of a rights-based approach in the laws, policies and institutions governing water distribution in Uganda. This is mainly because the human rights approach as stipulated by the Committee on Economic Social and Cultural Rights (CESCR) demands for the provision of accessible, acceptable, affordable and sufficient amounts of water for every individual.³⁷ It also calls for the putting in place of measures to address the needs of the most vulnerable people in society.³⁸ Finally, the human rights approach obliges the duty bearers to respect, promote, protect and fulfil individual's water needs.³⁹ Thus, human rights principles emphasise that by providing water, the government is not doing the population a favour but it is providing a service to which the population is entitled.

1.3 Significance of the Problem

This study is very vital and timely due to the increasing recognition that water resources are rapidly shrinking as a result of rapid population growth and industrialisation. Furthermore, neo-liberalisation policies such as privatisation have led to the abandonment of provision of key services such as water, sanitation and health care services thus increasing poverty levels and widening the gap between the rich and the poor. Thus, it is becoming very important to pursue a rights-based approach in order to overcome the negative impacts of these neo-liberalism policies. The human rights approach is relevant in this context due to its emphasis that development cannot be pursued independently of the fulfilment of the rights of the vulnerable people. Therefore, this study is very essential as it aims at informing policy/law makers, researchers, and legal practitioners of the gaps in the water laws, policies and institutions that should be addressed in order to ensure sufficient, acceptable and accessible water to every Ugandan. The study also

³³ Migereko (n32 above) 6.

³⁴ 'Uganda: Kampala is one big slum' *The New Vision. Uganda's leading daily* 31 October 2012. Available at <http://allafrica.com/stories/201210310503.html?viewall=1> (Accessed 19 August 2013).

³⁵ Uganda National Urban Profile (n32 above) 25.

³⁶ Uganda National Urban Profile (n32 above) 25.

³⁷ General Comment No. 15 (n16 above) Para. 12.

³⁸ General Comment No. 15 (n16 above) Para. 13-16.

³⁹ General Comment No. 15 (n16 above) Para. 20-29.

intends to propose practical strategies that are needed in incorporating a human rights-based approach in Uganda's water laws, policies and institutions.

1.4 Research Question

To what extent do Uganda's legal, policy and institutional frameworks adequately promote the realisation of the human right to water?

1.5 Literature Survey

Various scholars have written about the importance of the recognition of the human right to water. Joyeeta Gupta *et al* noted that the recognition of the right to water in countries' laws and policies converts political intentions into legal entitlements which can be utilised by the vulnerable groups to demand for access to water while placing an obligation on the government to promptly ensure the realisation of the right.⁴⁰ He further noted that the liberalisation policies that have been employed in the water sector have further disenfranchised the poor. This is principally attributable to the fact that water contractors often maintain that they are only accountable to their shareholders and thus international human rights obligations do not apply to them.⁴¹

In arguing for the importance of the recognition of the right to water, Rebecca Bates argues that the right to water is a customary right.⁴² She emphasises that the right to water has been implicitly and explicitly recognised in several international agreements as well as the various state practices shown by recognition of the right in their legislation as well as jurisprudence.⁴³ She mentions documents like the General Comment No. 15 of the CESCR, the UNGA resolution on the human right to water as well as the Mar Del Plata Action Plan as examples of the explicit recognition of the right to water. She however emphasises that the recognition of this right in these various documents does not imply that the government should provide each individual with which ever amount of water they desire but should put in place favourable laws and policies to ensure that every individual's basic water requirements can be met.⁴⁴

⁴⁰ J Gupta *et al* 'The human right to water: Moving towards consensus in a fragmented World' (2010) 19 *Review of European Community and International Environmental Law* 299.

⁴¹ Gupta *et al* (n40 above) 300.

⁴² R Bates 'The road to the well: An Evaluation of the Customary Right to Water' (2010) 19 *Review of European Community and International Environmental Law* 282-292.

⁴³ Bates (n42 above) 282-292.

⁴⁴ Bates (n42 above) 283.

The Millennium Development Goals (MDGs) have played a very crucial role in the recognition of water as an issue that needs to be given attention.⁴⁵ As a result of the MDGs, there has been increased recognition that without the efficient utilisation of water resources, the other development goals such as the ones on maternal health, education, gender equality, reduction of poverty and environmental sustainability will not be realised.⁴⁶ However, the MDGs have been criticised for only seeking to attain minimum targets and their emphasis on quantity rather than quality thus ignoring the meeting of human rights obligations.⁴⁷ Nonetheless, they have prompted discussions as to how the rights-based approach can be utilised for the realisation of the right to water.

One of such discussions is the one advanced by P.B Anand in which he makes a linkage between the MDGs and rights and argues that the adoption of the right to water can contribute to the achievement of the MDGs.⁴⁸ He emphasises that the right to water does not only focus on claims from duty bearers but also highlights duties, responsibilities as well as institutions mandated to provide water. He mentions Uganda as one of those countries whose constitution provides for the right to water and where there has been a significant increase in access to water.⁴⁹ However, he does not examine the extent to which these constitutional provisions have directly impacted this access and whether this access has improved across the board to include the most vulnerable regions as well as individuals. He however, emphasises that a human right to water implies giving priority to drinking water especially for the vulnerable people who do not have access to basic water supply.⁵⁰

However the issue of the right to water in Uganda and how it can be incorporated in Uganda's laws and policies has not been effectively examined. Rose Mwebaza examines the progress of Uganda in attaining the MDG target on water and sanitation with a focus on the governance framework for the delivery of water and sanitation services. She examines the extent to which Uganda adheres to the key principles of governance in the delivery of

⁴⁵ P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2005) 27 *Human Right Quarterly* 755-757.

⁴⁶ PB Anand 'Right to water and access to water: An assessment' (2007) 19 *Journal of International Development* 516.

⁴⁷ P Alston 'A human rights perspective on the Millennium Development Goals'; Paper presented as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development (2004) 12.

⁴⁸ Anand (n46 above) 515.

⁴⁹ Anand (n46 above) 518-520.

⁵⁰ Anand (n46 above) 517.

water and sanitation services.⁵¹ Despite proposing the adoption of the human rights-based approach as one of the strategies for meeting the MDGs, she does not explicitly show how Uganda's policies, laws and institutions can be revised to include the key human rights principles as they have been elaborated on in the General Comment No. 15 of the CESCR.⁵²

S.V Berg and S. Mugisha examine the most ideal technology to be adopted in serving the urban poor using a study area of a certain part of Kampala the capital city of Uganda. They argue that pre-paid water metres can meet both the urban poor needs as well as institutional sustainability.⁵³ They also argue for procedural justice as opposed to distributive justice, which can best be achieved with the usage of pre-paid water metres.⁵⁴ However, very little mention is made to the human rights implications of pre-paid water metres.

The study undertaken, by PM Mpanga, is one that is most closely related to this research. The study analysed the right to water in Uganda, however, it focused on a village in Mukono district.⁵⁵ Therefore, this study takes a broader and more in-depth approach in examining Uganda's laws, policies and institutions' compliance with human rights principles.

1.6 Methodology

This research will primarily use the desk research method. Information that has been written on water pertaining to Uganda, other countries and about the international instruments will be carefully analysed in order to further develop this line of argument. However, in a few instances, where possible, some key informants will be utilised to further elaborate on the topic. In all instances, ethical considerations will be adopted by acknowledging the source of information as well as obtaining consent in case of interviews with key informants.

⁵¹ R Mwebaza 'Sustaining good governance and sanitation in Uganda'. A report written by the Institute of Security Studies (2010) 2-3.

⁵² R Mwebaza (n51 above) 46.

⁵³ S V Berg and S Mugisha 'Pro-poor water service strategies in developing countries: Promoting justice in Uganda's urban project': National Water and Sewerage Corporation, October 2010 Kampala, Uganda 1.

⁵⁴ Berg and Mugisha (n53 above) 5.

⁵⁵ PM Mpanga 'Plenty of water but scarcity still persists: Surveying the status of the right to water in Uganda' (2007) Human Rights and Peace Centre (HURIPEC) Working Paper No 10.

1.7 Limitations of the Study

The study aims at examining Uganda's laws, policies and institutions to ascertain the extent to which they conform to human rights norms and principles. Therefore, conducting interviews with some of the key policy makers, key staff in the various water institutions and civil society organisations working on water issues would have enhanced the research findings. However, this is not possible due to the fact of the researcher being placed far away from Uganda.

1.8 Scope/Chapter Outline

Chapter One: Introduction

This chapter provides a background to the problem, states the overall aim as well as the objectives of the study. The chapter also outlines the purpose of the study, methodology, limitations and literature review. A brief overview of the other chapters is also laid out.

Chapter Two: International Provisions on the Right to Water

This chapter discusses the different instruments at international level that protect the right to water. The journey taken both at international and regional level to concretise the right to water is examined as well as gaps in the operationalisation of these instruments that might hinder their full implementation by the various state parties. The study also identifies the human rights principles espoused in these instruments and these set the standard for measuring the extent to which Uganda abides by its international obligations.

Chapter Three: Legal, Policy and Institutional Framework

This chapter analyses the constitutional provisions on water in a bid to examine whether they fulfil human rights principles. Additionally, Uganda's major policies and statutes on water are critically analysed in order to ascertain the extent to which they are in line with human rights principles. The gaps in these policies are identified and compared to approaches used elsewhere in realising the right to water. Finally, the chapter looks at the institutions that have been set up to manage, distribute and monitor water supply in order to find out whether the approaches they take are rights based.

Chapter Four: Conclusions and Recommendations

This chapter draws conclusions from the findings in the previous chapters. The chapter proposes specific recommendations to be undertaken in order to overcome the challenges

and shortcomings identified. In suggesting recommendations, an attempt is made to tailor the recommendations to the findings in order to avoid duplicating recommendations that have already been suggested by other researchers.

CHAPTER 2

NORMATIVE FRAMEWORK FOR THE RIGHT TO WATER UNDER INTERNATIONAL LAW

2.0 Introduction

This chapter outlines the development of the right to water at the international level. The chapter argues that the human right to water has emerged at the international level as a result of; the adoption of numerous declarations and resolutions affirming the right to water, the inextricable nature of the right in the realisation of other rights and the inclusion of the right in several countries' constitutions. However, it is acknowledged that the right to water needs to be explicitly and independently recognised in the binding universal documents. The chapter is divided into two major sections; section one discusses developments on the right to water at the international level, while section two discusses the development of the right to water at the regional level with particular emphasis on the African region.

2.1 International Level

2.1.1 Developments before the General Comment No. 15 on Water

The right to water is a socio-economic right, which has gradually developed from an implied right to an expressed right. Its development can be traced from the development of socio-economic rights. The genesis of human rights is the Universal Declaration on Human Rights (Universal Declaration), a non-binding document spelling out key human rights principles that was developed in 1945.⁵⁶ Article 25(1) of the Universal Declaration is of particular significance as it spelt out that everyone has the right to an adequate

⁵⁶ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, U.N. Doc A/810 (Dec. 10, 1948).

standard of living necessary for health.⁵⁷ The declaration was closely followed by 2 key covenants; the International Covenant on Civil and Political Rights (ICCPR)⁵⁸ and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁵⁹ The ICESCR spelt out numerous socio-economic rights but did not explicitly provide for the right to water as a free standing right.⁶⁰

Therefore, the right to water was not explicitly spelt out in the three key human rights documents (Universal Declaration, ICCPR and ICESCR).⁶¹ The reasons for the non-inclusion of the right to water are not spelt out in the *travaux preparatoires* of the conventions; however, scholars have offered possible explanations for its non-inclusion.⁶² They speculate that the drafters could have considered that water is a pre-requisite for human existence thus, like air; it did not need to be mentioned. Also, that the need for a provision on water was not urgent as water was perceived to be abundant at the time of the drafting of the conventions.⁶³ Nevertheless, its absence from these instruments, has contributed to states' reluctance to fully recognise the right to water as an enforceable right.⁶⁴

Despite its non-recognition in the key human rights documents, several conferences dating back to the 1970s adopted resolutions and declarations affirming the right to water. Key among these was the 1977 UN Mal Del Plata Water Conference, 1992 UN Conference on Environment and Development and the three World Water Forums (held in 1997 in Morocco, 2000 in Netherlands and 2003 in Japan). However, despite the acknowledgement of the right to water, the conferences laid a lot of emphasis on water as a good with immense economic value.⁶⁵ For instance, agenda 21 that was adopted during the 1992 Rio Conference on Human Environment and Development regarded water as a 'good'.⁶⁶ Though, the 1999 United Nations General Assembly Resolution on the Right to

⁵⁷ Universal Declaration (n56 above).

