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ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW

**THE LEGAL AND POLICY FRAMEWORK FOR
IMPLEMENTING THE RIGHT TO WATER IN
ETHIOPIA**

BY: TSEGA ANDUALEM GELAYE

January, 2014

Addis Ababa, Ethiopia

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BY: TSEGA ANDUALEM GELAYE

**ADVISOR: DR.TAKELE SOBOKA BULTO (LL.B, LL.M, MA, PhD,
ASSOCIATE PROFESSOR)**

**A Thesis Submitted to School of Graduate Studies, College of Law and
Governance, School of Law, Addis Ababa University, in Partial Fulfillment of
the Requirements for the Degree of Masters of Laws (LL.M in Human Rights)**

APPROVAL SHEET BY THE BOARD OF EXAMINERS

APPROVED BY BOARD OF EXAMINERS

_____	_____	_____
Advisor	Signature	Date
_____	_____	_____
Examiner	Signature	Date
_____	_____	_____
Examiner	Signature	Date

DEDICATION

To the memory of my father, ANDUALEM GELAYE ASENE. Wish you could live long to see this day as it was your dream.

To my mother WUBALEM MELAKU YESHANEW for everything you have done for me since I was born.

DECLARATION

TSEGA ANDUALEM, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name: TSEGA ANDUALEM

Signature: _____

This thesis has been submitted for examination with my approval as University advisor.

Advisor: DR. TAKELE SOBOKA BULTO (LL.B, LL.M, MA, PhD, Associate Professor)

Signature: _____

TABLE OF CONTENTS

Dedication.....	i
Declaration.....	ii
Table of Content	iii
Acknowledgment	viii
List of Acronyms	ix

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Background of the Study	1
1.2 Statement of the Problem.....	7
1.3 Research Question	10
1.4 Objective of the Study	10
1.4.1 Overall Objective.....	10
1.4.2 Specific Objectives.....	11
1.5 Methodology	12
1.6 Significance of the Study	12
1.7 Scope and Limitation of the Study.....	13
1.8 Organization of the Study.....	13

CHAPTER TWO

THE EVOLUTION OF THE RIGHT TO WATER

2.1 Evolution of the Right to Water at International Level	16
2.1.1 Non-Binding Instruments	
2.1.1.1 The Mar Del Plata Action Plan 1977	17
2.1.1.2 The Rio Declaration, UN Resolution On the Right to Development and MDGs	17
2.1.1.3 General Comment 15 of the CESCR.....	19
2.1.1.4 The Human Right to Water and Sanitation, United Nations General Assembly Resolution 64/292 Of 2010	19
2.1.1.5 The Human Right to Safe Drinking Water and Sanitation,	

Human Rights Council Resolution 7/22 of 2010	24
2.1.2 Binding Instruments.....	26
2.1.2.1 Explicit	27
2.1.2.1.1 Convention on the Elimination of Discrimination Against Women(CEDAW)	28
2.1.2.1.2 Convention on the Right of the Child (CRC)	28
2.1.2.1.3 Convention on the Rights of Persons with Disabilities (CRPD)	29
2.1.2.1.4 Geneva Conventions and its Additional Protocols	29
2.1.2.2 Implicit	30
2.1.2.2.1 International Covenant on Civil and Political Right (ICCPR)	31
2.1.2.2.2 International Covenant on Economic Social and Cultural Rights(ICESCR)	32
2.1.2.2.3 Convention on the Law of the Non-Navigational Uses of International Watercourses	34
2.2 The Evolution of the Right to Water in Africa	34
2.2.1 The African Charter on Human and Peoples Right	35
2.2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)	39
2.2.3 The Protocol to the African Charter on the Rights of Women in Africa.....	39
2.2.4 African Convention on the Conservation of Nature and Natural Resources 2003	40
2.3 Evolution of the Right to Water at National Level.....	40

CHAPTER THREE

THE NORMATIVE CONTENT OF THE RIGHT TO WATER AND RELATED STATE OBLIGATIONS

3.1 The Relationship Between Right to Water and Other Human Rights: Is Right to Water Derivative or Independent Right?	45
3.2 Normative Content of the Right to Water.....	48
3.2.1 Availability	49
3.2.2 Quality.....	50
3.2.3 Accessibility.....	51
3.2.3.1 Physical Accessibility.....	51
3.2.3.2 Economic Accessibility	52
3.2.3.3 Non-Discrimination.....	53
3.2.3.4 Information Accessibility.....	54

3.3 State Obligations Related to the Right to Water.....	55
3.3.1 Obligation to Respect.....	55
3.3.2 Obligation to Protect.....	56
3.3.3 Obligation to Promote.....	56
3.3.4 Obligation to Fulfill	56
3.3.5 Minimum Core Obligation of the Right to Water.....	57
3.4 The Right to Water and Vulnerable Groups.....	60
3.4.1 The Rural and Urban Poor	60
3.4.2 Women.....	61
3.4.3 Children.....	61
3.4.4 Persons with Disabilities.....	62
3.4.5 Refugees and Internally Displaced Persons	62
3.4.6 Indigenous People.....	63
3.5 Mechanisms of Ensuring the Accountability of States in Realizing the Right to Water.....	64
3.5.1 National Mechanism	64
3.5.2 Regional Mechanism	68
3.5.3 International Mechanism	70

CHAPTER FOUR

THE CURRENT STATE OF REALIZATION OF THE RIGHT TO WATER IN ETHIOPIA

4.1 The Water Resource Potential of Ethiopia, Budget Allocated for the Sector and Overall Water Access.....	72
4.2 Current State of Realization of Minimum Core Obligations of the Right to Water in Ethiopia.....	77
4.2.1 Availability	78
4.2.2 Quality.....	80
4.2.3 Physical Accessibility of Water	82
4.2.4 Economic Accessibility or Affordability of Water in Ethiopia	83
4.2.5 Non Discrimination and Access to Water in Ethiopia.....	89
4.2.6 Public Participation and Water Access in Ethiopia	91

CHAPTER FIVE

THE LEGAL FRAMEWORK FOR IMPLEMENTING THE RIGHT TO WATER IN ETHIOPIA

5.1 The Federal Democratic Republic of Ethiopia Constitution.....	94
5.1.1 Status of The Right to Water in the FDRE Constitution	94
5.1.2 The Normative Content of the Right to Water in the FDRE Constitution.....	102
5.2 Subsidiary Legislations for Implementing the Right to Water in Ethiopia	105
5.2.1 Ethiopian Water Resources Management Proclamation 197/2000	105
5.2.2 Ethiopian Water Resource Management Regulation.....	107
5.2.3 Environmental Pollution Control Proclamation.....	108
5.2.4 The Ethiopian Civil Code	109
5.2.5 The Criminal Code of the Federal Democratic Republic of Ethiopia	110
5.3 Gaps in the Existing Ethiopian Legal Framework for the Implementation of the Right to Water.....	111
5.4 Avenues of Seeking Remedy for Violation of the Right to Water In Ethiopia.....	115
5.4.1 Ethiopian Courts	116
5.4.2 Ethiopian Human Rights Commission.....	118
5.4.3 African Commission on Human and Peoples Right	120
5.4.4 Committee on Economic Social and Cultural Rights	122

CHAPTER SIX

THE POLICY FRAMEWORK FOR IMPLEMENTING THE RIGHT TO WATER IN ETHIOPIA AND THE RESPONSIBLE INSTITUTIONS

6.1 Ethiopian Water Management Policy	126
6.2 Ethiopian Water Sector Strategy.....	133
6.3 Water Sector Development Program	135
6.4 Growth and Transformation Plan (GTP)	137
6.5 National Human Rights Action Plan.....	139
6.6 Gaps in the Ethiopian Policy Framework of Implementation of the Right to Water.....	141

6.7 Institutions Responsible for the Implementation Ethiopian Laws and Policies on the Right to Water	145
6.7.1 The Ministry of Water and Energy (MOWE).....	146
6.7.2 The Ministry of Health (MOH).....	147
6.7.3 Ministry of Education (MOE).....	147
6.7.4 Ministry of Finance and Economic Development(MOFED).....	148
6.8 The Responsibilities of Other Stakeholders in the Implementation of the Right to Water In Ethiopia	148
6.8.1 The Responsibility of Individuals in the Implementation of the Right To Water In Ethiopia	148
6.8.2 The Responsibility of Businesses in the Implementation of the Right to Water in Ethiopia.....	151
6.8.3 The Responsibility of Other States in the Implementation of the Right to Water in Ethiopia.....	153
6.8.4 The Responsibility of the Media in the Implementation of the Right to Water In Ethiopia.....	154
6.8.5 The Responsibility of Non-Governmental Organizations (NGOS) in the Implementation of the Right to Water in Ethiopia.....	156

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATION

Conclusion and Recommendation	161
Bibliography	167

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LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
APAP	Action Professional Association for People
AU	African Union
CCI	Council of Constitutional Inquiry
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CGKR	Central Kalhari Game Reserve
COHRE	Center on Housing Rights and Evictions
CRC	Convention on the Rights of Child
CRPD	Convention on the Rights of Persons with Disabilities
DPSPs	Directive Principles of State Policy
ECOSOC	Economic and Social Council
EHRC	Ethiopian Human Rights Commission
ENHRI	Ethiopian Health and Nutrition Institute
ES 261:2001	Ethiopian Drinking Water Standard
ETB	Ethiopian Birr
EWRIC	Ethiopian Water Resource Information Center
FDRE	Federal Democratic Republic of Ethiopia
FIAN	FoodFirst Information and Action Network
FMOWR	Federal Ministry of Water Resources
GDP	Gross Domestic Product
GTP	Growth and Transformation Plan
HRC	Human Rights Council

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
JMP	Joint Monitoring Group
m ³	cubic meter
Maputo Protocol	The Protocol to the African Charter on the Rights of Women in Africa
MDGs	Millennium Development Goals
MOE	Ministry of Education
MOFED	Ministry of Finance and Economic Development
MOH	Ministry of Health
MOWE	Ministry of Water and Energy
NGOs	Non-Governmental Organizations
NHRI	National Human Rights Institution
NPPO	National Policy Principles and Objectives
RADWQ	Rapid Assessment of Drinking Water Quality
SERAC	Social and Economic Rights Action/Center for Economic and Social Rights
SNNPR	Southern Nations, Nationalities and Peoples Region
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN-Habitat	United Nations Settlement Program
UNICEF	United Nations Children's Fund
USD	United States Dollar
WASH	Water Sanitation and Hygiene
WHO	World Health Organization
WSSDP	Water Supply and Sewerage Development Program

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 BACKGROUND OF THE STUDY

Water is one of the most essential resources for the existence of life. A human body needs 3-5 liters of water per day just to prevent death from thirst.¹ Studies conducted on the link between human survival and water have shown that human beings could live without water only for about seven days since water constitute up to 60- 80% of their body makeup.² Apart from its use for drinking, water is also needed for undertaking a number of human activities such as cooking food, washing clothes and keeping one's personal hygiene. In some world religions also, water occupies a crucial place, since it is believed to be the foundation of life with a purifying power.³ These religions include Buddhism, Christianity, Hinduism, Islam, Judaism, Shinto and Zoroastrianism. As such, access to safe water is important for an individual to live life with dignity, good health, better educational and work opportunities. For the society at large, access to safe water contributes for development and economic growth as its members will be able to spend most of their days working if they remain healthy.⁴

Although, water is highly intertwined with human survival, development and overall wellbeing, a considerable number of people are deprived of access to water. According to the Joint Monitoring Progress report (UNICEF/WHO 2012) an estimated 780 million people do not have access to clean drinking water.⁵ The result is a high rate of water related deaths and illnesses, the latter of which prevent individuals from pursuing activities such as gainful employment or schooling. More than 3600 children die every day from preventable diarrheal diseases, which is more than from malaria, HIV (AIDS) means and measles combined.⁶ Unsafe water and poor

¹ G. Howard and J. Bartram, Domestic Water Quantity, Service, Level and Health(2003), p.3

² S.C. McCaffrey, The Law of International Watercourses: Non-Navigational Uses (2001) p. 3, as cited by Takele Soboka "The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System", African Human Rights Law Journal vol.11 no.2 (2011) p.344

³ Water in Religion, available at (<http://www.africanwater.org/religion.htm>) last visited January 2, 2013

⁴ C. D. Albuquerque, On The Right Track: Good Practices in Realizing the Right to Water and Sanitation, (2012) p.19

⁵ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (hereinafter WHO/UNICEF JMP), Progress on Drinking Water and Sanitation: 2012 Update (<http://www.unicef.org/media/files/JMPreport2012.pdf>) last visited on January 5, 2013

⁶ id. p. 20

sanitation are the second biggest killers of children in the world.⁷ Moreover, it is estimated that each year 443 million schools days are lost because of illness resulting from unclean water and poor sanitation.⁸

Given the number of people without access to safe water and the dependence of human life on water, it would be logical to inquire whether the right to water is incorporated in the main human right instruments. To ones dismay, the right to water is absent from the explicit terms of the international bill of rights i.e. Universal Declaration of Human Rights(UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). Only three International Human Right Treaties applying to a particular group of persons explicitly mention water.⁹ At regional level also, only two African Human Rights Treaties clearly include water in their provisions.¹⁰ The main justification given for the absence of the right to water from the core Human Rights instruments is that, at the time of their drafting, water was considered as an abundant as air, as such over looked by the drafters.¹¹

This assumption however does not reflect the reality. The reason for this is that, 97.5 % of earths water resource is salt water located in the oceans with no use for human consumption.¹² Fresh water accounts only 2.5% of overall water resource of the earth. Of the 2.5% fresh water 70% of it exists in the form of ice and snow in the mountains of Antarctica and arctic. Of the remaining 30% fresh water 97% of it is located in shallow and deep underground and only 0.3% of fresh water is located in lakes and rivers largely used by human beings.¹³ Apart from this, a number of

⁷ United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (2006), p.

⁸ *ibid*

⁹ Convention on the Elimination of All Forms of Discrimination against Women, adopted On 18 December 1979 and entered into force on 3 September 1981, art 14(2), Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, art. 24(2), Convention on the Rights of Persons with Disabilities and Optional Protocol. UN Doc A/61/611 of 2006, entered into force on 3 May 2008, art. 28

¹⁰ African Charter On the Rights and Welfare of the Child OAU Doc. Cab/Leg/24.9/49 (1990), entered into force Nov. 29, 1999, article 14(c) and Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa, 2003, art.15(a)

¹¹ I.T. Winkler, The Human right to Water Significance , Legal Status and Implications for Water Allocation, (2012), p.10

¹² UN WATER, Statistics: Graphs and Maps, (http://www.unwater.org/statistics_res.html)last visited on August 28, 2013

¹³ *ibid*

factors are also contributing their part for depletion of finite amount of water resources. These factors include increasing population growth, urbanization, increasing demand, water pollution and climate change.¹⁴

Cognizant of the increasing demand on the limited water resource and the number of people without access, the international community began to approach water from a human rights perspective since early 1970s. Accordingly, the 1972 United Nations Conference on Human Environment held in Stockholm, underscored the need to conserve water resources for equitable utilization of the present as well as the future generation.¹⁵ Later in the 1977, World Water Conference convened at Mar del Plata explicitly recognized the right to water for the first time.¹⁶ The right to water was also raised in subsequent the UN Conferences on environment as well as the UN Declaration on the Right to Development.¹⁷ A land mark development however is the General Comment 15 of Committee on Economic Social and Cultural Rights (CESCR) on the right to water issued in 2002.¹⁸ The Committee, undeterred by the absence of an explicit right to water from ICESCR, implied the right to water as implicit component of the explicitly guaranteed right to adequate standard of living and the right to health.¹⁹

The Comment provides that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.²⁰ The Committee also elaborated the normative content of the right and its minimum core obligations. It further indicated the tripartite obligations of state to respect, protect and fulfill the right to water.²¹ Following General Comment 15, the other milestones in the recognition of the right to water are the 2010 General Assembly²² and Human Rights Council resolutions²³ recognizing the

¹⁴ Winkler , cited above at note 11, p.20

¹⁵ Declaration of the United Nations Conference on the Human Environment ,June 1972, Principle.2

¹⁶ R. Bates, “The Road to the Well : An Evaluation of the Customary Right to Water”, Review of European Community and International Environmental law, vol.19.no.3 (2010),p.285

¹⁷ The International Conference on Water and Environment Dublin(1992), Agenda 21 of the UN Conference on Environment and Development (Rio summit) (1992)

¹⁸ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003

¹⁹ Id, para.3

²⁰ Id, para.2

²¹ Id, para.20

²² U.N. General Assembly, The Human right to Water and Sanitation, Resolution Adopted by the General Assembly, 3 August 2010, A/RES/64/292, Sixty-Fourth Session Agenda Item 48

²³ Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, Resolution adopted by Human Rights Council,6 October 2010, A/HRC/RES/15/9 , Fifteenth Session Agenda item 3

right to water as a human right. The General Assembly resolution was adopted by a vote 122 states in favor, 41 abstentions and none against it. The Human Rights Council resolution on the other hand was adopted by consensus.

Here one may ask what is the benefit of a human right framework or right- based approach for ensuring access to safe water? A right-based approach integrates the norms, standards and principles of the international human rights system in to the plans, policies and process of development.²⁴ Approaching access to water from a human rights perspective is the best method for a number of reasons. First, human rights do not leave the provision of water to state's discretion as charity.²⁵ They rather give individual a legal entitlement. Under human rights regime states will have a legally binding obligation to achieve concrete standards set by human rights law. As such "it identifies the right holders and their entitlements, and the corresponding duty bearers and their obligations, and works to strengthen the capacity of duty bearers to comply with their obligations to respect, protect and fulfill rights and of the right holders to claim and exercise their rights."²⁶

Second, human rights approach aims at ensuring minimal access of water to all people instead of targeting a percentage of the population without access before. It also ensures physical accessibility, sufficiency, affordability and quality of water.²⁷ Third, a human right framework incorporates accountability which is essential to ensure universal access to water. Accountability provides the forum for monitoring, complaint mechanism and redresses state violation or failures to deliver the services.²⁸

Although the recognition of the right to water at the international level is crucial, the actual implementation of the right is to a large extent is contingent upon national legal framework, guaranteed by constitutional and statutory provisions.²⁹ On the basis of these laws appropriate polices, strategies and action plans should be designed so as to ensure the realization of the right. In this regard, one of the core obligations of states emanating from the right to water is that states

²⁴ E.F. Wilson, "The Human Right Based Approach to Development: The Right to Water" Netherlands Quarterly of Human Rights vol. 22. no.2 (2005) p.215

²⁵ C.D. Albuquerque, cited above at note 4, p. 106

²⁶ *ibid*

²⁷ CESCR, cited above at note 18, para.12

²⁸ C.D. Albuquerque, cited above at note 4,p.32

²⁹ *Id*, p.51

are required to ensure that existing legislation, strategies and policies are compatible with obligations arising from the right to water.³⁰ They are also obliged to adopt national water policy, strategy and plan of action based on human rights law and principles.

Ethiopia has acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on September 1993. Consequently, the country has accepted obligation to take legislative and other measures to ensure the full realization of the rights in the covenant progressively one of which is the right to water. However, Ethiopia is one of the 41 nations which abstained in the 2010 United Nations General Assembly resolution that recognized the right to water and sanitation as a human right. The FDRE constitution also explicitly places water under national policy and principles. It says polices shall aim to provide all people with access to clean water.³¹

The abstinence of Ethiopia to General Assembly resolution recognizing right to water and the placement of water under policy principles may raise a doubt as to whether the Ethiopia considers the right to water as a human right. However, this doubt could easily be cleared by looking at the statement of the Ethiopian representative at the General Assembly and the careful reading of the provisions of the constitution. Accordingly, the Ethiopian representative to the General Assembly affirmed that water is a natural right.³² The concern on Ethiopia's part was voting in favor of the resolution might restrict its sovereign right to use its water resources.

But in the view of the author, Ethiopia's fear that its recognition of the right to water at the General Assembly resolution would reduce the country's share in the utilization of its international rivers like Nile is unreasonable or unfounded. The reason for this is that, the type of water use that is within the ambit of the right to water is only for personal and domestic purposes such as drinking, cooking and sanitation. And the amount of water required for these purposes is very small and rarely cause disagreement among states since life depends upon it.³³

Apart from this, if Nile basin countries require additional water to meet the personal and

³⁰ CESCR, cited above at note 18, para.37

³¹ Constitution of the Federal Democratic Republic of Ethiopia(hereinafter FDRE Cons.),1994, Art.90(1), Proclamation No.1/1995

³² Public information, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as a Human Rights (<http://www.un.org.News/Press/docs/2010/ga100967.htm>) last visited on 30 August, 2013

³³ Tadesse Kassa Woldetsadik, International Watercourses Law in the Nile Basin Three States at a Crossroads, (2013), p.259

domestic needs of their population, what they should do is reallocate their own share of water among different uses by giving priority for domestic purposes instead of demanding more water from Ethiopia.

Furthermore, Ethiopia's recognition of the right to water at General Assembly only reiterates the already established principle of the UN Water Course Convention, which provides that unless agreed otherwise conflicts among different water uses of an international watercourse should be resolved by giving special consideration for vital human needs³⁴ i.e. personal and domestic uses. The Nile cooperative framework signed among Nile basin countries also repeats this principle as it states 'water utilization in the basin should give priority to its most economic use, taking into account the satisfaction of basic needs and the safeguarding of eco systems'.³⁵ So had Ethiopia voted in favor of the General Assembly Resolution that recognizes the right to water, the effect would only be acknowledging the already existing principles of sharing international water resources instead of restricting the countries right to use its shared water resources.

Similarly, a careful reading of art 9(4), 13(2), 41(3), (4), 85(1), 90(1) and other provisions of constitution shows that the right to water is implicitly and explicitly included in the substantive bill of rights and it has an equal status as any other right recognized by the constitution. So obligations arising from right to water such as issuing laws, policies and strategies for implementing the right to water is also applicable to Ethiopia. In this regard, Ethiopia has adopted a number of laws, policies, strategies and action plans pertaining to the water. Some of them include Water Resource Management Proclamation, Water Resource Management Regulation, Environment Pollution Control Proclamation, Ethiopian Civil Code, The Federal Democratic Republic of Ethiopia Criminal Code, Ethiopian Water Policy, Ethiopian Water Strategy, Ethiopian Water Sector Development program (WSDP) the Growth and Transformation Plan (GTP) and FDRE National Human Rights Action Plan(2013).³⁶

³⁴ Convention on the Law of the Non-Navigational Uses of International Watercourses, Opened for signature 21 May 1997, UN Doc A/51/869 (not yet in force) art.10(2)

³⁵ Tadesse, cited above at note 33, p.260

³⁶ Ethiopian Water Resources Management Proclamation, 2000, Proc. No.197. Fed.Neg.Gaz. year 6 no.25, Ethiopian Water Resource Management Regulation, 2005, Council of Ministers Regulation No.115, Fed.Neg.Gaz year.11, no.27 Environmental Pollution Control Proclamation, 2002, Proclamation no.300, Fed.Neg.Gaz year.9,no.12 Civil Code of the Empire of Ethiopia, 1960, Proclamation No. 165, Neg.Gaz Extraordinary Issue No.2 year.19 no.2, FDRE Ministry of Water Resources, The Criminal Code of the Federal Democratic Republic of Ethiopia,2004, Proc.no.414, Fed.Neg.Gaz, FDRE Ministry of Water Resources, Ethiopian Water Management

But the issuing of laws policies alone does not guarantee the right to water for the right holder. The right to water could only realized when Ethiopia makes the right laws, polices, and strategies and ensure their proper implementation. In order to see the adequacy of these laws, policies and strategies they must be examined from the perspective of human right law and the practice. This research therefore examines the compatibility of existing Ethiopian laws, policies set to implement the right to water in Ethiopia and the current state of realization of the right in light of international human rights standards. As such, it sheds a light on how far has Ethiopia gone to implement its international obligations pertaining to the right to water on the ground.

1.2 STATEMENT OF THE PROBLEM

One of the targets set under The Millennium Development Goals (MDGs) - more specifically Goal 7- is to halve the portion of the people without sustainable access to clean water and sanitation by 2015. Attaining the target has been the major concern for many developed as well as developing countries. Ethiopia is no exception in this regard, as it has improved the overall clean water access from under 20% in 2000 to 68.5% in 2010 according to government figures.³⁷ Based on this figure the country is now a head of schedule to meet its official MDG 7 target of 70% accessibility by 2015.³⁸ But here it must be noted that, the above estimation of the government on the current state of water coverage was found to be erroneous when another study is conducted in 2011.³⁹ According to the new study the overall water coverage is not 68.5% but 52.1%. Similarly the water coverage urban area is not 91.5% but 74.6% and the rural water coverage is not 68.5% but 48.8%.⁴⁰ On the other hand, Joint Monitoring Progress report prepared by UNICEF and WHO estimates the country's progress from 29% in 2000 to 44% in 2010.⁴¹ If these Data of JMP is taken in to consideration Ethiopia will have a hard time even to meet the MDGs target on water.

Policy, (1999), Ethiopian Water Sector Strategy, (2001), FDRE Ministry of Water Resources, Water Sector Development Program Main Report, vol.1(2002), Ministry of Finance and Economic Development, Growth and Transformation Plan (GTP) 2010/11-2014/15, (2010) House of people Representatives, FDRE National Human rights Action Plan(2013)

³⁷ Ministry of Finance and Economic Development(hereinafter MOFED), Growth and Transformation Plan (GTP) 2010/11-2014/15, (2010), p.18

³⁸ J.Vidal, Ethiopia Posts a Big Gain in Access to Drinking Water, (<http://www.gurdian.co.uk/global-development/povrty-matters/2011/mar/04/clean-drinking-water-ethiopia>) last visited on 23, august 2012

³⁹ Ministry of Water, Irrigation and Energy , Water Supply and Sanitation Directorate 2005 Budget Year Progress Report of the Growth and Transformation Plan(Amharic), (2011)p.2

⁴⁰ ibid

⁴¹ WHO/UNICEF, cited above at note 5, p.43

Both figures of the Ethiopian government and that of the JMP indicate that Ethiopia has certainly made progress in expanding access to water, but still millions of Ethiopians are without access to this basic service. Concerning this, Water Aid Ethiopia estimates that out of the 85 million of Ethiopia's population 43.4 Million do not have access to safe water.⁴² This is shocking as the number of people without access to water is more than half of the total population. There is also a wide gap in access to water between the urban and rural population. According to government figures, the rural coverage of access to clean water stands at 48.8% compared with 74.6% in urban areas.⁴³ The disparity is even wider if we take a look at the JMP report, showing access to water in urban areas to be 97% compared to 34% access in rural areas in the year 2010. Here it must be noted that 85% of Ethiopia's population lives in rural areas. Apart from this, a recently released study by the UN Children Fund (UNICEF) shows that some 271,000 Ethiopian children under the age of five died in 2010 alone, with pneumonia and diarrheal causing more than one third of those deaths.⁴⁴ In a similar vein, a study conducted by Water Aid Ethiopia shows that each year 33,000 Ethiopian children die due to illness from unsafe water.⁴⁵ Furthermore, in 86% of Ethiopian rural households the task of water collection is assigned to women and children.⁴⁶ As such, they travel a long distances looking for water which is often contaminated. This in turn forces girl children to often miss, repeat classes and prevent them from going to school at all. All these facts show the magnitude of the problem in relation to access to water in Ethiopia and shows there is still a lot to be done.

As a result, Ethiopia's progress in increasing the access to safe water should be examined not only from the MDG's angle but also from a human rights perspective. Regarding this, Catarina de Albuquerque UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation stated that "the progress we have made might not seem so great once we have our

⁴² Water Aid Ethiopia, (<http://www.wateraid.org/where-we-work/page/ethiopia>), last visited 2 September 2013

⁴³ Ministry of Water, Irrigation and Energy, cited above at note 39, p.2

⁴⁴ IRIN, Safe Water a Glass Half Full, (<http://www.irinnews.org/Report.95737/ETHIOPIA-Safe-water-a-glass-half-full>), last visited on august 23,2012

⁴⁵ Water Aid, cited above at note 42

⁴⁶ In Ethiopia, Rural Women Improve their Lives, Befriending Budgets, (<http://www.unwomen.org/en/news/stories/2013/8/in-ethiopia-rural-women-improve-their-lives-befriending-budgets>) last visited 2 September 2013

human rights glass on. But with human right, we are painting a more honest picture of progress. We are getting closer to the reality and thus more able devise strategies to change it.”⁴⁷

The problem is that often there is a tendency on the part of states to take MDGs and human rights to mean one and the same thing. As such, they assume meeting the MDG target will relieve the state from its human rights obligations.⁴⁸ This assumption however is problematic since most of the MDG targets do not take in to consideration human rights principles. Accordingly, the aims of most of the targets are not to provide universal access to all but require states to ensure access for part of those without access.⁴⁹ With regard to water and sanitation for instance Goal 7 of the MDGs calls up on states to halve the percentage of the population deprived of access to water and sanitation by 2015. In addition to this, the MDGs targets do not address all elements of the right to water.⁵⁰ For instance, the MDG target for water does not say anything about the human right elements of water such as quality, affordability, participation, accountability and non-discrimination.

Moreover, the MDG’s failed to take into account the particular challenges vulnerable groups face in realizing their right to water. The focus of the MDG’s is rather on bringing improvement for the aggregate or the average instead of the vulnerable groups. Hence, it is possible for state to meet its MDG target for water without a single member of vulnerable group benefiting from it.⁵¹ Contrary to this, the human right to water incorporates the needs of vulnerable groups in realizing their right to water and it looks beyond the average. Furthermore, the accountability mechanism is for states under the MDG’s are less stringent than that of human rights. This is because the progress a state is making in meeting its MDG is largely monitored on the basis of the report it submits. Accordingly, if a state fails to achieve its target it will only be judged in the court of public opinion which is not that much effective.⁵² Conversely, the right to water held state to account before judicial and non-judicial means that are more effective.

⁴⁷ C.D. Albuquerque, cited above at note 4, p. 18

⁴⁸ C.D. Albuquerque, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation,(2010) P.5

⁴⁹ Id, p.6

⁵⁰ Id, p.10

⁵¹ M. Langford and I.T. Winkler, Quantifying Water and Sanitation in Development Cooperation: Power or Perversity? working paper series,(http://fxb.harvard.edu/wpcontent/uploads/sites/5/2013/09/Langford-and-Winkler_Final-Working-Paper-92413.pdf) last visited p.12, and C. D. Albuquerque , cited above at note 39,p.14

⁵² C.D. Albuquerque, cited above at note 48,p.19

This research therefore looks at Ethiopia's progress in realizing the right to water beyond the MDG's. Thus, it examines the compatibility of the existing Ethiopian legal and policy frameworks set to implement the right to water in Ethiopia and the prevailing practice in realizing the right to water, in light of the country's obligations under international and regional human rights instruments.

1.3 RESEARCH QUESTIONS

The following are some of the research questions the study tries to answer at the end:

- How does the right to water evolve at international, regional and national level?
- What are the normative contents and related state obligations of the right to water?
- What is the current state of realization of the right to water in Ethiopia?
- To what extent is the existing Ethiopian legal framework for implementing the right to water in Ethiopia compatible with the country's obligation under international and regional human rights instruments?
- To what extent is the existing Ethiopian policy framework for implementing the right to water in Ethiopia consistent with the country's obligation under international and regional human rights instruments?
- Which institutions undertake the responsibility of implementing Ethiopian laws and policies on the right to water?
- What are the responsibilities of other stakeholders in the implementation of the right to water in Ethiopia?

1.4 OBJECTIVE OF THE STUDY

1.4.1 OVERALL OBJECTIVE

The overall objective of this research is to examine the adequacy of existing Ethiopian legal and policy frameworks dealing with the right to water in light of human rights law standards and the practice, with the view of identifying the gaps so that every Ethiopian enjoys sufficient qualities of water that is affordable, accessible, acceptable and which is delivered in participatory, accountable and non-discriminatory manner.

1.4.2 SPECIFIC OBJECTIVES

Particularly, to appreciate the evolution of the right to water internationally and understand its normative content as well as the obligations of states clearly, the study aims to analyze treaties, UN Declarations, UN Resolutions, Human Rights Council Resolution and General Comments of the UN Committee on Economic Social and Cultural rights. At the regional level also, the study seeks to examine various African treaties, decision of the African Commission on Human and People's Right and documents issued by the African Commission on the Right to water. The study also aims to show best practices of model countries in implementing the right to water domestically by taking South Africa and India as examples.

This study also intends to evaluate the current state of realization of the right to water in Ethiopia by using the minimum core obligation of the right to water in relation to each aspect of the right as a benchmark. The study also seeks to determine whether the right to water is recognized in the FDRE Constitution and elaborate the normative content of the right to water in the constitution by analyzing its different provisions. Beside this, the study also aims to assess the compatibility of subsidiary legislation on water with the obligation Ethiopia assumed when ratifying international human rights instruments through comparison with international standards. The study also aims to indicate the possible avenues of remedies when the right to water is violated in Ethiopia.

Moreover, the study intends to determine to what extent the existing Ethiopian policy framework set to implement the right to water conforms to prescriptions under international instruments and indicate gaps in it. It accomplishes this purpose by examining the appropriateness of Ethiopian water policy, strategies, and action plans by using international and regional human rights standards as a benchmark. Finally, the study highlights the institutions responsible for the implementation of Ethiopian laws and policies by analyzing different proclamations and memorandum of understanding signed between them. It also aims to point out the responsibilities of other stake holders such as individuals, business, other states, media, and NGOs in the implementation of the right to water in Ethiopia.

1.5 METHDOLOGY

The study utilizes qualitative research method for data collection and analysis. It specifically relies on examining international human right instruments, General Comments of CESCR, UN General Assembly resolutions, Human Rights Council resolutions, international environmental laws, decision of the African Commission and documents issued by it, FDRE Constitution and other implementing legislation, Ethiopian water policy and strategy as well as plans dealing with the right to water. It also consults books, scholarly articles, and research papers for better understanding of the issue. Various internet sites will also be used for getting the relevant data and information. Moreover, the experience of other countries in implementing the right to water domestically will be reviewed to see if there is something that Ethiopia should learn from them.

1.6 SIGNIFICANCE OF THE STUDY

Most academic literatures written in the area of the human right to water have concentrated on the issue whether the right exists or not. However, it is rare to find literatures emphasizing on the domestic implementation of the right. This research is therefore significant as it contributes to the human rights discourse by showing how states are implementing or violating the right to water domestically. This would be accomplished by analyzing the existing Ethiopia's legal and policy framework dealing with the right to water as well as the current state of realization of the right from the perspective international human right principles and standards. As such, it fills gaps existing in the area.

Moreover, the research is also significant for right holder and the duty bearer government. For the right holders and those acting on their behalf, the study will create awareness by elaborating their rights incorporated in different legal and policy instruments. This will in turn help them to enforce their right and held the government accountable when it fails to take steps to realize their right or violates it. For the duty bearer government, it assists them to appreciate the gaps existing in the current Ethiopian laws, policies, strategies, plans and practices in realizing the right to water.

Furthermore, it would aid monitoring bodies, international organizations, donor governments and other stake holders to monitor Ethiopia's progress in realizing the human right to water so that they would enhance their support.

1.7 SCOPE AND LIMITATION OF THE STUDY

The study only examines laws, policies, strategies, programs and plans issued by the Federal government of Ethiopia on water and their implementation. The collection of data is also limited to Federal Government institutions. State constitutions, laws, policies, strategies and plans will not be discussed in the research in any depth due to time and financial limitation. The writer also chose to confine the scope of the study to Federal government since it assumes the primary responsibility of enacting laws and policies for implementing human rights domestically.

The major limitation that the study encountered is the absence of sufficient and updated data on the current state of realization of different aspects of the right to water in Ethiopia. Had such data been there it could have assisted in assessing the adequacy of existing laws, policies and action plans. Financial and time limitation to conduct the study is also a challenge.

1.8 ORGANIZATION OF THE STUDY

The thesis is arranged in seven chapters. Accordingly, the first chapter gives a general introduction and an overview of the study, which includes Background of the Study, Statement of the Problem, Research Questions, Objective of the Study, Research Methodology, Significance of the Study, Scope and Limitations of the study and Organization of the Study.

The second chapter analyzes the evolution of the right to water at international, regional and national level. Thus, it discusses the binding and non-binding international instruments that make reference to the right to water explicitly or implicitly. This chapter also analyzes different African treaties pertaining to the right to water. The chapter also discusses how the right to water evolved at national level by taking South Africa and India as an examples. The discussion held in this chapter lays the groundwork for evaluating Ethiopian laws, policies and practice in relation to the right to water since they are expected to be compatible with the obligation Ethiopia assumed under those international and regional human rights instruments.

The third chapter elaborates the normative content of the right to water as well as the obligation it imposes on states. Hence, it explains all elements of the human right to water including physical accessibility, affordability, quality, participation, non-discrimination and accountability. It also analyzes the obligation to respect, protect, promote and fulfill emanating from the human

right to water. Moreover, the application of the right to water to specific groups will also be discussed. Furthermore, the mechanisms for holding states accountable in relation to the right to water will also be dealt in this chapter.

The fourth chapter examines the current state of realization of the right to water in Ethiopia. As such, the current water potential of the country, financial resources allocated for the sector, physical accessibility, affordability and quality of water will be analyzed. The level of participation and accountability in relation to the right to water will also be discussed.

The fifth chapter examines the compatibility of Ethiopia's legal and policy framework with human right principles set forth in the right to water. It specifically analyzes FDRE constitution, Ethiopian Water Resource Management Proclamation, Ethiopian Water Resource Management Regulation, Ethiopian environmental laws as well as the Ethiopian Civil Code and FDRE Criminal Code.

The sixth chapter analyzes the adequacy Ethiopian policy framework for realizing the right to water. As such, it specifically examines Water Policy of Ethiopia, Ethiopian Water Sector Strategy, Water Sector Development Program, the Growth and Transformation Plan and FDRE National Human Rights Action Plan. It also discusses the respective role institutions responsible for implementation of laws and policies in relation to the right to water and the role of other stake holders.

The final chapter contains general conclusions, recommendations and questions for further research that help to make the existing practice, legal and policy frameworks on water compatible with human rights law and principles.

CHAPTER TWO

THE EVOLUTION OF THE RIGHT TO WATER

Introduction

The discussion over how a right came in to existence in international and regional human rights instruments, its normative content and the kinds of obligations it impose upon states, is inescapable when analyzing the adequacy of legal and policy frameworks countries put in place to implement the right domestically. Since, the ratification of international instruments by any state including Ethiopia entails the *good faith* obligation of ensuring the conformity of its existing laws, policies and practices with its international obligations.¹ If the state fails to do so the stipulations in those instruments would directly apply to the extent of inconsistency.²

Such discussion is particularly relevant to the right to water. This is because, unlike other human rights it is not easy to locate the right to water and see its normative content easily, due to the absence of its explicit mention in major human rights treaties. This fact has even led some scholars to adamantly argue that the right to water does not exist in international human rights law.³ So, this chapter reasserts the existence of the right to water by examining its evolution at International, African and National level. As such, it shows that the right to water is part and parcel of international and regional human rights instruments that Ethiopia is state party. It also analyzes how the right evolved at national level by referring to countries reputed for adopting model laws and policies for implementing the right to water domestically, to see if there is something Ethiopia could learn from them.

In the discussion, although Binding instruments are obviously more important than non-binding ones, the author preferred to discuss non-binding instruments in first place for two main reasons. The first is that when one tries to trace the evolution of the right to water, the approach of treating water as a human right was first emerged in non-binding instruments. The second is that, due to the absence of explicit reference of the right to water in main human rights treaties, non-

¹ Takele, Soboka, "The Monist- Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia", *Journal of Ethiopian Law* , vol.23, no.1 (2009), p.141-142

² Id, p.146

³ S. Tully, "A Human Right to Access Water? A Critique of General Comment no.15" *Netherlands Quarterly of Human Rights*, vol.23 no.1 (2006)p.37

binding instruments such as General Comment's and resolutions have played a crucial role in explicating the latent content of treaties in relation to right to water.

Accordingly, the chapter examines the evolution of the right to water at international, African and national level. The discussion on the evolution of the right to water at international level discusses non-binding and binding instruments pertaining to the right to water. On the other hand, the discussion on the evolution of the right to water in Africa discusses major African treaties as well as the decisions and documents issued by the African Commission in relation to the right to water. Finally, the chapter highlights the evolution of the right to water at national level by taking two model countries, South Africa and India as an example.

