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- Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya Kariuki Muigua
- Unequal Pay for Education of Equal Value: A Subtle Discrimination Against NON-SADC International Undergraduate Students - Lessons from Larbi-Odam V MEC for Education (North-West Province) 1998 1 SA 745 (CC), South Africa Johana K. Gathongo
- Decarbonising Africa's Agriculture and Forestry: Synergies and Trade-offs for Sub-Saharan Africa Caroline J. Kibii
- Neg- Med Model; A Special Tool for Resolving Boko Haram Insurgency in Nigeria Prof. Adesina T. Bello
- Corruption and Sustainable Development: Tracing The Root Causes and Radical Proposals for Way Forward Henry K. Murigi
- Utilising Science and Technology for Environmental Management in Kenya Kariuki Muigua
- Realising Sustainable Use of Biomass Energy in Kenya: Appraising the Regulatory and Institutional Framework Oseko Louis D. Obure
- Uti Possidetis, Self-determination and Conflicts in the Horn of Africa: The Case of Eritrea's Secession from and Border Conflict with Ethiopia Berita Mutinda Musau

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Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

By: **Kariuki Muigua***

Abstract

Water is considered to be a basic human right both under international and national laws. In fact, the right to water is considered as part of the socioeconomic rights. As such, all states the world over are expected to work towards ensuring that their citizens have access to clean and adequate amounts of water. However, for most states, including Kenya, this remains a challenge. This is attributable to climatic, political, economic and social reasons. This paper critically discusses these challenges that have hindered the realization of this right in Kenya and offers some recommendations on how the same can be overcome as part of realization of the constitutionally guaranteed socioeconomic rights in Kenya.

1. Introduction

Water is a basic human right which is recognized as such both under international and national laws.¹ It is one of the socioeconomic rights recognized under Article 43(1) of the Constitution of Kenya 2010.² The

*** PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP**

¹ McGraw, George S. "Defining and defending the right to water and its minimum core: legal construction and the role of national jurisprudence." *Loy. U. Chi. Int'l L. Rev.* 8 (2010): 127.

² 43. Economic and social rights

- (1) Every person has the right--
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

international legal instruments especially those on human rights obligate all states the world over to work towards ensuring that their citizens have access to clean and adequate amounts of water.³ However, for most States, including Kenya, this remains a challenge mostly attributable to climatic, political, economic and social reasons.⁴ Indeed, it has been argued that water is a key medium through which climate change impacts on human populations, society and ecosystems, particularly due to predicted changes in its quality and quantity.⁵ Water is also considered to be at the core of sustainable development agenda and is critical for socio-economic development, energy and food production, healthy ecosystems and for human survival itself.⁶ It is also said to be at the heart of adaptation to climate change, serving as the

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- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.

³ Kiefer, Th, I. Winkler, and S. Cacciaguiddi-Fahy, "Legal Resources for the Right to Water and Sanitation. International and National Standards." *International and National Standards* – 2nd Edition (2008).

⁴ "There Is No Time Left." *Human Rights Watch*, 2 Jan. 2019, www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana; Albuquerque, Catarina de, "Climate Change and the Human Rights to Water and Sanitation." (2010) <https://www2.ohchr.org/english/issues/water/iexpert/docs/ClimateChange_HRtWS.pdf> Accessed 27 October 2020; S Dos Santos and others, 'Urban Growth and Water Access in Sub-Saharan Africa: Progress, Challenges, and Emerging Research Directions' (2017) 607–608 *Science of The Total Environment* 497.

⁵ Albuquerque, Catarina de, "Climate Change and the Human Rights to Water and Sanitation." (2010) <https://www2.ohchr.org/english/issues/water/iexpert/docs/ClimateChange_HRtWS.pdf> Accessed 27 October 2020.

⁶ 'Water' (21 December 2015) <<https://www.un.org/en/sections/issues-depth/water/>> accessed 28 October 2020.

crucial link between society and the environment.⁷ Despite this important role of water, it is estimated that as at 2020, 2.2 billion people currently do not have access to safely managed drinking water, and 4.2 billion, or 55% of the world's population, are without safely managed sanitation.⁸ Recent studies have shown that the Corona Virus (Covid-19) global pandemic has not only made things worse as far as access to safe drinking water is concerned but has in fact served to expose how dire the situation is and how there are many people from the poor sections of the society who have no access to clean and safe drinking water.⁹ The World Health Organization has already affirmed that the provision of safe water, sanitation and hygienic conditions is essential for protecting human health during all infectious disease outbreaks, including of Corona Virus Disease 2019 (COVID-19).¹⁰

This paper critically discusses these challenges that have hindered the realization of this right in Kenya and offers some recommendations on how the same can be overcome as part of realization of the constitutionally guaranteed socioeconomic rights in Kenya.

