

# Access to sufficient water in South Africa: How far have we come?\*

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## 1. Introduction

Water is generally regarded as scarce resource the world over.<sup>2</sup> According to Damassa it is widely accepted as fact that only 10 percent of the annual world water supply is consumed by humans and that only 15 percent of people worldwide have an abundance of water.<sup>3</sup> The World Resource Centre (WRC) has estimated that 41 percent of the world's population, or 2.3 billion people, live under 'water stress', 'which means the per capita water supply is less than 1.7m<sup>3</sup>/year for these people.'<sup>4</sup> It is further stated that 1.1 billion people live without safe drinking water and 2.6 billion people do not have access to adequate sanitation which often leads to health problems.<sup>5</sup> Over 2 million people die every year owing to lack of safe water.<sup>6</sup> Statistics also show that globally almost 6000 children under the age of five die everyday from water related diseases.<sup>7</sup>

Water needs are estimated to increase with population growth and demand may double in 2050. The International Water Management Institute (WMI) provides two forms of water scarcity: physical and economic. Physical water scarcity occurs when available resources cannot demand, including minimum environmental flow

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<sup>2</sup> Johannesburg Declaration (2002), World Summit on Sustainable Development, Part 3, p.28, (hereinafter "The Johannesburg Declaration") available at [http://www.worldsummit2002.org/publications/memo\\_en\\_with.pdf](http://www.worldsummit2002.org/publications/memo_en_with.pdf). [accessed on 15 June 2009]; Fitzmaurice, M (2007) 'The human right to water', 18 Fordham Environmental Law Review, p. 537; Hardbeger, A (2005) 'Life, liberty and the pursuit of water: Evaluating water as human right and the duties and obligations it creates', 4 Northwestern University Journal of Human Rights p.331.

<sup>3</sup> Damassa, T (2006). Monthly update: Water scarcity, Sept 1 2006, as referred to in Fitzmaurice above (fn.1), p.537.

<sup>4</sup> Revenga, C 'Will there be enough water', as referred to Fitzmaurice above (fn.1), p.537.

<sup>5</sup> Watkins, K et al (2006). Human Development Report: Beyond Scarcity: Power, Poverty and Global Water Crisis', as referred to in Fitzmaurice above (fn.1), p537.

<sup>6</sup> World Health Organisation (2003). *The Right to Water*, as quoted in Hardberger above (fn.1),p.331.

<sup>7</sup> World Resource Institute, Earth Trends Environmental Information, in Damassa above (fn.2), as referred to in Fitzmaurice above (fn.1), p537.

requirements.<sup>8</sup> Economic scarcity occurs ‘when there is a lack of investment in water or lack of human capacity to respond to growing water demand. Institutions frequently favour the needs of certain groups of people to the detriments of others (such as women). Economic scarcity also includes inequitable water distribution even where infrastructure is in place.’<sup>9</sup>

The United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR),<sup>10</sup> has commented that water is a limited natural resource and a public good fundamental for life and health.<sup>11</sup> Furthermore, that the human right to water is indispensable for leading a life in human dignity. It also stated that water is a prerequisite for the realization of other human rights.<sup>12</sup> In as much as South Africa has made great strides in the provision of this important natural resource, many poor and vulnerable South African inhabitants either have access to insufficient water or the available water is not of quality suitable for drinking or personal hygiene.

This paper looks to what extent the South African government has met its obligation to provide access to sufficient water fit for human consumption. It also looks at the recent judicial decisions on the right of access to sufficient water, where courts have not only found that the minimum quantity of water prescribed by national legislation is insufficient, but have prescribed what a minimum quantity of water should be. Section 2 looks at United Nations treaty and regional law provisions on the right to or right of access to water and the relevant declarations and conferences. Section 3 looks at the South African constitutional and legislative provisions on right of access to water, as well as relevant policies. This is followed in section 4 by discussion of South Africa’s obligations to provide access to sufficient water under the Constitution as interpreted by the courts. Section 5 looks at the link between the right of access to

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<sup>8</sup> International Water Management Institute. *Water for Food, Water for Life: A Comprehensive Assessment of Water Management in Agriculture 11-12* (David Molden ed.), available at [http://iwmi.org/assessment/files\\_new/synthesis/Summary\\_SynthesisBook.pdf](http://iwmi.org/assessment/files_new/synthesis/Summary_SynthesisBook.pdf), as quoted in Fitzmaurice above (fn.1), p537.

<sup>9</sup> WMI, above (fn.7), Insights, p.7.

<sup>10</sup> The Committee on ESCR exercises oversight over compliance with the International Covenant on Economic, Social and Cultural Rights of 1966.

<sup>11</sup> In General Comment No.15, (29<sup>th</sup> session, 2002) [UN Doc E/C.12/2002/11], para 1.

<sup>12</sup> Id.

water and other rights in the Constitution. This is followed by Sections 6 and 7 discussing the progress made and challenges faced in providing access to water, respectively. Section 8 suggests what should be done to ensure access to sufficient water for everyone, followed by concluding remarks in section 9.

## **2. International law provisions on the right to or access to water**

The South African Constitution of 1996 allows for reference to international law in its interpretation. Section 39(1)(b) obliges “a court, tribunal or forum” to “consider international law” “[w]hen interpreting the Bill of Rights”. In *S v Makwanyane and Another*,<sup>13</sup> the South African Constitutional Court (CC) held that in terms of the above section ‘public international law’ means both international law that is binding on South Africa and international law that is not binding on South Africa. The CC stressed that our courts are obliged to consider both ‘hard’ and ‘soft’ international law in their interpretation of the Bill of Rights.<sup>14</sup> The following section looks at treaties which implicitly and/or explicitly mention the right to water both at the international and regional level, as well as international conferences making pronouncements on the right to water.

### **2.1 United Nations instruments (binding)**

The right to water is not widely recognised at international level, and neither explicitly provided for in key United Nations instruments such as the Universal Declaration of Human Rights (UDHR)<sup>15</sup>, the International Covenant on Economic (ICESCR), Social and Cultural Rights<sup>16</sup> as well as the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup>, together known as the International Bill of Rights.<sup>18</sup> Few reasons

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<sup>13</sup> 1995 3 SA 391 (CC).

<sup>14</sup> Para 35.

<sup>15</sup> Of 1948.