⁵⁸ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 172 (hereinafter ICCPR).

⁵⁹ International Covenant on Economic, Social and Cultural Rights, Dec.16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁶⁰ ICESCR (n59 above).

⁶¹ SC Maccfrey and KJ Neville 'Small capacity and big responsibilities: Financial and legal implications of a Human Right to Water in Developing Countries' (2008-2009) 21 *The George Town International Environmental Law Review* 681.

⁶² Maccfrey and Neville (n61 above) 681.

⁶³ Maccfrey and Neville (n61 above) 681.

⁶⁴ Maccfrey and Neville (n61 above) 681.

⁶⁵ Salman and McInerney-Lankford (n7 above) 14-16.

⁶⁶ M Fitzmaurice 'The human right to water' (2006-2007) 18 *Fordham Environmental Law Review* 546.

Development was an exceptional one as it emphasised that the right to clean water is an essential human right for the realisation of the right to development.⁶⁷

Additionally, several group specific conventions that came after the ICESCR included provisions explicitly mentioning water. For instance, Article 24(2) of the Convention on the Rights of the Child (CRC) obliges state parties to combat malnutrition and disease by ensuring access to sufficient nutritious foods as well as safe drinking water.⁶⁸ Article 14(2) of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) states that ‘State Parties shall ensure that women enjoy the right to adequate living conditions especially in relation to water supply’.⁶⁹ Article 28(2)(a) of the Convention on the Rights of Persons with Disabilities (CRPD) calls upon state parties to ‘take appropriate steps to ensure access by persons with disabilities to clean water services’.⁷⁰

Furthermore, the committees charged with monitoring these conventions have made several recommendations pertaining to water in their concluding observations to states.⁷¹ In its concluding observations to Uganda, the CRC Committee noted that many children were not adequately enjoying the pre-requisites of an adequate standard of living including food, housing, sufficient latrines and access to an adequate and safe amount of drinking water.⁷² Similarly, the CEDAW Committee recommended to Burkina Faso to ensure women’s increased access to essential primary health care facilities as well as safe drinking water.⁷³

The adoption of the Millennium Declaration in 2000 by the United Nations General Assembly greatly contributed to bringing the issue of water to the forefront.⁷⁴ One of the targets, 7C on the MDGs, urges states to ‘halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation’.⁷⁵ However, despite the fact that the declaration spelt out several human rights principles, the goals where

⁶⁷ United Nations General Assembly Resolution on the Right to Development A/Res/54/175 December 17, 1999 Para. 12.

⁶⁸ Convention on the Rights of the Child (CRC) November 20, 1989, 1577 U.N.T.S.3, Art.24 (2).

⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) September 30, 1981, 1249 U.N.T.S. 13, Art.14 (2).

⁷⁰ Convention on the Rights of People with Disabilities (CRPD), 13 December 2006, Art 28(2) (a). Available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> (accessed 23 October 2013).

⁷¹ M Williams ‘Privatization and the human right to water: Challenges for the new century’ (2006-2007) 28 *Michigan Journal of International Law* 482-486.

⁷² U.N. Convention on the Rights of the Child, Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Uganda, U.N. Doc. CRC/C/UGA/CO/2 (Nov. 23, 2005) Para. 57 and M Williams (n71 above) 482.

⁷³ Convention on all forms of discrimination against women (CEDAW), ‘Concluding Comments of the CEDAW Committee’, Burkina Faso, U.N. Doc. A/55/38 (Aug. 17, 2000) Para. 276.

⁷⁴ ‘We can end Poverty :Millennium Development Goals(MDGs and beyond 2015’ Available at <http://www.un.org/millenniumgoals/envIRON.shtml> (Accessed on 21 September 2013).

⁷⁵ MDGS and Beyond 2015 9 (n 74 above).

criticised for having sidelined the human rights aspect.⁷⁶ The MDGs settled for half measures as opposed to all-inclusive solutions, as seen in target 7C above, and they were state-focused thus reinforcing the notion of privatisation, which has been heavily criticised by human rights activists.⁷⁷

Therefore, despite acknowledging the indispensability of water to human existence, the above developments gave minimal recognition to the human rights aspect of water. This was the case until the recognition by the Committee on Economic Social and Cultural Rights (CESCR) of an independent and applicable human right to water by way of the General Comment No. 15.⁷⁸

2.1.2 The CESCR and the General Comment No. 15

The Committee on Economic Social and Cultural Rights (CESCR) is charged with the monitoring of state parties' implementation of the International Covenant on Economic Social and Cultural Rights (ICESCR).⁷⁹ The committee was established in 1985 under the United Nations Economic and Social Council (ECOSOC) Resolution.⁸⁰ In 2002, the CESCR came up with the General Comment No. 15 on the right to water.⁸¹ This was as a result of the numerous reports received by the committee of ensuring violations of the right to water in several countries.⁸²

1. Are General Comments Binding upon State Parties?

The General Comment is an authoritative interpretation of the provisions of the ICESCR.⁸³ However, it is a non-binding document as the committee is a body of independent experts and not government representatives and thus it does not have the capacity to make binding decisions.⁸⁴ This is derived from the Vienna Convention on the Law of Treaties

⁷⁶ Alston (n45 above) 764-766.

⁷⁷ Alston (n45 above) 764-766.

⁷⁸ Maccfrey and Neville (n61 above) 682.

⁷⁹ Committee on Economic Social and Cultural Rights 'Monitoring the economic social and cultural rights' United Nations Office of the High Commissioner of Human Rights. Available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (Accessed 16 October 2013).

⁸⁰ Office of the High Commissioner of Human Rights 'Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the implementation of the International Covenant on Economic Social and Cultural Rights', Economic and Social Council Resolution 1985/17, 28 May 1985. Available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (Accessed 16 October 2013).

⁸¹ General Comment No. 15 (n16 above).

⁸² General Comment No. 15 (n16 above) Para. 1.

⁸³ D Otto 'Gender Comment' 'Why does the Committee on Economic Social and Cultural Rights Need a General Comment on Women' (2002) 14 *Canadian Journal of Women and the Law* 11.

⁸⁴ Otto (n83 above) 11-14.

(VCLT) which emphasises that treaties are mutual agreements between state parties.⁸⁵ Therefore, interpretation of these treaties arises from consensus among the contracting state parties either as a result of state practice in the implementation of the treaty or by expressly agreeing to the interpretation.⁸⁶

However, if contracting states do not oppose the General Comment, then it is assumed that there is inferred agreement to the interpretation of the treaty.⁸⁷ Furthermore, if state practice is in line with the General Comment either through using the comment in the implementation of the particular treaty, using it to elaborate provisions in another treaty and implementing the measures in the comment, it may be said to have crystallised into binding law.⁸⁸ Nonetheless, General Comments are by and large considered to be highly persuasive but not binding, however they have a lot of political and moral influence.⁸⁹

II. Provisions in the General Comment No. 15

In the General Comment, the CESCR emphasised that the right to water could be read into articles 11(right to an adequate standard of living) and 12 (right to health) of the ICESCR.⁹⁰ That the right to water is fundamental for the realisation of an adequate standard of living and is vital for the realisation of other rights such as the right to food, right to housing and the right to the highest attainable standard of health.⁹¹ The committee further stressed that the word ‘including’ in Article 11(1) of the ICESCR’ is of particular importance as it was used to imply that the conditions for an adequate standard of living are not exhaustive.⁹² The committee also emphasised that the right to water is essential to the realisation of the right to life and dignity.⁹³

Some scholars have however argued that by reading the right to water into Articles 11 and 12 of the ICESCR, the CESCR did not firmly entrench it as a fully recognisable and independent right.⁹⁴ This creates a challenge in such a way that it is difficult to claim an independent violation of the right to water if other explicit rights (right to an adequate

⁸⁵ United Nations, Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations Treaty Series, Vol.1155, p.331.

Available at <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 17 October 2013) Art. 31(2).

⁸⁶ VCLT (n85 above) Art 31(3)

⁸⁷ Otto (n83 above) 12

⁸⁸ Otto (n83 above) 12.

⁸⁹ Otto (n83 above) 11-14.

⁹⁰ General Comment No.15 (n16 above) Para. 3.

⁹¹ General Comment No.15 (n16 above) Para. 3.

⁹² General Comment No.15 (n16 above) Para. 3.

⁹³ General Comment No.15 (n16 above) Para. 3.

⁹⁴ TS Bulto ‘The emergence of the human right to water in international human rights law: Invention or discovery?’ (2011) 12 *Melbourne Journal of International Law* 290.

standard of living, right to life, and right to the highest attainable standard of mental and physical health) have not been violated.⁹⁵ They further contend that the usage of the word ‘including’ by the CESCR is vague as other people might incorporate into it many other vague rights such as the right to internet services.⁹⁶ Other critics argue that the CESCR went against the *pacta sunt servanda* principle by including provisions in the ICESCR that states did not formerly agree to be bound by.⁹⁷

These critics have been challenged by the proponents of the right to water that have stated that the role of the CESCR is to give interpretative guidance to the various provisions of the ICESCR.⁹⁸ They also stated that the treaties ought to be interpreted purposively and not restrictively in order to give full meaning to their object and purpose.⁹⁹ Therefore, the CESCR deemed that, in light of the fact that water is one of the most essential conditions for survival, it is a guaranteed element of the right to an adequate standard of living.¹⁰⁰ This disregards other rights that might be ideal for an adequate and comfortable standard of living but not necessarily vital for human existence.¹⁰¹ These same proponents assert that treaties should not be drafted in exact terms that do not allow for developments at international level but should be drafted in an expansive manner to allow for their continuous relevance to changing situations.¹⁰²

The CESCR further elaborated on the normative content of the right by stressing that the realisation of the right to water requires that water is of quality (free from substance that endangers people’s health and of an acceptable colour, odour and smell); is accessible (in terms of distance, affordable, non-discriminatory and also involves the right to acquire information pertaining to water) and is available (sufficient and continuous for personal and domestic use).¹⁰³ The General Comment also highlights key human rights principles that must be adhered to in the implementation of the right to water, which include; non discrimination, equality (provides for substantive equality), participation, access to legal and other remedies and accountability.¹⁰⁴

⁹⁵ Gupta *et al* (n40 above) 297.

⁹⁶ Bulto (n94 above) 300.

⁹⁷ Bulto (n94 above) 292.

⁹⁸ Bulto (n94 above) 298-299.

⁹⁹ Bulto (n94 above) 298-299.

¹⁰⁰ Bulto (n94 above) 300-301.

¹⁰¹ Bulto (n94 above) 301.

¹⁰² Bulto (n94 above) 300.

¹⁰³ General Comment No. 15 (n16 above) Para. 12.

¹⁰⁴ General Comment No. 15 (n16 above) Para. 13-16, 55-59.

The CESCR also highlighted state parties' obligation to respect, protect and fulfil the right to water.¹⁰⁵ The obligation to respect requires state parties to desist from Acts that might either directly or indirectly infringe on the enjoyment of the right to water.¹⁰⁶ The obligation to protect obliges state parties to prevent third party interference in the enjoyment of the right to water.¹⁰⁷ While, the obligation to fulfil requires state parties to take positive measures to assist in the enjoyment of the right, provide appropriate education concerning water issues and provide water in circumstances where individuals are completely unable to access it.¹⁰⁸

The General Comment emphasised the importance of Article 2(1) of the ICESCR which requires states to take concrete and targeted steps, to the maximum of available resources, to realise the right to water and to avoid any retrogressive steps except in unavoidable circumstances.¹⁰⁹ When taking these steps, states should recognise the importance of international cooperation and thus take coordinated and separate actions aimed at the full realisation of the right to water.¹¹⁰ It was however emphasised that international cooperation should not in any way interfere with the enjoyment of the right to water.¹¹¹

The CESCR further spelt out several minimum core obligations that are immediately realisable.¹¹² These are; ensuring access to the minimum amount of water sufficient for personal, domestic use and for preventing diseases, the minimum amount set out is in line with the WHO guidelines which require 50 litres of water for each individual for all domestic and personal uses¹¹³; ensure that water facilities are accessible to all especially the marginalised groups; guarantee that personal security is not threatened in the process of accessing water; ensure equitable access to all available water facilities; put in place and operationalise a national water strategy as well as a plan of action and regularly monitor them in a participatory manner, regularly monitor the degree of realisation of the right to water, put in place relatively low cost target programmes particularly for the vulnerable groups; undertake measures to prevent, treat and control diseases connected

¹⁰⁵ General Comment No. 15 (n16 above) Para. 20.