2. Right to Water as a Socioeconomic Right: International legal framework

⁷ Ibid.

⁸ UN-Water, 'UN World Water Development Report 2020 "Water and Climate Change"' (UN-Water, 21 March 2020) <<https://www.unwater.org/world-water-development-report-2020-water-and-climate-change/>> accessed 28 October 2020.

⁹ Alan Nicol, 'The Pandemic Is Laying Bare a Global Water Crisis' (*Foreign Policy*) <<https://foreignpolicy.com/2020/05/12/coronavirus-pandemic-global-water-crisis/>> accessed 28 October 2020; The Lancet Global Health, 'Water and Sanitation in a Post-COVID World' (2020) 8 *The Lancet Global Health* e1101; Ling San Lau and others, 'COVID-19 in Humanitarian Settings and Lessons Learned from Past Epidemics' (2020) 26 *Nature Medicine* 647; World Health Organization. *Water, sanitation, hygiene, and waste management for the COVID-19 virus: interim guidance*, 23 April 2020. No. WHO/2019-nCoV/IPC_WASH/2020.3. World Health Organization, 2020.

¹⁰ World Health Organization. *Water, sanitation, hygiene, and waste management for the COVID-19 virus: interim guidance*, 23 April 2020. No. WHO/2019-nCoV/IPC_WASH/2020.3. World Health Organization, 2020.

It has been observed that international recognition of socio-economic rights dates from the early-20th century, and after the World War II, international treaties and conventions increasingly began to incorporate socio-economic rights, including, the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, International Convention on the Elimination of All Forms of Racial Discrimination, 1965 and the Convention on the Rights of the Child (1989), among others.¹¹

Economic, social, and cultural rights are defined to include the human right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education.¹²

While water is not explicitly mentioned as a human right under the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1966 International Covenant on Civil and Political Rights, it was, however, implied through other human rights, such as the right to life, right to an adequate standard of living, and the right to health.¹³ The realization of these rights is highly dependent on access to safe and adequate water.¹⁴

¹¹Dawood Ahmed and Elliot Bulmer, 'Social and Economic Rights,' *International IDEA Constitution-Building Primer 9*, International Institute for Democracy and Electoral Assistance (International IDEA), Second edition, 2017. <<https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf>> accessed 20 October, 2020.

¹²'What Are Economic, Social and Cultural Rights?' (CESR, 3 December 2008) <<https://www.cesr.org/what-are-economic-social-and-cultural-rights>> accessed 29 October 2020.

¹³'Human Rights' (*Safe Drinking Water Foundation*) <<https://www.safewater.org/fact-sheets-1/2017/1/23/human-rights>> accessed 28 October 2020.

¹⁴ United Nations, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4); Centre on Housing Rights and

The first efforts to officially recognize water as a human right were crystallized under the *Dublin Statement on Water and Sustainable Development*¹⁵ which came as a result of the International Conference on Water and the Environment (ICWE) in Dublin, Ireland, on 26 to 31 January 1992. The Statement acknowledges that ‘scarcity and misuse of fresh water pose a serious and growing threat to sustainable development and protection of the environment. Human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past.’¹⁶ The Conference participants called for “fundamental new approaches to the assessment, development and management of freshwater resources, which can only be brought about through political commitment and involvement from the highest levels of government to the smallest communities.” They also observed that commitment will need to be backed by substantial and immediate investments, public awareness campaigns, legislative and institutional changes, technology development, and capacity building programmes as well as a greater recognition of the interdependence of all peoples, and of their place in the natural world.¹⁷ The *Dublin Statement* thus called for concerted action to reverse the present trends of overconsumption, pollution, and rising threats from drought and floods.¹⁸

In 2002, the United Nations officially adopted water as a human right through the *General Comment 15*, of the International Covenant on Economic, Social and Cultural Rights which states as follows: “The human right to water entitles

Evictions and others (eds), *Manual on the Right to Water and Sanitation: A Tool to Assist Policy Makers and Practitioners Develop Strategies for Implementing the Human Right to Water and Sanitation* (Centre on Housing Rights and Evictions 2007);

¹⁵ ‘The Dublin Statement on Water and Sustainable Development’ (1992) 10 Waterlines 4.

