

**LOCALISING THE RIGHT TO
DRINKING WATER:
PERSPECTIVES AND CHALLENGES**

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CHAPTER I

INTRODUCTION OF THE THESIS

A BACKGROUND TO RESEARCH

Water is a vital condition of human health, life and well-being. Yet nearly 768 million people do not have adequate access to a source of safe drinking water.¹ Two and half billion people suffer from inadequate access to improved sanitation, which represents a third of the world population.² The way nations govern and manage water resources does not keep pace with the rapidly changing development, demographic and environmental conditions of modern times, and shows the lack of political determination to prioritise the access to water for human needs. It is increasingly recognized that ‘the ongoing, serious and growing water crisis – to a large extent is a crisis of governance’.³ Among the critical stakeholders who have a hands-on responsibility for providing the individuals, households and communities with drinking water are local governments, who operate at the forefront of the water crisis. Decentralisation of public responsibilities to local authorities increases their roles in the water sector operation, such as protection of water sources, pollution control and organisation of water services. While the strategic role of local authorities in addressing the water crisis is increasingly acknowledged, the municipalities are often left to their own devices to deal with its challenges without adequate political and financial support.

The human costs of the lack of access to clean water have generated significant response from the international community. Conceptual thinking, international law, and global policy action have developed a number of initiatives and frameworks to address the crisis. The most prominent approaches in this regard include sustainable development, Millennium Development Goals, human rights and good water governance. Taking their origins at the international level, these frameworks, developed with the best of intentions to address the global water crisis, often fail to think and act locally. Mainstreaming the global objectives into the local contexts is carried out in the ad-hoc fashion at the initiative of the intergovernmental agencies, donors, or national governments. The thinking on the localising global agendas is also rather a sporadic exercise in the academic discourse.

¹ WHO and UNICEF ‘Progress Sanitation and Drinking-water: 2013 Update’ 8.

² *ibid* 4.

³ World Water Assessment Programme, UN Water *The United Nations World Water Development Report 2: Water: a Shared Responsibility* (UNESCO Publishing 2006) 50.

Similarly, human rights as a normative and operational framework originates in international law, with the national governments in mind as the principal duty holders to safeguard and deliver rights. Primarily subjected to international monitoring, human rights in their practice and scholarship also fail to approach local level in any comprehensive manner.

The human rights framework is increasingly seen as a tool that can enhance water governance at all levels. The concept of water as a human right is gaining ground within the international community. It takes its origins in the international and regional human rights instruments and national legal systems gradually recognise the right. The official interpretation of the right to water by the UN Committee on Economic, Social and Cultural Rights sheds significant light on the content of the right and the means of its implementation.⁴ Arguably, the human rights-based approach is better capable of fulfilling its objective of the access to drinking water for all, if mainstreamed in a purposeful manner at the local level where the water crisis unfolds. Yet, the implications and challenges of the localising the human right to drinking water require the closer academic scrutiny.

B PURPOSE, STRUCTURE AND METHODOLOGY OF STUDY

1 Purpose and Hypotheses of the Study

The implications of the application of the human rights-based approach to drinking water at the level of local governments are little understood in theory and practice. At the level of academic inquiry this subject matter requires further examination. Clarification of the localising of the right to water standards and the unfolding human rights principles, such as accountability, participation and non-discrimination is one of the pertinent areas of analysis in this regard. This thesis asserts that local governments, when charged with the statutory duties as regards drinking water, concurrently carry out responsibilities in relation to the human right to water and engage in the implementation of the right within their territories. Yet, there is still a notable gap in understanding of the roles and human rights responsibilities of governments in relation to access to drinking water highlighted by the UN High Commissioner on Human Rights in 2007 upon

⁴ UNCESCR 'General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C 12/2002/11.

completing the study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation.⁵

The central purpose of this study is to advance the understanding of the perspectives and challenges of the localising of the human rights-based approach to water, with a view to reach better clarity on the human rights responsibilities of local governments on the right to water. In this connection the research is based on the following hypotheses. *The first hypothesis* affirms that local governments are bound by human rights responsibilities. *The second hypothesis* asserts that municipalities are responsible for the human right to water along with the national government. *The third hypothesis* suggests that the local application of the human rights-based approach to water is based on compliance with the right to water standards and entrenched through the human rights principles of non-discrimination, participation and accountability. Through the testing of these hypotheses, the study attempts to reach its purpose of scrutinising the utility of the localising the rights-based approach to drinking water and enhancing the understanding of its municipal application.

2 The Structure of the Thesis

To reach its purpose the research unfolds as follows. To address the first hypothesis, Chapter II at the outset of the thesis attempts to establish the practical relevance of the human rights framework to the local government action. It outlines how local governments through their functional roles and areas of action impact on human rights dynamics on their territories under the influencing factor of decentralisation. The Chapter then aims to ascertain the normative extent of the human rights responsibilities of the local government. Application of human rights laws to the local level is addressed from the perspectives of Public International Law, International Human Rights Law, and Constitutional Law.

To test the second hypothesis, Chapter III of the thesis examines the current development of the freshwater crisis, its causes, challenges, as well as the extent of global action attempting to deal with the crisis. It introduces the human rights-based approach to drinking water along with the other global frameworks, scrutinizing the human right to water on the matters of its emergence, scope, content and obligations of the governments in this respect as stipulated in the texts of the treaties and officially interpreted by

⁵ Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, A/HRC/6/3 16 August 2007, para 55.

the UN bodies. On this basis the Chapter establishes the standing of the human right to water as the local government responsibility, limited to the extent of their statutory responsibilities on drinking water.

The third hypothesis is tested subsequently. It starts with the evaluation of the application of the principles of non-discrimination and equality in access to drinking water at the level of local government. Normative obligations of municipalities as regards non-discrimination stipulated in the international and domestic law and the extent of municipal action impacting on equal access to water are examined in the Chapter IV. Perspectives on public participation in local decisions affecting access to water are addressed in the Chapter V, where participation as a human rights principle and a human right on its own standing, is translated to the issue of access to drinking water and examined as a human rights obligation of the local government. The accountability of local government for violation of the human right to water is scrutinized in the Chapter VI. It enquires in the potential of the UN human rights bodies and domestic mechanisms of accountability in highlighting the role of local governments in human rights practice, addressing municipal human rights responsibilities, the challenges of local implementation, and monitoring human rights compliance of the municipal action. It also undertakes an extensive examination of the domestic case law on the matter of bringing of local governments to account for different violations of the human right to drinking water, assessing the perspectives, potential and challenges of justiciability of the right to water that might be compromised locally. Scrutinising the findings of these Chapters, the research will attest its third hypotheses and reach closer to its central questions.

3 Methodology

The hypotheses of this research are scrutinised on the basis of several methodological approaches. The elaboration of the thesis is primarily based on the study of the academic literature, assessment of empirical findings and comparative legal analysis. The academic literature from the fields of legal, social and political science available to date on the subjects of local government, human rights and the right to water has been examined. The empirical research and evaluation of the evidence available on the topic have been extensively utilised across several chapters of the thesis. The empirical data has been identified through the broad desk study of the documents produced by the UN human rights bodies, court decisions and the working literature, such as research papers, reports produced by the civil society, UN intergovernmental agencies and other stakeholders engaged

with the water sector and human rights practice. The legal analysis of the international norms, human rights treaties, in conjunction with the interpretations of treaties issued by the UN treaty bodies, constitutional and national laws, and decisions of the domestic courts, has been extensively employed throughout this research. The tripartite typology of specific obligations of governments, customarily established in theory and practice of the human rights law, has been utilised in the thesis to scrutinise the research findings.⁶ The study has not limited itself to any particular country or region and examines the local practices, domestic laws, policies and empirical evidence from different parts of the world, including developing and developed countries of the North and South. This all-inclusive approach to the study ensures varied and comprehensive research findings and facilitates the author in reaching the well-founded and non-biased conclusions.

C THE ORIGINAL CONTRIBUTION OF THE RESEARCH

The human rights language and practice are becoming increasingly relevant to the local government. On the normative level municipalities ensure human rights compliance, and sometimes emerge as primary violators. Local governments repeatedly reiterate their commitment to human rights at the international meetings and global events. At their own initiative, or under the guidance of the national governments, municipalities integrate rights-based approaches into local development policies and plans, service provision, governance processes and community engagement. Yet, the practice of conscious compliance with and implementation of rights at municipal level is rather an exception than a norm. Local governments rarely base their day-to-day decision-making and policy action on human rights norms and principles.

In the human rights scholarship and practice the understanding of local government role in human rights dynamics remains poor and urgently requires further attention. Against this backdrop the research makes a modest attempt to address the gap in academic knowledge of the human rights implications of the municipal action. More specifically, this thesis evaluates the impact of local government function on drinking water, as a

⁶ Originated from H Sue *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press 1980), UN Commission on Human Rights 'The New International Economic Order and Promotion of Human Rights' (1987) UN Doc.E/CN.4/Sub.2/1987/23.

matter of specific human rights obligations. While the notion of water as a human right is evolving rapidly, the challenge of its application at the local level also lacks scholarly attention and scrutiny.

Effectively this study aims to bring a number of original contributions into academic knowledge. It advances the understanding of the implications of the rights-based approach to the municipal function on drinking water. It sheds light on the implications of mainstreaming of the human rights principles into local policy and decision-making on the water issues. Simultaneously, it brings further clarity on the obligations of municipalities in relation to the right to water and provides a better vision on the perspectives and challenges of localising the right. In the broader perspective, this research aims to advance the understanding of the local governments as legitimate human rights actors and their increasingly recognised potential to make the rights of people a reality.

CHAPTER II

LOCAL GOVERNMENTS AND HUMAN RIGHTS

A DEFINING LOCAL GOVERNMENT

1 Characteristics of Local Government

Local government is ‘[a] governing institution which has authority over a subnational territorially defined area; in federal systems, a substate territorially defined area’.⁷ In the federal states local government operates at the lowest level within the jurisdictions of both central and regional government. This study is predominantly concerned with the closest proximity of people to elected government, which exists under the different titles such as local (self-) government, local authority and municipality.⁸

In 1976 Stayner noted that ‘though it is not possible to define local government in exact verbal terms it can be characterised in such a way that it can be recognised as such in different times and places.’⁹ Despite the considerable diversity of their structure, titles and functions, local governments possess a number of common features, which allow describing this political institution reasonably accurately. This part outlines the core characteristics of the local governments.

(a) Legal status

The legal status of local authorities varies greatly across the world. The structure, method of formation and suspension of local bodies, powers and responsibilities of local governments, as well as the rules for changing of these responsibilities, are generally prescribed by law. A well-defined mandate, provided by a constitution or statute, ensures the secure position of municipality in the state. The stability of the institution is undermined in the absence of the defined legal regulation. In this regard the The International Union of Local Authorities World Wide Declaration of Local Self-

⁷ I McLean and A McMillan (eds) *The Concise Oxford Dictionary of Politics* (Oxford University Press 2009) 312.

⁸ For the purpose of this thesis, these titles are used as synonymous.

⁹ J Stayner *Understanding Local Government* (Martin Robertson 1976) 15.

Government¹⁰ encourages the national governments around the world to secure the legal status of local governments and the European Charter of Local Self-Government requires that '[t]he basic powers and responsibilities of local authorities shall be prescribed by the constitutions or by statute.'¹¹

The status of municipalities can be defined through the variety of legal instruments. For instance, in France, the Netherlands, Brazil, South Africa, or Uganda the domestic constitutions provide for the local government status, while the constitution of the USA, for instance, does not refer to municipalities, leaving it to the States to define the status of their subordinate political units. National legislation on its own or in addition to the constitutional provisions may prescribe the powers and responsibilities of local governments.¹² In federal states the legal status of municipalities may be defined by the constitutions or legislation of the sub-national units.¹³ In China local governments have been established by an executive order of the central government.

(b) Responsibilities

Local governments are multi-purpose bodies, assigned with a wide range of tasks and responsibilities. The competences of municipalities vary from country to country or, in federal states, from region to region. These typically include some or all of the following: housing and roads, water supply and sewerage, education and health, local development and social security, police and traffic regulation, management of natural resources and environmental protection, maintenance of public amenities and so on.

The issue of allocations of responsibilities between the levels of governments has been addressed in academic thinking. A number of accepted principles and theories have emerged as a result, including the principle of fiscal equivalency, the decentralisation theorem, and the subsidiarity and residuality principles.¹⁴ The rhetoric of decentralisation and subsidiarity, advocating for allocation of responsibilities at the level closest to people, has been widely acknowledged and applied in practice across the

¹⁰ IULA World Wide Declaration of Local Self-Government, June 1993, art 3.3.

¹¹ European Charter of Local Self-Government (opened for signature 15 October 1985, entered into force 9 September 1988) ETS N 122, art 4.

¹² In Latin America most of the states adopted municipal codes replacing the municipal legislation that had been in place since the beginning of twentieth century.

¹³ In the USA, Switzerland and Germany, for instance, the legal status of local governments is defined ultimately by the federal states.

¹⁴ A Shah 'A Comparative Institutional Framework for Responsive, Responsible, and Accountable Local Governance' in A Shah *Local Governance in Industrial Countries* (World Bank Publications 2006).

world. The subsidiarity principle, evolved from the social teaching of the Roman Catholic Church,¹⁵ claims that public responsibilities should be exercised by the lowest level of government capable to perform these tasks effectively, and a convincing case has to be made for functions to be transferred to the higher level of government.¹⁶ Devolution of responsibilities in many Western European States during the 1970s-1980s was undertaken under the subsidiarity agenda. Since 1990s decentralisation has gradually become a world-wide tendency, which resulted in an apparent increase of local governments' responsibilities.¹⁷

(c) Powers

The powers and competences of local authorities are constructed in two general ways. The first approach, called general competence, allows municipalities to get involved in any matter relating to local community, unless the law does explicitly provide otherwise. The rationale for such provision is that local authority is the first instance to recognise new tasks and problems; it is an appropriate institution to find a suitable solution and to react on the issue. The second approach, defined by the *ultra vires* principle, allows local governments to carry out only specifically authorised actions. It prohibits municipalities to perform any tasks that fall outside of their statutory responsibilities. The *ultra vires* principle still exists in the parts of the United Kingdom (UK),¹⁸ Chile, parts of the USA, while the principle of general competence is extensively utilised in continental Europe and Latin America. General competence allocates more extensive local power to municipalities, since it allows greater liberty to deal with the issues that arise locally.

(d) Financing

As a rule, national, or regional in the federal states, governments set down the principles of local funding. Financing of local governments comes from a variety of sources. Their own revenues, central and regional government

¹⁵ *ibid.*

¹⁶ As stipulated in the European Charter of Local Self-Government (n 11) art 4.3; UN-HABITAT 'International guidelines on decentralisation and the strengthening of local authorities' (2007); UCLG *Decentralisation and Local Democracy in the World: First Global Report* (2007) 289.

¹⁷ 'A History of Decentralisation' in FAO and others *The Online Sourcebook on Decentralization and Local Development* <http://www.ciesin.org/decentralization/English/General/history_fao.html> (15 May 2013).

¹⁸ The Localism Act 2011 s 1, assigned the local authorities in England with the power of general competence, which was a major breakthrough in the UK system.

transfers, and loans are the standard ways of funding. Revenues raised by municipalities themselves comprise service fees, levies and local taxes, such as income and property taxes. Their own income, however, is not sufficient to pay for discharging of their public functions, and has to be complemented by other sources. Funding that comes from the central government in the form of grants for general or specific purposes are crucial for municipal functioning. There is a great variety among the countries as regards the methods of financing. In some states, for instance in Ireland, local authorities mainly rely on central governments transfers, whereas in others like in Switzerland, most of local finances are raised through the local taxes. Borrowing, as a way of self-funding, is widely practiced in industrial countries, where local authorities are creditworthy and financial markets are well-functioning. For municipalities in developing countries access to credit is tightly circumscribed.¹⁹

(e) Autonomy

Local government is an element of a wider political and administrative structure of state. There are always one or several institutional levels it is subordinated to, which exercise control over the local level. The ideas of autonomy had been developed at times of the introduction of the local institutions in Europe. Principally, it had been elaborated as a means to regulate relations between governments in order to prevent arbitrary interventions of the central government. It is interesting to note that ideas of local government autonomy originally had a negative connotation, as a guarantee from the interference of the central government into local affairs. Currently the concept of autonomy has acquired a positive meaning, assuming the freedom of local authority to act in the interests of the community.²⁰

Local autonomy is a core value of local self-government. It embraces political, administrative and financial dimensions. Elections of local councils and local referenda are the features of political autonomy. Administrative dimension implies a 'freedom of action and organization for the local authority in the context of the laws',²¹ or the possibility to govern its own affairs without interference of central government.²² The financial autonomy of local governments implies the power to levy and collect its

¹⁹ *Decentralisation and Local Democracy in the World* (n 16) 291-294; Shah (n 14) 34, 40.

²⁰ F Kjellberg 'The Changing Values of Local Government' (1995) 540 *The ANNALS of the American Academy of Political and Social Science* 40, 42-43.

²¹ *Decentralisation and Local Democracy in the World* (n 16) 312.

²² The nature of local autonomy is normatively defined in the European Charter of Local Self-Government (n 11) arts 4.2, 4.4, 4.5, 6.1.

own sources of income, most notably taxing powers. The example provided in the preceding paragraph demonstrates that the local governments in Switzerland enjoy greater financial autonomy, than in Ireland.

Indeed the autonomy does not assume independence from the central government; it rather stands as a safeguard from the arbitrary intrusion of the centre. At the same time, central or regional governments have a legitimate right to exercise steering over the municipality.²³ Kjellberg provides several reasons for steering such as need to uphold the rule of law, macroeconomic steering, equalization of benefits and burdens, cost-effective production.²⁴ The balance between the steering and autonomy is arguably better struck through the clearly defined legal status of local authorities.

2 Local Government Roles

This section enquires into the rationale for the local government's existence from the normative and empirical standpoint. The most prominent aspects of engagement of the municipalities in political, economic and community life are addressed in some detail. The clarification of the areas of municipal engagement should assist with the discerning the human rights implications of local action in the section C of the current Chapter.

(a) Local politics and democracy

The political nature of local government is implied in its name, since 'government' per se is a political entity. In the words of Stayner local self-government can be seen as a 'miniature democratic political system on its own right'²⁵ with the limitations inevitably coming from its subordinate position in the political structure of a nation's democratic system.²⁶ By the means of local self-government state power is diffused in the national political system, while the patterns of power distribution vary greatly across the world. An elected local government is a key element in the political

²³ Art 8 of the European Charter of Local Self-government (n 11) provides normative regulation of the administrative supervision of municipalities.

²⁴ Kjellberg (n 20) 45-48 elaborates on the challenge of reconciliation of the values of local government, including autonomy, with the values of steering.

²⁵ *Understanding Local Government* (n 9) 24-25.

²⁶ This may not be correct in relation to countries in transition, autocracies or failed states.

systems of liberal democracies and it is a common understanding that '[l]ocal government is legitimated through election'.²⁷

Local self-government is based on the political principle of democracy.²⁸ An elected local institution, close and accessible to the population, it is indeed the essential instrument of local democracy.²⁹ Representative democracy is achieved through local elections and political accountability of councillors towards their constituencies, or holding of local referendums.³⁰ Participatory democracy entails citizens' engagement with local government structures with the purpose to inform policy formation, planning processes and other decision-making.³¹ Being closer to citizens, a local government emerge as a legitimate political platform for people to have their say in local affairs and to effectively exercise their right to self-government. The preamble of the European Charter on Local Self-Government in this context reaffirms this in the following words: '[c]onsidering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe... that is at local level that this right can be most directly exercised.'

As a matter of exercising its political power, the ideal local authority adopts local by-laws and policies, makes strategic decisions for development of public services, investment projects or resource allocations. It sets priorities for the local development, identifies public concerns, reconciles conflicting issues and protects the community and local residents against hardship. Decentralisation inevitably impacts on the political status of municipalities in a way that it stimulates greater dispersion of decision-making power. As such, the opportunities and challenges for democratic processes in local government are increased.

The challenges arising in this context are the growing tendency to consider local government as a merely administrative or business-like institution responsible for service provision.³² The growth of the governance networks involved in the shaping and implementation of local policies weakens the position of municipalities as a leading institution of local power and

²⁷ D Sweeting, C Copus 'Whatever Happened to Local Democracy?' (2012) 40 Policy & Politics 21, 22, referring to L Sharpe 'Theories and values of local government' (1970) 18 Political Studies 153, 168.

²⁸ John Stuart Mill first related democracy with local self-government in context of representative government, referred in J Brooks '(Can) Modern Local Government (be) in Touch with the People?' (1999) 14 Public Policy and Administration 42, 43.

²⁹ M Callanan 'Where Stands Local Government?' in M Callanan and JF Keogan (eds) *Local Government in Ireland, Inside Out* (Institute of Public Administration 2003) 6.

³⁰ P Blair 'Trends in Local Autonomy and Democracy: Reflections from a European Perspective' in R Batley, G Stoker (eds) *Local Government in Europe: Trends and Developments* (Macmillan 1991).

³¹ Sweeting (n 27) 23.

³² Refer to the section B 1 (b) of this chapter.

‘threaten[s] the normative bases of liberal democracy’.³³ In this context the political dimension of the local government is an important one not to lose sight of, since the political origins and democratic values are the basis of their very legitimacy.³⁴

(b) Service provision

In order to evaluate the role of local government as a service provider it is worth referring to the theoretical arguments first. The notion that local government is better able to match local needs and preferences in provision of public goods and services, as opposed to the uniformity of the centralised provision, is recognised in the early scholarly thinking³⁵ and contemporary public policy. The advocates of subsidiarity and decentralisation principles often employ this argument. The statement that local government is the most appropriate level to achieve efficiency in allocation of certain services constitutes a key economic rationale of decentralisation.

The ‘market failure’ arguments prove useful to comprehend and justify traditional governments’ role in provision of public goods and services.³⁶ Due to a variety of reasons, for instance the lack of competition, unemployment or inflation, markets may fail to provide essential services to the public. The role of governments, at all levels, is seen as an intervention and correction of ‘market failure’, because it is risky to rely exclusively on markets to provide public goods and services.

In opposition, the ‘government failure’ theory³⁷ advocates for the need of the markets to intervene in the delivery of public services, since the government may fail to do so, or services provided by the public body may not satisfy fastidious customers. It has been suggested that government failure is most prominent in local authority policy making and action.³⁸ The public choice school and new public management theory embraced the argument and furthered the theoretical basis for marketisation of local

³³ Sweeting (n 27) 23.

³⁴ C Andrew, M Goldsmith ‘From Local Government to Local Governance – and Beyond?’ (1998) 19(2) *International Political Science Review* 101.

³⁵ As argued by Tocqueville in 1838, Mill in 1861, Oates in 1972, summarised in P Watt ‘Principles and Theories of Local Government’ (2006) 26 *Economic Affairs* 4.

³⁶ Watt (n 35).

³⁷ A O Krueger ‘Government Failures in Development’ (1990) 4(3) *Journal of Economic Perspectives* 9.

³⁸ B Dollery, J Wallis ‘Local Government Failure’ (2001) University of Otago Economics Discussion Papers N 0121

<<http://www.business.otago.ac.nz/econ/research/discussionpapers/DP0121.pdf>> (11 August 2013).

public service delivery.³⁹ The key notions and values of these ideologies are efficiency and quality of service provision, availability of choice, responsiveness to the public, value for money and competition. They seek to achieve these outcomes through privatisation of public services or through integration of market values into the government operation on service delivery.

In practice the responsibility for public services, such as housing, waste collection, water supply, public transport, or education, constitute a major area of municipal activity. Local government decides on local policies and the level of services within the context of broader national frameworks, setting out overall objectives and targets. To meet these objectives municipality adapts local policies and services to suit local needs and priorities, allowing the public to articulate their voice and preferences through the mechanisms of participation.⁴⁰

Decentralisation and subsidiarity agendas underpin a major shift of responsibilities to local governments. There is no blueprint that has emerged in implementing subsidiarity. The range of local authorities' tasks and public functions varies in every country remarkably and according to Stewart 'often appears more as a result of historical accident than of any systematic consideration of their role'.⁴¹ A lack of the uniform development of subsidiarity, however, is not a problem. The difficulty arises when 'assignments are shifted in a way that is unclear, ambiguous, unreasonable, arbitrary, or inconsistent'.⁴² Also, the functional responsibilities are often shared with the other levels of government or specialised agencies, which entails the additional challenges such as lack of clarity over who is doing what.

Achieving efficiency in service delivery is an important target, which entails making decisions on the modality of service provision. Marketisation of public service delivery is increasingly encouraged as an option in this regard. Financially strained local governments have to make difficult choices engaging in liberalisation and commodification processes through privatisation of infrastructure, contracting out service delivery and tendering procedures. Many states in Europe have a long history of partnership in provision of services between levels of government, communities, private

³⁹ S Bailey 'Public Choice Theory and the Reform of Local Government in Britain: From Government to Governance' (1993) 8(2) *Public Policy and Administration* 7; G Tullock, A Sheldon, G Brady, *Government Failure: A Primer in Public Choice* (Washington DC: Cato Institute 2002).

⁴⁰ Callanan (n 29) 9.

⁴¹ J Stewart 'A Future for Local Authorities as Community Government' in J Stewart and G Stoker (eds) *The Future of Local Government* (Macmillan 1989) 247.

⁴² *Decentralisation and Local Democracy in the World* (n 16) 290.

and voluntary sector.⁴³ Participation of the private sector in local service delivery there unfolded gradually. In contrast, in a number of states, including UK, Germany, the Netherlands, and New Zealand, reforms of local service delivery have introduced market values and mechanisms instantly, transforming local governments into business-like organisations.⁴⁴ Overall, commercialisation and fragmentation of service provision, underpinned with the ‘local governance’ rhetoric, are blurring the standing of local governments in the field of service delivery.⁴⁵

In the developing world privatisation of public services is assertively pushed by the Bretton Woods institutions.⁴⁶ In 2002 government of Sri Lanka and the World Bank within the framework of the Poverty Reduction Strategy agreed to privatise almost all government services, enterprises and national resources such as forests, water, fisheries and minerals.⁴⁷ Since 1985, transportation, electricity, telecommunications, the airline and the mines in Bolivia all had been privatised under the pressure from the World Bank and IMF.⁴⁸ Privatisation agenda is based on the theoretical arguments of inefficiency, corruption, bureaucracy and the lack of transparency inherent in the municipal administration.⁴⁹ However, the processes and outcomes of privatisation of public services forced by the Bretton Woods institutions have shown little legitimacy for exactly the same reasons.⁵⁰

Privatisation of public services increasingly takes place at the local level. In the situation where the responsibilities for service provision are delegated to the local level, but are not matched with adequate funding, engaging with private sector may be the only option for financially strapped authority to maintain service delivery. Furthermore, municipalities in developing countries usually have limited capacity to engage with the multinational business company taking over the service delivery on an equal footing, as well as to protect people’s access to adequate service compromised by private provider.

⁴³ R Batley ‘Comparisons and Lessons’ in R Batley, G Stoker (eds) *Local Government in Europe: Trends and Developments* (Macmillan 1991) 215.

⁴⁴ *ibid.*

⁴⁵ Andrew (n 34).

⁴⁶ It is usually stipulated as a compulsory condition for the governments trying to secure the much needed funding or debt relief from the World Bank or the International Monetary Fund.

⁴⁷ D Pathirana ‘Privatisation of Water Resources And Human Rights’ (2004) 16 *Sri Lanka Journal of International Law* 1, 10.

⁴⁸ E P Beltrán ‘Water, Privatization and Conflict: Women from the Cochabamba Valley’ (2004) 4 *Global Issue Papers* 3, 31.

⁴⁹ Theoretical arguments for privatisation are summarised in S I Hale ‘Water Privatization in the Philippines: the Need to Implement the Human Right to Water’ (2006) 15 *Pacific Rim Law & Policy Journal* 765, 774 – 775.

⁵⁰ Examples in the water sector privatisation E P Beltrán (n 48) 26, 41; Hale (n 49) 788-789.

(c) Community government

Operating at the level closest to people and being well aware of their concerns and needs, local government is an ideal public platform linking state and communities. In continental Europe local government is traditionally regarded as an organic part of the community,⁵¹ responsible for the promotion of social inclusion, social, economic, environmental, recreational, cultural dimensions of local development, and acting to address local matters of concern. In contrast, the UK system habitually treated municipalities merely as the agents of central government responsible for service provision, and failed to embrace the concept of community government as enabling, responsive and accountable authority.⁵² This situation is gradually changing though over the last decade. Recently local authorities in England have been given the power of general competence, which shall allow them to address community issues on a legitimate basis.⁵³ Local authorities in England and Wales are been assigned with the power to promote and improve the economic, social, and environmental well-being of their areas, and charged with a duty to prepare community strategies as regards implementation of this function.⁵⁴

The power of general competence strengthens the position of the local authority as the community government. It allows municipalities to take on functions, initiatives and tasks outside the remit of national government, in order to promote interests of the local community, to foster the welfare of its inhabitants and to confront hardship arising locally. Even where it has more symbolic value and is rarely used, it strengthens the position of the municipality as the political authority acting on its own right and as a first resort for community in case of difficulty.⁵⁵ Meaningful engagement with community requires involving public in the decision-making process and is underpinned with participation, one of the core political values legitimising the very existence of local government. It is achieved through the elections, referenda, legal and judicial system, participatory structures and processes that allow individuals and community articulating their concerns and opinion.⁵⁶

⁵¹ A Norton 'Western European Local Government in Comparative Perspective' in R Batley, G Stoker (eds) *Local Government in Europe: Trends and Developments* (Macmillan 1991) 38.

⁵² Stewart (n 41) 236-254.

⁵³ UK Localism Act 2011 s 1.

⁵⁴ UK Local Government Act 2000, S 2(1), S 4.

⁵⁵ Blair (n 30) 51.

⁵⁶ *Decentralisation and Local Democracy in the World* (n 16) 294.

B HUMAN RIGHTS AS LOCAL MATTERS

1 Setting the Context

Myriads of social, political and economic processes take place in the modern world and directly impact localities. Political processes, such as building of the local government systems in the developing states, decentralisation of public functions and increased political autonomy directly engage municipalities.⁵⁷ Migration and mobility of people result in more than half of the world population residing in urban areas. Urbanisation entails an increased need in provision of housing, healthcare,⁵⁸ water⁵⁹ and education; it stimulates social segregation, exclusion of disadvantaged populations from services and participation.⁶⁰ Environmental challenges, management of scarce natural resources, their allocation for competing users, global warming, climate change, natural disasters,⁶¹ all have serious local implications. Features of the economic globalisation, such as rapidly developing information and communication technologies, the changing nature of capital and financial sector and the growing importance of multinational companies, all have consequences for municipalities. Liberalisation and privatisation impose market values into the local governments' world and gradually transform the nature of traditionally public services. The effects of these processes, such as growing gap between rich and poor, increase in absolute poverty, insecurity, social exclusion and environmental degradation, are particularly felt in local places in the developing world. Several frameworks adopted by the international community are attempting to address the above challenges, including development, governance and human rights. This section provides a brief insight into these frameworks and their relevance to the local level of government.

⁵⁷ *Decentralisation and Local Democracy in the World* (n 16).

⁵⁸ The Local Governments against HIV/AIDS commitment (June 2006).

⁵⁹ Declaration on Water by Mayors and Local Elected Representatives, 4th World Water Forum Mexico (2006); Declaration of Mayors and Local Elected Representatives on Water, 5th World Water Forum Istanbul, 2009.

⁶⁰ The Declaration of Local Authorities on the Participation of Women, 2005.

⁶¹ Declaration of Paris on Climate Change and Local Governments Executive Bureau of UCLG (2007).

(a) Development

From the perception of the international community ‘development’ means the global progress towards peace and security, economic development, self-governance and human rights.⁶² Development that aims to facilitate ‘the needs of the present without compromising the ability of future generations to meet their own needs’ is commonly understood as sustainable.⁶³ The global plan of action for sustainable development, adopted at the UN Conference on Environment and Development in 1992,⁶⁴ defined three components of sustainable development: social development, economic development and environmental sustainability. The World Summit on Sustainable Development, held in Johannesburg in 2002, reactivated a global commitment to sustainable development.⁶⁵ Prior that in 2000 international community enthusiastically agreed to joint action to reach Millennium Development Goals (MDGs), a set of global policy targets to tackle hunger and poverty, HIV, water and sanitation, education and housing, gender and environment issues.⁶⁶

While the agenda of development springs from the international level and is implemented by the states, the actual process of development unfolds locally. The most of the MDGs, in fact, depend on the local action. Municipalities have a key role in this process as they plan, implement and control activities in development areas, including the use of natural resources, water, building of infrastructure, energy consumption,⁶⁷ and are best suited to align development with the local needs. As the public authorities closest to communities, they are placed in an ideal position to facilitate participation of all interested groups in decision-making on development issues.

The international community acknowledges the role of local authorities as key actors to achieve sustainable development. Several commitments have been undertaken on the international level to activate sustainable development locally. Adopted on the Earth Summit in 1992 Agenda 21 encouraged local governments to design their own ‘Local Agendas 21’:

⁶² R M Verchick ‘Can Local Government Save the Global Commons? Lessons from the Johannesburg Summit’ (2003) 4 Leland Stanford Junior University Stanford Agora 4.

⁶³ World Commission on Environment and Development *Our Common Future* (1987), 43.

⁶⁴ Agenda 21, UN Conference on Environment and Development (13 June 1992) UN Doc. A/CONF.151/26 (Vols. I, II, & III) Rio de Janeiro, Brazil.

⁶⁵ For information see

<http://www.johannesburgsummit.org/html/basic_info/basicinfo.html> (11 August 2013).

⁶⁶ Information on the UN Millennium Summit 2000 and its outcomes is available at <<http://www.un.org/millennium/summit.htm>>(11 August 2013).

⁶⁷ Verchick (n 62).

Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in ... sustainable development.⁶⁸

Municipalities responded eagerly and 6,416 local authorities of 113 countries committed to Local Agenda 21 by the year 2002.⁶⁹ Eighty percent of the participating municipalities were from Europe where local sustainability action has been undertaken with particular enthusiasm. In 1994 the Charter of European Cities and Towns towards Sustainability (Aalborg Charter) was adopted as a core political document in support of Local Agenda 21.⁷⁰ In 2001 the Local Action 21 initiative was launched at the World Summit on Sustainable Development as a strategy to support implementation of local development plans and initiatives on sustainability, to stimulate implementing of the Local Agenda 21 and the Millennium Declaration.⁷¹

Local governments expressed their willingness to pursue development goals and targets in a number of political statements.⁷² In the local government declaration to the World Summit representatives of local governments committed themselves to accelerate local sustainability initiatives under the Local Action 21 agenda.⁷³ In 2005 the mayors and local government representatives, members of the United Cities and Local Governments (UCLG) reaffirmed their commitment to achieving the MDGs, highlighted the need for action at the local level and identified mobilisation of local governments as being crucial to success.⁷⁴

⁶⁸ Agenda 21 (n 64) para 28.1.

⁶⁹ International Council for Local Environmental Initiatives 'Second Local Agenda 21 Survey' Background Paper N 15 Submitted to the Commission on Sustainable Development (2002).

⁷⁰ G V Begin 'Inspiring Futures for European Local Governments!' (2004) 9 Local Environment 213.

⁷¹ International Council for Local Environmental Initiatives 'Local Government and the Johannesburg Summit' (2002) 18.

⁷² UCLG Founding Congress Final Declaration 'Cities, local governments; the future for development' 2004; The Rome Declaration of Mayors and Local Governments Conference on the MDGs 'Running out of Time' (2007); UCLG Final Declaration of the Congress of Jeju 'Changing Cities are Driving our World' (2007).

⁷³ Local Government Declaration to the World Summit on Sustainable Development (2002) 6.

⁷⁴ Local Government Millennium Declaration 'Bringing the Millennium Development Goals Back Home' UCLG 2005.

(b) Local governance

The generic concept of governance emerged in 1990s. It is based on the fact that governments are not the only actors shaping public policy and delivering public services. There is a variety of stakeholders, like governmental agencies, public-owned corporations, non-profit organisations and private sector who increasingly take part in policy and decision-making on service delivery at all levels, including local. Wilson describes local governance as follows:

Whereas local government is concerned with the formal institutions of government at the local level, local governance focuses upon the wider processes through which public policy is shaped in localities. It refers to the development and implementation of public policy through a broader range of public and private agencies than those traditionally associated with elected local government. Partnerships, networks and ... task forces, have become increasingly important parts of the local political scene during the last decade.⁷⁵

The notion of local governance today is well settled in academic debates in various contexts. In practice local governance rhetoric has become effectively accepted by a majority of international institutions such as the EU,⁷⁶ UNDP,⁷⁷ OECD,⁷⁸ or the World Bank,⁷⁹ since it conveniently facilitates the legitimacy of these institutions in influencing public policy. Not constrained with a clear-cut normative background,⁸⁰ governance provides a convenient frame of reference for engagement of supranational

⁷⁵ D Wilson 'Towards Local Governance: Rhetoric and Reality' (2000) 15 *Public Policy and Administration* 45.

⁷⁶ European Commission 'Towards an EU approach to democratic local governance, decentralisation and territorial development' Issues Paper (2008), UNDP 'Evaluation of UNDP Contribution to Strengthening of Local Governance' (2010).

⁷⁷ 'The UNDP Role in Decentralization and Local Governance' A Joint UNDP–Government of Germany Evaluation (2000), UNDP 'A User's Guide to Measuring Local Governance' (2009).

⁷⁸ OECD *Local Partnerships for Better Governance* (OECD Publishing 2001), D Rodrigo, L Allio and P Andres-Amo 'Multi-Level Regulatory Governance: Policies, Institutions and Tools for Regulatory Quality and Policy Coherence' OECD Working Papers on Public Governance No 13 (OECD Publishing 2009).

⁷⁹ For instance refer to the World Bank projects: Republic of South Sudan: Local Governance and Service Delivery Project available at <<http://www.worldbank.org/projects/P127079/local-governance-service-delivery-program?lang=en>> (11 August 2013), Rural Investment and Local Governance Project available at <<http://documents.worldbank.org/curated/en/2007/07/7870240/cambodia-rural-investment-local-governance-project>> (11 August 2013), Indonesia - Initiatives for Local Governance Reform Project available at <<http://www.worldbank.org/projects/P076174/initiatives-local-governance-reform-project?lang=en>> (12 July 2013).

⁸⁰ The framework of governance is theoretically based on the principles of participation, equality, transparency, accountability, rule of law.

actors with design and implementation of policies, initiatives and programmes.

The local governance trend is spreading around the world; however, the pace of its acceptance is uneven. In Japan, for instance, the shift to local governance is slow, because there is no pressure for it from inside and outside. Domestic efforts to copy Europe and North America to institute local governance arrangements are observed in Philippines. Being influenced by the EU and the World Bank, Morocco attempts to modernise local government through partnerships. Thus, the pattern of changes is not uniform and the concept is applied differently in diverse contexts.⁸¹

The practice of governance is particularly controversial in the developing countries, where the local governments are weak and international actors, who are not accountable locally, dominate in the governance partnerships. Redistribution of power and the blurring of boundaries of responsibilities across the governance networks minimise the role of local government and create the deficit of democracy. Arguably, municipal accountability towards people becomes less tangible in governance networks where the clarity over ‘who is responsible for what?’ becomes less distinguishable.

(c) Human rights

Human rights as an ideology, as a set of norms and as a framework for action, have become a prominent notion for modern politics and societies. Contemporary international human rights law takes its primary origins in the Universal Declaration on Human Rights,⁸² a non-binding document of the utmost moral force.⁸³ It became a predecessor of the human rights movement around the world and has been further elaborated into the host of international⁸⁴ and regional human rights treaties.⁸⁵ Human rights derive

⁸¹ M Geddes ‘Neoliberalism and Local Governance – Cross-National Perspectives and Speculations’ (2005) 26 Policy Studies 359.

⁸² Adopted 10 December 1948 UNGA Res 217 A(III).

⁸³ V Jaichand, M Suksi *60 Years of the Universal Declaration of Human Rights in Europe* (Intersentia 2009).

⁸⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1973) 999 UNTS 171 (ICCPR); International Convention for the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 30 ILM 1517 (Migrant

their normative authority from international law, incorporated further into constitutional and statutory legislation, and judicial action. The continuing transformation of the world order and redistribution of power within the domestic political systems challenge the traditional monopoly of national government over human rights responsibilities. On the one hand, local authorities are becoming prominent actors on the international arena and get involved as the key partners in a whole range of global matters and initiatives of human rights concern.⁸⁶ On the other hand, decentralisation reallocates public responsibilities that entail human rights implications, closer to localities.

The saying ‘[t]hink globally and act locally’ is being reiterated in different contexts, such as urban planning, sustainable development,⁸⁷ environment, education or economy. In the globalised world order local policy action and decision-making are increasingly expected to consider the ‘global’ concerns of the world community. Perhaps as a part of this tendency, human rights language is being ever more articulated in local government circles. Gradually, local authorities emerge as conscious human rights actors. They are increasingly considered as such by citizens, civil society, scholars, national governments and international community. The understanding of the implications of localising the international human rights, though, awaits its development in academia, civil society and government practice. The next part will identify the entry points for engagement of local government operation with human rights.

Workers Convention); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006; entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁸⁵ African Charter on Human and Peoples’ Rights (adopted 27 June 1981; entered into force 21 October 1986) 1520 UNTS 217; African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6; American Convention on Human Rights (adopted 22 November 1969; entered into force 18 July 1978) 1144 UNTS 123 (ACHR); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 14 November 1988, entered into force 16 November 1999) 28 ILM 156; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended) 213 UNTS 221; European Social Charter (adopted 18 October 1961; entered into force 26 February 1965) 529 UNTS 89; Charter of Fundamental Rights of the European Union (7 December 2000, entered into force 1 December 2009) OJ C 364/01 (EU Charter).

⁸⁶ Y Blank ‘The City and the World’ (2006) 48 *Columbia Journal of Transnational Law* 875.

⁸⁷ Verchick (n 62).

2 Linking Human Rights and Local Government

Human rights are traditionally conceived with national governments in mind. On the normative level they originate from the public international law domain where nation states operate as the central actors. In modern times, when the world order changes rapidly, new players are increasingly involved in the human rights dynamic, including the local level of government. The effectiveness of the states' human rights compliance becomes particularly evident at local level, where the practical implementation and, inevitably, the violation of rights take place. This part aims to deliver preliminary insight into the intersection of human rights and local government, outlining the human rights implications of local government roles and highlighting decentralisation that fuels interaction between both phenomena.

(a) Local government as a human right

As an instrument of local democracy local government can be affirmatively considered as a human right in itself. Article 21 of the Universal Declaration of Human Rights provides that the will of the people is the basis of authority of government, and 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.' The Preamble of the European Charter on Local Self-Government further elaborates that 'is at local level that this right can be most directly exercised.' Such connotation reinforces the status of local government in the political system of states and ultimately in the structure of the political rights. The notion of the 'right to the city' that has developed on practical and theoretical level⁸⁸ should be referred to in this connection. On the practical level the right to the city movement resulted in the adopting the European Charter for the Safeguarding of Human Rights in the City.⁸⁹ The academic discussion on the right to the city addresses diverse and vague nature of the concept, its dimensions and weaknesses.⁹⁰ In most cases the discourse elaborates a demand for democracy and participation, which relates this concept with the right to take part in government and reaffirms the vision on local government as a right in itself.

⁸⁸ H Lefebvre 'The Right to the City', in E Kofman and E Lebas (eds) *Writings on Cities* (London: Blackwell 1996 [1967]); A Plyushteva 'The Right to the City and Struggles over Urban Citizenship: Exploring the Links' (2009) 3(1) *Amsterdam Social Science* 81; M Dikeç and L Gilbert 'Right to the City: Homage or a New Societal Ethics?' (2002) 13(2) *Capitalism Nature Socialism* 58.

⁸⁹ See nn 99-100.

⁹⁰ Summarised in B Oomen and M Baumgärtel, *Human Rights Cities. Overview for the Sage Handbook on Human Rights* (2012).

(b) Locating rights into municipal roles

The governance of local affairs directly impacts on the human rights of local residents. The substantive realisation of most human rights all too often depends on behaviour of local governments. Acting as a political body, as a service provider or as a guardian of local community, the municipality consciously or unintentionally engages into the sphere of human rights of people living in the territory of their jurisdiction. There are a multitude of links connecting local governments and human rights. This part outlines several points of their intersection arising alongside the roles of local authorities described in the section A.2 of the current chapter.

Through the vision of local government as a *political instrument* one can recognise numerous human rights implications of the local political action. People's participation in political life has always been a human rights concern. Several well-established human rights underpin participation in local political processes on a democratic basis. The right to vote as a cornerstone of democratic elections must be upheld in the formation of local authorities. Local governments should not infringe the rights of residents to the freedom of speech, expression and association when they take active part in local political life, such as participating in political parties, establishing groupings, holding meetings, protests and demonstrations. Local councillors should also be free to belong to a party of their choice and enjoy the freedom of speech, including in local media. The official information on the municipal action, plans, decisions, budget and other local data of public interest should be made available through open dissemination or individual requests.

The role of local government in the *delivery of services* also brings up a range of human rights implications. Local authorities plan and implement programmes on provision of housing, education, water, sanitation or health services. They decide on local policies and budgets and provide services directly or through the private sector. Through performance of these functions and services local authorities engage in implementation of economic and social rights, including the right to adequate housing, the right to education, the right to the highest attainable standard of health or the right to water and sanitation. For instance, municipal social policies in relation to housing can facilitate or compromise local compliance with the right to adequate housing. In sum, municipalities service provision function and socio-economic rights are both concerned with the achievement of similar objectives and this intersection entails a host of opportunities and challenges.

The *community stewardship* role accommodates a number of human rights considerations for municipalities. When assigned the function of the administering police, local government is required to ensure rights of residents to liberty and security. In exercising administrative justice functions and taking decisions affecting individuals the municipality has to uphold the rights of residents to just and fair treatment. Where judicial function is performed locally, local government has a role in promotion of access to justice, as well as the obligations in relation to a fair trial.

The composition of communities varies in any given locality, and it is the general duty of government to address concerns of each group living at its territory. The interests of minorities and refugees, of women and youth, of persons with disabilities and older people should be equally considered in all areas of local action. Non-discrimination and attention to vulnerable groups are the key priorities of the human rights framework, which protects the rights of women, children, minorities, migrant workers and other groups. The local government is in the best position to identify disadvantaged individuals and groups in the local society and to adjust local development policies according to their specific needs while considering the human rights of these groups. Being close to people it is best situated to address discrimination, social exclusion, and to enable meaningful participation of every group in the local decision-making.