2.1 EVOLUTION OF THE RIGHT TO WATER AT INTERNATIONAL LEVEL

The right to water before it acquired the meaning it has today has evolved through a slow process that started in 1970s. Until this period most international instruments were silent about water access and conservation.⁴ It was in this period that the international community began to pay an increasing attention to the challenges facing the world water resources as well as finding the possible solutions for these problems.⁵ The contribution of this period to the recognition of the right to water is also noted by Rebecca Bates. She argues that, the developments in this period had a great impact for the recognition of the right to water as they show the acknowledgement by the world community of the importance of water for human survival, health and overall wellbeing.⁶ Malcolm Langford, describe the world water problems of that period as 'world water crises' composed of depletion of fresh water resources, disparities in access to drinking water and the urge for the privatization of water resources and services.⁷ He thus argues that the human right to water evolved in response to addressing these challenges. This chapter therefore, attempts to briefly discuss the evolution of the human right to water from its early beginning in 1970s up to the present day.

⁴ S. M. A. Salman and S. M. Lankford, The Human Right to Water: Legal and Policy Dimensions (2004), p.8

⁵ *ibid*

⁶ R. Bates, "The Road to the Well : An Evaluation of the Customary Right to Water", Review of European Community and International Environmental law, vol.19.no.3 (2010),p.285

⁷ M. Langford, Tragedy or Triumph of the Commons? Human Rights and the World Water Crises, available at <http://www.monash.edu.au/castancentre/events/2006/cont.06-langford-paper.html>) last visited on December 28, 2013

2.1.1 NON-BINDING INSTRUMENTS

By non-binding instruments the writer is referring to Declarations, Resolutions and General Comments. The common characteristic of these instruments is that they do not create a legally binding obligation on states.⁸ In spite of this common attributes they do not mean one and the same thing. Declarations and Resolutions are basically documents that demonstrate political commitments on the part of states without entailing obligations on them for voting or signing.⁹ On the other hand, General Comments, including those relating to the right to water, are interpretations of the UN treaty monitoring bodies with the objective of clarifying a particular right incorporated in a treaty. The interpretation of these bodies is considered as an authoritative though non-binding.¹⁰

With regard to non-binding instruments Takele concedes that, the main problem with them is their lack of legal enforceability.¹¹ This does not however mean that they have no role whatsoever in the development of international law. As such Takele argues, as time goes by non-binding instruments could trigger the formation of customary international law and inform the creation of binding treaties.¹² Non-binding instruments could also provide states with the opportunity to assess the positive and negative implications that could arise from new challenges such as realizing the right to water before they enter in to binding commitments which they could not ignore easily.¹³ It is with this rationale that this section discusses the role of selected non-binding instruments in the evolution of the right to water.

2.1.1.1 THE MAR DEL PLATA ACTION PLAN 1977

The Mar del Plata action plan was the outcome of the UN Water Conference convened at Mar del Plata Argentina from March 14-25, 1977. The main agenda of the conference was to take an immediate measure that aimed at resolving the increasing water crisis the world was facing and

⁸ Center on Housing Rights and Evictions, Legal Resources for The Right to Water and Sanitation: International and National Standards (2008),p.21

⁹ *ibid*

¹⁰ *ibid*

¹¹ Takele Soboka, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery," Melbourne Journal of International Law, vol. 12 (2011), P.310

¹² *ibid*

¹³ *Id*,p.311

to look for appropriate mechanisms for ensuring effective and efficient utilization of finite water resources of the earth.¹⁴ Representatives from 116 states as well as 96 international organizations, inter-governmental and non-governmental organizations were present in the meeting. The action plan represents international consensus on policy and operational measures.¹⁵

A number of resolutions and recommendations were incorporated in the Mar del Plata action plan addressing different issues. Among them Resolution II dealing with community water supply was the most important in relation to the right to water. It says “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs”.¹⁶ According to Salman and Lankford, this resolution is considered as one of the milestones in the recognition of the right to water as it explicitly declared for the first time water as a human right.¹⁷ Here it may be argued since the Resolution refers to people’s right to water instead of individuals it is difficult to consider it as a human right which is primarily about individual’s right. On this issue Winkler argues that, the term ‘basic needs’ implies that the right is about individuals.¹⁸ Moreover, the statement in the Resolution which emphasizes the importance of water for human survival and development both as an individual and as a part of the community shows that the right has both a collective and individual aspects.

In order to achieve improvement in water access and quality, the action plan acknowledges that unless there exists cooperation among states it would be impossible to address these challenges effectively.¹⁹ Thus, it called up on states to mobilize the necessary human, material and financial resources. Finally, the action plan designated the decade 1980-1990 the International Drinking Water Supply and Sanitation Decade in which states made commitment to step up their effort in addressing water and sanitation problems.²⁰

¹⁴ M. Falkenmark, “UN Water Conference: Agreement on Goals and Action Plan”, *Ambio*, vol. 6, no. 4 (1977)

¹⁵ *ibid*

¹⁶ *Id*, p.25

¹⁷ Salman and Lankford, cited above at note 4, p.9

¹⁸ I.T. Winkler, The Human right to Water Significance , Legal Status and Implications for Water Allocation, (2012), p.82

¹⁹ Malin, cited above at note 14,p.225

²⁰ *id*,P.222

2.1.1.2 THE RIO DECLARATION, UN RESOLUTION ON THE RIGHT TO DEVELOPMENT AND MILLENNIUM DEVELOPMENT GOALS (MDGs)

The approach of treating water from a human rights perspective continued in subsequent UN conferences following the Mar del Plata action plan. Accordingly, agenda 21 of the 1992 UN Conference on Environment and Development convened at Rio, reiterated Mar del Plata action plans stipulations of people's right to water.²¹ Similarly, the UN Resolution on the Right to Development which was adopted in 2000, provided that access to clean water is a fundamental human right and part and parcel of the Right to Development.²² In the same year, the UN Millennium Declaration was adopted by the General Assembly. The primary objective of the Declaration was poverty reduction.²³ With the objective of monitoring states progress in this regard the Declaration set 8 main goals. One of the goals set by the Declaration i.e. goal 7 (c) was a commitment on the part of states to reduce the number of people without access to clean water by half until 2015.²⁴ Although, MDGs fail to fully incorporate the right to water, the goal on water shows the increasing attention given to water.

2.1.1.3 GENERAL COMMENT 15 OF CESCR

As stated in the beginning of this chapter General Comment is an interpretation of treaty monitoring bodies of rights incorporated in treaties. Typical of this is General Comment 15 dealing with the right to water issued by the UN Committee on Economic Social Cultural Right (CESCR) which was put in place to monitor the implementation of International Covenant on Economic Social and Cultural Rights. Unlike most treaty bodies this Committee was established by the Economic Social Council (ECOSOC) Resolution in 1985 long after the adoption of the ICESCR in 1966.²⁵ Initially its mandate was limited to examining state reports and making recommendations. But latter 1987 the ECOSOC invited the Committee to issue General Comments and the General Assembly endorsed it.²⁶ The Committee issued its first General

²¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21, Chapter 18

²² U.N. General Assembly, The Right to Development, Resolution Adopted by the General Assembly, February 2000, A/RES/54/175 15 Fifty-Fourth Session Agenda Item 116 (b) para.12

²³ id, para.11,12,15,20,27,28,29

²⁴ U.N. General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly , 18 September 2000, A/RES/55/2, Fifty-Fifth Session Agenda Item 60 (b)

²⁵ Salman and Lankford, cited above at note 4, p.33

²⁶ Id, p.46

Comment in 1989 and up to 2013 it has issued 21 General Comments on different issues related to the implementation of the ICESCR.²⁷

In issuing General Comments the committee accomplishes a number of important purposes. First, since General Comments are issued after examining different state reports, the Committees will make available the best experience of states in the implementation of the covenant in the form of General Comment so that other states could learn from it.²⁸ Second, General Comments will also indicate areas where states have shown deficiency or weakness in the implementation of the covenant.²⁹ This will enable states to know the area of their weakness and motivate them to step up their effort to improve the deficiency. Third, General Comments play a very crucial role in providing normative clarity. This purpose is very essential particularly with socio economic rights one of which is the right to water. Concerning this, Alston argues one of the distinctive feature of the ICESCR is its vagueness compared to other instruments.³⁰ He argues General Comments of the CESCRC could play essential role in minimizing the vagueness of the covenant.

Though General Comments have purposes stated above they still remain non-binding. This does not however mean that they don't have any legal or political value. In this regard, Winkler argues that, General Comments carry with them a substantial legal weight for the following reasons. First, the CESCRC is the sole body that is officially entrusted with the power of interpreting the ICESCR and issuing General Comments.³¹ This makes its interpretation an authoritative one. Second, when one looks at the composition of the Committee members, they are reputed experts well versed with the jurisprudence of socio-economic rights.³² This also gives an additional weight for their interpretation of the covenant. Third, there exists a wide acceptance on the part of states General Comments issued by the Committee.³³ It's very uncommon to find complaints made against the Committee for issuing General Comments which furthers demonstrates the consideration by states that its interpretations are authoritative. This is important as it indicates

²⁷ Office of High Commissioner for Human Rights, Committee On Economic Social and Cultural Rights- GENERAL Comments, (<http://www2.ohchr.org/english/bodies/cescr/comments.htm>) Last visited on August 29, 2013

²⁸ Salman and Lankford, cited above at note 4, p.46

²⁹ *ibid*

³⁰ P. Alston, "Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights", Human Rights Quarterly, vol. 9, no. 3 (1987)

³¹ Winkler, Cited above at note 18, p.40

³² *ibid*

³³ *id*, p.41

tacit acceptance on the part of states of rights uncovered or elaborated by the CESCR as part and parcel of the ICESCR. Here, it could be argued that in light of the fact that General Comments are non-binding; states failure to oppose them should not be given too much weight. Since, states may keep silent to the Comments not out of approval rather for not taking them seriously. But in the view of the author, states silence to the Committees General Comments should not also be viewed lightly, since the stipulations of the Comment may overtime evolve into customary international law. Consequently, a state that fails to oppose the General Comments of the Committee may find it difficult to refuse compliance with the prescriptions of the Comment once it achieved the status of customary international law. Fourth, the Committee in the course of preparing General Comments consults and receives views from different stakeholders such as the NGO's, UN agencies with the view of ensuring the wide acceptance of its General Comments. Since General Comments are adopted in such a way any interpretation contrary to that of the Committees would find it challenging to find acceptance.³⁴

This being said regarding the CESCR and its General Comments in general, let us discuss General Comment 15 of the CESCR on the right to water which is the main concern of this section. General Comment 15 is considered as a milestone in the evolution of the human right to water as it for the first time defined the right to water as entitling everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.³⁵ Here it is important to note that there is no explicit mention of the right to water in the ICESCR. This may raise the question on how did then the Committee manage to locate the right to water in the Covenant if it is not mentioned explicitly as its mandate is limited to elaborating a right that exists in the covenant instead of creating one? The interpretation of the Committee with this respect was very creative. It managed to locate the right to water as implicit components of the explicitly guaranteed rights to adequate standard of living article 11 of the ICESCR and the right to health article 12 of the ICESCR.³⁶

³⁴ *ibid*

³⁵ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.2

³⁶ *Id.* para.3

In locating the right to water under the right to adequate standard of living the Committee relied on the term ‘including’.³⁷ The Committee argued that the term ‘including’ indicates that the list of right forming adequate standard of living is an illustrative one rather than being exhaustive. This means it is possible to add other rights under adequate standard of living so long as they are as essential as the rights stated in the article such as food, clothing and housing. In the Committees view, the right to water is comparable to the rights explicitly stated under article 11 in terms of importance if not more important than them. So the right to water deserves a place as a component of the right to adequate standard of living. On the other hand, in deriving the right to water from the right to health the Committee emphasized on the inextricable linkage that exists between the right to water and the right to health, since it would be impossible to imagine the realization of the right to health without clean and sufficient water.³⁸

The creative interpretation of the Committee resulted reaction of both criticisms and blessings from different scholars. To begin with criticisms, they mainly focus on how should the term ‘including’ which the CESCR relied on for locating the right to water under art 11 is interpreted and the very authority of the Committee to do so. Among the critics, Stephen Tully is the prominent one. He begins his attack on the Committees interpretative approach by arguing that the Committee should have followed a restrictive interpretation of the vague term ‘including’.³⁹ His fear was that unless the Committee follows a restrictive approach it may open the flood gate for endless number of rights essential for adequate standard of living but not explicitly guaranteed by the covenant. As example of such rights he mentions access to postal services and access to the internet.⁴⁰

Additionally, Tully accuses the Committee of exceeding its power and engaging in the task of revising the ICESCR.⁴¹ Regarding this, he argues the mandate of the Committee is confined to elaborating rights explicitly guaranteed by the covenant. The Committee in his view created a new right to water that is not explicitly recognized by the covenant in the name of interpretation and it is tantamount to revision of the covenant. On this issue Tully, argues if there is a need to incorporate the right to water in the ICESCR it should be done by states following the

³⁷ *ibid*

³⁸ *ibid*

³⁹ Tully, cited above at note 3, p.37

⁴⁰ *ibid*

⁴¹ *ibid*

amendment procedure under article 29 of the ICESCR.⁴² Furthermore, he asserts that if one looks at the *travaux preparatoires* of the covenant the right to water is deliberately excluded by the drafters of the ICESCR on the assumption that it is as essential as air obviating the need for official recognition.⁴³ Stephen McCaffrey also shares Tully's view in this regard.⁴⁴

On the other hand, the Committee's interpretative approach has received wide support among other scholars. These scholars basically provide counter arguments in response to the arguments of Tully explained above. To start with Takele, though he agree with Tully regarding the vagueness of the term 'including', he contends that the usage of the term is common in the international and regional law making since it is hardly possible to exhaustively list each and every circumstance to be regulated.⁴⁵ The inclusion of such vague terms is rather positive since they give the opportunity to incorporate emerging rights such as the right to water without the need to amend the convention every time. In his view the very purpose of incorporating the term including is to allow the addition of new rights that are as essential as those explicitly listed.⁴⁶

He also dismisses Tully's allegation that the Committee revised the covenant and created a novel a right. In his view the mere fact that a right is not explicitly stated in a treaty does not mean that it does not exist at all. A right rather has both explicit and latent contents. And the task of uncovering latent content of a right is the proper province of treaty monitoring bodies. So what the Committee did was to discover the already pre-existing right to water instead of inventing it.⁴⁷

Likewise, Langford belittles Tully's fear that broad interpretation of the term 'including' might entail the endless list of new rights under the right to adequate standard of living such as right to the access internet as unrealistic.⁴⁸ This is because the committee was very cautious in selecting the right to water and it did so after considering that the right is as fundamental as other rights listed there. So, comparing right to water with the right to access internet is not reasonable on

⁴² *ibid*

⁴³ *ibid*

⁴⁴ S. McCaffrey, "The Human Right to water" in E.D Weiss, L.B Chazournes and N.B Osterwalder(ed.), Fresh water and international economic law (2005),p.94

⁴⁵ Takele, cited above at note 11, p.301

⁴⁶ *ibid*

⁴⁷ *Id*, p.108

⁴⁸ M.Langford, "Ambition that Overleaps Itself? A Response to Stephen Tully Critique of General Comment 15 on the Right to Water" Netherlands Human Rights Quarterly, vol.24 no.3 (2006), p.437

Tully's part. Takele also concurs with Langford on this issue.⁴⁹ Furthermore, Langford dismisses Tully's assertion that the *travaux preparatoires* of the ICESCR indicate deliberate omission of the right to water from the covenant.⁵⁰ On this issue, Langford argues based on Vienna Convention on the Law of Treaties *travaux preparatoires* sit at the lower rank of interpretive tools and they are insignificant as such.⁵¹ Even if we consider the *travaux preparatoires* of the ICESCR the right to water is neither raised nor discussed in the drafting process of the covenant. This however in no way indicates that the drafters rejected the right to water rather they simply failed to discuss it.⁵²

2.1.1.4 THE HUMAN RIGHT TO WATER AND SANITATION, UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 64/292 OF 2010

Following the issuance of General Comment No. 15 in 2002, efforts aimed at enhancing the promotion of the right to water continued. In 2005, the UN Sub Commission for the Promotion and Protection of Human Rights adopted a draft guideline for the realization of the right to safe drinking water and sanitation.⁵³ The purpose of this guideline was to assist governments, policy makers and international agencies and civil societies in the implementation of the right to water and sanitation.⁵⁴ Three years later in 2008 the UN Human Right Council the main UN organ responsible for human rights appointed the Portuguese lawyer Ms Catarina Albaroque as independent expert on issues relating to human right obligations to access safe drinking water and sanitation for three years.⁵⁵ The primary mandate of the independent expert was to elaborate the content of the right to water and sanitation. According to McGraw, this appointment by the Human Rights Council triggered what called the "Geneva process" in which the independent expert and the Human Rights Council started to work together to further clarify the content and the legal basis for the right to water.⁵⁶

⁴⁹ Takele, cited above at note 11, p.300-301

⁵⁰ Langford, cited above at note 48, p.440

⁵¹ *Id.*, p.439

⁵² Takele Soboka Bulto, *The Extraterritorial Application of the Human right to Water in Africa*, (2013),p.41

⁵³ U. N. Sub-Commission on the Promotion and Protection of Human Rights, Res. 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation, 58th Sess., Aug. 7-25, 2006, U.N. Doc. A/HRC/2/2-A/HRC/Sub.1/58/36, (2006)

⁵⁴ *Ibid.*, p.2

⁵⁵ G. S. McGraw, "Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence", *Loyola University Chicago International Law Review*, vol.6 no.2 (2011),p.118

⁵⁶ *ibid.*

In the aftermath of these developments, the UN General Assembly adopted resolution 64/292 in 2010 that explicitly recognizes safe and clean drinking water and sanitation as a human right. The resolution was initiated by Bolivia and it was the United States of America that called for vote on the resolution.⁵⁷ Some 122 states voted in favor and none against, while 41 states abstained and 21 states were absent during the vote. Different reasons were given by states that abstained during the vote.⁵⁸ Countries including Turkey, Botswana, Netherlands and Canada argued that since the issue is being discussed by the Human Rights Council the decision by the General Assembly might bias the process and it's a premature one.⁵⁹ Others including United States of America argued the process of adopting the resolution lacked transparency and they were not given adequate time to assess the implication of the resolution.⁶⁰ Countries like the UK on the other hand asserted that they recognize the right to water as a component of the right to adequate standard of living rather than as a standalone right.⁶¹ Still other water rich countries including Ethiopia thought that recognizing the right to water would entail an obligation on their part to provide water for water poor countries depriving their right to control their own natural resources.⁶² In this regard, during the voting process the Ethiopian Representative said that "although access to clean water was a natural right. States had the sovereign right to their own natural resources, according to the United Nations Charter, and that principle should have been included in the text".⁶³

These being the main arguments of abstaining countries, the independent expert on the right to water and sanitation addressed the resolution as 'landmark' in the evolution of the right to water.⁶⁴ Several reasons could be mentioned for such reference. First, no state voted against the resolution.⁶⁵ This indicates that there is a general consensus on the existence of the right to water among states. Second, the resolution did not create a new right afresh rather acknowledged its

⁵⁷ Public information, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as a Human Rights (<http://www.un.org/News/Press/docs/2010/ga100967.htm>) last visited on 30 August, 2013

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *ibid*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ Office of High Commissioner for Human Rights, UN United to Make the Right to Water and Sanitation Legally Binding, at(<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>), last visited 2 September 2013

⁶⁵ Winkler, Cited above at note 18, p.78

existence. In this regard, Inga argues recognition by the General Assembly shows its position that the right to water is a preexisting right under international law.⁶⁶

2.1.1.5 THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION, HUMAN RIGHTS COUNCIL RESOLUTION 15/9 OF 2010

Subsequent to the UN General Assembly Resolution, the UN Human Right Council which is the highest ranking organ on human rights within the UN system adopted Resolution 15/9 in September 2010 reiterating the earlier recognition of water and sanitation as a human right by the General Assembly.⁶⁷ Compared to the General Assembly resolution, the Human Rights Council resolution has shown lots of progress. Unlike the General Assembly Resolution, no state called for vote on the resolution and it was adopted by consensus.⁶⁸ The fact that the Resolution was adopted by consensus adds a lot of weight to the further recognition of the right to water. In addition to this, apart from recognizing the pre-existence of the right to water the General Assembly resolution was silent the legal basis for it. This gap in the General Assembly resolution was remedied by the Human Rights Council resolution as it clearly stated the right to water as a component of the right to adequate standard of living and acknowledged its inextricable linkage with the rights such as right to health, dignity and life clearly stipulated in a number of human rights treaties to be discussed in the next section.⁶⁹ The implication of the Human Rights Council resolution is that since the right to safe drinking water and sanitation is incorporated in legally binding treaties and is legally binding.

In conclusion, although the resolutions issued by the General Assembly and the Human Rights Council could be considered as benchmarks in the evolution of the right to water for the reasons discussed above it does not mean that they are free from any drawback. One of the problems with these two resolutions is that they narrowed the type of uses that the right to water entitles a person.⁷⁰ As we have seen in our earlier discussion General Comment 15 of CESCR recognizes both drinking water as well as water use for personal and domestic purposes such as cooking and

⁶⁶ Id.p.79

⁶⁷ Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, Resolution adopted by Human Rights Council,6 October 2010, A/HRC/RES/15/9 , Fifteenth Session Agenda item 3

⁶⁸ WASH United, Freshwater Action Network (FAN Global), WaterLex, The Human Right to Safe Drinking Water and Sanitation in Law and Policy - A Sourcebook (WASH United, Freshwater Action Network (FAN Global), p.15

⁶⁹ Vienna Convention on the Law of Treaties(1969), Adopted on 22 May 1969, art.18

⁷⁰ P. Gerber and B. Chen, "Recognition of the Human Right to Water: Has the Tide Turned?" Alternative Law Journal, vol.36, no.1 (2011) p.24

hygiene. The two resolutions on the contrary seem to limit the right to water only for drinking purposes and this is a step backward compared to what is stated in General Comment 15. This deviation could be attributable to the need to bring about a broad consensus among states. But in the writers view the Resolutions should have been consistent with General Comment 15.

2.1.2 BINDING INSTRUMENTS

By binding instruments the writer is referring to treaties also known as covenants and conventions. Treaties unlike Declarations, General Comments and Resolutions, create a legally binding obligation for state parties that ratified or acceded to them.⁷¹ With regard to states that have signed a certain treaty but yet to ratify it they will not be compelled to enforce the treaty. But they are obliged to refrain from engaging in activities that defeats the object and purpose of the treaty they signed.⁷² This being said as introductory remarks on the meaning of treaties in general let us see the role of treaties in the evolution of the right to water. As stated in the beginning of the paper, only few treaties explicitly talk about the right to water. To borrow Takeles word a human right treaty that explicitly mentions the right to water is an exception than the rule.⁷³ This however, does not mean that the right to water is absent from the implicit terms of the treaty. In this section therefore, treaties that explicitly or implicitly incorporate the right to water are analyzed.

2.1.2.1 EXPLICIT

Explicit reference to the right to water exists in three international human rights treaties i.e. Convention on the Elimination of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and Convention on the Rights of Persons with Disabilities (CRPD). Similarly, the main treaties in international humanitarian law i.e. the Geneva Conventions of 1949 as well as its optional protocols explicitly mention water. In international water law also the Convention on the Law of Non-Navigational Uses of International Water Courses explicitly recognize the right to water.

⁷¹ Center on Housing Rights and Evictions, cited above at note 5, p.20

⁷² *ibid*

⁷³ Takele, cited above at note 11, p.296

2.1.2.1.1 CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN(CEDAW)

The CEDAW adopted in 1979, was the first universal human rights treaty that explicitly mentions water. It addresses the right to water in the context of non-discrimination. As such, article 14(2) of the convention imposes obligation on state parties to take the necessary measures aimed at eliminating discrimination against rural women and ensuring the enjoyment adequate living conditions including water supply. Through this provision the convention took note of the particular challenge rural women face in collecting water. This is very important since in many rural societies the task of collecting water was assigned to women and they spend considerable amount of time on it that prevents them from engaging in education and other activities. Although the explicit recognition of water in the CEDAW was positive development it is far from being comprehensive as it guarantee the right to water only for rural women.⁷⁴ The provision is also a vague one as it fail to clearly stipulate the amount of water to be supplied, its quality, whether they would get it for free or at affordable cost and how far they should travel to access water.

2.1.2.1.2 CONVENTION ON THE RIGHT OF THE CHILD (CRC)

The Convention on the Right to the Child was the most universally ratified human rights treaty up to date with 194 state parties.⁷⁵ It came in to force in 1990. Only two states i.e. United States of America and Somalia failed to ratify the instrument. The CRC also explicitly refer to the right to water in the context of the right to health. Accordingly, article 24(2) of the convention provides that states have the duty to prevent diseases and fight malnutrition “through the provision of adequate nutritious foods and clean drinking-water”. The beneficiaries of the instrument are persons below the age of eighteen years and it obviously exclude adults from its ambit. Moreover, the convention talks about only one element of the right to water i.e. water quality.⁷⁶ It is silent about other components of the right to water such as availability.

⁷⁴ K. Tetzlaff, “Towards a Global Convention on the Right to Water?” New Zealand Postgraduate Law e-Journal, Issue.2, (2005),p.9

⁷⁵Convention on the Right of the Child-UNTC, available at http://www.treaties.un.org/pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en last visited December 29, 2013

⁷⁶ Takele, cited above at note 11, p.297

Furthermore, the convention talks about water in terms of state obligations or duties instead of using the rights language.

2.1.2.1.3 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

This convention is the most recent human rights treaty with unequivocal acknowledgement of the right to water in its provision. The convention was adopted in 2006 and came to force in 2008. Like that of the CEDAW the right to water is recognized in the context of adequate standard of living and eliminating discrimination against persons with disabilities. Article 28 of the convention provides that states have the duty to “ensure equal access by persons with disabilities to clean water services and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs”.⁷⁷ Compared to its predecessors this treaty is more comprehensive as it incorporates different elements of the right to water. For instance, the treaty provides that water must not only be safe and to the needed amount. But it must also be affordable. Any amount of clean water is meaningless if the people could not afford it for lack of means. So the incorporation of water affordability by the CRPD is a positive development. Besides, the convention also emphasizes on the need for water service providers to take in to account the need of persons with disabilities in accessing water which is also a good progress.

2.1.2.1.4 GENEVA CONVENTIONS AND ITS ADDITIONAL PROTOCOLS

In the same way as the human rights treaties discussed above, the Geneva conventions and their additional protocols constituting the core of international humanitarian law also make explicit reference to water. Although their primary purpose is the alleviation of human suffering by regulating the conduct of war and protecting persons who are not taking part in hostilities like civilians and medical personnel’s as well as persons who no longer take part in hostilities such as the wounded, sick and prisoners of war, they have a lot in common with human rights law.⁷⁸

⁷⁷ Convention on the Rights of Persons with Disabilities and Optional Protocol. UN Doc A/61/611 of 2006, entered into force on 3 May 2008

⁷⁸ ICRC, What is International Humanitarian Law? (http://www.icrc.org/eng/resources/documents/legal-factsheet/humanitarian-law_factsheet.htm) last visited 31 August 2013

Concerning this, Winkler argues the two bodies of laws share common purposes as they strive ‘to protect the individual, to respect his or her dignity and to satisfy basic needs’.⁷⁹

To start with the third Geneva Convention of 1949 dealing with prisoners of war, it provides that in the evacuation of prisoners of war the detaining power must supply them sufficient amount of potable water.⁸⁰ Additionally, in the quarters where prisoners of war are living the detaining powers have also the obligation to make available prisoners of war sufficient drinking water.⁸¹ Likewise, the fourth Geneva Convention of 1949 dedicated to the protection of civilians stipulates that civilians under the control of the detaining power “shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.”⁸² Moreover, in the context of transferring civilians the convention recognizes the right of civilians to be provided with drinking water of the adequate quality and quantity so that they could maintain their health.⁸³

Apart from the Geneva Conventions, their two additional protocols adopted in 1977 also expressly include water as one of their guarantees. The first additional protocol adopted to regulate international armed conflict under article 54 bans attack on objects essential for the survival of civilian populations one of which is drinking water installations.⁸⁴ A similar provision is found in the second additional protocol governing non international armed conflicts.⁸⁵

2.1.2.2 IMPLICIT

⁷⁹ Winkler, Cited above at note 18, p.58

⁸⁰ Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 Entered in to Force 21 October 1950 , art 20

⁸¹ Id, art.26

⁸² Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva,12 August 1949 Entered in to Force 21 October 1950,art.85

⁸³ Id, art.89

⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I (8 June 1977) Entered in to Force 7 December 1978

⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),(8 June,1977) entered in to force7 December 1978 ,art.14

An indirect reference to the right to water is also made in other international treaties. Some of them includes the International Covenant on Civil and Political Right (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Law of Non-Navigational uses of international water courses (Water Course Convention). Each of them will be briefly discussed as follows.

2.1.2.2.1 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHT (ICCPR)

Even if the right to water is absent from the explicit terms of the ICCPR, it could be inferred from the very fundamental right to life expressly guaranteed under article 6 of the covenant.⁸⁶ This is because water is the essence of life and life cannot exist without it. The provision is coined as “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.⁸⁷ For so long, this provision was understood very narrowly as only requiring a state to refrain from killing its citizens and protect them from being killed by others i.e. imposing up on the state the obligation to respect and protect only.⁸⁸ The right was primarily understood as a negative right requiring abstention on the part of states rather than intervention. Thus, a person’s right to life was not considered to be violated if he died out of hunger, thirst or cold.⁸⁹

But later the restrictive interpretation of the right to life lost its heyday. It became to be accepted that the right to life not only impose negative obligation on state but also a positive obligation as well which requires states to make available conditions necessary for survival.⁹⁰ Now a state cannot sit and watch when its citizen die out of hunger, thirst or lacking other essential conditions of survival and escape responsibility as it has the positive obligation to intervene. The right to life like any other human right is now understood as entailing quartet obligations on states i.e. the obligation to respect, protect, promote and fulfill. The Human Rights Committee which is the treaty monitoring body of the ICCPR also endorses a broader interpretation of the

⁸⁶A. Hardberger, “Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates”, Northwestern Journal of International Human Rights, vol. 4, Issue. 2 (2005),p.338

⁸⁷ International Covenant on Civil and Political Rights, Adopted on 19 December 1966 and Entered into Force on 23 March 1976

⁸⁸ Hardberger, cited above at note 86, p.6, Winkler, Cited above at note 18, p.50

⁸⁹ *ibid*

⁹⁰ *ibid*

right to life incorporating both negative and positive obligations.⁹¹ Further, the covenant itself seems to favor a wide approach of interpretation of rights under the covenant. To illustrate, article 2 of the ICCPR provides that the obligation of states is not only restricted to respecting the right guaranteed in the covenant but also ensuring them which suggest a positive obligation as well.⁹²

It is by adopting a broad interpretation of the right to life that the right to water could be inferred from it. Accordingly, the right to life imposes obligation on the part of state to provide water to maintain life and ensure survival. The problem here is that if the right to water is understood as implicit in the right to life which is civil and political right, a person could claim its realization immediately pursuant to article 2 of the ICCPR. Yet, the right to water is largely understood as socio-economic right to be realized progressively pursuant to article 2 of the ICESCR. There is an apparent contradiction between the two approaches.

However, according to Winkler it is possible to reconcile the two approaches.⁹³ She argues that the assertion that economic rights are devoid of any immediate obligation is wrong.⁹⁴ Since socio economic rights have minimum core contents to be realized immediately and since the right to life only guarantee minimum amount of water to sustain life states should have the obligation to realize it immediately as it is too urgent to post pone it. So the right to life can safely incorporate the right to water.

2.1.2.2.2 INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)

In the discussion we had on General Comment 15 of the CESCR earlier, we have seen the specific terminology which the committee relied for locating the right to water as implicit component of the right to adequate standard of living under article 11 and the controversies surrounding it. The focus of this section is not on the specific terminology as it would be repetition. It rather emphasizes on the general approach of interpretation the Committee utilized in uncovering the hidden right to water in the ICESCR.

⁹¹ Winkler, Cited above at note 18, p.51-52

⁹² Id,p.53

⁹³ Id,p.54-55

⁹⁴ Id

According to Takele, the CESCR has followed three main approaches of interpretations in discovering the right to water. The first approach is that of ‘purposive interpretation’ or ‘teleological interpretation’.⁹⁵ This approach of interpretation assumes that when a certain legal instrument is adopted it aims at achieving certain ends or purpose. So, whenever there is an ambiguity or gap in a certain treaty the primary consideration should be its object and purpose. The purposive approach of interpretation could be utilized in promoting the aims of the instrument as well as in filling the existing gaps.⁹⁶ In line with this, the CESCR through its purposive interpretation has furthered the aims of the ICESCR by elaborating the implicit rights enshrined under the covenant. It also remedied the gap created by the absence of an explicit right to water in the ICESCR.

The second approach of interpretation of the Committee was that of ‘derivation’. Other scholars call this approach as interpretation based on ‘centrality or necessity’.⁹⁷ This is because the approach takes in to account the centrality of water for the realization of other explicitly recognized rights in the ICESCR and derives the right to water from them. Without water the practical realization of these rights will be meaningless and their presence in the instruments will merely be an empty signifier. A good example in this regard is the right to health stated under article 12 of the covenant. As water is central for practicality of this right, unless water is understood to be an implicit element of the right to health, it will lose its meaning in toto. It is for this reason that the Committee underlined the inseparable linkage between water and health and derived the right to water from the right to health.⁹⁸ Here, one may ask whether the right to water is a freestanding right or a derivative right and the different implications this might create. This topic would be discussed in the beginning of the next chapter.

The third approach is ‘state acquiescence or silence acceptance’.⁹⁹ Long before the issuance of General Comment 15, the CESCR has on several occasions reprimanded states for their failure to implement the right to water properly when it issues its Concluding Observations after examining state reports. Yet, no state opposed the criticism of the Committee on the ground that the right to water is not included in the ICESCR. These in the Committee’s view shows that states

⁹⁵ Takele, cited above at note 11, p.298-299

⁹⁶ *ibid*

⁹⁷ Salman and Lankford, cited above at note 4, p.59

⁹⁸ CESCR, cited above at note 35, para.3

⁹⁹ Takele, cited above at note 11, p.305

have accepted by silence the right to water as part and parcel of the ICESCR.¹⁰⁰ However, noting that concluding observations of the committee are the result of a dialogue with the state without the threat of force too much weight should not be given to this last argument of the committee.

2.1.2.2.3 CONVENTION ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Besides the ICCPR and ICESCR the right to water is also implicit in the conventions that fall under international water law regime. Although the primary objective of this body of law is to regulate interstate rights and duties on the utilization of international rivers rather than to confer a right up on the individual to claim from a state, it still has certain provisions that could serve as the legal basis for the right to water.¹⁰¹ A good example in this regard is the 1992 Convention on the Law of Non-Navigational uses of International Water Courses also known as the “Water Course Convention” regulating the use of Trans Boundary Rivers for consumptive purposes. The Water Course Convention under article 10(2) provides that when a conflict arise among states on the use of international water courses for different purposes it shall be resolved by primarily considering “vital human needs”. The term ‘vital needs’ had been interpreted as water that is absolutely necessary for human survival such as drinking water which is in line with the right to water.¹⁰²

2.2 THE EVOLUTION OF THE RIGHT TO WATER IN AFRICA

The absence of an explicit recognition of right to water in major international human right instruments is also duplicated in the Africa. As the African Charter on Human and People’s Right which is the principal human rights treaty in the African human rights system is silent on the right to water. It is only through the innovative interpretations of the African Commission that the right to water found a place as implicit component of other explicitly guaranteed rights of the charter.¹⁰³ This however, does not mean that no African treaty expressly mentions the right to water. On the contrary, three African treaties i.e. the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa and

¹⁰⁰ id, p.306

¹⁰¹ id, p.312-313

¹⁰² ibid

¹⁰³ Takele Soboka, “The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System”, African Human Rights Law Journal, vol. 11. no.2 p.345

the African Convention on the Conservation of Nature and Natural Resources openly state the right to water.

2.2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHT

The African Charter on Human and People's Right was adopted in 1981. Unlike the two international covenants and other regional human rights conventions, the African Charter is unique in the sense that it incorporates both civil and political rights as well as economic, social and cultural rights in a single instrument under the same implementation regime.¹⁰⁴ The charter in its preamble emphasizes the importance of socio-economic rights in realizing civil and political rights as well as their crucial role in ensuring development of the continent. In addition to incorporating both set of rights, the Charter also establishes the African Commission on Human and People's Right to oversee its implementation.¹⁰⁵

A number of socio economic rights were expressly guaranteed by the Charter. Some of them include the right to work, the right to adequate standard of health and the right to education. The Charter also incorporates other socio-economic rights not common in other instruments such as the rights of the aged and the disabled and the right to self-determination.¹⁰⁶ In spite of this, a significant number of socio-economic rights are also missing from the charter. Some of them include the right to adequate standard of living and the right to social security.¹⁰⁷ The right to water is among these missing rights. Here, it might be asked that why does the African Charter fail to incorporate the missing rights. The main reason cited as a justification for their exclusion is that since the implementation of these rights requires a considerable amount of resource it would be difficult to impose obligation up on most African states given their limited capacity.¹⁰⁸ This justification does not seem to hold water. Since the problem in most African countries is not that of lack of resources rather it is corruption and mal administration.

¹⁰⁴M.A. Baderin, "The African Commission on Human and Peoples Right and the Implementation of Social Economic and Cultural Rights in Africa", in Mashood A. Baderin and Robert Mccorquodale(ed.), Economic Social and Cultural Rights in Action (2007),p.141

¹⁰⁵African (Banjul) Charter on Human and Peoples' Rights(hereinafter ACHPR) (Adopted 27on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art.30

¹⁰⁶ Baderin, cited above at note 104, p.141

¹⁰⁷ Id, p.142

¹⁰⁸ Ibid

The absence of the right to water from the explicit terms of African Charter has partly been remedied by the innovative interpretations of the African Commission on Human and People's Rights.¹⁰⁹ The Commission while deciding on communications before it, has frequently derived the right to water from other explicitly guaranteed rights such as the right to health, the right to life and human dignity. In the case against Zaire for instance the Commission decided that, Zaire's government failure to provide safe drinking water is a violation of the right to health guaranteed under article 16 of the African charter.¹¹⁰ In another case against Nigeria, the Commission noted that Nigerian government's failure to control the pollution of water by corporations or non-state actors is tantamount to the violation of the right to health and the right to satisfactory environment articulated under article 22 of the Charter.¹¹¹ The Commission was particularly pleaded to acknowledge the existence of an independent right to water in the African charter in a case involving Sudan.¹¹² In this case the Sudanese government was accused of its collaboration in polluting water sources and denying them from accessing water in Darfur. But the Commission ignored their plea and confined Sudanese government's violation to the usual right to health.

The African Commission has also derived the right to water from the right to human dignity in a case against Angola.¹¹³ In this case what happened was that the Angolan government conducted a massive arrest of foreign nationals. These prisoners were provided with two buckets of water per day for 500. They used to bath in in the same place that they sleep and have their meals. The African Commission found the Angolan government guilty of violating the right to human dignity and prohibition of inhuman treatment guaranteed under article 5 of the African charter. Although, the commission is praised for its attempt to remedy the absence of the right to water from the explicit terms of the Charter, its approach of interpretation is severely criticized by scholars. The first critic that is mounted against the Commission is that it choose to treat the right to water as a as subset of other explicit rights rather than recognizing it as independent right implicit in the terms of the African Charter. In this regard, Takele argues the Commission departed from its earlier approach of uncovering independent hidden rights from other explicit

¹⁰⁹ Takele, cited above at note 103, p.345

¹¹⁰ *ibid*

¹¹¹ *id*,p.346

¹¹² *ibid*

¹¹³ *ibid*

rights such as the right to food and housing.¹¹⁴ The second criticism against the commission is its failure to elaborate the normative content and state obligations with sufficient clarity.¹¹⁵

Besides its decisions on Communications, the African Commission has also recognized the right to water in statements and documents issued by it. In this regard, three documents of the Commission could be mentioned as good examples i.e. the Pretoria Statement on Social, Economic and Cultural Rights in Africa (Pretoria Statement), State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) and Draft Guideline on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right (Draft Guideline).¹¹⁶ To begin with the Pretoria statement, it was the outcome of seminar between the members of the African Commission, representatives of member states and NGOs in Pretoria South Africa from September 13-17, 2004.

