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Critical Assessment of the Legal Framework of Water Pollution in Uganda

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ABSTRACT

This study was about the critically assessed the legal framework for the control of water pollution in Uganda. It was necessitated because, while Uganda has a legal framework covering environmental management in general, and water pollution in particular, the country continues to grapple with incidents of pollution arising from the use of water, the study entailed the document review of the constitution of Uganda, and the laws having to do with the regulation of water usage and the control of pollution, that is, the Water Act and the National Environment Management Act. The article also consulted case law relating to the control of water pollution in Uganda. The key findings of the study are that there is a lacuna in the National Environment Management Act having to do with the structure of environment committees at local levels, which might make implementation of anti-pollution laws ineffective; the Environment Management Act does not provide of the remuneration or reward of local environment committees, which might hinder devotion of the committees to environmental protection. In this wise, the article recommends amendment to the Environment Management Act to plug the lacunas, and codifying economic incentives and disincentives into law thereby giving them legal force.

Keywords: Economic incentives, Environmental law, Environmental management, Legal framework, Water pollution

INTRODUCTION

It is well established fact that human sustenance is contingent upon clean, uncontaminated water. And although the earth is over 17% covered by water, only a small percentage (0.5%) of it is fresh and fit for human consumption [1], which calls to reason and the need to conserve the consumable water bodies for the sustenance of human life. However, due to natural and anthropogenic, that is to say, man-made, sources, water becomes polluted that results in the origin of different water pollutants [2], causing diseases and death. Most water pollution takes place as a result of industrial discharge of chemicals as well as heavy metals. Yet, water pollution is not a new phenomenon. It is almost as old as human life. In the ancient times before industrialization, Water forms, water pollution took the form of human waste being deposited in the same water bodies humans drew drinking western [3], which contaminated them so much so that in order obtain clean drinking water the ancient civilizations needed to build aqueducts [4]. In medieval times, that is to say, in the 1800s, mercury was frequently dumped into water and was allowable to run freely into lakes and streams from most of the humans and farm waste. Also, most people during this period particularly those living in metropolises or cities simply dumped their waste and garbage onto the street[5]. Moreover, it was during this era that civilization, especially during the latter half of the century, made many astounding advances and discoveries that would result in damage to the ecosystem. Indeed, the industrial Revolution of the 1800s was mindless about the ecological impacts that resulted from industrialization; everything was about efficiency in production and nothing about the environment, the result being that toxic chemical substances from industries and factories were freely dumped into the rivers[6]. The situation was not helped as time went by, and in fact by the time the Second World War ended in 1945, the notable surge in industrialization of especially Western Europe and North America, had also resulted in much water pollution problems[7]. By this time, water pollution had been given due attention. However, in 1969 in the United States, following a series of fires on the Cuyahoga River, it was determined that flammable industrial waste dumped in the river was responsible for the fires, and the US government moved, for the first time, to give legal protection to water sources by enacting the 1972 Clean Water Act[8]. The Clean Water Act gave birth to a huge regulatory and public works effort that continues to this day. Its regulatory program and provisions granting financial assistance for the construction of municipal treatment facilities have succeeded in significantly reducing the

direct discharge of pollutants to the nation's rivers and lakes[9].

In Uganda, water pollution has been on the gradual rise and as population has grown and industrialisation taken place, so has contamination of water sources. Pa1iicularly, the ecological health of Lake Victoria, which was once clear but not anymore, has been affected as a result of a rapidly increasing human population due to migration to the area by plantation workers, clearance of natural vegetation along the shores to establish plantations of coffee, tea and sugar, growth of algae [10], growth of algae. Although Uganda has laws governing the use of water resources, which ideally aim at sustainable use of water resources including the prohibition of activities that may cause water pollution, water pollution continues. According to Angiro, Abira and Omara[11] industries are generating volumes of waste which are discharged without treatment into nearby water bodies. To compound the problem of industrial waste generation, most industries in Uganda use outdated manufacturing technologies and do not have functional effluent treatment plants. Therefore, raw and harmful wastes are discharged into the surrounding water bodies. Murphy et al. [12] reported that over 60% of groundwater sources tested in Kampala (Uganda) were positive for Escherichia coli (E. coli), which is commonly attributed to fecal contamination, during a typhoid outbreak in 2015. The evidence of water contamination and the nefarious effects related to disease outbreaks should not be happening, when Uganda has anti-water pollution laws, yet in 2015 alone, the typhoid outbreak in Kampala affected more than 10,000 people. These issues necessitated the present study that assesses the existing legal framework relating to the prevention of water pollution in Uganda.