¹⁶ *Ibid*, Introduction.

¹⁷ Dublin Statement on Water and Sustainable Development’ (1992), Introduction.

¹⁸ *Ibid*.

everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”¹⁹ *General Comment 15* was meant to interpret the 1966 Convention on Economic, Social and Cultural Rights confirming the right to water in international law.²⁰

On 28 July 2010, through *Resolution 64/292*²¹, the United Nations General Assembly recognized the human right to clean drinking water and as essential to the realization of all human rights.²²

The right to water is thus now internationally considered to be a human right with obligations to States to ensure that their subjects have access to clean and safe drinking water and sanitation.²³ The prominence of this right to water received a boosting under Goal 6 of the United Nations *2030 Agenda for Sustainable Development Goals*²⁴ which is dedicated to ensuring availability and sustainable management of water and sanitation for all. It requires all States to ensure that by 2030, they achieve universal and equitable access to safe and affordable drinking water for all.²⁵

3. National Legal and Institutional Framework on Access to Water

¹⁹ ‘Human Rights’ (*Safe Drinking Water Foundation*)

<<https://www.safewater.org/fact-sheets-1/2017/1/23/human-rights>> accessed 28 October 2020.

²⁰ General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), *Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11)*

²¹ UN General Assembly, *The human right to water and sanitation: resolution / adopted by the General Assembly, 3 August 2010, A/RES/64/292.*

²² International Decade for Action “Water for Life” 2005-2015. Focus Areas: The Human Right to Water and Sanitation’

<https://www.un.org/waterforlifedecade/human_right_to_water.shtml> accessed 21 October 2020.

²³ *Ibid.*

²⁴ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁵ Goal 6.1, *Transforming our world: the 2030 Agenda for Sustainable Development.*

The Constitution of Kenya 2010 guarantees under Article 43 the right of every person to access clean and safe water in adequate amounts.²⁶ The Water Act 2016²⁷ provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.²⁸

Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. Section 37(1) provides that a permit is not required- for the abstraction or use of water, without the employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for the abstraction of water in a spring which is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of this Act.

All water resources in Kenya are vested in the State where the Ministry of Water and Irrigation is responsible for overseeing the institutions created to manage water resources and provide water services.²⁹ The Water Act 2016 provides that every water resource is vested in and held by the national government in trust for the people of Kenya.³⁰

The Water Resources Authority established in Section 11(1) of the Water Act 2016 is to serve as an agent of the national government and regulate the management and use of water resources.³¹

²⁶ Article 43 (1)(d), Constitution of Kenya 2010.

²⁷ Water Act, No. 43 of 2016, Laws of Kenya.

²⁸ S. 9, No.43 of 2016, Laws of Kenya.

²⁹ Water Act, 2016, Part II.

³⁰ *Ibid*, s.5.

³¹ *Ibid*, s.6.

Section 64(1) of the Water Act 2016 provides that the Cabinet Secretary should, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a Water Services Strategy. The object of the Water Strategy shall be to provide the Government's plans and programs for the progressive realization of the right of every person in Kenya to water.³²

4. Challenges Hindering Access to Water in Kenya

The provision of water services for all Kenyans still remains a challenge despite the recognition of the right to clean, safe and adequate amounts of water for all Kenyans. This may be attributed to a number of factors which are discussed below but are in no way exhaustive.

4.1. Climate Change and Access to Clean, Safe and Adequate Water

Climate change is expected to continually and negatively affect the quality of water. This is because increasing water temperatures, higher or lower groundwater levels, floods and droughts raise the threat of heightened micro-organisms, chemical substances and radiological hazards in drinking water.³³ Thus, as far as climate change is concerned, it generally affects water supply through some of the following ways: damage to infrastructure from flooding, loss of water sources due to declining rainfall and increasing demand, and changes in the water quality of water sources and within distribution of water.³⁴

4.2. Legal and Institutional Challenges

It has been argued that while the related pressures of anthropogenic climate change and population growth will continue to make essential natural

³² Ibid, S. 64(2).

³³ Albuquerque, Catarina de. "Climate Change and the Human Rights to Water and Sanitation." (2010).

