

Interpreting the human right to water as a means to advance its enforcement in Uganda

Phiona Muhwezi Mpanga*

Lecturer, School of Law, Makerere University, Kampala, Uganda

Summary

The water supply and mechanisms for the delivery of water currently available to improve access to water for citizens remain a challenge for many African states. In Uganda, although executive policy has made some progress in alleviating the various impediments to enjoying access to water, these impediments have not been completely removed. Evidence from other jurisdictions has shown that the judicial interpretation of socio-economic rights may go a long way to crystallise the exact nature and scope of these rights and, thus, contribute to removing barriers to the enjoyment of these rights. The article explores the manner in which the right to water currently is spelt out in Uganda's Constitution. The article explores how the Constitutional and Supreme Courts of Uganda have used interpretive paradigms as a strategy to better articulate other constitutional socio-economic rights. The article finds that a teleological approach to interpreting socio-economic rights has not been utilised fully by Ugandan courts. It proposes that, if such an expansive approach to the interpretation of implicitly-protected human rights is adopted, it may enhance current conceptualisations and ultimately improve citizens' enjoyment of the right to water.

Key words: *human rights; socio-economic rights; water; right to water*

* LLB (Makerere) LLM (Cambridge) PhD (Witwatersrand); pmuhwezi@law.mak.ac.ug. This article is an updated version of a chapter in my PhD thesis. I am indebted to my supervisor, Prof Marius Pieterse, for insightful comments. I also thank the anonymous referees for their useful comments. Mistakes and omissions remain mine.

1 Introduction

In June 2015, the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) published its concluding observations in response to Uganda's initial report on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ While this is a significant milestone, the ESCR Committee's concerns and recommendations are more so. For instance, the Committee was concerned that not all Covenant rights were protected in the Constitution or laws of Uganda and, hence, were not justiciable in courts. It thus recommended that the country incorporate the ICESCR into national law and ensure its applicability in the domestic courts.² Even though such recommendations must be commended, no express reference was made to water. In the article, I particularly focus on opportunities for realising a human right to water within the context of socio-economic rights, and highlight the challenges existing under the current constitutional and policy framework of Uganda. I argue that there are means by which the Constitution of the Republic of Uganda (1995 Constitution) may be interpreted to read into its articles an enforceable right to water. Following from this, I argue that the judicial interpretation of a human right to water may well be a more efficient means of enforcing the 1995 Constitution in a manner which determines substantive entitlements accruing to citizens and, thus, provide a more enduring means of guaranteeing the right.

I start by exploring the unique features of the 1995 Constitution which facilitate executive and judicial interaction with human rights, including a human right to water.³ In the third section, I explore the manner in which a human right to water may be inferred from the constitutional text. In section four, I interrogate the extent to which executive translations of the right to water have authentically given the 1995 Constitution aspirational meaning and thus give content to the right to water. Section five interrogates whether it is possible to judicially enforce the human right to water. Considering that the right to water has not yet been adjudicated upon by the courts, I examine the approach of the Constitutional Court in adjudicating other socio-economic rights. As a result, much of this section speculates on the

1 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2fCO%2f1&Lang=en (accessed 15 July 2015).

2 Para 5, Concluding Observations on the initial report of Uganda.

3 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 reconceptualisation' (2004) Working Paper 88, Centre for Basic Research 1; GW Kanyeihamba *Kanyeihamba's commentaries on law, politics and governance* (2006) 1 19-38; FE Ssempebwa 'The Constitution as a basis of political and socio-economic development: Some issues' in RO Wengi (ed) *Founding the Constitution of Uganda: Essays and materials* (2011) 31-41.

extent to which the jurisprudence of the Ugandan courts would allow an elaboration and, ultimately, the enforcement of the right to water. Finally, I draw conclusions on the potential and impediments to constitutional interpretation as a means to enhancing the enjoyment of the human right to water in Uganda.

2 Bill of Rights and its enforcement in the 1995 Constitution

The 1995 Constitution contains an elaborate Bill of Rights which enumerates most human rights recognised under international law.⁴ 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 spells out 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:⁵

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.

