

LEGAL BRIEF

AFIEGO AND OTHERS V UMEME AND OTHERS MISC. CAUSE NO.135/2010

ACCESS TO ELECTRICITY AS A HUMAN RIGHT IN UGANDA

Introduction: The right to electricity struggling to come of age

Uganda's Constitution, celebrated as having a remarkable bill of rights world over, guarantees civil and economic, social and cultural rights. However, like elsewhere in the world, the conversation on justifiability of economic, social and cultural (the so called third and fourth) generation rights continues. The right to modern energy such as electricity is one of these rights and indeed a very contentious issue in contemporary human rights discourse. Earlier human rights instruments like the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights do not explicitly recognise access to electricity as a human right. Neither does Uganda's Constitution. However, proponents argue, a purposive interpretation of the Constitution would reveal that the right to access electricity is intrinsically linked to other human rightsⁱ. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is the only instrument that recognises the right to access to electricity as a human right. It provides that:

*"State parties shall take appropriate measures to eliminate discrimination against women in rural areas, in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."*ⁱⁱⁱ

The High Court in the case of *Salvatori Abuki v AG*ⁱⁱⁱ has interpreted the right to life to mean not just the right to exist, but to a decent and quality life. The right to a clean and healthy environment^{iv}, the right to communal existence and the right to education^v have all been recognised by the courts.

It is such flickers of hope that spurred Africa Institute for Energy Governance to move the courts for, inter alia, a declaration that access to electricity is indeed a human right.

AFIEGO and others v UMEME and others: A struggle for human rights

The case, currently before the High Court, was instituted by AFIEGO, an NGO that promotes energy and, in particular, electricity democracy. AFIEGO brought an application against national electricity generator UMEME, as well as the distributor (UEDCL), regulatory authority and the Attorney General in his capacity as representative of government. AFIEGO contends that electricity is a public good and its access and utilisation is a right that ought to be recognised under Article 45 of the Constitution. AFIEGO challenges the continued use of uncertified meters and estimated billing techniques in purported violation of the rights of the people.

The applicants further opine that the failure of the first respondent to avail concession agreements and report candidly on their investments in the sector is a breach of contract and a violation of the right to access information. Dickens Kamugisha, Executive Director of AFIEGO, desponds in paragraph 7 of his affidavit thus:

“The main consideration for signing of the Concession Agreement was premised on an understanding that the 1st respondent would invest US \$65 M in the distribution of Electricity within the first five years of operation that would ensure that the Respondent would acquire the relevant technology to upgrade the electricity distribution system guaranteeing broader coverage of electricity usage, reduced electricity losses, create a modern billing system that would ensure that customers would be able to get accurate and regular bills, tariffs per unit of electricity would be lowered considerably and load shedding would be abated.”

The paragraph is the gist of the application that indicates that the citizens of Uganda are not only being denied their right to access electricity, but are also being exploited by big organisations that have failed to deliver on their promises.

The applicants, on the other hand, deny that access to electricity is a human right. Benon Mutambi, Executive Director to the third respondent desponds in his affidavit that right to electricity is not justiciable since it is not guaranteed by the Constitution. He rebuts the

applicants' argument that the right to access electricity, being recognised under the National Objectives and Directive Principles of Policy are binding and ought to be enforced. The affidavit raises questions not only on justiciability but also enforceability, indicating that the lack of access to electricity has been caused by factors beyond their control- For example drought and increasing demand beyond what they are able to supply. The applicants also say that the first respondent's investment in the sector is closely monitored and the documents, including the concession agreements are available to the public.

The respondents indicate that they have procured their own testing grids to ensure accuracy of meters and that the system has safeguards which include UMEME reading meters once every quarter and these readings are based on actual consumption other than estimates. Besides, they urge further, the applicants have never presented their complaints to the respondents who would have acted upon them accordingly. In a similar vein, they pointed out that the 1st respondent appointed officers for the Electricity Disputes Tribunal.

