

# Chapter 56B

## Water

**Malcolm Langford, Richard Stacey & Danwood Chirwa**

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Section 27 of the Final Constitution reads, in relevant part, as follows:

(1) [E]veryone has the right to have access to . . . sufficient . . . water.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right.

### 56B.1 Introduction

Many commentators describe the South African Constitution<sup>1</sup> as the gold standard for all contemporary attempts to arrive at a legitimate basic law. Much, but not all, of this praise flows from the Final Constitution's inclusion of justiciable socio-economic rights.

Such tributes tend to gild the lily. The inclusion of justiciable socio-economic rights is, in reality, part of a broader trend in constitution-making from the mid-1980s onwards rather than a manifestation of any South African exceptionalism.<sup>2</sup> However, when it comes to the right to water and sanitation, the title of frontrunner

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

may be justified. The recognition of the right in FC s 27, together with the right to sanitation in the Water Services Act,<sup>3</sup> has played an important role in shaping international law and policy developments. In 2006, the United Nations Development Programme ('UNDP') recommended that states recognise the right to water and pointed to South Africa as an example of the best model (if not practice).<sup>4</sup> The South African experience grounded two decisive United Nations resolutions in 2010 that removed any doubts over the legal status of water and sanitation rights.

The politics and practice surrounding the right to water (and sanitation) within South Africa presents a more complicated picture. Access to water in South Africa has historically been conditional upon land ownership, and wealth or residency rights in formal urban areas. Race was therefore the primary determining factor in whether one had access to water and sanitation. Since the end of apartheid, the South African government has made significant strides in reversing some of these patterns. According to its definition of access, the proportion of those without access to water fell from 40 to 7 per cent, while the equivalent figures for sanitation are 51 and 21 per cent.<sup>5</sup>

At this juncture, many academics, jurists and social movement leaders might be tempted to shout: 'Lies, damned lies and statistics.' The debate over the actual degree of 'progress' made with respect to water and sanitation rights is quite heated. Critics of the government's efforts will point to the high number of disconnections, the many urban inhabitants and rural communities that have been

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unable to move beyond the most basic level of access due to the tardy pace of slum upgrading, impediments that flow from extremely slow land reform and a range of other limitations on effective access.<sup>6</sup> More time or a growing financial base alone will not solve such problems. Quantitative research across all of South Africa's municipalities shows that the level of 'available resources' within municipalities cannot explain the slow progress in securing access to adequate water and sanitation for all. Politics and policy would appear to hinder progress as much as the purse.<sup>7</sup>

The law's responses to these contemporary dilemmas — on the statute books and in the courtroom — have been the subject of equally intense debate.

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2 Of particular note are the post-authoritarian constitutions in Latin America, Eastern Europe, sub-Saharan Africa and, increasingly, Asia. See M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); B Simmons 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR' 27(1) *Nordic Journal of Human Rights* 64.

3 Act 108 of 1997.

4 See, for example, UNDP *Beyond Scarcity: Power, Power and the Global Water Crisis* (2006).

5 Government of South Africa *Millenium Development Goals Report* (2005) and Department of Water Affairs and Sanitation *Dashboard* available at [http://www.dwaf.gov.za/dir\\_ws/wsnis/default.asp?nStn=wsnisindex](http://www.dwaf.gov.za/dir_ws/wsnis/default.asp?nStn=wsnisindex) (accessed on 12 May 2011).

6 K Tissington, M Dettmann, M Langford, J Dugard & S Conteh *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (2008) available at [http://www.cohre.org/sites/default/files/water\\_services\\_fault\\_lines\\_sa\\_nov08.pdf](http://www.cohre.org/sites/default/files/water_services_fault_lines_sa_nov08.pdf) (accessed on 13 May 2011).

The Water Services Act sets out a range of obligations and measures for implementing the right of access to water. It guarantees the right to a basic water supply, incorporates protective procedures against deprivations of water and provides for the setting of national standards and norms for tariffs. This Act and the Local Government: Municipal Systems Act<sup>8</sup> ('Municipal Systems Act') create an elaborate framework designed to use private service providers to overcome obstacles in the delivery of water services.<sup>9</sup> The National Water Act<sup>10</sup> was promulgated to ensure that the nation's water resources are *sustainably developed*, conserved, managed and controlled.<sup>11</sup> Sustainable development by its very definition takes the needs of the worst off members of our community and protection of the environment into account.<sup>12</sup>

The case law reflects a number of positive developments as well. *Grootboom* affirmed that access to water (and sanitation) were part of the right to housing and that the state had positive obligations to ensure its progressive realisation.<sup>13</sup> In *Joe Slovo*, the Constitutional Court found that water and sanitation were key elements of the basic standards for alternative accommodation in the case of eviction.<sup>14</sup> The High Courts and Land Claims Court have provided some guidance with respect to the protection from interference with access to water.<sup>15</sup> National (as opposed to

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local) officials in the water sector show a high degree of cognisance of the policy implications of *Grootboom*.<sup>16</sup>

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7 M Langford, E Anderson & J Dugard 'Law, Economics and Politics: The South African Experience' in M Langford & A Russell (eds) *The Right to Water: Theory, Practice and Prospects* (forthcoming 2012).

8 Act 32 of 2000.

9 Municipal Systems Act s 10 and ss 76-78 respectively.

10 Act 36 of 1998.

11 National Water Act s 2.

12 See M Van der Linde & E Basson 'Environment' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 2, October 2010) Chapter 50.

13 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') para 35.

14 *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC), [2009] ZACC 16 ('*Joe Slovo*') at para 10.

15 See § 56B.3 and 56B.4 below.

16 See C Human 'The Human Right to Water in Africa: The South African Example' in E Riedel & P Rothen (eds) *The Human Rights to Water* (2006) 83-93.

However, recent judicial developments have tempered some of this early promise. The Constitutional Court's findings and its reasoning in *Mazibuko*,<sup>17</sup> and, to some degree, *Nokotyana*,<sup>18</sup> complicate a number of the basic legal assumptions about the right to water that had emerged in the early 2000s. In coming to a conclusion that prepaid water meters did not constitute a form of 'disconnection or limitation' or indirect discrimination, and that a policy to provide an average 25 litres per person per day in Johannesburg was reasonable, the Constitutional Court in *Mazibuko* appears to narrow the promise of its earlier socio-economic rights jurisprudence. Similarly, *Nokotyana* raises, rather than lowers, the threshold for success in challenges to the adequacy of government policy in sanitation cases. Of course, both decisions could be explained away (or have their potentially deleterious effects limited) by reference to their facts or the litigation strategy of the applicants. Nonetheless, as matters currently stand, the two judgments represent a particular challenge to advocates who seek to expand the horizons of the constitutional right to water.

This chapter will begin by adumbrating the available international and comparative law on the right to water. These bodies of law have developed rapidly in the last few years and their increasing divergence from the South African jurisprudence on the right to water provides a useful external perspective. §52B.3 offers an analysis of the different elements of the right to water as manifestly expressed in the Constitution. §52B.4 discusses the respective constitutional duties of different levels of Government. §52B.5 explores the emergence of the right to sanitation (internationally and in South Africa).

## 56B.2 International and comparative law

### (a) International recognition

The Universal Declaration on Human Rights does not, interestingly enough, contain a right to water: the most elemental ingredient for life at all. The right to water did not appear in international law until 1977. The Mar del Plata Declaration at the 1977 UN Water Conference announced that '[A]ll 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.' The right to water was recognized in the 1992 Dublin Principles<sup>19</sup> action plans emanating from the inter-governmental summits held in 1992 in Rio<sup>20</sup> and 1994 in

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17 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*').

18 *Nokotyana & Others v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC), [2009] ZACC 33.

19 *Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century* UN Doc. A/CONF.151/PC/112 (1992) available at <http://www1.umn.edu/humanrts/instreet/dublinwater1992.html> (accessed on 13 May 2011).

20 *Agenda 21: The United Nations Programme of Action from Rio* (1992) available at <http://www.un.org/esa/dsd/agenda21/> (accessed on 13 May 2011).

Cairo<sup>21</sup> and such regional political bodies such as the Committee of Ministers to Member States on the European Charter on Water Resources.<sup>22</sup> Despite this growing appreciation, the right was not expressly acknowledged in the final statements of a significant number of international meetings on water.<sup>23</sup>

The catalyst for the international recognition of the right to water has been the authoritative but non-binding General Comment 15 on the Right to Water.<sup>24</sup> The UN Committee on Economic, Social and Cultural Rights ('CESCR') had earlier made passing references to a right to water.<sup>25</sup> In 2002, it devoted an entire recommendation to the topic. Article 11 of the International Covenant on Economic Social and Cultural Rights ('ICESCR') states that everyone has the 'right to an adequate standard of living, including food, clothing and housing' and the Committee reasoned that the 'use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive'.<sup>26</sup> According to the Committee, the right to water 'clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival'.<sup>27</sup>

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- 21 UNDP *Programme of Action of the United Nations International Conference on Population & Development* (1994) available at <http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm> (accessed on 13 May 2011) principle 2.
- 22 *Recommendation 14* (2001) available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=231615&Site=COE> (accessed on 13 May 2011) at para 5 ('Everyone has the right to a sufficient quantity of water for his or her basic ... '[i]nternational human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.') The Ministers went on to provide specific recommendations on affordability and prevention of arbitrary disconnections. First. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.' Ibid. Second. It sets out a user pays system subject to the right to water: 'Without prejudice to the right to water to meet basic needs, the supply of water shall be subject to payment in order to cover financial costs associated with the production and utilisation of water resources.') Ibid at para 19.
- 23 See, for example, *Ministerial Declaration of the Third World Water Forum* (Kyoto, 23 March 2003) available at <http://www.mofa.go.jp/policy/environment/wwf/declaration.html> (accessed on 13 May 2011); *Ministerial Declaration of The Hague on Water Security in the 21st Century* (The Hague, 22 March, 2000) available at <http://www.cmaq.net/en/node/5025> (accessed on 13 May 2011); *Final Declaration, International Conference on Water and Sustainable Development* (Paris, 21 March 1998) available at <http://www.waternunc.com/gb/decfingb.htm> (accessed on 13 May 2011).
- 24 CESCR General Comment 15: The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003) ('General Comment 15').
- 25 See CESCR General Comment 6: The Economic, Social and Cultural Rights of Older Persons (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996) at para 5 (Water is referred to as a 'basic right'); CESCR *Concluding Observations of CESCR: Israel* UN Doc. E/C.12/1/Add.27 (12 April 1998) at para 28 (it had called on Israel to 'recognize the existing Arab Bedouin villages, the land rights of the inhabitants and their right to basic services, including water').
- 26 General Comment 15 (supra) at para 2.
- 27 Ibid. The Committee also stated that the right can be derived from the right to health in Article 12 though it devotes less attention to this argument.

The creation of the right to water attracted some controversy. For example, Tully levelled a number of arguments against the General Comment: (1) Article 11 offers no interpretive space for 'new' rights; (2) an amendment to the Covenant was necessary for incorporation of the right to water in the treaty; and (3) deference must be given to the states' omission of water in the drafting of the

Covenant.<sup>28</sup> He alleged that the General Comment has received only a lukewarm or negative reaction from states and contended that the topic of access to water would be better placed within other social rights, such as food, housing and health.

Nonetheless, most scholars recommended or applauded the Committee's stance.<sup>29</sup> The Committee offers a coherent legal argument.<sup>30</sup> The Committee draws on earlier state practice in reaching its conclusions,<sup>31</sup> and limits the undue expansion of the number of rights by requiring that new rights are comparable to the rights to food, clothing and housing and are of a serious and fundamental nature.<sup>32</sup>

In any case, in the wake of General Comment 15, states formally recognised (or re-recognised) the right to water and sanitation.<sup>33</sup> In July 2010, the UN General Assembly declared that 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'<sup>34</sup> Two months later, the UN Human Rights Council 'affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard

28 See S Tully 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23 *Netherlands Quarterly of Human Rights* 35-63. (He makes a number of other arguments such as the absence of a UN agency for water which is somewhat absurd given the late creation of an agency for housing and the absence of one for clothing. In any case, UN Water was recently established as an initiative of 23 UN agencies.) See also M Dennis & D Stewart 'Justiciability of Economic, Social, and Cultural Rights' (2004) 98 *American J of Internatioanl L* 462.

29 See S McCaffrey 'A Human Right to Water: Domestic and International Implications' (1992) 5 *Georgetown International Environmental Law Review* 1; P Gleick 'The Human Right to Water' (1999) 1 *Water Policy* 487, 478-503; H Smets 'Le Droit de Chacun a L'Eau' (2002) 2 *Revue Europeene de Droit de L'environnement* 123; M Vidar & M Mekouar *Water, Health and Human Rights* (2001); S Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004); S McCaffrey 'The Human Right to Water' in E Brown Weiss, L Boisson-De Chazournes & N Bernasconi-Osterwalder (eds) *Fresh Water and International Economic Law* (2005); T Kiefer & C Brolmann 'Beyond State Sovereignty: The Human Right to Water' (2005) 5 *Non-State Actors and International Law* 183, 183-208; A Cahill 'The Human Right to Water — A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *International Journal of Human Rights* 389, 389-410; A Cahill 'The UN Concept of the Right to Water: New Paradigm for Old Problems?' (2005) 21 *International Journal of Water Resources Development* 273, 273-282; Riedel & Rothen (supra).

30 The arguments are fully set out in M Langford 'Ambition that Overleaps Itself? A Response to Stephen Tully's "Critique" of the General Comment on the Right to Water' (2006) 26 *Netherlands Quarterly of Human Rights* 433, 433-459. See also S Tully 'Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford' (2006) 26 *Netherlands Quarterly of Human Rights* 461, 461-472; M Langford 'Expectation of Plenty: Response to Stephen Tully' (2006) 26 *Netherlands Quarterly of Human Rights* 473, 473-479.

31 See generally M Langford, A Khalfan, C Fairstein & H Jones *The Right to Water: National and International Standards* (2003) 120.

32 General Comment 15 (supra) at para. 3.

of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.<sup>135</sup>

Water and sanitation have long been accepted as elements of other human rights. The 1972 Stockholm Declaration mentions the need to protect natural resources, including water resources, for future generations<sup>36</sup> in the context of what became the right to environmental health.<sup>37</sup> The social dimensions of the emerging global water crisis have also been acknowledged internationally. The Convention on the Elimination of Discrimination Against Women ('CEDAW') explicitly mentions water and sanitation in the context of ensuring that rural women have access to adequate health care facilities.<sup>38</sup> In General Recommendation 24, the CEDAW Committee commented that water and sanitation were critical for the prevention of disease and the promotion of good health care.<sup>39</sup> Article 24 of Convention on the Rights of the Child ('CRC') maintains that access to clean drinking water is a part of a child's right to health. The CRC explicitly draws a strong link between the social and environmental dimensions of water:<sup>40</sup>

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33 Between 2002 and 2010 there was a growing acknowledgment of the status of the right to water at various levels. See, for example, European Parliament *Resolution on Water Management in Developing Countries and Priorities for EU Development Cooperation* (4 September 2003); Commission on Human Rights *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights* resolution 2004/17, E/CN.4/RES/2004/17 (2004).

34 *The Human Right to Water and Sanitation* U.N. Doc A/64/L.63/Rev.1 (2010) at para 1.

35 *Human Rights and Access to Safe Drinking Water and Sanitation* U.N. Doc. A/HRC/15/L.14 (2010).

36 See E Riedel 'International Environmental Law — A Law to Serve the Public Interest?' in J Delbrück (ed) *New Trends in International Lawmaking — International 'Legislation' in the Public Interest* (1997) 61 and E Riedel 'Change of Paradigm in International Environmental Law' (1998) 57 *Law and State* 22.

37 *Declaration of the United Nations Conference on the Human Environment* (1972) available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed on 13 May 2011)(Principle 1 reads: 'Man [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment'). In Resolution 45/94, the UN General Assembly recognised 'that all individuals are entitled to live in an environment adequate for their health and well-being.' This position was reaffirmed by Judge Weeramentary in the *Gabcikovo-Nagymaros* case who declared that protection of the environment is a 'sine qua non for numerous human rights'. *Case Concerning the Gabcikovo-Nagymaros Project (Slovakia-Hungary)* 37 ILM 162, available at <http://www.icj-cij.org/docket/files/92/7383.pdf> (accessed on 13 May 2011). It is also arguable that the earlier International Covenant on Economic, Social and Cultural Rights recognises a right to environmental health in article 12(2)(b).

38 Convention on the Elimination of All Forms of Discrimination against Women , G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

39 General Recommendation 24 (20th session, 1999) at para 28.

40 Article 24(2) reads:



States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: ... (c) 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.

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The CESCR too acknowledged the role of access to water and sanitation as essential components of other rights in the ICESCR. The right to housing is said to include 'safe drinking water', 'sanitation and washing facilities' and 'site drainage'<sup>41</sup> and the right to education demands an adequate school with safe drinking water and sanitation facilities for both sexes.<sup>42</sup> In terms of the right to health, the CESCR identifies access to safe and potable water and adequate sanitation as key components of the availability, accessibility and quality of health care services, an underlying determinant of the right, a minimum core obligation and a means to realise the additional obligation in the ICESCR to improve all aspects of environmental and industrial hygiene.<sup>43</sup> Regional human rights instruments pay limited attention to the right to water. The situation may be changing — particularly in Africa. The European Social Charter does not explicitly refer to a right to nutrition or water, although article 11 requires contracting parties to act to combat the causes of ill-health and prevent epidemic, endemic and other diseases. This obligation naturally rests on the provision of proper sanitation and a clean water supply.<sup>44</sup> Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights merely provides a right 'to live in a healthy

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States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To diminish infant and child mortality;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) 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;
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop preventive health care, guidance for parents and family planning education and services.

41 General Comment 4: *The Right to Adequate Housing*, (Sixth session, 1991) U.N. Doc. E/1992/23, annex III at 114 (1991).

42 General Comment 13: *The Right to Education* (Twenty-first session, 1999) U.N. Doc. E/C.12/1999/10 (1999), para. 6a.

43 General Comment 14: *The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 (2000).

environment and to have access to basic public services'.<sup>45</sup> The African Charter on Human and Peoples' Rights ('ACHPR') proclaims that state parties 'must take the necessary measures to protect the health of their people'.<sup>46</sup> The provision of water and sanitation clearly qualifies as 'necessary measures' to protect health. The African Commission on Human and Peoples' Rights, in *Free Legal Assistance v Zaire*,<sup>47</sup> held that '[t]he failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of Article 16'.<sup>48</sup> This relationship is made explicit in the later Protocol to the ACHPR on the Rights of Women in Africa. The first element of the right to nutrition and food in Article 15 is a requirement for states to take appropriate measures to provide women with access to clean drinking water. Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child also links safe drinking water to the right to health.<sup>49</sup> Without safe drinking water, neither good health nor adequate nutrition is possible.

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Turning to international humanitarian law, the 1949 Geneva Conventions provide that occupying powers must provide access to minimum water supplies for prisoners and other interned persons.<sup>50</sup> In addition, prisoners are to be provided with shower and bath facilities as well as water, soap and other facilities for their daily personal toilet and washing requirements.<sup>51</sup> The Additional Protocols of 1977 prohibit the destruction of '[o]bjects indispensable to the survival of the civilian population, such as . . . drinking water installations and supplies and irrigation works'.<sup>52</sup>

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44 A similar logic applies to the right to housing contained in article 31 of the Revised European Charter.

45 Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

46 Article 16(2).

47 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehova v Zaïre* Communications 25/89, 47/90, 56/91, 100/ ('*Free Legal Assistance v Zaire*').

48 *Ibid* at para 47.

49 Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child: 'State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: . . .(c) to ensure the provision of adequate nutrition and safe drinking water.'

50 See Geneva Convention (III) relative to the Treatment of Prisoners of War (1949) arts 20, 26 and 46; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) arts 89 and 127.

51 See Geneva Convention III arts 29 and 85.

52 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) art 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977) art 14.

International criminal law has transformed a number of these provisions into prosecutable war crimes<sup>53</sup> and crimes against humanity.<sup>54</sup> South Africa has largely incorporated the International Criminal Court Statute ('ICC Statute') into domestic law.<sup>55</sup> Under the ICC Statute, it is a war crime to intentionally use starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival.<sup>56</sup> This phrase obviously resonates with the terminology in the Additional Protocols and would by implication embrace water as necessary for basic needs and livelihoods. The crime has not yet been prosecuted before international tribunals. However, the UN Security Council has often condemned the denial of food.<sup>57</sup> Collective punishments, including specifically collective disciplinary measures that affect food, have also been identified as a crime in the Statute of the International Criminal Tribunal for Rwanda ('ICTR').<sup>58</sup> The denial of food and water are potential war crimes under customary international law in other tribunals.<sup>59</sup>

Acts or omissions that intentionally or recklessly deprive protected persons of food, leading to death, may amount to the war crimes of 'wilful killing' or 'murder'. The International Committee of the Red Cross has commented that 'it

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seems, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees' would be responsible for wilful killing.<sup>60</sup> Rottensteiner notes, however, that in three cases before the International Criminal Tribunal for the former Yugoslavia ('ICTY') involving deprivation of food to inmates, prosecutors have not

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53 A war crime is a serious and criminally punishable violation of international humanitarian law committed by any person with sufficient connection to armed conflict, international or internal, against a protected person. See generally *Prosecutor v Dusko Tadic a.k.a. 'Dule': Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* Case No. IT-94-1-AR72 (2 October 1995) available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (accessed on 22 May 2011) '*Tadic-Interlocutory*' and *Prosecutor v Dusko Tadic a.k.a. 'Dule': Opinion and Judgment* Case No. IT-94-1-AR72 [1997] ICTY 1.