<sup>16</sup> Of 1966

<sup>17</sup> Of 1966

<sup>18</sup> A Suggestion that the United Nations General Assembly develop a bill of rights came up at the United Nations Conference on International Organisation held in San Francisco in 1945. See Gleick, P.H (1999). ‘The Human Rights to Water’ 1(5) *Water Policy* 487 – 503, available at [http://www.pacinst.org/reports/basic\\_water\\_needs/human\\_right\\_to\\_water.pdf](http://www.pacinst.org/reports/basic_water_needs/human_right_to_water.pdf) [accessed on 15 April 2009] for a fuller account of the history of the three instruments.

have been advanced by commentators for what appears at first sight to be a glaring omission on the part of the framers. According to Hardberger 'early human rights were written in general terms and did not explicitly define all possibly implied rights.'<sup>19</sup> Gleick on the other hand is of the view that it is highly unlikely that the framers could have consciously excluded the right to water and 'while rights considered less<sup>20</sup> essential than the right to water have been recognised.'<sup>21</sup> For these reasons, and given the interdependence and interrelatedness of the socio-economic rights, the right to water is regarded as implicitly included by virtue of the other explicitly recognised rights such as the rights to health, adequate standard of living, life etc. For instance article 25 of the UDHR provides:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing...

Article 11 of the ICESCR states that

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The ICESCR further states in Article 12

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken . . . to achieve the full realization of this right shall include those necessary for. . . (3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.

The ICCPR provides in Article

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

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<sup>19</sup> Hardberger above (fn.1), p 331. She refers to the right to life which was 'originally read narrowly and did not include basic life necessities, but which has now been read more broadly to include measures that increase life expectancy like personal health and hygiene.'(Id).

<sup>20</sup> Such as to work, to protection against unemployment, to form and join trade unions, to rest and leisure in Articles 23 and 24 respectively.

<sup>21</sup> Gleick above (fn.17) at p.491.

It is by now generally accepted that meeting the standards of Article 25 of UDHR, Article 11 and 12 of ICESR and even Article 6 of ICCPR cannot be achieved without water of “sufficient and quality to maintain human health and well-being.”<sup>22</sup> In fact Gleick remarks that “[l]ogic also suggest that the framers...considered water to be implicitly included as one of the ‘component elements [i.e of the right to food, housing, health care etc] – as fundamental as air.” Moreover, the minimum amount of clean water envisaged by the framers of the above instruments is that which is necessary to “prevent death from dehydration, to reduce the risk of water-related diseases, and to provide for basic cooking and hygienic requirements.”<sup>23</sup>

Furthermore, Daniel, Stamatopoulou & Diaz see the exclusion of an explicit right to water in the international bill of rights as no stumbling block to realization and enforcement of this essential right: They hold the view that

There is nothing ill-defined or fuzzy about being deprived of the basic human rights to food and clean water, clothing, housing, medical care, and some hope for security in old age. As for legal toughness, the simple fact is that the 138 governments which have ratified the International Covenant on Economic, Social, and Cultural Rights have a legal obligation to ensure that their citizens enjoy these rights.<sup>24</sup>

The Committee on ESCR in its interpretation of Article 11(1) appeared to include the right to water for personal and domestic uses as a stand alone (independent) right. It noted that other listed rights in the article were not intended to be exhaustive by virtue of the use of the word “including”.<sup>25</sup> The Committee commented that ‘the right to water clearly falls within the category of guarantees since essential for securing an adequate standard of living, particularly since it was one of the most fundamental for survival.’<sup>26</sup>

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<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Danieli, Y., Stamatopoulou, E., Diaz, C.J., (1999). *The Universal Declaration of Human Rights: Fifty Years and Beyond*. Baywood Publishing Company, Inc., Amityville, New York, as quoted in Gleick above (fn.17) at p.492.

<sup>25</sup> General Comment No15 above (fn.10) para 3. See also Langford, M & Kok, A (2005) ‘The right to water’ in Brand, D and Heyns, C *Socio-Economic Rights in South Africa*, Pretoria University Law Press (PULP), 191-208.

<sup>26</sup> General Comment No. 15 above (fn.10) para 3.

To fortify its interpretation of article 11(1) the Committee referred to its previous general comments<sup>27</sup> and stated that in the final analysis the right to water “should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the rights to life and human dignity.”<sup>28</sup>

Furthermore, as can be seen from the title of the General Comment the Committee’s appears to also draw inspiration for its position that water should be seen as an independent right from the health provisions of the ICESCR.<sup>29</sup> Article 12(1) stipulates that States Parties to the ICESCR “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The Committee commented that the right to water is also “inextricably related to the right to the highest attainable standard of health.”<sup>30</sup> Langford & Kok<sup>31</sup> observe that the Committee had earlier only stated that the underlying determinants of the right to health include potable water.<sup>32</sup> In addition, the Committee in General Comment No 15 “elaborated on a number of other aspects of water under the right to health, beyond those of direct access to water for personal and domestic needs. Article 12(2)(b) provides that state parties to the treaty must aim to improve all aspects of environmental and industrial hygiene.”<sup>33</sup> The Committee noted that this duty “encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.”<sup>34</sup>

The right to water or right of access to water received explicit mention in subsequent international instruments. The United Nations Convention on the Elimination of Discrimination against Women of 1979 (CEDAW) obliges state parties to ensure rural women enjoy the right to adequate living conditions, particularly in relation to

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<sup>27</sup> General Comments No. 4 on the right to adequate housing (1991) para 8 (b); No. 6 on the economic and cultural rights of older persons (1995), paras 5 & 32; No. 14 (2000) on the right to the highest attainable standard of health, paras 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

<sup>28</sup> General Comment No. 15 above (fn.10) para 3.

<sup>29</sup> For a similar reading of the Committee’s approach see Langford & Kok above (fn.25) at p.193.

<sup>30</sup> General Comment No. 15 above (fn.10) para 3.

<sup>31</sup> Langford & Kok above (fn.25) at p.193

<sup>32</sup> Referring to paras 11, 12, 15, 34, 36, 40, 43 & 51 of its General Comment No 14 The right to the highest attainable standard of health (art.12 of the Covenant) (22<sup>nd</sup> session, 2000) [UN Doc E/C 12/2002/4].

<sup>33</sup> Langford & Kok above (fn.25) at p.193.