The major concern of the Conference was that despite the recognition of socio-economic rights in the African Charter, they still occupy marginalized position in many states and states are not doing enough to ensure their full realization. Accordingly, the objective the conference was to urge states to give more attention to the implementation of socio economic rights in their respective countries. At the conclusion of the meeting, participant member states issued a statement reiterating their obligations to respect, protect, promote and fulfill socio-economic rights.¹¹⁷ They also underscored the need to utilize maximum of their available resources by giving priority to the minimum core content of socio-economic rights. The statement addressed the right to water as component of the right to health. It says the right to health under article 16 of the African Charter entails the obligation to ensure 'adequate supply of safe and potable

¹¹⁴ Id,p.349

¹¹⁵ Id,p.250

¹¹⁶ "Statements from the Seminar on the Social, Economic and Cultural Rights in the African Charter" The African Human Rights Journal, Vol.5,(2005), African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 May 2010, Para. 7 (I) and African Commission on Human and Peoples Right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right, (201) para.71-75

¹¹⁷ "Statements from the Seminar on the Social, Economic and Cultural Rights in the African Charter" The African Human Rights Journal, vol.5,(2005), p.184

water’.¹¹⁸ This is consistent with the approach of the African commission treating the right to water as subset of other rights.

Contrary to the Pretoria statement, the African Commission departed from its approach of treating the right to water as a derivative right when it issued Tunis Reporting Guidelines and the Draft guideline on Economic Social and Cultural Right in the ACHPR. To start with the Tunis Guideline, it was issued in 2010 with the purpose of giving member states guidance for properly carrying out their reporting obligation under art 62 of the African Charter. The Guideline provides that state report must include *inter alia* ‘whether the State party has adopted a national framework law, policies and strategies for the implementation of each right’.¹¹⁹ Moreover, the Guideline also indicates the content of individual socio-economic rights protected by the African Charter in which states must give priority in their implementation report. One of these rights is the Right to water and sanitation provided under Paragraph 7 (I) of the Guideline. What is striking here is that unlike the usual approach of the African Commission of treating the right to water as subservient right, the guideline recognizes an independent right to water separate from other rights such as the right to health.

In the view of the author, this is a step in the right Direction and partly addresses the criticisms of some scholars like Takele, regarding the commissions early approach of treating the right to water as a derivative right. Furthermore, the guideline has also attempted to elaborate the normative content of the right to water under the African Charter. Accordingly, the guideline stipulates that states in their report should include the legislative and other measures that ‘have been taken to ensure access to the minimum essential amount of water, which is sufficient and safe for personal and domestic use’.¹²⁰ They are also expected to demonstrate what legal and other measure they have put in place to ensure the physical accessibility of water, location of water points at reasonable distance, water affordability, and fair procedure of water disconnection and regulation of private water supplying entities¹²¹. This is also a positive

¹¹⁸ Id, 187

¹¹⁹ African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human and Peoples’ Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, Para. 2(a)

¹²⁰ Id, Para. I(i)

¹²¹ Id, Para. I(iii)

development since the African Commission is criticized for not elaborating the normative content of the right to water under the African Charter.

A similar approach was followed by the African Commission in its Draft principles on Social, Economic, and Cultural Rights in the African Charter. Accordingly, the Commissions draft principles recognize the right to water as a freestanding Right with its own entitlements. This could be seen from paragraph 70 (I) of the Guideline.¹²² The guideline almost copied the stipulation of General Comment 15 of the Committee on Economic Social and Cultural rights regarding the normative content and the relating states obligation. So arguably, the African Commission is moving towards recognizing an independent right to water in the African Charter.

2.2.2 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD(ACRWC)

Africa is the only continent that has a regional human rights instrument exclusively devoted to the rights of children. The ACRWC was adopted in 1990 and entered in to force in 1999. The African children's charter share most principles of the CRC but it gave more emphasis to issues most relevant to Africa. The Charter in addition to incorporating children's rights, it also established Committee of experts to oversee its implementation. Unlike the African charter, the ACRWC has expressly incorporated the right to water. It provides states have the obligation to take appropriate measure "to ensure the provision of adequate nutrition and safe drinking water".¹²³ The Charter however, only addresses the quality aspects of water and says nothing about quantity. Moreover, the charter only applies to children.

2.2.3 THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN IN AFRICA

This protocol is also called the Maputo protocol as it was signed in Mozambique Maputo in 2003 and came in to force in 2005. The protocol provides for a number of women's rights such as women's participation in political process, socio-economic equality, reproductive rights and it

¹²² African Commission on Human and Peoples right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African charter on human and peoples right, (201) para.71-75

¹²³ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted on, 1990), entered into force Nov. 29,1999,art.14(2) c

bans harmful practices like genital mutilation.¹²⁴ Like that of the ACRWC, the Maputo protocol also explicitly incorporates the right to water. The protocol states that state parties have the duty to take the necessary measure to provide women with access to clean drinking water.¹²⁵ But it is silent about the amount of water to be provided and other elements.

2.2.4 AFRICAN CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES 2003

The African Nature Convention was first adopted in 1968 and later amended in 2003. Several factors necessitated the adoption of the convention but the primary ones are the increasing level of environmental degradation the continent is facing and the depletion of water resources.¹²⁶ The convention contains relevant provisions that support the promotion and protection of the right to water. With respect to this, article VII of the convention is solely dedicated for water. It provides that state parties to the convention have to “endeavor to guarantee for their populations a sufficient and continuous supply of suitable water”.¹²⁷ Moreover, the convention also impose obligation on states to prevent and control water pollution through the adoption of water quality standards so as to protect the population from water borne diseases.¹²⁸ Hence, the convention addresses both the quantitative as well as the qualitative aspects of the right to water.

2.3 EVOLUTION OF THE RIGHT TO WATER AT NATIONAL LEVEL

The right to water as an explicit and binding right, evolved at the national level long before the issuance of General Comment 15 of the CESCR and the 2010 General Assembly and Human Rights Council resolutions recognizing safe drinking water and sanitation as a human right. A good example in this regard is the constitution of South Africa adopted in 1996. South Africa’s constitution is considered as golden standard mainly for recognizing justiciable socio-economic rights including the right to water.¹²⁹ It provides that “Everyone has the right to have access to...

¹²⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women In Africa (adopted 2003)

¹²⁵ Id, art.15

¹²⁶ Takele, cited above at note 103, p.352

¹²⁷ African Convention on the Conservation of Nature and Natural Resources, Adopted 15 September 1968, Entered into force 9 October 1969 as Amended in 2003, Art. VIII

¹²⁸ *ibid*

¹²⁹ M. Langford, R.Stacey & D. Chirwa, Water, available at([http://www.escr-net.org?usr_doc/chap56B. pdf](http://www.escr-net.org?usr_doc/chap56B.pdf)) last visited July 4, 2013

sufficient food and water”.¹³⁰ In addition to the constitutional recognition of the right to water, South Africa also adopted national laws incorporating the right to water i.e. the National Water Act of 1998, the Water Services Act of 1997 and the ministerial regulation.

To start with the National Water Act, it regulates issues relating water resources management, protection and usage.¹³¹ In relation to the right to water, the water act urges for the establishment of a ‘reserve’ composed of two compartments i.e. the ‘human needs reserve’ and the ‘ecological reserve’. The basic human need reserve aims at setting aside the necessary quantity and quality of water for satisfying basic human needs such as water for drinking, food preparation and personal hygiene.¹³² In other words, the human needs reserves guarantee that water for basic human needs will have a priority over other types of water uses.

Although, setting aside a certain amount of water for meeting basic human needs is essential, it does not mean that it will be supplied to the people. This aspect is addressed by the Water Service Act of South Africa which regulates water service provision.¹³³ It states that the very purpose of the Act is to ensure ‘the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being’.¹³⁴ The Act provides that water service providers have a duty to work towards the realization of these rights. Moreover, the act stipulates that in case where the water providing institution was unable to meet the demands of all its customers, it shall give priority to basic water supply defined as the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene’.¹³⁵

Apart from regulating water service provision, the Act also empower the minister to issue ministerial regulations setting standards for water provision. Accordingly, Ministerial Regulation 3 set “a minimum quantity of potable water of 25 liters per person per day or 6 kiloliters per

¹³⁰ Constitution of the Republic of South Africa, 1996, art.27

¹³¹ I. T. Winkler, Respect, Protect, Fulfill: The Implementation of The Human Right to Water In South Africa, Paper presented at the Workshop on ‘Legal Aspects of Water Sector Reforms’ International Environmental Law Research Centre Geneva, (20 to 21 April 2007),(http://www.ielrc.org/activities/workshop_0704/content/d0729.pdf)

¹³² *ibid*

¹³³ *ibid*

¹³⁴ South Africa Water Services Act, Act No. 108.1997 as amended in 2004 section. 2

¹³⁵ *Id*, Section. 1

household per month”.¹³⁶ Another Ministerial Regulation dealing with water tariff provides that water provision institutions in the course of determining water tariff must take in to account the right to water and sanitation and make the service affordable through subsidies.¹³⁷ In addition to the laws discussed above, South Africa also adopted Free Basic Water policy in 2001 which is also in line with the right to water. The policy is meant “to provide each household with 6000 liters of water every month free of charge which amounts to 25 liters per day per person in a household of eight.”¹³⁸ Users who would like to use more than these amounts have to pay more and their payment is used for cross subsidizing the low users. The municipality also contributes its part in the financing of the policy.¹³⁹

It is for this laws and policy that South Africa is considered as a fore runner in the recognition of the right to water. Accordingly, the United Nations Development Program (UNDP) has suggested that in the recognizing the right to water states should follow the footsteps of South Africa as it is an example of the best model.¹⁴⁰ South Africa’s experience is also believed to have informed the 2010 General Assembly and Human Rights Council recognizing the right to water and sanitation as a human right. Although South Africa is considered as a best model, the right to water is also explicitly guaranteed in the constitution of other states. Some of them include Bolivia, the Democratic Republic of Congo, Ecuador, Uganda, Kenya, the Maldives, Nicaragua, Uruguay and Ethiopia.¹⁴¹

Apart from countries that specifically recognize the right to water in their constitutions, the right to water has also found its way in to the domestic legal system through judicial activism irrespective of its explicit absence. A good example in this regard is India. The Indian constitution does not recognize the right to water as fundamental human rights. A glance at the

¹³⁶ Republic of South Africa, Regulations relating to compulsory national standards and measures to conserve water, section 3 available at (<http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC9DREG-20%20April%202001.doc.>), last visited 31 August 2013

¹³⁷ Winkler, cited above at note 131, p.8

¹³⁸ A.G. Gualtieri, South Africa’s Water Law and Policy Framework Implications for the Right to Water, International Environmental Law Research Centre working paper (2007) (<http://www.ielrc.org/content/w0703.pdf>) last visited August 31, 2013

¹³⁹ *ibid*

¹⁴⁰ United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (2006), p.154

¹⁴¹ E. Chapple & F. Leitch, The Right to Water: Does it Exist and is it Justiciable content? Paper presented 28 May 2011 at the ANU College of Law, Environmental Law Student Society Symposium(<http://150.203.86.5/coast/events/environment/papers/chapple%26leitch.pdf>) last visited last visited October 5, 2013,

Indian constitution indicates that there is a bifurcation between civil and political rights on one hand and socio-economic rights in another.¹⁴² The constitution only considers civil and political rights as fundamental rights that are justiciable. Socio-economic rights on the other hand are categorized under Directive Principles of State Policy non justiciable *per se*.¹⁴³ But this does not inhibit the Indian Supreme Court from deriving the right to water as implicit component of the right to life guaranteed under article 21 of the Indian Constitution. The court decided “water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India”¹⁴⁴ So in India, the right to water evolved not through the actions of the law making body but rather by means of the interpretations of the judiciary.

Conclusion

The upshot of the discussion held in this chapter is that, the question over whether the right to water exists or not in international human rights law is now settled once and for all. Since the right to water is recognized in the existing international and regional human rights instruments either implicitly or explicitly. Some states have even gone far in implementing the right domestically by laying down adequate legal and policy framework. Thus, the focus of states from now on should be on how to better implement the right to water in their respective countries and make sure that their laws, policies and practice conform to their international commitment. Likewise, the attention of scholars should also shift to examining how the right to water could be better implemented domestically.

¹⁴² “What Price for the Priceless?: Implementing the Justiciability of the Right to Water,” Harvard Law Review, vol. 120, no. 4 (2007)

¹⁴³ *ibid*

¹⁴⁴ P. Cullet, “Water Sector Reforms and Courts in India: Lessons from the Evolving Case Law”, Review of European Community & International Environmental Law, vol.19.no.3 (2010),p.329

CHAPTER THREE

THE NORMATIVE CONTENT OF THE RIGHT TO WATER AND RELATED STATE OBLIGATIONS

Introduction

In the previous chapter we have appreciated the evolution of the right to water at International, African and national level. We have also identified the legal basis of the right. Once this task is accomplished, the next step would be to determine the normative content of the right as well as obligations arising from it which is dealt in this chapter.

As such, the chapter begins with the examination of the relationship between the right to water and other related rights to determine its status as a derivative or freestanding right. This is crucial since it is determinative of the scope of states' obligations the right entails. Then, the normative content of the right will be discussed by dividing it in to themes of availability, quality and accessibility. The chapter also analyzes the quartet layer obligations of states emanating from the right i.e. obligation to Respect, Protect, Promote and Fulfill.¹ Here it should be noted that unlike the African Commission, the Committee on Economic Social and Cultural Rights(CESCR) classified obligations flowing from Human Rights including the right to water in to three i.e. obligation to Respect, Protect and Fulfill.²

However, the author has chosen to follow the approach of the African Commission for the following reasons. First, the approach of the African Commission gives more clarity to the duties of states by separating the obligation to facilitate and promote from the obligation to Fulfill. In contrast, the approach of the CESCR might create ambiguity on state duties since it has placed together the obligation to facilitate, promote and fulfill under the obligation to fulfill. Second, the discussion held in this chapter will be used to evaluate the laws, policies and practices of an African country Ethiopia in relation to the right to water. Thus, it would be more sensible to follow the interpretations of the African Commission which is the principal human right body in Africa.

¹ Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (SERAC case), para.44

² Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.20

Additionally, the chapter identifies the core obligations of the right to water which has to be realized immediately. Further, the mechanisms for ensuring the compliance of states with the obligations they have assumed at international, regional and national level are also deliberated in this chapter. Thus, the discussion held in this chapter is crucial as it serves as a spring board for assessing the current state of realization of the minimum core obligation of the right to water in Ethiopia in chapter four. It is also be very handy in examining the adequacy of existing legal and policy framework for implementing the right to water in Ethiopia chapter five and six.

3.1 THE RELATIONSHIP BETWEEN RIGHT TO WATER AND OTHER HUMAN RIGHTS: IS RIGHT TO WATER DERIVATIVE OR INDEPENDENT RIGHT?

The right to water has a strong connection with a number of civil and political as well as socio-economic rights. It is also an essential pre-condition for the realization of these rights.³ Some of them include the right to life, the right to human dignity, the right to health, the right to adequate standard of living, the right to housing and the right to food. The relationship between water and other rights is also noted by the Committee on Economic Social and Cultural Rights (CESCR). In issuing General Comment 15, the Committee stated that the right to water is an implicit component of the right to adequate standard of living. It also underscored the relationship of water with the right to health, life and human dignity. Similarly, the Resolutions issued by the General Assembly and the Human Rights Council in 2010 recognizing the right to water as a human right also affirm its relationships with other rights.⁴ This has led some scholars like Amanda Cahill, to argue that the right to water is placed in a unique position between a derivative and free standing right.⁵

She further argues that this unique status of the right to water creates confusion on the precise contents of the right and the related state obligations, which in turn results a difficulty on both implementation as well as justicability of the right.⁶ In order to avoid these problems and bring more clarity to the status of the right, a thorough examination of the relationship between the

³A. Cahill, "The Human Right to Water – A Right of Unique Status": The Legal Status and Normative Content of the Right to Water", *The International Journal of Human Rights* vol. 9, no. 3, (2005), p.394

⁴U.N. General Assembly, The Human Right to Water and Sanitation, Resolution Adopted by the General Assembly, 3 August 2010, A/RES/64/292, Sixty-Fourth Session Agenda Item 48 and Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, Resolution adopted by Human Rights Council, 6 October 2010, A/HRC/RES/15/9, Fifteenth session Agenda item 3

⁵ Cahill, cited above at note 3, P.395

⁶ Id,p.391

right to water and other related rights is necessary. It will also be crucial to determine the current status or understanding of the right to water as a derivative or independent right under international law and the position of the African Commission in this regard. Accordingly, the investigation proceeds by asking two basic questions. What does a derivative right to water mean? What is the implication of having a derivative right to water?

A derivative right to water means that the right is not an end in itself rather a means for the realization of other rights like the right to health or the right to life. Its existence is contingent upon its utility for the effective fulfillment of other rights.⁷ The implication of the derivative approach is that the right to water cannot be claimed on its own unless its parent right is violated.⁸ This means that the right to water is deemed to have been violated only when its absence resulted in a health problem or endangered life. To put it more simply, even if the provision of water is less than the required quantity or quality, it will not be considered a violation so long as it is not of the extent to affect the right to life or health.

In addition to the issue of violation, the derivative approach to the right to water also has the effect of watering down the obligation of states.⁹ In order to demonstrate this, let us take the right to water as a derivative of the right to life. If water is considered as a subset of the right to life, the amount of water guaranteed under the right to life would only be for ensuring human survival i.e. water for drinking purposes aiming to prevent death from dehydration. Consequently, it does not recognize uses other than drinking such as water for cooking and for keeping one's hygiene stipulated under the right to water. This implies that the obligation of the state will be reduced to supplying drinking water only excluding water for other personal and domestic uses.

If a derivative approach to the right to water has such problems, it would be logical to inquire the possible advantages of a freestanding right to water. The primary benefit of an independent right to water is that, it provides more clarity to the normative content of the right and obligations

⁷ Takele Soboka, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery," Melbourne Journal of International Law, vol. 12 (2011), p.304 and Takele Soboka, "The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System", African Human Rights Law Journal, vol. 11. no.2, (2011), p.347

⁸ *ibid*

⁹ I.T. Winkler, The Human Right to Water Significance, Legal Status and Implications for Water Allocation, (2012), p.53

assumed by states.¹⁰ This will enable the individual to precisely know his right and claim it accordingly. The states will also be in a position to clearly appreciate the exact scope of its undertaking and work towards that goal. Apart from clarity, a freestanding right to water also offers maximum entitlements for the individual than the derivative one. This is because it incorporates water for personal and domestic uses in addition to drinking. Furthermore, if water is considered as a standalone right and implemented accordingly, the individual will have the required quantity and quality of water to realize his right life, maintain his health and live in dignity.

Turning to the examination of the claim by some scholars that the normative status of right to water is somewhere between derivative and independent right, it would be nice to begin our investigation from General Comment 15 of the CESCR which uncovered the hidden right to water from the ICESCR for the first time. In the view of the author, what the Committee did was revealing an independent right to water from the ICESCR at the same time acknowledging the undeniable strong link between the right to water and other related rights. This could be inferred from the committee's statement that the right to water is as equivalent as the other independent rights grouped under the right to adequate standard of living i.e. the right to food and the right to adequate housing.¹¹ This view is also shared by other writers on the subject.¹²

Besides, the statement by the committee that the fulfillment of the right to water 'is a prerequisite for the realization of other human rights' is also indicative of the independent status of the right to water. The Committees did not say that the realization of the right to water is dependent on the realization of other related rights. This shows that the right to water could be violated independently without affecting other rights. It also demonstrates that it is other related rights that are dependent on the right to water instead of the reverse scenario. All this shows that the Committee recognized an independent right to water.

A similar pattern is repeated if one examines the position of the UN General Assembly Resolution, Human Rights Council Resolutions recognizing the right to water and the stance of

¹⁰ Cahill, cited above at note 3, P.391

¹¹ CESCR, cited above at note 2, para.3

¹² E. Bluemel, "The Implication of Formulating a Human Right to Water", *Ecology Law Quarterly*, vol.31, (2004) ,p.971, Takele Soboka, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery," *Melbourne Journal of International Law*, vol. 12 (2011),p.303 , H. Greatrex, *The Human Right to Water*, available at(<http://www.victoria.ac.nz/./Greatex.pdf>) last visited December 28, 2013

the African Commission on the issue. The Two Resolutions of the General Assembly and the Human Rights Council declare that the right to water is an independent human right. This could also be affirmed from the statement of the UN Special Rapporteur on the right to water and sanitation following the issuance of the Human rights Council Resolution recognizing the right to water. The Special Rapporteur stated that ‘the right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable. Hence from today onwards we have an even greater responsibility to concentrate all our efforts in the implementation and full realization of this essential right’.¹³

As noted in the previous chapter, the African Commission also seems to be moving in the direction of recognizing an independent right to water. Although the decisions of the Commission on communications submitted to it so far is to treat the right to water as a derivative right, current documents issued by the commission seems to move away from its tradition of considering the right to water as subservient right. These documents are the African Commission Guideline on State Reporting (Tunis guideline) and the Draft Guidelines on the African Charter on Human and Peoples Right.¹⁴ As such, the African Commission is trying to keep abreast with international developments in relation to the right to water and it is very likely that the Commission recognizes independent right to water in its future decisions on communications. So, arguably all this indicates that the right to water is no longer of a unique status somewhere between a freestanding and derivative right rather it is an independent right having equal status as any other human right. Thus, the view that the right to water is a derivative right is no longer tenable.

3.2 NORMATIVE CONTENT OF THE RIGHT TO WATER

Once the existence of a freestanding right to water is established, it would be necessary to inquire the normative content of the right. By normative content, the writer is referring to the specific entitlements that accrue to individuals or groups from the recognition of the right to

¹³ UN News Center, Right to Water and Sanitation is Legally Binding, affirms Key UN Body, (<http://www.un.org/apps/news/story.asp?NewsID=36308#.UpnOdMQe3K1>) last visited on December 2, 2013

¹⁴ African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples’ Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para 7 (I) and African Commission on Human and Peoples right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African charter on human and peoples right, (201) para.71-75

water. It was the CESCR that determined the normative contents of the right to water for the first time in General Comment 15. The Committee by and large is praised for undertaking such task even if some scholars criticize it for not elaborating the contents of the right to water with sufficient clarity.¹⁵ When we look at the approach of the Committee in this regard, it has divided the normative content of the right in to three main categories i.e. availability, quality and accessibility. It further subdivided accessibility in to physical accessibility, economic accessibility, non-discrimination and information accessibility.

3.2.1 AVAILABILITY

Availability is primarily concerned about the quantity of water required for the realization of the right to water. The sufficiency or in sufficiency of water for the right can only be determined after looking at the type of water use recognized by it.¹⁶ Although water is used for a number of human activities that range from drinking to irrigation and hydro power generation, not all water uses are recognized by the right to water. The right to water rather gives priority to the use of water for meeting ‘personal and domestic needs’ that are very basic to survival such as water for drinking, personal hygiene, cooking, and washing clothes.¹⁷ So the amount of water that must be available under the right to water is for satisfying personal and domestic needs.

Determining the precise amount of water that must be available for an individual to meet personal and domestic needs is not simple. This is because the amount differs depending on the type of climate and individual circumstances.¹⁸ The quantity of water that a person living in a desert climate needs is not the same as an individual living in a normal climate because of dehydration. Similarly, pregnant or lactating mothers need more water than others. This is why the Committee refrained from stating the precise amount of water that the right to water entitles individuals. Instead it recommended the standard set by the World Health Organization (WHO) acknowledging that water need could vary from individual to individual.

¹⁵ Cahill, cited above at note 3, p.393

¹⁶ Winkler, Cited above at note 9, p.126

¹⁷ CESCR, cited above at note 2, para.12

¹⁸ *ibid*

Accordingly, the WHO standard shows that a person needs 2.5-4.5 liter per person per day for drinking only which could increase depending on his/her condition.¹⁹ Regarding the minimum amount of water necessary to meet personal and domestic needs, WHO suggests 20 liters per person per day is required.²⁰ This however does not mean that this is the optimal amount for the full realization of the right to water. It is rather only a minimum amount that states could not go below. Studies indicate that there is a significant health risk even with the provision of the minimum amount.²¹ As a result, the WHO recommends the availability of 50 liters per person per day to satisfy most personal and domestic needs.

Finally, in addition to providing for sufficient amount of water, availability also demands that the provision of water must not be intermittent rather it must be continuous and regular.²²

3.2.2 QUALITY

The availability of any amount of water is meaningless if it is not of the required quality fit to be used for consumption and other domestic purposes.²³ Contaminated water also poses a significant health risk as it causes waterborne diseases such as diarrhea. The presence of hazardous chemical in water such as arsenic and fluoride also cause diseases. It is for this reason that the CESCR incorporated water quality as one of the entitlements the right to water. Accordingly, the committee provides that “water should be free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.”²⁴ The Committee cited the WHO Guideline for drinking water quality as a bench mark regarding water safety.

The WHO guideline was adopted to serve as a model for national water quality standards and minimize the risks of contaminated water. It defines safe drinking water as that which “does not represent a significant risk to health over a lifetime of consumption, including different sensitivities that may occur between life stages”.²⁵ This guideline also addresses the microbial,

¹⁹ G.Howard and J. Bartram, Domestic Water Quantity, Service, Level and Health(2003),p.18-22

²⁰ *ibid*

²¹ *ibid*

²² CESCR, cited above at note 2, para.12

²³ A. Hardberger, “Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates”, Northwestern Journal of International Human Rights, vol. 4, Issue. 2 (2005),p.360

²⁴ CESCR, cited above at note 2, para.12

²⁵ Winkler, Cited above at note 9, p.135

chemical and radiological aspects of water contamination. It also indicates which of these threats need elimination and which of them require reduction to ensure the safety of the water.²⁶

In addition to ensuring the safety of water, the quality aspect also requires the water to have acceptable taste, color and odor.²⁷ The comment provides this not with the aim of preventing diseases as water might be free from hazardous substances but it might not have its natural color or taste. This is rather aimed at protecting the dignity of the user.²⁸ People could also become unwilling to use water if its taste, color or odor is unacceptable for them. In this regard, Winkler argues that if water is deprived of its natural taste or color it might deter the user from using it and force him/her to use water from unsafe sources.²⁹ In her view the presence of these features in the water will motivate the individual to use water from only safe sources.

3.2.3 ACCESSIBILITY

The availability of water in sufficient quantity and quality does not mean that people would have automatic access to it. A number of hurdles could inhibit people's access to water that range from the remoteness of the water source to discrimination. The CESCR in General Comment 15 has approached the issue of water accessibility from four angles i.e. physical accessibility, economic accessibility, non-discrimination and information accessibility.

3.2.3.1 PHYSICAL ACCESSIBILITY

Physical accessibility basically refers to the amount of time an individual must spend in round trip travel to arrive at a safe water source.³⁰ There exists a strong correlation between the time spent for water collection and the amount of water collected. The nearness or remoteness of the water source determines whether water will be used at all or how much water will actually be used. Studies conducted on physical accessibility of water have demonstrated that there exists an inverse relationship between time used for collecting water and its amount. Accordingly, when the time needed for water collection is between 5-30 minutes which is equivalent to a distance of

²⁶ *ibid*

²⁷ CESCR, cited above at note 2, para.12

²⁸ Takele Soboka, "The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System", *African Human Rights Law Journal*, vol. 11. no.2, (2011), p.366

²⁹ Winkler, Cited above at note 9, p.135

³⁰ L.K. Nkonya, Realizing the Human Right to Water in Tanzania, (<http://www.wcl.american.edu/hrbrief/17/3nkonya.pdf>) last visited December 28, 2013

100-1000 meters, the quantity of water collected will not go beyond 20 liters per person per day.³¹

In order to say that there is a reasonable or basic access to water, the water source must be located within a distance of 1000 meters or requires only 30 minutes of round trip.³² If the distance is greater than 1000 meters the amount of water collected will further be reduced to 5 liters per person per day.³³ These estimations are meant to indicate the minimum requirements in general. Personal circumstances of individuals should also be taken to account in determining whether there a reasonable physical access or not. For instance, people with disabilities might need to access to water facility that's very near to them compared to other users.³⁴

Cognizant of the linkage between quantity of water and time spend for the collection, General Comment 15 provides that “sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace”.³⁵ Additionally, the Comment also stipulates that the physical security of persons should not be endangered or threatened while accessing water.³⁶ This is particularly relevant for women and children since they could be exposed to rape and abduction if the water sources located in unsafe area.

3.2.3.2 ECONOMIC ACCESSIBILITY

Economic accessibility refers to affordability of water. The presence of a tap in one's home alone means nothing unless the individual can afford to pay for it. As such, the cost of getting water should not be exorbitant to deter anyone from accessing it.³⁷ Notably, the cost of attaining water is not only limited to direct and indirect costs but also includes connection and delivery expenses. In order to determine the affordability of water we have to look at the percentage of income the individual spend on water.³⁸ We must also note that the individual has to pay for his

³¹ Howard and Bartram, cited above at note 19, p.22

³² *ibid*

³³ *ibid*

³⁴ Winkler, Cited above at note 9, p.136

³⁵ CESCR, cited above at note 2, para.12

³⁶ *ibid*

³⁷ *ibid*

³⁸ *ibid*

other needs such as food, clothing, and housing besides water. So the amount of money a person spent for water must not comprises the satisfaction of his other needs.³⁹

According to the United Nations Development Program (UNDP), a person should not spend more than 3% of his income on water. As such 3% is considered as a benchmark to assess water affordability.⁴⁰ Here, it may be asked how about the very poor who have no income at all? Should they be deprived of water simply because they don't have the means? On this issue, General Comment 15 of the CESCR provides that the state should supply water to this individual's free of charge.⁴¹

The other issue raised in the context of affordability is the involvement of private sectors or corporations in the provision of water. There is a general assumption that if water is provided through private sectors its cost would be very high since the primary motive of the corporations is to make profit and recover the full cost they have incurred.⁴² As a result, the provision of water should be conducted by the government instead of corporations. When we look at the General Comment 15, it does not prefer a particular model of water provision and water could be supplied either through a company or the government. However, the Committee stresses that, states have the responsibility to regulate activities of private water providing companies, one of which is ensuring the affordability of their services for all.⁴³

3.2.3.3 NON DISCRIMINATION

The other entitlement forming part of the normative content of the right to water is the principle of non-discrimination. This principle has been incorporated in a number of human rights instruments including the International Covenant on Economic Social and Cultural Rights. The CESCR has defined Discrimination "as any distinction, exclusion or restriction or preference other preferential treatment that is directly or indirectly based on the prohibited ground of discrimination and which has the intention or the effect of nullifying or impairing the

³⁹ Winkler, Cited above at note 9, p.137

⁴⁰ United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (New York, Palgrave Macmillan 2006), p.11

⁴¹ CESCR, cited above at note 2, para.26

⁴² D. Barrett and V. Jaichand, "The Right to Water, Privatized Water and Access to Justice: Tackling United Kingdom Water Companies' Practices in Developing Countries", South Africa Journal of Human Rights, vol.23, (2007) p.346

⁴³ CESCR, cited above at note 2, para.24

recognition, enjoyment or exercise of the right, on equal footings, of the covenant right”.⁴⁴ The ICESCR provides an open ended list of prohibited grounds of discrimination such as “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁴⁵ Disability, sexual orientation, gender identity, and health status could fall under other status.⁴⁶ Discrimination could also be *de jure* that is based on law or *de facto* existing only in practice.

States are expected to take appropriate measures aimed at eliminating discrimination. Their obligation could go to the extent of taking affirmative actions to remedy the situation of those subjected to discrimination in the past.⁴⁷ What is more, the principle of non- discrimination cut across all human right including the right to water. Concerning this, General Comment 15 provides that “water and water facilities and services must be accessible to all” without any discrimination.⁴⁸ The Comment also indicated the vulnerable groups that could face discrimination in accessing water including the Rural and the Urban Poor, Women, Children Persons with Disabilities, Refugees and Internally Displaced Persons as well as Indigenous People.⁴⁹ The challenges this groups are facing in realizing their right is dealt detail under the section dealing with the right to water and vulnerable groups.

3.2.3.4 INFORMATION ACCESSIBILITY

Information accessibility in the context of the right to water refers to “right to seek, receive and impart information concerning water issues”.⁵⁰ Consequently, the state is expected to disseminate and publish information regarding its activities, laws, policies and budgets and policies relating to the realization of the right to water so that the public could know what the government is doing, participate in the process and ensure its accountability. The government

⁴⁴ Committee on Economic, Social and Cultural Rights , General Comment 20, Non-Discrimination on Economic Social And Cultural Rights, (2009)

⁴⁵ International Covenant on Economic, Social and Cultural Rights(hereinafter ICESCR), Adopted and Opened for Signature and Ratification by General Assembly Resolution No. 2000A (XXI) of 16 December 1966 and Entered into Force on 23 March 1976, art.2(2)

⁴⁶ Winkler, Cited above at note 9, p.112

⁴⁷ Id, 113

⁴⁸ CESCR, cited above at note 2, para.12

⁴⁹ ibid

⁵⁰ ibid

should also be responsive and provide the necessary information to individuals on any issue related to water be it water availability, quality or affordability.

3.3 STATE OBLIGATIONS RELATED TO THE RIGHT TO WATER

In the course of implementing the right to water, states have quartet level of obligations i.e. the obligation to respect, protect, promote and fulfill. Since the full realization of the right to water requires a significant amount of resource, a state is not expected to fulfill all aspects of the right forthwith. The state is rather required to realize the right progressively.⁵¹ This however does not mean that all aspects of the right to water are subject to the notion of progressive realization. Certain aspects of right to water identified as minimum core obligations need to be realized immediately as they are too urgent to postpone.⁵² Hence, this section examines the quartet as well as core minimum obligations emanating from the right to water.

3.3.1 OBLIGATION TO RESPECT

The obligation to respect is in general a negative obligation imposed on the part of state. Thus, a state is required to refrain from interfering with the enjoyment of one's human right.⁵³ In the context of the human right to water, the state is expected to abstain from tampering with an individual who is already exercising his/her right to water. The duty to respect the right to water particularly demands the state to refrain from arbitrarily disconnecting a pre-existing water access, polluting existing water sources, and reallocating water resources formerly used for meeting basic needs.⁵⁴ In the time of armed conflict also the duty to respect the right to water prevent states from attacking objects necessary for the survival of civilian population one of which is water facilities and installations.⁵⁵

⁵¹ Id, para.17

⁵² *ibid*

⁵³ Winkler, Cited above at note 9, p.108

⁵⁴ CESCR, cited above at note 2, para.21

⁵⁵ Id, Para.22

3.3.2 OBLIGATION TO PROTECT

Unlike the obligation to respect that require the state to restrain itself, the obligation to protect demands the state to prevent interference of third parties on the enjoyment of the right to water.⁵⁶ These third parties could be individuals, groups or companies. Accordingly, under the obligation to protect a state is expected to take the necessary measures to ensure that third parties do not engage in excessive extraction and pollution of water resources that may adversely affect the right of other users.⁵⁷ Similarly, when a state choose to deliver water services through third parties it has the duty to put in place the necessary legal and institutional framework to ensure that they provide equal access for all of a service that is affordable. The state must also set the necessary standards to ensure that water provided by the private sector is of an adequate quality and acceptable to the users.⁵⁸ Here, we could appreciate that the transfer of water provision by state to a private sector will not relive the state of its obligations since it is required to appropriately regulate their activities and ensure the observance of the right to water in their operation.

3.3.3 THE OBLIGATION TO PROMOTE

The obligation to promote demands a state to facilitate and promote.⁵⁹ By facilitation the state assists individuals in their effort to meet their need for water. The state could facilitate the realization of the right by allocating certain amount of water resources for meeting personal and domestic needs. It should also establish the necessary infrastructure in order to ensure the accessibly of water. Regarding, the state's duty of promotion, the African Charter on Human and Peoples Right provides that states have 'the duty have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood'⁶⁰. Thus, a state is expected to create awareness on water related issues such as the benefits of using safe water and the importance of minimizing water wastage etc.

⁵⁶ Winkler, Cited above at note 9,p. 108-109

⁵⁷ CESCR, cited above at note 2, para.23

⁵⁸ Id, para.24

⁵⁹ African Commission on Human and Peoples Right, cited above at note 1

⁶⁰ African (Banjul) Charter on Human and Peoples' Rights(hereinafter ACHPR) (Adopted 27on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art.25

3.3.4 THE OBLIGATION TO FULFIL

The obligation of the state to fulfill is a positive duty of states that require its intervention. As such, the state is expected to mobilize its machineries to ensure actual realization of human rights including the right to water.⁶¹ Accordingly, the main facet of the obligation to fulfill in relation to the right to water is states duty to supply water freely for those who are not in a position to pay for the service. The beneficiaries of the duty to provide of the state are largely people living in extreme poverty and persons in emergency situations.

3.3.5 MINIMUM CORE OBLIGATIONS OF THE RIGHT TO WATER

Like many other socio economic right the realization of the right to water requires a significant investment of resources on the part of the state. For this reason, it would be unrealistic to expect the state to fully realize the right to water straightaway. As such, the ICESCR under article 2 generally requires the state to use the maximum of available resources to ensure the full realization of the right to water progressively. Although, the full realization of the right needs time, the central elements of the right have to be realized immediately so that the existence of the right makes sense.⁶² These central aspects of the right are usually addressed as the ‘minimum core obligations’. The concept of minimum core obligations was developed by the CESCR in its General Comment 3. It provides that states have the immediate duty “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights incumbent upon every state party”.⁶³

The notion of minimum core obligation seems to apparently contradict with the concept of progressive realization. But some scholars argue that it is possible to reconcile the two concepts one of which is Inga Winkler. According to Winkler, in order to harmonize the two concepts we need to first understand that not all aspects of a certain right are equally urgent or essential.⁶⁴ The fulfillment of some elements of the right particularly those essential minimums are more urgent than others. If that is the case priority should be given to the satisfaction of the essential

⁶¹ Id, para.25

⁶² CESCR, cited above at note 2, para.119

⁶³ Committee on Economic, Social and Cultural Rights, General Comment No.3, The Nature of State Parties Obligation, 5th Session, 1990, U.N. Doc. E/1991/23, 1990 (Art. 2, par.1)

⁶⁴ Winkler, Cited above at note 9, p.118

minimum and what the minimum core obligations does is exactly the same.⁶⁵ Unless priority is given for the realization of the essential minimum content, the existence of the right as a whole will lose its importance.

As a result, the progressive realization of the right to water should not start from scratch or zero. It should rather begin from the fulfillment of the core minimum obligations. In other words, minimum core obligations are considered as the 'floor' level below which the state could not go.⁶⁶ Here it may be asked that what if the state lacks the resource to meet even the minimum essential level of the right to water? Generally, it is presumed that states have the capacity to meet their minimum core obligations. If a state argues that it does not have the requisite resources it carry the burden of proving that it has used the maximum available resource and sought international assistance.⁶⁷ It is only then that the state could justify its failure to meet its minimum core obligations.

Although the minimum core approach is praised for ensuring the satisfaction essential minimum of each right immediately, it is not without criticisms. The first criticism is that it is unrealistic to expect every state to meet the core obligation immediately. What should be expected from the state rather is acting reasonably to ensure the realization of the right.⁶⁸ The other criticism is that since core minimum approach focuses on meeting the minimum essential level of each right it might have the effect of restricting individuals right only to the minimum or might force the individual to settle for the little. But these critics do not sound too much convincing. This is because what minimum core demands the state is not to achieve the impossible. Rather it calls for a better allocation of resources on the part of the state and a convincing explanation for its failure. Further, prioritizing core minimum obligations will not have the implication of settling for the minimum. It rather raises the starting level of the state's obligations to the minimum core of the right and continues from there until the right is fully realized.⁶⁹

⁶⁵ Id,p.119

⁶⁶ Id,p.120

⁶⁷ ibid

⁶⁸ Winkler, cited above at note 9, p.123

⁶⁹ Id, p.124

In line with the objectives of the minimum core obligations discussed above, General Comment 15 of the CESCR has identified the following core obligation of the right to water meant to be realized immediately.⁷⁰

(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

(b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;

(d) To ensure personal security is not threatened when having to physically access to water;

(e) To ensure equitable distribution of all available water facilities and services;

(f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

(g) To monitor the extent of the realization, or the non-realization, of the right to water;

(h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;

⁷⁰ CESCR, cited above at note 2, para.37

3.4 THE RIGHT TO WATER AND VULNERABLE GROUPS

As indicated in the part dealing with non-discrimination certain groups or individuals face a particular challenge in realizing their right to water due to stigma and discrimination as such they are vulnerable to violation of their right. For this reason, the state is expected to look beyond the average and the majority. It is expected to look the particular situations these vulnerable groups are in and take positive measures to improve their situation and ensure equal access for them. The vulnerable groups are mainly the Rural and Urban poor, the Women, Children, People with Disabilities, Refugees and Internally Displaced person and Indigenous People. This would give us the background to analyze the difficulties vulnerable groups encounter in relation to their right to water in Ethiopia under chapter four of the paper.

