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CONCEPTUALISING, REALISING AND ENFORCING A HUMAN RIGHT TO WATER FOR UGANDA: COMPARATIVE PERSPECTIVES

Dissertation submitted by

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in fulfilment of the requirements for the degree

DOCTOR OF PHILOSOPHY

in the School of Law at the University of the Witwatersrand

May 2015

Supervisor: Professor Marius Pieterse

DECLARATION

I, Phiona Muhwezi Mpanga, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

This thesis is up to date as of 22 January 2015 (submitted for examination on 22 January 2015).

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ACKNOWLEDGEMENTS

Embarking on this study was made possible by funding from the Alistair Berkley Memorial Trust. I am grateful for the Trust's financial support. I would like to thank my supervisor Prof Marius Pieterse for his guidance and patience with me during the course of this project. I am also grateful for the support provided by colleagues and friends at the School of Law, Makerere University. Friends at the University of the Witwatersrand made the periods away from home and family bearable.

I am thankful for the support provided by the staff at Ministry of Water and Environment. The National Water and Sewerage Corporation staff, for affording me access to their resources, time and experiences which enabled me conclude this project. Many months were spent at the Center for Basic Research whose intellectual environment enabled me to persevere with the project.

My parents who encouraged me to pursue further studies have also provided enormous support over the years. Much love to Alexis, Miles and Amy who endured the long periods of separation without complaint. Most of all, love and special thanks to my friend and partner, David, who has remained my unwavering source of inspiration and emotional support.

CONCEPTUALISING, REALISING AND ENFORCING A HUMAN RIGHT TO WATER FOR UGANDA: COMPARATIVE PERSPECTIVES

ABSTRACT

International law is increasingly recognising a right to water. As with other socio-economic rights in international law, enjoyment of this right depends on its translation within domestic constitutional and legal systems. This dissertation concerns itself with the enjoyment of the right to water in Uganda, where it is not currently explicitly ensconced in the Constitution. The dissertation supports the findings of previous research showing that, where the understanding of a right to water as conceptualised within international law has been ensconced within the domestic legal framework; there is better translation of the right in domestic legislation and executive policy. This, it is advanced, is even more so when the right is made justiciable and is deliberated upon and enforced by the courts. This is illustrated through a desk study of the right to water in different legal systems. After unpacking the content and implications of the right in international law, the dissertation looks at the implicit manner in which the right is recognised in the Ugandan Constitution, links this to the extent to which it has been translated in legislation and executive policy and contemplates the possibilities of enhancing such translation through adjudication. By way of comparison, the dissertation then conducts similar analyses of the protection of the right in India (where, like in Uganda, it is also only indirectly ensconced in the Constitution but where, unlike in Uganda, it has been elaborated indirectly through adjudication) and in South Africa (where the Constitution guarantees a fully justiciable right to water and where the courts have adjudicated upon this right). The dissertation finds that constitutional protection of a justiciable right to water appears to provide the most appropriate springboard for its elaboration, translation and ultimate enjoyment. Constitutional protection legitimizes citizens' claims to enjoy the right, facilitates dialogue with the institutions of state over access to water, shapes water struggles and provides the most effective counterweight to the forces of neo-liberalism engrained within legislation, policy and water service delivery models. In the context of current constitutional reforms, the dissertation thus proposes that Uganda adopts a model in terms of which a justiciable right to water is explicitly entrenched in the Constitution and both directly and indirectly enforced by the courts.

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CHAPTER 1

INTRODUCTION: WATER NEEDS AND WATER RIGHTS

1.1 WATER AS A BASIC NEED

The need for fresh water is one of the most basic human needs. Water sustains life. Human beings need water for drinking and producing food. Water is essential for basic hygiene. It also plays a vital part in the social functioning of communities because in many parts of the world, water has strong cultural and religious connotations. The various uses to which we apply water create an important means of social mobilization as well as a means of enhancing social cohesion between communities.

Considering that water has several uses, there is increasing competition for utilising the resource. To illustrate the increasing competition for water use among sectors, the United Nations estimates that 70 percent of the world's total water usage is attributed to irrigation and agriculture. An additional 20 percent is used on industry, leaving a paltry 10 percent for everyday human consumption.[1] Commentators have even argued that, given the nature of these increasing demands on water resources at national level, there is likely to be increased tension between states over trans-boundary water resources. These commentators go as far as to argue that the next world war may be triggered by disagreement over the distribution of water resources.[2] The competition for water resources has thus added a new dynamic to its importance. Water is increasingly being regarded as one of the scarcest resources for current and future generations.[3]

Even though the importance of water as a prerequisite to human existence is not disputed, the problem of water scarcity has persisted. Scarcity is described as a situation where the demand for water is greater than the water which is readily available for use. From this perspective, there is no threat of absolute water scarcity globally, because the total amount of global fresh water is more than enough to meet the basic water needs of human beings. Rather, water scarcity appears to be due to distance to water sources, poor service

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[1] World Water Assessment Program sourced from http://www.unwater.org/statistics_use.html. Also see Linda Stewart & Debra Horsten 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *SAPL* 486, 503.

[2] Harriet Bigas et al (eds) *The Global Water Crisis: Addressing an Urgent Security Issue* http://inweh.unu.edu/wp-content/uploads/2013/05/WaterSecurity_The-Global-Water-Crisis.pdf.

[3] See Stephen C McCaffrey 'A human right to water: Domestic and international implications' (1992-1993) 5 *Georgetown International Environmental Law Review* 1, 4; and Bob Sandford 'Water and global security' in *The Global Water Crisis: Addressing an urgent security issue 12* http://www.inweh.unu.edu/WaterSecurity/documents/WaterSecurity_FINAL_Aug2012.pdf .

delivery, inability to pay for water services and outright exclusion from water sources.[4] These factors are not all caused by naturally occurring circumstances. The UN has argued that 'the roots of the crisis in water can be traced to poverty, inequality and unequal power relationships, as well as flawed water management policies that exacerbate scarcity.'[5]

Water scarcity affects millions of people around the world. The UN estimates that there are nearly 780 million people worldwide who cannot access clean and safe water.[6] More still, the majority of the 780 million people in the world who lack access to clean and safe water, are located in Sub-Saharan Africa, Asia and South America.[7] Many of these people live in urban areas.

The impact of water scarcity has been vicious. Water-related illnesses, caused by the lack of clean and safe drinking water, account for the deaths of approximately 1.5 million children under the age of 5 years.[8] Drawing a link between water scarcity and life, the UN reports that infant mortality rates are twice as high for households without access to safe water than for those households with adequate access to safe water.[9] More importantly, the scarcity of water has perpetuated the exclusion of many of the world's poor and vulnerable, who find themselves systematically disadvantaged and barred from enjoying access to water. While much of this exclusion is not legally ordained, it appears that, to some extent, it may be implicitly facilitated by law or omissions of law. It is these consequences of water scarcity, which require that the question of how water is delivered is reformulated, to examine the possibility and potential of enhancing enjoyment of water within a human rights paradigm.

1.2 WATER DELIVERY CHALLENGES IN UGANDA

This thesis mainly focuses on the enjoyment of a right to water as it pertains to Uganda which is endowed with significant freshwater resources. The country's rivers and lakes, including wetlands, cover about 18% of the total surface area of the country.[10] Uganda receives an ample amount of rainfall, which also enhances available water sources. The most significant

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[4] Jenny Gronwall *Access to Water: Rights, Obligations and the Bangalore Situatio*n (2008) PhD dissertation Linköping University downloaded from http://liu.diva-portal.org/smash/get/diva2:18111/FULLTEXT01 1, 29.

[5] United Nations *Human Development Report* (2006) v.

[6] WHO *UN- Water Global Analysis & Assessment of Sanitation & Drinking Water: The Challenge of Extending & Sustaining Services* (2012). In addition, about 2.5 billion people still lack access to basic sanitation.

[7] Ibid. These numbers have reduced over time. For instance by 2005, it was estimated that the population without water was 1.2 billion.

[8] See UN General Assembly, Human Rights Council Session A/HRC/15/L.14, 24th September 2010.

[9] UN *2nd World Water Development Report, National Water Development Report: Uganda* (2005) 1, 69.

[10] Uganda comprises a total area of 241,550 square kilometres (sq kms), of which about 15% or 36,902 sq kms are covered by fresh water bodies and 3% or 7,325 sq kms are covered by permanent and seasonal swamps. See Government of Uganda *Water Supply Atlas* (2010) http://mwe.go.ug/index.php?option=com_docman&task=cat_view&gid=59&Itemid=55.

hydrological features in the country are Lake Victoria and the River Nile. Lake Victoria is the second largest freshwater lake in the world and the largest in Africa. Much of the water used in Kampala, the country's capital city, and surrounding towns is sourced from Lake Victoria. In addition, nearly all of Uganda lies within the River Nile basin which charts its course through eleven African countries, many of which are water scarce.[11]

Uganda's water bodies buttress several uses for water and are at the heart of the country's socio-economic development. Besides supporting the country's domestic water supply, fresh water is necessary for livestock, industrial use, hydropower generation, agriculture, marine transport, fishing, waste discharge, tourism, environmental conservation mechanisms and, more recently, oil exploration and production. This indicates that there is an increasing demand for water resources to support tangible economic growth in the country.

But Uganda's fresh water resources are likely to diminish in the decades ahead. For example, over the past decade, it has been reported that changing weather patterns have been adversely affecting water resources. In addition, the water from Lake Victoria has receded significantly. Key amongst concerns over the extent to which water is being exploited and utilised for Uganda is agreement over the use of the Nile's water. In 2013 an attempt to revise the 1929 colonial Nile River treaty, which would have increased the extent to which Uganda and other countries could utilise the Nile's waters, was rejected by Egypt.[12] This is only one way of illustrating the need to focus on the manner in which water is conceptualised by institutions of State as the bedrock for planning and implementing measures geared at enhancing equity in water delivery for citizens in the long term.

Conceptualising water supply and delivery requires a contextual understanding of how water was historically distributed and delivered within Uganda. Apart from the colonial era infrastructure, that supported a few towns which were the hubs of colonial activity, there was little effort towards extending water infrastructure to all parts of the country. In many areas, water was accessed communally according to customary rules of land ownership. Reports indicate that, from about 1966 to 1990, no new water infrastructure was developed in the

[11] The river Nile basin area is shared by Burundi, Rwanda, Tanzania, DRC, Uganda, South Sudan, Sudan, Ethiopia, Eritrea, Kenya and Egypt.

[12] An accord, the Nile River Co-operative Framework Agreement, was signed by Rwanda, Tanzania, Uganda, Kenya and Burundi in 2013. But the 1929 treaty gave Egypt the power to veto any projects involving waters of the Nile by upstream countries such as Uganda. Also see "East Africa seeks more Nile water" *BBC* (14 May 2010) "Ethiopia ratifies River Nile treaty amid Egypt" tension *BBC* (13 June 2013) http://m.bbc.com/news/world-africa-22894294. There have also been reports of disputes relating to territorial claims over Lake George and Lake Albert which border the Democratic Republic of Congo, as well as Uganda's water boundaries with Kenya within Lake Victoria. See http://www.issafrica.org/iss-today/dispute-over-migingo-escalates.

country. By 1990, the UN estimated that only 10 percent of the country's population was being served by the State controlled National Water and Sewerage Corporation (NWSC), yet this was the primary institution mandated to provide water delivery services to citizens.[13] This shows that, even when water delivery was a state managed effort, it did not benefit the majority of citizens.

For the most part, water delivery in Uganda has been by self help mechanisms both within urban and rural areas in the sense that individuals take responsibility to ensure that water is available for their households. Citizens will depend on their own geographic knowledge of the city or rural area to determine where and how to reach water sources and for what the water will be used for. Rain water may be harvested during the rainy seasons, mobile water trucks may sell water to locals, or a local entrepreneur may collect water from a spring and traverse the neighbourhood selling jerry cans from a bicycle; a borehole may be used or an individual with a stand tap may sell at a small premium. For others the state water supply system may reach their homes to supply water.[14] What this explains is that most water delivery arrangements appear to be unregulated by the State.

When water delivery became the subject of the fierce 'privatisation versus public service' debate which affected many countries, Uganda was no exception. After the World Bank and IMF-driven economic liberalisation reforms of the 1980s, which sought to withdraw government from business and service delivery by emphasising privatisation, divestiture and cost sharing, water delivery was organised in a manner which promoted the interests of those who could afford to pay in order to consume water.[15] While the NWSC was able to expand its service to many more parts of Uganda, its business model emphasised payment for new water connections; efficiency in billing and collecting payments; payment of penal charges for re-connections where original connections had been removed for non-payment; and a lack of tolerance for failure to settle arrears. Most of the harsh effects

[13] UN *2nd World Water Development Report* op cit note 9 at 178. In 1972, the NWSC supplied water in three towns: Kampala, Entebbe and Jinja. See also William T Muhairwe *Making Public Enterprises Work: From Despair to Promise- A Turn Around Account* (2009) 5-10; 95-98.

[14] This information was gleaned from informal interviews with residents of an informal settlement of Kampala conducted in September 2013.

[15] See J Oloka Onyango 'Poverty, human rights and the quest for sustainable human development in structurally adjusted Uganda' (2000) 18 *Netherlands Quarterly of Human Rights* 23, 30-33 for an overview of the negative effect of IMF and World Bank reform policies on the struggle for human rights. For a more detailed discussion of privatisation, human rights and water delivery see Karen Bakker *Privatizing Water: Governance Failure and the World's Urban Water Crisis* (2010) Chapter 1 and 5.

resulting from such water service delivery reforms were felt within overcrowded settlements in urban areas.[16]

Even then, there are still challenges emerging from the social context in which water is delivered, which affects how and to whom it is distributed. First, Uganda's population has continued to grow rapidly. Population growth is estimated at 3.2 percent per annum and it is projected that the national population will rise to 37.9 million people by 2015.[17] National reports also indicate that population growth is especially rapid in the urban parts of Uganda. Kampala, the country's capital city, has a high population density in relation to other urban areas, which presents a unique challenge for water management.[18] The majority of these urban residents reside within informal settlements. NWSC reports that the city already has 24 areas zoned as informal settlements or slum areas. Many of these informal settlement areas are situated in low-lying areas which are prone to flooding, without adequate access to tap water.[19]

Poverty is another enduring problem which affects the context in which water is delivered in Uganda. By 2006, 31 percent of Uganda's population lived below the poverty line.[20] As in other developing countries, women and children in Uganda are burdened by water collection. A large percentage of the population still spends significant amounts of their productive time walking long distances to collect water. To compound this, owing to the long distances travelled, even the water collected may end up contaminated due to unhygienic water handling and storage practices.[21] This implies that there are still many citizens who need support in enhancing their enjoyment of water and whose social context ought to be taken into account while planning and implementing programs for water delivery.

The approaches used by the State to address the problems of water delivery also deserve interrogation. For instance within the rural and peri-urban areas, government policy

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[16] If water borne illnesses provide a measure of understanding the effect of water scarcity, in 1998 the highest incidence, consisting 49,514 cases of cholera was reported in Uganda. http://www.africhol.org/country/uganda. See also William T Muhairwe *Making Public Enterprises Work: From Despair to Promise- A Turn Around Account* (2009) 175-178.

[17] In 2002, the Population and Housing Census reported that the national population was at 24.2 million.

[18] UN *2nd World Water Development Report* op cit note 9 at 77.

[19] This information was gathered from an interview with Pro-poor Manager for National Water and Sewerage Corporation in September 2013. See also WHO *UN Water Global Analysis and Assessment of Sanitation & Drinking Water* op cit note 6 at 44. Government of Uganda *Joint Water & Environment Sector Support Programme 2013-2018* (2013) 1, 109.

[20]Government of Uganda *The National Development Plan* 2010/11-2014/15 (2010) 1, 276. According to the 2011 Human Development Indicators profile for Uganda, the country ranked below the trends in Sub-Saharan Africa. The indicators provide a composite measure of 3 dimensions: health, education and income. Uganda's HDI was 0.446 ranking 161 out of 187 countries with comparable data. In comparison the HDI of Sub-Saharan Africa was 0.463. Sourced from http://hdrstats.undp.org/en/countries/profiles/l.

[21]UN *2nd World Water Development Report* op cit note 9 at 61.

has emphasized a community approach to water delivery.[22] This community approach locates the responsibility for determining when and how water sources are managed with the various community leaders. While this may facilitate sustainable use of water resources, commentators caution that a community approach to water delivery does not prioritise the basic needs of the individual to exist in dignity and good health. Additionally, it does not appear to emphasize the responsibility of the state in actualising water delivery.[23]

As such, while the state has made progress in enhancing access to water supply from an economic perspective, the underlying problems surrounding substantive enjoyment of the human right to water remain.[24] Given that the poorest and most vulnerable may be unable to compete for water in circumstances of scarcity, it seems that the State's initiatives may themselves perpetuate the inequity existing in water delivery models. It would seem that while physical scarcity of water is not Uganda's problem, enjoyment of access to water may have been impeded by the weak water governance regime. This raises the question whether approaching water delivery issues from within a human rights paradigm would lead to better enjoyment of water services.

1.3 A RIGHTS-BASED APPROACH TO WATER

The notion that rights are a tool for social transformation has met with much scepticism. It has for instance been argued that law, by design, protects and entrenches the interests of the few who have or control resources. Some have argued that the conceptualisation of human needs within the human rights framework only serves to legitimize the interests of the wealthy and effectively to maintain the status quo, given that there are often laws, through which the poor are excluded from enjoying access to basic needs. Moreover, it has been argued that, through the liberties which come along with rights recognition, a rights framework prevents the redistribution of resources in any manner which would likely

[22] Phiona Muhwezi Mpanga 'Plenty of water but scarcity persists: Surveying the status of the right to water in Uganda' (2007) Working Paper No 10 HURIPEC 1, 22. In addition, the World Bank has piloted and promoted reliance on a demand driven approach to water delivery where those communities which have been able to organise themselves to manage water sources appear to get water facilities availed much quicker than areas where organisation appears to be absent or lacking.

[23] Malcolm Langford 'The United Nations concept of water as a human right: A new paradigm for old problems?' (2005) 21 (2) *International Journal of Water Resources Development* 273, 275.

[24] Over the last 10 years, Uganda developed a Poverty Eradication Action Plan (PEAP I and PEAP II) which was intended to provide a framework for national planning. The PEAP approach is described as a strategy which aims to forge a framework for economic growth; promote good governance and security; directly improve the ability of poor people to generate income; and directly improve the poor's quality of life. See UN *2nd World Water Development Report* op cit note 9 at 6.

improve the social status of the poor and vulnerable.[25] In short, the argument has been that law serves the interests of those with power and therefore that the human rights model cannot improve the lived realities of the poor and vulnerable.

But these arguments have been countered and have mostly been found to be erroneous. Scholars arguing for the application of a rights-based approach within the domestic context advance the view that a rights based approach empowers those who are poor and vulnerable to secure their freedom and entitlement to enjoy certain rights through direct claims made against the State.[26] Considering that the broader human rights discourse has constructed values which underpin human rights, the universal acceptance of the dignity and equality of human beings as values can be given broad interpretation in order to add weight and legitimacy to claims for basic needs.

Other scholars have countered the argument that rights perpetuate class interests by illustrating that the process of adjudicating socio-economic rights has transformative tendencies which aid the actualisation of these rights. These transformative tendencies manifest themselves by legitimizing basic needs as socio-economic rights. When the nature and content of a specific right is articulated within domestic legislation, it facilitates the possibility of legitimate rights claims. In addition, the courts are more willing to engage with elaborating on and enforcing such claims. In turn, citizens subsequently have a basis upon which their needs are recognised and are ultimately awarded a legitimate basis upon which to claim for the right.[27] Through rights-based adjudication, the interests of the poor and vulnerable are thus mainstreamed.

Much of this debate has been settled. Indeed, within the framework of international human rights law, claims for water as a basic need are increasingly perceived as human rights, particularly within a broader context in which it is accepted that all human rights are indivisible, interdependent and inter-related. Rights are thus perceived as a means to address concerns of protecting and distributing water within societies.

Accordingly, the interpretation of the normative content of many of these human rights has gravitated towards a universal understanding of these rights, and scholars have in turn

[25] Mark Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363, 1392-1394; Marius Pieterse 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) *Human Rights Quarterly* 796, 800-803.

[26] Paul O'Connell *Vindicating Socio-Economic Rights International Standards and Comparative Experiences* (2012) 1, 4.

[27] Marius Pieterse 'The Legitimizing/Insulating effect of socio-economic rights' (2007) 22 *Canadian JL & Society* 1, 4 and 9-10; Varun Gauri 'Fundamental eights and public interest litigation in India: Overreaching or underachieving? (2010) 1 (1) *Indian Journal of Law & Economics* 71, 74.

developed a human rights based approach which ought to enhance the realisation of socio-economic rights.[28] The human rights based approach has been adopted by the United Nations (UN) and reinforces the argument that basic needs such as water are better accessed and enjoyed by citizens in circumstances where the State conceptualises these needs as rights and thus applies a human rights framework to actualize its obligations to addressing the socio-economic needs of its citizens.

The UN has accordingly agreed on principles which aim to guide States when they are conceiving and implementing basic service delivery programs. These principles include participation, non-discrimination, equality, accountability, interdependence and indivisibility of rights.[29] The principles ought to work by infusing rights consciousness within national programs at domestic level. Even though these principles appear to be self standing, commentators have affirmed that they are in fact informed by law. The law is thus envisaged as capable of having a tangible effect in social processes because it mainstreams rights and ensures adherence to legal obligations.[30]

If these approaches have been articulated, why do challenges with water delivery persist? It has been argued that the application of a rights based approach is at most symbolic. As a result, water delivery concerns tend to focus on questions of water scarcity, tokenistic participation, top-down expensive solutions, insistence on universal payment of user fees and an allocation of most budgetary resources to the provision of water and sanitation infrastructure for wealthier neighbourhoods.[31] While all these factors may not hold equally true within Uganda's water delivery mechanisms, such concerns highlight the importance of critically analysing the manner in which constitutional, legislative and policy mechanisms operate to enhance or impede enjoyment of a right to water.

1.3.1 The Justiciability Debate As It Pertains To A Human Right To Water

A rights-based approach to realising socio-economic rights encompasses more than adjudication. The rights-based approach envisages a legal framework through which

[28] Philip Alston 'A framework for the comparative analysis of bills of rights' in Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999).

[29] Emilie Filmer-Wilson 'The human rights-based approach to development: The right to water' (2005) 23 *Netherlands Quarterly of Human Rights* 213, 217 ; United Nations *The Human Rights Based Approach To Development Cooperation: Towards A Common Understanding Among UN Agencies*(2003) downloaded from http://www.undg.org/content/programming_reference_guide_(undaf)/un_country_programming_principles/human_rights-based_approach_to_development_programming_(hrba)

[30]Paul Gready 'Rights-based approaches to development: what is the value added?' (2008) in Olivier de Schutter (ed) *Economic, Social & Cultural Rights as Human Rights* (2013) 877, 878.

[31] Malcolm Langford 'Ambition that overleaps itself? A response to Stephen Tully's critique of the general comment on the right to water' (2006) 24 *Netherlands Quarterly of Human Rights* 433, 449; Emilie Filmer-Wilson op cit note 29 at 217-9.

conceptualisations of rights guide the legislative and executive processes and ultimately provide a rallying point for activism within civil society. But the more controversial subject remains the appropriate avenue for their enforcement through law and especially courts, where for socio-economic rights, there is a major controversy regarding the appropriateness of their justiciability.

Those opposed to the notion that socio-economic rights ought to be vindicated by courts argue that the idea is fraught with ideological shortcomings and institutional illegitimacy. Firstly socio-economic rights are regarded as significantly different from their counter-part civil and political rights. Within the International Covenant of Economic, Social and Cultural Rights (ICESCR) these rights are expressed in a manner that describes aspirations in the context of societal needs and the pursuit of better social services.[32] Such aspirations cannot reasonably be immediately realised and, thus, it is argued, they cannot become the subject of adjudication.

Reluctance to accept justiciable socio-economic rights was premised on the argument that the adversarial form which adjudication takes does not allow courts to effectively deliberate matters concerning the allocation of resources because of the strong polycentric issues involved.[33] Claims for socio-economic rights to a great extent involve resource allocation. The concern is that such claims cannot be adequately resolved before courts, because any determination of one of these issues consequently affects matters of finance and the ordering of government priorities, which according to conventional wisdom, only the executive branch is well informed to determine. In a court setting, it is argued, the judge is only limited to the information presented by the adversarial parties and cannot have a complete understanding of the consequences which are likely to emerge from a decision the court is required to make.[34]

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[32]M Dennis and D Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health? (2004) 98 *American Journal of International Law* 462. The American reluctance to accept these rights as justiciable are elaborated upon by Craig Scott & Patrick Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania LR* 1, 19; Also see Martin Scheinin 'Economic and social rights as legal rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights A Textbook* (1995) 41; 'What price for the priceless? Implementing the justiciability of the right to water' [2006-2007] 120 *Harvard Law Review* 1067, 1077-8; Philip Alston 'Economic and Social Rights in the International Arena' (1998) 1 *ESR Review* 2; Matthew C R Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 11.

[33] Lon Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard LR* 353, 369. In this context, Lon Fuller contends that the adversarial form of adjudication involves making a claim and/or counter-claim founded in law and backed by evidence before a neutral judge who is then required to provide a reasoned judgment. The allocation of resources may not often be easily confined within such a space.

[34] Ibid at 371 and 394-404. Fuller describes polycentricity as questions which involve many affected parties and a fluid state of affairs connected by many interacting centers. A summary of these arguments in the South

Opponents of adjudicating socio-economic rights therefore caution that an adjudicative process relating to these rights conflicts with a separation of powers doctrine present in most jurisdictions. Within a pure doctrine of the separation of powers, the Constitution allocates the three arms of government (executive, legislature and judiciary) specific constitutional roles which avoid any overlap.[35] As such, matters concerning socio-economic claims which address citizens' needs and the allocation of resources are considered to be more efficaciously resolved by the executive who have the technical expertise to make such decisions. An attempt to draw the courts into the determination of socio-economic rights issues through adjudication would thereby, conceivingly serve to introduce an inappropriate role for courts and to second guess executive decisions.[36]

Reluctance to adjudicate socio-economic rights and the right to water is further enhanced by concerns about the democratic deficiency of the judiciary. It is argued that courts lack the democratic legitimacy to pronounce themselves on matters on which democratically elected members of the executive and in some cases the legislature have pronounced themselves.[37] It is thus argued that the courts have no basis upon which to second guess those organs which directly represent the citizens of the State whose decisions serve the best interests of those they represent.

On the other hand, proponents of justiciable socio-economic rights have long exposed the flaws inherent in these arguments. More so, the adjudication of several socio-economic rights in contextually different domestic settings has provided evidence that the concerns against adjudication may be overstated. The proponents of justiciability have demonstrated that civil and political rights and socio-economic rights are indivisible. A broad human rights framework simply enhances the 'needs' framework in articulating and realising socio-economic rights.[38] In addition, proponents have demonstrated that civil and political rights, the justiciability of which is more readily accepted, actually have financial and other resource implications and when courts have adjudicated upon these rights they have not exceeded their constitutional mandate. On this basis, it is difficult to argue against justiciability of their

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African context is provided in Marius Pieterse 'Coming to terms with judicial enforcement of socioeconomic rights (2004) 20 *SAJHR* 383, 392-396.

[35] N W Barber 'Prelude to the Separation of Powers' (2001) *The Cambridge Law Journal* 59, 76-77.

[36] For a broader discussion of the separation of powers doctrine see N W Barber ibid at 60.

[37] See 'What price for the priceless? Implementing the Justiciability of the Right to Water' op cit note 32 at 1075; Also see Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009); and Sandra Fredman (2008) *Human Rights Transformed Positive Rights and Positive Duties* 114.

[38] Rolf Künnemann 'A coherent approach to human rights' (1995) 17 (2) *Human Rights Quarterly* 323, 333; and Sisay Alemahu Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and People's Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317, 319.

socio-economic counterparts. Moreover, it has been shown that, while it is to be expected that socio-economic rights issues present polycentric challenges, this should not exclude the judiciary from their determination. From their point of view the courts have an innately different function in relation to socio-economic rights claims which merely infuses rights into the debate regarding the actualization of basic human needs.[39]

Consequently, it appears that the justiciability of socio-economic rights has slowly come to be accepted as plausible without causing the much feared shift in the balance of power between the various arms of government. Adjudication adds value to the infusion of a rights based approach to actualising socio-economic rights, particularly where it facilitates executive accountability and citizen participation. Drawing from Etienne Mureinik's conceptualisation of the ideal exercise of executive power within a constitutional democracy, scholars have argued that the judicial enforcement of socio-economic rights would offer courts an opportunity to enhance such accountability from the executive. More importantly, institutional concerns about the limits of judicial power would be allayed by allowing for a careful demarcation of the judicial function in reaching the broader goal of socio-economic transformation.[40] Considering that the typical form of accountability and citizens' participation in relation to matters relating to water services appears to be political accountability, the argument can be appropriated to make the case for a justiciable right to water.

Finally, theorists appear to agree that for socio-economic needs to be realised, they ought to be translated within the domestic legislative framework in a manner which accommodates judicial review. The translation within the domestic framework appears to envisage two main steps. First, a substantive entitlement needs to be legally articulated and defined. Secondly, legal or administrative mechanisms must be established through which substantive entitlements can be claimed or their violations challenged.[41] Ultimately, where a right has been adequately translated, it may be more amenable to judicial review.

1.4 THE CENTRAL QUESTIONS AND OUTLINE OF THIS THESIS

This thesis explores and evaluates possible ways to enhance enjoyment of a right to water in Uganda. Its central aim is to investigate whether and if so, what legal mechanisms can

[39] Marius Pieterse op cit note 34 at 392-396.
[40] Marius Pieterse op cit note 34 at 385, 388-9; Etienne Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) 10 *SAJHR* 31, 32.
[41] Lucy Williams 'Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis' (2005) 21 *SAJHR* 436, 439; Marius Pieterse 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy & Development* 1, 4-5.

enhance the enjoyment of a human right to water in Uganda. Two secondary questions arise from this central question. I consider whether and to what extent the constitutional articulation of a right to water would have a meaningful effect on how the right is elaborated within legislation, policy and ultimately on a judicial understanding thereof. Secondly, I consider whether the adjudication of a human right to water may impede or enhance the enjoyment of the right by citizens.

The central question of the thesis is premised on the assumption that the enjoyment of a right to water in Uganda is presently curtailed because of the manner in which the right is currently conceived within the constitutional and legislative framework. I presume that two challenges flow from the manner in which the right to water is conceived within the constitutional and legislative framework. First, the right to water is not independently enumerated within the Constitution. I claim that this creates a challenge because there is no firm basis upon which an individual or community can assert a claim to access water against the State as a matter of right.

The second challenge is that the right is not independently justiciable.[42] I argue that this presents a challenge because Ugandan courts already appear reluctant to indirectly vindicate rights claims when the rights claimed are not explicitly spelt out within the constitutional text. Given the weak manner in which the right is encapsulated within the Constitution, claims for a human right to water are unlikely to be entertained by courts, at least, in a manner that brings any positive consequences to claimants. Exploring possible solutions to these problems may go a long way to remove impediments to enjoyment of a right to water.

Commentators have expressed concerns about the utility of legislation as a means to recognise and protect socio-economic rights in comparison to constitutional protection. Legislation is perceived as discretionary. The state may or may not prioritise the elaboration of individual claims within legislation for various reasons, such as a preference to rely on executive policy. Secondly, legislation is easily the subject of review or even repeal. Commentators thus raise concerns that fundamental rights issues contained in such legislation would be left to the benevolence of the state through its ever changing policies.[43] While these propositions hold true, this study commences from establishing a constitutional recognition of a right to water and pre-supposes that within a constitutional democracy, legislation and policy is subject to the dictates of the constitutional text, as far as these are clear. Thus,

[42] I use the term justiciability here to mean individuals being able to take legal recourse and receive judicial remedies against the executive branch of government.

[43]Paul O'Connell *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (2012) 6-7.

legislative and executive policy must align itself to the spirit and content of the Constitution. In so doing, the scope and limits of legislation and executive policy are restrained by the Constitution.

The answers to the questions raised in this thesis are reached by way of a review of the international human rights regime which embodies the right to water and two country case studies of India and South Africa. Even though the case studies which are the focus of this thesis do not purport to be exhaustive of how constitutionalising, legislating and adjudicating a right to water has impacted and enhanced enjoyment of the right, they substantially benefit the thesis by allowing a reflection on the benefits and shortcomings of, respectively, explicit and implied constitutional recognition as well as direct and indirect adjudication of the right to water, in an attempt to reflect on the opportunities and shortcomings arising within Uganda's context. The selection of the two countries was further influenced by the fact that like Uganda, they both come from a common law tradition.

India is a developing country with a Constitution which appears to be similarly structured to Uganda's, in the sense that the constitutional text includes non-justiciable directive principles of state policy separate from a bill of rights. In addition, the Indian Constitution does not explicitly make reference to a right to water and explicitly determines that directive principles shall not be justiciable. Even then, the countries' constitutional law contexts are fundamentally distinct. India's Constitution has been tested for nearly 60 years as compared to Uganda's relatively new Constitution. At the same time India's constitutional rights have benefited from adjudication since the 1970s. A case study of India may therefore particularly illuminate the possibilities and challenges of indirect adjudication of a right to water and make it possible to draw lessons from a long history of constitutional adjudication.

On the other hand, the South African case study provides a more recent example of the utility of constitutional rights and how their direct adjudication can potentially transform the manner in which socio-economic rights are enjoyed. Although the entrenchment of socio-economic rights must be explained within the South African social context, the right to water is explicitly enumerated within the constitutional text and has been adjudicated alongside other socio-economic rights. The comparison with South Africa is additionally significant given that the country is a Sub-Saharan African country which deliberated over constitutional reforms and enacted a new Constitution at about the same time as Uganda. Yet, soon after the enactment of the new Constitution, and beyond, the South African courts engaged with the elaboration and interpretation of several socio-economic rights, including the right of access to water. The case study will facilitate a reflection on what could have been possible if

Uganda had taken a different view of constitutionalising socio-economic rights. Given that the idea of another constitutional review is being mooted within Uganda, this comparison may add weight to the question whether entrenchment and justiciability of a right to water holds promise.[44]

In each of the countries studied, the thesis devotes itself to addressing several secondary questions. It investigates whether there is an explicitly articulated right to water in the particular Constitution. In the alternative, it investigates whether there is a non-justiciable right to water as a directive principle in the Constitution. I then examine which other rights are enumerated and justiciable in the Constitution, into which aspects or elements of the right to water could be read. I examine the extent to which the right to water finds elaboration within the particular national legislation and policy. Finally, I examine the extent to which the right to water has been adjudicated upon and the outcomes of such adjudication.[45]

The focus of the thesis is the human right to water as it is used within the domestic context. In addition, I further narrow down my focus to how the right to water is implicated within urban centers which have been the testing ground for many of the reformed government policies on water delivery. Ultimately, I focus on how the enforcement mechanisms provided by courts empower communities, facilitate participation and enhance state accountability as enduring substantive benefits that can potentially flow from elaborating a right to water.

Two limitations flow from my own focus of the study. While I discern an intricate connection between the manner in which water is conceptualised and delivered and the evidence for and against the privatisation of water services, this work does not expand its scope to participating in debates over the appropriateness of the privatisation of water service delivery. At the same time, it does not explore water within the context of a right to sanitation even though the UN has declared a right to water and sanitation.

In addition, many countries (including Uganda, India and South Africa) now have institutions devoted to the protection of human rights whose mandate would seem to incorporate enhancing the enjoyment of human rights for citizens.[46] While I acknowledge

[44] Constitution to be amended-President Museveni *The New Vision* (7 June 2014).
[45] My study of Uganda was also influenced by several informal unstructured interviews with key informants from the state Ministry of Water and Environment, the National Water & Sewerage Corporation as well as twenty individuals who resided within two different urban settlements in Kampala city. These interviews were carried out during August-September 2013. While these are by all means not representative, the information gathered provided useful insights to the issues addressed in the study.
[46] For instance in Uganda, the Uganda Human Rights Commission and in South Africa, the South African Human Rights Commission.

that the work of these agencies may stimulate debate on the manner in which the right to water is actualised for citizens, this thesis does not attempt to explore the work of such agencies.

My investigation thus commences in chapter two of the thesis by surveying the manner and extent to which the human right to water is embodied within international and regional human rights treaties as well as within soft law and the resolutions of the United Nations General Assembly. It then explores the exact components of a human right to water as well as the internal parameters and external reach of a human right to water. It shows that the right to water has come to be accepted as a right within international human rights law, although uncertainty relating to its scope and reach remain. I argue that although the right to water finds its most explicit and elaborate acknowledgement within non-enforceable soft law, it has been articulated in a manner which makes it possible to begin to extrapolate implications of an internationally recognised human right to water which engenders positive State obligations as well as enforceable individual claims within the domestic setting.

In chapter three I explore the right to water in Uganda. This chapter begins with a historical exploration of how, if at all, socio-economic rights have been conceptualised in previous constitutional documents since the country achieved independence in 1962. It then delves into the constitutional assembly debates which shaped the manner in which socio-economic rights and the right to water were enumerated within the 1995 Constitution. The chapter proceeds to examine the manner and extent of constitutional recognition of the right to water in the text of the 1995 Constitution. It then explores the extent to which the Constitution measures up to the international law standards envisaged for a human right to water. The chapter shows that, even though the right to water is not explicitly articulated within Uganda's Constitution, it can still be inferred from the constitutional text on three grounds. First, the Constitution envisages that international law ought to be taken into account when interpreting the Constitution. Secondly, there are a number of rights, notably the rights to life, equality and dignity, into which elements of a right to water can be read. Thirdly, the Constitution includes directive principles of state policy into which a right to water, albeit only indirectly justiciable, can be read. The chapter then investigates the ways in which the legislative and policy framework elaborate and give content to the right to water. I argue that the right to water elaborated within Uganda's legislation and policy essentially underscores a neo-liberal paradigm with not much of a rights-based approach visible. Finally the chapter explores the possibility of adjudicating a right to water. Given that the Ugandan courts have never deliberated on a right to water, I mostly speculate from the manner in

which they have dealt with other socio-economic rights claims and the way in which the courts seem to conceive of their powers within the separation of powers debate. I argue that the courts appear unwilling to read rights into the constitutional text and as such in its current form, the right to water is unlikely to receive the much desired judicial elaboration. The chapter however shows that there are some decisions by the Ugandan courts which, if followed, may pave way for judicial elaboration of a right to water in future.

Chapter four offers a survey of the potential of indirect adjudication of the human right to water, emerging from India. Within the Indian setting, the right to water appears to be read into the constitution from the right to life and other entrenched rights at the instigation of the country's Supreme Court. Given that India is a federal state, there is little national legislation and policy which directly impacts water delivery. The thesis thus offers a sketch of the overarching legislative and policy framework as well as a proposed national bill encompassing water as a human right. The Chapter shows that Indian national legislative and policy framework does not entirely adopt a rights based approach although this appears to be changing particularly with proposals to enact laws espousing a human right to water and the adoption of a new policy framework in 2012. By examining several socio-economic rights decisions of the country's Supreme Court and federal High Courts to determine the extent to which these courts have elaborated on the internal contents and external reach of the right to water, the chapter argues that a willing court may go a long way to enhancing enjoyment of a right to water where the constitutional framework does not explicitly include a justiciable right to water. Even then, the main impediments to enjoyment of the right appear to be the neo-liberal underpinnings of the legislative and policy framework and the limitations arising from a focus on the negative aspects of the right emphasised by the Indian courts' jurisprudence.

Chapter five provides an illumination of the constitutional right to water in South Africa. As with the other country studies, this chapter examines the extent to which the right is elaborated within legislation and executive policy and whether if at all it dovetails with the international law contemplation of a human right to water. It argues that the right to water elaborated within national legislation tends towards a rights conscious model although it also appears to be affected by the neo-liberal underpinnings of state policy. More significant is the claim that the legislation and policy also appears to have been shaped by the outcomes of adjudication. However, the explicit presence of a right to water in the 1996 South African Constitution has meant that courts have been unwilling to read a right to water into other rights such as the right to life, which neglects some dimensions of the right. Also, the right as

adjudicated does not, in and of itself, vest immediately claimable entitlements, nor does it provide a complete buffer against neo-liberalism. However, in the end there is clearly more enjoyment of a right to water than in India and Uganda.

In Chapter six, I draw conclusions for the study. I find that, to a large extent, the implicit manner in which the international human rights framework contemplates a human right to water appears to have been mirrored within the domestic legal system in Uganda. However, what is explicitly recognised within international law appears to be explicitly emphasised within the 3 countries studied. Particularly, the 3 countries envisage a right to water as a universal entitlement which guarantees physical access to clean and safe water. To a marginal extent the domestic legal systems recognise that the water which is made available to citizens ought to be acceptable to them for their domestic use. On the other hand the study of Uganda and India shows that the adequacy of water availed by the State being an essential element of the right to water is absent. However, what appears to be contested in all three countries is the affordability of the water provided by the State's infrastructure. Given that Uganda and India's coverage of the components of a right to water is significantly partial, I thus conclude that the South African contemplation of the right appears to have come closest to ensuring that the legislative and policy framework cover the full scope of the right to water. The thesis thus concludes that the manner in which a right to water is articulated constitutionally may determine the extent to which the right can be vindicated in the domestic setting and the extent to which it finds expression in domestic legislative and policy frameworks.

In the end, the constitutional entrenchment of a right to water ought not be perceived as an end in itself. A rights based approach envisions that rights consciousness will enhance citizens' participation and state accountability. These principles are manifested in the dialogical potential of rights adjudication. The study shows that where there has been no constitutional entrenchment of the right as in Uganda there has been no dialogue facilitated and guided by the courts to construct a rights conscious legislative and policy framework pertaining to water. In India the study shows that even though there is no constitutionally recognised right to water, its enjoyment and protection have been facilitated by a creative and bold judiciary. At the same time, the study shows that the judiciary's role has slowly enhanced enjoyment possibly on account of the absence of an explicit right to water. For South Africa, the study showed that the courts have actively engaged with the executive and provincial legislatures in order to ensure that a rights conscious framework for enjoyment of the right to water is guaranteed. I thus conclude that a more enduring approach for Uganda

must aim to maximise the dialogical benefits of direct adjudication. So, in addition to articulation, justiciability appears to be a main enhancer of dialogic potential.

In sum, the thesis aims to show that better articulation of the right to water at the international and domestic level remains essential to the ultimate goal of enjoying entitlement to water for all. Given that there is increasing acceptance of the justiciability of socio-economic rights, it is plausible to argue that adjudication can provide an appropriate means through which enjoyment of the right to water in Uganda can be enhanced. It is therefore hoped that the thesis will provide insight into the formulation of a more explicit human right to water in Uganda. Ultimately it is hoped that the thesis will contribute to the debate on the extent to which judicial interaction with socio-economic rights could facilitate the deliberate elaboration of the rights in a manner which enhances citizen empowerment and democratic accountability. At the same time it is hoped that such judicial interaction may enhance dialogue with the executive and legislative institutions in a manner which fashions the legislative and policy framework pertinent to delivery of water in Uganda.

CHAPTER 2
CONSTRUCTING A HUMAN RIGHT TO WATER FROM INTERNATIONAL HUMAN RIGHTS LAW

2.1 BACKGROUND

None of the documents constituting the International Bill of Rights, that is, the UN's Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), makes explicit reference to a right to water. Consequently there has been a long debate over the legal foundations of a human right to water, particularly as to whether international law in fact recognised a human right to water and, if so, whether such recognition was legitimately founded.[1] Part of this debate has been brought to an end with the increasing acceptance that rights are interdependent and indivisible, and therefore that rights which are not expressly articulated may nevertheless be legitimately read into the text of the international bill of rights.

Commentators remained cautious of defining the exact content of and obligations engendered by the right to water within the existing international law paradigm. Much of the concern pertained to whether, given the vagueness of the documents from which it was inferred, a human right to water could be unpacked in a manner which made it possible to enumerate specific benefits accruing to an individual and, flowing from these benefits, to distil tangible obligations accruing to States.

In this chapter, I demonstrate that the right to water has come to be accepted as being implied within international human rights law. Consequently, it is possible to explore its internal parameters and external reach. As a starting point I explore the extent to which the right to water finds embodiment within international human rights treaties, the customary norms of international law and the African regional human rights conventions. Having found that there is a basis upon which a human right to water may be elaborated within international law, I then contemplate the exact content and scope of the right. Having shown that the

[1]Stephen Tully 'A human right to access water? A critique of general comment No 15' (2005) 23 *Netherlands QHR* 35, 43; Malcolm Langford 'Ambition that overleaps itself? A response to Stephen Tully's critique of the general comment on the right to water' (2006) 24 *Netherlands QHR* 433; Stephen Tully 'Flighty purposes and deeds; A rejoinder to Malcolm Langford' (2006) 24 *Netherlands QHR* 461; Erik B Bluemel 'The implications of formulating a human right to water' (2004) 31 *Ecology LQ* 957, 967-8.

contours of the international law right to water are fairly clear, I end with a discussion of its implications for States within the domestic constitutional and legal setting.

2.2 LOCATING THE HUMAN RIGHT TO WATER WITHIN INTERNATIONAL LAW TREATIES AND CUSTOMS

The UN's jurisprudence appears to affirm that it is appropriate to adopt a teleological interpretation of its human rights covenants, to the extent that the text of such covenants allows.[2] As such, most commentators locate the right to water by aggregating provisions of several human rights instruments and declarations which may be understood to imply or include an entitlement to water. Many of these instruments trace their roots to the Universal Declaration of Human Rights (UDHR). Although the UDHR is not an enforceable treaty, it has received universal acceptance as a basis for the recognition of rights and as an instrument that espouses the 'common standard of achievement for all peoples and all nations'.[3] Its statements on basic rights have increasingly become recognised as human rights in later treaties or as norms of customary international law.