<sup>34</sup> General Comment No 15 above (fn.10) para 8.

housing, sanitation, electricity and water supply, transport and communications.<sup>35</sup> The United Nations Convention on the Right of the Child of 1989 (CRC) provides that state parties to the CRC recognise the child's right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and shall strive to ensure that no child is deprived of his or her right of access to such health care services.<sup>36</sup> It further obliges state parties to take measures to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.<sup>37</sup>

International humanitarian law also makes provision for the right to water during armed conflict. It states that sufficient drinking water is to be supplied to prisoners of war and other detainees.<sup>38</sup> Prisoners of war and other detainees are to be provided with shower and bath facilities and water, soap and other facilities for their daily personal toilet and washing requirements.<sup>39</sup> Furthermore, "objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works."<sup>40</sup>

## 2.2 Regional Law

The African Charter on Human and Peoples' Rights (African Charter) does not explicitly mention the right to water. Article 16(2) obliges state parties to the African Charter to take the necessary measures to protect the health of their people. As with

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<sup>35</sup> Article 14(2)(h)

<sup>36</sup> Article 24(1).

<sup>37</sup> Article 24(2)(c).

<sup>38</sup> Articles 21, 25 & 46 Geneva Convention III 1949; Articles 89 & 127 Geneva Convention IV 1949, and Article 5 Additional Protocol II.

<sup>39</sup> Articles 29 & 85 Geneva Convention III 1949.

<sup>40</sup> Article 54 Additional protocol I & Article 14 Additional Protocol II. In General Comment No.15 the Committee on ESC has urged states parties to give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, and as part of such individuals and groups, states parties should take steps to ensure that "[p]risoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners.", para16.

the above instruments, the right to water must be deduced from the express provision of other rights such as health, the realization of which cannot be achieved without providing water and basic sanitation services. In any event, the African Commission on Human and Peoples' Rights (African Commission) has in the past derived such rights as food and housing from other rights such as health in the African Charter. In *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*<sup>41</sup> the Commission held that part of the states obligations under the African Charter to realize all human rights, and not just the rights in the Charter, "could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)".<sup>42</sup> The African Commission also held that

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14 [right to property], 16 [right to health] and 18 [right to family] reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>43</sup>

More explicitly, the Commission held that failure by the Nigerian government to guard against contamination of air, water and soil, amounted to violation of Articles 16 (right to health) and 24 (right to clean environment) of the affected community.<sup>44</sup>

Furthermore, in *Free Legal Assistance Group and Others v Zaire*,<sup>45</sup> the African Commission held that the "failure of the government to provide basic services such

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<sup>41</sup> Communication 155/96, decision made at the 30<sup>th</sup> ordinary session, Banjul, The Gambia, from 13 to 27 October 2001.

<sup>42</sup> Para 47.

<sup>43</sup> Para 60. For analyses of this decision see among others Nwobike, JC, (2005). 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*' 1 *Afr. J. Legal Stud.* 2 (2005) 129-146; Chirwa, DM (2002) . 'A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria' *ESR Review* (3)2, p. 19.

<sup>44</sup> Paras 50-54.

<sup>45</sup> (2000) AHRLR 74 (ACHPR 1995), as referred to in Langford & Kok above (fn.25) at p.196.

as safe drinking water and electricity and the shortage of medicine as alleged in Communication 100/93 constitutes violation of Article 16 [right to health]”.<sup>46</sup>

The African Charter on the Rights and Welfare of the Child (Charter on Welfare of the Child) explicitly includes the right to water. First, the Charter on Welfare of the Child provides that every child has the right “to enjoy the best state of physical, mental and spiritual health.”<sup>47</sup> In more explicit terms, the Charter on Welfare of the Child states that:

States parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.<sup>48</sup>

Similarly, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol) expressly mentions the right to water. The Protocol states that:

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security.

The European Social Charter<sup>49</sup> (Charter) makes no explicit mention of the right to water. Instead, as with the international bill of rights, the right to water is implicit in other provisions of the Charter. Article 11 states that contracting parties to the Charter should, either directly or in co-operation with public or private organisations, *inter alia*, remove as far as possible the causes of ill-health and prevent as far as possible the epidemic, endemic and other diseases. It should be obvious that access to water is a prerequisite for meeting the provisions of the above Article. Similarly, the right to water should be regarded as being included by implication in the Revised European Charter<sup>50</sup> (Revised Charter) by virtue of Article 31 which obliges state

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<sup>46</sup> Para 47 of English version.

<sup>47</sup> Article 14(1).

<sup>48</sup> Article 14(2)(c).

<sup>49</sup> Adopted in 1961.

<sup>50</sup> Adopted in 1996.

parties to “promote access to housing of an adequate standard” to ensure the “effective exercise of the right to housing.” The necessity of water to enjoy the other right explicitly mentioned in the Revised Charter is apparent in some of the recommendations of the European Committee of Ministers of member states of the Council of Europe (Committee of Ministers).<sup>51</sup> The Committee of Ministers has stated that:

[E]veryone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognize the fundamental right of all human beings to be free from hunger and to adequate standard of living for themselves and their families. It is quiet clear that these requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.<sup>52</sup>

The 1988 American Convention on Human Rights in the Area of Economic, Social and Cultural Rights states that “everyone shall have the right to live in a healthy environment and to have access to healthy basic services”.<sup>53</sup>

### **2.3 International conferences and declarations (non-binding)**

There have also been a number of international conferences with the right to water as the subject matter for discussion.<sup>54</sup> The Mar del Plata Declaration of the 1977 United Nations Water Conference states:

...all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.<sup>55</sup>

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<sup>51</sup> Monitors compliance of the European Social Charter/Revised European Charter by member states.

<sup>52</sup> Recommendation Rec(2001) 14 of the Committee of Ministers to member States on Water Resources, para 5, as quoted by Langford & Kok above (fn.25) at p.196.

<sup>53</sup> Article 11.

<sup>54</sup>Of course the declarations /agreements concluded at these conferences do not command the same legal force as Covenants do, however they “offer strong evidence of international intent and policy that inform the views of States,” Gleick above (fn.17) at p.493

<sup>55</sup> Preamble to the Mar del Plata Declaration.