Constitutional protections for the control of water pollution

There is sufficient literature as to the need for a constitution to provide for fundamental protections from pollution in general, and water pollution in particular, not just because a constitution is generally, if not universally, accepted as a supreme law to which all other legal frameworks yield, but also because other legal frameworks may not provide fundamental cover against abuse of natural resources, in which the constitution becomes a key facet of protections against pollution[13]. It is important a state's constitution provides for rights having to do with protections from the effects of pollution in general and water pollution to be specific, including; the right to a healthy environment, the right to life, to the extent that the rights insulate citizens from the effects of water pollution. In the like manner, the constitution also ought to impose duties on the state to prevent the pollution of water sources in ways that injure the health and wellbeing of citizens, and levy sanctions and costs on the violators of the protected rights. In addition, constitutional provisions can expressly enable legislatures to enact environmental laws to implement the protection[14]. The constitutional provisions which create and empower judicial or quasi-judicial institutions to interpret environmental laws and issue orders to the effect of protecting the environment and in particular to the effect of controlling water pollution. In Laguna Lake Development Authority vs. Court of Appeal[15], the Philippines Supreme Court was empowered by the constitution to look into legal disputes arising from application of environmental law. In consequence, the court upheld the authority of a government agency attached to the Department of Environment of the Philippines to issue cease and desist orders against a city that was illegally dumping garbage. Therefore, it is important that constitutional provisions exist, not only to empower legislatures, executive agencies, and courts to provide to issue and uphold orders having to do with the control of water pollution, but also makes express provisions to the effect of safeguarding the water resources and protecting citizens from harm that might arise from abuse of the resources. In that regard, constitutions ought to protect the *rights of citizens to a healthy environment*, and their *right to* life without which the basis for controlling water pollution would be difficult for parliaments to legislate against water pollution, for executive agencies to stop or control water pollution, and for courts to rule in favour the health and life of citizens in jeopardy owing to effects of water pollution.

The right to a healthy environment and the control of water pollution

The right to a healthy environment is a widely recognized right that has in many jurisdictions been relied upon as a constitutional basis for courts to inject themselves environmental disputes. In Minister of Health and Welfare Vs. Woodcarb (Pty) Ltd.[16], a South African court recognised the Minister's administrative responsibilities, as well as the right to seek redress for actions that infringed citizens' right to "an environment which is not detrimental to health and well-being" under the interim South African Constitution, holding that the defendant' unlicensed emission illegally interfered with the neighbours' constitutional right to a healthy environment[17]. In India, courts have relied on Article 48A, which provides for the protection of the environment and 51 A, which has to do with the fundamental duties (to protect the environment); both being principles of state policy[18]. The application of these principles has been interwoven with the separate right to life provision (ibid). In Rural Litigation and Entitlement Kendra vs. Uttar Pradesh[19], the right to a "healthy environment" was invoked, in which the petitioner alleged that unauthorised mining in the Dehra Dun area negatively affected the ecology and resulted in environmental damage. In the suit, the Supreme Court concurred with the petitioner regarding the right to live in a healthy

environment and issued an order to cease mining operations, notwithstanding the significant investments of the money and time by the mining company. In Turkey, the High Court ruled that Ei:1rogold's mine violated the provisions of Articles 17 and 56 of Turkey's amended constitution, which protect the fundamental rights to life and a "healthy, intact environment[20]. In Ecuador, the constitutional court upheld the verdict in *the Fundacion Natura vs. Petro Ecuador case*, that the defendant's trade in leaded fuel violated a ban on leaded fuel placed by Congress, and thus violated the plaintiff's constitutionally guaranteed right to a healthy environment [21, 22].