Previously, the embodiment of a right to water within the text of the UDHR was contested. Proponents of an existing right to water argued that, even though the word 'water' was not explicitly stated in the UDHR, the intention of the framers of the Declaration was to allow for future inclusion of any other necessities that enable health and well being, one of which is obviously water.[4] Others argued that it was not deemed necessary to specifically include water in the text since water is much the same as air: it is not possible to exist without it.[5] On the other hand, those opposed to the notion that international law recognised a right to water argued that the absence of an express reference to water, going as far back as the UDHR, provides evidence that it has never been recognised as a human right.[6]

The UDHR provides the earliest embodiment of rights which can be read to implicate enjoyment of a right to water. For instance, affirmations of the rights to equality, well being and life may contain aspects of a right to water. More importantly, the UDHR's preamble also introduced into international law the underlying principles of inherent dignity, equal and inalienable rights of all persons. In Article 1, the UDHR affirms that all people are born free

[2] Philip Alston & Gerard Quinn 'The nature and scope of states parties' obligations under the international covenant on economic, social and cultural rights' (1987) 9 *HRQ* 156, 161.
[3] The preamble to Universal Declaration of Human Rights, UNGA Resolution Res 217 A (III), 1948.
[4] Stephen C McCaffrey 'The human right to water' in Edith Brown Weiss (ed) *Fresh Water and International Economic Law* (2005) 96.
[5] Peter H Gleick 'The human right to water' (1999) 1(5) *Water Policy* 487.
[6] Stephen Tully op cit note 1.

and equal in dignity and rights. In Article 2, it states that, 'Everyone is entitled to all the rights and freedoms set forth in [the] Declaration, without distinction of any kind….' The UDHR further affirms that everyone has the right to life and that everyone has the right to a standard of living that is adequate for health and well being.[7]

Considered together, it is arguable that the affirmation of a right to life and enjoyment of a dignified existence is predicated upon the enjoyment of a right to water. Commentators roundly agree that the manner in which the UDHR set out the broader dimensions of the right to life was particularly aimed at encompassing rights to the fulfilment of socio-economic needs such as food, health, well being and social security.[8] The enjoyment of life necessitates that these socio-economic good and services are at a minimum regularly available. Such an interpretation may obviously be expanded to include the right to water.

2.2.1 The International Covenant on Civil and Political Rights

The human right to water is not explicitly recognised within the International Covenant on Civil and Political Rights (ICCPR), the main international law instrument that espouses civil and political rights.[9] However, it is possible to infer the right to water from the context within which the text of the ICCPR is framed. For instance, implicit recognition of a right to water is strengthened by the ICCPR's preamble, which emphasizes the inter-related nature of civil, political, economic, social and cultural rights. The preamble proclaims that the ideal of free human beings enjoying civil and political freedom can only be achieved if conditions are created whereby everyone enjoys civil and political rights, as well as economic, social and cultural rights. This affirmation that rights are inter-related may allow for a right to water to be read into the text of the ICCPR, because water is an essential determinant of human existence.

The human right to water may also be read into some of the explicitly enumerated rights in the ICCPR. For example, the right to water can be inferred from the right to life. The ICCPR recognises that, 'Every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his life.'[10] The States Parties to the Covenant are required to respect and ensure the Covenant rights to all individuals within their

[7] Article 3 and 25 (1) UDHR respectively.
[8] Peter H Gleick op cit note 5.
[9] International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN Doc A/6316 (1966) entered into force 23 March 1976.
[10] Article 6(1) of the ICCPR.

jurisdiction and to take legislative or any other measures necessary to give effect to the Covenant rights.[11]

A traditional interpretation of the right to life holds that it emerges from the inviolability of life and must be interpreted strictly, as being related to an individual's liberty and protection from the arbitrary deprivation of life by the State. It has accordingly been argued that the right to life does not provide safeguards against for instance, death from famine or the elements and does not encompass an entitlement to an appropriate standard of living. On this view, a compliant State would essentially need to refrain from acts that would cause arbitrary deprivation of life or prevent third persons from causing such arbitrary deprivation.[12]

However, this narrow approach to the meaning of a human right to life has not gained traction in recent years given the exposition of the right to life advanced by the Human Rights Committee ('the Committee') which provides authoritative, though ultimately non-binding, interpretations of the provisions of the ICCPR. The Committee understands the right to life primarily as 'the supreme right from which no derogation is permitted.'[13] As such, the right to life is a pre-condition for effectively recognising all other human rights and without which other human rights would be meaningless.

In addition, the Committee's General Comment affirms a more expansive interpretation of the right to life. It recommended that:

> The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[14]

Commentators have accordingly conceptualised the right to life in a manner which allows a right to water to be read into the meaning of life. As a starting point, the term 'life' is defined as the fundamental conditions necessary to support life.[15] Consequently, if a right to life is understood as innate, then life can only exist in conditions and circumstances that foster rather than inhibit it. This understanding of life goes beyond the protection of a biological existence and embraces the notion that life requires fulfilment through accessing

[11] Article 2(1) and 2(2) ICCPR.
[12] Yoram Dinstein 'The right to life, physical integrity, and liberty' in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 1, 115-116.
[13] Para 1 General Comment No 6 *The Right to Life* HRI/GEN/1/Rev.9 (Vol I) adopted on 30 April 1982.
[14] Para 5, General Comment No 6 *The Right to Life*.
[15] Peter Gleick op cit note 5.

food, water and other basic needs which are essential to make life meaningful.[16] These conditions necessitate that goods and services to satisfy all the above socio-economic needs are at a minimum regularly available. Consequently, such an interpretation infers a right to enjoy water for daily consumption.

In light of the generous approach to the interpretation of the ICCPR preferred by the Human Rights Committee, the right to water may also be inferred from affirmations of the rights to equality, dignity and guarantees of non-discrimination. The preamble to the ICCPR recognises that the rights expressed in the Covenant derive from the 'inherent dignity of the human person'. The main text of the ICCPR then affirms the equal rights of men and women to the enjoyment of all civil and political rights set forth in the Covenant,[17] 'without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[18] When read together, these affirmations may be read as implying that the rights and freedoms guaranteed within the ICCPR are predicated on the existence of and an ability to enjoy a right to water.

2.2.2 The International Covenant on Economic, Social and Cultural Rights

The human right to water is not explicitly recognised within the International Covenant on Economic Social and Cultural Rights (ICESCR). Nonetheless, it is possible to implicate the right within the text of some provisions of the ICESCR. Particularly, Articles 11 and 12 of the ICESCR espouse rights into which a right to water may be read.[19] The ICESCR provides in Article 11 that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.[20]

Article 12(1) determines that, 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

[16] Marius Pieterse 'Life' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed RS 3, 05-11 ch39- 1; OS 07-06 39-3 and OS 07-06 ch 39-18; Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6ed(2013) 267-268.
[17] Article 3 ICCPR.
[18] Article 2(1) ICCPR.
[19] General Comment No 15 *The Right to Water* U N Doc E/C 12/2002/11 approved on 26 November 2002.
[20] Article 11 (1) ICESCR, GA Res 2200A (XXI) UN Doc A/6316 (1966) entered into force on 3January 1976.

Reading a human right to water into the text of the ICESCR is supported by the albeit non binding interpretations of the Covenant's provisions found in several General Comments adopted by the United Nations Committee on Economic Social and Cultural Rights (UNCESCR).[21] Two of these General Comments appear to be particularly amenable to reading a right to water into the ICESCR and will be elaborated upon in the penultimate section of this chapter. These are, first, the General Comment 14 addressing the right to health, in which the Committee began to expound on components of the right to enjoy the highest standard of physical and mental well being[22] and secondly General Comment 15, which explicitly recognises water as a fundamental human right and specifically infers the human right to water as implicated within Article 11 and 12 of the ICESCR.[23]

Finally, Article 2(2) of the ICESCR, guaranteeing freedom from discrimination, may also be read to implicate some components of a human right to water. Considering that commentators have formed the view that enjoying an adequate standard of living pre-supposes a guarantee of freedom from discrimination, it is possible to argue that this guarantee pertains also to an implicit right to water.[24]

2.2.3 Other Conventions

A number of Conventions that came into force after the ICCPR and ICESCR make explicit reference to the right to water. Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that:

> States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ...

[21]The UNCESCR derives its mandate from the UN Economic and Social Council (ECOSOC) the body responsible for monitoring the reporting obligations of States under Part IV of the ICESCR, Articles 21-22 ICESCR.

[22] Particularly see General Comment No 14 *The Right to the Highest Attainable Standard of Health* UN Doc E/C 12/2000/4 (2000). Also see comments of Salman M A Salman & Siobhan McInerney-Lankford *The Human Right to Water Legal and Policy Dimensions* (2004) 45 on the vagueness of the normative implications of the rights contained in the ICESCR.

[23] See General Comment 15 *The Right to Water* UN Doc E/C12/2002/11 approved on 26 November 2002. See also critiques of elaborating the right to water through General Comments by Stephen Tully op cit note 1; Malcolm Langford op cit note 1; Sabine Scheuring 'Is there a right to water in international law?' (2009) 15 *UCL Jurisprudence Rev* 147; Matthew Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 90-91; Philip Alston 'The committee on economic, social and cultural rights' in P Alston *The United Nations and Human Rights: A Critical Appraisal* (1992) 494.

[24]Article 2(2) provides that: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination....' See also Knut Bourquain *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (2008)140.

> (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications[25]

In this context the entitlement to a right to water is explicitly implicated as a determinant of the right to enjoy adequate living conditions. In line with the reading of the right to health in international law as including an entitlement to water, it is arguable that the right to access adequate health care facilities in CEDAW also embodies the human right to water.[26]

The Convention on the Rights of the Child, (CRC), explicitly refers to a human right to water when it determines that:

> States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures…to combat disease and malnutrition…through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;[27]

The CRC further enjoins States Parties to recognise the right of a child to the enjoyment of the highest attainable standard of health.[28] The CRC's recognition of the right to drinking water is important because the CRC is one of a few Conventions that have attained near universal ratification by all members of the United Nations, thus providing strong evidence of universal recognition of a human right to water.[29]

The Convention on the Rights of Persons with Disabilities (CRPD) embodies a human right to water insofar as it enjoins States Parties to recognise the right of persons with disabilities to social protection. The CRPD's elaborate measures to promote the right to social protection include a determination that States shall ensure equal access to clean water services, and access to appropriate and affordable services.[30]

International humanitarian law also appears to give impetus to claims of a long existing right to water. For example, the 1949 Geneva Convention relative to the Treatment of Prisoners of War enjoins States Parties to ensure the provision of drinking water to prisoners of war and internees.[31] States are further enjoined to provide such prisoners and internees

[25] Article 14(2) (h) CEDAW, GA Res 34/180, UN Doc A/34/46 entered into force 3 September 1981.
[26] Article 14 (2) (b) CEDAW; See also Takele Soboka Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery?' (2011) 12 *Melbourne J Int L* 290, 297; Knut Bourquain op cit note 24 at 123-4.
[27] Article 24(2) (c) Convention on the Rights of the Child, GA Res 44/25 UN Doc A/44/49 (1989) entered into force 2 September 1990.
[28] Article 24(1) CRC.
[29] Currently 192 countries are party to the CRC, i.e. this includes every member of the UN except Somalia, South Sudan and the United States of America.
[30] Article 28, CRPD GA Res A/RES/61/106, Annex I entered into force May 2008.
[31] Article 26, Third Geneva Convention 75 UNTS 135.

with water, shower and bath facilities for their daily personal toilet and washing requirements.[32] The additional protocols of 1977 prohibit the destruction of objects indispensable to the survival of a civilian population such as foodstuffs, areas for the production of foodstuffs and drinking water installations.[33] On this basis, it is plausible to argue that the right to water is recognised within the broader international law framework.[34]

2.2.4 Customary International law

It is arguable that the human right to water is also embodied within the customary norms of international law.[35] The widely accepted factors in determining customary norms are long term use (duration), uniformity, general practice and the opinion of jurists. It is also possible to infer from these norms the normative content of a human right to water.[36] In fact, the International Court of Justice has indicated that it is enough to establish a norm where only two of these factors are proved to exist: patterns of uniform or universal practice and patterns of legal acceptance.[37] Therefore in order to establish the existence of a recognised norm of international law, from which a human right to water can be constructed, the proper place to begin is to investigate whether 'universal practice' exists and whether the right can be logically implied from such practice.

There appear to be several demonstrations of a universal practice relating to water. Several international declarations made subsequent to United Nations conferences allow for inferences to be made regarding the recognition of a human right to water. For instance Principle one of the Stockholm Declaration emanating from the 1972 United Nations Conference on the Human Environment, proclaimed that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits

[32] Articles 29 and 85 of Geneva Convention III.
[33] Article 54 Protocol Additional to the Geneva Convention relating to the Protection of victims of International Armed Conflict II, adopted on 8 June 1977.
[34] But see concerns that the limitations of the Conventions addressing specific groups within society cannot implicate a universal right to water raised by Stephen C McCaffrey 'The human right to water' in Edith Brown Weiss et al (ed) op cit note 4 at 98 and 107.
[35]These norms are recognised as a source of international law by the Statute of the International Court of Justice, in Article 38(b) which provides that the Court shall apply, 'international custom, as evidence of a general practice accepted as law.'
[36] Ian Brownlie *Principles of Public International Law* 7 ed (2008) 1, 7-8. The ICJ has also had occasion to pronounce itself on these elements, for example in the Asylum Case 1950 ICJ Reports 276; *North Sea Continental Shelf* Case (*FRG v Denmark, Netherlands*) 1969 ICJ Reports paras 71 and 74.
[37]*Nicaragua v USA* 1986 ICJ Reports 14 where the Court accepted the argument that there were two main aspects necessary to determine a norm: patterns of practice and patterns of legal acceptance. See Stephen C McCaffrey op cit note 4 at 94 commenting on the need for evidence of practice accepting the content of General Comment 15. See also G I Tunkin 'Remarks on the juridical nature of customary norms of international law' (1961) 49 *California Law Review* 419, 422.

a life of dignity and well-being...'.[38] Even though structured within the context of a healthy environment, it is arguable that the participating States recognised that rights to the environment and could be understood as encompassing water.

Later, the Mar del Plata Action Plan was developed as an outcome of the United Nations Water Conference. The Action Plan recognised water as a right and declared that all people have the right to drinking water in quantities and of a quality equal to their basic needs.[39] Subsequently, the period between 1981 and 1990 was declared as the International Drinking Water Supply and Sanitation Decade. The decade enhanced recognition of a right to water within member states, in so far as it was agreed that during this time, governments would commit to bringing about substantial improvements in drinking water supply and sanitation services within their jurisdictions.

The declarations that followed made even more explicit references to the human right to water. Following on from the Mar del Plata Action Plan, the International Conference on Water and Environment held in Dublin led to a further declaration relating to water. The Dublin Statement established several principles related to water and sustainable development.[40] In Principle four, the Statement reaffirmed that 'it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price'. Later that year, the United Nations Conference on Environment and Development concluded with the adoption of Agenda 21,[41] the general objective of which was to affirm people's right to have access to drinking water in quantities and of a quality equal to their basic human needs regardless of their stage of development and their social and economic conditions. In sum, many of the international declarations relating to water had began to conceive the concept of water as a human right, essential to the satisfaction of human beings' most basic needs and to the enjoyment of all other rights.

The patterns of legal acceptance of a human right to water within international law are further mirrored by the declarations of the UN General Assembly. For example, in 1986, the UN General Assembly declared the right to development in which it was required that development be carried out in a manner in which all human rights and fundamental freedoms

[38]The Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1 January 1973).
[39] Mar Del Plata Declaration and Plan of Action, Report of the UN Water Conference (1977), Argentina, UN Publication No E 77 II A 12.
[40] Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century UN Doc A/CONF 151/PC/112 (1992).
[41] Commonly referred to as the Rio Summit.

can be fully realised.[42] Subsequently, at the start of the millennium, the General Assembly endorsed a Resolution on the right to development. The Resolution affirmed that in realization of the right to development, 'the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community'.[43]

The General Assembly had also adopted the United Nations Millennium Declaration, which is lauded for its visionary re-statement of fundamental and shared values which need to be achieved within this century.[44] It was resolved that these shared values would be achieved through action in specific areas, some of which implicate an understanding that the enjoyment of water may be perceived as a human right. It was among others resolved to take action:

> To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.

In 2010, the UN General Assembly passed a resolution recognizing the human right to water and sanitation.[45] The resolution provided that the General Assembly '*Recognizes* the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'

The resolution was widely supported by member States and received 122 votes in favor.[46] Introducing the draft resolution, the Bolivian representative stated that:

> The right to drinking water and sanitation is a human right essential to the full enjoyment of life. Safe drinking water and sanitation are not only principal elements or components of other rights, such as the right to an adequate standard of living. The rights to safe drinking water and sanitation are independent rights, which must be recognized as such. It is not enough to urge States to fulfil their human rights obligations relating to access to drinking water and sanitation. It is necessary to call on States to promote and protect the human right to safe drinking water and sanitation.[47]

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[42] UN A/Res/41/128 of 1986.
[43] UNGAOR 54th Session Agenda Item 116(b). UN Doc A/Res/54/175 (15 February 2000) para 12(a).
[44] United Nations Millennium Declaration A/Res/55/2.
http://www.un.org/millennium/declaration/ares552e.htm sourced on 4th September 2012.The shared values are freedom, equality, solidarity, tolerance, and respect for nature and shared responsibility.
[45] UN General Assembly A/RES/64/292 of 3 August 2010.
[46] Some countries which voted in favour were Afghanistan, Algeria, Angola, Belgium, Brazil, China, Congo, Democratic Republic of Congo, Egypt, Germany, France, India, Nigeria, and South Africa. There is no indication of whether a delegation from Uganda was in attendance.
[47] UN General Assembly 108th Plenary Meeting A/64/PV108, 5.

Whereas there were no objections, there were abstentions from some countries.[48] Alluding to the reasons for their abstention, the delegate from Canada stated that:

> It is premature to recognize such a right without allowing States the benefit of full deliberations based on the independent expert's findings, their own internal processes and the agreement of States.[49]

These deliberations provide evidence of widespread legal acceptance as is required to establish a customary norm relating to a human right to water within international law. While there were objections to the proposition at the General Assembly, at least it appears that the abstentions did not go so far as to deny the right; rather they focused on its scope, something which is admittedly still debatable. These General Assembly resolutions serve to demonstrate that the international community is increasingly inclined to perceive water as a human right.

In what may be considered further affirmation of a customary norm of international law relating to access to water, the Berlin Rules on International Water Resources, compiled by a section of leading experts in water resources, determine that the right to water is recognised in customary international law. The Rules draw evidence from the fact that national Constitutions in more than 60 States include a right to a safe and healthy environment which can implicitly be linked to a human right to clean and safe water. The Berlin Rules further expressly state that 'Every individual has a right of access to sufficient, safe, acceptable, physically accessible and affordable water to meet that individual's vital human needs.'[50]

Together, these General Assembly debates and the Assembly's subsequent resolutions coupled with the findings of experts who compiled the Berlin Rules, provide evidence of the international consensus surrounding the universal acceptance of a customary right to water.[51] It is further arguable that the above resolutions indicate acceptance of a threshold normative content of the human right to water and its accompanying State obligations.

2.2.5 The African Regional Human Rights System

The African Charter on Human and Peoples' Rights (The ACHPR) serves as the single most authoritative statement of human rights recognised and enforceable on the African

[48]Countries which abstained included Australia, Botswana, Canada, Ethiopia, New Zealand, the UK and Northern Ireland, the Netherlands, Tanzania , and the USA.
[49] UN General Assembly 108th Plenary Meeting A/64/PV 108, 17.
[50] Article 17 (1) Revision of the Helsinki & Other International Law Association Rules on International Water Resources, 2004.
[51] Rebecca Bates 'The road to the well: An evaluation of the customary right to water' (2010) 19(3) *Review of European Community & International Environmental Law* 288.

continent.[52] It has been ratified by nearly all member states of the African Union signifying that the rights expressed therein are recognised and can be claimed by citizens within African states. In its preamble, the Charter proclaims that:

> …civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

There is no explicit right to water in the ACHPR. As in international human rights law, the right to water is however implied within a number of ACHPR rights. For instance, the human right to water can be inferred from the right to health, as was affirmed by the African Commission in *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire,* where it adopted a generous approach to interpreting the right to health in the ACHPR as encompassing the right to water.[53] The right to water may arguably also be read into the right to economic, social and cultural development,[54] the right to a satisfactory and favourable environment[55], the right to life[56], and the right to dignity.[57] Finally, as in international law, the right to water can be inferred from the notion of well-being. The ACHPR enjoins States to protect the family unit as a basis of society by taking care of its physical health.[58] It is arguable, then, that the ACHPR contemplates the right to water in much the same manner as the international law framework: within the paradigm of a decent standard of living; good health, protection of life, and a clean and healthy environment.[59]

Explicit recognition of a human right to water is found within the text of the African Charter on the Rights and Welfare of the Child (ACRWC), article 14(2) of which provides that States shall endeavor to provide adequate nutrition and safe drinking water for children. Similar provision is made in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) also referred to as the 'Maputo Protocol', article 15 of which provides for the right to food security, including an obligation to provide

[52] The Charter was adopted in June 1981 and entered into force in 1986. Uganda ratified it on 10 May 1986.
[53] Article 16 ACPHR. Following the hearing of a complaint against the Congolese State, the Commission stated that a State's failure to provide basic services such as safe drinking water was a violation of the right to health. *Communications* 25/89, 47/90, 56/91 and 100/93 (18th Ordinary Session, October 1995).
[54] Article 22 ACPHR.
[55] Article 24 ACPHR.
[56] Article 4 ACPHR.
[57] Article 5 ACPHR.
[58] Article 18(1) ACPHR.
[59] Takele Soboka Bulto ' The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human & Peoples' Rights (2010) 29 *The University of Tasmania LR* 142,149.

women with access to clean drinking water, land and the means of producing nutritious food.[60]

Within the East African region, the East African Community legislative assembly recently enacted an East African Community Human & Peoples' Rights Act (EACHPRA)[61] which aims to domesticate international human rights standards at a sub-regional level and establish an East African human rights regime. The right to water can be read into the East African Bill of Rights to the extent that it recognises a right to enjoy the best attainable state of health, the right to food and nutrition, children's entitlement to nutrition and health and the right to life.[62] Furthermore, the EACHPRA recognises the obligation of member states to provide protection and humanitarian assistance to internally displaced persons and refugees within their territorial jurisdiction.[63] Given that the EACHPRA determines that the minimum obligation to these vulnerable groups is to ensure safe access to, among others, 'essential food and clean water', it is possible to infer a right to water from such a guarantee.[64]

Finally, the declarations of African States, which may be construed as regional soft law, may be read as inferring a human right to water. For instance, the Pretoria Statement on socio-economic rights in the African Charter provides that the right to health in the African Charter entails access to basic sanitation and an adequate supply of safe and potable water. Since it is readily acceptable to read water into essential entitlements towards the fulfilment of the right to health, it is arguable that the Pretoria Statement particularly provides evidence of an accepted norm relating to water and affirms that African States recognise obligations flowing from the recognition of the human right to water.

2.3 THE AMBIT AND SCOPE OF THE HUMAN RIGHT TO WATER

It is accepted that rights recognised within the international human rights regime must additionally endow identifiable benefits, upon which citizens may base claims against the State. Not surprisingly, concerns about the recognition of the human right to water inevitably interrogate the normative content of the right within international law. It is these concerns

[60] This Charter entered into force on 29 November 1999. Takele Soboka Bulto 'The human right to water in the *corpus* and jurisprudence of the African human rights system' (2011) 11 *African Hum Rights LJ* 341, 344-345.
[61] The East African legislative assembly passed the Bill in 2012. The East African Community is a regional intergovernmental organisation consisting of five member States: Uganda, Kenya, Tanzania, Rwanda and Burundi. The treaty for its establishment was signed in 1999 and entered into force in 2000. The Organisation aims to achieve economic and political federation within the East African region.
[62] Articles 19(1), 21(3), 23(1) and 4(1) EAHRA respectively.
[63] Art 29(1) EAHRA.
[64] Art 29(1) and 29(2) EAHRA.

that I briefly re-visit, prior to mapping out the ambit and scope of the right to water in this section.

Commentators who remain cautious of readily acknowledging the existence of a human right to water have argued that the implicit nature of the international law right to water has several limitations which all relate in one way or another to its ambiguity. They argue that it is difficult to pinpoint the exact legal interest that a right to water protects, because the right is drawn from several loosely related rights, each with a distinct scope.[65] The legal foundations of the right to water therefore remain weak and loosely constructed. Accordingly, it is argued that claims for water cannot be effectively pursued by citizens, because they remain unable to articulate specific and independent entitlements flowing from the right.[66] This section remains to establish whether these concerns are borne out, with a survey of the internal and external dimensions of the international right to water.

In 2002, the UNCESCR issued General Comment 15 which explicitly recognised water as a fundamental human right and set out the standards inherent to the right.[67] General Comment 15 constitutes six elaborate parts which articulate the normative content of the right, the obligations for States Parties, the minimum core obligations inherent to the right, violations of the right, its implementation at national level and the obligations that it imposes upon non-state actors. My focus here is limited to elaborating upon the definition given to the right to water and the obligations that attach to States Parties, as conceptualised by the UNCESCR.

2.3.1 Defining the right to water

The UNCESCR underscores that the right to water is of universal application. In the preamble to General Comment 15, it describes water as a 'public good fundamental for life and health.'[68] The UNCESCR further emphasises the principle of non-discrimination, stating that the right to water must be enjoyed equally by women and men without discrimination. As such, the right to water applies to everyone and engenders a universal entitlement to the benefits that accrue from its recognition.

The UNCESCR constructs a right to water as a right of 'everyone to sufficient, safe, physically accessible and affordable water for personal and domestic uses.'[69] Personal and

[65] Knut Bourquain op cit note 24 at 133.
[66] Takele Soboka Bulto op cit note 61.
[67] See General Comment 15 *The Right to Water* op cit note 19.
[68] ibid para 1. Also see paras 13 and 16.
[69] Ibid para 2.

domestic use is described as including 'drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.'[70] Obviously, this is not a conclusive list, rather it represents the most basic of human needs forming the threshold for enjoyment of the right to water. The right thus implies interrelated freedoms and entitlements – freedom to maintain access; and entitlement to a water supply and management that provides equal opportunity for people to enjoy the right to water.[71] It is these freedoms and entitlements which will be elaborated forthwith.

(a) Water related freedoms

The UNCESCR envisages that the human right to water guarantees autonomy of access to water and water facilities, as well as freedom from interference when accessing water. In this way, the right to water, although not limited to, is broadly a guarantee of access to services. In engaging with the intricacies of the term *access*, the UNCESCR explains that the human right to water provides a guarantee to a sufficient or adequate supply of water for social and cultural utility.[72] A *sufficient or adequate supply* is further defined as that amount of water which is necessary to 'prevent death arising from dehydration, able to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygiene.'[73] The World Health Organisation (WHO) has set out specific guidelines which elaborate on what accessing an *adequate* amount of water entails. The WHO guidelines indicate that a minimum volume of 7.5 litres per person per day is to be considered as sufficient water for hydration and incorporation into food, for most people under most conditions. However, when personal and domestic hygiene are included, the basic amount is estimated at 20 litres per person per day.[74]

Given that what may be adequate in one situation may turn out to be inadequate in another, General Comment 15 further unpacks the term *adequacy* as embodying various dimensions of meaningful autonomy of access. To meaningfully enjoy autonomous access to water, four main inter-related factors must be present: physical access, economic access, non-discriminatory access and information access. Physical access connotes personal security within the precincts of the water source. The UNCESCR accordingly recommends that

[70] Ibid Para 12 (a); Drinking is defined as meaning water for consumption through beverages and food stuffs. Personal and household hygiene means personal cleanliness and hygiene of the household environment. Personal sanitation means disposal of human excreta. Food preparation includes food hygiene and preparation of foodstuffs, whether water is incorporated into or comes into contact with food.
[71] Ibid para 10.
[72] Ibid paras 6 and 11.
[73] Ibid para 2.
[74] WHO *Guidelines for Drinking Water Quality* 4 ed (2011) 83-84.

autonomy of access to water sources can be achieved where water sources are within safe physical reach for all sections of the population.[75] The UNCESCR elaborates that this requires services being within or in the immediate vicinity of each household,[76] education institution[77] and the workplace.[78] Although the UNCESCR does not specifically elaborate on the term 'immediate vicinity', the context in which it is applied appears similar to the World Bank's proposition that the notion of physical access entails the individual being within reasonable distance of the water source.[79]

'Economic accessibility' is in turn defined as an entitlement to affordable water facilities and services. For water to be economically accessible, the 'direct and indirect costs and charges associated with securing water must not compromise or threaten realization of other Covenant rights.'[80] Therefore, in determining what amounts to an adequate price for water, States should ensure that the price of water does not prohibit citizens from being able to consume other necessities or prohibit them from consuming water at all.[81]

Accessibility of water and water facilities also implicates the avoidance of discriminatory practices and policies. The Limburg Principles expound on the scope of the duty of non-discrimination by emphasizing that it should be checked at two levels: discrimination which may result because of existing laws, and actual discriminatory practices which may occur as a result of unequal enjoyment of rights on account of a lack of resources.[82] The UNCESCR emphasizes both of these aspects and proposes that to avoid discriminatory practices, water facilities must be accessible to all including the vulnerable members of society both in law and in fact. The UNCESCR shows that the autonomy over access to water and water facilities envisages that citizens will be guaranteed access to water sources which allow them to exercise some choice as to how water is actually enjoyed. For

[75] Para 12 (c) (i) General Comment 15; and General Comment 14, para 12 (b).
[76] A household is defined as including a permanent or semi permanent dwelling or temporary halting site. In General Comment 4, the UNCESCR stipulates that housing should include sustainable access to facilities for obtaining water.
[77] In General Comment 13, UNCESCR also stipulates that the right to education encompasses the presence of drinking water facilities within schools.
[78] The ILO Health and Safety Standards recommend that work places should provide drinking water facilities to employees.
[79] The World Bank has defined 'reasonable distance' as being in the home or within 15 minutes' walking distance. Taking local conditions into account, in urban areas, a distance not more than 200 metres from a house to a public stand post may be considered reasonable while in rural areas, reasonableness would imply that a housewife does not spend a disproportionate part of the day fetching water for her family's needs.
[80] Para 12(c)(ii) General Comment 15.
[81] According to the US Environmental Protection Agency, water is estimated to be 'unaffordable' if the cost exceeds two percent of household expenditure or 1.25 percent for poorer households. Sourced from US Environmental Protection Agency, 'Information for states on developing affordability criteria for drinking water' (1997) Washington DC.
[82] Limburg Principles, Principle 36-38; UN Doc E/CN4/1987/17.

instance, citizens may have a choice as to whether water may be accessed in the form of in-house connections, stand taps, bore holes or natural springs. At the same time, autonomy envisages that the State will not interfere with such enjoyment of access to water facilities.

Finally, the UNCESCR elaborates on the importance of ensuring sustainable access to water resources for agriculture.[83] Given that in its General Comment expounding on the right to food, the UNCESCR defines sustainability as a notion that incorporates long term availability and accessibility, it appears that the enjoyment of a right to water also implicates availability of water for food production.[84]

(b) Water related entitlements

Over and above an entitlement to access adequate water inherent to the freedom of autonomy to access water, the UNCESCR envisages that the right to water engenders an entitlement to 'a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.'[85] It would appear that the UNCESCR envisages that, in order to actualise the freedom to enjoy the right to water, States Parties need to set up supportive institutions which link the individual beneficiary to the water resources. Such a framework must however be understood within the broader goals of guaranteeing equality and non-discrimination in access to water. It can take the form of a structured national legal and policy regime, which ought to comprise of laws, regulations, policies as well as enforcement mechanisms. To actualise enjoyment of the right to water, such a framework ought also to encompass a physical infrastructural framework which practically makes concrete improvements to water availability. As such, the State's institutional framework should be able to make the freedoms relating to access real.

The right to water also implicates that the individual is entitled to water which is safe for human consumption, thereby encompassing a standard of water quality. In paragraph 12(b) of General Comment 15, the UNCESCR notes that water must be free from micro-organisms, chemical substances and radiological hazards that are harmful to health. The WHO also elaborates on the content of this standard by, for instance, determining that water

[83] Para 7 General Comment 15.
[84] Refer to paras 6 -8, 12 and 13 of General Comment 12, *The Right to Adequate Food*, E/C.12/1999/5. This general comment on the right to food notes that the core content of the right to food implies that food is available in a quantity and quality sufficient to satisfy the dietary needs of individuals. The accessibility of food should be both economic, by being affordable and physical in terms of being accessible to everyone, including for vulnerable individuals. In terms of availability, it refers to possibilities of feeding oneself directly from productive land or other natural resources or from well-functioning food distribution processes.
[85] Para 10, General Comment 15.

for human consumption should be derived from 'improved water sources'.[86] This is because, where an individual is able to collect water from an improved water source, the quality of such water is more likely to be free from micro-organisms and adulteration.[87] The notion of quality also embraces a standard of acceptability in terms of odour, taste and colour for personal and domestic use.[88] The importance of the quality of water which furthers enjoyment of the right to water is also underscored by the UNCESCR's position on the right to health as expressed in General Comment 14. There, the UNCESCR recognises that water is a determinant of the right to health and necessitates the availability of safe and potable water.[89]

To conclude, the freedoms and entitlements flowing from the recognition of a human right to water can be discerned from the UNCESCR's exposition on the right to water in General Comment 15. Concerns over the lack of discernible content of the right to water as expressed by some commentators are thus not borne out.

2.3.2 The Resulting State Obligations

An important feature of the ICESCR is its explicit pronunciation of States' Parties obligations towards the fulfilment of covenant rights regardless of the level of development attained within the domestic setting. In this section I particularly focus on the obligations arising out of the ICESCR and the UNCESCR general comment 15 and revisit scholarly elaborations of the specific obligations attaching to States Parties.[90]

Article 2 (1) of the ICESCR sets out the obligation of States Parties determining that:

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

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[86] WHO *Guidelines for Drinking- water Quality* op cit note 75 at 83 - 85. An improved drinking-water source is one that by the nature of its construction and design adequately protects the source from outside contamination, in particular by faecal matter. Examples are a public tap, piped water into dwelling, borehole, protected dug well, protected spring and rain water collection.

[87] WHO *Guidelines for Drinking- water Quality* op cit note 75. States are expected to use the guidelines as a benchmark to developing national standards based on the State's peculiar circumstances.

[88] In addition, in the context of the health of individuals acceptability is defined as being respectful of culture, gender sensitive and life cycle requirements in General Comment 14, *The right to the highest attainable standard of health* UN Doc E/C12/2000/4 (2000) para 12 (c).

[89] Ibid para 4, para 9 and para 12 (a).

[90] The ICCPR and other international and regional treaties envisage state obligations attaching to States Parties which are for the most part similar to those stipulated in the ICESCR. Even then, a more detailed analysis of States Obligations is provided by Matthew CR Craven op cit note 23 at 106-152; Philip Alston & Gerard Quinn op cit note 2. Also see General Comment 3, The nature of States Parties obligations, 1990; General Comment 9 *The domestic application of the Covenant* E/C12/1998/24.

From the phrasing of Article 2(1), there appear to be four main requirements against which States compliance with the ICESCR ought to be measured. The first requirement is to *take steps* to achieve the Covenant rights.[91] The second requirement is that of *progressive realisation,* which implies that States Parties are not necessarily expected to realise the rights immediately, but are nevertheless obliged to act expeditiously and effectively in order to ultimately reach the goal of realizing the rights within each particular socio-economic context.[92] The third requirement is that the State is required to use *all appropriate means* to achieve the covenant rights. Over and above legislation and policy, the availability of judicial remedies is increasingly accepted as a good indication that a State has put in place an appropriate mechanism for ameliorating violations of covenant rights.[93] Finally, the State is required to deploy *the maximum of available resources* towards the progressive realisation of covenant rights. It demands that States must, without exceeding the possibilities available to them, do their utmost in implementing the rights enshrined in the Covenant.[94] Consequently, the measure of availability of resources is determined by aggregating all international and national resources available to each particular State.

The *resources* stipulated in Article 2 (1) ICESCR refer to the specific tools which make it possible for the steps taken by the State to become meaningful, and typically include financial, natural, human, technological and informational resources.[95] In relation to the human right to water, this is even more intricate, because the water itself constitutes a natural resource. At the same time, substantial financial resources are required to improve water infrastructure while human resources are required to innovate and implement technological advances in water supply, which would enhance the enjoyment of the right within the resource envelope of the State.

Commentators have raised concerns about the manner of articulation of the state obligations under the ICESCR. The state obligations are considered to be imprecise, incapable of justiciability and not readily capable of enforcement. Nonetheless, in order to understand international law conceptualisations of a right to water, it is still necessary to explore the manner in which the obligations are spelt out in the tripartite typological

[91] Article 12 (2) (a)- (c) ICESCR; Robert E Robertson 'Measuring state compliance with the obligation to devote the 'maximum available resources' to realising economic, social, and cultural rights' (1994) 16 *HRQ* 693,695. Also see Para 2 General Comment 3 *The Nature of States Parties' Obligations* 12/14/1990; Philip Alston & Gerard Quinn op cit note 2 at 166.
[92] Principle 21, The Limburg Principles on the Implementation of the ICESCR UN Doc E/CN.4/1987/17; General Comment 3 para 9.
[93] Philip Alston and Gerard Quinn op cit note 2 at166-170.
[94] Philip Alston and Gerard Quinn op cit note 2 at 179; Limburg principles, principle 25.
[95]Robert E Robertson op cit note 92 at 697.

paradigm, as well as how the minimum core approach elaborates an understanding of the states obligations engendered by a right to water.

(a) State obligations to respect, protect and fulfil

The UNCESCR articulated the exact obligations attaching to a right to water, using the tripartite typology of interdependent duties adopted by the UN and traced back to the writings of Henry Shue according to which all rights impose at least three interrelated obligations, namely to respect, protect and fulfil upon States .[96] According to General Comment 15, the obligation to respect the right to water requires that States parties refrain from interfering with the enjoyment of the right to water for those for whom it has already been realised. It demands that States refrain from acts that would cause unlawful pollution or contamination of water.[97] It appears that interfering with enjoyment of the right to water includes intentional actions on the part of the State to impede enjoyment of the right to water such as arbitrary disconnections. For instance, the UNCESCR proposes that no disconnections should be effected in circumstances where an individual is deprived of the minimum essential level of water. As such, the State is obliged to establish a transparent and legal process of disconnection which takes into account the availability of a basic minimum amount of water for basic needs.[98]

The UNCESCR further envisages that the human right to water implicates several positive obligations for the State. First, it elaborates an obligation to protect the human right to water which enjoins States parties to prevent third parties from interfering with the enjoyment of water by existing beneficiaries. The UNCESCR envisages that the obligation to protect implores States to adopt necessary and effective legislative measures that would restrain third parties, including individuals, groups, corporations and their agents from inequitably dealing with water resources.[99]

The UNCESCR accordingly recommends that the obligation to protect requires that, where water services are operated or controlled by third parties, the States parties provide effective regulation. States must therefore prevent third party water operators from

[96] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, (1980). In addition, according to Rule 65, UNCESCR Rules of Procedure of the Committee, the Committee may prepare general comments based on the various articles and provisions of the Covenant with a view to assisting States parties in fulfilling their reporting obligations. (1 September 1993 UN Doc E/C12/1990/4/Rev1).
[97] Also refer to General Comment 14, para 34; Knut Bourquain op cit note 24 at 141-142; General Comment 15, para 21.
[98] See para 56, General Comment 15; and Malcolm Langford 'The United Nations concept of water as a human right: A new paradigm for old problems?' (2005) 21(2) *Int J of Water Resources Development* 273, 277-8.
[99] See para 23, General Comment 15.

compromising equality, affordability and physical accessibility of sufficient safe and acceptable water, by establishing an effective national regulatory system. Such a system would ideally include institutions that provide independent monitoring, a framework for genuine public participation and potential penalties for non-compliance on the part of water suppliers.[100]

The UNCESCR also elaborated on the obligation to fulfil the right to water. This obligation entails facilitating, promoting and providing water. The obligation to facilitate requires States to take positive steps to assist individuals and communities to enjoy the right to water. It appears that, at one level, the State has an obligation to remove any impediments to the enjoyment of the right to water such that those citizens who can afford to pay for water may not be denied their entitlement to a water supply. On the other hand, the obligation to provide enjoins States to provide water when communities or individuals are unable to provide it for themselves, for reasons beyond their control.[101]

An equally important aspect of the obligation to fulfil the right to water pertains to access to information. To satisfy the requirement of accessibility of water resources, the State ought to enhance access to information.[102] This entails ensuring that citizens are able to seek and receive information which would be useful to enabling them to make informed choices about water services. Conversely, the State ought to take steps to impart information concerning water issues to citizens.

(b) Minimum core obligations

The UNCESCR had earlier adopted the minimum core concept as a means to providing States Parties with a minimum threshold for States' obligations flowing from socio-economic rights. Following this, the UNCESCR elaborated on the minimum core of the right to water in General Comment 15. The minimum core is thus distinguishable from the full scope of the right because it only sets the floor for a State's obligations.[103] A minimum core of the right to

[100] See para 24, General Comment 15. Also see para 35, general comment 14 on the right to health which describes the obligation to protect to include equal access to health-related services provided by third parties. Knut Bourquain op cit note 24 at 148.
[101] See para 25, General Comment 15; and para 37, general comment 14.
[102] See para 12 (c) (iv), General Comment 15.
[103] David Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 119 *SALJ* 484,488; Guidelines 9 and 10 Maastricht Guidelines; Victor Dankwa, Cees Flinterman and Scott Leckie 'Commentary to the Maastricht Guidelines on violations of economic, social and cultural rights' (1998) 20 (3) *HRQ* 717; Phillip Alston 'Out of the Abyss: The challenges confronting the new UN committee on economic, social and cultural rights' (1987) 9 *HRQ* 332, 352-353; General Comment No 3 E/1991/23; Katharine G Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale J of Int Law* 113.

water is useful to clarify the content of the right for purposes of prioritising plans and their implementation by the State. It also protects the vulnerable citizens within the State by outlining the very minimum basic services they are entitled from the State.

While the minimum core appears to be a significant feature of the UNCESCR's approach to socio-economic rights, scholarly reactions to the concept have been mixed. First, some have expressed concern that developing states will most probably find difficulty in fulfilling immediate core obligations due to scarcity of resources.[104] Others have cautioned that the obligations promote a ranking of claims while ignoring the underlying factors which affect a State's efforts to actualize socio-economic rights. It has further been suggested that, as a result of the minimum core obligations being vague, they fail to provide valuable guidance to a court faced with concrete cases to determine whether specific claimants' needs ought to be prioritized over others.[105]

This notwithstanding, the UNCESCR determined that there are nine minimum core obligations in relation to the right to water, which are of immediate effect.[106] These are:

a) A minimum essential amount of water, sufficient and safe for personal and domestic uses to prevent disease;
b) A right of access to water and water facilities without discrimination especially for disadvantaged or marginalised groups;
c) Physical access to water facilities or services which provide sufficient, safe and regular water through a sufficient number of water outlets to avoid prohibitive waiting time within a reasonable distance of the household;
d) Personal security is not threatened when physically accessing water;
e) Equitable distribution of all available water facilities and services;
f) Adopt and implement a national water strategy and plan of action addressing the whole population which is subjected to periodic review through transparent and participatory processes. The strategy should include indicators and bench marks by which progress can be closely monitored;
g) Monitor the extent of realization or non-realisation of the right to water;
h) Adopt relatively low cost targeted programmes to protect vulnerable and marginalised groups;

[104] Stephen C McCaffrey op cit note 4 at 110-111; Stephen C McCaffrey & Kate J Neville 'Small capacity and big responsibilities: Financial and legal implications of a human right to water for developing countries' (2008-2009) 21 *Georgetown Int Environmental LR* 679, 680 & 701; In contrast, Mashood A Baderin 'The African Commission Human and Peoples' Rights and the Implementation of Economic, Social, and Cultural Rights in Africa' in Mashood A Baderin & Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* 139,142.

[105] Karin Lehmann 'In defense of the Constitutional Court: Litigating Socio-economic rights and the myth of the minimum core' (2006-2007) *American University Int LR* 163, 187-189; Katharine G Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale JIL* 113.

[106] George S McGraw 'Defining and defending the right to water and its minimum core: legal construction and the role of national jurisprudence' (2010-11) *Loyola University Chicago Int LR* 127,159-160. He summarises these obligations as follows: 1. The obligation to ensure universal access to water required to meet basic needs. 2. The obligation to put in place measures to guarantee non-discrimination in access. 3. The obligation to take deliberate, concrete and targeted steps towards full realisation and recognition of the right to water.

i) Take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.[107]

In summary, the minimum core obligations provide clarity on the content of the right to water, and additionally, they indicate what policies ought to be given priority within the domestic context. It also demonstrates that there is sufficient evidence from which to infer specific entitlements for citizens and specific obligations attaching to States which flow directly from recognition of the right to water even though there remains some uncertainty about its full scope.

2.3.3 Conclusion

In its current form the international human rights law regime provides ample guidance with which national legal systems can work in order to give content to a right to water within their national legal systems. In addition, the guidance provided by the UNCESCR in general comment 15 although not binding appears to elaborate a fully justiciable right to water. Finally, the UNCESCR's guidance appears to be elaborate enough to guide courts exercising their interpretive and enforcement of rights mandate within domestic courts such that citizens' claims for enjoyment of a right to water can be effectively adjudicated upon. Therefore claims that the right to water is too vague to recognise and consequently to make the subject of adjudication are no longer sound.

2.4 CONCLUSION: IMPLICATIONS FOR DOMESTIC LEGAL SYSTEMS

Returning to the main purpose of this chapter, it has shown that the human right to water is inferred within most international law Conventions and that there is increasing acceptance of the right to water derived from the practice of States Parties to these Conventions. We can therefore conclude that the right to water exists within international law, its content is clearly articulated within international law, and the obligations it engenders are increasingly clear. In conclusion, I therefore consider its implications for domestic legal systems.

While the duty of incorporation of international covenants is not absolute, States are obliged to ensure that the spirit of their international law obligations is translated into their domestic legislative and policy frameworks. There are two main implications which arise from the recognition of a right to water in international human rights law. First, at national level, the conceptualisation and articulation of water and water issues ought to take international law into account. Secondly, States must then translate the entitlements

[107] Para 37, General Comment 15.

envisaged and the obligations attaching to the State in terms of the international law right to water within the national legal regime. Put differently, States must adopt a rights based approach to the manner in which water is managed, delivered and regulated.

Applying a rights based approach boils down to using rights as scaffolding for conceptualising and implementing policies, in the sense that rights permeate all of the policies that relate to water services delivery.[108] A rights-based approach brings three main advantages within the domestic setting. First, it recognises the existence of claims and their corresponding obligations. In so doing, a rights-based approach translates mere needs to rightful enforceable claims. In this instance, a rights-based approach to realizing a right to water would serve to expand thinking about water delivery in terms of the international law human rights standards elaborated in General Comment 15.