(c) Decentralisation

A political phenomenon of decentralisation has established itself around the world over the last 25 years. In simple terms it involves shift of power and responsibilities from central government to subordinate levels and ‘has resulted in wider recognition of the role and position of local authorities as well as a significant increase in their powers and financing, notwithstanding the many differences between countries.’⁹¹ The diversity of the decentralisation processes, taking place in different political and regional contexts, has produced a mixture of outcomes, such as advanced or undermined democracy, improved or affected efficiency in service delivery. It is envisaged to enhance local development, but may result in gross inequalities between regions. It is expected to increase public participation, transparency and accountability of local institutions, but may result in empowering of local elite, increased corruption and exclusion of vulnerable and marginalised population from participation.⁹²

⁹¹ *Decentralisation and Local Democracy in the World* (n 16) 18.

⁹² International Council on Human Rights Policy *Local Rule: Decentralisation and Human Rights* (2002).

The outcomes of decentralisation inevitably bring about significant implications for the rights of local people. Where it results in more effective and accountable government and empowers disadvantaged groups, it may enhance political rights and facilitate progress in implementation of economic and social rights. In the opposite case where decentralisation exacerbates social divisions, deepens inequality, lowers services standards, strengthens local elites or even provokes violence, it undermines human rights.⁹³ In general, decentralisation processes create better opportunities and pose further risks to the local authorities' compliance with human rights.

3 Human Rights in Local Practice

(a) Human rights commitments of municipalities

The human rights vision slowly but confidently enters the local government domain. The most positive view of this development is that localities are increasingly adopting rights-based thinking on their own initiative, which becomes evident from the international and regional perspective. On several meetings, addressing modern challenges of development⁹⁴, information technologies⁹⁵, gender⁹⁶ and water⁹⁷ local authorities openly expressed their commitment to human rights ideals. European city municipalities went further than political statements. Four hundred cities signed up to the European Charter for the Safeguarding of Human Rights in the City.⁹⁸ This legally binding instrument institutes human rights obligations of cities towards their inhabitants; signatory cities are expected to incorporate principles and standards of the Charter into their local ordinances.⁹⁹ Local authorities' networks begin to emerge to address particular human rights issues, for instance European Alliance of Cities and Regions for Roma Inclusion¹⁰⁰.

⁹³ *ibid* 19-30.

⁹⁴ Final Declaration of the Congress of Jeju (n 72) contains the commitment to act 'to promote all human rights and respect diversity in our cities and territories as a foundation for peace and development', Pt II.

⁹⁵ The Declaration of Cities and Local Authorities on the Information Society, Bilbao (2005).

⁹⁶ United Cities and Local Governments in Africa, Worldwide Declaration on Women in Local Government (1998), Local Government Statement to Beijing+10 'Women in local decision making: leading global change' (2005).

⁹⁷ See n 59.

⁹⁸ Available at <http://www.idhc.org/cat/documents/Carta_ingles.pdf> (11 August 2013).

⁹⁹ European Charter for the Safeguarding of Human Rights in the City, Final Provisions, para 2.

¹⁰⁰ See <<http://www.roma-alliance.org/en/>> (13 August 2013).

While the international and regional collective voices of local authorities explicitly articulate human rights commitments, in domestic settings the degree of localising rights varies dramatically. In jurisdictions, where national governments recognise human rights on the normative level and explicitly require all public authorities to comply with respective obligations, the awareness and rights-based action of municipalities is developing.¹⁰¹ However, localising rights can take place despite the lack of national government willingness to recognise rights. Many anti-discrimination ordinances have been adopted by local governments throughout the US and ‘47 municipalities and 19 US counties have some sort of CEDAW resolution on their books’,¹⁰² whereas the national government failed to ratify the UN Convention on Elimination of Discrimination against Women. The municipality of San Francisco has adopted CEDAW Ordinance in 1998¹⁰³ with the task force established to oversee its implementation and to carry out related initiatives such as gender analysis of departments or gender budgeting.¹⁰⁴

Local authorities of many cities have taken remarkable self-initiative in the promotion of human rights of their populations. Hume City Council was the first local government in Australia, which in 2001 adopted a Social Justice Charter, followed by the Citizens’ Bill of Rights in 2004. This policy document explicitly reaffirms fundamental rights and elaborates on the framework for their implementation. The phenomenon of ‘human rights city’ has emerged over last two decades and is associated with the NGO ‘The People’s Movement for Human Rights Learning’ (PDHRE), which developed the working definition and methodology for urban areas willing to become human right cities.¹⁰⁵ Dozens of cities have adopted such identity with use of PDHRE guidance or on their own initiative, including Rosario, Barcelona, Porto Alegre, Graz, Washington, and Utrecht among others. The human rights cities though fall short of taking a holistic approach to rights and tend to address one or two selected issues such as gender and racial equality and non-discrimination, attend to a particular social group, or enhance human rights education or civic engagement.¹⁰⁶

¹⁰¹ For instance in Sweden, UK, Australia.

¹⁰² L Roskos ‘Human Rights: from the Local to the Global’ Peace and Freedom, 22 December 2005.

¹⁰³ City and County of San Francisco Municipal Code, Administrative Code, Chapter 12K: Local implementation of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) <<http://www.sfgov3.org/index.aspx?page=130>> (12 August 2013).

¹⁰⁴ Task force was replaced by the Commission on the Status of Women in 2006.

¹⁰⁵ PDHRE Human Rights Learning and Human Rights Cities: Achievements Report (2007) <<http://www.pdhre.org/achievements-HR-cities-mar-07.pdf>> (12 August 2013).

¹⁰⁶ J Aarsen, FR Bartolo and others ‘Human Rights Cities: Motivations, Mechanisms, Implications: A Case Study of European HRCs’ University College Roosevelt 2013, 28-29 <<http://mensenrechten.verdus.nl/pagina.asp?id=1633>> (10 August 2013).

Local authorities may support the mobilisation for human rights in other jurisdictions by acting in solidarity. The Municipal Council in San Francisco, for instance, requested to stop the law suit in the World Bank's International Center for the Settlement of Investment Disputes brought by the multinational company against the government of Bolivia for cancellation of the unjust privatisation contract.¹⁰⁷ An award for outstanding achievements for human rights at the local level was founded by the city of Graz, Austria. The same city has demonstrated disagreement with the death penalty practice in the US State of California, by taking the name of the State's governor Arnold Schwarzenegger off the city stadium originally named in his honour.¹⁰⁸ Nantes raised the Tibetan flag on the front of the city hall in solidarity with the nation whose rights are being violated by China.¹⁰⁹ The city of Amsterdam officials took quite a bold step raising the rainbow flag at the city hall during official visit of Russian president supporting the major public protest against discrimination of sexual minorities in Russia.¹¹⁰

(b) International and regional attention

Processes of localisation of human rights can be initiated and effectively supported by the UN and other organisations working at the international and regional level. The Council of Europe represents a good example of regional mechanism acting towards promotion and creating opportunities for localising rights. Working under its auspices the Congress of Local and Regional Authorities has taken a proactive role in this direction. For instance it called upon the governments to appoint human rights ombudsmen, adopted a strategic plan of action mobilising local governments to protect children against sexual abuse and exploitation, and joined in a campaign of the Council of Europe to combat domestic violence.¹¹¹ The European Commissioner for Human Rights in his presentation at the Congress of Local and Regional Authorities in 2006 reaffirmed the critical role of municipalities in the concrete realisation of human rights and suggested practical ways to strengthening the protection of human rights at local level.¹¹²

¹⁰⁷ Beltrán (n 48).

¹⁰⁸ M Bailloux 'Graz, or the right to a Human City in Europe?' in A Sugranyes, C Mathivet (eds) *Cities for All: Proposals and Experiences towards the Right to the City* (Habitat International Coalition 2010) 309.

¹⁰⁹ <http://www.nantes.maville.com/actu/actudet_-Actualit%C3%A9_-606114_actu.Htm>(17 May 2013).

¹¹⁰ <<http://www.euronews.com/2013/04/09/thousands-protest-putin-s-amsterdam-visit/>>(11 July 2013).

¹¹¹ B Oomen and M Baumgärtel (n 90).

¹¹² Original version of speech by Thomas Hammarberg, Council of Europe Commissioner for Human Rights

In 1992 in Dakar, the Mayors' Defenders of Children Initiative was launched by the UNICEF.¹¹³ Within this framework, a number of child-centred activities took place at the local level. In 1994 mayors of all existing municipalities in Honduras signed up to the 'Pact for Children: Municipal Decentralisation and Capacity-Building' where they committed themselves to comply with the Convention on the Rights of the Child and mainstream its provisions into municipal development plans. In 1996 the Child Friendly Cities international initiative was launched by UNICEF and other partners to build a network of and support local governments embedding children's rights as a key component of their goals, policies, and structures and has been implemented in the localities of over fifty countries.¹¹⁴

In 2004 UNESCO established International Coalition of Cities against Racism, a network of cities willing to address racism, discrimination, xenophobia and exclusion, with a view to support these authorities with development and implementation of efficient policies and allow sharing and learning experience to this aim. It connects more than 300 members and is divided in a number of regional Coalitions across the European, Arab, African, North and Latin American regions.¹¹⁵

The OSCE Mission in Kosovo focuses on municipal governance reform with a view to enhance the quality of services and public participation in decision-making. It regularly surveys the judicial and public service systems in municipalities in Kosovo, works on the rule of law and human rights monitoring within municipalities. The Mission also supports the work of and helped to establish human rights units in the municipalities.¹¹⁶ The French-based non-profit organisation International Permanent Secretariat for Rights and Local Governments was set up in 2007. Its mission includes facilitation the action of a network of actors involved in the defence and implementation of human rights, especially at local level.¹¹⁷

Organisations working in the field of development articulate similar concerns and take practical steps to support integration of human rights values into the domain of local governance. A global agenda on gender, women's rights and decentralisation was set out on the dedicated meeting of

<<https://wcd.coe.int/ViewDoc.jsp?id=1007941&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>> (11 August 2013).

¹¹³ E Riggio 'Child Friendly Cities: Good Governance in the Best Interests of the Child' (2002) 14 Environment and Urbanization 45, 47.

¹¹⁴ Project website <<http://www.childfriendlycities.org>> (11 August 2013).

¹¹⁵ Coalition website <<http://www.unesco.org/new/en/social-and-human-sciences/themes/fight-against-discrimination/coalition-of-cities/>> (12 August 2013).

¹¹⁶ On OSCE mission in Kosovo <<http://www.osce.org/kosovo/43381>> (11 August 2013).

¹¹⁷ Website of the Secretariat <<http://www.spidh.org/en/home/index.html>> (11 August 2013).

the world leading development actors in 2008.¹¹⁸ UNDP is actively mainstreaming human rights standards and principles in local development programming since 2002.¹¹⁹ The Swiss Agency for Development and Cooperation in 2006 expressed the importance of integrating of human rights based approaches in development work across all the levels of governance, claiming that its principles are most effective ‘when articulated from the micro up to the macro policy levels’.¹²⁰

(c) Domestic actions

The intellectual capacity of national research and educational institutions can be effectively utilised in the process of localising rights. This engagement may range from the academic analysis of the challenges of integrating of human rights into local government environment to delivering the training for municipal officials. The Human Rights and Peace Centre at Makerere University carried out a related project on Decentralised Governance and Human Rights in Uganda. The aims of the project were to raise awareness in local government on human rights principles, to influence policy-makers to integrate human rights principles in local administration, and to conduct research on the linkage between decentralisation, democratisation, human rights and access to justice at the local level.¹²¹ The British Institute for Human Rights conducted training for the equality officers of Welsh local authorities to raise awareness on the links between equality and human rights and the benefits of adopting a human rights approach in securing equitable services for all.¹²² Nineteen undergraduate students-researchers of the University College Roosevelt have recently conducted study of the phenomenon of seven human rights cities, addressing why and how human rights cities emerge, and the resulting implications.¹²³

Human rights institutions are capable of enhancing apprehension of human rights standards by local governments, to monitor their compliance with human rights and to investigate respective complains. Human rights

¹¹⁸ ‘Global Trends in Participation, Representation and Access to Public Services’ International Conference on Decentralisation, Local Power and Women’s Rights, Mexico November 2008.

¹¹⁹ Applying a Human Rights-Based Approach and Mainstreaming Gender in Local Development Programming and Implementation: Joint Community of Practice Meeting Gender, Human Rights, and Local Governance and Decentralisation, Armenia (2006).

¹²⁰ ‘Human Rights and Development, Learning from Experiences’ Results of the Capitalization Conference, Switzerland (2006) 16.

¹²¹ Link to the project <<http://www.huripec.mak.ac.ug/projects.html>> (11 August 2013).

¹²² Welsh Local Government Association ‘Rights, Responsibilities and Respect for Everyone: making more effective links between equality and human rights in Welsh local government’ (January 2006) 4.

¹²³ J Aarsen, FR Bartolo (n 107).

commissions, as the organs responsible for the promotion of human rights within the system of government, can have a considerable impact on localising human rights. The Eugene Human Rights Commission, in the US, pro-actively utilised its mandate in 2006, when it set up the Human Rights City Project to explore ways in which city government can infuse international human rights standards and principles across its overall operations.¹²⁴ Human rights institutions can be charged with a power to monitor the activity of local councils on the matter of their compliance with human rights obligations, as in the case of Victorian Human Rights Commission in Australia. Ombudspersons across the world are effectively dealing with human rights issues and challenges at the local level. For instance, the Victorian Ombudsman has a power to investigate the behaviour of local governments on the subject of breach of human rights contained in the Charter of Human Rights and Responsibilities. In Ireland the Ombudsman is empowered to investigate whether the local authority has acted properly, fairly and impartially and to make a recommendation to the local authority on the matter of the complaint.¹²⁵ Within this remit the Ombudsman has the power to consider if the individuals' rights enshrined in the domestic law have been locally compromised.

¹²⁴ Project can be accessed at <www.humanrightscity.com> (11 August 2013).

¹²⁵ Ireland Ombudsman Act 1980 s 4(2), s 6(3).

C THE NORMATIVE CONNECTION

The study of the origins and the extent of the binding force of human rights law on local government is one of the key matters of this research. While there is a common acceptance of the fact that local governments are bound by human rights responsibilities, there remains a need for closer assessment of this general perception. The empirical nexus between municipalities and human rights has been outlined in the previous section, yet the legal implications of this connection are the matter of distinct examination. The compulsory nature of human rights for local governments can be asserted from several legal perspectives. Public International law and its sub-field of International Human Rights law offer several avenues to assert human rights responsibilities of local governments. Incorporated into domestic legal systems human rights provisions become normative imperatives of immediate application for municipalities, capable of being enforced through the internal judicial and other mechanisms. Constitutional human rights norms are ultimately binding on the territory of the state and must be adhered to by all public authorities, including municipalities. The aim of this section is to examine the normative connection between the international and constitutional human rights and local authorities.

1 Public International Law

Public International Law is traditionally concerned with nation states and does not offer sub-state organs any self-standing status.¹²⁶ The status of local authorities and intra-state relations between central and local governments are exclusively domestic matters. Local governments are not normally permitted to enter into international legal agreements. Not being parties to the treaties, municipalities are not internationally responsible for compliance with their normative provisions. Yet, the general rules of Public International Law indirectly apply to local authorities, which create implications for localities as regards their compliance with the international human rights law. Two arguments supporting this affirmation are set out below.

¹²⁶ PJ Spiro 'The States and International Human Rights' (1997) 66 Fordham L Rev 567.

(a) The ‘Law of Treaties’ arguments

There is a well-settled duty of states to bring national law in conformity with the international legal commitments.¹²⁷ The application of this rule to the subject matter of this chapter leads to the interpretation that local authorities’ status, powers, competences as defined in national laws must not contradict with international human rights commitments of the state. Equally the local by-laws should also be consistent with the international human rights laws that the nation state has ratified.

Where the state failed to normatively regulate powers and actions of local authorities in accordance with the international law and the breach of such law by local authority occurred, states cannot appeal to the commands of their own laws to evade responsibility. According to the article 27 of the Vienna Convention on the Law of Treaties ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’¹²⁸ As such, states cannot justify violations of international human rights norms committed by local authorities, pleading to the commands of their national and sub-national law. This argument highlights the central role of national government in incorporation of the international human rights norms into domestic legal order. At the same time, the law-drafting by municipalities invokes similar considerations and risks of compromising the international human rights commitments of the state.

The Vienna Convention on the Law of Treaties elaborates on the territorial application of the international treaties, stipulating that they are ‘binding upon each party in respect of its entire territory’.¹²⁹ The application of this provision to the subject matter of this chapter leads to the interpretation that the rights and obligations stipulated in the international human rights treaties are binding on each and every municipality of the state parties. As such, the Law of Treaties allows the valuable understanding of the applicability of the international human rights laws on the local governments’ territories.

A limitation to these arguments shall be pointed out. The Vienna Convention provisions can be easily side-stepped, where a state makes a reservation to the human rights treaty to protect itself from the liability for the conduct of local government.¹³⁰ An example can be provided from the UK reservation to the CEDAW: ‘the United Kingdom can only accept the

¹²⁷ I Brownlie *Principles of Public International Law* (6th edn Oxford University Press 2001) 35.

¹²⁸ Adopted 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

¹²⁹ Art 29.

¹³⁰ GE Frug and DJ Barron ‘International Local Government Law’ (2006) 38 *Urban Lawyer* 1, 18-19.

obligations under paragraph (c) of Article 10 within the limits of the statutory powers of central Government in the light of the fact that the teaching curriculum...and the teaching methods are reserved for local control and are not subject to central Government direction.’ In a situation where responsibilities and powers of localities are increasing as never before, the reservations of this type may severely undermine the fulfilment of the international human rights conventions in a given state. It may as well prove embarrassing for the central government where it would appear as if it was unable to regulate its municipality.

(b) Customary law of State Responsibility

The issue of addressing human rights responsibilities by local authorities can be evaluated through the prism of international customary law rules on state responsibility, which have been summarised by the International Law Commission in the Draft Articles on Responsibility of States for internationally wrongful acts.¹³¹ The question to be addressed in this section is whether and how the rules of state responsibility apply or relate to local authorities failing to comply with the international human rights obligations of national government.

The internationally wrongful act of a state includes the following three elements: the conduct must be attributable to the state; it may have a form of either an act or omission, and it must constitute a breach of an international legal obligation.¹³² Connecting local governments with the State’s responsibility for the internationally wrongful acts requires assessing whether their acts or omissions contravening international human rights obligations are attributable to that state.

States are traditionally subdivided into a host of distinct sub-national entities, which carry their own legal status and responsibilities under domestic law. This reality of internal division should not create the possibility for the state to avoid responsibility for action of any of its entities. According to Article 4 of the International Law Commission framework document on Responsibility of States, the

‘conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever

¹³¹ International Law Commission ‘Report of the International Law Commission on the work of its fifty-third session’ (2001) ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ UN Doc A/56/10.

¹³² *ibid* art 2.

position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State'.¹³³

Authorities of territorial units of states apparently fall under the category of state organs, and state responsibility arises in relation to actions and omissions of all sub-national government bodies, federal units, provinces and further sub-divisions.¹³⁴

This conclusion creates two important considerations. First, states are responsible for internationally wrongful acts of their municipal authorities that constitute breach of international human rights law. National government must ensure that municipalities comply with the international human rights obligations of the state. Second, local authorities must comply with the obligations of their nation state arising from the international human rights treaties; otherwise they risk engaging with the internationally wrongful conduct and invoking the nation state's responsibility for it.

The responsibility of the nation state for breach of international law excludes municipal governments from the circle of responsible subjects, and as such detaches localities from conscious compliance with the international legal obligations of states. The present reality, where localities are getting increasingly involved in decision-making on the matters pertinent to the global law, such as for instance human rights or natural resources, requests a re-evaluation of the 'last century' doctrines. Formulated in the state-centric world based on the notion of sovereignty, state responsibility rules hold nation governments accountable for the conduct of their territorial units. Peter Spiro asserted in this regard that 'the doctrine of state responsibility should be reconceived to reflect the realities of this new international dynamic, which point towards the growing international capacity of political subdivisions'.¹³⁵ The challenge, he proposed, is to extend application of state responsibility to sub-national territories and to hold them accountable for violations of international law along with national government.

¹³³ *ibid* art 4.

¹³⁴ *Principles of Public International Law* (n 127) 433.

¹³⁵ PJ Spiro (n 126) 587.

2 International Human Rights Law

This part undertakes a study on the applicability of the international and regional human rights norms¹³⁶ to the local level of government. By default, international human rights are primarily the responsibility of the central government and for the last century world order this might be a suitable arrangement. An advanced interpretation of the burden of human rights responsibilities is required today in context of the changes in the politics of governance caused by decentralisation. While it is understood that the role of central government in translation of its human rights obligations into every level of government is critical, it is quite evident that the central governments underperform in this regard. This part is an ambitious undertaking of the teleological interpretation of the international human rights laws on the matter of their application at the level of local government, through the textual analysis of the treaties norms and consistently with their original spirit and goals. The aim of this analysis is to assess the extent to which international human rights law is directly relevant for the local government consideration and, perhaps, application.

(a) General Considerations

International human rights treaties are drafted, signed and ratified by the state parties, who are the primary subjects of the Public International Law. By the act of ratification of a human rights agreement the state party takes upon itself the obligations to respect, protect and fulfil particular rights of their population. As highlighted in the preceding chapter, the ‘conduct of any State organ shall be considered an act of that State under international law’.¹³⁷ In this light, the state party has to ensure that the behaviour of all its organs does not contradict its human rights obligations. At the very least all state organs are expected to respect the rights of individuals residing on the territory of that State. Traditionally the obligation to respect has been referred as negative, and in basic terms it requires state bodies to refrain from action which interfere with rights. Local government, as any other public organ established by the state, is obliged to act in accordance with the requirements of international human rights norms ratified by that state. Thus

¹³⁶ ICESCR, ICCPR, CERD, CEDAW, CRC, Migrant Workers Convention, CRPD, African Charter on Human and Peoples’ Rights with the Protocol on the Rights of Women in Africa; African Charter on the Rights and Welfare of the Child; ACHR with Additional Protocol in the Area of Economic, Social and Cultural Rights; European Convention on Human Rights; European Social Charter, EU Charter.

¹³⁷ International Law Commission ‘Report of the International Law Commission on the work of its fifty-third session’ (2001) ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ UN Doc A/56/10, art 4.

every municipality should respect rights of people residing within their territorial areas.

The obligations to protect and to fulfil appear in a 'positive' connotation, for the reason that they imply certain actions to be undertaken. These obligations need to be accommodated within the architecture of powers, competences and statutory duties of public authorities. Municipalities arguably are obligated to protect and fulfil human rights within the extent of their statutory competence over the subject matter, as delegated by the central government.

The questions of relevance of and giving effect to human rights at sub-national and local level have arisen throughout the drafting process of the UNDHR. The concern was expressed whether the national governments of federal states can assume human rights responsibilities for the issues that 'are ordinarily regarded as local burdens' under the domestic legal order stipulating the division of powers and jurisdictions within the state.¹³⁸ The suggested draft of the International Bill of Human rights contained the dedicated provision, which placed federal governments on the equal footing with non-federal states in respect of their human rights obligations.¹³⁹ The fact that the issue had been raised and debated at the inception of the contemporary human rights law, led to the federal clauses have been included in a number of the human rights treaties, as addressed further in this section.

Where the federal clauses are omitted from the texts of the human rights treaty, the statements issued by the State parties are useful for interpretation of the territorial application of the treaty. The United States of America's Federal Government expressed the following understanding upon the ratification of the CERD:¹⁴⁰

The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such

¹³⁸ UN Commission on Human Rights, Drafting Committee International Bill of Rights, First Session, Summary Record of the Eleventh Meeting (3 July 1947) E/CN.4/AC.1/SR.11.

¹³⁹ Report of the Drafting Committee to the Commission on Human Rights E/Cn.4/95 21 May 1948.

Draft International Covenant on Human Rights, art 24.

¹⁴⁰ Similar understandings have been issued by the USA upon ratification of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

This is a helpful clarification, which reflects well on the method of distribution of the human rights responsibilities within the governmental systems. First, it confirms that the implementation of rights is a matter of governments at all levels. Second, it highlights key role of central government to ensure and oversee the compliance with human rights laws and implementation of rights on the whole territory of the state.

One of the tasks of central government in this regard is to decide who has to do what in the course of implementation of rights, since the human rights agreements do not elaborate the respective obligations of each level of state. At times, however, human rights treaties directly or implicitly refer to local government bodies. These provisions can be of a particular value in the situation, where the central government fails to give effect to human rights in domestic law or policy-making clearly and to clarify the human rights responsibilities of municipalities.

(b) Interpretation

The texts of the international and regional treaties in various ways explicitly and implicitly elaborate on local governments' human rights obligations. This section interprets the treaties' language in order to examine the vocabulary that invokes municipalities as responsible actors along with other state bodies. The Universal Declaration on Human Rights (UDHR)¹⁴¹ broadly calls upon 'every organ of society' to strive to promote respect for rights and freedoms and to secure their effective observance. This would not be at odds to include local governments within the category of the 'every organ of society'. This is an important beginning for an attempt to distinguish the reference to municipalities in international human rights.

At times human rights treaties refer to 'public authorities and institutions'.¹⁴² A public institution appears more as an organ created to perform certain function and works in accordance with regulations set out in the state. A public authority, as opposed to public institution, entails the possession of power to make strategic decisions. This distinction however is conditional as the treaties fail to provide the definitions of these bodies. Most often international human rights conventions use the common title 'public

¹⁴¹ Adopted 10 December 1948 UNGA Res 217 A(III).

¹⁴² For instance CERD, CEDAW, CRPD.

authorities’,¹⁴³ which embraces a range of bodies created by states in order to exercise delegated powers and perform functions of public character. Local governments clearly fall within the scope of this term. Equally, local governments fit into the meaning of the term ‘administrative authorities, or legislative bodies’ utilised by the CRC, as municipalities usually comprise both ‘by-law making’ and administrative dimensions in their action.

While it is apparent that the treaties’ language implies local authorities, in fact they rarely mention them explicitly. In this regard reference to the ‘local level’, ‘all levels’ or ‘any levels’ appears useful in the effort to interpret belonging of municipalities to the range of responsible actors. CERD, for instance, refers to ‘all public authorities and public institutions, national and local’¹⁴⁴ and the Charter of Fundamental Rights of the European Union also appeals to the ‘public authorities at national, regional and local level’.¹⁴⁵ In general, the interpretation of the vocabulary of the human rights treaties allows for the conclusion that their provisions to a particular extent apply to the municipal authorities.

(c) General obligations

The applicability of international human rights norms to the local government level can be occasionally derived from the texts of the treaties; particularly from the provisions elaborating the general obligations of the state parties in the conventions adopted in the interest of vulnerable groups of population.

According to the article 2(a) of the CERD, State party must ensure that ‘all public authorities and public institutions, national and local’ shall not engage in any act or practice of racial discrimination. In the same way, article 2(d) of the CEDAW obligates State parties to ensure that public authorities ‘refrain from engaging in any act or practice of discrimination against women’. Discrimination by any public authority is also banned by the regional human rights instrument, the Protocol 12 to the European Convention on Human Rights.¹⁴⁶

Within the framework of general obligations elaborated in the article 4 of the CRPD, State parties undertake to ensure that public authorities act in conformity with the Convention. Article 3 of the CRC contains a general

¹⁴³ CERD, CEDAW, CRPD, EU Charter, European Convention on Human Rights.

¹⁴⁴ Article 4(e).

¹⁴⁵ Preamble of the EU Charter.

¹⁴⁶ Protocol 12 to the European Convention on Human Rights, art 1(2).

rule applicable to the administrative authorities or legislative bodies to take into consideration the best interests of the child in all actions regarding children.

The abovementioned provisions permit us to make the following conclusions. First, there is a primary duty on the State party to ensure the behaviour of authorities at all levels would conform with the requirements of the human rights treaties. CERD clarifies this process to some extent, encouraging State Parties to ‘take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations ... creating or perpetuating racial discrimination’.¹⁴⁷

Second, the *obligation to respect* has been articulated by these clauses as applicable to all authorities of the State party. This conclusion supports the argument made earlier that local authorities are obliged to refrain from or not to engage in acts and practices incompatible with the provisions of the conventions.

Third, there is an unequivocal message that flows through the content of several treaties as regards prohibition of discrimination at all levels of state, within all the public authorities and institutions. Local authorities of states which ratified the Protocol 12 to the European Convention are explicitly forbidden from engaging in discrimination on any grounds as outlined in the article 1(1) of the treaty.

Finally, these provisions prohibiting discrimination can be also considered as self-executing. Regardless of their translation within the domestic legislation, there appears to be an obvious and undeniable duty on the local governments to refrain from discrimination. In general the *prohibitions* contained in human rights treaties are well capable of being applied directly by public and administrative bodies, even in the eventuality where the national legislation is not appropriately amended.¹⁴⁸

(d) Substantive human rights obligations

International human rights laws contain a number of provisions that explicitly require certain substantive human rights to be secured at the local level. Some political and civil rights are intended to be fulfilled at every

¹⁴⁷ CERD art 2(1) (c).

¹⁴⁸ S Liebenberg ‘The Protection of Economic and Social Rights in Domestic Legal Systems’ in A Eide, C Krause and A Rosas (eds) *Economic, Social and Cultural Rights* (2nd edn Kluwer Law International 2001).

level of state and are mandatory for all public authorities. Economic and social rights, regrettably, receive little such recognition and articulation of their relevance to the local level.

(i) Right to take part in government

Article 21 of the UDHR provides that the will of the people is the basis of authority of government, and ‘everyone has the right to take part in the government of his country, directly or through freely chosen representatives.’ In 1966 the CERD extended the meaning of the right to take part in the Government to ‘any level’.¹⁴⁹ The preamble of the European Charter on Local Self-Government reaffirmed the importance of the right to participate in the conduct of public affairs and highlighted ‘that it is at local level that this right can be most directly exercised.’¹⁵⁰

Taking part in government comprises effective and full participation in political and public life, directly or through representatives. A broad framework of political participation entails a number of rights and freedoms supplementing each other in order to ensure meaningful participation, such as the rights to vote, to be elected, to equal access to public service, to perform all public functions, as well as the rights to free speech, assembly and association.¹⁵¹ The table 1 below illustrates how the right to take part in government is extended to local level by the explicit provisions of international or regional human rights treaties. An analysis of the provisions listed in the table 1 allows for making an unambiguous conclusion that realisation of the human right to political participation cannot be seen in isolation from the local political life.

Several international human rights treaties addressing the rights of disadvantaged groups of populations, along with the EU Charter, have explicitly advanced the right to political participation across all the levels of state. The rights to vote and to stand for the local government election are provided by the CERD, the CEDAW, the CRPD, the Protocol to the African Charter on the Rights of Women in Africa and the EU Charter. The right to hold public office at all levels of government is elaborated in the CEDAW and the CRPD.

¹⁴⁹ Art 5(e).

¹⁵⁰ European Charter of Local Self-Government (opened for signature 15 October 1985, entered into force 9 September 1988) ETS N 122.

¹⁵¹ H Stainer ‘Political Participation as a Human Right’ (1988) 1 Harvard Ybk Intl L 77.

Table 1

Human rights treaties on the right to participate in local political life

	Participation in local political life	The right to vote	The right to be elected	The right to equal access to public service
CEDAW Art 7(a)(b)	-To perform all public functions at all levels of government; -To participate in the formulation of government policy and implementation thereof at all levels of government	To vote in all elections	To be eligible for election to all publicly elected bodies	To hold public office at all levels of government
CERD Art 5(e)	To take part in the Government and in the conduct of public affairs at any level	To vote at any level	To stand for election at any level	To have equal access to public service
CRPD Art 29	To perform all public functions at all level of government	To vote in elections at all levels of government	To stand for elections at all levels of government	To hold office at all levels of government
Protocol to the African Charter on the Rights of Women in Africa Art 9	To be equal partners with men at all levels of development and implementation of State policies and development programmes	To participate without any discrimination in all elections	To be represented equally at all levels with men in all electoral processes	
EU Charter Art 40		To vote at municipal elections	To stand as a candidate at municipal elections	

CEDAW provides for the broadest normative scope of participation of women in local political life compared to other conventions. Along with voting rights and the right to hold public office, CEDAW entitles women to perform public functions at the local level of government and to take part in the formulation of local government policies and in their implementation. Similarly the African Charter on the Rights of Women in Africa entitles women to be equal partners with men at all levels of development and implementation of State policies and development programmes.

The CRPD contains provisions similar to CEDAW on the scope of the right to take part in local political life, except the opportunity to participate in the formulation and implementation of local government policies. The CERD adopted in 1966 is less explicit on the participation in local political life. Resembling the language of the UDHR it provides for the right to take part in the government at 'any level'. While voting rights at local level are secured by the CERD, the right to equal access to public service is not extended to local level. Presumably, this right can be derived from the broad scope of the right 'to take part in the conduct of public affairs at any level'.

(ii) Right to freedom of expression

The right to take part in political life to some extent is overlapping with the right to freedom of expression. Such interrelation is particularly observable from the local perspective and it appears important to secure the freedom of expression at the local level as well. International human rights conventions have been silent in this regard; however the European Convention on Human Rights and the EU Charter mainstreamed this right to the local level to some degree.

Both European human rights instruments in identical language define the right to freedom of expression as follows: 'this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.¹⁵² This version, in contrast with the relevant provisions of the UDHR and the ICCPR, contains an explicit instruction for the public authorities not to interfere with the enjoyment of this right.

A minor addition makes the whole difference in that it immediately extends the application of obligations in relation to the right to freedom of expression, and its satellite right of access to public information, to all

¹⁵² EU Charter art 11, European Convention on Human Rights art 10.

public authorities of the state parties of European human rights treaties, including local government.

(iii) Right to respect for private and family life

The European Convention on Human Rights contains a provision elaborating on the obligation of public authorities in relation to the right to respect for private and family life. Article 8(2) prohibits ‘interference by a public authority with the exercise of this right’. Therefore, local government of the State Party to the European Convention, as a public authority, is bound by the duty to respect for private and family life of people residing on the territory of their jurisdiction.

(iv) Rights of women

A number of substantive provisions in human rights treaties dedicated to women’s rights refer to local level. Article 14.2(a) of the CEDAW elaborates on the right of women living in rural areas ‘[t]o participate in the elaboration and implementation of development planning at all levels’. The aim of this norm is to ensure that women participate in and benefit from rural development, which is ultimately local.¹⁵³ The Protocol on the Rights of Women in Africa within the framework of the right to sustainable development stipulates the obligations on the States to ensure participation of women at all levels in decision-making, planning, implementation of development policies and programmes.¹⁵⁴ The same treaty elaborates on the obligations of the states to ensure ‘participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources’¹⁵⁵ and ‘in the formulation of cultural policies’¹⁵⁶ at all levels. These provisions are equally applicable for consideration at the local level where the policy and decision-making on development, natural resources and cultural contexts take place.

¹⁵³ Interesting to note that this provision appeared immediately after the right to development has been first time articulated by the UN Commission on Human Rights in the 1977.

¹⁵⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art 19(b).

¹⁵⁵ Art 18.

¹⁵⁶ Art 17.

(e) Domestic application of international human rights

Any elaboration on the applicability of the international human rights responsibilities to the local authorities would be incomplete without considering the ways international law is absorbed by the domestic legal systems. International human rights treaties when ratified by the State are expected to be expeditiously translated into the national law and practice. While it is said to be ‘as many ways of giving effect to international law as there are national legal systems’¹⁵⁷ and the constitutional law is often a decisive authority in this regard, the theory sets out two general relationships between national and international law.

States, where the international treaties become valid and obligatory legal instruments of domestic law from the moment of ratification, are said to utilise a monist approach. Under this arrangement the international human rights responsibilities of the state party become effective and compulsory across the architecture of all its organs, including local. Obviously not every provision of the human rights treaties may be applied directly by state bodies. The majority of their norms may not be utilised immediately and require specific measures to be taken, including the revision and changes in national and local legislation, as well as policy change. Yet, some international human rights norms that are of the self-executing character¹⁵⁸ are ‘capable of immediate application by judicial and other organs’¹⁵⁹ without prior legislative intervention. The most evident examples of such norms are the obligations to respect rights, and not to discriminate against enjoyment of rights. The role of local authorities in the utilisation of such norms and their responsibility to comply with the above is manifest, but requires structural integration through creating awareness, comprehension and institutional assimilation to facilitate application.

A dualist approach, in contrast with monism, requires taking additional measures, such as adopting special legislation, in order to incorporate international norms on the territory of the state. The shortcoming of this method is that the international human rights conventions are not automatically included in the range of legal instruments functional within the state. Local authorities then are not directly bound by their rules. Because the additional measures of domestic legal systems are often pending, the reach of the international norms to the local authorities’

¹⁵⁷ E Denza ‘The Relationship between International and National law’ in MD Evans (ed) *International Law* (2nd edn Oxford University Press 2006) 429.

¹⁵⁸ *Principles of Public International Law* (n 127) 48.

¹⁵⁹ UNCESCR ‘General Comment 3: The Nature of States’ Parties Obligations’ (14 December 1990) UN Doc. E/1991/23, para 5.

domain is not as straightforward, as it is for the states employing the monist approach.

The method of application of regional human rights provisions can be clarified by the supra-national court practice. The direct application of the EU Charter on Human Rights to municipal authorities within the EU member states can be derived from the case law of the European Court of Justice. In its early decisions the Court ruled that an individual may rely upon provisions of a directive that appear to be unconditional and sufficiently precise where the member State has failed to implement them in national law or domestic practice.¹⁶⁰ In its recent *Fratelli Costanzo* case the court held that all organs of the administration, including decentralized authorities, are in fact obliged to apply unconditional and sufficiently precise provisions of EU law. Moreover all authorities shall refrain from applying provisions of national law which conflict with the EU law provisions.¹⁶¹

(f) Localising effect of the federal clauses

Several human rights instruments have elaborated on the rules regulating the territorial application of the treaty norms. This has been done in respect of the federal states to ensure compliance with treaties within all the sub-federal parts of the State Party. Article 50 of the ICCPR and article 28 of the ICESCR identically extend the provisions of the Covenants ‘to all parts of federal States without any limitations and exceptions’. Therefore, the provisions of these treaties apply to all territorial units of the State parties, such as provinces, counties or districts.

The ACHR contains a particularly elaborate federal clause, which does not only extend the application of the convention to the sub-national level, but clarifies the mechanism of conversion of its provisions to the national and sub-national levels of the federal states:

Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government ... shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

¹⁶⁰ Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, p 71; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, p 748.

¹⁶¹ Case C-103/88 *Fratelli Costanzo v Comune Di Milano* [1989] ECR 1839, p 31.

2. With a respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures...to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention.

The value of federal clauses is at least two-fold. First, they prevent selective and uneven implementation of human rights across all the territory of the state. Second, without undermining of the role of central government, they unconditionally confer the burden of human rights responsibilities on the sub-national authorities.

A wider interpretation of these provisions extends the application of these clauses to the lower levels of government. Under the title 'all parts of federal States' or 'units of the federal state' one can consider not only the sub-national territories, but local jurisdictions as well. Such an expanded interpretation of the federal clauses would not contradict the spirit and the objectives of the treaty, as it suggests and advocates for the all-inclusive application of the conventions across all the types of sub-national divisions.

(g) Conclusion

An interpretation of the content of international human rights conventions permits the suggestion that some provisions are suitable for an immediate consideration at local level. These provisions, when they have a direct application on the territory of state, have a good prospect to be utilised by local governments as well as by residents of their jurisdictions. If the rules of the Public International Law on the state responsibility are appreciated, every norm requires it to be assessed on the matter of its application to the local level. This implication underscores the key role of central government in the enforcement of rights and translation of the related tasks to their sub-national structures. Article 4(e) of the CERD in the same vein stipulates that State parties shall not permit local authorities to promote or incite racial discrimination.

The potential of the treaties' obligations that explicitly refer to the public authorities deserves more attention and further critical assessment at least for the following considerations. First, these provisions are appropriate for direct application in a situation where the central government has failed to adequately translate the requirements of the international and regional human rights treaties to local level. Second, they can turn out to be the key reference points for local law and policy making where local authority is willing to embed a human rights approach into their political action. Third,

these provisions can be helpful to the judges and other actors involved in the enforcement of the human rights to bring local actors to account for violation of certain rights. Finally, they can assist individuals and groups in their struggle for the rights and freedoms by providing a legitimate frame of reference of a high legal authority.

Within the states employing the dualist approach the above considerations, perhaps, have slightly less significance, as the treaties' norms do not apply to local authorities directly. Nevertheless, the 'local' component of treaty norms has to be absorbed by the national legislation of such states in course of translation into domestic system. It also can be effectively utilised by judges who can use the international standards in interpretation of the local governments' human rights responsibilities. In this regard the Constitution of South Africa, for instance, obliges a court to consider international law to interpret the constitutional human rights norms.¹⁶² Regardless of the type of incorporation the norms referring to or implying responsibilities for local organs of state appear as an additional tool yet to be utilised by those concerned with the local human rights compliance and enforcement.

3 Constitutional Law

International law, to a certain extent, secures the imperative nature of international human rights norms for the local governments. At the same time, it gives to the states ultimate discretion to decide on how to operationalise human rights obligations within their national systems. National legislation serves a primary means to incorporate international human rights into the national and local level. Domestic human rights norms arguably have a better reach and stronger binding force on municipalities than international law.

Constitutions appear as the primary vehicles for giving effect to human rights law within the state territories, although specific legislation may also be utilised. A chapter dedicated to human rights of citizens features in the majority of the modern constitutions, often called a Bill of Rights. Ideally the list of constitutional rights reflects the scope of the international human rights commitments of the state. However some states have a narrower scope of domestic protection of rights than the international obligations. For instance, the Constitution of Ireland fails to adequately incorporate the economic, social and cultural rights and provide for their justiciability, even though the state has ratified the ICESCR in 1989. Alternatively, a Bill of Rights can contain a higher threshold of protection of human rights when

¹⁶² S 39(1)(b).

one compares the constitutional protection and the international obligations of a state, as is the case in South Africa.

The constitution is a supreme law of states and it is binding on all individuals, corporate entities and public authorities within their jurisdictions. The constitutional rights are binding on all public institutions of the states, including local authorities. Some explicitly articulate the municipal human rights responsibilities. The goal of this section is to undertake the analysis of the constitutional perception of the local government human rights responsibilities and to understand whether and how the constitutional provisions from different parts of the world¹⁶³ provide for the human rights obligations of the local governments. Initially it addresses the constitutional status of the local authorities in the system of the state governance and its link with the constitutional human rights provisions. The evaluation of constitutional human rights norms on the matter of their applicability at the local level is undertaken next. Finally, the examination of potential of utilisation of the constitutional enforcement mechanisms in bringing the municipalities to account for human rights non-compliance concludes the section.

(a) Local governments' status

Constitutional human rights provisions are binding on the state organs, institutions and agencies. When these norms explicitly refer to 'the State' or to 'the organs of the State', one might doubt whether these terms relate exclusively to the organs of the central government or imply the authorities performing public functions at every level. To reach better clarity on this matter, this part engages in a contextual interpretation of constitutional norms on municipal governance, so as to re-evaluate the position of local government in the structure of the state.

Domestic constitutions around the world consider local governments' from a variety of perspectives. Some constitutions articulate that municipalities are the means of exercising of the 'people's power',¹⁶⁴ 'municipal public power'¹⁶⁵ or are the 'local organs of state power'.¹⁶⁶ Such references imply the downward distribution of the state power, reiterate the political origins

¹⁶³ This chapter uses the random selection of the constitutions of the states from different parts of the world. For the list of constitutions refer to the Table of Constitutional Laws at the end of the thesis.

¹⁶⁴ Constitution of the Republic of Cuba, chapter XII titled 'Local Bodies of People's Power'; Constitution of the Republic of Armenia, art 2.

¹⁶⁵ Constitution of Venezuela, Chapter IV.

¹⁶⁶ Constitution of China, art 96.

of the local governments and reaffirm the status of the municipality as a legitimate authority of the state.

Another way constitutions attend to local authorities is by associating them with the territorial divisions of the state within which they operate. The territory of the nation states is normally divided into the units for the political and administrative purposes. Constitutions set up the local bodies to exercise public functions and to govern local affairs within these units. For instance, '[t]he administrative territorial units of the Republic of Armenia shall be the provinces and districts,'¹⁶⁷ and 'districts shall have local self-government'¹⁶⁸.

Constitutions may refer to local governments from a clear-cut perspective of governmental structure. The comprehensive provision in this regard is contained in the Constitution of the Republic of South Africa: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'.¹⁶⁹ From another angle the Constitution of Angola declares '[t]he democratic organisation of the state at local level ... shall include forms of local government'.¹⁷⁰ The provisions of such examples clearly indicate that the municipalities belong to the category of the 'state organs' bound with the constitutional human rights responsibilities.

Constitutions at times refer to local governments as to 'the basic entity of the political-administrative branch of the state'.¹⁷¹ The constitution of Sweden, for instance, clarifies that 'local government administrative authorities exist for the public administration'.¹⁷² These provisions, while highlighting a functional utility of the municipalities, refer to the public nature of their authority and confirm their belonging to a range of the 'public authorities' who ultimately bear the human rights responsibilities.

The observation of the constitutional norms from different states leads to the conclusion that the constitutional status of local authorities varies significantly across the states. Despite the variety of constitutional references and formal settings, the inference can be made as that local authorities, municipalities and local self-governments are the 'state organs', established by the central government to perform public functions and legitimatised in the constitution. The general observation shall be made at this stage that local governments are state organs responsible for human

¹⁶⁷ Constitution of the Republic of Armenia, art 104.

¹⁶⁸ *ibid* art 105.

¹⁶⁹ Art 40.1.

¹⁷⁰ Art 213(1).

¹⁷¹ Constitution of Colombia 1991, art 331.

¹⁷² Art 8.

rights. An accurate understanding of such responsibilities towards the constitutional rights of the citizens in any particular country requires consideration of the constitutional status of its local government.

(b) ‘The supremacy of the constitution’ argument

The supreme position of constitutions in the domestic legal systems implies that all and every institution of the state is required to comply with its provisions. Therefore constitutional human rights must be appreciated and protected by all public authorities of the state. The South African Constitution in this regard declares ‘[t]he Bill of rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’¹⁷³

Constitutional human rights norms are mainly articulated in terms of the individual’s ‘*right to*’ or ‘*freedom of (from)*’. Occasionally, the norms are supported by the corresponding obligations in relation to the particular right, which are addressed broadly to the ‘state’ or to ‘the public authorities’, ‘the state institutions’ or ‘the state bodies’. Some constitutional provisions usually fail to specify the authorities bound with the obligations. In this context, the principle of the supremacy of constitution reaffirms that all and every public authority, including local government, must be aware of and act in compliance with the constitutional human rights responsibilities. At the very least, the local authorities must not act in a way that compromises the human rights of its residents.