The tribunal has indeed become operational, albeit with a few questions about its jurisdiction and whether it dispenses justice to the people who need it the most. For instance, the tribunal is based in Kampala with no offices upcountry where the majority of Ugandans live. Also, electricity tariffs have continued to rise ever since the establishment of the Electricity Regulatory Authority as Ombudsman overseeing the sector^{vi}. For example, in 2012, the power tariffs increased by 69% for domestic consumers and 56% for industrial users^{vii}. In 2006, the tariffs increased by 35% in June and 41% in November^{viii}. In 2005, there was a 24% increment^{ix}.

Prior efforts to seek redress have never been decided on merit but rather were dismissed on technicality for failure to list all the plaintiffs and serve them personally- A failure that was seen as fatal^x.

Thus, the question still begs: Is electricity a human right?

The right to Electricity under Domestic Law

The Constitution, under the National Objectives and Policy Directives provides, under the head 'The Right to development', that in order to facilitate rapid and equitable development, the

state shall encourage private initiative and self-reliance^{xi}. Further, that the state shall take all necessary steps to involve the people as a whole in formulation and development programmes that affect them^{xii}. The state shall give priority to enacting legislation that enhances the right to development and equal opportunity^{xiii}. Such development shall be equitable and balanced between rural and urban areas^{xiv}. Further, the state is enjoined to protect natural resources for the people of Uganda and protect the environment^{xv}. In particular, the state shall promote and implement energy policies that will ensure that people's basic needs and those of environmental conservation are met^{xvi}. The Constitution further guarantees the right to access to information^{xvii} and to a clean and healthy environment^{xviii}.

These are the only provisions that touch on electricity as a human right. While conservatives argue that the National Objectives and Directive Principles of State policy are not part of the Constitution, the purposive and living instrument approach to constitutional interpretation necessitates that the Constitution be looked at as a whole- In full consideration of its history and the prevailing social, economic and political circumstances.

Seen in this light, it becomes clear that the right to access to electricity, that in turn would facilitate development and end energy poverty, is a human right that touches on every faucet of life. The right to life, a right to freedom from discrimination, the right to equality of men and women, the right to culture and the right to leisure that is not harmful can all be traced back to access to electricity^{xix}.

Women do most of both the house work and farming work in this country^{xx}. They carry a double burden of both nurturer and provider- A burden that would be greatly lightened if they had access to simple technological tools like cookers (as opposed to going out to collect firewood), dish washers and even decent and clean lighting to facilitate their work.

In this information era, a great chunk of the country is being left in the dark. The respondents in the AFIEGO case argue that the information that the applicants seek is available on the internet. However, only an estimated 10% of Ugandans have access to the internet- And yes, part of the problem is that there is no access to electricity that would power computers.

Of course, one is wont to argue that traditional media like radio reaches rural areas and there is no real necessity for electricity. This argument justifies the alienation of a big chunk of society from technological advancement- In turn; their right to share and celebrate their culture in a bigger sphere is inhibited. It is unacceptable that the majority of Ugandans should be kept in darkness, living a limited and limiting life, alienated by technological development the government boasts of improving but fails to extend to them.

Regional Protection of the Right to Electricity

Uganda is signatory to the African Charter on Human and People's Rights. The charter is the first in the world to recognise the inalienability of rights, and the fact that civil and political rights cannot be enjoyed in exclusion of economic, social, cultural and community rights^{xxi}. Thus far, the charter recognises hitherto questionable rights like, inter alia, the right to development, self-determination, education, health, culture and freedom from poverty.^{xxii} The charter also recognises responsibilities of citizens to protect and develop their nations^{xxiii}, and, in one of the most contentious twists, the duty of children to look after their parents^{xxiv}. For all its attempts to cover specific African needs, the charter does not explicitly recognise the right to electricity or modern energy.