Secondly, a rights-based approach ensures that the rights holders and duty bearers are distinctly recognised. For rights holders this recognition has immense benefits. For instance, it emboldens them to claim against duty bearers and exercise their rights effectively.[109] This recognition can enhance genuine public participation in the implementation of strategies for water delivery, through collaborating with communities but also through the use of rights based adjudication.

Finally, a rights based approach enhances accountability by establishing a paradigm whereby duty bearers are held accountable to rights bearers.[110] In human rights terms, accountability is useful at different levels. Since there are presumably competing needs that a State ought to address, it has been argued that accountability would ultimately enhance self-scrutiny by the executive. In this sense, accountability is not envisaged only as a routine electoral outcome but also extends to the kind of responsiveness demanded by a robust adjudicative system. Within a rights based paradigm, the executive exercises its functions aware that its policies must be ultimately explained within an objective standard. As a result, the state becomes more accountable by justifying to its citizens its policies and priorities towards enhancing enjoyment of a right to water.

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[108] Overseas Development Institute 'What can we do with a rights-based approach to development?' (1999) ODI Briefing Paper, London quoted in Emilie Filmer-Wilson, 'The human rights-based approach to development: The right to water' (2005) 2 *Netherlands Quarterly Review* 213, 216.

[109] Stephen C McCaffrey & Kate J Neville op cite note 105 at 693-700. The authors describe capacity as reflecting a government's financial, technical resources, and others such as the perception of government as an effective and responsible public agent and political will.

[110] Overseas Development Institute op cit note 109 at 217-218; Hugo Trembley 'A clash of paradigms in the water sector? Tensions and synergies between integrated water resources management and the human rights based approach to development' (2011) 51 *Nat. Resources Journal* 307, 318.

CHAPTER 3

RECOGNISING AND ENFORCING THE RIGHT TO WATER IN UGANDA

3.1 INTRODUCTION

A starting point for understanding the struggle for recognition and enforcement of socio-economic rights in Uganda is in the history of the Constitution making process prior to 1995. Accordingly, this chapter begins with a chronological account of Uganda's previous Constitutions and a background to the debates surrounding the promulgation of the 1995 Constitution.[1] It then explores the unique features of the 1995 Constitution which facilitate executive, legislative and judicial interaction with human rights (including, presumably a human right to water). In the third section, I explore the manner in which the human right to water may be inferred from the constitutional text. In section four, I explore the ways in which Uganda's legislative and policy framework elaborate and give content to the right to water. Section five interrogates whether it is possible to enforce the human right to water within the Ugandan courts. Considering that the right to water has not yet been adjudicated upon by the courts, I examine the approach of the courts in adjudicating other socio-economic rights. As a result, much of this section speculates on the extent to which the jurisprudence of the courts in Uganda would allow an elaboration and enforcement of the right to water. Finally, I draw conclusions on the potential and impediments to constitutional adjudication as a means to enhancing enjoyment of the human right to water in Uganda.

3.2 A HISTORICAL BACKGROUND TO THE STRUGGLE FOR SOCIO-ECONOMIC RIGHTS RECOGNITION IN UGANDA

Prior to 1995, Uganda had enacted three Constitutions. The first Constitution was enacted in 1962, at independence. Thereafter, consequent to politically tumultuous events in 1966,

[1] For a thorough account see Republic of Uganda *The Report of the Uganda Constitutional Commission: Analysis and Recommendations* (1993) UPCC; Republic of Uganda *Official Report of the Proceedings of the Constituent Assembly* (1994) UPCC; J Oloka- Onyango 'Economic and social human rights in the aftermath of Uganda's fourth Constitution: A critical reconceptualization' (2004) Working Paper No 88 Centre for Basic Research 1; George W Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* (2006) 1, 19-38; Frederick E Ssempebwa 'The Constitution as a basis of political and socio-economic development: Some issues' in Richard Okumu Wengi (ed) *Founding the Constitution of Uganda Essays and Materials* (2011) 31-41.

another Constitution was enacted. Only a year later, the third Constitution was promulgated.[2] In terms of human rights, these three constitutions recognised the fundamental human rights of the individual within a consolidated chapter, enumerating the Bill of Rights. These constitutional texts did not include additional directive principles of state policy. The Bills of Rights in these Constitutions appeared to give a limited scope to fundamental human rights as being limited to including the protection of life, liberty, security of the person and property.[3] The closest that the texts came to recognising socio-economic rights appears to have been the protection from forced labor and the protection of the right to a pension for public servants.

The period between 1966 and 1986 was also dominated by political instability.[4] Although terms such as fundamental human rights were routinely used by State agencies, they were conceived as relating to civil and political rights. To illustrate, in 1986 the Attorney General of Uganda issued a legal notice conferring powers upon a special Commission of Inquiry into violations of human rights covering the period 1962-1986. While, according to its terms of reference, the Commission was to inquire into 'human rights violations', these were defined as including acts of mass murder, arbitrary arrests, disappearances and denial of fair trials.[5] Subsequently, even though the Commission of Inquiry noted that the political turmoil experienced nationwide had led to social and economic deterioration (with the majority living below the poverty line without access to basic rights such as food, shelter and education) it never pursued an inquiry into the nature and form of socio-economic rights violations, nor did it provide any recommendations as to their amelioration.

After decades of political instability, the political transition, which began in 1986, was followed closely by a debate about constitutional reform. In 1988, a Constitutional Commission was constituted and tasked with gathering the views of the majority of Ugandans in order to incorporate these views and aspirations within the new Constitution. Particularly, the Constitutional Commission was required to make proposals for a national

[2] For an historical account of the enumeration of human rights within the previous Constitutions, see Joe Oloka-Onyango 'Judicial power and constitutionalism in Uganda' in Mahmood Mamdani & Joe Oloka-Onyango (eds) (1993) Uganda *Studies in Living Conditions Popular Movements and Constitutionalism* 463; Manisuli Ssenyonjo 'The domestic protection and promotion of human rights under the 1995 Ugandan Constitution' (2002) 20 *Netherlands QHR* 445, 446-453.

[3] See both Chapters III of the Constitution of Uganda 1962 and Constitution of the Republic of Uganda 1967; Republic Of Uganda *The Report of the Uganda Constitutional Commission* op cit note 1 at 138.

[4] 1986 is often marked as a significant reference point being the year in which Yoweri Museveni's government took over political power and much of the previous civil strife was brought to an end.

[5] Legal Notice No 5 of 1986; and The Republic Of Uganda (1994) *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* 1, 14-15 and 583.

Constitution which would guarantee the fundamental rights and freedoms of Ugandans.[6] The report compiled subsequent to the Constitutional Commission's review paid some attention to the recognition of socio-economic rights. The Commission noted:

> The rights to food, health, clean water…human shelter have been enjoyed only by some. Without these basic necessities of life, other human rights become virtually meaningless. Post-independence governments have squandered the country's wealth without doing justice to either the rural farmers or the urban and rural poor and without developing and implementing policies for fighting backwardness and abject poverty.[7]

The Constitutional Commission additionally wrote:

> There is widespread support for the view that priority should be accorded to the basic necessities of life such as food, water, shelter, health services, education…for the needy when deciding on priorities for socio-economic development and provision of services.[8]

Nonetheless, the Constitutional Commission recommended that these socio-economic rights could not be immediately enforced and were better suited for inclusion as national objectives and directive principles of State policy.[9] Only a selection of women's rights, labour rights and the right to a clean environment were recommended for inclusion as fundamental rights. In reference to enforcement of socio-economic rights, the Commission wrote:

> We believe Uganda needs to recognize the entire *International Bill of Rights* as developed up to now. The new Constitution should enshrine all its principles while ordinary laws should spell out necessary details of the Bill. But this should be done in accordance with the mentality and aspirations of the people bearing in mind the present as well as the likely future conditions of the country. Such rights which cannot be immediately enforced should nevertheless be contained in the Directive Principles of State Policy to serve as goals to be achieved.[10]

Following directly from this Constitutional Commission report, the Constituent Assembly delegates debated the content of the constitutional text. These debates also reflect a perception that the socio-economic rights enumerated within the draft Constitution were to be understood as mere aspirations. It is plausible that the extensive civil rights violations of

[6] The Constitutional Commission was established by The Uganda Constitutional Statute 5 of 1988. See sections 4 and 5; Republic of Uganda *The Report of the Uganda Constitutional Commission* op cit note 1 at para 0.17 for an extrapolation of the terms of reference which guided this Commission.
[7] Republic of Uganda *The Report of the Uganda Constitutional Commission* op cit note 1 at para 7.60, 147.
[8] Ibid para 23.21, 636.
[9] Ibid at 147, 154-161, 193, 834*;* See J Oloka-Onyango op cit note 1 at 12-15.
[10]Republic of Uganda *The Report of the Uganda Constitutional Commission* op cit note 1 at para 7.102, 159 (emphasis original).

previous years made it difficult to envisage extending equal protection to socio-economic rights. For instance, one delegate commented that:

> …these objectives are very good, the point I am seeking clarification on is about the possibility or practicability of this objective, because at any given time, I do not see how any Government will provide all these things, will ensure free education for all, food, accommodation, good health and so forth.[11]

In fact, the report of the Assembly's debates reflects that these objectives should by all means remain non-justiciable. For instance, delegates arguing against justiciability of socio-economic rights stated:

> …suppose tomorrow I go to Ibanda and I find I have no clean water within my vicinity, am I supposed to sue the government on the basis of this clause of Article 66?[12]

Another view stated:

> …I wonder how many cases [litigation] we are going to have of people with no decent accommodation, people with no medical facilities, with no clean water and so forth. I do not know how practicable this is going to be;….[13]

The Constituent Assembly ultimately agreed to remove the chapter detailing the socio-economic objectives from the main body of the Constitution. In the end, 1995 saw the passing of the country's fourth Constitution which aspired to 'building a better future by establishing a socioeconomic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress....'[14] In addition to a justiciable Bill of Rights, the Constitution of the Republic of Uganda (1995 Constitution) contained a non-justiciable section, which enumerates socio-economic rights as national directive principles of State policy (NODPSP). In this way, the NODPSP recognise, among others, non-justiciable rights to education, health, decent shelter and food security.[15]

The NODPSP also enumerate several social and economic objectives aimed at delivering social justice and economic development. For instance, the NODPSP recognise the

[11]Republic of Uganda *Proceedings of the Constituent Assembly Official Report 1 August 1994* volume 4 Motion: General debate on the draft Constitution of the Republic of Uganda 1377. Refer to Mr. Masalu Musene, 1384 (also quoted in J Oloka-Onyango op cit note 1 at 17).
[12]Ibid Lt Gumisiriza Guma 2115. (Also quoted in J Oloka-Onyango op cit note 1 at 19.
[13]Op cit note 11 at 1384. Also quoted in J Oloka-Onyango op cit note 1 at 17.
[14]Paragraph 3 of the preamble to the 1995 Constitution. This Uganda Constitution was promulgated on 8th October 1995, coinciding with the country's 33rd independence anniversary. It is the country's fourth constitution since independence.
[15] Objective XIV 1995 Constitution.

rights to development, culture, the environment, protection of the aged, protection of natural resources and ensuring gender equality.[16]

Commentators critical of the Constituent Assembly's approach to enumerating constitutional rights urge that the textual location of the rights became a crucial determinant of their effectiveness in influencing both law and policy.[17] Particularly, their relegation to the NODPSP meant that socio-economic rights were understood to be secondary and unequal to other fundamental human rights. Secondly, the classification of rights was determined by the Constituent Assembly delegates' conceptualisation of the justiciability of rights, meaning that socio-economic rights were classified as non-justiciable aspirations within the new constitutional dispensation.

But the promulgation of a 2005 amendment to the main body of the 1995 Constitution may have some effects on the conceptualisation of socio-economic rights. The newly inserted Article 8A stipulates that, 'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.' It has been argued that Article 8A may allow for a reading of the NODPSP as justiciable, given that the 1995 Constitution now makes it mandatory for the organs of State to take into account the NODPSP. Even then, this argument is yet to be tested before the courts.[18]

What is certain is that the NODPSP demand that the objectives and principles set out therein shall guide all organs and agencies of State in applying or interpreting the constitution or any law, and in making and interpreting any policy decisions for the establishment and promotion of a just, free and democratic society.[19] The NODPSP contemplate that the task of translating the rights enshrined therein lies with the executive and legislature, which are obliged to formulate goals for their protection and promotion.[20] Commentators accordingly

[16] Objectives IX, XXIV and XXVII, 1995 Constitution.
[17] J Oloka-Onyango op cit note 1 at 15-21.
[18]Christopher Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Working Paper No 24 HURIPEC 1,11-14; J Oloka- Onyango *Reviewing Chapter Four of the 1995 Constitution, Towards the progressive reform of human rights and democratic freedoms in Uganda* (2013) HURINET–U 1, 56-57; See John- Jean Barya 'Citizens' socioeconomic rights and Uganda's poverty eradication action plan' (2009) *East African Journal of Peace & HR* 398, 407-9; Ben Twinomugisha 'Protection of the right to health care of women living with HIV/AIDS in Uganda: The case of mbarara hospital' (2007) Working paper No 5 HURIPEC 1,19-20.
[19] Objective I (i) 1995 Constitution.
[20] Objectives V- XIII, 1995 Constitution. These particular NODPSP include respecting institutions mandated to protect and promote human rights; ensuring gender equality and equality for marginalized groups; protecting the aged; providing adequate resources for distribution of powers and functions; facilitating the right to development; public participation in development; the role of the State in protecting rights and ensuring equal opportunity, stimulating development and furthering social justice; ensure balanced and equitable development and protecting natural resources.

acknowledge that the NODPSP principles are significant, in so far as they have to be effected by the agencies of State whenever it is reasonably possible to do so without betraying the text of the 1995 Constitution.[21] This notwithstanding, the NODPSP, in their current form, appear to provide minimal support to the actual enjoyment and enforcement of socio-economic rights.[22]

3.3 THE BILL OF RIGHTS AND ITS ENFORCEMENT IN THE 1995 CONSTITUTION

The Constitution of the Republic of Uganda (1995 Constitution) contains an elaborate bill of rights which enumerates most human rights recognised within international law.[23] This bill of rights guarantees several qualified as well as unqualified rights. Although some of the rights enumerated are not elaborated upon, the bill of rights details the scope of many of the rights contained therein. The 1995 Constitution further contains a limitations clause, which also delimits the extent to which the rights can be enjoyed and enforced. Except for those rights that are non-derogable, the rights recognised in the bill of rights are subject to a general limitation to the effect that:

> In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.[24]

The 1995 Constitution further determines that public interest shall not permit any limitation of the enjoyment of the rights and freedoms prescribed by the Bill of Rights, beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is explicitly provided for in the Constitution.[25]

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[21]Grace Tumwine-Mukubwa 'The Uganda constitution, 1995 and human rights: Interpretation and enforcement of chapter 4 rights and freedoms' in Peter Mukidi Walubiri (ed) *Uganda: Constitutionalism at Cross Roads* (1999) 1, 13-16; John Cantius Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation'(2006)2 *African J Legal Studies*1,13.

[22]J Oloka-Onyango op cit note 18 at 2 and 11; J Oloka-Onyango 'The problematique of economic, social and cultural rights in globalized Uganda: A Conceptual review' (2007) HURIPEC Working paper no 3, 40, 47-49; J Oloka-Onyango 'Poverty, human rights and the quest for sustainable human development in structurally-adjusted Uganda' (2000) 18 *NQHR* 23, 31.

[23] Chapter 4 – Protection and Promotion of Fundamental and other human rights and freedoms. For instance, the right to education, culture, a clean and healthy environment and rights of workers are enumerated within chapter 4 of the Constitution. Civil and political rights such as a right to life, liberty, forced labour, privacy, right to a fair hearing as well as civic rights are also expressed within chapter four.

[24] Article 43(1). Non-derogable rights are enumerated in Article 44. They are freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair hearing and the right to an order of habeas corpus.

[25] Article 43(2)(c).

Although, the application of international human rights law within the domestic context is not explicitly articulated, it can be inferred within the NODPSP and main part of the 1995 Constitution. The NODPSP stipulates that the State's foreign policy shall espouse respect for international law and treaty obligations,[26] whereas Article 287 affirms that international treaties which were in force prior to promulgation of the 1995 Constitution continue to bind Uganda. While these provisions do not explicitly determine that the principles and interpretations of international law are applicable within the domestic system, it is plausible to argue that the application of international law can be inferred from the purpose and intent of the NODPSP and Article 287. Particularly, as will be elaborated below, this proposition may be extended to support the argument that any interpretations of the Constitution ought to be read in light of applicable international law.

The 1995 Constitution envisages an interpretive function for the Constitutional court, which includes the interpretation of the rights enshrined in the bill of rights.[27] Article 137(1) provides that 'Any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the constitutional court.' It further appears that while fulfilling its interpretive role, the Constitutional Court is mandated to scrutinize the legislative outcomes and executive action against standards imposed by the rights in the Bill of Rights.[28]

The 1995 Constitution envisages judicial enforcement of the bill of rights as well as judicial remedies for violations of the human rights enumerated therein. First, the 1995 Constitution stipulates that citizens can bring claims against the state and its institutions for rights violations. Article 50 determines that:

> Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation.[29]

Even where violations or threats of violations arise from statutory enactments or executive actions, the courts are constitutionally obliged to provide redress to citizens. Indeed, Article 137(3) stipulates that:

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[26] Objective XXVIII.

[27] Article 137(1). The Constitutional Court has original jurisdiction in matters of interpretation of the constitution. However, the Supreme Court is the highest appellate court and has appellate jurisdiction (sitting as a Constitutional Court of Appeal in all matters of constitutional interpretation).

[28] Article 137(3)(a) and (b).

[29] Article 50(1); also relevant are the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, Statutory Instrument No 26 of 1992, dated 20th November 1992, regulations 2 and 3 which provide that an application for redress in relation to the fundamental rights and freedoms referred to in the Constitution shall be made by motion and shall be heard by a judge of the High Court.

A person who alleges that-

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
(b) any act or omission by any person or authority,
is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.[30]

The 1995 Constitution thus bestows courts with wide discretionary powers to remedy violations of rights in the Bill of Rights. For instance in the exercise of judicial review, the Constitutional Court may make a declaration of unconstitutionality and where necessary determine the appropriate redress.[31] This envisages that, in the enforcement of rights, courts may be required to go beyond the rhetoric of mere declarations and may, in appropriate circumstances, have to provide substantive relief to successful claimants.[32]

3.4 INFERRING A CONSTITUTIONAL RIGHT TO WATER FROM THE 1995 CONSTITUTION

As in the case with other socio-economic rights, there is no right to water in the justiciable Bill of Rights in the 1995 Constitution. Explicit reference to a human right to water is only made within the NODPSP, which recognise the freedom to access water and freedom from interference with existing water supplies. The NODPSP stipulate that:

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall in particular, ensure that-
....
All Ugandans enjoy rights and opportunities and *access* to education, health services, *clean and safe water*, work, decent shelter, adequate clothing, food, security and pension and retirement benefits.[33]

In furtherance of this ideal, the NODPSP add that, 'The State shall take all practical measures to promote a good water management system at all levels.'[34] Since the NODPSP are fundamental to governing the State, it may be argued that the directives and aspirations

[30] Article 137(3)(a) and (b).
[31] Article 137(3)(b) and 137 (4).
[32] See for instance the position of the Supreme Court on the jurisdiction of the Constitutional Court in *Attorney General v Major General David Tinyefuza* Constitutional Appeal No. 1 of 1997, Judgments of Oder JSC; Tsekooko JSC, Mulenga JSC; and *Uganda Journalists Safety Committee & Another v Attorney General* Constitutional Petition No. 6 of 1997(unreported). For a detailed exposition on the potential of remedies see Manisuli Ssenyonjo op cit note 2 at 476.
[33] Objective XIV, Constitution of the Republic of Uganda, 1995. Emphasis mine.
[34] Objective XXI.

relating to universal access to safe and clean water ought to be read into the rights that have been explicitly enumerated within the bill of rights.

Constitutional impetus for reading the right to water into the bill of rights is provided by the State's obligation to comply with international human rights law standards, even in relation to non-enumerated rights. Article 45 of the 1995 Constitution reads:

> The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter [Bill of rights] shall not be regarded as excluding others not specifically mentioned.[35]

If Article 45 is given a generous interpretation, the absence of an explicit reference to the right to water in the Bill of Rights does not entirely exclude the right from constitutional recognition and, ultimately, enforcement. It is plausible to argue that Article 45 allows a reading into the constitutional text of other rights such as the right to water, which are espoused within international law.

There are several rights in the Bill of Rights into which aspects of the human right to water may be read. For instance, it is stated that, 'Every Ugandan has a right to a clean and healthy environment.'[36] Considering that the UNCESCR's general comment 15 regards the sustainability and quality of water resources as integral components of the right to water, it is possible to argue that a human right to water may be read into interpretations of environmental rights within the 1995 Constitution.[37]

In Article 22, the right to life is guaranteed. The Constitution stipulates that:

> No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda….[38]

Given the UN Human Rights Committee's view that the right to life should be interpreted generously, to encompass more than merely a restricted protection from arbitrary taking of life, it is possible to read basic survival requirements into a right to life. Given that water is a

[35] Article 45; Also see Ben Kiromba Twinomugisha 'Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda' (2007) 7 African *HRLJ* 283, 294.
[36] Article 39 Constitution of the Republic of Uganda, 1995.
[37] For instance in *British American Tobacco Limited v The Environmental Action Network Limited* Civil Application no 70/2002, Ntabgoba PJ in the High Court declined to read the right to life into the right to a clean and healthy environment.
[38] Article 22(1).

basic survival requirement, it is thus plausible to argue that a right to life may infer a right to water.[39]

However, the Ugandan right to life has been phrased negatively in the sense that it obliges the State to do little more than to respect life. This undermines the possibility of actualizing the positive dimensions of the right to life envisaged by UN Human Rights Committee's General comment six.[40] Even then, if the broader interpretation of a right to life prevailing in international law is accepted as an interpretive guideline for constitutional interpretation in Uganda, it is possible to view the right to life as requiring the State to take positive measures which would prevent loss of life. In relation to water, it is then possible to argue that the State has an obligation to fulfil and promote the right to life by putting in place measures which would prevent citizens from succumbing to illnesses arising from consuming contaminated water, or from lack of water for growing food for subsistence.

The human right to water may also be read into constitutional guarantees pertaining to the well being of children. In Article 34(3), a child's right to medical treatment, education or any other social or economic benefit is guaranteed. In Article 34(7), the need for special protection of orphans and other vulnerable children is recognised. When these provisions are read against the broader international law definition of a right to health, it is possible to argue that they may be generously interpreted as embodying a right to access safe water for daily use and consumption in order to sustain wellness.

The 1995 Constitution provides that no person shall be subjected to inhuman or degrading treatment.[41] Considering that the UNCESCR's General Comment 15 has espoused the right to water in a manner which seeks to protect the autonomy of the individual, it is possible to infer that the 1995 constitutional guarantee of human dignity may allow a reading which embodies aspects of the human right to water to the extent that where citizens are deprived of access to water, they are being subjected to an undignified existence.[42]

In addition, the right to water may be read into the 1995 Constitution's guarantees of a right to equality. For instance, in Article 21 the 1995 Constitution stipulates that:

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[39] General comment 6 The right to life HRI/GEN/1/Rev. 9 (Vol 1) para 5; J Oloka-Onyango op cit note 18 at 11-12.

[40] *Attorney General v Susan Kigula & Others* Constitutional Appeal No. 3 of 2002; Also refer to chapter 2 of this thesis. In contrast see *British American Tobacco Limited v The Environmental Action Network Limited* Civil Application no 70/2002.

[41] Article 24. Inhuman and degrading treatment is defined as any conduct which causes unnecessary suffering and shame on the dignity of a person. (*Salvatori Abuki v Attorney General* Constitutional Case No 2 of 1997).

[42] J Oloka-Onyango op cit note 18 at 17.

> All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.[43]

Two dimensions may be inferred from this text. First, it implies that laws must treat citizens equally. Secondly, it appears to require that the mechanisms established by the state to distribute resources such as water must be distributed equally. Given that the Constitution further envisages that it will redress the social and economic imbalances within Ugandan society, it is possible to read a guarantee of universal access to water into this provision.[44]

The notion of equal opportunity espoused in the 1995 Constitution further resonates with some important aspects of a human right to water. For example, equal opportunity is implied by Article 33(2) of the 1995 Constitution, which provides that the State shall provide the facilities and opportunities necessary to enhance the welfare of women. The Constitution adds that women shall have the right to equal opportunities in economic and social activities.[45] Given that General Comment 15 has recognised that women and children are the greatest victims of violations of the human right to water through the various impediments to access which cause them to either walk long distances or spend long hours collecting water for their families, it may be possible to read some aspects of a right to water into this constitutional guarantee.

Having found that it is possible to read international law understandings of the right to water into several provisions of the Ugandan Bill of Rights, I now consider the responsibility of the State for actualising the right to water. The 1995 Constitution provides that the rights and freedoms enshrined in the bill of rights shall be respected, upheld and promoted by all organs and agencies of Government and by all persons. This provision may be read as facilitating a direct interface with the UNCESCR's tripartite typology of state obligations to respect, protect and fulfil, as discussed in chapter 2. In relation to water, the obligation to respect appears to envisage deference to the constitutional norms by all organs and agencies of government as well as persons.[46] The obligation to protect seems to infer responsibility to look after natural resources, which include water bodies such as lakes, rivers, springs and streams, on behalf of the citizens.[47] The obligation to promote appears to infer taking all practical measures to advance a good water management system,[48] and to promote

[43]Article 21(1).
[44]J Oloka-Onyango op cit note 18 at 6-8.
[45]Article 33(4).
[46] Article 20(1); and Objective V(i) NODPSP.
[47] Objective XIII.
[48] Objective XXI.

sustainable development and public awareness of the need to manage water resources in a balanced and sustainable manner for the present and future generations.[49] The obligation to fulfil appears to envisage that the State ought to endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and in particular to ensure that all development efforts are directed at ensuring the maximum social and cultural well-being of the people.[50]

The actual manner in which the State's obligations to facilitate enjoyment of clean and safe water for citizens must be realised is contemplated by the 1995 Constitution. For example, the 1995 Constitution envisages a system of governance in which some level of executive and legislative responsibility is devolved to the lowest units of government (referred to as the local governments of districts). As such, local governments are vested with the responsibility to provide water services to people within their areas of governance.[51] If it is accepted that a right to water is inherent to the Constitution, it is possible to argue that the Constitution envisages that there is an obligation to respect, protect and fulfil the right to water in the exercise of local government authority.

To sum up, the 1995 Constitution appears to guarantee an implicit right to water, which at least operates as a directive principle to the legislature, executive and judiciary. It seems that, at most, the right to water can be read into the constitutional text by applying generous interpretations to other explicitly guaranteed rights which can be vindicated by citizens. Even then, its exact internal content and external reach remains abstract. I thus explore the extent to which the right to water is fleshed out in Uganda's national legislative and policy framework and consider whether this framework portrays the aspirations of the 1995 Constitution.

3.5 ELABORATING THE HUMAN RIGHT TO WATER WITHIN THE NATIONAL LEGISLATIVE FRAMEWORK

In the exercise of its constitutional powers, Parliament is mandated to make laws on any matter for the development and good governance of Uganda.[52] Considering that the NODPSP and Article 8A of the Constitution envisage that the State shall fulfil its obligations by enacting laws to give effect to the rights enumerated in the NODPSP, there are two primary pieces of legislation which directly impact water delivery and supply. These are the Water Act and its attendant regulations, and the National Water and Sewerage Corporation Act

[49] Objective XXVII.
[50] Objective XIV(a).
[51] Article 176(1) and (2)(g) 1995 Constitution; schedule 2 of the Constitution.
[52] Article 79(1) 1995 Constitution.

(NWSC Act).[53] Both of these Acts were promulgated in the aftermath of the 1995 Constitution and as part of broader water reforms. Of course, the timing of their promulgation is significant, given that Parliament and the executive were assuming significantly novel roles within a new constitutional dispensation.

Three considerations provide an important background to the motivation of these water law reforms. Prior to the enactment of these two pieces of legislation, there were several laws from which the principles of regulating water resources and water delivery could be pieced together. Even these were outmoded and inadequate.[54] It would seem that a key motivation for enacting new legislation was to harmonise the water legislative framework, such that water resources management was comprehensively dealt with in one piece of legislation. Secondly, the State had ratified the Ramsar Convention relating to the protection of wetland resources which had not been protected under any previous laws.[55] Given the emphasis on environmental rights within the NODPSP and main body of the 1995 Constitution it would seem that, at the time of promulgating the Constitution, the State was keen to articulate principles for the protection and management of the environment.[56] Thirdly, and a matter which is revisited later in this chapter, was the question of privatising water delivery services. It appears that the State was keen on preparing the National Water and Sewerage Corporation (NWSC) for divestiture and was motivated to concretise and legitimise its commercial goals in order to make the NWSC conducive for divestiture. These motivations ought to be borne in mind in considering how water was conceptualised within the two pieces of legislation designed to drive the constitution's water related NODPSP.

3.5.1 The Water Act

The Water Act stipulates that the provision of water for domestic use is central to its purpose. For instance, the Water Act emphasises as one of several objectives: 'to promote the provision of a clean, safe and sufficient supply of water for domestic purposes to all persons.'[57] The Water Act affirms the freedom to access water for basic human needs in section 7 which stipulates:

[53] The Water Act and NWSC Act were promulgated in 1995. While the NWSC Act Chapter 317 Laws of Uganda came into force in 1995, the Water Act came into force in 1997.
[54] Water service delivery was governed by NWSC Decree 34 of 1972. Water management was governed through a Public Lands Act 1969 and Rivers Act (1907) Chapter 357.
[55] Uganda acceded to the Ramsar Convention in March 1988.
[56] At about the same time that the Water Act and NWSC Act were promulgated, Parliament also promulgated the National Environment Act 1995 chapter 153.
[57] The Water Act, Chapter 152, Laws of Uganda, section 4(b). Under the definition section (1) 'domestic use' includes, use for the purpose of human consumption, washing and cooking by persons ordinarily resident on the

> … a person may-
> (a) While temporarily at any place; or
> (b) Being the occupier of or a resident on any land,
> where there is a natural source of water, use that water for domestic use, fighting fire or irrigating a subsistence garden.[58]

And that:

> …the occupier of land or resident on land may, with the approval of the authority responsible for the area, use any water under the land occupied by him or her on which he or she is resident or any land adjacent to that land.[59]

The Water Act prescribes water supply standards and elaborates the institutional framework within which water is supplied.[60] For instance, the Act envisages the creation of water supply areas delineated along local governments. The local governments which constitute water supply areas are required to establish water supply authorities and it is these water supply authorities that are ultimately mandated to deliver water to the individual at household level.[61] In urban areas, the water supply authority is the NWSC. Apart from these provisions, the rest of the Water Act is dedicated to management and protection of water resources.

However, while the right to access water sources appears to be couched in rights conscious language, the *water* which is the subject of the Water Act appears to be slightly different from that conceptualised in General Comment 15. The term 'water' is defined by the Water Act as including:

(i) Water flowing or situated upon the surface of any land;
(ii) Water flowing or contained in-
  (A) Any river, stream, watercourse or other natural course for water;
  (B) Any lake, pan, swamp, marsh or spring, whether or not it has been altered or artificially improved;
(iii) Ground water;
(iv) Such other water as the Ministry may from time to time declare to be water.[62]

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land where the use occurs; watering not more than 30 livestock units; irrigating a subsistence garden; and watering a subsistence fish pond.

[58] Section 7(1)(a) and (b).

[59] Section 7(2). Domestic use is defined in section 1(1) of the Water Act in substantially the same manner as General Comment 15. It includes purposes of human consumption, washing and cooking by persons ordinarily resident on the land where the use occurs; watering not more than 30 livestock units; irrigating a subsistence garden; and watering a subsistence pond.

[60] Sections 45-61.

[61] Section 45 and 46. In reality this chain of supply applies to a fraction of the population, 69% in urban areas and 64% in rural areas. The rest of the population rely on naturally existing water sources and do not benefit from the quality control mechanisms available to those who access piped water supply. Government Of Uganda Ministry of Water and Environment Joint Water and Environment Sector Strategic Plan Final Programme Document, April 2013 (JWESSP 2013-2018) 1, 11.

[62] Section 1(oo).

It would seem that the Water Act appears to be skewed towards broad water management of lakes, rivers and swamps as opposed to prescribing the manner in which the right to water may be enjoyed by citizens.

In terms of implementation, the Water Act appears to have enhanced enjoyment of the right to water by establishing several local government based water supply authorities, thereby actualising the NODPSP. As a result, there appear to be more people who can access safe and clean water through the local government water delivery system. But even then, there is still inequity in water supply, considering that a significant number of the population still does not have access to water or to a consistent and reliable water delivery mechanism.

It is plausible to suggest that the limited success in enhancing enjoyment of the right to water may be attributed to the Water Act's failure to articulate the full extent and scope of the human right to water. This obvious gap is likely to detract from the state much of its constitutional responsibility for providing water to its citizens in a manner which encapsulates the rights-based approach envisaged by the NODPSP.

3.5.2 The National Water & Sewerage Corporation Act

The NWSC Act, which was also promulgated in the aftermath of the 1995 Constitution, stipulates that the objects of the Corporation include, among others, the provision of water supply services for domestic and other uses.[63] In particular, the NWSC Act provides that the corporation shall develop the water and sewerage systems in urban centres and big national institutions.[64] Inevitably, the NWSC operates within a limited scope of urban centres and state owned institutions. The remainder of the NWSC Act details how the corporation shall be managed as a commercially viable entity.[65]

While the individual's autonomy to access water services through the NWSC is guaranteed, the use of water derived from the water authorities' supply infrastructure attracts a charge or fees for service provision.[66] Such charges have implications. First, the initial

[63] Section 5(2)(b)(i).
[64] Section 5(2)(d).
[65] The National Water and Sewerage Corporation has several institutional guidelines relating to the manner in which water supply will be managed. Some of these relate to water quality standards and a customer service charter. But these are non-enforceable standards which do not further a possibility for citizens to vindicate claims for a human right to water.
[66]This ought to be understood in relation to section 32 of the Water Act. Fees charged to consumers of water services include: 1) application and installation fees; 2) monthly service charges; 3) in case of disconnection, reconnection fees. Further to this under regulation 8(2) of the Water Supply Regulations 1999, the prescribed form for applying to get a connection includes application and installation fees; and s 94 which provides for the power of the authority to fix rates and charges for the services it provides. Regulation 28(1) Water Supply Regulations 1999, determines that charges are payable within a period of 14 days from the date of receipt of notice. Charges may be assessed on the basis of quantity of water supplied, or any other manner approved by the

entitlement to a water connection requires individuals to support their formal application for domestic water connection with a connection fee.[67] Secondly, NWSC is allowed by law to index its water service rates to prevailing market prices. By way of example, the Water Act (General Rates) Instrument determines that the rates payable are subject to annual indexation against the domestic price index, the exchange rate, the foreign price index and the electricity tariff.[68] It is arguable that, even where water authorities set out to price water at an affordable rate, such annual indexation would negate affordability if it is accepted that other determining factors of the water price consistently rise sharply annually.[69] Subsequently, the matter of fees and their negative impact on the affordability of water appears to be the most controversial aspect of the current water delivery paradigm.

One ironic aspect of the NWSC Act which merits consideration is its approach to water rates as encumbrances. Under the NWSC Act, water constitutes a charge on land.[70] As such, the potable water that flows from NWSC's infrastructure cannot become accessible to an individual unless the particular person can show legitimate claims to a portion of the land to which the water infrastructure has been installed.[71] It is arguable that access to water is not perceived as a universal entitlement of all citizens. Rather, it is viewed as an entitlement to those who can lay claim to land by either being owners or holders of a legal interest, such as a tenancy or a lease, over the land. Secondly, the consumer is obliged to pay fees for services provided irrespective of their financial situation. Where these rates remain unpaid for thirty days, the water authority is authorized to disconnect or restrict a water supply and to demand

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Minister. According to s 94(4) Water Act, a water authority is authorised to establish the minimum charges to be paid for water supplied and the charges to be paid per unit of water supplied albeit with the prior approval of the Minister. Also see s 5(2)(b) NWSC Act, which mandates the Corporation to set tariffs and charges.

[67]Regulation 8(2) Water Supply Regulations 1999 the prescribed form for applying to get a connection includes application and installation fees. In practice the initial connection fees are waived where the government acquires grants from donors. In the urban poor settlements, the connection fee is waived in exchange for the land owner allowing installation of a public stand tap on his/her land.

[68]Regulation 3 Water Act (General Rates) Instrument, Statutory Instrument No 30 of 2006.

[69]For instance in an interview with the NWSC-Kampala Water Legal Services Manager in September 2013, I learned that NWSC pays Uganda shillings 2 billion (equivalent to US $750,000) each month towards electricity charges alone for supplying water within Kampala alone (The interview transcript is on file with author).

[70]I use the term 'charge' in the sense that provision of water services creates a legal encumbrance over one's land.

[71]Regulation 8(2) Water Supply Regulations. Form A in the Schedule requires the land owner to sign the application form consenting to the water connection. Obviously this has implications where the applicant is not legally mandate to settle on the land. The requirement to accompany the application with a land title or proof of interest was brought to my attention during an interview with NWSC- Kampala Water's Legal Services Manager in September 2013 (The interview transcript is on file with author).

that the payment be settled.[72] Subsequently, it appears that the legislative framework facilitates a situation where clean and safe water is accessible to some and not all citizens.

While I acknowledge that some amount of control and regulation is required to manage and supply water services, the provisions in the NWSC Act appear to be disconnected from the purpose and intent of the 1995 Constitution's NODPSP and Bill of Rights, given that the legislation only marginally elaborates on the human right to water or embodies a rights consciousness. Even where the limitations to the bill of rights are taken into account, these statutory provisions, when read together, do not entirely lend themselves to a rights-based approach to delivery of water services.

In the end, when the Water Act and NWSC Act are considered together, it is possible to conclude that the impact of the NODPSP on water legislation has been limited. Drawing from this conclusion, I argue that there is a link between the weak elaborations of the right in national legislation to the manner in which the right to water is only present by implication within the overarching constitutional setting.

3.5.3 Appraising the national water policy framework

Initiating and implementing national policies that, ideally, embrace a rights-based approach to delivering water services is a function that is within the executive's constitutional mandate. Urging a closer reading of executive policies, commentators have cautioned that the country's economic policy framework may well be responsible for the impediments to full actualization of socio-economic rights in Uganda. These commentators argue that the economic policy framework has over the years promoted liberalization of the economy and privatization of national institutions hitherto responsible for delivery of basic services in a manner which does not reflect the spirit of the 1995 Constitution.[73] In this sub-section, I explore the extent to which the NODPSP have influenced policies relating to water, as well as the policies' impact on the enjoyment and elaboration of a human right to water for Ugandans.

There are several policies pertaining to water use and management that have been developed and implemented over the years. In this section, I focus particularly on the National Development Plan, because it provides a benchmark for current national planning processes and is instructive of the perception of water within the planning organs of State.

[72]Section 95(2)(a),(c) and (d) Water Act. The section details the procedures and remedies available to an unpaid water authority some of which are as extreme as distress and sale of the person's property and compulsory acquisition of the land under s 84(2) of the Water Act.

[73]J Oloka-Onyango op cit note 1 at 23-26; J Oloka-Onyango (2007) op cit note 22 at 5-6, 10-12 and 24; J Oloka-Onyango (2000) op cit note 22 at 30-33.

Thereafter, I consider specific water-related policies, particularly the National Water Policy and the Pro-poor strategy for water and sanitation, because they elaborate on water supply for domestic needs. Finally, I briefly consider the water privatisation policy and the ways in which it has impacted on the actual delivery of water services.

The National Development Plan was developed and adapted by Parliament in 2010.[74] It aims to ensure poverty eradication, with an emphasis on 'economic transformation and wealth creation'.[75] The National Development Plan anticipates that poverty will be eradicated by implementing eight objectives. Chief among these is 'increasing access to quality social services, through among others, safe water coverage'.[76] The term is used to refer to increasing the number of places where water can be collected in particular areas. As a driver for planning water services delivery, this suggests that the executive has been influenced by the NODPSP in articulating its vision for development. However, a closer look at the National Development Plan shows that the emphasis is on market-based approaches to alleviate poverty, without much attention being paid to advancing a rights agenda to the delivery of social services.

The National Water Policy, adopted in 1999, is the single most specific policy document elaborating on water delivery. It explicitly recognises that the policies enumerated within it are founded upon the 1995 Constitution's directive to provide clean and safe water and the state's responsibility to manage water resources sustainably. In view of this, the policy recognises that domestic water use must be given the highest priority when addressing water development and use. Indeed, the water policy stipulates that the key criteria to be used in allocating water resources will be the provision of water, 'in adequate quantity and quality to meet domestic demands'.[77] Having been formulated after the promulgation of the 1995 Constitution, the Policy appears to adhere to the directive principles' ideals, by envisioning

[74]Government Of Uganda *The National Development Plan 2010/11-2014/15* (2010). It replaced the Poverty Eradication Action Plans of 1997; 2001 and 2004/5-2007/8. Even these have been criticised for lacking an authentic human rights based approach to ameliorating socio-economic needs. See for instance J Oloka-Onyango (2007) op cit note 22 at 24-27.

[75]Government Of Uganda *The National Development Plan* (2010) 1, 3. Prior to the NDP, the Poverty Eradication Action Plans of 1997; 2001 and 2004/5 contained the primary national strategic planning objectives. They included a specific sector plan to improve rural and urban access to water. See also Phiona Muhwezi Mpanga 'Plenty of Water, but scarcity still persists: Surveying the status of the right to water in Uganda' (2007) Human Rights and Peace Center Working Paper No. 10, 1, 19-20; John-Jeanne Barya op cit note 18.

[76] See Objective d of the Plan. Other objectives include: Increasing household incomes and promoting equity; Enhancing the availability and quality of gainful employment; Improving stock and quality of economic infrastructure; Promoting science, technology, innovation and information and computer technology to enhance competitiveness; Enhancing human capital development; Strengthening good governance, defence and security; Promoting sustainable population and use of environment and natural resources.

[77] Government of Uganda *National Water Policy* (year) 8. Also refer to the meaning of 'domestic use' in the Water Act referred to earlier.

water supply within the context of meeting universal basic human needs envisioned by the 1995 Constitution.

The National Water Policy elaborates on the nature of water necessary to meet basic human needs, by making implicit reference to the quality of water sources from which water for human consumption ought to be sourced. For instance, the Water Policy anticipates that 'water' for domestic use is to be sourced from protected springs, hand pump equipped shallow wells or boreholes, or from a tap on a stand.[78] This is presumably because these water sources can be carefully monitored to guarantee for quality of water and availability of water channelled through them.

In addition to recommending sources for water suitable for human consumption, the National Water Policy embeds the responsibility of the State to make safe water available to citizens. The Policy stipulates that the water quality should be that recommended by the WHO until such a time as the country develops its own national water quality standards.[79] In 2009, the National Water Quality Management Strategy proposed to put in place national drinking water guidelines.[80] This strategy document is in effect an adoption of the WHO standards for water quality, given that the WHO guidelines are the benchmark for international water quality standards.

In the context of access to water, the National Water Policy stipulates a reasonable distance to a water source in urban and rural areas, by setting a recommended standard for distance from a rural public water point as being preferably within 1500 metres of the households. Within built up areas and peri-urban zones, it is recommended that a public water point be located within a walking distance not exceeding 200 metres. The policy stipulates that individual public water points in the urban areas should not serve more than 300 persons.[81] Finally, the Water policy recommends that in urban areas, the government's focus should be on the poorest communities in order to improve their access to water.[82]

The National Water policy specifies the amount of water that is ideally necessary for citizens' well being. In both rural and urban areas the basic service level for water supply means providing 20-25 litres per capita per day. This standard is in line with that recommended by the WHO and would appear compliant with international law standards.

[78] Ibid at 14-15.
[79] Op cit note 77 at 15.
[80] National Water Quality Management Strategy 39-40.
[81] Op cit note 77 at 14.
[82] Op cit note 77 at 15.

In sum, it appears that the National Water Policy adheres to the NODPSP and has conceptualised water delivery for domestic needs within a rights conscious framework. In addition, it refines specific standards of water delivery which, if well implemented, can go a long way to enhance enjoyment of the right to water.

The Pro-Poor National Strategy was designed to promote equity in access to water by improving access to water sources in urban and peri-urban areas, where the negative impact of population growth to water services appears to be most felt.[83] The Strategy aims at extending the water infrastructure to areas that previously had no access to the water supply network. For instance, the Strategy set out to pave way for extending water pipes to rural and urban slum settlements which hitherto had no existing water infrastructure. In addition, the requirement for a connection fee was waived in these areas. Considering that the initial cost of connecting to a water supply was known to impede citizens' access to water, subsidies received from Uganda's development partners were used to waive these charges in the urban slum settlements.[84] The Pro-Poor National Strategy proposes to improve the ease with which citizens can reach water. The executive has implemented this undertaking by increasing the number of stand pipes and public service points in urban slum settlements. In many of these areas, the stand pipes are pre-paid stand taps which allow several users to share a water source while retaining individual responsibility for the cost of the water.

But there are still contradictions which show that the translation of a right to water through executive policy cannot entirely actualise enjoyment of the right for citizens and realise the constitutional aspiration for social transformation. By way of example, the Pro-Poor National Strategy indicates that the motivation for the Strategy arose from the fact that rates charged for water remain inequitable among citizens.[85] Particularly, where the water delivery system breaks down in urban slum settlements, the cost at which water is supplied by private water vendors tends to be higher than the cost at which consumers with in-house connections access water.[86]

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[83] Government of Uganda Ministry of Water and Environment *Pro-Poor Strategy for the Water and Sanitation Sector Uganda* February 2006, 1 and 6.

[84] Ibid at 7. I understood the exact form of subsidisation through an interview with Assistant Commissioner for Urban Water and Sanitation, Ministry of Water and Environment which I conducted in August 2013.

[85] Government of Uganda Ministry of Water and Environment, Pro-Poor Strategy 1; Tariff Policy for Small Towns, Rural Growth Centres and Large Gravity Flow Schemes September (2009).