(c) General human rights obligations

The efficacy of the constitutional human rights protection in some countries is enhanced by the general procedural provision. These norms place on the state and its organs the broadly defined obligations in relation to the human rights. In the Constitution of Albania, for instance, this clause reads as follows: ‘The organs of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realisation’.¹⁷⁴ In similar way the Constitution of Norway declares: ‘It is the responsibility of the authorities of the State to respect and ensure human rights’.¹⁷⁵

¹⁷³ Constitution of the Republic of South Africa, art 8(1).

¹⁷⁴ Art 15.2.

¹⁷⁵ Art 110c.

Considering that the duties corresponding to the particular right are often omitted in the constitutions, the inclusion of the general procedural provision appears as a necessary device for the protection and fulfilment of the substantive human rights norms. As such, the procedural clause serves as a junction linking the substantive rights, enumerated in the constitution, with those actors responsible for their realisation, operating as a one-size-fits-all obligation clause for the often shorthand and declarative human rights provisions.

The obligations contained in the general clauses vary from the negative duty to respect rights¹⁷⁶, to the positive duties to ensure or guarantee rights,¹⁷⁷ as well as to contribute to their realisation¹⁷⁸ or implementation¹⁷⁹. The duty-holder is often named as an ‘organ of public power’, a ‘public authority’, an ‘authority of the State’, while the constitution of Switzerland refers to human rights duties of anyone acting on behalf of the state.¹⁸⁰ Local governments, though not mentioned directly, can also be referred as the duty-holders being the entities established by the State to exercise public functions and to govern local affairs. In rare instances the local government may be directly mentioned in the text of the clause, as in the case of the Russian constitution, which reads as follows: ‘The rights and liberties of man and citizen shall determine the meaning, content and application of the laws and the activities of the ... local self-government’.¹⁸¹ The Estonian constitution declares that ‘guaranteeing rights and liberties shall be the responsibility of ...local government’.¹⁸²

The broad nature of the general clauses does not allow defining who is responsible for what in the process of giving effect to rights. The Constitution of Switzerland provides the constructive provision in this regard, stipulating that ‘whoever exercises a state function is bound to the fundamental rights and obliged to contribute to their implementation’.¹⁸³ Indeed, the implementation of any human right is subject to separate regulations where the scope of local government responsibility would be considered.

¹⁷⁶ Constitution of Albania, art 15.2, Constitution of Norway, art 110.c, Constitution of Venezuela, art 19.

¹⁷⁷ Constitution of Norway, art 110.c, Constitution of Finland, s 22, Constitution of Estonia, art 14, Constitution of Venezuela, art 19.

¹⁷⁸ Constitution of Albania, art 15.2.

¹⁷⁹ Switzerland Constitution, art 35(2).

¹⁸⁰ *ibid.*

¹⁸¹ Art 18.

¹⁸² Constitution of Estonia, art 14.

¹⁸³ Art 35(2).

Not without limitations, general procedural clauses can be utilised in discerning human rights responsibilities of the local governments. These norms can serve as an applicable rule for the assessment of such local responsibility in a particular case, or in relation to a certain task.

(d) Non-discrimination clauses

Principles of non-discrimination and equality are fundamental for human rights. They are reaffirmed by the majority of the international human rights treaties¹⁸⁴ and articulated in national constitutions as specific non-discrimination provisions. As such they are imperative for all public authorities. A non-discrimination clause may be formulated in the form of a general statement. For example, the Constitution of Columbia provides ‘All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination...’.¹⁸⁵ In such a case the responsibility of local governments to comply with the above principle is implied.

Alternatively, the non-discrimination clauses can contain a prohibition for public bodies to discriminate or to establish arbitrary differences.¹⁸⁶ Several constitutions share the following common phrasing: ‘no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority’.¹⁸⁷ The prohibition from discrimination is equally binding for the local authorities of these states.

The non-discrimination clauses may be supported by an explicit positive requirement for public authorities to ensure equality. The article 6.2 of the Constitution of Andorra states ‘Public authorities shall create the conditions such that the equality ... of the individuals may be real and effective’. The Swedish Constitution goes further requesting the public institutions ‘to combat discrimination of persons’ and ‘to promote the opportunity for all to attain ... equality in society’.¹⁸⁸ The local governments’ responsibility to follow up with the above provisions can also be invoked, but the special national legislation in this relation would be sought for clarification.

¹⁸⁴ See part C2(c) of the current Chapter.

¹⁸⁵ Constitution of Venezuela, art 19.

¹⁸⁶ According to the article 19.2 of the Constitution of Chile ‘[n]either the law nor any authority may establish arbitrary differences’.

¹⁸⁷ Constitution of Bahamas Article 26(2), Constitution of Zimbabwe article 23(b), Antigua and Barbuda Constitution, art 14(2).

¹⁸⁸ Constitution of Sweden, art 2.

(e) Substantive human rights

(i) Civil and political rights

The actualisation of a number of civil and political rights takes place locally. Directly or otherwise constitutions stipulate that electoral and participatory rights, freedom of expression and access to information, right to privacy, or rights to petition and to follow the meetings of authorities are equally applicable at every level. The constitutional regulations on the local actualisation of the certain civil and political rights are exemplified below.

Constitutions of many states stipulate the rights to elect and to be elected in municipal authorities of their citizens and selectively of the migrant residents.¹⁸⁹ These rights can be contained among the list of political rights and in the provisions on the status of local authorities, and are directly binding on municipalities.

The right to submit petitions, complaints and proposals to the public authorities is frequently contained in constitutions. Apparently petitions can be forwarded to municipalities in relation to the matters of their competence.¹⁹⁰ In Estonia everyone has the right to petition local government authorities and their officials.¹⁹¹ The constitution of Russian Federation confers ‘the right to turn personally to and send individual and collective petitions to ... bodies of local self-government’ exclusively to its citizens.¹⁹²

The freedom to openly express ideas implies prohibition of the ideological control on the part of public authorities, including local. The constitution of Sweden in this regard states ‘every citizen shall be guaranteed freedom of expression in his relations with the public institutions’. Indeed Swedish local authorities being the public institutions are bound by this provision.

Freedom of expression embraces the right of people to access information from public authorities as regards their activities and other issues of public interest, as well as to have access to records on ones’ personal data. This right is becoming more and more constitutionally entrenched. Constitutions openly declare the right of individual to obtain information from ‘official

¹⁸⁹ The right to be elected in local government is rarely extended to migrant residents; see for instance Constitution of Finland, art 14(2).

¹⁹⁰ Dutch Constitution, art 5, for instance, specifies that petitions are to be submitted to the competent authorities.

¹⁹¹ Constitution of Estonia, art 46.

¹⁹² Art 33.

authorities'¹⁹³, 'state bodies and agencies'¹⁹⁴ or 'state organs',¹⁹⁵ and these references shall be directly applicable to local governments. Some countries explicitly include municipal administration in the scope of these provisions. For instance, the Norwegian constitution declares 'the right of access to documents of the State and municipal administration, and to follow the proceedings of democratically elected bodies'.¹⁹⁶ Former communist states go further in making it the obligation of the local government authorities 'to provide information on their work',¹⁹⁷ or to 'provide to each citizen access to any documents and materials directly affecting his or her rights and liberties'.¹⁹⁸

The other examples of the constitutionally entrenched civil and political rights explicitly binding on the municipalities are the right to follow the meetings and proceedings of local government found in Albania¹⁹⁹ and Norway,²⁰⁰ and the obligation of local authorities not to interfere with person's family life and privacy, stipulated in the article 26 of the Constitution of Estonia.

(ii) Economic, social and cultural rights

The role of local authorities in giving effect to the economic, social and cultural rights is immense: however, it is barely recognised and yet to be fully understood. The individuals' economic and social well-being can be set out by constitutions as a matter of priority. Often this is done in the language of economic, social and cultural rights, or sometime in the form of the directive principles.²⁰¹ The role of local authority in this area, however, is rarely outlined in the constitutions.

In reality public authorities and institutions, including local, are charged with various responsibilities around the personal economic and social well-being. The Constitution of Sweden at its very beginning stipulates:

'The personal, economic and cultural welfare of the private person shall be [the] fundamental aims of public activity. In particular, it shall be incumbent upon the public institutions to secure the right to

¹⁹³ Turkish Constitution, art 26.

¹⁹⁴ Constitution of the Republic of Bulgaria, art 41.

¹⁹⁵ Constitution of Albania, art 23.2.

¹⁹⁶ Art 100.

¹⁹⁷ Constitution of Estonia art 44(2).

¹⁹⁸ Russian Constitution, art 24.

¹⁹⁹ Constitution of Albania, art 23(3).

²⁰⁰ Constitution of Norway, art 100.

²⁰¹ Constitution of Ireland, art 36, Constitution of India part IV.

health, employment, housing and education, and to promote social care and social security.’²⁰²

In terms of economic, social and cultural rights some constitutions elaborate on the obligations of the authorities in general, without the division of roles across them. The constitution of Netherlands, for example, articulates the duties of ‘authorities’ in economic and social rights, such as to ensure sufficient number of public schools in every municipality,²⁰³ to protect and improve the environment,²⁰⁴ to promote the health of the population,²⁰⁵ to promote social and cultural development and leisure activities,²⁰⁶ and to promote the provision of sufficient employment.²⁰⁷

The Constitution of Finland is also very elaborate in terms of duties of ‘public authorities’ on the economic and social rights. It speaks of their obligations to ‘promote the right of everyone to housing and the opportunity to arrange their own housing’,²⁰⁸ ‘guarantee for everyone ... adequate social, health and medical services and promote the health of the population’,²⁰⁹ to ensure equal opportunity to receive educational services,²¹⁰ to protect the labour force,²¹¹ and ‘to guarantee for everyone the right to a healthy environment and ... the possibility to influence the decisions that concern their own living environment’.²¹²

Occasionally constitutions allocate responsibilities for the particular economic or social rights’ obligations to a specific level or type of authority. A few examples can be provided. The Russian Constitution, for instance, guarantees the enjoyment with the right to health and education locally, to be delivered by the municipal health care and educational institutions. In terms of obligations it says ‘organs of local self-government shall encourage home construction and create conditions for the realization of the right to a home’.²¹³ In Estonia ‘families with many children and the disabled shall be entitled to special care by state and local authorities’.²¹⁴

The lack of explicit articulation of the human rights responsibilities of local authorities does not imply their absence. The general procedural clauses can

²⁰² Art 2.

²⁰³ Dutch Constitution, art 23(4).

²⁰⁴ *ibid* art 21.

²⁰⁵ *ibid* art 22(1).

²⁰⁶ *ibid* art 22(3).

²⁰⁷ *ibid* art 19.

²⁰⁸ S 19(4).

²⁰⁹ *ibid* s 19(3).

²¹⁰ *ibid* s 16(2).

²¹¹ *ibid* s 18(1).

²¹² *ibid* s 20(2).

²¹³ Art 40.

²¹⁴ Constitution of Estonia, art 28(3).

serve as helpful clarifications. The Constitution of Switzerland in this context offers a comprehensive provision, cited above but worth repeating. It states that ‘[w]hoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.’²¹⁵ This norm illustrates well the general principle of allocation of human rights responsibilities among the various public authorities.

(f) Constitutional human rights protection

The binding force of the domestic human rights norms is safeguarded through the mechanisms of judicial or quasi-judicial accountability, which include national, regional and local courts, tribunals, human rights commissions, the Ombudsman institution, and the administrative justice procedures. All these mechanisms are capable of challenging municipalities for non-compliance with the human rights laws.

Often constitutional human rights standards are supplemented with the provisions elaborating on these mechanisms of protection or promotion, which serve as safeguards for individuals’ rights and freedoms and establish legitimate accountability of the states towards their residents. Each level of government including local is accountable towards residents and the constitutional measures on protection and promotion of human rights play important role in their enforcement at local level.

Courts are traditional mechanisms of accountability utilised to remedy the infringement of legal rights. Constitutions affirm the role of courts in restoration of the compromised human rights. For instance, in South Africa ‘[a]nyone ... has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief.’²¹⁶ The role of the court in enforcement of rights is vital. Numerous legal actions in different countries challenged the inadequate implementation and violation of the economic and social rights by municipalities along with the national government.²¹⁷ However, the limitations to the use of judicial mechanisms exist, such as costs and complexity of litigation, or the judiciary’s hesitancy in embracing the

²¹⁵ Art 35(2).

²¹⁶ Constitution of South Africa, art 38.

²¹⁷ Eg. *Olga Tellis v Bombay Municipal Corporation*, 1985 (3) SCC 545; *Municipal Council Ratlam v Vardhichand* 1980 AIR1622; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* 2003 (1) BCLR 72 (T); *Residents of Bon Vista Mansions v S Metro Local Council* 2002 (6) BCLR 625 (W); *Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28, *Menores Comunidad Paynemil s/accion de amparo Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, 19 May 1997.*

principles of social justice. The impact and effect of the court action on local compliance with human rights are little understood, and constitute a worthwhile topic for the closer academic scrutiny.

Some constitutions establish the mechanisms acting specifically for the protection or promotion of rights, such as Human Rights Commissions and Ombudsman. People's Advocate in Albania and Judicial Proctorate in Angola are examples of the human rights protection mechanisms. Since the state itself is the common violator of the human rights, constitutional mechanisms provide protection from unlawful decisions, actions or omissions of institutions of public power. The Albanian People's Advocate, for instance, 'defends the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act of the organs of public administration'.²¹⁸

The constitutional mechanisms of protection are established to challenge the public authorities, administration, or any other institutions of state power that violate rights. Indeed the protection mechanisms are capable of addressing the breach of the rights by the decisions, actions or omissions of local governments, even though this is rarely explicitly provided in the constitutional norms. The Russian Constitution shows an advanced provision in this regard, stating in article 46 that: '[t]he decisions and actions (or inaction) of state organs, organs of local self-government, public associations and officials may be appealed against in a court of law'.

(g) Concluding remarks

Local governments engage with the human rights of their residents on an everyday basis, and the articulation of their responsibilities in constitutions is very important. The supreme position within the domestic legal system makes the constitutions the ideal instruments for stipulation of the human rights responsibilities for municipalities. Constitution at its careful and purposeful utilisation can enable and compel the local government to appreciate and comply with the human rights standards in its everyday action. The constitutions can empower municipalities to utilise human rights as a frame of reference for policy formulation. Finally, the members of public seeking to enforce their rights infringed locally can use the constitution as a primary domestic human rights source.

However, the analysis of the constitutional norms undertaken in this section allows for the conclusion that they remain largely underutilised in this regard. The constitutional understanding of human rights as matters of

²¹⁸ Constitution of Albania, art 60(1).

municipal responsibility is very modest. Several countries appear to be more expressive on the constitutional obligations for its local authorities. The former communist countries Russia and Estonia stand out in this regard continuously elaborating on the human rights obligations of local government in an explicit manner. Overall, the contemporary constitutional human rights norms need to be interpreted in a systematic way along with the provisions on the status of local authorities, to discern the potential of their applicability at the local level.

D CONCLUSION

Examination of the legal connection between human rights and local government permits the conclusion that international human rights and constitutional rights are binding on local governments to a significant extent. The scope of responsibility is ambiguous and requires careful individual consideration in each nation state. Yet the overall understanding of the extent and nature of the human rights obligations of local authorities has emerged as a result of the examination.

Public International Law provides an important clarification on the responsibility of national government for human rights compliance of its subordinate authorities, and indicates the need to bring the domestic legislation regulating the local government status and action in accordance with international human rights standards. International human rights law allows identification and understanding of the human rights responsibilities of local government from several perspectives, such as the language of treaties, federal clauses, duties and implementation. The analysis allows highlighting the core role of the national governments in the translation of human rights responsibilities into local level, in supervision and facilitation of local implementation of rights, and the duty to protect the rights of individuals from being compromised by local government. The analysis also reveals several practical implications for local authorities. The International Law of Treaty, interpreted to consider the implications of municipal action, requires that local by-laws and regulations do not contradict the international human rights norms.

The method of incorporation of international norms in the legal domain of the state impacts on the local governments' human rights obligations. In the states with dualist approach, the international law does not constitute part of domestic law and is not directly applicable to local authorities. In the states with monist approach the international human rights obligations are directly applicable within the state. Thus from the moment of ratification of the human rights treaty its norms become binding on the local governments. In

particular the self-executing human rights norms, capable of immediate application, such as obligations not to discriminate and to respect rights, are directly binding on local governments. As regards the economic and social rights, municipalities have a specific role in their implementation as defined and monitored by national government.

The articulation of local responsibilities in constitutions appears to be an essential way of securing the human rights compliance locally. The supreme position within the domestic legal system makes the constitutions the ideal venues for stipulation of the human rights responsibilities for municipalities. The constitutional understanding of human rights as the matters of local government responsibility, however, is very modest. Some countries appear to be more expressive on the constitutional obligations for its local authorities than others. Constitutional norms mainly refer to the state, its organs or public authorities; thus the determination of their applicability at the local level requires systematic interpretation of available statutory legislation on the relevant matter.

The constitutional norms pave the way to statutory laws to regulate the matters in the greater degree of detail. This thesis does not embark on the research of the statutory legislation on human rights responsibilities for local governments. Brief reference though should be made to the domestic legislation of Australia and the UK, where the constitutional human rights protection is lacking but the statutory laws appear to compensate for this shortfall. The Australian Human Rights Act 2004 stipulates a number of human rights and request public authorities to act consistently with these rights.²¹⁹ A similar provision is contained in the section 6(1) of the UK Human Rights Act 1998, stipulating that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. The Act gives effect to rights and freedoms guaranteed under the European Convention on Human Rights, and provides for their compliance at every level of the state.²²⁰ This general procedural provision appears as a critical device that makes the regional human rights treaty binding at the local level.

The examined legal relationship of local governments with human rights enhances the understanding of the imperative nature of the rights for the municipalities that is often 'taken for granted' and as a result overlooked in practice. It highlights that human rights are not a merely the good practice policy choices of municipalities, but the legally binding normative standards to be complied with in the day to day operation of the local authorities of the States.

²¹⁹ Art 40B.

²²⁰ C Kilroy 'Local authorities and the Human Rights Act 1998 ECHR Act review' Irish Human Rights Commission and Law Society of Ireland (16 October 2004).

CHAPTER III

FRESHWATER: A FINITE RESOURCE, HUMAN RIGHT AND LOCAL RESPONSIBILITY

A UNDERSTANDING FRESHWATER

1 Introducing the Resource

Water is an essential element of our planet. It covers 72 per cent of the 509 million square kilometres of Earth's surface and amounts to 1.4 billion cubic kilometres. Fresh water constitutes only about three per cent of all water and it is found in glaciers, permafrost, in atmosphere, under the ground and on surface in rivers, lakes, or wetlands.²²¹ Only about one percent of all fresh water, or 40,000 cubic kilometres, can be withdrawn and consumed in a renewable fashion.²²²

The world's freshwater resources, however, are unevenly distributed in time and space. According to recent studies 85% of the Earth's population resides in the drier part of the planet.²²³ Water scarcity is a natural phenomenon in particular regions, where arid climates with low rainfall and droughts naturally decrease resource availability in particular regions. Water shortages can be notably induced by human activity through water overexploitation, poor water management, by pollution of resources or man-made desertification of land.²²⁴

Water is a critical resource in many dimensions. Primarily, it is a crucial condition of the very human existence at all stages of the lifecycle. Water contributes to the well-being of population as being utilised in irrigation, hydro energy, public water supply and sanitation services. Water availability for domestic needs and food production is indispensable to secure

²²¹ PH Gleick 'Water resources' in SH Schneider (ed) *Encyclopedia of Climate and Weather* (Oxford University Press New York 1996) vol 2, 817-823.

²²² W J Cosgrove and F R Rijsberman, *World Water Vision: Making Water Everybody's Business* (Earthscan Publications Ltd 2000) 6.

²²³ World Water Assessment Programme, UN Water *The UN World Water Development Report 3: Water in a Changing World* (UNESCO Publishing 2009) 170.

²²⁴ LS Pereira, I Cordery and I Iacovides *Coping with Water Scarcity: Addressing the Challenges* (Springer 2009) 8-10.

livelihoods of rural people, and proved to be a critical ingredient of poverty eradication.²²⁵ These benefits comprise the social value of water.

Furthermore, water is a prerequisite for growth and development, which underpins its economic value.²²⁶ It is critical resource for agriculture, energy, transport, environment and other development-related sectors. Freshwater scarcity negatively impacts on the overall development.²²⁷ Water security is also an essential condition for economic growth in the countries with strongly variable hydro-climatic conditions.²²⁸

2 Freshwater Challenges

Up to the second half of the 20th century, water was seen as a non-limited resource that could be used liberally for all kinds of human activity. Nowadays, in time of rapid economic development and population growth, technological change and sophisticated consumption patterns water became appreciated as finite resource.²²⁹

Water use for human purposes multiplied six fold during the 20th century. Today the total global use of the resource is estimated at about 4,000 cubic kilometres a year, with around 20 percent of water extracted from groundwater sources. Total water use at the national level ranges from 646 cubic kilometres a year in India to 25 cubic kilometres a year in Central African Republic.²³⁰ Globally, irrigated agriculture accounts for 70 percent of water withdrawals, industrial use and energy account for only 20 percent of total withdrawal, and domestic consumption takes only about 10 percent of overall water use.²³¹

²²⁵ Chapter 2 'Water for sustainable food production, poverty alleviation and rural development' in FAO 'Unlocking the Water Potential of Agriculture' 2003 <<http://www.fao.org/docrep/006/y4525e/y4525e00.htm>> (25 June 2013).

²²⁶ PM Austria and PV Hofwegen (eds) *Synthesis of the 4th World Water Forum*, 3-13.

²²⁷ E Barbier *Natural Resources and Economic Development* (Cambridge University Press 2005) 277-278.

²²⁸ *Synthesis of the 4th World Water Forum* (n 227) 5.

²²⁹ *World Water Vision: Making Water Everybody's Business* (n 222) 5.

²³⁰ The ten largest water users are India, China, the US, Pakistan, Japan, Thailand, Indonesia, Bangladesh, Mexico and the Russian Federation. Statistics are available at FAO-AQUASTAT database <<http://www.fao.org/nr/water/aquastat/dbase/index.stm>> (25 July 2013).

²³¹ Data from the Comprehensive Assessment of Water Management in Agriculture 2007 cited in *The UN World Water Development Report 3: Water in a Changing World* (n 223) 99.

Water consumption is uneven throughout the world and nations can be divided into two groups according their water use.²³² Africa, most of Asia, Oceania, Latin America and the Caribbean have significant rural population consuming water for food production. Meanwhile, emerging economies in these regions experience increasing demand for water in domestic and industrial purposes, which creates tension and competition between agricultural and urban uses. In the other group of urbanized economies of Europe and North America, industry and energy take larger share of water withdrawal. Water used for agriculture in these regions accounts only for 50 percent, due to the increasing amounts of food being imported. The domestic supply of water for drinking, hygiene and household needs takes the least quantity of water in both groups.

Rapid development of human civilisation over last century coupled with the changes in lifestyles created unprecedented pressure on water resources. Population growth, urbanisation, and migration reduced the availability of water per capita in particular regions. A rise in living standard requires increased amounts of water to provide more goods and services, and to produce food for millions of people moving from one meal to two meals per day. As a result, the agricultural and industrial activities expand, leading to increased demand and competition for water, over-abstraction and pollution of the water resources. Other forces that affect water resources include globalisation, developments in science and technology innovations, pricing policies for water and water-related goods, trade patterns, evolution of laws and policies, global and national politics and social movements.²³³

Increased demand for water brought about adverse environmental impact. Pollution of the water resources with the untreated sewage,²³⁴ nuclear waste, the traces of chemicals and pharmaceuticals are major water problems in the developing world.²³⁵ Unregulated and excessive use of groundwater leads to deteriorating farming lands and to exhaustion of the resource.²³⁶ Imbalances between the availability of and increased demand for the resource generate unprecedented competition for water between uses, which put unbearable pressure on ecosystems.²³⁷

²³² *The UN World Water Development Report 3: Water in a Changing World* (n 223) 100-102.

²³³ *ibid* 13-14.

²³⁴ More than 80% of sewage in developing countries is discharged untreated, polluting rivers, lakes and coastal areas according to *The UN World Water Development Report 3: Water in a Changing World* (n 223) 42.

²³⁵ *ibid* 136. 140 million people are affected by natural arsenic pollution of fresh water in 70 countries according to S Bagchi 'Arsenic Threat Reaching Global Dimensions' 177 (11) *Canadian Medical Association Journal* 1344, 1345.

²³⁶ *The UN World Water Development Report 3: Water in a Changing World* (n 223) 131.

²³⁷ *ibid* 150-159.

The allocation of the resources between competing uses and nations is currently a formidable challenge. The competition for water though should unfold with consideration of the key concerns of humanity, and in this context the water use for human survival and dignity should be put first. The freshwater crisis has received attention of the international community and the access to drinking water became a priority target of the global water policy. Despite that the reality of access to water for human needs in many countries remains appalling. The next part provides further insight into the current situation on access to water for human needs.

3 Access to Drinking Water

About 768 million people did not have adequate access to a source of safe drinking water in 2011.²³⁸ It is estimated that 55 per cent of the world's population is connected to water supply at their dwelling or yard, and 34 per cent use other improved sources of water.²³⁹ The remaining 11 percent of global population do not have adequate access to safe drinking water, which means collecting infected water from canals and ditches, sharing water sources with animals, or carrying water long distances. Two and half billion people suffer from inadequate access to improved sanitation, which represents a third of world population.²⁴⁰ The deprivation spreads unevenly across the world regions. Statistics show that in South-East Asia 196 million people lack access to safe water and 1.127 million people have no access to improved sanitation; in Africa the figures are 297 and 313 million respectively. In Europe 18 million people do not have access to improved source of water and 70 million have no access to improved sanitation.²⁴¹

The importance of water is difficult to overestimate. Comprising approximately two thirds of human body, it is a vital condition of human health and life. However, close to half the population in the developing world suffer from water-related diseases, while nearly half the hospital beds is taken up by these conditions.²⁴² Children under five are mostly affected by the lack of safe drinking water. Statistics on premature child mortality caused by water and sanitation deficit in the developing world are appalling. Diarrhoea, directly related to unsafe water, inadequate sanitation or poor

²³⁸ WHO/UNICEF *Progress Sanitation and Drinking-water: 2013 Update*, 8.

²³⁹ *ibid.*

²⁴⁰ *ibid.* 4.

²⁴¹ According to the graph charts of the WHO, UNICEF Joint Monitoring Programme for Water Supply and Sanitation <<http://www.wssinfo.org/data-estimates/graphs/>> (12 August 2013).

²⁴² UNDP *Beyond Scarcity: Power, Poverty and the Global Water Crisis* Human Development Report 2006 (Palgrave Macmillan New York 2006) 45.

hygiene, accounts for the deaths of approximately 1,800 children per day.²⁴³ Malnutrition causes up to 53% of all deaths in children younger than five, while up to 50% of undernutrition is related to repeated diarrhoea and other water-related diseases.²⁴⁴ Overall, lack of drinking water and sanitation causes about 1.5 million child deaths a year.²⁴⁵

The World Health Organisation estimates the basic minimum requirement for daily consumption for drinking and personal hygiene as 20 litres per day per person from a source within 1 km from the household.²⁴⁶ South African Free Basic Water Policy allows for 6,000 litres of free water per household per month²⁴⁷, while the typical household usage constitutes 20,000 litres.²⁴⁸ In practice, the average daily water consumption in developed countries comprises 200-400 litres per capita,²⁴⁹ while in the developing world this figure can be as little as 12 litres in Uganda, 5 litres in arid areas of East Africa and western India.²⁵⁰

Freshwater is indispensable for quality of life, well-being and poverty alleviation.²⁵¹ It stimulates productivity of labour, education, and maintains public health. Access to water often reflects the distribution of wealth, whereas the poorest population have the worst access to the resource.²⁵² One of the most affected groups in this regard are urban residents living in informal settlements, who have no access to public services²⁵³, and rural poor, who depend on water to sustain their livelihoods.

The domestic supply of water for drinking, hygiene and household needs takes only 10 percent of all water uses in the economy; however it is increasingly difficult to secure water for these purposes. Because water resources are distributed very unevenly around the Earth, people residing in

²⁴³ According to UNICEF's specialised statistical web site <<http://www.childinfo.org/water.html>> (12 August 2013).

²⁴⁴ *ibid.*

²⁴⁵ UN Water Fact Sheet on Sanitation (2013).

²⁴⁶ WHO *Domestic water quantity, service level and health* (Geneva 2004), cited in WHO, UNICEF *Water for Life: Making it Happen* (2005) 27.

²⁴⁷ Available at < <http://www.dwaf.gov.za/documents/fbw/qabrochureaug2002.pdf>> (25 July 2013).

²⁴⁸ D Barret and V Jaichand *'The Right To Water, Privatised Water And Access To Justice: Tackling United Kingdom Water Companies' Practices In Developing Countries'* (2007) 23 South African Journal of Human Rights 551, 555.

²⁴⁹ *World Water Vision: Making Water Everybody's Business* (n 222) 9.

²⁵⁰ *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (n 242) 35.

²⁵¹ QK Ahmad 'Towards Poverty Alleviation: The Water Sector Perspectives' (2003) 19 (2) Water Resources Development 263.

²⁵² One in three people lacking access to clean drinking water survive on less than 1 dollar a day and two in three on less than two dollars a day. More than 385 million people without adequate sanitation live on less than \$1 a day, and more than 660 million on less than \$2 a day. *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (n 242) 7.

²⁵³ World Water Assessment Programme, UN Water *The UN World Water Development Report 2: Water: a Shared Responsibility* (UNESCO Publishing 2006) 91.

arid regions systematically suffer from water shortage. Yet, the access of the population to freshwater is mainly hampered by development activities. Geopolitical challenges, such as population increase, urbanisation and migration, along with economic growth and elevation of consumerism, lead to overexploitation and pollution of the resource. Increased competition for water between the largest uses, industry and agriculture, hampers the availability of water for domestic use.²⁵⁴

It is increasingly recognized that ‘the ongoing, serious and growing water crisis – to a large extent is a crisis of governance’.²⁵⁵ The way nations govern and manage water resources does not keep up with the rapidly changing development, demographic and environmental conditions. The absence of focused political determination to prioritise the access to water for people is clearly manifested in outdated national water regulations of most of the countries. The following part demonstrates how nations and international community regulate water resource uses and address the challenges of access of population to drinking water.

B REGULATING THE USE OF FRESHWATER RESOURCES

The way modern societies approach the allocation of, access to and control over the resource creates the current situation in the water sector. To understand the politics of water and the reasons of their failure, it is worth to enquire the ways the water is governed, how and where the decisions on water use are made, how laws and regulations are devised and what the challenges of their implementation are. It is also important to look at the roles of key actors of the sector such as public authorities, international actors, private sector, owners and users of water.

‘Water governance’ is a generic term which addresses these issues and processes from the interdisciplinary perspective. It is only recently governance frameworks entered the water sector thinking and practice.²⁵⁶ Traditionally, water laws and regulations have been studied by lawyers. Water policies and resource management were mainly subjects of technical expertise of water engineers or policy analysts. The scale of the current crisis in the sector has triggered a much-needed interdisciplinary inquiry on

²⁵⁴ As highlighted in the section A.2 of the current chapter.

²⁵⁵ *The UN World Water Development Report 2: Water: a Shared Responsibility* (n 253) 50.

²⁵⁶ H Tropp ‘Water Governance: Trends and Needs for New Capacity Development’ (2007) 9 (2) Water Policy 19.

the processes and actors involved into the decision-making over the use of resource.

This part highlights the principle dimensions of these processes. First, it provides a brief induction into a vision of water sector from the governance perspective. Second, it reflects on the general features of national water regulations. Finally, international policy measures addressing freshwater challenges are outlined.

1 Water Governance

Water governance is defined as ‘the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different level of society.’²⁵⁷ Essentially, it reflects how users, public authorities at all levels, public-private partnerships, civil society organisations, communities, and other stakeholders interact as regards decision-making on the use of resource. Governance is concerned with the dynamics of these processes, as well as with the water related laws and policies and the outcomes of their implementation.

The stakeholders are involved in making decisions on use of water resources according to their competency defined in national and local regulations. The scope of the stakeholders’ action expands to taking part in water reforms, law and policy-making, development of regulations at different stages and levels, and engagement in their implementation. The analysis of dynamics of the decision-making on water issues is critical for understanding of how the water sector operates in a given jurisdiction. Water governance appears as a conceptual perspective concerned with the current contextual processes impacting the sector, such as privatisation of services or decentralisation of water control and decision-making. It provides the platform to reflect on the critical issues affecting the water sector, such as financing, public participation or corruption.²⁵⁸

Finally, water governance is manifested in local, national and global levels.²⁵⁹ In earlier times, water was governed locally through the leadership of traditional authorities. In modern times, national governments have

²⁵⁷ P Rogers and AW Hall *Effective Water Governance* Global Water Partnership (Elanders Novum 2003) 16.

²⁵⁸ *The UN World Water Development Report 2: Water: a Shared Responsibility* (n 253) Chapter 2.

²⁵⁹ C Pahl-Wostl, J Gupta and D Petry ‘Governance and the Global Water System: A Theoretical Exploration’ (2008) 14 *Global Governance* 419, 421.

acquired a significant role in regulation of the resource, such as devising national laws and policies and exercising controlling functions over their implementation. However, water is conventionally considered as being a local matter. The principle of subsidiarity supports the idea that freshwater that should be managed at the lowest level. Decentralisation, as a contemporary political phenomenon underpinned by the idea of subsidiarity transfers responsibility for water services to the local authorities.²⁶⁰ At the same time, as freshwater challenges become a global concern, an international dimension of water governance gradually gains ground in the water sector.²⁶¹

2 Domestic Regulation

Throughout history, civilisations attempted to regulate relationships with regards to ownership, use and management of water resources. This is achieved through a range of instruments such as local rules and customs, social and legal norms, national and local policies and regulations. Public and traditional authorities, communities, lawyers and water engineers, owners and users of resource operate within the water sector on the basis of these regulations.

The norms and practices in the water field traditionally concerned with ownership and rights of use and access to water sources.²⁶² Customary legal systems, Muslim law, Hindu and Buddhist laws elaborate on the rights of communities to own and use water resources. Private and public ownership over water resources are the features of the civil law system. Individual rights to use water resources, attached to ownership of land riparian to watercourse, are found in the common law systems. In the former communist legal system water bodies are considered exclusively as the property of the state. Current developments in public policy relate water resources to public state ownership through recognition of the political significance of water, to community control under the decentralisation agenda, or to private control with the support of the neo-liberal ideology.

The vision of water within the civilisations always informed the regulation of the resource. Throughout history water has been reflected upon as a subject of worship, and in religious doctrines it is seen as a gift of God.

²⁶⁰ J Winpenny 'Financing Water for All' Report of the World Panel on Financing Water Infrastructure, Global Water Partnership and World Water Council, 2003.

²⁶¹ O Unver 'Global Governance of Water: A Practitioner's Perspective' (2008) 14 Global Governance 409.

²⁶² DA Caponera *National and international water law and administration: selected writings* (Kluwer Law International 2003) 83-84.

Towards the end of the 20th century it became an object of economic ideology and is increasingly considered as an economic good.²⁶³ Only a decade ago access to drinking water was recognised as a human right in response to the rising freshwater crisis.²⁶⁴

The regulations with regard to water use are characterised by the highest density throughout the history and across the world. This is a result of mixed processes, influences, and constant development of water uses within a variety of cultural and country specific contexts.²⁶⁵ As Professors Dellapenna and Gupta note, ‘today, water law and policy are a patchwork of local customs and rules, national legislation, regional agreements and global treaties’ resulting ‘from complex historical evolutionary processes’.²⁶⁶ The contemporary issues concerning the water sector requiring further regulation include the integration of environmental principles in water management,²⁶⁷ integrated water resources management, competing uses of water, public participation, decentralisation of responsibilities, privatisation of water and the role of science.

The extent of the current freshwater crisis, created by unsustainable and inequitable use of the resource, challenge the adequacy of domestic water sector regulations. In 1977 the UN Water Conference referred to domestic water legislation as complex, scattered and incompatible with each other; creating fragmentation of responsibilities between authorities, and lagging behind current water management practices.²⁶⁸ This statement made thirty-five years ago remains relevant today, since the water regulations fail to deal with the constantly developing uses of the resource and related challenges. According to analysts, ‘water legislation of necessity must keep evolving to accommodate emerging trends in water resources management, development and protection’.²⁶⁹ Additionally, the water regulations need to be drafted and adopted within the fair democratic environment in consultation with experts and participation of the sector stakeholders and public.

²⁶³ Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (ICWE) (26-31 January 1992) UN Doc. A/CONF.151/PC/112 Dublin, Ireland.

²⁶⁴ UNCESCR ‘General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’ (20 January 2003) UN Doc E/C 12/2002/11.

²⁶⁵ JW Dellapenna and J Gupta ‘The Evolution of Global Water Law’ in JW Dellapenna and J Gupta (eds) *The Evolution of the Law and Politics of Water* (Springer 2009) 9-10.

²⁶⁶ *ibid.*

²⁶⁷ JW Dellapenna and J Gupta ‘Toward Global Law on Water’ (2008) 14 *Global Governance* 437, 442.

²⁶⁸ Report on the United Nations Water Conference, Mar del Plata, 1977, UN Doc E 77.II.A12.

²⁶⁹ SMA Salman and DD Bradlow *Regulatory Frameworks for Water Resources Management: A Comparative Study* (World Bank 2006) 141.

3 International Policy Measures

Water regulation was inherently a local matter throughout the history, but relatively recently global and regional developments began to respond to the growing water crisis. The international policy-making evolved over last decades in response to challenges of use, distribution and sharing water resources that concern the globalised world community.

The initial international attention to water at the level of the UN was expressed at the conference on the Environment in 1972. The first UN conference on water was held in 1977 and resulted in Mar Del Plata Action Plan.²⁷⁰ As an outcome of this plan, the 1981-1990 decade was declared as the international decade of water supply and sanitation. After 1990, the global policy action on water accelerated. The Dublin Principles, adopted in 1992 at the conference on water and the environment made important international policy statements, such as: ‘fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment’ and ‘water has an economic value in all its competing uses and should be recognised as an economic good’.²⁷¹ The Dublin Principles have a major world-wide influence on national water regulation²⁷² and are considered as the *Magna Carta* for water resources management.²⁷³

The global plan of action for sustainable development, known as the Agenda 21, was adopted at the UN Conference on Environment and Development, 1992.²⁷⁴ Chapter 18 of the Agenda 21 addresses freshwater resources and elaborates on a number of related programmes, such as protection of water resources, water for sustainable urban and rural development, drinking water supply, impact of climate change on water resources and assessment of water resources. The Millennium Declaration adopted at the General Assembly of the UN in 2000 sets out several targets for the global community, known as Millennium Development Goals, which includes a target on water: ‘to halve the proportion of people who are unable to reach or to afford safe drinking water’.²⁷⁵ The World Summit on Sustainable Development in 2002 revisited the issue of protecting and

²⁷⁰ Report on the UN Water Conference (n 269).

²⁷¹ Dublin Statement (n 263).

²⁷² M Solanes and F Gonzalez-Villarreal *The Dublin Principles for Water as Reflected in a Comparative Assessment of Institutional and Legal Arrangements for Integrated Water Resource Management* (Global Water Partnership 1999).

²⁷³ *Regulatory Frameworks for Water Resources Management* (n 269) 141.

²⁷⁴ Agenda 21, UN Conference on Environment and Development (13 June 1992) UN Doc. A/CONF.151/26 (Vols. I, II, & III) Rio de Janeiro, Brazil.

²⁷⁵ United Nations Millennium Declaration UN Doc. A.Res/55/2 New York, 2000.

managing water resources, reemphasised the value of the resource for sustainable development, and suggested a set of actions in this regard.²⁷⁶

The scale of international policy action on water shows the extent of the global concern over the resource and the commitment of the world community to deal with the unfolding crisis. The evolving phenomenon of global policy-making on water issues²⁷⁷ increasingly appears as the shared platform for making coherent and focused decisions to reverse the water crisis. In contrast, international law on freshwater does not emerge as a helpful utility in this regard, lagging ‘far behind the times’.²⁷⁸ The next section continues examination of the international water governance and illustrates the approaches the global community use to deal with the issue of access to drinking water.

4 Global Frameworks to Address Water Crisis

The human costs of the lack of access to freshwater have generated significant reaction and response from the international community. Conceptual thinking and international law and policy have developed a number of initiatives and frameworks to address the issue. This part reflects on prominent avenues for action to address the challenge of access to safe drinking water currently being mainstreamed across the water sector, such as development, MDGs, good governance and human rights.²⁷⁹

(a) Sustainable development

The concept of sustainable development initiated and supported by the UN promotes the international and inter-generational equity and meeting of economic, social and environmental goals by current and future humanities.²⁸⁰ Development is seen as sustainable in nature, when it ‘meets

²⁷⁶ ‘Plan of Implementation of the World Summit on Sustainable Development’ Report of the World Summit on Sustainable Development, Johannesburg, South Africa (4 September 2002) UN Doc. A/CONF.199/20, chapter IV.

²⁷⁷ Unver (n 261).

²⁷⁸ JW Dellapenna and J Gupta (n 265) 9-10.

²⁷⁹ The other policy agendas include Integrated Water Resources Management, private sector participation and trade liberalisation in water sector. These agendas are not considered here as they do not aim to improve access of low-income disadvantaged communities to drinking water.

²⁸⁰ UN General Assembly Report of the World Commission on Environment and Development UN Doc A/RES/42/187, P Rogers, KF Jalal and JA Boyd *An Introduction to Sustainable Development* (2007 Routledge).

the needs of the present without compromising the ability of future generations to meet their own needs'.²⁸¹ This concept has been enthusiastically embraced in international policy-making and currently is seen as an overarching goal of humankind.

Agenda 21²⁸² defined three components of sustainable development: social development, economic development, and environmental sustainability. Freshwater, conceptualised as a 'basic human need', became one of the central issues of the international policy action on sustainable development. It is seen as a critical challenge to ensure equitable use of the resource where different interests are met and water resources are retained for the use of future generations.

Chapter 18 of Agenda 21 addressed freshwater resources and included a number of programmes and related targets for governments. The paragraph 18.8 of the Agenda addressed the issue of access of people to drinking water and states that "priority has to be given to the satisfaction of basic human needs and the safeguarding of ecosystems". Governments were called to ensure all urban residents have access to 40 litres of safe water per capita per day and 75 per cent of the urban population is provided with improved sanitation facilities by the year 2000.²⁸³

Those targets had not been met, and less ambitious goals with the longer timeline for implementation had been adopted a decade later at the World Summit on Sustainable Development (WSSD) in 2002. It was suggested to halve the number of people without safe access to drinking water by 2015 and halve the number of people without safe access to sanitation by 2015.²⁸⁴ The WSSD reaffirmed the principle of priority of the satisfaction of basic human needs in allocation of water among competing uses.²⁸⁵

The challenges of bringing of the water-related objectives of sustainable development into reality are multifaceted. The concept itself lacks substantive clarity, and its mainstreaming into domestic contexts is subject to loose interpretation. It is not clear whether sustainable development is a process or whether it is a goal. Priority of allocation of water for basic human needs, as set out in the Agenda 21, is a positive feature of the sustainable development. The economic priorities of the concept, however, are often favoured in national contexts, at the expense of the social and environmental dimensions. Several strategies have been simultaneously

²⁸¹ Chapter 2 'Towards Sustainable Development' World Commission on Environment and Development *Our Common Future* UN Doc.A/42/427.

²⁸² Agenda 21 (n 274).

²⁸³ *ibid* para 18.58.

²⁸⁴ Plan of Implementation (n 276) para 25.

²⁸⁵ *ibid* paras 25, 26 (c).

applied to implement the goals of sustainable development;²⁸⁶ however few of them addressed the issue of access to drinking water as a matter of priority, or in purposeful fashion.

(b) Millennium Development Goals

The Millennium Development Goals (MDGs) adopted at the UN Millennium Summit in September 2000 represent a set of targets, which the international community set to reverse poverty, hunger, illness and inequality, including the water related goal of reducing the proportion of people without access to safe drinking water by 2015.²⁸⁷ Adopting the water related targets in the formal UN context was a welcome undertaking, yet their implementation required an immense effort for the developing countries. To meet the MDGs governments were expected to evaluate the current situation, to set rational targets, to devise attainable plans of action and to allocate the adequate resources. Therefore, the strategies employed by the states to advance related sustainable development concerns could serve as the avenues for promotion of the MDGs as both agendas are closely interlinked.²⁸⁸ In this regard the aligned governance processes mainstreaming water related MDGs in national and local policy are the critical avenues for their progress. These processes, however, are not straightforward. As one author notes the water and sanitation targets 'are set against narratives and policy agendas that are often contradictory and, in some cases, may undermine efforts to achieve the targets.'²⁸⁹

Another potential pitfall of the MDG action is that in an attempt to half the proportion of people without access to safe water and sanitation governments might be inclined to assist those who are easier to reach, rather than isolated and marginalised populations living in remote rural areas, or lacking legal land or housing tenure.²⁹⁰ The global action led to drinking water coverage in the world exceeded the MDG target on water by one

²⁸⁶ Such as Poverty Reduction Strategy Papers, National Environmental Plans, Local Agendas 21, National and local development plans and strategies.

²⁸⁷ United Nations Millennium Declaration (n 275).

²⁸⁸ B Dalal-Clayton 'The MDGs and sustainable development: the need for a strategic approach' in D Satterthwaite (ed) *The Millennium Development Goals and Local Processes: Hitting the target or missing the point?* International Institute for Environment and Development 2003.

²⁸⁹ G McGranahan 'Beyond inaccurate crisis narratives; meeting the water and sanitation MDGs', in D Satterthwaite (ed) *Millennium Development Goals and Local Processes: Hitting the target or missing the point?* International Institute for Environment and Development 2003.

²⁹⁰ V Roaf, A Khalifan and M Langford 'Monitoring Implementation of the Right to Water: A Framework for Development Indicators' (2005) 14 *Global Issue Papers* 1, 12.

percent by 2010.²⁹¹ While this is a positive development indeed, the question arises, whether the states that have reached the target can legitimately postpone their effort to serve the remaining population without access to water until the 2015.

(c) Good water governance

Good governance is widely promoted by the development agencies, international and regional institutions who consider it critical for achieving the MDGs, poverty reduction and sustainable development outcomes. This notion is well absorbed in the academic discourse, since the breadth and complexity of the governance perspective, creates an open space for interdisciplinary scholarly enquiry and research.