The African Charter and indeed the Organisation of African Unity has been called a toothless barking dog that is not likely to bite. It has also been labelled a mere statement of ideals other than justiciable rights. Still, the charter is a strong statement that human rights are living and ever changing, and that it is not viable to stick to the traditional human rights. The judiciary, too, should be open to developing human rights discourse. For human rights, like humanity itself, is ever evolving.

The Right to Electricity under International law

Even on the international stage, access to electricity as a human right is contentious. However, the Universal Declaration of Human Rights provides that:

“Everyone has the right to a standard of living adequate for health and wellbeing of himself and of his family, including food, clothing, houses and medical care and necessary social services.”

Following the ejusdem generis rule of statutory interpretation, electricity can fit in this list. The UDHR has overtime become international customary law that all states are bound to follow.

While the ICCPR guarantees such fundamental rights as the right to life and equality and the ICESPR guarantees the right to development, education, culture, leisure and a clean and healthy environment among others, these two traditional human rights instruments do not mention the right to electricity as a human right. However, the CEDAW recognises that if non-discrimination on the basis of sex is to become a reality, women ought to be enabled to access resources to make the quality of their lives better.^{xxv} The CEDAW lists the right to access to electricity alongside non-contentious basics like clean potted water, transport and proper sanitation^{xxvi}. Indeed, in 2010, the UN CEDAW committee declared that indeed access to electricity is a human right^{xxvii}. The tide toward a broadened understanding of human rights is clear and in 2012 electricity's cousin, internet access was also declared a human right^{xxviii}.

Conclusion: Beyond the human rights discourse

The AFIEGO case is a chance for Uganda's judiciary to uphold the progressiveness it has often stood for, defending human rights in the face of cultural and even religious contentions^{xxix}. When it comes to the issue of access to electricity, legal arguments mean little to those affected. The reality to them is the abject poverty that they live with day in day out without any hope of alleviation, the haywire climate they can no longer rely on and the lack of basic technological devices their counterparts in the developed world take for granted. Here, the reality is their alienation from the rest of the world and development, their resignation to a poor quality life and unacceptable standard of living. Beyond even the legal arguments, these people's only hope is that the court holds the key out of this dark abyss.

ⁱ Gandhi, R., Access to Energy: Human Rights Perspective- India Experience, 2013, RSOILPL

ⁱⁱ Art 14 (2) (h)

ⁱⁱⁱ Constitutional Case no. 7 of 1997

^{iv} Byabazaire v Mukwano Industries (2001) LLR (HCU)

^v Salvatori Abuki v AG, Supra no. iii

^{vi} Kahigwa, J.A., Uganda: Regulating Umeme Power Tarrifs, 15th April 2013, The Independent Magazine

vii Supra

viii Supra

ix Supra

^x Kasozi Joseph and 50,003 Ors v UMEME (HCSS No. 188 of 2010).

^{xi} The Constitution of Uganda, 1995, Objective XI

^{xii} Supra, Objective x

^{xiii} Supra, Objective XI (i)

^{xiv} Supra, Objective XII (ii)

^{xv} Supra, Objective XIII

^{xvi} Supra, Objective

^{xvii} Supra, Objective XXVII

^{xviii} Supra, Art 41

^{xix} Supra, Art 39

^{xx} Supra, no. i

^{xxi} Ojiambo, R., Rural Women and Information in Uganda, No Date, Food and Agricultural Organisation FAO

^{xxii} The African (Banjul) Charter on Human and People's Rights, 1981, Preamble

^{xxiii} Supra, Article 24, 25 and 26 and Chapter II

^{xxiv} Supra, Art 29

^{xxv} The Convention on the Elimination of Forms of Discrimination Against Women, Art 17

^{xxvi} Supra

^{xxvii} Report of the Committee on the Elimination of All Forms of Discrimination Against Women, 2010

^{xxviii} The Human Rights Council, 2012

^{xxix} See for example Law and Advocacy for Women in Uganda v AG, Constitutional Petition no. 8 of 2007