54 Crimes against humanity involve acts or omissions committed against any civilian population, in a widespread and systematic manner based upon State, organisation or group policy.

55 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

56 Statute of ICC art 8(2)(b)(xxv). The almost identical prohibitions appear in art 54 Additional Protocol I and art 14 Additional Protocol II, and could also constitute international crimes given the decision in *Tadic Interlocutory* (supra) at para 134 ('Customary international law imposes criminal liability for serious violations of Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict.')

57 UN Security Council 'Statement by the President' UN Doc S/25334 (25 February 1993).

58 Article 4(b).

59 It is prohibited under Geneva Convention IV art 33 and Protocol II art 4 at para 2(b).

60 J Pictet (ed) *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 597.

utilised this category of war crime.<sup>61</sup> Denial of water may, in some circumstances, amount to the war crime of torture, inhumane treatment, cruel treatment, or wilfully causing great suffering or serious injury to body or health.<sup>62</sup> For example, the Trial Chamber of the ICTY found in *Delijac* that the 'creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care' constituted both cruel treatment and wilfully causing great suffering or serious injury to body or health.<sup>63</sup>

In relation to crimes against humanity, a number of such crimes have an explicit water dimension. Extermination is defined in the Statute of the ICC to include the 'intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.'<sup>64</sup> Torture and other inhumane acts also constitute a crime against humanity.<sup>65</sup> *Delijac* indicates that a crime against humanity might encompass the deprivation of water. The Prosecutor of the ICTY, in the *Nikolic* indictment, contended that the accused committed such a crime by:

Participating in inhumane acts against more than 500 civilians ... endangering the health and welfare of detainees by providing inadequate food, endangering the health and welfare of detainees by providing living conditions failing to meet minimal basic standards.<sup>66</sup>

## **(b) Content of the right**

Beyond the mere recognition of the right, the CESCR has determined its content in significant detail. The most difficult issue was the scope of the right. As water is ubiquitous in human life, identifying a universal and inalienable entitlement was a challenge. It is particularly necessary for realising a range of rights in the ICESCR:

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water is necessary for food production and environmental health as well as various livelihoods and cultural practices. The Committee eventually hived off household water uses (consumption, cooking, hygiene and, where necessary, sanitation) from

61 She suggests that this may relate to the time and resource burdens in establishing the necessary causality. C Rottensteiner 'The Denial of Humanitarian Assistance as a Crime under International Law' (1999) 835 *International Review of the Red Cross* 555.

62 These are grave breaches under common art 3 of the Geneva Conventions and art 4(2)(a) of Additional Protocol II. Rottensteiner suggests that denial of humanitarian assistance in some circumstances may amount to an 'outrage upon personal dignity, in particular humiliating and degrading treatment' which is prohibited under the Geneva Conventions and their Protocols and constitutes an international crime under art 4(e) ICTR Statute, and arts 8(2)(b)(xxi) and (c)(ii) ICC Statute. Rottensteiner (supra).

63 *The Prosecutor v Zejnil Djalil et al* (16 November 1998) Case No IT-96-21-T at para 422.

64 Arts 7(1)(b) and 7(2)(b). Extermination involves murder on a large scale but allows for sparing of some member of a group unlike genocide.

65 Arts 7(f) and (k) Statute of ICC.

66 *The Prosecutor v Dragon Nikolic, a.k.a. 'Jenki'*, Indictment (4 November 1994) Case No IT-94-2, ICTY at para 24.1.

other uses on the basis that they were universal and constant. Everyone requires a basic amount of water every day.

To the extent that greater amounts of water are needed for realising other rights in the ICESCR, such as food, work or environmental health, the right to water becomes conditional. That is, the CESCR states that in realising the right to food, sufficient priority should be 'given to the water resources required to prevent starvation and disease' and efforts should be directed towards 'ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems'.<sup>67</sup> Some have argued that the Committee erred in not explicitly considering such household uses as kitchen gardening or livestock herding.<sup>68</sup> It may be culturally and contextually appropriate to consider such uses in some countries as 'household uses'. Van Koppen, Smits and Mikhail have demonstrated that in rural areas such uses of water are sometimes prioritised before some of the household uses identified by the CESCR.<sup>69</sup>

In setting out the key elements of the right, the CESCR closely hews to its approach of disaggregating according to the supply dimensions of availability and quality and the demand-side factors like accessibility and affordability. These elements should, however, be understood in a broader context: the content of the right should be framed by the principles of human dignity, life and health and must be understood as a social and cultural good and not primarily as an economic good. The CESCR argued that the right must be realized in a sustainable manner.<sup>70</sup>

As regards availability, the Committee chose not to specify a precise minimum amount. Instead, it stipulated that the amount must be sufficient and regular for personal and household uses. However, the amount must correspond to World Health Organisation ('WHO') guidelines. The Committee quotes two studies<sup>71</sup> that argue that approximately 50 litres of water is needed per day, with 20 litres as a minimum, although one of the studies places greater emphasis on minimising the distance to a water point as it is the greatest determinant of how water can be practically accessed. Other scholars argue for a higher amount and the policy in a number of developing countries is to aim higher than 50 litres.<sup>72</sup> In

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67 General Comment 15 (supra) at paras 6-7.

68 M Langford 'Crossfire: There is no Human Right to Water for Livelihoods: A Debate with Melvin Woodhouse' (2009) 28(1) *Waterlines* 5.

69 B Van Koppen, S Smits & M Mikhail 'Homestead- and Community-scale Multiple-use Water Services: Unlocking New Investment Opportunities to Achieve the Millennium Development Goals' (2009) 58 *Irrigation and Drainage* 73.

70 General Comment 15 (supra) at para 11.

71 See J Bartram & G Howard 'Domestic Water Quantity, Service Level and Health: What Should be the Goal for Water and Health Sectors' (2002). See also PH Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83.

72 M Falkenmark 'Meeting Water Requirements of an Expanding World Population' (1997) 352 *Philosophical Transactions of the Royal Society London* 929.

any case, General Comment 15 notes that some 'may also require additional water due to health, climate, and work conditions'.<sup>73</sup>

Water must be of sufficient quality. The CESCR refers to the WHO Guidelines on Drinking Water Quality<sup>74</sup> and indicates that water must be free from 'micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health'.<sup>75</sup> Quality is interpreted broadly to include acceptability. Acceptability, in turn, encompasses colour, odour and taste.

The key contributions of the CESCR are its accessibility elements: (1) physical accessibility; (2) affordability; (3) non-discrimination; and (4) access to information. 'Physically accessible' means that water must be within or in close proximity to people's homes, schools, health care facilities and workplaces. The facilities must be of sufficient quality and culturally appropriate. The Committee strongly emphasises the role of gender, noting that facilities must be designed with privacy and lifecycle concerns in mind and that physical security should not be threatened when women access water facilities.<sup>76</sup>

Water must also be *affordable* for all purposes. The Committee uses a formulation earlier deployed in defining the right to housing: 'The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.'<sup>77</sup> Thus, the Committee steers clear of demanding water be provided free, but, later in the General Comment, it lists a number of options to ensure that water is affordable. These options include provision of free or low-cost water. Other policies such as low-cost techniques and technologies and income supplements are intended to ensure affordability.<sup>78</sup>

The third aspect of accessibility is *non-discrimination*. States parties must guarantee that the right to water is enjoyed without discrimination,<sup>79</sup> and equally between men and women.<sup>80</sup> The CESCR has observed that states parties are obliged to take steps to remove 'de facto discrimination' which means that 'the allocation of water resources, and investments in water, facilitate access to water for all members of society'.<sup>81</sup> To make the point, the Committee comments on a familiar scenario in Africa:

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73 General Comment 15 (supra) at para 12(a).

74 World Health Organisation *Guidelines for Drinking-water Quality* (2nd Edition, vols. 1-3, 1993).

75 General Comment 15 (supra) at para 15. The Committee refers States parties to standards that are 'intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health.'

76 General Comment 15 (supra) at para 12(c)(i).

77 Ibid at para 12(c)(ii).

78 Ibid at para 27.

79 ICESCR art 2 para 2.

investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.<sup>82</sup>

The General Comment makes extensive reference to the duty of government to confront the obstacles faced by women, children, rural and deprived urban areas, indigenous peoples, nomadic communities, refugees, asylum seekers, people with disabilities, and prisoners and detainees. Importantly, the General Comment covers residents of informal settlements, and stresses their right to receive water irrespective of the legal status of their occupation of the land or housing. The CESCR has often addressed the situation of ethnic groups in its concluding observations. Libya, for example, was urged to 'implement the right of the Amazigh population to access safe water in the regions of Nefoussa and Zouara, and to report back to the Committee on this issue in its next report' given that other regions in the country had greatly improved access.<sup>83</sup> The Committee has also expressed concern about discrimination with respect to access to water in the following situations: Palestinians, Bedouins and Israeli Arabs in Israel;<sup>84</sup> prisoners in Yemen and Zambia;<sup>85</sup> Roma in various European countries;<sup>86</sup> Travellers in Ireland; indigenous peoples in Canada;<sup>87</sup> internally displaced people and a range of other marginalised groups in Georgia; and refugees and internally displaced people in Azerbaijan.<sup>88</sup>

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80 ICESCR art 3. The express and implied prohibited discrimination on the grounds according to the Committee are race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status.

81 General Comment 15 (supra) at para 14.

82 General Comment 15 (supra).

83 *Concluding Observations of CESCR: Libyan Arab Jamahiriya* UN Doc. E/C.12/LYB/CO/2 (25 January 2006) at paras 18 and 35. See also comments on Amazigh population and right to water in *Concluding Observations of CESCR: Morocco* UN Doc. E/C.12/MAR/CO/3 (2006); and access to water in Republika Srpska in *Concluding observations of CESCR: Bosnia and Herzegovina* E/C.12/BIH/CO/1 (2006) at paras 27 and 49.

84 *Concluding Observations of CESCR: Israel* UN Doc. E/C.12/1/Add.27 (1998) at paras 10, 24, 26 and 28.

85 *Concluding Observations of CESCR: Yemen* E/C.12/1/Add.92 (2003) at para 18; *Concluding Observations of CESCR: Zambia* UN Doc. E/C.12/1/Add.106 (2005).

86 See *Concluding Observations of CESCR: The former Yugoslav Republic of Macedonia* 24/11/2006. E/C.12/MKD/CO/1.

87 See *Concluding Observations of CESCR: Canada* UN Doc. E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (2006) at para 16.

88 *Concluding Observations of CESCR: Azerbaijan* E/C.12/1/Add.20 (1997) at para 52.

The final dimension is *information* accessibility. The right to water must embrace the ability to seek, to receive and to impart information that ensures the efficacy of its use.<sup>89</sup>

### (c) State obligations

The general duty of state parties to progressively realise the right to water and avoid deliberate retrogressive measures is articulated by the CESCR in General Comment 15. The Committee appears to be at pains to emphasise that the right to water can be realised quickly:

Realization of the right should be feasible and practicable, since all states parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.<sup>90</sup>

The General Comment then breaks down state parties' obligations into three simple duties: respect, protect and fulfil.

The *duty to respect* is understood as a state obligation not to interfere unjustly with a person's access to water. The following examples spring to mind: denial of equal access; interference with customary or traditional arrangements for water allocation; pollution; and extraction. The Committee clearly specifies that when a household cannot pay for water, disconnection should only proceed if there is sufficient justification, due process and an alternative, adequate and appropriate water source.<sup>91</sup> The Committee has taken up these issues in its concluding observations on Israel. It expressed concern about the impact of security fences on access to water resources for Palestinians and the 'inequitable management, extraction and distribution of shared water resources' by the Israeli government which limited 'access to, distribution and availability of water for Palestinians in the occupied territories.'<sup>92</sup>

General Comment 15 is more precise about the *duty to protect* than earlier general comments.<sup>93</sup> The Committee first provides examples of state duties to protect: legislate; ensure private actors do not deny equal access; and prevent pollution and inequitable extraction by third parties. However, the General Comment then addresses private actors who provide water services. It specifically requires the state to create a sufficient regulatory framework, including penalties for non-compliance, that ensures that the private sector will act consistently with *democratic principles* such as participation, and that pushes private actors to take the *necessary steps* to assist in the realisation of the right to water — or at least not frustrate the objective. An earlier draft used even stronger language. The deleted

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89 General Comment 15 (supra) at para 48.

90 General Comment 15 (supra) at para 18.

91 Ibid at para 56. It concludes its prescriptions on due process by noting that '[u]nder no circumstances shall an individual be deprived of the minimum essential level of water'.

92 *Concluding Observations of CESCR: Israel* (supra) at para 25.

93 Ibid at paras 23-24.



language called for the deferral of privatisation until a regulatory framework was in place. At the same time, the General Comment opens with the phrase that water is a 'public good'. A 'public good' suggests, at a minimum, that a state should ensure that its possession, use or development is a collective concern. By placing the gloss of a public good on the right to water, the Committee suggests the degree of its unease with private solutions. Some authors, such as Matthew Craven, have criticised the CESCR though for not going far enough on the question of privatisation: 'one may sense that the Committee may be legislating for its own

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absence — or excluding its own competence — in the very area in which the discussion of water rights is most acute and in which the Committee's voice is perhaps most needed'.<sup>94</sup> Nonetheless, the CESCR has perhaps been more stringent in its concluding observations than in the General Comment. In the case of Morocco, it expressed concern over 'privatization of public services such as water and electricity in urban centres in Morocco, the effect of which is to impose an additional economic burden on families living in shantytowns and thus aggravate their poverty'.<sup>95</sup> In 2001, it recommended that Nepal 'ensure that projects involving privatization of water supply provide for continued, assured and affordable access to water by local communities, indigenous people, and the most disadvantaged and marginalized'.<sup>96</sup>

The final domestically-oriented obligation is the *duty to fulfil*. As we noted earlier, the CESCR strives to emphasise that the realisation of the right was practical (despite the reality that water scarcity and resources constraints are growing problems in many states, and therefore a limiting factor with respect to the right's realisation.) Accordingly, the Committee writes that the Covenant requires that governments use all available resources to progressively implement the right to water. The right does not have to be realised overnight, the Committee maintained, but the government must immediately take steps in the direction of ensuring universal access. According to the General Comment, this includes developing a plan and strategy to expand affordable access while also protecting the quality of the water supply. States must also: actively search for the necessary resources, nationally and locally; implement the plan and monitor its implementation over time; and provide systems of accountability so that citizens, NGOs and others can provide information or complaints about failures in the system. For the first time in the CESCR's jurisprudence, reference is made to a duty of states to properly engage with provincial or regional governments and local authorities. The national government must ensure that these units have sufficient resources to fulfil the right to water and do not discriminate in its provision.<sup>97</sup>

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94 M Craven 'Some Thoughts on the Emergent Right to Water' in E Riedel & P Rothen (eds) *The Human Rights to Water* (2006) 35 at 45-46.

95 *Concluding Observations of CESCR: Morocco* (supra).

96 *Conclusions and recommendations of CESCR, Nepal* U.N. Doc. E/C.12/1/Add.66 (2001) at paras 41-42.

97 General Comment 15 (supra) at para 51.

In concluding observations, the Committee has been growing slightly more specific on the steps needed to improve access. In the case of Georgia, the Committee recommended that the state:

[T]ake effective measures, in consultation with relevant civil society organizations, to improve the situation of internally displaced persons, including the adoption of a comprehensive programme of action aiming at ensuring more effectively their rights to adequate housing, food and water, health services and sanitation, employment and education, and the regularization of their status in the State party ... [and] continue its efforts to improve the living conditions of its population, in particular by ensuring that the infrastructure for water, energy provision and heating is improved[.]<sup>98</sup>

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In the case of Yemen, a water-stressed state, the Committee addressed the human rights dimension of water allocations and the need to take preventive action to protect and improve water resources.<sup>99</sup>

The General Comment also sets out the 'international' obligations to respect, protect and fulfil under article 2(1). In the case of the right to water these obligations are quite specific. States are required to: respect the right in other countries; prevent their nationals and registered corporations from harming the water rights of others overseas; take steps to provide financial and in-kind support to poorer countries struggling to assist their residents; ensure that the international financial institutions of which they are members do not violate the right;<sup>100</sup> and impose sanctions regimes that provide for repairs to infrastructure essential to provide clean water and do not disrupt access to water.

#### **(d) Comparative Law**

While South Africa was one of the first countries to incorporate the right to water into its constitution, the right has increasingly become more common and detailed in constitutions across the globe.<sup>101</sup> Since 2000, the number of constitutions with the right to water has tripled.<sup>102</sup> For example, article 23(20) of the Constitution of Ecuador provides that the state shall 'recognise and guarantee to the people' the 'right to a quality of life that ensures ... potable water'. Article 249 goes on to clarify that:

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98 *Concluding Observations of the CESCR: Georgia* E/C.12/1/Add.83 (2002) at paras 31 and 40.

99 *Concluding Observations of the CESCR: Yemen* (supra) at paras 19, 37, 38 ('The Committee is concerned about the persisting water crisis which constitutes an alarming environmental emergency in the State party, and which prevents access to safe and affordable drinking water, particularly for the disadvantaged and marginalized groups of society, and for rural areas.... The Committee urges the State party to introduce strategies, plans of action, and legislative or other measures to address the scarcity of water problems, in particular the sustainable management of the available water resources. The Committee recommends that effective water management strategies and measures be undertaken in urban setting, exploring possibilities for alternative water treatment and developing ecological dry sanitation methods in rural settings.')

100 See, further, A Khalfan *Implementing General Comment No. 15 on the Right to Water in National and International Law and Policy* (2005).

101 See, generally, M Langford, A Khalfan, C Fairstein & H Jones *Legal Resources for the Right to Water: International and National Standards* (2004) ('Legal Resources').

102 See T Kiefer *Legal Recognition of the Right to Water* (2009).

The State shall be responsible for the provision of public utilities of potable water and irrigation ... The State may provide those services directly or by means of delegation to mixed public-private companies or private companies, through concession, association, capitalisation, or other contractual forms. The contractual conditions may not be unilaterally modified . . . The State shall guarantee that public utilities supplied under its control and regulation, respond to the principles of efficiency, responsibility, universality, accessibility, continuity and quality; and will ensure that their tariffs are equitable

The Ecuadorian state is also mandated by its constitution to promote local and communal solutions for the management and provision of water.<sup>103</sup> Article 14 of

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the Constitution of Uganda provides that 'all Ugandans enjoy rights and opportunities and access to . . . clean and safe water'. Another notable example is Uruguay. A successful constitutional referendum in 2004 recognised the right to water and was supplemented with a proviso that the water supply was to remain in public hands.<sup>104</sup> Other constitutions specifically impose duties upon the state to ensure adequate water for the population at large or contain directive principles for state policy in the area.<sup>105</sup> The environmental aspects of water supply are also protected in a significant number of constitutional documents. These constitutions empower, or command, the states to protect their natural water resources.<sup>106</sup>

Even when the right to water has not been explicitly included in the text of the constitution, foreign constitutional jurisprudence evinces a number of instances in which the right to water has been derived from other constitutional rights. In *Arrêt no 36/98*, the Belgian Court of Arbitration recognised the right of everyone to a minimum supply of drinking water by utilising article 23 of Belgium's Constitution — the right to the protection of a healthy environment.<sup>107</sup> In India, in *Hussain v Union of India*, the High Court of Kerala found that the 'right to sweet water, and the right to free air, are attributes of the [constitutional] right to life, for these are the basic elements which sustain life itself'.<sup>108</sup> This holding was later affirmed by the Indian

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103 Art 246 states: 'The State shall promote the development of communal or self-management companies, such as cooperatives ... potable water management councils and others of similar type, whose property and management belongs to the community or the people that work in them, use their services or consume their products.'

104 See 'Referendum Gives Resounding "No" to the Privatisation of Water' *Inter Press Service News Agency* (1 November 2005) available at <http://www.ipsnews.net/print.asp?idnews=26097> (accessed on 22 May 2011).

105 See, for example, the constitutions of Colombia, Zambia, Iran, Zambia, Gambia and Venezuela and commentary in M Langford 'The Right to Water in National Law: A Review' in Riedel & Rothen (supra) at 115-126; and M Langford, A Khalfan, C Fairstein and H Jones, *Legal Resources for the Right to Water: International and National Standards* (Geneva: COHRE, 2004), available at [www.cohre.org/water](http://www.cohre.org/water).

106 Examples include Uganda (preamble), Cambodia (art 59), Eritrea (art 10), Co-Operative Republic of Guyana (art 10), Iran (art 45), Laos (art 17), Mexico (art 27), Nigeria (art 20), Portugal (art 81), and Venezuela (art 127).

107 *Wemmel Community, Moniteur Belge*, 24/4/98 (1 April 1998).

108 *Hussain v Union of India* OP 2741/1988 (26 February 1990).

Supreme Court.<sup>109</sup> In *Ryan v AG*, the Irish Supreme Court similarly recognised the right to water as a natural consequence of the expressly articulated right to life.<sup>110</sup>

The following sections provide a brief overview of how national and regional adjudicators have addressed various dimensions of the right to water.

### (i) Availability

In *Delhi Water Supply & Sewage Disposal Undertaking & Another v State of Haryana & Others*, the Supreme Court of India found that there was insufficient water, even for drinking, available in Delhi in the summer months.<sup>111</sup> The State of Haryana, the upper riparian on the River Yamuna, did not release sufficient water from the Tejwala Head. The Court accorded priority to water use for drinking purposes and held that 'it would be mocking nature to force the people who live on the bank of a river to remain thirsty, whereas others incidentally placed in an advantageous

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position are allowed to use the water for non-drinking purposes'.<sup>112</sup> It found that the upper riparian may not deny the lower riparian 'the benefit of using the water . . . for quenching the thirst of its residents' and directed the State of Haryana to supply a sufficient quantity of water for domestic purposes to Delhi. In addition, the Court ordered that the two reservoirs in Delhi be kept full to capacity through the supply of water from the River Yamuna.