3.4.1 THE RURAL AND THE URBAN POOR

When one looks at the number of people without access to safe water, the poor living in the rural and urban areas constitute the main portion.⁷¹ These groups also suffer a lot from their denial of water access since they don't have any other alternative than using a contaminated or unimproved water source. Studies have revealed that globally the poor living in slums constitute 42% of the population residing in the cities of developing countries.⁷² Those living in slums often find it very difficult to gain access to water. This is because most of the time the water providers are not willing to connect them to water facilities for variety of reasons. Some of them include: the absence of documents that entitle the slum dwellers water access, their inability to pay for the service and the possibility of eviction.⁷³ What is more, the poor also pay more for the service compared to their rich counterpart since they rely on water vendors and informal suppliers. For instance, a survey conducted in Accra has shown that the poor living in slums pay 6-8 % more for water than those areas where high income earners live.⁷⁴ So states are expected to take measure aiming at improving the condition of the poor.

⁷¹ World Health Organization (WHO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Centre on Housing Rights and Evictions (COHRE), WaterAid, and the Center for Economic and Social Rights (CESR)(hereinafter WHO *etal*),The Right to Water, Fact Sheet No. 35 (Office of the United Nations High Commissioner for Human Rights, 2003). P.18

⁷² *ibid*

⁷³ *ibid*

⁷⁴ *ibid*

3.4.2 WOMEN

Women are also one of the vulnerable groups that face a particular challenge in realizing their right to water. In many societies the task of collecting water is assigned to women. As a consequence, they spend up to 4 hours a day in traveling to collect water from a water source located far away.⁷⁵ They also spend a considerable amount of time in queues waiting for their turn. The time they spend for water collection in turn prevent them from attending school and engaging in other productive activities. In this regard, studies have revealed that one of the reasons for the gender gaps in school is because girl children are sent for water collection than schools.⁷⁶ This would in turn prevent women from getting a better job in the future. Beside these problems, women also suffer from health problems while collecting water. This is because the water load they are carrying is very large and it might be detrimental to them. They will also be exposed to waterborne diseases such as Bilharzia.⁷⁷ Furthermore, women are largely excluded from participation in the design and implementation of programs related to water as such their views is often excluded.⁷⁸ The state must therefore, strive to eliminate discrimination against women and take positive measure to improve their conditions.

3.4.3 CHILDREN

Children because of their physical immaturity and weak immune system suffer a lot from contaminated water. Studies have demonstrated that in developing countries with high child morbidity rate waterborne disease of diarrhea takes the lion share, which is greater than all the deaths caused by pneumonia, malaria and HIV/AIDS merged together.⁷⁹ Some estimates even state that 90 % of children below the age of five die due to contaminated water.⁸⁰ Children also contract disease easily from water contaminated by chemicals since their resistance capacity is very low. Further, the challenges children face in relation to the right to water also affect their right to education. This is because in rural communities in particular children are sent to fetch water for their families and they could not regularly attend class.⁸¹ Additionally, if the school

⁷⁵ Id, p.19

⁷⁶ UNDP, cited above at note 41, p.47

⁷⁷ ibid

⁷⁸ ibid

⁷⁹ WHO *etal*, cited above at note71, p.21

⁸⁰ UNDP, cited above at note 41, p.47

⁸¹ Id,p.21-24

where the children are studying does not have the necessary water facilities inside it or near its vicinity children will not be able to attend school properly. Their options are either to use contaminated water, or buy water at a great cost or bring it from home at a great inconvenience.⁸² In connection with this, it is important to note that only 34.4 % of Ethiopian primary schools have water facilities.⁸³

3.4.4 PERSONS WITH DISABILITIES

The major challenge persons with disabilities often face with regard to their right to water is the physical inaccessibility of water facilities.⁸⁴ In most cases when buildings are built and water facilities are constructed they do not take in to account the particular needs of persons with disabilities. The reason for their exclusion is not because the cost of building facilities that accommodate the interests of persons with disabilities is excessive. It is rather because of the inadequate attention given for their needs and their exclusion from decision making process.⁸⁵ If the realization of the right to water for persons with disabilities is to be improved for the better, the state must put in place the necessary laws, policies and institutions to ensure the water facilities are equally accessible to them. The state should also be open and inclusive to incorporate the interest and views of people with disabilities in its water laws, policies and programs.

3.4.5 REFUGEES AND INTERNALLY DISPLACED PEOPLE

According to the Office of High Commissioner for Human Rights each year around 30 million people run away from their homes due to conflict and natural disasters.⁸⁶ Refugees and Internally Displaced People face a number of challenges in fulfilling their right to water. The primary challenge they face is the lack of adequate water supply in the camps they reside. Since most of the camps are overcrowded with a large number of refugees the amount of water provided for them is often insufficient.⁸⁷ Studies conducted have shown that refugee and Internally Displaced

⁸² WHO *etal*, cited above at note 71, p.21

⁸³ Federal Democratic Republic of Ethiopia Ministry of Education, Education Statistics Annual Abstract, 2010-11, p.38

⁸⁴ WHO *etal*, cited above at note 71, p.21

⁸⁵ *ibid*

⁸⁶ *Id*, p.23

⁸⁷ *ibid*

People only survive with 2-3 liters of water per person per day.⁸⁸ This will force the refugees to consume water from unsafe sources exposing them to waterborne diseases such as cholera.⁸⁹ In addition to this, when refugee women and girls travel away from the camp to collect water they may be asked to render sexual service in exchange for water.⁹⁰ Furthermore, since refugees are mainly aliens to the country they are camping, they often are victims of discrimination, xenophobia and racism.⁹¹ The state should also take the appropriate measure to ensure equal water access for refugees and Internally Displaced People taking in to account the particular challenges they encounter.

3.4.6 INDIGENOUS PEOPLE

Indigenous people have a strong link with water as it occupies a central place in their everyday way of living, tradition, culture and overall existence. The access to water for indigenous people will be threatened when the state fails to consider the connection they have with their land and natural resources.⁹² In the absence of sufficient recognition on states part of indigenous people's right over their ancestral land and natural resources, their water source could be expropriated, over extracted and polluted. This in turn result deprivation of water access for the indigenous people. In order to relive indigenous peoples from these challenges the state must respect their ancestral lands and acknowledge their customary water rights over their land.⁹³ Moreover, the state should also play an active role in protecting the traditional water sources of indigenous people from expropriation, over extraction and pollution. In addition, the state should also invite indigenous people and discuss with them on how to better ensure their right to water.

⁸⁸ ibid

⁸⁹ ibid

⁹⁰ ibid

⁹¹ Id,p.24

⁹² ibid

⁹³ ibid

3.5 MECHANISMS OF ENSURING THE ACCOUNTABILITY OF STATES IN REALIZING THE RIGHT TO WATER

In the absence of mechanisms for checking whether a state is living up to the obligations it assumed, the quartet obligations of states to respect, protect, promote and fulfill the right to water would be meaningless. As a result, mechanisms of accountability are very essential tools to gauge the performance of states in meeting its obligations. Different mechanisms of accountability exist at national, regional and international level. The stakeholder in the process also includes states, non-governmental institutions, regional and international bodies.

3.5.1 NATIONAL MECHANISMS

The very purpose of ensuring accountability at any level is to demand justification from state regarding the measures it has taken to meet its obligations in relation to the right to water. Accordingly, a state is expected to explain what it is doing, why it is doing and how it is doing so that the full realization of the right to water can be ensured as soon as possible.⁹⁴ Although, human rights law does not prescribe a particular mode of national accountability mechanism, it demands that all mechanisms should be accessible, effective and impartial.⁹⁵ According to WHO and *etal*, accountability of states at national level could be done by policy, administrative, political means, or through the judiciary or National Human Right Institutions (NHRIs).⁹⁶ These mechanisms are the single most important avenues of remedy due to the principle of complementarity. Since it is only when the national mechanisms are unable or unwilling to redress a rights violation that regional and international mechanisms of accountability are invoked.

To see how these mechanisms operate and ensure accountability, let us begin our examination with policy, administrative and political means. Take a state's water policy or action plan that incorporates benchmarks regarding water quantity or quality or affordability as an example, it can clearly serve as an indicator to monitor the performance of state. Similarly, administrative sanctions and remedies could be provided to individuals when public or private water suppliers

⁹⁴ Id, p.38

⁹⁵ *ibid*

⁹⁶ *ibid*

deprive their access to water.⁹⁷ In the political sphere also, individuals could use the ballot box to ensure the states accountability. To demonstrate how this is possible, assume that a certain political party has promised to make the provision of water its priority. But when it wins the election and form the government it forgot all its promises and failed to do anything that improves water access. If such scenario occurs the people can make the government to account by denying their vote when it competes in the next election.

The judiciary could also play a crucial role in making the state to account for the obligations it assumed under the right to water. In a number of countries courts are playing prominent role in providing remedy's to individuals when their right to water is violated due to deprivation of their pre-existing water access, water pollution and unaffordability of water. A good example in this regard is the decision of Botswana court of appeal in 2011 in the matter between *Matsipane Moseithanyane v The Attorney-General of Botswana*.⁹⁸ The case involves the Basarwa people living in Central Kalahari Game Reserve (CKGR). Following the Botswana's governments proposal to relocate the Basrwa people outside the CKGR, some members of the Basarwa people accepted the offer and moved to another place where basic facilities including water exist. On the other hand, other members of the Basarwa opted to remain in the CKGR.

Afterwards, the Botswana government sealed and dismantled the borehole located inside the CKGR where the Basarwa people get water for meeting their personal and domestic needs.⁹⁹ The government also prohibited the Basarwa from sinking a new borehole for satisfying their domestic water needs at their own expense. As a result of these measures, the Basarwas residing in the CKGR were unable to get sufficient amount of water for meeting their basic needs. Consequently, they were forced to rely on melons and other roots which could provide them only with few drops of water. They were also unable to bring water from outside as the nearest water source is located 40 kilometers away from CKGR. Furthermore, the amount of rain they get is very small since the area is a desert.¹⁰⁰

⁹⁷ Id, p.39

⁹⁸ *Matsipane Moseithanyane & Others v The Attorney-General of Botswana*, Court of Appeal, CALB-074-10

⁹⁹ Ibid

¹⁰⁰ ibid

The lack of water has created a number of health complications for the Basarwa people. Some of them include constipation, headache and dizziness.¹⁰¹ It also made the Basarwa weak and prevented them from doing their usual chores. According to Dinokopila, the shortage of water in the CKGR has deprived them of energy.¹⁰² As such, their only option was to spend their time sitting in their huts. The problems lactating mothers face is even worse as the lack of water limits their capacity to produce sufficient milk for feeding their children. Their children used to cry a lot and unable to sleep well. Besides, since the Basarwas lack water for cleaning themselves their appearance looks very dirty.¹⁰³

All this problems forced the Basarwas to bring a legal action against the government of Botswana. Accordingly, the Basarwa people alleged that the Botswana government action of depriving them their pre-existing access to water violates their constitutionally guaranteed right to protection from inhuman and degrading treatment stipulated under article 7 of the Botswana constitution.¹⁰⁴ In response to this allegation, the government of Botswana argued that the applicants brought all these problems by themselves since they choose to stay in the reserve.¹⁰⁵ After hearing the arguments of both sides, the Botswana court of appeal held that the Basarwas people residing in the CKGR have the right to maintain their pre-existing right to water over the borehole or built a new one so that they could use it for personal and domestic uses.¹⁰⁶

It also decided that the actions of the Botswana government that led to the deprivation of their right to water amounts to violation of their right to protection from inhuman and degrading treatment.¹⁰⁷ The decision of the court is very interesting as it used the explicitly guaranteed civil and political right to protection from inhuman treatment to enforce the socio-economic right to water that is absent from the explicit terms of the Botswana constitution and hold the government to account for its actions.

Likewise, another good example of judicial involvement in holding the states accountable for realizing the right to water is the decision of the South Africa Constitutional court in the

¹⁰¹ *ibid*

¹⁰² B. R. Dinokopila, "The Right to Water in Botswana: A Review of the Matsipane Moselelhanyane Case", *African Human Rights Law Journal*, vol.11, no.1(2011) p.285

¹⁰³ *Id*, p.292

¹⁰⁴ *Id*, p.287

¹⁰⁵ *Id*, p.286

¹⁰⁶ *Id*, p.290

¹⁰⁷ *Id*, p.291

Mazibuko case.¹⁰⁸ The case started in the South Gauteng High Court in Johannesburg, in July 2006. The applicants were Mrs Lindiwe Mazibuko and five other residents of the city of Phiri South Africa. In their application the claimants raised two main issues. The first is that, they argued the city's free basic water policy that provides 6 kiloliters of water per household per month (25 liters per person per day) is not sufficient for large households and contravenes the article 27(1) b of South African constitution that recognizes access to water.¹⁰⁹ Their second claim was that the installment of pre- paid water meter that automatically disconnects when 6 kiloliter of water is used is unlawful and unconstitutional violating their right to water.¹¹⁰ The respondents in this case were the City of Johannesburg (the City), Johannesburg Water (Pty) Ltd and national Minister for Water Affairs and Forestry.

The decision of the high court was that the amount of water provided under the city's policy is insufficient and it should be raised to 50 liters per person per day.¹¹¹ In addition to this the high court also ruled that the installment of pre-paid water meter is unlawful. Aggrieved by the decision of the high court the respondents brought their appeal before South African Supreme Court. The Supreme Court merely reduced the amount of water to be supplied to 42 liters per person per day and upheld the decision of the high court in relation to the installment of the pre-paid water meters.¹¹² The applicants were not happy with the decision of the Supreme Court and appealed to the South African constitutional court arguing that the decision of the high court should have been upheld. After examining the case the constitutional court quashed the judgments of the South African high and supreme courts on the matter saying that the city's water policy and the installment of prepaid water meters are reasonable and in line with the stipulations of the South African constitution.¹¹³

Although, the South African constitutional court failed to rule in favor of the applicants, it has tried to hold the state of South Africa accountable by examining the reasonableness of the government's policy in implementing the right to water. What should be appreciated here is the fact that courts in other countries are holding states accountable in relation to laws and policies

¹⁰⁸ Lindiwe Mazibuko and others and the City of Johannesburg and others, Constitutional Court of South Africa Case CCT 39/09 2009 ZACC 28

¹⁰⁹ Id, para.25

¹¹⁰ ibid

¹¹¹ Id, para.26

¹¹² Id, para.28

¹¹³ Id, para.169

they set for implementing the right to water. Ethiopian courts should learn from the Botswana and South African courts to ensure the accountability of the Ethiopian government in relation to its implementation of the right to water in Ethiopia.

Having said this much about judicial mechanisms, the role of National Human Right Institutions (NHRI) in ensuring the accountability of state in relation to the right to water are analyzed subsequently. Thus, one of the primary responsibilities of NHRIs is to monitor the domestic implementation of human rights by their respective governments and ensure accountability.¹¹⁴ As such, NHRIs located in different countries of the world are engaging in tasks of ensuring the accountability of states in realizing the right to water. Exemplary NHRI's in this regard are the Kenyan National Human Rights Commission and its Peruvian counterpart. The Kenyan Human Rights Commission has a department that specifically works on the implementation of socio-economic rights. This department has assessed the implementation of the right to water in Kenya and issued a report.¹¹⁵ Similarly, the Peruvian NHRI has studied the legal and policy framework for implementing the right to water in Peru and issued a report entitled "citizens without water: analysis of a rights violation" with its recommendations.¹¹⁶ Ethiopian NHRIs particularly the Ethiopian Human Rights Commission needs to follow the example of its Kenyan and Peruvian NHRIs in relation to the implementation of the right to water in Ethiopia.

3.5.2 REGIONAL MECHANISMS

The next level of accountability for states in relation to the right to water exists at regional level. This task is primarily undertaken by regional human right monitoring bodies operating in Africa, Europe and America. Since the thesis focuses on the implementation of the right to water in Ethiopia, it only discusses the regional mechanisms of accountability in Africa where Ethiopia is held to account. Accordingly, two main monitoring bodies exist in Africa i.e. the African Commission on Human and People's Right and the African Committee of Experts on the Right and Welfare of the Child.

¹¹⁴ WHO *etal*, cited above at note71, p.42

¹¹⁵ *ibid*

¹¹⁶ *Id*, p.43

The African Commission as part of its mandate to protect human rights receives complaints of violation of the right to water from individuals as well as states.¹¹⁷ As outlined in the preceding chapter in the section dealing with the evolution of the right to water in Africa, in a number of occasions the Commission has found states in violation of the right to water as component of the right to life, health or human dignity. This shows that states could be held accountable when they engage in the violation of the right to water. The main problem however is the recommendations of the Commission are not binding.

Apart from the African Commission, the African Committee of Experts on the Right and Welfare of the Child (ACERWC) could also held state parties to account for violating children right to water. There are two ways for the Committee to accomplish this task. The first is through examination of state reports. Every state party to the African Charter on the Right and Welfare of the Child is required to submit report to the Committee every three years.¹¹⁸ The report mainly deals with the measures they have taken to ensure rights incorporated in the Charter, one of which is the right to water. The second means of holding state accountable is through receiving communications alleging the violations of children right to water.¹¹⁹ Interesting example in this regard is the decision of the ACERWC in the matter between *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya V. The Government of Kenya*.¹²⁰

In their communications to the ACERWC the applicants alleged that Nubians living in Kenya had their origins in the present day of Central Sudan. Their settlement in Kenya was the outcome of the decision of British colonial authorities of conscripting Nubians living in Sudan to join the British army and settle in Kenya in early 1900s. Although the Nubians in Kenya repeatedly requested the British colonizers to return them to Sudan, the authorities refused and failed to address the matter. Similarly, the Kenyan government also failed to resolve their situation following Kenya's independence from British rule in 1963 and kept on treating the Nubians as

¹¹⁷ African (Banjul) Charter on Human and Peoples' Rights (hereinafter ACHPR) (Adopted 27 on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art. 46

¹¹⁸ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted on, 1990), entered into force Nov. 29, 1999, art. 43

¹¹⁹ Id, p.44

¹²⁰ Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya V. The Government of Kenya, The African Committee of Experts on The Rights And Welfare of The Child (ACERWC) 22 MARCH 2011, Communication: No. Com/002/2009

‘aliens’ simply because they descended from Sudan.¹²¹ This has created a serious problems to the Nubian children in Kenya to get Kenyan Nationality due to their parents’ and legal guardians’ social origin. It also prevented the Nubian children from realizing their socio-economic rights including their right to water on equal basis.¹²² Accordingly, the applicants argued that the conduct of Kenyan government *inter alia* violated equal access to healthcare including the provision of safe drinking water guaranteed under article 14(2) c of the ACRWC.¹²³

The Decision of the ACERWC on this issue was that the right to highest attainable standard of health ‘includes underlying conditions for achieving a healthy life are protected by the right to health’ and that includes water.¹²⁴ Thus, the committee decided that the failure of the Kenyan government to provide children of Nubian origin with equal access to water violated article 14 (2) c of the ACRWC and recommended the Kenyan government to improve the Situation.¹²⁵ Here it must be noted that, even if the decisions of the Committee or the Commission is not binding the pressure it creates on the state in the eye of the public is significant.

3.5.3 INTERNATIONAL MECHANISMS

In addition to the national and regional mechanisms, states could also be held accountable at the international arena. Treaty monitoring bodies established under different international human right treaties undertake the task of monitoring states performance in relation to the right to water.¹²⁶ Like that of the regional systems the methods used by international treaty bodies is either state reporting or complaints. Accordingly, the Committees on Economic, Social and Cultural rights, the Committee on Elimination of Discrimination against Women, the Committee against Torture and the Human Rights Council have recommended states to improve access to water while examining state report of different countries.¹²⁷

¹²¹ Id, Para. 3

¹²² id, Para.58

¹²³ id,para.7

¹²⁴ Id, para.59

¹²⁵ Id, para.69

¹²⁶ WHO *etal*, cited above at note 71, p.44

¹²⁷ *ibid*

Although, the Committees on Economic, Social and Cultural rights has not yet received complaints, it is possible to complain the violation of the right to water to the Committee provided the state ratified the Optional Protocol to the International Covenant on Economic Social and Cultural Rights.¹²⁸ Similarly, it is also possible to submit communications to other treaty monitoring bodies alleging the violation of right to water in the contexts of those rights recognized by them.¹²⁹ In addition to international treaty monitoring bodies, the UN Special Procedures also supervise states progress in realizing the right to water. The supervision is particularly done by the UN Special Rapporteur on the Human Right to Water and Sanitation.¹³⁰

Conclusion

To sum up, the conclusion of this chapter is that the right to water should primarily be understood as an independent right as it gives the right more clarity and broader protection for the individual. The international as well as regional bodies concerned with human rights are also reaffirming the existence of the right to water as a freestanding right. Regarding the normative content of the right, it entitles individual to sufficient, safe, affordable, physically accessible water on non -discriminatory basis. The right also imposes quartet layers of obligations to respect, protect, promote and fulfill the right to water. Further, states are also required to give priority to meeting the core minimum obligations of the right to water that has to be realized immediately as it is too urgent to be postponed. Moreover, states must take in to account the particular challenges vulnerable groups like the poor, Women and Children face in realizing their right to water and strive to improve their situation. Finally , if states fail to live up to the obligations discussed above in connection with the right to water they could be held accountable at national, regional and international level.

¹²⁸ Optional to the International Covenant on Economic, Social and Cultural Rights, Doc.A/Res/63/117 adopted on 10may 2008, entered in to force may 5, 2013

¹²⁹ WHO *etal*, cited above at note 71, p.45

¹³⁰ *ibid*

CHAPTER FOUR

THE CURRENT STATE OF REALIZATION OF THE RIGHT TO WATER IN ETHIOPIA

Introduction

In the preceding two chapters we have outlined the evolution of the right to water, its normative content and related state obligations in general. Starting from this chapter, the discussion focuses on the right to water in Ethiopia which is the main theme of the research. Accordingly, this chapter examines the current state of realization of the right to water in Ethiopia by using the minimum core content of the right as a benchmark which must be realized immediately. As such, the chapter begins the discussion by looking at the water resource potential of the country, the amount of budget the country is allocating for water and overall water access. Then, it specifically examines the current status of water availability, quality, physical accessibility, affordability, non-discrimination and access to information and participation in Ethiopia. This would help to evaluate the appropriateness of the legal and policy framework set to implement the right to water in Ethiopia from the prevailing practice in the country in subsequent chapters.

4.1 THE WATER RESOURCE POTENTIAL OF ETHIOPIA, BUDGET ALLOCATED FOR THE SECTOR AND OVERALL WATER ACCESS

Ethiopia became a state party to the International Covenant on Economic Social and Cultural Right (ICESCR) in June 1993 through accession with no reservation. As stated in the previous chapters, ICESCR is considered as the primary legal basis for the right to water. Beside the ICESCR, Ethiopia is also a state party to all most all international and regional treaties that incorporate the right to water either implicitly or explicitly. As outlined in chapter two these instruments include the Child Right Convention, Convention on the Elimination of Discrimination Against Women, Convention on the Right of People with Disabilities, International Covenant on Civil and Political Rights, African Charter on the Right and Welfare of the Child and the African Charter on Human and Peoples Right. By becoming a party to these instruments Ethiopia has undertaken to honor the obligations stipulated in them with respect the right to water.

Accordingly, the ICESCR obliges state parties to fully give effect to the rights enshrined in the covenant gradually by committing their maximum available resources.¹ Here, it could be seen that the availability of resources is one of the factors considered in gauging the extent of realization of the rights in the covenant. For this reason, the obligation of a country with abundant resources is not the same with a country with limited resources. Additionally, the obligation of states is to use its maximum available resources. This implies that a state is expected to increase the amount of resource it allocates for the full realization of the right to water progressively by giving priority to minimum core obligations of the right which must be fulfilled immediately. Consequently, retrogressive measure on the part of a state is not allowed under the ICESCR unless it has a compelling and convincing justification.² With this background, the discussion proceeds to examine the water resource potential Ethiopia has and the amount of financial resources it is allocating.

One of the most important resources for the realization of the right to water is the existence of sufficient amount of water within the state. Ethiopia is blessed in this regard and often addressed as the ‘water tower’ of Africa. The reason for this is the enormous water resource potential of the country. According to the National Water Development Report for Ethiopia, the country has 12 major river basins with annual discharge 122 billion cubic meters of water per year.³ The ground water resource capacity of the country is also very large. It is estimated that Ethiopia has a ground water potential of 2.6-6.5 billion cubic meters of water per year.⁴ With these potential the country could develop 3.7 million hectares of land with irrigation, generate 30,000 megawatt electricity and supply all its population with clean water.⁵ But so far the country has used only 3% of its total water resources for different purposes. Of the 3% used the amount of water used

¹ International Covenant on Economic, Social and Cultural Rights(hereinafter ICESCR), Adopted and Opened for Signature and Ratification by General Assembly Resolution No. 2000A (XXI) of 16 December 1966 and Entered into Force on 23 March 1976, art.2(1)

² Committee on Economic, Social and Cultural Rights, General Comment No.3, The Nature of State Parties Obligation, 5th Session, 1990, U.N. Doc. E/1991/23, 1990, para.9

³ United Nations Educational, Scientific, and Cultural Organization World Water Assessment Program, National Water Development Report for Ethiopia, Addis Ababa (2004)P.62

⁴ *ibid*

⁵ *ibid*

for the realization of the right to water i.e. water used for personal and domestic purpose is only 11% (0.03% of the total).⁶

Despite Ethiopia's enormous water resource potential, a significant number of its population is deprived of access to safe water. The figures regarding the exact percentage of Ethiopian people having access to safe water varies substantially depending on the source of the data. As such, the Ministry of Finance and Economic Development of Ethiopia claims that the 68.5 % of the Ethiopian population has access to improved water source.⁷ This estimate was made by the ministry in 2010 while preparing the country's Growth and Transformation Plan which will be discussed in chapter six of the paper. But the estimation of the ministry was found to be erroneous when another study was conducted in 2011. According to the new study the percentage of Ethiopia's population having access to safe water is only 52.1%.⁸ On the contrary, the assessment made by the Joint Monitoring Program of World Health Organization (WHO)/United Nations Children Fund (UNICEF) shows that the percentages of people with access to improved water source is 44% only, which is less than the estimates of the government.⁹ The disparity between the two assessments could partly be explained by the different definition of what constitute improved water source. If we take the average of the two assessments, the percentage Ethiopian people without access to safe water would be 52% which is more than half of the country's population.

Notably, both figures show only the percentage of population that has access to 'improved water source'. The standard here is whether the population uses improved water source or not. This standard was developed to monitor states' progress in achieving Goal 7 (c) of the Millennium Development Goals (MDGs) of halving the number of people without access to water by 2015. Accordingly, indicator 7.8 of the MDGs define improved water source as water obtained from a

⁶ Water Supply and Sanitation in Ethiopia, http://en.wikipedia.org/wiki/Water_supply_and_sanitation_in_Ethiopia last visited on October 1, 2013

⁷ Ministry of Finance and Economic Development(hereinafter MOFED), Growth and Transformation Plan (GTP) 2010/11-2014/15, (2010),p.18

⁸ Ministry of Water, Irrigation and Energy , Water Supply and Sanitation Directorate 2005 Budget Year Progress Report of the Growth and Transformation Plan(Amharic), (2011),p.2

⁹ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (hereinafter WHO/UNICEF JMP), Progress on Drinking Water and Sanitation: 2012 Update (<http://www.unicef.org/media/files/JMPreport2012.pdf>) last visited on, p.43

piped source within the dwelling, yard, or plot; a public tap or stand pipe, or borehole; a protected well; spring water and rainwater.¹⁰

Obviously, the definition will not tell us the quantity of water the individual is getting and its quality. Moreover, it does not also tell how far the individual is traveling to collect water, how much money is he/she paying for water and whether he/she is facing discrimination in accessing water. In other words the definition of improved water source does not incorporate the elements of the human right to water i.e. availability, quality, physical accessibility, affordability, non-discrimination and access to information. Thus, it does not reflect the country's true progress in realizing the right to water. The implication of this is that the Ethiopian government should not be overjoyed of meeting the MDG target for water as it does not reflect honest progress. If the government wants to show real progress it must go beyond the improved water source and demonstrate what it has achieved in terms of meeting each and every element of the right to water.

The other important resource for realizing the right to water is financial resource. Accordingly, Ethiopia is expected to allocate the maximum of its available financial resources to ensure the full realization of the right to water progressively. Despite the absence of an exact formula for determining whether a state is using the maximum of its available resources or not in human rights law, United Nations Development Program(UNDP) suggest that a state should spend at least 1% of its Gross Domestic Product(GDP) on water and sanitation.¹¹ Apart from this, a state spending in other sectors particularly its military spending also gives some highlights on how the country is allocating resources. The Committee on Economic Social and Cultural Rights (CESCR) in the course of issuing concluding observations established states military spending as one indicator showing whether a state is utilizing its maximum available resources for the realization of socio-economic rights in the covenant including the right to water.¹² Regarding this, the Committee specifically noted that 'unbalanced budgetary allocations constitute serious

¹⁰ C. D. Albuquerque, Report of The Independent Expert On The Issue Of Human Rights Obligations Related To Access To Safe Drinking Water And Sanitation,(2010) ,p.19

¹¹ United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (2006),P.9

¹² Committee on Economic Social and Cultural Rights, Concluding Observations: Senegal, UN Doc. E/C.12/1/Add.62 (24 September 2001), para. 23 and Committee on Economic Social and Cultural Rights, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/COD/CO/4 (20 November 2009), para. 16

breaches in the State party's obligations under article 2.1 of the Covenant'.¹³ In contrast, a study conducted by the UNDP shows that Ethiopia's military budget is 10 times the water and sanitation budget.¹⁴ In light of the CESCR indicator above, Ethiopia is in violation of its obligation to use 'maximum available resources' under article 2(1) of the ICESCR through misallocation of resources.

In addition to this, a state is also expected to increase the amount of resources it allocates for the realization of the right to water from time to time.¹⁵ Contrary to this expectation Ethiopia is decreasing the amount of financial resources it allots for water supply from time to time. To illustrate, water and sanitation declined as a share of total poor focused expenditure from 7.4% in 2005/06 to 3.4% in 2009/10.¹⁶ Similarly a study undertaken by Water Aid indicates that the government's allocation of budget for the water sector is declining almost by half –from 4% in 2006 to 2.5% in 2010.¹⁷ Furthermore, according to the estimation of World Bank the amount of Per capita investment for the water sector in Ethiopia is less than half a dollar which is one of the lowest recorded levels in the world.¹⁸

For comparison, the writer considered the per capita investment on water of two east African states i.e. Kenya and Uganda. Kenya allocates 8 USD per capita on water which is 16 times higher than what Ethiopia earmarks.¹⁹ Likewise, the per capita spending of Uganda on water is 2.37 USD which is 4.7 times bigger than what Ethiopia spends.²⁰ Additionally, the CESCR in General Comment 15 has clearly stated that 'insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups,

¹³ Committee on Economic Social and Cultural Rights, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/COD/CO/4 (20 November 2009), para. 16

¹⁴ id, p.8-9

¹⁵ ICESCR, cited above at note 1, art 2(1) and M. Ssenyonjo, "Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law", The International Journal of Human Rights, Vol.15, No.6 (2011), p.976

¹⁶ Water Supply and Sanitation in Ethiopia, cited above at note 6

¹⁷ IRIN, Safe Water a Glass Half Full, (<http://www.irinnews.org/Report.95737/ETHIOPIA-Safe-water-a-glass-half-full>), last visited on august 23,2012

¹⁸ Water supply and Sanitation in Ethiopia, cited above at note 6

¹⁹ Water Supply and Sanitation in Kenya, (http://en.wikipedia.org/wiki/Water_supply_and_sanitation_in_Kenya) last visited on December 1, 2013

²⁰ Water supply and sanitation in Uganda, (http://en.m.wikipedia.org/wiki/Water_supply_and_sanitation_in_uganda) last visited on December 2, 2013

particularly the vulnerable or marginalized,²¹ constitute violation of states obligation to fulfill the right to water. All these demonstrate that Ethiopia is not allocating the maximum of its available resources for the realization of the right to water and lot remains to be done.

Beside misallocation of resources, the budget allotted for water supply is also suffering from corrupt and inept practices. According to the study of the Ethiopian Federal Ethics and Anti-Corruption Commission, the water sector is seriously affected by ‘corruption and spoiled system’.²² In the Commissions study the major factors that led for high vulnerability of the water sector for corruption are involvement of multiple government agencies, the origin of finance from different sources, private sector involvement, poor accountability and transparency.²³ The study also indicated that corruption in the implementation of water supply projects mainly occur in the stages of project design, bidding and procurement of goods for the project.²⁴ This would obviously affect the realization of the right to water in Ethiopia negatively.

4.2 CURRENT STATE OF REALIZATION OF MINIMUM CORE OBLIGATIONS OF THE RIGHT TO WATER IN ETHIOPIA

Although the right to water is subject to the principle of progressive realization like most socio-economic rights, certain core aspects of the right are too urgent to be postponed for the future. As such, a state is required to realize the minimum core aspects of the right to water immediately and resource constraint is not a defense.²⁵ Concerning this, the CESCR has identified the minimum core obligation emanating from the right to water in General Comment 15 and stated that these aspects of the right must be fulfilled forthwith.²⁶ Accordingly, this section assesses Ethiopia’s performance in in meeting core minimum obligation of the right to water so far. As such, the current state of water availability, quality, physical and economic accessibility, discrimination and attention to vulnerable groups as well as information accessibility and involvement of the public on water issues are also examined. Ethiopia’s minimum core

²¹ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.12, para.44(c)

²² Federal Ethics And Anti-Corruption Commission, Corruption Risks In The Water Sector Of Ethiopia, (2013, Unpublished Available in the Commissions Library and Documentation)

²³ *ibid*

²⁴ *ibid*

²⁵ Committee on Economic, Social and Cultural Rights, cited above at note 2, para.1,10,12

²⁶ CESCR, cited above at note 21, para.12, para.37

obligation of adopting legal and policy measures for implementing the right to water in Ethiopia are discussed in chapter five and six of the paper.

4.2.1 AVAILABILITY

The minimum core obligation of the state in relation to the availability aspect the right to water is to make sure that its people have ‘minimum essential amount of water’ sufficient for meeting their personal and domestic needs.²⁷ With this respect, the international standard prescribes that 20 liters per person per day is minimum essential amount of water.²⁸ As such, Ethiopia is expected to ensure that its population has at least 20 liters of water per person per day. However, the current state of water availability in Ethiopia falls below the international minimum. Even by somewhat inflated government data, in rural Ethiopia, where 85% of its population lives the per capita water consumption is 15 liters per person per day.²⁹ This amount is barely sufficient to meet personal and domestic needs. What is more, in light of the fact that even 20 liters of water per person per day poses a significant health risk an amount below that would produce a devastating result. Compared to the rural part of Ethiopia the per capita water consumption in urban areas is a bit higher 20 liters per capita per day.³⁰ This amount is equivalent only to the international minimum standard set by the WHO.

Water availability has also another minimum core dimension which is states obligation to ensure the presence of water on continuous basis or regularly.³¹ The current state of realization of this aspect of availability of water is also poor both in urban and rural areas. To demonstrate, a study conducted by the UNDP has indicted that in rural Ethiopia 29% of hand pumps and 33% of mechanized boreholes were not working due to maintenance problem.³² This would obviously affect the regularity of water supply for persons using these sources of water. Similarly, the regularity of water supply is also a serious problem in urban areas. A good example in this regard is the situation in Addis Ababa. Although the Addis Ababa’s city administration claims that the

²⁷ *ibid*

²⁸ G. Howard and J. Bartram, Domestic Water Quantity, Service, Level and Health(2003),p.1 and 22

²⁹ Ministry of Water and Energy ,Universal Access Plan, <http://www.mowr.gov.et/index.php?pagenum=2.4> last visited October 1, 2013

³⁰ *ibid*

³¹ CESCR, cited above at note 21, para.37

³² UNDP, cited above at note 11, P.88

overall water access has reached 94%, frequent interruption of water supply is a common problem in some parts of the city.³³

The City Administrations Water and Sewerage Authority Deputy Manager Mr Tesfalem in an interview with Ethiopian Television on Filfit program has mentioned numerous reasons as the main causes of frequent water breakdown in the City Administration.³⁴ The first is recurrent electric interruption in the City. Since most water pumps of the Authority operate by using electric power, the moment electricity is interrupted they stop functioning. Yet, the City does not have sufficient generators to replace electricity when power is interjected. The cost of fuel for the existing generators is also a big challenge for the authority. Besides this, the topography of some areas of the city is also blamed for water interruption. In this regard, the Deputy Manager of the Authority has stated that it is difficult to supply water for high altitude areas of the City than the low areas due to their topography. Furthermore, the damage on water supply lines at time of road construction or digging activity of other utilities is also mentioned by him as another cause for water interruptions in the City.

In the areas of the city where water is often interrupted, it could last for a number of days at times five days a week. One of these areas is Kotebe a village located within the Yeka sub-city, where the author of this paper lives. In this area, getting water from the tap during the day time is almost unthinkable. Water is often interrupted and most of the times it comes late night at inconvenient time for collection. As a result, a family which failed to fetch water during the night had to spend the next day either without water or buy water at a great expense. Here it must be noted that 0.5 liter bottled water costs about 5 Ethiopian birr or 0.25 United States Dollar (USD) which is not affordable for most families. The cost of getting water from water vendors during these days is also expensive. A 20 liter water container is bought for five Ethiopian birr which could go up to 10 birr when the cost of transporting it is included.

Furthermore, during the days where water is interrupted cleaning one self and using toilet is also a big problem. This is because most toilets require some amount of water to dispose waste. Thus, the absence of water results in the accumulation of waste and the toilet becomes non-operational.

³³ Ethiopian Television, Interview With Tesfalem Addis Ababa Water and Sewerage Authority on Ethiopian television Filfit Program, Dec 4, 2012(http://www.diretube.com/filfit/interview-with-tesfalem-addis-ababa-water-and-sewerage-authority-video_dbdbcbfd.html) last visited October 5, 2013

³⁴ ibid

The only option for the people is either to go to other operational toilets located far away or refrain from defecating which is a very difficult thing that goes against a person's right to live a dignified life.

4.2.2 QUALITY

The other minimum core obligations of states flowing from the right to water is its duty to ensure the safety of water used for personal and domestic purposes so that disease could be prevented.³⁵ Accordingly, Ethiopia has the obligation to make sure that water used by its population is safe. The most recent study on the current state of water quality was conducted by the WHO and UNICEF in 2005. This study is believed to provide 'an excellent, statistically representative snapshot of the status of the microbiological and chemical quality of drinking-water sources in Ethiopia'.³⁶ It was during the consultative meeting of the WHO/UNICEF held in Bangkok in the year 2002 that Ethiopia was selected to implement the pilot project on the Rapid Assessment on Drinking Water Quality (RADWQ). A committee consisting of the Federal Ministry of Health (FMOH), the Federal Ministry of Water Resources (FMOWR), the Ethiopian Health and Nutrition Research Institute (EHNRI), the Quality and Standards Authority of Ethiopia, the Ethiopian Environment Protection Authority, UNICEF and WHO was created to monitor the implementation of the project.³⁷ The project was undertaken for a period of five months December 2004-2005.

Consequently, samples were collected from 1815 sites and placed into 64 clusters by four field teams.³⁸ The total sample was further divided into four broad areas and over four improved water sources which includes utility piped supplies, boreholes, protected dug wells and protected springs. Each of these improved water sources at that time serve 5% of the Ethiopian population. Water samples collected from these sources was tested for the following parameters: thermotolerant coliforms, faecal streptococci, pH, turbidity, chlorine residual, appearance, conductivity, arsenic, nitrate, fluoride, and iron.³⁹ Apart from this, 10% of the total number of

³⁵ CESCR, cited above at note 21, para.37

³⁶ Dagnew Tadesse *et al*, Rapid Assessment of Drinking Water Quality in the Federal Democratic Republic of Ethiopia Country Report of the Pilot Project Implementation in 2004- 2005, (World Health Organization and UNICEF 2010),p. xi

³⁷ *Id*, p. viii

³⁸ *Id*, p. xi

³⁹ *ibid*

household samples was analyzed for the deterioration of water quality during distribution and storage.