The United Nations Principles for Older Persons<sup>56</sup> also has provision on the right to water. Organised in five parts, the section of the principles providing for economic and social rights is that entitled 'independence' and it states, among other things, that "older persons should have access to adequate food, water, shelter, clothing and health care." The principles state that access should be brought about through the provision of income, family and community support and self-help." The Dublin Statement on Water and Sustainable Development<sup>57</sup>, adopted at the 1992 International Conference on Water and the Environment, acknowledged the "basic right of all human beings to have access to clean water and sanitation at an affordable price."<sup>58</sup>

The need to access water is also recognised in Action programs adopted by states. In the 1992 Agenda 21 and the 1994 Programme of Action adopted at the United Nations International Conference on Population and Development, states included the right to water.<sup>59</sup>

In the United Nations Habitat Agenda (UN- Habitat) states linked human health and quality of life to sustainable human settlements and that the latter "depend development of policies and concrete actions to provide access to food and nutrition, safe drinking water, sanitation, and universal access to the widest range of primary health-care services...to eradicate major diseases that take a heavy toll of human lives, particularly childhood diseases..."<sup>60</sup>

The World Health Organization (WHO) and the United Nations Children's Fund (UNICEF) have set standards below which states cannot go in their attempts to provide access to water in their territories. The WHO and UNICEF have set the minimum of 20 litres of safe drinking water per person per day, and water source

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<sup>56</sup> Adopted by the General Assembly in terms of Resolution 46/91 of 16 December 1991, entitled 'Implementation of the International Plan of Action on Ageing and Related Activities.'

<sup>57</sup> The statement was issued by government designated experts from 100 countries and representatives of 80 international, intergovernmental and non-governmental organizations.

<sup>58</sup> Principle No.3 of the Dublin Statement.

<sup>59</sup> See para 18.47, Agenda 21, Report of the United Nations Conference on Environment and Development 1992, and Principle No.2, Programme of Action of the United Nations International Conference on Population and Development.

<sup>60</sup> Adopted by over 171 states at the City Summit in Istanbul, Turkey, June 1996, Chapter II 'Goals and Principles', available at <http://ww2.unhabitat.org/declarations/ch-2a.htm> [accessed on 15 June 2009]. South Africa is signatory to the UN-Habitat Agenda.

must be located within a reasonable distance from the household.<sup>61</sup> The principle of 'reasonable distance' has been interpreted to mean a distance not farther than 200 meters from the house or a public stand post, in an urban environment.<sup>62</sup> In rural areas, the definition is "more flexible and may vary with the topography of the area."<sup>63</sup> Furthermore, the World Bank has defined 'reasonable access' as 'in the home or within 15 minutes' walking distance.<sup>64</sup> Langford and Kok point to the need for adoption of "[a] proper definition...taking local conditions into account: in urban areas; distance of not more than 200 meters from the house or a public stand post may be considered reasonable access; in rural areas reasonable distance implies that the housewife does not have to spent a disproportionate part of the day fetching water for the family's needs."<sup>65</sup>

In the Millennium Declaration 2000 states, among other goals, committed themselves to ensuring environmental sustainability and set themselves a number of targets including to "halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation."<sup>66</sup>

### **3. South African Law**

#### **3.1 The Constitution**

The South African Constitution of 1996 is one of the few national constitutions containing an express provision on the right to water. Section 27(1) states that

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<sup>61</sup> WHO/UNICEF *Global water supply and Sanitation Assessment Report 2000*.

<sup>62</sup> See 'Mid-decade of evaluation of water supply and sanitation in Latin America and the Caribbean', conference organized by the Pan – American Health Organisation and WHO in Washington DC, 1997, available at <http://www2.unhabitat.org/declarations/ch-2a.htm>ington DC, 1997, available at <http://www.cepis.org.pe/muwww/fulltext/aguabas/mideca/mideca.html>, as referred to in Langford & Kok above (fn.25) at p.195 fn.21.

<sup>63</sup> *Id.*

<sup>64</sup> See World Bank at [http://poverty.worldbank.org/files/4237\\_annex\\_s.pdf](http://poverty.worldbank.org/files/4237_annex_s.pdf), as referred to in Langford & Kok above (fn.25) at p.195 fn.21.

<sup>65</sup> Langford and Kok above (fn.25) at p.195 fn.21.

<sup>66</sup> Goal 7 of the nine Millennium Development Goals in the Millennium Declaration, available at <http://www.un.org/millenniumgoals/envIRON.shtml>. [Accessed on 15 June 2009]. South Africa is a signatory to the Millennium Declaration.

“[e]veryone has the right to have access to... sufficient...water”. Section 27(2) provides that the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights”.

### **3.2 Legislation and policies on access to water**

Parliament sought to give effect to the above constitutional injunction by enacting the Water Services Act 108 of 1997. The preamble to the Act recognizes the “rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well being”. This recognition is repeated in section 3(1) which provides that “[e]veryone has a right of access to basic water supply and basic sanitation”. Furthermore, section 3(2) states that “[e]very water service institution must take reasonable measures to realize these rights”.

In terms of section 1 “basic water supply” means a prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, to support life and personal hygiene.

The Act in section 1 read with section 3(1) therefore confers to everyone a right of access to “the prescribed minimum standard of water supply necessary for the reliable supply of a sufficient quantity to households...to support life and personal hygiene”.<sup>67</sup> The regulations<sup>68</sup> to the Act prescribe what the basic water quantity and minimum standard of water supply should be. Regulation 3 states:

- ‘3 The minimum standard of water supply service is –
- (a) ...
- (b) A minimum quantity of portable water of 25 liters per person per day or 6 kilolitres per household per month.
- (i) at a minimum flow rate of not less than 10 liters per minute.

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<sup>67</sup> For a similar interpretation see *City of Johannesburg and Others v Lindiwe Mazibuko and Others* (Case No. 489/08) 2009 (SCA), para 8.

<sup>68</sup> Government Gazette 22355, 8 June 2001, Government Notice R509, Regulation 3.

(ii) within 200 metres of a household; and

(iii) with an effectiveness such that no consumer is without supply for more than seven full days in any year.’

Thus the Act by way of sections 3 and 1 read with regulation 3(b) confers to everyone a right of access to a minimum quantity of water of 25 litres per person per day or 6 kiloliters per household per month.

There is also the National Water Act 36 of 1998. It however serves a slightly different purpose from the Water Services Act in that it mainly regulates access to water in order to support livelihoods and establishes a system of licensing in order to secure access to water.