### (ii) Quality of water

Cases concerning the quality of water have addressed both discrete communities and all residents in a water catchment area. An excellent example of the former is *Valentina Norte Colony, Defensoría de Menores Nro 3V Poder Ejecutivo Municipal s/acción de amparo* in Argentina.<sup>113</sup> A provincial Children's Public Defender brought a case on behalf of the children of a rural community whose drinking water was contaminated by oil. The court of first instance ordered that the authorities immediately supply 100 litres per day of drinkable water to each child and to each member of their families until the contamination had been removed. The Court later slightly reduced the amount of water and limited it to those families that were legally settled. However this reversal in course was later overturned by the provincial Supreme Court. The provincial Supreme Court took its cue, in part, from provisions of the UN Convention on the Rights of the Child and the internationally recognised demands for higher daily allotments of water for children. In a similar case, the Public Defender filed an amparo action to protect indigenous Mapuche children from water contaminated with lead and mercury.<sup>114</sup> The provincial Civil Court of Appeals upheld the trial court order compelling the province to provide 250 litres of drinking water daily per inhabitant and to take measures to address any damage

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109 *Subhash Kumar v State of Bihar & Others* (1991) AIR 420.

110 [1965] IR 294, 315.

111 AIR 1996 SC 2992, (1996) 2 SCC 572, [1996] 3 SCR 13 ('*Delhi Water Supply*').

112 *Delhi Water Supply* (supra).

113 Expte. 46-99. Acuerdo 5 del Tribunal Superior de Justicia. Neuquen (2 March 1999).

to health caused by metal contamination. While water was brought in on a daily basis to the community, the state failed to comply with the more systemic orders in relation to water supply and health. A complaint was later filed with the Inter-American Commission on Human Rights.<sup>115</sup> The state then committed itself to provide affected children with treatment at Gutierrez Hospital, in Buenos Aires, to establish a water treatment plant, and to disclose information on the source of the contamination.

In various countries, public interest litigants have invoked a panoply of constitutional rights to protect water sources. In *Hussain v Union of India*, the High Court considered conflicting evidence regarding the impact on water quality of a government agency's plans to dig wells on a set of islands.<sup>116</sup> The court required that the agency's plans be referred for official review in order to protect the right

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to water. In Bangladesh, in *Dr. Mohiuddin Farooque & Others v Bangladesh & Others*, the Government authorities were directed to implement and to ensure compliance with water and air pollution control laws based upon a sweeping interpretation of the constitutional right to life.<sup>117</sup> The Minister of Industries was also directed to ensure that no new industrial units and factories were set up without first arranging adequate and sufficient measures to control pollution. In *Surendra Bhandari*, in Nepal, the Supreme Court found violations of an implied Constitutional right to environmental health and issued an interdict that forced the respondent industry to comply with its promise to remove pollution of water sources within three months. The relevant District Administration Office was required to monitor the implementation of the order.<sup>118</sup> In *Matanza-Riachuelo*, collective action was taken against the Argentinean government for failing to regulate more than 3,000 corporations whose industrial activities affected a large river basin, home to 7 million people and the largest proportion of Argentina's poorest communities.<sup>119</sup> After a process involving multiple parties, the Argentinean Supreme Court issued a series of interim structural orders for the development of detailed plans and monitoring procedures. By 2007, a plan had been adopted and the Court requested a federal court to monitor enforcement of the decision.

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114 *Menores Comunidad Paynemil s/acción de Amparo* Division II of Neuquen's Civil Court of Appeals (19 May 1997).

115 *Mapuche Paynemil and Kaxipayiñ Communities* Case No 12.010.

116 *Hussain v Union of India* (supra). For an overview of the extensive litigation on water pollution in India, see S Muralidhar 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102.

117 Supreme Court, High Court Division, Special Original Jurisdiction, Writ Petition No 891 of 1994 (15 July 2001).

118 *Surendra Bhandari & Others v Shree Distillery Private Ltd & Others* Writ No 3259 of the Nepali year 2053, reprinted in *Supreme Court Judgments on Constitutional Issues* (2001) 206. See also *Surya Shama Dhungel v Godavari Marbles Industries, N.K.P. Golden Jubilee* Special Issue 2052 at 169.

119 File M. 1569. XL, Supreme Court of Argentina (8 July 2008).

The quality of water in urban and peri-urban supply services has been challenged. In *Prakash Mani Sharma*,<sup>120</sup> the Nepal Supreme Court agreed that the state had a responsibility to respect the people's right to pure and clean drinking water as well as to implement legislation requiring it to oversee, to inspect and to monitor the activities of the Water Services Corporation. However, the Court found that it could not assess whether the level of parasites and pathogens in the water contravened WHO standards — as claimed by the applicants.<sup>121</sup> At the same time, it stressed that the Water Services Corporation could not claim immunity from its duties. The Court requested that the Ministry of Physical Planning give appropriate directives to the corporation.<sup>122</sup> In *Bhojraj Aire*,<sup>123</sup> the Nepal Supreme Court was stricter in relation to the setting of quality standards and ordered the water and

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environmental ministries to ensure that the water quality standard and pollution tolerance limit met statutory requirements.<sup>124</sup>

### (iii) Physical accessibility and affordability

In Botswana, the Court of Appeal drew on international standards concerning the right to water to address a prohibition on repairing a well for drinking water. In 2006, a majority of the High Court in *Sesana* found that an indigenous San community had been wrongfully evicted from the Kalahari Game Reserve and the refusal to provide hunting licenses violated the Constitution.<sup>125</sup> However, the community was later denied permission to repair a borehole for drinking water. In *Mosetlhanyane & Matsipane v The Attorney General*, the Court of Appeal unanimously held that the community had a statutory right, under the Water Act, as lawful occupiers of land to sink a borehole for domestic purposes.<sup>126</sup> The Court went further and agreed with the applicants that the denial amounted to degrading treatment under the Constitution. After referring to the dire health impacts on the community, the Court cited the international consensus on the right to water as embodied in General Comment 15

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120 *Prakash Mai Sharma v Nepal Khanepani Sansthan (Nepal Water Supply Corporation) & Others*, Writ No 2237 of the year 2047, decision dated 2057/3/26.

121 The petitioner also cited a study report conducted by the Contagious Disease Department of the Ministry of Health, where the department had collected samples from the water of different restaurants. The study showed the presence of 9000 germs in 100ml of water. According to the petitioner the activities of the Corporation stood against art 11(1) of the 1962 Constitution and ss 3, 5, 6 of the Water Supply Corporation Act 2046.

122 One can understand that under the 1962 Constitution the Court had difficulty in evaluating evidence, but by the time it gave the decision, the 1990 constitution was already in operation. It could have referred to that.

123 *Bhojraj Aire v Ministry of Water Resources & Others* Writ No 3305 of the Nepali year 2056, decision dated 2058/6/11.

124 See also *Bhojraj Aire v Ministry of Population and Environment*, Writ No 4193 of the Nepali year 2056, decision dated 058/10/26. Failure to set standards for other areas of water and air pollution was a violation of constitutional rights to life and environmental health.

125 *Sesana & Others v Attorney General* [2006] (2) BLR 633 (HC).

126 Case No CACLB-074-10 (27 January 2011).

and the UN General Assembly's formal recognition of the right in July 2010. The Government was ordered to 'refrain from inflicting degrading treatment'. The Court took steps to facilitate the community's exercise of their right to rehabilitate the bore hole, albeit at the community's own expense.

In *Kranti v Union of India & Others*, the Supreme Court of India dealt with the adverse living conditions faced by the inhabitants of the Andaman and Nicobar Islands after the tsunami in 2004: the tsunami had caused extensive damage to the shelters and livelihoods of the island inhabitants.<sup>127</sup> The petitioners applied for interim relief to mitigate the effects of the disaster and argued that the available funds were being utilised improperly. The Court issued an interim order directing the local administration to take immediate steps for rain water harvesting, to clean out and to recharge the existing wells and to dig new wells if necessary in order to provide for the drinking water needs of the inhabitants.

A number of foreign cases address the direct or indirect responsibility of private actors. In *Mme Lefevre v Ville d'Amiens, Cour de Cassation, Troisième chambre civile*, a French tenant had complained that a public housing provider had failed to provide running water.<sup>128</sup> The High Court agreed with the provider that it was not possible to provide water and noted that the tenant had been offered alternative accommodation. The Supreme Court disagreed and found that reasonable housing accommodation — one of the constitutional objectives to protect human

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dignity — includes the provision of running water. It ruled that a landlord is responsible for providing access to potable water to a tenant.

In Indonesia, the Constitutional Court reviewed the constitutionality of the Indonesian Law on Water Resources. A challenge mounted by various NGOs contended that the law had encouraged the privatisation of water services.<sup>129</sup> The Court rejected the petition and declared the law to be conditionally constitutional. It passed muster only if it was interpreted, implemented and applied in accordance with the conditions established by the Court. If these conditions were not met, then the law could be subjected to a further review. In its judgment, the Court acknowledged that access to water is a human right: it grounded its finding in various sources of international law and article 28H of the Indonesian Constitution (the right to a life of well-being in body and mind.) The Court stressed that the state has the obligation to respect, to protect and to fulfil the human right to water and held that the responsibilities of the Government, as laid down in the Law on Water Resources, must be interpreted in light of the right to water. Regarding water resources allocation, the Court stressed that '[t]he Government is obligated to prioritize untreated water to fulfil the daily needs for every individual'.<sup>130</sup> The Court further stated that a price can be charged for water processing and distribution. However, the price must not be unaffordable, the mechanism for arriving at the

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127 *Kranti v Union of India & Others*, Civil Appeal No. 2681 of 2007, arising out of S.L.P (c) No. 4716/2006, decided on 16 May 2007.

128 Supreme Court, 3rd Civil Chamber, Arrêt No 1362 (15 December 2004).

129 *Judicial Review of the Law No 7 of 2004 on Water Resources*, Constitutional Court of the Republic of Indonesia, 058-059-060-063/PUU/II/2004 (19 July 2005).

130 *Ibid.*

price should be transparent and the various costs should be determined in consultation with communities. The Court also suggested that community participation, as a general matter, should be prioritised in water management.

#### (iv) Disconnections

Disconnection of water services has often been dealt with under consumer or utility law. However, treatment of water as a utility — when the utility is state-owned — has often been a bulwark against private overreach and subjected the utility to state oversight. Of course, state ownership or regulation of a monopoly is no guarantee that those persons in the greatest need will receive the water that they require. As a result, challenges to disconnection have increased in lock step with the increased recognition of the right to water. In England, the Queen's Bench has held that automatic cut-offs of the water supply upon the exhaustion of credit in a prepaid meter were inconsistent with the statutory requirement of notice before disconnection.<sup>131</sup> In Brazil, the Special Jurisdiction Appellate Court of Paraná found that the disconnection of a water supply, even for non-payment, violated constitutional rights to essential services.<sup>132</sup> In *Rajah Ramachandran v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd*, the High Court of Malaya, found that disconnection of water services due to non-payment of an inexplicably high

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water bill was unreasonable.<sup>133</sup> The Court argued that the defendant should have taken a less drastic action that would have caused less inconvenience to the consumer. It could sue the consumer in Court as a 'reasonable' person would. The Court held that the consumer was entitled to an explanation for the bill and that the 'draconian act of cutting off supply was too harsh in the circumstances of this case'.<sup>134</sup>

In *François X & the Union Fédérale des Consommateurs d'Avignon v Société Avignonnaise des Eaux*, the Avignon Federal Union of Consumers applied to the Court for the reconnection of their water supply. It had been disconnected following a dispute concerning the application of tariffication.<sup>135</sup> The French Court found that, pursuant to article 809(1) of the New Code of Civil Procedure, a Circuit Court judge may make an order to prevent imminent prejudice. It ruled that 'disconnecting water amounted to depriv[ing] an essential element of the life of a family made up of six people, of which four are children ... and constitutes an important impediment and

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131 *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB). This case is discussed in some depth in § 56B.4(c)(ii) below.

132 Bill of Review, 0208625-3.

133 Civil Suit No 22-716-2003 (2 March 2004).

134 *Ibid.*

135 Swiss Tribunal de Grande Instance (District Court) of Avignon, Order No. 1492/95 (12 May 1995) ('*François X*'). See also *In CISE v Association Consommateurs Fontauliere, Tribunal de Grande Instance (District Court) of Privas*, Order No. 9800223 (5 March 1998).



health risk which could only be remedied by the immediate reconnection of water supply'.<sup>136</sup>

## 56B.3 South African Law

### (a) Explicit and implicit recognition

Section 27(1)(b) of the Final Constitution provides that 'everyone has the right to have access to sufficient food and water'. This right belongs to a cluster of rights that obliges the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'.<sup>137</sup> It must be pointed out that the constitutional protection of the right to water does not flow only from FC s 27(1)(b). Rather, a range of other constitutional provisions indirectly recognise and support the right to water. This multiple and overlapping recognition demonstrates the significance of water to humanity and underscores the interrelatedness of water rights and other rights. For example, the right of access to sufficient food is protected in the same provision as the right of access to water because food and water are intimately connected in practice and theory.<sup>138</sup> Water forms an essential component of human nutrition as it is an indispensable raw material for food production.<sup>139</sup> Likewise, '[a]ccess to sufficient,

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RS3, 05-11, ch56B-p22

affordable, clean water for hygiene purposes should be seen as part of the primary health care services<sup>140</sup> protected in FC s 27(1)(a).<sup>141</sup>

The significance of water to housing cannot be gainsaid. It thus does not come as a surprise that, in *Government of the Republic of South Africa & Others v Grootboom & Others*, the Constitutional Court proffered an expansive definition of adequate housing that 'requires available land, appropriate services such as the provision of water and the removal of sewage'.<sup>142</sup> Apart from linking water with housing, this dictum establishes another important connection, in the South African context at

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136 *François X* (supra).

137 FC s 27(2).

138 The right of children to nutrition is specifically protected in FC s 28(1)(c). For more on FC s 28(1)(c), see A Friedman, A Pantazis & A Skelton 'Children's Rights' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) § 47.4.

139 D Chirwa 'Water Rights' in S Khoza (ed) *Socio-economic Rights in South Africa: A Resource Book* (2007) 343, 352.

140 *White Paper on Water Policy for South Africa* (1997) available at [www.dwaf.gov.za/documents/policies/nwppw.pdf](http://www.dwaf.gov.za/documents/policies/nwppw.pdf) (accessed on 22 May 2011) at para 2.1.8.

141 In *Free Legal Assistance Group & Others v Zaire Communications* 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR 1996) at para 47 (The African Commission on Human and Peoples' Rights held that 'the failure of the government [of Zaire] to provide basic services such as safe drinking water and electricity and the shortage of medicine' amounted to a violation of the right to health under article 16 of the African Charter on Human and Peoples' Rights).

142 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 35.

least, between water and land. In South Africa, access to water has historically been interwoven with access to land. The so-called riparian principle held that a landowner had the exclusive right to use the water sources on her land, including water emanating from streams and dams on their land and ground water. This principle, in the context of a state-backed apartheid system of disinheriting black people from land ownership, meant that the majority of the people in South Africa did not have control over water resources. In order to rectify this historical injustice, the right of equitable access to land protected by FC s 25 provisions regarding land reform are critical. To the extent that we remain 'locked in' to apartheid era, quasi-private control of riparian rights, the majority of South Africans will continue to be denied adequate access to water. Seen in light of the FC s 26 right of access to housing and its concomitant right against arbitrary evictions, restrictions on access to water for domestic use or for cultivating crops and animals may amount to a constructive eviction that has to be justified in terms of the Land Reform (Labour Tenants) Act<sup>143</sup> and the Extension of Security of Tenure Act<sup>144</sup> ('ESTA').<sup>145</sup>

Claims to water can also be grounded in FC s 24: the only so-called 'third generation' right protected in the South African Bill of Rights. FC s 24 entitles everyone to 'an environment that is not harmful to their health or well-being', and imposes an obligation on the state to protect the environment by, among other

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things, preventing pollution and promoting conservation 'through reasonable legislative and other measures'.<sup>146</sup> At the same time, the right requires the 'ecologically sustainable development and use of natural resources' in a way that promotes 'justifiable economic and social development'.<sup>147</sup> The Water Services Act<sup>148</sup> represents a legislative attempt to meet these obligations. Water is a fundamental component of a healthy environment and a critical natural resource, and the Water Services Act recognises this in the clear connection it draws between the rights to sufficient water and to a clean and healthy environment. The preamble to the Act

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143 Act 3 of 1996 ('Labour Tenants Act').

144 Act 62 of 1997.

145 The Labour Tenants Act s 1(vi) defines 'eviction' as including the deprivation of a right to occupy or use land. 'Right in land' means 'any real or personal right in land, including a right to share cropping or grazing land'. See Labour Tenants Act s 1(xvi). Similarly, ESTA s 1(1)(vi) defines 'evict' as to 'deprive a person against his or her will of residence on land, or the use of land, or access to water that is linked to a right of residence in this Act'. See also *Mosetlhanyane & Another v The Attorney General* CACLB-074-10 (27 January 2011)(The Botswana Court of Appeal emphasised that lawful occupiers of land have an 'inherent' right to extract groundwater from beneath that land for domestic purposes. Ibid at para 16. The Court pointed out that limitation or restriction of access to water necessary for domestic use, to the extent that such limitation or restriction makes continued occupation of the relevant land difficult and induces lawful occupiers to relocate, 'render[s] meaningless' any rights of lawful occupation. Ibid at paras 7, 12 and 16.)

146 FC ss 24(a) and (b)(i) & (ii). For more on FC s 24, see M Van der Linde & E Basson 'Environment' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 2, October 2010) Chapter 50.

147 FC s 24(b)(iii).

148 Act 108 of 1997.

emphasises that it rests on 'the rights of access to basic water supply and basic sanitation ... and an environment not harmful to health or well-being'. The interconnected web of rights in which our concern for water is anchored is reflected in the set of interconnected obligations that the state bears in terms of these rights. The National Water Act<sup>149</sup> articulates many of these obligations, and sets out in law a commitment to both sustainable and equitable use of water.<sup>150</sup> The preamble to the Act recognises that South Africa's discriminatory history has prevented equal access to water, and acknowledges the government's responsibility to protect the nation's water resources and ensure the redistribution of water. In line with this governmental responsibility, s 3 of the Act vests ownership of water in the nation as a whole, as 'an indivisible national asset', and designates the executive as the public trustee of that asset.

While the National Water Act establishes the principles and procedures for the management and protection of the nation's water resources, the Water Services Act deals with the supply of water to the population. The substance of the two Acts is closely linked. Proper water supply is impossible without effective management of water resources. Although the provision of water supply and sanitation services is distinct from the overall management of water resources, the preamble to the Water Services Act notes that water provision 'must be undertaken in a manner consistent with the broader goals of water resource management'. The Constitutional Court, for its part, has recognised this connection. In *Mazibuko v City of Johannesburg*, O'Regan J, writing for a unanimous Court, stated that the Water Services Act 'highlights the connection between the rights of people to have access to a basic water supply and government's duty to manage water services

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sustainably.<sup>151</sup> Fulfilling the promise of sufficient water for all, she continued, 'will require careful management of a scarce resource. The need to preserve water is a responsibility that affects all spheres of government'.<sup>152</sup>

The following discussion does not set out an exhaustive analysis of all the rights that are relevant to the protection and to the advancement of water rights.<sup>153</sup> It does however give a glimpse of the fluidity of the right to water as a constitutional claim,

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149 Act 36 of 1998.

150 Sustainability and equity are guiding principles of the National Water Act. They appear both in the Act's preamble and the general explanatory paragraphs at the beginning of each chapter, as well as in many of the operative sections of the Act. Section 2 states that the purpose of the National Water Act is to ensure that the country's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account the need to promote equitable access to water and the need to promote efficient, sustainable and beneficial use of water. The section lists a number of factors to be taken into account in the management of water resources, ranging from social concerns like the need to meet growing water demand, promote social and economic development and meet the basic water needs of present and future generations, to the environmental imperatives to protect biodiversity and aquatic ecosystems and prevent pollution and degradation of water resources.

151 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*').

152 *Ibid* at para 3.

153 Other relevant rights include the right to equality, dignity, life, administrative justice and the right of detainees to conditions of detention that are consistent with human dignity.

its connection with other rights and, most importantly, its essentiality. It also exposes the difficulty in the contextual or reasonableness approach to the constitutional interpretation of socio-economic rights adopted by the Constitutional Court. In *Soobramoney v Minister of Health*,<sup>154</sup> the Court refused to hold that the right to life imposes a positive obligation on the state to provide life saving treatment to a critically ill patient. It contended, implicitly, that limited public health system resources placed an inevitable and unfortunate brake on claims brought under FC s 11's the right to life. (The decision itself largely limits its analysis to claims brought by Mr Soobramoney under FC s 27's rights of access to adequate health care and to emergency medical treatment.) However, claims to water rights are clearly multifaceted and cannot be resolved comprehensively and effectively through FC s 27(1)(b) alone. Boldly stated, therefore, the right of access to water can only be fully realised by a combination of water-specific policies and carefully constructed generic policies concerning other social services such as the environment, sanitation, health, food, housing and land.