The constitutional duty to protect the environment from water pollution

Insomuch as constitutions provide for rights of citizens, it would be futile if concomitant duties were not imposed. Indeed, constitutions in many and various jurisdictions impose duties alongside rights. However, it is important to note that duties to protect the environment and in particular water sources from pollution ought to be imposed on the state, which includes both central and local authorities; firms, and individuals. The state has, under the *trust doctrine* of environmental protection, the duty to safeguard *national commons* or such resources that cam1ot be owned by a single individual; firms have a duty to not harm citizens, individuals have a duty to not injure themselves and others, while utilizing water resources. Constitutional environmental provisions also impose duties to protect the environment, sometimes through explicitly imposing a duty on the state and other parties and sometimes through implicitly granting a right to a healthy environment. Although the legal effect of such constitutionally provided·duties is unclear, courts occasionally have relied upon the fundamental duties to interpret ambiguous statutes[23]. The constitutional duty to protect (or not to harm) the environment can be borne by the govenm1ent and its organs, individuals, legal persons, or some combination of these parties[24]. In some cases, constitutional enviro1m1ental duties explicitly addressed to citizens have been expanded to apply also to the state.

In *L.K. Koolwal vs. Rajasthan*[25], for example, the High Court of Rajasthan, Indian, ruled that the fundamental duty to protect the environment in Article 51A(g) extended not only to citizens but also to instrumentalities of the state. As a result, the court held that by virtue of Article 51 A (g), citizens have the right to petition the court to enforce the constitutional duty of the state. It is, however, important to note that ordinarily, the duties and rights are commonly between government agencies and legal and natural persons. Nonetheless, it ought to be also between natural persons, between legal persons and between legal persons and natural persons[26]. In other words, if the duty imposed on states to control the activities of natural and legal persons, and on natural and legal persons to regulate their activities; and not on natural person to regulate the activities of another natural person or legal person, or the legal person to regulate the activities of another legal person, control of pollution might not be achieving the effectiveness it ought to achieve. The bottom line is that every right has a duty that attends it, and so is the right to a healthy environment, which should in a proper constitutional construction impose a duty on each person, whether legal or natural, to protect the environment, and as Versea [21] has contended, it also must create complementary (legal) capacity if it is to be meaningful. Accordingly, the individuals should have the *locus standi* to take legal action for breach of the right to a decent and healthy environment and for failure to observe the corollary duty, against firms, govenm1ent and fellow individuals, whether or not the individual has or individuals are victims of a violation. Firms, too, need to have a similar capacity.

The legal framework for the control of water pollution

First and foremost, a legal framework for the control of water pollution draws on the provisions of a constitution with regard to protections as to the rights to subsist in a healthy environment, and to life, or similar or related rights. And, as stated already, a legal framework aimed to control pollution, which does not derive from such constitutional provisions might not have legal force, and may be rendered null and void. Nonetheless, a legal framework which is founded in constitutional provisions to protect the environment, and the health and life of citizens must also be conformity with certain factors. As Kipane and Vilks[27] have inferred, there is no straight jacket of environmental legislation that is appropriate to all countries; and therefore that each country must formulate environmental laws, which reflect its own realities and for prosperity. In consequence, envirom11ental legislation should aid socio-economic development and should not be a hindrance. At the same time, the legal framework should not be inept as to promote development at the expense of life and wellbeing of the citizens. However, generally, a legislative framework, which is appropriate and operable, needs to co exist with the policy relating to development, in agreement with or complementary to customary laws and norms relating to the environment and water use, and should vouch for the prevention of pollution rather than punishment for the same[28].

Environmental law within the policy imperatives

Environmental legislation is not the· only tool for environment management; and anti-water pollution law cannot be the only basis of controlling water pollution and in fact may prove ineffective when relied upon in isolation[29]. Other imperatives such as sensitization and popular awareness are equally important.

Accordingly, a good anti-pollution law ought to recognize the importance of other policy imperatives, and allow them room to work where they have a likelihood or proof of working than when the force of the law is used. This is particularly relevant where law would interfere with settled human rights such as the rights to work or to housing, or disrupt accepted standards of behaviour, or would be difficult to implement[27]. In such circumstances, a law should be have anticipate such difficulty as may be derived from applying it, and provide for innovative way out of the mess without attracting resistance and hostility, yet leading to the desired result of controlling water pollution.