[86] Information gathered from an interview with Assistant Commissioner for Urban Water and Sanitation, Ministry of Water conducted in August 2013 showed that private vendors charge up to Uganda shillings 500/- ($0.19) for 20 litres of water in comparison to the recommended rate of ug shs 20/ (US $0.01). On the other hand, water supplied through an in-house water connection which guarantees a regular water supply costs approximately ug shs 28 (Interview transcript on file with author). To put this challenge in perspective, during

Even where the government has proposed a series of initiatives to promote equity by the introduction of pre-paid meters; price controls for water sold at public yard taps or stand pipes; and finally encouraging consumers to use yard taps as opposed to buying water from commercially driven private water vendors, it has withdrawn the benefits of such initiatives without much consideration of the lived realities of the poor and vulnerable.[87] For instance, within three years of introducing water subsidies, and at a time when the benefits of easily accessible water had began to trickle down to the poor, government proposed that the increased numbers of people accessing potable water was indicative of a potential source of tax revenue for the State. It then proposed to use the growing base of water connections as a means to raise national revenue.[88] Although the tax was aimed at private domestic water users who neither receive water through the pre-paid mechanism nor from public stand pipes, in some parts of Kampala, the capital city, water rates were immediately hiked by water vendors on account of the value added tax.[89] This shift in focus from enhancing water access for the poor to increased national revenue provides evidence that a weak legislative basis for a right to water impedes its full enjoyment and actualisation.

However, the impact of the executive's proposal to introduce a value added tax to water services may have indirect advantages. One immediate advantage appears to have been the dialogue which ensued between Parliament and the executive relating to this proposal. During the last two years, Parliament's committee on natural resources has debated and consistently recommended that government drops proposals of the value added tax on domestic water supply, in order not to forestall access to safe water where citizens cannot afford clean and safe water.[90] This would appear to have generated the much desired dialogue between the executive and legislature on at least one component of the human right to water. Even though the tax was nevertheless implemented, the debates and dialogue it stirred point

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interviews in the community, I heard that in some areas the pre-paid water stand taps had broken down and remained so for at least 9 months.(Interview of 22 August 2013; transcript on file with author).

[87] Tariff policy for Small Towns, Rural Growth Centres and Large Gravity Flow Schemes Sept. (2009) 7.

[88] The Value Added Tax (Amendment) Act No 8 of 2012 had included the supply of water for domestic use among exempt supplies. But subsequently, the Finance Bill 2013 had proposed to re-introduce VAT on water for domestic use.

[89] This information was gleaned from an interview with a resident from an informal settlement of Kampala who doubled as a women's representative on the lowest local council unit, (the LCI) conducted in August 2013, transcript on file with author).

[90] See for instance the Parliament of Uganda *Report of the Committee on Natural Resources on the Ministerial Policy Statements & Budget Estimates for the Financial Year 2012/2013* (August 2012) 1,23; and Parliament of Uganda *Report of the Committee on Natural Resources on the Ministerial Policy Statements & Budget Estimates for the Financial Year 2013/2014* (August 2013) 1, 33; Value Added Tax on Water Rejected *The New Vision* (2 May 2013).

to the potential of a rights-based approach, to the extent that it can compel justification of executive policy where this is likely to impede enjoyment of the right to water.

The Water Privatisation Policy has impacted on the manner in which water is conceptualised and delivered for citizens. Even though the NWSC, which is responsible for water delivery in many urban centers, was not divested to a private company as was initially planned, the delivery of water services was adapted to accommodate private companies in the delivery of water. The privatisation of water delivery has taken the form of performance-based contracts between the government and the NWSC, as well as other private companies mandated to supply water within local government water supply areas. This unique model of involving private companies in the delivery and supply of water services was adopted after a long debate over whether an outright sale of NWSC would be more effective in improving water services than a rigorous private enterprise reform.

Whereas the privatisation of water services has enhanced availability and accessibility of water and facilitated the improvement of water quality, it does not appear to facilitate a rights-based approach to water delivery. A close reading of the performance management contract model does not reflect rights consciousness. For instance, within the performance management system which was devised for measuring NWSC's performance in delivering services to citizens, four key aspects were prioritised. These were articulating targets for improving efficiency in billing and collection; ensuring that corporate planning and budgeting best practices were complied with; incentive payments of up to 25% of senior managers' salaries; and performance contract review in order to recommend appropriate bonuses for staff.[91] Subsequent performance contracts have expounded on the scope of targets to include extending services to the poor in urban areas.

While the direct effect of privatisation of water services, which may have entrenched harsh market oriented policies to water delivery, appears to have been avoided through the preferred public enterprise reform approach that was applied to water services delivery, the negative effects of privatisation were not completely avoided.[92] Public enterprise reform was not devoid of neo-liberal tendencies and may have created impediments to the enjoyment of water services for many Ugandans.

Returning to the question of whether the directive principles have impacted on elaboration of policy and ultimate enjoyment of a human right to water, it would seem that

[91] Yahya Jamal & Leroy Jones 'Impact of Privatization in Africa: Uganda water' (2006) 7-8 http://siteresources.worldbank.org/EXTNTFPSI/Resources/UgandaWater.pdf .

[92] 'Uganda's NWSC on track for privatisation' (2002) vol 3 issue 12 http://www.globalwaterintel.com/archive/3/12/general/ugandas-nwsc-on-track-for-privatisation.html .

the NODPSP in the 1995 Constitution have gone a long way towards enhancing enjoyment of the human right to water. It is possible to argue that the Water Policy and Pro-Poor Water Strategy exhibit human rights based consciousness to conceptualizing and delivering water to citizens, which was likely implored by the the NODPSP.

The policies discussed in this section have all been implemented. They have also been subjected to periodic review and have not remained stagnant. From its own reports the executive appears to demonstrate that these programs and policies have substantially increased the number of households with access to clean and safe water within urban and rural areas. For instance, the reports provide evidence to the effect that during the period 2007-2012, there was remarkable progress made in increasing the number of additional people served by the water supply systems both in the rural and urban areas.[93] Indeed, these reports have enumerated gains made in terms of the five core components of a human right to water: universality of access to water, adequacy of water, safety of water and affordability of water.

However, while the human rights based consciousness apparent within water specific national policy must be lauded, examples from the lived experiences of citizens such as that provided by the urban poor appear to show that the social contexts in which the state policies operate appear to undermine the likely strengths of these policies. In the end, it appears that a well-articulated right lacking the threat of justiciability may remain only on paper.

Finally, considering that water seems to be only recognised to the extent that it is a non-justiciable right, it is possible to argue that this distinction between rights and justiciability may have re-surfaced in the model applied to elaborating legislation and policy on water. It seems that the most articulate contemplation of the right to water was again relegated to non-enforceable policy documents which cannot provide anchor to an individual's claims for enjoyment of the right to water. While policies may be designed to be human rights conscious, they lack the force of law and have failed to absorb the inequity still associated with water delivery. It seems plausible to argue that problems with enjoyment of the right may be traced back to the manner in which the constitutional making process treated water.

3.5.4 A brief note on proposed water reforms

[93] Government Of Uganda Joint Water and Environment Sector Strategic Plan op cit note 61 at 9-10 (On file with author). At the same time, the program anticipates that between 2013-2018, an additional total of 3.4 million Ugandans will benefit from the plan by accessing clean and safe water from the program.

During the course of 2013, the Ministry of Water and Environment initiated proposals for broad water legislation reforms. This reform has been motivated by the need to incorporate many of the developments in water resources management and water delivery which have taken place over the last 14 years. Given that these proposals have not come into force, they are not yet applicable to the legal regime governing water.[94] Nonetheless, I briefly consider two significant proposals, the proposed National Water Policy and the proposed Water (Amendment) Act. The proposed National Water Policy proposes six guiding principles for reformulating the domestic water supply policy. They are: to prioritize protection of the environment; to enhance participation of women in water service delivery; to strengthen communities to implement and sustain water and sanitation programs; to enhance financial viability of public utilities; and to ensure the allocation of public funds for water supply development activities in a manner that prioritizes those segments of the population who are presently inadequately served or not served at all.[95] Even at this stage, the proposed policy appears to have marginally considered a re-conceptualisation of water delivery in a manner which incorporates the human right to water and its implications for domestic water supply.

Within the proposed Water Act, the significant proposal is to extend the entitlement to access water to include a clause to the effect that residents are entitled to access water through the use of rain water harvesting techniques, such that an owner or occupier of land may construct any works for rainwater harvesting or for the recycling of used water for domestic purposes without having to seek approval or a permit from the water authority.[96] While this may elaborate on an entitlement to use water, it clearly regards responsibility for domestic water as being primarily an individual and not State responsibility.

Whereas these proposals for reform must be welcomed, it appears that they will change little in terms of the substantive enjoyment of a human right to water, to the extent that the scope of the right remains vague and the obligations attaching to the State for actualisation of the right remain largely absent.

3.6 THE POTENTIAL AND CHALLENGES OF ADJUDICATING THE RIGHT TO WATER IN UGANDA

Notwithstanding the mandate granted to the courts under the 1995 Constitution, the adjudication of socio-economic rights issues in Uganda has remained infrequent and no

[94] This information arose from a personal communication with an official with the Ministry of Water and Environment.
[95] Proposed National Water Policy (draft of July 2013) 1, 29. On file with author.
[96] Proposed Water (Amendment) Bill section 7A (Draft of June 2013 on file with author).

decision has concerned the right to water. This section considers challenges which appear to have impacted on how the courts have so far vindicated socio-economic rights within the cases before them and how these rights have been interpreted. Although not directly concerned with the enforcement of socio-economic rights within the NODPSP, there are a few Supreme Court, Constitutional Court and High Court decisions which have addressed the broader interpretations of the right to life, the right to a means of livelihood, and albeit, only tentatively the right to health. These decisions engage with the application of the NODPSP, the doctrine of separation of powers and the political question doctrine. It is from these decisions that I seek to map out the potentials and pitfalls of adjudicating a right to water within the current adjudicative paradigm.

3.6.1 The courts' application of international law

Given that the 1995 Constitution does not explicitly refer to the application of international law by the courts, some scholars have questioned whether there is a legitimate basis upon which international law can be applied in the interpretation of domestic law.[97] However, the jurisprudence emerging from the courts provides an explicit answer. The courts are willing to interpret constitutional provisions in light of international law. Although the decisions in which international law has been referred to in interpreting the constitutional text do not involve socio-economic rights, there is nothing to suggest that they are excluded from this willingness.

Two principles emerging from the courts' decisions illustrate this position. When interpreting the 1995 Constitution, courts have maintained that international law must be taken into account. Where there are several plausible interpretations applicable to the constitutional text; courts as a rule avoid those interpretations which are inconsistent with international law.[98] Secondly, courts will take cognisance of the fact that Uganda has acceded to international covenants.[99] It is therefore arguable that their stance relating to international law enables them to consider the general comments of the UNCESCR as persuasive when

[97] By international law, I refer to the main sources of international law defined by the ICJ Statute. Also see Busingye Kabumba 'The application of International Law in the Ugandan judicial system: A critical enquiry' (2010) in Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* 84; Grace Tumwine-Mukubwa op cit note 21 at 14-15.

[98] *Major General David Tinyefuza v Attorney General* Constitutional Petition No 1 of 1996, Judgment of Egonda Ntende JA (Ag)18; and *Attorney General v Susan Kigula & 417 Others* Constitutional Appeal No 3 of 2006 (SC).

[99] *Attorney General v Susan Kigula & Others* (ibid) judgment of Egonda Ntende JSC and *Susan Kigula & Others v Attorney General* Constitutional Petition No 6 of 2003 (judgment of Twinomujuni JA).

determining the meaning of constitutional rights. This means that it is possible for Ugandan courts to recognise a justiciable right to water inherent to other rights in the Bill of Rights.

3.6.2 The courts' approach to adjudicating socio-economic rights claims

Several principles of constitutional interpretation which are pertinent to understanding the adjudication of socio-economic rights within the Ugandan context have emerged from decisions of the Constitutional Court and the Supreme Court. First, the Constitutional court has affirmed that, in the interpretation of the bill of rights, it will take cognisance of the fact that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come. The constitutional provision will accordingly be given the widest construction possible in order to realise the full benefit of the guaranteed right.[100]

Summarizing the cardinal principles of constitutional interpretation in *Davis Wesley Tusingwire v The Attorney General,* the Constitutional Court has more recently re-stated three other principles of interpretation which are of relevance here. It affirmed that in interpreting the Constitution, the rule of harmony or completeness must be applied. This means that constitutional provisions are looked at as an integrated whole meant to sustain each other and should not be looked at in isolation.[101] Secondly, where several provisions of the Constitution have a bearing on the same subject, they should be read together so as to ensure that the full meaning and effect of their intent is affirmed.[102] Finally, the Constitutional court has affirmed that a non-derogable article of the 1995 Constitution confers absolute protection and should be enforced by all government and non-government organs as well as individuals.[103]

In the first constitutional petition subsequent to the promulgation of the 1995 Constitution, the Constitutional Court in *Tinyefuza v Attorney General* referred to abiding by the values in the NODPSP and wrote:

> In applying or interpreting the constitution or any other law, the courts and indeed all other persons must do so, so we are ordained, for the establishment and promotion of a just, free and democratic society. That ought to be our first canon of construction. It

[100] *Attorney General v Uganda Law Society* Constitutional Appeal No 1 of 2006 (SC); and more recently in *Davis Wesley Tusingwire v The Attorney General* Constitutional Petition No 2 of 2013. (on file with author).
[101] Also relied upon in *Paul Ssemwogerere v. Attorney General* Constitutional Appeal No 1 of 2002 (Supreme Court); *Attorney General v. Susan Kigula and Others* op cit note 98.
[102] *Twinobusingye Severino v. Attorney General* Constitutional Petition No 47 of 2011 (Constitutional Court).
[103] *Attorney General v. Salvatori Abuki* Constitutional Appeal No 1 of 1998 (Supreme Court) also reported in 2000 KaLR 413.

> provides an immediate break or departure with past rules of constitutional construction....[104]

Later, *Salvatori Abuki & Another v Attorney General* also engaged with the application of the NODPSP in vindicating the constitutional rights of the petitioner, in addition to deciding challenges to the constitutionality of the Witchcraft Act.[105] The petitioner sought to vindicate, among others, the constitutional guarantee to equality and freedom from discrimination found in article 21(1), and the right to dignity in article 24. In the Constitutional Court, while declaring a banishment order to be an infringement of a right to dignity, Egonda Ntende J, stated:

> I am prepared to take judicial notice of the fact that the majority of Ugandans live in rural Uganda working the land for their livelihood. The effect of a banishment order as in this case, would be to exclude such a person from shelter, food by denying him access to his land, and also means of sustenance, without provision of an alternative. The person so banished is rendered destitute on leaving the prison gates.[106]

Most significant was the Constitutional Court's casting of justiciable human rights within the frame of the NODPSP. The judge stated that:

> I take this view guided by the National Objectives and directive principles of state which we are enjoined to apply in interpreting this constitution in part thereof. ….
>
> An exclusion order under section 7 ... seems to me to be set in the opposite direction from assuring access of the person banished to any shelter, food, security, clean and safe water, and healthy services.[107]

Both *Tinyefuza v Attorney General* and *Salvatori Abuki & Another v Attorney General* have been lauded for demonstrating the court's willingness to read the NODPSP into the Bill of Rights, which suggested a willingness to perceive the rights enumerated in the NODPSP as justiciable.[108] The decisions show that the courts can vindicate rights located in the NODPSP, provided that they are willing to generously interpret entrenched rights in a manner which allows for the NODPSP to be read into the bill of rights.

However, none of the constitutional cases decided subsequent to *Salvatori Abuki & Another v Attorney General* followed this approach to interpreting the NODPSP.[109] Indeed, in

[104] *Major General David Tinyefuza v Attorney General* (op cit note 98) judgment of Egonda Ntende J (unreported) 12-13.
[105] Constitutional Case No 2 of 1997.
[106] Egonda Ntende in Salvatori *Abuki v Attorney General* 41.
[107] Egonda Ntende J 43-44.
[108] J Oloka-Onyango op cit note 1 at 38-39; Christopher Mbazira op cit note 18 at 64-66.
[109] For instance in *Ssemwogerere & Olum v Attorney General* Constitutional Appeal No 3 of 1999, the Supreme Court found that the constitutional court would have jurisdiction to determine matters concerning the internal

Centre for Health, Human Rights and Development (CEHURD) v Attorney General (CEHURD) the petitioners invoked the argument that the NODPSP were binding upon the executive and justiciable without success.[110] The petition arose from grievances of relations of two women who had died in hospital during the course of child birth. The petitioners alleged that the government's failure to provide the basic minimum maternal health package amounted to an infringement of the constitutional right to access health services and of the right to life. The Constitutional Court dismissed the petition on a preliminary point of law without evaluating any of the petitioners' arguments. As it stands, the *CEHURD* case showcases the shortcomings of relying on the NODPSP to enhance enjoyment of socio-economic rights, and additionally, the *CEHURD* case waters down the potential of indirect vindication of socio-economic rights.[111]

On the other hand, the courts must be lauded for not quashing the hopes of adjudicating socio-economic claims, given that the Constitutional Court has marginally acknowledged their justiciability. For instance, although the *CEHURD* bench dismissed the petition at a preliminary stage of the trial and found that there were no questions that merited constitutional interpretation, the court did not go as far as to declare that the right to health could not be justiciable. Indeed, the Court stated that the petitioners could claim redress from the High Court, on the basis of Article 50 of the 1995 Constitution.[112] In the aftermath of *CEHURD*, claims for the right to health have already been filed before the High Court although they are still at trial stage. It remains to be seen how the courts will deal with the matter of interpreting a right ensconced in the NODPSP.

It would therefore appear that there is a possibility of a direct claim arising from Article 50, for any rights recognised within the NODPSP. I would go so far as to argue that the Court implied that there is a directly justiciable right to health for Ugandan citizens. Given that the right to health is also only referred to in the NODPSP, it is then plausible to argue that the right to water may also be similarly justiciable. Of course, this argument is yet to be tested.

3.6.3 The courts' interpretation of the right to life

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workings of Parliament in deciding whether an Act of Parliament had been properly passed to become law. Also see George W Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* (2006) 1, 3.

[110] *CEHURD, Ben Twinomugisha, Rhoda Kukkiriza, Inziku Valent & Uganda National Health Users Organisation v The Attorney General* Constitutional Petition No 16 of 2011(unreported). The case is currently under appeal before the Supreme Court seated as the Constitutional Appeal Court in *CEHURD v Attorney General* Constitutional Appeal No 1 of 2013. The hearing of the appeal commenced on 20 March 2014 but had not concluded at the time of writing.

[111] J Oloka-Onyango (2013) op cit note 18 at 10-12; J Oloka-Onyango (2007) op cit note 22 at 47-49.

[112] Page 16 of Constitutional court ruling (on file with author). There is currently one High Court trial founded on the right to health, which is still under trial at the time of writing.

A review of the constitutional matters requiring an interpretation of the right to life indicates that the Ugandan courts have refrained from adopting the generous interpretation of the right suggested by the UN's Human Rights Committee's General Comment six and followed in some foreign jurisdictions. Two cases illustrate this. In *British American Tobacco Limited v The Environmental Action Network Ltd*, the petitioner's allegations that a tobacco manufacturer's failure to disclose the risks of smoking contravened the right to life were deemed to be too remote to implicate the right to life. Even though the court was willing to accept that smoking in public places was an environmental risk, it was unwilling to regard such an environmental risk as a threat to life.[113]

Further, in a matter challenging the constitutionality of the death penalty, as a violation of the right to life, the Constitutional court rejected the South African Constitutional Court's generous interpretation of the right to life. Even though the South African Constitutional Court's jurisprudence was relied upon in interpreting the right against inhumane and degrading treatment in *Salvatori Abuki*, the court was reluctant to also apply the South African Court's interpretation of the right to life.[114] It decided that, even though some commonwealth jurisdictions whose decisions could be persuasive to the Ugandan courts had found the death penalty to be a violation of the right to life, Article 21 of the 1995 Constitution could not be interpreted as meaning that there were no circumstances in which life could be lawfully terminated.[115] Although the main contention in this case was the constitutionality of capital punishment, the decision nonetheless points to the Ugandan court's restrictive reading of the right to life.

But the courts appear to construe a threat to life more broadly where survival requirements are at stake. In *Salvatori Abuki* the constitutional court bench appeared willing to generously interpret the constitutional right to life when the Constitutional Court reasoned that the effect of the exclusion order made against the petitioner could be read as extending to abrogating life or threaten the right to life, which was unconstitutional.[116] In this way, the Constitutional court impliedly affirmed the proposition that circumstances which are so deplorable that a citizen is deprived of food and water may infringe on their right to life and thereby entitle them to constitutional relief.

[113] *BAT (U) Ltd v The Environmental Action Network Ltd* Misc. Application 27 of 2003.
[114] *Salvatori Abuki v Attorney General* Constitutional Case No 2 of 1997 Judgment of Tabaro J 29-30 (on file with author).
[115] *Susan Kigula & Others v Attorney General* op cit note 99 judgment of Twinomujuni JA 56-57.
[116] Judgments of Okello J 1, 17 and 23; and Tabaro J 1, 30-31.

These decisions tell us that there is no textual impediment to a generous and permissive interpretation of the right to life. Indeed, its potential to found a claim for satisfaction of a right to water appears to depend solely upon judicial willingness to explore the exact content and scope of the right, within the context of international and foreign law.

3.6.4 The separation of powers

As elsewhere, rights-based adjudication in Uganda often evoke tensions in relation to Courts' perceived counter-majoritarianism and their pushing the boundaries of conventional notions of the separation of powers. But the Ugandan courts' record with the interpretation and enforcement of civil and political rights has shown that the courts affirm that the 1995 constitutional dispensation envisaged moderate notions of a separation of powers and mandated judicial review of governmental actions and omissions.[117] Courts are at once expected to articulate a balance between governmental interest and citizens' interests as well as protectors of the constitution. Indeed, the courts have not shied away from deliberating over executive and legislative actions or omissions where constitutional rights and the rule of law appeared to be at risk.[118] However, when presented with matters related to socio-economic rights, it is difficult to discern how the Ugandan courts perceive their role. With respect to socio-economic claims, it seems that courts have interpreted their constitutional mandate narrowly, implying that these are matters which are within the constitutional powers of the legislature or the executive and as such are beyond the purview of adjudication. More specifically, the courts appear to perceive engagement in such matters as interfering with political questions.

Uganda's constitutional law jurisprudence inherits the political question doctrine traced back to American jurisprudence. The doctrine urges caution in the balance of power constitutionally exercised by the three arms of government.[119] The doctrine is based on the notion that there are certain issues which courts can refrain from determining because the

[117] *Uganda Law Society v Attorney General of the Republic of Uganda* Constitutional Petition No 18 of 2005 (right to a fair trial).

[118] *Major General David Tinyefuza v Attorney General* op cit note 98. For instance in *Ssemwogerere & Olum v Attorney General* Constitutional Appeal No 3 of 1999, the Supreme Court found that the constitutional court had the jurisdiction to determine matters concerning the internal workings of Parliament in deciding whether an Act of Parliament had been properly passed to become law; *Uganda Law Society v Attorney General of the Republic of Uganda* Constitutional Petition No 18 of 2005 (right to a fair trial); *Zachary Olum & Rainer Kafiire v Attorney General* Constitutional Petition No 6 of 1999 (CA) (parliamentary rules curtailing right to a fair trial); *Lukwago Elias, Lord Mayor of Kampala Capital City Authority v Attorney General & Others* Misc. Application No 94 of 2014 (executive action in abuse of court process was declared null and void).

[119] The American context is elaborated in Alexander M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Fritz W Scharpf 'Judicial review and the political question: A functional analysis' (1966) 75 *Yale LJ* 517.

constitution envisages that they are matters to be resolved by the democratically elected organs of government.[120] In Uganda, the doctrine was first adopted in a 1960's politically motivated decision in *Uganda v Commissioner of Prisons, ex-parte Matovu.*[121]

In a post 1995 Constitutional Appeal *Attorney General v General David Tinyefuza*, the political question doctrine was resurrected.[122] One of the justices urged that the doctrine was applicable to the constitutional petition before the court. He stated:

> Even where courts feel obliged to intervene and review legislative measures of the legislature or the administrative decisions of the executive in circumstances where a challenge on the grounds that the rights or freedoms of individuals are clearly infringed or threatened, they do so sparingly and with the greatest of reluctance.[123]

The judgment relied on the definition of a 'political question' established by the American Supreme court in *Marbury v Madison*. In Uganda, the Judge urged (in relation to the determination of terms and conditions of service for the military), that courts should avoid adjudicating upon political matters unless individual liberty or the Constitution are clearly infringed or threatened.[124]

Whereas the remarks in *Tinyefuza* were not explicitly endorsed by the full constitutional appeal bench, and were not followed in subsequent constitutional cases, the doctrine influenced the Constitutional Court in the single, most important case invoking the socio-economic right to health.[125] In *Centre for Health, Human Rights and Development (CEHURD) v Attorney General*, the political question doctrine was resurrected to quash any hope of vindicating socio-economic rights through the Courts.[126] In *CEHURD v Attorney General* the doctrine was described as referring to:

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[120] See Mark V Tushnet 'Law and prudence in the law of justiciability: The transformation and disappearance of the political question doctrine' (2001-2002) 80 *North Carolina Law Review* 1203, 1204.
[121] (1966) EA 514, 530.
[122] Constitutional Appeal No 1 of 1997. This case concerned a claim for the freedom from forced labour, which cannot strictly be classified as a socio-economic right. See also Mtendeweka Mhango 'Separation of powers and the application of the political question doctrine in Uganda' (2013) 6 *African Journal of Legal Studies* 249, 257-262.
[123] Ibid Kanyeihamba JSC 11.
[124] Ibid Kanyeihamba, JSC 11.
[125]For instance in several other constitutional cases such as the R*eferendum case* and *Ssemogerere & Olum v Attorney General*, the political question doctrine was in effect overruled.
[126]*CEHURD, Ben Twinomugisha, Rhoda Kukkiriza, Inziku Valent & Uganda National Health Users Organisation v The Attorney General*, Constitutional Petition No. 16 of 2011(unreported). The case is currently under appeal before the supreme court seated as the Constitutional Appeal Court in *CEHURD v Attorney General* Constitutional Appeal No. 1 of 2013. The hearing of the appeal commenced on 20th March 2014 but had not concluded at the time of writing.

> "Questions of which Courts will refuse to take cognisance, or to decide on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative powers".[127]

The Constitutional Court adeptly dismissed the petitioners' claims. At the hearing of the petition, the Attorney General raised a preliminary objection challenging the legitimacy of the petition, to the effect that matters of health policy, such as that which the court was being called upon to determine, raised questions of a political nature. The Attorney General argued that to determine such questions required the Constitutional Court to adjudicate over matters that were within the discretion granted to the executive and legislature in the 1995 Constitution. Citing the judgment of Kanyeihamba in *Attorney General v David Tinyefuza*, the Constitutional Court determined that it was bound by the earlier position of the Court. It stated that:

> Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with guidance from the above discussions reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement polices of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these polices except in the Executive.[128]

Even though the political question doctrine had not been relied upon in previous constitutional rights cases and does not appear to hold traction in the Constitutional Courts' jurisprudence, it appears to have resurfaced in a matter in which the right vindicated was not explicitly recognised within the Bill of Rights. It is plausible to argue that the Constitutional Court appears to have re-conflated the separation of powers with the doctrine of political question in a socio-economic rights case and thereby chose to avoid engaging with claims for the enforcement of socio-economic rights within the NODPSP.

However, the Court's cautious approach may be explainable. Given that the right to health was not explicitly entrenched within the 1995 Constitution as a justiciable right, the Constitutional Court may have found difficulty in adopting a generous interpretive approach to the NODPSP. When the Court's actions are viewed as pertaining to socio-economic rights claims within the NODPSP, and not necessarily to the entire Bill of Rights, it is arguable, that

[127]Page 10-11 Ruling of the Court in *CEHURD v Attorney General* quoting Black's law Dictionary by Henry Campbell Black & others, 6th edition West Publishing Company 1990, page 1158 (Ruling on file with author).
[128] Page 14 of the Constitutional court's ruling (on file with author); For a contrasting view of the applicability of the political question doctrine in Uganda see Mtendeweka Mhango op cit note 122 at 262-264.

to date, the courts have not fully grasped the powers vested in them by the 1995 Constitution on account of their attitude towards the adjudication of socio-economic rights.

3.7 CONCLUSION

The chapter set out to explore the extent to which a human right to water is embodied within Uganda's constitutional and legislative framework and the implications of such recognition for the enjoyment of water as a right by citizens. It finds that there is no explicit reference to a human right to water within the main part of the 1995 Constitution. At most, there is a non-justiciable right to water, emerging from the NODPSP set out in the preamble to the Constitution. However, considering that the 1995 Constitution implicitly allows an international law understanding of the right to be taken into account in interpreting the bill of rights, there appears to be ample space for interpreting the text of several rights within the bill of rights as implicating a human right to water. But this weakens the basis upon which the right is founded and does not facilitate better understanding of the obligations that may flow from the right. Indeed, the vague manner in which the right to water is set out in the 1995 Constitution may have impacted on the extent to which the right later finds translation within law and policy.

Indeed, the water legislation barely exhibits a rights-based approach to conceptualizing and delivering water to citizens. This said, the harsh effect of legislation is somewhat countered by a more rights conscious policy regime. Various executive planning documents have enumerated the successes made in terms of the five core components of a human right to water: universality, access, adequacy, safety and affordability. These redeeming features of policy provide some relief to beneficiaries and make it possible to distill some normative content of the right to water. In addition, the implementation of policy has enhanced the enjoyment of the human right to water in many areas. Even then, the shortcomings of relying on government policies to articulate and realise the human right to water mainly arise from the fact that their success has not allowed full actualisation of the right. Moreover, while policies may be designed to be human rights conscious, they are watered down by the force of law. As such, without executive benevolence, citizens appear to be hard pressed to make rights-based claims for water.

The chapter has also shown that, although the courts have not had opportunity to hear a claim related to a human right to water, the outcomes of adjudicating other rights claims illustrate some common trends. The courts are willing to apply a generous interpretive approach to the provisions of the 1995 Constitution. Furthermore, they are willing to apply

international law in the interpretation of the 1995 Constitution, which goes a long way to introducing international human rights standards into the domestic setting.

The pattern which seems to emerge from the study of the Constitutional court cases shows that the court focuses on three matters in deciding a rights-based challenge: First, the primary focus appears to be interrogating its own jurisdiction to hear the petition. This may show that the court's primary concern is with institutional legitimacy. The court then examines whether there is a prima facie violation of the right and finally if the violation is justifiable. This may tell us that the Constitutional court does not pay due attention to interpreting the normative content of the rights impugned because of its own attitude to addressing rights violations.

At the same time, the courts are clearly unwilling to determine claims arising from socio-economic directives of state policy. Since the courts appear open to giving the 1995 Constitution a generous interpretation and have vigorously enforced rights explicitly enumerated within the Bill of Rights, it would seem that the underlying problem with socio-economic rights claims is with the manner in which they have been articulated as non-justiciable within the NODPSP. I therefore contend that the courts' jurisprudence so far does not support claims for a human right to water and that this weakness may be attributed to the manner in which the right to water has been classified as a NODPSP.

Commenting on the motivations for applying a political question doctrine, Alexander Bickel argued that American courts applied the doctrine as a technique to avoid judicial review of executive action or omissions, so as to avoid legitimising political positions.[129] But critics have argued that when courts refuse to adjudicate over such matters, they shut the door to the possibility of ever having such matters deliberated upon, given the rules of judicial precedent which bind the courts.[130] Bickel's arguments may have motivated the Ugandan courts because judges may be more concerned about protecting their legitimate institutional space and are generally reluctant to read rights into the constitutional text beyond those which have explicitly been recognised as justiciable. Given that courts are likely to adjudicate claims on the basis of precedent, it seems that the underlying problem of a vague constitutional right to water may endure, and will accordingly remain an impediment to full realisation of the right.

Finally, an indirect consequence of the current stance taken by the Constitutional Court has been that the court has avoided interaction and dialogue between the legislature,

[129] Alexander M Bickel op cit note 119 at 70-71, 183-198.
[130] Fritz W Scharpf op cit note 119 at 538.

executive and judiciary over the nature and content of socio-economic rights. Such interaction or dialogue may have been useful to destabilise or soften the neo-liberal tone of state policies, which appears to hold sway over a rights-based approach to the actualisation of a human right to water for Uganda.

CHAPTER 4

INDIRECT VINDICATION: ENFORCING THE RIGHT TO WATER IN INDIA

4.1 BACKGROUND

India is a developing country with a long and rich constitutional history, having gained its independence more than a decade before Uganda.[1] As already indicated, a case study of India adds significance to this thesis because even though the two countries are very different, there are several pertinent similarities. First, the structure of India's constitution is textually similar to that of Uganda in that both include directive principles of State policy, which were envisaged to be non-enforceable, in a separate and distinct part of the Constitution from the Bill of Rights. Secondly, India's Constitution has been tested for over 60 years and the constitutional rights entrenched therein have benefited from adjudication since the 1970s. Its Supreme Court potentially provides the broadest jurisprudence on socio-economic rights. Additionally, both countries have faced challenges with addressing poverty amongst the larger sections of their populations and have dealt with the effects of adopting the new economic policies championed by developed states in the 1990s. A case study of India may particularly illuminate the possibilities and challenges of indirect adjudication of a right to water and offer lessons to reflect upon how the legal regime in Uganda may enhance enjoyment of the right if a similar approach is followed. Like Uganda, India is a common law jurisdiction, which implies that the principles of common law and adjudication which emerged from England have deeply affected the understanding and application of legal principles.

The historical context in which India and Uganda's constitutions were enacted are similar, given that both countries had come to the end of political struggles and were looking to enacting Constitutions that would transform the State and the lives of their citizens. Constituting 395 articles and 8 schedules, the Constitution of India (1950 Constitution) came into effect after a lengthy process of debate by the Constituent Assembly.[2] Much like the Ugandan Constituent Assembly, there was debate over the inclusion of justiciable socio-economic rights within the constitutional framework. As in Uganda, the majority adopted the view that the socio-economic needs could only be provided by the State to the extent possible

[1] India became independent in 1947. Its Constituent Assembly finalised the country's Constitution in 1949 and it subsequently came into force in 1950.

[2] There have been at least 98 amendments to the Indian Constitution from 1950 to 2014. See Mahendra P Singh (ed) *V N Shukla's Constitution of India* 11 ed (2008) 1100- 1117 for some of these amendments.

and could not be included in the Constitution as justiciable fundamental rights. But unlike Uganda, socio-economic rights were included as a separate chapter in the main part of the constitutional text.[3]

In terms of water resources, India is a water stressed country. In other words, the demand for water is much higher than the amount of available water. To illustrate the importance of water resources for India, the United Nations Environment Program reports that in the coming decades, India's single most significant problem will be the availability of fresh water.[4] A 2006 United Nations Human Development Report focusing on water disclosed that amongst poor communities living in informal settlements, Indian citizens used far less water than the amount recommended by the WHO.[5] It has been said that approximately 65,000 Indian villages do not have access to a sufficient number of nearby water sources to satisfy the international human rights law standard relating to reasonable walking distance from a public water source.[6]

The main sources of India's fresh water are the country's rivers, ground water aquifers and annual rainfall. The water from these rivers is delivered to citizens using various technologies. One notable method is the creation of water storage facilities by creating small reservoirs (i.e. ponds or man-made lakes). The country has developed technologies to tap its groundwater, although in some areas the ground water has been over-exploited. India also has a high annual rainfall which boosts these water sources. Most of the ground water harnessed feeds into irrigation of agricultural land and supports the supply of drinking water for the country's large cities.[7]

Availability and access to water for the majority of the people living in towns and cities is dependent on the transfer of water from rural areas to the cities, through pipelines and tankers. Given that these services are operated by private water vendors who supplement the public service providers, this makes water more expensive and less readily available,

[3] Article 37 of the 1950 Constitution. For an elaborate consideration of the Constituent Assembly debates see Shylashri Shankar 'Descriptive overview of the Indian constitution and the supreme court of India' in Oscar Vilhena & Upendra Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 105, 111-112; W E Forbath 'Why is this rights talk different from all other rights talk? Demoting the court and reimaging the Constitution' (1994) 46 *Stanford LR* 1771.

[4] United Nations UNEP (2001). *India: State of the Environment Report* (2001) UNEP/RRC.AP. http://www.rrcap.unep.org/pub/soe/indiasoe.cfm. 5; Jenny T Gronwall '*Access to Water: Rights, Obligations and the Bangalore Situatio*n' (2008) PhD dissertation Linköping University downloaded from http://liu.diva-portal.org/smash/get/diva2:18111/FULLTEXT01 34-36; Government of India *National Water Policy (2012)* 1-2.

[5] United Nations *Human Development Report* (2006) 35, 48, 54. The HDR reports that water use averages 8 litres per day in informal settlements in Chennai, India and that diarrhoea claims about 450,000 lives annually in the country.

[6] Erik B Bluemel 'The implications of formulating a human right to water' (2004) 31 *Ecology LQ* 957, 981-988.

[7] Jenny T Gronwall op cit note 4 at 33-36.

especially during the summer months. For India's urban slum dwellers the situation is even worse, as they often need to make direct payments for every litre of their drinking water, and yet suffer the burden of having to carry it over long distances.[8]

The enjoyment of the right to water within India must further be understood within a particular social context. For instance, the manner in which water is accessed and delivered is historically biased by a social caste system. The social caste system which prevailed prior to promulgating the 1950 Constitution determined the manner and extent to which social benefits were distributed. It entrenched a systematic exclusion of citizens from social and economic benefits, including water. One of the main aims of India's constitutional order is to transcend this past and transform India's society through constitutionalism.[9] But, six decades after the 1950 Constitution was promulgated, caste inspired segregation still impedes the enjoyment of the human right to water, because it remains deeply engrained in Indian society and its effects are still apparent in the country. The 2006 UNDP report indicates that, while water scarcity prevails in communities which were historically poor and segregated, it does not appear to affect the wealthier and socially privileged communities.[10]

Accordingly, in this chapter I claim that some of the impediments to the enjoyment of the right to water in India may be attributed to the absence of a constitutionally entrenched, justiciable right to water. I then show that India's current legislative framework does not reflect a rights conscious approach to water services and delivery. However, there is significant recognition and enjoyment of the right to water, which may be attributed to the boldness of the country's apex court and their willingness to read the right to water into other rights. Welcome though this may be, it nevertheless has limited the potential to achieve the full scope of the right, as envisaged within international human rights law.

To this end, I begin this chapter by traversing the constitutional and national legislative framework to explore the manner in which the right to water is embodied in the country's legal regime, and evaluating the extent to which other constitutionally entrenched rights may allow a reading in of the right to water. I then examine several decisions of the country's

[8] Jenny T Gronwall op cit note 4 at 33-36.

[9] For a more elaborate discussion refer to Jayna Kothari 'Social rights litigation in India: Developments of the last decade' in Daphne Barak-Erez & Aeyal M Gross (eds) *Exploring Social Rights Between Theory and Practice* (2011) 171, 173-4; Kathleen O'Reilly & Richa Dhanju 'Public taps and private connections: the production of caste distinction and common sense in a Rajasthan drinking water supply project' (2013) *Transactions of the Institute of British Geographers* 1; Paul O'Connell *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (2012) 82; Granville Austin *Working a Democratic Constitution: A History of the Indian Experience* (1999) chapter 3 accounts for the significance of fundamental rights as growing from the need to reform land ownership which had pitted the poor against the wealthy landed class.

[10] United Nations *Human Development Report* op cit note 5 at 48, 54.

Supreme Court and federal High Courts which have elaborated on a human right to water, in order to determine the extent to which these courts have elaborated on the internal contents and external reach of the right. In the final section, I evaluate the prospects and shortcomings of the Indian model to vindication of the right to water.

4.2 AN OVERVIEW OF INDIA'S CONSTITUTIONAL FRAMEWORK

Two parts of the 1950 Constitution are significant for this dissertation. Part three of the Constitution enumerates the fundamental rights inherent to citizens. Some of these fundamental rights are spelt out as express declarations while others appear to be prohibitions.[11] In part four, the Constitution enumerates directive principles of State policy, by which the State is to be governed. These are set out as instructions for the future guidance of the executive and legislature.

The 1950 Constitution does not explicitly recognise socio-economic rights. Nonetheless those basic needs which international human rights law has come to recognise as underlying socio-economic rights are mostly articulated within the directive principles of state policy. For example, the directive principles broadly include economic rights and social welfare principles. The State is directed to ensure, among others, an adequate means of livelihood, a fair distribution of material resources, conditions of work that ensure a decent standard of life and full enjoyment of leisure, social and cultural activities, public assistance in cases of undeserved want, nutrition, and a healthy environment.[12]

It is significant that the directive principles envisage respect for international law and treaty obligations.[13] India has acceded to many of the international covenants from which a right to water can be located in international law.[14] Commentators attribute the frequent reference to international law instruments such as the UDHR, ICCPR and ICESCR in Indian jurisprudence to this constitutional provision, which effectively obliges the executive, legislature and courts to comply with international law, and anticipates the application of the ICESCR within the domestic legislative framework.[15]

In Article 37, the 1950 Constitution expressly distinguishes fundamental rights from the directive principles on grounds of enforceability. The Article provides that:

[11] Articles 12-35.
[12] Articles 36-51. Mahendra P Singh (ed) op cit note 2 at A-46 – A -48.
[13] Article 51 (c).
[14] For instance, India acceded to the ICESCR on 10 April 1979.
[15] Mahendra P Singh (ed) op cit note 2 at 360.

> The provisions contained in this Part [Part IV] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.[16]

To emphasise the importance and distinction with fundamental rights, the 1950 Constitution additionally determines that the fundamental rights are inviolable except for the limitations defined in the Constitution itself. It provides in Article 13(2) that the state shall not make any law which takes away or abridges the fundamental rights in the Constitution.[17]

At the same time, the Supreme Court is invested with authority to interpret and ensure the protection of fundamental rights in the Constitution.[18] The persons who can make claims for the direct enforcement of rights are enumerated within Article 32 of the 1950 Constitution, which determines that any person has the right to institute legal proceedings before the Supreme Court where rights have been violated.[19] Where claims for fundamental rights violations are made, the High Court is granted concurrent jurisdiction to hear the petitions.[20]

More significantly, the 1950 Constitution provides for the direct enforcement of these fundamental rights, by awarding the Supreme Court and High Court powers to grant a wide range of remedies where claims are founded on violations of fundamental rights.[21] Article 32(2) stipulates that:

> The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred....[22]

Like the Ugandan Constitution, the 1950 Constitution clearly grants wide and effective remedial powers to the courts on matters relating to human rights.

4.3 LOCATING A CONSTITUTIONAL RIGHT TO WATER

[16] Article 37.
[17] According to article 12, the state includes the government and parliament of India, the government and legislature of the State and all other local authorities. Mahendra P Singh (ed) op cit note 2 at 461-2.
[18] Article 32 (1).
[19] Article 32 (1) and (4). MP Jain op cit note 17 at 710-714 shows that the provision grants standing only to the person whose rights have been infringed. Nonetheless, the judicial approach has been to interpret standing liberally and to allow organisations and groups who have a common grievance.
[20] Article 32 (3) stipulates that: 'Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).'
[21] Article 32 (1); Mahendra P Singh (ed) op cit note 2 at 319-329.
[22] Similar powers are granted to the High Court in Article 226. Not all these remedies would be appropriate when indirectly enforcing socio-economic rights through fundamental rights. For example, directions and orders in the form of habeas corpus (produce the body of an individual) and quo warranto (inquiry into title to public office) may be more readily applicable to civil rights adjudication.

The 'fundamental rights' enumerated in the 1950 Constitution include equality rights, speech freedoms, the right to life, education, freedom from exploitation and forced labour, religious freedoms, minority and cultural rights as well as rights to constitutional remedies.[23] There is no explicit right to water in the Bill of Rights nor, is it mentioned in the directive principles. However, in line with an international law understanding of the interconnectedness and interdependence of rights, there are several provisions in the 1950 Constitution that may in certain contexts be read as including some of the internal content of the right to water.

Several of the fundamental rights enshrined in Part III of the 1950 Constitution may be read in a manner which implicitly embodies the human right to water, especially when the rights are given the expansive interpretation envisaged by the UN Human Rights Committee and UNCESCR. Particularly, Article 21 provides that, 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' Although the textual formulation of the right to life does not suggest a right to water, the Indian courts have read the right to water into the right to life, as is elaborated in section 4.5 below.

At the same time, dimensions of a right to water may be read into the foundational constitutional right to equality before the law and the equal protection of the law in terms of Article 14 as well as the guarantee of non-discrimination in Article 15(1), which determines that:

> The State shall not discriminate against any citizens on grounds of religion, race, caste, sex, place of birth or any of them.

Article 15(2) extends this prohibition to indirect discrimination, when it determines that:

> No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.[24]

It is possible to read these provisions as embodying the universal aspirations of equality and non-discriminatory practices, which are themselves attributes of a human right to water.

Undoubtedly, there are limitations to the constitutional guarantee of non-discrimination. For instance, it is anticipated that the State can discriminate in order to improve the social conditions of a particular section of the community. This kind of positive discrimination is anticipated in Article 15(3) which provides that the guarantee against discrimination shall not prevent the State from making any special provision for women and children. In line with

[23] Articles 12-35; M P Jain op cit note 17 at 460.
[24] The term 'ghat' is defined as stairs leading down to a body of water, particularly a holy river.

this, it is plausible to argue that the 1950 Constitution envisages that legislation may be passed to ensure that the State takes positive steps towards enhancing equity in access to water sources. This would further imply that the freedom from discrimination and inequality, imposes positive obligations on the State to ensure equal enjoyment of the right to water.

Up to this point I have located a right to water within the enforceable fundamental rights entrenched in the 1950 Constitution. The right to water may further be implicitly read into the directive principles of state policy, which require the State to develop policy directed at securing an adequate means of livelihood.[25] The 1950 Constitution aspires to promote the welfare of citizens. Article 38 (1) determines that:

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.[26]

Given that UNCESCR General Comment 15 articulates livelihood as including the availability of water for basic human needs, it may be argued that the 1950 Constitution envisages state responsibility to formulate policy which, when implemented, satisfies water-related needs at least insofar as this enhances the livelihood of individuals.

The directive principles further anticipate that the State has an obligation to promote the right to water. For example, Article 47 provides that the 'State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties....' Furthermore, Article 46 determines that the '... State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes....' It may be possible to read these 'economic interests' as also encompassing those relating to access to water, in so far as the directive principles provide for the promotion of the needs of the vulnerable castes and tribes who are predominantly the poorest communities within India's society.

