

Mandate of the Special Rapporteur on the human rights to safe drinking water and sanitation

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(Please use this reference in your reply)

16 March 2022

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolution 42/5.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **legislative and policy framework on the prohibition of water disconnections for those who are incapable of paying, in particular, in the context of COVID-19**.

Legal framework

Disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human rights to safe drinking water and sanitation and in order to prohibit such disconnections, it is imperative that the human rights to safe drinking water and sanitation are explicitly recognized in the legal framework. In relation to the national legal framework, I note the following information:

- The Constitution of Kenya 2010 recognizes that “every person has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation” (article 43). Further, article 56 of the Constitution states that “the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups [...] have reasonable access to water, health services and infrastructure”.
- The Water Act (Act No. 43 of 2016) implementing article 43 of the Constitution stipulates that “every person has the right to access water resources” (section 9, Part 2). The Water Act furthermore stipulates the priority be given to the use of water for domestic purposes over the use of water for any other purpose by explicitly stating that “the use of water for domestic purposes shall take precedence over the use of water for any other purpose” (section 43(2), Part 3). In addition, the Water Resource Authority - a state corporation established under section 11 of the Water Act to safeguard the right to clean water - may reserve the quantity of water for domestic purposes in a water resource (section 43(2), Part 3).
- Section 70(1) of the Water Act established the Water Services Regulatory Board (WASREB) which sets, monitors, and reviews rules and regulations to ensure that water services provision is affordable, efficient, effective, and equitable, including, among others, evaluating and recommending water and sewerage tariff (section 72(1)(b)). The WASREB developed a guideline called “the model Water Services Regulations”, which stipulates several elements related to the

minimum quantity of water and disconnection of water services.

- First, the model Water Services Regulations stipulates that the minimum standard for basic water supply services is a minimum quantity of potable water of 20 litres per person per day or 6 kilolitres per household per month, at a minimum rate of not less than 10 litres per minutes, within 200 metres of a household, and with effectiveness such that no customer is without supply for more than seven consecutive days in a month (section 7).
- Second, the model Water Services Regulations defines the circumstances warranting a termination of service as non-payment of bills more than fourteen days in arrears, provided that the water service providers issue the 14 day notice to pay to its customers (section 14).
- Furthermore, according to the model Water Services Regulations, the water service providers are required not to disconnect water services in situations when the customers fail to pay charges not properly reflected on a bill or fail to pay disputed charges, among other conditions (section 15). However, the situations do not reflect the incapacity of the customer to pay for water service bills.

I would like to congratulate Kenya for explicitly recognizing the human rights to water and sanitation in the Constitution and the human right to water in the Water Act, however, without a reference to the human right to sanitation in the latter. I wish to reiterate that the human right to water and the human right to sanitation are closely interlinked but they are two distinct rights. Thus, the human rights to safe drinking water and sanitation - both the human right to water and the human right to sanitation - as components of the right to an adequate standard of living are essential for the full enjoyment of the right to life and all human rights as stipulated in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was ratified by your Excellency's Government in 1972.

In addition, as your Excellency will note in 2015, the human right to water and sanitation was explicitly recognized by the General Assembly in its resolution 70/169, which "[recognized] that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living".

I would also like to point out that the absence of human right to sanitation leads to a gap in national legal framework and lead to inexistent or inadequate sanitation facilities as well as serious deficiencies in water management and wastewater treatment which can negatively affect water provision and sustainable access to safe drinking water. In this regard, I wish to note that the resolution 70/169 which was adopted by consensus that "in progressively realising the human rights to safe drinking water and sanitation as well as other human rights, States should increasingly pursue integrated approaches and strengthen their water resource

management, including by improving their wastewater treatment and by preventing and reducing surface and groundwater pollution”.

I wish to welcome the reference to prioritization of water for drinking and water for domestic usage as set out in section 43(2), Part 3 of the Water Act. In this regard, I emphasize that water is required for a range of different purposes, besides personal and domestic uses, to realize many of the rights stipulated in the ICESCR. These purposes include water necessary to produce food (right to adequate food), to ensure environmental hygiene (linked to the right to sanitation and the right to health), to secure livelihoods (right to gain a living by work) and to enjoy certain cultural practices (right to take part in cultural life). In addition, there are other usages of and demands for water in for-profit industries such as the agribusiness sector. Nevertheless, as stipulated by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 15 (2002) (E/C.12/2002/11), priority in the allocation of water must be given to the right to water for personal and domestic uses (para. 6). Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the rights stipulated in the ICESCR (ibid).

Furthermore, I wish to reiterate that disconnection of water and sanitation services due to an inability to pay for the service is a retrogressive measure and constitutes a violation of the human rights to water and sanitation (CESCR, General Comment No. 15 (2002) (E/C.12/2002/11), para. 44a). Such retrogressive measures are incompatible with the international human rights obligations pertaining to the human rights to water and sanitation. Also, the African Commission on Human and Peoples’ Rights (Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 92.k) recommends that States ensure that procedures take into account the individual's ability to pay and therefore disconnections for non-payment should not result in a person being denied access to a minimum amount of safe drinking water where that person proves that he or she is unable to pay for these basic services.