## **(b) The meaning of FC s 27(1)(b)**

### **(i) The prevailing approach to FC s 27 rights**

While *Mazibuko* represents the first case in which the Constitutional Court has dealt directly with the FC s 27(1)(b) right to sufficient water, the Court's prevailing approach to the socio-economic rights conferred in s 27(1) retains a determinative influence over our nascent right-to-water jurisprudence. This interpretative authority flows, on a formal level, from the fact that the right to have access to sufficient water in FC s 27(1)(b) is qualified in exactly the same way by FC s 27(2) as the rights to health care, social assistance and food, in FC ss 27(1)(a), (c) and (d). Along with the FC s 26(1), the right to have access to adequate housing, all of these rights are subject to the state's obligation to take reasonable and other legislative measures, within available resources, to achieve their progressive realisation.

In addition, the Constitutional Court has made it clear in judgments dealing with these rights that neither the s 26(1) right nor the s 27(1) rights exist as self-contained or stand-alone entitlements to the socio-economic resources they concern. Rather, the Court's conjunction of ss 27(1) and 27(2) has resulted in a somewhat inverted analysis in terms of which the content of each right rests on the reasonableness of the state's response to progressively realising that right. Determining

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the content of each right in the first place — that is, working out what the right entitles citizens to — is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within its available resources, in order to realise the right progressively. In *Minister of Health v Treatment Action Campaign* the Court held that 'section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).'<sup>155</sup> This approach was affirmed in *Khosa v Minister of Social Development*, where Mokgoro J stated that 'the ambit of the s 27(1) right can ... not be determined without reference to the

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154 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17 ('*Soobramoney*') at para 15.

155 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 ('*Treatment Action Campaign*' or '*TAC*') at para 39.

reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in s 27(1).<sup>156</sup> The Court extended this understanding of socio-economic rights to the right to water in *Mazibuko*:

Applying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather, it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right to sufficient water, within available resources.<sup>157</sup>

This approach has drawn criticism.<sup>158</sup> It is difficult to understand quite how the content of a justiciable right to a socio-economic good, claimable against the government, is defined by the action that government itself takes in providing access to that socio-economic good. The Court has, since *Grootboom*, fallen back on the notion of reasonableness to assess whether the state's legislative and policy responses to a socio-economic need will pass constitutional muster.

Criticism notwithstanding, the approach is consistent with the Court's reluctance to accept the idea that socio-economic rights carry some kind of 'minimum core content' enforceable against the state in all circumstances.<sup>159</sup> It is important to note though that the CESCR separates the two dimensions: ie, the content of the rights and the minimum core obligations. In each General Comment, it sets out some broad elements — the content of each of the rights (affordability, quality, physical accessibility) — which are to be achieved progressively. But the CESCR requires immediate realisation of a basic threshold for many of these elements. The Constitutional Court has been reluctant to move forward on either front. So although, it has technically rejected the notion of a minimum core, it has

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RS3, 05-11, ch56B-p26

occasionally filled in the content of socio-economic rights in housing and health litigation.<sup>160</sup>

Similarly, the logic of the principle of 'constitutional subsidiarity' squares with the prevailing approach to the socio-economic rights. In terms of this principle, litigants cannot rely directly on the terms of the Final Constitution in support of a rights claim where legislation has been enacted to give effect to that right.<sup>161</sup> Would-be rights-claimants must instead access the constitutional rights through the legislation, and

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156 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 ('*Khosa*') at para 43.

157 *Mazibuko* (supra) at para 50.

158 See for example, K Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *SAJHR* 448, 457 (arguing that the approach misses the distinction between first-stage rights determination and second-stage justification); C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *SALJ* 264; N de Villiers 'Procedural Fairness and Reasonableness Administrative Action within the Social Assistance system: Implications of Some Settled Cases' (2006) 22 *SAJHR* 405; and D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

159 *Grootboom* (supra) at para 32, *TAC* (supra) at paras 26-39, *Mazibuko* (supra) at paras 46-68. On the rejection of the idea of minimum core content to socio-economic rights, see §56B.3(iii)(bb) below.

160 *Grootboom* (supra) at para 35.

frame a case in the express terms of the legislation rather than in the terms of the constitutional right. Of course, one must remember that the super-ordinate legislation must be consistent with the constitutional provision to which it gives effect. The mere fact that the state says the legislation gives such effect does not make the legislation constitutional and immune to contestation. Applied to socio-economic rights, the principle of subsidiarity has the effect of restricting socio-economic rights claims to the express terms of the legislation enacted to give effect to those rights, unless a challenge to the constitutionality of the legislation is mounted. A fuller consideration of the implications of the Court's jurisprudence, and the connection between this principle and the Court's stance against reading a minimum core content into socio-economic rights, appears below in §§ 56B.3(a)(iii) and (iv).

## (ii) Right holders and protected uses of water

The right to have access to water as defined in FC s 27(1)(b) may be claimed by 'everyone'. This term opens up the possibility for juristic persons to be considered as holders of this right. (At the same time, juristic persons, given the horizontal application of the Bill of Rights, may be called upon to make provision for a particular good over which it possesses control.<sup>162</sup>) The Final Constitution explicitly states that a juristic person can hold rights 'to the extent required by the nature of the rights and the nature of that juristic person'.<sup>163</sup> The relevance of this provision

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RS3, 05-11, ch56B-p27

to the right to water is sharply underscored by the fact that there are many uses to which water may be put. These range from domestic use, cultural practices, personal hygiene, environmental protection, agricultural production to industrial use. Juristic persons such as corporations and commercial farmers may, therefore, also be entitled to the right to water. These diverse water uses will invariably lead to conflicts whose settlement would depend on the manner in which the right is interpreted. Typically, difficult decisions would need to be made concerning how much water should be allocated for domestic use on the one hand and industrial use

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161 The citation in support of this principle is by now a familiar one in the Court's own judgments. The following list is taken directly from *Mazibuko* (supra) at n 54: 'See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), [2004] ZACC 15 at paras 22-6 (in the context of the Promotion of Administrative Justice Act 3 of 2000 which gives effect to the constitutional right to administrative justice in s 33 of the Constitution); *MEC for Education, KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) [2007] ZACC 21 at para 40 (in the context of s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Equality Act) and *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) [2007] ZACC 10 at para 52 (in the context of labour legislation and the labour rights protected in s 23 of the Constitution).'

162 See *School Governing Body of Juma Masjid Primary School & Others v Ahmed Aruff Essay & Others* [2011] ZACC 13 (CC) (Court holds that private trust has violated the right to basic education of learners in a public school by abrogating terms of lease for school grounds and shutting the learners out. The private actor's behaviour unjustifiably infringed the learners' access to a basic education in terms of FC s 29(1).) See S Woolman 'Application' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'Between Charity and Clarity: Kibitizing with Frank Michelman on How Best to Read the Constitutional Court' in D Bilchitz & S Woolman (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2011).

163 FC s 8(4).

on the other hand.<sup>164</sup> Such conflicts lie at the heart of the 'sustainable development' jurisprudence slowly developing under FC s 24(b)(iii).

While FC s 27(1)(b) — read with FC s 8(4) — admits of an interpretation that considers corporations as right holders and a wide spectrum of protected water uses, priority ought to be given to basic human water needs in preference to commercial needs. The Water Services Act<sup>165</sup> provides that '[i]f the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must prioritise the provision of basic water supply and basic sanitation to them'. This provision is consistent with the CESCR's General Comment 15. The Comment states that 'priority in the allocation of water must be given to the right to water for personal and domestic uses'<sup>166</sup> and 'to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.'<sup>167</sup>

### (iii) 'Sufficient'

To begin, it must be noted that FC s 27(1)(b) protects the right to have access to 'sufficient' water, not 'adequate' water in terms of the ICESCR. No reason exists to suggest that the South African Constitution intended a different meaning to be accorded to the term 'sufficient' from that ascribed to 'adequate'. The two terms tend to be used interchangeably and should be understood to mean the same thing. Hence, the meaning attached to the term 'adequate' in CESCR's General Comment 3 is of critical relevance to the understanding of the right of access to water under the Final Constitution.

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RS3, 05-11, ch56B-p28

The use of the term 'sufficient' serves the primary purpose of underlining the qualitative and quantitative dimensions of the right. Sufficiency presupposes the existence of adequate facilities and mechanisms that enable people to access water services. It also imposes an obligation of result on the state to achieve specified goals with regard to the quantity and the quality of water. As the CESCR has stated, the right to water demands that the state ensure that the water supply for each person is 'sufficient and continuous for personal and domestic uses'.<sup>168</sup> However, the precise quantity of water that may be deemed to be 'sufficient' has not yet been

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164 Water in South Africa is a very scarce resource. The growth of the industrial sector and commercial farming since the last half of the 20th century has increased the demand for water considerably. According to the United Nations Development Programme (UNDP), South Africa is already swimming below the water-stress threshold. This gloomy picture is replicated regionally and worldwide. UNDP estimates that a quarter of the world's population currently lives in river basins that are closed and the number of people in water-stressed areas is forecast to spiral upwards from 700 million to 3 billion in 2025. In Sub-Saharan Africa, the percentage of people in water-stressed areas will shoot up from 30 per cent to a whopping 85 per cent. UNDP *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (2006) 135. The water-stress threshold is determined on the basis of the availability of water against the population. Thus, 1700 cubic metres per person is considered as the national threshold for meeting water requirements for agriculture, industry, energy and the environment. 1000 cubic metres per person constitutes a situation of water scarcity while the availability of under 500 cubic metres per person represents the case of 'absolute scarcity of water'. Ibid.

165 Act 108 of 1997.

166 General Comment 15 (supra) at para 6.

167 Ibid.

established. It is particularly difficult to set a global benchmark due to the different water demands and needs in different parts of our richly diverse world. The CESCR itself sidestepped the issue in its General Comment 15 and instead deferred to the guidelines developed by the World Health Organisation.<sup>169</sup> However, the two studies the CESCR cites both conclude that approximately 50 litres of water would be needed per day, with 20 litres as a minimum, in order to achieve sufficient health outcomes.<sup>170</sup>

What may be more important than rough numbers is the recognition that the state has an obligation to demonstrate not only that access to water is being measurably extended to a larger number of people, but also that the quality and quantity of access is increasing over time.<sup>171</sup> We shall turn return to this issue when we address the free water policy of the South African government.

It would be pointless to require the state to provide sufficient access to water in clearly delineated quantitative amounts without first taking cognisance of the quality of the water. This right should be understood, following the CESCR, to oblige the state to ensure that the water it provides is 'safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health'.<sup>172</sup> The qualitative dimension of the right also relates to the acceptability of the colour, odour and taste of the water required for personal and domestic use.<sup>173</sup>

### **(aa) Background to Mazibuko v City of Johannesburg**

The question of sufficient water in terms of FC s 27(1)(b) was placed squarely before the Constitutional Court in *Mazibuko v City of Johannesburg*.<sup>174</sup> At this point it is worthwhile setting out the parameters of the case, describing briefly the policies adopted by the City of Johannesburg and Johannesburg Water (Pty) Ltd and the terms of the challenge to that policy.

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168 CESCR General Comment 15: The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003) ('General Comment 15') at para 12(a).

169 According to the CESCR, '[t]he quantity of water available for each person should correspond to World Health organisation (WHO) guidelines.' *Ibid* at para 12(a).

170 See J Bartram & G Howard 'Domestic Water Quantity, Service Level and Health: What Should be the Goal for Water and Health Sectors' *WHO* (2002). See also PH Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83.

171 See S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6(2) *Law, Democracy and Development* 159, 172.

172 General Comment 15 (*supra*) at para 12(b) (emphasis in original).

173 *Ibid*.

174 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*').



Johannesburg Water is a private company incorporated in January 2001 and wholly owned by the City of Johannesburg.<sup>175</sup> The court challenge against Johannesburg Water and the City of Johannesburg revolved around two aspects of the water service delivery policy: the first was Johannesburg Water's policy of providing 6 kilolitres (6000 litres) of water per month, free of charge, to every account holder in the city; and the second was the company's programme of upgrading water infrastructure and billing systems — Operation Gcin'amanzi — which involved the installation of either communal taps within 200 metres of each dwelling, yard taps with restricted flow, or metered connections with pre-paid meters. The applicants complained that the free basic water policy was in conflict with FC s 27(1)(b) and that the installation of pre-paid meters in their homes in Phiri, Soweto was unlawful. The latter challenge was primarily based on principles of administrative justice. We discuss this leg of the argument in §56B.4(c)(ii) below. Our focus, for now, is on the first claim: that the City's provision of free basic water up to a limit of 6 kilolitres violates the constitutional right to sufficient water.

The Water Services Act 108 of 1997 defines 'basic water supply' to mean:

the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

The 'prescribed minimum' referred to in this definition has been set in terms of national regulations.<sup>176</sup> Regulation 3(b) of these regulations provides that the 'minimum standard for basic water supply services' includes a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month, at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household, and with an effectiveness such that no-one is without a water supply for more than seven full days in any year. In effect, *these provisions adopt a minimum core approach*: they set out in legislation and regulations a quantity of water to which every household absolutely must have access. One might contend, therefore, that the South African government has accepted the principle of a minimum core obligation in respect of water, even though, as the litigation in *Mazibuko* demonstrates all too clearly, the sufficiency of the minimum core obligations it has assumed remain very much in dispute.

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In the Johannesburg High Court, where the applicants launched their challenge to the constitutionality of the Johannesburg water policy, Tsoka J held that the free water policy adopted by the City and Johannesburg Water was irrational and unreasonable. The High Court replaced the policy with an order requiring the City and Johannesburg Water to provide each applicant and similarly placed residents of

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175 Although a private company, Johannesburg Water is nevertheless a 'municipal entity' in terms of s 1 read with ss 86B(1) and 86D(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 ('Municipal Systems Act'), because the municipality, as the sole owner, retains effective control of the company. The establishment and corporate structure of the company governed by the Municipal Systems Act, while its financial management is governed by the Local Government: Municipal Finance Management Act 56 of 2003. As the City of Johannesburg remains accountable and responsible for the actions of Johannesburg Water, it would perhaps be inaccurate to describe this as an instance of privatisation.

176 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water' *Government Gazette* No 22355, Notice R509 of 2001 (8 June 2001). These regulations are ostensibly made in terms of s 9 of the Water Services Act, which empowers the Minister to 'prescribe compulsory national standards' relating to the provision of water services, the effective and sustainable use of water resources, among others.

Phiri with 50 litres of free water per day.<sup>177</sup> The Supreme Court of Appeal upheld the City's and Johannesburg Water's appeal against the High Court judgment. However, the outcome of this victory was surely only marginally more appealing to the City and the company than the High Court's order.<sup>178</sup> The SCA held that the free water policy had been based on the mistaken belief that regulation 3(b) imposed no obligation to provide the prescribed minimum free of charge to those who could not afford to pay. As such, the City and Johannesburg Water's decision had been 'materially influenced by an error of law' and could be set aside on that basis.<sup>179</sup> The SCA declared that 42 litres of water per day would constitute 'sufficient water' within the meaning of FC s 27(1)(b) and ordered the City and Johannesburg Water to revise their water policy accordingly.

It is worth noting that both the High Court and the SCA seem to have approached the challenge to the free basic water policy as an application for judicial review of an exercise of public power, and that both courts appear to have disposed of the matter in terms of the principles of administrative justice. Both courts used the language of administrative justice to issue orders which 'reviewed and set aside' the decision to adopt the policy: The High Court held that the policy was irrational and unreasonable and the SCA found that adoption of the policy had been materially influenced by an error of law. While neither court mentioned the provisions of the Promotion of Administrative Justice Act ('PAJA')<sup>180</sup> as part of their reasons for setting aside the free basic water policy, s 6 of PAJA provides that administrative actions can be reviewed on the grounds of 'irrationality', 'unreasonableness' or if the action was materially influenced by 'an error of law'. So although the SCA found that the Johannesburg water policy amounted to a violation or limitation of the FC s 27(1)(b) right to sufficient water, the opinion is framed in language best suited to review of executive action under administrative law.<sup>181</sup>

In the Constitutional Court, on the other hand, the applicants relied directly on the Constitution for the argument that the free basic water policy should be

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declared invalid because it is unreasonable within the meaning of FC s 27(2). The applicants further invited the Court to quantify the amount of water that would be 'sufficient' within the meaning of FC s 27(1)(b). They contended that 50 litres per

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177 *Mazibuko & Others v City of Johannesburg & Others (Centre on Housing Rights and Evictions as Amicus Curiae)* [2008] 4 All SA 471 (W).

178 *City of Johannesburg & Others v Mazibuko & Others* 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA) ('*Mazibuko SCA*').

179 *Ibid* at para 38.

180 Act 3 of 2000.

181 It is difficult to criticise either court too roundly for taking an administrative law approach here, since it is unclear whether either court actually did so. The terms of their judgments certainly suggest that PAJA and the principle of administrative justice were determinative, but neither court is explicit in basing its reasons for 'reviewing and setting aside' the water policy on PAJA or administrative justice principles. Indeed, it is doubtful that PAJA would even apply to the decisions involved in adopting water policy, because the definition of 'administrative action' is explicit in excluding the executive functions of municipalities. The judgments can, of course, be heartily criticised for their vagueness in this regard.

person per day met FC s 27(1)(b)'s requirements. They also argued that since the standards set in regulation 3(b) constituted minimum standards, the Court was free to set even higher basic standards.<sup>182</sup>

The *Mazibuko* Court disagreed. In the first place, it held that the free basic water policy 'falls within the bounds of reasonableness and therefore is not in conflict with either s 27 of the Constitution or with the national legislation regulating water services'.<sup>183</sup> Second, the Court declined the invitation to set a minimum core — at the current levels or higher. As we explain in the discussion that follows, however, the Court's grounds for rejecting the notion of a minimum core for the right to water is not entirely consistent with the use it makes of the concept of reasonableness.

### **(bb) The consolidation and extension of the stance against 'minimum core content'**

The arguments that the applicants urged upon the Constitutional Court in *Mazibuko* would have required the Court to jettison its prevailing approach to socio-economic rights. The correct approach, the applicants submitted, is to first set out the content of the right by quantifying the amount of water sufficient for dignified human life, and only then to consider whether the state has acted reasonably in seeking to progressively achieve access for all to that quantity of water.<sup>184</sup> In *Nokotyana*,<sup>185</sup> heard and decided shortly after *Mazibuko*, the Constitutional Court was presented with the same form of argument. There, the applicants urged the Court to find that the right to housing in FC s 26(1) had to be interpreted to include basic sanitation and electricity, and that the Court's previous decisions with respect to FC s 26 should be revised accordingly.<sup>186</sup>

In both cases, the Court identified this argument as a call for the identification of a minimum core, or basic content, to socio-economic rights. It relied on judgments in its previous socio-economic rights cases — *Grootboom* and *TAC* — to reject it.<sup>187</sup> In those cases, the Court declined the invitation to specify a minimum

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RS3, 05-11, ch56B-p32

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182 *Mazibuko* (supra) at para 44.

183 *Ibid* at para 9.

184 *Ibid* at para 51. It is worth mentioning, as the Court did, that the applicants' proposal was in fact for a quantified content of the right to water that exceeds a minimum core or basic content. The applicants were explicit in arguing that the quantity of 50 litres of water per person per day is what is sufficient for 'dignified human life', not merely the minimum necessary to support life. Applicants' Heads of Argument at paras 342 and 355; *Mazibuko* (supra) at para 56. In making this argument the applicants urged on the Court the SCA's interpretation in the court below, which held that the right of access to water 'cannot be anything less than a right of access to that quantity of water that is required for dignified human existence'. *Mazibuko SCA* (supra) at para 17, quoted in the Applicants' Heads of Argument at para 324.

185 *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*').

186 *Ibid* at para 47.

187 *Mazibuko* (supra) at paras 46-68.

core content to the rights to housing and health care. In both of those earlier cases, though, the Court gave some ground to the concept of minimum core by admitting that evidence could be presented to show that a particular right has a particular minimum content, and that such an evidence-based minimum could be influential in assessing the reasonableness of the state's conduct in meeting its socio-economic obligations. The *TAC* Court was careful to note that establishing such a minimum generally falls beyond the limits of the judicial function:

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.<sup>188</sup>

In *Grootboom* and *TAC*, then, the Court seemed to accept that a minimum core content to socio-economic rights could be established, on the basis of evidence, by institutions other than the judiciary. In *Mazibuko*, the Court reiterates that it would be 'institutionally inappropriate' for a court to determine what the achievement of any particular socio-economic right would entail:

This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.<sup>189</sup>

In the preceding paragraph, the Court had said that whatever decisions the legislature and the executive take in this regard, they should never be constrained by a minimum core understanding of socio-economic rights. What these rights require, the Court noted, will vary over time: 'Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.'<sup>190</sup> In the face of an apparent willingness on the part of government to assume a minimum core obligation in respect of water, which it has done with a regulative prescription of a 'minimum standard for basic water supply services', the Court's response is disappointing and retrogressive.<sup>191</sup>

The implications of this position are twofold. First, the Court has effectively discharged the government from any obligation the Constitution may have imposed on it to set and work towards concrete goals of socio-economic provision. Second, the Court has sidestepped the question of what 'sufficient' means in the FC s 27(1) (b) right of access to sufficient water. In doing so it has relied on numerous contextual factors which, it argues, influence the sufficiency of a quantity of water, including the manner of water delivery and the uses to which water is put. The obligation to supply water will vary depending on the circumstances

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188 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 ('*Treatment Action Campaign*' or '*TAC*') at para 38.

189 *Mazibuko* (supra) at para 61.

190 *Ibid* at para 60.

191 On retrogressive state policies or laws and socio-economic rights, see S Woolman, C Sprague & V Black 'Why State Policies that Undermine HIV Lay Counsellors Constitute Retrogressive Measures that Violate the Right of Access to Health Care for Pregnant Women and Infants' (2009) 25 *SAJHR* 102.

of each water-user.<sup>192</sup> More than this, the Court's reasoning ensures that the state bears no obligation to specify a quantity of sufficient water within the meaning of this right, or to take reasonable steps to progressively realise such a goal. Whatever content the legislature or the executive might happen to give to the term 'sufficient' is subject to constitutional scrutiny only against the amorphous concept of reasonableness.