The Second World Water Forum was one of the first international meetings that explicitly addressed governance as a main concern to be addressed in dealing with scarcity of water services. Later international meetings, such as the Bonn International Conference on Freshwater 2001, the World Summit on Sustainable Development 2001 and the 13th session of the UN Commission on Sustainable Development, have emphasised improved governance as a primary concern for effective functioning of the water sector.

There have been numerous attempts to organise thinking on water governance, to develop the tools for the analysing of its processes and outcomes. Development agencies and international institutions came up with the principles that guarantee ‘good’ or ‘effective’ functioning of the sector governance. The UNDP suggests that the general principles of good water governance are built on core concepts of equity, efficiency, participation, decentralisation, integration, transparency and accountability.²⁹² The Global Water Partnership developed a set of principles underpinning effective water governance. First, it claims the approaches in governance have to be open and transparent, inclusive and communicative, coherent and integrative, equitable and ethical. Second, the performance and operations in the sector must be accountable, efficient, responsive and sustainable.²⁹³

Governance frameworks may be utilised by stakeholders at all levels to evaluate and enhance the performance of the water sector, including the

²⁹¹ WHO/UNICEF *Progress Sanitation and Drinking-water: 2013 Update*, 3.

²⁹² World Water Assessment Programme *The UN World Water Development Report 1: Water for People Water for Life* (UNESCO Publishing 2003) 373.

²⁹³ *Effective Water Governance* (n 257).

delivery of adequate access to drinking water. Several aspects have to be taken in consideration, however. The absence of unifying terms of reference is a disadvantage of the good water governance approach, which allows the development agencies to set their own interpretation of the concept. In this context, the criteria of ‘good’ or ‘effective’ water governance vary, remain ambiguous and open to discretionary understanding. Finally, good water governance does not specifically target access to drinking water or other substantive issues, but rather emerges as an operational device to achieve the objectives of the sector.

(d) The human rights-based approach to drinking water

Rights-based approaches to the action to achieve substantive development goals are increasingly applied in development and public sector practice. The notion of drinking water as a human right is gaining ground²⁹⁴ and converts the access to resource into a legal enforceable right of every individual. The human right to water makes it a matter of governments’ obligation to ensure access to safe water for everyone in their jurisdiction. As a result, the human rights perspective carries significant implications on the governments’ policy in the water sector, particularly in the field of water services provision.

Despite its utmost legitimacy, the contemporary human rights framework still has to prove its own worth for social change. Limited evidence of mainstreaming of the right to water to the practice of the water sector raises the question whether the recognition of water as a human right and application of the rights-based approach to water issues makes difference and adds value to efforts to address the crisis. According to theoretical thinking, it does. A rights-based perspective takes its origins and strength in the norms of international and regional human rights law and underpins the legal commitment of states to ensure access to water for everyone residing on its territory. It shifts the conventional government attitude to water services as a merely public function to a matter of residents’ legitimate demand. It obligates authorities to prioritise the use of water for drinking purposes in decision-making on water allocation. Implementation of the right to water requires taking positive steps such as legal and policy change, adjustment of budget expenditure for the water sector, regulation of private sector involved in delivery of water services, and prioritising the services to the poor or disadvantaged population. Human rights perspective converts facilitation of public participation in decision-making on water-related decisions into a matter of governments’ legal obligation.

²⁹⁴ Refer to Section C of the current Chapter.

Mainstreaming the human rights perspective into the practice of the water sector though remains a challenge, associated with a poor understanding of implementation the right to water in national and local contexts. However, the main barriers to introducing of the human rights approach in the domestic contexts emerge at the political level, where the reluctant attitudes to the human right to water prevent its adequate recognition and protection in domestic systems.

(e) Conclusion

The access to drinking water is one of key challenges for modern humanity. It has been explicitly recognised in several political statements and legally binding instruments that allocation of water for human needs shall be prioritised. In practice, however, it remains difficult to ensure this priority in the context of increased competing uses and controversial domestic regulations on water. Currently the water sector is absorbing several interlinked ways to address the water crisis, which emerged as a result of the international political action and law-making.

Sustainable development and Millennium Development Goals represent the global political commitments that embrace water-related targets along with other sustainable outcomes. Their pitfalls are the lack the operational facility and normative strength. Their success is underpinned with the states' willingness to implement its policy targets. Good water governance emerges as a set of principles devised to support and inform the effective functioning of the sector. Water governance perspective does not set substantive goals, and acts as an operational framework. Good governance is seen as indispensable for achievement of the objectives of sustainable development, including access of population to freshwater.

The human rights perspective contrasts with these frameworks. It is the only approach that sets out substantive targets in normative terms and acts as an operational facility for their achievement. Theoretically the rights perspective holds a stronger potential to address the issue of access to drinking water. In practice, however, this approach waits to be implemented to its full potential yet, pending the adequate recognition and application with the national and local jurisdictions. The following section sets out the normative framework of the human right to water which underpins the strength of the rights based approach to drinking water applied at the national and local government level.

C ACCESS TO WATER AS A HUMAN RIGHT

1 Normative Origins of the Right to Water

Human rights law takes its origin in the Universal Declaration on Human Rights,²⁹⁵ a non-binding document of the utmost moral force and a predecessor of the contemporary human rights movement. It has been further elaborated into two universal binding treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁹⁶ and the International Covenant on Civil and Political Rights (ICCPR).²⁹⁷ None of these three core human rights documents explicitly refers to water since at the times their development the access to drinking water was not a matter of significant global concern.

Yet for the first time freshwater was addressed from the human rights perspective as early as in 1977, as mentioned earlier. The Mar Del Plata Declaration proclaimed that all peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.²⁹⁸ Two years after, the reference to water appeared for the first time in a human rights treaty, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁹⁹ According to article 14 of CEDAW State Parties shall ensure that water supply is guaranteed to women in rural areas as an element of the right to enjoy adequate living conditions.

The next explicit recognition of the right to water has been made in the Convention on the Rights of the Child in 1989, which located the duty of states to provide clean drinking water for children in the framework of the right to the highest attainable standard of health.³⁰⁰ The most recent development of the right to water at the international level is found in the Convention on the Rights of Persons with Disabilities, adopted in 2006.³⁰¹

²⁹⁵ Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

²⁹⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

²⁹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1973) 999 UNTS 171 (ICCPR).

²⁹⁸ Report on the UN Water Conference (n 269).

²⁹⁹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

³⁰⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 24.

³⁰¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006; entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

In article 28, it provides for access to clean water by persons with disabilities, as a part of their right to social protection and an adequate standard of living.

The scarcity of the resource on the African continent explains that its regional human rights law refers to access to water. The African Charter on the Rights and Welfare of the Child requests states to ensure the provision of safe water as a measure of the implementation of the right to health.³⁰² In contrast, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa requires States to 'provide women with access to clean drinking water' as an element of the right to nutritious and adequate food.³⁰³

A number of the United Nation instruments, such as the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Rules for the Protection of Juveniles Deprived of their Liberty, the UN Principles for Old Persons and the UN Guiding Principles on Internal Displacement contain explicit obligations to provide access to drinking water for these vulnerable categories of population.

Access to water has been interpreted by the UN Committee on Economic, Social and Cultural Rights as an independent self-standing right in its General Comment 15,³⁰⁴ following the growing international concern around water issues and the parallel developments in the recognition of access to water as a human rights issue. General Comment 15 derived the right to water from the broad scope of the right to adequate standard of living,³⁰⁵ and outlined the content of the right and the corresponding obligations of states.

At the global and regional political level the right to safe drinking water is reaffirmed in a number of declarations, adopted at various international regional conferences on development, water and related issues.³⁰⁶

³⁰² African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 art 14.2(c).

³⁰³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6, art 15.

³⁰⁴ See n 264.

³⁰⁵ UDHR art 25; ICESCR art 11.1.

³⁰⁶ Agenda 21 (n 274) Chapter 18.47, Programme of Action of the International Conference on Population and Development, Cairo 1994, principle 2; Dublin Statement (n 263) principle 4; Council of Europe, Committee of Ministers: Recommendation Rec (2001)14 On the European Charter on Water Resources (October 17, 2001) para 5.

2 Controversy around Status

The water crisis and the challenge of access to drinking water became an issue of the international concern over the last few decades. For the human rights framework access to water is a relatively new subject matter. While it has been occasionally articulated in various sources since 1977, it became a focus of closer attention of the human rights movement only since the issue of the General Comment 15 on the right to water by the CESCR in 2002.

Academic debate unfolded as regards the status of the issue of access to water in the human rights law. While many human rights scholars and activists support the interpretation of access to water as an independent human right that entails specific human rights obligations,³⁰⁷ random voices emerged to contest this affirmation,³⁰⁸ since neither of the human rights treaties recognise access to water as a distinct right per se. Casual articulations on water in the treaties and other law instruments embed the obligations regarding access to water within the frameworks of rights to health, food, housing and adequate standard of living.

The General Comment 15 derives the right to water as a self-standing one that springs from the broad scope of the right to adequate standard of living. It was a momentous development in human rights practice, when the treaty body interpreted a covenant in a daring and forward-looking way. The UNCESCR had been criticized for 'invention' of a novel right without precedent.³⁰⁹ The Committee though was not acting out of its legitimate mandate, invited to issue General Comments and encouraged to '[c]ontinue using that mechanism to develop a fuller appreciation of the obligations of State parties under the ICESCR' by the UN Economic and Social Council.³¹⁰ While lacking binding force, the General Comments provide the authoritative interpretation of the ICESCR and must be taken into account

³⁰⁷ A Cahill 'The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9(3) *International Journal of Human Rights* 389; A Hardberger 'Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates' (2005) 4 *NUJIHR* 331; M Langford 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' (2005) 21(2) *Water Resources Development* 273; M Langford 'Ambition that Overlaps Itself? A Response To Stephen Tully's Critique Of The General Comment On The Right To Water' (2006) 24 *Netherlands Quarterly of Human Rights* 434; Ling-Yee Huang 'Not Just Another Drop In The Human Rights Bucket: The Legal Significance Of A Codified Human Right To Water' (2008) 20 *Florida Journal of International Law* 353.

³⁰⁸ S Tully 'A Human Right to Access Water? A critique of General Comment No. 15' (2005) 23(1) *Netherlands Quarterly of Human Rights* 35.

³⁰⁹ MD Dennis, DP Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *The American Journal of International Law* 462, 494; S Tully (n 308).

³¹⁰ UN Economic and Social Council resolution 1987/5.

by the states that ratified the Covenant in the process of implementing its provisions on their territories.

There is a growing acknowledgment at the international, national and local level that access to water as a matter of human survival, dignity, freedom and equality is a self-standing human right pending the adequate recognition in international human rights law and at the domestic level. Access to drinking water is characterised by its distinct features that are not embedded in the scope of other interconnected rights. On the practical level, if considered merely as an element of the other rights, such as health, housing or food, the right to water would not be secured in its entirety, implemented disjointedly through the housing, agricultural or health sectors. The self-standing right to water had to be implemented within the specific water sector that operates to deliver water for drinking and domestic purposes according to its own principles, laws, regulations and institutions. In any event, the controversy of the status of the access to water in the academic debate should not become a cause for the neglect of the issue in the human rights practice and an obstacle for its implementation.

3 Scope and Content of the Right to Water

(a) The scope of the right

The human right to water is defined by the General Comment 15 as the right to access ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.³¹¹ In terms of the scope it refers to access to water for personal and domestic uses that ‘ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene’.³¹² The use of water for the other purposes, such as irrigation, farming, energy generation, and industrial needs, falls outside the scope of the right. Water is vitally important for these areas and indispensable for the realisation of the other human rights. Yet from the human rights perspective the priority in allocation of water must be given to personal and domestic uses.³¹³ In the light of interdependence and indivisibility of human rights, access to water for personal and domestic purposes simultaneously enhances the realisation of other rights such as the rights to life and health, rights to housing, food, education and work.³¹⁴

³¹¹ General Comment 15 (n 264) para 2.

³¹² *ibid* para 12(a).

³¹³ *ibid* para 6.

³¹⁴ UN Commission on Human Rights ‘Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water

(b) Content of the right

General Comment 15 elaborates the human right to water as a complex right that consists of a number of substantive and procedural components. The substantive components include availability, quality and accessibility of water for beneficiaries of the right. Availability of water implies sufficient and continuous water supply.³¹⁵ The condition of continuous supply implies that the water must be available at most of times. The requirement of sufficiency poses a question of minimum quantity of water,³¹⁶ that is defined in the General Comment 15 as ‘an adequate amount of water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements’.³¹⁷ Estimation of sufficiency requires consideration of all personal and domestic uses of water, specific climate conditions and individual needs.³¹⁸ Governments as a rule define what constitutes sufficient water; however the court can potentially intervene to correct the unfair government policy. The South African government established a basic water free water supply of 25 litres per person per day.³¹⁹ In the *Mazibuko* case the Johannesburg High Court ordered that 50 litres of free water be provided to each person³²⁰, but subsequently the Supreme Court of Appeal amended this amount to 42 litres.³²¹ The Constitutional Court overruled these decisions, concluding that it is a government task to quantify what constitutes “sufficient water”.³²²

Water for drinking and personal uses must be clean and safe, that is why the ‘quality’ requirement is a fundamental feature of the right. The General Comment 15 stresses that water must be free from health hazards, such as micro-organisms, chemical substances and radiation. The quality of water also implies acceptable colour, taste and odour.³²³ As a matter of practice states define the criteria of water quality and monitoring procedures in

supply and sanitation’, report of the Special Rapporteur EI Hadji Guisse (2004) UN Doc E/CN.4/Sub.2/2004/20, paras 15-20.

³¹⁵ *ibid* para 12(a).

³¹⁶ Gleick recommends a basic water requirement standard of 50 litres per person per day. P Gleick ‘Basic Water Requirements for Human Activities: Meeting Basic Needs’ (1996) 21 *Water International* 83.

³¹⁷ General Comment 15 (n 264) para 2.

³¹⁸ For instance, hard manual labour, breastfeeding, or pregnancy is associated with increased consumption of water.

³¹⁹ Department of Water Affairs, South Africa, *Free Basic Water Implementation Strategy*, 8 <<http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf>> (12 August 2013).

³²⁰ *Mazibuko v City of Johannesburg* (06/13865) [2008] ZAGPHC 106.

³²¹ *City of Johannesburg v Mazibuko* (489/08) [2009] ZASCA 20.

³²² *Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

³²³ General Comment 15 (n 264) para 12(b).

national standards. Municipalities, public utilities, communities and private vendors, providing access to water in form of services, facilities, rural water schemes, or bottled water, must deliver safe water, while the onus is on the state to establish the system of monitoring quality of drinking water delivered by the suppliers. The failure of county Galway, Ireland, local governments, to provide public water of appropriate quality for more than six months in 2007 is an example of the violation of the human right to safe drinking water.³²⁴

Accessibility of water is a complex component of the right, which encompasses three substantive dimensions, namely physical access, affordability and equal access. First, water ‘must be within safe physical reach for all sections of the population. ... [It] must be accessible within or in the immediate vicinity, of each household, educational institution and workplace’.³²⁵ The criteria for physical access include the distance to a water source, and one kilometer is considered, as a maximum, a reasonable distance by the WHO.³²⁶ Safe and convenient access for people with disabilities, women, elderly and children are also important conditions of the physical accessibility. The Special Rapporteur on Violence Against Women in this regard highlights the security and health challenges faced by women travelling ‘considerable distances and spend several hours a day collecting water, which is often polluted and dangerous to their health and well-being’ and who are exposed to the risk of sexual and other forms of violence on daily basis.³²⁷

Second, water and the related services and facilities must be economically accessible, or in other words, affordable. The human right to water does not imply that water services must be free. However, the key requirement of the right framework is that ‘direct and indirect costs and charges, associated with securing water must be affordable’.³²⁸ Inability to pay for water shall never deprive a person of the minimum essential level of water.³²⁹ Practices of the disconnection of the poor for failure to pay, or installations of pre-paid water meters can be cited as the examples of policies failing to consider the affordability dimension of the right to drinking water and pose to poor

³²⁴ N Pestova ‘Local Governments as Human Rights Actors: Perspectives on the Right to Water. A Galway Case Study’ (2007) LLM Thesis, National University of Ireland, Galway, 65-70.

³²⁵ *ibid* para 12(c)(i).

³²⁶ WHO and UNICEF ‘The Global Water Supply and Sanitation Assessment’ (Geneva New York 2000).

³²⁷ Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo A/HRC/17/26, 2 May 2011, para 30.

³²⁸ General Comment 15 (n 264) para 12 (c)(ii).

³²⁹ *ibid* para 56.

households the threat of deprivation of the access to basic water on the inability to pay.³³⁰

Third, the access to water has to be equal and discrimination in access to resource on any of the prohibited grounds is prohibited.³³¹ A human rights framework requests governments to take specific steps to ensure equal access to water for vulnerable members of society, such as women, children, older persons, inhabitants of rural and deprived urban areas, people with disabilities, indigenous peoples, refugees, internally displaced persons or prisoners.³³² The unfavourable Israeli policies on the occupied territories, such as the ban on digging new wells, quotas on water use, or disproportionate pricing, explicitly discriminate against Palestinians, because they do not apply to Jewish settlers living there.³³³

The content of the right to water comprises several procedural elements, such as 'the right to seek, receive and impart information concerning water issues',³³⁴ 'the right of individuals and groups to participate in decision-making process that may affect their exercise of the right to water',³³⁵ and the right to effective remedies.³³⁶ The information concerning water issues comprise, amongst other, data about quality of supplied water,³³⁷ level of industrial pollution of the natural water resources, or any water related emergencies posing the threat to people's life and health. Participation and accountability constitute the cornerstone normative standards and principles underpinning the operation of human rights framework. They are embedded as procedural elements into the normative content of the right to water in order to guarantee the substantive elements of the right reach everyone.

³³⁰ On the consequences of the use of pre-paid water meters in the UK and South Africa see D Barret and V Jaichand 'The Right To Water, Privatised Water And Access To Justice: Tackling United Kingdom Water Companies' Practices In Developing Countries' (2007) 23 South African Journal on Human Rights 543.

³³¹ General Comment 15 (n 264) para 12(c)(iii).

³³² *ibid* para 16.

³³³ Center for Economic and Social Rights 'Thirsting for Justice: Israeli Violations of the Human Right to Water in the Occupied Palestinian Territories' (2003) A Report to the 30th Session of the UNCESCR.

³³⁴ General Comment 15 (n 264) para 12(c)(iv).

³³⁵ *ibid* para 48.

³³⁶ *ibid* para 55.

³³⁷ The Access Initiative documented how the residents of Washington City were not informed of the contamination of the public water supply with lead for more than two years, while the authorities were trying to eliminate the problem. See <<http://www.accessinitiative.org/blog/2008/03/lead-our-water-a-washington-dc-mystery>> (13 August 2013).

4 Obligations of Governments

(a) Structure of the states parties' obligations

Human rights law creates legal relationships between states and their population. Within its framework the individuals enjoy certain rights and the state bears the obligations towards residents with regards to these rights. The significance of the obligations is at least two-fold. First, a translation of the human right into the corresponding duties provides 'a clearer notion of the content or proposed content of the right itself'.³³⁸ Second, 'the emphasis on duties connected with rights ... moves the debate in the direction of implementation, towards the question of who has to do what if these rights are to be realised'.³³⁹

The right to access clean drinking water belongs to a category of the economic, social and cultural rights. The nature of the obligations relating to these rights has been defined in article 2.1 of the ICESCR, which stipulated that states have to take steps towards progressive realisation of these rights. Due to the progressive nature, economic, social and cultural rights were often misinterpreted as being the programmatic goals, or aspirations, rather than immediate legal rights. To address this misunderstanding, the UNCESCR in 1990 clarified that the ICESCR imposes on states the legal obligations of immediate effect.³⁴⁰

In respect to the right to drinking water, states have two immediate obligations. First the obligation is to guarantee that the right is exercised without discrimination of any kind. Second the duty is to take deliberate, concrete and targeted steps towards the full realisation of the right.³⁴¹ Concurrently, states have a permanent continuous duty 'to move as expeditiously as possible' towards the full realization of the right to water.³⁴² Both, the immediate obligations and the continuous duty belong to the category of general obligations.

Besides, states are bound by the specific legal obligations to ensure access to water, namely to respect, to protect and to fulfil the right to access drinking water. The General Comment 15 on the right to water enlists the

³³⁸ HJ Steiner and P Alston *International Human Rights in Context: Law, Politics, Morals* (2nd edn Oxford University Press 2000) 181.

³³⁹ JW Nickel 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 *Human Rights Quarterly* 77, 80.

³⁴⁰ UNCESCR 'General Comment 3: The Nature of States' Parties Obligations' (14 December 1990) UN Doc. E/1991/23 para 1.

³⁴¹ General Comment 15 (n 264) para 17.

³⁴² General Comment 3 (n 340) para 9, General Comment 15 (n 264) para 18.

‘core obligations’ of states to ensure the satisfaction of the minimum essential level of the right to water. The governments’ obligations on international cooperation to secure access to water as a matter of priority are also elaborated on by the General Comment 15.

(b) Specific legal obligations

The tripartite classification of states obligations to respect, protect and fulfil human rights has been developed by human rights scholars³⁴³ and is commonly utilised within the UN charter-based and treaty-based human rights systems.³⁴⁴ Within this framework the obligation to respect requires governments to refrain from certain forms of behaviour that interfere with the enjoyment of human rights. The obligations to protect and to fulfil involve performance of specific tasks and taking action by governments to guarantee and ensure the rights.

In order to comply with the duty to respect states must refrain from diminishing or polluting water, arbitrarily interfering in arrangements for water allocation, limiting access to, or destroying, water services and infrastructure as a punitive measure.³⁴⁵ An example of a violation of the obligation to respect the right to water comes from the conduct of the Israeli State, which is setting water use quotas, over-exploiting shared water resources, destroying water infrastructure and has restricted building of new wells in the Occupied Palestinian Territories.³⁴⁶

The obligation to protect requests governments to adopt the necessary and effective legislative and other measures that restrain third parties, such as individuals, groups or corporations, from denying equal access to adequate water, polluting or inequitably extracting from water resources.³⁴⁷ The water resource management and environmental protection policies and regulations are appropriate mechanisms for addressing these concerns. In the situation when a third party operates water services, the primary role of governments is to prevent the third party from compromising the right to water through an ‘effective regulatory system ... which includes independent monitoring, genuine public participation and imposition of penalties for non-

³⁴³ B Toebes *Right to Health as a Human Right in International Law* (Intersentia 1999) 306-310, outlining the scholarly interpretations of the specific human rights obligations.

³⁴⁴ UNCESCR ‘Report on the Right to Food as a Human Right’ (1987) UN Doc.E/CN.4/Sub.2/1987/23 was one of the first applications of the tripartite obligations of states to respect, to protect and to fulfill rights in the UN system.

³⁴⁵ General Comment 15 (n 264) para 21.

³⁴⁶ Center for Economic and Social Rights (n 333) 23.

³⁴⁷ General Comment 15 (n 264) para 23.

compliance’.³⁴⁸ This obligation is crucial in current development of the liberalisation and privatisation trends in the water sector, posing significant challenges for people’s access to safe affordable water.

The obligation to fulfil comprises three sub-duties of governments: to facilitate, to promote and to provide. The obligation to fulfil the right to access water considers the measures of the implementation of the right, such as recognition within the national political and legal systems,³⁴⁹ adoption of a national water strategy and a plan of action,³⁵⁰ taking measures to ensure that water is affordable for everyone,³⁵¹ and facilitating ‘improved and sustainable access to water, particularly in rural and deprived urban areas’.³⁵² The South Africa’s case can be recalled in this regard, where the constitutionally entrenched right to water has been implemented through the national strategy and policy action at all level of state.

(c) Core obligations

In 1990 the UNCESCR has developed the notion of core obligations in relation to the economic, social and cultural rights, which it defined as ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party’.³⁵³ In its General Comments on the substantive rights³⁵⁴ the UNCESCR has provided the state parties with the clarification of the content of core obligations in respect of these rights. Similarly, General Comment 15 elaborated on the core obligations of states parties as regards the right to drinking water, which should have an immediate effect.³⁵⁵ These obligations embrace the substantive elements of the right to water, such as availability of at least minimum essential amount of water, quality of water, physical accessibility to improved sources of drinking water, including

³⁴⁸ *ibid* para 24.

³⁴⁹ *ibid* para 26.

³⁵⁰ *ibid* para 26, 28.

³⁵¹ *ibid* para 26, paragraph 27 provides the examples of such measures.

³⁵² *ibid* para 26.

³⁵³ General Comment 3 (n 340) para 10.

³⁵⁴ UNCESCR ‘General Comment 13: The right to education (article 13 of the Covenant)’ E/C.12/1999/10 8 December 1999, para 57; UN CESCR ‘General Comment 14: The Right to Highest Attainable Standard of Health’ (2002) UN Doc E/C.12/2000/4, paras 43, 47-48; UNCESCR ‘General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)’ E/C.12/GC/17, 12 January 2006, paras 39, 41-42; UNCESCR ‘General Comment 18: The Right to Work (article 6 of the International Covenant on Economic, Social and Cultural Rights)’ E/C.12/GC/18, 6 February 2006, para 31; UNCESCR ‘General Comment 19: The Right to Social Security (article 9)’ E/C.12/GC/19 4 February 2008, paras 59-61.

³⁵⁵ General Comment 15 (n 264) para 37.

personal security, and non-discriminatory access to water.³⁵⁶ The affordability aspect and the procedural elements of the right to water, such as the right to seek, receive and impart information concerning water issues, or the right to effective remedies, are not addressed within the scope of the core obligations. The adoption and implementation of a national water strategy and plan of action, as well as the monitoring of the right to water, are interpreted by the UNCESCR as the core obligations of states.³⁵⁷

D DRINKING WATER AS MUNICIPAL RESPONSIBILITY

Municipalities are facing a freshwater crisis at the front line. Through involvement in water services provision and water resources management local governments directly and indirectly influence access of local population to drinking water. The daunting reality of eleven percent of the global population lacking access to drinking water³⁵⁸ is a clear manifestation of the deficiencies in local water services provision. The key role of local government in ensuring provision of safe water for domestic uses is increasingly recognised and reaffirmed at the global events on water.³⁵⁹ The Mayor of Marseilles at the 5th World Water Forum reaffirmed that cities and regions ‘are the foremost actors in addressing the lack and unequal distribution of water’.³⁶⁰ Against this backdrop, this section attends to the issue of the access to water as a municipal function and human rights responsibility.

1 Local Government Role in the Water Sector

Local authorities carry out significant roles in the water sector. The provision of water services and engagement in water resource management are common functional areas of municipal action around the world. Water services are normatively defined by the EU Water Framework Directive 2000 as

³⁵⁶ *ibid* para 37.

³⁵⁷ *ibid*.

³⁵⁸ WHO/UNICEF *Progress Sanitation and Drinking-water: 2013 Update*, 8.

³⁵⁹ UN-HABITAT, UNITAR ‘Access to Basic Services For All: Partnerships and Rights-Based Approach’ Background Paper No. 4 prepared for the 12th Session of the Commission on Sustainable Development, 2004, World Water Council ‘Water at Crossroads. Dialogue and Debate at the 5th World Water Forum’ Istanbul 2009, 45-46.

³⁶⁰ World Water Council (n 359) 45.

all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater; (b) waste-water collection and treatment facilities which subsequently discharge into surface water.³⁶¹

Literally speaking, water services include drinking water supply, sanitation services, irrigation and drainage, wastewater collection and treatment, flood protection and storm water management. The extent of the local governments' responsibility for the different types of water services differs from country to country and exists in a variety of contexts. In urban settings, for instance, water services can be the direct task of a local authority, while in rural environment the municipal role might comprise facilitation of the community managed water supply and sanitation systems.³⁶²

Water resources management is a broader functional area that can be defined as 'the process of decision-making on assessment, allocation, use, regulation, monitoring and development of surface and underground water sources'.³⁶³ It is a shared responsibility of different stakeholders in the water sector, where certain roles such as resource protection and pollution control can be performed at the local level.³⁶⁴ Other local functions, such as urban and land use planning, local development and solid waste management, also affect water resources.

2 Decentralisation of Water Services

Decentralisation of the state power leads to the increase of the responsibilities of local governments as regards the basic services delivery. The principle of subsidiarity that underpins this development is based on the anticipation that local government, as a level closest to people is more flexible to adopt services according to local requests. Municipalities due to their proximity are expected to be more responsive to demand for service and accountable than national governments.

³⁶¹ Directive 2000/60/EC Of The European Parliament and of The Council, 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, 38. 22.12.2000 EN Official Journal of the European Communities L 327/1.

³⁶² As for instance in Ireland, Sri Lanka. On the implications of the role of local governments as community facilitator see H Lockwood 'Institutional Support Mechanisms for Community-managed Rural Water Supply & Sanitation Systems in Latin America', Environmental Health Project, Strategic Report 6.

³⁶³ S Smits 'Key terms and definitions' LoGo Water, IRC International Water and Sanitation Centre, Delft, the Netherlands 2005.

³⁶⁴ For instance, local authorities in Ireland, Pakistan, South Africa, and Bolivia have responsibilities in environmental protection of water resources and pollution control.

Decentralisation impacts the water sector in a way that responsibility for water services is streamlined down to local authorities and communities, who are becoming critical institutions to enable actions to provide water services. Drinking water and sanitation challenges, in fact, are local challenges. Municipalities in this respect are seen to be in a best position to identify the gaps in these services and to work out the solutions adapted to local needs. Municipal authorities in Japan, South Africa, Bolivia, Uganda, India, Niger, Ghana, to name a few, are responsible for drinking water supply to their populations.

Decentralised responsibility for water and sanitation services is expected to boost service efficiency, sustainability and sensitivity to local needs.³⁶⁵ Decentralisation may not achieve the desired outcomes if not supported with the capacity building measures, adequate financing or power to raise revenues.³⁶⁶ Decentralised water service responsibilities entail mixed outcomes for the local status of right to water that have yet to be assessed in their entirety.³⁶⁷ Contrary to the current trend the opposite processes of centralisation can take place, as for instance in Ireland where a state owned company is being set up to take over the municipal responsibilities for the drinking water services to increase their efficiency and effectiveness.³⁶⁸

Decentralisation of the public function of the drinking water supply reshapes the architecture of the water sector and impacts on the dynamics of local water governance. The roles and tasks as regards water services and facilities are shared between government institutions and communities, whereas the duplication and overlapping of responsibilities often take place. The regulatory bodies on the national level are being set up to oversee the local service delivery. Water services, therefore, are realised under various arrangements, regulations and practices. The role of municipalities as actors influencing and delivering the access to drinking water has to be considered within these evolving and diverse contexts.

³⁶⁵ M Mehta, D Mehta, *Financing Water and Sanitation at Local Levels* WaterAid (2008) 45

<www.wateraid.org/documents/plugin_documents/financing_water_and_sanitation_at_local_levels.pdf> (11 August 2013).

³⁶⁶ UN-HABITAT 'International Guidelines on Decentralisation and the Strengthening of Local Authorities' 2007, Section D. Financial resources and capacities of local authorities.

³⁶⁷ International Council on Human Rights Policy *Local Government and Human Rights: Doing Good Service* (2005).

³⁶⁸ Department of Environment, Heritage and Local Government 'Reform of the Water Sector in Ireland' Position Paper January 2012

<<http://www.environ.ie/en/Publications/Environment/Water/FileDownload,29192,en.pdf>> (11 August 2013).

3 Municipal Roles as Human Rights Responsibilities

This section embarks on the examination of the intersection of the local authorities' roles related to drinking water with their responsibilities in relation to the right to water. The local governments on a numerous occasions expressed their commitment to the right to water and the obligations it entails.³⁶⁹ It is a common understanding that municipal authorities bear human rights obligations towards local residents in relation to their right of access to safe drinking water.³⁷⁰ Yet there is little clarity over the extent of municipal engagement with the right to water and the scope of the duties it creates.

The General Comment 15 highlights the role of local authorities in implementation of the right to water, but it does not substantively define their obligations in this regard. The Special Rapporteur on the Right to Water El Hadji Guisse took a more advanced approach in relation to interpreting the responsibilities of local governments by enumerating the range of duties for all levels of governments in the state.³⁷¹ The obligations of the municipal authorities on the economic, social and cultural rights, including the right to water derived from the Constitution and relevant jurisprudence, have been addressed by some scholars in South Africa.³⁷²

The human rights obligations of the municipalities cannot be discerned outside of the consideration of their engagement in the water sector and roles in drinking water supply. The tasks of local governments on water are evolving and vary from country to country, depending on the legal and administrative systems of the states. Municipalities can be responsible for different aspects of water services from their initial development, such as policy-making, financing, planning, to the ultimate service delivery.

³⁶⁹ United Cities and Local Governments, Founding Congress Final Declaration, 'Cities, local governments; the future for development', 2004, para 24; Local Government Water Code, the Lisbon Principle, 2000; Local Government Declaration for the Third World Water Forum, Kyoto 2003, principle 4; Declaration of the European local and regional governments, 2005, Council of European Municipalities and Regions; Declaration on Water by Mayors and Local Elected Representatives, 4th World Water Forum, Mexico, 2006.

³⁷⁰ UNCHR 'Realization of the right to drinking water and sanitation' Report of the Special Rapporteur El Hadji Guisse (11 July 2005) UN Doc E/CN.4/Sub.2/2005/25 (hereinafter Draft Guidelines) paras 2.1-2.3; WHO *The Right to Water* Health and human rights publication series, no 3 (2003) 31.

³⁷¹ Draft Guidelines (n 370) para 2.1.

³⁷² See for example N Steytler 'Socio-economic rights and the process of privatizing basic municipal services' (2004) 8(2) *Law, Democracy and Development* 157, J Visser, E Cottle and J Mettler 'Realising the Right of Access to Water: Pipe Dream or Watershed?' (2003) 7(1) *Law, Democracy and Development* 27.

Municipal duties can involve adopting local policy on drinking water and accordingly its further implementation, keeping records on the status of services and infrastructure which informs the policy-making action, building infrastructure and its maintenance. Service provision may be a direct function of local government or it can be separated from the authority, where other actors, such as public utilities,³⁷³ communities, or private sector are engaged to deliver water services and facilities. As such, local service provision can emerge in a variety of ways, such as public services, public-private partnerships, community management or privatised services. Depending on the domestic water sector arrangements, local authorities can be responsible for some or all these activities. Their obligations as regards the human right to water shall be examined in conjunction with these tasks.

On this footing, the duties of local government in relation to the right to access drinking water may be preliminarily mapped as follows. The human rights obligation to respect applies to each level of government and entails abstaining from action that interferes with the enjoyment of the right to water.³⁷⁴ According to this obligation municipalities must not pollute water sources, limit access to water, or destroy water services and infrastructure. When the local authority interferes with the right to water, for instance when it denies access to services on a discriminatory basis,³⁷⁵ or disconnects service provision for non-payment and leaves the individual without minimal access to water it violates its duty to respect the right to water. The central government in these cases is under the obligation to intervene and to protect local people from the violation of their right.

Environmental management is a functional area of the local government cross-cutting with the issue of access to drinking water and, as such, has human rights implications. The responsibilities to maintain safety of water resources in the course of waste water treatment, sanitation, or litter disposal entail the obligation to respect the right to water. Monitoring compliance of the third parties with the environmental legislation corresponds with the obligation to protect the right of access to safe water.

Guisse suggests that governments at all levels share the obligation to protect the right of access to drinking water and to stop other actors from interfering with the existing access.³⁷⁶ In practice, the observance of this duty would be depending on the statutory arrangements in any given state. In Niger, for example, the local governments are empowered to prohibit activities intensively using water for the purposes not related to human consumption

³⁷³ As for instance the case in Philippines, where water supply is delivered local government-owned and controlled corporations.

³⁷⁴ Draft Guidelines (n 370) para 2.3(d).

³⁷⁵ General Comment 15 (n 264) para 51.

³⁷⁶ Draft Guidelines (n 370) para 2.3(d).

during droughts.³⁷⁷ Municipalities enforcing this power when the competition for fresh water at the time of drought is high, act in compliance with the statutory law, as well as with their human rights obligation to protect the right to water. This example suggests that discharging the duty to protect should be facilitated by the domestic legislation that empowers or obligates local government to safeguard the existing access to water.

When a municipality contracts out service delivery to a private company, or delegates it to a publicly utility, it remains responsible for the adequate water supply on its territory and often acts as a regulator. Regulation is a critical oversight function that is applied to monitor service providers and ensures their accountability towards the service users.³⁷⁸ It is also a critical aspect of the obligation to protect the right to water.³⁷⁹ Local authorities when contracting out the delivery of water services to a third party are bound by the obligation to protect the right to drinking water for their community. To prevent violations the right to water by service providers, municipalities must establish a regulatory system that requires them ‘to ensure physical, affordable and equal access to safe, acceptable and sufficient water... and includes mechanisms to ensure genuine public participation, independent monitoring and compliance with regulations’.³⁸⁰

The capacity of local government to perform the regulatory function is a critical issue. When engaging with the large transnational businesses, municipalities are often less capable and competent to negotiate the terms of concession contracts³⁸¹ and to regulate the third party delivering water services. This asymmetry can result in compromised access to water for local communities and lowering of service standards, such as quality and affordability of supplied water.

The obligation to fulfil the right to water is a complex duty that comprises a range of action to be taken to realise the right from legislative and policy change to carrying out the activities to deliver water to people. Local authorities can be considered as being bound by the obligation to fulfil the right to water, where its subject matter falls within their functional competency assigned by statutory legislation or national policy. Steytler

³⁷⁷ Niger Water Law No. 93-014, art 9.

³⁷⁸ OBA Working Paper Series ‘Regulation of Water and Sanitation Services: Getting Better Service to Poor People’ Paper No. 8, June 2006; E Groom, J Halpern, D Ehrhardt ‘Explanatory Notes on Key Topics in the Regulation Of Water And Sanitation Services’ Water Supply And Sanitation Sector Board Discussion Paper Series Paper No. 6 June 2006.

³⁷⁹ General Comment 15 (n 264).

³⁸⁰ Draft Guidelines (n 370) para 2.3(c).

³⁸¹ Human Rights Council Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque 29 June 2010 A/HRC/15/31, para 37; P Marin *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries* (World Bank Washington DC 2009) 34.

refers to ‘direct intersection’, correspondence, or ‘fit’ between the functional areas of municipal competence and the nature and scope of socio-economic rights as a defining condition for assigning the local government with the obligation to fulfil.³⁸²

The obligation to fulfil disaggregates into the sub-duties to provide, promote and facilitate.³⁸³ In urban settings the municipalities can be charged with responsibility to provide access to water in form of water services or public facilities. In rural environments the communities often install and operate water schemes at their own initiative, so water and sanitation systems can rather be informal and practice-based. The role of local authority in this case is usually to regulate and monitor the community-based water supply, giving it the long-term back-up support.³⁸⁴ This function of local governments substantively correlates with the duty to facilitate the right of access to water, which entails taking ‘positive measures to assist individuals and communities to enjoy the right.’³⁸⁵

Local authorities can be responsible for the public facility of delivering drinking water for people. Construction and management of public water fountains and public wells, for instance, is stipulated as a districts’ responsibility in the Niger legislation.³⁸⁶ In Serbia local authorities regulate and define the use and managing of the springs, public wells and fountains.³⁸⁷ Similarly, ‘constructing, altering and maintaining ... baths, washing places, drinking fountains, tanks, wells’ are stipulated in the Rajasthan Municipalities Act 1959, as the Municipal Boards responsibility.³⁸⁸ From the human rights perspective this function of the municipalities corresponds with the scope of the obligation to provide access to water to people who are unable to realize their right themselves.³⁸⁹

Municipalities responsible the public function of drinking water supply can be considered as bound by the obligation to fulfil the right to water for their people. In this regard a number of practical implications arise linked with the process of implementation, which is addressed in the following section.

³⁸² N Steytler (n 372) 161-162.

³⁸³ General Comment 15 (n 264) para 25.

³⁸⁴ For instance in Ireland, Sri-Lanka, Uganda.

³⁸⁵ General Comment 15 (n 264) para 25.

³⁸⁶ AA Djirmey ‘The Decentralization Act, Latest of the Legislative Reforms in Terms of Water Management in Rural Areas in Niger’ in C Dubreuil *The Right to Water: From Concept to Implementation* (World Water Council 2006).

³⁸⁷ UN-HABITAT ‘Legal Issues for City-to-City Co-Operation’ 2007, 48.

³⁸⁸ Section 98 (i) of Rajasthan Municipalities Act 1959 cited in *Rampal v State of Rajasthan* AIR1981Raj121.

³⁸⁹ General Comment 15 (n 264) para 25.

4 Implementation

Implementation of the right to water is a continuous process that aims to bring the normative standards of the right into practical outcomes and involves deliberate action of public authorities at different levels. States have an immediate obligation to take steps towards the full realisation of economic, social and cultural rights. In this regard the UN Special Rapporteur on the Right to Water reaffirmed that ‘each level of government in a state, including...the local authorities, has a responsibility to move progressively and as expeditiously as possible towards the full realization of the right to water’.³⁹⁰ Precisely, all public authorities charged with functions related to drinking water are obliged to engage in the implementation of the right.

The General Comment 15 was the first UNCESCR document which explicitly highlighted the role of local authorities in the rights realisation. It stated ‘[w]here implementation of the right to water has been delegated to regional or local authorities, the State party still retains the responsibility to comply with its Covenant obligations’.³⁹¹ This interpretation raises important questions as regards who is responsible for the right to water and who does what for its realisation. The operational responsibility for drinking water supply can be delegated to the public authorities at the different levels and in this context the implementation of the right becomes a matter of shared responsibility.³⁹² The situation where drinking water is a joint matter of national, sub-national and local governments, but the responsibilities are not clearly defined, may lead to the authorities relying on each other for doing the job, while people are left without the access to water.³⁹³ In this regard General Comment 15 elaborates on the importance of ‘sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies’,³⁹⁴ so all responsibilities with regards to the right to water are considered and allocated without duplication.

The ultimate responsibility to guarantee that the right is enjoyed equally across the state territory rests with the national government, who should oversee the process of implementation and facilitate public authorities in discharging their responsibilities in relation to the right to water. General Comment 15 requests the national governments to ensure that local

³⁹⁰ Draft Guidelines (n 370) para 2.1.

³⁹¹ General Comment 15 (n 264) para 51.

³⁹² In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) Constitutional Court of South Africa emphasised the importance of the cooperative effort of the governments at all levels in implementation of human rights.

³⁹³ As illustrated in the case *Uzir v Gauhati Municipal Corporation* 1999 (3) GLT110.

³⁹⁴ General Comment 15 (n 264) para 51.

authorities have at their disposal sufficient resources to maintain and extend the necessary water services and facilities, while scholars reaffirm ‘that without the development of financial and institutional capacity to provide water services, the right to water is of only limited value’.³⁹⁵ However, capacity constraints, including a lack of financial, technical and human resources, prevent municipalities in the developing countries from the adequate performance of the decentralised water and sanitation tasks. WaterAid reported that local authorities in Tanzania received less than 7% of the total of approved water expenditure, and in Ethiopia local administrations, woredas, have no water sector staff.³⁹⁶ The Special Rapporteur on the Right to Water observed that municipalities ‘rarely have the financial or technical capacity needed to address the accessibility, affordability and quality of services’,³⁹⁷ which compromises people’s right of access to drinking water. Chronically under resourced municipalities seek funding from the international donors and risk engaging in unfair conditional loans that often require privatisation of the water service provision. The capacity issues invoke the need for reassessment of local budget priorities and making difficult decisions such as cross-subsiding and compromising spending in other areas of municipal action, as well as pricing of water. A human rights framework obligates national governments to ensure the adequate capacity of public authorities to perform their duties as regards implementation of the access to water, allowing municipalities to requesting for adequate financial arrangements on the legitimate basis;³⁹⁸ however this potential is yet to be developed.

Implementation as a process involves a series of legal and policy changes, monitoring and the need for the effective mechanisms of accountability. Adequate recognition of the right to water in the domestic legal frameworks is a fundamental step to this aim.³⁹⁹ Domestic legislation, including local by-laws, needs to be revised and amended in accordance with the standards

³⁹⁵ Ibid, SC McCaffrey and KJ Neville ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries’ 212 *Georgetown International Environmental Law Review* 679, 680.

³⁹⁶ D Redhouse ‘Getting to Boiling Point: Turning up the Heat on Water and Sanitation’ (London UK WaterAid 2005) 24-25, along with other challenges the report states that local authorities in Tanzania received less than 7% of the total of approved water expenditure in 2004/2005, and in Ethiopia local administrations (woredas) have no water sector staff.

³⁹⁷ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation A/66/255 (3 August 2011), para 54.

³⁹⁸ This position was rearticulated in the Draft Guidelines (n 370) for the realisation of the right to drinking water and sanitation, para 2.2.

³⁹⁹ UNCESCR ‘General Comment 9: The Domestic Application of the Covenant’ (3 December 1998) UN Doc E/C 12/1998/24, para 2. Constitutions of Democratic Republic of Congo, Ethiopia, Ecuador, Gambia, South Africa, Uganda, Uruguay and Zambia guarantee the right to water to their citizens.

of the right.⁴⁰⁰ For instance, certain elements of the legal regime based on the riparian model of water allocation contradict with the requirements of the right to water. If these regulations are not revised the implementation of the right would be significantly weighed down.⁴⁰¹

Legislative change alone is not a sufficient measure of implementation. As a rule states enjoy a margin of discretion in selecting their means and decide the most suitable methods.⁴⁰² The appropriate means in this regard ‘include, but are not limited to, administrative, financial, educational and social measures’.⁴⁰³ Most effectively, the economic, social and cultural rights, including the right to water, are implemented through the targeted policies, strategies and programmes.⁴⁰⁴ A national strategy or plan of action is an essential vehicle of mainstreaming of the right to water responsibilities into the day-to-day action of the competent authorities. General Comment 15 suggests the strategy to be rights-based, setting achievable targets and goals along with policies for its implementation, benchmarks and indicators, and include institutional responsibility, appropriate allocation of available recourses and accountability mechanisms.⁴⁰⁵ Strategy or plan of action can be effectively adopted by subnational and local authorities responsible for fulfilling the right to water on their territories. Generally, national policy stipulates the minimum standards of service provision, whereas the subnational or municipal policies adjust national targets to local circumstances. In countries where decentralisation is underway, local governments are given a higher degree of autonomy, including the power to introduce the local by-laws, regulations and policies.⁴⁰⁶

Policy implementation at the local level entails planning of steps to be undertaken to attain policy objectives. The Special Rapporteur recommended for governments at all levels to develop plans of action for the full realisation of the right to water,⁴⁰⁷ and in their policies and programmes prioritise the persons without any basic access.⁴⁰⁸

⁴⁰⁰ S Liebenberg, ‘The Protection of Economic and Social Rights in Domestic Systems’ in A Eide, C Krause and A Rosas (eds), *Social, Economic and Cultural Rights* (2nd edn Kluwer Law International 2001) 79-82.