More specifically, the directive principles stipulate that the State must ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.[27] The express reference to protecting food, health needs and an ideal standard of living are precisely the same rights within which the UNCESCR

[25] Article 39(a). MP Jain op cit note 17 at 585 constructs livelihood in the sense of Article 19(1) (g) freedom to practice a profession or the opportunity to work or earn a living protected in Article 16. But this furthers a narrow approach to socio-economic protections; Vrinda Narain 'Water as a fundamental right: A perspective from India' (2009-2010) 34 *Vermont LR* 917,920.
[26] Article 38(1).
[27] Article 39(f).

embodies the right to water that is adequate to sustain subsistence food production and to support the primary health needs of individuals, as well as a life of dignity. It is therefore possible to interpret these directive principles as embodying the right to water as a determinant of health, food and dignity.

In Article 41, the directive principles stipulate that the State shall, within the limits of its economic capacity and development, make effective provision for securing public assistance in cases of undeserved want.[28] This may imply a responsibility on the State to physically provide water to those who cannot access it, either as a result of distance from water sources or as a result of the cost of water from such sources. In this sense, it may be argued that the Constitution envisages that the State guarantees that there are no impediments to enjoying the right to water for those who bear the burden of sourcing water for themselves. Article 41 can thus be read as implicating the obligation to fulfil the human right to water.

In relation to preserving the sanctity of the environment, the directive principles provide in article 48A, that the State shall endeavour to protect and improve the environment. Article 48A may be read in a manner which aligns with the General Comment 15 recommendation to States to ensure that traditional water sources are protected from unlawful pollution.[29] The constitutional guarantee to protect the environment may further be read to imply that water necessary to sustain life is embodied within the meaning of a clean and safe natural resource environment.[30] In so doing, the constitutional protection of natural resources such as rivers, lakes or wells, may allow a reading into the constitution a promise that the water made available for consumption by citizens is safe. Given that India's available water resources have been significantly depleted and many others have been heavily polluted to the extent that some water sources are no longer fit for human consumption or even agriculture, the state's obligation to protect citizens from the effects of pollution is given even more impetus.[31]

Overall, as in Uganda, the absence of an expressly articulated right to water in the Indian Constitution does not in and of itself hinder the recognition of the right if the Constitution is interpreted generously and purposively, in line with applicable international law.

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[28] Article 41. The areas in which the State is required to provide economic assistance include public assistance in cases of unemployment, old age, sickness and disablement. Mahendra P Singh (ed) op cit note 2 at 350-1 refers to this directive as covering measures of social security.
[29] Para 16(c) General Comment 15.
[30] Saby Ghoshray 'Searching for human rights to water and corporate privatisation in India: *Hindustan Coca-Cola Pvt Ltd v Perumatty Grama Panchayat*' (2006-2007) 19 *Georgetown Int Environmental LR* 643, 668.
[31] Erik B Bluemel op cit note 6 at 982.

4.4 THE RIGHT TO WATER WITHIN NATIONAL LEGISLATION

The 1950 Constitution empowers the Parliament to make national legislation, but particularly devolves legislative competence relating to water supply to the state legislatures.[32] The institutional framework envisaged by the 1950 Constitution contemplates a decentralised system of government, whereby legislative competence for water services is devolved to the 28 federal states and the national capital.[33] As a result, there appears to be scanty legislation at national level, prescribing the management and use of water. National legislation relating to the prevention of pollution, protection of the environment and human rights in general, may possibly provide some indirect elaboration for a human right to water. I attempt to trace the right within such national legislation and reflect on the implications of the proposed draft National water framework bill was prepared in 2013, and proposes an overarching national water legislative framework.[34]

The actual responsibility to provide water services for domestic use is delegated to municipalities. Consequently, there are more than 20 pieces of state-specific legislation which affect water supply and delivery, which cannot be satisfactorily explored here.[35] However, the 1950 Constitution appears to exclude legislation aimed at giving effect to the directive principles from judicial review, regardless of whether the review aims at challenging the constitutionality of the legislation or whether it aims to challenge the legislation's failure to realise the directive principles.[36] It appears that the State-specific legislation relating to water delivery may be outside the purview of judicial review and, accordingly, that the content may not offer much guidance to the questions interrogated in this thesis.

At national level, the Protection of Human Rights Act envisages that the State maintains responsibility for the protection of all rights.[37] In section 2(1)(d) the Protection of Human Rights Act expressly defines the term 'human rights' as meaning the rights relating to

[32] Section 246; and 7th Schedule, List II, which states that: Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.
[33] 7th Schedule list II of 1950 Constitution.
[34] For a more elaborate discussion on how federal states have legislated over water refer to: Philippe Cullet & Sujith Koonan (eds) *Water Law in India: An Introduction to Legal Instruments* (2011) chapter 2 and 4; Philippe Cullet *Water Law, Poverty, and Development: Water Sector Reforms in India* (2009); Philippe Cullet 'Evolving regulatory framework for rural drinking water: Need for further reforms' in *India Infrastructure Report* (2011) 151-161; Philippe Cullet 'Water law in India: Overview of existing framework and proposed reforms' *International Environment Law Research Centre* Working Paper (2007) 1-12.
[35] Article 243W of the Constitution which details the powers, authority and responsibilities of municipalities as well as the 12th Schedule of the Constitution. Philippe Cullet & Sujith Koonan (eds) *Water Law in India* ibid at 49 provides a list of available water policies by state.
[36] Article 31C.
[37] Act 10 of 1994 as amended by the Protection of Human Rights (Amendment) Act 43 of 2006.

life, liberty, equality and dignity of the individual guaranteed by the constitution; or embodied in the international covenants; and enforceable by courts in India.[38] Undoubtedly, the covenant rights most closely connected to water include life, health, housing, food and social security. It is within the embodiment of these rights that the right to water may be read into the legislation. While this appears to offer some reprieve, from a rights based perspective, the Protection of Human Rights Act appears weak and may at most embody a right to water indirectly. At the same time, it does not seem to elaborate on any remedies for its infringement.

Other Statutes specifically articulate various elements of the right to water. For instance, regulation of water quality is cursorily referred to within the preamble to the Water (Prevention and Control of Pollution) Act, which states its purpose as including to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water.[39] Section 3 of the Environment Protection Act vests the central government with powers to take all measures necessary for purposes of protecting and improving the quality of the environment and for preventing, controlling and abating environmental pollution.[40] When these two aspects of the legislation are viewed together they reflect alignment with the obligation to ensure the quality of water for basic human needs.

In sum, the national legislation appears to be inclined towards management of water sources rather than elaborating on a human right to water. Consequently it does not appear to espouse a rights based consciousness to the administration and distribution of water in India. The manner in which water is treated within national legislation underscores the impediments to enhancing enjoyment of a human right to water. The weaknesses exposed within the national legislation may further the claim that because the human right to water is neither explicitly recognised within the fundamental rights nor the directive principles of the 1950 Constitution; it has been interpreted in an inchoate manner at provincial level.

4.4.1 Assessing the national policy relating to water

The National Water Policy

[38] Section 2(1)(f) Protection of Human Rights Act clarifies that international covenants are the ICCPR and ICESCR.
[39] Act No 6 of 1974 downloaded from http://indiacode.nic.in/.
[40] Act No 29 of 1986 The Environment Protection Act is one of the most significant legislations having notably come into force in the whole of India. The environment is defined in section 2 as including 'water, air and land and the inter-relationship which exists among and between air, water and land and human beings other living creatures, plants, micro-organisms and property'.

Matters of water supply and delivery have been elaborated upon in various water policies at the national level. A National Water Policy was first adopted in 1987, subsequently revised in 2002 and more recently in 2012. The main objective of this centrally approved National Water Policy is 'to propose a framework for creation of a system of laws and institutions and for a plan of action with a unified national perspective'. This essentially provides a general frame with which state policies are expected to align themselves. The National Water Policy has set out several basic principles on which the planning, developing and managing of water resources ought to be founded.[41] There is no explicit reference to adhering to constitutional and international standards essential to actualising a human right to water within the National Water Policy. Even so, it remains a significant step towards developing national legislation relating to water supply, given that the lack of an overarching national water law regime appears to have impeded a coherent articulation of the right across the federal states.[42]

The National Water Policy affirms three basic principles that may allow a reading which implicates the normative content of a human right to water. First, it adopts notions of equity and social justice as essential to informing how water is used and allocated; secondly, it espouses good governance through transparent informed decision making; and, thirdly, it determines that safe water for drinking and sanitation should be considered as pre-emptive needs when allocating water.[43] The policy recommends that, in recognising water as a scarce resource, it must be managed as a community by the state, under the public trust doctrine to achieve food security, livelihood, and equitable and sustainable development for all.[44]

Another significant aspect of the National Water Policy is the apportioning of responsibility over water for basic needs across all spheres of government. The Policy recognises that the central government, states and local governance institutions must 'ensure access to a minimum quantity of potable water for essential health and hygiene to all its citizens, available within easy reach of the household.'[45] Furthermore, the National Water Policy proposes an overarching water pricing policy. It proposes that equitable access to water for all and its fair pricing are central to water used for drinking.[46] To cater for those who may not afford the price of water, the Policy recommends that the principle of

[41] Government of India *National Water Policy (2012)* 2-3. For a background see Roopa Madhav 'Context for water sector and water law reforms in India' in Philippe Cullet et al (eds) *Water Law for the Twenty –First Century: National and International Aspects of Water Law Reform in India* (2010) 109-137.
[42] Vrinda Narain op cit note 25 at 922; For an elaboration of federal state policies on water see Philippe Cullet & Sujith Koonan (eds) *Water Law in India* op cit note 34 in chapter 2 and 4.
[43] Government of India *National Water Policy (2012)* 2-3.
[44] Ibid at 2 and 4.
[45] Ibid at 4.
[46] Ibid at 7.

differential pricing may be retained for the pre-emptive uses of water for drinking and sanitation, food security and supporting a livelihood for the poor.[47] When these propositions are read together, they provide the most explicit articulation of a human right to water to be found in the Indian policy framework.

The Drinking Water Supply Policies

The central government routinely adopts guidelines to developing specific legislation at the federal state level. Therefore, the federal state legislative system is able to craft regulations and standards with the support of the central government's overarching national guidelines. These national guidelines often provide a framework, upon which the federal states can rely in the absence of national legislation or national policy. Demands for the supply of drinking water have led to the national government proposing such guidelines in relation to drinking water. As such, even though there is no national legislation, there is a specific regulatory framework. This framework aims to define the quantity and quality of drinking water standards within rural and urban areas. The draft guidelines set out the standards for supply of drinking water which is accessed from public water systems; standards relating to quality of water; and criteria to assure a supply of safe and clean drinking water within both rural and urban settlements.[48] What these policies show is that, to a great extent, the human right to water in India has been elaborated upon and clarified predominantly through non-enforceable executive policy. Given that commentators continue to surface the inequity in water delivery schemes across India, it appears that implementation of executive policy has not yielded ideal outcomes.

As I will discuss in the section that follows, the emphasis on articulating drinking water standards may be attributed to the dialogue between the courts and executive pursuant to citizens vindicating a right to water. Even though it appears that water reforms have evolved slowly, this outcome must be welcomed as a major benefit of rights adjudication.

4.4.2 A Note on the Proposed National Water Framework Law

In 2013, the Indian Ministry for Water Resources proposed a Draft Water Framework Bill.[49] Even though this is not equivalent to a law in force, it points to the manner in which the national government envisages translation and actualisation of the human right to water in

[47] Ibid at 7.
[48] Philippe Cullet & Sujith Koonan *Water Law in India* op cit note 34 at 71-74; 84-92.
[49] Sourced from http://mowr.gov.in/writereaddata/linkages/nwfl126 .

India. The Bill's preamble recognises that the country needs a cohesive framework among federal states in the form of guiding principles for the protection, conservation and regulation of water, in order to bring about equitable, socially just, conflict-free, efficient and sustainable management of water. The Bill proposes that the framework law's principles will be justiciable. It further proposes that water shall be subjected to pricing on economic principles to ensure its development costs and efficient use, and to reward conservation.[50]

Even though the Bill is in draft form and may be revised, one point of weakness appears to lie with the proposed approach to pricing. Considering that General Comment 15 recognises that affordability is an aspect of the right to water, this does not seem to align with the proposal in the draft bill, which appears to commodify water. Even though the draft Water Framework Bill proposes that each state ought to ensure equitable access and fair pricing of water and envisages that the supply of water to those below the poverty line may be subsidised, the future implications of such neo-liberal underpinnings in some clauses may outweigh the subsequent equitable pricing proposition.[51]

Nonetheless, the draft Water Framework bill substantially makes in roads in defining the internal parameters for a human right to water in several provisions. In a country that is rapidly industrialising, it proposes that allocations for water shall ensure that water for human life shall take precedence over other uses such as industry and agriculture. For instance it proposes that:

> Every individual has a right to a minimum quantity of potable water for essential health and hygiene and within easy reach of the household.[52]

Further, it determines that:

> The minimum quantity of potable water shall be prescribed by the appropriate government after expert examination and public consultation.
>
> Provided that the minimum quantity of potable water shall not be less than 25 litres per capita per day.[53]

The Draft Water Framework Bill proposes to clarify the exact obligations of the State. This is underscored by a statement that the State shall continue to bear the obligations even where water is corporatized or privatised. In summary, it is arguable that many of the principles ensconced in the Bill espouse an explicit right to water which, once enacted into

[50] Section 3 (18).
[51] Section 6 (1) and section 13 (2).
[52] Section 4(1).
[53] Section 4(2).

law, will be a major step towards its full translation. The direct benefit of this proposed law may be found in its legitimising of direct claims for a human right to water.

To conclude, it appears that the last 27 years have seen the most rigorous executive policy changes relating to water delivery for India. Yet, these changes have only partially defined and enabled actualisation of the human right to water. It is therefore arguable that the slow shift towards enacting rights conscious legislation and policy which would enhance the ultimate enjoyment of the right for citizens may be attributed to the fact that the right to water can at best be indirectly located within the constitutional text.

4.5 ADJUDICATING THE HUMAN RIGHT TO WATER IN INDIA

The Indian Supreme court and State High Courts have been famous for passing landmark decisions interpreting the fundamental rights and the directive principles in the 1950 Constitution. In many of these decisions, the courts have vindicated socio-economic rights to food, housing, health and water by integrating the directive principles of State policy within a reading of the fundamental right to life, the directive principles relating to health and environmental concerns, and the obligation to raise the standard of nutrition and living.[54]

The Supreme Court of India has set out various principles of constitutional interpretation useful to understanding the context in which the human right to water has emerged in the courts' jurisprudence. First, the Supreme Court found that the directive principles of State policy are, while not enforceable, fundamental to the governance of the country, in the sense that the State has a duty to apply these principles while making laws.[55] Commentators have urged a reading of this proposition to mean that directive principles and fundamental rights are mutually reinforcing and complimentary.

Secondly, while elaborating on its interpretive function, the Supreme Court has reiterated the principle that the Constitution cannot be construed narrowly. It must be given a wide and generous interpretation, taking into account changing conditions and purposes, so that the constitutional provision does not get fossilized. The Court has emphasised that it needs to remain flexible enough to meet newly emerging problems and challenges while interpreting fundamental rights in the Constitution.[56]

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[54] The cases referred to in this section were sourced mainly from All India Reporter to ensure uniform referencing. Where this was not possible, internet sources which do not enable uniform referencing particularly http://www.indialii were used.

[55] *Kesavananda Bharati & Others v State of Kerala & Another* Writ Petition 135 of 1970, Para 142.

[56] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi & Others* AIR 1981 SC 746.

Thirdly, even though the 1950 Constitution does not explicitly mandate the courts to interpret the constitutional text in light of international law, the Supreme Court has affirmed in a number of its decisions that its interpretation of the bill of rights will take into cognisance international law. Relying on a generous interpretation of Article 51(c) of the 1950 Constitution, the Supreme Court has held that international law instruments become part of Indian law as long as they are not inconsistent with it.[57] The Supreme Court has affirmed that the courts will maintain a focus on the core principles embodied in international covenants and must aim to give them effect within the domestic setting.

4.5.1 The Courts' interpretation of the fundamental right to life

Prior to pronouncing itself on the right to water, one of the earliest precedents made by the Supreme Court interpreted the ambit and scope of the right to life. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi and Others*, the Supreme Court determined that the ambit of the right to life extended to dignity and an adequate standard of living.[58] In discussing the nature of the right to life, the Supreme Court stated:

> We think that the right to life includes the right to *live with human dignity and all that goes along with it*, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.[59]

The normative content of the right to life was further expounded upon to include the notion of a right to livelihood. In *Olga Tellis & Others v Bombay Municipal Corporation and Others* pavement dwellers petitioned the Supreme Court, claiming that demolishing their makeshift and slum settlements would deprive them of accommodation near the city which consequently would deprive them of their jobs and their means of existence.[60] The *Olga Tellis* decision was important because it extended the right to living conditions, hitherto confined within the context of the social and economic directive principles of State policy, to constitute an integral part of the right to life. Affirming that the content of the right to life included the right to livelihood, the Supreme Court stated that:

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[57] *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526; Mahendra P Singh (ed) op cit note 2 at 360; Shylashri Shankar op cit note 3 at 132.

[58] AIR 1981 SC 746. Perhaps the earliest case expounding on the interpretation of the right to life as including dignity and personal liberty was *Maneka Ghandi v Union of India* AIR 1978 SC 597, in which the Supreme Court stated that even though Article 21 was couched in negative terms, it conferred some positive benefits.

[59] AIR 1981 SC 746, para 7, page 753 (emphasis mine).

[60] AIR 1986 SC 180, paras 2-6.

> The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the *right to livelihood* because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.[61]

The *Olga Tellis* Supreme Court went a step further by articulating the corresponding State obligations attaching to the right to life. In doing so, it inferred a negative obligation on the State to respect citizens' opportunities to make a living. I emphasise the obligation to respect here, because it would seem that the *Olga Tellis* Supreme Court subtly narrowed an interpretation of the obligations engendered by the right to life as being confined to imposing negative obligations, when it stated that it was not possible for the court to make orders which compelled the State to take specific actions towards relieving the conditions of citizens.[62]

4.5.2 Indirectly vindicating the right to water from interpretations of the right to life

Explicit judicial acknowledgement that the right to life could be interpreted to include water was later forthcoming from a number of Supreme Court and High Court decisions. The content of the right to water was then elaborated upon in *Subhash Kumar v State of Bihar & Ors*.[63] The petition alleged that a private company had been discharging effluent which found its way into a river, making the water unfit for drinking and irrigation purposes. The Supreme Court held that the right to life included the right to enjoy 'pollution free water' in order to realise the full enjoyment of life. As such, anything that endangered or impaired the quality of life amounted to a derogation of the Constitution.[64] Although the Supreme Court did not hear the case on its merits, the decision remains important because the Supreme Court explicitly elaborated on the content of the right to life as including access to safe water.

The courts have further pronounced upon the sufficiency of water to meet human needs as an aspect of the right to water and hence the right to life. In *S K Garg v State of Uttah Pradesh & Others,* the petition sought suitable directions to ensure a regular supply of water

[61] Paras 79F-H, 80A-B.
[62] AIR 1986 SC 180 Para 33.
[63] [1991] INSC 3, downloaded from http://www.liiofindia.org/cgi-bin/disp.pl/in/cases/cen/INSC/1991/3.html although the petition was ultimately refused on the grounds that the petitioner's claims were aimed to settle a personal grudge and not in the public interest, this case nonetheless affirms an explicit right to water.
[64] Para 13.

to the citizens of Allahabad.[65] The petition disclosed that the town had suffered from an acute water shortage for a long time. The petitioners averred that, in some instances, the water supplied was filthy and in others, the hand pumps provided water in trickles, causing long queues for those collecting water.[66] The High Court held that the right to get water is part of the right to life and that a large proportion of the citizens of Allahabad were being deprived of this right.

The High Court vindicated claims for a right to drinking water in *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala*, where the State had taken an excessively long period of time to actualise its plans to supply drinking water to the community. The High Court held that the State's failure to supply safe drinking water to the community was a violation of the fundamental right to life and ordered the State to take and complete steps to ensure a supply of drinking water to the community within a period of six months.[67]

The court in *S K Garg v State of Uttah Pradesh & Others* made orders implicating the state obligations to fulfil the right to water. The High Court ordered that, to ensure water quality, the water supplied for drinking in the area had to be tested regularly to ensure that it was potable.[68] In making this order, the Court affirmed that the State and its agents had an obligation to fulfil the right to water by taking measures to ensure that the quality of water supplied was of a particular standard.

In *Bandhua Mukti Morcha v Union of India*, a public interest petition challenged the living and working conditions of bonded labourers for, amongst other things, violating their right to life.[69] The claims relating to water were that these labourers could only access dirty water from a stream as a source of drinking water. Drawing from its previous interpretations of the right to life as including the right to live with dignity, the Supreme Court set out the content of the right to water and the obligations it engendered. The Supreme Court stated that the bonded labourers were entitled to pure drinking water and specifically that this obligation was to be borne by their employers.[70] In what appears as an attempt to elaborate on the obligations of the federal state and central government, the Court directed both governments to ensure that the applicable legislation, which provided for specific amounts of drinking water which had to be provided to workers in mines was immediately enforced.

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[65] (1998) 2 UPLBEC 1211.
[66] Para 2- 3.
[67] 2006 (1) KLT 919. Sourced from www.ielrc.org/content/e0642.pdf.
[68] Para 11.
[69] AIR 1984 SC 802. The petition also relied on the prohibition of forced labour and directive principles requiring equality, ensuring a livelihood and work under humane conditions.
[70] AIR 1984 SC 802, paras 10, 34 and 40.

FK Hussain v Union of India[71] dealt with the question of achieving a delicate balance in enhancing water supplies while actualising the right to life. In this matter, the High Court was faced with a petition seeking to preserve the natural water resources at the expense of a technologically enhanced water supply. The petitioners lived on islands which had limited ground water resources. The community's demand for water had increased and the local administration decided to augment ground water supply by using electric or mechanical pumps. The petitioners, as residents, argued that the action of the local administration would amount to an invasion of the right to life by depleting the islands' limited natural resources. The petitioners adduced expert evidence which demonstrated that the existing fresh water equilibrium would be upset if the local administration's project were to proceed. They sought orders to restrain the administration from implementing the scheme.[72]

In response to the petition, the state contended that the growing need for water made it impossible to maintain the traditional means of collecting water. It averred that the islands had poor sanitary conditions and a prevalence of water borne diseases, which made it necessary to introduce a scheme of protected water supply. In a bid to account to the aggrieved citizens, the state argued that the available water was of bad quality and required purification, contending that its plan would be implemented in a manner which ensured the pumping of water would be controlled in order to minimize the likelihood of excessive withdrawals of water.[73]

The High Court relied on the expert reports, which found that the existing ground water was limited and that excessive withdrawals of the ground water would diminish potable water on the islands. The Court found that the right to life had several attributes, amongst which was the right to 'sweet water'. The Court found that the right to potable water, being a basic element of life, had to be prioritised above other water needs.[74] While the court did not elaborate on the term 'sweet water', within the context of the petition, I presume that the Court perceived water in terms of the ideal balance of acidity and alkalinity in fresh water, which affects its taste and hence its acceptability to the community.

The obligations of the State were brought into sharp focus in *FK Hussain v Union of India* in which the State had made compelling arguments for enhancing water supply in the area to remedy shortages of clean water and water borne illnesses. At the same time, the experts invited to advise the court during the trial had shown that there were other methods of

[71] AIR 1990 KERALA 321. Also referred to as *Attakoya Thangal v Union of India.*
[72] AIR 1990 KERALA 321, Para 2-3.
[73] AIR 1990 KERALA 321, Para 4.
[74] Para 7.

enhancing water supply in the area beyond the available ground water resources.[75] The High Court affirmed the State's obligation to fulfil the right to water in a manner which did not violate the entitlement of other citizens to enjoy their human right to water.

Narmada Bachao Andolan v Union of India involved a contestation of a large dam project on the Narmada River which flowed within a number of federal states. There were fears that the dam project would adversely affect the environment.[76] The Petitioners claimed that the implementation of the project would cause mass displacement of citizens and adverse environmental consequences, thus violating the right to life. Upon evaluating detailed responses on the conflicting gains and disadvantages of the project, the majority Supreme Court bench determined that the project would be instrumental in enhancing the adequate supply of water to meet all the requirements of the people who previously had inadequate water supply. Put otherwise, the dammed water would be able to cater for multiple purposes and provide water beyond drinking needs – such as water for agriculture and industry.[77] The Supreme Court reiterated that:

> 'water is the basic need for the survival of human beings and is part of right of life and human rights enshrined in Article 21 of the Constitution of India...The Resolution of the U.N.O in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under: All people whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs'[78]

The *Narmada Bachao Andolan* court explicitly defined a right to water with reference to international law standards emerging from International Declarations affirming the right to sufficient and potable water for basic needs. However, in effect, the court upheld the dam project which is alleged to have caused the displacement of 500,000 to 4 million citizens.[79] As a result, this case is usually criticised as an indication of the court's weak stance in the face of capitalist development and an example of the shortcomings of a neo–liberal bench more interested in protecting its own class and donor interests.[80]

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[75] Para 7.
[76] AIR 2000 SC 3751.
[77] Paras 249-250, 252; 275 and 276.
[78] Para 274.
[79] Jenny T Gronwall op cit note 4 at 289.
[80] Jenny T Gronwall op cit note 4 at 289; Surya Deva 'Human rights realization in an era of globalization: The Indian experience' (2006) 12 Buffalo Hum Rights LR 93, 120. On the flip side, it has been pointed out that the majority of the Court's decision may have been reached as a result of the bench's perception of the litigant. The environmental interest group which instituted the proceedings was not perceived as authentically representing the interests of the vulnerable rather than to stop the implementation of the project. Indeed it was contended that their allegiance lay with the land owning class which was opposed to the project because it would deprive them

The faults of *Narmada Bachao Andolan* notwithstanding, it provides authority for the position that the ambit of the right to water extends beyond a bare satisfaction of drinking water needs to having enough clean water to meet a range of basic needs.[81] Secondly, the decision affirms that the State has a continuing obligation to providing potable water in areas which have none.

Even though no reference was made to the ICESCR, *Gautam Uzir v Gauhati Municipal Corporation*[82] presented the High Court with an opportunity to explore the State's obligation (akin to Article 2(1) of the ICESCR) to use available resources to progressively realise the right to water. This judgment relates to two petitions which were heard jointly by the High Court. The petitioners sought relief from the perpetual scarcity and impurity of water in the municipal area. Ingeniously, the respondent Municipal Corporation, while admitting that it was aware of its duties regarding the supply of drinking water, argued that it was faced with financial and spatial constraints which made it unable to augment its existing water plant.[83] In its affidavits in response it acknowledged that only 30% of the Corporation area was covered by the existing water supply network.[84] The Corporation blamed the bleak situation on a lack of funds and legal restrictions which had disabled it from increasing water rates for 24 years.

In its ruling, the high court re-stated the Supreme Court's position that clean water is essential for life within the interpretation of Article 21.[85] The novelty of the decision lies with the high court's interpretation of the role of the state government in realising a right to water. For instance, the Court noted that, even though the State did not have the financial resources to finance large projects, this did not do away with the State's responsibility to mitigate the crisis of water scarcity within its available resources. The High Court recommended that the State could have met its obligations if it started by implementing smaller schemes rather than constructing none at all.[86] It accordingly ordered the State to initiate small, affordable schemes, so as to gradually improve the water situation in phases.[87] The court further observed that:

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of cheap labour. See Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 139-141.

[81] Vrinda Narain op cit note 25 at 920-921.

[82] PIL No 12 of 1998 and PIL No 9 of 1999. Sourced from http://www.ielrc.org/content/e9918.pdf .

[83] Para 3 and 4.

[84] Para 8.

[85] Para 10.

[86] Para 10.

[87] Para 13.

> We feel that it may not be possible for us to believe that the Respondents are helpless and shall continue to supply 1/3rd of the water required and that too, not very clean. Concrete, workable, practical and affordable scheme have to be framed by them....[88]

In my view, the court aimed to give application to the international human rights law principle that the government is obliged to take steps to progressively realise the right to water within its available resources.

4.5.3 Reading the right to water into the directive principles

The Supreme Court has relied on the directive principle imploring the State to improve the level of nutrition and the standard of living of its people, as well as the principle pertaining to protection of the environment, in order to affirm the human right to water. In *Hamid Khan v State of Madhya Pradesh*, the High Court heard a petition in which it was claimed that the water supplied by the state government contained excessive fluoride, which had consequently caused deformities amongst thousands of people within the state who had consumed the water.[89] The High Court affirmed that Article 47 of the 1950 Constitution, which determined that the state had a responsibility to raise the level of nutrition, standard of living and improve the public health of its people, included a responsibility to provide unpolluted drinking water. It accordingly held that the state had violated its duty to supply pure drinking water to citizens.[90]

Vellore Citizens Welfare Forum v Union of India vindicated an entitlement to water of a particular quality, as embodied within the right to a clean environment. The petitioners alleged that a large leather tanning industry in the State discharged untreated effluent into the river which was the community's main source of water.[91] As a result, the area suffered from acute shortages of drinking water. The Supreme Court referred to the principles of sustainable development, affirming that Indian law recognised the principle that development had to eradicate poverty and improve the quality of life while at the same time remaining mindful of maintaining the existing eco-systems. The Supreme Court integrated the directive principles within its reading of Article 21 and found that:

> The Constitutional and statutory provisions protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the alienable common law right of clean environment.[92]

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[88] Para 14.
[89] AIR 1997 MP 191 para 2-5.
[90] Para 6.
[91] AIR 1996 SUPREME COURT 2715 paras 1-2.
[92] Para 15, page 2722.

4.5.4. The right to water as it relates to water resource allocations

The Indian courts have additionally affirmed the right to access water for citizens in cases involving competing claims for water within communities. In these cases, tensions within communities have been heightened between those with a vested interest in extracting water from public water sources for irrigation on the one hand, and those who depend on these water sources to derive water for their basic needs on the other. *Delhi Water Supply and Sewerage Disposal Undertaking v State of Haryana*[93] was a dispute between the water board of Delhi and the upstream State from which Delhi's drinking water was sourced. The residents of Delhi depended on the State of Haryana for the bulk of their drinking water needs, but the State of Haryana on several occasions failed to supply water to Delhi on account of its obligation to supply water for irrigation within Haryana. The Supreme Court stated:

> The primary use to which the water is put being *drinking*, it would be mocking the nature to force the people who live on the bank of a river to remain thirsty, whereas others incidentally placed in an advantageous position are allowed to use the water for *non-drinking* purposes.[94]

The Supreme Court's decision expounds the understanding of a right to water in the context of water allocations. It affirmed that when allocating water resources, the right to drinking water ought to be paramount over any other use of water, such as water for irrigation. It is plausible to read into this precedent an affirmation that water allocations must prioritise basic human needs.[95]

The Supreme Court has further deliberated on the limitations to the enjoyment of the right to water. Particularly in the enjoyment of the individual's right to water, a person cannot be at liberty to prejudice the enjoyment of other citizens' right to water. In *Venkatagiriyappa v Karnataka Electricity Board* the court was faced with the delicate question of balancing individual rights as against communal rights to access water.[96] *Venkatagiriyappa* involved several petitions which had been made by farmers in the State, asserting the right to dig private boreholes to irrigate their farms as an extension of the right to life. The petitioners' boreholes contravened the respondent's executive order, which required that boreholes be

[93] [1996] INSC 348.
[94] Para 1 (my emphasis).
[95] The idea of prioritising human needs over industrial activity was deliberated upon again in *MC Mehta v Union of India* AIR 1987 SC 965 in which the petition disclosed that the industrial activities in the area let off a poisonous chlorine gas. The Supreme Court held that life, public health and ecology had priority over unemployment over loss of revenue.
[96] 1999 (4) Kar LJ 482 downloaded from http://indiankanoon.org/doc/1863578/ .

constructed at least 825 feet apart in order to avoid stressing the water table. The available research indicated that water supply to the communal rural water supply schemes would be significantly depleted to the disadvantage of villagers if the private farmers were allowed to have their way.[97] The Court held:

> The right to life cannot however be extended to mean living according to one's own whims and caprices without caring for life and liberty of others. The acknowledgement of the concept of fundamental right envisages the enjoyment of such right without affecting the rights of other citizens.[98]

Providing a contextual view, it further stated that:

> In a developing country like India, no citizen can claim absolute right over the natural resources ignoring the claims of other citizens. It is true that life without water cannot be conceived. But, it is equally true that water resources being limited, its user has to be regulated and restricted in the larger interests of the society and for the welfare of the human beings. We are, therefore, of the opinion that the right under Article 21 which is available to all citizens, can be held at the most to have water for drinking purposes, as, admittedly, without it, the life cannot be enjoyed at all. However, the right to have water for irrigation purposes cannot be stretched to the extent of bringing it within the ambit of Article 21 of the Constitution of India.[99]

The *Venkatagiriyappa* High Court provides a most lucid account of the internal and external dimensions of the right to water. In elaborating the internal dimensions of the right to water, the case brought to surface the notion that water has to be perceived with reference to its utility to the individual. In respect of the external dimensions, the case emphasized that the scope of a human right to water must necessarily be limited by the competing basic needs of others in the community.

4.5.5 The right to municipal services

The Supreme Court considered the question of the constitutional obligation to provide municipal services to slum dwellers in *Municipal Council, Ratlam v Shri Vardhichand.*[100] Even though the matter related to provision of sufficient sanitary facilities, its principle is instructive. The respondents had made a petition in a lower court claiming that the municipal council had failed to provide public conveniences for slum dwellers who were, as a result, causing a public health risk to the locality. The Court found in favour of the residents and ordered the municipality to provide public sanitation facilities, along with a water supply, for the slum dwellers.

[97] Para 4.
[98] Para 7.
[99] Para 7.
[100] 1980 AIR 1622.

On appeal by the municipality, the Supreme Court upheld the lower court's findings. Given that the proceedings had been pending for seven years, the Court added that the municipal council's claims that it lacked resources to improve the sanitation system were unreasonable. In its judgment, the Supreme Court affirmed that the municipal council was constitutionally obliged to provide sanitary facilities to all residents of the municipality within the context of the directive principle to improve public health in Article 47 of the Constitution. Consequently, while the court orders would require the municipality to adjust its budget, the Supreme Court was willing to indirectly vindicate the rights of the slum dwellers by ordering positive action on the part of the State.

4.5.6 Evaluating the Indian courts' jurisprudence

Although the preceding subsections did not review all the decisions in the High Courts and Supreme Court of India concerning socio-economic rights and water, they considered a significant number of the courts' reported decisions spanning a period of at least fifteen years. It is therefore possible to draw conclusions on the manner in which the Indian courts have addressed the typical impediments to enforcing the right to water, as well as on the impact of the indirect judicial vindication of the right to water.

Concerns of institutional illegitimacy do not appear to have impeded the enforcement of a right to water through the Indian courts. Those opposed to the manner in which the court has interpreted and enforced socio-economic rights have mostly criticised the Supreme Court for its activist role through public interest litigation. These critics urge that the Supreme Court has usurped executive and legislative authority by adjudicating upon matters which are constitutionally outside the judiciary's purview. Even then, the judicial overreach argument appears to be mostly overstated.[101] Indeed the jurisprudence shows that the courts have interpreted the right to water by reading this right into the right to life, while simultaneously interpreting the directive principles of state policy. Given that constitutional interpretation is within the purview of the Supreme Court, it appears that the courts have circumvented the institutional illegitimacy impediment and enforced a right to water, without subjecting the programs and policies elaborating socio-economic rights to direct judicial review. The lesson therefore to be drawn from the experience of India is that a willing court can negotiate space

[101] For a comprehensive summary of these and opposing views see Varun Gauri 'Fundamental rights and public interest litigation in India: Overreaching or underachieving?' (2010) 1 (1) *Indian Journal of Law & Economics* 71, 75.

within which it can legitimately exercise its constitutional mandate, without necessarily conflicting with deeply held notions of a separation of powers.[102]

Secondly concerns about the ideological shortcomings of a right to water and other socio-economic rights do not appear to have impeded the enforcement of a right to water through the Indian courts. Although commentators have urged that the directive principles constitute constitutional aspirations which cannot be immediately realised and therefore cannot become the subject of adjudication, the approach of the Indian courts has prevailed over this impediment.[103] The courts have used the interdependence and inter-relatedness of rights to elaborate and interpret the right to life in a manner which encompasses several other socio-economic rights, including water. The Supreme Court's approach appears to be one which aims to harmonise the fundamental rights and directive principles rather than to perceive directive principles as being somehow inferior. It would seem that this approach has successfully circumvented the typical opposition to the justiciability of directive principles and a right to water.

The Indian courts have not only overcome the usual concerns against adjudicating the right to water, but their judgments have had a direct impact on the manner in which the right to water is conceptualised and actualised. Commentators have remarked that there are dialogical benefits of adjudication which indirectly enhance the enjoyment of rights for citizens because, when judges adjudicate, they inevitably engage with policy and thereby make citizens' needs more visible. In so doing, courts act as a catalyst to legislative and executive activity rather than to paralyse.[104] The Supreme Court's decisions may accordingly have facilitated the opportunities to review water related policies.

For instance, in the aftermath of *Subash Kumar*, the first Supreme court decision which explicitly affirmed a right to water, several claims for a right to water were decided, both in the Supreme court and in the federal High courts. Commentators attribute this to the power of the Court's decisions to embolden the poor.[105] The major outcome has been that Indian jurisprudence has gradually crystallised a right to safe and clean drinking water for citizens. Even though water reforms had already began prior to the *Subhash Kumar* Supreme Court

[102] Shylashri Shankar op cit note 3 at 121-123, 133.

[103] Mahendra P Singh (ed) op cit note 2 at A46-47.

[104] Varun Gauri op cit note 101 at 75-78; Sheetal B Shah 'Illuminating the possible in the developing world: Guaranteeing the human right to health in India (1999) 32 *Vanderbilt J of Transnational Law* 435, 472 and 483; Amita Dhanda 'Realising the right to health through co-operative judicial review: An analysis of the role of the Indian Supreme Court' in Oscar Vilhena & Upendra Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 413.

[105] Sheetal B Shah op cit note 104 at 472 and 485.

decision, it is plausible to relate the emphasis on drinking water guidelines at national and provincial level to the outcome of this and subsequent decisions of the courts.[106]

Another related outcome appears to be the enhanced enjoyment of a right to drinking water for many citizens. In many federal states, clear guidelines articulating the standard for drinking water supply have been adopted. Once passed into law, the current National Water Bill, which envisages an enforceable right to water, may introduce a direct remedial framework for claimants of a right to water. Commentators suggest that the adjudication has had an indirect effect on executive policy given that the executive has been excruciatingly slow in responding to the courts' judgments.[107] Even then, in comparison to the nearly fifty years it has taken the executive and legislature to adopt the aspirations of the directive principles, the outcome of adjudication cannot be overemphasised.

A closer look at the approach and outcomes of adjudication for India indicates that the justiciability and ultimate enforcement of a right to water has been an outcome of judicial willingness. Unlike Uganda, where the Constitution's directive principles expressly make reference to water, this is not the case for India. The courts have therefore creatively used their constitutional mandate to interpret the Constitution and enforce fundamental rights for the benefit of citizens in a manner which ultimately realises the transformative ideals of the 1950 Constitution.

The jurisprudence of the Indian courts has accordingly been welcomed as exemplary in adjudicating socio-economic rights in general and the right to water specifically. Commentators have described the Supreme Court's record in adjudicating socio-economic rights as evidencing a dynamic approach to social justice.[108] In many ways, the courts have stretched the possibilities of the 1950 Constitution to vindicate socio-economic rights claims while empowering the lower, and more easily accessible, state high courts to use their judicial mandate to protect the rights of poor and vulnerable citizens.

But the Court's record has not been entirely without criticism. Commentators have argued that the cases have exposed an underlying lack of principle, to the extent that the

[106] Philippe Cullet & Sujith Koonan (eds) *Water Law in India* op cit note 42 at 71-74.

[107] Shylashri Shanar 'Descriptive overview of the Indian constitution and the supreme court of India' in Oscar Vilhena & Upendra Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 105-6.

[108] Shylashri Shankar op cit note 3 at 113; Amita Dhanda 'Realising the right to health through co-operative judicial review: An analysis of the role of the Indian Supreme Court' in Oscar Vilhena & Upendra Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 407 & 413; Upendra Baxi 'Taking suffering seriously: Social action litigation in the supreme court of India' (1985) *Third World Legal Studies* 107, 119-120,122.

courts have issued several 'inconsistent and contradictory judgments.'[109] Using the *Olga Tellis* case as evidence of this inconsistency, Paul O'Connell observes that the Supreme Court, while declaring a right to livelihood, granted orders that effectively allowed the State to evict the pavement dwellers. In this way the substantive outcome of what appeared to be a pro-poor decision was not in favour of the vulnerable street dwellers.

While this may bear some truth, in respect of the water related cases, I propose that such claims of inconsistency are not borne out. I would rather argue that the courts' main weakness has been its failure to go beyond the rhetoric of affirming rights. The court could have provided more clarity on the internal dimensions of the right to water by expanding on the standards of quality, adequacy and access to water. However, a possible reason for the Supreme Court's failure to expound its jurisprudence in a way which addresses these underlying constitutional issues may be a result of there not being express constitutional norms relating to water upon which it could decisively base its jurisprudence.[110]

Given that enforcing the positive obligations of the state to its citizens is a critical feature of the progressive realisation of the human right to water for those most in need, commentators have been critical of the underlying class interests that the courts seem more inspired to protect. Critics highlight the shift towards using public interest litigation to protect the class interests of the privileged, while undermining the rights of the poor and vulnerable classes.[111]

A case that has been singled out by most commentators in this regard is the *Narmada dams* case, where the judgment adeptly relied on international law conventions to define the right to water before swiftly dismissing claims that the poor communities in the area would suffer irreparable injury by the massive project. The Court's paternalistic approach to the petitioners' claim of the community's right to remain in their locale is telling. It stated that 'the rehabilitation sites they will have [those relocated] will have more and better amenities than which they enjoyed in their tribal hamlets.'[112] Commentators point to two main implications of this shift in mindset. First, it is urged that an increasingly neo-liberal leaning bench is showing increasing disregard of rights claims of the poor and vulnerable, behind the

[109] Paul O'Connell op cit note 9 at 97; Paul O'Connell 'The death of socio-economic rights' (2011) 74 (4) *The Modern LR* 532, 547-548.
[110] Vrinda Narain op cit note 25 at 923.
[111] Paul O'Connell op cit note 9 at 101-3; Paul O'Connell 'The death of socio-economic rights' (2011) 74 (4) *The Modern LR* 532, 547-548; Oishik Sircar 'Spectacles of emancipation: Reading rights differently in India's legal discourse' (2011-2012) 49 *Osgoode Hall LJ* 527, 533-534; Varun Gauri op cit note 104 at 80.
[112] Para 276.

façade of development for the betterment of the poor.[113] Furthermore, it would seem that the role of public interest litigation has shifted from serving the poor and vulnerable, who ought to be the beneficiaries of its outcomes, to the wealthier classes who already have economic and political power.[114] This shift in the judicial mindset is perhaps the most far reaching negative outcome which points to the limitations of an indirect vindication of rights. If concerns about the bench's neoliberal tendencies hold, a lasting challenge may be to craft a solution which has the ability to counter the more powerful liberal interests against which the protections of poor citizens' needs are pitted using the force of a rights conscious legal framework.

Another shortfall of these decisions would appear to be the underlying effect that judicial precedent may have on the crafting of rights claims. It seems that the right to water is not justiciable as an independent right, but only as a survival requirement inherent to the right to life. This may imply that there has to be a risk or a violation of a right to life prior to a claim being actionable. The effect of this is that only the negative and core dimensions of the right to water appear to be truly enforceable. This may consequently impede full realisation of a right to water.

Commentators have argued that it appears to be difficult for the Supreme Court to use socio-economic rights adjudication as a means of challenging the financial and economic decisions of government. Yet these financial and economic decisions are determinants of full actualisation of the rights.[115] It seems that, for an individual to successfully put forward a claim where the State has not taken any further steps towards reviewing its programs or their implementation to achieve key milestones, the claim must be anchored to a life threatening risk.[116] Consequently, the outcomes in these cases may have in fact narrowed the possibility of enforcing the positive obligations of the state.

4.6 CONCLUSION

The case study of India appears to suggest that the manner in which the right to water is articulated in the Constitution of a state is an important factor. Directive principles of state policy appear to have provided minimal direction to executive policy and legislative content. Even then, the manner in which the constitution articulates the right to water may not be the

[113] Paul O'Connell op cit note 9 at 100-101.
[114] Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 137-8.
[115] Paul O'Connell op cit note 9 at 104.
[116] The *Hamid Khan* case where the state tested drinking water supplies for micro-organisms but did not test for fluoride content may offer evidence of this risk.

only determinant as to whether or not the right will be actualised. Rather, the case study suggests that there are other factors, particularly, the willingness of the various agencies of government.

In India this willingness emerged from a Supreme Court which has negotiated for itself a space within which it was able to focus on adopting a rights based approach to exercising its constitutional mandate to enforce socio-economic rights. Using this method, it indirectly vindicated rights which would otherwise have not been entertained before courts. Judicial willingness has additionally given the dialogue on constitutional aspirations more meaning.

The momentum gained from the Supreme Court's interpretation of fundamental rights may have stimulated the legislature and executive into action, culminating in the substantive protection and enjoyment of the right to water that we can now see in India. Therefore, indirect vindication can over time enhance enjoyment of a right to water, albeit very slowly.

CHAPTER 5:
ENFORCING THE RIGHT TO WATER IN SOUTH AFRICA

5.1 BACKGROUND

Within Sub-Saharan Africa, South Africa is one of the only constitutional democracies with a budding socio-economic rights jurisprudence. As I already indicated, a case study of South Africa's constitutional and legislative framework and jurisprudence will be useful to this study for several reasons. South Africa provides an ideal comparator as an African country with a similar transformative political agenda to Uganda. The widely celebrated Constitution of the Republic of South Africa, 1996, reflects a transformative agenda and was promulgated at about the same time that Uganda promulgated its current constitution. The result is that both countries have constitutions which are nearly the same age. But South Africa's constitution explicitly recognises and makes justiciable the right to water. In fact, its apex court has already adjudicated upon several socio-economic rights including the right to water. Therefore, a study of South Africa may be a valuable comparator for what could have been possible in Uganda, shading light on the potential and pitfalls of enforcing constitutionally entrenched socio-economic rights in a developing country.