The result of the RADWQ report demonstrate that the overall compliance of the collected samples WHO guideline on drinking water quality and national standard was 68% for thermotolerant coliforms, fluoride, arsenic and nitrate.⁴⁰ Among the four improved water sources utility piped supplies had the highest overall level of compliance (80%) and protected springs the lowest (44%).⁴¹ Individually, for thermotolerant coliforms, 72% of drinking-water supplies tested were in compliance with both the WHO guideline value and the Ethiopian Drinking-Water Standard ES 261:2001.⁴² Compliance ranged from 43% for protected springs to 88% for utility piped supplies. Similarly, the compliance rate for fluoride with the WHO guideline value and the national standard of 1.5 mg/l was approximately 94%. Furthermore, regarding nitrate nearly 100% of collected water samples complied with the WHO guideline value and the national standard of 50 mg/l.⁴³

But the RADWQ study does not show the full extent of water quality problem in Ethiopia. This is because, although the study says that 32% of improved water sources in Ethiopia supply water of inadequate quality, one has to ask for how much of the Ethiopian population uses this improved water Sources. Accordingly, at the time the study was conducted only 37% of the Ethiopian population uses the water from the improved water sources.⁴⁴ The overwhelming majority of Ethiopian population 63% uses water from unimproved water sources where water quality is unthinkable at all. This shows that Ethiopia is lagging behind a lot in meeting its minimum core obligation to ensure the supply of water of an adequate quality.

Furthermore, the study conducted by the RADWQ has concluded that monitoring of water quality is poorly enforced in Ethiopia.⁴⁵ Several reasons could be mentioned but the major ones are lack of financial resources, poor logistics, limited human resources, inadequate laboratory equipment, and limited availability of reagents at the regional level.⁴⁶ Thus, ‘water quality

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² *ibid*

⁴³ *ibid*

⁴⁴ *Id*, p.4

⁴⁵ *Id*, p.5

⁴⁶ *ibid*

monitoring and surveillance’ is Ad hoc only conducted when new water supplies are being developed or commissioned; when there is a disease outbreak; when dealing with customer complaints; and when significant changes in water-quality are reported during inspection’⁴⁷ .

The poor state of water quality in Ethiopia could also be observed from the number of children that die from waterborne diseases every year. In this regard, study conducted by the UNICEF shows that some 271,000 Ethiopian children under the age of five died in 2010 alone, with pneumonia and diarrheal causing more than one third of those deaths.⁴⁸ Similarly, a study undertaken by Water Aid Ethiopia shows that each year 33,000 Ethiopian children die due to illnesses caused by contaminated water.⁴⁹ Furthermore, according to the 2011 Demographic and Health Survey of Ethiopia 90.2 % of drinking water in Ethiopia is not subjected to any treatment before it is used for drinking showing the poor state of water quality and the significant health risk it poses.⁵⁰

4.2.3 PHYSICAL ACCESSIBILITY OF WATER

General Comment 15 of the CESCR also stipulates the minimum core obligation of states in relation to the physical accessibility element of the right to water. Accordingly, it says that states must ensure the location of water outlets at ‘a reasonable distance from the household’⁵¹. Concerning this, the international standard stipulates that a water source is considered to be at a reasonable distance if it is located within 1000 meters of the person’s vicinity.⁵² When the current state of realization of the physical accessibility aspect of the right to water is examined, it falls short of the international standard particularly in the rural parts of Ethiopia.

These could be seen from the country’s Growth and Transformation Plan (GTP) which says in rural Ethiopia water is accessible within 1.5 kilometers.⁵³ Thus, an individual in rural Ethiopia has to travel at least 0.5 kilo meters more than the international minimum standard on the physical accessibility of water. This additional distance according to WHO would reduce the

⁴⁷ ibid

⁴⁸ IRIN, cited above at note 17

⁴⁹ Water Aid Ethiopia, (<http://www.wateraid.org/where-we-work/page/ethiopia>), last visited 2 September 2013

⁵⁰ Central Statistical Agency and ICF International Calverton, Demographic and Health Survey 2011, (2012), p.14

⁵¹ CESCR, cited above at note 21, para.37

⁵² Howard and Bartram, cited above at note 28, p.18-22

⁵³ MOFED, cited above at note 7, ibid

amount of water collected to 5 liters per person per day.⁵⁴ Besides, the distance of 1.5 kilometer is only the average and there are places in Ethiopia where people travel more than 2 kilometers to collect water. For instance, studies have revealed that in some areas of the Amhara region people travel for more than 60 minutes equivalent to more than 2 kilometers to fetch water.⁵⁵ Compared to the rural parts of Ethiopia, the physical accessibility of water in urban areas is much better. In this regard, Ethiopia's GTP states that in urban areas of the country water points are located within 0.5 kilometers of the household which complies with the international minimum standard.⁵⁶

The physical inaccessibility of water in rural parts of Ethiopia has created a lot of problems for the society. To illustrate, a study conducted by Water Aid Ethiopia and other bodies have shown that people prefer to use contaminated water near their vicinity than travel long distances for many hours to collect water from safe source.⁵⁷ The result of this decision is frequent sickness of the members of the rural community particularly children from waterborne diseases such as diarrhea, typhoid and stomach ache. Sickness, from water borne diseases in turn prevents children from attending school and the adult members from engaging in their other day to day chores.

Apart from sickness due to contaminated water, the heavy burden of transporting water from a distant water source also poses a significant health risk. The reason for this is that, not all families own pack animals like donkeys for transporting water from a faraway water sources. As such, their only option is to carry heavy containers of water on their back using ropes. Here a statement given to the UNICEF by Ethiopian mother Medhin demonstrates the severity of this problem.⁵⁸ Accordingly, Medhin states that she and her 13 years old daughter Tilalem living in the Raya Azebo area travel long distances to collect water. Some days they have to wait for hours to get their turn, as other women and girls fill up their containers. Once their container is filled they conduct the return journey carrying 25 liters of water each on their backs across the

⁵⁴ Howard and Bartram, cited above at note 28, p.18-22

⁵⁵ B. Edilsten, "Water Poverty In Rural Ethiopia, Effects on Women, Health And Poverty Cycle", Global majority E-Journal, vol.4, no.1, (2013) p.48-50

⁵⁶ *ibid*

⁵⁷ Mengistu Dessalegn *et al*, Voices from the Source Struggles with Local Water Security in Ethiopia, (Water Aid Ethiopia 2013), p.5

⁵⁸ Unicef, In Ethiopia, UNICEF Helps Meet Water Supply Challenges in Drought-Hit Raya Azebo District, (http://www.unicef.org/infobycountry/ethiopia_59056.html) last visited October 1, 2013

mountainous terrain. “It is very heavy, it is water after all,” says Medhin. “The rope digs into our shoulders, it swells and gets sore. Because I don’t have a donkey, it is my daughter and me who must carry the water.”⁵⁹ The problem is even worse for pregnant mothers, since traveling long distances carrying heavy containers of water on their back often causes child miscarriage.⁶⁰

Moreover, the physical inaccessibility of water in rural parts of Ethiopia has made water collection a major preoccupation for women and children.⁶¹ As such, the task of water collection would prevent them from engaging in other productive activities. With respect to this, since girls in rural Ethiopia travel long distances to collect water they frequently come late to classes or do not come to classes at all. This factor also causes dropout and repeating classes on the part of girls resulting regress in terms of education.⁶² As an illustration, a study conducted on 70 women in Amhara Regional State of Ethiopia reported that, 18.5 percent of them admitted to have kept a girl home from school to assist them with water collection.⁶³

Furthermore, the minimum core obligation of Ethiopia to ensure the physical security and safety of persons while collecting water is also at a poor level. To begin with girls, when they travel to far places in search for water especially in dry seasons they might face dangers of physical violence and rape. Additionally, water collection from faraway place also exposes girls for abduction, forced and early marriage.⁶⁴ Beside this, when people try to collect safe water from other places the local inhabitants where the water source is located have preference over them and they may deny them access at all. This often results a serious fight between the local inhabitants and people who came from other places in search for safe water resulting at times physical injury.⁶⁵ All these problems show that Ethiopia must do a lot to ensure its minimum core obligation ensuring the accessibility of water at a reasonable distance.

⁵⁹ Ibid

⁶⁰ Pbs News Hour, In Ethiopia a Daily Struggle for Clean Water, march 18, 2010 http://www.pbs.org/newshour/bb/weather/jan-june10/ethiopia_03-18.html last visited on October 1,2013

⁶¹ ibid

⁶² ibid

⁶³ Edilsten, cited above at note 52,p.49

⁶⁴ Pbs News Hour, cited above at note 60

⁶⁵ ibid

4.2.4 ECONOMIC ACCESSIBILITY OR AFFORDABILITY OF WATER IN ETHIOPIA

The availability, quality and physical accessibility of water becomes meaningless if the cost of getting it is very excessive. Taking note of this concern, General Comment 15 of the CESCR imposes the minimum core obligation of states to design and implement 'low-cost targeted water programs'⁶⁶ aimed at making water affordable for all in general and vulnerable groups in particular. Regarding this, the international standard on the affordability of water prescribes that the amount of money an individual spends on water should not exceed 3% of his income.⁶⁷ The purpose of the standard is to make sure that the cost of getting water does not prevent the individual from meeting his other needs and rights beside water.

When the current state of water affordability in Ethiopia is examined on the basis of this standard, the difficulty one encounters is the absence of sufficient data showing how much percentage of individual's income is spent on water. Thus, the only data that the writer was able to find was the Household Income, Consumption and Expenditure (HICE) Survey 2004/5 undertaken by Central Statistical Agency of Ethiopia. According to this survey housing, water and fuel account for the 2nd largest component of expenditure of an individual with 18.1% with an average of 320.51 Birr per person per annum'.⁶⁸ However, this survey does not tell us the precise percentage of income spent on water.

Accordingly, the writer has referred to case studies conducted on water affordability in selected rural and urban areas of Ethiopia. The author has also looked into the water tariff structure of the Addis Ababa City administration with the view of providing readers some highlights on the current state of water affordability in Ethiopia. To begin with the case study on water affordability in rural Ethiopia, it was commissioned by Water Aid. The areas selected were Shinile in Somali Regional State, and Konso in Southern Nations, Nationalities and Peoples Region (SNNPR) of Ethiopia.⁶⁹

⁶⁶ CESCR, cited above at note 21, para.37

⁶⁷ UNDP, cited above at note 11, P.11

⁶⁸ The Federal Democratic Republic of Ethiopia Central Statistical Agency, Household Income, Consumption and Expenditure (HICE) Survey 2004/5 Undertaken by Central Statistical Agency, vol. 1 Analytical Report, Statistical Bulletin 39 (2007) p.ix and p.65

⁶⁹ Mengistu Dessalegn *et al*, cited above at note 57, p.10

In these areas access to improved water sources always requires payment. The collected payment is utilized for maintenance as well as for covering fuel expenses used for generators. The amount of payment for water collected from a borehole ranges from ETB 0.25 to Ethiopian Birr (ETB) 0.50 per 20 liter jerry can.⁷⁰ According to the study, the amount of income spend on water in these areas is ‘equivalent to USD 0.70 to 1.40 per cubic meter (by comparison, the latter is roughly the same amount that United Kingdom consumers pay, but in a country where annual per capita GDP is some 36 times higher)’.⁷¹ The study further shows that ‘at these rates purchasing just 15 liters per person per day for a relatively small household of five would cost ETB 340-680 per year’.⁷² This amount is significant when one looks at the yearly annual income in these places. With respect to this, although recent data on typical annual income in the study sites were not available, estimates of early 2000s shows that these were just ETB 800 – 2400 for agricultural households in Konso and ETB 2000 – 7000 for pastoralist households in Shinile.⁷³

The study has further shown that majority of the people near the boreholes use water from the borehole instead of other unimproved water sources. This fact suggests that the cost of getting water is affordable for most households. But this assumption does not take in to account how water expense is preventing the fulfillment of their other needs which is important to say water is affordable. Furthermore, water cost is a significant concern for most poor and vulnerable households. To illustrate, the study has indicated that some households in Shinile have stated that the 0.25 ETB water cost is a burden for them and they would like to obtain water for free since they could not afford it.⁷⁴ Similarly, in Konso where the price for jerry can is 0.50 ETB some households have stated that they have began to collect water from unimproved sources since the cost of getting water from safe water sources is unaffordable for them.⁷⁵ This shows that Ethiopia must step up its effort to make water affordable for its poor and vulnerable households forming part of its minimum core obligations.

This being said regarding water affordability in the rural parts of Ethiopia, the discussion proceeds to examine the current state of water affordability in the urban areas of the country.

⁷⁰ ibid

⁷¹ ibid

⁷² ibid

⁷³ ibid

⁷⁴ Id, p.11

⁷⁵ ibid

Concerning this, a case study on Adma town of the Oromia Regional State was sponsored by the Ministry of Water and Energy. According to this study, 32.25% of the respondents said the price is fair, 23.45% said it is very cheap and the rest 43% said it is very expensive.⁷⁶ The study has further stated that the reason behind the high number of the respondent to say the cost of water is very expensive may be due to the fact that some of the households purchase water from vendors at a price much higher than the existing official tariff. Regarding this, the study has demonstrated that the average vender's price for water in the town is '0.15 cents for a bucket of water (excluding labor cost) or Birr7.50 for one cubic meter'.⁷⁷ When this is compared to the official tariff rate, which is Birr1.30 for the lowest consumption bundle (1-5m³), it is 500% greater'.⁷⁸ Among those respondents who said water is expensive, 58.96% were from low-income group, 35.9% were from middle-income group and 37.96% were from the high-income group⁷⁹. These figure show that water affordability in urban areas of the country is also an issue for the urban population particularly the urban poor.

In addition to this study, the researcher has also tried to see the tariff structure of the Ethiopia's capital, the Addis Ababa City Administration. Accordingly, documents examined by the researcher show that the first water tariffs in the city was set in the year 1927 G.C.⁸⁰ The then water tariff provides that for those with the ability to pay the cost should be low and for those with no ability to pay water should be provided free of charge.⁸¹ The current water tariffs of the City were adopted in 2011/2012. In setting the tariff three main considerations were taken in to account.⁸²

The first is to ensure that the tariffs structure will not harm low income and middle income dwellers of the city. The second consideration is to ensure the sustainability of water provision in the City by collecting reasonable fee from users. The third was to deter wastage of water by users through appropriate tariff. Hence, the water tariff for consumers using 0-7m³ per month is 1.75 ETB per m³ per month, 8-20.99 m³ per month is 3.80 ETB per m³, 21-40.99m³ per month is 4.75

⁷⁶ Alebel Bayru, Affordability and Willingness to Pay for Improved Water Supply in Urban Areas of Ethiopia (http://users.ictp.it/~eee/workshops/smr1686/alebel_1.DOC) last visited November 9, 2013

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ Addis Ababa water and sewerage authority, Essential Information's that Customers should Know (Amharic), Brochure (2012), p.1

⁸¹ *ibid*

⁸² *Id*, p.11-12

ETB per m³, 41-100.99 m³ per month is 5.95 ETB per m³, 101-300.99 m³ per month is 7.45 ETB per m³, 301-500.99 m³ per month is 9.3ETB per m³ and if the consumption above 501 m³ per month the tariff is 11.6 ETB per m³.⁸³

A reasonable inquiry here would be what is the fate of persons who could not afford even the reduced rate? Is there any possibility for them to get water free of charge? The answer to this question is negative; no payment means no water irrespective one's ability to pay. This violates Ethiopia's obligation to fulfill the right to water by providing free minimum essential amount of water for those who proved their inability to pay. The other problem related to the affordability of water in the city is the high initial cost of private tap connection which is around 412 ETB (20.6 USD) paid once in full.⁸⁴ In relation to this, a study conducted in the poor areas of Addis Ababa has revealed that the high initial connection cost has forced the residents to purchase water from water vendors at an excessive cost. These households on average spend 6.2 ETB (0.74 USD) per m³.⁸⁵ The price of water vendors in these areas is 8.5 times higher than the official tariff and the residents spend about 9% of their income on water⁸⁶ although the international standard on water affordability prescribe water spending not to exceed 3% of income.

The City Administration is making an effort to make water affordable in line with Ethiopia's obligation under the ICESCR and other instruments ratified by Ethiopia by subsidizing the water sector. The form of subsidy is both direct and cross subsidization. Cross subsidization is undertaken by adopting different tariff rate for domestic users and commercial users.⁸⁷ The tariff rate for household users is progressive. On the other hand the tariff rate for commercial users is a flat rate.⁸⁸ This is to make water affordable for household users using water for domestic purposes. Although, this measures are good, frequent water interruption in the City is posing a challenge to affordability of water. This is because in those days where water is interrupted dwellers of the city will be forced to buy bottled water or water from water vendors

⁸³ Id, p.14

⁸⁴ S.K Sharma and Belayhun Weldemeskel Berket, Water Supply System in Selected Urban Poor Areas of Addis Ababa(2008), p. 433

⁸⁵ ibid

⁸⁶ ibid

⁸⁷ Addis Ababa Water and Sewerage Authority, cited above at note 80, p.14

⁸⁸ ibid

at a price way beyond the official tariff. So the City Administration must strive to address water affordability problem.

4.2.5 NON DISCRIMINATION AND ACCESS TO WATER IN ETHIOPIA

In addition to the core minimum obligations discussed above, Ethiopia is also required to immediately guarantee the provision of water services and facilities ‘on a non-discriminatory basis, especially for disadvantaged or marginalized groups’⁸⁹. The country is also expected to ‘ensure equitable distribution of all available water facilities and services’⁹⁰. When one tries to analyze the current state of realization of non-discrimination facet of the right to water in Ethiopia, the immediate problem one encounters is the unavailability of sufficient disaggregated data showing water access for different groups of persons. The reason for this is that, data’s pertaining to access to water in Ethiopia are largely stated in gross terms covering the overall population without showing how much of this percentage are for instance Children, People with Disabilities , Indigenous Peoples and Refugees. This by itself shows the inadequate attention given for vulnerable groups in realizing the right to water in Ethiopia. Further, the practice also contradicts the African Commission state reporting guideline regarding states obligation to ‘provide statistics on the enjoyment of each right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, particularly with reference to groups identified as vulnerable or marginalized’⁹¹. Nevertheless, the writer will discuss the urban rural bias in accessing water in Ethiopia and the particular challenges woman face in realizing their right to water where there is some data.

Accordingly, a recent a study of the government shows that the rural coverage of access to clean water is 48.8% while water coverage in urban areas is 74.6% in urban areas.⁹² Conversely, Joint Monitoring Program report shows that access to water in urban areas to be 97% compared to 34% access in rural areas in the year 2010.⁹³ Despite the disparity of the two figures both of them show there is a strong urban bias in accessing water in Ethiopia and concurs with the global

⁸⁹ CESCR, cited above at note 21, para.37

⁹⁰ ibid

⁹¹ African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In the African Charter on Human And Peoples’ Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para.3

⁹² Ministry of Water, Irrigation and Energy , Water Supply and Sanitation Directorate 2005 Budget Year Progress Report of the Growth and Transformation Plan(Amharic), (2011), p.2

⁹³ WHO/UNICEF JMP, cited above at note 8, p.43

reality that most people deprived of water access reside in rural areas. Regarding this, Desalegn Rahmeto argues that the strong urban bias of water access in Ethiopia indicates successive government's failure to allocate sufficient resources for improving water access in rural parts of Ethiopia.⁹⁴

He further argues that the high percentage of water access in urban places is also not representative of all urban areas across the country. Rather, it is due to the high water access in the capital city Addis Ababa where millions of people live.⁹⁵ Thus, the country is not providing access to water to its rural and urban population on equal basis. It is also difficult to say that water facilities are accessible to all on equal basis even in urban areas of the country. For instance, in Addis Ababa certain areas of the city get water 24 hours and 365 days without any interruption. On the contrary, other areas of the city go without a single drop of water at times for five days a week. In light of this fact it would be difficult to say Ethiopia is ensuring equal access to water even to its urban population.

Besides the urban rural bias of accessing water in Ethiopia there is also a *defacto* discrimination against women and girl children in relation to water collection. This is because in most parts of Ethiopia the chore of water collection is primarily assigned to women and girl children. As an illustration, the 2011 Demographic and Health Survey of Ethiopia shows that adult women undertake 61.3% of water collection.⁹⁶ Girl children below the age of 15 years took the second place in water collection by taking 15.4%.⁹⁷ In contrast, water collection share of adult men and male children below the age of 15 is 5.9% and 4.8% respectively.⁹⁸

This clearly shows that women and girl children in Ethiopia assume the unfair and heavy burden of meeting their family's water needs. The consequence of their marginalized position is that they would not be able to compete with their male counterparts on equal basis since the chore of water collection inhibits them from engaging in other productive activities and education. Unless the government does something to ease the heavy burden of Ethiopian women and girl children

⁹⁴ Dessalegn Rahmato, Water Resource Development in Ethiopia: Issues of Sustainability and Participation, Forum for Social Studies, 1999, available at http://www.ethiopians.com/Main_FSS_Paper1.htm last visited October 1, 2013

⁹⁵ *ibid*

⁹⁶ Central Statistical Agency and ICF International Calverton, cited above at note 50, p.14

⁹⁷ *ibid*

⁹⁸ *ibid*

in relation to access to water, the goal of putting women in equal footing will be a mirage or a distant dream.

4.2.6 PUBLIC PARTICIPATION AND WATER ACCES IN ETHIOPIA

The other area of minimum core obligation of the right to water, in which Ethiopia is performing poorly, is its failure to ensure sufficient participation of the community in water development projects. For so long the predominant way of thinking was that if enough water points are installed water access problems would be solved once and for all.⁹⁹ But this assumption was not correct, since many of water points installed with this thinking stopped functioning after serving the community for a very short period of time. In this regard, UNDP data shows that in rural Ethiopia 29% of hand pumps and 33% of mechanized boreholes do not work at any given time which indicates the poor engagement of the society in design and installment of these systems.¹⁰⁰

Similarly, Water Aid Ethiopia also acknowledges the poor involvement of the community in water development projects. With respect to this, Meselech Seyoum of the Water Aid Ethiopia says that people are often excluded from participating in water provision and management systems. She further states that there is thinking on the part of the government that ‘we know what is good for the people’.¹⁰¹ In her view this line of thinking is responsible for lack of sustainability, ownership and short life span of installed water points. Thus, in the absence of community engagement any water development project is doomed to fail. So the government must strive to ensure sufficient participation of the public so that the sustainability and durability of water points is to be achieved.

Compared to the rural areas participation and access to information in the urban areas of the Ethiopia is better. For instance, concerning access to information the writer was able to find a brochure prepared by the Addis Ababa Water and Sewerage Authority entitled ‘Essential information’s that customers should know’.¹⁰² The brochure provide information’s regarding preconditions that customers must fulfill to get new connection or relocation of water lines,

⁹⁹ Pbs News Hour, cited above at note 60

¹⁰⁰ UNDP, cited above at note 11,P.88

¹⁰¹ Pbs News Hour, cited above at note 60

¹⁰² Addis Ababa Water and Sewerage Authority, cited above at note 80

water tariff and different fees for different services. This is a good practice that other water providers in the country must look up to.

Likewise, in the area of participation in water issues, urban areas of the country are performing better compared to their rural counterparts. As evidence, the practice in the Addis Ababa water and sewerage authority could be cited as an example. The authority has established water forums with its customers in which it discusses problems in its provisions every three month.¹⁰³ This is also a good experience that other water providers in the country must follow or learn from.

Conclusion

To summarize, the finding of this chapter is that Ethiopia is not utilizing its enormous water resource potential to resolves its population's acute problem of water access. There is also misallocation of financial resources that has limited the amount of budget the country allots for water supply. Corrupt practice is also taking a significant portion of budget allocated for water supply. Besides, the finding of the chapter shows that by and large Ethiopia has violated the minimum core obligation or content of every aspect of the right to water. Given immediate nature of the core minimum obligations of the right to water, it is fair to say that there is already a rampant violation of the right to water in Ethiopia.

¹⁰³ Ethiopian Television, cited above at note 33

CHAPTER FIVE

THE LEGAL FRAMEWORK FOR IMPLEMENTING THE RIGHT TO WATER IN ETHIOPIA

Introduction

In the previous chapter we have seen the poor state of realization of the very minimum core obligations of the right to water in Ethiopia. One the mechanisms for remedying this problem is having an adequate legal framework for the implementation of the right to water that conforms to human rights standards and principles. Accordingly, the International Covenant on Economic Social and Cultural Rights (ICESCR) obliges state parties to put in place laws for the proper realization of the rights in the covenant one of which is the right to water.¹ Likewise, the African Charter on Human and Peoples Right, the African Charter on the Right and Welfare of the Child the African Women Protocol, State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) and Draft Guideline on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right (Draft Guideline) incorporating the right to water underscore states obligation of taking legislative and other measures for implementing the right domestically.²

Thus, the focus of this chapter would be to analyze the extent of conformity of existing Ethiopian laws enacted for the implementation of the right to water with the stipulations of the above international and regional human rights instruments. To this effect, the chapter begins by examining the status of the right to water in the Ethiopian constitution. Then, it analyzes the stipulations of relevant subsidiary legislation below the constitution, regarding the right to water, with the view of determining their consistency or inconsistency with human rights principles and

¹ International Covenant on Economic, Social and Cultural Rights(hereinafter ICESCR), Adopted and Opened for Signature and Ratification by General Assembly Resolution No. 2000A (XXI) of 16 December 1966 and Entered into Force on 23 March 1976, art.2(1)

² African (Banjul) Charter on Human and Peoples' Rights(hereinafter ACHPR) (Adopted 27on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art.1, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted on, 1990), entered into force Nov. 29,1999,art.1, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women In Africa (adopted 2003), art.2 and 26(1), African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para.2 ,African Commission on Human and Peoples right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right, para.2

standards. Ultimately, the chapter discusses the possible avenues of seeking remedy in case the right to water guaranteed by Ethiopian laws and international instruments is violated.

5.1 THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION

The analysis of legislative measures that a country has taken to implement right to water incorporated in the ICESCR and other human rights instruments must start with the constitution as it sits at the apex of national laws. In Ethiopia also, the constitution is the supreme law of the land and sits at the top. As a result, any law, decision of an organ or practice that goes against the constitution is null and void.³ This special status of the constitution also gives rights recognized by it a superior position. However, the recognition of rights in the constitution alone does not automatically guarantee their implementation. It rather paves the way for development of legislation, enforcement of the rights by courts and political pressure on the government to realize these rights.⁴

To start with the development of legislation, since the constitution is usually crafted in general terms it calls for the enactment of laws that regulate the specifics and provide details regarding the entitlements of individual and the obligations of states. Apart from that, the recognition of rights in the constitution also gives enforceability to rights when a state fails to honor its obligation to respect, protect, promote and fulfill rights. Further, the establishment of rights in the constitution also creates a political pressure on the part of the government as it elevates the question of individuals from that of needs to that of rights.⁵ It is with this background that the status of the right to water in the Ethiopian constitution must be seen.

5.1.1 STATUS OF THE RIGHT TO WATER IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION

When we look at the Constitution of the Federal Democratic Republic of Ethiopia (FDRE), the right to water is recognized both explicitly as well as implicitly. To begin with the explicit recognition article 90(1) provides that “to the extent the country’s resources permit, policies shall

³ Constitution of the Federal Democratic Republic of Ethiopia(hereinafter FDRE Cons.),1994, Art.9(1), Proclamation No.1/1995

⁴ Center on Housing Rights and Evictions, Legal Resources for The Right to Water and Sanitation: International and National Standards (Centre on Housing Rights & Evictions – 2nd ed.,2008), p.58

⁵ Id, p.59

aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.” The provision is placed in Chapter Ten of the constitution entitled- ‘National Policy Principles and Objectives’- (NPPOs) instead of the Bill of Rights incorporated under chapter three of the constitution. This has led some scholars to argue that the constitution has uniquely incorporated socio economic rights including water both as fundamental rights and as NPPOs which are analogous to Directive Principles of Policy (DPSPs).⁶ However, it is not logical for the framers of the constitution to make socio-economic rights of the FDRE constitution both fundamental rights and DPSPS. The reason for this is that if the constitution proclaims socio-economic rights to constitute Bill of Rights they will be enforceable in courts of law. Conversely, if the constitution characterizes socio- economic rights as DPSPs they would lose their enforceability in courts. Thus, if the constitution characterizes socio- economic rights as fundamental rights and DPSPs at the same time it would create an apparent contradiction and dilemma regarding the enforceability of socio-economic by the judiciary. In other words, it would only make sense for the constitution when it categorizes socio-economic rights either as fundamental right or as DPSPs not as both at the same time.

So we must ask whether the socio-economic rights stated in the NPPOs of the Ethiopian constitution are indeed DPSPs. In order to do this, appreciating the fundamental characteristics of DPSPs is crucial. One of the primary features of DPSPs is that they are not enforceable in a court of law.⁷ This means in case the government overlooks or violates stipulations in the DPSP it will not be held accountable in courts and the claimants will not get remedy. However, even if DPSPs are unenforceable in courts, they serve as guideline for the legislature. Thus, the legislature is expected to be guided by these principles in carrying out its duties.⁸

This being said regarding the main attributes of DPSPs, looking how DPSPs are formulated in other constitutions helps to clarify issues regarding DPSPs. A good example in this regard is the Indian Constitution. The Indian constitution splits rights recognized by it as ‘fundamental rights’

⁶ Sisay Alemahu, "The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia", Journal of Ethiopian Law, vol. 22 no. 2, (2008), p.138

⁷ D. Villars, “Directive principles of State Policy and Fundamental Rights: The Indian Experience”, South Africa Journal on Human Rights, vol.8 no. 29 ,(1992),p.34

⁸ *ibid*

and ‘directive principles of state policy’.⁹ The provision dealing with DPSPs provides that “the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”.¹⁰ This shows that if the constitution wanted to make certain rights DPSPs and deprive them enforceability in courts it would do so explicitly. For this reason, there is no presumption for considering rights as DPSPs unless the constitution says clearly. It is with this background that the question whether rights stipulated in the NPPOs of the Ethiopian constitution are indeed DPSPs must be answered.

Accordingly, a careful reading of the FDRE constitution shows that socio-economic rights stated in the part dealing with NPPOs are not meant to be DPSPs. This is because; the constitution does not explicitly deprive the courts power to enforce rights located in the NPPOs. On the contrary, the constitution demands courts to take them in to account while carrying out their duties. This could be inferred from art 85 of the constitution which says “any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter”. Since the provision of the constitution says any organ of government it would obviously include courts.

A similar line of argument was pursued by the Ghanaian Supreme Court in its decision in the December 31st Case and the Lotto case. Accordingly, in the December 31st case Justice Adade noted that “the Directive Principles of State Policy contained in the 1992 Constitution, Chapter Six were justiciable because the Constitution as a whole was a justiciable document and accordingly, if any part was non-justiciable, the Constitution itself had to indicate it”¹¹. He also cited article 1(2) and 2(1) of the Ghanaian constitution in support his argument which states that any law that is inconsistent with or in contravention of any provision of the constitution is void to the extent of inconsistency.¹² Here it is important to note that a similar provision exists in the

⁹ What Price for the Priceless?: Implementing the Justiciability of the Right to Water,” Harvard Law Review, vol. 120, no. 4 (2007), p.1080

¹⁰ *ibid*

¹¹ A.A An-Na’im, Human Rights Under the African Constitutions: Realizing the Promise for Ourselves (2003), p.71, The Attitude of Ghanaian Courts towards the Enforcement of Socio-economic Rights of the Citizenry: A Critical Review. Available at(<http://www.articlesbase.com/national-state-local-articles/the-attitude-of-ghanaian-courts-towards-the-enforcement-of-socioeconomic-rights-of-the-citizenry-a-critical-review-1094081.html>)last visited on December 31, 2013

¹² The Constitution of the Republic of Ghana 1992

FDRE constitution that proclaims “any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect”¹³. Likewise, in 2008 in the Lotto case the Ghanaian Supreme Court reiterated its judgment on the December 31st case regarding DPSPs.¹⁴

Beside this, basic rules of legal interpretation also fail to support the assertion that rights stated in the NPPOs of the FDRE constitution are DPSPs. This is because justiciability or accountability of a state for a rights violation in courts is the rule and its non-accountability is the exception. Accordingly, the consideration of socio-economic right as DPSP is the exception and must be interpreted narrowly pursuant to the rules of interpretation. The rationale behind this rule in the context of human rights instruments is to give more protection to the individual’s right. If this rule is followed to its letter it will lead to the conclusion that a right should only be construed as DPSP only when it is clearly provided to that effect. As such, since the FDRE constitution does not provide to that effect rights stated in the NPPOs of the FDRE constitution are not DPSPs.

What is more, even in countries like India where the constitution explicitly coin socio-economic rights as DPSPs unenforceable in courts, a unanimity of judicial opinion has emerged regarding the courts obligation to read in or apply DPSPs in the interpretation of fundamental rights.¹⁵ With respect to this, they argue that DPSPs and fundamental rights must be interpreted by courts harmoniously by exerting all the necessary effort to ensure that they supplement one another. Accordingly, Indian courts have on numerous occasions read in water stated under the DPSP of the Indian constitution as part and parcel of the fundamental right to life.¹⁶ This shows that the interpretation of socio-economic rights as DPSPs that deprive them applicability in courts is outdated and no longer accepted. Hence, DPSPs must be enforced or interpreted by courts without ignoring or taking away fundamental rights. It is for this reason that some scholars adamantly argue that NPPOs of the FDRE constitution could ‘be applied as binding

¹³ FDRE Const., cited above at note 2, art 9(2)

¹⁴ The Attitude of Ghanaian Courts towards the Enforcement of Socio-economic Rights of the Citizenry: A Critical Review. Available at(<http://www.articlesbase.com/national-state-local-articles/the-attitude-of-ghanaian-courts-towards-the-enforcement-of-socioeconomic-rights-of-the-citizenry-a-critical-review-1094081.html>)last visited on December 31, 2013

¹⁵State of Kerala and Another, appellants vs. N. M. Thomas and Others, respondents, High Court of Kerala, Case Number Civil Appeal No. 1160 of 1974, para.158

¹⁶ What Price for the Priceless?: Implementing the Justiciability of the Right to Water,” Harvard Law Review, vol. 120, no. 4 (2007), p.1080

undertakings, or at least used to guide the interpretation and understanding of the fundamental rights and freedoms'¹⁷.

Additionally, the principle of positive or constructive interpretations of laws in times of vagueness also defeats the argument that NPPOs of the FDRE constitution are DPSPs. According to this principle whenever there is vagueness or ambiguity in a law it should be interpreted or constructed positively in manner that gives effect to the right instead of resulting its nullity. Similarly, the vagueness on the status of NPPOs should be interpreted positively to give effect to those rights stated there. Such interpretation is only possible only when the NPPOs of the FDRE are interpreted as not comprising the DPSPs. Concerning this, the Ghanaian Supreme Court ruled that a presumption of justiciability DPSPs of the Ghanaian Constitution would strengthen the legal status of socio- economic rights and 'any ambiguity in article 34 should be resolved in favor of enforceability so as to strengthen the enforcement of fundamental human rights'.¹⁸

Moreover, the justiciable divisibility of socio- economic rights on one hand and their civil and political counterparts on the other hand has lost its currency. This is especially true in the years following the 1993 Vienna Declaration Program Action that reiterates the interdependence, interrelatedness and indivisibility of all categories of rights. Hence, the classification of civil and political rights as justiciable and socio-economic rights as non-justiciable is no longer tenable. As well, the African Charter on Human and Peoples Right which Ethiopia is a state party has made socio-economic justiciable equally as the civil and political rights of the Charter. The same is true for the ICESCR.

This is crucial as article 13 of the FDRE constitution demands the interpretation of the constitutions human rights provisions in light of international instruments ratified by Ethiopia. Likewise, article 37 of the FDRE constitution that talks about a person's right to bring justiciable matters to court does not define what justicability means or exclude socio-economic rights from its ambit Thus, to interpret the socio economic rights stated in the NPPOs of the FDRE constitution as DPSPs goes against Ethiopia's good faith obligation of ensuring the consistency

¹⁷ Adem Kassie , Ethiopia Introductory Notes available at ([http://www.web.up.ac.za/./Ethiopia\(1\).pdf](http://www.web.up.ac.za/./Ethiopia(1).pdf)) last visited December 2, 2013

¹⁸ The Attitude of Ghanaian Courts towards the Enforcement of Socio-economic Rights of the Citizenry: A Critical Review, cited above at note 14

of its domestic laws with its international obligation which was outlined in chapter two of the paper.

Further, the appreciation of socio- economic rights under the NPPOs of the FDRE constitution as DPSPs also contradicts Ethiopia's obligation to provide domestic remedies when a right is violated. To illustrate, assume that the NPPOs of the FDRE are DPSPs and inquire what sort of domestic remedies would be available for an individual whose right to water is violated in Ethiopia? According to the African Commission where ordinary courts are excluded from entertaining cases by law domestic remedies are deemed to be not available.¹⁹ In the view of the author the characterization of socio-economic rights in the NPPOs of the FDRE constitution would have a similar implication and makes domestic remedies non- existent since it deprive them their enforceability in courts. The only option for individual would be to submit his case to regional or international treaty monitoring bodies without exhausting local remedies due to their non-availability. In contrast, considering the NPPOs of the FDRE constitution as binding interpretive guides to fundamental rights ensures the availability of domestic remedies to victims and conforms to countries international commitment.

Furthermore, the implication of classifying NPPOs the FDRE constitution as DPSPs is not confined to socio- economic rights only. Rather, other non- derogable rights of the constitution like the right to self-determination recognized under article 39 of the constitution could also be affected by such interpretation. Since a similar provision is stated under article 89 of NPPOs dealing with political objectives. Hence, the understanding of NPPOs of the FDRE constitution as DPSPs could also have the absurd implication of even making the non -derogable right of self-determination non-justiciable in courts law. All this implies that the rights incorporated in the NPPOs are simply the extension and elaboration of socio-economic rights listed under art 41 of the constitutions Bill of Rights.

Turning to the implicit recognition to the right to water, it is found in article 41 of the FDRE constitution entitled socio-economic rights. The particular sub articles in which the right to water could be inferred are sub article 3 and 4 of the constitution. As such, Article 41(3) provides that

¹⁹ N. Udombana, "So far, So fair: The Exhaustion of Local Remedies Rule in the Jurisprudence of the African Commission on Human and people's Rights", *The American Journal of International Law*, vol.97 no.1,(2003), p. 22

“every Ethiopian national has the right to equal access to publicly funded social services.” The term publicly funded social services could incorporate a number of socio-economic rights including water. Similarly, article 43(4) of the FDRE constitution says that “the State has the obligation to allocate an ever increasing resource to provide to the public health, education and other social services.” Here, the provision gives an open ended illustrative list of socio-economic rights and leaves a space for including other rights. The main yardstick for including unnamed rights in the open ended list is their equivalence in terms of significance to the illustrative rights already listed explicitly.²⁰ According to this criterion the right to water is as crucial as the right to health and education, even more central than them. Hence, it deserves to be included under the term other social services.

Beside the recognition of the right to water as an independent right in the FDRE constitution, the right to water is also an essential precondition for the realization of other human rights recognized by the constitution. This interlinks between the right to water and other human rights are consistent with the fundamental characteristics of human rights interdependence and interrelatedness. Thus, the right to water is intertwined with the right to life, right to protection from inhuman and degrading treatment, the right to equality, the right to development and the right to clean and healthy environment guaranteed under the FDRE constitution.

Accordingly, the first right that is strongly intertwined with the right to water is the Right to Life guaranteed under article 15 of the FDRE constitution. It states that “every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law.” Since life could not exist without water, the meaningful exercise of ones right to life depends on ones right to water. As a result, water is an essential condition for the realization of the right to life and its implicit component. For this reason, this provision of the constitution should be interpreted broadly not only to prevent death from arbitrary killing but also loss of life that result from the deprivation of essential condition of life one of which is water.

²⁰ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, , para.3

In addition to the right to life the right to water has also a strong bond with the Right to Protection from Inhuman Treatment enshrined under article 18 of the FDRE constitution. Sub article 1 of article 18 recognizes every person's right to be free from degrading and inhuman treatment. This provision is also relevant in connection with the recognition of the right to water, as water is vital to live life with dignity that is worthy of respect. As such, it is possible to locate water as implicit element of the right to protection from inhuman and degrading treatment.

The other right recognized under the FDRE constitution where the right to water could be derived is the Right to Equality stated in article 25 of the constitution. The primary objective of this provision is to ensure equality of individuals before the law without distinction on the basis of sex, religion, political opinion or any other status. What make this provision unique is that it cuts across all human rights including the right to water. Thus, the right to equality ensures individual right to equal enjoyment of social services including water without any discrimination and preference. It also demands the government to make water accessible not only for certain section of the society or for particular groups only. Rather, the right to equality obliges the state to ensure equal access to water for all.