¹⁰⁶ General Comment No. 15 (n16 above) Para.21-22.

¹⁰⁷ General Comment No.15 (n16 above) Para. 23-24.

¹⁰⁸ General Comment No.15 (n16 above) Para. 25-29.

¹⁰⁹ General Comment No.15 (n16 above) Para. 17-19.

¹¹⁰ General Comment No.15 (n16 above) Para. 30-36.

¹¹¹ General Comment No.15 (n16 above) Para. 30-36.

¹¹² General Comment No.15 (n16 above) Para. 37.

¹¹³ World Health Organisation 'Domestic Water Quantity, service, level and health' (2003) WHO/SDE/WSH/03.024.

to water; ensure physical access to water facilities at agreeable distances and avoid long waiting times.¹¹⁴

Critics have however maintained that some of the core obligations might be difficult for impoverished states to immediately realise due to the limited resources available in these countries.¹¹⁵ For instance, the core obligation of ensuring minimum access for all and the one ensuring physical access for all to water facilities, cannot be realised immediately as they require huge technological, financial and human resources.¹¹⁶ Furthermore, as mentioned above, the General Comment is a non-binding document so states might not feel obliged to implement the provisions therein.¹¹⁷ The CESCR goes ahead to require states that are in position to offer assistance to offer economic and technical assistance to help in the fulfilment of the minimum obligations.¹¹⁸

However, due to the financial crises that have plagued the developed world in recent times, the developed countries are increasingly shifting focus to address the challenges within their countries and this has substantially cut the amount of aid to other countries.¹¹⁹ Additionally, developed countries tend to attach a lot of conditionalities to the aid, which might not necessarily be in line with realisation of human rights principles. These factors thus affect the immediate implementation of the minimum obligations. However, despite the shortcomings raised above, the General Comment No. 15 played a great role in elaborating on the right to water and affirming that the right needs to be recognised and enforced.

In addition to the elaboration of the General Comment, the CESCR has repeatedly emphasised the need to uphold the right to water in its concluding observations to states. In its concluding comments to Azerbaijan in 2004, the CESCR urged the state to undertake measures to ensure the safeguarding of fundamental economic social and cultural rights for the refugees and internally displaced persons especially adequate housing, food and water.¹²⁰ Similarly, in its observations to Iraq in 1997, the CESCR requested the state to

¹¹⁴ General Comment No.15 (n16 above) Para. 37 (a-i).

¹¹⁵ Macffrey and Neville (n 61 above) 685.

¹¹⁶ Macffrey and Neville (n 61 above) 685.

¹¹⁷ Macffrey and Neville (n 61 above) 686.

¹¹⁸ General Comment No. 15 (n16 above) Para. 38.

¹¹⁹ Macffrey and Neville (n 61 above) 685.

¹²⁰ Concluding Observations of the Committee on Economic Social and Cultural Rights: Azerbaijan 12/14/2004.E/C.12/1/Add.104 Para. 52.

take every initiative to ensure access to portable water by the population especially in the rural areas.¹²¹

2.1.3 Developments after the General Comment

The sub-commission on the promotion and protection of human rights further supplemented on the work of the CESCR by coming up with guidelines of the realisation of the right to drinking water and sanitation in 2006 aimed at facilitating various stakeholders in implementing the right to water.¹²² This was closely followed by a study on equitable access to safe drinking water and sanitation presented to the Human Rights Council in 2007 by the High Commissioner for Human Rights in which he emphasised that the time was ripe to consider access to safe drinking water and sanitation as a human right.¹²³ In 2008, the United Nations Human Rights Council established the mandate of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation.¹²⁴ In 2011, the mandate was extended and its title was changed to Special Rapporteur on the Human Right to Water and Sanitation further cementing the importance of this right.¹²⁵

These developments laid the ground for the subsequent adoption of a resolution by the United Nations General Assembly (UNGA) in 2010 recognising the right to safe and drinking water and sanitation as a human right to which 122 Countries assented and 41 absented themselves.¹²⁶ However, the resolution just like the General Comment is a non-binding document thus merely places a moral obligation to recognise the right to water.¹²⁷

In 2010, the Human Rights Council asserted the existence of a human right to water by confirming the UNGA resolution and emphasising that the right to water and sanitation is derived from the right to an adequate standard of living.¹²⁸ Shortly after this, the Special

¹²¹ Concluding observations of the Committee on Economic, Social and Cultural Rights: Iraq, 12/12/1997 E/C.12/1/Add.17. Consideration of Reports submitted by State Parties under Articles 16 and 17 of the Covenant Para. 36.

¹²² 'Realisation of the right to drinking water and sanitation' Report of the special Rapporteur El Hadji Guisse Economic and Social Council 11 July 2005 E/CN.4/Sub.2/2005/25. The guidelines were adopted by the UN sub-commission on the promotion and protection of human rights in August 2006.

¹²³ Report of the United Nations High Commissioner for 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 A/HRC/6/3.

¹²⁴ 'Human rights and access to safe drinking water and sanitation' March 2008 Human Council Resolution 7/22.

¹²⁵ 'The Human right to safe drinking water and sanitation' 'Resolution adopted by the human rights Council 16/2 Para. 4, 8 April 2011.

¹²⁶ United Nations General Assembly Resolution. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010).

¹²⁷ R Rutherford 'An International Human Right to Water' Alabama law review: 'How to secure the place of people ahead of profits in the struggle for water access' (2010-2011) 62 *Alabama law review* 876.

¹²⁸ H.R.C. Res. 15/9, at 2, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010).

Rapporteur on the Human Right to water stated that the Human Rights Council affirmation asserted the existence of the right to water and sanitation as a legally binding right.¹²⁹

The affirmation of the human right to water at the international level is a very important step in ensuring access to water by populations around the world. However, numerous challenges still exist especially in regard to operationalisation of this right. One of the outstanding challenges is the fragmentation in water governance right from the UN level, which is characterised by competing approaches and practices within the 28 UN agencies.¹³⁰ This lack of consensus was witnessed during the adoption of the UNGA resolution where several developed countries such as the USA abstained from voting stating that the way the right was framed in the resolution was not supported by existing international law.¹³¹

As a result of a lack of a united front in the UN on the right to water, other discourses have permeated through and become even stronger such as those arguing that water should be distributed equitably without giving priority to any sector.¹³² Another discourse is the one by the development practitioners who regard water as an economic good and fronted this approach throughout the world water forums.¹³³ Thus, despite emphasising the prioritisation of water in the Poverty Reduction Strategies, water is treated as a basic need and not as a right.¹³⁴ These varying discourses have influenced the extent to which the right to water has been recognised and implemented at the regional as well as the national level.

2.2 Regional Level

Neither the European Convention on human rights¹³⁵ nor the European Social Charter (1961)¹³⁶ directly provide for the human right to water. However, they have taken several steps in order to offer protection for the right to water. For instance, in 2001, the

¹²⁹ Office of the High Commissioner for Human Rights, 'A Landmark Decision to Make the Right to Water and Sanitation legally binding' (2010) <http://www.ohchr.org/EN/NewsEvents/Pages/RightToWaterAndSanitation.aspx/> (accessed 22 September 2013)

¹³⁰ Gupta *et al* (n40 above) 298.

¹³¹ Gupta *et al* (n40 above) 298-299.

¹³² Gupta *et al* (n40 above) 295.

¹³³ Gupta *et al* (n40above) 296.

¹³⁴ Gupta *et al* (n40 above) 296.

¹³⁵ European Convention on Human Rights (hereinafter the ECHR), Nov. 4, 1950, 213 U.N.T.S. 221.

¹³⁶ European Social Charter 18. X.1961 Council of Europe. Available at <http://www.coe.int> (Accessed 22 Sept 2013).

European Charter on Water Resources was adopted by the European Council of Ministers¹³⁷ and in 2009, a resolution was passed by the European Parliamentary Assembly urging for the recognition of the human right to water.¹³⁸

On the other hand, despite the fact that most of the key treaties at the American Regional level do not explicitly provide for the right to water, several provisions in these treaties infer a right to water. These include; Articles 1(right to life) and 11(right to health) of the American Declaration on the Rights and Duties of Man (1948),¹³⁹ Article 26 of the 1969 American Convention on Human Rights which urges states to progressively realise economic social and cultural rights,¹⁴⁰ Article 11(1) (right to a healthy environment and to access to basic public services) and Article 12(1) (right to adequate nutrition for everyone) of the 1988 San Salvador Protocol on Economic Social and Cultural Rights.¹⁴¹ In addition, several countries in the American Region have explicitly recognised the right to water in their constitutions such as Bolivia, Uruguay and Nicaragua.¹⁴² Special attention is now turned to the African Regional system.

2.2.1 African Regional System

The African Charter on Human and People's Rights (African Charter) is a bit unique as it provided for both civil and political rights on the same level as social and economic rights.¹⁴³ Scholars have contended that several factors pushed the African leaders to advocate for the inclusion of socio-economic rights together with civil and political rights in the African Charter.¹⁴⁴ These included; the need to reverse the negative impacts of colonialism on Africa's socio-economic development, high levels of underdevelopment in most post colonial states characterised by endemic poverty, malnutrition and numerous preventable diseases.¹⁴⁵

¹³⁷ 'Recommendations (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources', Council of Europe, Adopted by the Committee of Ministers (Oct. 17, 2001). Available at <https://wcd.coe.int/ViewDoc.jsp?id=231615&Site=COE> (Accessed 22 September 2013).

¹³⁸ 'Water: A Strategic Challenge for the Mediterranean Basin, European Parliament Assembly. RES 1693, (2009).

¹³⁹ American Declaration on the Rights and Duties of Man (hereinafter ADRDM), Organization of American States OEA/SER.L./V.11.23, doc. 21 rev. 6 (1948).

¹⁴⁰ American Convention on Human Rights, Organization of American States Nov.22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123.

¹⁴¹ Protocol of San Salvador, Organization of American States Nov. 17, 1988, O.A.S.T.S. No. 69 (1988).

¹⁴² De Albuquerque & Roaf (n1 above) 51.

¹⁴³ Organisation of African Unity,(OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981 CAB/LEG/67/3 rev.5,21 I.L.M.58 (1982).

¹⁴⁴ C Mbazira 'Enforcing the Economic Social and Cultural Rights in the African Charter on Human and Peoples' Rights :Twenty years of redundancy ,progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333-338.

¹⁴⁵ Mbazira (n144 above) 333-338.

The right to water is not explicitly provided for in the African Charter, however the subsequent treaties have provided for it. One of such treaties is the African Charter on the Rights and Welfare of the Child, Article 14(2)(c), which requires states to take measures to ensure the ‘provision of adequate nutrition and safe drinking water’.¹⁴⁶ In addition, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) explicitly provided for the right to water.¹⁴⁷ The Maputo Protocol included water among the key requirements for fulfilling the right to food security as Article 15(a) mentions that states shall guarantee the right to nutritious and sufficient food for the women by providing them with access to clean drinking water.¹⁴⁸

The African Commission has gone ahead to include the right to water in several other persuasive but non-binding documents. For instance, in 2011, the African Commission adopted State Party Reporting Guidelines for Economic Social and Cultural Rights in the African Charter in which it emphasised state parties’ obligation to report on the measures taken to realise the right to water and sanitation.¹⁴⁹ In the same year, the African Commission adopted Draft Guidelines on Economic Social and Cultural Rights in the African Charter where it spelt out the right to water and sanitation as one of the key rights derived from Articles 4 (right to life), 5 (right to dignity), 15 (right to work), 16 (right to health), 22 (right to development) and 24 (right to environment) of the ACHPR.¹⁵⁰

In executing its role as a quasi-judicial organ, the African Commission has read the right to water into existing socio-economic rights as well as other civil and political rights. In *Free legal Assistance Group and others V Zaire*, the commission held that the failure of the government to ensure that vital services such as water are available is a violation of Article 16 (right to health).¹⁵¹ Additionally, in the case of *Sudan Human Rights*

¹⁴⁶ Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁴⁷ African Commission on Human and Peoples’ Rights ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of women in Africa (Maputo Protocol)’, AHG/Res.240 (XXXI), adopted 17 November 2003, entered into force 25 November 2005. Available at <http://www.achpr.org/instruments/women-protocol/> (accessed 16 October 2013).