³⁴ Guy Howard and others, 'Climate Change and Water and Sanitation: Likely Impacts and Emerging Trends for Action' (2016) 41 Annual Review of Environment and Resources 253.

resources scarce globally, domestic and international policy has been slow to adapt to this threat.³⁵ The water sector is mainly governed by the Water Act, 2016³⁶, which was enacted to provide for the regulation, management and development of *water* resources, *water* and sewerage services; and for other connected purposes. The Act was also meant to align the water sector with the Constitution's primary objective of devolution where the Act acknowledges that water related functions are a shared responsibility between the national government and the county government. One of the characteristics of privatization and commercialization of water resources is the need for operational permits for various uses of water. Section 36 of the Water Act 2016 provides that a permit is required for any of the following purposes- any use of water from a water resource, except as provided by section 37; the drainage of any swamp or other land; the discharge of a pollutant into any water resource; and any other purpose, to be carried out in or in relation to a water resource, which is prescribed by Regulations made under this Act to be a purpose for which a permit is required.

While the 2016 Water Act introduced the shared water management system as per the Constitution between the national and county governments, the main management structure and decision making powers were mostly left with the national government's organs.³⁷ This has often created tension between the two levels of government, each seeking to control the sector. This may have at times affected provision of water services. This is especially so where the national Government institutions such as the Water Resources Management Authority and the Water Services Regulation Authority may claim power to license and issue permits relating to water use and access while at the same time county governments may seek to control water bodies within their territories, resulting in conflicts.

³⁵ 'Water Provision in Kenya: Problems and Challenges in Managing Finite Resources | Navarra Center for International Development' <<http://ncid.unav.edu/en/news/water-provision-kenya-problems-and-challenges-managing-finite-resources>> accessed 28 October 2020.

³⁶ Water Act, No. 43 of 2016, Laws of Kenya.

³⁷ See Muigua, Kariuki. "Streamlining Water Governance in Kenya for Sustainable Development." (2017).

4.3. Poverty

Poverty levels among the Kenyan communities and especially among the urban informal settlements play a huge role in hindering access to water services considering that private water vendors who are the main suppliers of water in such areas are in business. Lack of purchasing power thus drive the households to use unsafe, dirty and inadequate amounts of water for their domestic needs.³⁸

4.4. Population Growth and Rural-Urban Migration

While the Government's efforts have always been to ensure that both the urban and the rural areas of the country all have access to clean and adequate water, past studies have showed that the rampant population growth coupled with high rates of rural-urban migration has always left the Government struggling to meet the resultant high water demands in the urban areas due to water shortage and the pressure on the infrastructure.³⁹

4.5. Gender Inequality and Realization of Right to Water

Gender is used to refer to the different roles, rights, and responsibilities of men and women and the relations between them, that is to say, gender does not simply refer to women or men, but to the way their qualities, behaviours, and identities are determined through the process of socialization.⁴⁰

³⁸ 'The Water Crisis: Poverty and Water Scarcity in Africa' (*The Water Project*) <<https://thewaterproject.org/why-water/poverty>> accessed 1 November 2020; Anindita Sarkar, 'Informal Water Vendors and the Urban Poor: Evidence from a Nairobi Slum' (2020) 45 *Water International* 443.

³⁹ Chemeril Chepyegon and Daisuke Kamiya, 'Challenges Faced by the Kenya Water Sector Management in Improving Water Supply Coverage' (2018) 10 *Journal of Water Resource and Protection* 85; 'Nairobi Water: What's behind Severe Shortages?' *BBC News* (2 November 2019) <<https://www.bbc.com/news/world-africa-50253189>> accessed 1 November 2020; 'Kenya - Water & Sanitation for the Urban Poor' <<https://www.wsup.com/where-we-work/kenya/>> accessed 1 November 2020.

⁴⁰ 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Gender and Water' <<https://www.un.org/waterforlifedecade/gender.shtml>> accessed 31 October 2020.