*Mazibuko* sets out what appears to be the high watermark of its preparedness to enforce the Constitution's socio-economic rights against government:<sup>193</sup> First, it will order a government to take steps to realise rights if it has not taken any steps. Secondly, it will assess the reasonableness of any steps the government has taken, and order government to review its adopted measures, if they turn out to be unreasonable. Following *Grootboom*, the Court may order government to make provision for those desperately in need, and following *TAC*, the court may order government to remove unreasonable limitations or exclusions from measures or policies that it has already adopted. The Court stated finally that the obligations imposed by the socio-economic rights provisions of the Constitution further require government to continually revise its policies in order to ensure the progressive realisation of rights. The Court, under the right circumstances, may be prepared to order such revisions.<sup>194</sup>

### **(cc) A brief note on comparative approaches to questions of sufficient water**

It is interesting to note that courts in similarly-situated or poorer countries have taken a more expansive approach to the amount of water to be provided in accordance with the right to water. In Argentina, courts have regularly ordered 100 to 250 litres of water per person per day be provided for situations of emergency relief.<sup>195</sup> In *CEDHA v Provincial State and Municipality of Córdoba*, the Court relied more explicitly on international standards. CEDHA launched legal actions against provincial and municipal authorities for failing to prevent pollution of communal water sources.<sup>196</sup> The culprit was an under-maintained and over-stretched sewer-

192 *Mazibuko* (supra) at para 62.

193 *Ibid* at para 67.

194 *Ibid* at para 67 ('If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty on government continually to revise its policies to ensure that the achievement of the right is progressively realised.') See also *Nokotyana* (supra) at para 4 (the Court stated that 'the role of the courts in the achievement of socio-economic goals is an important but limited one').

195 See discussion of *Valentina Norte Colony, Defensoría de Menores N° 3V. Poder Ejecutivo Municipal s/acción de amparo expte*, 46-99 Acuerdo 5 del Tribunal Superior de Justicia, Neuquen (2 March 1999) in 56B.2(d)(ii).

196 *CEDHA v Provincial State and Municipality of Córdoba*. See R Picolotti, 'The Right to Safe Drinking Water as a Human Right' (2005) 1 (4) *Housing and ESC Rights Quarterly* 1.

treatment plant. The Court implied the right to water from the constitutional right to health and, after quoting General Comment 15, ordered as follows:

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[T]he municipality of Córdoba adopt all of the measures necessary relative to the functioning of the [facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94.

While 200 litres clearly exceeds the standards referred to in General Comment 15, the Argentine courts have focused more on common, rather than minimum, usage in Argentine society.

In Indonesia, the Constitutional Court has required the Government and municipalities to take heed of international standards on water quantity. The Court has held that '[t]he volume of daily basic needs should be established based on the universally applied standard regarding the minimum water needs to fulfil the daily basic needs.'<sup>197</sup>

#### **(iv) The principle of constitutional subsidiarity**

FC ss 32 and 33 — the right of access to information and the right to administrative justice<sup>198</sup> — demand that national legislation 'must be enacted to give effect to these rights'. Similarly, FC s 9(4) requires that national legislation 'must be enacted' to give effect to constitutional equality rights and to prevent or to prohibit unfair discrimination. The right to fair labour practices set out in FC s 23 provides that national legislation 'may be enacted' to regulate certain aspects of the right. FC s 9(2) provides that legislative measures intended to remedy the effects of past discrimination may be promulgated. Legislation has been enacted in respect of each of these five rights.<sup>199</sup> In two of the cases where the Constitution required legislation to be passed — access to information and administrative justice — the rights as set out in the relevant sections of the Constitution were deemed to be inoperative until such time as the required legislation was passed. In order to ensure that people were not left without those rights, Item 23 of Schedule 6 of the Final Constitution reproduced the text of the relevant rights from the Interim Constitution to stand in place of the text of FC ss 32 and 33 until the legislation was passed.

FC ss 32 and 33 were thus inchoate until Parliament promulgated the legislation giving effect to them. This interaction between constitutional rights and the enabling 'super-ordinate' legislation that fleshes them out provides 'a picture' of the Court's constitutional principle of subsidiarity. Subsidiarity views legislation as an optimal

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197 *Judicial Review of the Law No. 7 of 2004 on Water Resources* Constitutional Court of Indonesia 058-059-060-063/PUU/2004 (19 July 2005).

198 For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, M Bishop & J Brickhill *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

199 In relation to FC s 32, the Promotion of Access to Information Act 2 of 2000; in relation to FC s 33, the Promotion of Administrative Justice Act 3 of 2000; in relation to FC s 23, the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997; in relation to FC s 9, the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

method for giving effect to a constitutional right. The principle of subsidiarity is restated in *Mazibuko* as follows:

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This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.<sup>200</sup>

It makes some sense that the principle should apply to the socio-economic rights enshrined in FC ss 26(1) and 27(1). In the first place, the state 'must take legislative and other measures' to give effect to those rights. Secondly, the prevailing approach to socio-economic rights and the Court's stance regarding the minimum core content of those rights suggests that only through the state's 'legislative and other measures' will the Constitution's socio-economic rights contain any clear content at all. Indeed, the Court says as much in *Mazibuko*:

The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.<sup>201</sup>

A similar approach was taken by the Durban High Court in one of the first water rights cases.<sup>202</sup> In a decision handed down before the regulations prescribing a basic minimum water supply had been promulgated, the Court held that without state action, the constitutional right to sufficient water is 'incomplete, and accordingly unenforceable'.<sup>203</sup> As the Constitutional Court subsequently held in *Mazibuko*, the Durban High Court rejected the applicant's argument that FC s 27(1)(b) read with the Water Services Act entitles people to some basic quantity of water:

It is clear that the Water Services Act was directed at achieving the right embodied in the Constitution. The difficulty, however, is that in the absence of regulations defining the extent of the right of access to a basic water supply, I have no guidance from the Legislature or executive to enable me to interpret the content of the right embodied in s 3 of the Act.<sup>204</sup>

On this approach, the primary obligation the state bears in terms of constitutional socio-economic rights are those that it places on itself in terms of legislative or other

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200 *Mazibuko* (supra) at para 73. On the principle of constitutional subsidiarity more generally, see the exchange between AJ van der Walt and Karl Klare. See AJ van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77; K Klare 'Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129. See also L du Plessis 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 *Stellenbosch Law Review* 207; L du Plessis 'Interpretation' in S Woolman, M Bishop & J Brickhill *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

201 *Mazibuko* (supra) at para 66.

202 *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D).

203 *Ibid* at 427F.

204 *Ibid* at 427C-D.

measures. These measure may then be assessed for reasonableness in terms of FC ss 26(2) and 27(2). However, it is important to note, that the state is obliged to create a plan that is reasonable, sufficiently well-funded, appropriately administered, capable of realisation, cognisant of short, medium and long-term goals, and sensitive to the plight of those persons in desperate need. The principle of

subsidiarity does not permit the state to ignore these desiderata in the conception of a plan, nor does it allow the state to offer no plan at all.

*Nokotyana* reinforces the Court's rubric for socio-economic rights analysis and its general commitment to the principle of subsidiarity. The Court states that the housing legislation in question had been 'promulgated to give effect to the rights conferred by section 26 of the Constitution'.<sup>205</sup> It is clear from what follows in *Nokotyana* that the Court was concerned largely with the rights the applicants bore in terms of the housing legislation in question. Indeed, it applauded the applicants for relying primarily on the legislation, and stated emphatically that they 'cannot be permitted' to rely *only* on the Constitution.<sup>206</sup> The decision went the applicants' way because, in the Court's view, the municipality's delay in complying with the obligations imposed on it by the legislation was unacceptable and unreasonable. The obligations themselves, however, and people's corresponding rights, were held to depend entirely on the national housing legislation and the obligations the state imposed on itself therein. Viewed in isolation, little appears to separate this model of constitutional rights from a democratic system based upon parliamentary supremacy. Although the *Grootboom* criteria remain the measure of 'reasonableness' for socio-economic rights jurisprudence, one should be concerned that our commitment to constitutional supremacy could lose much of its bite were the principle of subsidiarity to allow Parliament (largely alone) to determine the scope and the extent of people's rights.<sup>207</sup>

Were Parliament alone to determine the initial scope of a right, the only thing standing between constitutional socio-economic rights and unbridled parliamentary supremacy would be the possibility of a challenge to the constitutionality of legislation giving effect to those rights. Even so, it is difficult to see how legislation enacted in terms of FC s 26(2) or FC s 27(2) could be found to infringe the rights in FC s 26(1) or FC s 27(1), when the legislation defines the content of those rights.

If an effective constitutional challenge to the state's legislative and other measures has been rendered largely impossible by the Court's convoluted doctrine, it must fall, as the Court loudly proclaims, to the FC s 27(2) concept of reasonableness to assess the constitutionality of the state's actions in meeting its socio-economic obligations. But it is here that the Court's logic begins to, but does not entirely, unravel. In considering whether the principle of constitutional

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205 *Nokotyana* (supra) at para 47. Chapters 12 and 13 of the National Housing Code deal with determinations of the status of settlements and the municipal services those determinations entitle them to receive. The Housing Code was published in terms of section 4 of the Housing Act 107 of 1997, and was apparently treated by the Court to form part of that legislation. See further §56B.4(c)(i) infra.

206 *Ibid* at para 49.

207 See further D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591, and S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 463ff.



subsidiarity applies to the City of Johannesburg's free basic water policy, the Court in *Mazibuko* said only that 'it may not'.<sup>208</sup> Were the principle to apply in every instance, water service providers and other organs of state would need only comply with the terms of national legislation giving effect to the right to have

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access to sufficient water in order to discharge their constitutional obligations. So, for example, if a municipality or other water services authority had within its available resources the capacity to exceed the basic water supply standards set in national legislation, the subsidiarity principle would not require the water service provider or state to provide any more than stated minimum.<sup>209</sup> Such a position is hard to square with the Constitution's own commitment to progressive realisation — a notion that reflects a developmental state's obligation to provide the goods necessary for living a life worth living as those goods become available in greater quantities and quality. That the *Mazibuko* Court ultimately avoided giving an answer to the question as to whether subsidiarity operates here — by deciding instead that the City's policy could not be said to be unreasonable — suggests that the reasonableness standard has not been displaced by the tautological principle of subsidiarity.

Another important consideration follows from this analysis of the Court's treatment of reasonableness. Whatever teeth the reasonableness requirement retains rests, we believe, on the existence of some prior conception of what a given socio-economic right requires. In other words, reliance of the concept of reasonableness necessarily commits the Court to determining — at least to some degree — the content of the rights the Final Constitution confers on South Africans.

#### (v) 'Access'

The formulation of the right in FC s 27(1)(b) is one of 'access to water' rather than a 'right to water'. In *Grootboom*, the Constitutional Court purported to draw a distinction between the right to housing and the right 'to have access to housing' in FC s 26. In highlighting the distinction between the two terms of art, it stated that the right of access to housing recognises that housing entails more than the possession of a box-like physical structure. It also requires 'available land, appropriate services such as the provision of water and the removal of sewerage and the financing of these including the building itself'.<sup>210</sup> More expansively still, the Court went on to add that the words 'access to' suggests that the state possesses the power to require private individuals and organisations to provide housing. It stated: 'it is not only the state who is responsible for the provision of houses, but ... other agents within our society, including individuals themselves, who must be enabled by legislative and other measures to provide housing.'<sup>211</sup>

In truth, no meaningful difference really exists between 'the right to housing' and 'the right to have access to housing'. Indeed, the CESCR has interpreted the right to

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208 *Mazibuko* (supra) at para 74.

209 *Mazibuko* (supra).

210 *Grootboom* (supra) at para 35.

211 *Ibid.*

housing in exactly the same terms as those employed by the Constitutional Court when interpreting the right of 'to have access to housing'. The Committee stated that shelter does not mean 'merely having a roof over one's head' and

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cannot be understood 'exclusively as a commodity'.<sup>212</sup> Instead, it has emphasized that shelter should be seen as 'the right to live somewhere in security, peace and dignity'.<sup>213</sup> The CESCR has also extracted from the right to water strikingly similar obligations to those identified by the Constitutional Court under FC s 26's right to housing. To be sure, what the Constitutional Court describes as the meaning and the implications of 'access' for the state is in essence a subset of the state's obligation to fulfil rights. The latter, as we explained above, has two limbs: the obligation to facilitate the realisation of the right and the obligation to provide the basic good to those who cannot afford it.<sup>214</sup>

Nevertheless, the Constitutional Court's definition of the right of access to housing in *Grootboom* has significant implications for the interpretation of the state's obligations in relation to socio-economic rights generally and the right of access to water specifically. Firstly, it drew attention to the need to discriminate between the obligations of the state to those persons who can afford to exercise socio-economic rights on their own and those who cannot. It stated: 'For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance.'<sup>215</sup> By contrast, the Court required the state to provide actual assistance to those who cannot afford to pay for adequate housing: 'Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. ... The poor are particularly vulnerable and their needs require special attention.'<sup>216</sup>

By implication, the right of access to water requires that the state must not only refrain from interfering with existing access to this right, it must also take measures to facilitate the realisation of this right so that people are able to exercise it relying on their own means and resources. Moreover, the state has the obligation to provide water to those who cannot afford it. This outcome can also be achieved by reading the right of access to water under FC s 27(1)(b), together with FC s 7(2), which recognises the state's duty to fulfil rights. We discuss the interaction of FC ss 7(2) and 27(1)(b) in the next section.

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212 CESCR General Comment 4: The Right to Adequate Housing, (Sixth session, 1991) U.N. Doc. E/1992/23 (1991) at para 7. In the same paragraph, the CESCR endorses the views of the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000: 'Adequate shelter should mean ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost.'

213 Ibid.

214 General Comment 15 (supra) at paras 25–29.

215 *Grootboom* (supra) at para 36.

216 Ibid.

In general, however, the state has an obligation to ensure that water and water facilities are accessible to everyone — poor or not — without discrimination. As the CESCR has stated, this duty means that the state must ensure both physical access and economic access.<sup>217</sup> The former indicates that water and water facilities must be within the physical reach for all sections of the population and that the personal security of the people accessing water services is guaranteed. The latter indicates that water services must be affordable for all.<sup>218</sup>

Intriguingly, the Constitutional Court's statement that 'it is not only the state who is responsible for the provision of housing'<sup>219</sup> can be interpreted to mean that privatisation is not *prima facie* unconstitutional. The state can, through law, rely upon private persons to provide water services. International human rights law lends credence to the idea that the involvement of the private sector in water provision may not be objectionable unless it can be proved that the private party violates the right.<sup>220</sup> Ultimately, however, the Constitution places the burden upon the state to ensure that all of its obligations to respect, protect, promote and fulfil the right to water are met whether it is the service provider, the co-service provider, or the state that determines how other social actors vouchsafe this essential guarantee.

## 56B.4 Duties of the State

As noted earlier, the South African Constitution expressly recognises the duties to respect, protect, promote and fulfil human rights. These duties are addressed in more detail elsewhere in this work.<sup>221</sup> Here, we focus on the application of these duties to the right to have access to water.

### (a) Different spheres of government

The provision of water services is a joint responsibility of all three spheres of government — national, provincial and local.<sup>222</sup> The Final Constitution requires the national government to adopt legislation concerning the establishment of municipalities that takes into account 'the need to provide municipal services [including water services] in an equitable and sustainable manner'.<sup>223</sup> It has done so, in respect of water services, in terms of the legislation discussed already in this

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217 General Comment 15 (supra) at paras 12(c)(i) and (ii).

218 *Ibid.*

219 *Grootboom* (supra) at para 35.

220 See General Comment No. 3: The Nature of States Parties Obligations (Fifth Session, 1990) UN Doc. 12/14/1990 at para 8; and *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986) at para 6.

221 See S Woolman 'Application' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

222 D Chirwa 'Water Rights' in S Khoza (ed) *Socio-economic Rights in South Africa: A Resource Book* (2007) 343, 351.

223 FC s 155(4).

chapter — the Water Services Act and the National Water Act. The national government has also promulgated numerous regulations setting standards of water quality, outlining the principles of water management and service delivery, and establishing pricing and

tariff structures.<sup>224</sup> Moreover, the rule of law, the obligations imposed by the rights to clean water and to a clean and healthy environment, and the provision in FC s 8(1) that all organs of state are bound by the rights in the Bill of Rights, together require that all levels of government meet the legislative and constitutional obligations to manage water resources and provide water services.

According to FC s 152(1), one of the objects of local government is to 'ensure the provision of services to communities in a sustainable manner'. The Water Services Act, accordingly, requires every municipality functioning as a water services authority to make bylaws containing conditions for the provision of water services. These bylaws must provide, at least, for 'the technical conditions of supply, including quality standards, units or standards of measurement, the verification of meters, acceptable limits of error and procedures for the arbitration of disputes relating to the measurement of water services provided.'<sup>225</sup>

However, according to Schedule 4, part B of the Final Constitution — as read with FC s 155(1)(a) and (7) — both the national government and provincial governments have competence through legislation and other measures to monitor and to support local government in the provision of water services. Similarly, any standards of service or water quality set by municipal bylaws are subject to national standards prescribed by the Minister under the Water Services Act.<sup>226</sup> Rates and tariffs charged by water services providers are also subject to the norms and standards set by the Minister.<sup>227</sup> Despite these national regulatory powers, a vast disparity in tariff and pricing structures for water services exists across water services authorities. These disparities, and the injustice they work, suggests the urgent need for a greatly enhanced and engaged role for the national government in the standardisation of water pricing.<sup>228</sup> To put it somewhat differently, the decentralisation of public functions and the distribution of competences in various functional areas across

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224 See, for example, 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water', *Government Gazette* 22355, GN R509 of 2001 (8 June 2001)(Deals among other things, with water quality, water and sanitation services, and the disposal of effluent and other objectionable substance); 'General Authorisations in terms of Section 39' *Government Gazette* 20526, GN 1191 (8 October 1999) revised in *Government Gazette* 26187, GN 398 (26 March 2004) (Authorising the use of water resources without need of a license and setting 'wastewater limit values' for the discharge of wastewater into water sources); and 'Establishment of a Pricing Strategy for Water Use Charges in Terms of Section 56(1) of the National Water Act 36 of 1998' *Government Gazette* 20615, GN 1353 (12 November 1999).

225 Water Services Act s 21(1)(b).

226 Water Services Act s 9(1).

227 Water Services Act ss 10(1) and (2).

228 K Tissington, M Dettmann, M Langford, J Dugard & S Conteh *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (2008) available at [http://www.cohre.org/sites/default/files/water\\_services\\_fault\\_lines\\_sa\\_nov08.pdf](http://www.cohre.org/sites/default/files/water_services_fault_lines_sa_nov08.pdf) (accessed on 13 May 2011) 4-5 and 49.

national, provincial and local government is a source of inequality and administrative inefficiency. While water and sanitation services are local government matters, for example, the functional areas of healthcare and housing are matters of national and provincial legislative competence. The close conceptual link between the rights to health, housing and water is thus not mirrored

in the regulatory and administrative scheme through which water needs are and are not met in South Africa.<sup>229</sup>

The collaborative relationship between national, provincial and local governments in the provision of municipal services is reinforced by FC s 154(1). The section requires national and provincial governments, by legislative and other means, to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions' In at least one case, the national government has provided significant financial assistance to a municipality unable to effectively manage its wastewater treatment facilities. The Emfuleni municipality, responsible for numerous sewage spills into the Vaal River near Parys in the Free State between 2005 and 2009, was allocated R130 million by the national Minister of Water Affairs for the upgrade of facilities and staff.<sup>230</sup>

Further, FC s 155(7) requires the national and provincial governments to monitor the performance of local government structures in fulfilling their constitutional obligations and exercising their functions.<sup>231</sup> In the same vein, s 62(1) of the Water Services Act mandates national and provincial government oversight of the performance of all water services institutions.<sup>232</sup> The national government maintains fairly comprehensive monitoring programmes in respect of water service delivery

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229 Tissington et al (supra) at 17 and 41.

230 J Tempelhoff 'Civil Society and Sanitation Hydropolitics: A Case Study of South Africa's Vaal River Barrage' (2009) 34 *Physics and Chemistry of the Earth* 164, 170. See also *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*'). (The Constitutional Court noted that the national government and provincial executive in Gauteng had agreed to make an amount of R1.1 million available to the Ekurhuleni local government in order to increase access to chemical toilets in informal settlements. Ibid at para 36. The SCA has held, however, that FC s 139, which empowers provincial governments to intervene in local government matters to ensure that local governments are able to meet executive obligations in terms of the Constitution or legislation, does not impose a duty on provincial (or national) government to provide financial assistance when a municipality finds itself unable to cover its debts. *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union & Others* 2002 (1) SA 76 (SCA)).