¹⁴⁸ Maputo Protocol Article (n147 above) 15(a).

¹⁴⁹ ‘Content of Individual Rights’ State Party Reporting Guidelines for Economic Social and Cultural Rights in the African Charter on Human and Peoples’ Rights adopted by the African Commission on Human and Peoples’ Rights 24, October 2011 Guideline 7.

¹⁵⁰ ‘Economic Social and Cultural Rights Enshrined in the Charter’ Draft Principles and Guidelines on Economic Social and Cultural Rights in the African Charter on Human and Peoples’ Rights adopted by the African Commission on Human and Peoples’ Rights 24, October 2011 Principle 71-75 . Available at www.achpr.org (Accessed on 17 September 2013).

¹⁵¹ 25/89-47/90-56/91-100/93 *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, les Témoins de Jehovah v Democratic Republic of the Congo*, 04 April 1996 Para. 47.

Organisation V the Sudan, the commission found a violation of the right to water by reading into Articles 4, 16 and 22 of the African Charter.¹⁵²

In one of the most crucial cases regarding socio-economic rights at the African level (*the SERAC case*); the Commission ruled that the contamination of water sources by the government violated the right to a satisfactory environment (24) and the right to health (16). Several countries have also included the right to water in the justiciable sections of their constitutions, these include; Kenya, Democratic Republic of Congo and South Africa.¹⁵³

The challenge however, is that state parties and the African Union don't often take communications of the African Commission seriously.¹⁵⁴ Furthermore, there is no system or body to ensure the enforcement of the recommendations by the African Commission.¹⁵⁵ The establishment of the African Court on Human and People's rights seemed to provide a ray of hope for the implementation of recommendations, however, so far it has not contributed much to reversing the situation.¹⁵⁶

2.3 Conclusion

In all, the chapter has fronted an argument that, despite the lack of an explicit provision on the right to water in the key human rights documents; the ICCPR, ICESCR and Universal Declaration, the numerous affirmations made through other group specific conventions as well as other non-binding resolutions and declarations show the emergence of the right to water. Additionally, the centrality of water in the achievement of other rights such as the right to life, right to health, right to food, right to sanitation and right to housing prove that the right to water itself is an indispensable right that can no longer be ignored. Last but not least, state practice, through recognition of the right to water in their constitutions and assenting to the numerous resolutions and declarations, depicts that states cannot continue relying on the non-recognition of water in the key instruments as a justification for non-fulfilment of the right to water.

¹⁵² 279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009 Para. 209-212.

¹⁵³ De Albuquerque & Roaf (n1 above) 51.

¹⁵⁴ Mbazira (n144 above) 333.

¹⁵⁵ Mbazira (n144 above) 333.

¹⁵⁶ Mbazira (n144 above) 333.

CHAPTER 3

LEGAL, POLICY AND INSTITUTIONAL FRAMEWORKS FOR THE REALISATION OF THE RIGHT TO WATER IN UGANDA

3.0 Introduction

This chapter is aimed at examining the extent to which Uganda's laws, policies and institutions conform to human rights principles on the right to water elaborated upon in the previous chapter. It is contended that while Uganda's numerous laws, policies and institutions fulfil certain human rights principles, they are not drafted, formulated and implemented in human rights terms. As a result, several human rights violations of the right to water go un-noticed or un-attended to. The chapter is divided into four sections; the first section briefly illustrates what the human rights-based approach to water entails, the second section analyses Uganda's legislative framework to ascertain its conformity to human rights principles, section three assesses the extent to which Uganda's policy framework upholds human rights norms and the fourth section analyses the institutional frameworks and their conformity to human rights principles.

From the outset, it is important to note that Uganda follows a decentralised government structure thus public service delivery such as water, education and health is implemented through the local government.¹⁵⁷ As a result, Uganda has a series of laws, policies and institutions that operate both at the national, regional and local level. Furthermore, as set out in the General Comment No. 15 on water, the chapter will focus on water for domestic purposes and personal use¹⁵⁸, although it is acknowledged that in certain instances, there are overlaps between water for personal use and water for other purposes.

3.1 The Human Rights-Based Approach (HRBA) to Water

The HRBA is a conceptual framework based on international human rights standards aimed at promoting and protecting human rights based on the principle that human rights should guide all development processes.¹⁵⁹ The HRBA is very instrumental in giving voice to those who are often excluded or marginalised from decision-making such as the women and the

¹⁵⁷ The Uganda Water and Sanitation Dialogues 'Water and sanitation modes of supply in Uganda: Executive Summary'. Final Desk Study Report, December 2007 viii.

¹⁵⁸ General Comment No.15 (n16 above) Para. 12(a).

¹⁵⁹ De Albuquerque & Roaf (n1 above) 106.

children.¹⁶⁰ The vulnerable people, known as rights holders, are thus identified, informed of their rights and empowered to demand and exercise them.¹⁶¹ The duty bearers are reminded of their obligations and their capacities are built in order for them to comply with their obligations of respecting and promoting rights.¹⁶²

The HRBA thus enables for the integration of human rights norms in laws, policies, processes and institutions.¹⁶³ In the context of the right to water, the norms and standards are those espoused in General Comment No. 15 on water that have been elaborated upon in the previous chapter¹⁶⁴. The human rights principles are also drawn from other human rights instruments. These instruments emphasise principles of participation, accountability, empowerment, provision of adequate legal remedies, non-discrimination, equality and a special focus on the vulnerable people.¹⁶⁵

3.2 Legislative Framework

Uganda has committed itself to progressively realise the right to water through its ratification of numerous human rights instruments at the international and the regional level that provide for the right to water. These include the ICESCR, which Uganda ratified on 21 January 1987¹⁶⁶, and the CRC, which was ratified on 17 August 1990.¹⁶⁷ At the regional level, Uganda ratified the African Children's Charter on 17 August 1994¹⁶⁸ and the Maputo Protocol was ratified on 22 July 2010.¹⁶⁹

General Comment No. 15 obliges states to set up efficient regulatory frameworks to prevent third parties from obstructing the enjoyment of the right to water in any way.¹⁷⁰ These frameworks must provide for independent monitoring, effective public participation as well as imposition of penalties for non-compliance.¹⁷¹ Therefore, explicit recognition of the right to water in a country's laws is very pertinent as it shows a state's commitment to

¹⁶⁰ De Albuquerque & Roaf (n1 above) 106.

¹⁶¹ United Nations, Office of the United Nations High Commissioner of Human Rights (OHCHR) *The Right to Water: Fact sheet No. 35* (2010) Geneva, Switzerland 15.

¹⁶² De Albuquerque & Roaf (n1 above) 106.

¹⁶³ OHCHR Fact Sheet (n161 above) 15-16.

¹⁶⁴ OHCHR Fact Sheet (n161 above) 16.

¹⁶⁵ OHCHR Fact Sheet (n161 above) 15-16.

¹⁶⁶ United Nations Treaty Collection, International Covenant on Economic Social and Cultural Rights 16 December 1966. Available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en (accessed 20 October 2013).

¹⁶⁷ United Nations Treaty Collection, Convention on the Rights of the Child (CRC) 20 November 1989. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (Accessed 28 October 2013).

¹⁶⁸ Ratification Table, 'African Charter on the Rights and Welfare of the Child'. Available at <http://www.achpr.org/instruments/child/ratification/> (accessed 28 October 2013).

¹⁶⁹ Ratification Table, 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of women'. Available at <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 28 October 2013).

¹⁷⁰ General Comment No. 15 (n16 above) Para. 24-25.

¹⁷¹ General Comment No. 15 (n16 above) Para. 25.

realising the right.¹⁷² The entrenchment of the right also transfers entitlements to the people that they can demand for from the state and the state is required to deliver these within the legal framework.¹⁷³

Uganda has a series of laws pertaining to water supply and sanitation. These laws apply both at the national, regional and local level as a result of Uganda's decentralised system of governance. These include; the Uganda Constitution, the Uganda Water Act (1997) Cap 152 with its regulations, Local Government Act (1997), Cap 243, National Water and Sewerage Corporation Act (1995), Cap 317, National Environment Act (1995), Cap 153.¹⁷⁴ However, due to the limited scope of this study, all these regulatory frameworks will not be analysed. This section will only focus on the two pertinent legal instruments which guide the implementation of all the other laws pertaining to water. These are; the Uganda Constitution (1995) and the Uganda Water Act (1997), Cap 152.

3.2.1 The Constitution of Uganda

In 1995, Uganda promulgated the current constitution in order to restore constitutionalism and the rule of law back to Uganda which had, for many years, been characterised by lack of constitutionalism, oppression, political and other forms of instability.¹⁷⁵ The constitution is aimed at providing a comprehensive framework through which all the laws, policies and institutions governing water should be established.¹⁷⁶

The constitution did not explicitly provide for the right to water in its Bill of Rights. Water and sanitation is mentioned in a section referred to as 'National objectives and directive principles of state policy'. Objective XXI states that, 'The state shall take all practical measures to promote a good water management system at all levels'. Objective XXVI subsections (i) and (ii) provide a framework for management and utilisation of natural resources including water. Subsection (i) provides, 'the state shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations'. Subsection (ii) states that,

The utilisation of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans and in particular, the states shall take all possible measures to prevent or

¹⁷² De Albuquerque & Roaf (n1 above) 45.

¹⁷³ De Albuquerque & Roaf (n1 above) 45.

¹⁷⁴ National Water Development Report (n22 above) 14.

¹⁷⁵ The Constitution Uganda, 1995 (n24 above)'Preamble'.

¹⁷⁶ National Water Development Report (n22 above) 14.

minimize damage and destruction to land, air and water resources resulting from pollution or other causes.

The appearance of these provisions in this section as opposed to Chapter 4 in the Bill of Rights puts their justiciability in question as they are merely aimed at guiding law and policy makers in interpreting laws and policy decisions.¹⁷⁷ The amendment to the constitution in terms of article 8(A) 1 of 2005 provided a ray of hope as it elevated the status of the directive principles. It states that 'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and principles of state policy'.¹⁷⁸ The justification for the insertion of this clause was given by Honourable Margaret Zziwa who stated that,¹⁷⁹

In order to strengthen the culture and spirit of nationalism it is important to have the minimum interests or the minimum element to be the guiding principles of state policy. And these interests must be stated in the justifiable part of the Constitution in order to give them a permanent feature, which must be implemented by all government agencies.

However, this line of thinking was frustrated in the Maternal Health Case (*CEHURD v Attorney General*) that was brought to the High Court of Uganda in 2011.¹⁸⁰ The case concerned the death of two expectant mothers in two different referral health centres as a result of negligence on the part of health workers as well as insufficient basic maternal health equipment.¹⁸¹ Owing to the fact, that the right to health is not guaranteed in the bill of rights, the petitioners relied on several directive principles where health is mentioned, amendment 8A and also derived the right to health from other protected constitutional provisions such as right to life (Article 22), rights of women (Article 33) and freedom from degrading and inhuman treatment (Article 24).¹⁸²

The derivation of rights from existing rights is not an entirely new approach as it has been used by courts elsewhere. For instance, India, which like Uganda has its water provisions in the directive principles of state policy, has been successful in its approach of broadly interpreting article 21 (right to life) of the Indian constitution as encompassing the right to

¹⁷⁷ The Constitution of Uganda (1995): *Implementation of Objectives National Objectives and Directive Principles of State Policy* (n24 above) I.

¹⁷⁸ The Constitution (Amendment) Act 2005 Insertion of Article 8A.

¹⁷⁹ Parliament of the Republic of Uganda (2005) *Hansard Report* August 15. The motion got 94 votes in favour of it, 3 members abstained and 0 were against. Available at <http://www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard> (accessed 20 October 2013).

¹⁸⁰ The Republic of Uganda: In the Constitution of Uganda. *Centre for Human Rights and Development (CEHURD) and others v Attorney General*, Constitutional Petition No.16 of 2011.