The 1995 Constitution further determines that public interest may 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 1995 Constitution.⁶

Although the application of international human rights law within the domestic context is not explicitly articulated, and scholars have questioned its application, as discussed later in the article, it can be inferred within the National Objectives and Directive Principles of State Policy (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.⁷ Article 287 affirms that international treaties which were in force prior to the promulgation of the 1995 Constitution continue to be binding on Uganda. While these

4 Ch 4 Protection and Promotion of Fundamental and Other Human Rights and Freedoms. Eg, the right to education, culture, a clean and healthy environment and the rights of workers are enumerated in ch 4 of the Constitution. Civil and political rights, such as a right to life, liberty, forced labour, privacy, the right to a fair hearing as well as civic rights are also expressed in ch 4.

5 Art 43(1). Non-derogable rights are enumerated in art 44. These 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*.

6 Art 43(2)(c).

7 Objective XXVIII.

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 may be inferred from the purpose and intent of the NODPSP and article 287. Particularly, as will be elaborated upon in the section which follows, this proposition may be extended to support the argument that any interpretations of the 1995 Constitution ought to be read in light of applicable international law.

In the context of articulating a role for the courts, the 1995 Constitution envisages for the Constitutional Court an interpretive function, which includes the interpretation of the rights enshrined in the Bill of Rights.⁸ 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 appears that, while fulfilling its interpretive role, the Constitutional Court is mandated to scrutinise the legislative outcomes and executive action against standards imposed by the rights in the Bill of Rights.⁹

The 1995 Constitution envisages the 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 provides:¹⁰

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.

Even where violations or threats of violations arise from statutory enactments or executive actions, the courts are constitutionally obliged to provide redress to citizens. Article 137(3) stipulates that:¹¹

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.

The 1995 Constitution, thus, bestows on courts 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

8 Art 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).

9 Arts 137(3)(a) & (b).

10 Art 50(1).

11 Arts 137(3)(a) & (b).

declaration of unconstitutionality and, where necessary, determine the appropriate redress.¹² 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.¹³

3 Inferring a constitutional right to water from the 1995 Constitution

The international law conceptualisation of a human right to water constructs a universal entitlement to sufficient, safe, acceptable, physically-accessible and affordable water for personal and domestic use.¹⁴ There is no such conceptualisation of a right to water in the justiciable Bill of Rights of the 1995 Constitution. Explicit reference to a human right to water is only made in the NODPSP, which recognise the freedom to access water and freedom from interference with existing water supplies. The NODPSP stipulate:¹⁵

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.

In furtherance of this ideal, the NODPSP add that '[t]he state shall take all practical measures to promote a good water management system at all levels'.¹⁶

The significance of these objectives is emphasised by an amendment to the Constitution, in article 8A(1), which stipulates that the country shall be governed based on principles of national interest enshrined in the NODPSP, and enjoins parliament to make appropriate laws to give effect to this clause.¹⁷ Since the NODPSP are fundamental to governing the state, several scholars have argued that the directives and aspirations relating to socio-economic rights have been given equal force as those rights set out explicitly in the Bill of

12 Arts 137(3)(b) & 137(4).

13 See eg the position of the Supreme Court on the jurisdiction of the Constitutional Court in *Attorney-General v Major General David Tinyefuza Constitutional Appeal 1 of 1997*, judgments of Oder JSC, Tsekooko JSC, Mulenga JSC; and *Uganda Journalists Safety Committee & Another v Attorney-General Constitutional Petition 6 of 1997* (unreported). For a detailed exposition on the potential of remedies, see M Ssenyonjo 'The domestic protection and promotion of human rights under the 1995 Constitution' (2002) 20 *Netherlands Quarterly of Human Rights* 445 476.

14 Para 2 General Comment 15 UN Doc E/C.12/2002/11.

15 Objective XIV Constitution of the Republic of Uganda, 1995 (my emphasis).

16 Objective XXI.

17 Art 8A(2).

Rights.¹⁸ Although this has not been tested before the courts, it is arguable that universal access to safe and clean water ought to be read into the rights that have been enumerated explicitly in 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:¹⁹

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.

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 that article 45 allows a reading into the constitutional text of other rights espoused in international law, such as the right to water.

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 '[e]very Ugandan has a right to a clean and healthy environment'.²⁰ Considering that the ESCR Committee'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 in the 1995 Constitution.²¹

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

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.

