

Right to clean and safe water under the Kenyan Constitution 2010

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Water is essential for the survival of all human beings. However, in Kenya access to safe drinking water and sanitation facilities is limited: an estimated 41% of the population relies on unprotected wells, springs or informal water providers (WHO & UNICEF, Progress on Sanitation and Drinking-Water, 2010) while 69% do not have access to safe and hygienic toilets or latrines. Types of water uses vary, based on the individual customs of communities: while all communities need water for drinking, cooking, hygiene, agriculture and livestock, some communities also use it for religious ceremonies. The importance of water and its primacy for many cultures has prompted debates on recognising the right to water as a self-standing and independent human right.

International and regional framework

The right to water is not specifically mentioned in the International Covenant on Economic Social and Cultural Rights (ICESCR). It is also not mentioned in regional instruments such as the African Charter on Human and Peoples' Rights, Inter-American Convention on Human Rights and the European Convention on Human Rights. However, this has not stopped the Committee on Economic Social and Cultural Rights (CESCR) from focusing on the right to water.

The CESCR has been mandated to monitor the implementation of the ICESCR. The CESCR's recent attention to the right to water has been the catalyst for significant momentum in the area. The CESCR initially addressed the question of water and sanitation in its General Comments on housing, health and education. General Comments are released to clarify the scope of the rights provided in the ICESCR to assist State Parties in implementing them. Moreover, the CESCR reporting guidelines asks states to provide information on access to both water and sanitation under the right to water and housing. Many of the concluding observations therefore simply addressed the lack of access to basic water supply and recommended improvement.

The CESCR adopted General Comment No 15 (2002) on the right to water under articles 11 and 12 of ICESCR. Article 11 states that everyone has the right to 'an adequate standard of living, including food, clothing and housing' and the CESCR has argued that the use of the word 'including' indicates that this catalogue of rights was not in-

tended to be exhaustive. Further, the CESCR stated that the right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental requirements for survival.

The General Comment No. 15 provides significant detail on the content of the right, and addresses what is perhaps the most difficult issue to resolve: what is alienable entitlement? The CESCR has resolved this question by following a universalistic approach, reducing the right to cover household water use only (personal consumption, cooking, hygiene and, where necessary, sanitation). The CESCR also follows its own 'standards recipe' of availability, accessibility, acceptability and quality. With regard to states' obligations, the CESCR refers to the duty of government to confront the obstacles faced by an extensive range of groups in accessing water, including women, persons with disabilities, children, refugees, prisoners and marginalised communities as part of the requirement of guaranteeing non-discrimination and equality under Articles 2(2) and 3. The CESCR also sets out the duty to respect, protect and fulfil.

In the African context, the right to water is not specifically provided for in the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter) or in the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). However, in both the African Children's Charter and the Maputo Protocol, safe and clean water is mentioned as a condition that enhances the realisation of the right to health of children and women respectively. These documents direct states to take appropriate means to provide adequate, safe and clean drinking water to combat diseases and malnutrition among children. Additionally, the right to water is expressly provided for in the African Commission's Guidelines on Economic, Social and Cultural Rights. The Guidelines impose an obligation on states to ensure the realisation of the right to water by ensuring the availability, affordability and accessibility of clean and safe water to all (Part II). However, the guidelines form part of 'soft law', and are not binding on State Parties.

Water as a human right in Kenya

Kenya has ratified the ICESCR. Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya forms part of Kenyan law. This automatically incorporates the application of ICESCR into the laws of the country. Kenya is among the few countries in the world that have explicitly recognised the right to water as a con-

Water must be of adequate quality, safely accessible to people, accessed without discrimination, and it must be affordable

stitutional right. Other countries include South Africa and Uruguay. Article 21(1) of the Constitution places an obligation on the State to respect, protect, promote and fulfil the rights contained in the Bill of Rights. This establishes that all the rights in the Bill of Rights impose a combination of negative and positive duties on the state. A set of socio-economic rights are protected in article 43 of the Constitution. Article 43(1)(d) of the Constitution recognises the right to water. It provides that 'every person has the right to clean and safe water in adequate quantities'.

However, this right must be read together with Article 21 (2), which calls on the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the right to water. Therefore, Article 43(1)(d) delineates the scope of the right, and incorporates at the very least a negative obligation on the State and all other entities and persons to desist from preventing or impairing it. On the other hand, Article 2(2) speaks to the positive obligation imposed on the State. It both defines and qualifies the State's positive duties by referring to three key elements: (a) the obligation to take legislative, policy and other measures; (b) to achieve the progressive realisation of the right; and (c) to do so within available resources.

Scope of the right

There are two primary issues that arise in relation to the scope of the right to access water in Article 43(1)(d). Firstly, the right to water refers to 'clean and safe water'. This is a water quality requirement. The question is: what constitutes clean and safe water? This question remains a subject of debate and is commonly determined in legal systems by balancing exposure-based health assessments with economic cost-benefit analyses. These are difficult questions that normally are normally resolved through administrative/regulatory processes that may be inconsistent with the more rigid jurisprudence of constitutional law. The quality requirement attempts to ensure that the water is free of disease-causing contaminants. However, according to the CESCR in its General Comment 15 (2002), water must be of adequate quality (WHO Guidelines noted), safely accessible to people within or in close proximity to their homes, accessed without discrimination, and must be affordable, though free in some circumstances.