Policy implemented during the pandemic

The affordability of water and sanitation services and disconnections are inextricably linked, as in many instances the failure to pay for services leads to disconnection, which has been highlighted during times of COVID-19. In this regard, I note the following information relating to the policy implemented during COVID-19:

- On 28 February 2020, the President of Kenya established the National Emergency Response Committee on Coronavirus (COVID-19) in accordance with an Executive Order (No. 2 of 2020).
- Following the Public Health Order 2020 (No. 37 of 2020) issued on 1 April 2020, the Cabinet Secretary of Health requested Nairobi City Water and Sewerage Company (mandated to provide clean water and sewerage services to the residents of Nairobi City County) and Kenya Power (a public liability company which transmits, distributes and retails electricity to customers throughout Kenya) not to disconnect water and electricity because of unpaid bills.

- On 6 April 2020, the President issued the enhanced measures in response to COVID-19 and requested the Nairobi Metropolitan Services (a public service that was formed on 9 March 2020 following an agreement that led to the transfer of four core functions from Nairobi City County Government to the National Government) “to not only continue but expand their provision of free water to all our informal settlements”.
- In response to the Public Health Order 2020 and the Presidential speech of 6 April 2020, the water services providers undertook a range of tasks including installation of water storage tanks for domestic use and handwashing in public places, trucking water to consumers in vulnerable situations and reactivation of disconnected accounts and hygiene promotion among other interventions, according to the WASREB 2019/20 report.
- Following water supply measures were implemented across Kenya during COVID-19 pandemic:
 - In March 2020, in Kandara Town, a Murang’a water company installed more than 200 water points.
 - On 2 April 2020, the Central Rift Valley Water Works Development Agency, responsible for water and sewerage services in the counties of Nakuru, Narok, Laikipia, Baringo and Nyandarua, rehabilitated water supply systems including boreholes and pipelines.
 - On 30 June 2020, the Athi Water Works Development Agency, responsible for water and sewerage infrastructure in the counties of Nairobi (i.e., Kiambu and Muranga Counties), constructed 93 steel elevated tanks and 63 boreholes in conjunction with Nairobi Metropolitan Services to provide water service to more than 600,000 people and 16 million litres per day.

I welcome the above-mentioned initiatives by your Excellency’s Government to ensure continuous water services to the public and to provide free water to informal settlements in Nairobi. Having adequate access to water and sanitation is more challenging for the population who live in rural areas as the settlement locations are remote and it is equally challenging for those living in informal areas without proper water and sanitation infrastructures in place. Further, COVID-19 adds another layer of challenge for those populations to access water and sanitation, which is essential to ensure sanitary recommendations to prevent contamination from COVID-19. While the measures taken to provide water storage tanks and water points to rural and informal areas by water service providers is welcomed, I am concerned that a one-time exercise of delivering water to those areas does not provide a sustainable measure for the population to have access to water and sanitation in the long-term, in particular, with the prolonged COVID-19 situation. I would like to emphasise that the human rights to water and sanitation requires States to provide drinking water supply for each person which is sufficient and continuously available for personal and domestic uses (CESCR, General Comment No. 15 (2002))

(E/C.12/2002/11), para. 12(1)).

Furthermore, I am particularly concerned about the absence of a policy to guarantee the provision of a minimum quantity of water for those who are unable to pay during the ongoing COVID-19 pandemic. The adoption of such a policy is particularly important as water and sanitation are the underlying determinants of health, especially during the current efforts to curb the spread of the COVID-19 pandemic (CESCR, General Comment No. 14 (2000) (E/C.12/2000/4), para. 11). In the context of the COVID-19 pandemic, guaranteeing minimum access to water and sanitation is the basis of prevention and can thus save the lives of many people, especially those in vulnerable situations.

Finally, I would like to stress that the above mentioned concerns are heightened by the ongoing COVID-19 pandemic and the need for people, particularly those in vulnerable situations, to have access to water and sanitation in order to comply with the recommendation to wash their hands as a preventive measure against COVID-19. Further, it should be noted that both during the time that the COVID-19 pandemic persists and when it is overcome, the disconnection of water services due to incapacity to pay constitutes human rights violations that all States must avoid at all costs in accordance with their international human rights obligations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the matters mentioned above.
2. Please provide information on how the implementation of the prioritization of water for domestic purposes, stipulated in section 43(2), Part 3 of the Water Act is implemented in practice. Please provide any concrete cases and examples.
3. In relation to the minimum standard for basic water supply regulated under the model Water Services Regulations, a guideline developed by the Water Services Regulatory Board (WASREB):
 - a. Please provide information on how such guideline is implemented and monitored in practice. Please provide any concrete cases and examples as well as evaluation and monitoring reports.
 - b. Please provide information on whether and how the quantity of basic standard water supply has been guaranteed to the public since the Public Health Order 2020 on 2 March 2020.
4. In relation to measures implemented by water services providers described in the WASREB 2019/20 report, please provide the criteria and/or definition on how the WASREB and water services providers identified households in vulnerable situations to provide water services and/or to reactivate their disconnected water accounts.

5. In relation to the free water measures announced by the presidential statement on 6 April 2020:
 - a. Please indicate the criteria established to identify informal settlements in Nairobi which would or has benefited from the free water.
 - b. Please indicate detailed information on how the free water is distributed and the number of households that benefited from the distribution.
6. Please provide information on legal remedies available to people whose water supply is cut off due to their inability to pay.
7. Please provide information on legal and policy measures taken to ensure the affordability of water services for those who are unable to pay their bills for reasons beyond their control, including unemployment and poverty.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Pedro Arrojo Agudo
Special Rapporteur on the human rights to safe drinking water and sanitation