¹⁸¹ *CEHURD and other v Attorney General* (n180 above) Para. 5.

¹⁸² *CEHURD and other v Attorney General* (n180 above) Para. 10 and 11.

water.¹⁸³ In the *A.P. Pollution Control Board V Prof M.V Nayadu*, the court emphasised that it was incumbent upon the state under Article 21 of the Indian constitution to ensure access to clean drinking water for the Indian population.¹⁸⁴ Furthermore, in *M.C Mehta v Union of India*, the Indian Supreme Court emphasised that the state should comply with Article 21 of the constitution by refraining from limiting citizens' access to ground water and other resources.¹⁸⁵ This approach can also be derived from the assertion by the Committee on Economic Social and Cultural Rights (CESCR) that the right to water is vital for the realisation of other rights such as the right to life, right to dignity, right to health and right to food.¹⁸⁶

Nonetheless, the Ugandan Constitutional Court dismissed the case stressing that it had no jurisdiction over the matter as it lay within the ambit of the executive or the legislature.¹⁸⁷ The position taken by the court is similar to that raised by opponents of socio-economic rights who contend that they infringe on the separation of powers doctrine.¹⁸⁸ This point of view has been challenged by countries like South Africa that have made socio-economic rights justiciable and have gone ahead to adjudicate several socio-economic rights cases. One of such cases is the *Mazibuko* case, which was brought to the South African Constitutional Court by Phiri residents of Johannesburg who were challenging the free basic water supply (6 kilolitres per household per month) as insufficient to meet the residents' basic needs and thus inconsistent with section 27 (right to water) of the constitution.¹⁸⁹ In this case, the court, in referring to the *Treatment Action Campaign* case asserted that,¹⁹⁰

The Constitution contemplates rather a restrained and focused role of the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications but are not in themselves directed at re-arranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.

¹⁸³ V Narain 'Water as a fundamental Right: A Perspective from India' (2009) 34 *Vermont Law Review* 917.

¹⁸⁴ *A.P.Pollution Control Bd.v.Prof.M.V.Nayudu*, 2000 S.C.A.L.E.354, Para. 3.

¹⁸⁵ *M.C. Mehta v. Union of India*, (1998) 2 S.C.R. 530, Para. 17.

¹⁸⁶ General Comment No 15 (n16 above) Para. 3.

¹⁸⁷ *CEHURD and other v Attorney General* (Findings of the Court) (n180 above) 9-16.

¹⁸⁸ P De Vos 'Pious wishes or directly enforceable human rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal of Human Rights* 68-69.

¹⁸⁹ *Mazibuko v City of Johannesburg* (2009) ZACC 28 Para. 4-6.

¹⁹⁰ *Mazibuko* (n189 above) Para. 55.

Therefore, the court asserted that the obligation to ensure access to sufficient water did not imply the right to claim ‘sufficient water’ from the state immediately but requires the taking of reasonable, legislative and other measures to achieve the right and thus dismissed the challenge to the constitutionality of the free basic water policy.¹⁹¹

The *Mazibuko* case illustrates that the inclusion of the right to water in the constitution does not lead to the infringement of the separation of powers principle but allows for judicial scrutiny of the government policies, thus enabling for their continuous adjustment and improvement. Therefore, failure by the Ugandan State to accord sufficient recognition to the right to water in the constitution is a violation of key human rights norms and principles.

3.2.2 The Uganda Water Act (1997), Cap 152 Laws of Uganda - 2000 Edition

The government adopted a comprehensive Water Act which aims at establishing a legislative framework for the utilisation, safeguarding and governing of water resources.¹⁹² The Act seeks to ensure provision of clean, safe and sufficient amounts of water and to control pollution of water resources, through waste discharge which is detrimental to the health and to the environment.¹⁹³ In order to control pollution, the Act sets out several punishments for those who are deemed to have polluted water resources including; bringing of charges against them in court and if found guilty they may be imprisoned for not more than five years.¹⁹⁴ The Act also provides for the provision of water permits as well as waste discharge permits which are closely and continuously supervised and can be suspended or cancelled in cases of misuse.¹⁹⁵

However, the Water Act does not provide for a body or a specific person charged with undertaking inspection of activities to ensure that they comply with the provisions of the Act. Articles 21 and 37, which deal with inspection, set out that monitoring and approval of works shall be undertaken by ‘an authorised person’. An authorised person is defined in Article 2(1) as ‘a person acting on behalf of the minister, a director to whom powers have been delegated, an officer, a servant, an agent of an authority acting on behalf of the authority’. This implies that a water authority can be anyone working in the water sector as long as they are given the powers to act in that capacity. This weakens the monitoring role as it does not allow for consistency in reporting on outcomes from the monitoring process as well as holding someone accountable in situations where monitoring is not

¹⁹¹ Mazibuko (n189 above) Para. 57.

¹⁹² The Water Act Cap 152, 7 April 1997 Section 4.

¹⁹³ The Water Act Cap 152 (n192 above) Section 9-10.

¹⁹⁴ The Water Act Cap 152 (n192 above) Section 31-33 and Section 40.

¹⁹⁵ The Water Act Cap 152 (n192 above) Section 18-30.

effectively executed. Therefore, in order to ensure effective inspection, there should be a body or individual, preferably chosen by the water policy committee and solely charged with undertaking the monitoring role.

The Zambian Water and Sanitation Act (1997) can be a reference point in this instance. Article 33(1) of the Act sets out that, 'The council shall appoint inspectors to monitor, inspect and enforce the provisions in this act', Article 33(2) states that 'the secretary shall issue an identity card to each inspector' and Article 34 states that 'each inspector shall furnish the council with such reports and other information relating to an inspection as the Council may direct'.¹⁹⁶

Furthermore, the Water Act does not sufficiently provide for the right to water as stressed by General Comment No. 15, which emphasises that the obligation to fulfil requires that the right to water be given sufficient recognition within legal systems.¹⁹⁷ Article 4(a) of the Act states that one of the objectives of the Act is 'to promote the provision of a clean, safe and sufficient supply of water for domestic purposes for all persons'. The use of the words 'promote the provision' as opposed to 'ensure the right to water' for all persons, fall short of the HRBA as it does not clearly emphasise that water is an entitlement for all persons. Furthermore, Article 7 states that 'a person may (a) while temporarily at a place (b) being the resident on any land, where there is a natural source of water, use that water for domestic use'. The 'usage' of the term 'may' in this context is not certain and thus can be subject to abuse or infringement.

Uganda can learn from South Africa which in addition to its constitution went ahead to adopt the National Water Act and the National Water Services Act based on a rights-based model. Article 3(1) of the National Water Services Act states,¹⁹⁸

(1) Everyone has a right of access to basic water supply and sanitation, (2) Every water services institution must take reasonable steps to realise these rights and (3) every water service authority must in its water services development plan, provide for measures to realise these rights.

Also, the Uganda Water Act does not give priority to water for domestic purposes. Article 4(a) states that 'a person may (a) while temporarily at a place (b) being the resident on any land, where there is a natural source of water, use that water for domestic use'. This

¹⁹⁶ The Zambia Water Supply and Sanitation Act No.28 of 1997.

¹⁹⁷ General Comment No.15 (n16 above) Para. 26.

¹⁹⁸ Republic of South Africa: Government Gazette 'Water Services Act' No.108 of 1997.

provision does not show the state commitment to prioritise water for personal use over any other purpose as stipulated by the General Comment on water. The General Comment stresses that, despite the fact that water is required for numerous purposes, while allocating water, priority must be given to water for domestic, personal purposes and to meet the minimum core obligations espoused in the General Comment No. 15.¹⁹⁹ The Water Act would have shown its commitment to uphold human rights principles if a provision had been included in the Act prioritizing water for domestic purposes over water for any other purpose as stipulated in the Kenya 2002 Water Act which states,²⁰⁰

The use of water for domestic purposes shall take precedence over the use of water for any other purpose and the authority may in granting any permit reserve such part of the quantity of the water in a water resource in its opinion is required for domestic purposes.

The Water Act also mandates for the formation of the Water Policy Committee (WPC) whose role is to offer advice to the minister in charge of water affairs, set national policies and coordinate revision of national legislation.²⁰¹ The composition of the WPC is however not very representative as it comprises eleven people and only two of these; the district council chairperson and the chief administrative officer, represent local government.²⁰² Due to the fact that water projects are implemented at the local government level, the structure of the WPC should be balanced enough to enable for inclusive or participatory planning. Participation is emphasised in the minimum core obligations of the General Comment on water which state that water strategies and plans of action should be developed in a participatory and transparent manner.²⁰³

The Act further requires the establishment of water and sanitation committees, water user groups and water user associations at the local community level. These are charged with managing water facilities through their maintenance and continued supervision.²⁰⁴ They also undertake revenue collection for the management of the water source under the supervision of the director of the Directorate of Water Development.²⁰⁵ However, in some instances, these have been accused of exploiting the revenue collection role by charging

¹⁹⁹ General Comment No 15 (n16 above) Para. 6.

²⁰⁰ The Kenya Water Act No 8, 17 October 2002 Art 32(2).

²⁰¹ The Water Act Cap 152 (n192 above) Art 9-10.

²⁰² The Water Act Cap 152 (n192 above) Art 9(1).

²⁰³ General Comment No 15 (n16 above) Para. 37 (f).

²⁰⁴ The Water Act Cap 152 (n192 above) Article 51-52.

²⁰⁵ De Albuquerque & Roaf (n1 above) 61.

exorbitant prices on the water sources thus making it difficult for some sections of the population to afford the services.²⁰⁶

Article 74(3) states that if a person on whom a notice is served within a specified period of time does not abide by the notice, the authority may disconnect any service to the land and recover its costs from the person on whom the notice is served. Disconnections do not necessarily violate human rights principles, however several considerations must be taken into account before the disconnection.²⁰⁷ For instance, disconnections should not infringe on the right to dignity especially by denying the vulnerable people access to minimum amounts of water necessary for basic survival.²⁰⁸ People who are poor often find themselves unable to afford water services due to conditions beyond their control.²⁰⁹ Therefore, disconnecting water sources on which they depend for their livelihood and requiring them to recover costs that they were unable to pay for in the first place, may leave them in a worse off position. This is also emphasised in the General Comment which stresses that states are required to provide water in circumstances where people are unable to realise the rights by themselves with the resources at their disposal.²¹⁰

Therefore, the gaps in these regulatory frameworks show their inadequacy in effectively complying with human rights principles, a factor that plays a role in their mode of implementation. Additionally, they have very weak enforcement mechanisms thus go against the obligation to respect the right to water articulated in General Comment No. 15 on water.²¹¹

3.3 Policy Framework

States are required to ‘adopt a national strategy as well as a plan of action in order to implement the right to water’.²¹² Additionally, it is incumbent upon states to ‘adopt comprehensive and integrated strategies to ensure availability of sufficient and safe water for present and future needs’.²¹³ Thus in fulfilling its human rights obligations, Uganda has adopted numerous policies pertaining to the water sector. These include; the National Development Plan, the National Water Policy, the National Environmental and Management Authority Policy, National Wetlands Management Policy, Fish Farming Policy,

²⁰⁶ De Albuquerque & Roaf (n1 above) 61.

²⁰⁷ De Albuquerque & Roaf (n1 above) 61.

²⁰⁸ De Albuquerque & Roaf (n1 above) 61.

²⁰⁹ De Albuquerque & Roaf (n1 above) 61.

²¹⁰ General Comment No 15 (n16 above) Para. 25.

²¹¹ General Comment No 15 (n16 above) Para. 23-24.

²¹² General Comment No 15 (n16 above) Para. 26.

²¹³ General Comment No 15 (n16 above) Para. 28.

and the National Gender Policy. It thus remains to be seen whether the substance of these policies as well as their implementation complies with human rights principles.

However, all of these policies cannot be examined within the scope of this study. Therefore, in examining Uganda's policy framework, this section will focus on some of the most important policies as well as programmes undertaken by the government in ensuring increased access to water. The policies that are elaborated upon in this section are; the National Development Plan and the National Water Policy.