-
- 18 C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Working Paper 24 Human Rights Peace Centre 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 JJ Barya 'Citizens' socio-economic rights and Uganda's poverty eradication action plan' (2009) *East African Journal of Peace and Human Rights* 398 407-409; B Twinomugisha 'Protection of the right to health care of women living with HIV/AIDS in Uganda: The case of Mbarara hospital' (2007) Working paper 5 Human Rights Peace Centre 1 19-20.
- 19 Also see BK Twinomugisha 'Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda' (2007) 7 *African Human Rights Law Journal* 283 294.
- 20 Art 39 Constitution of the Republic of Uganda, 1995.
- 21 See paras 11 and 12 General Comment 15 UN Doc E/C.12/2002/11.
- 22 Art 22(1).

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 the arbitrary taking of life, it is possible to read basic survival requirements into a right to life. Given that water is a basic survival requirement, it is, therefore, plausible to argue that a right to life may infer a right to water.²³ 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 a lack of water for growing food for subsistence.

The human right to water may also be read into constitutional guarantees pertaining to the wellbeing of children. In article 34(3) a child's right to medical treatment, education or any other social or economic benefits 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.²⁴ Considering that the ESCR Committee's General Comment 15 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 subjected to an undignified existence.²⁵

In addition, the right to water may be read into the 1995 Constitution's guarantees of a right to equality. For instance, article 21 of the 1995 Constitution stipulates:²⁶

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.

Two dimensions may be inferred from this clause. First, it implies that laws must treat citizens equally. Second, 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 in

23 General comment 6 The right to life HRI/GEN/1/Rev 9 (Vol 1) para 5; Oloka-Onyango (n 18 above) 11-12.

24 Art 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 2 of 1997.

25 Oloka-Onyango (n 18 above) 17.

26 Art 21(1).

Ugandan society, it is possible to read a guarantee of universal access to water into this provision.²⁷

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 must 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.²⁸ Given that General Comment 15 recognises 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 the right to water into this constitutional guarantee.

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 ESCR Committee's tripartite typology of state obligations to respect, protect and fulfil.²⁹ 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.³⁰ The obligation to protect seems to infer a responsibility to look after natural resources, which include water bodies such as lakes, rivers, springs and streams, on behalf of citizens.³¹ The obligation to promote appears to infer taking all practical measures to advance a good water management system,³² and to promote sustainable development and public awareness of the need to manage water resources in a balanced and sustainable manner for present and future generations.³³ 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 country's people.³⁴

To sum up, the 1995 Constitution appears to guarantee an implicit right to water, along the same lines as international law conceptualisations of the right. The 1995 Constitution also appears to

27 Oloka-Onyango (n 18 above) 6-8.

28 Art 33(4).

29 See paras 20-29 General Comment 15 UN Doc E/C.12/2002/11.

30 Art 20(1); Objective V(i) NODPSP.

31 Objective XIII.

32 Objective XXI.

33 Objective XXVII.

34 Objective XIV(a).

guarantee a right to water, which at least operates as a directive principle to the 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 remain abstract. I thus explore the extent to which the right to water is fleshed out in Uganda's national policy framework and consider whether this framework portrays the aspirations of the 1995 Constitution.

4 Elaborating the human right to water within executive policy

Initiating and implementing national policies that, ideally, embrace a rights-based approach to delivering water services is a function that is in 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 the full actualisation of socio-economic rights in Uganda. These commentators argue that the economic policy framework has over the years promoted the liberalisation of the economy and privatisation of national institutions hitherto responsible for the delivery of basic services in a manner which does not reflect the spirit of the 1995 Constitution.³⁵ 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. Initially, I particularly focus on the National Development Plan, as it provides a benchmark for current national planning processes and is instructive of the perception of water within the planning organs of state. Thereafter, I consider specific water-related policies, particularly the National Water Policy and the pro-poor strategy for water and sanitation, since 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.

35 Oloka-Onyango (n 3 above) 23-26; J Oloka-Onyango 'The problematique of economic, social and cultural rights in globalised Uganda: A conceptual review' (2007) Human Rights and Peace Centre Working Paper 3, 5-6 10-12 24; 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.