⁴⁰¹ EB Bluemel ‘The Implications of Formulating a Human Right to Water’ (2004) 31 *Ecology Law Quarterly* 957, 982-983, 997-1000, evaluating the challenges of compatibility of the legal regimes based on riparian model of water allocation in India and Argentina, countries that recognise the right to water, with the right to water requirements.

⁴⁰² UNCHR ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1987) UN Doc E/CN.4/1987/17, paras 18, 71.

⁴⁰³ General Comment 3 (n 340) para 7.

⁴⁰⁴ S Leckie ‘Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 81, 106.

⁴⁰⁵ General Comment 15 (n 264) para 47.

⁴⁰⁶ See Chapter 2 section D.3.

⁴⁰⁷ Draft Guidelines (n 370) para 2.3 (b), recommending that such plan should establish specific targets, indicators and time frames and identify the necessary resources.

⁴⁰⁸ *ibid* para 2.3(a).

Simultaneously financial decisions and budgetary arrangements have to be made to enable the local action on water. Both, the national and local plans of action must include indicators to monitor implementation of the right.⁴⁰⁹ To facilitate implementation, legal and policy measures, plans of action and budgetary decisions must incorporate the right to water standards and principles, and to address the needs of the vulnerable and marginalised individuals and communities as a priority.⁴¹⁰

On the practical side, the implementation measures would not deliver the desired outcomes if designed without consideration of the internal realities, practices and organisation of public authorities.⁴¹¹ The institutional deficiencies in governance processes and structures, such as corruption, bureaucracy, lack of transparency, short-term political interests, and unclear allocation of responsibilities severely decline the efficiency of the service provision⁴¹² and diminish the right to water status in localities. According to the UN-Habitat ‘access to services is directly affected locally by good or bad governance, good or bad policy choices and good or bad management style of the local authorities.’⁴¹³ Corruption and lack of transparency can lead to local governments entering into concession contracts with large businesses, which disregard local priorities and the right to water requirements. In response, the human rights framework suggests utilisation of the principles of participation and accountability capable of addressing these institutional challenges.

⁴⁰⁹ *ibid*; General Comment 15 (n 264) paras 47, 53.

⁴¹⁰ JL Washington ‘The Gap Between Policy and Implementation’ in BK Goldewijk, AC Baspineiro and PC Carbonari (eds) *Dignity and Human Rights. The Implementation of Economic, Social and Cultural Rights* (Intersentia 2002).

⁴¹¹ V V Govender ‘Economic, Social and Cultural Rights in South Africa: Entitlements, not Mere Policy Options’ in BK Goldewijk, AC Baspineiro and PC Carbonari (eds) *Dignity and Human Rights. The Implementation of Economic, Social and Cultural Rights* (Intersentia 2002) 88.

⁴¹² M Yunusa ‘Strengthening Local Authorities to better meet the water challenge’ A background paper for a panel discussion at the special session organized by the World Water Council at Africities 4, held at the Kenya International Conference Centre, September 2006.

⁴¹³ UN-HABITAT, UNITAR ‘Access to Basic Services for All: Partnerships and Rights-Based Approach’ Background Paper No 4 prepared for the 12th Session of the Commission on Sustainable Development, 2004, 10.

E CONCLUSION

This chapter addressed the status of the issue of access to drinking water as a self-standing socio-economic right, derived by the UNCESCR from the broad scope of the right to adequate standard of living. It introduced the right to water into the thesis to lay the foundation for further elaboration of the research questions. It established the scope and content of the right to water, as well as the structure and nature of the obligations of the states relating to access of individuals and communities to drinking water. Primarily, the human rights framework converts the basic human need in the access to clean water in the legally binding human right that entails a range of obligations on the states and its authorities at all levels.

Specifically this chapter addressed the status of the right to water as a matter of local responsibility. It attempted to undertake a preliminary enquiry into the extent and scope of the obligations of municipalities in relation to the human right to safe drinking water and its role in the implementation of the right. The deliberations of this chapter allow the conclusion that governments at all levels are bound by the responsibilities as regards the right to water. Local authorities at all times are obligated to respect the right, as follows from the nature of the obligation and the spirit of international human rights law. The obligation to protect the right to water from the interference by third parties is also a municipal duty; however it requires adequate incorporation through the domestic legislation to facilitate compliance. The obligation to fulfill is complex in nature and only relates to municipalities if their functional remits embrace the nature and scope this duty. Implementation of the right to water is a matter of joint responsibility of the authorities charged with the public function of the water supply, and requires taking the appropriate steps to towards the full realisation of the right. In the overall process the role of national government is to oversee and facilitate implementation, to support and strengthen local government, and to provide for the enabling rights-based legislative and policy frameworks and budgetary arrangements.

The extent of global action to address freshwater crisis, as illustrated in this Chapter, holds the promising potential to guide the local action towards restoration of the current situation. Local authorities at the international events reaffirm the priority of access to safe water for their residents. A human rights based approach in this context emerges as a potentially effective framework in the local effort to address water crisis. Yet the understanding of the human rights obligations of local authorities on the issue of the access to water at the level of academic enquiry, within the practice of the UN human rights system and across the global civil society

remains poor.⁴¹⁴ The recognition of access to drinking water as a human right and a clear understanding of the respective duties it entails for the central and local authorities is lacking within nation states. In this context the perspectives of implementation of the right also remain uncertain. Increased attention to the municipalities as the key actors in implementation is critical for the effective realisation of the right. The improved understanding and practical application of the human rights principles, norms and practices at the local level is a way forward to enhance the access to drinking water for the people. With these considerations in mind, this thesis proceeds with its inquiry into the perspectives of application of the right to water at the municipal level across the human rights principles of accountability, participation and non-discrimination.

⁴¹⁴ Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments A/HRC/6/3 16 August 2007, para 55, 67, highlighting the need for clarification of the role, responsibilities and specific obligations of local authorities.

CHAPTER IV

EQUALITY AND NON-DISCRIMINATION IN ACCESS TO WATER

The human right to water guarantees equal access to the resource for everyone without discrimination. A range of local decisions affect the equal access of the population to drinking water. These include the development and adoption of the local policies on water supply, planning on the provision of water services and its implementation, setting out the tariffs and rates for the water supply, making decisions on allocating of the water resources to different users, and the others. This chapter undertakes an examination of the impacts that local decisions make on equal access to water, to attain enhanced understanding of the utility of the human rights framework in achieving the equality in the access of individuals and groups to water at the local level. With this aim, it outlines the normative dimension of the obligations of local authorities to ensure equal access to water, reflects on the evidence from different parts of the world highlighting challenges faced by vulnerable populations and addresses the human rights implications of the local tariff setting.

A NORMATIVE OBLIGATIONS OF MUNICIPALITIES

1 International Human Rights Law

Non-discrimination clauses or substantive provisions of the human rights treaties stipulating the right to water assert the normative obligation of governments to guarantee access to drinking water for everyone without discrimination on any kind of prohibited grounds.⁴¹⁵ While these provisions may not explicitly refer to local governments, they have to be complied with

⁴¹⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, article 2.2; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 2; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 1, 14.2(h); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006; entered into force 3 May 2008) 2515 UNTS 3, art 5, 28.2(a); African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 art. 14.2(c); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 art 15 (a).

equally across all the territory of states and are binding on all public authorities. Failure to comply with the provisions of the international human rights law by any organ or institution of state, including local government, amounts to violation of this law and constitutes internationally wrongful act for which the nation state is responsible.⁴¹⁶

International human rights treaties adopted in the interests of marginalised groups of population invoke the obligations of the local governments in relation to non-discrimination. According to the article 2(a) of the CERD a State party must ensure that ‘all public authorities and public institutions, national and local’ shall not engage in any act or practice of racial discrimination. In the same way, article 2(d) of the CEDAW obliges State parties to ensure that public authorities ‘refrain from engaging in any act of practice of discrimination against women’. At the regional level of the Council of Europe, discrimination by any public authority is prohibited by the Protocol 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴¹⁷

The provisions of these treaties outlaw discrimination at all levels of state, for all the public authorities and institutions, including local governments. Accordingly, municipalities of the State parties that ratified these human rights treaties should not engage in discrimination on any prescribed grounds in course of their activities, including the delivery of water services. The normative provisions of the human rights treaties on prohibition of discrimination can be considered as self-executing. Within the states that utilise the monist way of incorporation of the international laws in domestic legal systems these provisions are well suited for direct application by public authorities, even where the national legislation fails to mainstream the requirements of the international human rights treaties.⁴¹⁸ Regardless of the translation of the norms within the domestic legislation, there appears to be an undeniable human rights obligation on the local governments to refrain from discrimination in relation to access of people to drinking water.

⁴¹⁶ Refer to Chapter II, elaborating on the legal link between the public international law and local governments.

⁴¹⁷ Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened to signature on the 4th November 2000) ETS 177, art 1(2).

⁴¹⁸ S Liebenberg ‘The Protection of Economic and Social Rights in Domestic Systems’ in A Eide, C Krause and A Rosas (eds), *Social, Economic and Cultural Rights* (2nd edn Kluwer Law International 2001), 78.

2 Authoritative Interpretation by the UN Bodies

The issues of non-discrimination and equality are the cross-cutting themes in the official interpretations and authoritative recommendations issued by the UNCESCR, the UN High Commissioner for Human Rights, and the Special Rapporteur on the right to water. On several occasions these bodies addressed the responsibilities of local governments on non-discrimination and equality in access to water.

General Comment 15 on the right to water issued by the UNCESCR elaborates on the scope of the right and the extent of the corresponding obligations of governments. It explicitly locates non-discrimination as a key dimension of the right to water stipulating that ‘water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds’.⁴¹⁹

A States’ obligation to ensure the right to access water, water services or facilities on a non-discriminatory basis is interpreted by the UNCESCR as the core obligation of immediate effect.⁴²⁰ The category of ‘core obligation’⁴²¹ aims to ensure the satisfaction of, at the very least, minimum essential levels of the right to water. Non-discriminatory access in this regard is regarded as mandatory for achieving at least the minimum level of the right for everyone.

In order to achieve equality in access to drinking water for all, governments must pay special attention to vulnerable and marginalised groups of their society who face challenges in exercising this right, such as women, children, refugees, asylum seekers, internally displaced persons, prisoners, minority groups, indigenous peoples, or migrant workers.⁴²² The municipalities responsible for the delivery of water service are immediately involved in the provision of access to service for these groups, and their actions and decisions often raise the serious equality concerns, as illustrated and examined in the below sections of this Chapter.

General Comment 15 does not elaborate on the roles and obligations of local authorities in relation to the right to water to any significant extent.

⁴¹⁹ UNCESCR ‘General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’ (20 January 2003) UN Doc E/C 12/2002/11, para 12(c) (iii).

⁴²⁰ *ibid* para 37(b).

⁴²¹ Introduced by the UNCESCR in ‘General Comment 3: The Nature of States’ Parties Obligations’ (14 December 1990) UN Doc. E/1991/23.

⁴²² General Comment 15 (n 419) para 16.

Nevertheless, the UNCESCR implies the obligation of municipalities not to discriminate through highlighting the duty of the states to ensure that their local authorities do not engage in discriminatory practice.⁴²³ In her annual report on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation the UN High Commissioner for Human Rights supports this interpretation and brings it a step forward.⁴²⁴ She refers to local authorities as agents acting to ‘guarantee equal access to affordable and physically accessible water and sanitation’.⁴²⁵ These interpretations taken together suggest the duty of local authorities to ensure equality in access to water services and to not engage in discrimination.

Both interpretations of the UNCESCR and of the UN High Commissioner similarly emphasise the state party obligation to oversee local governments. The violation of the obligation to guarantee access to water without discrimination, which is effectively derived from the article 2.2 of the International Covenant of the Economic, Social and Cultural Rights, can be conducted via direct action or omission by states through their authorities at the local level. And it is ultimately the nation state that is accountable for discrimination taking place at the local level. The UNCESCR and the UN High Commissioner authoritative interpretations are issued with consideration of this understanding.

The Special Rapporteur El Hadji Guisse called on local governments to ‘[e]stablish a regulatory system for private and public water and sanitation service providers that requires them to provide physical, affordable and equal access to safe, acceptable and sufficient water.’⁴²⁶ This clarification reiterates the obligation of the local authorities, contracting out the service provision to the third parties, to protect the right to water and to ensure that third parties do not compromise the equal access to the services.

The UNCESCR in its ‘General Comment 20: Non-discrimination in economic, social and cultural rights’ encourages states to adopt measures to attenuate or suppress conditions that perpetuate inequality. Such measures would be legitimate ‘to the extent that they represent reasonable, objective

⁴²³ *ibid* para 51.

⁴²⁴ Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments A/HRC/6/3 16 August 2007.

⁴²⁵ *ibid* para 39.

⁴²⁶ UNCHR ‘Realization of the right to drinking water and sanitation’ Report of the Special Rapporteur El Hadji Guisse (11 July 2005) UN Doc E/CN.4/Sub.2/2005/25 (hereinafter Draft Guidelines’ para 2.3 (e).

and proportional means to redress de facto discrimination⁴²⁷ and can be discontinued where equality has been effectively achieved, or may be implemented on the permanent basis, such as facilitating physical access to water for the persons with disabilities. As illustrated further in this chapter, local governments can be authorised to take measures of this kind, for instance on tariff setting.

Decisions on budget allocations and investments in water services have a crucial impact on equal access of the population to the service. For example, such funding can disproportionately favour better off members of society, or it may be allocated to poor rural areas. General Comment 3 in 1990 clarified that to be compatible with the commitments on economic, social and cultural rights, the government's budgetary strategies shall address specific needs of disadvantaged groups and 'even in times of severe resources constraints the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.⁴²⁸ This interpretation is essentially applicable to those municipalities, who regularly approve local budgets, allocate investments into water infrastructure, prioritise upgrade of services and make other financial decisions affecting access to resource for different groups of population. In the *Mazibuko v City of Johannesburg* the Supreme Court of Appeal addressed the City policies on the matter of their compliance with the constitutional right to water for the poor households, and requested the City council to 'formulate a revised water policy ... in so far as it can reasonably be done having regard to its available resources'.⁴²⁹

Finally, General Comment 15 recommends to governments when making decisions on allocation of water resources for drinking and domestic purposes between competing users to ensure that equal access to water for all members of society would not be compromised.⁴³⁰ This recommendation is equally applicable to municipalities responsible for allocation of the water resource uses, particularly in the countries with scarce resources of potable water.

⁴²⁷ UNCESCR 'General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/20 2 July 2009, para 9.

⁴²⁸ General Comment 3 (n 421) para 12.

⁴²⁹ *City of Johannesburg v Mazibuko* (489/08) [2009] ZASCA 20 para 43.

⁴³⁰ General Comment 15 (n 419) para 14.

3 Domestic Legislation on Equality and Non-Discrimination

States are under obligation not to engage in discrimination and provide individuals and groups with equal access to drinking water. To comply with this obligation states must ensure that their domestic legal order explicitly enshrines the principles of non-discrimination and equality across all legal instruments that directly or otherwise regulate access of individuals and groups to drinking water. This section illustrates a translation of these principles in domestic constitutional and statutory legislation.

(a) Constitutional provisions

Principles of non-discrimination and equality are commonly reaffirmed in the national constitutions and apply to all public authorities of the state. A non-discrimination clause in constitutions may be articulated in the form of a general statement or to be formulated as a prohibition for public authorities to discriminate or to establish arbitrary differences. According to the article 19.2 of the Constitution of Chile, '[n]either the law nor any authority may establish arbitrary differences'. Antigua and Barbuda Constitutional Order 1981, Constitutions of Bahamas, Zimbabwe share identical provision: 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority'.⁴³¹ As a general rule any constitutional non-discrimination provisions inevitably apply to and bind all local authorities across the state territory.

The non-discrimination clauses may be supported by an explicit requirement for public authorities to take measures to ensure equality. For example, the Swedish Constitution requests the public institutions 'to combat discrimination of persons' and 'to promote the opportunity for all to attain ... equality in society'.⁴³² The local governments' responsibility to follow up with such provisions is implied; however the specific statutory legislation or policy measures would be sought for further clarification of the related responsibilities.

Ideally constitutional provisions shall obligate states to guarantee equal access to drinking water without discrimination on any grounds. The Constitution of the Gambia suggests a good example of such norm,

⁴³¹ Constitution of Bahamas art 26(2), Constitution of Zimbabwe art 23 (b), Antigua and Barbuda Constitutional Order 1981 art 14.

⁴³² Constitution of Sweden, art 2.

providing that ‘[t]he State shall endeavour to facilitate equal access to clean and safe water ... to all persons’.⁴³³ The constructive feature of this provision is creating a positive obligation on the state and its authorities to guarantee equal access to water.

Constitutional provisions stipulating non-discrimination in access to public services, by definition apply to public water services. The preamble of constitution of Senegal, for example, proclaims equal access to public services for all citizens.⁴³⁴ The constitution of Nepal prohibits denying the access to public services or utilities on the ground of caste or tribe.⁴³⁵ While these norms are essentially important, they do not guarantee equal access to privatised water services if these become privatised.

(b) Domestic laws

Domestic legislation is a vital instrument to advance a constitutional guarantee of equality and non-discrimination and translate its application to the matter of the access to drinking water. At the same time, discrimination may be directly manifested in domestic laws, for example when only citizens of the state are entitled to access water services. Similar issues can be present in the local by-laws and regulations.⁴³⁶ In this regard it is crucial that legal instruments regulating access to water issued at any level are revised on the matter of their compliance with the international or constitutional requirements on non-discrimination.

A number of laws from different countries effectively outlaw discrimination in relation to access to services, including water and sanitation. Canadian human rights legislation elaborates on ‘equal treatment with respect to services, goods and facilities’⁴³⁷, and prohibits a denial of access to those on prohibited grounds of discrimination.⁴³⁸ In Germany the Municipal Acts of the states declare citizens’ entitlement to use municipal facilities on a non-discriminatory basis.⁴³⁹

⁴³³ Constitution of the Gambia 1996, as last amended 2001, art 216.

⁴³⁴ Constitution of the Republic of Senegal, 2001, as last amended by Law 2007-26 of 25 May 2007.

⁴³⁵ Interim Constitution of Nepal 2007 art. 14 (2).

⁴³⁶ Such as requirement to hold the ownership title over the house in order to connect to the service.

⁴³⁷ Ontario Human Rights Code, 1990 as amended in 2006, art 1.

⁴³⁸ Canadian Human Rights Act, 1985 as amended in 1998, art. 5.

⁴³⁹ Human Rights and Access to Water: Comments by the Federal Republic of Germany pursuant to op. 1 of Decision 2/104 of the United Nations Human Rights Council (2007), 14.

Most often the laws request public service providers to avoid discrimination in access to and price for the service.⁴⁴⁰ To ensure equality of access to service, some laws allow for differential treatment of the groups in disadvantaged situation, particularly with regards to pricing for water. The Law on the Regulating Authority for Public Services in Costa Rica declares that ‘[t]he differential tariffs established for social reasons shall not constitute discrimination’.⁴⁴¹ Similarly, the South African Municipal Systems Act allows the reasonable differentiation of tariffs between different areas and categories of users.⁴⁴² The norms of this kind are binding on the local authorities that carry out the responsibility for the service provision and provide legitimate opportunity to enhance equality in access to drinking water.

Mexican Water Law requests the authorities to observe the principle of non-discrimination in the formulation, execution and monitoring of the water management policies, stipulating that ‘the water infrastructure and services shall be accessible for every person without discrimination, including the vulnerable or marginalized population’.⁴⁴³ Provisions of this type effectively mainstream the principles of equality and non-discrimination into the local water sector and are binding for the local authorities responsible for policy making on management of water resources.

B ATTENTION TO MARGINALISED GROUPS

The analysis of the human rights obligations of local authorities cannot be undertaken comprehensively in isolation from the assessment of their actions. Often discrimination and inequality of access to water is perpetuated by local government practices appearing neutral on the surface but obscurely discriminating against individuals, who already suffer historical prejudice and social exclusion from the mainstream society. This section reflects on the problematic of the access to water for the marginalised groups resulting from practices of municipalities, in order to establish the challenges and perspectives of compliance with human rights principles of non-discrimination and equality at the level of local government.

⁴⁴⁰ Costa Rica Law on the Regulating Authority for Public Services, Law 7593 of 9 August 1996, as amended in 2002 art 12; Colombia Law 142 of 11 July 1994, establishing the regime for public household services; Guyana Public Utilities Commission Act No. 10 of 1999 s 34.

⁴⁴¹ Costa Rica Law on the Regulating Authority for Public Services, Law 7593 of 9 August 1996, as amended in 2002 (Unofficial translation) art 12.

⁴⁴² South Africa Municipal Systems Act 32 of 2000 s 74.

⁴⁴³ Water Law of the Distrito Federal, Mexico, 2003 (Unofficial translation), article 6.

1 Informal Settlements

The poor living in slums represent 42 per cent of the urban population in developing world.⁴⁴⁴ Because slum-dwellers do not hold legitimate tenure over the land and the building they occupy, they are often denied public water services by local authorities,⁴⁴⁵ who are not willing to include these settlements in the development plans and to connect their residents to water and sanitation networks. Often the municipalities are concerned that connection to the service may legitimise the settlement and occupation of land, which was established in an irregular manner.⁴⁴⁶ As a result, residents have to fetch water from unprotected sources or buy it from vendors at an overpriced rate.

It may be the case that domestically these local practices are legitimate and carried out in compliance with national law and policy regulations. However, from the human rights perspective a denial to connect informal settlements to water and sanitation services and facilities constitutes discrimination. In this regard the UNCESCR requests that ‘informal human settlements ... should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status’.⁴⁴⁷ Several encouraging examples of successful lobbying of local authorities for provision of basic services to informal settlements emerge from Buenos Aires.⁴⁴⁸

2 Roma Communities

In a number of European countries, including Serbia, Montenegro, Slovenia, France, where the majority of population enjoy access to drinking water and sanitation, systemic discriminatory practices of national and local authorities exclude Roma population from adequate access to clean drinking water. Similarly with the case of informal settlements, discrimination of Roma in terms of access to municipal water service occurs due to the lack of

⁴⁴⁴ Office of the United Nations High Commissioner for Human Rights, UN HABITAT, WHO ‘The Right to Water: Fact sheet No. 35’ (2010).

⁴⁴⁵ Water Aid Nepal ‘Improving Water and Sanitation Governance through Citizen’s Action’ 2008.

⁴⁴⁶ M Langford ‘The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?’ (2005) 21(2) *Water Resources Development* 273, 278.

⁴⁴⁷ General Comment 15 (n 419) para 16 (c).

⁴⁴⁸ F Almansi and others ‘Everyday Water Struggles in Buenos Aires: The Problem of Land Tenure in the Expansion of Potable Water and Sanitation Service to Informal Settlements’ (2003) *WaterAid and Tearfund*.

legitimate tenure over the land they occupy or construction permits for the buildings they live in. Another reason for denial is unemployment status of Roma and their inability to pay for the service.⁴⁴⁹

The devastating and humiliating impact of the lack of access to water on Roma communities is being well captured by the UN Special Rapporteur on the Human Right to Water and Sanitation Catarina de Albuquerque during her mission in Slovenia.⁴⁵⁰ She evidenced that residents in Roma settlements either use water from the polluted source or fetch water from the stream about ten kilometres away, bathing in streams at the risk of being chased by the police.⁴⁵¹ Deplorable hygienic conditions and absence of sanitation facilities affect Roma health, prevent children from attending school and discourage adults from taking up employment.⁴⁵² Local authorities in these countries ultimately decide on connection to their services. In denying the access to water services to Roma communities they effectively violate their right to drinking water. In a discussion paper on the issue of access of Roma communities to drinking water Cojocariu from the European Roma Rights Centre refers to the municipalities as ‘the main actors engaging in discriminatory policies against Roma’.⁴⁵³

At the same time an alternative practice exists where local governments act in compliance with the principles of equality and non-discrimination and develop solutions to ensure access to water for Roma population. In Hungary the disadvantaged Roma settlement in Keteli get free water from the municipal public taps that are installed within the distance of 150 metres from the households.⁴⁵⁴ In Slovenia the political will of local counsels led to positive change in access of a number of Roma communities to municipal water systems. Local authorities have waived the requirements for connection to water networks, such as having the legal ownership over the land and the building permits for houses.⁴⁵⁵ A long-term solution is being developed in locality Trebnje, where the municipality is working with

⁴⁴⁹ Ina Zoon, *On the Margins: Roma and Public Services in Romania, Bulgaria, and Macedonia*, Open Society Institute, 2001.

⁴⁵⁰ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Addendum Mission to Slovenia. A/HRC/18/33/Add.2 4 July 2011.

⁴⁵¹ *ibid* para 34-35.

⁴⁵² *ibid* para 36.

⁴⁵³ C Cojocariu ‘Minorities and the Right to Water and Sanitation: The Case of the Roma’ European Roma Rights Centre, Budapest, Hungary in S Hoffman *The implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) Solidarite Eau Europe, 14.

⁴⁵⁴ E Somogui ‘Case Study on the Right to Water and Sanitation in Hungary: The example of the city of Nyiregyhaza’ in S Hoffman *The implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) Solidarite Eau Europe, 21.

⁴⁵⁵ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Addendum Mission to Slovenia. A/HRC/18/33/Add.2 4 July 2011, para 39.

community to regularise the tenure status of the land and buildings of Roma households.⁴⁵⁶

As a matter of human rights law, the access of the disadvantaged Roma communities to water should not solely depend on the goodwill of municipalities. The core root of discrimination is that the access to drinking water for Roma communities is not guaranteed in their countries. National governments effectively allow discrimination practices by local authorities in violation of their human rights obligation to protect Roma's access to water⁴⁵⁷ and to ensure that municipalities do not engage in discrimination.⁴⁵⁸ Local initiatives to facilitate equal access to water for Roma are encouraging practice, compatible with the human rights principles of equality and non-discrimination. It also demonstrates the remarkable example of the municipal human rights compliance superseding the one of the national government.

3 Traveller Communities

Members of Traveller community also experience difficulties in access to drinking water. In 2000 a quarter of Traveller families in Ireland were living in temporary roadside encampments without access to water.⁴⁵⁹ The 2006 estimate showed that 295 temporary housing units of Irish travellers have no access to piped water.⁴⁶⁰ In 2011, 168 traveller households had no access to piped water and 265 households had no sewerage facility.⁴⁶¹ The UNCESCR expressed its concern on this issue in 2002 and recommended that Ireland enhance its efforts to provide alternative accommodation for these families.⁴⁶² According to the draft third periodic report of Ireland to the UNCESCR the percentage of families living in unauthorised sites in 2009 had dramatically decreased to 4.7% which suggests that the situation with access of the community to drinking water has improved.⁴⁶³

⁴⁵⁶ *ibid* para 40.

⁴⁵⁷ General Comment 15 (n 419) para 23.

⁴⁵⁸ *ibid* para 51.

⁴⁵⁹ First Progress Report of the Committee to monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, 5 December 2000, Stationery Office, 17.

⁴⁶⁰ Census 2006 Volume 5 – Ethnic or Cultural Background (Including the Irish Traveller Community) (Stationery Office, Dublin, Ireland) ISBN 0-7557-7194-X, 62.

⁴⁶¹ Ireland, Census 2011 Profile 7 Religion, Ethnicity and Irish Travellers - Ethnic and cultural background in Ireland. Statistical tables, Table 22, 71.

⁴⁶² Concluding observations of the Committee on Economic, social and Cultural Rights: Ireland E/C.12/1/Add.77 5 June 2002 paras 20, 32.

⁴⁶³ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant Third periodic report of States parties, Ireland (draft) para 642 <<http://www.dfa.ie/home/index.aspx?id=319>> (25 July 2013).

According to the Localism Act 2011 local authorities in the UK are empowered to make decisions on the accommodation needs of Travellers. Despite the protest of traveller communities, the civil society and the UNCERD mass eviction from the Dale Farm Travellers site by Basildon Council left four hundred people effectively without the access to water and sanitation. Serious health concerns arose from the works of local authority on the site, where two septic tanks were fractured resulting in raw sewage contaminating nearby water supplies for the neighbourhood traveller sites.⁴⁶⁴ In its highly critical response to the incident the Council of Europe Commissioner for Human Rights called on the national government to ensure that local authorities are made aware of the state's obligation to respect human rights of Travellers.⁴⁶⁵

4 Rural People

Rural communities in the developing world experience low levels of access to improved source of drinking water and sanitation.⁴⁶⁶ The inequality between rural and urban population in terms of access to adequate water is also evidenced in the developed countries.⁴⁶⁷ The challenge of access is indeed a governance issue, aggravated by isolation, poverty and powerlessness of rural communities. The local authorities, who have the responsibility for water and sanitation in the rural areas, are one of the primary stakeholders accountable for adequate access to resource. Municipalities set priorities and decide which communities to be served first when make ultimate decisions on local development and investment in water works in local policies and budgets. Rural settlements are easily forgotten since they are rarely given opportunity to articulate their needs, may not be organised and capable of engaging in negotiation with local authorities and to influence budget decisions.⁴⁶⁸ In the meantime dense urban settlements are more readily prioritised for investment as they have higher political significance for the elected members of local councils.⁴⁶⁹

⁴⁶⁴ 'Dale Farm: Post Eviction Winter 2011/2012' An update by the Irish Traveller Movement in Britain, 2012.

⁴⁶⁵ See

<https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH%282012%2914&Language=lanEnglish&Ver=original&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged> (25 July 2013).

⁴⁶⁶ WHO and UNICEF *Meeting the MDG drinking-water and sanitation targets: the urban and rural challenge of the decade* (2006).

⁴⁶⁷ FIAN Spain 'Compliance with the Human Right to Water by the Spanish State', abstract of the Parallel Report (2004).

⁴⁶⁸ MD Fuente and O Campaini 'The Right to Water, the Bolivian Case' Green Cross International (2006) 7.

⁴⁶⁹ A Jouravlev *Drinking Water Supply and Sanitation Services on the Threshold of the XXI Century* (UN Publication 2004).

5 Poor People

Poor communities traditionally experience inequalities in their access to basic needs including drinking water and sanitation. For instance in Peru, access to water is universal for the richest population, and only a third in the poorest households have access to safe water.⁴⁷⁰ The areas where poor live are less likely to get budget allocations for new drinking water infrastructure or for upgrade of faulty services and facilities.

Another challenge for the poor to access water is a high cost of connection to service networks. While the tariffs for water service for the connected households may be affordable and even subsidised, the price for the actual connection can prevent poor individuals from availing of the service. According to the UNDP '[i]n Manila the cost of connecting to the utility represents about three months' income for the poorest 20% of households, rising to six months' in urban Kenya.'⁴⁷¹ WaterAid in Nepal observed the exclusion of the majority of extremely poor residents from connection to sanitation service as they cannot make the required contribution in either cash or labour.⁴⁷²

Unaffordable charges seriously impact the access to drinking water for poor. Not connected to water mains, they have to pay a high price for water of susceptible quality delivered by private vendors. Water vendor prices in slums in developing countries are up to sixteen times higher than public utility prices, because water as a good passes through the number of intermediaries.⁴⁷³ Even if connected to the public mains the poor end up paying the highest tariffs. According to the UNDP the poor residents in Accra pay ten times more for their water than those living in high-income areas.⁴⁷⁴ Setting water service tariffs and rates is often the responsibility of the local authorities, and this task involves important human rights implications of equality and affordability of the access to water.⁴⁷⁵

As a matter of the human rights obligation local authorities have to address the inequality in access to water and sanitation for the poor when making decisions on investment in water works, setting out the local rate for connection to the service and service tariffs, or regulating the third parties that are involved in the water service provision in their locality. Listening of the poor in the decision-making on water issues is another avenue for the

⁴⁷⁰ UNDP *Beyond Scarcity: Power, Poverty and the Global Water Crisis* Human Development Report 2006 (New York 2006) 50.

⁴⁷¹ *ibid* 10.

⁴⁷² Water Aid Nepal (n 445).

⁴⁷³ *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (n 470) 52.

⁴⁷⁴ *ibid* 53.

⁴⁷⁵ Refer to part C of the current Chapter.

enhancing equality in access to water for these communities and should be effectively utilised by local authorities in order to comply with the human right to water requirements.

6 Conclusion

Municipalities carrying out the responsibility for water supply to local communities often affect equal access of vulnerable populations to sufficient safe drinking water. Poor people facing high water charges set out by local government, or by other service providers under municipal permission, cannot afford water in sufficient quantity. Informal settlements, Roma and Traveller communities can be denied access to water by local authorities due to their 'irregular' housing or residency status. Local regulations prohibiting certain communities to connect to service, manifests formal discrimination towards these groups. People with disabilities face challenge in terms of physical access, while it is a matter for the responsible local council to consider their particular needs in policy-making and implementation.

Municipalities often fail to address the specific needs of vulnerable and marginalised groups in terms of their access to water and provide the sustainable solutions. The needs of people with disabilities in the facilitated physical access to water may never get addressed due to their invisibility in local political life and poor opportunities for their participation. Exclusion of informal settlements, Travellers, Roma, rural and poor communities is perpetuated by the stigmatising attitudes of local government and mainstream society towards the 'unpopular' communities, as well as by the limited opportunities for participation of these groups in decision making. The allocation of funds and extending services to 'unwelcome' communities may be a difficult choice for local politicians in a fear of disapproval by majority population.

In response to this situation a human rights framework, in unequivocal manner, seeks to address specific needs of the different categories of population and to attend to the most vulnerable and marginalised in order to guarantee their equal access to water at the local level. Equality and inclusion emerge as the guiding principles of the decision-making on water for the local governments who embrace human rights as a matter of priority and commitment. Public authorities at all levels are bound with the strict obligation not to engage in discrimination. Municipalities responsible for the implementation of the right to water must ensure that their policies and regulations do not exclude people from access to water on the prohibited grounds, but rather facilitate the equal access. In this context Special

Rapporteur on the human right to safe drinking water and sanitation highlighted the practice of Japanese municipalities to ensure the public facilities for water and sanitation are accessible for persons with disabilities.⁴⁷⁶

C THE PRICE OF WATER: IMPLICATIONS FOR EQUAL ACCESS

Equal access to adequate amount of water should not be compromised by high water charges set out locally. The interrelationship between equality and affordability is an issue that is worth further examination within the context of this chapter. According to the UNDP ‘inequality in water provision relates not just to access ... but also to price’.⁴⁷⁷ Economic accessibility is one of the key dimensions of the normative content of the human right to drinking water, which entails that ‘[w]ater, and water facilities and services, must be affordable for all’.⁴⁷⁸ It requests the service tariffs to be pro poor and implies subsidising disadvantaged households or communities according to their ability to pay. High prices or service charges affect the capacity to purchase adequate amount of water and deepen inequality in enjoyment of the right. In many countries local authorities responsible for drinking water have powers to determine tariff policies, or to set tariffs according to the local circumstances.⁴⁷⁹ Their decision-making on this matter carries direct human rights implications of affordability and ultimately impacts on equal access to water.

The human rights perspective on equality requires the local tariff policy not to disproportionately burden the poor with water costs compared to wealthier households. To this end the differential treatment can be effectively used by local governments as a legitimate means of maintaining of equality in society and addressing the needs of the poor in water with careful consideration of their ability to pay. Differentiation of water tariffs in local settings has to be undertaken cautiously as to avoid deepening of inequality. The Japanese municipality act imposed 3.57 times higher water rates on people not registered as residents which had been successfully

⁴⁷⁶ Human Rights Council United Nations Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque Addendum Mission to Japan A/HRC/18/33/Add.3 4 July 2011 para 41.

⁴⁷⁷ *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (n 470) 52.

⁴⁷⁸ General Comment 15 (n 419) para 12(c)(ii).

⁴⁷⁹ For example in Sri Lanka, Hungary, Ghana, Australia, Mexico or Philippines, Romania, Spain, Japan, or South Africa.

challenged in the court.⁴⁸⁰ The Municipal Systems Act in South Africa allows for the local tariff policies to differentiate between users, services, geographical areas provided that the differentiation does not amount to unfair discrimination.⁴⁸¹ This provision creates an opportunity for the local government to ensure access to water on equal footing. Yet the discretionary powers always carry the risks of misuse, and evidence exists of the tariff across the South African municipalities within the comparable settings range from truly pro-poor to alarmingly the opposite.⁴⁸² The Constitutional Court of South Africa in the case of *City Council of Pretoria v Walker* addressed a situation where a municipality applied effectively lower rates for the residents of a former black township than for occupants of formerly-white areas. The Constitutional Court held that cross-subsidisation and differences in charges were acceptable.⁴⁸³

The differential treatment applied through the tariff systems subsidising disadvantaged users is a potential mechanism to enhance equal access to water for all. Generally, the tariff structures incorporate the elements of subsidising in various ways, and deliver diverse equality outcomes. Subsidy for water consumption can be provided to all without differentiating between rich and poor, as is mostly the case in South Asia. It can be targeted at the poor as for instance in Chile, where only a means-tested household can receive water at a reduced price. Under the system of progressive tariff, subsidy may be provided for the set amount of water used in a given calendar period, while the exceeding consumption is charged at a higher rate. The initial set amount of water can be provided free of charge to the household, as is the case in South Africa. This system, however, is of little benefit for the larger families who consume more water than the subsidised allowance. The progressive tariff system that takes into account the number of people in the household and allows for the subsidised amount of water per person has a greater potential to enhance equal access to water as, for example, in Brussels and other regions of Belgium.⁴⁸⁴

Water meters are essential for the operation of the subsidised tariffs. Recognizing the importance of metering in relation to affordability and

⁴⁸⁰ Information provided in the submission by the Permanent Mission of Japan to the International Organisations in Geneva to the High Commissioner for Human Rights on her request to participate in consultation on human rights and access to water and sanitation, 2007.

⁴⁸¹ South Africa Municipal Systems Act 32 of 2000 s 74.

⁴⁸² K Tissington and others 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008 Centre for Applied Legal Studies Johannesburg, Centre on Housing Rights and Evictions, Geneva Norwegian Centre for Human Rights) 4.

⁴⁸³ *City Council of Pretoria v Walker* CCT 8/97 [1998] ZACC 1.

⁴⁸⁴ H Smets 'Le droit à l'eau dans les législations nationales' 2005, cited in the C Dubreuil 'The Right to Water: From Concept to Implementation' (World Water Council 2006), 33-34.

efficient use of water, the Hungarian municipality of Nyíregyháza in the early nineties implemented a subsidy programme to support poor households to install meters.⁴⁸⁵ In contrast to the standard water metering, the practice of the pre-paid water meters apparently contradicts with human rights standards.⁴⁸⁶ It directly violates the human right to water since it allows disconnection from supply of the household unable to pay and leaves it without minimum water. Furthermore, through the deprivation of individuals from the resource most essential to maintaining of physical health, the practice of pre-paid meters compromises the human right to health and right to life. Major cholera outbreak in uThungulu region of KwaZulu Natal in South Africa in 2000-2002 was primarily caused by conversion of the free communal taps to pre-paid meters by the local authority and had resulted in 259 deaths and 113 966 infections.⁴⁸⁷ A discriminatory policy of the City of Johannesburg imposing the pre-paid meter devices in the poor black residents and giving unlimited access to water for the better-off communities was successfully challenged in the domestic courts.⁴⁸⁸ The Constitutional Court, which some regard as a retrogressive step, supported the City policy on pre-paid meters and reversed the decisions of the lower courts, mainly because it was unclear what quantity of free water would be necessary for larger households.⁴⁸⁹

Affordability is an acute problem for people who do not have connection to the service and have to purchase water from the private vendors.⁴⁹⁰ In some cases the costs of connection to municipal water networks can be unaffordable for a household. Local governments can resolve the challenge through subsidising of the connection to main service and to enhance equal access to water. In the absence of connection to public water service, the other interim solutions such as installation of communal taps, public fountains or regular delivery of water in tanks can be provided for the people in need by the local authorities responsible for the water supply on their territories to ensure equal access to safe water for all.

⁴⁸⁵ E Somogui 'Case Study on the Right to Water and Sanitation in Hungary: The example of the city of Nyiregyhaza' in S Hoffman *The implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) Solidarite Eau Europe.

⁴⁸⁶ D Barret and V Jaichand 'The Right To Water, Privatised Water And Access To Justice: Tackling United Kingdom Water Companies' Practices In Developing Countries' (2007) 23 *South African Journal on Human Rights* 543, 350-352.

⁴⁸⁷ *ibid* 551.

⁴⁸⁸ *Mazibuko v City of Johannesburg* (06/13865) [2008] ZAGPHC 106; *City of Johannesburg v Mazibuko* (489/08) [2009] ZASCA 20.

⁴⁸⁹ *Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

⁴⁹⁰ See n 471-475.

D CONCLUSION

Decentralisation of water services to local governments suggests that municipalities are best placed to identify the needs of their communities in water and to work out the solutions responsive to local contexts. Delegated powers and responsibilities on drinking water supply allow prioritising of certain areas or populations in terms of delivery or upgrade of the services and facilities. Local decision-making on development of water policies, planning of water services, setting priorities for budget allocation and investment in water and tariff setting can greatly enhance or otherwise hamper equal access to water services and facilities for vulnerable and marginalised populations. The empirical evidence illustrated in this Chapter reveals the systematic engagement of municipalities in the practice of discrimination through negligence or direct denial of water services to the disadvantaged communities. The contrasting examples from Slovenia highlight the extent of power local authorities possess to ultimately decide on the people's access to water. It demonstrates how access to water for local communities depends on the goodwill of local politicians in the absence of national policy and legislation safeguarding their interests.

Access to water is an essential human right of everyone and should not be selectively granted by the local authorities. There is a self-evident obligation on the local government to adhere to the human rights standards and principles of equality and non-discrimination, which follow from the international human rights commitments of the state, and commonly reiterated in the domestic legislation. The unequivocal obligation not to discriminate prohibits local authorities from denying connection to undesirable communities, to set unfair tariffs and to carry out any other differential treatment based on the prohibited grounds and affecting the equal access to water. The human rights principle of equality requires positive action from the local authorities and makes it a matter of municipal obligation, not merely the goodwill, to attend to the 'least served', poor, vulnerable and marginalised. Municipalities operate in a strategic position of public authority obligated and capable to address such needs through the local regulations and policies, planning and implementation of water services works and decisions on water tariffs.

The barriers to equal access to water are not only political and legal issues, but also financial and budgetary. The human rights framework challenges the unjust distribution of resources: it requests the local budget decisions to consider situations and needs of disadvantaged members of society even in times of severe resources constrains by adoption of low-cost targeted

programmes.⁴⁹¹ It requests that public funds are distributed in a fair way as to guarantee access to water to the least served population and demands the local budgets prioritise the communities and individuals without improved access rather than the privileged better off settlements.⁴⁹² At the same time national governments are under the obligation to ensure the municipalities are financially capable to deliver services to local population.⁴⁹³

The national government, acting as the main guarantor of rights across its entire territory, holds the strategic role to oversee and measure the human rights impact of local decision-making. The national government bears the ultimate human rights obligation to protect its people from discrimination by local government. In this regard the statutory legislation containing strong anti-discriminatory provisions is the key, as well as the national water strategies and policies formulated with consideration of principle of equality and setting the needs of vulnerable populations as the priority targets. The national government appears as the primary violator of the norms and principles of the right to water where the local authorities act according to the central instruction. For instance, if national government decides on tariff policy, subsidies and service rates, local authorities are merely responsible for its accurate administration and have no power to decide on its requirements. If the national policy compromises the human right to water and perpetuates inequalities in access to water, the local authorities implementing the policy share the responsibility for the violation of the right with the national government.

A human rights framework prohibits discrimination of vulnerable and disadvantaged communities, and obliges governments at all levels to identify and prioritise their specific needs and to work out the solutions to ensure sustainable equal access to water for all.⁴⁹⁴ To this aim the rights-based mechanisms of participation and accountability accessible to ordinary people are crucial to ensure the national measures on equality and non-discrimination are implemented at the local level and the concerns of the disadvantaged groups are heard. The application of the human rights standard and principle of participation at the local level and its utility for the issue of the access to drinking water is considered in the following chapter of this thesis.

⁴⁹¹ General Comment 3 (n 421) para 12.

⁴⁹² V Roaf, A Khalifan and M Langford, 'Monitoring Implementation of the Right to Water: A Framework for Development Indicators' (2005) 14 *Global Issue Papers* 1, 27, 35.

⁴⁹³ General Comment 15 (n 419) para 51.

⁴⁹⁴ Draft Guidelines (n 426) para 2.3 (a).

CHAPTER V

RIGHTS-BASED PARTICIPATION ON LOCAL WATER ISSUES

Participation is an international human rights standard and is a key cross-cutting principle of the human rights framework. Water governance and development frameworks in their own language recognise the importance of people's participation in decision-making processes around water issues. This principle is implemented in practice through a variety of policy agendas, mechanisms, and approaches.⁴⁹⁵ This Chapter aims to elaborate on the perspectives and practices of participation in local decision making with a view to assess these developments from the human rights-based perspective. In particular, the attention is focused on the role of municipalities in the local participatory processes and how this role does correspond with their human rights responsibilities on the right to water. Overall this part of the thesis attempts to evaluate features of public participation as a core operational principle of the rights-based approach to drinking water at the level of local government.

A PUBLIC PARTICIPATION IN THE WATER SECTOR

1 Operational Context

Public participation is a notion that is increasingly seen as an essential feature of modern society. It is envisaged as an active involvement of public in politics, development, or community. Participation is explicitly reaffirmed by a number of authoritative institutions, international and regional processes. The European Union recognises participatory democracy as one of the key dimensions of the democratic life.⁴⁹⁶ Participation is explicitly stipulated as a human right by the international

⁴⁹⁵ For instance, integrated water resource management and good governance agendas, sustainable development and human development frameworks, EU Parliament and Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy (signed on 23 October 2000, entered into force 22 December 2000) L 327.

⁴⁹⁶ The Lisbon Treaty enshrines the complementarity between representative democracy and participatory democracy, arts 10, 11 of Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (13 December 2007) 2007/C 306/01.

and regional human rights treaties.⁴⁹⁷ Academia has been elaborating on the perspectives of public participation through the interrelated disciplines of political, legal and social studies.⁴⁹⁸

Participation is a well-recognised feature of the theory and practice of the water sector. It has been fledged out as a requirement bringing legitimacy to the decisions around use and management of the water resources and manifests itself through a number of formats at the different levels of the responsible authorities. Driven by several agendas embedded in the international water and environmental law and policy⁴⁹⁹, the participation mechanisms in the water sector are established to reflect on a variety of water resource management and environmental issues. It is not clear though whether the existing mechanisms are adequate for the articulation of the public concerns on the particular issues of the access to drinking water and sanitation. Additionally, the public can articulate their water related concerns through the broader, not necessarily water-related, participatory mechanisms available at national, sub-national, local and community levels. In the context of this dissertation these are the essential points to bear in mind in the course of the evaluation of the perspectives of the rights-based participation in local decisions on the access to drinking water.