3.3.1 National Development Plan 2010/11-2014/15

The Uganda policy framework is placed within the wider National Development Plan (NDP) which is the national framework for poverty reduction based on the principle that improvement of the water sector will contribute to poverty reduction.²¹⁴ The NDP replaced the Poverty Eradication Action Plan (PEAP), a government tool which was aimed at poverty eradication, economic development and social transformation.²¹⁵ The NDP spells out governments' commitment to increase access to water using several outcome indicators such as; access, equality, equity, hand washing, management, per capita investment and gender.²¹⁶

The NDP sets Uganda's water supply target which is to increase access to safe water by 77% for the rural population and 100% for the urban population by 2015.²¹⁷ This is far above the MDG target which requires the halving of the percentage of people without water.²¹⁸ This target is in line with human rights principles which call for ensuring accessibility, availability and quality of water services. However, the human rights approach lays most of its emphasis on qualitative and quantitative access for each individual.²¹⁹ This aspect is missing from the NDP which focuses on average performance and does not set out a target for individual access.

For instance, in 2013, access to water in urban areas was estimated at 70% for the urban areas and access in rural areas was at 64%.²²⁰ However, there are still huge disparities amongst the districts; for instance, while Kaabong had 12% in 2010, Rukungiri had 90%.²²¹

²¹⁴ E Gutierrez and Y Musaazi 'The changing meaning of reforms in Uganda: Grappling with Privatisation as public water services improve,' July 2003 Discussion paper, Water Aid, 4.

²¹⁵ National Water Development Report (n22 above) XV.

²¹⁶ The Republic of Uganda 'National Development Plan' (2010/11- 2014/15) 7.7 April 2010 268.

²¹⁷ National Development Plan 7.7.3 (n216 above) 271-272.

²¹⁸ MDGS and Beyond 2015 9 (n74 above).

²¹⁹ General Comment No 15 (n16 above) Para. 12(a).

²²⁰ Government of Uganda: Ministry of Water and Environment 'Water and Environment Sector Performance Report: Foreword' October 2013.

²²¹ National Development Plan 7.7.1 (n216 above) 268.

The NDP further estimated that half of the districts were still below the national average and 130 sub-counties out of the then 1024 were below 39%.²²² Furthermore, there are many challenges associated with data collection such as the difficulty in ascertaining the reliability of the data that comes in from the districts and the fact that many assumptions are made while collecting data.²²³ For instance it is often assumed during data collection that protected springs serve 200 people per spring and boreholes serve about 300 people but in some congested areas, they serve many more people as a result of rapid population growth leading to long hours of queuing for water.²²⁴ Additionally, some districts have been noted to report lower figures of access than those that they have collected in order to access more funds.²²⁵ Therefore, the NDP approach is similar to the MDG approach which has been criticised for focusing on quantities and ignoring other social, economic, political and cultural factors.²²⁶

The General Comment asserts that increasing access to water should not be restricted to volumetric quantities and technologies but should also be treated as a social and cultural good.²²⁷ Therefore, the reliance on figures does not comply with human rights principles which call for a special emphasis on the vulnerable people and prohibit discrimination based on any grounds including national and social origin.²²⁸ Furthermore, this approach does not adequately address the structural inequalities in water service delivery which are more pervasive in the rural areas.²²⁹

3.3.2 The National Water Policy (1999)

The National Water Policy is the major document for water management in Uganda, which was developed as a follow-up to the Water Action Plan (1993-1994).²³⁰ The policy was developed in line with the constitution as well as Uganda's goals for social and economic development, decentralisation, environmental sustainability and realisation of gender equality.²³¹ The policy emphasises management of water resources in an integrated manner, the finite nature of water resources and the important function of the private

²²² National Development Plan 7.7.1 (n216 above) 268.

²²³ Mwebaza (n51 above)18-20.

²²⁴ Mwebaza (n51 above) 18-19.

²²⁵ Andrew Quinn 'Monitoring and evaluation of rural water supply in Uganda', October 2010, TRITA-LWR Lic Thesis 2052 12.

²²⁶ Office of the High Commissioner for Human Rights 'Claiming the Millennium Development Goals: A human Rights Approach' HR/PUB/08/3 (2008) 4-5.

²²⁷ General Comment No 15 (n16 above) Para. 11.

²²⁸ General Comment No.15 (n16 above) Para. 13-16.

²²⁹ Mwebaza (n51 above)18.

²³⁰ National Water Policy (n25 above) 1.

²³¹ National Water Policy (n25 above) 'Foreword'.

sector in water management.²³² The policy also gave due consideration to water for domestic purposes and emphasised that priority should be given to providing water for domestic purposes, which is of good quality and in adequate quantities.²³³

The policy is in line with human rights principles to the extent that it has taken steps to 'ensure sufficient coordination between national ministries, regional and local authorities with an aim of reconciling water related policies'.²³⁴ This was through its facilitation of the 2002 Sector Wide Approach (SWAP) to planning which enabled the government, together with development partners, to support an integrated Strategic Investment Programme (SIP) within the wider framework of 'Joint Water Supply and Sanitation Programme Support' (JWSSP).²³⁵ In 2008, the Water and Environment Sector were merged.²³⁶ Upon the merging of the sectors, JWSSP changed to Joint Water and Environment Sector Support Programme (JWESSP).

Furthermore, the government, through its sector wide approach, has complied with the monitoring obligations required under the human rights approach. The SWAP established a comprehensive monitoring mechanism based on measurable indicators which are continuously evaluated by the annual Government/Development Partners Sector Review (JSR).²³⁷ The approach also enables for the reviewing of financial and technical performance and the preparing of annual water sector performance reports which are distributed to several stakeholders.²³⁸

However, participation in the JSR has been considered to be very elitist as the reviews are attended by government representatives, donors and urban-based non-governmental organisations and are often organised in Kampala.²³⁹ Furthermore, some of the water projects are devised at the national level with little input from the district which is charged with the implementation of the projects.²⁴⁰ As a result of lack of ownership of the projects, the district leaders do not support or monitor their implementation, thus affecting the sustainability of such projects.²⁴¹ Furthermore, the aspects of the policy framework that adhere to human rights principles are accidental as the government has

²³² National Water Development Report (n22 above) 13.

²³³ National Water Policy 5.1 (n25 above) 15.

²³⁴ General Comment No 15 (n16 above) Para. 51.

²³⁵ The Uganda Water and Sanitation Dialogues (n157 above) 6.

²³⁶ Government of Uganda: Ministry of Water and Environment 'Water and Environment Sector Performance Report' September 2011 1.

²³⁷ Water and Environment Sector: The fourth Joint Government of Uganda -Development Partners' Review 'Agreed Minutes' 23-25 October 2012, Speke Resort Munyonyo 13-15.

²³⁸ Mwebaza (n51 above) 15.

²³⁹ Mwebaza (n51 above) 36.

²⁴⁰ Mwebaza (n51 above) 37-38.

²⁴¹ Mwebaza (n51 above) 38.

not undertaken any deliberate mechanisms to monitor their compliance with human rights principles spelt out in the key human rights documents. The Ugandan government thus falls short of fulfilling its human rights obligations which call upon states to monitor the extent to which their policies are realising the right to water.²⁴²

The National Water Policy adopted several guiding principles, one of which was the recognition of the vital role of women in the provision, management as well as protection of water.²⁴³ As a result, several frameworks have been adopted over the years within the National Gender Policy (NGP) framework aimed at ensuring that gender is mainstreamed within the water and sanitation sector.²⁴⁴ The most recent of these is the Water and Sanitation Sub-Sector Gender Strategy (2010-15).²⁴⁵ Despite the comprehensiveness of the strategy, the situation on ground has not changed much as focus is still mainly put on the inclusion of women in key decision-making structures such as the water supply boards as well as the user committees.²⁴⁶

However, by focusing on increasing the numbers of women in decision-making structures, the policy takes a simplistic approach in achieving equality and overcoming non-discrimination for women in the water sector.²⁴⁷ Women especially those in the rural areas are disproportionately affected by lack of water as the burden of collecting water to cater for their families usually lies on them.²⁴⁸ The CESCR calls for the adoption of substantive equality in order to overcome de-facto discrimination.²⁴⁹ Viewed in this lens, the policy leans towards formal equality and thus does not comprehensively address structural challenges that hinder women from effectively enjoying their right to water.²⁵⁰

A human rights compliant policy framework is very vital as it guides the implementation of programmes in a way that caters for all the individuals especially those that are often excluded from service delivery. Therefore, by not incorporating a rights-based approach, Uganda's policy framework falls short of effectively addressing people's needs.

²⁴² General Comment No.15 (n16 above) Para. 52.

²⁴³ National Water Policy 4.2 Guiding principles (n25 above) 78.

²⁴⁴ The Uganda Water and Sanitation Dialogues (n157 above) 8.

²⁴⁵ Government of Uganda: Ministry of Water and Environment 'Water and Sanitation Sub-Sector Gender Strategy' 2010-2015.

²⁴⁶ The Uganda Water and Sanitation Dialogues (n157 above) 8.

²⁴⁷ Mpanga (n55 above) 19.

²⁴⁸ General Comment No.15 (n16 above) Para. 16(a).

²⁴⁹ Committee on Economic Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights* (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20. Available at: <http://www.refworld.org/docid/4a60961f2.html> [accessed 30 September 2013] Para. 8(b) and 9.

²⁵⁰ Mpanga (n55 above) 19.

3.4 Institutional Framework

Institutions are very vital for the realisation of the right to water as laws and policies do not amount to much without effective implementation mechanisms. States are thus required to establish institutional mechanisms to ensure the implementation of their strategies appropriately allocate resources to these institutions and put in place accountability mechanisms to ensure that the resources are put to the right purpose.²⁵¹

The institutions charged with water supply and management in Uganda are numerous and spread out at the national and the local level. These include; Ministry of Water and Environment, Directorate of Water Development (DWD), National Water and Sewerage Corporation, Local Governments, the Uganda Water and Sanitation NGO Network (UWASNET), Water User Committees, Ministry of Lands and Urban Planning, Ministry of Health, Ministry of Gender Labour and Social Development, Ministry of Education and Sports, Ministry of Finance Planning and Economic Development.²⁵²

The limited nature of this study cannot allow for an analysis of most of these institutions. This section will thus only focus on the Ministry of Water and Environment (together with the DWD), local government, National Water and Sewerage Corporation (NWSC), the private sector and development partners.

3.4.1 Ministry of Water and Environment (MWE)

The MWE is the principle body charged with water management in Uganda, which lies under the water and environment sector.²⁵³ The DWD is the principle institution that is charged with water distribution both for domestic and commercial purposes.²⁵⁴ It is also charged with capacity enhancement as well as other forms of support to local governments, private operators as well as other service providers. It consists of three departments; urban water supply department, rural water supply department and water resources department.²⁵⁵

The MWE is funded by the national budget and a series of development partners. Prioritisation of the water sector is seen through the amount of resources allocated to the water sector as noted by human rights principles which stress that states should appropriately allocate resources in order to ensure the realisation of the right to water.²⁵⁶

²⁵¹ General Comment No. 15 (n16 above) Para. 47.

²⁵² The Uganda Water and Sanitation Dialogues (n157 above)19.

²⁵³ Sector Performance Report 2013 (n220 above).

²⁵⁴ Sector Performance Report 2013 (n220 above) 12.

²⁵⁵ The Uganda Water and Sanitation Dialogues (n157 above) 20.

²⁵⁶ General Comment No. 15 (n16 above) Para. 47.

The government annually allocates a budget to the water and sanitation sub-sector. However these funds have been noted to be decreasing annually, for instance in 2012, 489.3 billion was allocated to the water and environment sector and this amount substantially declined to 382 billion Uganda Shillings in 2013.²⁵⁷

Furthermore, the water and environment sector is a very crucial one but the money disbursed to it often constitutes a minimal percentage of the national budget, for instance in 2012, the percentage to the water sector constituted a meagre 3.1% of the national budget²⁵⁸ and in 2013 it reduced to 2.8% of the national budget.²⁵⁹ These amounts have thus been often noted to be insufficient to meet the water demands of Uganda's ever increasing population.²⁶⁰ These funds are also heavily donor dependent as can be seen from the fact that in 2012 42.5% of the budget was funded by donor resources²⁶¹ and only decreased in 2013 due to embezzlement claims that led to the freezing of funds by some donors.²⁶² The dependency on donors opens the door to implementing donor demands and pushing their goals, which in some instances run contrary to human rights principles.