It is also possible to infer the right of water from the Right to Development provided under article 43 of the FDRE constitution. It provides “the Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.”²¹ From this provision, the term improved living standard is important as the water is one of the most essential elements for ensuring adequate standard of living. Consequently, the right to water could be derived from this constitutional provision. A unique feature of this provision is its focus on the rights of groups instead of individuals as it says ‘peoples of Ethiopia as a whole... have the right’. As such, it could be argued that the provision addresses the collective aspect of the human right to water.

Additionally, the right to water could also be inferred from the Right to Clean and Healthy Environment recognized under article 44 of the FDRE constitution. With respect to this, the constitution provides that “all persons have the right to a clean and healthy environment.”²² The important term for deriving the right to water from this provision is ‘environment’ which

²¹ FDRE Cons, cited above at note 3, art.43(1)

²² Id, art.44(1)

encompasses things in our surrounding which includes water.²³ Accordingly, since water constitutes one component of the environment, the right to healthy clean and healthy environment obliges the government to ensure access to safe water.

Apart from the provisions of the FDRE where the right to water could be implied, there are also certain provisions of the constitution that contribute for the better realization of the right to water. In this regard, article 12 and article 29 of the FDRE constitution could be cited as examples. To start with article 12 (1), it provides that government activities must be transparent. This in the context of the right to water could mean that the responsible body must make its activities and information on the issues of water accessible to the public. It also stipulates that government official should be held accountable if they fail to discharge their duties appropriately.²⁴ In relation to the right to water this means that if the body entrusted with the task of ensuring the realization of the right to water fails to carry out its responsibilities it will be held accountable. Likewise, Article 29 of the FDRE constitution talks about the Freedom of Expression which includes the right to seek information.²⁵ This provision entitles citizens to seek and impart information's related to the issue of water.

In conclusion the right to water is recognized in the FDRE constitution both expressly and impliedly. It is also stipulated as an independent right of its own existence in the constitution. The right is also a necessary condition for the realization of a number of rights in the constitution where it could be derived implicitly. But in the view of the writer the right to water should primarily be construed as an independent right in the FDRE constitution as it would give the right more clarity and makes its implementation on the ground a lot easier. This however does not mean that the recognition of the right to water as an implicit component of other rights does not add any value to it. Such recognition rather gives the right a further reinforcement for its implementation.

²³ Definition of Environment, available at (<http://www.newagepublishers.com/./001773.pdf>) last visited on December 28, 2013

²⁴ Id, art.12(2)

²⁵ Id, art.29(2)

5.1.2 THE NORMATIVE CONTENT OF THE RIGHT TO WATER IN THE FDRE CONSTITUTION

Once the legal basis for the right to water within the Ethiopian constitution is identified, the next task would be to see the entitlements flowing from the recognition of the right to water in the FDRE constitution. Concerning this, the FDRE constitution is vague in determining the scope of the right to water. It merely says “every Ethiopian national has the right to equal access to publicly funded social services”²⁶ which could include water. The only clarification in this regard is article 90(1) which provides ‘to the extent the country’s resources permit, policies shall aim to provide all Ethiopians access to...clean water’. By reading this provision one could only infer two things. The first is that the right is dependent on the availability of resources as such it is to be realized progressively. This stipulation of the FDRE constitution is analogous to states obligations to realize rights incorporated in the ICESCR progressively by utilizing the maximum of their available resources which was discussed under chapter three of the paper. Further, the other inference is that since the provision says access to clean water it entitles the individual water that has the required quality. This inferences are however not sufficient to appreciate the full scope and content of the right to water.

In order to resolve this problem of vagueness one has to look article 9(4) as well as 13(1) of the constitution. Article 9(4) provides that ‘all international agreements ratified by Ethiopia are an integral part of the law of the land.’ Similarly, article 13(2) states that ‘the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia’. These two provisions show that international and regional human rights treaties ratified by Ethiopia form part and parcel of the constitution and share parity of status with the constitution. Additionally, when there exists a doubt about fundamental human rights recognized in the constitution and their interpretation is needed, it should be interpreted in line with international and regional human rights instruments in which Ethiopia is a state party.

²⁶ Id, art.41

Accordingly, the most comprehensive interpretation of the right to water to date was given by the Committee on Economic Social and Cultural Rights (CESCR) which oversee the implementation of the ICESCR in General Comment 15 of 2002. The comment has been very influential in the interpretation and the application of the right to water both in specific countries as well as regional human rights system. To illustrate, the Argentine Supreme Court has stated that courts must follow the interpretations of UN treaty monitoring bodies in adjudicating cases and specifically mentioned General comment 15 of the CESCR in the Marchisio José Bautista case.²⁷ Likewise, instruments issued by the African Commission i.e. Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) and Draft Guideline on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right (Draft Guideline) were largely inspired by General Comment 15 of the CESCR and mainly copied its stipulations word for word.²⁸

The comment provides that the right to water incorporates elements of availability, quality, and physical accessibility, Economic accessibility, non-discrimination and access to information. Thus, the right to water recognized under the FDRE constitution must be interpreted in conformity of General Comment 15 of the CESCR since Ethiopia is state party to the ICESCR. Accordingly, the following are the normative contents of the human right to water or entitlements of individuals guaranteed under the FDRE constitution:

- The right to sufficient quantity of water to meet personal and domestic needs
- The right access water of adequate quality that does not poses a health risk or danger
- The right to get water from a water source located at reasonable distance obviating the need to travel far
- The right to access water at an affordable cost and to be provided with free basic amount of water if the person has no means to pay for it
- The right to access water equally without facing any discrimination

²⁷ I.T. Winkler, 'Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India', *Law, Social Justice & Global Development Journal (LGD)* vol.1. 2008 Available at (http://www.go.warwick.ac.uk/ej/Lgd/2008_1/winkler)

²⁸ African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para 7 (I) and African Commission on Human and Peoples right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right, para.71-75

- The right to access any information related to water.

When the recognition of the right to water under the FDRE constitution is interpreted in such a way it would meet the requirements of art 9(4), 13(2) of the constitution and the countries general obligation of good faith, which demands it to ensure the compatibility of its domestic laws with its international duties.

5.2 SUBSIDIARY LEGISLATION FOR IMPLEMENTING THE RIGHT TO WATER IN ETHIOPIA

The international and constitutional recognition of the right to water alone is not enough to realize the individual's right to sufficient, clean, physically accessible and affordable water on the ground. This is because the recognition of the right to water in international instruments and the constitution is customarily stated in general terms with very little specifications. For this reason, a detail legislation of implementation is necessary to elaborate the abstract stipulations of the right in international treaties and constitutions so that it could be transformed in to a more concrete and practical right.²⁹ It is for this rationale that I devote this section for the discussing legislation enacted for implementing the right to water recognized under international treaties ratified by Ethiopia and the FDRE constitution. Accordingly, the discussion focuses on the aspects of the right to water recognized by these laws. The gaps existing in these legislation will be dealt in the next section.

5.2.1 ETHIOPIAN WATER RESOURCES MANAGEMENT PROCLAMATION 197/2000

This proclamation is enacted in 2000 six years after the adoption of the FDRE constitution. The primary objective of this law is to ensure the protection and utilization of the country's water resource so that its people could enjoy the highest social and economic benefits.³⁰ From this objective one could infer that one of the fundamental objectives of the proclamation is to ensure Ethiopian people's access to water for personal and domestic uses³¹ as it is impossible to achieve

²⁹ Center on Housing Rights and Evictions, cited above at note 4, p.74

³⁰ Ethiopian Water Resources Management Proclamation, 2000, Art.3 ,Proc. No.197. Fed.Neg.Gaz. year 6 no.25

³¹ Id, art.2(2)

the highest social and economic benefits without first securing peoples need for water to meet their basic needs.

In addition to its objective, the proclamation also incorporates different components of the right to water in its provisions. The first element of the right to water incorporated in this proclamation is the availability of water. In order to provide people with sufficient amount of water for meeting their domestic and personal needs sufficient quantity of water must be allotted for this purpose. In this regard, the proclamation provides that ‘domestic uses shall have priority over and above any other water use’.³² This provision is crucial at it gives preference to water for meeting personal and domestic uses compared to other uses of water which conforms to the right to water.

The second element of the right to water recognized by the proclamation is quality of water. Accordingly, the proclamation provides that water quality standard will be determined by looking at the physical, chemical, microbiological and radiological factors as a parameter³³. Thus, this provision of the proclamation is consistent with the right to water and General Comment 15 of the CESCR. Regarding this, General Comment 15 provides that water must be ‘free from micro-organisms, chemical substances and radiological hazards’.³⁴

Beside the elements of availability and quality, the proclamation also includes affordability or economic accessibility of water to a certain extent. This is because as a matter of principle the proclamation provides that water charges must be paid for any water use including water for meeting personal and domestic needs.³⁵ However, as a matter of exception it states that in certain circumstances certain users could be exempted from paying water charges for using water.³⁶ This provision is clearly related to states obligation to fulfill the right to water explained under Chapter three of the paper. But the proclamation does not specify the circumstances in which a person will be relived from paying for water. It rather state that the conditions will be determined in the regulation to be issued for the implementation of the proclamation. Nevertheless, the regulation is also silent on this issue. Regarding this, both General Comment 15 of the CESCR

³² Id, art.7(1)

³³ Id, art.2(13)

³⁴ CESCR, cited above at note 15, para.12(b)

³⁵ Ethiopian Water Resources Management Proclamation, cited above at note 16, art.21(1)

³⁶ Id, art.21(3)

and draft guideline of the African Commission on socio-economic rights stipulate that a person could be provided with minimum essential amount of water by a state free of charge when he/she demonstrate his/her inability to pay for water for a reason beyond his control.³⁷

These instruments also provide that under no circumstance will a person be deprived of access to essential minimum amount of water for lack of means. The experience of foreign jurisdictions on this issue also conforms to the above prescriptions. For instance, in South Africa poor households are provided with free water of 25 liters per person per day.³⁸ In light of the instruments and foreign experiences it would be logical to interpret the term conditions for exemption from payment for water under Ethiopian Water Resource Proclamation to include a situation where a person prove his lack of means to pay for water. It is only when this provision of the proclamation is interpreted in such manner that it would conform to states obligation of fulfilling the right to water by providing those without means with water free of charge.

5.2.2 ETHIOPIAN WATER RESOURCE MANAGEMENT REGULATION

This regulation was issued by the Council of Ministers pursuant to article 30 of the Water Resource Management Proclamation which empowers the Council to issue detail regulation for the implementation of the proclamation. Consequently, it was issued in 2005 three years after the adoption of General Comment 15 of the CESCR on the right to water. As such, it would normally be expected to incorporate as many elements of the right to water as possible. However, the provisions of the regulation could only be linked to two aspects of the right to water i.e. water quality and access to information. With regard to quality the regulation provides that before water supply well becomes functional its quality must be verified by a laboratory to ascertain whether it is fit use for domestic purposes³⁹. In addition, the regulation also provides

³⁷ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.25 African Commission on Human and Peoples Right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African charter on human and peoples right, (201) para.75 xiii

³⁸ Republic of South Africa, Regulations relating to Compulsory National Standards and Measures to Conserve water, section 3 available at (<http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC9DREG-20%20April%202001.doc>), last visited 31 August 2013

³⁹ Ethiopian Water Resource Management Regulation, 2005, Art.16(1) Council of Ministers Regulation No.115, Fed.Neg.Gaz year.11, no.27

that water supply well must be sealed to protect the water from contamination with sewerage and run off.⁴⁰

Another provision of the regulation with some relevance for the right to water is article 34 which provides the consequence of not paying water charges. Accordingly, it states that if the individual fails to pay water charge the government could respond by disconnecting or cutting off water supply. The positive aspect here is that the government must give 60 days of notice or grace period within which the individual could pay and maintain access.⁴¹ When this provision is compared to the prescriptions of the CESCR under General comment 15 and that of the African Commission on draft guideline, it is by and large consistent with their stipulation that disconnection must not be arbitrary and it must follow a fair procedure. Yet, unlike the Ethiopian Regulation, disconnection of the minimum essential amount for a reason of inability to pay is not justified under any circumstance in the General Comment 15 of the CESCR as well as the African Commission draft guideline.

5.2.3 ENVIRONMENTAL POLLUTION CONTROL PROCLAMATION

The Environmental Pollution Control Proclamation was issued in 2002. Although, this proclamation is not exclusively dedicated for water; it has certain provisions that reinforce the quality element of the right to water. The proclamation defines environment as “the totality of all materials whether in their natural state or modified or changed by humans, their external spaces and the interactions which affect their quality or quantity and the welfare of human or other living beings, including but not restricted to, land, atmosphere, weather and climate, water, living things, sound, odour, taste, social factors, and aesthetics”.⁴² Hence, it expressly incorporates water as one component of the environment.

Apart from defining the environment in such manner the proclamation provides that persons should not engage in activities that pollute the environment. They are rather required to take precautionary measure so as to prevent the pollution of the environment which includes water.⁴³ Additionally, if individuals transgress this provision and contaminate the environment, the

⁴⁰ Id, art.17(1)

⁴¹ Id, Art.34

⁴² Environmental Pollution Control Proclamation, 2002, art. 2(6) Proclamation no.300, Fed.Neg.Gaz year.9,no.12

⁴³ Id, art 4(2)

agency is empowered to take legal and administrative actions against them. The penalty includes fine or/and imprisonment and varies depending whether the wrongdoer is a natural or artificial person. Thus, ‘if the wrong doer is a human person the penalty could be a fine of not less than one thousand Birr and not more than five thousand Birr or to an imprisonment of not less than one year and not more than ten years or both’⁴⁴. Likewise, if the culprit is a juridical person the remedy is a fine between 5000-25000 Ethiopian birr as well as ‘an imprisonment of the officer in charge for a term of not less than five years and not more than ten years, or a fine of not less than five thousand Birr and not more than ten thousand Birr or both’.⁴⁵ Furthermore, the proclamation also incorporates the polluter pays principle which obliges the person polluting the environment to clean the environment (water) at his own expense or pay the cost of cleaning it.⁴⁶ These principles are essential to ensure the quality element of the human right to water.

5.2.4 THE ETHIOPIAN CIVIL CODE

The Ethiopian Civil Code was promulgated 1960 long before the adoption of the FDRE constitution and the Water Resource Administration Proclamation. This however does not mean that the Civil Code provisions dealing with water have no application what so ever at the moment. Rather, to the extent its provisions conform to the FDRE constitution and the subsequent proclamations, the civil code would be applied in addressing certain issues relating to water. With this background the provisions of the Civil Code having some relevance to the right to water are examined as follows.

Accordingly, article 1232 of the Civil Code recognizes the land owners right to use water on, below or crossing his land for his personal use and for the use of persons living with him. Here the term ‘land owner’ should be understood as ‘land possessor or use-fructury’, since the constitution does not allow land ownership. Further, the Civil Code also imposes obligation up on the ‘land possessor’ to give certain amount of water from his land for his neighbors to use it for domestic purposes on the payment of adequate compensation.⁴⁷ In addition to compensations two conditions must be fulfilled for the possessor to assume such obligations. The first condition

⁴⁴ Id, art.16

⁴⁵ ibid

⁴⁶ Id, art 3(4)

⁴⁷ Civil Code of the Empire of Ethiopia, 1960, art.1234(2) Proclamation No. 165, Neg.Gaz Extraordinary Issue No.2 year.19 no.2

is that the water available in his land must be in excess of his needs. The second condition is that his neighbors must be in a position where they could not get water from anywhere unless they incur excessive costs.⁴⁸ Hence, this provision in a way incorporates the availability and affordability elements of the right to water to a certain degree.

The Civil Code also addresses certain aspect of water quality as it entitles individuals using a water source to oppose the construction of any work that might pollute water.⁴⁹ This is very important to protect the quality of water. Furthermore, the Civil Code also gives priority for domestic uses of water over others. With respect to this, it provides that users in the upstream cannot irrigate their land if it is detrimental to the downstream users utilizing water for domestic purposes.⁵⁰

5.2.5 THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

The Federal Democratic Republic of Ethiopia (FDRE) Criminal Code has addressed the availability and quality aspect of the right to water in parts dealing with serious as well as petty offences. To begin with the stipulation in the part listing down serious offences, the criminal code provides that the destruction of water installations in time of war is considered as war crimes against civilian population.⁵¹ This offence carries a penalty that ranges from five years imprisonment to death. The stipulation of the code in this regard contributes for the fulfillment of the availability element of the right to water since getting sufficient amount of water is contingent upon or presupposes the existence of water facilities.

In relation to the quality aspect of the right to water, the Criminal Code states that, ‘whoever intentionally contaminates by means of substances harmful to health drinking water serving the needs of man or animals, is punishable, according to the circumstances and the extent of the damage, with fine or simple imprisonment for not less than one month, or, in more serious cases, with rigorous imprisonment not exceeding seven years.’⁵² The prescription of the code in this regard will deter persons from polluting water which is important to realize the quality

⁴⁸ Id, art.1233

⁴⁹ Id, art.1235

⁵⁰ Id, art.1237(1)

⁵¹ The Criminal Code of the Federal Democratic Republic of Ethiopia,2004, art. 270(i),Proc.no.414, Fed.Neg.Gaz,

⁵² Id, art.517(1)

component of the right to water. In similar vein, the part of the Criminal Code dealing with petty offenses punishes the violations of regulations or directives pertaining to water and with fine or arrest.⁵³

5.3 GAPS IN THE EXISTING ETHIOPIAN LEGAL FRAMEWORK FOR THE IMPLEMENTATION OF THE RIGHT TO WATER

In the previous section we have discussed the core Ethiopian legislation put in place to implement the right to water in Ethiopia. Although, these legislation incorporate some aspects of the right to water, their development is at a very rudimentary stage when they are compared with the international human rights law standards and national legislation of other countries. Thus, there exists a significant gap in them which in turn creates problem for the implementation of the right to water in Ethiopia. Notably, the main problem with the Ethiopian legal framework is that it did not incorporate most components of the right to water with sufficient clarity. This will prevent the right holders from claiming their rights and the duty bearers from executing their duties appropriately which stands in the way of proper implementation of the right in Ethiopia. With this background, the main gaps in Ethiopian legal framework for the implementation of the right to water are examined as follows.

To begin with the right to water element of ‘availability’ which basically deals with quantity of water, although the international standard recommends that a person must have at least 20 liters of water per day, the Ethiopian legal framework is silent on the issue of water quantity. As a consequence, an individual living in Ethiopia would not know how much minimum water is he/she entitled per day, leaving him/her to accept whatever amount he/she get even if it isn’t sufficient to meet even basic needs. When we see the experience of other countries in this regard they have a very advanced law. To illustrate, take South Africa and Indonesia as an example. Under South African Ministerial Regulation, the minimum quantity of potable water is 25 liters per person per day or 6 kiloliters per household per month.⁵⁴ Similarly, Indonesian Regulation 23/2006 sets a higher amount of minimum water quantity of 60 liters per person per day.⁵⁵

⁵³ Id, art.830(a)

⁵⁴ Center on Housing Rights and Evictions, cited above at note 4, p.75

⁵⁵ ibid

Another aspect of the availability element of the right to water is that water provision must be continuous or uninterrupted. The Ethiopian legal framework does not address this issue at all. On the contrary, South Africa has enacted a model law that adequately addresses this issue. Accordingly, South African Regulation provides that the water providing institution must ensure that ‘no consumer is without a supply for more than seven full days in any year’.⁵⁶ In addition, if water service is interrupted for more than 24 hours, the water supplying institution must provide consumers with 10 liters of water per person per day using alternative sources.⁵⁷

With the view of increasing the amount of water available for personal and domestic uses, the national laws of other countries make distinction between the quality of water to be supplied for domestic use and water used for other purposes. In this regard, the water law of Georgia and Kazakhstan provides that it is not possible to use water that has a drinkable quality for non-domestic purposes⁵⁸. Ethiopia should learn from the experience of other countries that have advanced laws set to implement the availability element of the right to water. Thus, Ethiopia should enact a law that clearly state that an individual is entitled to at least 20 liters of water per person per day in line with the international standard as a starting point for the progressive realization of the right to water in Ethiopia. It should also modify its water law to ensure sufficiency of water supplied of for domestic and personal uses and guarantee its availability with very little interruption.

The other element of the right to water poorly addressed by the Ethiopian legislation is the element of physically accessibility of water which demands the accessibility of water at a distance as near as possible. All Ethiopian legislation dealing with water are silent on the issue of physical accessibility of water. This is startling given the fact that women in the rural part of Ethiopia travel for hours to collect water.⁵⁹ Indeed, the Ethiopian legal framework on the right to water is lagging behind a lot compared to both the international human rights standard and national laws of other nations. Concerning this, the international standard is that the water point must at least be within 1000 meters.⁶⁰

⁵⁶ Republic of south Africa, Cited above at note 33

⁵⁷ *ibid*

⁵⁸ Center on Housing Rights and Evictions, cited above at note 4, p.75

⁵⁹ Central Statistical Agency and ICF International Calverton, Demographic and Health Survey 2011, (2012)

⁶⁰ G.Howard and J. Bartram, Domestic Water Quantity, Service, Level and Health(2003),p.18-22

Although this is the international minimum, the national law of South Africa provides a better standard. Accordingly, South African Regulation relating to compulsory National Standards and Measures to Conserve Water provides that water should be accessible at maximum distance of 200 meter.⁶¹ Hence, Ethiopia should reform its laws dealing with the right to water to incorporate the physical accessibility element. The new law must clearly provide that individuals should not travel more than 1000 meters. It should also emphasize the states continuous duty to minimize the distance below 1000 meters overtime to reach at optimum level of household connection. Further, the law should also impose obligation up on state to ensure that water facilities are available within or near educational or other institutions.

The inadequacy of the Ethiopian legal framework for the implementation of the right to water could also be seen if one looks at how the economic accessibility or affordability element of the right to water is addressed in Ethiopian laws. Although, the water resource proclamation and the Civil Code have few provisions relevant to the issue of affordability of water, this aspect of the right to water is hardly got enough attention in Ethiopian laws when one compares it with both the international standards and legislation of other countries. With respect to this, the international standard provides that a person should not spend more than 3% of his income on water.⁶² If the individual spends within this range water is generally deemed to be affordable.

This international standard on water affordability has informed the domestic laws of some states. Indonesia is a good example in this regard. As such, Indonesian Regulation No. 23/2006 provides that water tariff must take in to account the element of affordability.⁶³ Furthermore, the regulation stipulates that an individual should not spend more than 4% of his/her income for 60 liters of water per day.⁶⁴ Some countries have even enacted advanced laws that clearly impose on the government the duty to subsidize water so that poor households could afford it. Regarding this, the national law of Panama could be mentioned as an example. This law provides that poor families and those in extreme poverty are entitled to subsidy from the state to cover a portion of

⁶¹ Republic of south Africa, Cited above at note 33

⁶² United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (New York, Palgrave Macmillan 2006), p.11

⁶³ Center on Housing Rights and Evictions, cited above at note 4, p.78

⁶⁴ *ibid*

their water expenses. Particularly, the law states that the subsidy could go up to 85% of the family's consumption the minimum being 20 %.⁶⁵

Additionally, the other ignored aspect of the right to water under Ethiopian legal regime on the right to water is non-discrimination. Like most elements of the right to water Ethiopian law is also silent on the issue of non-discrimination and differential treatment of vulnerable groups. This is also surprising when one considers the factual discrimination against women in relation water. As we have seen in chapter four of the paper, the primary responsibility of collecting water in most parts of Ethiopia is undertaken by women and girl children. The existing Ethiopian legal framework does nothing to change this situation for the better. It rather ignores the issue at all. Ethiopian laws are also poor in addressing the particular challenges vulnerable groups face in realizing their right to water. On the contrary, domestic laws of other countries set to implement the right to water clearly outlaw discrimination, the domestic laws of Canada and Columbia could be mentioned as an example.⁶⁶

Apart from this, national laws of other jurisdictions also provide for the preferential treatment of vulnerable groups in realizing their right to water. For instance, the United Kingdom law prohibits disconnection of water to a household if vulnerable groups are in it.⁶⁷ It also allows for the application of differential water tariff by taking in to account the age, disability and health condition of the user.⁶⁸ Similarly, the South African Water Act states that the government must take in to account the socio-economic and physical traits of the user in setting standards on water.⁶⁹ Ethiopia needs to learn from the experience of these countries and reform its laws to better accommodate the interest of vulnerable groups and eliminate discrimination in relation to the right to water.

The final element of the right to water grossly overlooked by the Ethiopian legal framework of implementation is participation and access to information. Although, the ICESCR demands Ethiopia to make available for individuals the necessary information regarding water and involve

⁶⁵ WASH United, Freshwater Action Network (FAN Global), WaterLex, The Human Right to Safe Drinking Water and Sanitation in Law and Policy - A Sourcebook (WASH United, Freshwater Action Network (FAN Global)), p.198

⁶⁶ Center on Housing Rights and Evictions, cited above at note 4, p.79

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ *ibid*

them in decision making process, the country's legal framework failed to reflect this commitment. Thus, individual's right to access information and participate in decisions making regarding the location of water point, their management, water quality issues and water tariff is totally absent from Ethiopian laws. In contrast, other state parties of the ICESCR have enacted exemplary implementation laws on this issue.

Accordingly, on the issue of participation the Malaysian Water Service Industry Act prescribes the establishment of 'water forums' to with the objective of enhancing the participation of the public in the provision of water service.⁷⁰ Likewise, on the issue of access to information Honduras's national law recognizes water users right "to receive information about the provision of the services, tariff system and method of payment, plans regarding expansion and improvement of services, and any other circumstances that may be of their interest, with sufficient detail to enable them to exercise their rights as users".⁷¹ Ethiopia should consider these laws and update its legal framework to adequately incorporate the participation and access to information element of the right to water.

5.4 AVENUES OF SEEKING REMEDY FOR VIOLATION OF THE RIGHT TO WATER IN ETHIOPIA

So far in this chapter we have seen the recognition of the right to water in the existing Ethiopian legal framework as well as the gaps in it. Once this is done, the next question would be what redress mechanisms are available for the individuals if the right is violated in Ethiopia. This question is important since the recognition of the right to water in a country's constitution and other laws does not guarantee its automatic respect. Hence, there should be a mechanism that would provide the individual with proper remedies when his/her right to water is violated. This strong bond between rights and remedy is succulently expressed by the old legal maxim which says '*ubi jus ibi remidum*' (where there is a right, there is a remedy).⁷²

Accordingly, this section explores the possible avenues of getting remedy in case where individual's right to water is violated in Ethiopia. Four main avenues are discussed in the section

⁷⁰ Id, p.78

⁷¹ WASH United, cited above at note 59, p.179

⁷² Ubi Jus Ibi Remidum Law and Legal Definitions, available at <http://www.definitions.uslegal.com/u/ubi-jus-ibi-remedium> last visited December 28, 2013

i.e. remedy from Ethiopian Courts, remedy from the Ethiopian Human Rights Commission, Remedy from the African Commission on Human and People Right and Remedy from the Committee on Economic, Social and Cultural Rights.

5.4.1 ETHIOPIAN COURTS

Due to a better enforceability of their decision courts are considered as the primary avenues of seeking a remedy for a rights violation. Thus, any exploration of the different ways of remedy must begin from Ethiopian courts. Accordingly, the FDRE constitution impose an obligation up on courts to respect and enforce fundamental rights recognized by the constitution and international treaties ratified by Ethiopia one of which is the right to water.⁷³ In the writers view this duty is particularly important in relation to the right to water. This is because since the existing Ethiopian legal framework put in place to implement the constitutional right to water is by and large inadequate, the primary legal ground for individual alleging the violation of his right to water would be the constitution and international human right instruments ratified by Ethiopia.

Concerning this, when one looks at how Ethiopian courts are enforcing fundamental rights of the constitution, the practice shows that courts are often reluctant to enforce rights on the basis of the provision of the constitution. This practice of courts is not negative in toto rather it is consistent with the principles of avoidance which prescribes that as much as possible courts should determine dispute on the basis of other laws set to implement the constitution instead of invoking the constitution directly.⁷⁴ Three main reasons are often given as the rationale behind the principle of avoidance. First, since the constitution is the supreme law of the land it should not be invoked to resolve each and every matter⁷⁵. Instead, its invocation should only be called as an exception when there is no other alternative. Second, if the constitution is invoked for each and every matter other laws will not get the chance to be defined, discussed, interpreted, elaborated and applied. This in turn bars the incremental development of other laws.⁷⁶ Hence, the principle

⁷³ FDRE Cons., cited above at note 3, art.13(1)

⁷⁴ Takele Soboka, "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory", African Journal of International and Comparative Law vol.19.1 (2011) p.107

⁷⁵ Id, p.108

⁷⁶ ibid

of avoidance seeks to enhance the incremental development of other laws. Third, overreliance on the constitution might encourage abstract jurisprudence that does not resolve a concrete case.⁷⁷

Although, all these reasons could be mentioned as a justification for the practice of Ethiopian courts, the real reason behind Ethiopian courts' reluctance to enforce the provision of the constitution emanates from their mistaken interpretation of article 83 of the FDRE constitution which provides 'all constitutional disputes shall be decided by the House of the Federation'.⁷⁸ This provision has been understood as if there is any invocation of constitutional provision in the pleadings of the parties the courts are excused from entertaining the case and they shall refer the matter to the House of Federation.⁷⁹ If such interpretation is to be accepted it would imply that the constitution has snatched the courts' power of adjudicating cases on the basis of the constitution.

However, this line of interpretation is not what the constitution has intended and meant. This is because the constitution has imposed on all organs of the state including courts the duty to enforce the fundamental rights and freedoms recognized by the constitution.⁸⁰ In the absence of courts' power to interpret and apply the constitution it would be impossible to imagine how Ethiopian courts could carry out their constitutional obligation of enforcing human rights provisions. Besides, the constitution clearly states that 'Judicial Powers, both at Federal and State levels, are vested in the courts only.'⁸¹ This provision indicates that the constitution wanted to reserve the power to apply any law including the constitution to resolve concrete cases or factual disputes to regular courts. As a result, the term 'constitutional dispute' must be interpreted narrowly so as to conform to the spirit of the constitution.

Regarding this, Takele argues the term 'constitutional dispute' should be construed as legal interpretational dilemma instead of a factual one.⁸² Such dilemma arises when the provision of the constitution gives two equally convincing meanings both of which are consistent with the constitution.⁸³ In other words, this means that an issue of constitutional dispute will not arise if

⁷⁷ *ibid*

⁷⁸ FDRE Cons., cited above at note 3, art.83(1)

⁷⁹ Takele, cited above at note 74, p.110

⁸⁰ FDRE Cons, cited above at note 3, art.83(1)

⁸¹ *Id*, art 79(1)

⁸² Takele, cited above at note 74, p.110

⁸³ *Id*, p.115

one of the interpretations is contrary to the constitution. In such cases, the court should just drop the inconsistent line of interpretation and decide on the basis of interpretation that conforms to the constitution.

Hence, it only when the court faces two lines of interpretations that are in line with the constitution that it should refer the matter to the House of Federation. This shows that the constitution has given the primary duty of interpretation and application of the constitution to regular courts. Thus, the House of Federation has only residual power of interpretation of the constitution. In the authors view this line of interpretation of the term constitutional dispute is sound. This is because unless the provision is interpreted in such a way it will be impossible for courts to properly exercise their constitutional duty of enforcing the constitution and the judicial power that the constitution vest in them.

If such course interpretation of the constitution is adopted it would mean that courts have the power to enforce and interpret the fundamental rights and freedoms incorporated in the constitution and international treaties ratified by Ethiopia. Further, the statement of socio-economic rights under NPPOs of the FDRE constitution does not also prevent courts from enforcing them. As argued above NPPOs of the FDRE constitution are merely binding elaborations of fundamental rights listed under article 41 of the constitution rather than DPSPs excluding courts from their reach. Consequently, since the right to water is one of the fundamental rights recognized by the FDRE constitution and international human right instruments in which Ethiopia is a state party, an individual could claim remedy from Ethiopian courts if his /her right to water is violated.

5.4.2 ETHIOPIAN HUMAN RIGHTS COMMISSION

The Ethiopian Human Rights Commission was established in 2000 by proclamation No.210/2000 as an independent legal person accountable to the House of People Representative. The preamble of the proclamation provides that the Commission was established to play a major role in enforcing human rights in the country.⁸⁴ As such, the Commission was entrusted with the objectives of educating the public about human rights as well as ensuring their full respect,

⁸⁴ Ethiopian Human Rights Commission Establishment Proclamation, 2000, art.5 Proclamation No. 210, Fed.Neg.Gaz year 6 No.40

protection and enforcement. In addition to these objectives, the Commission also aims at taking appropriate remedial measures when human rights are violated.⁸⁵

Even though, all objectives of the Commission in one way or another contribute their part for ensuring the full realization of the right to water in Ethiopia, the focus of this sub section would be on the Commission's objective of human rights protection and its pledge to provide redress in the case of violation. Accordingly, proclamation 210/2000 has empowered the Commission to 'undertake investigation, upon complaint or its own initiation, in respect of human rights violations'.⁸⁶ So, any individual in Ethiopia can submit complaint alleging the violation of his right to water to the Ethiopian Human Rights Commission. When we look at the rules of procedure of the commission, complaints can be submitted by the victim, his wife, family or third party.⁸⁷ It is also possible to submit the complaint orally or in writing free of charge.⁸⁸

Once the Commission receives complaints it conducts investigation to determine whether the right is violated or not. If the commission is of the view that there is violation it tries to resolve the matter as amicably as possible and provide remedy for the individual.⁸⁹ With regard to the nature of the remedy, the proclamation provides an illustrative list of different remedies as it says any other appropriate 'measure be taken'.⁹⁰ Consequently, an individual whose right to water is violated could get a remedy that ranges from regaining his access to water that is disconnected arbitrarily up to getting basic amount of water free of charge if he proves his inability to pay.

However, the effectiveness of the Commission to carry out its mandates properly was doubted by some. For instance, the Human Rights Committee in its concluding observations following Ethiopia's report stated that the Ethiopian Human Rights Commission does not comply with the Paris principles (General Assembly resolution 48/134).⁹¹ Further, it noted that the Commission 'has not made any recommendation regarding existing or new laws, it has undertaken very few investigations on alleged human rights violation, and its recommendations and suggestions

⁸⁵ *ibid*

⁸⁶ *Id*, art.6(4)

⁸⁷ *Id*, art22(2)

⁸⁸ *ibid*

⁸⁹ *Id*, art.26(1)

⁹⁰ *Id*, art.26(2)

⁹¹ Concluding Observations of the Human Rights Committee, Ethiopia, UN.Doc.CCPR/C/ETH/CO/1(2011), para.6

following its monitoring of correctional facilities were not implemented by the state party.⁹² All these show the ineffectiveness of the Ethiopian Human Rights Commission in general.

Particularly, the author noted a serious problem on the commission's part in addressing the violation of the socio- economic rights in general and the right to water in particular .This is because, in its 14 years existence the Commission has never received a single complaint alleging the violation of the right to water in a country where nearly half of its population is without access to safe water.⁹³ Likewise, officers of the commission stated that complaints submitted to them are predominantly related to civil and political rights and a communication alleging the violation of socio-economic rights is very rare.⁹⁴ This shows that the Commission needs to do a lot and it must learn from the experiences of other National Human Rights Institutions such as Kenya and Peru discussed in chapter three of the paper.

5.4.3 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT COMMISSION

The other option of seeking remedy for an individual whose right to water is violated in Ethiopia is the African Commission on Human and People's right. The commission is entrusted with the task of monitoring the implementation African Charter on Human and People's Right ratified by Ethiopia in 2000. As such, the commission engages in protection, promotion and interpretation of the Charter.⁹⁵ Part of its protectional mandate is to receive communications from individuals alleging the violation of rights recognized in the African Charter. As we have seen chapter two of the paper the absence of the right to water from the African Charter has been remedied by the innovative jurisprudence of the African Commission on Human and People's Right locating the right to water within other expressly stated rights of the Charter such as the right to life, health and human dignity. Thus, it is possible a person in Ethiopia to submit a communication to the African Commission on human and Peoples Right if he/she is the opinion that his/her right to water is violated by the Ethiopian government.

⁹² *ibid*

⁹³ Interview with Ato Ahmed Hassen, Ethiopian Human Rights Commission, on December 17,2013

⁹⁴ *ibid*

⁹⁵ African (Banjul) Charter on Human and Peoples' Rights(hereinafter ACHPR) (Adopted 27on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art 30 and 45

However, there are certain admissibility requirements that the communication must satisfy in order for the Commission to consider his communication. The admissibility requirements are stated in article 56 of the African Charter. Accordingly, the Commission only accepts communications if they (1) Indicate their authors even if the latter request anonymity, (2) Are compatible with the Charter of the Organization of African Unity or with the present Charter, (3) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, (4) Are not based exclusively on news discriminated through the mass media, (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, (6) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and (7) Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter.

Even if, most of these admissibility requirements are clear, the precondition of exhaustion of local remedies need a little elaboration as it is the main ground for the rejection of most communications submitted to the African Commission.⁹⁶ This precondition demands the individual to first finish all venues of getting remedy available in his own state before it approach the commission. Two reasons are often cited as the rationale behind the rule on the exhaustion of local remedies. The first is to give the state the opportunity to redress the alleged violation on its own before it is held to account at regional or international level.⁹⁷ This rational is consistent with the principle of state sovereignty. The second reason is that domestic remedies are considered to be timely and effective compared to their regional and international counterparts.⁹⁸ Hence, the commissions rule on exhaustion of local remedies serves these two purposes.

A look at the African Commission's jurisprudence on the exhaustion of local remedies shows that a remedy must be available, effective and efficient for individual to exhaust it.⁹⁹ The commission has defined availability to mean that the remedy must be 'readily accessible' for the individual.¹⁰⁰ It has also given some instances where remedy is deemed to be not available. The first of these instances is where the courts power to enforce fundamental rights is taken away by

⁹⁶ Udombana, cited above at note 14, p. 13

⁹⁷ Id, p.9

⁹⁸ ibid

⁹⁹ Id, p.21

¹⁰⁰ Id, p.22

ouster clauses.¹⁰¹ The other instance is where the right is insufficiently defined or provided in the domestic laws of the state.¹⁰² If the individual could prove anyone of this he/she would be exempted from exhausting local remedies.

The Commission has also stated that a remedy is deemed to be effective and sufficient if it has a prospect of success.¹⁰³ As such, the individual is expected to show that he/she has tried to exhaust local remedies but did not gain any result. Accordingly, a person alleging the violation of the right to water in Ethiopia to the African Commission must either show that he/she has exhausted local remedies or local remedies are not available, effective or sufficient.

5.4.4 COMMITTEE ON ECONOMIC SOCIAL AND CULTURAL RIGHTS(CESCR)

The CESCR has not yet started receiving individual complaints although Optional Protocol to the ICESCR entitling the committee to receive and decide individual complaints was adopted in 2008 and entered in to force in May 2013.¹⁰⁴ Ethiopia is yet to ratify the protocol. Thus, the individual complaint procedure of the CESCR is not available for victims of violation of the right to water in Ethiopia presently even if there is a future prospect of submitting communications to the committee provided Ethiopia ratifies the protocol. However, the obligation of states to submit report regarding the measures they have taken to implement the rights recognized by the covenant may provide some remedies to the individual since the Committee recommends states to improve deficiencies in its Concluding Observations. Unfortunately, Ethiopia has a bad reputation of submitting reports to the CESCR. Although, the country ratified the ICESCR in 1991 it has submitted its combined 1st, 2nd and 3rd periodic report only in 2012.¹⁰⁵ The country reply to the issues listed by the Committee was submitted a day before the beginning of the dialogue. This shows the country needs to improve it weaknesses in this regard.

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *Id*, p.27

¹⁰⁴ Optional to the International Covenant on Economic, Social and Cultural Rights, Doc.A/Res/63/117 adopted on 10may 2008, entered in to force may 5, 2013

¹⁰⁵ Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights Ethiopia, 2012.para.2

After examining the Ethiopia's report the Committee issued its Concluding Observations containing some of its concerns and recommendations with regard to the right to water. Accordingly, the Committee has expressed its concern that the relocation program conducted in Ethiopia failed to take in to account the availability of water facilities in the place of relocation. And it recommended Ethiopia that 'people living in relocation sites are provided with basic services (including drinking water)'.¹⁰⁶

The other concern of the Committee in relation to the implementation of the right to water in Ethiopia is 'that a large percentage of households in rural areas as well as people living in refugee camps do not have ready access to safe drinking water and sanitation, with over half of the households having to make a long journey to fetch drinking water'.¹⁰⁷ These observations of the Committee show the violation of the availability and physical accessibility elements of the right to water in Ethiopia. The Committee has urged Ethiopia to 'take steps to improve the accessibility to safe drinking water and sanitation, in particular in rural areas as well as in refugee camps'.¹⁰⁸ If the recommendation of the Committee is observed by Ethiopia it may provide remedy to the individual whose right to water is violated in Ethiopia.