The Water Services Act codifies a 1994 Department Water Affairs and Forestry’s *Water Supply and Sanitation Policy* (Water Policy). The Water Policy in relation to water supply stated that

Basic water supply is defined as 25 litres per person per day. This is considered to be minimum required for consumption, for the preparation of food and personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered a minimum.

For the foregoing reason the Department in 2003 issued a Strategic Framework for Water Services entitled ‘Water is Life, Sanitation is Dignity’. In terms of the Framework basic levels of service would be reviewed in future to consider raising the basic level from 25 litres per person per day (or 6 kilolitres per household per month) to 50 litres per person per day. Sadly this review by the government never happened until the courts were confronted three years later (2006) with reviewing the allocated amounts (among other things) in subsequent suits against the government (see Section 6 below).

#### **4. Obligations of the State**

As a general principle, individuals have to meet their own water needs. And where there is an existing access to water, as a minimum, the state may not interfere in the enjoyment of access to water. That is to say that the state may not prevent people

from using their own available resources to meet their water needs. This duty does not only apply between state and individuals, it equally applies between individuals themselves. Where one individual threatens or violates another's right of access to water, the state must step in and protect an individual's right of access to water against threat or violation from another.

The Constitution provides for the progressive realisation of the right of access to water. The phrase 'progressive realization' was inspired by such international instruments as the ICESCR, and accordingly, neither retrogression nor inaction is allowed. According to the Committee on ESCR, the phrase should be interpreted to oblige a state to "move as expeditiously and effectively as possible" towards a full realization of a particular right.<sup>69</sup> The Constitutional Court has held that this interpretation is in consonance with the demands in the South African Constitution.<sup>70</sup> For this reason the state is expected to develop:

- clear goals;
- realistic strategies for the achievement of these goals;<sup>71</sup>
- time-related benchmarks to measure progress;<sup>72</sup>
- monitoring and review mechanisms by which progress in the realization of the right may be measured.<sup>73</sup>

The state will be violating its obligation to provide its citizens with access to water if its water policy leads to a decline in access to water by South African citizens at the hands of the state. The Committee on ESCR has stated that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified ... in the context of the full use of the maximum available resources."<sup>74</sup>

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<sup>69</sup> General Comment No 3, para 9.

<sup>70</sup> In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), para 45.

<sup>71</sup> General Comment No 1, para 4 – speaking of "principled polic-making".

<sup>72</sup> General Comment No 1, para 6. See also Langford & Kok above (fn.25) p.202, fn.57.

<sup>73</sup> General Comment No 15, section V.

<sup>74</sup> In General Comment No 3, para 9.

This is significant in the South African context as section 27(2) of the Constitution conditions the duty to progressively realize a right of access to water on the availability of resources. Furthermore, initially the Constitutional Court has indicated its deference to the state on budgetary and allocation of resources decisions, and only limiting its review to the reasonableness of whatever means the state thought appropriate to realize the rights in the Constitution including that of access to water.<sup>75</sup> The Committee on ESCR has interpreted this qualification to refer to resources existing within a state as well as resources available from international community through international assistance and co-operation.<sup>76</sup>

Subsequent cases however reveal that courts will be more interventionist with regard to state budgetary and resource allocation decisions when it deems justified, provided enough information is placed before it and it feels competent to make that kind of intrusion in the particular circumstances. In this respect a court reviewing the right of access to water may draw inspiration from the Committee on ESCR General Comment No.15 which signifies a marked shift from earlier comments regarding resource constraints consideration. In this recent comment that Committee on ESCR stated that “with respect to the right to water, States parties have a *special* obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.”<sup>77</sup> [emphasis mine].

The South African Constitution spells out the state obligations in respect of the rights in the Constitution. Section 7(2) provides that ‘[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights’. The duty to respect requires of the state to desist from interfering with the enjoyment of the right of access to sufficient

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<sup>75</sup> In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), a first socio-economic right case concerning the right to health care, the court applied a “rationality test” in assessing whether the state was meeting its obligation to access to health care in term of section 27(1)(a) of the Constitution. The Court held that state decision must “rational” and taken in “good faith”, para 9. If these requirements are met, courts will not interfere with a particular decision. The state will not be acting rationally if it allocates grossly inadequate or no resources to the realization of a particular socio-economic right, para 9.

<sup>76</sup> In General Comment No.3, para 13.

<sup>77</sup> The Constitution Court gave early indications of this intention in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), and then in *Minister of Health and Others v Treatment Action Campaign and Others (No.2)* 2002 5 SA (CC), and recently, in *City of Johannesburg and Others v Lindiwe Mazibuko and Others* (Case No. 489/08) 2009 (SCA) delivered a decision with budgetary and resource implications for the state when it raised the minimum quantity of water from 25 litres per person per day to 42 litres per person per day.

water. The Committee on ESCR has stated that the right to water contains freedoms and entitlements. The “freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.”<sup>78</sup> This would mean that the state must refrain from “arbitrarily depriving people of their right of access to sufficient water, or denying or obstructing the right of access to sufficient water, or unfairly discriminating when allocating water resources”.<sup>79</sup>

The duty to respect has been enforced in few cases before the High Courts from as early as 2001. In *Manqele v Durban Transitional Metropolitan Council*,<sup>80</sup> the applicant, an unemployed woman, who occupied premises with seven children, sought a declaratory order that the discontinuation of water services to the premises was unlawful. Her contention was that the by-laws in terms of which the water service was discontinued exceeded the boundaries of its authority (*ultra vires*) in terms of the Water Services Act. She relied on her right to a basic water supply as contained in the Act and did not rely on the Constitution. The Metropolitan Council responded by saying that the right to a “basic water supply” in the Act had no content, as no regulations have been passed to give meaning to the right. The Court found in favour of the Metropolitan Council. De Visser points out that the “decision was ‘regrettable’, and that had constitutional arguments been advanced, the Court would have been confronted with assessing the scope of the right to basic water supply under the Act.”<sup>81</sup>

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,<sup>82</sup> the applicants sought interim relief on an urgent basis for the reconnection of their water supply. Unlike in the *Manqele* case, the applicants in this case based their claim on

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<sup>78</sup> General Comment No.15, para 10. By contrast, the “entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.” (Id.).

<sup>79</sup> Langford and Kok above (fn.25) p.203.