Environmental legislation ·within customary law

Customary law, norms and practices are regarded cannot be disregarded and cannot be repealed and replaced by an act of parliament without the consent of the people to who they apply and who believe them to be legally binding, which is why a good legislative act has to be recognize them. In the terms of Walekhwa et al.[30], it is of essence to figure out how to integrate the conservation ethic, and in the case of this study to integrate anti-water pollution imperatives in customary law, so that customs and practices that are deleterious to the environment may be discarded. Customary law is itself created by the existence of a general practice in a given community, where the members of the community accept the practice as law. Yet, customary law is not imposed arbitrarily or believed to be law by accident. It is created through a process that is almost all-inclusive; they are therefore well understood, widely in not universally consented to, and easily articulated by just about anyone. Diala [31] puts it very eloquently that if we study such customary-law societies, we see that the legal norms of such a society are, despite their customary character, capable at any time of being formulated by persons-whether in authority or not-involved in situations where such norms are relevant. The process of making customary law in customary law societies, entails formulation of a norm by any member of society, which is then evaluated by fellow-members in the light of their opinion of its accuracy or acceptability and their estimate of the emitter's authority or claim to speak. Such customary legal norms, then, are crystallized by a process of interchange and articulation, supported and strengthened by reliance on them, not only m disputes but in the conduct of ordinary life [32]. This process therefore renders customary law stable and the most enforceable because it elicits easier compliance, and it would be a mistake to supplant customary concerning water pollution in disregard of norms and customs communities believe are legally binding. Seeking compliance with the law should be the utmost goal of a piece of legislation because unless a law is obeyed by its subjects, it cannot be an effective law. Yet, as Diala [31] compellingly contends, even when a person is aware of a· law, he cannot be compelled to observe it even if the form of it is mandatory, and even if sanctions for non-compliance are built into the law. People tend to find a way around laws they do not believe in; some overtly and others covertly. If the compulsive character of laws were the solution, the world would be free of crime because there is no scarcity of them. However, the reality is that there is crime as much as there is compulsive legal rules. Smith et al.[33], in this sense, has also cogently argued that the history of intensified penal sanctions in response to non-compliance with a mandatory law shows the self deception of the legislator, and therefore that a law should be essentially a kind of persuasion it is to be effective or be able to achieve the ends to which it is made. Therefore, because customary laws and norms find better compliance, positive laws should be couched in intricate ways that integrate with customs and norms, or if norms mid ci1stomary laws are detrimental to the quality of water, ill ways that replace them through a process that leads to a change in beliefs the practices and the practices themselves. Accordingly, since in the African setting there are varied customs and norms in various communities, it would not be prudent to couch a law in the terms that are universal, if it intends to achieve the purpose eliciting compliance from its subjects; the same needs to be true of anti-water pollution laws in Uganda.

Preventive aim of Environmental Management

Laws are made to achieve either of the three goals, namely prevention, cure, and facilitation. in so far as a law is preventive, it is designed to discourage behavior which is disapproved of; in so far as a law is curative, it operates ex post facto to rectify some failing or in justice or dispute; and in so far as a law is facilitative, it provides formal recognition, regulation and protection for an institution of the law, such as manage. or contracts [31]. If prevention is better than cure, which is what a popular adage preaches, then laws including laws for the control of water pollution ought to aim at prevention more than at punishment, compensation restoration. The principal reason behind this approach is that it is more expensive to repair than to prevent damage to the environment [34]. It is an approach that is based on the precautionary principle, which is in fact favoured by international legal frameworks especially by the Rio Declaration (1992)[35], which under principle 15 it is provided that: "In order to protect the environment, the precautionary approach shall be widely applied by states to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific. Certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." As such, a good law anti-water pollution ought to be made with prevention of water pollution as its first priority, which within national