The first National Development Plan was developed and adopted by parliament in 2010.³⁶ It aimed at ensuring poverty eradication, with an emphasis on 'economic transformation and wealth creation'.³⁷ Without much shift in strategy from the first plan, the second National Development Plan, launched in June 2015, anticipates that human capital development will be enhanced with improvements in access to safe water.³⁸ As a driver for planning water service delivery at the national level, these plans suggest that the executive may have been influenced by the NODPSP in articulating its vision for development. However, a closer look at both the first and second National Development Plans 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 water 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 in it are founded on 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'.³⁹ Having been formulated after the promulgation of the 1995 Constitution, the policy appears to adhere to the ideals of the directive principles by conceptualising 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,

36 Government of Uganda *The National Development Plan 2010/11-2014/15* (2010); *The National Development Plan II 2015/16-2019/2020*. These 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 eg Oloka-Onyango (2007) (n 35 above) 24-27.

37 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. These included a specific sector plan to improve rural and urban access to water. See also PM Mpanga 'Plenty of water, but scarcity still persists: Surveying the status of the right to water in Uganda' (2007) Human Rights and Peace Centre Working Paper 10, 1 19-20; Barya (n 18 above) 398 407-409.

38 Government of Uganda *The National Development Plan II* (2015/16- 2019/20) 1 202-205.

39 Government of Uganda *National Water policy* (1998) 8. Also refer to the meaning of 'domestic use' in the Water Act referred to earlier.

or from a tap on a stand.⁴⁰ This is presumably because these water sources can be monitored carefully to guarantee sufficient quality and availability of water channelled through them.

In addition to recommending sources of 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 World Health Organisation (WHO) until such time as the country develops its own national water quality standards.⁴¹ In 2009, the National Water Quality Management Strategy proposed to put in place national drinking water guidelines.⁴² 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 the distance from a rural public water point as being preferably within 1 500 metres of households. In built-up areas and peri-urban zones, it is recommended that a public water point be located within walking distance not exceeding 200 metres. The policy stipulates that individual public water points in urban areas should not serve more than 300 persons.⁴³ 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.⁴⁴

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

The National Water Policy envisages the involvement of communities in determining the kind of technology that may be offered to them when developing their specific water supply systems. It emphasises a demand-driven approach which entails involving citizens in determining where water points should be located. In addition, it stipulates that in selecting the kind of water sources to be deployed in particular areas, consideration must be given to the use of low-cost technologies in order to keep the costs of operation and maintenance of water sources affordable.⁴⁵ This is an indication that the policy takes into consideration the specific needs of citizens in its conceptualisation of the right to water, as one which must be acceptable to citizens.

40 *Water policy* (n 39 above) 14-15.

41 *Water policy* 15.

42 National Water Quality Management Strategy 39-40. This strategy document is in effect an adoption of the WHO standards for water quality which is the benchmark for international water quality standards.

43 *Water policy* (n 39 above) 14.

44 *Water policy* 15.

45 *Water policy* 17.

The National Water Policy envisages the monitoring of the policy in order to ensure its implementation and to assess its effectiveness. This function is carried out by the Directorate of Water Development which is required to set out clear goals and monitoring indicators. Some of these include the initiation of legislation, bye-laws and regulations, the setting of standards, as well as establishing water management institutions and systems.⁴⁶ This may show that the policy abides by the state's constitutional obligation set out in the NODPSP, namely, to fulfil the realisation of a human right to water.

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 towards enhancing the 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.⁴⁷ 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 the 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.⁴⁸ 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 the responsibility of individuals to pay for the water consumed.⁴⁹

However, there are still contradictions indicating that the translation of a right to water through executive policy cannot entirely actualise the 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

46 *Water policy* 33-34.

47 Government of Uganda Ministry of Water and Environment Pro-Poor Strategy for the Water and Sanitation Sector Uganda February 2006, 1 & 6.

48 Pro-Poor Strategy (n 47 above) 7. I understood the exact form of subsidisation through an interview with the Assistant Commissioner for Urban Water and Sanitation, Ministry of Water and Environment which was conducted in August 2013.