Nonetheless, the historical context in which the Constitution of the Republic of South Africa, 1996 (1996 Constitution) was promulgated differs somewhat from Uganda's. Even though debates about the contents of a new constitution began when both countries had come to the end of their respective political struggles, in South Africa the arguments for entrenchment of socio-economic rights, served a symbolic function. Socio-economic rights were perceived as a means to advance the goal of achieving social transformation and signified a complete break from the apartheid era.[1] This was important for South Africa because, during the apartheid era, the unequal enjoyment of socio-economic goods and services was intricately linked with the legal and institutional framework through which these

[1]More detailed examinations of the nature of transformation envisaged by the South African constitution are provided in Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31; Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Marius Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *SA Public Law* 155; Sandra Liebenberg *Socio Economic Rights: Adjudication under a Transformative Constitution* (2010); Linda Stewart 'Adjudicating socio-economic rights under a transformative constitution' *PennState Int LR* (2010)28(3) 487.

basic goods and services were distributed. For instance, water delivery mechanisms ensured that white South Africans enjoyed better access to water for domestic and agricultural use.[2]

The new constitutional order therefore aimed to realise radical social welfare reforms in order to transform South African society and enhance the welfare and economic opportunity of its citizens.[3] In South Africa's context therefore, it was essential for the country's post apartheid constitution to cement socio-economic rights, by buttressing them with the force of judicial enforcement.

At present, South Africa is on the threshold of being regarded as a water stressed country. Apart from providing water for domestic use, the country's water resources are shared amongst the agricultural, forestry, mining, manufacturing and power generation sectors. Considering that the country receives less rainfall than the world average, this means that its major rivers, which are its main water sources, have increasingly less available water.[4] The main means of water delivery in urban areas are through the municipal piped water systems. In informal settlements and areas where natural water resources' quality has deteriorated, municipal trucks periodically deliver water which is stored in tanks by residents. In rural areas, citizens access water from public water taps although there are still some who source water directly from rivers.

Given this background, I begin this chapter by exploring the constitutional framework, within which rights are interpreted and enforced. The third section explores the ambit and scope of the right to water in the 1996 Constitution. In the fourth section, I traverse the national legislative and policy framework to explore the extent to which the constitutional right to water finds elaboration, and to evaluate the extent to which this framework reflects the rights consciousness of the 1996 Constitution. The three sections which follow examine the High Court and Constitutional Court jurisprudence which has elaborated on the right to water. To conclude, I evaluate the strengths and weaknesses of the South African model of constitutional protection of water rights as it impacts upon substantive enjoyment of the right to water for poor and vulnerable citizens.

In this chapter I claim that the entrenchment of a justiciable right to water may account for the extent to which the right has been elaborated upon within the South African legislative and policy framework. I also claim that this has enabled the courts to crystallise the nature of

[2] See Michael Kidd *Environmental Law* 2ed (2011) 69-72 for a history of South African water legislation.
[3]Pierre de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67,68-70. Also refer to the second Constitutional Principle contained in Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993.
[4] White Paper on a National Water Policy for South Africa (1997) 13-14; Michael Kidd op cit note 2 at 68.

the State's obligations to realising the right while adjudicating claims for its enjoyment. More importantly, I claim that a constitutional right to water may have facilitated deliberate dialogue between the three main organs of government, as well as within the spheres of government, in a manner which has advanced substantive enjoyment of the right.

5.2 SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK

The preamble to the 1996 Constitution recognises that the Constitution was promulgated in order to establish a society based on democratic values, social justice, and fundamental human rights and to improve the quality of life of all South African citizens.[5] Towards this end, the 1996 Constitution determines that its founding values include 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[6] The 1996 Constitution additionally contains an elaborate bill of rights in chapter two, enumerating a range of universally accepted human rights and freedoms.

The 1996 Constitution provides explicit guidance on what must be taken into account in the interpretation of its Bill of Rights. First, section 39 determines that, when interpreting the Bill of Rights, a court or tribunal must consider international law and may consider foreign law.[7] South Africa has acceded to the ICESCR and although it has not yet been ratified, the country has ratified other conventions such as CEDAW, the CRC and the African Charter, which ensconce elements of a right to water.[8] In addition, when interpreting national legislation that gives effect to constitutional standards, the 1996 Constitution demands that courts give preference to any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[9] Therefore, the UNCESCR's interpretations of the rights to water and health, as well as the Human Rights Committee's interpretation of the right to life, must be taken into account when considering the meaning of the equivalent rights in the 1996 Constitution.

[5] Constitution of the Republic of South Africa Act 108 of 1996. Its commencement date was 4 February 1997.
[6] Section 1 (a).
[7] Section 39 (1) (b) of the 1996 Constitution. Commentators have indicated overwhelming support to relying on both binding and non-binding international conventions arguing that the reference in section 39 is to 'international law' and not *binding* international law such that the Courts are given the free rein to apply the relevant body of international law. For instance see Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005)160.
[8] The Republic of South Africa acceded to the ICESCR on 3 October 1994. The cabinet approved that South Africa should ratify the Covenant on 10 October 2012.
[9] Section 233.

In the same vein, the 1996 Constitution provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.'[10] The constitutional values of human dignity, equality and the advancement of human rights and freedoms are expressly referred to in section 1 of the Constitution as forming the foundations of the State. They also constitute fully fledged human rights.[11] This shows that the interpretation of the right to water must embody these constitutional values.

Within the Bill of Rights, the 1996 Constitution includes socio-economic rights alongside civil and political rights, affirming the principle of interdependence and indivisibility of the rights emerging from the UDHR. This implies that the 1996 Constitution also rejects the distinctions historically framed around enforceable civil and political rights against non-enforceable socio-economic rights.[12] It is plausible to expect that, when interpreting and enforcing the bill of rights, a court will aim to advance the interdependence and interrelated nature of the constitutional rights.

Understandably, enjoyment of the rights enumerated within the Bill of Rights is limited. Section 36 determines that:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Even though this general limitation clause implies that it is applicable to all rights enumerated in the Bill of Rights, it is not entirely clear whether it remains applicable in instances where rights also specifically include internal modifiers or limitations. Commentators have mostly agreed that section 36 applies to the limitations arising from the rights which attach negative obligations on the State.[13] Nonetheless there remains debate as to

[10] Section 39 (1).
[11] Section 9 (1); 9 (2) and section 10.
[12] Pierre De Vos op cit note 3 at 68-71.
[13] Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 152; Stu Woolman & Henk Botha 'Limitation' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (2014) (OS 07-06) 33-41.

whether section 36 would also apply in instances where a challenge relates to the rights which attach positive obligations, given the particular phrasing of the socio-economic rights enumerated in the 1996 Constitution.[14]

The manner in which enforcement of the rights in the Bill of Rights is envisaged, for whom and against whom enforcement is possible, are all matters which are explicitly spelt out. Like the Ugandan Constitution, section 38 of the 1996 Constitution recognises the right to seek legal redress for an infringement or threatened infringement of the Bill of Rights.[15] It provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

At the same time, section 38 mandates a court to make declarations and where necessary grant appropriate relief in matters relating to infringement of the Bill of Rights. The actual import of the term 'appropriate relief' has been teased out by commentators and the courts, to mean that the relief granted by a court in the context of a constitutional claim must be that which is required to effectively protect and enforce the Constitution.[16]

Accordingly, the 1996 Constitution mandates the courts to exercise their discretion in the manner in which they make awards to claimants.[17] The court is constitutionally vested with wide latitude to grant orders, to the extent that these orders are just and equitable. It has been proposed that this provision carries with it important consequences for claimants of socio-economic rights. It appears to envisage a court which is empowered to be flexible and creative in crafting remedies for socio-economic rights claimants, subject only to the

[14] Pierre De Vos op cit note 3 at 93-4; Marius Pieterse 'Towards a useful role for section 36 of the Constitution in social rights cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council'* (2003) *SALJ* 41, 44 and 47; and Kevin Iles 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *SAJHR* 448, 459.

[15] The persons who may approach court according to s38 are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members. Applicants need only meet any one of these requirements: *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 37.

[16] Michael Bishop 'Remedies' in Stuart Woolman et al (eds) Constitutional *Law of South Africa* 2ed (2014) (OS 06-08) 9- 56; Mia Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) *SAJHR* 215; *Fose v Minister of Safety & Security; Sanderson v Attorney General of the Eastern Cape; President of Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd.*

[17] Section 172 of 1996 Constitution.

appropriateness, equity and just nature of its orders.[18] Much like the Ugandan Constitution, the courts are therefore granted wide remedial powers when vindicating constitutional rights.

Considering that, within international law, water is perceived both as a right and a service, the 1996 Constitution appears to integrate this conceptualisation while apportioning executive competence over water amongst the different spheres and different arms of government. The executive shares responsibility over water services with the local governments (which consist of municipalities). One significant constitutional responsibility for local governments is the provision of services to communities in a sustainable manner.[19] In addition, the 1996 Constitution directs local governments to structure and manage their administrative and budgeting processes in order to give priority to the basic needs of communities.[20] This shows that the 1996 Constitution envisages that the national government as well as municipal governments will translate the right to water through executive policy.

The 1996 Constitution further envisages concurrent legislative functions between the Parliament and local government.[21] As such, it determines that municipalities are mandated to make and administer by-laws for the effective administration of the matters within their sphere of administration.[22] Water and sanitation services within the context of potable water supply systems are enumerated as one such area which requires shared administration in Schedule 4 of the 1996 Constitution.

Furthermore, section 33 of the 1996 Constitution determines that everyone has the right to just administrative action that is lawful, reasonable and procedurally fair. It also envisages that legislation must be enacted to give effect to this right. It is therefore expected that legislative provisions and municipal by-laws pertaining to water delivery will take citizens' procedural rights into account. Consequently, it is expected that, at both national and provincial levels, legislative competence over water supply for domestic use will remain concurrently shared.

5.3 DEFINITION AND IMPLICATIONS OF THE CONSTITUTIONAL RIGHT TO WATER

[18] Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383, 411-412; Sandra Liebenberg 'South Africa: Adjudicating social rights under a transformative Constitution' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75, 97.
[19] Section 152 (1).
[20] Section 153 (a).
[21] Section 43 and 44.
[22] Section 156 (2).

The human right to water may find embodiment within several provisions of the 1996 Constitution. For instance, much the same way as it is implicitly recognised within international law, the right to water may be read into a right to access health services.[23] Other rights which can be read to imply elements of the right to water include the right to food,[24] the right to life,[25] the right to have one's dignity respected and protected,[26] the right to equality before the law and equal protection and benefit of the law given that equality includes the full and equal enjoyment of all rights and freedoms.[27] The human right to water may also be read into the right to an environment that is not harmful to health and well-being.[28] The human right to water may additionally be inferred from children's rights to basic nutrition, shelter, health care and social services,[29] the right to housing[30], and the right of prisoners to conditions of detention that are consistent with human dignity, including adequate accommodation and nutrition.[31] Given that water is inextricably linked to the enjoyment of all these rights, it makes sense to understand these rights as encompassing elements of a right to water.

But the 1996 Constitution provides far more than an implied human right to water. It explicitly recognises a fully justiciable human right to water which is the main focus of the remainder of this section. In section 27, the Constitution states:

(1) (b) Everyone has the right to have access to…sufficient …water;
(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [this] right.

The use of the word *everyone* in the text of section 27(1) (b) has been understood to mean that the entitlement to water enshrined in the Constitution is a universal entitlement. This may imply that the right to water applies to every individual person within South African territory.[32] It is suggested that the term 'everyone' also includes all juristic persons, because the 1996 Constitution extends its protection to juristic and natural persons.[33]

[23] Section 27 (1) (a); David Bilchitz 'Health' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (2014) (OS 12-05) 56A-5.
[24] Section 27 (1) (b).
[25] Section 11.
[26] Section 10.
[27] Section 9 (1) and (2).
[28] Section 24.
[29] Section 28.
[30] Section 26(1); Also see Malcolm Langford, Richard Stacey & Danwood Chirwa 'Water' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) 56B-22.
[31] Section 35 (2) (e).
[32] *Khosa v Minister of Social Development* op cit note 15 at paras 46-7.
[33] Section 8(4) of the 1996 Constitution provides that juristic persons can hold rights to the extent required by the nature of the rights and the nature of the juristic person. See Malcolm Langford, Richard Stacey & Danwood

The implications of a constitutional entitlement to social inclusion and protection are two-fold. First, it implies that water and water facilities ought to be distributed to everyone, without discrimination. Secondly, it implies that there ought to be efficient measures put in place to guard against discriminatory practices while establishing and maintaining water sources. The State is thus implored to ensure that its laws, policies and their implementation do not lead to a result that discriminates against certain sections of the population.[34] Nonetheless, in line with section 9(2) of the Constitution, it is to be expected that policies may positively discriminate, in order to facilitate the inclusion of those in most desperate conditions.

The right to water enshrined in the 1996 Constitution is defined as a right of access. Access to water literally means entitlement to have water within easy physical reach.[35] This interpretation corresponds to the definition provided by the UNCESCR in General Comments 14 and 15, which envisage that water sources ought to be within easy walking distance for citizens. It also means that the State ought to take measures to facilitate the realisation of the right to water so that people are able to rely on their own means and resources to enjoy water.

Access may also imply that water must be affordable, so that everyone is able to enjoy sufficient water, regardless of their income. Commentators agree that section 27 does not mean that the State should provide water to everyone at no cost. However, this does not imply that no *individual* would ever be entitled to water free of charge. The consensus appears to be that a constitutional right of access to water embodies a responsibility upon the individual to pay a reasonable fee for the benefit received when accessing water services, and conversely that the State should make special provision for assistance to those individuals who are unable to meet the cost of the water required for their basic needs.[36]

Finally, the 'access' standard set out by the 1996 Constitution should as far as possible be aligned to the UNCESCR's understanding of the similar standard in international law, which it views as entailing autonomy to enjoy water as a human right exists where individuals are guaranteed an adequate amount of water which is regularly available, of a quality which is acceptable to them, and backed by information which is relevant to enabling them make decisions regarding their enjoyment of a right to water.

Chirwa op cit note 30; *Exparte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* 1996(4) SA 744 (CC) para 57.

[34] Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-39.

[35] Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-39.

[36] Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-38; contrast with views in Pierre De Vos 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 87.

The text of section 27 (1) (b) further provides that the constitutional entitlement is to *sufficient* water. Presumably, each person is entitled to have an amount of water that is enough to cater for his/her most immediate daily basic needs, such as cooking, drinking and personal hygiene. Commentators propose that 'sufficient water' includes the qualitative and quantitative aspects of water accessed by people, since it would be pointless to define quantities without giving consideration to quality.[37] In sum, the constitutional standard for sufficient water ought to be interpreted as meaning entitlement to enough water for basic human needs. This understanding of adequacy appears to dovetail with the international standard, which envisages that water must be enough for the individual to meet their most basic human needs.

Section 27 (1) (b) guarantees a right to access *water*. The nature of *water* envisaged in this section is not defined. What is clear is that the water should suffice to support human needs, health and wellness. It is arguable that the text of the Constitution is broad enough to allow a generous and conjunctive reading of section 27 (1), which would draw in attributes such as water services, water facilities and tangible water.

The State's general obligations arising from the right to water are generally provided for in section 7, which stipulates that the State 'must respect, protect, promote and fulfil the rights in the Bill of Rights.' This ought to be read together with section 8, which stipulates that the Bill of Rights applies to all laws and all institutions. As such, in the exercise of their obligations, the branches of government at the national, provincial and municipal level are obliged to act within the confines of the 1996 Constitution. In order to conform with the constitutional requirements, these institutions must respect, protect, promote and fulfil the right to water. Given the similarity of these standards the tripartite typology of obligations envisaged by the UNCESCR, it appears that the international law framework can provide guidance to the interpretation of the human right to water within the South African context.[38]

More specific obligations are stated in section 27(2). First, section 27(2) implies that the State is primarily responsible for enabling realisation of the right to water.[39] The State is

[37] Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-27 and 28. Moreover, section 39 allows for reliance on international law when interpreting the Constitution.

[38] Anton Kok & Malcolm Langford, 'The right to water' in Danie Brand & Christof Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 203-5; Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-54 and 55; Danie Brand 'Introduction to socio-economic rights in the South African Constitution' in Danie Brand & Christof Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1,9-11; Sandra Liebenberg 'The Interpretation of socio-economic rights' in M Chaskalson et al(ed) *Constitutional Law of South Africa* 2 ed (12- 03) 33-i, 33-10 and 33-11.

[39] Also refer to the arguments made by Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B- 39.

thus obliged to take positive steps to enable citizens to have a sufficient amount of potable water within their reach. This obligation pertains to all organs and levels or spheres of government. As already shown, the legislature, executive and judiciary as organs of State each have distinct responsibilities affecting the right to water as enshrined in the Bill of rights. Thus, the institutional design envisaged by the 1996 Constitution appears to presuppose a level of interaction between the various institutions, in order to actualize enjoyment of the human right to water.

Corresponding with the ICESCR standard of state responsibility, the 1996 Constitution determines that the State's obligations towards realising the right to water is to be achieved through the use of reasonable legislative or any other measures. The State must thus promulgate subsidiary legislation to give effect to section 27(1) rights. Consequently, it is to be expected that, at both national level and local government level, and in the exercise of their constitutional mandate, the parliament, provincial and municipal legislatures must promulgate legislation on matters of domestic water supply, which must embody the constitutional right to water.

The State as the primary duty bearer can also use 'any other measures' to realise the right to water. These measures may include national plans, policies and standards to ensure access to sufficient water. Others have interpreted this as implying that, at a minimum, such plans, policies and standards should have four distinct components. These components include the development of clear goals, that the state should develop realistic strategies for the achievement of these goals, that the state should have time-related benchmarks to measure its progress in achieving the goals, and, finally, that the state should establish monitoring and review mechanisms by which progress in achieving the goals and, ultimately, the realization of the human right to water, may be measured.[40]

The 1996 Constitution envisages that the progressive realisation of the human right to water is subject to resource constraints. The constitutional standard requires that legislative and other measures must be taken *within the available resources*.[41] This implies that any efforts to realise the right to water must take cognisance of what is possible within the means accessible to the State. The cost of implementing policies and programs particularly ought to fit within the same resource envelope required to actualize other equally important rights, such as the rights to access health services and food.

[40]Anton Kok & Malcolm Langford op cit note 38 at 202; Section 2 of the 1996 Constitution provides that all branches of the State are bound by the Constitution.
[41] Section 27 (2).

The term *resources* also includes financial, human and natural resources. Financial resources refer to the sum of fiscal monies available to the State and are therefore not limited to the budgetary appropriations of the State. Put otherwise, an inquiry into the financial resources must consider the total resource envelope prior to appropriation to the different sectors in the economy. These financial resources may include fiscal resources available within the State and those provided through development assistance from other States.[42] If this is accepted, then it appears that the constitutional standard is less demanding than the international law requirement, requiring a State to use its *maximum* available resources'.[43]

Water itself is a natural resource and, particularly, is a scarce resource within South Africa. As a natural resource, it constitutes an input in agriculture as well as an input into potable water which is, in many instances, chemically treated water prior to channelling to domestic users.[44] The obligation on the State therefore is twofold: First, to adequately apportion water as it naturally occurs, to ensure equitable distribution for the basic water needs of individuals within the state. Additionally, to ensure that appropriate amounts of financial, human and other resources are available to ensure that water services infrastructure is constructed and remains functionally able to supply water services to citizens. For instance the State must be able to account for the total amount of fresh water available and how it is appropriated between domestic, industrial or large scale agricultural uses. In so doing, the State must demonstrate that appropriate amounts have been apportioned to domestic use, in the course of fulfilling the constitutional promise of availing sufficient water to all.

The progressive realisation standard is intended to oblige the State to demonstrate compliance with its obligations over time. This means that the steps taken towards progressive realization should be purposive, expeditious and effective for realizing the right to water.[45] For instance, Liebenberg proposes two main implications arising from the 'progressive realisation' standard, for all socio-economic rights. First, it acts as a limitation on the pace of the State's fulfilment of its obligations. Already having acknowledged that the

[42]Pierre De Vos op cit note 3 at 97-98; Sandra Liebenberg 'The Interpretation of Socio-Economic Rights in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Revision service 5 2013) OS 12-03, 33-54-33-57; Philip Alston & Gerard Quinn 'The nature and scope of states parties' obligations under the international covenant on economic, social and cultural rights' (1987) 9 *Human Rights Quarterly* 156; A contrasting view is offered by Mike Muller 'Parish pump politics: the politics of water supply in South Africa' (2007) 7 *Progress in Development Studies* 33, who argues that there are several competing factors which affect the decisions around making these resources available; Kevin Iles op cit note 14 at 454.

[43] For instance see Marius Pieterse 'A different shade of red: socio-economic dimensions of the right to life in South Africa' (1999) 15 *SAJHR* 372, 379; Sandra Liebenberg 'The ICESCR and its implications for South Africa' (1995) 11 *SAJHR* 359, 366.

[44]Mike Muller op cit note 42 at 35.

[45]Anton Kok & Malcolm Langford op cit note 38 at 202. Also refer to General Comment No 3 (1990).

right to water cannot be realised immediately, a standard of progressive realisation means that the State's progress will be gradual. Secondly, it implicitly invites an interpretation that the conduct of the State will demonstrate gradual progress towards realising the right to water, by breaking down the existing barriers to access. For instance, there should be evidence that legal, administrative, operational and financial impediments to enjoying water services are being reduced over time, in order to demonstrate progress.[46] The main import of this progressive realization standard is that it requires the State to make budgetary decisions and allocations with the aim of systematically fulfilling the right to access water. In sum, the 1996 Constitution advances a substantive human right to water and envisages communal and individual claims for water against the State, which mostly align with the international law standards for the right to water.

Finally, considering that the 1996 Constitution enumerates a specific right to water and also engenders a host of negative and positive obligations on the part of the State to realise the human right to water within South Africa, it is arguable that the constitutional norms set out appear to envisage that the agencies of State must adopt a rights-based approach in their efforts to improve the enjoyment of water services for poor and vulnerable citizens of the country.

5.4 TRANSLATING THE RIGHT TO WATER THROUGH NATIONAL LEGISLATION

The institutional framework envisaged by the 1996 Constitution contemplates a decentralised system of local government, whereby legislative responsibility for water services is apportioned between the national government, the provinces and the municipal councils. At national level, the National Water Act 36 of 1998 and Water Services Act 108 of 1997, which both came into force after the promulgation of the 1996 Constitution, are the two foremost pieces of legislation which aim to fulfil the constitutional mandate for reform of water use and management. The Local Government Municipal Systems Act 32 of 2000 spells out the overarching responsibilities of municipalities. At municipal level, there are nine provinces, each with several municipal by-laws which spell out the municipal mandate and standards of water services. In this section, I explore the extent to which these pieces of legislation and relevant regulations align themselves to the 1996 Constitution and effectively serve to concretise the contents of section 27(1)(b). Considering that the Johannesburg municipality

[46] Sandra Liebenberg op cit note 38 at 33-41- 33-42.

water services regulations have been the subject of adjudication by the apex court in *Mazibuko & Others v City of Johannesburg & Others*, the analysis relating to municipal regulations focuses on these particular regulations.

5.4.1 The National Water Act

The primary aims of the National Water Act reflect a broad intention to equitably and sustainably use South Africa's water resources. Having come into force after the promulgation of the 1996 Constitution, the Act's preamble recalls that discriminatory practises in the past had prevented equal access to water and the use of water resources and, as a result, the national government has an obligation to facilitate equitable distribution of water resources. Even though no explicit reference is made to the 1996 Constitution, given the time at which the National Water Act was passed, and its reference to ideals which are textually similar to those espoused in the Constitution, the Act can be understood as contemplating the translation of the constitutional commitment to equitable enjoyment of water resources.

To affirm this goal, in section 2, the National Water Act provides that the primary purpose of the Act is to ensure that national water resources are protected, used, developed, managed and controlled in ways which take into account, amongst other factors-

(a) Meeting the basic human needs of present and future generations;
(b) Promoting equitable access to water; …
(d) Promoting the efficient, sustainable and beneficial use of water in the public interest.[47]

To effectively facilitate autonomy in accessing water, the National Water Act determines that any person may use water in or from a water source for reasonable domestic use.[48] To this extent, the National Water Act translates into national legislation two important aspects of a right to water emerging from international law standards: equitable access to water resources and sustainable use of resources to facilitate availability of water resources for future generations. Beyond this, the National Water Act sets out standards for water allocation which give domestic water primary importance and contains an implementation plan for water resource management.[49]

5.4.2 The Water Services Act and Regulations

[47] National Water Act No 36 of 1998.
[48] Section 4 (1) National Water Act 1998.
[49] See section 6 and 16 NWA determining allocations for water and requirement for Minister to establish a reserve for basic needs.

Considering the importance of enhancing water delivery, the Water Services Act, which focuses on specific water delivery for household use, was also enacted soon after the promulgation of the 1996 Constitution.[50] In the preamble, the Water Services Act affirms that, '...rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being' are recognised.[51] It also affirms the obligation of all spheres of government to ensure that water services are provided in a manner which is efficient, equitable and sustainable.

In section 3, the Water Services Act states that 'everyone has a right of access to basic water supply ….' The term 'basic water supply' is defined as:

> (1) ...the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.[52]

But the Water Services Act stipulates that the right to a basic supply of water, set out in section 3, is subject to the limitations contained in the Act.[53] It determines that, 'Every person who uses water services provided by a water services provider does so subject to any duplicable condition set by that water services provider.'[54] Further, it stipulates that a Water Services provider must set out the conditions upon which water in a specific area is supplied. These conditions must, among other issues, clarify the determination and structure of tariffs, the conditions for payment, the circumstances under which water services may be limited or discontinued, and procedures for limiting or discontinuing water services.[55] The specific conditions for accessing a water supply are then elaborated through the Water Services Regulations.

The Water Services Regulations, which were gazetted in 2001 prescribe the minimum standard of water supply services referred to in the Water Services Act.[56] The prescribed standard provides the closest attempt to expressing the goal of promoting equitable access to water. Regulation 3 stipulates that:

> The minimum standard for basic water supply services is-
>
> (a) the provision of appropriate education in respect of effective water use; and

[50] The Water Services Act 108 of 1997 was gazetted in December 1997.
[51] This is also reiterated as one of several objects of the WSA in section 2.
[52] Section 1(iii).
[53] Section 3(4).
[54] Section 4 (4).
[55] Section 4(2) (c). Michael Kidd 'Not a drop to drink: Disconnection of water services for non-payment and the right of access to water' (2004) 20 *SAJHR* 119, 131 who advances the argument that the regulations can be justified within the constitutional framework.
[56] Regulations Relating to Compulsory National Standards and Measures to Conserve Water, No R. 509, 22355 Government Gazette, 2001.

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-

i. at a minimum flow rate of not less than 10 litres per minute;
ii. within 200 metres of a household; and
iii. with an effectiveness such that no ***consumer*** is without a supply for more than seven full days in any year.[57]

In situations of emergency, where this minimum standard may not be supplied, Regulation 4 specifies the amount which must be supplied:

> A water services institution must take steps to ensure that where the water services usually provided by or on behalf of that water services institution are interrupted for a period of more than **24** hours for reasons other than those contemplated in section 4 of the Act (*conditions for provision of water services)*, a ***consumer*** has access to alternative water services comprising -
>
> (a) at least 10 litres of potable water per person per day; and
> (b) sanitation services sufficient to protect health.[58]

There are several other legislative provisions addressing availability, quality and affordability of water. For instance, section 9 (3) of the Water Services Act provides that, when prescribing standards, the Minister responsible for water must consider the need for everyone to have a reasonable quality of life and equitable access to water services.[59] In addition, Regulation 3 (2) provides that:

> A water services institution must consider the right of access to basic water supply and the right of access to basic sanitation when determining which water services tariffs are to be subsidized.

In section 10 (1), the Water Services Act provides that: "The Minister may, with the concurrence of the Minister of Finance, from time to time prescribe norms and standards in respect of tariffs for water services." Section 10 (4) then elaborates that "No Water Services Institution may use a tariff which is substantially different from any prescribed norms and standards". Given the assurances to take quality of human life into account while determining the cost of water, it appears that the Water Services Act sets standard norms which take into account the importance of keeping water prices for domestic users minimal. The need to maintain a decent quality of life is thus arguably embedded as a norm of water pricing for basic needs.

[57] *My emphasis.*
[58] My emphasis.
[59] Also refer to s 74(2) Local Government Municipal Systems Act which sets out a policy for tariff setting that is cognisant of the need for the poor to access basic services.

Water services institutions are required to take reasonable measures to realise the right to access water.[60] Indeed, section 11 of the Water Services Act stipulates that water authorities have a duty to all consumers and potential consumers in their area of jurisdiction, to progressively ensure efficient, affordable, economical and sustainable access to water services. The Water Services Act goes further to require that in emergency situations, the water authority is obliged to take reasonable steps to provide basic water supply to any person within its area of jurisdiction, which water supply may, where necessary be provided at no cost to the consumer.[61]

The Water Services Regulations proceed to prescribe the quality of water suitable for human needs. Regulation 5 (1) provides that 'a water services authority must include a suitable programme for sampling the quality of potable water provided' to consumers within its water services development plan. Further, Regulation 5 (3) states that a water services institution must compare the results obtained from the testing of the samples with the Specifications for Drinking Water, or the South African Water Quality Guidelines published by the Department of Water Affairs and Forestry. These regulations demonstrate that the State acknowledges the norm that the quality of water supplied to individuals must be of a basic, acceptable standard.

Within the municipal sphere, municipal by-laws prescribe the terms upon which water will be delivered to citizens. For example, within the municipal area of Johannesburg, the city's by-laws provide for terms of access by setting various parameters of water service for individual users. Johannesburg City by-laws prescribe three service levels and thus restrict the circumstances under which water could be accessed.[62] Notably, the by-laws state:

> Levels of service
> 3(2) The levels of service shall comprise-
> (a) Service Level 1, which must satisfy the minimum standard for basic water supply and sanitation services as required in terms of the Act and its applicable regulations and must consist of-
> (i) a water supply from communal water points; … and
> (b) Service Level 2, which must consist of-

[60] See section 3 Water Services Act. For definitions, 'water services institution' is defined in section 1(xxi) WSA as meaning a water services authority, a water services provider, a water board and a water services committee; and 'water services authority' is defined in section 1 (xx) WSA as meaning any municipality including a district or rural council as defined in the Local Government Transition Act, 1993 responsible for ensuring access to water services. These ought to be read together with section 73 of the Local Government Municipal Systems Act 32 of 2000.

[61] Section 11(5) Water Services Act.

[62] Section 3(1) City of Johannesburg Metropolitan Municipality Water Services By-laws June 2008. Section 1(1) of the City's by-laws describes a basic water supply as meaning the 'minimum standard of water supply services … prescribed in terms of the Act under regulation 3 of Government Notice R509, as amended from time to time, or any substitution for that regulation.'

(i) an unmetered water connection to each stand with an individual standpipe;… provided that-

(aa) the average water consumption per stand through the unmetered water connection for the zone or group of consumers in the zone does not exceed 6 kilolitres over any 30 day period;

(bb) the water standpipe is not connected to any other terminal water fittings...;

(dd) the Council may adopt any measures necessary to restrict the water flow to service level 2 consumers to 6kl per month.

(c) Service Level 3 which must consist of-
(i) a metered full pressure water connection to each stand; and
(ii) a conventional waterborne drainage installations connected to the Council's sewer.

3(3) If a consumer receiving Service Level 2 contravenes sub-paragraph (aa) and (bb) to subsection (2) (b)-

(a) the Council may install a pre-payment meter in the service pipe on the premises; and
(b) the fees for water services must be applied in accordance with section 6.

3(4) The level of service to be provided to a community may be established in accordance with the policy of the Council and subject to the conditions determined by the Council.

An additional limitation to the extent to which access to water can be enjoyed is stipulated in Regulation 4, which stipulates that:

> 4**.** (1) No person, other than a consumer on Service Level 1[communal water point], may consume, abstract or be supplied with water from the water supply system, or utilise the sewage disposal system or any other sanitation services, unless he or she has applied to the Council on the prescribed form for such services, and such application has been agreed to.
> (2) An application for the use of water services approved by the Council constitutes an agreement between the Council and the applicant, and takes effect on the date referred to in the application.[63]

5.4.3 The Local Government Municipal Systems Act

Framework legislation necessary to re-define municipal responsibility over water services within the sphere of municipal government was promulgated in 2000. The Local Government Municipal Systems Act provides that a municipality is enjoined to give effect to the

[63] By-law 4(1) and (2). These Johannesburg by-laws were the by-laws specifically challenged and adjudicated upon in the *Mazibuko* cases.

provisions of the Constitution in the exercise of its authority.[64] Municipalities are therefore required to give priority to the basic needs of the local community, to promote the development of the local community and to ensure that all members of the local community have access to at least the minimum level of basic municipal services.[65] The municipal services must be equitable and accessible, and must be provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time.[66] The Act also states that a municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself, or by way of service delivery agreements.[67] The Local Government Municipal Systems Act thus spells out the positive obligations that specifically attach to the state within the local government sphere and advances the notion that there is a minimum acceptable standard of basic services for all citizens.

5.4.4 An evaluation of legislative translations of the right to water

Although, like the Ugandan water legislation, the National Water Act reflects little rights consciousness, overall, the framework legislation was clearly conceptualised with reference to constitutional obligations and should be credited for expanding the normative content of a human right to water. Particularly, the Water Services Act comprehensively translates water delivery within the terms of the constitutional right to water and its attendant obligations on the State to promulgate reasonable legislative or other measures. The standards set out in the Water Services Act provide clear, claimable benefits for the individual and demarcate specific obligations for the national and provincial government. As a result, citizens have a firm basis upon which claims for water services can be made and upon which they can hold the national and provincial government to account.

Even so, there appear to be some concerns relating to the extent to which the right to water has been translated. The most problematic is the decidedly neoliberal framing of the entitlement to water. The Water Services Act frames enjoyment of a right to water within a paradigm of *consumers* of water. Commentators remain concerned that translating constitutional rights as accruing to *'consumers'* falls short of the constitutional ideal of non-

[64] Section 2 of the Local Government Municipal Systems Act, defines a 'municipality' as an organ of state within the local sphere of government exercising legislative and executive authority within a demarcated area. It consists of the political structures and administration of the municipality and the community of the municipality
[65] Section 73(1)(a)-(c) Local Government Municipal Systems Act.
[66] In s1 of the LGMS Act 'basic municipal services' are defined as services that are necessary to ensure an acceptable and reasonable quality of life and which if not provided would endanger public health or safety or the environment. Section 73(2) (a) and (b) Local Government Municipal Systems Act.
[67] Section 74 Local Government Municipal Systems Act; and section 160 (2) (c) Constitution.

exclusion and presents a neo-liberal ideology which impedes the translation of constitutional entitlements.[68] It is argued that constitutionally entrenched rights are purposely aimed at correcting historic social inequity and ought not to be carved out to serve a particular class, namely those who are able to pay for services. It appears that the current legislative paradigm has conceptualized water as an entitlement due to a special class of citizens. This delegitimizes the claim to enjoyment of the socio-economic right for those who are unable to pay for water, because such citizens are perceived in negative light, as being poor and dependent. Within this context, commentators argue that neo-liberal ideology ultimately serves to systematically exclude some individuals from the sphere of protection guaranteed by constitutional rights.[69]

When this argument is applied to the water delivery mechanisms and standards set out in the Water Services Act, the implication is that the consumer based paradigm detracts from the constitutional guarantee of access to water. All persons who identify as *consumers* and access water through water services institutions are entitled to a minimum amount of potable water. In my view, this implies that those who do not identify as *consumers* by virtue of the fact that they are unable to access water through the established institutional framework are excluded from this entitlement to a minimum amount of potable water.[70] For instance, citizens whose source of water is a spring or river are especially not guaranteed a minimum amount of water, since the amount of water they are able to access is determined by factors such as distance from the water point and ability to carry larger amounts of water. For those residing within urban areas, it appears that the consumer based paradigm denies their entitlement to anything over and above the minimum amount of free basic water, should they be unable to pay for it.

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[68] Neo-liberalism here is expressed as using free- market oriented approaches to service provision whereby classical contract law principles, such as freedom of contract are given precedence. Also see the axis between 'commodifying' and 'decommodifying' water spelt out by Patrick Bond & Jackie Dugard 'The case of Johannesburg water: What really happened at the pre-paid 'parish pump'' *Law Democracy and Development* (2008)1, 4.

[69]Thomas Coggin & Marius Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257, 269-270; Marius Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) *SAJHR* 359, 370-8; Marius Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa (2014) *SALJ* 149, 165. Though I do not agree, Christopher Mbazira 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji & Amahlati' (2005) draft working paper (on file with author) offers a contrary view of the WSA recognizing consumers and potential consumers in section 11(4) WSA, arguing that this indicates a willingness to transcend the idea of water service being a contractual relationship.

[70]A consumer is defined in section 1(iv) WSA as an end user who receives water from a water services institution including an end user in an informal settlement. In other words, to become a consumer, one must be connected to the water authority's supply infrastructure either individually or communally.

Finally, the 2014 South African Human Rights Commission report on water delivery points to the fact that the legislative standards have not been operationalised nationwide. As such, there remains a wide gap between the legislative translation of the right to water and actual enjoyment of the right, particularly for poor and vulnerable citizens of South Africa.[71] This may indicate that the legislation has not been entirely effective as a means to enhance enjoyment of a right to water.

5.4.5 Executive translation through water policies

Efforts to reform South African water policy began prior to the promulgation of the 1996 Constitution and as early as the Reconstruction and Development Plan (RDP) of 1994. The RDP had acknowledged the widespread demand for improving availability of and equitable access to social services. In the context of water delivery, the RDP promised that, in the short term, South Africans would have free access to 25 litres of water per person per day and that this would be increased to 50-60 litres in the medium term.[72] This promise appears to have been interpreted differently by the executive and technocrats, who later argued that it meant that government would extend affordable, water on the one hand,[73] and citizens, who argued that the reference was to a lifeline tariff, or to water at no cost for basic domestic needs on the other.[74] In any case, the RDP promise remained to find space within the national planning and implementation process that was to follow.

There are currently four policy documents that support the water legislative framework. They include the White Paper on Water Supply and Sanitation (1994), the White Paper on a National Water Policy for South Africa (1997), the White Paper on Basic Household Sanitation (2001), and the Strategic Framework for Water Services (2003). The White Paper on Water Supply and Sanitation (1994) asserted the principle of entitlement to a basic amount of water and to a basic, affordable sanitation service. However, it also explicitly adopted the position that, where communities were unable to afford the cost of basic services, government would subsidise the cost of infrastructure development to deliver basic minimum water services to such communities but would not subsidise the operating, maintenance and repair costs for such infrastructure.[75] This implied that, once water facilities were constructed

[71] South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) http://www.sahrc.org.za/home/21files/FINAL%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf page 26-27; 38-39.
[72] RDP 1994, 57 para 2.6.7; Mike Muller op cit note 42 at 39-41 for a background to the free basic water policy.
[73] Mike Muller op cit note 42.
[74] Patrick Bond & Jackie Dugard op cit note 69 at 13.
[75] White Paper on Water Supply and Sanitation for South Africa (1994) 19.

in an area, citizens would be expected to pay for the water supplied at a price which factored in the operation and maintenance of water infrastructure.

The National Water Policy, which was developed subsequently, aimed to facilitate access to basic water services for human needs through equitable, fair procedures and to provide water free of charge for all South Africans. Having been adopted after the coming into force of the 1996 Constitution, it is pertinent to note that, contrary to the language of the 1994 White Paper on Water Supply and Sanitation, water for basic needs was conceptualised as a fundamental service which needed to be availed to all within rural and urban South Africa without recourse to cost.[76]

In line with this policy principle and underpinned by the constitutional entrenchment of the right to water, in February 2001, the national government adopted the Free Basic Water Policy. The Free Basic Water Policy guaranteed each household in South Africa a free minimum quantity of potable water. This quantity was set at six kilolitres per household per month and was based on the assumption that each individual person needs 25 litres of water per day and that the average household consisted an average of 8 people.[77] This minimum amount is now regarded as the standard for realising equity in delivery of water for South Africans.[78] But the Free Basic Water Policy proposed that municipalities needed to consider ways to restrict water supply, such that consumers were made aware of the requirement to pay for additional water consumed. Commenting on the suitability of pre-payment meters, the text of the policy described them as being well suited to a free basic water initiative and useful to avoid meter reading and billing challenges.[79]

Subsequent changes to the water policy were initiated in 2013. On this occasion, the national government's review of the water policy included a clarification that the provision of free basic water to citizens attached a responsibility to pay for any services consumed over and above the free basic amount. While the national government's review of the water policy also clarified that free basic water would be supplied with some limitations, no explicit reference to pre-payment water meters was made.[80]

The Free Basic Water Policy was implemented through the local government structure, which is constitutionally mandated with the responsibility for water services delivery. Cities and municipal councils thus formulated their own policies and plans of action to facilitate the

[76] White Paper on a National Water Policy for South Africa (1997) 19-20, 39, 62-63.
[77] DWAF *The Free Basic Water Implementation Strategy* (2007) Version 4 page 5-7.
[78] National Gazette *National Water Policy Review* Water Policy Positions General Notice 888 of 2013, 9 and 13.
[79] DWAF *The Free Basic Water Implementation Strategy* (2007) Version 4, 10-11.
[80] National Gazette *National Water Policy Review* Water Policy Positions General Notice 888 of 2013, 14-15.

implementation of the policy in a manner which, in addition to elaborating the policy, was aligned to the overarching legislative framework. As a result, while the national government adopted the Free Water Policy in 2001, in some municipal areas, its implementation commenced much later, due to the differences in the financial and other resource capacity of the particular local governments.

In Johannesburg, the City's municipal authority adopted its free basic water policy within the terms of the National Free Basic Water Policy in 2001. The City's policy stipulated that the basic entitlement to water was 25 litres of water per day per person. The City began implementing this policy in areas where conventional meters for water already existed. In these areas, once the free allocation was used up, the water user continued to have access to water on credit, which was settled in arrears. In 2003, the City initiated the free basic water policy within poorer areas and townships, including Orange Farm and Soweto. In these areas, implementation of the policy was accompanied by a much disliked pre-payment metering system. The households in these areas were installed with pre-payment meters, using an elaborate and expensive technological mechanism. The pre-payment meters enabled the beneficiary households to receive a maximum of 6 kilolitres of water at no cost. Thereafter, any additional water use attracted a charge, which had to be paid prior to the tap supplying any additional water. In other words, these pre-payment meters were designed to automatically switch off until the water user paid a sum of money to the City.[81]

In the course of the legal dispute relating to water services initiated by township residents against the City, which I discuss in the section that follows, the city of Johannesburg introduced a special case policy in 2002. The target groups for the special case policy consisted of pensioners, disabled persons, unemployed persons, employed persons with low income and HIV/AIDS patients and/or their orphans.[82] The special case policy aimed at providing vulnerable households with relief in the form of charges for municipal services. In 2004 and 2005, the policy was amended. In the latter year, it was renamed the Indigent Persons Policy. More significant than the change in name was that after July 2007, all those who registered as indigents qualified for an additional allocation of free basic water of 4 kilolitres per month. As a result, the indigent account holder received 10 kilolitres free

[81] Antina Von Schnitzler 'Citizenship prepaid: water, calculability and techno-politics in South Africa' (2008) 34 (4) *Journal of Southern African Studies* 899, 903-911.

[82] According to the Johannesburg Council's policy of rebates, a special case is referred to as a person who is responsible for the payment of services and rates and qualifies for government interventions. The determining factor is usually a low income but in order to access the benefits, a resident had to first register as indigent. Registration required meeting certain pre-conditions such as proof of income, affidavit confirming employment status, South African ID book and others.

basic water per month. Additionally, indigent account holders were entitled to a further 4 kilolitres of water per annum to cater for emergencies.[83]

The National Water Policy has been criticised by commentators for several reasons. The most pertinent criticism appears to be the extent to which the Policy is neo-liberally inspired, given its underlying emphasis on all consumers paying the cost of operating and maintaining water services. These underlying neo-liberal elements then appear to find traction within municipal policy and by-laws. Commentators also argue that the water policy advances neo-liberal attributes by commoditising water as opposed to promoting the social attributes of water.[84]

Given the adoption of a pre-payment water service delivery system among vulnerable communities by municipalities, commentators have also argued that the water policy is rooted in the notion that the water user is perceived as a consumer who needs to behave economically, thus 'adjusting his means to his ends'.[85] In other words, a consumer's water needs are pre-determined by how much they are able to pay, rather than what is necessary to live in dignity. In their view, the pre-paid metering policy was designed to provide only the water that was affordable to the user without any subsidy which could take into account real water needs beyond the free basic amount.[86] Therefore, it has been argued that the pre-payment system became a tool to further a neo-liberal water delivery system rather than an effective means to improve the lived realities of many poor citizens.

The third criticism is grounded in the implementation of the Free Basic Water Policy. Relying on data collected by the state directorate responsible for water delivery, commentators argue that, even as a free basic water supply was being rolled out, millions of poor households had their water supply disconnected between 2003- 2007 for non-payment of arrears. For many others, the implementation was arbitrarily enforced through pre-payment meters, yet the amount of water delivered 10 years after the RDP promise was of a quantity which only met the RDP short term promise. It did not go as far as to deliver the 50-60 litres per household promised in the medium term. These commentators argue therefore that the

[83] While the registration requirements remained much the same, the nature of benefits increased. For instance, depending on the extent of the registered person's poverty level, the benefits included subsidies on water, electricity; refuse collection, rates, sanitation and a rental subsidy. In some instances a transport subsidy may also be provided. In addition, registration was valid for a 6 month period, after which an individual must re-apply.

[84] Patrick Bond & Jackie Dugard op cit note 69 at 12 -16 & 20 illustrate neo-liberal attributes of water policy such as emphasising means-tested subsidisation, prioritising inefficiencies in billing and reducing unaccounted for water 4.

[85] Antina Von Schnitzler op cit note 82 at 902.

[86] Jackie Dugard 'Rights, regulation and resistance: The Phiri water campaign' (2008) 24 *SAJHR 593*,600-603.

implementation of a free basic water supply went against the grain of a rights based approach to water delivery.[87]

While the National Water Policy may be unduly biased in favour of paying consumers, this criticism does not take account of the potential relief offered by the Free Basic Water Policy, which itself provided a significant departure from the emphasis of commoditising water for basic needs and significantly redeemed the most vulnerable citizens.[88] In most municipalities, the potential harshness of these neoliberal leaning policies was softened by the implementation of a free basic water policy and extension of water services to many citizens who previously had none. For instance, between 1994 and 2004 approximately 10 million South Africans who previously had no access to water were able to have water within 200 metres of their households.[89] For the City of Johannesburg, it is evident that the Free Basic Water Policy as well as the Indigent Persons' Policy numbed the harsher strategies aimed at enhancing billing and reducing water losses.