⁴⁹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1973) 999 UNTS 171 (ICESCR) art 25(1); International Convention for the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 5; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 7, art 14.2(a).

⁴⁹⁸ J Carter and J Howe 'Stakeholder Participation and the Water Framework Directive: The Case of the Ribble Pilot' (2006) 11 (2)2 Local Environment 217; P Cullet and A Gowlland-Gualtieri 'Water Investments and the Participation of Local Communities' in E Brown Weiss, L Boisson de Chazournes and N Bernasconi-Osterwalder (eds) *Fresh Water and International Economic Law* (Oxford: Oxford University Press 2005) 303; C Brannstrom, J Clarke and M Newport 'Civil Society Participation in the Decentralisation of Brazil's Water Resources: Assessing Participation in Three States' (2004) 25(3) Singapore Journal of Tropical Geography 304.

⁴⁹⁹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998; entered into force on 30 October 2001) 2161 UNTS 450 (Aarhus Convention); EU Parliament and Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy (signed on 23 October 2000, entered into force 22 December 2000) L 327; Rio Declaration on Environment and Development, 1992, principle 10; 'Plan of Implementation of the World Summit on Sustainable Development' Report of the World Summit on Sustainable Development, Johannesburg, South Africa (4 September 2002) UN Doc. A/CONF.199/20, para 25(b).

2 Substantive Characteristics and Challenges

In a nutshell public participation is a vehicle that allows the public voice to be heard in the process of decision-making on management and use of water resource, including for drinking purposes. It offers the opportunity to people to directly articulate their needs and concerns related to quality and distribution of water and to assert their rights on the access to the resource.⁵⁰⁰ The Access Initiative, an NGO carrying out the research and project work in this field states that ‘processes for public participation are needed in all steps of a decision, from initial consultation to issuing of the decision, to implementation and review of the decision’.⁵⁰¹

Participation is carried out through a variety of mechanisms. Most common and possibly least effective forms are merely informing and consulting with public on the proposed major water-related decisions or policy changes. Far more advanced processes involve direct citizens’ involvement in the formulation of the policies and plans on development of water and sanitation services.⁵⁰² Ideally, such involvement should be carried out throughout the whole policy cycle from planning to implementation and monitoring.⁵⁰³ A referendum is another progressive method allowing the public to express its opinion in water decision-making, arguably the most all-inclusive one.⁵⁰⁴ For instance, in Honduras a public referendum must be held before making decision on privatisation of public water services. The other ways of getting people involved include representation on water users associations, public service users committees within authorities and participation in public surveys.

All forms of participation require regulation and facilitation from the statutory and civil society sectors, including measures on capacity building of communities to represent themselves in the participatory processes that are available to them. The participation process in its ideal is expected to be transparent and inclusive, so as to represent voices of every one in the community including the poor, powerless and disadvantaged.⁵⁰⁵

⁵⁰⁰ World Water Assessment Programme *The United Nations World Water Development Report 1: Water for People Water for Life* (UNESCO Publishing 2003), 378.

⁵⁰¹ The Access Initiative ‘Citizens Voices in Water Governance: The Role of Transparency, Participation and Government Accountability’ 2005.

⁵⁰² Centre on Housing Rights and Evictions *Manual on the Right to Water and Sanitation* (2007) 75.

⁵⁰³ *The UN World Water Development Report 1: Water for People Water for Life* (n 500) 378.

⁵⁰⁴ H Smets ‘The Right to Water in National Legislations’ (2006 Paris: Agence Française de Développement).

⁵⁰⁵ World Water Assessment Programme, UN Water *The United Nations World Water Development Report 2: Water: a Shared Responsibility* (UNESCO Publishing 2006), 77.

The reality of participation, however, remains far from the theory and faces a number of challenges. The findings of the research undertaken by The Access Initiative have shown that the degree of public participation in water decision-making is not adequate and requires improvement.⁵⁰⁶ In European countries public participation on tariff settings and liberalisation of water services is rarely carried out.⁵⁰⁷

Who participates in the decision-making on behalf of ‘public’ is another challenge. Ideally, all-inclusive public participation implies the involvement of citizens, communities, service users, disadvantaged groups, including women, poor, indigenous peoples, rural and any isolated populations.⁵⁰⁸ Evidence suggests that marginalised groups tend to be unrepresented in the water related decision-making processes.⁵⁰⁹ The main reasons for this are the lack of motivation and capacity within these communities to meaningfully participate in public life resulting from poor education, social exclusion and poverty.

The absence of adequate and true information on water issues, as well as gaps in dissemination of information among the disadvantaged groups most often frustrates participation.⁵¹⁰ Respectively, the availability of adequate information and regulated access to it for all groups are critical for the meaningful participation.

Among the reasons that perpetuate these issues is a lack of will in the government to create the platforms and mechanisms for participation of public in decision-making, particularly in the states where participatory rights are not sufficiently articulated in constitutional and legal frameworks. Sometimes the domestic legal systems place an onus on the public and communities to initiate the processes of participation,⁵¹¹ who often are lacking capacity to do so and require governments’ support or facilitation by the non-governmental sector.⁵¹²

⁵⁰⁶ *ibid.*

⁵⁰⁷ ‘Towards a Regional Programme for Human Rights Based Approach to Water for Europe and CIS countries: challenges and opportunities’ paper presented on the ‘Towards a UNDP Regional Programme for a Human Rights-Based Approach to Water Governance’ Workshop 14 May 2008- Bucharest, 5.

⁵⁰⁸ *The UN World Water Development Report 1: Water for People Water for Life* (n 500) 378.

⁵⁰⁹ International Environmental Law Research Centre, Written Statement on the Human Right to Water Submitted to the UN Human Rights Council at its 6th session (September 2007) 2.

⁵¹⁰ *The UN World Water Development Report 2: Water: a Shared Responsibility* (n 505) 78.

⁵¹¹ *ibid* Columbia Law 142 of 11 July 1994, art. 62.

⁵¹² C Dubreuil ‘The Right to Water: From Concept to Implementation’ (World Water Council 2006) 30-31, 43.

3 Local Perspective

Public participation in the water decisions at the local level, while sharing the same features as highlighted above, bears its own distinct characteristics and challenges. Local participation in theory is expected to deliver a number of advantages due to its immediate outreach to communities. In contrast with participation at national level, disadvantaged isolated communities whose voices often remain unheard have a far better chance to be listened to and be involved in the decision making on drinking water at the local level. Where the local process of participation is inclusive and transparent, there is a greater opportunity for decision-making to recognise and consider the actual needs of local communities and to consider their knowledge.

Local government plays an important role in the participatory process. It is in the ideal position to establish and facilitate public participation in decision-making as, by definition, it is close to communities. Local policy-making and further planning of the water and sanitation services by local government can actively involve public. Local government's decision on privatisation of the local water services is another critical development that should be consulted with local community. Where it does not directly provide water and sanitation service, the municipality is in the best position to facilitate the dialogue between communities and service provider.

In reality public participation in local water-decision making is often mismanaged or simply absent. The report of the chair of the thirteenth session of the Commission on Sustainable Development identified 'further involvement of local communities, especially women, in planning and policy-making' among the other existing needs of local governments.⁵¹³ Poor participation can be a result of the broken communication and low trust between communities and local municipalities, limited capacity of the communities or local authorities to engage in negotiation, civic dialogues, consensus building and conflict management,⁵¹⁴ or merely an absence of the established participatory mechanisms. The perspectives of local participation are greatly enhanced if national legislation obliges local governments to consider public voice in their decision making, as well as to provide access to the water-related information on the open basis and at the request of individuals and communities.

⁵¹³ UN Economic and Social Council, Commission on Sustainable Development 'Major groups' Priorities for Action in water, sanitation and human settlements' (11-22 April 2005) UN Doc E/CN.17/2005/5, para 118.

⁵¹⁴ *ibid* para 126.

B PARTICIPATION AND HUMAN RIGHTS

The significance of individual's participation in public life is well recognised and reaffirmed by the human rights theory, normative framework and practice. Firstly, it is stipulated as a human right. Secondly, participation in theory enables people to articulate their needs and to demand other rights. It is in this regard participation is increasingly given a status of the principle of the human rights framework. It is worth outlining in brief the standing of participation in human rights, in order to facilitate the evaluation of participation in public water sector through the human rights lens.

1 Participation as a Human Rights Standard

The right to participate in public life and government earned a notable status in the international human rights law. Participation as a human right takes its origins from the provisions of the article 21 of the Universal Declaration of Human Rights⁵¹⁵, which embraces three dimensions of participation: the right of everyone 'to take part in the government of his country', the right of equal access to public service and participation through elections.

Following this original clause several key human rights treaties elaborate on the right to participate. The ICCPR stipulates citizens' 'right to take part in the conduct of public affairs, directly or through freely chosen representatives'.⁵¹⁶ The CERD guarantees the right of everyone without distinction as to race, colour, or national or ethnic origin 'to take part in the Government as well as in the conduct of public affairs at any level'.⁵¹⁷ The CEDAW speaks of the right of women 'to participate in the formulation of government policy and the implementation thereof',⁵¹⁸ and the right of rural women 'to participate in the elaboration and implementation of development planning at all levels'.⁵¹⁹ The CRPD states that 'in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities'.⁵²⁰ The

⁵¹⁵ Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

⁵¹⁶ ICCPR art 25(1).

⁵¹⁷ CERD art 5(c).

⁵¹⁸ CEDAW art 7(b).

⁵¹⁹ *ibid* art 14.2(a).

⁵²⁰ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006; entered into force 3 May 2008) 993 UNTS 3, art 4.3.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families permits this group the right of participation in public affairs of their state of origin and ‘in decisions concerning the life and administration of local communities’ in the state of their employment.⁵²¹ The Aarhus Convention guarantees the right to public participation in environmental matters and enlists well-elaborated duties of governments in relation to this right.⁵²²

Regional human rights treaties also elaborate on participation as a human right. Article 13 of the African (Banjul) Charter on Human and Peoples' Rights⁵²³ and article 23 of the American Convention on Human Rights⁵²⁴ similarly provide for the right of citizens to participate in the government of their country. The European Convention on Human Rights⁵²⁵ and the EU Charter⁵²⁶ are notably modest in articulation of the right to political participation, limited to the provisions on the right to free elections in the Convention⁵²⁷ and the right to vote and to stand as a candidate at municipal elections in the Charter⁵²⁸ respectively. Article 25 of the EU Charter guarantees the right to participate in social and cultural life for elderly persons⁵²⁹ and the right to participate in the life of the community for the persons with disabilities is provided in Article 26. In contrast in the Protocol to African Charter on Human and Peoples' Rights on the rights of Women in Africa participation is extensively articulated as a right of women, as well as a duty of the States, in various fields of public life such as politics, culture, peace, environment and development.⁵³⁰

⁵²¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 30 ILM 1517 arts 41, 42.

⁵²² Aarhus Convention, preamble, para 6.

⁵²³ African Charter on Human and Peoples' Rights (adopted 27 June 1981; entered into force 21 October 1986) 1520 UNTS 217.

⁵²⁴ American Convention on Human Rights (adopted 22 November 1969; entered into force 18 July 1978) 1144 UNTS 123.

⁵²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (as amended).

⁵²⁶ Charter of Fundamental Rights of the European Union (7 December 2000, entered into force 1 December 2009) Official Journal of the European Communities, 18 December 2000 (OJ C 364/01).

⁵²⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952, art 3.

⁵²⁸ Art 40.

⁵²⁹ The explanations for the EU Charter drafted to clarify its provisions in respect of the article 25 state: ‘[o]f course, participation in social and cultural life also covers participation in political life’, Draft Charter of Fundamental Rights of the EU (11 October 2000) Brussels (18.10) CHARTE 4473/00.

⁵³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6, arts 9, 10, 17, 18.

2 Evolving Scope of Participation in Human Rights Thinking

As outlined above the right to participation in public life is firmly grounded in the international human rights law. From its inception in the Universal Declaration on Human Rights as a human right standard the scope of participation is been developing through the variety of human rights instruments, such as international and regional treaties, political declarations,⁵³¹ General Comments and Concluding Observations of the human rights treaty bodies.⁵³² The understanding of the right to participate has been further advanced by human rights scholars, who based their interpretation on political science.⁵³³

The right to participate in its essence is an entitlement to take part in the public affairs of the state, locality and community. Treaties articulate different ways this entitlement can be exercised. Participation can be achieved through holding a position in the government, such as being elected as a representative or being employed for the public service post. Voting in election for a public representative is another way of exercising of the right to take part in public life. Apparently, these forms of participation appear as the core features of representative democracy.

The majority of provisions on the right to participate also contain the ‘take part’ clause, which suggests that the forms, in which participation in public affairs can be exercised, are not limited with the abovementioned choices. Apparently, meaningful participation requires other options of political and civic engagement being made available for the public, since democratically elected representatives can fail to meet expectations of their constituencies.

Academic interpretation of the legitimate ways of exercising the right to take part in public affairs was underpinned by progressive political science theories of participatory democracy advocating for continuing political participation over the episodic experiences of voting. From this perspective the ‘take part’ clause was interpreted by Henry Steiner as a programmatic right that is ‘to be realised progressively over time in different ways in different contexts’.⁵³⁴

⁵³¹ Vienna Declaration and Programme of Action (1993) UN GAOR World Conference on Human Rights UN Doc A/CONF157/24, Declaration on the Right to Development (4 December 1986) UN Doc A/RES/41/128.

⁵³² For a comprehensive analysis of interpretation of participation as an economic, social and cultural right see N McMurry ‘The Right to Participation from General Recommendation to Binding Law’ LLM Thesis, Irish Centre for Human Rights, National University of Ireland Galway, 2001.

⁵³³ H Steiner ‘Political Participation as a Human Right’ (1988) 1 HarvY’Bk Intl L 77.

⁵³⁴ *ibid.*

In 1986 the Declaration on the Right to Development spoke on the ‘active, free and meaningful participation in development’⁵³⁵ and recognised ‘popular participation in all spheres as an important factor in development and in the full realization of all human rights’.⁵³⁶ Since the crucial role of participation in development had been recognised, the understanding of the potential of the right to participate and the forms of its manifestation has been advanced. Accordingly, participation is increasingly referred as a core human rights value⁵³⁷, or as a principle of human rights⁵³⁸, due to the premise that it facilitates the implementation of the other rights or, in other words, creates conditions in which human rights can be effectively realised.

3 Participation as a Dimension of the Right to Water

Participation is a human right and the principle underlining the human rights framework as established in the preceding paragraph. Participation in decision-making on drinking water is a right in itself and an operational principle of the rights-based approach to access to water. Often the understanding of participation articulated in the literature on water governance is situated around the importance of creating opportunities for the involvement of the public to take part in decision-making on water. A human rights vision radically converts this opportunity or ‘best intentions’ thinking into a requisite legal right of everyone.

Interpretation of the participation in water decisions as a dimension of the right to water has been undertaken by a number of the UN human rights mechanisms. Their elaborations allow identifying several angles of its application in the water sector.

Essentially, participation in water issues is equally important at the individual and community levels. Therefore, it is accurate to restate that ‘everyone has the right to participate in decision-making processes that

⁵³⁵ Declaration on the Right to Development (n 531) Preamble.

⁵³⁶ *ibid* art 8.2.

⁵³⁷ International Council on Human Rights Policy *Local Government and Human Rights: Doing Good Service* (2005) 19. The European Committee of Social Rights has articulated that the ESC rights are underpinned by the values of ‘solidarity, non-discrimination and participation’ European Committee of Social Rights, *Digest of the Case Law* (Online: Council of Europe, 2008) 14 <http://www.coe.int/t/dghl/monitoring/socialcharter/digest/digestSept2008_en.pdf> (12 August 2013).

⁵³⁸ Report of the Second Interagency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform, ‘Attachment 1: The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies’, 5-7 May 2003, Stamford, USA.

affect their right to water and sanitation'.⁵³⁹ The value of the communities' voice in making decisions on water issues is explicitly reiterated by the authoritative human rights interpretations and the non-governmental organisations that apply the human rights approach to their work.

Participation as a human right is to be respected, protected and fulfilled by states. Concerning drinking water and sanitation it imposes on the governments at least the following duties. In compliance with the principles of equality and non-discrimination, governments must ensure involvement and equal representation of the marginalised groups in decision-making.⁵⁴⁰ Another governments' obligation is to ensure full and equal access to information on drinking water, water and sanitation services and environment, held by public authorities and third parties.⁵⁴¹

Participation emerges as a dimension of the duty of governments to protect the right to water. According to this obligation a regulatory system has to be established for the service providers, whether public or private, so as to ensure that they are operating in compliance with the requirements of the right to water. It is a key requirement to the regulatory system to include mechanisms for the genuine public participation.⁵⁴²

Participation is embedded in the core obligation of governments related to the right to water as spelled out by the UNCESCR in the General Comment 15. It requests states 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'.⁵⁴³

Participation is also seen as a vehicle for addressing legitimate public concerns over privatisation of water services. The United Nations High Commissioner for Human Rights in her report emphasised 'the role of individuals in decision-making on who supplies water and sanitation services, the type of services supplied and how these should be managed when making decisions on private sector delivery'⁵⁴⁴. Similarly, the Special

⁵³⁹ UN Commission on Human Rights 'Realization of the right to drinking water and sanitation' Report of the Special Rapporteur EIH Guisse (11 July 2005) UN Doc E/CN.4/Sub.2/2005/25 (hereinafter Draft Guidelines) para 8.1.

⁵⁴⁰ *ibid.*

⁵⁴¹ UNCESCR 'General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C 12/2002/11, para 48; Aarhus Convention art 4.

⁵⁴² Draft Guidelines (n 539) para 2.3 (e), General Comment 15 (n 541) para 24.

⁵⁴³ General Comment 15 (n 541) para 37(f).

⁵⁴⁴ UN Human Rights Council, Report of the UN High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments (16 August 2007) UN Doc A/HRC/6/3, para 53.

Rapporteur on the Right to Water elaborated on the importance of listening to communities claiming ‘that communities should have a voice in managing drinking water supplies and should have the opportunity to be heard and to participate in decisions on the privatization of water supplies’.⁵⁴⁵

And finally, participation emerges as a requirement of the process of implementation of the human right to water with respect to formulation of the water strategies and plans of action.⁵⁴⁶ Public consultation in respect of development of new legislation translating the right to water and sanitation in the national legal framework is equally important, yet General Comment 15 failed to elaborate on this aspect of participation. The Aarhus Convention is more considerate on this matter, requesting states ‘to promote effective public participation during the preparation by public authorities of legally binding rules that may have a significant effect on the environment’.⁵⁴⁷ The Law on Environmental Sanitation in Brazil, 2007, was developed through a multi-stakeholder process and in Ukraine the process of development of the national water legislation was supported with public consultation.⁵⁴⁸

C LOCAL PARTICIPATION AS A HUMAN RIGHTS MATTER

The previous section elaborated on the notion of participation as it understood in the water sector and in the human rights framework. This chapter shall attempt to merge both perspectives with a view to unpack their interplay at the local level, paying particular attention to the role of local government in this process. In order to evaluate the rights based participation in local water issues, it is necessary to assess whether there exists a human right to participate at the local level, and, correspondingly, obligations on local governments in relation to this right. To this aim the international legal standards and policy statements will be addressed first. Then this section turns to the examination of the statutory provisions of the participation mechanisms on water decision-making at local level in domestic law. Finally, the role of civil society organisations in establishing and sustaining the rights-based participation is addressed from the empirical perspective.

⁵⁴⁵ UN Commission on Human Rights ‘Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation’, final report of the Special Rapporteur, EI Hadji Guisse (2004) UN Doc E/CN.4/Sub.2/2004/20, para 58.

⁵⁴⁶ General Comment 15 (n 541) para 48.

⁵⁴⁷ Aarhus Convention art 7.

⁵⁴⁸ Dubreuil (n 512) 31.

1 Local Participation as an International Human Right

Chapter 3 of this thesis has effectively established whether the international law creates the human rights obligations for local authorities. It scrutinised the international and regional human rights treaties containing provisions on the right of individuals to participate in local public affairs, which explicitly or by default translate into the local governments' human rights obligations.

While article 25 of the ICCPR does not directly refer to the right to participate in the conduct of local public affairs, in its authoritative interpretation the UN Human Rights Committee had effectively extended the application of the right to the local level. The 'conduct of public affairs' term has been explained by the Committee as including 'all aspects of public administration, and formulation and implementation of policy at ...local level.'⁵⁴⁹ Consequently, this interpretation implies the set of duties on local authorities in respect of the right to local participation.

Article 7(b) of the CEDAW stipulates the rights of women to participate in the formulation of government policy and implementation thereof at all levels of government. Article 14.2(a) of the CEDAW articulates the right of women living in rural areas '[t]o participate in the elaboration and implementation of development planning at all levels'. Equally, article 5(e) of the CERD speaks of the right to take part in the Government and in the conduct of public affairs at any level.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains the most advanced provisions on local participation.⁵⁵⁰ It utilises the language of obligation and binds states to guarantee 'increased and effective representation and participation of women at all levels of decision-making', as well as elaborates the methods of implementation of the women's right to participate, requesting states to take specific positive steps such as affirmative action, national legislation and other measures.

In Europe support to the right to participate locally is reaffirmed in the preamble of the European Charter on Local Self-Government, which reaffirmed the importance of the right to participate in the conduct of public affairs and highlighted "that it is at local level that this right can be most

⁵⁴⁹ UN Human Rights Committee 'General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 5.

⁵⁵⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 9.

directly exercised.”⁵⁵¹ Recently entered into force the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, is an outstanding further development for local participation.⁵⁵² The Protocol is obviously the only international treaty that is dedicated exclusively to this right, and is a first regional legal instrument that explicitly introduced this right in Europe, under the auspices of the Council of Europe.

The value of these international legal standards is at least twofold. Primarily, the provisions of the international and regional treaties outlined above, imply public participation in the local decision-making on the access to drinking water, while not articulating this directly. Access to drinking water is indeed a local public affair, entailing a continuous process of decision-making at the level of local authorities, from planning of relevant policies to their implementation. Accordingly, it is correct to assert that there exists a right to take part in local decision-making on the access to drinking water, which in turn creates corresponding duties on the local authorities as to ensure this right.

The second significant conclusion can be reached utilising the analysis of the Chapter 2 on international obligations of local authorities. States Parties when they ratify the treaties must implement their provisions, including the right to participation in local water issues, through the national legislation or policy change. At the same time, from the moment of ratification municipal authorities are bound by the obligations of the self-executing character that are capable of the immediate application. These include the responsibilities to respect the participatory rights and to avoid discrimination of any kind that leads to exclusion of particular individuals and groups from participation.⁵⁵³ The duty not to discriminate at the very least forbids municipalities from preventing disadvantaged individuals and communities in exercising their right to participate in the local water issues through the legitimate forums that are already in place. The obligation to respect the right to participate prohibits the local authority from eliminating structures of participation that exist locally.

⁵⁵¹ European Charter of Local Self-Government (opened for signature 15 October 1985, entered into force 9 September 1988) ETS N 122.

⁵⁵² Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (Opened for signature 16 November 2009, entered into force 1 June 2012) CETS No.: 207 Utrecht, 16.XI.2009 ETS 122.

⁵⁵³ As follows from the analysis on equality and non-discrimination in the Chapter IV.

2 Political Statements on Local Participation

Policy statements or declarations issued at supranational level carry the potential to advance the process of mainstreaming of local participation in local government water decision-making. Not all these statements are necessarily driven by or refer to human rights ideals, but nevertheless their objectives are mostly compatible with the human right to participate and are worth considering in the context of this research.

‘The International guidelines on decentralisation and the strengthening of local authorities’⁵⁵⁴ provide an important global policy standard for interpreting what is requested from the local authorities to implement their duties so as to ensure meaningful local participation. While not legally binding, the document was developed through an extensive consultative process by the UN HABITAT and serves as framework instrument for governments at all levels, shaping the local decentralisation processes in line with the world’s best practices. It articulates participatory democracy as a key process of local governance and sets out very elaborate criteria of participation, which to some extent match the parameters of the rights-based participation, such as citizens’ empowerment, non-discrimination and inclusiveness of women and young people and the duty of local authority to establish participation processes.

A key international water policy document, the Dublin Statement on Water and Sustainable Development, in 1992 introduced a principle that ‘water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels’.⁵⁵⁵ It explains the approach as ‘full public consultation and involvement of users in the planning and implementation of water projects’.⁵⁵⁶ The Johannesburg Plan of Implementation of the World Summit on Sustainable Development, 2002 encourages the states to facilitate access to ‘participation, including by women, at all levels in support of policy and decision-making related to water resources management and project implementation.’⁵⁵⁷

The Resolution on the Recognition of the Right to Drinking Water in the Member States of the European Union requests public authorities to organise effective participation of users in decision-making on the water

⁵⁵⁴ UN-HABITAT ‘International guidelines on decentralisation and the strengthening of local authorities’ 2007.

⁵⁵⁵ Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (ICWE) (26-31 January 1992) UN Doc. A/CONF.151/PC/112 Dublin, Ireland.

⁵⁵⁶ *ibid.*

⁵⁵⁷ ‘Plan of Implementation (n 499) para 25(b).

services provision and the prices of these services.⁵⁵⁸ Very notable statements have been made at the World Water Forums, where local governments expressed their commitment to promote citizens engagement in the defining of local water policies in the democratic and inclusive manner, ‘through the instruments of representative, participatory and direct democracy’.⁵⁵⁹

While not legally binding, these political commitments play an important role in shaping national and local policies. Additionally, communities and individuals can refer to these statements when advocating for their right to participate in local decision-making on water issues.

3 National Laws as Vehicles of Local Participation

Internationally reaffirmed, the right to participate in the local water issues is only truly guaranteed for people if the participatory mechanisms and processes are set out in the statutory law. Currently several countries have formalised participatory process into their legal frameworks.⁵⁶⁰ For instance, the provision to hold a referendum prior to privatisation in any municipality has been introduced in Honduras.⁵⁶¹ The New Zealand Local Government Act stipulates that the local authority must initiate a special consultative process in relation to any change in the delivery mode of a significant activity, including change from delivery of water services by the local authority itself to delivery of the services by another operator.⁵⁶² Special consultative procedure also applies in the case of development of the long-term council community plan, which inevitably contains provisions on the local water and sanitation services.⁵⁶³

Quite remarkable provisions are found in Columbia where municipalities are obliged ‘to ensure...the participation of users in the management and financing of the entities that provide public services in the municipality’ through the medium of the self-organised Committees for Development and

⁵⁵⁸ Resolution on the Recognition of the Right to Drinking Water in the Member States of the European Union, European Council on Environmental Law, 17 January 2004.

⁵⁵⁹ Local Government Declaration for the Third World Water Forum, Kyoto 2003, Declaration on Water by Mayors and Local Elected Representatives, 4th World Water Forum, Mexico 2006.

⁵⁶⁰ Centre on Housing Rights and Evictions *Source No 8: Legal Resources for the Right to Water: International and National Standards* (2004).

⁵⁶¹ Referred in A Khalifan ‘Implementing the Right to Water in Central America’ paper presented on ‘The Human Right to Water and the Political and Social Central American Agenda’ 21 - 22 June 2005, Nicaragua.

⁵⁶² New Zealand Local Government Act 2002, No. 84, 24 December 2002, s 88.

⁵⁶³ *ibid* s 84.

for the Social Control of Public Utilities.⁵⁶⁴ To ensure adequate implementation of participation municipalities are entrusted with ‘the broad and continuous task of working with the community to introduce the basic functional elements of the committees as well as to prepare and advise them permanently in their operation’.⁵⁶⁵

Another good example comes from Brazil, where the 2007 Law on Environmental Sanitation explicitly declares the centrality of participatory processes to reach the goal of universal access to sanitation, with a focus on poor and marginalised groups. According to this law, service providers, municipalities and the public engage in participation in decision-making processes through the Council of Cities, the multi-stakeholder body set up to discuss and make decisions on urban issues.⁵⁶⁶

The value of these provisions is crucial. The perspectives of local participation in water related decision-making are greatly enhanced if national legislation establishes mechanisms requesting local governments to involve the public in decision-making. Indeed, participation can also be established through the national or local policy initiatives. The advantage of the legal framework is that it guarantees greater stability of participatory processes for the public.

4 Civil Society Role

Non-governmental organisations (NGOs) and community-based organisations (CBOs) have always played a profound role in advocating for people’s rights locally. Their involvement with participatory processes on water decision-making can be critical to applying the rights based approach to access drinking water locally, provided they adhere to human rights principles in their action. The good reference in this regard can be provided from the work of the international NGO WaterAid, which carries out worldwide action on developing awareness and understanding of the right to water across other rights organisations, assisting their partner organisations to promote the right to water and lobby public authorities.

In the environment where people are not capable of taking part in local decision-making, or there is a poor trust between community and local authorities, civil society organisations may represent the community voice.

⁵⁶⁴ Columbia Law 142 of 11 July 1994, art 5.2, unofficial translation taken from COHRE Legal Resources Draft.

⁵⁶⁵ *ibid* art 65.1.

⁵⁶⁶ UN Human Rights Council ‘Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Compilation of good practices’ (29 June 2011) UN Doc A/HRC/18/33/Add.1, para 14.

It is generally accepted that community-based organisations ‘[p]articipate in consultations with local authority and public or private service providers, contribute to planning and budgeting, and evaluate if the design of plans provide access to basic services to the poor.’⁵⁶⁷ In this regard it must be remembered that while the voice of NGOs is often put forward as the voice of the communities, this may not always be the case.⁵⁶⁸ There is a risk these organisations have only partial understanding of the needs of local people on access to water, as well as NGOs might have limited capacity to represent community in decision-making structures.⁵⁶⁹

Most sustainable involvement of the civil society organisation in this regard is focused on building the capacity of local people directly to represent needs of their communities in local structures. Applying the rights perspective to the local issue of access to water and sanitation, India-based NGO SATHEE carried out work on identification and training of the most marginalised community members to engage with local authorities for planning and problem solving.⁵⁷⁰ SATHEE seeks to establish a sustainable model of interaction between community and local authority that does not require intervention from NGOs. Through enabling marginalised individuals to engage with local government on behalf of their community local NGOs advanced public participation in a rights-sensitive way.

Where the participation mechanisms are not in place, civil society organisations can be the critical vehicles to lobby local authorities to initiate public involvement in local water decision-making. In 2004 representatives of civil society articulated they ‘are keen that the poor be involved and treated with equity. They demand that the local authorities... [p]romote civic engagement through consumer education and awareness, ombudsman offices, public hearings, participatory planning, etc.’⁵⁷¹ There is a role for civil society to advocate for participation in local government.

Another way civil society organisations facilitate participation is by establishing the platforms for engagement where these are absent. Such work is particularly helpful in developing countries where local governments themselves lack capacity to initiate meaningful engagement with local people. WaterAid project ‘Local Millennium Development Goals

⁵⁶⁷ UN-HABITAT, UNITAR ‘Access to Basic Services For All: Partnerships and Rights-Based Approach’ Background Paper No. 4 prepared for the Twelfth Session of the Commission on Sustainable Development, 2004.

⁵⁶⁸ *Local Government and Human Rights: Doing Good Service* (n 537) 58.

⁵⁶⁹ The international consultations highlighted the need for NGOs to ‘[t]rain themselves and obtain knowledge necessary to participate in planning and decision-making’, UN-HABITAT, UNITAR (n 567).

⁵⁷⁰ Freshwater Action Network/WaterAid Governance and Transparency Fund ‘Learning from experience: Rights and governance advocacy in the water and sanitation sector’ 2011, 16-17.

⁵⁷¹ UN-HABITAT, UNITAR (n 567).

Initiative’, implemented in a number of developing countries, provides several examples of establishing the forums for engagement of local governments and communities.⁵⁷²

Among the findings of WaterAid during the project were the absence of trust and communication between communities and local authorities, and the need for communities to be engaged in strategic planning, budgeting and monitoring. With the aim to ‘create a space for the local communities to engage in dialogue with local authorities’ coordinating meetings were organised by WaterAid in Ghana in the 15 districts.⁵⁷³ The meetings allowed the opportunity for the poor to demand for reconsideration of water tariffs and for persons with disabilities for consider their access to hand pumps of boreholes. The meetings created the space for vulnerable groups to demand their access to water to be affordable and physically accessible and, therefore, to demand the core dimensions of their basic human right. A similar platform, Citizen’s Watch Forum, is set up in two municipalities in Nepal to establish dialogue and overcome poor participation.⁵⁷⁴

The engagement of the civil society organisations with the local water participatory processes evolves in various ways, such as direct representation of the community in all forms of decision-making from planning to implementation and monitoring, building capacity of people to represent their needs, lobbying local governments to establish participatory processes, building trust and assisting engagement of people and local governments. No matter the method of involvement, the rights-based participation expects from the civil society organisations an understanding of the access to water as a human right, appreciation of participation as a human right and a core value of the rights-based approach, promoting these standards within communities and advocating for mainstreaming the human rights norms and principles into the local government decision-making related to access to drinking water.

⁵⁷² WaterAid ‘Local Millennium Development Goals Initiative: Local Government and Water and Sanitation Delivery’ Report 2008.

⁵⁷³ Water Aid Ghana ‘Facilitating Change in WASH Delivery at the Local Government Level’ Briefing Note No 1, September 2011.

⁵⁷⁴ Water Aid Nepal ‘Improving Water and Sanitation Governance through Citizen’s Action’ 2008.

D ANALYSIS

1 Right to Participate in Local Water-Related Decisions

Elaborations of this chapter allow the conclusion that participation in local decision-making on the access to drinking water is essentially a human right. First, it originates from the civil and political right to take part in local government and local public affairs. Second it is underpinned within the framework of the human right to water. Finally, participation as an operational principle of human rights is indispensable to guarantee implementation of the right to drinking water through creating the local opportunities for people to inform and influence municipal decision-making on water related issues.

The right to participate in a local government's decisions equally belongs to communities as well as to individuals.⁵⁷⁵ In its practical application the rights-based participation would ultimately benefit vulnerable groups, who are traditionally excluded from the local political and development processes. A rights-based approach, based on the principles of equality and non-discrimination, obliges local authorities to guarantee and facilitate the opportunities for women, rural and indigenous people, traveller community, and other marginalised groups to raise voice and articulate their needs in formulation of water policies, plans, water budgets and monitoring their implementation.

2 Local Government as a Duty-Bearer

Local authorities are key actors in the participatory processes. They have knowledge of the local needs and are in ideal positions to involve the public in decisions on local water issues. From the human rights perspective local participation is a right of individuals and communities. Therefore, municipalities bear certain obligations in relation to this right. The examination of the legal instruments on participation and the interpretation of participation by the UN human rights bodies allow the conclusion of the following duties of municipal authorities.

⁵⁷⁵ The General Comment 15 (n 541) articulates 'the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water', para 48.

(a) Local implementation of the right to water

Implementation of the right to water is a matter of governments at all levels.⁵⁷⁶ Besides the legislative changes, the process of implementation involves adoption of the plan of action on realisation of the human right to water, including at the local level.⁵⁷⁷ The General Comment 15 emphasised the importance of participation in the implementation process and explicitly articulates in this regard that ‘the right of individuals and groups to participate in decision-making processes ... must be an integral part of any policy, programme or strategy concerning water.’⁵⁷⁸ Engaged in the process of the implementation of the right to water, the municipalities are under an obligation to include individuals and groups in the decision-making that affects their exercise of the right to water. It appears that this obligation applies to those municipalities who develop and implement local policies regarding provision of drinking water. Moreover, scholars suggest that participation of local communities can facilitate compliance, reduce implementation burden and, as such, compensate for limited financial and technical resources of municipalities.⁵⁷⁹

(b) Information concerning water issues

The obligation of local authorities to give full and equal access to information on water, water services and the environment follows from the interpretation issued by the UNCESCR in its General Comment 15 on the right to water.⁵⁸⁰ This obligation corresponds with the ‘information accessibility’ dimension of the right to water, which embrace the right to seek, receive and impart information concerning water issues.⁵⁸¹ The Special Rapporteur on the Right to Water summarised these interpretations and clarified that ‘everyone should be given equal access to full and transparent information concerning water, sanitation and the environment held by public authorities or third parties’.⁵⁸²

(c) Equality and non-discrimination

Participatory processes at the local level shall be fair and provide equal opportunity for all individuals and groups to get involved in decision-

⁵⁷⁶ Draft Guidelines (n 539) para 2.

⁵⁷⁷ *ibid* para 2.3(b).

⁵⁷⁸ General Comment 15 (n 541) para 48.

⁵⁷⁹ SC McCaffrey and KJ Neville ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries’ 212 *Georgetown International Environmental Law Review* 679, 681,703-704.

⁵⁸⁰ General Comment 15 (n 541) para 48.

⁵⁸¹ *ibid* para 12 c (iv).

⁵⁸² Draft Guidelines (n 539) para 8.3.

making on water issues. A local government bears ultimate duty not to engage in discrimination in its action on the grounds such as gender, race, nationality, age and any other criteria as provided in international and regional human rights treaties and often in domestic law. Municipalities, when they establish and facilitate mechanisms of participation in water issues, shall not exclude certain individuals and groups from the process.⁵⁸³ Moreover, local governments would be expected to make pro-active efforts to ensure the equitable representation of the vulnerable groups of population that have traditionally been marginalised in decision-making.⁵⁸⁴

(d) Privatisation of local water services

While the international human rights law does not explicitly elaborate on the need for public participation in the process of privatisation of water services, its general provisions on participation equally apply to this particular type of issue of significant public concern. The Special Rapporteur on the Right to Water and United Nations High Commissioner for Human Rights stress the importance of providing the opportunity for communities and individuals to be heard and to take part in decisions on the privatisation of water services.⁵⁸⁵ Their recommendations are equally applicable to the similar processes taking place at the local levels, since municipalities around the world are engaging in contracting out the delivery of water services to private parties. Accordingly, the local government should be seen as obliged to involve public in making decision on the privatisation of the water services.

(e) Regulatory system for service providers

The issue of participation is found in the duty of governments to protect the right to water in the framework of relationship between water service providers and individuals as service users. According to this obligation a regulatory system has to be established for the service providers, whether

⁵⁸³ For example, General Comment 15 (n 541) para 16(a) explicitly requests governments to ensure that ‘women are not excluded from decision-making processes concerning water resources and entitlements’.

⁵⁸⁴ Draft Guidelines (n 539) para 8.1.

⁵⁸⁵ UN Commission on Human Rights ‘Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation’, final report of the Special Rapporteur EI Hadji Guisse (2004) UN Doc E/CN.4/Sub.2/2004/20, para 58; UN Human Rights Council ‘Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments’ (16 August 2007) UN Doc A/HRC/6/3, para 53.

public or private, so as to ensure that their operation is in compliance with requirements of the right to water. It is a key requirement to the regulatory system to include mechanisms for the genuine public participation.⁵⁸⁶

Municipalities contracting out water services to public or private company are often involved in setting out local regulatory procedures for the providers in the form of contract or local by-law, within the context of the broader domestic regulation. In this scenario a local authority is under the obligation to define the regulatory system in the format that it would serve to guarantee and protect the right to water for the service users. Such local systems of regulation must provide for the mechanisms of participation through which service users can raise concerns over the service delivery.⁵⁸⁷

E CONCLUSION

The importance of participation in local government decisions on the access to drinking water is self-evident and recognised in literature and political statements. It is commonly understood that participatory approaches foster a sense of ownership and increase accountability and transparency in water service delivery.⁵⁸⁸ At the same time, local participation is not stipulated as a legal requirement for the authorities in international water law.

International human rights law explicates the crucial conclusion that individuals and communities have the human right to participate in local decisions on access to drinking water. As a result, the rights-based approach converts participation from the discretionally granted opportunity into legal right to engage with the politics of water and articulate concerns on drinking water quality or service tariffs, to influence local decisions on development and privatisation of water services and budget allocations.

The understanding of participation as a human right carries significant implications for the local government, who bear the legal obligation to set up and to facilitate the participatory processes. From this standpoint, the human rights-based participation is a stronger framework than the similar policy recommendations of the good governance, poverty reduction or sustainable development agendas.

Yet, the rights-based vision on participation is missing in contemporary local government. Thus, perspectives of its application are inevitably challenging and any progress in this direction can only be anticipated along

⁵⁸⁶ General Comment 15 (n 541) para 24.

⁵⁸⁷ Draft Guidelines (n 539) para 2.3 (e).

⁵⁸⁸ UN-HABITAT, UNITAR (n 567), Dubreuil (n 512) 30.

with the consciously applied mainstreaming of human rights into local government operation. In practice, implementation of the rights-based participation in local governments would face several challenges. The mere lack of experience on how to involve communities in the processes of planning and implementation of local policies on drinking water can present a serious obstacle. In this case it can be argued that capacity building measures and assistance in setting up participatory processes and structures from national government and civil society would be beneficial.

The obligation to define regulatory system that guarantees the right to water and provides for mechanisms of participation, through which users can raise concerns over service delivery, could be challenging for a local authority to comply with. When a municipality contracts out services to big multinational company, often it fails to negotiate fair terms due to limited economic and political power, as well as lack of competence and willingness to protect residents from unjust treatment by service provider. This issue needs to be a subject of national government supervision, who bears ultimate responsibility to protect the right to water of its people.

Another difficulty for local authority can be reaching out to hear the voice of the marginalised groups. Traditionally excluded from political decision-making, these communities require capacity building to enable them to assertively articulate the issues of their concern in access to drinking water. This presents a real obstacle for the rights-based participation. Civil society and community-based organisations often represent the voices of vulnerable populations in a professional capacity. Still, intermediate participation may fail to articulate the real needs and concerns, and municipalities should be aware of the risk of underrepresentation. At the same time, the understanding of the access to water as a human right at the individual and community level is poor, which further undermines the perspectives of local rights-based participation.

Finally the role of national government and its obligation to ensure local participation on water decision-making has to be commented on. National government bears primary responsibility for human rights. It carries out the obligations to respect, protect and fulfil the right to take part in local public affairs through legislative and policy measures. The national legal instruments as shown in this chapter create a stable legislative platform for participation in water issues. Without political willingness and concrete action by the national government the prospects of local participation are indefinite and remain dependant exclusively on the determination of local authorities and activism of local people and civil society.

CHAPTER VI

RIGHTS-BASED ACCOUNTABILITY OF LOCAL GOVERNMENT

Accountability is a core principle of the rights-based approach along with the principles of participation and non-discrimination. Accountability unfolds in the possibility to challenge the violations of the human rights, to bring the responsible actors to account and to obtain the effective remedy from the existing enforcement mechanisms. A rights-based approach to drinking water establishes legal entitlement of individuals and groups to physical access to a source of potable water of good quality at the affordable price without discrimination. In this respect the issue of accountability emerges on the basis that the access water is a legally enforceable entitlement: it allows the right-holders to question the responsible actors for failure to guarantee access to water. The actors responsible for the access of people to water are governments, who are the principal duty-holders in the human rights framework. As established in this thesis the local authorities bear the responsibilities in relation to provision of the local population with drinking water. Local governments are the duty-holders in the framework of the right to water, operating at the level closest to people. This chapter undertakes the evaluation of the local governments' human rights-based accountability for access of people to drinking water from the perspective of the operation of different mechanisms of enforcement and their apprehension of the local level. The role of local civil society as the catalyst of accountability is highlighted across the chapter, which concludes with the analysis of the application and utility of the rights-based accountability of local government.

A CONCEPTUAL AND OPERATIONAL UNDERPINNINGS

Accountability as a principle is embraced by both water governance and human rights frameworks;⁵⁸⁹ however, its meaning in each concept is somehow different in terms of objectives and processes. Accountability is a cornerstone feature of the human rights based approach and its purpose is to safeguard the rights against infringement. The Maastricht Guidelines

⁵⁸⁹ OAI Jayyousi 'Water as a Human Right: Towards Civil Society Globalisation' (2007) 23/2 Water Resources Development 329.

defined the essence of the human rights accountability in a nutshell: ‘Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.’⁵⁹⁰ While the term ‘accountability’ does not explicitly appear in the human rights treaties, the principle is manifested across several interrelated characteristics of the human rights framework, such as core notions of legal entitlement and duty, the principle of legal recourse and the right to effective remedy, and the cluster of certain civil and political rights.

Human rights are legal standards, based on the core notions of the entitlement, freedom and obligations. Freedoms and entitlements belong to individuals and groups and correspond with the obligations of the responsible actors to deliver entitlement, not to interfere with freedom and to restore the right. The legal basis of the human rights relationship invokes the legal responsibility, or accountability, for its noncompliance. Protection of human rights thus is safeguarded with the possibility of legal recourse exercised through the available enforcement mechanisms. Accountability, as a core feature of any legal framework, is a critical vehicle to guarantee that the ‘rights-duty’ relationship is discharged as stipulated.

The right to an effective remedy is another related attribute of accountability that serves as a functional utility addressing the noncompliance with human rights obligations. The human rights treaties contain various measures providing for the effective remedies for those whose human rights have been violated.⁵⁹¹ Legal recourse and effective remedy are exercised through the courts, administrative procedures, human rights commissions, institution of Ombudsman, and other measures of enforcement and accountability at the domestic level.

International and regional institutions of human rights monitoring, such as the special procedures of the UN Human Rights Council, reporting mechanisms and concluding observations of the treaty bodies, regional judicial and quasi-judicial structures complement domestic accountability with the authoritative external supervision. These structures offer across-the-board recourse to address human rights violations, including the right to

⁵⁹⁰ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997 (1998) 20 Hum Rts Q 691, para 22.

⁵⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 as amended (European Convention on Human Rights) arts 6, 13 and 41; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1973) 999 UNTS 171 (ICCPR) arts 2, 14; American Convention on Human Rights (adopted 22 November 1969; entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 25.

water, and instruct national governments to comply with their human rights' obligations.⁵⁹²

Furthermore, accountability in human rights is strengthened through the interdependent and indivisible civil and political rights and freedoms, such as free expression and access to information,⁵⁹³ rights to participate⁵⁹⁴ and to freedom of association with others.⁵⁹⁵ These rights act as catalysts and guarantors of governments' responsibility towards its citizens for the violation of their human rights. These rights allow existing and effective functioning of the independent civil societies, which play an important role in the realisation of the human rights accountability of public authorities within the states.