<sup>80</sup> 2002 6 SA 423 (D), as discussed in Langford and Kok above (fn.25) p.203.

<sup>81</sup> De Visser, J (2001). ‘Disconnection of water supply’. *Local Government Bulletin* 3(1), as referred to in Langford and Kok above (fn.25) p.203, fn.65.

<sup>82</sup> 2002 6 BCLR 625 (W).

the constitution. The Court found that the obligation to respect existing access entails that the state may not take any measures that result in the denial of such access. It held that by disconnecting the water supply, the council had *prima facie* breached the applicants' existing rights. With reference to the Water Services Act, the Court stated that the Act provides that the procedure for discontinuing water services must be fair and equitable and must provide for reasonable notice of the intention to discontinue the service and must provide for an opportunity to make representation. Furthermore, where a person proves to the satisfaction of the relevant water services provider that he or she is unable to pay for basic services, the service may not be discontinued. It held that a *prima facie* violation of a local council's constitutional duty occurs if a local authority disconnects an existing water service, and that such disconnection therefore requires a constitutional justification. It is submitted that this decision is in accordance with the Committee on ESCRs general comments.<sup>83</sup>

Furthermore, interference with water supplies may in some situation require a court order before hand. This would be the case if the "disconnection, denial or limitation of access to water services or supplies amounts to a constructive eviction - meaning a resident is forced to leave his or her own home as a result - then it is arguable that this cannot occur without a court order."<sup>84</sup> Constructive eviction by cutting water supply would thus upset section 26(3) requiring that eviction be carried out in terms of a court order obtained after considering all the relevant circumstances. In fact the Land Claims Court has elsewhere stated that restricting the use of land may amount to an eviction and therefore triggering the application of section 26(3).<sup>85</sup>

The duty to *protect* the rights in the Bill of Rights, on the other hand, requires the state to prevent violations of the right access to water by third parties. That is to say if a landlord arbitrary disconnects water supply to a lawful tenant, the state must and restore water to the tenant. A component of the obligation to protect is a duty to

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<sup>83</sup> General Comment No. 15 para 56, where the Committee on ESCR states: "Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies ". See also Langford and Kok above (fn25) p.204.

<sup>84</sup> Langford and Kok above (fn25) p.204

<sup>85</sup> In *Van der Walt v Lang* 1999 1 SA 189 (LCC) and *Dhlahdla v Erasmus* 1999 1 SA 1065 (LCC), as cited in Langford and Kok above (fn.25), fn.68.

regulate private provision of water services. The Committee on ESCR has stated that:

Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.<sup>86</sup>

The duty to *promote* the right of access to sufficient water in the Bill of Rights would involve, among other things, the promotion of educational and informational programmes aimed at generating awareness and understanding of the right of access to sufficient water. The Committee on ESCRs has commented that the “obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage.”<sup>87</sup>

The obligation to *fulfil* the rights in the Bill of Rights, requires of the state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right.<sup>88</sup> Another important component of the duty to fulfill is that the state must facilitate and provide access to sufficient water. According to the Committee on ESCR “[s]tates parties are also obliged to fulfill (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.”<sup>89</sup> In the *TAC* case, the Constitutional Court has however made it clear that sections 26(2)<sup>90</sup> and 27(2)<sup>91</sup>

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<sup>86</sup> General Comment No.15, para 24.

<sup>87</sup> General Comment No.15, para 25; see also generally General Comment No.10, (*The role of national human rights institutions in the protection of economic, social and cultural rights*, 19<sup>th</sup> Session 1998 [E/C.12/1998/25]), para 3(a).

<sup>88</sup> Maastricht Guidelines (1998) *Human Rights Quarterly* 691-701, para 6, as quoted to in Langford and Kok above (fn.25), p.204., fn.74.

<sup>89</sup> General Comment No.15, para 25.

<sup>90</sup> Section 26(2) stipulates: “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”

<sup>91</sup> Section 27(2) provides: “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”

qualify the section 7 obligations in respect of socio-economic rights.<sup>92</sup> The state's obligation to respect, protect, promote and fulfil the right of access to sufficient water is likewise limited by these qualifiers. It however remains unclear to what extent these qualifiers limit the state's duty to 'respect' the right of access to sufficient water given the specific nature of this obligation. It is submitted here that these qualifiers should not affect the State's duty to respect as this duty typically calls for very minimal or no resources at all for its implementation.

## **5. Linking access to water with other rights in the Constitution**

From the record of general comments by the Committee on ESCR, the interdependence of access to water and other rights becomes conspicuous. In fact, access to water is often a precondition for the fulfillment and enjoyment of most of the other rights.

Commentators point to the difference in wording of the socio-economic rights such as between section 26 (housing), 27 (health, water, food, social security) – categorized as 'access rights'- and section 28(1)(c) – talking of 'basic nutrition'- and as such a basic right - as signifying the essence of the right of access to sufficient water, as 'basic nutrition' presupposes existence of access to water sufficient for 'drinking, food preparation and even food production'.<sup>93</sup> The significance of the wording lies in the fact that the state has to meet this obligation, with regard to children, immediately as this right is not qualified. However the Constitutional Court in *Grootboom*, in the context of access to housing, stated that sections 28(1)(b) and 28(1)(c) must be read together and that the obligations set out in section 28(1)(c) primarily rests on the parents or family of the child and only alternatively on the state, for example in the case where children are removed from their families.<sup>94</sup>

Furthermore, section 35(2)(e) provides that everyone who is detained, including every sentenced prisoner, has a right to "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation and nutrition, reading material and medical treatment". As

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<sup>92</sup> TAC case above (fn.62), para 39.

<sup>93</sup> Langford and Kok above (fn.25) p.206.

<sup>94</sup> Paras 76-79.

stated above water forms an important component of that nutrition which the state must provide at its own expense.

Moreover, section 24 stipulates that everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected through legislative and other measures that prevent pollution and ecological degradation; promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>95</sup> With many people still drawing water directly from the source (rivers or dams, wells) and often with no other alternatives a harmful environment would represent a health hazard. Using untreated water from the source exposes communities to a variety of water and air-borne contaminants with a potential to lead to serious health problems. For instance in the SERAC case applicants complained of illnesses associated with their polluted water and soil, including gastrointestinal problems, skin diseases, cancers and respiratory ailments. After detailing the initial steps to be taken by the government to remedy the situation complained of, the Commission stated that a government's obligation in relation to the right to health and healthy environment of its citizens consisted of the following minimum:

- to take reasonable precautions to avoid contaminating the environment in a manner that threatens the physical, mental and environmental health of its citizens;
- to ensure that private parties do not systematically threaten peoples' health and environment;
- to provide citizens with information regarding environmental health risks, and with meaningful opportunities to participate in development decisions.<sup>96</sup>

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<sup>95</sup> See also Langford and Kok above (fn.25) p.207.