Even then, while these changes in executive policy are welcomed, they highlight the shortcomings of relying on non-enforceable executive policy to actualise enjoyment of the right to water. The neo-liberal aspirations which ultimately find expression in the policies and the manner of their implementation potentially diminish a rights conscious conceptualisation of water.

The changes within the national and local government policies relating to water may be attributed to two factors. First, these changes may have arisen from the explicit and constitutionally entrenched right to water. It is plausible that the entrenchment of a constitutional right to water galvanized the State's efforts to elaborate and clarify on the nature of the right, given that pre-constitutional debates had emphasized that the right to water was not readily enjoyed by many poor South Africans. In this context, it was essential that national policy furthered the constitutional norms.

Secondly, institutional dialogue between the branches of government and social dialogue between government and citizens have been advanced as a means through which translation and actualisation of socio-economic rights can be enhanced. The ability to sustain institutional conversations between the branches of government and rights beneficiaries

[87] Patrick Bond & Jackie Dugard op cit note 69 at 23-24.
[88] Mike Muller op cit note 42.
[89] DWAF *A History of the First Decade of Water Service Delivery in South Africa 1994-2004: Meeting the Millennium Development Goals* (2004).

enriches policies, programs and legislation.[90] The changes in the national and municipal water policies which have occurred since 1994 may manifest an attempt to maintain dialogue between the institutions of government, about better ways of enhancing access to water and fulfilling the aim of progressively removing barriers to access to water.[91] Nonetheless, the institutional contribution of the executive to translating the right to water cannot be overstated. Sandra Liebenberg has cautioned that the basis upon which executive policy is crafted and implemented may not necessarily take into consideration the purpose and values constitutional socio-economic rights seek to protect.[92] Like the study of India showed, national and provincial water policies are more likely to benefit from the outcomes of judicial review of executive policy based on the judicial interpretation of socio-economic rights.[93] Given the dialogical benefits promised by socio-economic rights adjudication, the extent to which the changes in South African water policy have occurred subsequent to judicial review is a question investigated in the section that follows.

5.5 ADJUDICATING THE CONSTITUTIONAL RIGHT TO WATER

5.5.1 Socio-economic rights cases in the Constitutional Court pre-*Mazibuko*

Even though water crises are a significant problem for many vulnerable South Africans, there have been only a handful of water related claims in the courts of law. Nonetheless, several claims relating to other socio-economic rights have established principles which are relevant to the adjudication of the section 27(1) (b) right. The Constitutional Court had already affirmed the extent to which socio-economic rights were justiciable; and it had clarified the extent to which the courts would subject socio-economic rights claims to scrutiny long before the first water related claim was to be instituted. Particularly in its three earliest constitutional court cases challenging the right to health and the right to housing, the Constitutional Court had interpreted the state obligations to socio-economic rights and clarified the courts'

[90] Sandra Liebenberg 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (2008) 303,311-12; Marius Pieterse 'Reply: On 'dialogue', 'translation' and 'voice'' in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (2008) 331, 334-7; Rosalind Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited'(2007) 5 *International Journal of Constitutional Law* 391, 400-405.

[91] Patrick Bond & Jackie Dugard (op cit note 69 at 24) point out several other factors such as a massive cholera outbreak, voter apathy, and a failure of the neo-liberal water pricing policy.

[92] Sandra Liebenberg 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (2008) 303,312.

[93] Varun Gauri 'Fundamental rights and public interest litigation in India: overreaching or underachieving?' (2010) 1 *Indian Journal of Law & Economics* 71, 75-78; Sheetal B Shah 'Illuminating the possible in the developing world: Guaranteeing the human right to health in India' (1999) 32 *Vanderbilt J of Transnational Law* 435, 472 and 483.

interpretive approach to adjudicating them. The decisions demonstrated that international law was an important guide to interpreting the rights in the Bill of Rights. These early decisions also significantly impacted on the remedial framework within which socio-economic rights were subsequently understood and vindicated by the courts. I focus here on six of the Constitutional Court decisions mainly for their similarity in terms of the paradigm in which the socio-economic rights claimed therein were adjudicated, and one decision relating to the obligations of local government.

The inclusion of socio-economic rights as justiciable rights in the bill of rights was contested during the constitution making process. Subsequently, the Constitutional Court addressed the question of the justiciability of socio-economic rights during the certification process of the 1996 Constitution. In *Ex parte Chairperson of the* Constitutional *Assembly: In Re Certification of the Constitution of the Republic of South Africa, (the Certification judgment)* the Constitutional court rejected the objections made against the inclusion of socio-economic rights within the constitutional text.[94] Two of these objections were, first, that the socio-economic rights were inconsistent with the separation of powers doctrine because the judiciary would encroach on the proper terrain of the legislature and executive. Secondly, the inclusion of socio-economic rights was contested on the basis that these rights were not justiciable since their enforcement raised budgetary issues which were beyond the scope of judicial review.[95] The Constitutional Court found that budgetary implications could not exclude socio-economic rights from being adjudicated. It reasoned that, even when a court enforces civil and political rights, the order it makes would often have budgetary implications. Most importantly though, the Constitutional Court affirmed that socio-economic rights were justiciable, stating that 'at the very minimum socio-economic rights can be negatively protected from improper invasion.'[96]

Subsequent to *the Certification* judgment, the socio-economic rights cases before the Constitutional court affirmed the justiciable nature of socio-economic rights. The Constitutional Court consistently reminded litigants that the issue of their justiciability had been put beyond question by the text of the 1996 Constitution and the *Certification* judgment. The Court, on several occasions, reiterated that 'The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given

[94] 1996(4) SA 744 (CC).
[95] Paras 76- 77.
[96] Paras 52 and 78. This principle was subsequently re-stated in *Government of the Republic of South Africa & Others v Grootboom & Others* 2000(11) BCLR 1169 (CC), para 34 and *Minister of Health and others v Treatment Action Campaign (TAC) and Others TAC (No 2)* 2002 (5) SA 721 (CC) para 46.

case.'[97] As such, although the early socio-economic rights based claims did not directly implicate the human right to water, these cases are still relevant to understanding the extent to which the Constitutional court was willing to go in vindicating similar claims.

The first of these cases was *Soobramoney v Minister of Health (Kwazulu-Natal).*[98] The appellant challenged the policy of a State hospital which excluded him from entitlement to treatment by way of regular renal dialysis.[99] The appellant based his claim on the constitutional right to life in section 11, read together with section 27(3) which provides for the right to emergency medical treatment.[100] The Constitutional Court, hearing the appeal, considered that the demand to receive long term renal dialysis was not an emergency and that the right to life was not applicable to the matter. It thus considered his claim within the context of the right to access health services in section 27(1) and (2).[101]

Considering that, by this time, comparative jurisprudence from India offered a broad interpretation of the right to life implicating several socio-economic rights, it is significant that these foreign decisions did not impact on the position taken by the South African Constitutional court. While the *Soobramoney* Court acknowledged that enjoyment of socio-economic rights was essential to the full enjoyment of life, it declined to infer a right to emergency medical treatment from the constitutional right to life. In fact, even though the Constitutional Court had not interpreted the positive obligations attaching on the State in the context of the right to life prior to *Soobramoney*, it declined to endorse the Indian jurisprudence which read an obligation upon the State to provide emergency medical treatment into the right to life. The Court reasoned that the South African Constitution was distinguishable from the Indian Constitution considering that the South African Constitution explicitly enumerated rights with positive obligations imposed on the state within its Bill of Rights. The Constitutional Court thus concluded that its duty was to apply the obligations as formulated within the South African Bill of Rights.[102] On this occasion, the Constitutional Court remained hesitant to elaborate on the exact positive obligations that a right to life would require of the State.[103]

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[97] *Government of the Republic of South Africa & Others v Grootboom & Others* 2000(11) BCLR 1169 (CC). Para 20; *Minister of Health and others v Treatment Action Campaign (TAC) and Others TAC (No 2)* 2002 (5) SA 721 (CC) para 25.
[98] 1998 (1) SA 745 (CC).
[99] Para 1-3.
[100] Para 7.
[101] Para 22.
[102] Para 15 and 19; para 57.
[103] See Marius Pieterse 'Life' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* (2013) 2ed (Revision Service 5 OS 07-06) 39-17 -21; Marius Pieterse op cit note 43 at 382-3.

In determining whether the State had violated the appellant's right of access to health care services, the *Soobramoney* Court applied a rationality standard to determine the extent to which the State's positive obligations were fulfilled through executive policy. It found that, in the circumstances, the hospital's policy was rational and had been implemented fairly, considering the limited resources available to the hospital.[104] The decision was significant because the Constitutional Court indicated that it would intervene and review a government's decision only if such a decision was irrational and lacking in good faith in allocating scarce medical resources available to citizens.

In 2000, the Constitutional Court dealt with a claim founded in the right to access adequate housing enshrined in section 26(1) and (2). *Government of the Republic of South Africa & Others v Grootboom* involved a group of people who had moved out of deplorable housing conditions in a squatter settlement within the Oostenberg municipal area.[105] They had illegally settled on vacant land that was privately owned and earmarked for low cost housing. Subsequent to a forceful eviction, they set up temporary structures on a sports field adjacent to the Wallacedene community centre.[106] The respondents claimed entitlement to temporary housing until such a time as they were provided with permanent accommodation.

Even though the Constitutional Court had previously declined to read socio-economic rights into the right to life, it emphasised the inter-relatedness of socio-economic rights, stating that, 'There is a close relationship between it [right to housing] and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole.'[107] The Court thus urged that affording socio-economic rights to all people would advance equality.[108]

The *Grootboom* court interpreted the meaning of *access*. It clarified that *access* entailed unlocking the system both for those who could afford the housing standard contained in section 26(1) and those who could not. It reasoned that, for those who could afford to provide their own housing, the right implied access to housing stock, finance, and a legislative framework and planning laws to facilitate self-built houses. On the other hand, for those who

[104] Paras 25, 29-30, 36.
[105] 2000(11) BCLR 1169 (CC).
[106] See paras 4-11; and paras 13-14. Also refer to *Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 277, (C). At the trial in the High Court the applicants had inter alia, sought an order directing the municipality to provide adequate and sufficient basic temporary shelter and/ or housing to them and their children pending their obtaining permanent accommodation. The High Court considered the claim in terms of section 26 and found that the municipality had taken reasonable legislative and other measures within the available resources to achieve the progressive realization of the right to access adequate housing.
[107] Grootboom para 24.
[108] Ibid para 23-24 and 36.

could not afford, access implied that the state would develop the necessary social assistance programs.[109]

However, departing from the rationality standard established in *Soobramoney*, the *Grootboom* court introduced a standard of reasonableness against which it measured the State's housing program. In clarifying the standard of reasonableness, the court stated that:

> A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.[110]

To assess reasonableness, the Constitutional Court set out criteria which could be objectively applied to determine the extent to which government programs were reasonable. It held that a reasonable government program must allocate responsibilities to the different spheres of government (national, local and provincial governments). Secondly, that a reasonable program must be comprehensive and determined by all three spheres of government in consultation with each other. Thirdly, the policies and programs had to be reasonable both in their conception and implementation. Fourthly, in determining the reasonableness of measures, the court would consider whether the program was balanced and flexible and whether the program made appropriate provision for attention to housing crises and to short, medium and long term needs. Additionally, the Court emphasized that 'a programme that excludes a significant segment of society cannot be said to be reasonable.' Finally, the Court added that a reasonable program would allow for continuous revision and review.[111]

Having set out the standard and meaning of reasonableness, the *Grootboom* Court interrogated the State housing programme against the reasonableness criteria. It held that the municipal council's measures were unreasonable, because they did not cater for the emergency needs of vulnerable communities.[112] The Constitutional Court held that section 26(2) required the State to devise and implement within its available resources a comprehensive and coordinated programme in order to progressively realise the right to access housing. Further, this programme had to include relief for those living in intolerable or crisis situations. At the date of the application, the Municipal Council's housing programme

[109] Ibid para 36.
[110] Ibid para 41. Also see paras 43- 44; 46, and 83.
[111] Ibid paras 39- 43.
[112] Ibid paras 63-69 and para 99.

fell short of this standard because 'it failed to make reasonable provision within its available resources for people in the Cape Metropolitan….'[113]

In another health services related case, the Constitutional Court expanded its reasonableness approach to adjudicating socio-economic rights. *Minister of Health v Treatment Action Campaign (TAC No 2)* was a matter that challenged national policy relating to mother-to-child-transmission of HIV within the public health care sector.[114] The appeal before the Constitutional Court was brought by the government seeking to reverse an order that had been made in the High Court, requiring government to provide the anti-retroviral drug Nevirapine to HIV-positive mothers and their newborn babies who sought health care services in public hospitals.[115] The central question addressed by the Constitutional Court was whether the government had shown that 'the measures it adopted to provide health care services for HIV positive mothers and their newborn babies fell short of its obligations under the Constitution.'[116] Applying the reasonableness standard established in *Grootboom*, the Constitutional Court found that the State's mother-to-child-transmission of HIV policy was unreasonable, because it was inflexible and did not take into consideration the poor women who could not access the sites and could not afford to pay for the anti-retroviral treatment.[117] More importantly, the *TAC No 2* Court expanded the reasonableness criteria to include transparency stating that, '...for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.'[118]

Another aspect arising from these early socio-economic rights cases that is worth revisiting is the Constitutional Court's views on applying the minimum core principle arising from international law. The amici in *Grootboom* and *TAC No 2* had urged the Constitutional Court to adopt the minimum core approach expressed in General Comment 3, which would require the Court to determine the minimum threshold for the progressive realization of the rights to adequate housing and to health care services. The amici particularly urged that this standard would be helpful if applied to determining whether the State had acted reasonably. Even though the Constitutional Court recognised that relevant international law could be a

[113] Paras 95 and 99. The appeal was however in part successful in so far as the CC set aside the High Court order which compelled the appellants to provide the respondent children and their accompanying parents with shelter until such time as their parents were able to shelter their own children.
[114] *TAC (No 2)*2002 (5) SA 721 (CC).
[115] Paras 2 and 43; In the High Court, the judge had found that the government's policy which was to provide the anti-retroviral drug to two public hospitals per province which were identified as treatment sites was unreasonable.
[116] *TAC (No 2)*2002 (5) SA 721 (CC) para 25.
[117] Ibid paras 67-70.
[118]Ibid para 123.

guide to interpreting the South African constitutional socio-economic rights, it cautioned that the weight to be given to international law would vary depending on the rule or principle of international law being applied.[119] In the final event, the Court declined to apply the international law standard of a minimum core to its interpretation of a South African right to housing and a right to health.[120] The Court reasoned that it was not possible to determine the minimum core in South Africa, because it did not have sufficient information comparable to the Committee of the ICESCR.[121] Yet, it recognised that there were instances where it might be 'possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.'[122]

The extent to which the right to equality interacts and reinforces other socio-economic rights was articulated by the Constitutional Court in *Khosa v The Minister of Social Development (Khosa).*[123] *Khosa* was a case challenging the exclusion of permanent residents from accessing social grants guaranteed by the right to social security in section 27(1)(c). The Constitutional Court found that permanent residents were equally entitled to access social grants as other South African citizens. It asserted that:

> Equality in respect of access to socio-economic rights is implicit in the reference to 'everyone' being entitled to have access to such rights in section 27.[124]

The Constitutional Court thus affirmed that the phrase *everyone* embodied the non-exclusion standard in enjoyment of human rights envisaged in international law. In relation to a human right to water, this decision shows that the Constitutional Court's interpretation of equality is similar to the UNCECSR's General Comment 15 interpretation of a non-exclusive human right to water.

The *Khosa* court additionally illustrated the inter-relatedness of the rights within the Bill of Rights when it affirmed that where the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they had to be taken into account along with the available human and financial resources in determining whether the state had

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[119] *Grootboom* para 26.
[120] *Grootboom* para 32-33 and *TAC No 2* paras 34-39.
[121] *Grootboom* paras 32 and 33. In para 32, it states that: 'It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary…. All this illustrates the complexity of the task of determining a minimum core….' Also refer to *TAC No 2* paras 26-39.
[122] *Grootbom* para 33; *TAC No 2* para 34.
[123] *Khosa & Others v The Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* op cit note 15.
[124] Ibid para 42.

complied with the constitutional standard of reasonableness.[125] This somewhat expanded the criteria for reasonableness established in *Grootboom* and *TAC No 2*. There appear to be instances where the Court will take into consideration the inroads made to equal enjoyment of other rights while evaluating government programmes for reasonableness.

The Constitutional Court has also elaborated on the negative obligations arising from the socio-economic rights enumerated within the Constitution. *Jaftha v Schoeman (Jaftha)* is one such decision.[126] The appellants claimed the right to access adequate housing arguing that the import of national legislation could not impliedly prevent or impair existing access to housing guaranteed by section 26(1). The Constitutional Court affirmed its previous position that the negative obligations to respect enjoyment of socio-economic rights were immediately justiciable. It thus concluded, that in light of the conception of adequate housing envisaged within international law and the 1996 Constitution, 'any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1).'[127] However, the Constitutional Court went on to add that such a limitation may in certain circumstances be justifiable in terms of section 36.

In addition to vindicating socio-economic rights claims, the Constitutional Court had also considered the constitutional obligations attaching to local governments. It had been approached by property owners for relief against payment of municipal debt incurred by their tenants in *Mkontwana v Nelson Mandela Metropolitan Municipality*.[128] The Constitutional Court held that municipalities were constitutionally obliged to provide water and electricity services to residents as a matter of public duty, given that many communities in South Africa were still without access to basic facilities.[129]

In sum, prior to the *Mazibuko* case, reasonableness had been well established as a principled standard against which government programs could be evaluated through the adjudicative process.[130] The reasonableness test is important because it indicates several features to which socio-economic laws and policies, including water policies, must adhere, particularly that they must not exclude and must satisfy the basic needs of the most

[125] *Khosa* para 44; Sandra Liebenberg op cit note 1 at 157; Kevin Iles op cit note 14 at 457.
[126] *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC).
[127] *Ibid* para 34.
[128] 2005 (1) SA 530 (CC).
[129] Para 1, 18-23, 38 and 105.
[130] Marius Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 (4) *Human Rights Quarterly* 882, 892; Sandra Liebenberg op cit note 38 Chapter 33; Sandra Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) 17 *Stellenbosch LR* 5, 24-29; Sandra Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2009) *Law Democracy & Development* 159, 167.

vulnerable. At the same time, the Constitutional Court appeared willing to explore the content of the constitutional obligations of local government to citizens.

But, the Constitutional Court's approach to constitutional rights based claims had been criticised as well. The reasonableness standard had been criticised for failing to facilitate a more substantive analysis of the socio-economic rights at stake.[131] Commentators also criticised the Constitutional court's failure to give the right to life a more generous interpretation.[132] Thirdly, the Constitutional Court's approach had been criticised for being too deferent to the executive and consequently for leaving little enforceable entitlements inherent to socio-economic rights.[133]

5.5.2 Adjudicating the Right to Water in the High Court pre-*Mazibuko*

Prior to the Constitutional Court's consideration of the right to water, claims for a specific right to water had been made to the High Court in matters which related to disconnection of water supply by municipal service providers. These matters addressed a class of citizens for whom the right to water had already been realised. The cases thus interrogated the potential limitations to enjoyment of the right to water for individual citizens. These challenges arose prior to the Water Services Regulations, which elaborated a threshold for basic water services.[134]

In *Manqele v Durban Transitional Metropolitan Council*[135] an unemployed woman occupying premises together with her seven children challenged the council's decision to disconnect her family's water supply on account of non-payment of arrears under the provisions of the Water Services Act (WSA). The City by-laws provided for disconnection of a water supply where an account holder was in arrears. Her application was premised upon the argument that the City by-laws impugned the WSA which guaranteed the right to a basic water supply, although in argument her counsel sought to rely on section 27 of the Constitution. She therefore sought a declaration that the discontinuation of water supply services to her premises was unlawful.[136]

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[131] D Brand 'The proceduralisation of South African socio-economic rights jurisprudence' in H Botha et al (eds) *Rights and Democracy in a Transformative Constitution* 33; Marius Pieterse op cit note 43 at 382-3.
[132] Sandra Liebenberg op cit note 131 at 167; Marius Pieterse op cit note 43 at 382-4.
[133] D M Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards 'deference lite'?' (2006) 22 *SAJHR* 301, 316.
[134] For a more thorough discussion see Michael Kidd op cit note 56. Also see Anel du Plessis 'A government in deep water? Some thoughts on the state's duties in relation to water arising from South Africa's bill of rights' (2010) 19 *Review of European Community & International Environmental Law* 316.
[135] 2002 (6) SA 423 (D).
[136] Paras F-G.

The High Court dismissed the claim. The Court relied on the absence of regulations prescribing the basic supply of water to find that, in the circumstances, the right to water was incomplete and unenforceable. Declining to interpret the Water Services Act in terms of the constitutional guarantee of a right to access water, Niles-Dunèr J wrote:

> The interpretation that the applicant wishes me to place upon s3 of the Act, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, requires me to pronounce upon and enforce upon the respondent the quantity of water that the applicant is entitled to have access to, the quality of such water and acceptable parameters for 'access' to such basic water supply. These are policy matters which fall outside the purview of my role and function, and are inextricable linked to the availability of resources.[137]

It would seem that the High Court was perhaps persuaded by the City's evidence that it had taken steps to provide a basic amount of 6 kilo litres of water free of charge, even without municipal regulations being promulgated. It would also seem that the judge formed the view that the applicant's arrears remained unpaid for a long period while she continued to incur more debt with the Council. For instance, the judge wrote that the applicant had been given a free basic service and 'chose however not to limit herself to the water supply provided to her free of charge by the respondent, but to consume additional quantities of water in respect of which she has an obligation to pay.'[138] Contextualising the applicant's precarious position as a *choice* meant that, in the Court's view, she did not fall within the ambit of those vulnerable citizens who were unable to pay for basic services. This perception of the legitimacy of her claim may have discredited the claim before the court.[139]

A year later, residents of a block of apartments in Johannesburg sought similar relief in the High Court. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*[140] the applicants, who were residents of Bon Vista Mansions, a block of flats in inner city Hillbrow, sought an order for the reconnection of the water supply on the basis of their constitutional right to water. The applicants' grievances emerged from the fact that the block of flats had had its water supply disconnected by the municipal council. At the time the application was brought before the Court, their water supply had been disconnected for three consecutive days.[141] The Court found that a reading of section 27(1) together with section 7

[137] Paras D-F, page 427.
[138] Paras B-D page 430. Also see Paras H- I page 426.
[139] Michael Kidd op cit note 56 at 126.
[140] 2002 (6) BCLR 625 (W).
[141] Para 1-2.

of the Constitution and section 4 of the Water Services Act collectively established the principle that:

> If a local authority disconnects an existing water supply to consumers, this is prima facie a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification.[142]

The High Court found that the local council's act of disconnecting the supply was prima facie in breach of its constitutional duty and this therefore placed the onus on the local council to demonstrate that its actions were justifiable. While the Court found that section 4 of the Water Services Act was a justifiable limitation on the right to water, it held that the council did not show that their actions met the requirements of the Constitution and Water Services Act to justify the legitimacy of the disconnections. The High Court thus held that the balance of convenience weighed in the applicants' favour and that they were entitled to an interim order against the respondent to reconnect their supply.[143]

The *Bon Vista* court's decision is important for signalling a willingness to engage the executive by requiring it to explain the basis upon which its decisions were made. Additionally, *Bon Vista* affirmed that the constitutional right to water imposed an obligation on the State to respect citizens' rights to access water.[144] It set out parameters for the limits of the obligation to respect, by finding that a lawful disconnection of a water supply is a justifiable limitation to the right to water. However, such a limitation imposes an obligation on the water service provider to justify its actions within the pre-conditions set out in section 4 of the Water Services Act.[145]

5.5.3 Adjudicating the right to water: the *Mazibuko* judgments

A class action on behalf of residents of Phiri Township within Soweto was instituted in *Mazibuko v The City of Johannesburg*.[146] It was to be the first case in which applicants directly claimed their constitutional right to access to water.[147] The Phiri township, one of the oldest townships of Soweto, had been selected as Johannesburg City's test case area for the implementation of a pilot project code named Operation Gcin'amanzi (Operation Save

[142] Paragraph 27.1 .
[143] Paras 20,30-31 and 33.
[144] Anel du Plessis op cit note 135 at 320.
[145]Michael Kidd op cit note 56 at 129. These pre-conditions are that the disconnection must be fair, provide reasonable notice of intention to disconnect; notify the consumer of a right to make representations; and finally not result in a person being denied access to water for non-payment where they are unable to pay for basic services.
[146] 2008 JOL 21829 (W).
[147] For a detailed history of the circumstances leading up to the case see Patrick Bond & Jackie Dugard op cit note 69; Jackie Dugard op cit note 87.

water). At the core of Operation Gcin'amanzi was a plan to renovate Phiri's poor infrastructure and replace it with a modern and efficient water supply infrastructure. In addition, the project would introduce a pre-payment water supply system for distributing domestic water supply in the township. Alongside the new pre-payment meters, the City of Johannesburg would provide 6 kilolitres of water per month to each household, at no cost. Once the 6 kilolitres had been consumed, the water supply to the stand was automatically cut off. The affected account holder was then required to either purchase water credits in order to be entitled to the supply of water, or to wait until the following month for the next free water allocation. For some large households with little or no income, these difficult choices would present themselves for a period of about two weeks each month.[148]

The application in the High Court was brought against the City of Johannesburg as the Water Authority; Johannesburg Water as the City's contracted water services provider and the Minister of Water Affairs and Forestry. In the sub-sections which follow I provide a factual background to the litigation which founded the claims in the three courts and subsequently a summary and evaluation of the decisions reached respectively by the High Court, Supreme Court of Appeal and the Constitutional Court.

(a) A background to the claims

The application primarily challenged the constitutionality of legislation, policy and the implementation of policy relating to provision of domestic water to individual users within the City of Johannesburg. In particular, the applicants claimed that the Regulations relating to Compulsory National Standards and Measures to Conserve Water, particularly Regulation 3(b), which set 6 kilolitres or 25 litres per person per day as the basic water supply to be provided free to all households, was unconstitutional because it was an arbitrary amount which was not adequate for poor households. Secondly, they claimed that the City of Johannesburg and Johannesburg Water had put in place municipal water policies which violated the Constitution. Two aspects of the policies were specifically challenged. A policy akin to Regulation 3(b) introducing a free water policy limit of 6 kilolitres per household per month or 25 litres per person per day, and a policy introducing pre-payment water supply through metres in Phiri, where the residents had previously accessed an unlimited supply of water charged at a flat rate, and in contrast to other areas in the City, which continued to have unlimited water supply on credit.[149]

[148] Paras 3-4 and para 92 High Court Judgment of Tsoka J.
[149] Ibid para 9, 71 of judgment by Tsoka J.

The applicants sought several orders from the High Court. First, an order to review and set aside the two policy decisions of the respondents. The applicants also sought a declaration that Regulation 3(b) of the National Standards Regulations was unconstitutional and invalid because they were unreasonable. Finally, they sought an order that each applicant and other similarly placed residents of Phiri were entitled to 50 litres of water per person per day, with an option of a metered supply.[150]

All these claims were contested by the respondents. More importantly, the respondents provided a justification for the policy to introduce the pre-payment meter system in Soweto. The City believed that the pre-payment metered water supply system would significantly reduce water lost in the infrastructure or 'unaccounted for water', since the City remained unable to account for 75% of water pumped into Soweto. It contended that the access to pressurized, unlimited water in Soweto was unsustainable, in view of the City's plans to extend its water supply to many other people who had none at all.[151] Additionally, the City urged that the project would reduce wastage amongst users who would only pay for water actually consumed.[152]

(b) The High Court in Mazibuko v City of Johannesburg

The High Court decided the application in favour of the applicants, affirming that individuals were entitled to enforce the right to water.[153] The Court ordered the City to provide the applicants and similarly placed residents of Phiri with a free basic water supply of 50 litres per person each day, as well as an option of a metered supply installed at the cost of the city.[154]

The High Court extensively interpreted the emerging obligations for the State with the aid of international law norms. The High Court also found that interpreting the right to water required a conjunctive reading of sections 27 and section 7(2) of the Constitution. It thus affirmed that the right to water implicated negative and positive obligations for the State. The Court found that the city had violated its obligation to respect the citizens' right to water, by introducing and implementing a prepayment water scheme that was not founded within the provisions of the Water Services Act.[155]

[150] Ibid para 10-12, 27-54, of judgment by Tsoka J.
[151] Ibid para 12, 129, 135, 138-142.
[152] Ibid para 4,19 and 101 judgment by Tsoka J.
[153] Ibid para 166 Tsoka J.
[154] Ibid para 183 Tsoka J.
[155] Ibid paras 82-96.

Additionally, the High Court determined that the Constitution required the State to fulfil the right to water by providing water and water facilities to the poor and most vulnerable members of the population, who were clearly unable to pay.[156] While acknowledging that the obligation to fulfil the right to water was actualised at the lowest level by the responsible Water Services Authority, the High Court clarified that each Water Services Authority had an obligation to ensure basic water provision depending on its resources.[157] Impliedly, the extent to which each Water Services Authority would be expected to realise its obligation to fulfil the human right to water would vary from case to case.

The High Court affirmed that the State had an obligation to protect the right to water by facilitating the progressive realisation of the right through policies and legislation which were compliant with sections 27(2) and 7(2) of the 1996 Constitution.[158] Indeed, the Court lauded the Minister responsible for Water (who was the 3rd respondent) for having promulgated the Water Services Act and regulations, as well as a national policy establishing a national minimum basic water amount in fulfilment of the executive's constitutional obligations.[159]

Given that there were still many South Africans who had no access to the basic amount of water, the High Court found that the sections of the Water Services Act which provided for the limitation or disconnection of water services were justifiable limitations to the enjoyment of the right to water.[160] The judge wrote, 'Taking account of the State's position and available resources, its infringement of the right to water is understandable.'[161] Nonetheless, the Court found that, in the particular case, the limitation introduced by automatic water cut off mechanisms could not be justified by the respondents.[162]

Considering that the applicants had set out their contention with the regulations and policies along the standard of reasonableness established in *Grootboom* and *TAC No 2*, the High Court evaluated the reasonableness of the legislative and policy measures adopted and implemented by the City. In the end, the Court found that, while the Regulations did not fall short of the constitutional standard read together with international law, the pre-payment scheme as well as the City's social policies and the manner in which they were implemented fell short of the reasonableness standard. For instance, the Court found that the aim of the Gcin'amanzi project was unreasonable, that the manner in which information about the

[156] Ibid para 40-41.
[157] Ibid para 49.
[158] Ibid para 41.
[159] Ibid para 42.
[160] Ibid para 71- 74.
[161] Ibid para 102.
[162] Ibid para 82-84.

project had been provided to the residents was misleading and never consultative, and that many households who had more than 8 residents were essentially left without access to water, which meant that the policy excluded the most vulnerable and was inflexible. In assessing the City's social policy against a standard of reasonableness, the High Court held that the underlying policy aim, which was to entice the poor residents to accept pre-payment meters was irrational and unreasonable.[163]

Commentators lauded the High Court's decision for its interpretive and evaluative approach to the obligations generated by section 27(1). Commentators have remarked that Tsoka J's judgment showed a commitment to utilising a rights-based approach as a means to realising the basic needs of poor and vulnerable communities within South Africa, in a manner which previous decisions had not accomplished.[164]

This was the first instance relating to socio-economic rights claims in which a court demonstrated willingness to initiate an enquiry into a rights violation by determining the exact normative content of the constitutional right to water.[165] Secondly, the High Court had shown willingness to explore the interconnectivity of rights in the Bill of Rights, when it acknowledged that water constituted an element of many of the other rights enumerated within the Bill of Rights.[166] The High Court further affirmed that the right of access to water corresponded to international norms envisaged in General Comment 15, by elaborating on content of the right in a manner similar to the UNCESCR.[167]

However, other commentators have criticised the High Court for over-reaching its institutional mandate, by the manner in which it sought to provide normative clarity to section 27(1). Previous Constitutional Court decisions such as *Soobramoney* and *TAC No2* had indicated that availability of resources was at the heart of the government's obligation to progressively realise section 27 rights. It was therefore argued that, in specifying an exact amount of water for individuals' basic needs, the judgment had the potential of completely eroding confidence in the courts, because there was a possibility that the State was not able to provide the 50 litres of water. In such circumstances, a prescriptive court order such as this

[163] Ibid paras 138-150.
[164] Jackie Dugard 'Can human rights transcend the commercialization of water in South Africa? Soweto's legal fight for an equitable water policy' (2010) 42 (2) *Review of Radical Political Economics* 175, 190.
[165]Sandra Liebenberg op cit note 1 at 180-1; Linda Stewart 'Adjudicating socio-economic rights under a transformative constitution' (2010) 28 *Penn State International Law Review* 487, 497-499. Also see paras 31-40; paras 151-9 and 169-179 Tsoka J.
[166] Paras 124 and 157, 160.
[167] Sandra Liebenberg op cit note 1 at 179.

only served to damage the credibility of courts in participating in enforcement of these constitutional rights.[168]

It appears that the applicability of a minimum core content of the right to access water remains an unsettled issue. Whereas the High Court acknowledged that the premises upon which a minimum core could be identified in *Grootboom* did not necessarily exist in *Mazibuko*, it expressly declined to rely on the General Comment 15 notion of minimum core content of the right to water. Instead, the Court particularised what would amount to 'sufficient water' for the residents of Phiri, as 50 litres per person per day.[169] Yet, it would seem that the content of the National Regulations provide indications that there may well be a minimum content of the right to water.[170] Commentators have cautioned that, because the High Court did not clarify whether the 50 litres was the equivalent of a minimum amount for residents of Phiri, it did not provide the normative clarity required on the possibility of establishing a minimum core content of the right of access to water.[171] While this criticism may be founded, it does not counter the effect that the court had explicitly granted citizens an entitlement to a minimum, specific amount of water.

(c) The Supreme Court of Appeal in City of Johannesburg v Mazibuko

In 2009, the City of Johannesburg and Johannesburg Water appealed against the High Court judgment to the Supreme Court of Appeal (SCA).[172] The SCA addressed two main issues. First, whether the City had a constitutional duty to provide free water to the residents of Phiri. Secondly, whether the City could restrict access to water to Phiri residents by means of pre-payment water meters.[173] In a unanimous judgment, the SCA set aside the decision to limit the free basic water supply in Phiri. The SCA declared 42 litres per person per day to be a 'sufficient' amount, but confirmed that the installation of pre-payment meters was unlawful. As an interim measure, the Court ordered that the City provide each account holder in Phiri registered as an indigent with the quantified amount of water pending reformulation of the City's policy.[174]

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[168] Linda Stewart op cit note 166 at 501-2. The same argument has been made against the Supreme Court of Appeal decision in *Mazibuko*. See Jackie Dugard & Sandra Liebenberg 'Muddying the waters' The Supreme Court of Appeal's judgment in the Mazibuko case' *ESR Review* Vol 10 (No 2) 11, 15.
[169] Paras 127-134 Tsoka J.
[170] Sandra Liebenberg op cit note 1 at 184.
[171] Linda Jansen Van Rensburg 'The right of access to adequate water [discussion of *Mazibuko v the City of Johannesburg* case no 13865/06]19' (2008) *Stellenbosch LR* 415, 420-3; 429.
[172] 2009 (3) SA 592 (SCA).
[173] Para 1 Streicher JA.
[174] Refer to paras 24, 42 and 62 Streicher JA.

Affirming the interrelatedness of rights to life, health and dignity, the SCA elaborated on the meaning of 'sufficient water' in terms of section 27(1).[175] Streicher J stated that '...the right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence.'[176] The SCA reasoned that the exact quantity necessary for existence was dependent on the circumstances of each individual and thus concluded that, for the residents of Phiri whose conditions required water borne sanitation, this amount was 42 litres.[177]

The SCA affirmed that section 27(1) imposed an exact positive obligation upon the City to fulfil the right to water. Reasoning that the obligations imposed by the right to water extended to meeting the basic water needs of the most desperate and vulnerable members of the community, the SCA found that the City had an obligation to provide free water to those residents who could not afford to pay for water.[178] Finally, the SCA stated that the City had an obligation to act reasonably and progressively to fulfil its obligations to residents. It thus ordered the City to reformulate its free water policy in order to meet the standard of reasonableness.[179]

Considering that legislation is one of the means by which the 1996 Constitution envisages that socio-economic rights will be realised, the SCA considered whether the Water Services Act and its regulations complied with the 1996 Constitution. It found that section 3 of the Act and its accompanying regulations were not intended to detract from the right of everyone to access sufficient water in terms of section 27(1), and was therefore not unconstitutional.[180]

(d) The Constitutional Court in Mazibuko v City of Johannesburg

Mazibuko and the other Phiri claimants appealed against the SCA judgment to the Constitutional Court. The appellants averred that the SCA had erred in determining that the sufficient amount of water required by section 27 was 42 litres per person per day.[181] They were also aggrieved with the order of the SCA requiring the City to provide this amount of water free of charge only to those on the indigents register, averring that the SCA should have declared that the City was obliged to provide this amount of water, free of charge, to *all*

[175] Para 21; also see Jackie Dugard & Sandra Liebenberg op cit note 169 at 15; Sandra Liebenberg op cit note 1 at 181-2; Linda Stewart op cit note 166 at 497-8.
[176] Op cit note 173 para 17.
[177] Op cit note 173 para 21-24.
[178] Op cit note 173 paras 27-30.
[179] Op cit note 173 para 27-28, and 42.
[180] Op cit note 173 paras 14-15.
[181] 2010 (4) SA 1 (CC); paras 6 and 37.

the residents of Phiri who could not afford to pay for their own water.[182] At the same time, the City cross-appealed the decision of the SCA. It took issue with the findings that the residents of Phiri were entitled to 42 litres per person per day, that this amount had to be provided for free to those on the indigents register and that the instalment of pre-payment meters in Phiri was unlawful.[183]

The Constitutional Court dismissed the applicants appeal and upheld all the grounds of the City's cross-appeal. I evaluate the central aspects of the judgment in the paragraphs that follow, in order to tease out the significance of this decision for South Africa's constitutional law jurisprudence.

i. Justiciability

The Constitutional Court re-affirmed its earlier stance that, while the constitutional right to water enumerated in section 27(1) was justiciable, it did not confer any immediate rights to individuals to claim sufficient water from the State. However, the Court clarified that, even though immediate individual claims could not be adjudicated in a manner which required a Court to specify the content of the socio-economic right, courts could nonetheless subject legislation and executive policy which gave content to the right to water to a reasonableness analysis. Indeed, the Constitutional Court stated that, at the very least, it would enforce the right to water where government took no steps to realise the rights or when the measures taken by government were unreasonable. The Constitutional Court distinguished the applicants' claim for a specific amount of water from the orders it had made previously in *Grootboom* and *TAC No 2*. It reasoned that, in those cases, it had simply evaluated government policy for reasonableness and, upon finding that the policy fell short of the standard, ordered government to review its policy. Ultimately, the Court reaffirmed that it would not order the direct provision of social goods and services on demand.[184]

ii. Content of the right to water

One of the most significant aspects of the Constitutional Court judgment was its setting aside of the High Court and SCA's determination of a specific amount of water as being 'sufficient' in terms of section 27(1). Ultimately, the Constitutional Court declined to quantify an exact amount of water as constituting 'sufficient water' within the scheme of section 27(1).To this end, the CC stated that:

[182] Ibid para 31.
[183] Ibid para 32.
[184] Ibid paras 57, 62-67.

> ...what constitutes sufficient water depends on the manner in which water is supplied and the purposes for which it is used..... Courts are ill-placed to make these assessments for both institutional and democratic reasons.[185]

It continued to state that:

> These considerations were overlooked by the High Court and the Supreme Court of Appeal, which without first considering the content of the obligation imposed upon the State by s 27(1) (b) and 27 (2) found it appropriate to quantify the content of the right....[186]

The Constitutional Court followed the principle in *Jaftha* affirming that the socio-economic rights within the Constitution imposed a negative obligation upon the State to respect the enumerated rights. As such it emphasised that the State had an obligation to refrain from interfering with the enjoyment of socio-economic rights.[187] Ultimately, it found that, even though the residents of Phiri had previously had unlimited access to water, the installation of pre-payment meters did not constitute interference with their enjoyment of the right to access sufficient water.[188]

Reiterating its own position in *Grootboom* and *TAC (No.2)* on the approach to interpreting sections 26 and 27 of the Constitution, the Court maintained that the scope of the positive obligation imposed upon the State by these provisions is carefully delineated by their second sub-section to the effect that the State must take reasonable legislative and other measures progressively to realise the right within its available resources.[189] In this regard, the Constitutional Court found that the City had an obligation not only to make policies but also to continuously revise them, in order to ensure progressive realisation of the right to water.[190] Thus, in interpreting the positive obligation of the State to realise the right to water, O'Regan J stated:

> …the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources.[191]

iii. The reasonableness evaluation

[185] Ibid para 62.
[186] Ibid para 68.
[187] Ibid para 47.
[188] Ibid paras 135-142.
[189] Ibid para 49.
[190] Ibid para 40, para 66.
[191] Ibid para 50.

The Constitutional Court was urged to find that the City's free basic water policy was unreasonable. In evaluating the grounds pointing to unreasonableness advanced by the applicants, the Court found that this was not the case. It rejected the argument that the free basic water policy was unreasonable because there were large households for whom the 6 kilolitres was inadequate. The Court reasoned that it would be expensive and inequitable for the City to raise the threshold amount of free basic water for all, because this would disproportionately benefit stands with fewer residents. Considering that the City's policy was in line with the minimum national standard, the Court dismissed the applicants' claim.

The Constitutional Court also rejected the claim that the City's policy was inflexible, instead emphasizing that various changes had been made to the policy after 2001. In the Court's opinion, the evidence adduced by the City showed that the City was continually reconsidering its policy and finding new ways to improve services to its poorest inhabitants, which contradicted claims of inflexibility.[192] It stated:

> What is clear from the conduct of the City is that it has progressively sought to increase access to water for larger households who are prejudiced by the 6 kilolitre limit. It has continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city. It cannot therefore be said that the policy adopted by the City was inflexible, and the applicants' argument on this score too must fail.[193]

iv. A critique of the Constitutional Court's decision

The decision of the Constitutional court in *Mazibuko* did not escape criticism. There was a general perception amongst commentators that the Constitutional Court's strict adherence to the reasonableness standard led to its failure to engage with the substantive content of socio-economic rights claims of poor and vulnerable citizens.[194] For instance, the Court's evaluation of the reasonableness of the City's free basic water policy has been criticised for failing to measure the policy against the values of equality and dignity underpinning the right to water, subsuming the content of the right to water into the qualifications of the right in section 27(2).[195] Sandra Liebenberg, for instance, proposes that the Court should have taken into account the basic water needs of the affected households and its impact on their life, health and dignity, as was done by the two lower courts. In her view, such an engagement

[192] Ibid paras 90-97.
[193] Ibid para 97.
[194] Pierre De Vos 'Water is life (but life is cheap)' 2009 http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/ ; Sandra Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution*; Stuart Wilson and Jackie Dugard 'Taking poverty seriously: The South African constitutional court and socio-economic rights' (2011) *Stellenbosch LR* 664 -666.
[195] Sandra Liebenberg op cit note 1 at 179 and 466-9; Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-28 and 56B-30 and -31; and Linda Stewart op cit note 166 at 494-5.

with the substantive needs of aggrieved people would be more likely to impact on the outcome of an analysis of the reasonableness of the State's policy.[196]

Yet again, the debate over the institutional limitations inherent to adjudicating socio-economic rights arose in *Mazibuko*. Commentators accept that judicial review requires a court to remain mindful of the constitutional roles of the other arms of governments.[197] Additionally, that the legislative and executive branches may be better suited to translate specific aspects of socio-economic rights, due to their positioning in terms of information and expertise, among other considerations.[198] While the *Mazibuko* Constitutional court reminded that it would not hesitate to review the decisions of the executive or legislative arms of government by way of evaluating legislation or policy for reasonableness, it was felt that its subsequent actions reflected an unwarranted deference to the executive.[199] Commentators have particularly criticised the *Mazibuko* court for only cursorily reviewing the City's free basic water and indigents' policies and for failing to interrogate the City's reasons for limiting access to water to the claimants.[200]

It has further been alleged that the Constitutional Court ascribed to a neo-liberal conceptualisation of the human right to water, which appears to have affected the outcome of the claim. In many instances, O'Regan J referred to the claimants as consumers.[201] The *Mazibuko* court appears to have constructed an entitlement to adequate water as being available to willing consumers, as opposed to being grounded in the non-exclusion ideal espoused in the 1996 Constitution and elaborated upon in *Khosa*. Like the Indian court, the South African court appeared to construe the right to water within a market based paradigm, which serves to protect the interests of wealthier citizens. Yet, this does not sit well with the constitutional ideals.

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[196] Sandra Liebenberg's argument in *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (op cit note 1) also aligns with the argument previously made by Marius Pieterse 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' 2007 *HRQ* 796, 819-820.

[197] Cora Hoexter *Administrative Law in South Africa* 2ed (2012) 353-355; Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009)175; Lucy A Williams 'The role of courts in the quantitative implementation of social and economic rights: A comparative study' (2010) 3 *CCR* 141, 189-191; *Mazibuko* (CC) op cit note 182 paras 66-67 O'Regan J.

[198] Marius Pieterse op cit note 18 at 387-388; Linda Stewart op cit note 166 at 506; Sandra Liebenberg op cit note 1 at 469.

[199]See Sandra Liebenberg op cit note 1 at 469; Murray Wesson 'Reasonableness in retreat? The judgment of the South African constitutional court in *Mazibuko v City of Johannesburg*' *HRLR* (2011)11(2) 390, 404; and Stuart Wilson & Jackie Dugard op cit note 195 at 677-8.

[200] Lucy A Williams 'The role of courts in the quantitative implementation of social and economic rights: A comparative study' (2010) 3 *CCR* 141, 189, 191, 196-197; D M Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards 'deference lite'?' (2006) 22 *SAJHR* 301, 316.

[201] *Mazibuko* op cit note 182 paras 121-4; Marius Pieterse op cit note 70 at 376-378.