Conclusion

To sum up, the finding of this chapter is that the right to water is recognized in FDRE constitution as a fundamental human right both explicitly and implicitly. The explicit reference of the right to water in the National Policy Objectives of the FDRE constitution does not also affect its status since the NPPO of the FDRE does not meet the criteria for DPSPs and they are merely binding elaborations or explication of fundamental rights of the constitution. It is also argued that the status of international instruments in the FDRE constitution helps to elaborate the normative content of the right to water in the FDRE constitution.

In relation to subsidiary legislation set to implement the constitutional guaranteed right to water, although some laws address few aspects of the right to water in a scattered manner, by and large the existing Ethiopian legal framework failed to incorporate most elements of the right to water and is falling behind the international human right standard and domestic laws of other states.

¹⁰⁶ Id,para.21

¹⁰⁷ Id, para.23

¹⁰⁸ ibid

Regarding the avenues of remedy, the finding of the paper is that Ethiopian courts are not carrying out their constitutional duty of enforcing fundamental human rights of the constitution including the right to water. A similar weakness was observed with Ethiopian Human Rights commission. Beside these national mechanisms it is also argued in that the Ethiopian the African Commission on Human and People's right could provide remedies for an individual whose right to water is violated in Ethiopia through communication. On the other hand, the CESCR could also remedy the violation of the right to water in Ethiopia in the course of examining Ethiopia's state report.

CHAPTER SIX

THE POLICY FRAMEWORK FOR IMPLEMENTING THE RIGHT TO WATER IN ETHIOPIA AND THE RESPONSIBLE INSTITUTIONS

Introduction

Policy frameworks form part and parcel of the (inter)national human rights monitoring and enforcement mechanisms. As such, they play a crucial role in ensuring the accountability of government in meeting its quartet obligation of respecting, protecting, promoting and fulfilling the right to water. Cognizant of this key role of policies in the realization of the right to water, the Committee on Economic Social and Cultural Rights (CESCR) in General Comment 15 has called upon state parties of the International Covenant on Economic Social and Cultural Rights (ICESCR) to adopt national water policy, strategy and action plan for the implementation of the right to water.¹ Further, adopting policies, strategies and action plans for realizing the right to water constitutes minimum core obligations and they are immediate.² The adopted national policies and strategies must be based upon and conform to international and national human rights law and principles.

Apart from this, the Committee has also unequivocally noted that if a state fails to adopt national water policy, strategy and action plans it would amount to violation of the right to water by omission.³ Likewise, states reporting Guideline of the African Commission as well as its Draft Guidelines on economic, social and cultural rights also underscore the obligations of states to adopt policy, strategies and action plans for the implementation of each right including the right to water.⁴ Particularly, the state reporting Guideline of the African Commission further notes that adopting legislation alone without enacting supporting policies by state is considered as an

¹ Committee on Economic, Social and Cultural Rights (hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.47

² Id, para.37 (f)

³ Id, para.43

⁴ African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para 2 (a), and African Commission on Human and Peoples Right, Draft Principles and Guidelines on Social, Economic and Cultural Rights in the African Charter on Human and Peoples Right, para. 75(i)

insufficient measure for the implementation of the right.⁵ Thus, due to the *good faith* obligation of Ethiopia to ensure the consistency of its policies with its international obligations, in case the policies fail to conform to international standards, it would entail the direct application of the international stipulations to the extent of inconsistency. To put it simply, international standards which Ethiopia accepted will replace domestic policies to the extent of their contradiction.

Accordingly, this chapter analyzes the consistency of policies, strategies and actions plans set to implement the right to water in Ethiopia from human rights law and principles perspective. Moreover, since policy frameworks require the existence of appropriate institutions to ensure their proper implementation, the chapter also briefly looks at the existing Ethiopian institutions with the mandate of implementing laws and policies on the right to water. Furthermore, noting the fact that full realization of the right to water demands the active involvement of multiple stake holders this chapter also indicates some of the expected respective role of these actors.

6.1 ETHIOPIAN WATER MANAGEMENT POLICY

The Ethiopian Water Management Policy was adopted in the year 1999 by the then Ministry of Water Resources of Ethiopia. The primary goal of the policy was attaining socio-economic development of the country through adequate utilization of its enormous water resource potential.⁶ Thus, the policy desires to make the peoples of Ethiopia beneficiaries of their countries water resources for economic and social development. Notably, due the vital role of water for attaining development be it social or economic, it is fair to say that the objective of the Ethiopian Water Policy indirectly recognized the right to water. Additionally, the water policy also reaffirms Ethiopian people's common of the ownership of the country's water resources provided under the Federal Democratic Republic of Ethiopia (FDRE) Constitution.⁷ The stipulation of the policy in this regard indicates the incorporation of the 'public trust doctrine'.⁸

⁵African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para 2(a)

⁶ FDRE Ministry of Water Resources, Ethiopian Water Management Policy, (1999), section 1.2

⁷ Id, section 1.3, Constitution of the Federal Democratic Republic of Ethiopia(hereinafter FDRE Cons.),1994, Art.9(1), Proclamation No.1/1995, art.89(5)

⁸ P. Cullet, "Water Sector Reforms and Courts in India: Lessons from the Evolving Case Law", Review of European Community & International Environmental Law, vol.19.no.3 (2010), p.332

The doctrine dictates that, since water resources are very essential for the public, they should not be subject to private ownership. Instead, the ownership of these resources should be in the hands of the people as a whole and the government should hold these resources in trust of the public.⁹ Likewise, General comment 15 of the CESCR also considers water as a public good.¹⁰ Further, public trust doctrine imposes upon the government the fiduciary duty of care and responsibility. As such, it is required to ensure the equitable distribution of water resources for all and refrain from any activity that would have the effect of depriving any individual or groups access to water.¹¹ Pursuant to the Ethiopian water policy the same commitments are expected from the Ethiopian government which holds the country's water resources in trust of the public.

This being said concerning the Ethiopian Water Management Policy in general, its stipulations in relation to the right to water enshrined under the FDRE constitution and international human right instruments ratified by Ethiopia is examined subsequently. Thus, compared to the legal framework set to implement the constitutionally guaranteed right to water in Ethiopia, the policy framework put in place for the implementation of the right has given unequivocal recognition to individuals right to water and incorporated a number of elements of the right. To begin with the recognition of the right, the policy has provided that 'as far as conditions permit, every Ethiopian citizen shall have access to sufficient water of acceptable quality, to satisfy basic human needs'.¹² This stipulation reiterates what is provided under article 90 (1) of the FDRE constitution.

The policy also acknowledges the resource implication of fully realizing the right to water. As such, the phrase 'as far as conditions permit' shows that the full realization of the right is dependent upon the availability of resources. Apart from recognizing the right to water, the policy has also incorporated different components of the right to water. Accordingly, the first element addressed by the policy is the availability component of the right to water that primary deals with the quantity aspect of water. Although the policy does not state the precise amount, it provides that individuals must have 'sufficient' water to meet their basic needs. Regarding sufficiency of water, WHO states that the minimum criterion for water supply should be 20 liters

⁹ *ibid*

¹⁰ CESCR, cited above at note 1, para.1

¹¹ Cullet, cited above at note 8, p.332

¹² FDRE Ministry of Water Resources, cited above at note 6, section 1.3(2)

per capita per day.¹³ The water policy also provides that in the allocation of water for different uses domestic and personal uses shall have priority over uses.¹⁴ Here it must be noted that the allocation of water for other uses is based on the consideration that which of the uses give more economical advantage.¹⁵ Thus, ‘the policy states that water allocation gives highest priority to water supply and sanitation while apportioning the rest for uses and users that result in highest socio-economic benefits’¹⁶.

Beside availability, the Ethiopian Water Management Policy also incorporates the quality aspect of the right to water. Concerning this, the policy states that the water provided to the Ethiopian people must be ‘water of an acceptable quality’. But the policy does not elaborate on the parameters for saying whether the water is of an adequate quality or not. According to the CESCR the parameters for determining water quality include the presence of micro-organisms, chemicals and radiological substances.¹⁷ Hence, the policy rather stresses the necessity of establishing water quality standards and guidelines.¹⁸ It also underscores the need to protect water resources of the country from pollution so that water quality is maintained.¹⁹

The other element of the right to water recognized in the Ethiopian Water Management Policy is the economic accessibility or affordability of water. In relation to this element, the policy begins with the basic assumption that water is ‘both an economic and social good’.²⁰ This assumption on the part of the Ethiopian water policy deviates to a certain extent from what is provided in General Comment 15 CESCR. In this regard, General Comment 15 states that ‘water should be treated as a social and cultural good and not primarily as an economic good’.²¹ The basic difference between the General Comment and the Ethiopian Water Policy on this issue is that, in the case of the Ethiopian Water Policy, water is treated equally as an economic and social good.

¹³ G. Howard and J. Bartram, Domestic Water Quantity, Service, Level and Health(2003),p.1

¹⁴ FDRE Ministry of Water Resources, cited above at note 6, section 2.1.1(1)

¹⁵ Id, section 2.1.1(2)

¹⁶ ibid

¹⁷ CESCR, cited above at note 1, para.12(b)

¹⁸ FDRE Ministry of Water Resources, cited above at note 6, section 2.2.2(c)

¹⁹ ibid

²⁰ Id, section 1.3(3)

²¹ CESCR, cited above at note 1, para.11

On the contrary, for General Comment 15, water is not equally social and economic good. It is rather a social and cultural good principally²² and only secondarily an economic good.

When water is treated as an economic good primarily, the danger that follows is that the determination of water access will be contingent upon market forces without considering equity or need.²³ The main rationale behind this approach is the belief that it will 'promote conservation and greater sustainability of water resources by making waste more expensive'.²⁴ The same justifications are provided in the Ethiopian Water Policy when it talks about the pricing system. Accordingly, the policy stipulates that the pricing system should aim at achieving conservation, protection and efficient use of water.²⁵

But the main concern here is that, if the determination of water price is left to market forces purely, the price they set may not take into account the ability to pay of certain sections of the society depriving them access due to unaffordability.²⁶ One of the mechanisms for addressing this concern is the recognition of the right to water which provides for the economic accessibility or affordability of water for all by treating it as a social good and cultural good primarily than an economic one. Nevertheless, even if the Ethiopian Water Management Policy deviates from General Comment 15, by placing the economic and social values of water on equal footing, it still is difficult to say the policy is inconsistent with human rights principles and standards. This is because the policy does not state that water is solely an economic good. It rather recognizes the social value of water as well.

Further, the policy clearly provides that the provision of water to the under privilege sections of the society should be based on 'special social strategy' so that water is affordable to them.²⁷ Although the policy does not specify what it calls the 'underprivileged section', in the view of the author this should be interpreted to mean vulnerable groups recognized under international and regional human rights treaties including the poor, Children, Women, People with Disabilities, Internally Displaced Persons, Refugees and Indigenous People facing daunting

²² *ibid*

²³ E. Bluemel, "The Implication of Formulating a Human Right to Water", *Ecology Law Quarterly*, vol.31, (2004) p.962

²⁴ *Id*, p.963

²⁵ FDRE Ministry of Water Resources, cited above at note 6, section 2.2.5 (B) (2)

²⁶ Bluemel, Cited above at note 15, p.963

²⁷ FDRE Ministry of Water Resources, cited above at note 6, section 2.1.1 (12)

challenges in realizing their right to water. Moreover, with regard to the price of water, the policy states that it should neither be too high nor too low.²⁸ The concern of the policy is that if the cost of water is excessive it might discourage people from using water. Similarly, if the price of water is too cheap it might encourage people to over use and waste water.

A major departure of the Ethiopian Water Management Policy from General Comment 15 of the CESCR, in relation to economic accessibility of water, is the distinction it makes between the rural and urban residents of the country. Accordingly, the policy provides that in rural disadvantaged communities with limited financial means, the capital cost needed for the provision of water for them is covered by the government.²⁹ What is expected of such communities is only covering the operation and maintenance cost of the system. As outlined in chapter four of the paper, the practice with regard to payment in some rural parts of Ethiopia like Shinelle and Konso conforms to the stipulations of the policy since the collected fee is used for the purposes of operation and maintenance. Additionally, the policy states that the tariff is to be based on a flat rate tariff.³⁰

Nevertheless, the stipulation of the policy concerning the payment of maintenance and operation costs by all water users irrespective of their ability to pay was seen to be problematic in light of the prevailing practice. As noted in chapter four, for some members of rural communities paying even the operation and maintenance cost of water is a big challenge. As a consequence, these communities were forced to use water from unsafe sources. Likewise, the stipulation of the policy about flat rate tariff in rural parts is also unsound since it does not take in to account the individual's ability to pay. It is important to know that the practice shows some families were not able to pay even the flat rate tariff. Thus, the policy prescriptions on these issues may contradict Ethiopia's obligation to fulfill the right to water by providing those without means free water.

On the other hand, the aim of the Ethiopian Water Management Policy for urban areas is the 'full cost recovery principle'.³¹ This principle dictates that the state or private water providing entity must be able to recover the full cost it incurred for supplying water to all users³². International

²⁸ Id, section 2.2.5 (B) (4)

²⁹ FDRE Ministry of Water Resources, cited above at note 6, section 2.2.5 (B) (6)

³⁰ Id, section 2.2 (2) and 2.2(6)

³¹ Id, section 2.2(2)

³² Bluemel, Cited above at note 22, p.964

financial institutions also advocate this principle and the privatization of water supply for the reason that it ensures a stable and viable water supply system.³³ They further argue given the scarcity of resources and the high cost involved in supplying water, it would be difficult for a state to cover all the expenses without the involvement of the private sector through privatization on the basis of full recovery principle. Regarding the involvement of the private sector in water services provision neither General Comment 15 of the CESCR nor the African Commission Guideline on state reporting prohibits privatization.³⁴ However, it is clearly stated in both instruments that privatization of water service delivery does not transfer states obligations. Rather, states obligation to protect demands states to regulate the activities of private water providing companies and ensure the observance of all aspects of the right to water in the course of the companies operation.³⁵

However, the major problem with the full cost recovery principle is that it may lead to unaffordable price for some sections of the society. This could be seen from the well-known case of Cochabamba water conflict in Bolivia.³⁶ The case follows the decision of the Bolivian government to privatize the water supply system in the Bolivia's capital with the view of solving the water supply problem of the city as well as the pressure from international financial institutions.³⁷ At the time in which the decision was made 60% of the city's population was without access to water and the remaining portion gets water in a non-continuous manner.

The immediate result of the privatization was a significant water price increase by Bethel, the water providing company with the objective of recovering the full cost it incurred for water provision. As a result of the increase the residents of Cochabamba were forced to spend up to 20% of their income on water though the international standard on water affordability prescribe only 3-5%.³⁸ Aggrieved by the excessive water price increase the residents of the Cochabamba

³³ Id, p.65

³⁴ Committee on Economic, Social and Cultural Rights(hereinafter CESCR), General Comment No. 15, The Right to Water, 29th Session, 2003, U.N. Doc. E/C.12/2002/11, 2003, para.23-24, and African Commission on Human and Peoples Right, State Party Reporting Guidelines for Economic, Social and Cultural Rights In The African Charter on Human And Peoples' Rights (Tunis Reporting Guidelines) adopted on 26 may 2010, para.I (iii) a

³⁵ ibid

³⁶ Bluemel, Cited above at note 22, p.965

³⁷ ibid

³⁸ Id, p.966

protested and the government of Bolivia cancelled the contract of water provision it gave to private entities.

Accordingly, the incorporation of the full cost recovery principle in the urban areas of the country under the Ethiopian water management policy may create problem water unaffordability for the poor sections of the urban community like the case of Cochabamba. Here it is noteworthy that even with the subsidy of the Addis Ababa City Administration some poor residents of the City are spending about 9% of their income on water.³⁹ Thus, following the policies stipulation of full cost recovery which the City Administration is already planning to do would further push the price for water. Additionally, the inclusion of the full cost recovery principle in the policy is not consistent with the right to water and General Comment 15 of the CESCR since it defeats the affordability or economic accessibility aspect of the right to water. The policy should have anticipated the bad consequence the full recovery principle might have on the poor section of the urban population.

Nonetheless, the policies exemption of the rural population from the full cost recovery principle should be appreciated. This is because since the cost of supplying water in rural parts requires a lot of resources the application of the cost recovery principle would make water unaffordable for the majority of the population. In addition, since the rural community constitutes the overwhelming majority of the Ethiopian people without access to safe water, applying such principle would have made their situation much worse. It would also amount to violation of states obligation to respect the right to water which demands the state to refrain from interfering in a manner that hampers the realization of individual's right to water.

The other element of the right to water recognized by the Ethiopian Water Management Policy is participation and non-discrimination. With respect to this, the water policy provides that the meaningful participation of all stake holders, communities and women in water development projects shall be ensured.⁴⁰ Particularly, the policy cognizant of the *de facto* discrimination against women in decision making, it provides that women should fully be involved in planning,

³⁹ S.K Sharma and Belayhun Weldemeskel Berket, Water Supply System in Selected Urban Poor Areas of Addis Ababa(2008), p. 433

⁴⁰ FDRE Ministry of Water Resources, cited above at note 6, section 1.3(6) and 2.2.13(C)(2)

implementation, decision making and trainings on water related issues.⁴¹ This would enable women to make heard of their voices appropriately.

Further, the policy also makes certain statements relevant to the access to information and accountability elements of the right to water. Thus, the policy underscores the need to ensure accountability on the allocation and utilization financial and other resources for water resource development.⁴² Such measures are to be supervised by respective communities, regional and federal government organs. This is important to know what the government is doing, why it is doing and how it is doing which contributes for the better realization of the right to water in Ethiopia. Finally, the policy also emphasizes the need to create awareness on water issues so that they feel ownership towards the resources and assume the responsibility of carrying out operation and maintenance of the projects which is essential for sustainability.⁴³

6.2 ETHIOPIAN WATER SECTOR STRATEGY

The Ethiopian Water Sector Strategy was issued in the year 2001 following the adoption of water management policy. Its primary aim was to identify the means and ways for translating the objectives of the Water Management Policy into action.⁴⁴ As such, it aspires to create feasible and practical guidelines for ensuring ‘sustainable, efficient, effective, reliable, affordable and user acceptable development of water supply’.⁴⁵ This being the general objective of the strategy, it particularly prescribes certain means and ways that help to achieve the quality, non-discrimination, access to information and participation elements of the right to water.

To begin with the quality aspect of the right to water, the strategy provides the following measures to be undertaken so that water quality is maintained. Among these measures, the first is tracing the origins of water pollution.⁴⁶ This involves the identification and classification of pollutants in type, character, and frequency. The other measure recommended by the strategy was the establishment of a strong monitoring and control procedures for maintaining water

⁴¹ Id, section 2.2.10(1)

⁴² Id, section 3.3.1.4(A) 2.1(6)

⁴³ Id, section 2.2.3 (D),(6)

⁴⁴ FDRE Ministry of Water Resources, Ethiopian Water Sector Strategy, (2001), p.1

⁴⁵ Id, p.2

⁴⁶ Id, p.6

quality.⁴⁷ This is to be achieved through the adoption of national water quality standards by consulting the concerned institutions. In this regard, the adoption of the Ethiopian Water Quality Standard ES 261:2001, in 2001 by the then Quality and Standards Authority of Ethiopia could be said to be the outcome of the strategies recommendation.⁴⁸

In the preparation of the standard ES 261:2001 a National Technical Committee composed of members from Federal Ministry of Health, Federal Ministry of Water Resources, Ethiopian Health Nutrition Research Institution and the Ethiopian Environmental Protection Agency was involved.⁴⁹ Experts from governmental and non-governmental organizations also took part in the process. The national standard used the second edition of the World Health Organization(WHO) Guidelines for drinking-water quality (the latest guidelines at the time) as a bench mark.⁵⁰ It also consulted the drinking-water standards of Kenya and India. Thus, it ‘specified maximum permissible levels, as well as methods for testing, for 18 physicochemical parameters that affect the palatability of drinking-water; 24 toxic chemicals (including 11 pesticides); total viable organisms; faecal streptococci; coliform organisms; and E. coli type 1 strain (thermotolerant)’.⁵¹

Besides setting national water quality standards, the strategy also prescribes their proper implementation through undertaking a periodic safety check at least once in three years.⁵² Yet, the current practice discussed in chapter four demonstrates that water quality monitoring in Ethiopia is *ad hoc* rather than periodic and nearly 90.3% of drinking water is used without any treatment.⁵³ On the other hand, the strategy also demands the revision of the existing legislation to better prevent pollution and punish those involved in the activity of pollution with the objective of improving water quality.⁵⁴ In this regard, the provisions of the Ethiopian Pollution Control Proclamation of 2002 and the 2004 Federal Democratic Republic of Ethiopia Criminal Code, preventing and penalizing pollution are the results of the strategy.

⁴⁷ *ibid*

⁴⁸ Dagnew Tadesse *et al*, Rapid Assessment of Drinking Water Quality in the Federal Democratic Republic of Ethiopia Country Report of the Pilot Project Implementation in 2004- 2005, (2010), p.7

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ *ibid*

⁵² FDRE Ministry of Water Resources, cited above at note 43, p.11

⁵³ Central Statistical Agency and ICF International Calverton, Demographic and Health Survey 2011, (Addis Ababa, Ethiopia and Calverton, Maryland, USA: Central Statistical Agency and International 2012), p.14

⁵⁴ *Id*, p.30

Apart from the quality element, the Ethiopian Water Strategy also addresses access to information and participation. In relation to implementing the access to information aspect of the right to water the policy recommends a number of measures. Among these measures, the first is the establishment of water resource database that contain information that different users may require.⁵⁵ The database is to be established in a way that facilitates the easy entry, storage, retrieval, review, analysis and dissemination of collected data. To this effect the strategy also establishes the Ethiopian Water Resource Information Center (EWRIC) under the auspices the then ministry of water resources now renamed as the Ministry of Water and Energy.⁵⁶

The strategy also specifies different set of actions that should be carried out in order to ensure the realization of the participation element of the right to water. Accordingly, the strategy promotes the establishment of water users association and water users committees at the lower administration levels such as Wereda, zone and Kebele.⁵⁷ It also underscore the need to give adequate legal recognition of the water associations and communities right to engage in water development projects from the beginning to the end.⁵⁸ Nevertheless, the prevailing practice noted in chapter four of the paper indicates that the involvement of people in water development projects including their location, operation and sustainability is at a very poor state.

Further, the national Water Strategy of Ethiopia also stipulates certain types of measures that help to eliminate discrimination in accessing water. As such, the strategy begins by acknowledging the fact that the disadvantaged sections of the society, particularly women are often excluded from water planning and management although they are the ones carrying the excessive burden of providing their families with water.⁵⁹ In order to improve the situation of woman in this regard, the strategy promotes the active engagement of women in water development projects. To this effect, it provides for the allotment of a specific number of seats for women in community water committees.⁶⁰

⁵⁵ Id. p.6

⁵⁶ ibid

⁵⁷ Id, p.7

⁵⁸ ibid

⁵⁹ Id, p.10

⁶⁰ ibid

6.3 WATER SECTOR DEVELOPMENT PROGRAM

Besides developing water policy and strategy, General Comment 15 of the CESCR also impose the obligation upon states to adopt action plans that incorporate all elements of the right to water with clear objective or targets and time frame of achievement.⁶¹ These targets serve as indicators of how a state is performing its obligation. Accordingly, the Ethiopian Water Sector Development Program was developed by the Ministry of Water Resources in 2002 could be considered as one of the action plans adopted by Ethiopia for implementing the right to water. One of the objectives of this program is increasing the population's access to safe drinking water.⁶² The program is divided in to four major subsectors i.e. water supply and sewerage, irrigation, hydro power, and general water resources.⁶³ The life span of the program is 15 years divided in to three five years period i.e. short term (2002-2006), medium term (2007-2011) and long term (2012-2016).⁶⁴ Since the focus of this thesis is in the right to water the focus would be what the Water Sector Development Program says on water supply. With respect to this, the program set growth target for water supply on the basis of the existing level of coverage and the projection of future population growth. The following table summarizes the growth targets on water supply.

Table 1. Targets of the Water Supply and Sewerage Development Program (WSSDP)⁶⁵

Region	Existing Situation			End of 2006			End of 2011			End of 2016		
	Population	Coverage %	Population	Population	Coverage %	Population	Population	Coverage %	Population	Population	Coverage %	Population
Addis Ababa	2,570	70	1,799	2,973	95	2,824	3,418	100	3,418	3,883	100	3,883
Afar	1,243	16.5	205	1,389	32.6	453	1,540	48.8	752	1,695	65.1	1,103
Amhara	16,748	30.7	5,136	19,120	43.2	8,266	27,175	55.5	12,045	24,484	67.3	16,476
Benishangul Gumuz	551	20.3	112	625	40.5	253	706	52.5	371	791	64.5	510
Dire Dawa	330	59.5	196	398	70.6	281	474	92	436	555	97.8	543
Gambella	216	17.6	38	247	28	69	279	44.2	123	311	53	165
Harari	166	22.7	38	196	29.5	58	228	78.7	179	265	90.6	240
Oromiya	23,023	31.2	7,175	26,553	47.6	12,632	30,410	65.8	20,019	34,476	83.2	28,685
Somali	3,797	13	464	4,329	23.6	1,023	4,919	40.8	2,006	5,537	56.9	3,151
South (SNNPR)	12,903	28.6	3,691	14,902	38.3	5,709	17,035	50.2	8,548	19,247	71.3	13,725
Tigray	3,797	34.1	1,296	4,335	52.9	2,293	4,923	72.2	3,557	5,551	92.3	5,122
National	65,344	30.9	20,180	75,067	45.1	33,862	85,647	60.1	51,453	96,795	76	73,604

⁶¹ CESCR, cited above at note 1, para.47

⁶² FDRE Ministry of Water Resources, Water Sector Development Program Main Report, vol.1(2002), p.3

⁶³ Id, p.7

⁶⁴ Id, p.5

⁶⁵ Id, p.8

The program also sets different water growth target in the urban and rural areas. It also specifies what sort of activities will be conducted in order to meet the targets. Accordingly, the program aims to improve the overall water coverage in urban areas from 74% in 2002 to 98% in 2016.⁶⁶ It aims to achieve this target by undertaking (a) study and design for 391 towns (b) construction of water works for 402 towns (c) rehabilitation of water works in 112 towns. On the other hand, the targets to increase the water supply in rural areas from 23% in 2002 to 71% in 2016. In order to reach this target the program aims to construct (a) 4225 deep well (b) 9329 shallow well (c) 27,338 hand-dug wells (d) 18,908 springs (e) 2225 surface dam and (f) 2857 works of rehabilitation.⁶⁷

Besides setting growth targets, the program also estimates the amount of financial resources needed to accomplish the targets and the possible sources of finance.⁶⁸ Accordingly, the program estimates that an aggregate 2935.8 million United States Dollar (USD) is needed to meet the target. Out of this resources 2,086 million (71%) will be spent for supplying water in rural areas. The remaining 819 million (28%) will be used for providing access to water in urban areas. The funding for the program is to be covered by the following sources: the government 24.5%, international private sector 25.4%, domestic private sector 10.2 %, communities 5.1% and donors 34.8%.⁶⁹

6.4 GROWTH AND TRANSFORMATION PLAN (GTP)

The Growth and Transformation Plan (GTP) of the FDRE was adopted by the Ministry of Finance and Economic Development in 2010/11 as a medium strategic framework for a period of five years (2010/11-2014/15).⁷⁰ Unlike other policies, strategies and action plans discussed above, this plan is not exclusively devoted to the water sector alone. On the contrary, the GTP in general aims to meet Ethiopia's long term vision "to become a country where democratic rule, good-governance and social justice reigns, upon the involvement and free will of its peoples; and once extricating itself from poverty and becomes a middle-income economy" and maintain

⁶⁶ ibid

⁶⁷ ibid

⁶⁸ Id, p.11

⁶⁹ Id,p.20

⁷⁰ Ministry of Finance and Economic Development(hereinafter MOFED), Growth and Transformation Plan (GTP) 2010/11-2014/15, (2010),p.3

economic growth.⁷¹ This being the general purpose of the plan, it also addresses the issue of water supply in different parts.

Accordingly, one of the specific objectives of the plan is to meet at least or at minimum the Millennium Development Goals⁷², one of which is to halve the number of population without safe water by 2015. In addition, the plan also recognizes the importance of access to adequate and clean water. Concerning this, the action plan provides that access to safe water is essential to foster economic and social development.⁷³ It also acknowledges the necessity of ensuring access to safe water for improving the quality of life and eradicating poverty.⁷⁴

Further, the plan also aims to ensure ‘a better and closer access to safe water’.⁷⁵ Accordingly, the GTP ambitiously aims to improve the overall access to potable water from 68.5% in 2010/2011 to 98.5% in 2014/15.⁷⁶ The plan also sets a specific target for urban and rural areas. To begin with urban areas, the plan aims to increase water access from 91.5% in 2009/10 to 100% in 2014/15.⁷⁷ On the other hand the growth target of the GTP for rural areas is to improve water coverage from 65.8 in 2009/10 to 98% in 2014/15.⁷⁸

But here it must be noted that, the estimation of the GTP on the current state of water coverage was found to be erroneous when a study is conducted in 2011.⁷⁹ According to the new study the overall water coverage is not 68.5 but 52.1%. Likewise, the coverage urban area is not 91.5% but 74.6% and the rural coverage is not 68.5% but 48.8%.⁸⁰ But the growth target of GTP has not changed. The other thing worth noting here is that the target set under the GTP by far exceeds the target set by the water sector development program which aims to make the total coverage of water access 76% by the year 2016.⁸¹

⁷¹ Id, p.7

⁷² ibid

⁷³ Id, p.41

⁷⁴ ibid

⁷⁵ Id, p.10

⁷⁶ Id, p.18

⁷⁷ ibid

⁷⁸ ibid

⁷⁹ Ministry of Water, Irrigation and Energy , Water Supply and Sanitation Directorate 2005 Budget Year Progress Report of the Growth and Transformation Plan(Amharic), (2011)p.2

⁸⁰ ibid

⁸¹ FDRE Ministry of Water Resources, cited above at note 61, p.8

Furthermore, one of the things that the GTP of Ethiopia could be praised for when it is examined from the right to water perspective is its unequivocal incorporation of the physical accessibility element of the right to water for the first time. Regarding this, the GTP besides stating the need to access water from a closer source determines the maximum distance that individuals in urban and rural areas of Ethiopia should travel to collect water. Thus, the GTP states the maximum distance that an individual living in urban areas must travel is 0.5 km.⁸² On the other hand, an individual living in rural parts of Ethiopia is expected to travel for an average 1.5 km.⁸³

6.5 FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA NATIONAL HUMAN RIGHTS ACTION PLAN (NHRAP)

The action plan was adopted by the FDRE House of Peoples Representatives in the year 2013. Its main objective is strengthening the implementation of human rights recognized by the FDRE constitution in a coordinated manner and creating favorable conditions for better protection of human rights.⁸⁴ The plan is also designated to comply with Ethiopia's International obligations to adopt National Human Rights action plan stipulated under the Vienna declaration of 1993 and Human Rights Committees' recommendation on Ethiopia's Universal Periodic Report (UPR).⁸⁵ Three years is the duration of the plan and it incorporates civil, political as well as social, economic and cultural rights together.

One of the freestanding or independent socio-economic rights listed under the action plan is the right to water.⁸⁶ With respect to this, the action plan has provided very important stipulations that assist in the implementation of the right to water. First, the action plan unequivocally stated the recognition of the right to water in the FDRE constitution by citing article 41 and 90 of the constitution.⁸⁷ Second, it has provided regional and international human right instruments which Ethiopia is a state party also impose obligation on Ethiopia to implement the right to water domestically.⁸⁸ Accordingly, the action plan cites ICESCR art 11 and 12, Convention on the Elimination on Discrimination against Women (CEDAW) art 14(2), Child Right Convention

⁸² MOFED, cited above at note 69,p.18

⁸³ *ibid*

⁸⁴ House of Peoples Representatives, Federal Democratic Republic of Ethiopia National Human Rights Action Plan (Amharic) (2013) section 3.6 The Right to Clean Water

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ *ibid*

24(2) c, and African Charter on Human and Peoples Right art 24. Third, the action plan indicates domestic laws and policy for the implementation of the right to water.⁸⁹ To this effect it mentions Water Resource Management Proclamation Proc. 197/2000 and the Ethiopian Water Policy of 2001.

Further, the action plan also lists down problems and challenges for the realization of the right to water in Ethiopia. These includes water wastage, poor culture treating water before consumption, lack of sustainability of water projects, poor maintenance and administration of water sources, lack of finance, presence of individuals without any access to water in both urban and rural areas of the country, poor inspection of water quality and lack of coordination among utilities in carrying out infrastructural development.⁹⁰ To address these challenges the action plan pledges to create awareness regarding water wastage and treatment. It also promises to increase budget for water supply, improve water quality inspection as well as lack of coordination between utilities.⁹¹

However, the author noted the following weaknesses in the action plan concerning its stipulations on the right to water. First, apart from citing the Ethiopian water law, policy and strategy as implementation documents, the action plan failed to test their adequacy or inadequacy in light of the country's international obligations. This research could fill these gaps in the action plan. Second, the policy chose to talk about the right to water in general terms without breaking it in to its elements and ignored the minimum core obligations of the right to water in Toto which must be prioritized as a matter of urgency. What is striking here is that, the policy made a passing remark saying that the government's efforts were effective in ensuring sufficiency, physical accessibility, affordability and non-discrimination in accessing water without showing how. In contrast, the discussion held in chapter four of this paper shows that there is already a rampant violation of even the very minimum core obligations of the right to water Ethiopia and lot remains to be done on the government's part.

⁸⁹ ibid

⁹⁰ ibid

⁹¹ ibid

6.6 GAPS IN THE ETHIOPIAN POLICY FRAMEWORK OF IMPLEMENTATION OF THE RIGHT TO WATER

When one considers the fact that the Ethiopian water policy and strategy were adopted before the issuance of General Comment 15 of the CESCR elaborating the normative content of the right to water, the incorporation of most elements of the right to water in Ethiopian policy instruments is something to be appreciated. This however does not mean that the existing policy framework for implementing the right to water in Ethiopia is totally consistent with human rights principles and law. One could observe a number of problems with the existing Ethiopian policy framework when it is examined in light of the General Comment 15 of the CESCR on the right to water. Some of these problems are discussed as follows.

To begin with the minimum core obligation of the right to water, the Ethiopian policy framework set to implement the right to water fails to recognize the notion of minimum core obligations in its stipulations. The policies, strategies and action plans discussed in the previous sections of this chapter seem to understand all aspects of the right to water as subjects of progressive realization. This position of the Ethiopian policy framework does not conform to the right to water and General Comment 15 of the CESCR. This is because General Comment 15 has clearly made a distinction between the core minimum obligations of the right to water and other obligations the right entails.⁹² Beside this, the Comment has also identified what these obligations are and the need to realize them immediately by giving them priority.⁹³ In line with this position of the CESCR, the Ethiopian policy framework should have clearly identified the minimum core obligations of the right to water and provide for their immediate realization since they form the very essence of the right and they are too urgent to be realized progressively.

In addition to the minimum core obligations of the right to water, one could observe a number of discrepancies between the Ethiopian policy framework and General Comment 15 of the CESCR if one tries to compare their stipulations on individual aspects of the right to water. A good example in this regard is the availability element of the right to water. According to the Ethiopian Growth and Transformation Plan, the aim is to provide an individual living in the rural parts of Ethiopia 15 liters of water per person per day. This amount does not conform to the

⁹² *ibid*

⁹³ CESCR, cited above at note 1, para.37

international standard on the minimum per capita consumption of water. As stated in General Comment 15 of the CESCR, WHO estimates that under normal climatic and health conditions an individual, needs at least 20 liters of water per person per day.⁹⁴ This shows that the aim of the policy with regard to the quantity of water provided for the rural dwellers is not consistent with the international minimum standard. Water polices of other countries have also set a higher quantity of water per capita. To illustrate, the South African water policy fixes the minimum essential amount of water per capita to 25 liters per person per day without making distinction between urban and rural residents.⁹⁵ Likewise, Sri Lankan water policy even set a higher quantity of 40 liters per person per day as a minimum standard.⁹⁶ Thus, Ethiopian water policy should draw inspiration from the experiences of these countries.

Aside from that, the stipulation of the Ethiopian water policy on water tariff for urban residents seems to contradict General Comment 15 of the CESCR, in particular the economic accessibility or affordability element to the right to water. This is because, as noted earlier the Ethiopian water policy and strategy aims to recover the full cost incurred for water provision in urban areas from consumers in the form of water tariff. This might have the effect of making water unaffordable for the poor sections of the society and prevent them from accessing it. The Ethiopian policy framework should have excluded the concept of full cost recovery since it is not supported by human rights law and principles. Further, the Ethiopian policy framework also failed to incorporate the international standard that the amount of income an individual spend for water should not exceed 3% of his income.⁹⁷ This could be mentioned as an additional weakness of the Ethiopian policy framework with regard to the affordability element of the right to water.

It is also noteworthy that the Ethiopian water policy does not recognize free water under any circumstance even if it clearly says that water should not be either too cheap or too expensive. This contradicts Ethiopia international obligation to fulfill the right to water providing those proving their inability to pay with minimum essential amount of water free of charge. A glance at the experience of other countries experience show that they have adopted very advanced policies on

⁹⁴ Id, para.1

⁹⁵ Center on Housing Rights and Evictions, Legal Resources for The Right to Water and Sanitation: International and National Standards (Centre on Housing Rights & Evictions – 2nd ed.,2008), p.75

⁹⁶ Id, p.133

⁹⁷ United Nations Development Program (hereinafter the UNDP), Beyond Scarcity: Power, Poverty and the Global Water Crisis, (2006), p.11

this issue. For instance, South African Free Basic Water Policy dictates that 25 liters of water per person per day should be provided free of charge.⁹⁸ Given the level of economic development of Ethiopia it would be unrealistic to duplicate the South African policy totally. However, in the view of the author, providing minimum essential amount of water free of charge for persons confirming their inability to pay is within the realm of possibility and that is what the fulfill obligation of the right to water demands Ethiopia.

What is more, the target of the Ethiopian policy framework on the physical accessibility element of the right to water also falls below the international minimum standard and General Comment 15 of the CESCR. In this regard, the GTP aims to make water physically accessible within 1.5 km in the rural parts of Ethiopia. Contrary to this, the international minimum standard on physical accessibility of water provides that an individual should not travel more than 1 km to collect water.⁹⁹ A distance is greater than this would reduce the amount of water collected 5 liters or force individuals to collect water from unsafe nearby water source.

Concerning physical accessibility, other countries have adopted a very progressive policy. A good example in this regard is the Sri Lanka's Rural Water Supply and Sanitation Policy. The policy states that the maximum distance that an individual travels to collect water in rural areas is 200 meters and it should be reduced gradually.¹⁰⁰ So, even if it is difficult to make water available in rural areas of Ethiopia at a distance of 200 meters, the international minimum standard of 1km should be stated as a starting point in the Ethiopian policy framework for the implementation of the right to water with a clear statement that it must be reduced gradually.

Additionally, the Ethiopian policy framework on water fails to address the right to water element of non-discrimination with regard to vulnerable groups particularly Children, People with Disabilities, Indigenous people , Refugees and Internally Displaced People. The policy framework neither recognizes the particular challenge these groups face nor incorporate any measure that helps to improve their situation. This is surprising when one consider the enormous attention the policy gave to one of the vulnerable group's women and nothing is provided regarding others. The approach of ignoring vulnerable groups in the Ethiopian policy framework

⁹⁸ Center on Housing Rights and Evictions, cited above at note 94, p.75

⁹⁹ Howard and Bartram, cited above at note 13, p.18-22

¹⁰⁰ Center on Housing Rights and Evictions, cited above at note 94, p.77

on water does not go hand in hand with General Comment 15 of the CESCR that demands the state to take a number of measures aimed at improving their situation for better.¹⁰¹

Furthermore, the target setting in the Ethiopian action plans adopted to improve access to water is also at a poor level when it is examined from human rights perspective. This is because the primary target of the Ethiopian action plans that set growth target for water access is primarily meeting the Millennium Development Goals (MDG) goal that aims of halving the population without access to water by 2015. The problem with the MDG goal on water is that it fails to incorporate all elements of the right to water and does not aim for universal access. The same problem is reflected to a certain degree if one looks at the Ethiopian action plans setting target for water. A good example in this regard is the Growth and Transformation Plan of Ethiopia.