It has rightly been argued that women and girls are disproportionately affected by the lack of access to basic water, sanitation and hygiene facilities, due to their needs during periods of increased vulnerability to infection around menstruation and reproduction as well as the fact that women and girls also have a larger role relative to men in water, sanitation and hygiene activities, including in agriculture and domestic labour.⁴¹ Specifically, it has been noted that women and girls are responsible for fetching water in most households, a practice that has implications for women's health in the form of spinal injury, neck pain, spontaneous abortion from heavy and awkward workloads, and caloric expenditure.⁴² In addition, it has rightly been argued that water-fetching responsibilities by women and girls also add to the burden of unpaid domestic work, decrease time towards other income-generating activities and affect the time for leisure and nonessential activities.⁴³

5. Fulfilling the Right to Water as a Socioeconomic Right for the People of Kenya

5.1. Public Participation and Consultation in Decision-Making

Principle No. 2 of the *Dublin Statement on Water and Sustainable Development* (1992) recommends that water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.⁴⁴ It goes on to state that 'the participatory approach involves raising awareness of the importance of water among policy-makers and the general public. It means that decisions are taken at the lowest

⁴¹ 'WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment' (WHO) <<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 31 October 2020; 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Gender and Water' <<https://www.un.org/waterforlifedecade/gender.shtml>> accessed 1 November 2020.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Principle 2, H Tessoroff, *Dublin Statement on Water and Sustainable Development: Aqua AQUAAA*, Vol. 41, No. 3, p 129-135, June 1992.

appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.⁴⁵

There is a need for the Government and other stakeholders to involve communities in decision-making processes relating to water management not only as a way of ensuring that the constitutional thresholds are met but also as a way of ensuring that they appreciate the challenges that face the sector and use the available water efficiently.

5.2. Addressing Poverty for Fulfilling the Right to Water

In a Resolution on the Right to Development adopted on 19 December 2016, the United Nations General Assembly expressed their concern that the majority of indigenous peoples in the world live in conditions of poverty, and recognized the critical need to address the negative impact of poverty and inequity on indigenous peoples by ensuring their full and effective inclusion in development and poverty eradication programmes.⁴⁶

Considering that there is continued privatization and commercialization of provision of water services in the country, there is a need to address poverty levels in the country in order to ensure that people are economically empowered to afford safe, clean and adequate amounts of water for their own use.⁴⁷

5.3. Addressing Gender Inequality in Water Services

⁴⁵ Ibid.

⁴⁶ Preamble, UN General Assembly, *The Right to Development: Resolution adopted by the General Assembly*, 19 December 2016 [on the report of the Third Committee (A/71/484/Add.2)] 71/192. This was a follow up to the *Declaration on the Right to Development*, adopted by the General Assembly in its resolution 41/128 of 4 December 1986, which confirmed that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations, and that the individual is the central subject and beneficiary of development.

⁴⁷ 'Water Has More to Do with Poverty than You Think' (*ONE*, 20 March 2020) <<https://www.one.org/international/blog/water-access-poverty-health/>> accessed 1 November 2020.

It has rightly been argued that since women have an increased need for water for hydration, sanitation and hygiene during menstruation, pregnancy, the postnatal period and while caring for sick family members or young children, when these basic needs are not met, women and girls are unable to participate equally in society.⁴⁸ This is especially more pronounced in Kenya and Africa where gender roles in society are still greatly affected by cultural beliefs.⁴⁹ As modernity and campaigns towards promotion of gender equality continue to address these cultural notions, there is a need for the government and water providers to ensure that women and girls have access to adequate and safe water for domestic and agricultural use for as long as they still bear the burden of being caregivers and nurturing families.⁵⁰ While the 2010 Constitution of Kenya acknowledges access to clean and safe water as a basic human right falling under social economic rights and assigns the responsibility for water

⁴⁸ 'WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment' (WHO)
<<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 31 October 2020.

⁴⁹ Ngubane, Siegfried Johan. "Gender roles in the African culture: implications for the spread of HIV/AIDS." PhD diss., Stellenbosch: University of Stellenbosch, 2010; Burgess, Norma J. "Gender roles revisited: The development of the "woman's place" among African American women in the United States." *Journal of Black Studies* 24, no. 4 (1994): 391-401; Okrah, Kwadwo. "The dynamics of gender roles and cultural determinants of African women's desire to participate in modern politics." *Global Engagement and Transformation* 2, no. 1 (2017); Fingleton-Smith, Edwina. "The lights are on but no (men) are home. The effect of traditional gender roles on perceptions of energy in Kenya." *Energy research & social science* 40 (2018): 211-219; Ng'umbi, Yunusy Castory. "Re-imagining family and gender roles in Aminatta Forna's *Ancestor Stones*." *Tydskrif vir letterkunde* 54, no. 2 (2017): 86-99; Tshweneyagae, Duduetsang. "Balancing the Roles: Societal/Cultural Gender Expectations and Roles Conflict Among African Working Women."