B AVENUES OF MUNICIPAL ACCOUNTABILITY

Consideration of water as a human right means that deprivation of access to an affordable source of potable water is a rights violation, which is capable of being restored through the judicial and other appropriate procedures. A rights-based approach emphasises accountability of all public and private actors, who impact on the access to drinking water. The ultimately accountable figure in the human rights framework is national government, which ratifies the human rights treaties and incorporates the human rights standards in the domestic law and practice. However, as this thesis argues, the operational responsibility for implementation of the right to water is often assigned to local authorities. Therefore, it is appropriate to suggest that the accountability of local governments follows their human rights responsibilities in relation to right water.

Local governments, when they act as decision-making authorities, as well as water service providers, are responsible for the violations of the right to water of the citizens, local communities and service users. Accountability in this regard is invoked irrespective of the type and form of local water supply, whether public or private. Individuals and groups who are denied their right to water should have access to judicial or other complaint procedures to hold local authorities and local water service providers to account and to secure effective remedies against the violation of their right.

⁵⁹² Ling-Yee Huang 'Not Just another Drop in the Human Rights Bucket: The Legal Significance of A Codified Human Right to Water' (2008) 20 Florida J Intl L 353, 364.

⁵⁹³ ICCPR art 19; European Convention on Human Rights art 10; ACHR art 13.

⁵⁹⁴ ICCPR art 25(a); ACHR art 23.

⁵⁹⁵ ICCPR art 22; European Convention on Human Rights art 11; ACHR art 10.

This chapter establishes the avenues through which the local dimension of accountability can be accomplished or enhanced. First, it assesses the position of the international mechanisms of human rights monitoring on the role of local governments in human rights practice, in order to reach a better understanding of the perception of the UN human rights bodies on localising rights. Then the domestic procedures are evaluated on the matter of their utility in bringing the local authorities to account for violation of the right to water.

1 International Human Rights Mechanisms

As human rights are traditionally associated with national governments, and increasingly with multinational business sector and intergovernmental structures like WTO or IMF, the United Nations and regional human rights machinery have not paid much attention to the local authorities as human rights actors. Yet, the recognition of the local government impact on the status of rights and attention to the issues of local implementation can be identified in the content of the reports and other official documents issued by various UN human rights bodies.

(a) UN Charter bodies

The UN Human Rights Council through several statements, initiatives and procedures raised some attention to the local authorities and their human rights responsibilities in relation to the access of population to drinking water. In its resolution from 6 October 2010 the Council called upon the states to ensure effective remedies by putting in place accessible mechanisms of accountability at the appropriate level.⁵⁹⁶ This is a notable suggestion in itself as it highlights the need for effective local accountability to guarantee the access to water.

Upon the request of the Human Rights Council in 2006, the Office of the United Nations High Commissioner for Human Rights conducted a detailed study on the scope and content of the human rights obligations related to equitable access to safe drinking water and sanitation.⁵⁹⁷ The study revealed the need for further clarification ‘regarding the role, responsibilities and specific obligations of local authorities responsible for the provision of

⁵⁹⁶ UN Human Rights Council Resolution ‘Human Rights and Access to safe drinking water and sanitation’ (6 October 2010) UN Doc A/HRC/RES/15/9, para 8 (f).

⁵⁹⁷ UN Human Rights Council Decision 2/104 ‘Human rights and access to water’ (27 November 2006).

water and sanitation services,' as well as specific obligations of national government vis-à-vis local authorities.⁵⁹⁸

The mandate of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation began with the appointment by Human Rights Council in 2008⁵⁹⁹ which extended as the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation to further three years in 2011⁶⁰⁰. Both mandates had been encouraged to engage with local authorities to identify, promote and exchange best practices on access to safe drinking water, as well as to further clarify the content of human rights obligations in relation to access to drinking water.

In their working documents the Independent Expert and Special Rapporteur regularly illustrate the impact of municipal authorities on the realisation of the right by local communities and refer to the local dimension of non-discrimination and participation as the key principles of human rights based approach to drinking water. These documents serve as an important source of evidence of the human rights impact of good local practices, as well as indicate serious violations of the right to water by municipal authorities in respect of vulnerable and disadvantaged communities.⁶⁰¹

The Special Rapporteur on a number of occasions recognised the challenges of local implementation of the right to water in the context of decentralisation and made recommendations to the national governments as regards adequate financing and capacity building of disadvantaged local areas as to ensure equal enjoyment with the human right to water across the territory of the nation states.⁶⁰² In his guidelines for the realisation of the right to water the Special Rapporteur on the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Right to Drinking Water Supply and Sanitation, acting for the UN Sub-Commission on Promotion and Protection of Human Rights, El Hadji Guissé had explicitly elaborated on the number of actions and obligations of local governments in relation to

⁵⁹⁸ UN Human Rights Council 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' (16 August 2007) UN Doc A/HRC/6/3.

⁵⁹⁹ UN Human Rights Council Resolution 7/22 'Human rights and access to safe drinking water and sanitation' (28 March 2008).

⁶⁰⁰ UN Human Rights Council Resolution 'The human right to safe drinking water and sanitation' (8 April 2011) UN Doc A/HRC/RES/16/2.

⁶⁰¹ This source of evidence has been extensively utilised throughout this study.

⁶⁰² UN Human Rights Council 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque' (4 July 2011) UN Doc A/HRC/18/33, paras 48, 83(d); UN Human Rights Council 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation Catarina de Albuquerque' (3 August 2011) UN Doc A/66/255, paras 53-55, 75 (g).

the implementation of the right, including ‘a responsibility to move progressively and as expeditiously as possible towards the full realization of the right to water and sanitation for everyone, ... drawing, to the maximum extent possible, on all available resources’.⁶⁰³

(b) UN treaty bodies

The UN treaty bodies are established to monitor the compliance of the states with the commitments taken upon ratification of the international human rights treaties. These bodies systematically encourage states to ensure the human rights accountability at the domestic level.⁶⁰⁴ The treaty bodies that explicitly addressed the local governments’ roles and responsibilities in realisation of the human rights such as water, housing and health, among other economic and social rights, include the UN Committee on Economic, Social and Cultural Rights (UNCESCR), the UN Committee on the Rights of the Child (UNCRC), the UN Committee on the Elimination of Racial Discrimination (UNCERD), and the UN Committee on the Elimination of Discrimination against Women (UNCEDAW).

The treaty bodies undertake an authoritative interpretation of their respective human rights treaties through the issue of General Comments or General Recommendations. While these interpretative documents are not legally binding on the states, their elaborations represent an authoritative interpretation of the provisions of the human rights treaties and should be taken into account by the states in the process of implementing its provisions on their territories. The Concluding Observations of the treaty bodies inform the international community on the treaty bodies’ assessment of the states’ periodic reports and serve as a credible record of the human rights compliance of the state parties.

Both types of documents prove to be useful in the evaluation of the local authorities’ human rights standing and specific responsibilities. Through their work the treaty bodies continuously reflect on the local challenges for human rights compliance, revealing for example numerous cases of the violation of the human rights of vulnerable groups occurring as a result of municipalities inadequately performing their statutory functions. The recommendations that follow the assessment of the state reports and

⁶⁰³ UN Commission on Human Rights ‘Realization of the right to drinking water and sanitation. Report of the Special Rapporteur El Hadji Guissé’ (11 July 2005) UN Doc E/CN.4/Sub.2/2005/25, para 2.1.

⁶⁰⁴ M Langford ‘Ambition that Overlaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water’ (2006) 24 *Netherlands Quarterly of Human Rights* 434, 451.

practices in turn suggest the ways of overcoming the local difficulties. The treaty bodies' concluding observations and general comments are valuable sources of assisting with further understanding of local human rights dynamics. On the very few occasions, though, the committees address the local challenges of the specific human right to drinking water. Yet, the observations and interpretations of treaty bodies as regards the 'localisation' of the rights at the municipal level are in principle applicable to the right to water and are evaluated in detail in the present section.

(i) General Comments

The local level of government is addressed in the UN treaty bodies' General Comments and Recommendations to a very modest extent. The UNCESCR and the UNCRC could be complimented for the recognition of the specific role of local government in the process of implementation of rights. Both bodies emphasised a particular need for coordination among different departments and levels of government for adequate implementation.⁶⁰⁵ In its General Comments the UNCESCR identified a number of local measures for the realisation of the particular rights to water,⁶⁰⁶ to work⁶⁰⁷ and social security⁶⁰⁸. In General Comment 5 the UNCRC highlighted the alarming implications of the decentralisation, including inequitable resource allocation among municipalities and the resulting inequalities in the level of enjoyment with the human rights.⁶⁰⁹ It emphasised the importance of overcoming the associated challenges through the sustaining of the ultimate human rights responsibility of the national government,⁶¹⁰ monitoring local implementation and evaluation of the local budgetary decisions on the matter of their consideration of the children's best interests.⁶¹¹

⁶⁰⁵ UNCRC 'General Comment No 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (27 November 2003) UN Doc CRC/GC/2003/5, paras 27, 37. UNCRC 'General Comment No 7 Implementing Child Rights in Early Childhood' UN (20 September 2006) Doc CRC/C/GC/7/Rev.1, para 22. UNCESCR 'General Comment 4: The right to adequate housing' (13 December 1992) UN Doc E/C.12/1991/4 para 12; UNCESCR 'General Comment 12: The right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, para 22.

⁶⁰⁶ UNCESCR 'General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11.

⁶⁰⁷ UNCESCR 'General Comment 18: The Right to Work (article 6 of the International Covenant on Economic, Social and Cultural Rights)' (6 February 2006) UN Doc E/C.12/GC/18, paras 12 (b) iii, 26, 54.

⁶⁰⁸ UNCESCR 'General Comment 19: The Right to Social Security (article 9)' (4 February 2008) UN Doc E/C.12/GC/19, para 73.

⁶⁰⁹ UNCRC 'General Comment No 5 (n 605) paras 40, 41.

⁶¹⁰ *ibid.*

⁶¹¹ *ibid* para 45.

The General Comments of the treaty bodies attend to the human rights violations committed as the direct local actions or omissions.⁶¹² Discrimination by local authorities emerges as an issue of particular attention among several treaty bodies. Discrimination perpetrated at the local level has been referred as a violation of the economic, social and cultural rights by the UNCESCR in the General Comment 20⁶¹³. UNCRC in its General Comment 5 addressed the importance of safeguarding children from discrimination in the enjoyment of rights resulting from decentralisation policies in the State party.⁶¹⁴ UNCERD in its General Recommendations issued several statements as regards the State party's responsibility to ensure that local authorities do not engage in racial discrimination,⁶¹⁵ including practices affecting rights of Roma communities.⁶¹⁶

(ii) Concluding Observations

Through assessment of the States' periodic reports the UN treaty bodies regularly identify inequalities in access to basic services across localities and the resulting territorial disparities in enjoyment with human rights. UNCESCR in its observations of the periodic report from Brazil expressed its concern with 'persistent and extreme inequalities' in access to basic services among the regions and municipalities in the State and recommended to take an immediate action to reduce inequities and imbalances.⁶¹⁷ The disparities as regards access to safe water in rural and urban areas were noted in Chile by the UNCRC in 2007,⁶¹⁸ and the inequalities in access to water for Aboriginal population in Canada are observed by the UNCESCR in 2006.⁶¹⁹ As a follow up on the concern, the UN treaty bodies issue recommendations to the States, such as to ensure

⁶¹² UNCESCR 'General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2005) UN Doc E/C.12/2005/4, para 42.

⁶¹³ UNCESCR 'General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, para 14.

⁶¹⁴ UNCRC General Comment No 5 (n 605) para 41.

⁶¹⁵ UNCERD General Recommendation XIII on the training of law enforcement officials in the protection of human rights (1993) para 1; UNCERD General Recommendation XV on article 4 of the Convention (1993) para 7; UNCERD General Recommendation XXIX on article 1, paragraph 1, of the Convention (Descent) (2002) para 7 (mm).

⁶¹⁶ UNCERD General Recommendation XVII on discrimination against Roma (2000) para 31.

⁶¹⁷ UNCESCR Concluding Observations: Brazil (26 June 2003) UN Doc E/C.12/1/Add.87, paras 17, 40.

⁶¹⁸ UNCRC Concluding Observations: Chile (23 April 2007) UN Doc CRC/C/CHL/CO/3.642, para 59.

⁶¹⁹ UNCESCR Concluding Observations: Canada (22 May 2006) UN Doc E/C.12/CAN/CO/4- E/C.12/CAN/CO/5.597, para 15.

equal and adequate provision of basic services, including water, to population of different locations, and to vulnerable groups in particular.⁶²⁰ The committees also recognise a link between local inequalities and the lack of financial and technical capacity of municipalities to achieve rights. In this regard states are advised to evaluate their budgetary structures to reduce imbalances in the distribution of resources,⁶²¹ to ensure that local authorities receive additional funds necessary for adequate provision of services,⁶²² and to build the capacity of municipalities for service delivery.⁶²³

The issue of inequality in enjoyment with rights across different municipalities is interlinked with the question of local implementation of human rights. In several instances treaty bodies commented on the insufficiency of local efforts to deliver rights⁶²⁴, the lack of coordination among involved bodies and mechanisms at different levels, and impact of decentralisation⁶²⁵ as the key challenges of local implementation. In its concluding observations to Germany's sixth periodic report the UNCEDAW reiterated that the Convention is binding on all branches of government and municipalities and recommend state 'to ensure, through the effective coordination of the structures at all levels and in all areas, that uniformity of results in the implementation ... is achieved throughout the State party's territory'.⁶²⁶ Similar recommendations are issued by the same body to Brazil in 2007⁶²⁷ and by the UNCERD to the USA in 2008.⁶²⁸

Another relevant feature that is regularly highlighted by the treaty bodies is the need for raising human rights awareness of local authorities. UNCESCR suggests disseminating information regarding the implementation process to local level and the organising of the systematic and ongoing training programmes on the provisions of the human rights treaties for the local

⁶²⁰ *ibid* para 64, UNCRC Concluding observations: Panama (21 December 2011) UN Doc CRC/C/PAN/CO/3-4, para 18(b).

⁶²¹ UNCESCR Concluding Observations: Brazil (26 June 2003) UN Doc E/C.12/1/Add.87, para 40.

⁶²² UNCESCR Concluding Observations: People's Republic of China (including Hong Kong and Macao) (13 May 2005) UN Doc E/C.12/1/Add.107, para 56.

⁶²³ UNCRC Concluding Observations: Chile (23 April 2007) UN Doc CRC/C/CHL/CO/3.642, para 60; UNCERD Concluding Observations: Nepal UN Doc CERD/C/304/Add.108 (1 May 2001), para 12.

⁶²⁴ UNCEDAW refers to 'the different degree of political will and commitment of state and municipal authorities' in its Concluding Observations: Brazil (10 August 2007) UN Doc CEDAW/C/BRA/CO/6, para 13.

⁶²⁵ Challenge of inequitable implementation posed by devolution of powers to sub national levels of government in Italy featured in the concluding observations of the UNCRC and of the CEDAW both in 2011.

⁶²⁶ UNCEDAW Concluding Observations: Germany (12 February 2009) UN Doc CEDAW/C/DEU/CO/6, para 16.

⁶²⁷ UNCEDAW Concluding comment: Brazil (10 August 2007) CEDAW/C/BRA/CO/6, para 13, 14.

⁶²⁸ UNCERD Concluding Observations: USA (8 May 2008) CERD/C/USA/CO/6, para 13.

government officials.⁶²⁹ UNCRC recommends providing local government officials with training on children's rights.⁶³⁰ The UNCRC recommend transmitting the concluding observations to local authorities for appropriate consideration and further action⁶³¹ along with the recently established Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of Persons with Disabilities.

2 Domestic Mechanisms

In its General Comment 9 when considering the issues of the domestic application of the Covenant, the UNCESCR reiterated the central obligation of the states to give effect to the economic, social and cultural rights and to achieve it 'by all appropriate means'.⁶³² It highlighted the necessity of the introduction at the domestic level of the mechanisms of redress, such as administrative or judicial, stating that 'appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place'⁶³³. This interpretation echoed the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, which highlighted the necessity of the effective remedies, including judicial, at the domestic level.⁶³⁴ This section addresses the traditional forms of human rights accountability found at the domestic level and outlines their potential to hold local authorities to the scrutiny of the human rights justice.

⁶²⁹ UNCESCR Concluding Observations: Jordan (1 September 2000) UN Doc E/C.12/1/Add.46 para 38, UNCESCR Concluding Observations: Ukraine (24 September 200) UN Doc E/C.12/1/Add.65, para 34.

⁶³⁰ UNCRC Concluding observations: Italy (31 October 2011) UN Doc CRC/C/ITA/CO/3-4, para 18, UNCRC Concluding Observations: Lithuania (17 March 2006) UN Doc CRC/C/LTU/CO/2, para 21.

⁶³¹ UNCRC Concluding Observations: Azerbaijan (17 March 2006) UN Doc CRC/C/AZE/CO/2, para 69, UNCRC Concluding Observations: Bangladesh (26 June 2009) UN Doc CRC/C/BGD/CO/4 para 97, UNCRC Concluding Observations: Bolivia (16 October 2009) UN Doc CRC/C/BOL/CO/4 para 91.

⁶³² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(1).

⁶³³ UNCESCR 'General Comment 9: The Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, para 2.

⁶³⁴ 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17, para 19.

(a) Administrative measures

While judicial mechanisms are indispensable and obligatory for enforcement of the right to water, human rights accountability at the municipal level can be made effective through the use of the ‘other appropriate remedies’.⁶³⁵ These include administrative procedures that in particular cases can be adequate to address the claim and provide effective remedy. The UNCESCR in the General Comment 9 suggested to the states to consider administrative measures as an alternative to the judicial remedies and recommended these to ‘be accessible, affordable, timely and effective’.⁶³⁶ The Committee also suggests that all administrative authorities in their decision-making would be taking account of the requirements of the ICESCR,⁶³⁷ especially in relation to the certain norms of the Covenant that can be deemed to be of a self-executing character. Where the administrative mechanisms fail to restore the infringed right the option of the judicial appeal of the administrative decision should also be provided to reinforce the accountability.⁶³⁸

As regards to the right to water claims, the administrative measures can be effectively used at the service provision level. These procedures can serve as easy accessible, time and cost effective avenue for the individuals to lodge complaints and requests to protect their rights as service users. The Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque in her progress report on the compilation of good practices highlights the importance of the establishment of the administrative mechanisms at the level of local authorities who carry out the responsibility for water supply for domestic use and act as water service providers.⁶³⁹ In this case administrative procedures appear as a valuable tool of municipal accountability and local enforcement of the right to water.

Australia offers a useful example of local use of the administrative mechanism. The Energy and Water Ombudsmen in several Australian states operates as a statutory-based, independent, free and confidential dispute resolution service to help customers to resolve issues with their water supplier such as billing, connections, sewerage spills and blockages, meters, customer service, or actions of the supplier affecting service users and their

⁶³⁵ General Comment 15 (n 606) para 55.

⁶³⁶ General Comment 9 (n 633) para 9.

⁶³⁷ *ibid.*

⁶³⁸ *ibid.*

⁶³⁹ UN Human Rights Council ‘Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque. Addendum Progress report on the compilation of good practices’ (1 July 2010) UN Doc A/HRC/15/31/Add.1, para 57.

property.⁶⁴⁰ Local councils act as the water suppliers in certain areas in the Australian states, along with the public and private utilities. In the state New South Wales two local councils, Gosford City Council and Wyong Shire Council, voluntarily signed up for the jurisdiction of the Energy and Water Ombudsman. This action of municipalities demonstrates their readiness to be accountable to their constituencies and can be considered as compatible with the requirements of the ICESCR.⁶⁴¹

The local authorities may introduce their own complaints mechanisms. Galway County Council, Ireland, adopted the Customer Care Plan containing the Complaints and Appeals Procedure.⁶⁴² Persons dissatisfied with the delivery of service can submit a complaint and are offered redress in the form of apologies and rectification; alternatively they can appeal the decision to the Ombudsman. The Plan defined the ‘customer service delivery response target times’, according to which complaints on the water quality have to be investigated in four hours, and complaints of ‘poor pressure’ or no water supply within one working day.⁶⁴³

Sweden features the quasi-judicial procedure of the administrative court, which can direct the municipality to discharge its obligations for water supply when it is compromised the health needs of residents. The literature evidenced that the Supreme Administrative Court has ordered the municipalities to upgrade the inadequate infrastructure.⁶⁴⁴

(b) National human rights institutions

Human rights accountability at the domestic level is traditionally supported by the national institutions, such as ombudspersons and human rights commissions. According to the description spelled out by the UNCESCR a national human rights institution is a body established by the Government that

⁶⁴⁰For example <<http://www.ewoq.com.au/>>, <<http://www.ewon.com.au/>>, <<http://www.ewov.com.au/>> (25 July 2013).

⁶⁴¹ Australia ratified the ICESCR on the 10 December 1975.

⁶⁴² County Galway Local Authorities ‘Customer Service Action Plan 2010-2014’, 13-14, available

<<http://www.galway.ie/en/AboutYourCouncil/CustomerService/CustomerCharterPlansConduct/Customer%20Services%20Action%20Plan%202010%20-%202014.pdf>> (13 August 2013).

⁶⁴³ *ibid* 16.

⁶⁴⁴ H Smets ‘The Right to Water in National Legislations’ (2006 Paris: Agence Française de Développement) 78.

‘enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country concerned, and is mandated to perform various activities designed to promote and protect human rights’.⁶⁴⁵

In their work human rights institutions engage with various entities, public or commercial, whose actions in one way or another have impact on the human rights of individuals and groups. National human rights institutions thus are well positioned to attend to the local authorities’ human rights performance and accountability. The national constitutions⁶⁴⁶ and legal mandates of these institutions can provide for their engagement with local government.

One of the functions of the national human rights institutions is examining complaints alleging infringements of the socio-economic rights within the state territory⁶⁴⁷. UNCESCR in the General Comment 15 advised that the remit of these institutions should be open to address violations of the right to water.⁶⁴⁸ As an alternative to judicial measures, the human rights institutions can investigate complaints as regards the infringements of the access to drinking water and ensure remedies in the more flexible, time and cost efficient manner.⁶⁴⁹ It is important to note though that as a practice the human rights institutions do not issue binding decisions, but rather provide recommendations for the parties of the dispute.

Ombudspersons across the world have effectively dealt with the human rights issues and challenges at the local level for decades.⁶⁵⁰ In Australia, the Ombudsman in the state of Victoria has a power to investigate the behaviour of local governments on the subject of breach of human rights contained in the Charter of Human Rights and Responsibilities. The institutions of Ombudsman have been utilised as a mechanism of independent investigation of the complaints and disputes between individuals, whose right to water has been compromised, and local authorities responsible for the water provision in their jurisdictions. Service

⁶⁴⁵ UNCESCR ‘General Comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights’ (10 December 1998) UN Doc E/C.12/1998/25, para 2.

⁶⁴⁶ For instance Constitution of Slovenia in the Article 159 provides for the establishment of the office of the ombudsman ‘to protect human rights and fundamental freedoms in relation to state authorities, local self-government authorities, and bearers of public authority’.

⁶⁴⁷ General Comment 10 (n 645) para 3(g).

⁶⁴⁸ General Comment 15 (n 606) para 55.

⁶⁴⁹ Centre on Housing Rights and Evictions *Manual on the Right to Water and Sanitation* (2007) 30.

⁶⁵⁰ For instance the Ombudsman in New South Wales, Australia

<<http://www.ombo.nsw.gov.au/what-we-do/our-work/local-government>> (11 April 2013).

users can seek help from the Ombudspersons where local authorities treat them in discriminatory or inconsistent manner, do not comply with legal procedures, or fail to notify customers about decisions such as disconnection or change in tariffs. There is abundant evidence of the utilisation of the institution of the Ombudsman at the local level with regard the issues of drinking water, where local authorities are involved as service providers or public authorities making decisions that affect people's access to water.

In Ireland an individual can apply to the Ombudsman with a complaint as regards water services provided by local authorities.⁶⁵¹ In 2011 the Office of the Ombudsman received twenty-six complaints relating to provision of water supply by Irish local authorities.⁶⁵² In Hungary a family from the Roma settlement disconnected from water service due to non-payment, applied to the Ombudsman for a violation of their constitutional rights to social safety, healthy environment and health.⁶⁵³ Following the inquiry with the local officials the ombudsman established that there was no violation of the constitutional rights, however the social support provided by municipalities was insufficient to ensure basic standard of living for disadvantaged families.

Another interesting example of the utilisation of the Ombudsman mechanism to restore right to water issues at the local level comes from Argentina, where local councillors filed the complaint to the ombudsman against town mayor.⁶⁵⁴ The councillors argued that the mayor entered into an agreement with a private water service provider who failed to provide clean and safe drinking water and imposed onerous rates on customers.⁶⁵⁵ This example provides a useful insight into the interplay of local politics and complexity of decision-making at the local level, and suggests an innovative way of utilisation of the Ombudsman as an institution to ensure human rights based institutional accountability.

⁶⁵¹ The Ombudsman Act 1980 empowers the Office to investigate whether the local authority has acted properly, fairly and impartially and to make a recommendation to the local authority on the matter of the complaint. S 4(2), S 6(3).of the Ombudsman Act 1980.

⁶⁵² Ireland Office of the Ombudsman: Annual Report 2011
<<http://www.ombudsman.gov.ie/en/publications/annual-reports/2011-annual-report/annualreport2011/annexa.html>> (10 August 2013).

⁶⁵³ From E Somogui 'Case Study on the Right to Water and Sanitation in Hungary: The example of the city of Nyiregyhaza' in S Hoffman *The Implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) Solidarite Eau Europe, 22-23.

⁶⁵⁴Featured in the submission to the UN High Commissioner from the Water for the People Network- Asia 'Water Privatization in the Philippines: Creating Inequity in People's Access to Sufficient and Potable Water'.

⁶⁵⁵ According to the presentation by the Water for the People Network at the Forth World Water Forum in 2006, the Ombudsman dismissed the case in 2003, presentation
<[http://www.worldwaterforum4.org.mx/sessions/FT1_07/Promoting%20people%E2%80%99s%20governance%20in%20the%20Philippine%20water%20sector\(final\).pdf](http://www.worldwaterforum4.org.mx/sessions/FT1_07/Promoting%20people%E2%80%99s%20governance%20in%20the%20Philippine%20water%20sector(final).pdf)> (11 August 2013).

Finally, the monitoring function of national human rights institutions must be highlighted as a practice that strengthens accountability. At the national level it includes review of the legislation and policy programmes to ensure that they are consistent with the right to water. It may result in a contribution to the development of legislation and recommendation for policy change. Similar reviews can be undertaken at the regional and local level.⁶⁵⁶ Monitoring of municipal governments on the matter of their compliance with the obligations in relation to the right to water should be part of the functional remit for the national human rights institutions.

(c) Judicial mechanisms and access to justice

Courts play a crucial role in the framework of the human rights accountability: they represent the branch of the state power that is created to oversee the compliance with the domestic laws by the state authorities and other actors. They can be regarded as the critical institutions to hold local governments to account for the violation of the right to water. The effectiveness of the other mechanisms of accountability, such as administrative procedures, human rights commissions and ombudsmen, is also reinforced by the judicial measures. Access to justice is instrumental for human rights accountability: it serves as a means to protect and restore rights.⁶⁵⁷ It has been embedded in the core human rights instruments at the international and regional levels as a right in itself.⁶⁵⁸ Article 8 of the Universal Declaration of Human Rights states ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’⁶⁵⁹ The ICCPR speaks about the entitlement of everyone to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’ in determination of his rights and obligations in a suit at law.⁶⁶⁰ The same article 14.1 articulates “all persons shall be equal before the courts and tribunals”. This provision has been interpreted by the UN Human Rights

⁶⁵⁶ *Manual on the Right to Water and Sanitation* (n 649) 45.

⁶⁵⁷ S P Baumgartner ‘Does Access to Justice Improve Countries’ Compliance with Human Rights Norms? — An Empirical Study’ (2011) 44 *Cornell Intl L J* 441.

⁶⁵⁸ Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 8, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1973) 999 UNTS 171 (ICCPR) art 2.3 (b), Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 as amended art 6(1), Charter of Fundamental Rights of the European Union (7 December 2000, entered into force 1 December 2009) OJ C 364/0, art 47.

⁶⁵⁹ Art 8.

⁶⁶⁰ Art 14.1.

Committee as a right of equal access to the courts,⁶⁶¹ which can further be translated as a guarantee of the equal access to justice for violation of the right to water.

The ICESCR is not explicit about the access to court as a mechanism of redress for the violation of the economic, social and cultural rights. Nevertheless, these rights, including the right to water, are justiciable⁶⁶² and can indeed be invoked before the courts. Various challenges to access to drinking water have been subjects of adjudications at the national and sub-national levels of justice, vindicating the right to life, right to health, and housing, healthy environment, above and beyond the premise of the right to drinking water itself.⁶⁶³ The UNCESCR in its general comments and concluding observations constantly refer to the judicial mechanisms and remedies as a feature of the economic, social and cultural rights.⁶⁶⁴ General Comment 15 on the right to water reiterates that everyone should have access to effective judicial remedies at both national and international levels.⁶⁶⁵ While the Comment does not refer to access to remedies at the local level, the range of judicial mechanisms at national level includes the hierarchy of the judicial institutions from the lowest district or municipal level to the highest courts operating in the state.

The pre-condition for justiciability of the socio-economic rights is their reception or recognition within the domestic legal system, so that rights are given effect and can be invoked before domestic courts.⁶⁶⁶ Adoption of

⁶⁶¹ UN Human Rights Committee 'General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial' (27 July 2007) UN Doc CCPR/C/GC/32(2007).

⁶⁶² Deval Desai 'Courting Legitimacy': Democratic Agency and the Justiciability of Economic and Social Rights, (2009- 2010) 4(1) *Interdisciplinary Journal of Human Rights Law*, Note 'What Price for the Priceless?: Implementing the Justiciability of the Right to Water' (2007) 120 *HVLR* 1067, R Pejan 'The Right to Water: the Road to Justiciability' (2004) 36 *George Washington International Law Review* 1181.

⁶⁶³ For a list of cases refer to the Centre on Housing Rights and Evictions *Source No 8: Legal Resources for the Right to Water: International and National Standards* (2004), Office of the UN High Commissioner for Human Rights, UN HABITAT, WHO, *The Right to Water*, Fact sheet No. 35.

⁶⁶⁴ UNCESCR 'General Comment 3: The Nature of States' Parties Obligations' (14 December 1990) UN Doc. E/1991/23 para 5; General Comment 9 (n 633) paras 3,9,10,11, 14; General Comment 12: The right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, para 32; UN CESCR 'General Comment 14: The Right to Highest Attainable Standard of Health' (2002) UN Doc E/C.12/2000/4, paras 33,59; General Comment 15 (n 606) para 55; UNCESCR 'General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)' (12 January 2006) E/C.12/GC/17, paras 18 (a)(b), 19, 28, 34, 39(d), 43, 44, 46, 51, 52; UNCESCR 'General Comment 18: The Right to Work (article 6 of the International Covenant on Economic, Social and Cultural Rights)' (6 February 2006) UN Doc E/C.12/GC/18, paras 22, 48; UNCESCR 'General Comment 19: The Right to Social Security (article 9)' (4 February 2008) UN Doc E/C.12/GC/19, para 77.

⁶⁶⁵ General Comment 15 (n 606) para 55.

⁶⁶⁶ General Comment 3(n 664) para 6. General Comment 9 (n 633) para 7.

legislative measures is considered by the UNCESCR as ‘highly desirable and in some cases ... indispensable’.⁶⁶⁷ Adequate incorporation of the ICESCR into domestic system is indispensable for implementation of the rights, as well as for their judicial redress. It allows judges in exercising the judicial review in the case concerning the socio-economic rights to apply provisions of the ICESCR directly or as interpretative standards.⁶⁶⁸ The derivative nature of the right to water poses an additional challenge to its integration into the domestic legislation and ultimately to its justiciability. Still, the human right to drinking water has been entrenched into national constitutions and legislation across the world,⁶⁶⁹ which provides fertile ground for its judicial protection at the domestic level.

Within the states it is not uncommon that the Constitutions and national legislation guarantee access to justice. At the same time the adequate incorporation of the ICESCR and recognition of the human right to water in domestic legal order, as referred above, enhances the perspectives of its judicial enforcement. These provisions, if in place, open the opportunity for people to bring their human rights related complaints to the local, municipal or district courts, which are closer to individuals and supposedly easier to access. The possibility of bringing the human rights claims against the local authority to a local court in practice would depend on the rules of admissibility in any given country. The judicial system should allow the human rights claims to be invoked through the courts, either at municipal, sub-national or national levels. Ideally, the individuals and groups should be given the opportunity to institute proceedings against the local authorities, or other local actors, compromising their right to water, for appropriate redress before the closest court in their municipal jurisdiction.

Evidence suggests that local courts face the challenge of poor understanding of the human rights principles and norms among the judiciary. For instance, local council courts in Uganda serve as important vehicles of justice due to their popularity in the community and the comparative advantage in relation to other courts in terms of speed, simplicity, low cost, accessibility and focus on resolution.⁶⁷⁰ The need for basic legal training, as well as training in human rights and their relevance to the delivery of justice had been identified and recommended for local courts in Uganda by the DANIDA

⁶⁶⁷ General Comment 3 (n 664) para 3.

⁶⁶⁸ General Comment 9 (n 633) paras 12-15.

⁶⁶⁹ C Albuquerque, United Nations Special Rapporteur on the human right to safe drinking water and sanitation and V Roaf, *On the Right Track: good Practices in Realising the Rights to Water and Sanitation* (Lisbon 2012) 51-55.

⁶⁷⁰ From Global Rights ‘Promoting Access to Justice and Human Rights – Bundibugyo District, Uganda’ 2011, 25

<http://www.globalrights.org/site/DocServer/Training_Manual_Final_13_Jan_2011_3.pdf?docID=12524>(11 August 2013).

judiciary programme in 1998.⁶⁷¹ Decade later ‘little adherence by [Local Council Courts] to principles of human rights, ethics, principles of natural justice such as letting both sides be heard, and gender sensitivity’ have been observed by Global Rights.⁶⁷² This example indicates the challenge of apprehension of human rights at the local level, and emphasises the importance of pro-active human rights education of the local judiciary and community.

The other challenges associated with the judicial enforcement of the human rights claims are the length and costs of the procedure, geographic location of the court, language requirements, as well as complexity and need for legal advice and guidance.⁶⁷³ In this regard the Independent Expert on the Right to Water advised that ‘effective, affordable and timely access to an independent and functioning judicial system is crucial in case other forms of accountability fail to respond effectively to the violations in question’.⁶⁷⁴ While this is an encouraging statement that is accurately relevant to local justice, the scope exists for further research on the practice, challenges and success factors of the local adjudication of the right to water. This section does not attempt to further examine the potential, risks and limitations of the local litigation of the right to water, but it is important to highlight that there remains much to be understood about the pre-conditions for successful rights claims in the local context.

⁶⁷¹ Baseline Survey on the Local Council Courts System in Uganda, Final Report, Danida, December, 1998, 2, cited in Penal Reform International, Access to justice in sub - Saharan Africa the role of traditional and informal justice systems, November 2000, 109.

⁶⁷² Global Rights (n 670) 25.

⁶⁷³ FAN Global ‘An Activists handbook on the right to water and sanitation’ 2010, 68.

⁶⁷⁴ UN Human Rights Council ‘Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque. Addendum Progress report on the compilation of good practices’ (1 July 2010) UN Doc A/HRC/15/31/Add.1, para 55.

C OPERATIONALISATION OF ACCOUNTABILITY

The monitoring and accountability mechanisms on the international and national levels act as the guarantors of domestic implementation of human rights. These include UN human rights charter and treaty bodies, judiciary, human rights commissions, and ombudsmen among others, who monitor and evaluate compliance of the governments at different levels with human rights standards, and draw attention to the human rights implications of their laws, policies, strategies and practices.

The potential of the rights-based accountability to tackle these issues and secure the remedies for those whose access to water has been unlawfully compromised at the local level, is emerging but requires further apprehension of the local dimension at the UN level and a better integration in the domestic institutions. There are common issues that feature in the UN treaty and charter bodies' documents indicating local challenges of human rights compliance. These include discrimination of disadvantaged population in access to rights, the need for improved coordination among the levels of government, the restrained capacity of local governments to implement human rights and inequalities in implementation among the regions in the context of decentralisation. Domestic mechanisms are utilised in addressing local issues arising from water services provision, challenges emerging from privatisation, and discrimination in access to water service.

At the local level the practical challenge remains in advancement of conscious and dynamic application of the rights-based accountability in relation to the unlawful acts and omissions of the municipalities often operating concurrently as the government authority and the service provider. Accountability essentially depends on at least three primary conditions, which are equally indispensable to hold municipalities to account. First is the adequate incorporation of the international human rights laws into the domestic legal system. Second condition is the availability of the mechanisms of holding the responsible actors to an account with their remit allowing consideration of human rights claims. Finally, access to these mechanisms needs to be facilitated by the means of legal aid and the participation of civil society.

Legislation incorporating the right to water into the water governance processes and clearly outlining the respective obligations of the authorities in this regard is the foundation of the rights-based accountability at the local level.⁶⁷⁵ Where the domestic legislation does not explicitly entrench the

⁶⁷⁵ General Comment 15 (n 606) para 57.

right to water the laws stipulating the duties of local authorities can assist municipal accountability. The statutory laws can facilitate accountability by stipulating the right of the individuals or groups to approach courts and other mechanisms with the request to restore the compromised rights as regards access to safe drinking water. The examples of these laws can be found in the legislation on the management of water resources or regulating the water service provision in Liberia,⁶⁷⁶ Kyrgyzstan,⁶⁷⁷ Belarus,⁶⁷⁸ Indonesia,⁶⁷⁹ Honduras,⁶⁸⁰ Guyana,⁶⁸¹ Georgia,⁶⁸² and Australia.⁶⁸³ These provisions may not explicitly refer to the local governments; however these laws would apply in situations where the municipalities carry out the responsibilities as regards water resources management and service provision. In contrast, the laws may be explicitly retrogressive in terms of withholding the local government accountability. For instance the Water Services Act 2007 in Ireland provides immunity to local water services authorities from any civil proceedings for the recovery of damages in the national courts for a failure to exercise statutory powers.⁶⁸⁴

The UNCESCR in the General Comment 15 clarified that accountability has to be entrenched through the national strategy or plan of action for implementation of the right to water. Firstly, the strategy must be based on the human rights principles, which include accountability, and, secondly, it should ‘establish accountability mechanisms to ensure the implementation of the strategy’.⁶⁸⁵ The adoption of the strategy or plan of action is inherently seen as a task for the national government as a part of its duty to take steps to realise the right to water. Within the framework of this duty the central government should ensure, promote and monitor accountability for the right to water at the local level.

This can be achieved, for instance, by extending the remit of domestic accountability mechanisms to address the claims against the local governments compromising the right to water. The Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation in her report on the

⁶⁷⁶ Environment Protection and Management Law of the Republic of Liberia, 2002, Section 5 - Protecting the Right to a Clean and Healthy Environment.

⁶⁷⁷ Kirgizstan Law on drinking water, Law No. 33 of 25 March 1999, as last amended 28 June 2003, art 19.

⁶⁷⁸ Water Code of the Republic of Belarus, Law No. 191-3 1998, as last amended 13 June 2007.

⁶⁷⁹ Law No. 7/2004 on Water Resources 2004, art 82 (e), (f).

⁶⁸⁰ Decree No. 118-2003, Framework Law for the Drinking Water and Sanitation Sector, art 13, 25.

⁶⁸¹ Public Utilities Commission Act, Act No. 10 of 1999.

⁶⁸² Water Law No. 936-Ic of 1997, art 13.

⁶⁸³ Australian Utilities Act 2000 No. 65, 2002, last amended by A2007-22 of 6 September 2007.

⁶⁸⁴ S 29 of the Water Services Act, 2007.

⁶⁸⁵ General Comment 15 (n 606) para 47.

mission to Slovenia called on the central government to ‘establish national-level monitoring programmes to ensure that municipalities are complying with the human rights obligations of Slovenia to guarantee access to safe drinking water and sanitation to all within its territory’.⁶⁸⁶

Finally, the operationalisation of accountability is not effective without civil society that plays a fundamental role in holding governments at all levels to account.⁶⁸⁷ Acting as a catalyst of local accountability civil society institutions assists vulnerable or marginalised groups to understand and defend their right to water, and to hold the responsible local governments to account. In this regard the General Comment 15 encouraged states to respect, protect, facilitate and promote the work of civil society actors.⁶⁸⁸

The accountability mechanisms aim to ensure access to effective remedies to anyone who has been denied their rights.⁶⁸⁹ Access to water is inherently a local matter, and the effective enforcement of the right to water compromised locally is critical. This chapter established the perspectives on the existing institutional contexts for the local governments’ human rights accountability for the right to water. The international structures monitoring human rights performance are in the ideal position to enhance attention to local government as a human rights actor, however this potential is yet to be utilised to its best. The mechanisms and procedures for bringing the local authorities to account at the domestic level stand as the critical mechanisms to restore compromised right to water, and their utilisation depends on the number of conditions such as an active civil society and legislative change permitting action. The cornerstone of human rights accountability at the domestic level is judicial power, which stands as a last resort in restoring of injustice. The perspectives of utilisation of judicial action in holding the local government to an account for specific violations of the right to water are addressed next.

⁶⁸⁶ UN Human Rights Council ‘Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Addendum Mission to Slovenia’ (4 July 2011) UN Doc A/HRC/18/33/Add.2, para 58 (d). Additionally she called to ensure the implementation of the National Programme of Measures for Roma for the Period 2010-2015 in all municipalities by offering incentives to pay particular attention to Roma people and holding municipalities accountable for failure to respect the right of Roma communities, para 58 (f).

⁶⁸⁷ FAN Global (n 673).

⁶⁸⁸ General Comment 15 (606) para 59.

⁶⁸⁹ *ibid* para 55.

D SUBSTANTIVE ISSUES ARISING IN DOMESTIC JURISPRUDENCE

Failure of local authorities to perform their functions related to drinking water can be challenged as a human rights violation by the way of judicial review. Domestic litigation is gradually emerging as the effective mechanism of human rights accountability for violations of the right to water at the local level; yet its efficiency in bringing the local actors to account can be problematic and depends on different factors. Encouraging examples of the pro-active role of judiciary in adjudicating the local challenges of access to water demonstrate that municipalities can be effectively held to account for the violations of the right to water and the appropriate remedies can be granted to the affected individuals in courts. Domestic jurisprudence from India, South Africa, Argentina and other countries outlined in this Chapter ascertains development of rights-based accountability of local governments for violations of the right of access to drinking water and sanitation, specifically around several substantive matters, such as lack of services, contamination of water supply, pollution of water resources, practice of pre-paid water meters contradicting the right to water requirements, and disconnection of water supply. This Chapter examines the perspectives of justiciability of these particular matters in domestic courts and illustrates the position of local governments in the proceedings and the remedies granted by courts. Simultaneously this enquiry aims to enhance the understanding of the potential and limitations of the judicial protection as an accountability mechanism for violation of the right to water at the local level.

1 Access to Water and Sanitation

Domestic jurisprudence from around the world provides a number of encouraging examples of the pro-active role of judiciary in adjudicating the obligations of local governments to ensure adequate water and sanitation services and facilities to their residents. Domestic courts in India,⁶⁹⁰ South Africa,⁶⁹¹ Sweden,⁶⁹² among others, considered cases in relation to

⁶⁹⁰ *Garg v State of Uttar Pradesh* (1998) 2 UPLBEC 1211; *Uzir v Gauhati Municipal Corporation* 1999 (3) GLT110; *Koolwal v State of Rajasthan* AIR1988 Raj2; *Municipal Council Ratlam v Vardhichand* AIR 1980 SC 1622; *Rampal v State of Rajasthan* AIR1981Raj121; *Kranti v Union of India* 2007(8) JT 359.

⁶⁹¹ *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZAGPJHC 14.

⁶⁹² According to Smets (n 644) the Supreme Administrative Court in Sweden has obliged a municipality to install equipment because the existing water and sanitation infrastructures were inadequate.

inadequate access to services and facilities resulting from the failure of municipalities to fulfil their statutory obligations to meet the needs of the local population for water and sanitation. Judicial decisions that consider inadequate access of the population to sufficient drinking water and sanitation most often have been based on the statutory provisions stipulating respective responsibility of the sub-national, local and other authorities. The courts, which considered cases on the inadequate water supply and sanitation, proved to be sympathetic to the values and principles of social justice and several judgements are explicitly based on the human rights standards. Indian courts, for instance, have invoked the constitutionally guaranteed right to life as a primary value to which other claims and rights such as water and sanitation are intrinsically connected.⁶⁹³

Legal actions against sub national governments decided in favour of deprived communities have secured the following remedies. By and large, judges have ordered the municipalities to address inadequate water and sanitation in their localities without delay. In *Rampal v State of Rajasthan*⁶⁹⁴ the court directed the Municipal Board to construct proper sewers and drains within period of three month. In *Kranti v Union of India*⁶⁹⁵ interim directions were issued for Local Administration to immediately take steps to supply water for people affected by the Tsunami, in the form of water harvesting, construction of cemented tanks and digging additional wells. In *Nokotyana v Ekurhuleni Metropolitan Municipality*⁶⁹⁶ the judge ordered the provision of communal water taps for the neighbourhood, but dismissed the request for sanitation services. In *Ratlam v Vardhichand*⁶⁹⁷ the municipal council was ordered to construct a sufficient number of public latrines and provide water supply as to ensure sanitation within six month.

These decisions effectively invoke the municipal duty to fulfil the human right to access water and sanitation respectively, and carry considerable budgetary implications.⁶⁹⁸ The lack of financial resources represents a significant challenge for the local authorities in developing countries, which have no funding to extend or repair services and facilities. This argument is often expressed in the proceedings by the local authorities in defence of their case. By and large the judiciary dismissed the ‘lack of finance’ as a valid justification for a failure to perform the statutory duty by

⁶⁹³ *Garg v State of Uttar Pradesh* (n 690), *Joseph v State of Kerala* 2007(1) KLT368; *Koolwal v State of Rajasthan* (n 690).

⁶⁹⁴ *Rampal v State of Rajasthan* (n 690).

⁶⁹⁵ *Kranti v Union of India* (n 690).

⁶⁹⁶ *Nokotyana v Ekurhuleni Metropolitan Municipality* (n 691).

⁶⁹⁷ *Ratlam v Vardhichand* (n 690).