231 FC s 155(7) provides:

The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

232 Water Services Act s 62(1) provides:

Monitoring of water services institutions

(1) The Minister and any relevant Province must monitor the performance of every water services institution in order to ensure-

(a) compliance with all applicable national standards prescribed under this Act;

and water resource management. The 'Blue Drop' system is a monitoring scheme designed to assess the quality of drinking water provided by water service authorities across the country. The 2010 Blue Drop Report describes the Blue

Drop reporting process as part of a drinking water quality regulation programme with the objective of 'ensuring the improvement of tap water quality by means of compliance monitoring.'<sup>233</sup>

Monitoring, however, does not always lead to action. In a recent 'Green Drop' report by the Department of Water Affairs on the quality of the nation's sewage treatment plants, fewer than half were found to score 'better than 50% in measurement against the stringent criteria set'. Only slightly more than half of the country's plants were even assessed, since many plants 'were not sufficiently confident in their levels of competence to be subjected to assessments', or simply did not respond to calls for assessment.<sup>234</sup> Water services authorities constitute one of the biggest groups of polluters of the country's water, and it would appear that even where water service authorities are identified as polluters, little action is taken against them. South Africa's situation is not uncommon. In the US, more than 9400 out of 25000 sewage systems have violated water laws by dumping raw or insufficiently treated sewage into rivers and other water sources. And yet, fewer than one in five of these US sewage treatment authorities is ever sanctioned in any way for its violations of the law.<sup>235</sup> In the US, the reluctance to prosecute organs of state is often put down to a desire to avoid 'political problems'<sup>236</sup> and the obligations of 'co-operative federalism' that animate the US Clean Water Act.<sup>237</sup> The South African Constitution, for its part, establishes a set of principles of 'co-operative government and intergovernmental relations', which include the obligation for organs of state to avoid legal proceedings against one another and make all

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(b) compliance with all norms and standards for tariffs prescribed under this Act; and

(c) compliance with every applicable development plan, policy statement or business plan adopted in terms of this Act.

(2) Every water services institution must-

(a) furnish such information as may be required by the Minister after consultation with the Minister for Provincial Affairs and Constitutional Development; and

(b) allow the Minister access to its books, records and physical assets to the extent necessary for the Minister to carry out the monitoring functions contemplated in subsection (1).

233 Department of Water Affairs *Blue Drop Report 2010: South African Drinking Water Quality Performance Management* available at [www.dwa.gov.za/dir\\_ws/DWQR/subscr/ViewNewsDoc.asp?FileID=73](http://www.dwa.gov.za/dir_ws/DWQR/subscr/ViewNewsDoc.asp?FileID=73) (accessed on 14 April 2011) 1.

234 Department of Water Affairs *Green Drop Report 2009: South African Waste Water Quality Management Performance* available at <http://www.dwa.gov.za/Documents/GreenDropReport.pdf> (accessed on 12 April 2011).

235 C Duhigg 'As Sewers Fill, Waste Poisons Waterways' *New York Times* (23 November 2009).

236 See statements of environmental advocacy group Riverkeeper, quoted by Duhigg *ibid.*

237 R Kundis-Craig *The Clean Water Act and the Constitution* (2009) Chapter 1.

reasonable efforts to resolve disputes using the 'mechanisms and procedures established for that purpose'.<sup>238</sup> The apparent injunction to avoid confrontation in these provisions has led some commentators to blame them for the failure of national and provincial governments to take action against municipalities in persistent violation of their obligations under the National Water Act.<sup>239</sup>

The legislative and constitutional framework envisages the national government both as a monitor and a regulator of the water services functions of local government. Unfortunately, during the first decade of the Final Constitution (with its scheme of cooperative government), the national government largely

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failed to play its part as regulator. In recent years, however, it has begun to take a more active role. Between 2006 and 2008 the Department of Water Affairs ('DWA') developed a National Water Services Regulation Strategy for ensuring compliance with water law and policy at all levels of government. To this end, DWA operates a Compliance, Monitoring and Enforcement Directorate, for a time known as the 'Blue Scorpions', mandated, as its name suggests, to monitor and to enforce compliance with water legislation. The Directorate uses four legal instruments against offenders: its starts with notices known as 'pre-directives' and injunctions in the form of directives, and ends with cases in the water tribunal and criminal prosecutions in normal courts of law. In its August 2010 report to Parliament, the Directorate broke down offenders into the following categories: mines; agriculture; industry; water services authorities; and others. In the year up until June 2010, water services authorities had been issued with 86 out of 264 pre-directives, 23 out of 97 directives, had appeared in one out of six cases before the water tribunal, and faced six out of 23 criminal prosecutions.<sup>240</sup>

Along the same lines, the draft National Water Services Regulation Strategy anticipates that the DWA will have the power to reassign water services functions to other departments or spheres of government if major problems arise, or to intervene directly in service delivery in cases of gross failure or where lives or the environment are at risk.<sup>241</sup> This approach seems consistent with the provisions in the Final Constitution that allow for the assumption of responsibility for the fulfilment of constitutional obligations by different spheres of government. FC s 139 empowers provincial executives to intervene in municipal affairs if a municipality 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'.<sup>242</sup> The powers of intervention set out in the Constitution are not exhaustive, but they

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238 FC ss 41(1)(h)(vi) and 41(3). The preamble to the Water Services Act states that 'in striving to provide water supply services and sanitation services, all spheres of Government must observe and adhere to the principles of co-operative government'. See also S Woolman & T Roux 'Cooperative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

239 Tempelhoff (supra) at 171; J Tempelhoff, V Munnik & M Viljoen 'The Vaal River Barrage, South Africa's Hardest Working Water Way: An Historical Contemplation' (2007) 3 *TD: The Journal for Transdisciplinary Research in Southern Africa* 107, 130.

240 'Regulation, Compliance Monitoring and Enforcement in the Water Sector' briefing to Parliament's Portfolio Committee on Water and Environmental Affairs (11 August 2010) available from the Parliamentary Monitoring Group website at <http://www.pmg.org.za/report/20100811-departemnt-water-affairson-blue-scorpions-setting-compliance-and-enfo> (accessed on 27 September 2010).

241 Tissington et al (supra) at 16.

include the assumption of responsibility for the obligation in question and the dissolution of the municipal council and the appointment of an administrator. The national government has a similar power of intervention in respect of provincial government affairs<sup>243</sup>

We offer two brief comments about the constitutionality of this strategy: First, it is unclear as to whether a provincial government or the national government is constitutionally entitled to intervene in matters for which local government bears executive authority. These matters are listed in Part B of Schedule 4 to the Final Constitution, and they include '[w]ater and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems'. It makes no sense, however, to read FC s 139 to mean that the provincial government may intervene only in those functional areas over which the local governments enjoy no executive authority, because, obviously, local government has no executive obligations within the meaning of FC s 139 in those functional areas. Nevertheless, the subject matter is important when considering the constitutional validity of a FC s 139 intervention. *City of Cape Town v Premier, Western Cape & Others* concerned the lawfulness of the Western Cape Premier's appointment of a commission of inquiry into the affairs of the Cape Town local government. The Cape High Court held that the lawfulness of the Premier's action depended on whether the subject matter of the abortive commission of inquiry was such that a FC s 139 intervention could rationally result from the commission's findings.<sup>244</sup> The implication here is that FC s 139 interventions are limited to certain subject matters, and that the validity of a FC s 139 intervention will rest on the existence of a rational connection between the purpose and the subject matter of the intervention. Since local governments enjoy executive authority only in respect of the matters listed in Part B of Schedule 4 — read with FC s 156(1)(a) — and any matters assigned to them by national or provincial legislation in terms of FC s 156(1)(b), it is reasonable to conclude that the

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242 FC s 139(1).

243 FC s 100. Provincial governments have intervened far more readily in local government affairs than has the national government in provincial affairs. See generally C Murray & Y Hoffman-Wanderer 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) 18 *Stellenbosch Law Review* 7, and Y Hoffman-Wanderer & C Murray 'Suspension and Dissolution of Municipal Councils under section 139 of the Constitution' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 141. The first cases in which a province sought to dissolve a municipal council entirely, in the North West municipality of Lekwa-Teemane, did not arise until 2004. The Lekwa-Teemane municipality in that case was crippled by financial instability and an inability to meet many of its service-delivery obligations. One of its problems was an outstanding account with the DWA for unpaid water bills in the amount of R11.7 million, which had led DWA to contemplate the reduction of water supply to the municipality. 'Report of the ad hoc Committee on Intervention in the Lekwa-Teemane Local Municipality in terms of section 139(1)(c) of the Constitution' Proceedings of the National Council of Provinces (11 February 2004) 114ff. The National Council of Provinces did not approve the province's request to dissolve the council and assume its functions itself in terms of FC s 139(1)(c), with the result that the province intervened only in terms of FC s 139(1)(b) to assume responsibility for certain local government obligations. 'Second Report of the ad hoc Committee on Intervention in the Lekwa-Teemane Local Municipality in terms of section 139(1)(c) of the Constitution' Proceedings of the National Council of Provinces (4 March 2004) 114ff). The national Department of Basic Education recently announced its intention to intervene in the Eastern Cape in terms of FC s 100(1)(b) and assume responsibility for constitutional and legislative obligations in the field of education. *Statement to the National Assembly on the Eastern Cape Education Department Intervention by Minister of Basic Education Angie Motshekga* (16 March 2011).

244 2008 (6) SA 345 (C) at para 89.



provincial government retains a right of intervention, in terms of FC s 139, only in respect of those subject matters over which local government has executive authority. The provinces therefore retain a right to intervene in, and if necessary assume responsibility for, water and sanitation services at the local level.

Second, one might suspect that the assumption by national government of a local government's water service obligations in terms of the National Water Services Regulation Strategy infringes the provincial right of intervention in terms of FC s 139. Indeed, FC s 100 provides only for national intervention in provincial executive affairs, not in local government matters. The authority for the national government to intervene in this way, however, is founded on FC s 139(7). FC s 139(7) provides that if a provincial government is unable to or chooses not to exercise the powers of intervention set out in the rest of FC s 139, 'the national executive must intervene... in the stead of the relevant provincial executive'.

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### **(b) The constitutional obligation to respect, protect, promote and fulfil rights**

All spheres of governments have obligations with respect to the right of access to water. The question that arises is whether all three spheres of government are equally burdened by the obligations to respect, protect, promote and fulfil the right to have access to water. The duty to fulfil may be different from the other three duties. According to Jaap de Visser and others, the duty to fulfil is onerous: 'local government's hands might be tied by its [limited] constitutional mandate' so it cannot take 'legislative, administrative, budgetary and judicial or other similar measures to fulfil these rights'.<sup>245</sup> However, municipalities would still be bound to respect, protect and promote the right to water.<sup>246</sup> The flip-side of this reasoning is that national and provincial governments are primarily responsible for the duty to fulfil the right of access to water through legislation, budgetary allocation and policies.

In practice, it is not possible to arrive at a clear-cut apportionment of the four duties among the three spheres of government; the determination of which sphere of government is responsible for the failure to comply with any of these duties will depend on the facts of each case. A municipality may be bound by the duty to fulfil the right just as the other two spheres of government may be. Municipalities design policies or make budgetary allocations aimed at implementing their own goals, and the legislation promulgated or policies adopted by national or provincial governments. Municipalities are essentially the implementation arm of the national and provincial governments. They have the constitutional duty to provide municipal services to communities in a sustainable manner.<sup>247</sup>

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245 J de Visser, E Cottle & J Mettler 'Realising the Right of Access to Water: Pipedream or Watershed' (2003) 7(1) *Law, Democracy & Development* 27, 29.

246 *Ibid.*

247 The Municipal Structures Act 117 of 1998 provides that a municipal council must annually review the needs of the community, its priorities to meet those needs, its organizational and delivery mechanisms for meeting those needs, and its overall performance in achieving the objects of FC s 152. Similarly, the Local Government: Municipal Systems Act 32 of 2000 ('Municipal Systems Act') requires municipalities to 'give effect to the provisions of the Constitution and . . . ensure that all members of the local community have access to at least the minimum level of basic municipal services'. Municipal Systems Act s 73(1)(c). 'Basic municipal service' means 'a municipal service

On the other hand, the obligations of national and provincial governments extend beyond the duty to fulfil. For example, a simple case of disconnection of water by a municipality may flow directly or indirectly from water policies adopted at the national or provincial level. In such an instance, it may be easy to isolate the local authority as a possible violator of the duty to respect the right to water while ignoring the responsibilities of national and provincial governments pertaining to the adoption, through legislation and policies, of protective measures against such matters as arbitrary disconnections of water services.

The upshot of this discussion is that all three spheres of government have obligations in relation to the right of access to water. They are all enjoined to respect, protect, promote and fulfil this right. While local government operates

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at the contact point with communities and, as such, is primarily obligated to provide municipal services to communities, it is important not to ignore the linkages between this responsibility and those of national and provincial governments. As was emphasized in *Grootboom*, measures aimed at realising socio-economic rights must be comprehensive and well-coordinated in the sense that they must 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available'.<sup>248</sup> Comprehensiveness and coordination are the hallmarks of cooperative government and *conditiones sine qua non* for the effective realisation of the right to water.<sup>249</sup>

As the roles in relation to the provision of water of national, provincial and local governments are closely intertwined, so are the functions of various government departments. DWA (formerly the Department of Water Affairs and Forestry) is the principal organ responsible for water services. But, as noted earlier, water is a cross-cutting issue which transcends departmental boundaries. Other government departments dealing with the environment, housing, land, and industrial development are also directly and indirectly responsible for water services. For the state to comply with its obligations under the Constitution, it must put in place and implement legislation and policies that focus both on water directly and on other services that have implications for access to water. These policies must be coherent and comprehensive so that everyone is guaranteed access to water.

### (c) Respect

The duty to respect creates a buffer between the state and the individual: it insulates individuals from state interference with their existing access to water. The state can violate this duty through, for example, limiting or cutting off access to water, or destroying water infrastructure and pollution.<sup>250</sup>

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that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'. Municipal Systems Act s 1.

248 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 39.

249 Principles of cooperative government are laid down in Chapter 3 of the Final Constitution and include the principle that all spheres of government should provide 'effective, transparent, accountable and coherent government for the Republic as a whole'. FC s 41(1)(c). See, generally, S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

## (i) Disconnections

As Michael Kidd has argued,<sup>251</sup> disconnection of existing access to water constitutes a prima facie limitation of the right of access to water. The Constitutional Court has recognised that rights in the Bill of Rights impose negative duties on the state, in the sense that any measure that deprives a person of existing access to, for example, adequate housing constitutes an infringement of the right to have access to adequate housing.<sup>252</sup> In South Africa, due in part to the implementation

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of commercialisation principles, disconnections of water supply have become a common occurrence as a means of enforcing payment for water services.<sup>253</sup> Are these disconnections of water for personal and domestic use constitutional? This question is particularly important because, as we have noted above, s 3(1) of the Water Services Act guarantees everyone the right of access to 'basic water supply and basic sanitation'. The Act defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.<sup>254</sup> The regulations promulgated in terms of this provision effectively establish a minimum quantity of water, and minimum standards of access to water, that the state has committed to providing, apparently regardless of the availability of resources.

The Water Services Act restricts the right of a service provider to discontinue water services on any ground. According to s 4(3)(a) of this Act, service providers<sup>255</sup> have the obligation to adopt procedures for the limitation or discontinuance of water services that are fair and equitable. Furthermore, these procedures must:

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250 CESCR General Comment 15: The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003) ('General Comment 15') at para 21.

251 M Kidd 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water' (2004) 20 *SAJHR* 119.

252 *Jaftha v Schoemann & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 34.

253 For example, it has been alleged that about 800-1000 disconnections per day were taking place in early 2003 in Durban affecting about 25 000 people in a week. Another study has revealed that between 1999 and 2001, 159 886 households experienced water cut-offs on grounds of non-payment in Cape Town and Tygerberg. See, for example, A Loftus "'Free water" as Commodity: The Paradox of Durban's Water Service Transformations' in D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 189, 194; L Smith 'The Murky Waters of Second Wave Neoliberalism: Corporatisation as a Service Delivery Model in Cape Town' in McDonald & Ruiters (supra) at 168, 180.

254 Water Services Act s 1(iii).

255 In terms of Water Services Act s 1(xxiii), 'water services provider' means 'any person who provides water services to consumers or to another water services institution but does not include a water services intermediary.' The latter means 'any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract'. See Water Services Act s 1 (xxii).

- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless —
  - (i) other consumers would be prejudiced;
  - (ii) there is an emergency situation; or
  - (iii) the consumer has interfered with a limited or discontinued service; and
- (c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water service authority, that he or she is unable to pay for basic services.<sup>256</sup>

According to these provisions, a disconnection of water service for any reason must accord with the prescribed minimum procedural fairness guarantees of notice and the right to be heard. In *Joseph & Others v The City of Johannesburg & Others*, the Constitutional Court commented on the need for procedural fairness when electricity supplies are disconnected.<sup>257</sup> It held that where people are 'already receiving a service as a matter of right', the service provider is obliged to follow

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fair procedures before terminating those services.<sup>258</sup> *Joseph*, as has been argued elsewhere, appears to follow a constitutional doctrine of legitimate expectations.<sup>259</sup>

Significantly, a water service provider cannot disconnect water supply where the consumer satisfies the relevant service provider that he or she is unable to pay. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,<sup>260</sup> Budlender AJ held that the effect of these provisions when read in the light of FC ss 27(1) and 7(2) is that disconnection of an existing water supply to consumers by a local authority is a *prima facie* breach of its constitutional duty to respect the right of existing access to water. These legislative restrictions are critical to ensuring that poor communities have continued access to water services.

Similarly in *Highveldrige Residents Concerned Party v Highveldridge Transitional Local Council & Others*, the local authority was directed to reinstate residents' water supply as a form of interim relief.<sup>261</sup> While the judgment primarily deals with the *locus standi* of the applicant, the Court made an assessment of the balance of convenience. It reasoned that any potential pecuniary losses of the respondents could not outweigh the human need and suffering that would occur due to the lack

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256 Water Services Act s 4(3).

257 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC), [2009] ZACC 30 ('*Joseph*').

258 *Joseph* (supra) at para 47.

259 See C Sprague & S Woolman 'Moral Luck: Exploiting South Africa's Policy Environment to Produce a Sustainable National Antiretroviral Treatment Programme' (2006) 22 *SAJHR* 337 (Discussing *Van Biljoen v Minister of Correctional Services* 1997 (4) SA 441 (C) in which the High Court found that two prisoners with HIV/AIDS previously on ARVs in penal institutions had a legitimate expectation to receive ART while incarcerated.)

260 2002 (6) BCLR 625 (W).

261 High Court (Transvaal Provincial Division) Case No 28521/2001 (17 May 2002).

of fresh water. It relied for that conclusion on both FC s 27 and the rights of children to adequate nutrition in FC s 28.<sup>262</sup> It is clear that section 4(3)(c) of the Water Services Act imposes the onus on the consumer to prove that he or she is unable to pay for basic services. A trickier question is how proof 'to the satisfaction of the relevant service authority' should be interpreted. In the past, such a phrase was interpreted as conferring wide discretion on the authorities. As long as they proved that they were satisfied about the existence of the facts on which the opinion was based, they could not be faulted even if, objectively speaking, the information before them could not have justified the opinion they reached.<sup>263</sup> In the new constitutional order, the Constitutional Court has expressed disquiet against the grant of unguarded and broad discretionary powers because the exercise of such powers comes with a propensity to infringe constitutional rights.<sup>264</sup> In the present case, to leave the determination of who is unable to pay solely within the discretion of a service provider would render

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the protection of s 4(3)(c) nugatory. Inability to pay should be determined by an objective standard rather than a subjective standard.

How much protection, it may be asked, does s 4(3)(c) of the Water Service Act really offer to those that are unable to pay for basic services? An answer to this question was attempted in *Manqele v Durban Transitional Metropolitan Council*.<sup>265</sup> The applicant was an unemployed 35 year-old-woman who resided, with seven children, in a flat owned by the respondent. Water supply to her flat was disconnected by the respondent due to non-payment for the service. In her application to have the water reconnected, she relied, among other legal provisions,<sup>266</sup> on her right under s 4(3)(c) to have continued access to water despite her inability to pay. However, the judge responded that since the applicant had used more water than that available under the respondent's free water policy, she could not rely on the protection under this section.<sup>267</sup> According to the Court:

The applicant chose however not to limit herself to the water supply provided to her free of charge by the respondent, but to consume additional quantities of water in

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262 For more on this aspect of FC s 28, see A Friedman, A Pantazis & A Skelton 'Children's Rights' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) §47.4.

263 There is a rich, if odious, body of judicial opinion supporting this point in South Africa's security legislation cases. See, example, *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A).

264 See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8; *Janse van Rensburg NO v Minister of Trade & Industry NO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC), [2000] ZACC 18. For a more detailed discussion on subjective phrases, see C Hoexter *Administrative Law in South Africa* (2007) 265-271.

265 [2002] 2 All SA 39 (D).

266 The applicant also relied on the right to basic water supply in Water Services Act s 3. As the regulations defining the extent of this right had not yet been promulgated, Niles Duner J held that this section was not justiciable. This holding is problematic simply because the right to water is itself a justiciable right under the Constitution. The failure to promulgate the regulations itself should have been considered as a violation of the right to water under the Act as read with FC s 27(1)(b).

respect of which she has an obligation to pay... . This in my view, takes the applicant outside the ambit of being a person contemplated by section 4(3)(c).

The judgment thus holds that disconnections for non-payment are acceptable where consumers use more water than the relevant water services provider has undertaken or is obliged to provide for free. It is unclear whether, on this view, disconnection for non-payment would result in consumers being denied access to, or even the basic quantity of, free water. Properly constructed, then, *Manqeke* holds that disconnections for non-payment for use of amounts over and above the allotted amount are acceptable so long as people continue to have access to the amount of water supplied for free by the relevant water services provider. The holding may seem tortured — but it retains a certain consistency. End users are entitled to a certain amount of water per month free of charge. After use of their free water, they remain responsible for payment of the remainder. However, disconnection for repayment of the remainder ought not to result in the denial of their monthly free allotments.