<sup>96</sup> *SERAC* case above (fn.41), at pp.6-7.

## 6. Progress achieved in providing access to sufficient water to poor South Africans

Painting a picture of the progress made thus far by the government on poverty alleviation generally, the President, during his state of the nation address of 2009, said, regarding water and sanitation, that “access to potable water improved from 62% in 1996 to 88% in 2008 and that access to sanitary facilities improved from 52% in 1996 to 73% in 2007.”<sup>97</sup>

A practical and an effective way of targeting free basic services such as water to those who cannot afford to pay for them has been through the Indigent Register policy adopted by government at municipal level.<sup>98</sup> Municipalities identify households that are eligible to receive free basic services. Of the estimated 5,5 million indigent households in the country, over four million (73%) are registered on municipal databases and currently receive free basic water.<sup>99</sup>

The judiciary has recently played a role in ensuring access to sufficient water. In *Mazibuko & others v City of Johannesburg & others (Centre on Housing Rights & Evictions as amicus curiae)*,<sup>100</sup> the applicant brought a complaint against the City’s use of prepaid water metres in the township of Phiri in Soweto, Johannesburg. The use of the prepaid metres meant that when a free basic water of 25 litre per person per day or 6 kilolitres per household per month, allocated to these residents every month, was exhausted, they were left with no water until the next month’s allocation.

The High Court (Court) found that the use of prepaid water metres was unlawful as it was not authorised by City’s by-laws.<sup>101</sup> The Court also held that the use of prepaid

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<sup>97</sup> Motlanthe, K (2009). State of The Nation Address of The President of South Africa, Kgalema Motlanthe to The Joint Sitting of Parliament. 6 February. Available at <http://www.pmg.org.za/briefing/20090206-state-nation-address>. [Accessed on 19 May 2009]

<sup>98</sup> See *City of Johannesburg and Others v Lindiwe Mazibuko and Others* (Case No. 489/08) 2009 (SCA), paras 42&46.

<sup>99</sup> The Presidency. 2008. Towards Anti-Poverty Strategy For South Africa, A Discussion Document. Available at [http://www.thepresidency.gov.za/docs/pcsa/economic/draft\\_antipoverty1008.pdf](http://www.thepresidency.gov.za/docs/pcsa/economic/draft_antipoverty1008.pdf). [Accessed on 19 May 2009](Anti-Poverty Strategy).

<sup>100</sup> [2008] JOL 21829 (W).

<sup>101</sup> Para 105.

metres amounted to unfair discrimination as these were installed only in poor households while residents in upmarket areas received water on credit. There is further discrimination in that the use of prepaid metres does not allow opportunity to make representation on their inability to pay for water, while this opportunity was available to their affluent counterparts.<sup>102</sup> The court ordered the immediate removal of prepaid metres.<sup>103</sup> More, importantly, the court found the amount of 25 litres per person per day or 6 kilolitres per household as insufficient for the residents' daily needs, such as drinking, cooking, bathing and personal hygiene. The court ordered the City to provide a minimum of 50 litres per person per day.<sup>104</sup>

The City of Johannesburg appealed against this decision to the Supreme Court of Appeal (SCA). The SCA upheld the High Court's decision in as far as it related to the lawfulness of the use of prepaid water metres. It also agreed that 25 litres per person per day or 6 kilolitres per household per month was insufficient to meet drinking, cooking, bathing and personal hygiene. With regard to what amount is sufficient to meet the above daily needs, the SCA was caught between two expert evidence. The respondent's evidence showed that a total of 50 litres per person per day was the minimum required to drink, cook, bath, flush toilet and personal hygiene.<sup>105</sup> However, the appellant's evidence showed that the same needs could be met with approximately 41.2 litres per person per day.<sup>106</sup> By way of remedy, and apparently relying on a "Plascon Evans" rule, the SCA preferred the appellant's evidence and ordered the City to immediately provide those on its indigent register with 42 litres per person per day.<sup>107</sup> Importantly, the SCA did not order immediate removal of prepaid water metres, instead it gave the City 2 years to revise its water policy in relation to the respondent.<sup>108</sup>

The decision is generating increased scholarly interest. For instance, Dugard and Liebenberg, while embracing certain aspects of the judgment, are critical of the

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<sup>102</sup> Paras 91, 92.

<sup>103</sup> Para 183.

<sup>104</sup> Para 183.

<sup>105</sup> Para 21.

<sup>106</sup> Para 22.

<sup>107</sup> Para 61.

<sup>108</sup> Para 62. This decision is being appealed to the Constitutional Court.

SCA's overall decision.<sup>109</sup> They point to the decision as representing a missed opportunity to "provide normative clarity in interpreting the right of access to sufficient water and the nature of the obligations it imposes on water services providers."<sup>110</sup> At remedial level they also argue that the court's order is weak for its failure, inter alia, to direct an immediate ban prepaid water meters.<sup>111</sup> The court's reduction of the 50 litre per person day ordered by the High Court to 42 litre per person per day also came under attack.

The merits and demerits of the arguments by Dugard and Liebenberg set aside, for me the varying orders given by the two courts in relation to the minimum amount they deemed adequate to meet the basic needs of the applicants, show the inherent difficulty (even danger) for courts in setting minimum obligations for governments. On appeal the Constitutional might very well find that the 42 litre per person per day is inadequate but that 50 litres per person per day will be unjustifiably burdensome on the public purse. Still, it might, as Dugard and Liebenberg call for, adopt a generous interpretation of the evidence presented of the needs of the applicants and direct a quantity of water even higher than ordered by the High Court (50 litres per person per day).<sup>112</sup>

I submit that in a properly functioning democracy with a relatively competent executive that both the above courts should have declared the current 25 litres per person per day in the enabling legislation inadequate and therefore incompatible with section 27(1) of the Constitution, but leave it up to Parliament to prescribe the minimum quantity it deems appropriate and affordable.<sup>113</sup> This would not only take care of the perception that courts are encroaching into the executive terrain but would also avoid the kind of hostility aroused in the executive by the order of the

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<sup>109</sup> Dugard, J and Liebenberg, S (2009). Muddying the waters: The Supreme Court of Appeal's Judgment in the *Mazibuko* case. *ESR Review* 10(3), p.11.