jurisdictions, should consist in planning for environment management at the local, regional and national levels. At the lower levels, planning helps take into account, the particulars of locality and local circumstance; at the national level, the larger picture is taken into account [31]. Planning involves periodic exercises, which enable revision to take into account lessons learned, and concretize the gains realized. Prevention is also achievable through environmental impact assessments, which are studies conducted to determine the possible negative and positive impacts. A project can have on the environment, before the commencement of the actual project. By studying the possible impacts, it is possible to avoid the adverse impacts by either redesigning the project or by taking other mitigation measures and in some cases if a project 1s environmentally unfeasible, it helps in deciding to stop a project all together [36]. Also, it helps industries avoid possible litigation by ensuring that they do not undertake obviously environmentally harmful projects. Given the importance of Environmental Impact Assessments, it should be expected that a good anti-water pollution law should provide for compulsory environmental impact assessments from investors or developers whose project would need to utilize a water resource in Uganda, whether small or big. Yet, it is one thing to have such a provision, and another to require it to be implemented by environmental administrators. Accordingly, a law ought also to provide for reasonable sanctions that induce environmental managers to implement the Environmental Impact Assessment provision. Nonetheless, Environmental Impact Assessments alone may not be sufficient to prevent water pollution. First, because the assessments might be overly optimistic and not reflecting the actual impact on water pollution, and secondly because implementation of a project may not necessarily follow the project design, which might result in water pollution. Therefore, an environmental audit, which ensures that the project continues to perform in accordance with the set standards becomes a necessary preventive intervention. Like the EIA, the environmental audit is also a comprehensive study comprising a systematic, documented, periodic and objective evaluation of how well environmental organization, management, and equipment are performing with the aim of helping to safeguard the environment by: (i) facilitating control of environmental practices, (ii) assessing· compliance with company policies, including meeting regulatory requirements[31].

Approaches of enforcement of and compliance to anti-water pollution laws

The enforcement of and compliance to environmental law, is an important issue, which has to be taken care of by all legislation. The traditional forms of enforcement by means of fines and terms of imprisonment may not be sufficient to ensure compliance (ibid) because as already noted, the laws rarely compel people to comply. If penal law is not an effective device, there has to be an innovative shift to cause compliance. In this regard, many countries have found it necessary to move away from the command theory of criminal law to the use of economic devices such as incentives and disincentives in the form of taxes and charges for behavior deleterious to the _environment on the side of disincentives and tax credits, tax exemptions, rewards for good environmental performance, soft loans and subsidies on the side of incentives [31]. Penal law fails -because it fails at justice by causing the poor to pay a price while the rich get away with crime in most cases yet the latter are the major polluters and environn1ent degraders. In jurisdictions where corruption is pervasive, such as in Africa, the rich find it easier to buy themselves out of justice and never get their just desserts for flouting the law and polluting water resources. The goal of economic devices is to modify behavior by using economic factors rather than legal Compulsion [31], which economic tools can achieve more efficiently and effective than penal law since economic devices have within them, an auto enforcement inner logic. Economic devices are more efficient because there is no need for lengthy and cumbersome litigations unless a culprit who is a subject or target of the devices disputes a levy or the authority of the imposing authority. They are effective because they easily modify behavior towards compliance by the rewards attaching to good behavior. Beyond the traditional form of sanctions (punislm1ent for infraction) and the emerging concern with economic incentives and disincentives, another trend to ensure enforcement may be discerned [31]. Environmental considerations have been key factors in the development of legal requirements for the registration, labeling, control on advertising, and classification of dangerous processes, products and by-products such as hazardous chemicals and waste. To ensure that these requirements are met, the law should go further to require reports on potentially dangerous inputs, products, processes, and by-products and to provide for inspection and analysis of inputs, products and by-products. These techniques have been particularly used in specific legislation relating to hazardous substances and wastes and they are pertinent to sustainable industrial development [37]. Examples of these approaches are the recent laws enacted in Malawi, Zambia, Ghana and Gambia.

CONCLUSION

This article focused on analyzing the legal framework in the protection of water pollution in Uganda. The study revealed that lacuna in the environment management Act has to do with the · structure of environment committees at local levels, which might make implementation of anti- pollution laws ineffective.

Recommendation

In this wise, the article recommends amendment to the Environment Management Act to plug the lacunas, and

codifying economic incentives and disincentives into law thereby giving them legal force.

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