⁵⁰ 'WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment' (WHO)
<<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 1 November 2020.

supply and sanitation service provision to county governments⁵¹, for a huge population of the Kenyan people, this remains a mirage.⁵² As things currently stand, water was commercialized as evidenced under the current water laws in Kenya and water has continually become expensive and women and girls' access to the same is further hindered by their reduced purchasing power, especially in the urban informal settlements.

It is estimated that only about 20% of the population in Kenya's urban informal settlements have access to safe drinking water.⁵³ While in the major restructuring of Kenya's urban water delivery system towards commercialization and privatization where private vendors are being regularized for better service delivery in terms of regulation of prices and quality of water,⁵⁴ women and the urban poor continue to be disadvantaged. There is thus a need for continued empowerment of women and girls as a way of ensuring that they are economically, socially and politically empowered in order for them to have not only a say in water management decisions but also have the economic means to access the same.⁵⁵

⁵¹ Fourth Schedule, Constitution of Kenya 2010.

⁵² 'OHCHR | Kenyans Have Rights to Safe Water and Sanitation on Paper – Now It's Time to Make Them a Reality' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14913&LangID=E>> accessed 1 November 2020.

⁵³ Anindita Sarkar, 'Informal Water Vendors and the Urban Poor: Evidence from a Nairobi Slum' (2020) 45 *Water International* 443; See also 'Nairobi Water: What's behind Severe Shortages?' *BBC News* (2 November 2019) <<https://www.bbc.com/news/world-africa-50253189>> accessed 1 November 2020.

⁵⁴ *Ibid.*

⁵⁵ Jabeen, Farhat, and Musarat Jabeen. "Women empowerment and socio-economic development: a case study of Pakistan." *European Journal of Business and Social Sciences* 1, no. 10 (2013): 113-116; Liliane, Uwantege Kayumba, and Peter Mbabazi. "The impact of women economic empowerment projects on their socio-economic development in Rwanda: The case of Agaseke project." *European Journal of Business and Social Sciences* 4, no. 6 (2015): 59-87; Meraj, Muhammad, and Mahpara Begum Sadaqat. "Gender equality and socio-economic development through women's empowerment in Pakistan."

5.4. Combating Climate Change for Safeguarding Water Resources

Considering that climate change poses a great threat to water sources and supply, there is a need for the stakeholders in water sector to work closely with other stakeholders in order to combat climate change through such means as sound management policies for water, using climate resilient technologies, among other means.⁵⁶ Some authors have also argued that since water and sanitation services contribute to greenhouse gas emissions, choice of wastewater treatment technologies, improved pumping efficiency, use of renewable sources of energy, and within-system generation of energy also offer potential for reducing emissions.⁵⁷

5.5. Financing of Water Projects

Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.⁵⁸ The object of the Fund is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund and to assist in financing the development and management of water services in marginalized areas or any area which is considered by the Board of Trustees to be underserved including- community level initiatives for the sustainable management of water resources; development of water services in rural areas considered not to be commercially viable for provision of water services by licensees; development of water services in the under-served poor urban areas; and research activities

Ritsumeikan Journal of Asia Pacific Studies= *Ritsumeikan Journal of Asia Pacific Studies* 34 (2016): 124-140.

⁵⁶ Burman, RR, RN Padaria, JP Sharma, Eldho Varghese, Bidisha Chakrabarti, and Sreenath Dixit. "Impact of climate resilient technologies in rainfed agro-ecosystem." *Indian Journal of Agricultural Sciences* 87, no. 6 (2017): 816-24.

⁵⁷ Guy Howard and others, 'Climate Change and Water and Sanitation: Likely Impacts and Emerging Trends for Action' (2016) 41 Annual Review of Environment and Resources 253.

⁵⁸ Water Act 2016, S. 113(1).

in the area of water resources management and water services, sewerage and sanitation.⁵⁹

This fund should be utilized towards ensuring that all persons get to enjoy the right to clean, safe and adequate amounts of water as a socio-economic right. The fund should be used to improve water supply for both urban and rural populations.

5.6. A Human Rights Approach to Water Services Provision

It has been argued that the human right to water implies that water supply must be accessible within, or in the immediate vicinity of, each household, educational institution, workplace and public place.⁶⁰

The right to water is now seen as an implicit component of the right to an adequate standard of living and the right to health.⁶¹ Indeed, in the Kenya case of *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR*, the Court went further and affirmed that the right to clean water is intertwined with the right to clean and healthy environment.