The challenge is compounded by the fact that the projected sums to the sector often differ from the sums that are actually remitted for instance in 2012, UGX 281.58 billion was approved but 244 billion was actually released.²⁶³ The funds are disbursed in a very inconsistent manner which does not allow for effective planning.²⁶⁴ This undermines the realisation of government human rights obligations to fulfil the right to water and also depicts lack of transparency and accountability in water resource management.

Furthermore, MWE undertakes urban water supply through the National Water and Sewerage Corporation and the private sector provides water to small towns. Rural water supply is facilitated by the government through the community based maintenance system, which is based on communities taking control of the development and supervision of their facilities.²⁶⁵ The government employs a demand-responsive approach in supplying water to rural communities, which requires that a request is made by communities or households for water.²⁶⁶ The community members or households then participate in

²⁵⁷ Sector Performance Report 2013 (n220 above) Executive Summary ii.

²⁵⁸ Sector Performance Report 2012 (n27 above) Executive Summary i.

²⁵⁹ Sector Performance Report 2013 (n220 above) Executive Summary ii.

²⁶⁰ Sector Performance Report 2011 (n236 above) i, Sector Performance Report 2012 (n27 above) i and Sector Performance Report 2013 (n220 above) ii.

²⁶¹ Sector Performance Report 2012 (n27 above) Executive summary i.

²⁶² Sector Performance Report 2013 (n220 above) Executive Summary ii.

²⁶³ SPR 2012 Sector Performance Report 2012 (n27 above) Executive Summary i.

²⁶⁴ Mpanga (n55 above) 20.

²⁶⁵ Sector Performance Report 2013 (n220 above) 13.

²⁶⁶ De Albuquerque & Roaf (n1 above) 110-111.

deciding the method of provision.²⁶⁷ However, in certain instances, the demand-responsive approach may not be human rights compliant as it may discriminate against the vulnerable people. This is due to the fact that the services are mostly provided to those who often request for them because they can afford them thus leaving those who are unable to afford to rely on other unimproved water sources.²⁶⁸

Moreover, despite ensuring increase in access to water through construction of water points in the form of stand pipes, water pumps and boreholes, the MWE still falls short of adhering to human rights principles that emphasise access to adequate, continuous, accessible and safe water sources. This is due to the fact that some of the improved water sources constructed by the ministry dry up during the dry season as a result of extreme drops in the water tables. As a result, water supply is cut off for the people who then resort to unsafe water sources, which are in some cases far away from where they stay.²⁶⁹ Additionally, some areas are often difficult to access due to the very bad roads, which are impassable during the rainy season thus cutting off services for the people.²⁷⁰ These areas also experience poor staffing as a result of the reluctance of many people to be placed in these hard to reach areas.²⁷¹ Last but not least, the community members charged with supervising water points in the rural areas sometimes hike the prices for their personal benefit thus making them even more unaffordable for the already poor people.²⁷²

3.4.2 The Local Government

Bringing services closer to people through decentralisation can lead to the promotion of human rights by enabling for the enhancement of transparency, accountability and participation.²⁷³ However, decentralisation might sometimes hinder the realisation of human rights especially in instances where local governments do not possess the financial or technical capacity to ensure availability, affordability and accessibility to safe water.²⁷⁴

The local government is an important organ in Uganda's decentralised government structure. It consists of districts, town councils and sub-counties that are mandated by the local government to provide water services at that level.²⁷⁵ Each district has a district water office charged with managing, improving and supervising of water facilities.²⁷⁶ Local

²⁶⁷ De Albuquerque & Roaf (n1 above) 110-111.

²⁶⁸ De Albuquerque & Roaf (n1 above) 110-111.

²⁶⁹ Mwebaza (n51 above) 20.

²⁷⁰ Sector Performance Report 2013 (n220 above) 64.

²⁷¹ Sector Performance Report 2013 (n220 above) 64.

²⁷² Mwebaza (n51 above) 21.

²⁷³ De Albuquerque & Roaf (n1 above) 206.

²⁷⁴ De Albuquerque & Roaf (n1 above) 206.

²⁷⁵ Sector Performance Report 2013 (n220 above) 14.

²⁷⁶ Sector Performance Report 2013 (n220 above) 14.

governments work in close consultation with the Ministry of Water and Environment to contract and manage private firms for piped areas in the urban centres, which are not under National Water and Sewerage Corporation.²⁷⁷ Private operators offer maintenance services and manage water services in small towns and peri-urban areas.²⁷⁸ Additionally, every district has a district water and sanitation coordination committee with several district stakeholders charged with overseeing and coordinating water and sanitation activities at the district level.²⁷⁹

The most important factor for the success of the decentralisation programme is coordination between actors at the national level and those at the local level. However, studies show that, despite the extensively elaborated policy framework, the linkages between these actors are still weak.²⁸⁰ Programmes, budgets and monitoring tools are still largely drafted at the national level with limited input from the district and other local stakeholders. This creates resentment, lack of ownership by the district officials and refusal to implement these programmes.²⁸¹ Furthermore, district water offices, water service committees and the communities still lack the capacity to effectively execute their roles.²⁸²

The implementation of the programmes is also characterised by corruption, which is manifested in numerous ways. These include; reporting of low figures of access in order to acquire more funds, politicians influencing the diversion of resources from one area to another, bribing in order to get reconnected, unscrupulous awarding of contracts, charging extremely high prices on water points, falsifying water meter readings, frustrating the construction of a new water point due to the need to have monopoly over the area, embezzling money collected by water committees and many others.²⁸³ Corruption is thus one of the biggest inhibitors to the provision of water to the people who urgently need it and thus greatly contributes to the high numbers of deaths that occur as a result of water borne diseases acquired from contaminated water sources.²⁸⁴

By permitting the persistence of corruption, Uganda is infringing on human rights principles, which view corruption as a human rights violation. The General Comment states that any misappropriation of resources that hinders the enjoyment of rights by

²⁷⁷ Sector Performance Report 2013 (n220 above) 14.

²⁷⁸ Sector Performance Report 2013 (n220 above) 15.

²⁷⁹ Sector Performance Report 2013 (n220 above) 14.

²⁸⁰ Quinn (n225 above) 7.

²⁸¹ Quinn (n225 above) 7.

²⁸² Quinn (n225 above) 7.

²⁸³ Mwebaza (n51 above) 39.

²⁸⁴ Mwebaza (n51 above) 40.

individuals or groups, especially the marginalised groups, is a violation of the obligation to fulfil the right to water.²⁸⁵ In overcoming corruption, Uganda could look at approaches taken in Zambia. The Zambia National Water and Sanitation Council and the Water Board have operationalised water watch groups and public inquiries where the community can report on the implementation of programmes as well as corrupt practices occurring in the water sector.²⁸⁶

3.4.3 National Water and Sewerage Corporation (NWSC)

National Water and Sewerage Corporation (NWSC) is a public entity established by the NWSC Act and charged with the provision of water to large urban centres around the country and in the capital city.²⁸⁷ It currently provides water and sewerage services to 28 large urban centres.²⁸⁸ Its operations are aimed at expanding coverage, making service delivery more effective, improving labour productivity, improving water infrastructure and ensuring more investments.²⁸⁹ The NWSC has greatly enhanced access to improved water sources through establishing uniform tariffs in order to ensure equity in pricing thus contributing to the affordability of water for Ugandans.²⁹⁰

NWSC has also undertaken to implement pro-poor activities which include the constructing of public stand posts to provide water for those who cannot afford it,²⁹¹ building of toilets for poor people and commissioning caretakers for them. These activities, however, operate on a very small scale and thus their contribution is almost negligible. Furthermore, despite the overall improvement of the NWSC, it still leans towards the cost recovery mechanism, which lays a lot of emphasis on consumer rights as opposed to human rights.²⁹² This often creates a situation where water users only enjoy their rights to access to water when they are in position to pay for the water services thus excluding those who are unable to pay for the water services.²⁹³

Additionally, despite attempts to make the tariffs more affordable, the prices for connection to metered water are still high for the urban poor most of who are slum dwellers.²⁹⁴ These often rely on unimproved water sources and thus end up paying more

²⁸⁵ General Comment No. 15 (n16 above) Para. 44(c).

²⁸⁶ De Albuquerque & Roaf (n1 above) 203.

²⁸⁷ Sector Performance Report 2013 (n220 above) 13.

²⁸⁸ Sector Performance Report 2013 (n220 above) 13.

²⁸⁹ Sector Performance Report 2013 (n220 above) 13.

²⁹⁰ Sector Performance Report 2013 (n220 above) 13.

²⁹¹ Sector Performance Report 2013 (n220 above) 81.

²⁹² Berg & Mugisha (n53 above) 6.

²⁹³ Berg & Mugisha (n 53 above) 6.

²⁹⁴ Mwebaza (n51 above)20.

for water than those who are connected to an improved water source.²⁹⁵ For instance, a jerry can of water currently cost between 200 and 300 shillings, which is more than 120 shillings for approximately 18 litres of water utilised when one is connected to piped water.²⁹⁶ This goes against human rights principles which emphasise that in achieving economic accessibility, the cost of water should not infringe on the realisation of other essential rights especially for the vulnerable members of the population and that water should be sufficient and continuous for each person.²⁹⁷

3.4.4 Private Sector

Arguments have been forwarded for and against privatisation. Supporters of privatisation contend that water requires huge financial, technical and human resources for its effective implementation that are often not at the disposal of developing states thus necessitating the employment of external capacity.²⁹⁸ The opponents claim that the profit maximisation aim of privatisation makes it impossible to pursue a human rights-based approach based on principles of participation and non-discrimination.²⁹⁹ Additionally, that it takes the provision of key public services from the hands of the government to the private sector rendering them unaffordable.³⁰⁰

The experience of privatisation in the Uganda water sector can be said to be both positive and negative. In the 1990s, Uganda started strongly pursuing a privatisation strategy aimed at bringing in more investments and more private management.³⁰¹ These permeated into the water sector as it was hoped that they would improve water coverage and reduce the inefficiencies in the public water sector.³⁰² To this end, the National Water and Sewerage Corporation underwent numerous reforms under the Public Enterprises Reform and Divestiture Act (1993) aimed at making it viable for privatisation.³⁰³ These attempts were not successful but the reforms enabled the NWSC to improve its operations thus enabling it to become one of the most functional water corporations in Africa.³⁰⁴

²⁹⁵ Mwebaza (n51 above)20.

²⁹⁶ Mwebaza (n51 above) 20.

²⁹⁷ General Comment No.15 (n16 above) Para. 12.

²⁹⁸ Gutierrez & Musaazi (n214 above) 8.

²⁹⁹ Gutierrez & Musaazi (n214 above) 7.

³⁰⁰ Alston (n45 above) 767-769.

³⁰¹ National Water Policy 3.3.2 (n25 above) 6.

³⁰² Gutierrez & Musaazi (n214 above) 1.

³⁰³ The Uganda Water and Sanitation Dialogues (n157 above) 12.

³⁰⁴ The Uganda Water and Sanitation Dialogues (n157 above) (n2 above) 12.

Nonetheless, the management of urban centres in small towns is privatised.³⁰⁵ The private firms undertake activities such as system design and construction, maintenance of water supply systems, supplying water equipment such as pipes, pumps, and meters.³⁰⁶ Their involvement has led to several improvements such as enhanced record keeping, improved water access, lower levels of water interruptions.³⁰⁷ However, several shortcomings have been noted in the private sector such as; lack of transparency in awarding contracts, inflation of costs, poor supervision, and installation of outdated equipment.³⁰⁸ This undermines human rights principles of accountability, state obligation to respect, protect and fulfil the right to water. The inflation of costs hikes water prices thus making it difficult for the poor people to afford improved water sources. Therefore, monitoring systems for private operators should be strengthened and also supplemented by low cost measures to cater for those who are completely unable to access water through the private operators.

3.4.5 Development Partners

Donor assistance is very vital in the realisation of the right to water. The General Comment on water echoes Article 2(1) and Articles 11 and 23 of the ICESCR which urge states to recognise the purpose of international cooperation and assistance to enable for the progressive realisation of the right to water.³⁰⁹ However, it is emphasised that any international assistance should not be provided in a manner that is inconsistent with the covenant as well as other human right standards.³¹⁰ Uganda heavily relies on donor support in order to finance its budget, for instance in 2012, donor support accounted for 42.5%³¹¹ of the budget to the water and sanitation sector while in 2011 it accounted for 27%.³¹² Some of the major donors that fund Uganda's water sector include; the World Bank, African Development Bank, European Union and the German government.³¹³

Due to their substantial financial contribution to the water sector, donors strongly influence policy formulation. For instance, Uganda's Poverty Support Reduction Programmes (PSRPs) are strongly influenced and gradually improved in line with the World Bank and International Monetary Fund goals and targets.³¹⁴ Additionally, the Sector Wide

³⁰⁵ The Uganda Water and Sanitation Dialogues (n157 above).