This said, some commentators have pointed out that the fact that the matter was successfully brought to trial was in itself an achievement, given that it challenged the neo-liberalism underpinning much of the State's water policies.[202] Patrick Bond and Jackie Dugard have previously argued that much of the national water policies, although superficially rights conscious, were underpinned by neo-liberal aspirations which valorised achieving efficiency in billing and reducing demand for water by eliminating credit for the poor. These aspirations conceived of water services as a commodity, the price and supply of which were predominantly determined by consumers' ability to pay. From this point of view, Bond and Dugard argued that Johannesburg municipality had adopted the free basic water policy not as a means to meet the social aspects of water access, but rather to limit demand for water among the urban poor. In their view, the *Mazibuko* cases therefore compelled the City to adjust its policies and their implementation in a manner which centered upon rights rather than economics. The litigation process thus proved somewhat effective in countering the neo-liberal aspirations of the policies in tempering the harshness of the pre-payment water supply scheme.

A related positive feature of *Mazibuko* has been the manner in which it served to hold the executive accountable for the actualisation of the right to water. According to democratic accountability theory, judicial review provides an important forum in which government can be compelled to account to citizens for the manner in which it has decided to distribute state resources.[203] Indeed the Constitutional Court emphasised that the possibility of making the executive account to citizens within the adjudicative forum was a means of enhancing democratic accountability.

In *Mazibuko*, the Constitutional Court had gone to great lengths to affirm that socio-economic rights litigation enhanced participation of citizens in the matters that most concerned them. Indeed, *Mazibuko* provided an illustration as to how engagement between citizens and the executive could be useful to the provision of substantive relief to rights claimants, given that the claimants and most indigent residents of Johannesburg appear to have benefited from policy reform after the judgment. During the litigation process, the State was put to task to disclose why it had formulated the particular policy, its research, as well as the reasons why the particular policy option was favoured over other options. In this way, the citizens were empowered to meaningfully engage with executive policy, thereby enhancing

[202] Patrick Bond & Jackie Dugard op cit note 69 at 3; Thomas Coggin & Marius Pieterse op cit note 70 at 270.
[203] D M Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards 'deference lite'?' (2006) 22 *SAJHR* 301, 319; Lucy Williams op cit note 201 at 188.

their participation in crafting measures and solutions to challenges that directly affect them.[204] Indeed, the *Mazibuko* court admitted evidence on the nature and extent of the water services problem and the ways in which the City had sought to extend relief to the poor and vulnerable. Commentators welcome this effort, because it offers hope for the possibility of transcending the predominantly procedural relief commonly associated with socio-economic rights adjudication, to a point where the adjudication enhances accountability of the executive and local government authority.

Mazibuko further illustrates many of the indirect benefits of adjudicating socio-economic rights claims. Commentators have argued that the threat of judicial review acts to influence government action.[205] The *Mazibuko* cases provided the evidence. The extent to which the City was willing to account for and review its water policies provided perhaps the strongest evidence of the power wielded by the threat of judicial review. It is arguable that the main policy changes were inspired by the claims made by the applicants and were aimed directly at addressing the very grievances which were brought to surface in their affidavits.

The impact of the *Mazibuko* litigation on policy continues to reverberate. The *Mazibuko* cases compelled an interaction between the executive and judicial arms of government as well as the community in a bid to resolve the substantive problem of access to sufficient water among the poorer residents of Johannesburg. While I do not underestimate previous efforts that had been made by the City to inform and educate communities on the free basic water policy and how it would be implemented through pre-payment meters in some parts of Johannesburg, a lot more was gained from the adjudication process.[206] For instance, the City hastened plans to revise its free basic water policy to provide 50 litres of water per person per day, thereby enhancing access to sufficient water.[207] It also made proposals for a policy to avail water for emergencies, as well as proposals on increasing accessibility to the indigents register. It further proposed to install pre-payment meters which had a trickle device, such that when the free basic amount run out, there was a small amount of water that could trickle out of the taps as opposed to a total shut down of the water services. While it is arguable that all these gains could have been achieved by other means, my contention is that the pressure of litigation and, particularly, the initial positive outcome for the applicants could have

[204] Marius Pieterse op cit note 70 at 370.
[205] Eric C Christiansen 'Using constitutional adjudication to remedy socio-economic injustice: Comparative lessons from South Africa' (2008) 13 *UCLA Journal of International & Foreign Affairs* 369-406.
[206] Jackie Dugard & Malcolm Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *SAJHR* 39, 57-58; Lucy A Williams op cit note 201 at 188 and 193.
[207] op cit note 182 at paras 59, 90-97; 160-165.

caused reverberations in other areas of the City and the State, ensuring that the City acted with haste. In so doing, there was an effective attempt to progressively realise the right.

Nonetheless, I acknowledge that the substantive gains made towards removing barriers to accessing water in Johannesburg cannot be exclusively linked to the justiciable nature of the right to water. There had been several civil society campaigns on the subject and, prior to the court cases, the citizens in Phiri had been adequately informed of their constitutional entitlements as regards water. From this stand point, they were better placed to articulate and make direct and forceful claims to their perceived constitutional entitlements. These factors, none of which depend upon the justiciability of the right to water as such, certainly had a significant role to play in causing the City to review and adjust its policies and their implementation. But this does not detract from the argument that directly justiciable rights provide a better stand for those whose basic needs remain unrealised and additionally that adjudication can positively contribute to the better enjoyment of rights.

The *Mazibuko* cases provided legitimacy to claims for enjoyment of water services, which is likely to continue to empower and shape struggles for water beyond the conclusion of the case.[208] Jackie Dugard comments that, prior to *Mazibuko*, rights activists were circumspect of the benefits, if any, of litigating the implementation of a pre-payment meter system. However, once the case was initially decided in a manner which affirmed the rights of the individual, these activists were provided a useful additional resource for their cause. These claims are in line with arguments previously advanced about the utility of legal resources as a tool to advance the interests of the poor and vulnerable.[209]

Finally, *Mazibuko* illustrated once again that the value of public interest litigation in vindicating the needs claims of the most poor and vulnerable members of society cannot be determined by court room victories alone. Commentators have cautioned that socio-economic rights adjudication is a 'more contextually specific and complex process', through which similar questions may lead to different answers from a court. As a result, the focus should not exclusively be on successful court room outcomes, because it is not always easy to turn a court room victory into actual social change. Rather, the emphasis should be on seeking to maximise the broader impact of adjudication by analysing whether litigation has had an

[208] Jackie Dugard op cit note 87 at 596, 608-9; Jackie Dugard and Malcolm Langford op cit note 207 at 56.
[209] Clarence Dias 'The Legal Resources Approach' in Asbjorn Eide et al (eds) *Food as a Human Right*, UNU, 177.

impact on the social conditions underpinning the lived realities of claimants and thus affected existing structures of power.[210] With *Mazibuko*, this appears to have been the case.

5.5.4 Socio-Economic Rights Cases Subsequent To *Mazibuko* In The Constitutional Court

Four years after the *Mazibuko* case was concluded, domestic water crises continue to overshadow the benefits of entrenching a constitutional right to water in many parts of South Africa. To date, there are still community demonstrations arising from the State's perceived failure to live up to its obligations to progressively improve the conditions for water access and to remove barriers to access to water. For instance, in 2014, there were several service delivery protests, a number of which related to water shortages.[211] Such protests may show that executive policy has not responded adequately to the needs of citizens. Nonetheless, this does not detract from the benefits inherent to vulnerable citizens being recognised as participants in the debate with the executive over formulation and implementation of government policy. In order to evaluate the impact of *Mazibuko* on South Africa's socio-economic rights jurisprudence, in this sub-section, I consider three Constitutional Court cases which were decided shortly after *Mazibuko*.[212]

In *Joseph v City of Johannesburg (Joseph)*, the Constitutional Court had to determine whether a municipality's disconnection of electricity to municipal residents violated their constitutional right to procedural fairness in the exercise of administrative action.[213] The applicants were residents in a block of apartments owned by a private company. The municipality's electricity service provider, City Power, disconnected the block of apartments for the landlord's failure to settle substantial arrears, even though the residents had paid their electricity bills directly to the landlord. The applicants approached the High Court seeking an order of reconnection, and a declaration that they were entitled to procedural fairness. In the

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[210] Jackie Dugard and Malcolm Langford op cit note 201 at 47. Also see Luke Sinwell 'The Wynberg concerned residents' disempowering court victory' (2010) 21 *Urban Forum* 153,167.

[211] Water shortages caused protests in Mothutlung, Madibeng in February 2014, reported in the Mail & Guardian 14th February 2014 and 8th February 2014 online http://mg.co.za/tag/service-delivery-protests; Christopher Mbazira 'Service delivery protests, struggle for rights & the failure of local democracy in South Africa and Uganda: Parallels and divergences' (2013) 29 (2) *SAJHR* 251; Pregs Govender "Madibeng: 'the place of water'" http://www.sahrc.org.za/home/index.php?ipkmenuID=92&ipkArticleID=257; SAHRC Water and Sanitation Report of 2014 http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf

[212] There are several other decisions addressing socio-economic rights subsequent to *Mazibuko* which are not relevant to the right to water and thus not discussed here. For instance, *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Nokotyana v Ekhurhuleni Municipality* 2010 4 BCLR 312 (CC); *Occupiers of 51Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 3 SA 208 (CC) discussing meaningful engagement.

[213] 2010 (4) SA 55 (CC).

High Court, their claim was unsuccessful. The applicants then appealed to the Constitutional court, arguing that their rights were materially and adversely affected by the termination of their electricity supply in contravention of section 3 of the Promotion of Administrative Justice Act (PAJA).[214] They argued that the rights infringed included the right of access to adequate housing, the right to dignity, and the contractual right to electricity in terms of their contract with the landlord.[215]

The Constitutional Court considered the relationship created under the 1996 Constitution between a public service provider and members of the local community.[216] It affirmed that the provision of basic municipal services to all inhabitants of South Africa, irrespective of whether or not they had a contractual relationship with a service provider, was a cardinal obligation of local government. It thus re-stated its position in *Mkontwana* that municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.[217]Consequently, the Constitutional Court found that, because City Power supplied electricity in fulfilment of its constitutional and statutory obligation to provide basic municipal services, the applicants were enjoying a corresponding right to receive municipal services. As such, they were entitled to procedural fairness from City Power prior to its taking a decision which would materially and adversely affect their enjoyment of that right.[218]

The decision in *Joseph* is significant because it affirms the public law right to basic municipal services derived from the interpretation of local government's obligations. Given that the supply and delivery of water services is among the basic municipal services which local governments ought to provide, the decision potentially enhances procedural protection against disconnection of water supply. Even though such benefit may appear beneficial only to those having paid for water services, it may provide a counterweight to the harsh effect of the neo-liberal 'customer service' practices, including disconnections.

Another, related decision of the Constitutional Court post *Mazibuko* was *Nokotyana v Ekurhuleni Metropolitan Municipality,* which concerned residents of an informal settlement claiming for decent sanitary facilities and adequate lighting in public areas.[219] The claimants challenged the reasonableness of their municipality's sanitation policy which offered one

[214] Section 3 PAJA reads: Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
[215] Para 12.
[216] Para 33
[217] Para 34, 35-40.
[218] Para 46-47.
[219] (2010) 4 BCLR 312 (CC).

chemical toilet per ten families in the place of their existing pit latrines. Relying on their right of access to adequate housing, the claimants proposed that they were entitled to one "ventilated improved pit latrine" per household.[220] While still in the High Court, the applicants also relied on section 27 of the Constitution in seeking an order obliging the Municipality to provide their settlement with among others, communal water taps. This claim was conceded by the municipality and the Court ordered it to provide these basic interim services immediately. On appeal, the Constitutional Court declined to interpret the right to housing as implicating a right to sanitation.[221] Nonetheless, in evaluating the reasonableness of the municipality's decision to improve the slum settlement, the Court found that a delay of three years to make a decision to upgrade the settlement to a formal township was unreasonable for purposes of section 26 (2).

The decision in *Nokotyana* is significant, because it explores the scope of the local government's obligation to progressively enhance enjoyment of constitutional rights. Even though the claim for improved sanitation facilities was declined, the fact that the municipality did not dispute an immediate entitlement to water services indicates that the South African jurisprudence is moving towards establishing an enforceable right to receive basic municipal services.

But these decisions have not been without criticism. While the Constitutional Court was willing to supplement reasonableness with an alternative evaluative approach which took into account the public law right to receive municipal services, the Court's approach nonetheless reflects neo-liberal undertones. In these two decisions, the Constitutional Court affirmed that citizens have a legitimate expectation to basic services. But it has been argued that the Court's notion of what is 'legitimate' is impacted by whether citizens have paid for municipal services. It is therefore arguable that, even though *Joseph* appeared to provide an effective counterweight to neo-liberal ideology, it did not completely depart from neo-liberalism. It is therefore arguable that the extent to which socio-economic rights are enforced will be impeded by the Court's seeming endorsement of neo-liberal conceptualisations of citizenship.[222]

[220] Paras 2 and 21.
[221] Para 54; Also see David Bilchitz 'Is the Constitutional court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality* (2010) 4 *SALJ* 591; Malcolm Langford, Richard Stacey & Danwood Chirwa op cit note 30 at 56B-65- 56B-66.
[222]Marius Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) 28 *SAJHR* 359, 375-378.

This said, *Joseph* and *Nokotyana* reaffirm the dialogical advantages of socio-economic rights adjudication.[223] In practical terms, dialogue between citizens and the executive inevitably involves local governments, which are directly responsible for ensuring delivery of services in a manner which upholds constitutional ideals. In these judgments, it appears that the claims provided an opportunity for dialogue between local governments and citizens on matters of basic service delivery. The Court appears to have facilitated such dialogue by creatively interpreting the constitutional mandate of local government.[224]

The dialogue facilitated through an adjudicative process gives voice to vulnerable citizens to articulate their needs. Once the court provides a forum for such claims, they are legitimized. Ultimately, adjudication of claims pertaining to service delivery appears to have facilitated a shift in power from the privileged towards the poor and vulnerable, whose claims would otherwise have been considered illegitimate.[225] The judgments show that citizens can legitimately challenge municipal authority in the planning and implementation of policy to enhance their enjoyment of basic services. While, in the past, commentators circumspect of socio-economic rights' entrenchment had warned that there was little empirical evidence to show that judicial intervention improved living conditions for individuals who were poor and vulnerable, it is no longer entirely possible to support such a claim.[226]

5.5.5 Litigating water rights in the High Court after *Mazibuko*

Two years after *Mazibuko*, the community in Carolina and Silobela initiated a claim in the High Court for an order, inter alia, to provide temporary potable water to them. In *Federation for Sustainable Environment v Minister of Water Affairs*[227]*(The Carolina case)*, the High Court considered an urgent application seeking to enforce the State's positive obligations to provide water to residents in Silobela and Carolina in the short and medium term, since the area's water supply was contaminated by acid mine water and there was therefore no access to clean and safe water for domestic use.[228] Due to the unhealthy state of the water supply in the area, water tanks were provided to distribute potable water. However, the tanks were not filled regularly and the 25 litres per household which was provided by the local government was inadequate because the tanks were accessed on a 'first come first served' basis. The

[223] Thomas Coggin & Marius Pieterse op cit note 70 at 268 and 271.
[224] Sandra Liebenberg op cit note 91 at 320.
[225] Thomas Coggin & Marius Pieterse op cit note 70 at 271; Jackie Dugard & Malcolm Langford op cit note 207 at 45-59.
[226] Denis M Davis 'The Case against the inclusion of Socio-economic demands in a Bill of Rights except as Directive Principles' 8 *SAJHR* 475, 484-5 & 489.
[227] [2012] ZAGPPHC 128.
[228] Ibid para 1-2 to para 1-4.

claimants also alleged that some residents had to walk long distances to access the potable water. It further transpired that they lacked water for considerable periods, sometimes exceeding seven days, which, it was claimed, amounted to an infringement of their constitutional right to access water.[229] The respondents, on the other hand, denied the gravity of the problem, and argued they had acted promptly by providing water tanks, some of which were destroyed by the community.

The High Court found in favour of the applicants. It held that the rights of the applicants had been violated and ordered the local government to implement the State's obligation to ensure provision of water services in the area.[230] The decision affirmed that it was still possible for the vulnerable and most desperate individuals to claim for immediate fulfilment of their right to water in emergency conditions. This affirms that the constitutional protection of a right to water coupled with legislative and judicial translation can effectively remedy urgent water needs of poor and vulnerable citizens.

5.6 CONCLUSION

This chapter set out to explore the extent to which an explicitly recognised constitutional right to water has been translated through legislative and executive mechanisms and ultimately, through the courts. It transpires that such translation has occurred at all spheres of government. Although prior to the coming into force of the Constitution, the 1994 RDP had articulated a plan for improving universal access to basic services, the explicit reference to a right to water in the 1996 Constitution spurred immediate action to develop specific executive policies and legislation, which shaped the standard for water services delivery for domestic use. The time it has taken to craft such specific legislation and policy has been significantly shorter than appeared to have been the case in India.

Nonetheless, the policies and legislation have been criticized for failing to completely ensconce the ideals of the 1996 Constitution and instead reflecting a neo-liberal discourse. Even then, the constitutional protection of a right to water has offered a chance for effectively countering the neo-liberal aspects of law and policy. Two examples demonstrate this. First, executive responsiveness to actualising basic needs can be accounted for by the transformative nature of the South African Constitution. In the context of water delivery, policies have been crafted and reformulated to establish a free basic water entitlement and to

[229] Ibid paras 5 and 6 and para 23.
[230] Ibid paras 18-20.

remove impediments to enjoyment of water where even this threshold amount is insufficient for the indigent.

The second example relates to judicial responsiveness to socio-economic rights. Unlike India, the South African courts are explicitly mandated to enforce socio-economic rights. Indeed, the courts have allowed the judicial space to be used as a forum for dialogue between citizens and the agencies of government in fulfilment of their constitutional mandate. By doing this, the courts have responded to citizens demands for a better articulation of the right to water, by elaborating its normative content and interpreting the state obligations. In the end, judicial responsiveness has triggered fairly quick executive action towards improving water policies and water delivery mechanisms. As such, these examples go to show that state agencies appear to derive their willingness to act from the force of the constitutional text, which explicitly mandates them to actualise the enjoyment of a right to water.

At the same time, a closer look at the method and approach of the courts reveals that the enforcement of a human right to water has been influenced by the typical concerns relating to the limits of judicial power in the enforcement of socio-economic rights. For instance, unlike the Indian Courts, the Constitutional Court appeared to refrain from giving substantive content to a right to water on account of the limits of its institutional capacity. As such, the Constitutional Court appeared more comfortable with subjecting existing policy and legislation to some form of rights-based judicial scrutiny rather than setting out its own interpretation of the right to water. The Constitutional Court has also been unwilling to read a right to water into other rights such as the right to life. This may neglect some dimensions of the right to water. Of course, this difference in approach may be attributed to the existence of a legislative and policy framework to which the reasonableness standard could be applied which did not exist in India. Even then, it seems that the South African Constitutional Court has been more cautious than its Indian counterpart in overcoming institutional competence challenges.

It appears that judicial willingness to utilise their constitutional mandate in interpretation and enforcement of a right to water is critical to realising substantive enjoyment of the right. However, like India, the decisions of the South African apex court have raised concerns about the underlying ideology through which socio-economic rights enforcement is conceptualised. It appears that, in both countries, the courts have been influenced by neo-liberal ideology, which prioritises a market approach to delivery of water services. However, in South Africa, the neo-liberal ideology appears to be more effectively

countered by the explicit recognition of a right to water as well as by the constitutional obligation on local government to provide basic services.

To conclude, even though immediate claims of entitlement to water have not entirely succeeded, it would appear that the courts in South Africa have gone a long way in empowering citizens to claim and enjoy water as a human right. More importantly, for South Africa, even though law, policy and judicial thinking conceptualise a neo-liberal and customer-centred model of water service delivery, their full thrust is largely tempered by the text and spirit of the 1996 Constitution. It is arguable then, that the 1996 Constitution has singularly directed the conceptualisation and realisation of a right to water. Returning to the main question raised in this thesis, the example of South Africa shows that explicit recognition and direct vindication of a right to water has gone further in facilitating enjoyment of a right to water.

CHAPTER 6
TOWARDS AN ALTERNATIVE APPROACH TO REALISING A RIGHT TO WATER IN UGANDA

6.1 INTRODUCTION

This dissertation explored and evaluated possible legal mechanisms for enhancing the enjoyment of a human right to water for Uganda. Many studies have evaluated the utility of legal means to enhance enjoyment of socio-economic rights in different jurisdictions and found that, in countries which constitutionally protected socio-economic rights and had strong institutions for judicial review, the state devoted a more significant amount of financial resources to the realisation of socio-economic rights and increased the priority of social programs, which benefited vulnerable and marginalised citizens.[1] Country-specific studies have also evaluated the role of the courts in advancing pro-poor struggles.[2] With a particular focus on actualising enjoyment of a right to water in a developing country context, this study supports the findings of previous research.

This dissertation sought to advance the claim that, where a right to water is explicitly recognised within the constitutional text as an enforceable right, it is better translated through legislation and policy and ultimately more effectively enforced by the courts. In the end, this translates into better enjoyment of the right to water by citizens. In each of the countries studied, I examined the manner in which the constitutional framework pertaining to recognition and enforcement of socio-economic rights impacts on how the right to water is constructed within the domestic context. Drawing from the constitutional text, I explored the effects of the specific and implied constitutional construction of the right to water on its eventual translation through legislation and executive policy. I also considered how, if at all, adjudication had enhanced enjoyment of a right to water for citizens. A significant proportion of the study was dedicated to examining the outcomes of adjudication and considering whether court decisions made a difference in substantive enjoyment of the right to water. In doing so, I studied the judicial approaches followed by courts in adjudicating socio-economic

[1] Amy K Makinen 'Rights, review and spending: Policy outcomes with judicially enforceable rights' (2001) 39 *European Journal of Political Research* 23, 29-32; 43-44.
[2] Oscar Vilhena & Upendra Baxi (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013); Malcolm Langford et al *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014).

rights claims, with a view to establishing the benefits and shortcomings of direct and indirect adjudication of the human right to water.

The study was premised on the notion that constitutional protection of socio-economic rights has increasingly been accepted as a means to enhance enjoyment of these rights. In turn, commentators who have examined the utility of adjudicating socio-economic rights as a means to enhance enjoyment of these rights have argued that while adjudication alone cannot guarantee enjoyment of these rights, it tends to enhance their actualisation. This manifests mainly in three ways. The first is by legitimizing basic needs as socio-economic rights. Where the nature and content of a specific right are articulated by the courts, citizens have a basis upon which their needs are recognised, and citizens are ultimately afforded a legitimate basis upon which to claim for the right. Secondly, adjudication can counter the negative impact of liberalist views of rights, which seek to use rights to protect the privileged and perpetuate the desolate conditions of the poor through maintaining the status quo. Where the State uses resource re-distribution to enhance progressive realisation of socio-economic rights, it is likely to be met with resistance from those already privileged. However, a rights based paradigm enables government to argue that, in order to realise its obligations, it is necessary to apply human rights-based approaches to resource distribution in order to realise socio-economic rights.[3] Finally, because the adjudicative process facilitates the participation of citizens in determining issues of concern to them, it can counter judicial overreach concerns typically raised against judicial involvement in enforcement of socio-economic rights.[4]

Of course arguments for adjudication of socio-economic rights may be countered by concerns that a rights framework can set off negative consequences for vulnerable citizens. Commentators critical of rights discourse have argued that rights are indeterminate and, as a result, do not offer any substantive solutions to the real needs of vulnerable citizens. Given the varying and opposing interests that may be implicated by enjoyment or violation of a right, commentators argue that liberal interests are more likely to be preserved through rights discourses.[5]

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[3] Marius Pieterse 'The Legitimizing/Insulating effect of socio-economic rights' (2007) 22 *Canadian JL& Society* 1, 4 and 9-10; Varun Gauri 'Fundamental rights and public interest litigation in India: Overreaching or underachieving?' (2010) 1 (1) *Indian Journal of Law & Economics* 71, 74.

[4] Jackie Dugard and Malcolm Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism (2011) 27 *SAJHR* 39, 55 and 57-59; Sandra Liebenberg 'Needs, rights and transformation: Adjudicating Social Rights' (2006) 17 *Stellenbosch LR* 5, 12-16; Marius Pieterse 'The Legitimizing/Insulating effect of socio-economic rights' (2007) 22 *Canadian Journal of Law & Society* 1.

[5] Mark Tushnet 'An essay on rights' (1983-84) 62 *Texas LR* 1363, 1370-3.

In addition, the advancement of socio-economic rights in the courts operates within a broader institutional framework in which courts have institutional limits. The courts cannot be left to fashion the manner in which water rights are actualised and to overshadow legislative and executive roles in actualising a right to water. Accordingly, the argument that is advanced in this dissertation emphasises an interaction between all these branches of government.

6.2 A SUMMARY OF THE FINDINGS OF THIS DISSERTATION

This dissertation set out to explore the broader question of the effectiveness of a rights-based approach to water in ameliorating water needs and in enhancing meaningful and equitable access to water by the poor and vulnerable. I explored this question through three main themes within three country studies of Uganda, India and South Africa. The three main themes interrogated the utility of a constitutional protection of a human right to water, the effectiveness of legislative and executive translation of a human right to water, and the utility of adjudication of rights as a means to enhance enjoyment of a human right to water.

In the countries studied, there were three main means through which socio-economic rights, from which the right to water is read, are constitutionally protected. In Uganda, it was within the non-justiciable directive principles of state policy. In India, the constitutional protection emerged indirectly from the judicial enforcement of the right to life and an expansive application of rights to a clean and healthy environment; while in South Africa, the right to water was constitutionally protected through direct entrenchment.

Where socio-economic rights are protected as directive principles, they were not directly justiciable but remain to be translated mostly within legislative and executive strategies. On the other hand, where socio-economic rights are protected as substantive and enforceable rights, even though legislative and executive translation is envisaged, they tend also to be directly enforceable. Some enjoyment of the right to water therefore appears to be present whether or not the rights were directly justiciable. Given that, in the end, the three paradigms provided means through which socio-economic rights were being enjoyed by citizens, this dissertation examined which of these paradigms provided better relief for vulnerable citizens.

Commencing with unpacking the international law understanding of the right to water, chapter 2 showed that the right is inferred within most international law Conventions. I identified the various rights through which a right to water can be read into several of the

international human rights Covenants, particularly the rights to life, health and to an adequate standard of living given the UNCESCR General Comment 15's elaboration of the content of the right to water, which is highly persuasive, although not binding upon States. Even then, a conjunctive reading of international law covenants and declarations affirms a universal right to sufficient, safe, acceptable, accessible and affordable water for personal and domestic use. I demonstrated that, on a conjunctive reading of the Covenants and UNCESCR's General Comment, there is sufficient evidence from which to infer specific entitlements for citizens and specific obligations attaching to states which flow directly from implicit and explicit recognition of the right to water, even though there remains some uncertainty about the full scope of the right.

On account of this understanding of a right to water, I began by examining the extent to which international law finds expression in Uganda's domestic legal system, in chapter 3. I demonstrated that the 1995 Constitution impliedly envisages the application of international law within the domestic setting. The 1995 Constitution is also structured in a way which allows for a generous interpretation and enforcement of the Bill of Rights. Given that the human right to water is recognised as a directive principle of state policy, it cannot be directly enforced, as is the case with other constitutional rights. At most, it operates as a directive principle to the legislature, executive and judiciary. Even then, its exact internal content is limited to three components - a right for everyone to enjoy clean and safe water. In addition, its external reach remains abstract. Therefore, not all elements of the right to water enjoy constitutional protection in Uganda. I then showed that this lack of constitutional entrenchment led to weak legislative translation of the right to water. While it appears that the most elaborate translation of the right to water for Uganda had been through executive policy, I showed that such translation did not embody the international law understanding of the right to water and particularly weakened possibilities for its enforcement.

Chapter 3 showed that the Ugandan Constitutional court was willing to apply a generous interpretive approach and apply international law to the interpretation of the 1995 Constitution which goes a long way to advancing international human rights standards domestically. Yet, the Constitutional Court's jurisprudence has illustrated that the courts are unwilling to determine claims arising from socio-economic directives of state policy. I argued that the courts' potential to creatively enforce socio-economic rights is impeded by concerns regarding their institutional legitimacy. Accordingly, it appears that judges may be more concerned about protecting their legitimate institutional space and are generally reluctant to read rights into the constitutional text, beyond those which are explicitly recognised as

justiciable in the Bill of Rights. Given that courts are likely to adjudicate claims on the basis of precedent, it seems that the underlying problem of a vague constitutional right to water may endure and remain an impediment to successful adjudication of the right in Uganda. Therefore, I concluded that enjoyment of the right through non-justiciable directive principles of state policy was an ineffective means towards universal enjoyment of the right to water.

Chapter 4 examined the constitutional framework for translating and vindicating a right to water in India. I found that the 1950 Constitution of India neither explicitly mandated the application of international law nor recognised a right to water. Unlike Uganda's directive principles which explicitly refer to a human right to water, the Indian Constitution's directive principles do not even include an explicit reference to the right to water. In sum, there is at most an implied constitutional protection accorded to water within the context of international human rights law. I showed that, consequently, India's national and municipal legislation did not thoroughly elaborate on the right. The study showed that it was mainly through executive policy that the right to water had most recently been elaborated.

The study then found that the Indian Supreme Court's flexible approach to interpreting directive principles as underscoring the fundamental rights provisions, its generous interpretation of a right to a clean and healthy environment, and specifically, its elaboration of the socio-economic dimensions of a right to life have informed the content and scope of the right to water in India. As a result, the Supreme Court's jurisprudence established a universal right to clean and safe water for drinking purposes. I concluded that, while judicial interpretation had facilitated protection and enjoyment of the right to water, it did not allow for the full expression of the right to water as understood in international law. Even though judicial review in India has not been impeded by typical concerns about the enforcement of socio-economic rights, it has taken a long time for the outcomes of adjudication to stimulate legislative and water policy reforms. I argued that the Indian experience showed that the manner in which the right to water is constitutionally framed, may be critical to the extent to which it is translated and realised. From the Indian case study, I concluded that indirect vindication through reading the right to water into other rights will only partially vindicate the right and then only in the long term.

Chapter 5 focused on the understanding and translation of the right to water within South African constitutional law. It showed that the 1996 Constitution explicitly allowed for international law applications of the right to water to influence interpretations of the constitutional right to water. It then showed that all elements of the right to water enjoyed explicit constitutional protection in the South African Constitution. Subsequently, I explored

the extent to which the legislative and executive translations of the right to water elaborated on the constitutional right to water. I argued that the constitutional entrenchment of a right to water had facilitated strong translations of the right, both within the legislative and executive spheres of government, running through to municipal level. In addition, unlike in India, the translation of a right to water has happened at a relatively fast pace, which may be explained by its constitutional entrenchment.

I then examined the outcomes of a range of decisions of the South African Constitutional Court, in which socio-economic rights were interpreted and vindicated. I argued that the manner in which the Constitutional Court had approached claims for water can be attributed to the constitutional mandate and explicit recognition of the justiciable nature of the right. However, I showed that, unlike the Indian Supreme Court, the Constitutional Court has been unwilling to read socio-economic rights into the right to life, which disregards the legitimacy of some dimensions of the right to water. In addition, the Constitutional Court's interpretation of the right to water does not vest citizens with immediately claimable entitlements to water. However, a closer look at the outcome of adjudication in terms of substantive enjoyment of water, shows better enjoyment of the right to water in South Africa, given the time it has taken to implement the 1996 constitutional ideals. This may be attributed to the constitutional entrenchment of a justiciable right to water.

6.2.1 The impact of constitutional entrenchment to conceptualising a right to water

To summarise, this study showed that the manner in which the Constitution expresses a right to water impacts on the extent to which the various elements of the right are being enjoyed by citizens. Given that the right to water is considered as a determinant of the rights to life, health and enjoyment of a decent standard of living within international law, I examined how it has been conceptualised within the domestic context of Uganda, India and South Africa and evaluated the extent to which such conceptualisation enhanced enjoyment of the right. The manner in which the right to life is conceptualised as a fundamental right whose actualisation is tied to the enjoyment of other rights such as water is at the core of India's contextualisation of a right to water. While Uganda and South Africa have also entrenched a right to life, it does not appear to have influenced conceptualisations of a right to water. For Uganda and South Africa, the manner in which the right to water is conceptualised appears to be hinged to improvement of social services for citizens although in South Africa the Constitution goes further to entrench these social services as enforceable rights. As a result, I conclude that

unlike India and South Africa, a Ugandan understanding of the right to water is an aspiration rather than an entitlement for citizens.

Accordingly, after examining the manner in which the right to water was elaborated through legislation in the countries studied, I concluded that the constitutional entrenchment of the right to water in South Africa had facilitated a more thorough translation in legislation than the Indian model, which conceptualised a right to water indirectly, through a reading into of a right to life and elaborations of directive principles of state policy. At the same time, the South African legislative translation of a right to water was more comprehensive than the Ugandan translation which relied only on directive principles of state policy. Indeed I found that the national and municipal legislations in India and Uganda regulating water supply and delivery did not espouse rights conscious language. In these instances I argued that a weak legislative framework was attributable to the manner in which the right to water had originally been conceptualised in the respective Constitutions.

Even then, it appears that in all three countries studied, the executive translation of a right to water offered an elaborate interpretation of the right within policy documents. This is to be expected, considering that the executive's legitimacy is often dependent on improving service delivery for citizens. Yet, in all three countries studied, it appeared that inequity in enjoyment of the right to water remained and there were still millions for whom impediments to enjoyment of the right remain. In Uganda, I demonstrated that the directive principles could have influenced the conceptualisation of a right to water within national water policies adopted by the executive, although this did not result in full translation of the right. While in India, an understanding of enjoyment of a right to life as dependent on consuming clean and safe water has influenced Indian conceptualisation of water as a right, thereby, delivering partial translation of the right. In South Africa's case, it seems that national policies relating to water were more elaborate in establishing a minimum standard of norms in adherence to the constitutional ideals for universal enjoyment of a human right to water. This shows that explicit constitutional protection goes even further to shape executive translation of the right to water. Therefore I conclude that, even though the Ugandan understanding of a right to water ensconces some of the elements of the right to water at international law, it remains to be fully conceptualised.

The study found that domestic understanding of the right to water was enhanced by adjudication in India and South Africa. In India, the expansive interpretations of the right to life and the right to a clean and healthy environment by the Supreme Court yielded a limited interpretation of a human right to water for drinking purposes. I argue that although this

understanding of the right to water goes some way to enhance enjoyment of the right and to minimise the negative outcomes of consuming unsafe water, it does not fully accommodate the international law understanding of the right to water. At the same time, the South African Constitutional Court's reluctance to read a right to water into the right to life has inhibited better understanding of some dimensions of the right to water. The study found that although the South African Constitutional Court had directly adjudicated upon the right to water, its jurisprudence has not established immediately claimable entitlements to water and has mainly expanded understanding of the state obligations to citizens by imposing substantive standards on the state at national and municipal levels of government. Given that the right to water has not been adjudicated upon in Uganda, and as my study lamented, that this was not likely to happen soon, I would argue that the extent to which courts have been able to use the manner in which the right to water is constitutionally protected to interpret the right is also determined by their own internal approaches to adjudication.

6.2.2 The impact of constitutional protection on water struggles

All three countries studied were faced with complex challenges to improving water delivery. This study found that struggles for better delivery of water for domestic use, although complex, have benefitted significantly from invoking human rights law as a means to frame demands for equitable water access.[6] At the same time, the struggles for water rights appear to be more vocal where water is perceived as a human right, as was the case in India and South Africa. Uganda appeared to have muted claims for water delivery with little attention being given to the articulation of claims for water both by the legislature and executive. At most, concerns relating to water appear to have been voiced where a value added tax on water delivery for those accessing piped water was proposed by government. Yet in both rural and urban areas, water delivery remains a significant challenge for many citizens.

It appears that, in India and South Africa, the need to ameliorate the water crises borne by citizens has been articulated as a legitimate claim for which the State must be held to account. Yet, the cases decided in courts reflect an implicit difference in the form which water struggles have taken. In India, because claims for water are drawn from claims of a right to life, the legitimacy of such claims appears to be driven by a threat to life. In South Africa on the other hand, claims for water are directly linked to demands for fulfilment of

[6] The Soweto or Phiri water campaign is a poignant example. See Thomas Coggin & Marius Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257, 270; Jackie Dugard & Malcolm Langford op cit note 4 at 57-58.

standard norms and the expectation that municipal councils have an obligation to provide basic services. This tells us that, in South Africa, where the right to water is constitutionally entrenched, struggles for water have been better shaped and inspired by the constitutional promise to establish a society based on democratic values, social justice and fundamental rights.

It appears that constitutional protection of a right to water has enhanced State accountability towards citizens by requiring the executive to transparently explain its policies and engage with citizens in a forum which allows for such state policies to be subjected to rigorous evaluation. Particularly for South Africa, the study found that citizen engagement in policy making is more rigorously demanded. I argue that the explicit constitutional protection of a right to water accounts for the extent to which the executive has engaged with citizens prior to reviewing and improving its water policies. Therefore I conclude that democratic accountability for water delivery appears to be better facilitated in South Africa than is the case in India and Uganda.

6.2.3 The social impact of vindicating a right to water

Efficient mechanisms for water delivery, or a lack thereof, have a direct impact on communities in the countries studied. Commentators have argued that socio-economic rights adjudication provide a means through which the social conditions underpinning the lived realities of citizens can be improved.[7] Given that the claimants for a right to water are in many instances poor and vulnerable, it is to be expected that there would be direct benefits in the form of remedies such as improved water delivery frameworks, as well as indirect benefits through empowering rights beneficiaries. The study of India found that beneficiaries had directly benefited in some instances, where municipal authorities had been ordered to ensure that steps were taken to provide or improve the quality of drinking water. Although the initial wave of judge-led vindication of a right to water appeared to have improved the lived realities of citizens, given that concerns over the courts' increasingly neo-liberal leanings cannot be overlooked, it would appear that there has not been a substantive shift in the balance of power in favour of vulnerable citizens. I argued that this may be as a result of the absence of an explicit constitutional right to water, upon which objective and principled judicial interpretations of the right can be founded. In South Africa, by contrast, commentators showed that there was both a direct benefit in terms of improved water delivery services as well as a shift in the existing structures of power arising from direct

[7] Jackie Dugard & Malcolm Langford op cit note 4 at 57-58.

vindication of a right to water in favour of poor and vulnerable citizens.[8] I therefore conclude that the South African model, which ensconces constitutional protection and direct adjudication, is more likely to deliver direct and indirect benefits of enjoying water services.

6.2.4 The extent to which constitutional entrenchment counters neo-liberal ideology

This study interrogated the extent to which a constitutional entrenchment of a human right to water facilitated branches of government to rely on the human rights based approach in developing and implementing executive policy, legislation and judicial decisions. In all three countries studied there appear to be intentional measures to ensure that the price of water for basic needs remains affordable. Nonetheless, for those most poor and vulnerable, the existence of ability to pay as a pre-condition to enjoyment of the right to water negates the ideal of a universal right to enjoy access to water. The negative impact of this pre-condition is particularly felt in Uganda and India. In South Africa's case, the adoption of a free basic water entitlement and broader social policies designed to cater for the needs of marginalised citizens' points to a more rights-based approach to water delivery.

In all three countries studied, I showed that water related legislation, policies and decisions were significantly influenced by neo-liberal ideology. In Uganda, where the right to water is read into other rights and the directive principles of state policy, a strong neo-liberal water delivery system was established through legislation and policy, which used a weak rights language and focused on the delivery of water as a service to consumers. The study of India found that the existing legislation and proposed legislative framework facilitating a water delivery system was mostly neo-liberally inspired. At the same time it found that, while the Supreme Court had initially set down pro-poor decisions, in more recent years there were concerns that its decisions had been increasingly neo-liberally inspired. The study of South Africa found that, while executive policy and legislation had neo-liberal leanings, they were curtailed by the presence of explicit constitutional protection of the human right to water. Even though commentators remain concerned that the Constitutional court and High court adopted a neo-liberal stance which perceived water users as consumers, it appears that the extent to which a market based approach to water delivery was furthered by executive policy was countered by the constitutional protection to a right to water. The South African adjudication of the right to water exemplifies the possibility of challenging the neo-liberalism underpinning a State's water policies. To conclude, I find that where the right to water is

[8] Jackie Dugard and Malcolm Langford op cit note 4 at 39, 47. Also see Luke Sinwell 'The Wynberg concerned residents' disempowering court victory' (2010) 21 *Urban Forum* 153,167.

given constitutional protection, such a rights-based conceptualisation of water needs may offer an effective counter weight to neoliberal discourse.

6.2.5 The impact of constitutional protection on institutional dialogue

This study found that the constitutional protection of a right to water could enhance and sustain institutional dialogue between the branches of government and social dialogue between government agencies and citizens. Such dialogue was also found to be a useful means through which translation and actualisation of socio-economic rights can be enhanced. In all three countries studied, water delivery was effected through local governments responsible for the delivery of municipal services. It is to be expected that this institutional dialogue inevitably involves the local governments, which are directly responsible for ensuring delivery of services in a manner which upholds constitutional ideals. In Uganda, where a non-justiciable right to water exists, some dialogue appeared to exist between the legislative and executive institutions over formulation of law and policy which would affect the prices of water. But it would appear that executive positions prevail over the form and outcome of water delivery. This may be explained by the fact that the executive is better supported by technocrats and is therefore in a better position to adopt and implement policies for effective water delivery. Even then, I conclude that for Uganda the institutional dialogue has not been sustained and has mostly remained weak on account of the vague understanding of the ambit and scope of a right to water.

For India, where an indirectly justiciable right to water is recognised, the study found that the dialogue seemed to have been sparked by judicial interpretations of a right to life, as including drinking water. I argued that subsequent national and federal state policies which clarified a right to potable drinking water were a result of a dialogue between the judiciary and executive arms of government. Even then, I showed that it had taken a long time for the executive and lately the legislative arms of government to act upon the judicial interpretations of a right to water. I therefore conclude that, while the indirect vindication model may facilitate interpretations of a right to water, it does not stimulate the much desired institutional dialogue necessary to enhance entitlement and enjoyment of a right to water for beneficiaries.

Perhaps the South African experience provides the best evidence of the ability to sustain institutional conversations between the branches of government and rights

beneficiaries.[9] This study argued that because of the possibility of direct vindication of a right to water, South African policies, programs and legislation have been enriched within a shorter period of time than India. The changes in the national and municipal water policies which have occurred since the coming into force of the 1996 Constitution (which entrenched a justiciable right to water) may manifest an attempt to maintain dialogue between the institutions of government, about better ways of enhancing access to water and fulfilling the aim of progressively removing impediments to enjoyment of the right. Even though it would appear that the institutional contribution of the executive to translating the right to water has stimulated much of the changes to water policies and legislation, I would argue that like the study of India showed, national and provincial water policies are more likely to benefit from the outcomes of judicial review of executive policy. This was particularly shown by the manner in which the City of Johannesburg responded to the *Mazibuko* litigation by consistently altering its policies to accommodate the applicants' concerns, which led to the City's water policy being more pro-poor. I therefore conclude that the dialogical benefits promised by socio-economic rights adjudication, have benefited South Africa more substantially as a result of the simultaneous constitutional protection and adjudicating the right to water.

6.3 SUGGESTIONS FOR FURTHER RESEARCH

The dissertation showed that there were various entitlements flowing from recognition of the human right to water and the application of a rights-based approach to water delivery. In arriving at the desirable point where these entitlements can be both enjoyed and claimed, international law envisages that the State and its agencies have several obligations to realise. Most of these obligations may well be realised through the involvement of private water suppliers. Inevitably, this brings into play the question of the extent to which a horizontal application of the right to water may enhance enjoyment of the right for beneficiaries. However, this dissertation did not elaborate on the manner in which a horizontal application to the right to water may play out for citizens and third parties. Research on this aspect may engage with and clarify the full extent of a State's obligations in realising the rights of citizens.

The research showed that Uganda's water policies and its water delivery paradigms appeared to be heavily influenced by neo-liberal underpinnings. Yet, this research did not

[9] Marius Pieterse 'Reply: On 'dialogue', 'translation' and 'voice'' in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (2008) 331,334-7.

fully explore the ways in which a neo-liberal policy environment can effectively co-exist within the rights based approach to water delivery advocated for in this thesis. At the same time, given that the neo-liberal influences were present in all three countries studied, it is unlikely that states may completely abandon a consumer and market based paradigm in improving water delivery services. I therefore propose that further research on the co-existence of the two paradigms would be necessary to minimise the harsh effects of neo-liberal ideology on poor and vulnerable citizens.

This dissertation showed that domestic understandings of judicial power appear to impact on the extent to which courts are willing to enforce socio-economic rights and the right to water. But the research did not fully explore or propose ways in which the enjoyment of these rights can be enhanced by engaging with the judicial function and domestic conceptualisations of the limits of judicial power in Uganda. I propose that further research in this area may enhance an understanding of the role of the courts in vindicating socio-economic rights.

6.4 CONCLUSION

Water has several dimensions, which mainly revolve around its resource capabilities, economic utility as well as a basic necessity of life. It is possible to utilise a rights based approach to water in order to meaningfully improve access to the resource. At the same time, the tension between all these dimensions may be reduced when water is perceived within a reconceptualised human right for citizens. This dissertation concludes that there appear to be three necessary pre-conditions to effective enjoyment of the right to water: an explicitly articulated right within the domestic constitutional framework; explicit justiciability of the human right to water and an open, approachable and creative court, in whose arena poor and vulnerable citizens can voice claims.

In addition, the cost and other resource implications of enhancing enjoyment of a right to water through improved water delivery mechanisms cannot be ignored. Where these three pre-conditions are in place, water delivery ceases to be confined within the legislative and executive spheres and is extended to the judicial sphere. This facilitates the institutional interaction required to remove the impediments to the enjoyment of the right to water, because these impediments are more likely to be given adequate attention by state agencies. In this way, effective translation of the human right to water in a manner that postulates water for basic needs through the lens of a rights based approach would most likely have tangible

results for the most desperate citizens. It is therefore hoped that, once the Ugandan courts re-conceptualise their interpretive function, they will be well placed to offer claimants relief by affirming the enforceability of a human right to water and crafting appropriate remedies for its violation.

Finally, much progress has been made in increasing access to water for most of the poor and vulnerable citizens, particularly in urban areas, but these efforts still fall short of the constitutional ideal which rests on an equitable society. This study has shown that, if Uganda is committed to enhancing enjoyment of the right to water, it ought to expressly articulate a justiciable right to water in the Constitution and empower Courts to evaluate policies aimed at giving effect to the right for constitutional compliance. Considering that the idea of a review of the 1995 Constitution is being mooted these additional efforts may realise the commitment 'to building a better future by establishing a socioeconomic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.'[10]

[10] Preamble to the Constitution of the Republic of Uganda 1995.

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