It has rightly been pointed out that even though the right to water and sanitation is now anchored in international human rights law, there are still serious lags in implementation at the regional and national level. States, policymakers, international development partners and civil society groups working in the water and sanitation sector have often proved slow to act when it comes to making the right to drinking water and sanitation a reality.⁶²

⁵⁹ Water Act 2016, S. 114.

⁶⁰ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." *Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* (2009).

⁶¹ United Nations, General Comment No. 15.

⁶² Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." *Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* (2009).

While commercialization and privatization of water sector may have its own benefits as far as efficiency is concerned, there is a need for the government to continue implementing pro-poor strategies aimed at ensuring that the poor and marginalized groups in society also have access to clean and safe water for use. This would be treated as part of human rights-based approach to water and sanitation for all. This is the only way that the progressive realization of socio-economic rights in Kenya would be realized for all. In *Mitubell Welfare Society vs. The Attorney General & 2 Others* Petition No. 164 of 2011, Mumbi Ngugi, J held that;

"The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

The progressive realization of the right to clean water by the State was also affirmed in the case of *Isaac Kipyego Cherop v State Ministry of Water & 142 others* [2017] eKLR where the Court stated as follows:

I do find that though the Petitioner has right to clean and safe water in adequate quantities which the State is to endeavor to render progressively. I do agree with the 2nd respondent that the realization of the right to clean and safe water in adequate quantities require

huge financial commitments and therefore, the same can be achieved progressively.

.....

I do find that the right to clean and safe water in adequate quantities under Article 43 of the Constitution is subject to progressive realization. Rights under Article 43 of the Constitution can only be realized progressively. The State cannot realize this right for every Kenyan in one investment. The right to clean and safe water in adequate quantities is not a final product for direct dispensation but is aspirational.

The Government is thus expected to take tangible steps towards ensuring that these rights are fulfilled for all persons. The Constitution also gives every person to pursue their human rights before courts of law where the same are violated or are at the risk of being violated.⁶³ To this end, courts have also held that the Environment and land court has the jurisdiction to hear and determine a dispute under Article 43 (d) thus touching on the right to clean and safe water in adequate quantities, as was decided in *Isaac Kipyego Cherop v State Ministry of Water & 142 others* [2017] eKLR.

It is not until the Government fully treats the provision of water services to its people as a critical human right that they will spare to ensure that all its citizens have access to clean, safe and adequate amounts of water. In cases of extreme poverty, the Government may provide water for basic needs for free while ensuring that for the bigger populace, the water is affordable by reigning in on unscrupulous water dealers while also ensuring that service provision complies with the human rights standards.⁶⁴

⁶³ Article 70, Constitution of Kenya 2010.

⁶⁴ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." *Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* (2009).

6. Conclusion

Seeing that water is now considered to be a human right issue, and as the global population grows, there is an increasing need to balance all of the competing commercial demands on water resources so that communities have enough for their needs.⁶⁵

The State obligation *to fulfil* its human rights obligations includes the obligations to facilitate and promote. The obligation to facilitate requires the State to take specific measures within its available resources to assist individuals and communities to enjoy the right. The obligation to promote requests the State to take targeted steps. To this end, the State should adopt a national water strategy and a plan of action, as well as appropriate financing and pricing policies.⁶⁶

While it is acknowledged that the fulfilment of the right to water as a socio-economic right is progressive, the Government should continually work with non-state actors, private investors, NGOs and other stakeholders to ensure that the same is fulfilled for Kenyan citizens and especially the most vulnerable and marginalized groups.⁶⁷ The Government should continually work towards coming up with ways of ensuring that water is affordable for all. However, considering that water is a scarce commodity, there is also need for public education and creating awareness on the need to use water efficiently in order

⁶⁵ 'Water' (21 December 2015) <<https://www.un.org/en/sections/issues-depth/water/>> accessed 28 October 2020.