The Constitutional Court approved of this approach in *Mazibuko*. O'Regan J held that the automatic disconnection of water supplied from a prepaid metered system or a yard standpipe after six kilolitres per month was beyond constitutional reproach. The Court concluded that in circumstances where the water supply has been cut off because the basic, free, quantity of six kilolitres has been exhausted, but will be reconnected at the beginning of the following month, it cannot be said that a 'limitation or discontinuation of water services' in terms of s 4(3) of the

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Water Services Act has occurred. It is a 'temporary suspension in supply' to which section 4(3) does not apply.<sup>268</sup>

In sum, people who are unable to pay for water are entitled to no more than the six kilolitres of free water per month per household. If that was what Parliament had intended, however, it would have had no reason to include s 4(3)(c) in the Water Services Act. Section 3 of the Water Services Act provides that everyone has a right of access to a basic water supply, while s 1(iii) defines 'basic water supply' to mean the 'prescribed minimum standard of water supply services necessary . . . to support life and personal hygiene'. The regulations in turn prescribe the minimum basic water supply as six kilolitres a month per household. Together, these provisions suffice to ensure that people have access to a minimum basic water supply. The *Mazibuko/Manqeke* gloss on FC s 27 and the Water Services Act holds that where the basic water supply is provided free of charge, WSA s 4(3)(c) — which deals with denial of basic water supply for non-payment — does not apply. Section 4(3)(c), on the *Mazibuko* and *Manqeke* approach, can apply only in situations where the basic water supply is not supplied for free. Since February 2001, however, the South African government has been providing basic water for free in terms of the free basic water policy.<sup>269</sup> While it is true that the government is under no constitutional obligation to

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267 The respondent's policy later received national legislative approval under the Regulations to the Water Services Act referred to above.

268 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*') at paras 119-124.

269 'Free Basic Water Implementation Strategy (version 2)' (2002) available at <http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf> (accessed on 17 April 2011).

provide free basic water,<sup>270</sup> in the context of the prevailing policy landscape, the courts have altered the meaning of s 4(3)(c) of the Water Services Act from disconnection to temporary suspension. If that outcome is what the Court intended, then it should make such a dramatic holding, with all its unfortunate consequences, clear to the reader and to the people of Phiri and other locales.

A policy decision by cabinet and the subsequent implementation of that policy cannot be allowed to alter the meaning of a legislative provision.<sup>271</sup> And it remains true that s 4(3)(c) was designed to protect the water rights of abjectly poor people.

It is for this reason that we propose an alternative interpretation of the provision. Our starting point is the recognition that what is prescribed as a basic water supply in the regulations is the minimum, not the maximum, amount of basic water. The provision of the minimum amount of water does not exhaust the state's obligations under s 3 of the Water Services Act as read with FC s 27(1)(b)'s obligation to progressively realise the right to water for those who are unable to pay for it. Section 4(3)(c) states explicitly that the discontinuation of water services for non-payment must not result in the denial of access to basic water. To the

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extent that the paragraph protects only that minimum quantity of basic water, and not any amount of water in excess of that minimum, the provision is inconsistent with the constitutional and policy scheme that sets a minimum, but not a maximum amount, of basic water. The paragraph should rather be read to ensure that no discontinuation (as opposed to suspension) of water services occurs for reasons of non-payment, regardless of how much water is used, in circumstances where people are genuinely unable to pay for water services. It therefore may be reasonable to set some form of maximum limit for persons who cannot pay. All residents face some (soft) limits on high water usage: such limits generally take the form of higher prices.

Last, but not least, it may be asked whether s 4(3)(c) of the Water Services Act can be relied upon in connection with premises that are not private dwellings. A comparison can be made between this section and s 63A of the British Water Industry Act 1991. The British Act makes it an offence for a water services provider to use a limiting device with the intention of enforcing payment of charges due in respect of the supply of water for a list of specified premises: private dwelling houses, children's homes, residential care homes, prisons and detention centres, schools and premises used for children's day care. Although similar provisions are absent from the Water Services Act, Michael Kidd has argued, quite persuasively, that it cannot be deemed 'equitable and fair' in terms of s 3(a) of the Act to discontinue water supply for non-payment from such premises as schools.<sup>272</sup>

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270 *Mazibuko* (supra) at para 85. For further discussion on this point, see § 56B.4(f)(ii) below.

271 But see the approach taken to the principle of constitutional subsidiarity in *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*') (Rights to receive basic service were held to depend on the provisions of chapters 12 and 13 of the National Housing Code — a policy document developed in terms of the National Housing Act 107 of 1997.) See also D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591 (Contends that this approach has the result of allowing 'a policy document to overrule a legislative obligation' to provide basic sanitation services in terms of the National Water Act and its regulations.).

272 M Kidd 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water' (2004) 20 *SAJHR* 119, 136.

Alternatively, he has argued that in the case of schools, learners are innocent and not direct customers of the water service provider. Consequently, they should be regarded as being unable to pay for the water supply to the private service provider and therefore deserving of protection under s 4(3)(c). Kidd's interpretation would mean that premises like schools and prisons are protected from disconnections where the owners are unable to pay for water services. The Courts' approach to s 4(3)(c), with its manifest difficulties, is unlikely to leave vulnerable classes of persons — learners and prisoners — clearly protected by rights enshrined in FC s 29 and FC 35 vulnerable to disconnection.

## (ii) Prepaid meters

Due to the prevalence of non-payment for water services, particularly in black communities, municipalities have increasingly resorted to using prepaid meters as a credit control mechanism in South Africa. These meters have the effect of discontinuing a service automatically after the credit expires. During the 1990s, the use of prepaid meters was opposed in the United Kingdom both by consumers and municipalities concerned about the health risks associated with water cut-offs.

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Litigation that sought to have prepaid meters declared unlawful was ultimately successful:<sup>273</sup> the use of prepaid water meters was prohibited by legislation in 1999.<sup>274</sup>

In the English litigation, the Queen's Bench held automatic cut-offs of the water supply upon the exhaustion of credit in a prepaid meter to be inconsistent with the statutory requirement that notice be given to the social services department —

273 *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB). See, generally, M Drakeford 'Water Regulation and Prepayment Meters' (1998) 25 *Journal of Law and Society* 588; J Dugard 'Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 SAJHR 593; and E Harvey 'Managing the Poor by Remote Control: Johannesburg's Experiment with Pre-Paid Water' in D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatisation in South Africa* (2005) 120.

274 The Water Industry Act of 1991 was amended in 1999. The new section 63A, inserted by section 2 of the Water Industry Act of 1999 provides:

Prohibition of use of limiting devices.

- (1) A water undertaker shall be guilty of an offence under this section if it uses a limiting device in relation to any premises specified in Schedule 4A to this Act, with the intention of enforcing payment of charges which are or may become due to the undertaker in respect of the supply of water to the premises.
- (2) For the purposes of this section "a limiting device", in relation to any premises, means any device or apparatus which—
  - (a) is fitted to any pipe by which water is supplied to the premises or a part of the premises, whether that pipe belongs to the undertaker or to any other person, and
  - (b) is designed to restrict the use which may be made of water supplied to the premises by the undertaker.
- (3) An undertaker does not commit an offence under this section by disconnecting a service pipe to any premises or otherwise cutting off a supply of water to the premises.
- (4) An undertaker guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.



which can indefinitely delay disconnection — and the requirement that water consumers be given seven days' notice of disconnection and an opportunity to contact and make representations to the relevant social services department. In the South African context, it would seem that prepaid meters circumvent the procedures for discontinuing water service set out in s 4(3) of the Water Services Act. The argument that the installation and operation of prepaid meters violates both the Act and FC s 27(1)(b) was directly before the Constitutional Court in *Mazibuko*.

The Court's response was vastly different to the Queen's Bench's response in *Director of Water Services*.<sup>275</sup> Leaving aside the question of whether a cut-off amounts to an administrative action for the purposes of the Promotion of Administrative Justice Act, s 4(3)(b) of the Water Services Act in any case requires procedures for the disconnection of water services to 'provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations'. The Court considered the meaning of this provision:

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Could section 4(3) mean that every time a water supply, provided through a pre-paid meter is about to be suspended because the credit purchased for the water supply is at its end, reasonable notice and an opportunity to be heard must be provided to the relevant customer by the municipality? This would, in my view, have a result that borders on the absurd. It would require the municipality to give advance notice and an opportunity to be heard, possibly several times a month or more to every person who has a pre-paid meter installed. For there is no reason why the reasonable notice should only apply when the suspension of the service arises because the basic water supply has been exhausted. On the applicants' argument it would arise every time the pre-paid water allowance has been consumed and it is time to purchase a further allocation.<sup>276</sup>

To require such onerous procedures, the Court concluded, would be administratively untenable, and for that reason should not be required.<sup>277</sup> In this way, the Court has essentially limited any rights of procedural fairness by seeking to justify their limitation against the difficulty of respecting those rights. To say that rights are too difficult to respect, however, is an unacceptable excuse for abrogating them. The

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275 The Final Constitution does not oblige courts to consider foreign law when interpreting the rights in the Bill of Rights, although it may do so. FC s 39(1)(c). Moreover, it does not appear from the Heads of Argument that either the applicants or the amicus curiae cited the case to the Court. Nevertheless, the point here is not to berate the Court for its failure to refer to foreign law, but for the poverty of its logical and intellectual approach in the face of a patently better one.

276 *Mazibuko* (supra) at para 122.

277 Ibid at para 123. Consider the US Supreme Court's response to the debate around whether statutory welfare and disability rights can be terminated without prior notice or hearing in the two cases of *Goldberg v Kelly* 397 US 254 (1970) and *Mathews v Eldridge* 424 US 319 (1976). Having held in *Goldberg* that welfare rights constitute property for the purposes of the 5th and 14th Amendments' protections of due process, the Supreme Court considered in *Mathews* the administrative burden the requirements of due process place on officials. It held that any burden placed on the bureaucratic machinery of state welfare support has to be balanced against the urgency of the need in which welfare or disability claimants find themselves. The urgency of need is a theme the Constitutional Court has embraced in its earlier judgments on socio-economic rights, notably *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19; *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)*, 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) [2001] ZACC 19; and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC), [2009] ZACC 16. It is odd, then, that the Court shows so little willingness to take the urgency of the need for water into account, or, as in *Mathews*, to balance the administrative burden against the urgent need for water.

English court in *Director of Water Services* was faced with precisely the same conundrum. Its response to the situation in which a technology of water reticulation and a set of rights are incompatible was to reject the technology of water reticulation — that is, prepaid meters — rather than to reject the rights. If the only way to respect the welfare rights granted by s 4(3) of the Water Services Act is to ban the use of prepaid meters, then so be it. As to whether disconnection can be justified in terms of FC s 27, our socio-economic jurisprudence permits the Court to balance administrative costs and the provision of basic goods. We would argue that 'access to water' constitutes an urgent need for those persons in desperate circumstances, and that the established criteria for reasonableness articulated in *Grootboom* ought to prevent disconnection or suspension.

Finally, the applicants argued that the change in water supply policy from one in which people had been charged a flat rate in the form of a 'deemed consumption tariff' to one involving the installation of prepaid meters amounted to a deprivation of existing rights of access to sufficient water and thus a violation of the negative duty to respect rights.<sup>278</sup> Under the terms of the previous system,

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residents of Phiri in Soweto had paid a flat rate of R68,40 per month for an unlimited amount of water for domestic use. The free basic water policy provides an amount of six kilolitres per month for free, with water in excess of that amount charged for on the basis of a subsidised block tariff. The Court's response to this argument turns on whether or not water supplied using pre-paid meters is more expensive overall for consumers than the old deemed consumption scheme. The flat rate charged under the old scheme was based on a deemed consumption of 20 kilolitres per month. In terms of the new free basic water programme and pre-paid meters, the charge for 20 kilolitres would come to R95,80 per month. This charge is clearly more than the old flat rate of R68,40. However, the Court points out that according to the 2006/2007 tariff for combined water and sanitation services, consumers 'still charged on the deemed consumption tariff will be charged a flat rate of R131,25 for water and sanitation. Thus, the flat rate appears to cost 25 per cent more than the amount charged to pre-paid meter customers.'<sup>279</sup> The Court concluded from this costs comparison 'that the move from the deemed consumption system to the pre-paid metered system with a free allocation of 6 kilolitres per month [does not] constitute a retrogressive step.'<sup>280</sup>

#### **(d) Protect**

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278 *Mazibuko* (supra) at paras 135-136.

279 *Mazibuko* (supra) at para 140.

280 *Ibid* at para 142. Against this conclusion see the argument that the tariff structure implemented by Johannesburg Water, with steeply rising water prices at the lower end of the usage scale after the free water allocation has been exhausted rather than a convex curve with steeper price increases at the 'luxury', high consumption end of the scale, impacts negatively on low-income households and makes water bills unaffordable. P Bond & J Dugard 'The Case of Johannesburg Water: What Really Happened at the Pre-paid "Parish Pump"' (2008) 12 *Law, Democracy and Development* 1, 7; P Bond & J Dugard 'Water, Human Rights and Social Conflict: South African Experiences' (2008) 11(1) *Law, Social Justice and Global Development* 1, 9-11; and J Dugard 'Civic Action and Legal Mobilisation: The Phiri Water Meters Case' in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71, 79-80.

The duty to protect is critical to the realisation of the right to water principally because of the increasing involvement of private actors in the provision of water services. The state can privatise the provision of water services but not its obligations implicit in the right to water.<sup>281</sup> In the context of the privatisation of water, the state remains primarily responsible for regulating private service providers so that they do not deny individuals or groups their right to water.<sup>282</sup>

Water services were previously provided predominantly by state departments. The White Paper on the Transformation of the Public Service 1995 marked a formal transition from the state dominated system of service provision to one in which private service providers are allowed to play a part. Privatisation of water services<sup>283</sup> was given a legal boost by the enactment of the Water Services

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Act in 1997.<sup>284</sup> The form of privatisation tried in a number of municipalities<sup>285</sup> is a management contract. Under this arrangement, operation of the water system is contracted out to a private provider while the system itself is still owned by the government.

### (i) Privatisation

Due partly to the public resistance to privatisation and partly to the failure of these 'pilot' privatisation initiatives to live up to the expectations of greater efficiency,<sup>286</sup> better service quality and enhanced accessibility, the state has now leaned towards corporatisation as a more preferable mode for providing water services.

Corporatisation is a process whereby a government department is turned into a public company with the aim of letting it function as a commercial entity.<sup>287</sup> Ownership, control and management of the assets remain in the hands of the state, but the new entity operates in accordance with business principles. Amendments to the Municipal Systems Act in 2003 have made it more difficult for private service

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281 D Chirwa 'Privatization and Freedom from Poverty' in G van Bueren (ed) *Freedom from Want* (forthcoming 2011).

282 K de Feyter & FG Isa 'Privatization and Human Rights: An Overview' in K de Feyter & FG Isa (eds) *Privatization and Human Rights in the Age of Globalization* (2005) 1, 3-4.

283 Privatisation is used here to refer to the process through which the state involved private actors in the provision of services. It embraces many forms including the total sale of assets, private-public partnerships, management contract, employee buyout and outsourcing.

284 Water Services Act s 11.

285 The delivery of water and sanitation services in three Eastern Cape municipalities — Queenstown, Stutterheim and Fort Beaufort — were the first basic municipal services to be privatised in 1992, 1993 and 1994 respectively. Lyonnaisse Water Southern South Africa (restructured in 1996 as Water and Sanitation Services (WSSA)) was the private actor that won the relevant management contracts. The provision of water services in Nelspruit was in 1999 contracted out to Bi-water, a British based multinational corporation, for 30 years. Again, in 1999, the provision of water and sanitation services in Dolphin Coast and Durban was contracted out to multinational companies SAUR International and Bi-Water respectively. In 2001, management contracts to provide similar services were won by WSSA in respect of Johannesburg.

286 For assessments of the performance of privatisation initiatives in South Africa, see generally D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005).

providers to become involved in water provision through management contracts or outright sale of state assets than was initially planned.<sup>288</sup> Chances for a private service provider to be awarded a contract such as those awarded to BiWater and SAUR International in Dolphin Coast are now rather slim. Thus, contrary to popular assumptions, water is mostly provided by state departments and corporatised entities. Although municipalities still outsource certain services related to water provision, such as meter reading, very few municipalities have contracted the provision of these services to private companies. In *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd & Others*,<sup>289</sup> the case turned in large part on the lack of participation in the awarding of a concession for private

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operation of water services. The municipality was successful in nullifying the 6 year-old contract. However, the municipality did not succeed because it claimed it could no longer afford the high management fees of R400 000 per month being charged by the private contractor. Rather, the High Court found that the municipality itself had not complied with the necessary consultation and public participation requirements in awarding the tender.

While the involvement of private service providers creates peculiar problems relating to their regulation by the state and their accountability to the public,<sup>290</sup> issues pertaining to access to water services are essentially the same whether these services are provided by the state, by private service providers, or jointly. This is so because public providers now use commercial principles in providing water services: full cost recovery measures, ring fencing, removal of subsidies, and the use of harsh credit enforcement mechanisms. We explore below the ramifications that these commercial principles have on the right of access to water services.

## (ii) Farm owners and other landowners

In some circumstances, interference with water supplies should require a court order in advance. If the disconnection, denial or limitation of access to water services or supplies amounts to a constructive eviction — a resident is forced to leave their home as a result — then there is precedent to suggest that disconnection cannot occur without a court order. Under FC s 26(3) an eviction cannot proceed without the

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287 D McDonald 'Privatization and the New Ideologies of Service Delivery' in D McDonald & L Smith (eds) *Privatizing Cape Town: Service Delivery and Policy Reforms since 1996* Municipal Services Project, Occasional Paper Series No 7 (2002) 20.

288 For example, the procedures now require municipalities to involve communities when deciding to involve external delivery mechanisms and concluding agreements with private service providers, to assess different mechanisms before going external and to opt for an external mechanism only where it presents the best chance of achieving the objectives of the providing municipal services that are accessible and equitable. See D Chirwa 'Water Privatisation and Socio-economic Rights in South Africa' (2004) 8(2) *Law, Democracy and Development* 181, 191-192; N Steytler 'Socio-economic Rights and the Process of Privatizing Basic Municipal Services' (2004) 8(2) *Law, Democracy and Development* 157, 169-176.

289 [2001] ZAEHC 3.

290 See, for example, D Chirwa 'Privatization of Water in Southern Africa: A Human Rights Perspective' (2004) 4(2) *African Human Rights Law Journal* 218.

imprimatur of judicial approval. The Land Claims Court, itself, has suggested that severe restrictions on the use of land may amount to an eviction.<sup>291</sup>

The duty to *protect* the rights in the Bill of Rights may require the state to prevent violations of the right of access to sufficient water by third parties.<sup>292</sup> For instance, if a farmer unreasonably and arbitrarily cuts off access to water to lawful occupiers of his property, then the state must act to restore access to sufficient water to the occupiers. Likewise, water services operated by private operators must be sufficiently regulated by the government to ensure that such operations do not interfere with the right to water of other members of the commonweal.

### (e) Promote

The duty to promote is educational in nature. It requires the state to raise awareness among water users about their right to water, including the hygienic use of water, the protection of water sources and sustainable use of water.<sup>293</sup> Indeed, the regulation giving effect to the right to have access to a basic water supply and basic sanitation services contains a requirement that 'appropriate education in respect of effective water use' must be provided.<sup>294</sup>

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The government's duty to promote a right is also a shield against claims arising from other legal provisions or constitutional rights.<sup>295</sup> In *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others*, the right to adequate housing assisted the national government in defending its right to create temporary housing for flood victims in the face of claims by neighbouring residents that property values would fall and their peaceful environment would be disturbed.<sup>296</sup> In the case of water such protection is also buttressed by the property right enshrined in FC s 25(8): 'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination' (Our emphasis).

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291 See *Van der Walt & Others v Lang & Others* Case No 102/98 (LCC); *Dhladhla & Others v Erasmus* Case No 11/98 (LCC).

292 Maastricht Guidelines on violations of Economic, Social and Cultural Rights (1997) at para 6.

293 General Comment 15 (supra) at para 25.

294 Regulation 3(a) of the Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001).

295 See G Budlender 'The Justiciability of the Right to Housing: The South African Experience' in Scott Leckie (ed) *National Perspectives on Housing Rights* (2003) 207-216. In the context of the right of access to sufficient water, the state's duty to *promote* the rights in the Bill of Rights might mean the creation of educational and informational programmes designed to enhance awareness and understanding of the right of access to sufficient water. See CESCR General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights (19th session, 1998) UN doc E/C12/1999/22 at para 3(a). See also *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17 at para 49 (Madala J) ('Perhaps a solution may be to embark upon a massive education campaign to inform the citizens generally.')

296 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19.

## (f) Fulfil

The duty to fulfil, as mentioned earlier, has two elements: the obligation to facilitate the realisation of the right and the obligation to provide the goods guaranteed by the right. The former requires that the state must put in place measures that enable people to have access to the right using their own means. The latter requires the state to provide direct assistance to those who cannot afford water services so that they can have access to these services. This obligation, as will be demonstrated below, has particular relevance to disconnections, pricing for water services and tariff enforcement mechanisms.

### (i) Ensuring affordability

Access to water in South Africa is determined by consumer tariffs that seek to recover the full cost of the service.<sup>297</sup> According to the *White Paper on a National Water Policy for South Africa 1997*, '[t]o promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure development and catchment management activities'. While this policy also stipulates that provision will be made for some or all of these charges to be waived in order to promote equitable access to water for basic human needs, it does not explain how this is to be done. This policy now takes the form of the Water Services Act. The Act requires that the Minister, when prescribing norms and standards in respect of tariffs for water services,

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consider, among other things, the recovery of the costs reasonably associated with the provision of the water services.<sup>298</sup>

'Full cost recovery' means that the tariff for water services must reflect the initial cost of installing the infrastructure (capital cost) and the expenses associated with operating and maintaining the infrastructure (marginal costs).<sup>299</sup> Where water is provided by a private service provider, the cost of providing it is easy to ascertain. By contrast, where water is provided by a public operator, the cost can only be determined if the accounting system for water services is separated from other services. Thus, the Water Services Act expressly provides that '[w]hen performing the functions of a water service provider, a water services authority must manage and account separately for those functions.' This practice is known as 'ring-fencing'. It enables a service provider to eliminate subsidies and cross-subsidies that might have otherwise enabled the service provider to reduce the full cost of providing water services and hence lowering the tariffs.