<sup>110</sup> Dugard and Liebenberg above (fn.109), at p.17.

<sup>111</sup> *Id.*

<sup>112</sup> For instance some commentators put the minimum quantity of water necessary to meet basic needs at around 94.5 litres person per day. See Rudi, J (2008). Extending the minimum essential amount of water: Going beyond the High Court's standard. *ESR Review* 9(4), p.8.

<sup>113</sup> Indian Courts for instance have deemed necessary to usurp the function of the executive as they see the executive as incompetent. See Gonsalves, C (2005). 'Reflections on the Indian Experience', in Squires, J, Langford, M and Thiele, B. *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*. UNSW, p.177 at p.182.

High Court.<sup>114</sup> We should bear in mind that in strategizing for successful socio-economic rights litigation one is advised to “choos[e] cases in which the State is not required to allocate more than minimal resources, or additional resources,…”<sup>115</sup> Allowing Parliament to set its own minimum obligations is also important as South Africa is experiencing increasing disobedience of court orders by the executive. Otherwise it is difficult to see how the poor and the marginalized come out winners in such an environment.

## **7. Challenges in accessing water by poor South Africans**

Despite improvements in government services to the poor, there are concerns. Data released by Statistics South Africa in 2007 indicated that it has proven difficult to reach many of the poorest municipal districts as well as informal settlements and farm workers. As a result, poor households continue to lag in access to government services. For instance, in 2005, half of poor households still had no piped water on site and a third had no electricity. According to the state, these shortfalls place a burden on women and girls, who continue to undertake most household labour.<sup>116</sup>

The data shows that poor households also find it difficult to pay for services. In September 2005, 3,3% of households spending under R800 a month who had access to water said they had been cut off in the last month for failure to pay. In contrast, among better-off households cut-offs totalled 2,1% for water.

The government concedes that households often do not know what programmes are available, and government does not always correctly identify the needs of households and communities. Furthermore, the working poor may find it hard to prove they are indigent and so end up paying for education, health, water and electricity.<sup>117</sup>

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<sup>114</sup> For instance the City of Johannesburg mayor, Amos Masondo, was reported to have said in reaction to the High Court order: “Judges are not above the law. We don’t want judges to take the role of Parliament, the role of the National Council of Provinces, the role of the legislature and the role of this council. Judges must limit their role.” See “Masondo takes on ‘water judge’” *BusinessDay*. 15 May. 2008.

<sup>115</sup> Chenwi, L. (2008). ‘Litigating socio-economic rights through amicus briefs: Challenges and strategies’, *ESR Review* 10(1), p.7, at p.10.

<sup>116</sup> Anti-Poverty Strategy above (fn.99) p.36.

<sup>117</sup> Anti-Poverty Strategy above (fn.99) p.46.

Moreover, the extension of government services has not always been co-ordinated to ensure they support each other. For instance, plans for new housing settlements do not always include clinics, schools, retail and industrial sites or public transport. Sometimes people who are eligible for social grants cannot get the necessary identification documents.<sup>118</sup>

According to the government, this picture “points to some gaps in the existing government services. These include lack of services for unemployed able-bodied people, deficiencies with regard to reach and coverage of some of the services currently provided [as well as] inefficiencies in the provided services.”<sup>119</sup>

## **8. Some recommendations**

In view of what the state obligations entail both in terms of the South African Constitution and international norms, Langford and Kok suggest that the state would be fulfilling its obligation if its actions accorded with the following guidelines:

- Every South African inhabitant should have access to water. The state should prioritise improvement of access to water in those areas where the greatest need exists.
- Every inhabitant should have access to enough water to meet basic needs. Such water should be of adequate quality.
- Water sources should be as close as possible to households.
- Water should be available on a daily basis.
- Water provision services must be easily maintainable, effective, reliable and must be flexible enough to upgrade easily.
- Water should be as affordable as possible, especially to the disadvantaged and vulnerable members of the South African society.

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<sup>118</sup> Id.

<sup>119</sup> Anti-Poverty Strategy above (fn.99) p.46.

- Adequate policy must be developed and monitored to prevent pollution of water resources and to encourage water conservation.<sup>120</sup>
- Water use must be managed and controlled adequately.
- The state must monitor the right to water and provide, as far as possible, effective remedies for violations.

It is submitted that these recommendations are as pertinent in 2009 as they were in 2005.

## 9. Conclusion

We have a long way since many doubted whether the right of access to adequate was justiciable pointing to its glaring exclusion from the international bill of rights. Today, from the general comments of UN human rights treaty bodies and regional decisions, to a number of international conferences and declarations, as well as a growing body of academic literature on the subject, it is clear that the right of access to sufficient water is as legally enforceable as any other right listed in the international bill of rights.

As discussed above, the right of access to sufficient water is essential for dignified existence, let alone the fact it is a source of life, so to speak. In South Africa, from Statistics and Surveys released at regular intervals, it clear that great strides have been made since 1994 in bringing basic services such as water to many poor households. However Statistics also reveal that a great many are still either denied or have access to insufficient water. This is a cause for concern. By government's own admission, "...clean water [and] adequate sanitation... [is] critical in overcoming poverty. On the other hand, in the context of persistent inequalities and social divisions, delays in obtaining services, lower levels of service and relatively high levels of disconnection in poor communities generate considerable anger".<sup>121</sup>

The contribution of the judiciary in the litigation of the right of access to water in recent decisions is also notable. Declaring that the current 25 litre per person per

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<sup>120</sup> Langford and Kok above (fn.25) pp.207-208.

<sup>121</sup> Anti-Poverty Strategy above (fn.99) p.35.

day is inadequate and therefore incompatible with section 27(1) of the Constitution is commendable. So is the courts' declaration that prepaid water meters are unlawful for a number of reasons. However to preserve to foster a cordial and co-operative relation between the judiciary and other arms of the State, must set what the minimum obligations of governments are, and not courts. It is only in such an environment will the poor be winners as government is likely to obey instructions from a democratically elected parliament.

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