⁶⁶ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." *Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* (2009); CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

⁶⁷ 'Providing Sustainable Sanitation and Water Services to Low-Income Communities in Nairobi' (*World Bank*) <<https://www.worldbank.org/en/news/feature/2020/02/19/providing-sustainable-sanitation-and-water-services-to-low-income-communities-in-nairobi>> accessed 1 November 2020; 'Review of Drivers and Barriers of Water and Sanitation Policies for Urban Informal Settlements in Low-Income and Middle-Income Countries' (2019) 60 Utilities Policy 100957.

to minimize wastage of the same. Water is an integral part of the socio-economic rights and the Government cannot ably fulfill its obligations on Article 43 of the Constitution of Kenya without working towards fulfilling its obligations on provision of water for all citizens. Fulfilling the right to water as a prerequisite for realization of other socio-economic rights for the people of Kenya is indeed necessary and possible.

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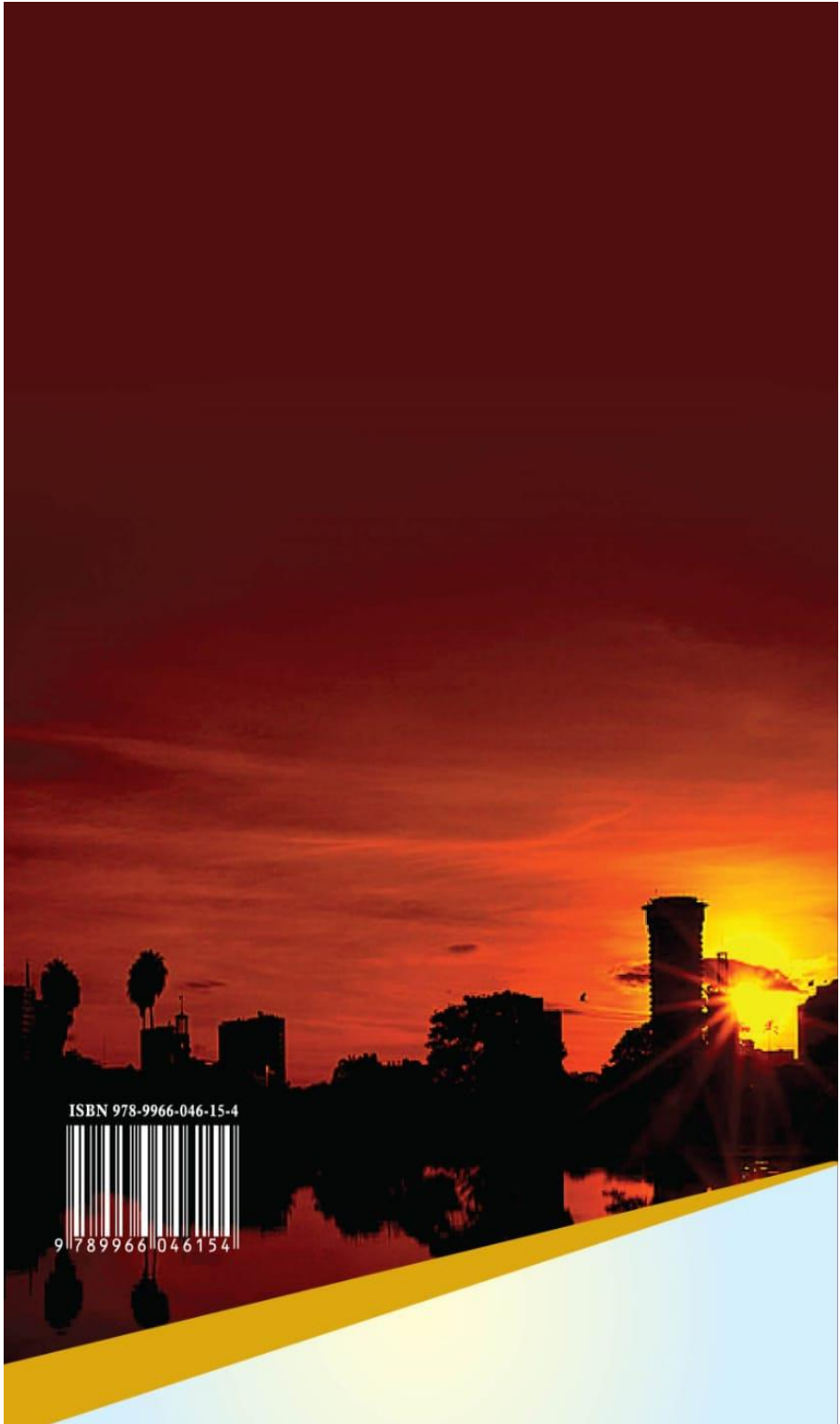
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