49 Government of Uganda Ministry of Water and Environment, Water and Environment Sector Performance Report 2013, 1 77.

strategy arose from the fact that rates charged for water remain inequitable among citizens.⁵⁰ 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.⁵¹

Even where the government has proposed a series of initiatives for promoting equity by the introduction of pre-paid meters, price control for water sold at public yard taps or stand pipes, and by 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 for the lived realities of the poor and vulnerable.⁵² For instance, within three years of introducing water subsidies, and at a time when the benefits of easily-accessible water had begun to trickle down to the poor, government proposed that the increased numbers of people accessing potable water were 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.⁵³ 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 increased by water vendors on account of the value added tax.⁵⁴ This shift in focus from enhancing water access for the poor to increased national revenue provides evidence that a weak legislative basis for the right to water impedes its full enjoyment and realisation.

However, the impact of the executive's proposal to introduce a value-added tax on water services may have indirect advantages. One immediate advantage appears to have been the dialogue which

50 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).

51 Information gathered from an interview with the Assistant Commissioner for Urban Water and Sanitation, Ministry of Water conducted in August 2013 revealed 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 interviews in the community, I learnt that in some areas the pre-paid water stand taps had broken down and remained so for at least nine months (interview of 22 August 2013; transcript on file with author).

52 Ugandan Ministry of Water and Environment *Tariff policy for small towns, rural growth centres and large gravity flow schemes* (September 2009) 7.

53 The Value Added Tax (Amendment) Act 8 of 2012 had included the supply of water for domestic use among exempt supplies. However, subsequently the Finance Bill 2013 had proposed to re-introduce VAT on water for domestic use.

54 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).

ensued between parliament and the executive relating to this proposal. During the last two years, parliament's committee on natural resources debated and consistently recommended that government drop proposals of a value-added tax on domestic water supply, in order not to forestall access to safe water where citizens cannot afford clean and safe water.⁵⁵ 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 to the potential of a rights-based approach, to the extent that it can compel the justification of executive policy where this is likely to impede the enjoyment of the right to water.

The Water Privatisation Policy has impacted on the manner in which water is conceptualised and delivered to citizens. Even though the National Water and Sewerage Corporation (NWSC), which is responsible for water delivery in many urban centres, 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 in 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 about whether the outright sale of the NWSC would be more effective in improving water services than a rigorous private enterprise reform.

Whereas the privatisation of water services enhanced the availability and accessibility of water and facilitated the improvement of water quality, it does not appear to have facilitated a rights-based approach to water delivery. A close reading of the performance management contract model does not reflect rights consciousness. For instance, in the performance management system which was devised for measuring the 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 per cent of senior managers' salaries; and performance contract review in order to recommend appropriate bonuses for staff.⁵⁶ Subsequent performance contracts have

55 See eg the Parliament of Uganda *Report of the Committee on Natural Resources on the Ministerial Policy Statements and 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 and Budget Estimates for the Financial Year 2013/2014* August 2013 1 33; 'Value-added tax on water rejected' *The New Vision* 2 May 2013.

56 Y Jamal & L Jones 'Impact of privatisation in Africa: Uganda water' (2006) 7-8 <http://siteresources.worldbank.org/EXTNTFPSI/Resources/UgandaWater.pdf> (accessed 15 July 2015).

expounded on the scope of targets to include extending services to the poor in urban areas.

While the direct effect of the 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.⁵⁷ 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 the elaboration of policy and the ultimate enjoyment of a human right to water, it would seem that the NODPSP in the 1995 Constitution have gone a long way towards enhancing the 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 conceptualising and delivering water to citizens, which was likely implored by 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 programmes and policies have substantially increased the number of households with access to clean and safe water in urban and rural areas. For instance, the reports provide evidence to the effect that during the period 2007-2012, remarkable progress was made in increasing the number of additional people served by the water supply systems, both in rural and urban areas.⁵⁸ Indeed, these reports have enumerated gains made in terms of the five core components of the human right to water: universality of access to water; adequacy of water; safety of water; quality of water; and affordability of water.

However, while the human rights-based consciousness apparent in the 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.⁵⁹

57 'Uganda's NWSC on track for privatisation' (2002) 3 Issue 12 <http://www.globalwaterintel.com/archive/3/12/general/ugandas-nwsc-on-track-for-privatisation.html> (accessed 1 April 2016).

58 Government of Uganda 'Joint Water and Environment Sector Strategic Plan Final Programme Document' 2013-2018, 9-10 (on file with author). At the same time, the programme 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 programme.

59 World Bank Global Water Practice; S Mutono et al *Water and sanitation for the poor and bottom 40% in Uganda: A review of strategy and practice since 2006* (2015) 57-58.