⁶⁹⁸ This aspect is addressed further in the current Chapter.

municipalities. In *Koolwal v State of Rajasthan*⁶⁹⁹ the judge quite frankly declared:

‘[t]he primary duties will have to be performed by the Municipal Board and there cannot be any plea whether the funds are available or not... It is for the Municipality to see how to perform the primary duties and how to raise resources for the performance of that duty.’⁷⁰⁰

In *Ratlam v Vardhichand*⁷⁰¹ the local authority was requested to rearrange the budget priorities so as to find resources to provide sanitation services. In *Uzir v Gauhati Municipal Corporation*, the financial situation was considered by the judge who ordered the State and municipal authorities to jointly work out a financial solution.⁷⁰²

2 Quality of Drinking Water

Municipalities along with other sub-national authorities appear in the court proceedings for failure to perform their statutory obligations to deliver clean potable water free from the health hazards. Domestic case law dealt with situations where the quality of drinking water had been compromised as a result of interlinked issues such as poor maintenance of waterworks and public sewer treatment system, lack of public sanitation facilities, close proximity of faulty leaking water supply and sanitation systems, and pollution of natural water resources caused by unlawful emissions and discharges. Indian case law features a number of public interest litigations filed against sub-national authorities to ensure their compliance with the duty to supply safe drinking water and to address causes of contamination.⁷⁰³ Similarly actions have been taken against local authorities in Argentina for failure to ensure access of people to safe water linked with the environmental pollution of natural resources.⁷⁰⁴

⁶⁹⁹ *Koolwal v State of Rajasthan* (n 690).

⁷⁰⁰ *ibid* para 6.

⁷⁰¹ *Ratlam v Vardhichand* (n 690).

⁷⁰² *Uzir v Gauhati Municipal Corporation* (n 690).

⁷⁰³ *ibid*; *Malhotra v State of Madhya Pradesh* AIR 1994 MP 48; *Satpathy v State of Orissa* 1996(II)OLR546; *Council for Protection of Public Rights and Welfare and Others v State of Bihar* 1992(2)BLJR822.

⁷⁰⁴ *Menores Comunidad Paynemil s/accion de amparo Expte. 311-CA-1997*. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, 19 May 1997; *Defensoria de Menores Nro 3 v. Poder Ejecutivo Municipal Agreement 5*, Superior Justice Court. Neuquen. 2 March 1999, for description of the case in English see Juan Miguel Picolotti *The Right to Water in Argentina* (2003) CEDHA; Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial: *Marchisio José Bautista y Otros*, Acción de Amparo (Expte. No. 500003/36), 19 October 2004 (hereinafter *CEDHA v Municipality and Province State of Córdoba*) information on the case and its follow up in English is summarised in YE Najle ‘Humans Rights to Water and Sanitation in Courts’ Consultation with Civil Society

Domestic litigation on these issues carries important human rights implications, even where court orders do not refer to human rights. Most often decisions are based on the statutory obligations of sub-national authorities to deliver safe water, as well as on the relevant case law. Local responsibilities for provision of clean drinking water, when stipulated in the domestic legislation, effectively underpin judicial considerations and allow adjudicating claims against violation of the right to water. In some instances judgements are explicitly based on the reference to human rights standards stipulated in domestic constitutions and international human rights instruments. The Indian jurisprudence traditionally refers to the constitutionally entrenched right to life, from which the right to clean water is derived.⁷⁰⁵ Argentinean courts have founded their position mostly on the basis of the rights to health and environment, which embrace the access to clean water, and explicitly referred to the Constitution⁷⁰⁶ and different international human rights instruments such as the UNCRC,⁷⁰⁷ the UNDHR, the ICESCR and the General Comment 15 on the right to water.⁷⁰⁸ The judicial reference to the human rights standards and its international and domestic sources is important in asserting the human rights responsibilities of municipalities, such as the duties to provide access to safe water and to protect it from contamination by third parties.

As regards the remedies, courts issued directions to local authorities to address contamination and restore provision of clean water. In *Malhotra v State of Madhya Pradesh* court ordered the Municipal Corporation to ‘take all steps to ensure that potable water is not contaminated and polluted’.⁷⁰⁹ Similarly in *Kranti v Union of India*⁷¹⁰ interim directions were issued for Local Administration to clean the existing wells polluted by the Tsunami. The court can direct parties to set up a committee consisting of the responsible authorities and other interested stakeholders to study the problem with a view to work out long term solutions and to ensure the court decision has been implemented. This type of measure has been applied by Indian judges who refrained from giving detailed instructions to the

Organizations on “*Good Practices on Water, Sanitation and Human Rights*” Geneva, Palais des Nations, Sale XIII- 13 to 14 September 2010.

⁷⁰⁵ Indian case law links access to safe drinking water as a feature of the right to life enshrined in the article 21 of the Constitution of India, e.g. in *Uzir v Gauhati Municipal Corporation* (n 690), *Malhotra v State of Madhya Pradesh* (n 703), *Kumar v State of Bihar* 1991(1) SCC 598. In *Joseph v State of Kerala* (n 693) court stated ‘the right to have clean drinking water supplied in sufficient quantities also forms part of the right to life guaranteed under Article 21 of the Constitution of India to citizens’.

⁷⁰⁶ *Menores Comunidad Paynemil s/accion de amparo* (n 704).

⁷⁰⁷ *Defensoria de Menores Nro 3 v Poder Ejecutivo Municipal Agreement 5* (n 704).

⁷⁰⁸ *Marchisio José Bautista y Otros* (n 704).

⁷⁰⁹ *Malhotra v State of Madhya Pradesh* (n 703) para 16 (a).

⁷¹⁰ See n 690.

government on how to exercise their statutory functions.⁷¹¹ Alternatively, judge may request the respondents, which can be several sub-national authorities, to jointly take steps to address water contamination and to report back on the progress within the set time period.⁷¹² Courts in Argentina have ordered provincial governments to provide applicants, or all affected residents, with a certain amount of clean water on the daily basis,⁷¹³ as well as to take steps to protect the environment and to restore safe drinking water supply.⁷¹⁴ Cases with regard to contaminated potable water usually articulate health-related concerns for the population. In this regard the Argentinean court requested authorities to examine the health impact of pollution, and to provide appropriate treatment to affected population.⁷¹⁵ In *Council for Protection of Public Rights and Welfare v State of Bihar* the judge ordered local authority to undertake testing of water quality on a monthly basis, as required in the municipal by-law and to keep the public informed about the results through the press.⁷¹⁶

3 Disconnection from Water Services

Local authorities acting as service providers inevitably encounter situations when households fail to pay for water. To recover the arrears, municipalities come up with notorious practices, such as introducing the pre-paid meters,⁷¹⁷ disconnection from water supply or even cutting off the electricity⁷¹⁸ to force customers to pay their water bills. Since water is vital to sustain life, the situations of non-payment have to be resolved in a civilised and legitimate manner, so as not to put customer's health, dignity and life in danger. General Comment 15 outlines a number the essential conditions of lawful interference with the right to water, including an opportunity for affected individuals to obtain legal recourse and remedies.⁷¹⁹

⁷¹¹ See for e.g. *Satpathy v State of Orissa* (n 703); *Council for Protection of Public Rights v State of Bihar* (n 703).

⁷¹² *Malhotra v State of Madhya Pradesh* (n 703), *Uzir v Gauhati Municipal Corporation* (n 690), para 14.

⁷¹³ In *Children's Public Defender v Neuquen Province* (n 704) government was ordered to supply each inhabitant with 250 litres of drinking water per day, in *CEDHA v Municipality and Province State of Cordoba* (n 704) court instructed to provide 200 litres of water to the four claimants; in *Colonia Valentina Norte Rural Public Defender for Minors Number 3 v Municipal Executive Authority* (n 704) decision requested 100 litres of water per inhabitant.

⁷¹⁴ *CEDHA v Municipality and Province State of Cordoba*, *Children's Public Defender v Neuquen Province* (n 704).

⁷¹⁵ *Children's Public Defender v Neuquen Province* (n 704).

⁷¹⁶ *Council for Protection of Public Rights v State of Bihar* (n 703), para 11 (a).

⁷¹⁷ *Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

⁷¹⁸ *BG Beck v Kopanong Local Municipality* (case no. 3772/ 2002, unreported), *Hartzenberg v Nelson Mandela Metropolitan* [2003] JOL 10625 (SE). Such practice features constructive eviction, which is a separate human rights issue.

⁷¹⁹ General Comment 15 (n 606) para 56.

Essentially, discontinuation of at least the minimum essential level of water supply for non-payment is a violation of human right to water.⁷²⁰ Domestic laws and jurisprudence are essential to regulate disconnection in accordance with the human rights requirements. In 2002 Special Jurisdiction Appellate Court of Brazil⁷²¹ considered a situation where a sick individual had been disconnected from water supply for non-payment and ordered the immediate re-establishment of the service. The decision was founded on the petitioner's human rights, constitutional rights, consumer rights and the case law.⁷²²

However the states' practices on disconnection are not uniform and can contradict with the international human rights standards. Municipalities providing water services and carrying out disconnections, emerge as the principal violators of the right to water for their people. Jurisprudence of South African courts features several cases considering the legitimacy of discontinuation of existing water supply of the individuals and groups for non-payment by local authorities, which are examined next.⁷²³

(a) Group applications for interim measures

In *Residents of Bon Vista Mansions v Southern Metro Local Council* the High Court granted interim measures to the applicants and ordered the municipality to reconnect the affected users to water supply. The court based its decision on the section 27(1)(a) of the Constitution, which stipulates the right of everyone to access water, and the section 7 of the same document, which refers to the duty of the state organs to protect the rights enumerated in the Constitutional Bill of Rights. The judicial decision has also referred to the international human rights instruments⁷²⁴ and scholarship⁷²⁵ as a source of interpretation of the constitutional duty of the state authorities to respect the existing right.⁷²⁶

⁷²⁰ *ibid.*

⁷²¹ *Bill of Review* 02086253 Special Jurisdiction Appellate Court, Parana (Brazil) August 2002.

⁷²² Brazilian courts have consistently based a prohibition of disconnection of water supply to consumers unable to pay based on the Article 42 of the Consumer Defence Code, Law 8078 of 11 September 1990, which reads 'In the collecting of debts, the defaulting consumer must not be ridiculed or exposed to any shameful situations or threats'.

⁷²³ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), *Manquele v Durban Transitional Metropolitan Council* 2002 (6) SA 423(D), *Highveldrige Residents v Highveldrige Transitional Local Council* 2003 (1) BCLR 72 (T).

⁷²⁴ In paras 15, 17, 18 judge refers to the ICESCR and the General Comments of the UNCESCR.

⁷²⁵ In the paras 16, 19 the Court refers to the scholarship works of M Craven and S Liebenberg elaborating on the duty to protect rights.

⁷²⁶ Constitution of South Africa s 7(2).

The Court found that ‘if a local authority disconnects an existing water supply to consumers, this is prima facie a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification’.⁷²⁷ The onus was on the Council to justify the disconnection,⁷²⁸ and to prove it complied with the requirements of the Water Services Act, which serves as a legislative framework to the limitation and termination of the water supply to service users.⁷²⁹ As the Council failed to prove that disconnection was undertaken lawfully, the interim interdict had been granted to applicants to have their water supply restored.

The judicial reasoning had been quite different in the *Highveldridge Residents v Highveldridge Transitional Local Council*⁷³⁰ case, where the group of indigenous households had also successfully challenged the disconnection of the water supply by the municipality. The court undertook the assessment of the balance of convenience. It considered the need of the applicants in water and distress that may occur as a result of disconnection as outweighing the pecuniary losses of the respondent. As an interim measure, the water supply was reinstalled pending the final decision of the case on its merits.

(b) Individual disconnection applications

The *Manquele v Durban Transitional Metropolitan Council*⁷³¹ case considered the individual situation on its merits. The applicant sought to reverse her individual disconnection resulted from the non-payment, on the basis of her right to basic water in the Water Services Act. The Council argued in response that the right has no defined content, since no regulations existed at the time to prescribe the extent of the right of access to a basic water supply. The court supported the Council, stating that it is not in a position to interpret the content of the right embodied in the Act, since this task is a matter of legislature and executive powers of the state. When the applicant attempted to advance her claim with the reference to her constitutional rights the court refused to consider this argument, as it had not been alleged in the founding application.

The applicant claimed that she was unable to pay for basic services, whereas the section 4(3)c of the Water Services Act prohibits a customer being

⁷²⁷ Para 27.1.

⁷²⁸ Paras 20, 32.

⁷²⁹ The Act sets out conditions and limitations, which must be followed by the water service provider prior to disconnection.

⁷³⁰ See n 723.

⁷³¹ *Manquele v Durban Transitional Metropolitan Council* (n 723).

denied access to basic water for non-payment, if s(he) is not in a position to pay and can prove it to the water authority.⁷³² On this merit the court established that the council had been supplying the applicant with six kilolitres of water per month free of charge as a basic service, and the applicant had far exceeded that amount in her use and was required to pay for this use, hence

[t]his ... takes the applicant outside the ambit of being a person contemplated by s 4(3)c, ie one who can prove that ... she is unable to pay for 'basic services', and she cannot rely upon her inability to pay for such additional supply for the purposes of enjoying the protection afforded by this section.⁷³³

This decision indicates that the court interpreted the law in a restrictive manner that effectively eliminates the protection given by the statutory guarantee of the section 4(3)c of the Water Services Act, from the consumers who receive free water allowance according to the Free Basic Water Policy. This decision failed to take into consideration the unequivocal statement of the General Comment 15 that '[u]nder no circumstances shall an individual be deprived of the minimum essential level of water',⁷³⁴ and has been criticised by experts.⁷³⁵

(c) Disconnections in context of the pre-paid meters

The practice of installation of pre-paid meter devices, which automatically cut the customer off the supply when the unpaid upfront quantity of water is used up, contradicts the human rights framework.⁷³⁶ Discontinuation of water supply by pre-paid meters arbitrarily deprives the households from access to minimum essential level of water in case of their inability to pay. The introduction of the pre-paid meters primarily hits the most vulnerable groups of population such as poor and women.⁷³⁷ The limitation of access to water through the use of pre-paid meters also involves increased health risks for affected consumers. Conversion of free communal taps in Thungulu region of KwaZulu Natal in South Africa was a main reason of the cholera

⁷³² Water Services Act Section 4(3)c.

⁷³³ *Manqele v Durban Transitional Metropolitan Council* (n 723) 430, cited in M Kidd 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water' (2004) 20 South African Journal on Human Rights 119, 126.

⁷³⁴ Para 56.

⁷³⁵ Kidd (n 733) 131-132.

⁷³⁶ General Comment 15 (n 606) para 56.

⁷³⁷ Coalition against Water Privatisation & the Anti-Privatisation Forum 'Lessons from The War against Prepaid Water Meters the Struggle against Silent Disconnections Continues' (2006) <http://apf.org.za/IMG/pdf/Final_PPM_Research_Report_-_102006-2.pdf> (11 August 2013).

outbreak in 2000- 2002.⁷³⁸ Evidence from the United Kingdom shows that introduction of the prepaid meters in the 1990s was associated with unreasonably high frequency of disconnections and increased public health concerns.⁷³⁹ From the human rights perspective, this practice arbitrarily interferes with the individuals' right to water, compromising the substantive and procedural dimensions of the right enumerated in the paragraph 56 of the General Comment 15.

While some countries such as UK prohibit use of pre-paid meters, South African legislation fails to do so in explicit terms, which allows local water authorities to introduce the upfront payment devices for the poor communities who cannot afford to pay for water.⁷⁴⁰ Such a practice implemented by the authorities of the Johannesburg City in the poor, predominantly black areas had been challenged by a group of affected residents in the *Mazibuko v City of Johannesburg* case. The High Court and subsequently the Supreme Court supported the claim of the appellants and declared the policy of local government as contradicting the constitutional norms and other statutory laws, as well as being discriminatory and unfair. In its consideration of the appeal by the City council the Constitutional Court reviewed the decisions of the lower courts in a retrogressive light, and recognised the constitutionality of the local government water policy and introduction of pre-payment meters.⁷⁴¹ The controversy around the judicial interpretation of the legitimacy of the pre-paid form of water supply created a huge resonance in the society and had been criticised by human rights scholars.⁷⁴² The case also sent mixed messages to the local authorities, who received a green light from the Constitutional Court to introduce the pre-paid water meters to the communities with the limited ability to pay.

This approach by the city of Johannesburg contrasts sharply with the position of local governments in the UK, who in 1998 requested the Director General of Water Services to stop the use and further instalment of the 'budget payment units' in domestic premises by the water suppliers in their respective local areas. As the Director General had refused to take the enforcement action, the six local authorities applied for judicial review and were granted an order of *certiorari* to quash the unfavourable decision.⁷⁴³ As a follow up from this case, instigated by local governments, the

⁷³⁸ D Barret and V Jaichand 'The Right To Water, Privatised Water And Access To Justice: Tackling United Kingdom Water Companies' Practices In Developing Countries' (2007) 23 SAJHR 543, 551.

⁷³⁹ *ibid* 550.

⁷⁴⁰ *Mazibuko v City of Johannesburg* (n 717).

⁷⁴¹ *ibid* para 169.

⁷⁴² T Humby and M Grandbois 'The Human Right to Water in South Africa and the Mazibuko Decisions' (2010) 51 *Les Cahiers de Droit* 521, 537.

⁷⁴³ *Regina v Director-General of Water Services, ex parte Oldham Metropolitan Borough Council* (1998) 96 LGR 396.

disconnection for non-payment and the use of pre-payment metering devices were prohibited through legislation in 1999.⁷⁴⁴ This case provides a remarkable illustration of municipalities getting together to challenge the failure of the national government to protect the right to water and to stop violation of the right by the third parties. It illustrates the avenue for municipalities to defend the access of their residents to drinking water from malpractice of the private service provider through the use of court, and in accordance with their obligation to protect the human right to water.

(d) Conclusion

The *Bon Vista* and *Highveldridge* cases prove the effectiveness of the group application to the court for the interim measures to reverse disconnection from the water service by local authority. While the court ordered the restoration of the water supply to affected residents on the interim basis, the disconnection itself had not been assessed on its merits at the time of the order. The *Manquele* case considered the individual's situation on its merits and showed the unfavourable judicial approach towards protection of the individual consumer from termination of her water supply. The applicants in *Bon Vista* and *Highveldridge* alleged their constitutional rights were violated, whereas the applicant in *Manquele* based her claim on the right to basic supply stipulated in the Water Services Act. As a result the judge in *Manquele* case failed to consider the right of the applicant to drinking water in its entirety as a constitutional human right, and had dealt with the application in the formal and restrictive manner. The *Mazibuko* case was the first case in the Constitutional Court of South Africa to deal with interpretation of the article 27(1)(b) of the Constitution on the right to water and the minimum quantity necessary for consumption per family. It addressed the constitutionality of the City policy on the use of pre-paid meters, which resulted in disrupted access of consumers of water due to their inability to pay. Disappointingly, this decision failed to embrace the interpretation of disconnection contained in the General Comment 15, and the best domestic practices in similar cases.

The mixed outcomes of cases on the disconnection of water services in South Africa apparently indicate the need for better-defined laws on this matter that would inform the practice of local authorities and allow the courts to address the disconnection issues in a systematic and uniform way. Currently the Water Services Act⁷⁴⁵ requests the service providers, including local authorities acting in this role, to formulate the conditions for

⁷⁴⁴ UK Water Industry Act 1999, s 1.

⁷⁴⁵ S 3.

water service provision, including the procedures for the limitation and discontinuation of services. While the Act contains a number of clauses on this matter to protect the consumer,⁷⁴⁶ the risks exist of local disconnection procedures formulated or implemented contrary the right to water and further clarity on the legal implications of disconnections practice has been sought in academic discourse.⁷⁴⁷ The outcomes of the court's proceedings in turn largely depend on the individual judicial interpretation of the right to water and orientation to the social justice. In this respect, the case from Brazil must be recalled to illustrate how judicial interpretation of consumer protection laws effectively assist to ensure the enjoyment with the individuals' human right to water without shameful and threatening interruption.⁷⁴⁸ The absence of the clear-cut legislation on disconnection compatible with the interpretation contained in the General Comment 15 on the right to water allows South African municipalities to act in violation of their obligation to respect the right.

4 Protection of Water Sources in Public Interest

Local governments can use courts to take a proactive role in support of the interests of their communities when private parties interfere with the water resources and environment in unsustainable manner. Several cases have been dealt with by the High Court of Kerala State, India, where the municipalities refused to authorise further operation of the business actors who affected access of people to drinking water. In *John v Kalamassery Municipality*⁷⁴⁹ the Court supported the position of the local government that requested the local entrepreneur to discontinue extraction of groundwater causing water scarcity in the area. The judicial decision was founded on the statutory provisions and explicitly highlighted the contrast between private interests of the applicant and larger public interest.

Where the private actor is a franchise of a big international company, it appears to become more difficult for local authority to defend their action undertaken in public interest. In *Pepsico India Holdings v State of Kerala*⁷⁵⁰ the local authority, the Panchayat, raised the similar concern of overexploiting of the groundwater by the private company and refused to extend its operational licence. The case considered the authority of Panchayat to issue or to cancel the license, and it was established in this particular case that the local authority did not have such competency. Yet,

⁷⁴⁶ Water Services Act s 4(3).

⁷⁴⁷ M Kidd (n 733).

⁷⁴⁸ See nn 721-722.

⁷⁴⁹ *John v Kalamassery Municipality* 2006(2) KLT386.

⁷⁵⁰ *Pepsico India Holdings v State of Kerala* WP(C) No. 27334 of 2003(D), 2008(1) *Kerala Law Journal* 218.

the Court acknowledged the legitimate concern of the Panchayat in the depletion of water resources and suggested this issue be referred to the State agency in charge of use of groundwater.

In *Perumatty Grama Panchayat v State of Kerala*⁷⁵¹ the Court enthusiastically upheld the right of Panchayat to prohibit overexploitation of the groundwater resources by the Hindustan Coca-Cola Beverages Company, which had been extracting huge amounts of water to turn into the commercial product and caused acute water scarcity in the locality. The decision was founded on the doctrine of public trust, asserting that public as a whole is a main beneficiary of the natural resources and water should be freely available to all. The State as the trustee of the precious community resource should protect it for general public use rather than support commercial private interests. This duty to protect water resource by the State, including its local authority Panchayat, had been repeatedly articulated in the decision, supported by reference to the statutory provisions and linked to the article 21 of the Constitution of India on the right to life. The decision was reversed by the division bench of the High Court, which ordered the Panchayat to renew the licence of the company and allowed extraction of up to 500,000 litres groundwater per day.⁷⁵² The conflict had been evolving rapidly and several administrative and judicial actions took place since 2003.⁷⁵³ An interesting observation from the whole situation is that State government initially acted on the side of the business company against the Panchayat, but later changed its standing and joined the Panchayat in its enthusiastic effort to protect the public interest in access to clean water.

As it appears, the eventual outcome of the cases of this type of case may not always be favourable for the municipalities' acting to safeguard the water for their communities. The result can depend on the formal and statutory requirements such as the internal division of competencies, jurisdictions, and powers among the various statutory authorities as regards authorisation of the private actor's operation and activities, including extraction of water. Besides that, the intolerant attitude of the local government to the overexploitation of groundwater by private businesses and their attempt to protect natural resource in the interests of public in courts must be seen as compatible with the international obligations of governments regarding the right to water.

⁷⁵¹ *Perumatty Grama Panchayat v State of Kerala*, 2004(1) KLT731.

⁷⁵² *Hindustan Coca-Cola Beverages (P) Ltd. v Perumatty Grama Panchayat*, 2005(2) KLT554.

⁷⁵³ The summary of actions is available at < <http://www.righttowater.info/ways-to-influence/legal-approaches/case-against-coca-cola-kerala-state-india/>>(11 August 2013).

5 Standing of Local Authorities in Judicial Proceedings

Several observations can be made as regards the position of municipal authorities throughout the judicial processes considering the access of individuals and groups to drinking water. The standing of municipalities appears to vary depending on the expected outcomes, the importance of the case for the authority, and the priorities of the local social policy. It differs indeed whether the local authority emerges as violating the right to water of people, or otherwise acts to protect such right.

The role of the municipality in the proceedings can be fairly passive. Where the duties as regards drinking water and sanitation are set out in domestic legal or policy regulations, and the case has predictable unfavourable outcomes, municipalities rarely contest the legitimacy of the self-evident allegations in their failure to fulfil the statutory functions. In *Joseph v State of Kerala* three respondents, the State government, municipality and lower authority Block Panchayat, failed to make any representations to the proceedings. Failure to engage with the court was interpreted by the judge as a callous attitude towards the people, whom they govern, suffering for decades from the lack of clean drinking water.⁷⁵⁴

Municipalities can also appear as quite assertive participants in the judicial proceedings regarding water and sanitation and defend their position. In several cases from India, referred above, they claimed to be taking all possible steps to discharge statutory responsibilities, and attempted, though unsuccessfully, to use '*financial alibi*' to justify a failure to fulfil duties.⁷⁵⁵ Where the drinking water supply is a matter of shared responsibility among State and local governments, the municipal authorities attempted to defend their position by blaming the higher authority for the failure to allocate funding to commence work.⁷⁵⁶

Several unfavourable lower courts' decisions have been appealed by municipalities to the higher judicial mechanisms. In *Ratlam v Vardhichand* the council appealed the decision of the High Court, challenging its authority 'by affirmative action to compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis'.⁷⁵⁷ In the *Mazibuko* case the City authority assertively defended the legitimacy of its policy throughout all the stages of the judicial process and appealed the unfavourable decisions twice. The

⁷⁵⁴ *Joseph v State of Kerala* (n 693).

⁷⁵⁵ *Ratlam v Vardhichand* (n 690), *Koolwal v State of Rajasthan* (n 690), *Uzir v Gauhati Municipal Corporation* (n 690).

⁷⁵⁶ *Uzir v Gauhati Municipal Corporation* (n 690).

⁷⁵⁷ *Ratlam v Vardhichand* (n 690) para 1.

standing of local government in this particular case is quite disturbing, as it pursued its cause against the people's basic right to access drinking water. Contrasting observations emerge from the cases in the Kerala State, India, where local governments effectively defended the right to water claims of their local communities that are affected by action of the third parties creating water scarcity in the localities.

E CONCLUSION

The examination undertaken in this Chapter establishes that local governments can be effectively held to account for the violations of the right to water in the course of domestic litigation and that the remedies can be sought by the affected individuals in courts. Courts across the world considered the cases challenging the local authorities for substantive matters such as lack of access to water services and facilities, contamination of water supply, pollution of water resources, practice of pre-paid water meters contradicting the right to water requirements, disconnection of water supply. Certain matters appear to be invoked more often, however this is not to conclude that the other claims pertinent to the right to water cannot be litigated as well. Other local challenges that compromise the right to water, for instance discrimination, inadequate implementation of the right, or matters arising from privatisation processes, can also be effectively addressed in domestic courts; however the potential of litigation to address these issues is yet to be fully utilised.

Courts adjudicating the right to water claims based their decisions on the different legal sources, including international human rights instruments, constitutional norms, and statutory duties of municipalities on water provision, consumer, public health, environment laws, as well as relevant case law. The variety of legal norms utilised in the judicial decisions explains the lack of uniformity in the case law on local violations of the right to water. The absence of the legislation incorporating the right, or obscure statutory and policy provisions not compatible with the right to water standards, undermine the effectiveness of adjudication of the right to water claims in domestic courts.

In the course of litigation the human rights duties of the local governments in relation to the right to water have been given effect, or either failed to be invoked, by the courts. For instance the obligation *to fulfil* and to provide the water and sanitation services to the people in dire need, as well as to provide water of the adequate quality, has been effectively upheld by the Indian jurisprudence. Court actions brought against the Indian municipalities for provision of contaminated water implicitly challenged

their failure *to fulfil* the right and to ensure provision of safe drinking water. Courts decisions order local government to take steps to comply with their statutory duties and to ensure people's access to clean water within the specific timeframe.

Adjudication of the claims on the environmental pollution of water sources by private business companies against the local authority in Argentina indicate the failure of the authorities *to protect* the right to water from actions of third parties. These cases have secured the remedies to restore safe drinking water supply and the environmental state of water resources. At the same time, local authorities can initiate the judicial action in an attempt to defend the right to water claims of their constituencies and using the court can effectively discharge their human rights *duty to protect* the access of people to water from the violations of the right by third parties, as it had taken place in the Indian State Kerala.

The obligation of the local authority *to respect* the right to drinking water, and not to arbitrarily interfere with it, has been addressed by the domestic courts in cases which consider disconnection. In South Africa these cases have not always been decided in full accordance with the interpretation of the duty to respect in the General Comment 15. The *Mazibuko* case exposed the divergence of the judicial understanding of this duty highlighting the shortfalls in the statutory protection for the right to water. While the right is given effect in the domestic constitution and statutory legislation, the judicial interpretations of the right and the respective duties of the governments as regards disconnections are not been consistent.

Overall codification of the right to water in domestic legislation facilitates the judicial enforcement of the right to water arbitrarily compromised by public authorities or other actors.⁷⁵⁸ The South African example in this regard is unique and positive, but not without pitfalls as illustrated in this chapter. The Indian court practice of deriving the right to water from the constitutional right to life is progressive, however quite unusual and bold as it invokes the budgetary implications for local authorities. Some scholarship warned in this regard of the risk of extending the spectrum of rights and positive claims too far beyond the available public resources, and to avoid this 'judicial unpredictability' the rights need to be given their expression in legislation.⁷⁵⁹ While this is a legitimate warning, it has to be seen in conjunction with the whole statutory legal framework in the given state. In

⁷⁵⁸ Ling-Yee Huang 'Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water' (2008) 20 Florida Journal of International Law 353, advocating for the international and domestic codification of the right to water as a self-standing right.

⁷⁵⁹ Note 'What Price for the Priceless?: Implementing the Justiciability of the Right to Water' (2007) 120 HVLR 1067, 1086-1088.

the cases where Indian courts enforced the right to water related claims such as a lack of water services or poor water quality, besides the constitutional right to life and the resulting right to water, they referred to the duties of municipalities on drinking water embedded into the existing statutory legislation regulating the municipal activities.

Where the breach of statutory duties or violations of the human right to access water by local authorities was established, the courts applied various remedies to restore the right. The range of remedies is very broad, reflective of the nature of the breach, and include among the others the re-establishment of the access to water affected by the arbitrary disconnection of water supply; the order to deliver, extend or repair the water and sanitation infrastructure in the areas in need within the certain timeframe; and the order to provide individuals living in the areas of contaminated supply with safe potable water. Environmental and public health considerations instigate the courts to request municipalities to eliminate contamination of water resources, regularly test water quality and inform public on the results, assess the health impact of contamination and provide treatment to affected individuals. The implementation of the decisions is a challenge in itself and often requests the follow up action and further advocacy effort by civil society organisations involved in the case.⁷⁶⁰ Compliance with the orders invoking expenditure can also be quite problematic for the municipalities. Thus the remedies may not always be discharged in full or in time, which undermines the purpose of the accountability of local authorities for non-compliance with the right to water.

All in all, domestic litigation is gradually emerging as the effective mechanism of human rights accountability for violations of the right to water at the local level. Encouraging examples of the pro-active role of the judiciary in adjudicating the local challenges of access to water demonstrate that municipalities can be effectively held to account. At the same time, local governments themselves can effectively utilise courts as a legitimate way to protect the right to drinking water compromised by third parties, and this should be regarded as a positive development. It has to be reiterated at the end that bringing the local actors to account and securing legal recourse through the courts can be problematic due to different impediments illustrated in this Chapter. For instance, the implementation of court decisions where the budgetary considerations are invoked can be challenging. However, most of the difficulties arising along the reinstatement of social justice in access to water at local level are capable of been addressed and should not be seen as compromising the development of justiciability of the right to water and municipal accountability.

⁷⁶⁰ Najle (n 704) 5.

CHAPTER VII

CONCLUSIONS

A ASSESSMENT OF THE HYPOTHESES

1 Human Rights as Local Imperatives

The first hypothesis of this research asserted that local governments are bound by the human rights responsibilities of the state. The study at its outset undertook an enquiry into the notion of the local government and its interconnection with the phenomena of human rights. It illustrated that local governments are systematically engaged in the dynamics of civil, political and cultural rights by virtue of its very existence as a political instrument of local democracy and the guardian of the community. Charged with public functions as regards housing, water, sanitation, public health, environment, or education, municipalities engage with the socio-economic rights of their population on everyday basis.

The examination of the legal implications of human rights for local level has been undertaken through the study of the Public International Law, International Human Rights Law and Constitutional law. Human rights originated as a field of in the Public International Law that operates in compliance with its normative considerations. While the Public International Law does not consider local authorities as the self-standing subject, it creates implications for the application of the human rights at the local level through other normative documents, such as the Law of Treaties, the Law of State Responsibility, and the method of giving effect to the international law in the domestic legal systems. For instance, the Law of State Responsibility considers acts and omissions of municipalities contradicting the international human rights norms as internationally wrongful acts. International Human Rights Law does not specifically attend to the human rights responsibilities of municipalities leaving it at the discretion of the national governments. Yet the examination of the international and regional human rights treaties permit the attesting of the local human rights responsibilities implied in the texts of the treaties.⁷⁶¹

The arrangements on the translation of the provisions of the international human rights treaties into domestic systems are primarily undertaken at the

⁷⁶¹ Among these the most prominent are the prohibition to engage in discrimination, and the obligation to respect rights.

constitutional level. Where the constitution stipulates that the international human rights treaties are part of the domestic legal order from the moment of their ratification the norms become directly binding on the local authorities. Where the treaty norms require further incorporation into the domestic legal system, constitutional law emerges as a particularly important vehicle for setting out the municipal human rights responsibilities. The comparative study of constitutions from different countries suggests that the constitutional apprehension of human rights as the matters of local responsibility can be very modest. Some countries appear to be more expressive on the constitutional obligations for its local authorities than the others, which create mixed opportunities for human rights compliance at local level. Constitutional provisions on human rights mainly refer to the state and its authorities, and the determination of their applicability at the local level calls for a systematic interpretation of the statutory legislation on the subject matter.

The study comprehensively examined the first hypothesis and demonstrated that human rights are legally binding on local governments. The Public International Law, International Human Rights Law and the Constitutional Law imply, support or stipulate the human rights responsibilities of local authorities, who are obliged to consider and comply with the human rights laws and in this connection have to be encouraged and facilitated to embed the rights-based approach into their operation.

2 Localising the Right to Water

To test its second hypothesis the study set out the context of the current crisis of access to drinking water, by reviewing its extent, causes and challenges. The international community increasingly recognises the priority of allocation of water for human needs and escalates action to deal with the crisis. Currently the water sector absorbs a number of approaches, emerged as a result of the international political action and law-making to address the lack of access to drinking water. Sustainable development and Millennium Development Goals represent the global political commitments that embrace water-related targets. Good water governance offers a set of principles underpinning the functioning of the sector, critical for the achievement of political commitments addressing crisis. A human rights-based approach is the only framework that sets out substantive targets of access to water for all in normative terms and acts as an operational facility for their achievement. It is based on the core notion of the human right to water, which has a defined scope, content and set of obligation of governments, as stipulated in the texts of the treaties, reaffirmed in declarations and officially interpreted by the UN human rights bodies.

In many countries access of population to drinking water is a public function of local government. Responsible for providing the individuals, households and communities with drinking water, they operate at the forefront of the water crisis. Decentralisation of public responsibilities to municipalities increases their roles in the water sector operation, such as protection of water sources, pollution control and organisation of water services within their jurisdictions. Simultaneously, the access to safe drinking water increasingly becomes a matter of human rights responsibility of the local governments. Overall freshwater is the subject of joint responsibility of the different stakeholders, so the obligations in relation to the right to water are shared among the authorities involved in the public functions related to drinking water supply, and management of environment and water resources. As this thesis suggests, local governments' responsibility for the human right to water unfolds within the extent of their respective statutory duties.

3 The Rights-Based Approach to Water

The human rights-based approach to water is underpinned with the core principles of equality and non-discrimination, participation, and accountability. The perspectives of their implementation in connection with the municipal responsibilities on the drinking water have been substantively examined in this thesis to test its third hypothesis.

(a) Non-discrimination

The evaluation of the application of the principles of non-discrimination and equality in access to drinking water at the level of local government has been undertaken through the examination of the normative obligations of municipalities stipulated in the international and domestic law and empirical evidence of municipal action impacting on equal access to water. On the normative level, local authorities are directly banned from discriminating in their action on drinking water, according to the international and regional human rights law, constitutional and statutory law. The empirical evidence reveals that municipal governments can be in a position of ultimate power to identify priorities and make decisions on access to water for vulnerable and disadvantaged groups, such as Roma and Traveller communities, rural, poor and informal settlements. Holding this strategic position municipality can adversely discriminate against or otherwise enhance access to water for these groups.

The operationalisation of the human rights principle of equality entails a positive action to guarantee equal access to water by attending to the least served, vulnerable and marginalised communities across all local action on drinking water, such as policy making, strategic planning, budgetary decisions and service delivery. The needs and challenges of the disadvantaged groups in access to water must be identified and prioritised in local government decision-making. Setting tariffs for water services is an example of the local action that carry implications on the equal access to water from the perspective of ‘economic accessibility’, the key normative dimension of the right to water. Rights-based local tariff policy does not affect the equal access of individuals and groups to water on the basis of their ability to pay.

(b) Participation

The question of local participation in the water related issues from the human rights perspective has been addressed through evaluation of the relevant human rights norms, domestic laws and practice. Participation as a human rights principle and a human right of its own standing, when examined through the perspective of the right to drinking water and a human rights obligation of the local government, result in a number of the normative observations, which in turn suggest the practical implications of the local rights-based action on drinking water.

This research reached the important conclusion on a right of individuals and groups to participate in the local water decision making, originating from the right to take part in local government and featured in the normative content of right to water. Primarily, the rights based participation empowers individuals and groups to legitimately articulate their right to water concerns to the responsible municipalities through the participatory structures. Yet, the lack of awareness, capacity issues and isolation impede the fulfilment of this right for certain groups of population.

This right entails a number of corresponding obligations on the part of the local government, which include providing information on water services and environment, facilitation of the participation of individuals and groups in decision making as a part of the implementation of the right to water, abstaining from discrimination and engaging with the groups traditionally misrepresented in local government processes. Where municipal service is delegated to a third party, the local government, under the human rights obligation to regulate the service provider, must establish mechanisms of public participation where customers can raise concerns over the service provision.

(c) Accountability

Accountability is a core principle of human rights that ensures an adequate response to the rights violations in form of effective remedies. Accountability unfolds at the international and domestic level, with both levels capable of attending to local challenges in access to water. The research examined the potential of the UN human rights bodies and domestic mechanisms of accountability in highlighting the role of local governments in human rights practice and raising their profile as human rights actors. It demonstrated the significance of accountability in addressing municipal human rights responsibilities, the challenges of local implementation, and monitoring municipal action on the matter of human rights compliance. The UN treaty and charter bodies in their work recognise local government impact on human rights dynamics, and very occasionally is this link made with regard the human right to water. The work of the Special Rapporteur on the right to water, who systematically attends to local governments' action highlighting good local practices, violations and challenges, stands out in this regard.

Domestic forms of accountability are better suited to hold municipalities to the scrutiny under human rights norms. Administrative procedures emerge as appropriate to address claims at the service provision level. The ombudspersons and human rights commissions are in a position to monitor municipal compliance with the right and investigate disputes as regards the compromising of the access to drinking water by municipalities in flexible, time and cost efficient manner. Access to courts, as a human right in itself, is indispensable to hold local governments to account for the violations of the right to water. An extensive examination of the domestic court actions brought against the local authorities asserts the implications, potential and challenges of justiciability of the right to water compromised at the local level. Case law from India, South Africa, Latin America examined in the thesis, suggests that local governments can be effectively held to account under domestic litigation for violations of their obligations to respect, protect and fulfil the right to water and the effective remedies can be sought through the court. What is more, local governments can also use courts in the interests of their communities when private parties interfere with the water resources and environment in unsustainable manner.

(d) Integration of the principles

Principles of participation, equality and accountability are interrelated and interdependent in their utility to underpin the human rights based approach

to water in local government action. Limited opportunities for participation and impeded access to accountability mechanisms perpetuate discrimination and inequality. Similarly discriminatory practices prevent participation in local water decisions for certain groups.

On the other hand, the better compliance with the principles mutually strengthens their effect. Rights-based participation in local decision-making on water strengthens the perspectives of equal treatment. The disadvantaged communities are traditionally underrepresented in the local decision-making processes.⁷⁶² Participation as a human rights principle and a norm requests governments at every level to involve these groups in the whole range of decisions that affect their access to water, including on policy development and planning of water services, on budget allocation and tariff setting. Rights-based participation ensures that specific needs of all groups are heard and taken into consideration, and enhances equality in access to drinking water.

Likewise, the rights-based accountability strengthens equality and non-discrimination in access to water. The evidence of continuous attention to the issue of discrimination at the local level in the course of monitoring action of the UN human rights bodies is an encouraging practice in this regard. The domestic accountability mechanisms would appear to be the primary vehicles to combat discrimination, restore justice and equal access to water at local level. Yet the research has identified very few practices in this regard, highlighting underutilisation of the accountability in addressing locally perpetuated discrimination.

B CONCLUDING ANALYSIS

The study has effectively tested its hypotheses and allowed a closer examination of its purpose. The assessment of the implications of the human rights principles at the local level brings the research to the advanced understanding of the features of the rights-based approach to drinking water at the municipal level. These include the substantive human rights issues arising from the local action and the obligations of the local governments on the right to water, the dynamics of implementation and the role of national government on the localisation of the right to water.

⁷⁶² See Chapter V on local rights-based participation, which highlights the challenges for marginalised groups to get involved in the decision-making on water issues.

1 Substantive Issues and Human Rights Obligations of Municipalities

The evaluation of the domestic case law, the documents of the UN human rights bodies and the reports of the civil society organisation allowed identification of a number of substantive matters, arising from functional remit of local authorities on drinking water and demonstrates the common patterns of the local violations of the human right to water. The most prominent challenges taking place at the municipal level include a lack of water services and facilities in poor and socially disadvantaged communities, discrimination, disconnection from service, and pollution of water resources. The spectrum of these violations analysed in connection with the human rights standards allows further elaborating on the scope of substantive human rights obligations of local governments.

This thesis has demonstrated how discrimination unfolds at the local level affecting the access of disadvantaged communities to drinking water services. The non-discrimination clauses set out in the international, regional, and national human rights laws are binding on the local governments who are prohibited to engage in discriminatory practices. Moreover, municipalities operating in conformity with the human rights framework attain to ensure equal access to water.

The human rights obligation to respect requires the state and its authorities to refrain from the interference with existing access to water. The issues of disconnection from water service and pollution of water resources bear the similar characteristics of interfering with the access. A disconnection deprives households from water, and pollution impacts access for those who rely on water directly from the natural source. As Chapter 2 concludes, the international and regional human rights treaties and the customary law of State Responsibility require that public authorities respect human rights. The normative framework of the right to water explicitly prohibits authorities from interfering with the access to drinking water, so the individuals are left without basic water supply. Local governments when arbitrarily disconnecting customers from water supply or polluting water resources, act in violation of their human rights obligation to respect the right to water.

The obligation to protect the right to water requests the state authorities to prevent third parties from interfering with the enjoyment with the right. It can be invoked at the level of local government, if the pollution of water resources occurs as a result of the action by the third party and municipalities are issued with the statutory mandate to carry out functions of the environmental protection. The issue of disconnection also falls into to

the scope of the obligation to protect the right to water, where the service provision is carried out by third parties, such as private sector or public utility. Local governments overseeing the service providers and acting as regulatory authority, are under the human rights obligation to protect access to water from the arbitrarily interruption. In sum, the duty to protect the right to water from violations by the third parties is of the direct relevance to municipalities; however its application is subject to the institutional arrangements in the local water sector and the extent of the statutory obligations of municipalities.

All levels of government responsible for water supply carry the obligation to fulfil the right to water. The challenge of the lack of water services and facilities in poor and socially disadvantaged communities is a clear indication of the failure to fulfil the right for these communities on the part of public authorities charged with the statutory duties as regards water supply. This obligation is of a complex nature, and only relates to municipalities with the functional remit embracing the scope of the duty. Decentralisation of the state power in many states leads to the increased responsibilities of local governments in the water sector, including the power to make strategic decisions as regards the development of water services. Simultaneously decentralisation leads to the increased human rights responsibilities, and the duty to fulfil the right to water in particular. As a part of this duty municipalities should extend or improve services to poor and disadvantaged communities deprived of the access to adequate water as a matter of priority. Municipalities in this situation become primary responsible actors for the failure to take steps to fulfil the right and to provide access to water for the most deprived.

2 Implementation and Role of National Government

The study reiterates the common understanding that the implementation of the right to water is intrinsically a local government matter. More precisely, it has been particularly recognised throughout the research that the implementation of the right, corresponding with the obligation to fulfil, is a matter of joint responsibility of the authorities charged with the public function of the water supply. The analysis of the UN human rights bodies' references to localising rights demonstrates the systematic attention to the position of local authorities in the implementation processes and the associated challenges, such as inequitable resource allocation and disparities between territories, lack of municipal capacity to fulfil rights and poor coordination between levels of government. The court decisions from India and South Africa highlight the challenges of local implementation to from several angles, such as capacity issues, shared responsibility for drinking

water and political willingness to act in the interests of poor and disadvantaged. Implementation emerges as a cross-cutting issue in the study of the application of the human rights principles at the local level. Essentially the process of implementation involves a systematic consideration of the principles of non-discrimination and equality, participation and accountability. Simultaneously, a failure to mainstream the human rights principles into the local action on water negatively affects local implementation of the right to water.

Decentralisation of the public functions to local level does not diminish the human rights obligations of the national government, which has the primary responsibility towards its people and the international community for violation of the right to water. Decentralisation of the responsibilities on water supply shifts the operational side of implementation to the lower levels of government, but invokes specific human rights implications for central government based on their obligation to protect human rights. In this context, discrimination practices of municipalities highlighted in this thesis indicate a failure of a number of national governments to protect the right to water of its people. Overall, the role of national authorities is to oversee and facilitate local implementation in form of support and strengthening of municipalities, providing for the enabling legislative, policy, budgetary and accountability frameworks, in which the human right to water can be effectively fulfilled.

3 Closing Remarks

The localising of the human right to drinking water, its challenges and perspectives have been examined through the study of the dynamics of local application across the principles of discrimination, participation and accountability. The study reached a better understanding of the roles and human rights responsibilities of local governments on the right to access safe drinking water. The identified scope of the roles and responsibilities of local government shall not be considered as exhaustive, but rather as establishing a foundation for further research and discussion. The thesis suggests a comprehensive methodological approach to the assessment and application of the human rights-based approach to local action on drinking water. In the broader context, this study adds to the understanding on the implications of the process of localising human rights and the status of local government as an emerging human rights actor. Overall, this research has attempted to make a contribution to the human rights scholarship, to generate discussion and to encourage further study on the topic that has not had closer scrutiny by the experts in the field.

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