³⁰⁶ The Uganda Water and Sanitation Dialogues (n157 above) 22.

³⁰⁷ The Uganda Water and Sanitation Dialogues (n157 above) 23.

³⁰⁸ The Uganda Water and Sanitation Dialogues (n157 above) 23.

³⁰⁹ General Comment No. 15 (n16 above) Para. 30.

³¹⁰ General Comment No. 15 (n16 above) Para. 34.

³¹¹ Sector Performance Report 2012 (n27 above) 'Executive Summary' i.

³¹² Sector Performance Report 2011 (n233 above) 'Executive Summary' i.

³¹³ Agreed Minutes JSR, 2012 (n237 above) 3-4.

³¹⁴ Gutierrez & Musazi (n214 above) 2.

Approach (SWAP) mentioned above is jointly undertaken by the government and the development partners who agree on a plan of action as a way of enhancing the performance of the sector.³¹⁵ The SWAP is different from budget support where the government has full autonomy of the funds given.³¹⁶ With the SWAP approach, the donors exert a considerable level of control over the utilisation of funds though they allow for some level of innovation and adjustment by the government in its objectives and projected plans.³¹⁷ This allows for greater efficiency as the donor monitors whether the allocated funds are put to the right purpose, however there is often an implied expectation for the government's objectives and programmes to be in line with donor goals.

Donor influence therefore, affects the extent to which the government adheres to human rights principles in that if the donor goals are human rights compliant, the government will align its goals to be more human rights compliant and vice versa. For instance, at the height of the government's attempts to privatise the National Water and Sewerage Corporation in the late 1990s and early 2000s, it was accused by civil society organisations, of promoting privatisation merely as a means to appease donor interests in order to acquire more funds.³¹⁸ This view was cemented by the fact that donors were in favour of reform strategies that sought to promote privatisation as a way of reducing inefficiencies and improving water management.³¹⁹ Therefore, due to the influence they exert on policy formulation and programme implementation, donors should also be held accountable to ensure that activities undertaken extraterritorially do not violate human rights as elaborated upon by the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights.³²⁰

3.5 Conclusion

This chapter has illustrated that Uganda has numerous laws, policies as well as institutions that are directly and indirectly charged with ensuring safe, sufficient and continuous access to water in Uganda. These are comprehensively drafted and thus in some instances make mention of human rights norms and principles. However, this is more accidental

³¹⁵ Gutierrez & Musaazi (n214 above) 4-5.

³¹⁶ Gutierrez & Musaazi (n214 above) 4-5.

³¹⁷ Gutierrez & Musaazi (n214 above) 4-5.

³¹⁸ Gutierrez & Musaazi (n214 above) 7.

³¹⁹ Gutierrez & Musaazi (n214 above) 8-9.

³²⁰ Maastricht Guidelines on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights. Final Version (29 February 2012). Available at http://www.fian.org/fileadmin/media/publications/2012.02.29_Maastricht_Principles_on_Extraterritorial_Obligations.pdf (accessed 26 October 2013).

rather than deliberate and can be attributed to the similarities between human rights norms and other frameworks. However, by and large, Uganda's legal, policy and institutional frameworks are not drafted and implemented in cognisance of human rights norms and thus often fall short of effectively fulfilling human rights principles on the right to water. This calls for the need to concretise the human rights principles in the laws, policies and institutions pertaining to water in Uganda in order for them to sufficiently contribute to the realisation of the right to water.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

The study set out to investigate whether Uganda laws, policies and institutions adhere to human rights norms and principles on the right to water. In order to effectively undertake this study, it was imperative to ascertain whether a human right to water has emerged at the international level.

The study confirmed that indeed the right to water has emerged at the international level as a result of three major factors; the numerous resolutions and declarations that have been adopted by countries confirming the need to protect the right to water, through the acknowledgement of the indispensability of the right to water for the realisation of other rights such as the right to food, right to housing, right to health, right to life and right to dignity and also through state practice shown through the inclusion of provisions on the right to water in their constitutions. After confirming the existence of the right at the international level, the study turned to Uganda to find out whether it's legal, policy and institutional frameworks adhere to the rights-based approach.

4.1 Summary and Conclusion

4.1.1 Legal Remedies

The study established that Uganda has ratified numerous regional and international binding treaties that call for the realisation of the right to water. However, it has not taken concrete steps to domesticate these treaties and implement the provisions therein. This can be deduced from the fact that Uganda's laws and policies do not espouse human rights principles both in their formulation as well as their implementation.

The provisions on the right to water in the Ugandan constitution are found in the directive principles of state policy as opposed to the bill of rights thus leaving their justiciability in question. Furthermore, the courts decided that the social economic objectives in the directive principles are not in their domain and thus it is up to the legislature and executive to decide on them. This illustrates the inadequacy of the constitution as well as the judicial bodies to address the infringements on the right to water.

The National Water Act is the principle regulatory instrument from which all other instruments in the water sector derive their mandate. However, it is not crafted in human rights terms and this affects its mode of implementation which is often not compliant with human rights principles. Furthermore, attempts have not been taken to bring it in line with human rights principles in the General Comment on water and other human rights instruments.

As a result of Uganda's weak regulatory systems, several human rights violations continue to occur in the water sector including; pollution of water sources, discharge of waste in public water sources and the perpetrators of these violations often go unpunished. These violations have several adverse physical, economic and social consequences on the people who rely on these water sources especially the vulnerable people.

4.1.2 Policy Framework

Uganda's policy framework adheres to certain human rights principles such as; continuous monitoring and policy adjustment encourages some level of participation in policy drafting and implementation and it aims at progressively increasing access to water for Ugandans. However, the policies are not drafted in human rights terms and also do not take stock of the human right developments that occur at the international level pertaining to the right to water. These policies tend to lean towards donor goals and objectives and this is not surprising considering that a substantial amount of Uganda's programmes and projects are funded by donor funds hence the need to conform to donor expectations in order to ensure continued support. However, in some instances, this undermines their adherence to human rights principles.

The policies are also more aligned to the MDG approach of increasing numbers of people with access to water. However, these numbers often ignore the high levels of inequality in several areas in Uganda, varying levels of availability of water and access to safe water. Thus, while the average percentage of the number of people who can access water is seen to be increasing, some areas are stagnating and others are even declining. This undermines the principle of non-discrimination which emphasises the putting in place of measures to ensure that the most vulnerable members of the population have access to basic amounts of water. This also applies to the gender policies which are often geared towards increasing the number of women representatives in decision-making structures. While this is a positive step in realising gender equality in the water sector, it is not often coupled with measures aimed at eliminating the structural factors that hinder women's equal access to water.

Additionally, participation in policy-making is largely national and urban-based and thus excludes policy makers at the local level who are charged with the implementation of the policies. This affects their level of ownership of the water projects hence their lack of sustainability. This also excludes the vulnerable people who are most affected by lack of access to adequate and improved water sources.

The study also identified pervasive levels of corruption in policy implementation characterised by embezzlement of funds, colluding with the lawbreakers, unfairly hiking water prices to make extra profit and diverting resources. The study stressed that corruption leads to violation of several human rights principles of participation, accountability as well as the obligation to respect which requires refraining from infringement of peoples' right to water.

4.1.3 Institutional Framework

Several institutions have been set up to manage and ensure access to water both at the national, regional and local level. These institutions often undergo monitoring in order to review their performance and improve their operations. However, these are faced with resource challenges as the financial resources disbursed to the sector are often way below what is necessary to accomplish their goals. Additionally, there is often a discrepancy between the money projected and that which is actually sent to the water and environment. The money is also disbursed in an inconsistent manner thus frustrating the planning process. Misappropriation of these resources also greatly contributes to their inability to effectively improve access to water. Corruption has also led to decreased trust among development partners leading to the cutting of funds.

The issue of affordability of the water also still looms large as the poor people cannot afford to connect to piped water and thus resort to buying water from private service providers. The water purchased from private service providers has been noted to often cost more than the water for those who are connected to piped water systems and is also subject to unnecessary hiking of prices by the water vendors in order to get more profits. The poor people thus resort to accessing water from unimproved water sources thus exposing them to several water related diseases.

4.2 Recommendations

In light of the above, in order for Uganda's laws, policies and institutions to effectively contribute to the realisation of the right to water, the following specific recommendations are proposed;

4.2.1 Strengthen Regulatory and Policy Frameworks

Uganda should undertake to strengthen the constitutional provisions on the right to water. Therefore, the amendment to the constitution in terms of Article 8A(1) should be operationalised thus making directive principles of state policy justiciable. This will enable individuals whose right to water has been violated to seek redress from the courts of law. It will also enable for public and judicial scrutiny of the water laws, policies and institutions thus enabling for their continuous improvement.

Uganda should domesticate the international treaties that it has ratified and must also; undertake measures in order to bring its water laws, policies and institutions in conformity with the international standards on the human right to water. Thus, the government should ensure that the laws and policies that are not in line with human rights principles on water are amended or repealed.

The regulatory frameworks both at the national and local level should be strengthened in order to ensure that those who infringe on the right to water through pollution, discharge of waste in public water sources are adequately punished. To this end, the government should strengthen the monitoring of the water permit system to ensure that the permits are being given and used for the right purpose.

Private vendors and operators should be required to register and give their locations so that they are frequently monitored to ensure that they do not charge exorbitant prices. The award of tenders to private operators should also be closely monitored to ensure that those who are selected possess the required skills.

Civil society should be instrumental in undertaking public interest litigation and lobbying the courts to enforce socio-economic rights. Civil society should also lobby government to fulfil its international human rights obligations including the submission of periodic reports to the human rights treaty bodies.

4.2.2 Monitoring and Accountability Mechanisms

Government should strengthen its audit systems and undertake constant monitoring to ensure that the disbursed funds are put to the right purpose. Those who embezzle or misappropriate funds should be given stricter punishments such as public embarrassment, imprisonment and requiring them to return the amounts of money embezzled.

Civil society should enhance its watchdog role by monitoring government programme implementation, budget allocation, and through active participation in the annual joint sector review meetings. Civil society should also actively engage in building capacities of government stakeholders to enable them to incorporate the HRBA in water management.

Development partners and private operators should also undergo scrutiny to ensure that they are human rights compliant and are thus adhering to the principles pronounced in the Maastricht Principles on extraterritorial obligations in the area of socio-economic rights.

4.2.3 Participation and Non-Discrimination

Since project implementation occurs at the grassroots, project formulation should also start from the grassroots as opposed to the top down approach that is currently used. Communities should be empowered to effectively understand their role as rights holders and to monitor water projects in their areas to ensure that human rights principles are being observed. They should also be involved in identifying challenges faced in water consumption and devising possible solutions to those challenges. In this way, the solutions devised will be appropriate to the community in question and thus they will be in position to own the projects and work towards their sustainability. Additionally, all planning mechanisms should have both the local and national stakeholders effectively represented.

The government should take stock of the disparities between regions as some districts lie in the semi-arid region and others are hard to reach due to poor infrastructure. In such cases, special arrangements should be undertaken to ensure that regions that go without water due to the reduction of the water table in the dry season are facilitated to be able to have access to water.

The government should put in place low cost measures for the urban and rural poor who cannot afford to be connected to the piped water system. These low cost measures should be regularly monitored to ensure that they are not hijacked by private groups or individuals seeking to gain profit from them.

The social, economic and cultural challenges that the marginalised groups such as the women, children and people with disabilities face while accessing water should be put into consideration. These include; the impact of the distance of the water source for women's and girls' security, gender roles that ascribe to women and girls the role of collecting water, challenges pertaining to the hygiene and health needs of women. Thus, the policies and programmes should not only be geared at increasing the number of women in decision-making positions but in enabling them to overcome these structural challenges. Therefore, in cases whereby, due to these circumstances, they are completely unable to access water, the government should undertake special measures to ensure access to a minimum amount of water for basic sustenance.

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