In the end, it appears that a well-articulated right lacking the threat of justiciability may remain only on paper.

Finally, considering that the right to water seems to be recognised only 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 the policy on 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.

5 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 decision has involved the right to water. This section considers the challenges which appear to have impacted on how the courts have so far vindicated socio-economic rights in the cases before them and how these rights have been interpreted. Although not directly concerned with the enforcement of socio-economic rights in the NODPSP, there are a few Supreme Court and Constitutional Court decisions which have addressed the broader interpretations of the right to a means of livelihood and, albeit only tentatively, the right to health. It is from these decisions that I seek to map out the potential and pitfalls of adjudicating the right to water, which appears to be elaborated mainly in the sphere of executive policy within the current adjudicative paradigm.

5.1 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.⁶⁰ However, the jurisprudence emerging from the courts provides an explicit answer. The courts are willing to interpret constitutional provisions in light of international law. This indicates that international law is considered an aid to interpretation of the Constitution.⁶¹ Although the decisions in which international law has been referred to

60 By international law, I refer to the main sources of international law defined by the ICJ Statute. Also see B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 84; G Tumwine-Mukubwa 'The Uganda Constitution, 1995 and human rights: Interpretation and enforcement of chapter four rights and freedoms' in PM Walubiri (ed) *Uganda: Constitutionalism at crossroads* (1999) 14-15.

61 For a detailed account, see Kabumba (n 60 above) 84 90-96.

in interpreting the constitutional text do not involve socio-economic rights, there is nothing to suggest that these rights 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, as a rule courts avoid those interpretations which are inconsistent with international law.⁶² Secondly, courts will take cognisance of the fact that Uganda has acceded to international covenants.⁶³ It is, therefore, possible that their stance relating to international law enables them to consider international law conceptualisations of socio-economic rights when called upon to adjudicate constitutional rights. Drawing from these scholarly writings and court interpretations of other rights, discussed in the penultimate section of this article, I contend that it is possible for Ugandan courts to recognise a justiciable right to water.

5.2 Constitutional Court's approach to adjudicating socio-economic rights claims

Several principles of constitutional interpretation which are pertinent to understanding the adjudication of socio-economic rights in 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, accordingly, will be given the widest possible construction in order to realise the full benefit of the guaranteed right.⁶⁴

Summarising the cardinal principles of constitutional interpretation in *Davis Wesley Tusingwire v The Attorney-General*,⁶⁵ the Constitutional Court re-stated three additional 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.⁶⁶

62 *Major General David Tinyefuza v Attorney-General* Constitutional Petition 1 of 1996, judgment of Egonda Ntende JA (Ag) 18; and *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 (SC).

63 *Kigula* (n 62 above), judgment of Egonda Ntende JSC and *Susan Kigula & Others v Attorney-General* Constitutional Petition 6 of 2003, judgment of Twinomujuni JA.

64 *Attorney-General v Uganda Law Society* Constitutional Appeal 1 of 2006 (SC); and, more recently, in *Davis Wesley Tusingwire v The Attorney-General* Constitutional Petition 2 of 2013. (on file with author).

65 *Tusingwire* (n 64 above).

66 Also relied upon in *Paul Ssemwogerere v Attorney-General* Constitutional Appeal 1 of 2002 (Supreme Court); *Kigula & Others* (n 62 above).

Second, where several provisions of the Constitution have a bearing on the same subject, these should be read together so as to ensure that the full meaning and effect of their intent are affirmed.⁶⁷ Finally, the Constitutional Court has affirmed that a non-derogable provision of the 1995 Constitution confers absolute protection and should be enforced by all governmental and non-governmental organs as well as by individuals.⁶⁸

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 held:⁶⁹

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 provides an immediate break or departure with past rules of constitutional construction.

Later, *Salvatori Abuki & Another v Attorney-General* similarly 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.⁷⁰ 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 the right to dignity, Egonda Ntende J stated:⁷¹

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.

Most significant was the Constitutional Court's casting of justiciable human rights within the frame of the NODPSP. The judge stated:⁷²

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.

67 *Twinobusingye Severino v Attorney-General* Constitutional Petition 47 of 2011 (Constitutional Court).