The plan aims to increase water access from 68.5 in 2009/10 to 98.5% in 2014/15. It also plans to make water physically accessible within 1.5 km for rural areas and 0.5 km for urban areas. In addition to this it also aims to supply 15 liters per day for rural dwellers and 20 liters per day for urban dwellers. This shows that the GTP is better than the MDG goal as it targets to provide water to higher percentage of population than stated in the MDG and recognize the right to water elements of availability, physical accessibility. But the plan fails to incorporate other elements of the right to water such as quality, economic accessibility or affordability, non-discrimination, participation, and access to information. It also does not aim at universal access. Thus, it share the problem of MDGs not addressing all aspects of the right to water which is not consistent with human rights principles.

Finally, the Ethiopia policy framework set to realize the right to water suffers from poor implementation and follow up problems. This could be seen from the disparity between what the policy provides with respect to each aspect of the right and what is happening on the ground. A good example in this regard is the special attention the Ethiopian policy framework gave for eliminating discrimination against women and reliving women from the heavy burden of collecting water. With respect to this, although the policy has provided for a number of measures

¹⁰¹ CESCR, cited above at note1, Para. 12, 13,37,44 and 59

that help to improve their situation women and girl child, they are still assuming 80% of water collection burden.¹⁰² This shows the huge gap between policy and practice.

6.7 INSTITUTIONS RESPONSIBLE FOR THE IMPLEMENTATION ETHIOPIAN LAWS AND POLICIES ON THE RIGHT TO WATER

The adoption of national laws and policies on the right to water *per se* does not guarantee the realization of the right on the ground. Thus, besides laying down the legal and policy framework for the implementation of the right to water, the state must establish adequate institutions that assume the responsibility of converting laws and policies in to practice or give effect to them. It is for this rationale that General Comment 15 of the CESCR underscored the necessity of establishing reliable institutions that undertake the task of implementing laws, policies, programs and action plans adopted by a state to realize the right to water.¹⁰³

For so long the responsibility of implementing Ethiopian laws and policies related to the right to water were undertaken by different ministries in a scattered and uncoordinated manner.¹⁰⁴ Recently however, the respective Ministries came to realize that it is only when their activities related to Water, Sanitation and Hygiene (WASH) are integrated that better benefits accrue to the right holders. With this premise, the former Ministry of Water Resources (MOWR), the Ministry of Health (MOH) and the Ministry of Education (MOE) signed a memorandum of understanding (MOU) in 2006 for the joint implementation of the WASH program.¹⁰⁵ The MOU was later revised in November 2012 following the structural changes in respective ministries and the adoption of the GTP. In the 2012 memorandum of understanding a new partner the Ministry of Finance and Economic Development (MOFED) joined the joint WASH implementation program.

The following are the two main rationales mentioned by the 2012 MOU for integrating the WASH program. First, the recognition by the respective ministries that access to clean water and

¹⁰² Central Statistical Agency and ICF International Calverton, cited above at note 52, p.14

¹⁰³ CESCR, cited above at note 1, para.28

¹⁰⁴ Ministry of Water and Energy, Ministry of Health, Ministry of Education, and the Ministry of Finance and Economic Development, Memorandum of Understanding on Integrated Implementation of Water Supply, Sanitation and Hygiene Program in Ethiopia, (2012), p.3

¹⁰⁵ *ibid*

improved sanitation are fundamental human rights and targets of the MDG.¹⁰⁶ Second, the acknowledgment of the WASHs role in achieving ‘MDG in reduction of poverty, empowering women, increased access to universal education, reducing infant and child mortality rate combating major communicable diseases, and environmental suitability’.¹⁰⁷ Accordingly, this section discerns the responsibilities of the respective ministries in the implementation of laws and policies on the right to water by examining the mandates given to them by the legislature in different proclamations and the MOU of 2012.

6.7.1 THE MINISTRY OF WATER AND ENERGY (MOWE)

The power of the Ministry of Water and Energy (MOWE) of Ethiopia with regard to the implementation of law and policies of the right to water could be traced from two different proclamations and the MOU of 2012. In their chronological order the proclamations are the Ethiopian Water Resource Management Proclamation of 197/2000 and Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation of 691/2010. According to Proclamation 197/2000, the MOWE is empowered to ensure and monitor the implementation of Ethiopian laws and policies on water.¹⁰⁸

Similarly, proclamation 691/2010 mandates the MOWE to engage in and support activities aimed at expanding potable water supply coverage.¹⁰⁹ It also prescribes the ministry to monitor the implementation of water supply projects sponsored by foreign donors. Further, the proclamation also empowers the ministry to set water quality standards in consultation with other concerned organs and ministries.¹¹⁰

Apart from the powers given to it by these two proclamations, the MOWE has pledged to undertake the following activities in the MOU that are relevant to the implementation of the right to water in Ethiopia. The first is to ensure the supply of safe drinking water to communities, school, health facilities and other institutions.¹¹¹ In addition to water provision, the ministry has

¹⁰⁶ Id, p.5

¹⁰⁷ ibid

¹⁰⁸ Ethiopian Water Resources Management Proclamation, 2000, art.8 (1) (i) ,Proc. No.197. Fed.Neg.Gaz. year 6 no.25,

¹⁰⁹ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, art.26(1)(H), proc.no.691,Fed.Neg.Gaz year.17,no.1

¹¹⁰ Id, art. art.26(1)(g),

¹¹¹ Ministry of Water and Energy *et al*, cited above at note 103,p.11

also assumed the responsibility of carrying out water quality before the construction and transfer of water sources to the public. Moreover, the MOWE has pledged to facilitate the activities of regional management units, wereda sector office and town water boards so that they could ensure the achievement of desired results in the implementation of the WASH program.¹¹²

6.7.2 THE MINISTRY OF HEALTH (MOH)

The responsibilities of the Ministry of Health (MOH) regarding the implementation laws and polices dealing with the right to water in Ethiopia could be appreciated from the Public Health Proclamation 200/2000 and the MOU of 2012. Thus, Proclamation 200/2000 give the ministry the authority to verify the quality of water supplied to the public be it from spring, well or pipe lines.¹¹³ In the absence of quality verification by the ministry it is not possible for anyone to supply water in any of the above means. Likewise, the ministry is also empowered to control the quality of imported and produced bottled mineral or plane water.¹¹⁴ As such, it is illegal for anyone to produce, distribute or import water without securing prior quality confirmation from the MOH.

This being the powers of the MOH in the public health proclamation, the 2012 MOU also restates these responsibilities of the ministry. Accordingly, the MOU assigns the primary responsibility of giving trainings on water quality monitoring and surveillance to the MOH.¹¹⁵ In addition, the ministry is also expected to conduct water quality monitoring before and after the construction of water supply system.¹¹⁶

6.7.3 MINISTRY OF EDUCATION (MOE)

Unlike the MOWE and the MOH, the responsibilities of the Ministry of Education (MOE) regarding the implementation of Ethiopian laws and policies related to the right to water could only be found in the MOU of 2012. Accordingly, the MOE has undertaken to ensure the availability of water facilities in schools.¹¹⁷ Further, the MOE has assumed the responsibility of establishing WASH clubs in schools and making WASH part and parcel of the school

¹¹² *ibid*

¹¹³ Public Health Proclamation, 2000, art.10(1) Proc. Fed.Neg.Gaz, year.6 no.28

¹¹⁴ *Id*, art.10(2)

¹¹⁵ Ministry of water and energy *et al*, cited above at note 103,p.11-12

¹¹⁶ *ibid*

¹¹⁷ *Id*,p.12

curriculum. ¹¹⁸These duties of the ministry are geared towards the creation of awareness in the community on WASH issues which contributes its part for the realization of the right to water in Ethiopia.

6.7.4 MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT (MOFED)

Like that of the MOE the role of the Ministry of Finance and Economic Development (MOFED) in the implementation of the WASH program and policies dealing with the right to water in Ethiopia is only stated in the MOU. Thus, the ministry has assumed the responsibility of monitoring the implementation of the GTP target on water and sanitation.¹¹⁹ Additionally, the MOFED has the duty to ensure the proper allocation of resources for the WASH program. It has also undertaken to conduct audit and control the budget allocated for the WASH program at regional and wereda level so that it is used for the intended purpose.¹²⁰

6.8 THE RESPONSIBILITIES OF OTHER STAKEHOLDERS IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

Although the Ethiopian government is primarily responsible for the realization of the right to water in Ethiopia by putting in place the necessary legal and policy frameworks *inter alia*, the efforts of the government alone will not guarantee the implementation of the right. Hence, other stakeholders must also assume their share of responsibilities if the right to water is to be fully realized in Ethiopia. In the view of the author, these actors or stakeholders include Individuals, Businesses, Other States, Non-Governmental Organizations and the Media.

6.8.1 THE RESPONSIBILITY OF INDIVIDUALS IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

The duty or responsibility of individuals in realization of human rights is not often the subject of discussion in the human rights discourse. This may create the impression that individuals could ‘exercise their rights without any sense of responsibility’.¹²¹ But the reality is that ‘the

¹¹⁸ *ibid*

¹¹⁹ *Id*, p.13

¹²⁰ *ibid*

¹²¹ International Council of Human Rights Policy, Taking Duties Seriously: Individual Duties in International Human Rights Law a Commentary, (Switzerland, International Council of Human Rights Policy 1999),p.2

fulfillment of duty by each individual is a prerequisite to the rights of all'.¹²² Thus, individuals have responsibility towards realizing their own human rights as well as the human rights of others including the right to water. The notion of individual responsibility for realizing his or her own rights is better articulated in the right to development in which the right to water could be inferred from.

One of the core obligations of states emanating from the Right to Development is creating an enabling environment for individuals so that they could realize their right on their own.¹²³ Accordingly, the individual carry the primary responsibility of realizing his right once the government created the enabling environment. This could be observed from art 2 (2) of the United Nations Declaration on the Right to Development which says 'all human beings have a responsibility for development individually and collectively'.¹²⁴ As such, it is only when the individual is unable to realize his rights on his own for a reason beyond his control that the state must intervene.¹²⁵ The CESCR in the General Comment 15 provides something similar to this when it elaborates the states obligation of fulfilling the right to water.

The comment bifurcate the states obligation to fulfill the right to water into the obligation to facilitate and the obligation to provide. The assumption behind the facilitate aspect of the obligation to fulfill is that the individual take the prime responsibility of realizing his right to water. States obligation in relation to facilitation is creating conditions for the enjoyment of rights. The states obligation to provide comes to the picture only when 'individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal'.¹²⁶

Hence, an individual in Ethiopia has the responsibility to realize his right to water on his own once the government put in place the necessary enabling conditions or frameworks. It only in a situation where an individual is unable to do so for reason beyond his capacity that he/she should

¹²²American Declaration on the Rights and Duties of Man, Adopted on 2 May 1948 , preamble

¹²³ A. VandenBogenerade, "The Right to development in international Human Rights Law: A call for its dissolution", *Netherlands Quarterly of Human Rights*, vol.31,no.2 (2013), p.195-196

¹²⁴ United Nations, Declaration on the Right to Development, General Assembly Resolution 41/ 128, annex, 41 UN GAOR Supp. (No. 53), UN Doc. A/41/53 (1986)at p. 186.

¹²⁵ CESCR, cited above at note 1, para.25 and 26

¹²⁶Id, para.25 and 26

demand direct provision of water by the government.¹²⁷ Such responsibility on the part of the individuals helps to ensure a better implementation of the right to water in Ethiopia.

Apart from the responsibility of individuals to realize his right to water on their own upon the facilitation of necessary conditions by government, they have also the duty to exercise their right responsibly and duty to towards others. This duty is enshrined in the Universal Declaration of Human Rights (UDHR), International Covenant on Economic Social and Cultural Rights(ICESCR) and the African Charter on Human and People's Right. To begin with UDHR, it provides that 'everyone has duties to the community in which alone the free and full development of his personality is possible'.¹²⁸ Similarly, the preamble of the ICESCR states that 'the state parties to the present covenant...realizing that the individual having duties to other individuals and the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present covenant'.¹²⁹

In a similar vein, the African Charter on Human and People's Right impose a broad responsibility on individual as it provides 'every individual shall have the duties towards his family and the society, the state and other legally recognized communities and the international community'.¹³⁰ When these duty of the individual is applied to an individual exercising his right to water in Ethiopia, it means that the individual should exercise his right to water responsibly and strive not to interfere or prevent others from realizing their right to water. Such duty for instance requires the individual to refrain from wasting water, from polluting water, from damaging water facilities and from ignoring when water supply facilities are broken down. All these duties of individuals contribute for the implementation of the right to water in Ethiopia.

¹²⁷ *ibid*

¹²⁸ Universal Declaration on Human Rights (UDHR), (1948), art.29(1)

¹²⁹ International Covenant on Economic, Social and Cultural Rights(hereinafter ICESCR), Adopted and Opened for Signature and Ratification by General Assembly Resolution No. 2000A (XXI) of 16 December 1966 and Entered into Force on 23 March 1976, art.2(1)

¹³⁰ African (Banjul) Charter on Human and Peoples' Rights(hereinafter ACHPR) (Adopted 27on June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986, art. 27(1)

6.8.2 THE RESPONSIBILITY OF BUSINESSES IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

The obligation of businesses in the realization of human rights is another area that is least discussed in human rights literatures. So far the only instrument articulating this issue is the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ forwarded by UN Special Representative for Business and Human Rights in 2011.¹³¹ The framework was subsequently endorsed by the Human Rights Council. According to this framework, businesses do not assume the state’s legal obligation of protecting and fulfilling human rights.

Their obligation or responsibility is primarily confined to respecting all internationally recognized human rights.¹³² The framework defines this obligation as avoiding the infringement of the right of others and addressing the adverse impacts on human rights emanating from the activities of the business. These core obligations are summarized as the responsibility ‘to do no harm’ and ‘due diligence’ obligations aimed at preventing and remedying the adverse effect of the activities of the business on human rights.¹³³

Also, General Comment 15 of the CESCR has touched upon the issue when it elaborates the states obligation of protecting the right to water. Thus, the obligation to respect the right to water obliges a state to prevent third parties including businesses from ‘compromising equal, affordable, and physical access to sufficient, safe and acceptable water’.¹³⁴ But the comment focuses on the obligation of the states to regulate the activities of business rather than indicating the responsibility of business in the implementation of the right to water *per se*.

Consequently, this sub section examines the responsibilities of business in the implementation of the right to water in Ethiopia on the basis of the framework providing for the ‘do no harm’ and ‘due diligence’ responsibility of businesses. Accordingly, businesses assume these responsibilities in the course of using water for themselves as well as when they provide access

¹³¹ Report of the Special Representative of the Secretary- General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 2011, para.

¹³² The CEO Water Mandate, Bringing a Human Rights Lens to Corporate Water Stewardship, (2012), p.3

¹³³ Institute for Human Rights and Businesses, Draft Business, Human rights and the right to water: challenges, dilemmas and opportunities round table consultative report, (2009), p.7

¹³⁴ CESCR, cited above at note 1, para.24

to others. To begin with the responsibility of business water users, they are expected to observe national laws, regulations and policies that give priority for personal and domestic uses in the allocation of water resources¹³⁵.

In addition, business water users have the responsibility of utilizing water efficiently so that they do not deprive the local population's access using water for personal and domestic purpose. Moreover, business also have the responsibility to establish adequate waste treatment plants to prevent the pollution of water that tampers with the quality aspect of the right to water.¹³⁶ Furthermore, in deciding the location of facilities business should undertake a prior impact assessment of the facility on access to water by the local community by taking in to account the interest of vulnerable people, providing the necessary information and ensuring the active participation of the local community.¹³⁷ Hence, business water users in Ethiopia are expected to assume these responsibilities if the right to be implemented properly.

Similarly, in the course of providing water to the people businesses are expected to observe certain responsibilities. One of them is acting in line with laws, regulations, policies, targets, and benchmarks set by the government to realize the right to water.¹³⁸ Besides, businesses are also expected to extend their services to and give priorities for marginalized groups including the poor, Women, Children, People with Disabilities and the like.¹³⁹ They are also expected to ensure the affordability of the services they provide for the poor section of the society. Accordingly, they must undertake regular supervision of water price to ensure affordability to the poor and adopt a flexible payment system such as phased connection charge or the need to deposit certain amount of money to access water.¹⁴⁰

Businesses are also expected to avoid arbitrary water disconnection when they render services.¹⁴¹ In consultation with the government they must ensure that individuals are not denied the basic minimum amount of water required for meeting personal and domestic needs under any circumstance. Finally, water provider businesses must make available information's regarding

¹³⁵ Institute for Human Rights and Businesses, cited above at note 132, p.18

¹³⁶ *ibid*

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

water provisions and ensure the active participation of the people in any decision they make.¹⁴² These responsibilities on the part of the businesses contribute their part for the effective realization of the right to water. Here what must be noted is that water provision in Ethiopia is predominantly undertaken by the government agencies. But there is no legal or policy statement that prevent the private sector from engaging in water provision. So, businesses which might engage in water supply activity in the future need to observe these responsibilities emanating from the right to water.

6.8.3 THE RESPONSIBILITY OF OTHER STATES IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

General Comment 15 of the CESCR has provided the tripartite obligation of states to respect, protect and fulfill the right to water extra-territorially or beyond their borders. Accordingly, the obligation to respect requires states to abstain from engaging in any activity that could have the effect of denying the realization of the right to water in other countries.¹⁴³ The activities that a state is expected to refrain from includes embargos that prevent the supply of water or other materials essential for the realization of the right to water. Additionally, states are obliged not to use water as a tool for advancing their political and economic interest.¹⁴⁴

With regard to the extra-territorial obligation of the state to protect the right to water, states are required to regulate the activities of their nationals and corporations so as to prevent them from violating the right to water in other countries.¹⁴⁵ Further, the extra-territorial obligation of states to fulfill the right to requires a positive intervention on the part of developed nations to assist the developing ones in their effort to realize the right to water by providing financial, technical resources and aid.¹⁴⁶ This obligation of states to international cooperation and assistance is enshrined in a number of human rights instruments.

To begin with the United Nations Charter, it provides that one of the primary objectives of the institution is to ensure international cooperation in addressing problems of social, economic and

¹⁴² *ibid*

¹⁴³ CESCR, cited above at note 1, para.31

¹⁴⁴ *Id*, para.32

¹⁴⁵ *Id*, para.33

¹⁴⁶ *Id*, para.34

humanitarian character.¹⁴⁷ Similarly, the UDHR also underscores the importance of realizing socio-economic rights through ‘national effort and international cooperation’.¹⁴⁸ The ICESCR also incorporates states duty of international assistance and cooperation. It specifically provides that ‘each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.¹⁴⁹

The CESCR in General Comment 3 has stated that maximum available resources in ICESCR include resources obtained from the international assistance.¹⁵⁰ Further, the notion of minimum core obligation of socio-economic rights presupposes international cooperation or assistance. This is because core minimum obligations constitute the very essence of the right and they have to be realized immediately. However, developing countries including Ethiopia face financial and technical difficulty even to immediately realize the minimum core obligations of socio-economic rights in general and the right to water in particular. Thus, developed countries must assist Ethiopia to meet the minimum core obligations of the right to water.

6.8.4 THE RESPONSIBILITY OF THE MEDIA IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

In today’s era of information and communication, the responsibility of the media in the promotion and protection of human rights in general and the right to water in particular cannot be underestimated. A media could use a number of mechanisms to carry out its duties. One of them is creating awareness about right to water. Although, it has been more than half a century since the adoption of the international Bill of Rights most people are still unaware of their rights. Concerning this, the study conducted by the amnesty international has concluded that only 8% of adult Americans and 4 % of the youth know fundamental human rights.¹⁵¹ The lack of awareness

¹⁴⁷ Charter of the United Nations, (1945) , art.3 and 54,

¹⁴⁸ UDHR cited above at note 127, art.22

¹⁴⁹ ICESCR, Cited above at note 128, art.2(1)

¹⁵⁰ CESCR, cited above 1, para.13

¹⁵¹ G.N Ray, The Role of the Media in the Protection of Human Rights, available at (<http://presscouncil.nic.in/speechpdf/The%20Role%20of%20Media%20in%20Protection%20of%20Human%20Rights%20Visakhapatnam.pdf>) last visited July 4 2013

is could even be worse for the right to water in light of the fact that it is one of the least known rights in the human rights catalogue.

In the observation of the writer the level of awareness of human rights and the right to water in Ethiopia is at a very poor state. This calls for the active involvement of the media in educating the public about the right to water. The media should also expose the violation of the right to water in Ethiopia and put the issue on the table until the violation is appropriately remedied. Besides, the media has also the responsibility to give appropriate attention to the challenges the vulnerable groups are facing in realizing their right to water and try to improve their situation by becoming a voice for the voiceless.

Accordingly, when the role of Ethiopian Medias in creating awareness about the right to water is examined, it exists at a poor state. Even if, the Medias have broadcasted few programs by interviewing authorities responsible for the supply of water, they did not approach water supply issue from the human rights perspective which would have given the true picture of the state of water supply in Ethiopia. So Ethiopian Medias in the future should strive to make known to the public the normative content of the right to water, bring to light their violation and hold the authorities accountable on the basis of human right standards.

In addition to creating awareness about the right to water in the public, Medias are also essential to make known to the authorities the obligation Ethiopia has assumed in relation to the right to water when it became a state party to different international and regional human rights instruments. This duty is assigned to the media since it serve as a bridge or play a role of communication between the state and the public.¹⁵²

¹⁵² ibid

6.8.5 THE RESPONSIBILITY OF NON-GOVERNMENTAL ORGANIZATIONS (NGOs) IN THE IMPLEMENTATION OF THE RIGHT TO WATER IN ETHIOPIA

NGOs have also their own share of responsibilities in the implementation of the right to water in Ethiopia. They could carry out their duties in different ways. One of those mechanisms is setting the realization of the right to water as a primary agenda of the government.¹⁵³ This could be achieved by bringing to the attention of the government the key issues involved in the right to water, give priority for them and take action. Besides agenda setting, NGOs could also assist the realization of the right to water in Ethiopia through standard setting.¹⁵⁴ This means they could provide inputs to revise and update existing Ethiopian laws, policies, strategies and action plans related to the right to water to ensure their conformity with human rights laws and principles. This could be done by submitting drafts of laws, policies and actions plans prepared by legal and other experts for the government's consideration.

Additionally, NGOs have also the responsibility to safeguard the violation of the right to water in Ethiopia. They could undertake this duty by preparing report on the current state of realization of the right to water in Ethiopia and make it known to the public and the government.¹⁵⁵ Once the report is publicized it would be difficult for the government to turn a blind eye to their findings. Moreover, NGOs could also undertake research on the right to water in Ethiopia and submit their findings to the inter-governmental organizations and treaty monitoring bodies since NGOs have consultative status in some IGOs and could submit their views to UN treaty monitoring bodies.¹⁵⁶ A good example in this regard is the CESCR. The Committee allows NGOs to submit oral and written information to the Committee as well as its working groups. This would help to ensure the accountability of the Ethiopian government in relation to the realization of the right to water.

¹⁵³ J. Wouters and I.Rossi, Human Rights NGOs: Role, Structure and Legal Status, working paper no.14, (2001) available at (www.law.kuleuven.be/iir/nl/onderzoek/wp/WP14e.pdf) last visited July 4. 2013

¹⁵⁴ *ibid*

¹⁵⁵ *Id*, p.8

¹⁵⁶ *Id*, p.9

Furthermore, NGOs could facilitate the implementation of the right to water in Ethiopia through aid and education.¹⁵⁷ The aid could be financial support to water supply projects undertaken by the Ethiopian government. They could also build water facilities on their own as well as provide water to people in the emergency situations. Aid from NGOs could also take the form of legal assistance, which involves the representation of victims alleging the violation of their right to water in Ethiopia before national courts, regional and international bodies.¹⁵⁸ Here it would be helpful to briefly analyze the Ethiopian law and practice regarding NGOs standing to litigate cases involving the violation of human rights. Accordingly, the Civil Procedure Code provides a party cannot be a plaintiff unless he/she has a vested interest.¹⁵⁹ Likewise, in order to bring a class action suit the Civil Procedure Code requires membership in the group.¹⁶⁰ Similarly, the tort provisions of the Ethiopian Civil Code state that the plaintiff must be the one who suffered damage.¹⁶¹ Thus, in light of these provisions the standing to litigate for NGOs is limited.

However, different articles of the FDRE constitution could be interpreted to provide NGOs with a standing to bring action in courts when human rights are violated. These could be inferred from articles 9(2), and 37 of the constitution. Hence, article 9(2) states that ‘all citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it. The important term in this article is ‘duty to ensure’ observance of the constitution which could include bringing court action to make sure that the constitution’s human rights provision are respected by others. Since the term other associations in the article could include NGOs, one mechanism of carrying out their constitutional duty is by litigating the violations of human rights provisions of the constitution without the need to show that they are the victims.

Most importantly, article 37 of the FDRE provides that everyone has a right to bring justiciable matter to a court of law. In particular, art 37(2) states that the complaint could be submitted by ‘any group or person who is a member of, or represents a group with similar interest’. Thus, this provision permits individuals and NGOs to conduct public interest litigation and enforce

¹⁵⁷ Id, p.5

¹⁵⁸ J. Wouters and I.Rossi, cited above at note 152, p.10

¹⁵⁹ Civil Procedure Code of the Empire of Ethiopia, 1960, art 33, Neg Gaz-Extraordinary Issue year 25, no. 3 decree no.52

¹⁶⁰ Id, art.35

¹⁶¹ Civil Code of the Empire of Ethiopia, 1960, art.2091 Proclamation No. 165, Neg.Gaz Extraordinary Issue No.2 year.19 no.2

fundamental rights of the constitution.¹⁶² Further, since the constitution is the supreme law of the land the stipulations of the Ethiopian Civil Procedure Code and Ethiopian Civil Code regarding standing does not prevent NGOs from bringing a case in courts representing victims of violations of human right including the right to water.

Turning to the practice, the writer has found one court case related to the quality aspect of right to water where an Ethiopian NGO was involved.¹⁶³ In this case, the plaintiff was Action Profession Association for Public (APAP) an Ethiopian NGO and the defendant was the FDRE Environmental Protection Authority. The matter concerns the pollution of Akaki and Mojo rivers by government and private industries. According to the study conducted by the plaintiff, it has been confirmed that the two rivers were polluted by wastes released by factories and have a bad odor. Furthermore, the study also indicated that since the residents utilize water from these rivers for drinking and domestic consumption it is also affecting their health, social and economic wellbeing.¹⁶⁴ Following this APAP approached the Environmental protection authority concerning this problem. However, the response of the authority was not satisfying to the plaintiff.

Afterwards, the plaintiff brought action against the authority in the Federal First Instance court Lideta division alleging defendant's failure to carry out its duties under the pollution control proclamation. The relief sought by the plaintiff include for the authority to halt the pollution of the rivers by factories, clean up the pollution and for the authority to appoint a commission that ensures the cleaning of rivers.¹⁶⁵ As a preliminary objection the defendant argued that since the environmental protection authority is merely a regulatory organ not the polluter responsible for violation, the plaintiff does not have the right to bring action against the authority. The ruling of the court on this issue was in favor of the defendant. Accordingly, the court stated that art 11 of the Pollution Control Proclamation is intended to allow court actions against polluters

¹⁶² Tsegai Berhane and Merha Tebeb Teklemedhin Environmental Law Teaching Material,(2009), p.113

¹⁶³ Action Professional Association for Public(APAP) vs. FDRE Environmental Protection Authority, Federal First Instance Court File no.64902

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

themselves. Thus, it does not allow a person to charge the environmental protection authority in court in case of dissatisfaction with its response.¹⁶⁶

In the view of the author the decision of the court is not convincing. This is because the environmental protection authority should also be held accountable in court when it fails to properly discharge the responsibilities entrusted to it by the environmental protection proclamation. With respect to this article 12 (2) of the FDRE constitution, provides that ‘Any public official or an elected representative is accountable for any failure in official duties’. Hence, in the view of the author this provision of the constitution allows a court action to be instituted against the authority or the responsible official who failed to discharge its responsibilities since scrutiny by courts is one mechanism of ensuring accountability. In any case, even if the plaintiff did not allege the violation of the right to water specifically and the court did not rule in its favor this case is crucial as it shows what NGOs could do to enforce the human right provisions of the FDRE constitution by instituting court action.

Finally, NGOs have also the responsibility to educate the public about its entitlements flowing from the right to water and how they are going to be enforced, which greatly support the implementation of the right to water in Ethiopia. However, the provision of the Ethiopian Charities and Societies Proclamation No. 621/2009 of Ethiopia which prevent ‘Ethiopian resident’ NGOs receiving more than 10% of their fund from foreign sources and foreign NGOs from engaging in the ‘advancement of human and democratic rights’ is serious obstacle that impair NGOs from carrying out their duties discussed above.¹⁶⁷

Conclusion

In short, the finding of this chapter is that the existing Ethiopian policy framework has incorporated aspects of the right to water to a considerable degree which is something positive. However, some stipulations and standards of Ethiopian policies, strategies and action plans fall below the international standard. The target setting in polices and action plans also focuses on MDGs that does not incorporate all aspects of the right to water. Moreover, there is a serious problem of implementation of the stipulation of the policies. With regard to institutions

¹⁶⁶ *ibid*

¹⁶⁷ Charities and Societies Proclamation, 2009, Proc. No. 621, art .2(2),(3),(4) and 14(2) j and 14(5), Fed.Neg.Gaz. Year15, no. 25

responsible for implementation of laws and policies relating to the right to water the chapter has identified Ministry of Water and Energy, Ministry of Health , Ministry of Education and Ministry of Finance and Economic Development and indicated their responsibilities. Concerning, the role of other stake holders in the implementation of the right to water in Ethiopia, it is argued that Individuals, Businesses, other states, Media and NGOs have their share of responsibilities if the right to water is to be realized properly.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATION

The topic of this research is important for three main reasons. First, nearly half of the Ethiopia's total population is without access to sufficient clean water for meeting its personal and domestic needs. And approaching access to water from a human rights point of view is the best way for improving access to water in the country. This is because, right based approach to access water elevates the needs of the right holders to legal entitlements, ensure the realization of all aspects of the right and provide right holders with a better monitoring and accountability mechanisms for holding the state accountable. Second, domestic legal and policy frameworks are the single most important mechanisms for implementing the states obligations in international and regional human rights instruments. As such, there adequacy or inadequacy is determinative of whether the rights under international and regional instruments are transferred in to a reality or not. Third, when states become parties to international or regional human right treaties they assume the good faith obligation of ensuring the compatibility of their domestic laws, policies and practices with their international commitments.

Due to time and financial limitations the scope of the study was confined to the examination of laws and policies issued by the Federal Government of Ethiopia for realizing the right to water. Thus, it did not study the compatibility of FDRE regional states laws, policies and practices in relation to the implementation the right to water in any depth. With respect to the methodology, the writer largely relied on the examination of international, regional and national documents pertaining to the right to water. To a limited extent, the writer also used interview. This being said regarding the importance, scope and the methodology of the study in general, the main findings and recommendation of the study are summarized as follows.

Even if, ensuring adequate access to water is a pre-requisite for an individual's health, dignity and overall wellbeing, the right to water was absent from the explicit terms when most international and regional human rights instruments were drafted. Through time, largely due to the effort of CESCRC and other UN bodies such as the UN General Assembly and Human rights Council, the right to water was inferred from the implied terms of international human rights treaties. In Africa also, despite the absence of an explicit right to water in the African Charter,

the African Commission played a crucial role in discovering the right to water from the implicit terms of the Charter in the course of deciding on communications as well as issuing guidelines for state reporting.

Thus, now there is a consensus that a freestanding right to water is part and parcel of international as well as regional human rights instruments either implicitly or explicitly having a strong interlink with other rights. Besides, many states are implementing the right domestically by laying down appropriate legal and policy frameworks. However, there is a problem on the part of states of taking MDGs and Human rights as one and the same. This has resulted too much focus on meeting MDG target on water instead of domestic implementation of the right to water which indicates true progress of states in improving access to water. Hence, the paper examined Ethiopia's laws, policies and practices beyond the MDGs based on the standards and principles of the right to water.

With respect to the normative content of the right to water, it entitles individuals and groups to sufficient, safe, acceptable, physically accessible, affordable water delivered in participatory, accountable and non-discriminatory manner. Like other human rights, the right to water imposes quartet layers of obligations for states i.e. obligation to respect, obligation to protect, obligation to promote and the obligation to fulfill. The right also has core minimum obligations constituting its very essence deemed to be realized immediately. Aside from that, certain groups of individuals encounter daunting challenges in realizing their right to water including the urban and rural poor, Children, Women, People with Disabilities, Internally displaced Peoples, Refugees, and Indigenous people. Further, the accountability mechanisms for violation of the right to water are available at national, regional and international level.

Ethiopia being a state party to almost all international and regional human rights instruments recognizing the right to water assumes the good faith obligation of ensuring the conformity of its laws, policies and practices concerning the right to water with their stipulations. It also undertakes to realize the core contents of the right to water immediately by giving priority. The finding of the thesis regarding the compatibility of Ethiopian practice, law and policy on the right to water with its international commitments is summarized in the following manner together with the author's recommendation for each part.

With respect to the current practice of realization of the core minimum obligation of right to water in Ethiopia, it is noted that the country is not using its enormous water resource potential for meeting even the minimum core obligations of the right to water. Misallocation of financial resources and corruption is also affecting the realization of the right water. Consequently, the finding of the thesis shows that there is a rampant violation of minimum core content of every aspect of the right to water i.e. availability, quality, physical accessibility, affordability, non-discrimination, participation and access to information in Ethiopia since they are deemed to be realized immediately. Vulnerable groups like Women, Children, Refugees and rural poor are also having a hard time in realizing their right to water.

To improve the current state of realization of the minimum core obligation of the right to water in Ethiopia the author recommends the following points. First, the country must give priority of meeting the core minimum aspects of each element of the right to water as a matter of urgency as they are immediate obligations which could not be postponed for the future. Second, the country must allocate ever increasing financial resources to improve water access and ensure the proper utilization of the allocated resources by preventing bad practices such as corruption through transparency and accountability. Third, Ethiopia needs to step up its effort in relieving vulnerable groups from overwhelming challenges they face in realizing their right to water as it constitutes the core minimum obligation of the right to water.

Concerning the consistency of existing Ethiopian legal framework for implementing the right to water with the country's international obligations, the paper has identified both its merits and demerits. To begin with the merits of the legal framework, the recognition of the right to water in the FDRE constitution as a freestanding right both explicitly and implicitly is a big achievement. In connection with this, it was strongly argued that NPPOs of the FDRE constitution are not DPSPs rather binding interpretive guides or explications of the constitutions fundamental rights. In addition, the recognition of some aspects of the right to water in subsidiary legislations such as Water Resource Proclamation, Water Resource Regulation, Pollution Control Proclamation, the Civil Code and FDRE Criminal Code is also a strong side of the legal framework.

Turning to the deficiencies of the legal framework in relation to the implementation of the right to water, they could be summarized in to three. First, subsidiary legislation failed to incorporate most elements of the right to water including availability and continuity of water supply,

physical accessibility, affordability, participation, and access to information and protections for vulnerable groups. Moreover, different aspects of the right to water are located in different legislations in a scattered and disorderly manner. This would create difficulties for right holders to claim their right and duty bearers to execute their duties. Furthermore, the justiciability of socio-economic rights in general and the right to water in particular is almost non-existent both in Ethiopian courts as well as the Ethiopian human rights commission. Finally, even if Ethiopia is a state party to the ICESCR it has not yet ratified the optional protocols that gives individuals the standing for submitting communications alleging the violation of the socio-economic rights including the right to water. This has prevented individuals from using the CESCR as an avenue of remedy when their right to water is infringed. Ethiopia has also a bad reputation of submitting state reports very late.

To improve the compatibility of Ethiopian legal framework on the right to water with Ethiopia's international obligations, the author proposes the following measures. One, a comprehensive Right to water proclamation or law that incorporates all aspects of the right to water should be enacted. This makes the law readily accessible both for the right holders as well as for duty bearers. A second, courts must uphold their constitutional responsibility of enforcing the human rights in the FDRE constitution in general and the right to water in particular by ensuring their applicability in the cases before them. A third, since the right to water is one of the least known human rights, training should be given to judges and legal practitioners regarding the normative content of the right and the obligations resulting from it as well as the laws and policies enacted to realize the right in Ethiopia. A fourth, the Ethiopian Human Rights Commission must actively engage itself to create awareness about the right to water in the public and provide remedy when the right is violated. A fifth, Ethiopia should ratify Optional Protocol to the ICESCR that allows individuals to submit communications. Doing so would further give the country a further drive to better implement socio-economic rights to avoid scrutiny before the Committee. A sixth, Ethiopia should submit its state reports regarding the measures it has taken to implement the right to water on time. These would help the country to appreciate the strong and weak sides of its measures before it is too late.

With regard to the conformity of Ethiopian policy framework for the implementation of the right to water with Ethiopia's international commitments, the study has detected positive and negative

aspects. Accordingly, the explicit recognition of the right to water, the incorporation of public trust doctrine and the inclusion of quality, affordability, participation, and non-discrimination aspects of the right to water could be mentioned as strong sides of the policy framework. On the other hand, the absence of priority for core minimum obligations, adoption of full cost recovery principle for urban areas, the unavailability of free basic water for persons without means, poor attention to most vulnerable groups, the focus of policies target setting on MDGs rather than the elements of the right to water and poor implementation of the policies stipulations were the major problems with the existing Ethiopian policy framework.

In order to make the Ethiopian Policy framework in line with the international obligations, the author suggests the following recommendations. First, the existing Ethiopian water policy and strategies should be revised based on international standards and must include all elements of the right. Additionally, the revised policy should give priority to the realization essential minimum level every aspect of the right. Second, the revised policies should recognize states obligation of providing free basic water for those who proved their inability to pay. They should also drop the full cost recovery principle in urban areas which could make water unaffordable. Third, the revised policies must take note of the severe challenges vulnerable groups encounter in accessing water. Accordingly, the revised policies and strategies should clearly stipulate the sort of actions taken to relieve Children, People with Disabilities, Refugees, IDPs and Indigenous Peoples from the challenges they face in realizing their right to water. Fourth, future target setting on water should not only aim at meeting the MDGs. It should rather state precisely what it plans to achieve in realizing each element of the right to water with a specific time frame.

Regarding the institutions responsible for the implementation of Ethiopian laws and policies pertaining to the right water the thesis has identified the Ministry of Water and Energy, Ministry of Health, Ministry of Education and Ministry of Finance and Economic Development as major stake holders at the Federal level. It also noted the coordination of their activities through WASH program as a positive development. However, the big gap between the policies, strategies and actions plans stipulation and the practice shows weakness on the part of implementing institutions particularly those available at lower units of administration. Thus, the writer recommends a capacity building program particularly for those organs located at grass root level

to improve their effectiveness and efficiency in implementing laws and policies related to the right to water properly.

At last, the paper considered role of other stake holders in the implementation of the right to water in Ethiopia. The identified stake holders are individuals, businesses, other states, Medias and NGOs. Thus, the paper recommends individuals to make effort on their own to realize their right to water once the government facilitate conditions and exercise their rights responsibly not to affect others. Similarly, Business should also respect the due diligence and do no harm principles in their operation so that the right to water is realized. Likewise, other states particularly developed state have the extra-territorial obligation of assisting developing states financially to ensure the fulfillment of the right to water. Additionally, NGOs in Ethiopia need to play active role in agenda setting, revision of laws and policies, litigation and awareness creation to enforce the right to water in Ethiopia. And the government needs to revise CSO law and lift the restrictions that forbid Ethiopian resident and foreign NGOs from activities related to human rights. Further, Medias should also play their role in creating awareness, exposing the violation of the right to water and they should hold the government accountable.

Overall, it is fair to conclude that the existing Ethiopian legal and policy framework for the implementation of the right to water has significant gaps when it is examined from the perspective Human Right and the current state of realization of the right in Ethiopia. The consistency of FDRE regional states laws and policies concerning the right to water in light of the countries international obligations needs a further research. Additionally, to change the poor culture of litigating socio-economic right in Ethiopian courts and Ethiopian Human Rights Commission, questions concerning how a complaint alleging the violation of socio-economic right could be field in Ethiopian courts, how jurisdiction is determined, what could be the reliefs sought, on what laws to base the claims and who has a standing to litigate requires more research.

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