Secondly, Article 43 has created an equal amount of uncertainty for water quantity. For example, what is an 'adequate quantity' of water per person and how would it

be determined? What is the relationship, if any, between access to that quantity from an urban water utility system and payment of a share of the expenses of the system? How would an adequate quantity be guaranteed to rural residents who are not connected to an urban water utility system? How would the constitutional right to water impact on the conflicting claims of different water users within and between agriculture, cities and industry? General Comment No. 15 defines quantity by listing the World Health Organisation (WHO) minimum water requirement but allows for flexibility depending on specific local circumstances. The CESCR does not give a magic number for an adequate or minimum amount, though it references WHO documents indicating it should be a minimum of 50 litres of water per person per day.

In the judicial interpretation of the right by courts in Kenya, it is instructive to examine the interpretation of a similar provision in Section 27 of the Constitution of South Africa. That country's Constitutional Court has decided in a series of cases that Section 27 requires the government to take reasonable measures to progressively realise water access, within available resources, but does not create a directly enforceable right to immediate delivery of water. On 8 October 2009, the Court decided its most recent case (*Mazibuko case CCT 39/09*), regarding whether the constitutional right to water was violated by the decision of the City of Johannesburg to limit the free basic water supply to 6 kilolitres per connection per month in certain areas. Citing the context-specific nature of 'sufficient water' supplies, the primary responsibility of the legislature for implementation of Section 27, and the overall reasonableness of the city's water allocation, the Constitutional Court refused to overturn the city's water utility policies.

The South African cases demonstrate, at a minimum, that the recognition of the right to water in the Kenyan Bill of Rights might pose significant administrative and legal challenges in the interpretation and implementation of that provision. If courts in Kenya were to interpret Section 43 as a statement of the government's dedication to improving water access, it may be beneficial, but if it were interpreted as a requirement to supply a firm quantity or quality of water as determined by the courts, it would likely constitute a barrier to progressively improving water access. The inclusion of Article 43, it could be argued, is meant to increase attention to water resource issues, but that attention may be slowed by continuing economic constraints. Kenya's citizens may be better off if the Constitution focuses less on the rhetoric of a right to water and more on efficient water management and improving the conditions for public and private investment in the nation's water infrastructure.

As far as progressive realisation is concerned, measures to be adopted by the State must be geared towards the progressive realisation of the right to water. Improving access to clean and safe water is thus inherent in the concept of progressive realisation. Water must be accessible not only to those living in urban areas and cities but also in rural and marginalised areas. Article 56 provides specific rights to minorities and marginalised groups. The

State is required to put affirmative action programmes in place that are designed to ensure that marginalised areas have reasonable access to water. Certain areas have been victims of long-standing discrimination, marginalisation and exclusion. The affirmative action programmes and policies should be aimed at addressing past discrimination by state policy or practice. This might improve the availability and accessibility of water in such areas.

In terms of available resources, extending access to water to everyone in the country will have significant resource implications. The state's positive obligations to fulfil the rights in Article 43 of the Constitution are qualified by reference to its available resources. Thus the availability of resources is an important factor in ensuring accessibility of water to every Kenyan. The court will have a role to play in assessing the availability of resources. This is because all socio-economic rights, including the right to water, would be deprived of their meaning if the government was allowed to determine the extent of its own obligation through its budgetary policies. The Kenyan courts have had an opportunity to enforce the right to water. The High Court has determined that everyone in Kenya has a right to safe and clean water in adequate quantities. In the case of *Ibrahim Sangor Osman v AG* (Constitutional petition No. 2 of 2011), 1123 people were evicted from their land by government officials to make way for road construction. The petitioners, among them women, children, and elderly persons, had occupied the lands since the 1940s. In spite of this, they were not given a notice of eviction or consulted by the Government. They were rendered homeless when the government evicted them with armed policemen and bulldozers. The police used tear gas on the petitioners and resorted to physical violence when they tried to resist the demolition of their homes. As a result, some of the petitioners were forced to live in the open and others in makeshift structures, all exposed to the elements of nature and health risks and without access to basic necessities like food, water, and sanitation. Several children dropped out of school. In addition, 26 of the evicted individuals were over 60 years of age and were forced to endure unbearable conditions.

In the decision, the High Court of Embu concluded that this style of eviction violated the dignity of the petitioners and their human rights. According to the Court, the

petitioners are entitled to the rights to adequate housing, reasonable standards of health care, and to clean and safe water in adequate quantities under the Constitution of Kenya. In addition, it also ruled that the government violated the right to clean and safe water, among other socio-economic rights. The Court also mentioned that Kenya has ratified the ICESCR, which means that the government is bound to respect, protect, and enforce the rights recognised in the Covenant, including the rights to water and sanitation. In conclusion, the Court awarded each person the sum of KSh200,000 in damages and ruled that the petitioners should be allowed to return to their land so that they are able to enjoy their socio-economic rights, including the right to water.

The decision is a landmark victory for socio-economic rights in Kenya. The decision represents the beginning of efforts by civil society to ensure socio-economic rights are not just in the books, but are implemented and respected by the government. Hopefully, the Government of Kenya will comply with the Court's decision and make sure the people affected are returned to their homes and adequately compensated.

Conclusion

Water is critical to the survival of all living things, yet a large proportion of Kenyans do not have access to sufficient quantities of clean and safe water for drinking and personal use. Lack of water has severe consequences, including dehydration and hygiene-related disease. The inclusion of the right to water in Kenya's Constitution is a way of ensuring that Kenyans' right to adequate and clean water is realised, and has placed an obligation on the State to ensure access to clean and safe water in adequate quantity. In addition, Kenyans can now enforce this right against the Government in a court of law.

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