68 *Attorney-General v Salvatori Abuki* Constitutional Appeal 1 of 1998 (Supreme Court), also reported in 2000 KaLR 413.

69 *Tinyefuza* (n 62 above), judgment of Egonda Ntende J (unreported) 12-13.

70 Constitutional Case 2 of 1997.

71 Egonda Ntende J in *Abuki* (n 68 above) 41.

72 Egonda Ntende J in *Abuki* (n 68 above) 43-44.

Both *Tinyefuza* and *Salvatori Abuki* 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.⁷³ These decisions indicate 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* followed this approach to interpreting the NODPSP.⁷⁴ Indeed, in *Centre for Health, Human Rights and Development (CEHURD) v Attorney-General*, the petitioners invoked, without success, the argument that the NODPSP were binding upon the executive and justiciable.⁷⁵ The petition arose from the grievances of relatives of two women who had died in hospital during the course of childbirth. 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 the enjoyment of socio-economic rights and, additionally, the *CEHURD* case waters down the potential of indirect vindication of socio-economic rights.⁷⁶

On the other hand, the courts must be lauded for not quashing the hopes of adjudicating socio-economic claims, given the fact 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.⁷⁷

In the aftermath of *CEHURD*, claims for the right to health have already been filed before the High Court. One of these cases has come to conclusion. In *The Centre for Health, Human Rights and Development*

73 Oloka-Onyango (n 3 above) 38-39; Mbazira (n 18 above) 11-14.

74 Eg, in *Ssemwogerere & Olum v Attorney-General* Constitutional Appeal 3 of 1999, the Supreme Court found that the Constitutional Court would have jurisdiction to determine matters concerning the internal workings of parliament in deciding whether an Act of parliament had been properly passed to become law. Also see *Kanyehamba* (n 3 above) 1 3.

75 *CEHURD & Others v The Attorney-General* Constitutional Petition 16 of 2011 (unreported). In October 2015, the Supreme Court, sitting as the Constitutional Appeal Court in *CEHURD v Attorney-General* Constitutional Appeal 1 of 2013, ordered that the Constitutional Court hear the petition on its merits. The hearing of the petition had not started at the time of writing.

76 Oloka-Onyango (n 23 above) 10-12; Oloka-Onyango (2007) (n 35 above) 47-49.

77 Page 16 of Constitutional Court ruling (on file with author).

& *Others v Nakaseke District Local Administration*,⁷⁸ the High Court declared that the constitutional right to protection of women on account of their unique status and maternal functions in society was violated where a woman died in the course of childbirth due to the medical attendants' failure to provide emergency obstetric care in a local government hospital. Even then, the High Court's finding was framed within the context of fundamental rights explicitly included in the main text of the 1995 Constitution, and it did not rely on the right to health set out in the NODPSP. Therefore, it still remains to be seen how the courts will deal with the matter of interpreting a right ensconced in the NODPSP. At the same time, arguments for direct claims based on the NODPSP remain to be tested.

However, the High Court's approach may be explicable. Given that the right to health was not explicitly entrenched as a justiciable right in the 1995 Constitution, the High Court may have found it difficult to adopt an approach based on the NODPSP, given that the Constitutional Court had not offered any interpretive guidance. 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 possible to argue that, to date, the Constitutional Court and Supreme Court 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.

6 Conclusion

This article set out to explore the extent to which the human right to water is embodied in Uganda's constitutional framework and executive policy in order to surface the implications of such recognition for citizens' enjoyment of water as a right. It concludes that there is no explicit reference to a human right to water in 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, which courts may utilise, to interpret the text of several rights within the Bill of Rights as implicating a human right to water.

The article has shown that, although the courts have not had the opportunity of hearing a claim related to the human right to water, the outcomes of adjudicating other rights claims illustrate some common trends. The Constitutional and Supreme Courts are willing to apply a generous interpretive approach to the provisions of the 1995 Constitution. Furthermore, these Courts are willing to apply

78 Civil Suit 111 of 2012 13 (judgment on file with author).

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

Of concern, though, is the pattern which seems to emerge from the study of the Constitutional and Supreme Court cases relating to rights-based challenges: The Courts appear 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 in 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. It is, therefore, contended 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, yet executive interpretations of the NODPSP continue to fall short in facilitating the full realisation of the right. This is of concern. Given the fact 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 the full realisation of the right.