Unbridled application of the full cost recovery principle may occasion unfairness in the South African context. As Pape and McDonald have argued, white South Africans and the industrial sector benefited enormously from heavily subsidised

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297 S Flynn & D Chirwa 'The Constitutional Implications of Commercialising Water in South Africa' in McDonald & Ruiters (eds) (supra) at 59, 65.

298 Water Services Act s 10(3)(d). Other considerations in s 10(3) include social equity, the need for the return on the capital invested for the provision of water services and the financial sustainability of the water services in the area in question.

299 See also P Bond, G Ruiters & D McDonald 'Water Privatization in Southern Africa: The State of the Debate' (2003) 4(4) *ESR Review* 12.

municipal services during the apartheid era.<sup>300</sup> As the geographical distribution of the people in South Africa still follows predominantly racial patterns, white communities and the industrial sector continue to benefit from reasonably good infrastructure. Most black communities, in contrast with white communities, require new infrastructure for water services. It follows that charging them the full cost of service delivery will result in higher tariffs, thereby perpetuating and reinforcing the effects of past unfair discrimination.<sup>301</sup>

Subsidies can be provided by the state. In *City Council of Pretoria v Walker*,<sup>302</sup> the South African Constitutional Court concluded that cross-subsidisation among consumers and differentiation in tariffs for services is not *per se* unconstitutional.<sup>303</sup> *Walker* concerned a claim of discrimination by a white person living in a predominantly white community that a neighbouring black community was being favoured with respect to tariffs for municipal services. In the black community, flat rates were charged. In the white community, the tariffs were charged according to the

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RS3, 05-11, ch56B-p59

exact amount of services consumed. Langa DCJ held that special measures taken to ensure that disadvantaged communities enjoy access to basic services were necessary.<sup>304</sup> The flat rate was permissible 'while phasing in equality in terms of facilities and resources, during a difficult period of transition'.<sup>305</sup> This holding is consistent with comments made by the CDESCR regarding service pricing. According to the CDESCR:

Any payment for water services must be based on the principle of equity, ensuring that these services whether publicly or privately provided are affordable for all including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.<sup>306</sup>

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300 J Pape & DA McDonald 'Introduction' in DA McDonald & J Pape (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 20-22.

301 It has been shown, for example, that the tariff per litre of water in rural KwaZulu-Natal is multiple times higher than that for the previously advantaged suburbs of Richard's Bay. See E Cottle & H Deedat *The Cholera outbreak: A 2000-2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority areas, uThungulu Region, KwaZulu-Natal* (2002) 79, available at <<ftp://ftp.hst.org.za/pubs/research/cholera.pdf>> (accessed on 31 May 2011).

302 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC), [1998] ZACC 1 ('Walker').

303 The *Walker* Court stated that 'There may be cases where it is not unfair to charge according to different rates for the same services; it seems to me to be inconsistent with the equality jurisprudence developed by this Court to hold that all cross-subsidisation is precluded by sect 8(2) of the 1993 Constitution'. *Ibid* at para 42.

304 However, selective enforcement of payment for tariffs (not forming part of the special measures) was held to be a violation the non-discrimination clause.

305 *Walker* (supra) at para 27.

306 General Comment 15 (supra) at para 27.

Legislation does place limits on the notion of full cost recovery. For example, the Minister, when setting the norms and standards in respect of tariffs for water services is empowered under s 10(1) of the Water Services Act to differentiate among geographical areas, categories of water users or individual water users.<sup>307</sup> Similarly, s 97(1)(c) of the Municipal Systems Act requires credit control and debt collection policies to make provision for indigent debtors. This statutory provision is consistent with its rates and tariff policies and any national policy on indigents.

However, apart from the free water policy discussed below, it is not clear how equity considerations apply in tariff determination. On the contrary, evidence suggests that municipalities tend to use full cost recovery as the overriding yardstick in setting tariffs.<sup>308</sup> Full cost recovery is achieved through the use of prepaid meters and a pricing system for post-paid meters which operates so that after the first block of free water, the charges for the next blocks rise steeply.<sup>309</sup> This practice contradicts the state's commitments under the Constitution, the Water Services Act and the National Water Act. Together, the Constitution and these two acts require the state to structure tariffs for water services so that the poor are not denied access to water.

## (ii) Free water policy

The duty to fulfil the right to water summons the state to provide the means through which poor people can gain access to water. The free water policy is a principal means through which the state has, thus far, provided direct assistance to poor people in accessing water services. To restate: the minimum standard for basic water supply is '25 litres per person per day or 6 kilolitres per household per month' at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household.<sup>310</sup>

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Many writers have argued that this amount of free water is grossly inadequate.<sup>311</sup> These arguments were presented to the Constitutional Court in *Mazibuko*. The trend at the international level suggests that about 50 litres per person per day is the recommended basic amount of water for drinking and sanitation.<sup>312</sup> In addition to challenging the ultimate amount, some have attacked the free water policy on the ground that it has not been implemented uniformly and properly in all municipalities.<sup>313</sup> For example, a case-study of the Ilembe District Municipality undertaken by the South African Human Rights Commission revealed that over

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307 Sec 10(1)(a) of the Water Services Act.

308 See, eg, Cottle & Deedat (supra) at 71-72.

309 Ibid. See also McDonald (supra) at 28.

310 Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001), regulation 3(b).

311 See, eg, J de Visser, E Cotle & J Mettler 'Realising the Right of Access to Water: Pipedream or Watershed (2003) 7(1) *Law, Democracy & Development* 27, 43; C Mbazira 'Privatization and the Right of Access to Sufficient Water in South Africa: The Case of Lukhanji and Amahlati' in J de Visser & C Mbazira (eds) *Water Delivery: Public or Private?* (2006) 57-85.

312 See, eg, P Gleick, 'The Human Right to Water' (1999) 1(5) *Water Policy* 587-503.



40 per cent of the population does not have access to free basic water.<sup>314</sup> It has also been argued that those living in informal structures do not benefit from this policy.<sup>315</sup> Of particular concern is the fact that the current pricing system operates in such a way that after the first block of free water, charges for the next blocks rise sharply.<sup>316</sup> It is likely that this last issue will soon be the subject of constitutional litigation.<sup>317</sup>

In *Mazibuko*, the Constitutional Court made it clear that the state is under no constitutional obligation to provide free water. Referring specifically to the City of Johannesburg, the Court held that 'the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right.'<sup>318</sup> Indeed, in overturning the Supreme Court of Appeal's decision, the Constitutional Court held that the applicants had based their challenge to the policy on the position that the city was under an obligation to provide a certain amount of free water. The SCA had held that since the City's policy had been formulated on the misconception that it was not under an obligation to provide free water to those who could not afford to pay, the policy was materially influenced by an error of law and should be set aside on that basis.<sup>319</sup> The Constitutional Court overturned this finding. In so doing, it affirmed that the City is under no obligation to provide free water in terms of the prescribed minimum basic water supply.<sup>320</sup>

The Supreme Court of Appeal based at least part of its reasoning on s 4(3)(c) of the Water Services Act.<sup>321</sup> Reading this provision alongside the Constitutional Court's dictum generates a couple of thought-provoking observations. The

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section provides that: 'Procedures for the limitation or discontinuation of water services must not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services provider, that he or she is unable to pay for basic services.' In other words,

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313 See S Booysen *The Effect of Privatization and Commercialisation of Water Services on the Right to Water: Grassroots Experiences in Lukhanji and Amahlati* (Community Law Centre, 2004) 53.

314 South African Human Rights Commission *6th Economic and Social Rights Report* (2006) 111.

315 Flynn & Chirwa (*supra*) at 71-73.

316 McDonald (*supra*) at 28.

317 Private communication from lawyers acting for residents in two informal settlements with Malcolm Lanford (3 May 2011).

318 *Mazibuko* (*supra*) at para 85.

319 *Ibid* at para 28.

320 *Ibid* at para 85.

321 *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Eviction as amicus curiae)* 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA) at paras 29-38.

if a person cannot pay for basic water services, providing that person has an existing connection to a water supply and has been receiving basic water services, that person is entitled to continue receiving basic water services, for free. The protection against water cut-off for reasons of non-payment contained in s 4(3)(c) of the Water Services Act effectively establishes a statutory right to receive free basic water services.

It must be noted, however, that this protection applies only against water cut-offs, or the limitation or discontinuation of water services. The statutory right to free basic water thus only applies to people with existing connections to a metered or deemed-consumption water supply. If this is correct, then it establishes a slightly bizarre disparity between poor people with water connections who cannot afford to pay for basic water, and poor people with no connection who cannot afford to pay for that water. Plainly, people with no existing connection to a water supply cannot be charged for water. In terms of the City of Johannesburg's free basic water policy, these individuals and households are people with access to water in terms of 'service level 1'. Service level 1 constitutes access to water from a communal standpipe with unlimited flow no more than 200 metres away from the dwellings in question.

The more pressing point, however, is this: the statutory entitlement to free basic water does not extend to poor people without an individual connection to a water supply. There is no absolute statutory right to free basic water, and poor people without individual connections to a water supply could be required to pay for a basic water supply. Only once a person has an individual connection to a water supply which is capable of being discontinued do they enjoy a right of free access to basic water services — subject to the provision that they cannot pay for the water themselves. The statutory scheme is consequently under-inclusive. It creates a distinction between two classes of people. The distinction is arbitrary because it is entirely conditional on whether they had a pre-existing connection to a municipal water source or not. The Constitutional Court's jurisprudence on reasonableness in the context of socio-economic rights holds that any reasonable measures must take account of those in desperate circumstances or in urgent need of socio-economic resources. The statutory scheme confers a benefit on one class of people who cannot afford to pay for water, while denying that benefit to a class of people whose need for water is arguably more urgent and desperate. For this reason, the statutory plan would appear to be unreasonable within the Constitutional Court's own understanding of FC s 27(2).

### **(g) Equality guarantee**

FC s 27 does not create a directly enforceable set of rights. That is, an individual will not be able to sue the government for immediate relief: unless he or she

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is already in receipt of service or goods in question.<sup>322</sup> However, the rights do require that the government put in place a reasonable plan to effect their progressive implementation. Courts may decide that FC s 27 is not directly enforceable against private parties such as private water service providers.<sup>323</sup>

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322 See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 '*Treatment Action Campaign*' or '*TAC*') at para 39 ('We therefore conclude that FC s 27(1) does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).')

To avoid the difficulties associated with the individual enforcement of socio-economic rights, an alternative argument could be based on FC s 9. The advantage of basing a claim on s 9 is twofold: Private parties are explicitly prohibited from unfairly discriminating and the right is immediately and directly enforceable. Pierre De Vos<sup>324</sup> proffers the following argument for a FC s 9 claim. He first notes that the Constitutional Court has on various occasions affirmed that all the rights in the Bill of Rights are interdependent, interrelated and often mutually supporting.<sup>325</sup> The Court has also accepted that the Constitution embraces a substantive notion of equality, as opposed to a formal understanding of equality.<sup>326</sup> In deciding whether discrimination is 'unfair,' the deciding factor is the impact of the conduct on the complainant. De Vos puts it as follows:

What is required is to take into account the *impact* of the state's action or omission on a specific group with reference to the social and economic context within which the group finds itself. The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find that there was a constitutional duty to pay special attention to the needs of such a group.<sup>327</sup>

He further argues that the factors a court would consider in deciding whether the state's plan in realising socio-economic rights is *reasonable* are comparable to the factors a court would consider when deciding whether *unfair* discrimination occurred. A failure to take into account the structural inequalities in society, or the failure to take into account the impact of particular conduct on particularly vulnerable groups, could in appropriate circumstances amount to 'unfair' discrimination.<sup>328</sup>

A claim based on unfair discrimination, either against the state or a private water supplier, will only succeed if an appropriate 'prohibited ground' is identified. Two possible grounds are socio-economic status and gender. Socio-economic status is not explicitly listed in the Constitution. A court would have to be persuaded

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that such a ground could be read into the list by analogy.<sup>329</sup> Should such an analogy prove successful and should the state or a private water supplier's policy be shown

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323 See *Grootboom* (supra) at para 34; *TAC* (supra) at para 39. The Constitutional Court held that FC s 26(1) and (2) and FC s 27(1) and 27(2) must be read together to identify the scope of the right. FC s 26(2) only obliges the 'state' to take reasonable measures to realise the right and a court that follows a literal interpretation may then decide that if water supply has been privatised, that only the state may be held liable, as only the state is addressed in FC 26(2).

324 P De Vos '*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258.

325 See General Comment 15 (supra) at para 1 ('State parties have to adopt effective measures to realize, *without discrimination*, the right to water, as set out in this general comment') and at para 12(c)(iii) ('Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and fact, *without discrimination* on any of the prohibited grounds.')

326 De Vos (supra) at 267.

327 *Ibid.*

328 *Ibid* at 272.

to disparately and negatively impact on the poor, a claim could be brought by an individual or group of individuals against the state or against the private supplier directly.<sup>330</sup> Similarly, a gender-based discrimination suit could be brought against a private water supplier<sup>331</sup> in cases where it can be demonstrated that its water supply policies impact disproportionately on (rural) women. It goes without saying that exhaustive empirical research would probably have to be undertaken to support either the class or gender based claim.

While courts have been very careful in crafting appropriate remedies in socio-economic rights decisions and have not granted immediate relief to claimants,<sup>332</sup> the same situation should not necessarily apply to a claim based on the equality guarantee. The Constitution allows for 'appropriate' relief and the qualifiers contained in FC ss 26(2) and 27(2) do not appear in s 9.<sup>333</sup> It would therefore be open to a court to grant immediate relief to a particular claimant. Courts will, of course, be inclined to hold that since the socio-economic rights as framed in the Constitution explicitly spell out the state's duties, the equality provision may not be used to create more onerous obligations. Indeed, the *Grootboom* Court, for example refused to allow the more onerous provisions in FC s 28 (Childrens'

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329 'Social origin' and 'birth' are protected grounds in the Constitution but courts will not necessarily interpret these grounds to include socio-economic status. Section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 hints that 'socio-economic status' is a prohibited ground for discrimination in South African law.

330 For example, if a particular private water supplier terminates cross-subsidisation measures that lead to an increase in the tariffs charged to poor 'customers', such a supplier could arguably be interdicted to reintroduce cross-subsidisation measures. Cross-subsidisation was found to be 'fair' discrimination in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) [1998] ZACC 1. The Court implicitly recognised the need for cross-subsidisation measures in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 at paras 80, 121-125 and 169. See also E Wamugo 'Privatisation and Regulation in Sub-Saharan Africa: Issues for Consideration' (2001) June *International Business Lawyer* 263 at 265 ('Some level of cross-subsidisation (eg between rural and urban users) may be socially desirable'); COSATU 'The Realities of Privatisation' (2002) 26 SA *Labour Bulletin* 30 (Raises an argument that privatisation may not occur if it would end cross-subsidisation of services for the poor or would have a negative impact on the poor); De Visser et al (supra) at 43 (Notes that local businesses have been excluded from cross-subsidisation policies and argues that in light of the fact that 78 per cent of water in South Africa is consumed by commercial agriculture and industry and only 12 per cent by domestic water consumption, that equal treatment is unreasonable and local businesses should be expected to participate in cross-subsidisation.)

331 S Liebenberg & M O'Sullivan 'South Africa's New Equality Legislation: A Tool for Advancing Women's Socio-Economic Equality?' University of Cape Town and the Law, Race and Gender Unit, Faculty of Law (January 2001) 3 (Copy on file with authors)('[W]hile all the poor in South Africa are disadvantaged by a lack of access to social services such as water women are disproportionately affected because they bear a vastly disproportionate burden of household maintenance, child care, and care for elderly or sick relatives.') The authors also note that the Constitutional Court has taken judicial notice of the disproportionate burden of reproductive work performed by women. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('Hugo') at para 37. See also G Brodsky & S Day 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian J of Women and the Law* 185.

332 In *Soobramoney*, the Court refused to grant relief to the applicant and did not order the state to provide life-saving treatment. In *Grootboom* and *TAC*, the Court found that the existing government plans and policies were unreasonable and merely ordered the state to devise and implement a reasonable plan.

333 FC s 38.

Rights) to allow children with families to secure immediate relief in the form of housing, when the family itself would not be entitled to such relief under FC s 26. Such a conclusion would sorely test Kriegler J's view that the Final Constitution is primarily and emphatically an egalitarian document.<sup>334</sup> And yet it is a conclusion which Kriegler J — and the rest of the Constitutional Court — signed on.

In *Mazibuko*, the Constitutional Court recognises the validity of this kind of equality claim, even though it ultimately rejects both versions of the applicants' challenges on the basis of equality.<sup>335</sup> In terms of existing constitutional jurisprudence, any differentiation between classes of people that is not rationally connected to a legitimate government purpose is prohibited by FC s 9(1).<sup>336</sup> The applicants in *Mazibuko* presented the argument that the introduction of prepaid meters in only the Phiri region of Soweto drew a distinction between classes of people that is not related to any legitimate government purpose.<sup>337</sup> There were three other areas in Johannesburg that, like Phiri, had for many years received water as 'deemed consumption areas': Orange Farm, Ivory Park and Alexandra. In none of these other three areas, however, had prepaid water meters been introduced.<sup>338</sup> The Court held, however, that prepaid meters had been introduced in part to reduce water wastage, and in part to remedy the problem of unaccounted for water distributed in Soweto, for which no payment was received and from which no revenue was generated. The attempt to remedy a situation the Court appeared to agree was unsustainable was in the Court's view a legitimate government purpose that could not be held to be irrational in terms of FC s 9(1).<sup>339</sup>

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334 See *Hugo* (supra) at para 74 ('The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.')

335 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC) [2009] ZACC 28 ('*Mazibuko*').

336 *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 42. See also *Mazibuko* (supra) at 84 (Court quoted *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) [1997] ZACC 5 at para 25 as follows: 'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner.')

337 *Mazibuko* (supra) at para 145.

338 Prepaid electricity meters have been introduced in Orange Farm, and the struggle against them has been going on for some years under the banner of the Soweto Electricity Crisis Committee. See A Egan & A Wafer, 'The Soweto Electricity Crisis Committee: A Case Study for the UKZN Project on Globalisation, Marginalisation and New Social Movements in Post-Apartheid South Africa' (2004) 12. See also R Ballard, A Habib & I Valodia *Voices of Protest: Social Movements in Post-apartheid South Africa* (2006).

339 *Mazibuko* (supra) at para 146.

The applicants' second equality challenge to the installation of prepaid meters was that their introduction in predominantly black neighbourhoods, but not in predominantly white neighbourhoods, amounted to unfair discrimination between white and black water consumers. Unfair discrimination by the state is prohibited by FC s 9(3), and discrimination on the basis of race or colour is presumptively unfair in terms of s 9(5). The Court set out the test for unfair discrimination

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as follows: 'To determine whether the discrimination is unfair it is necessary to look at the group affected, the purpose of the law and the interests affected.'<sup>340</sup> The Court held that the impact of the City's water policy could not be said to be harmful or disadvantageous to the residents of Phiri. They were not treated less favourably under the terms of the City's water policy than residents of other, predominantly white areas in which no prepaid meters were installed. Indeed, the Court continued, Phiri residents actually pay less for their water than consumers in other parts of the City.<sup>341</sup> The differentiation between Phiri residents and others, then, because it entailed no disadvantage or harmful impact for the residents of Phiri, did not amount to unfair discrimination.

The Court went on to make an important comment on how to understand equality in a deeply unequal society such as ours:

The conception of equality in our Constitution recognises that, at times, differential treatment will not be unfair. Indeed, correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment.<sup>342</sup>

Slavish adherence to an ideal of equal treatment, in other words, is not necessarily the best way in which to go about achieving a more equal society, nor is it always feasible. The implication of the Court's reasoning here is that where benefits can be brought to one group of people by treating them differently to other groups of people, the ideal of equality should not prevent that. The achievement of equality may necessitate and justify different, perhaps unequal, treatment.<sup>343</sup>

In *Nokotyana & Others v Ekurhuleni Metropolitan Municipality*, however, the Constitutional Court blatantly ignores the principle set out in this dictum.<sup>344</sup> In *Nokotyana*, the applicants had sought from the respondent an increase in the number of ventilated improved pit latrines in the Harry Gwala informal settlement, so that each family, or alternatively every two families, would have access to a single latrine.<sup>345</sup> The municipality indicated that it was in a position to offer only one latrine to every ten households.<sup>346</sup> It emerged during the litigation that the national and Gauteng provincial governments had offered to finance the provision of toilets

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340 *Mazibuko* (supra) at para 150. The Court referred here to *Harksen v Lane NO* (supra) at para 54 (Test for unfair discrimination is set out in full.)

341 *Ibid* at para 152.

342 *Ibid* at para 156.

343 On the distinction between equal treatment and treatment as an equal, see, especially, R Dworkin *Taking Rights Seriously* (1977), 227ff.

344 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*').

to meet the applicants' prayers. The municipality resisted this offer on the ground that to improve access to sanitation services for the residents of the Harry Gwala settlement while not doing the same for other residents of the municipality and the province would amount to unequal treatment. The Court agreed:

It would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.<sup>347</sup>

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It is hard to reconcile the approach taken by Van der Westuizen J in *Nokotyana* with O'Regan J's observations about the nature of equality in *Mazibuko*, or the Court's well-entrenched precedent in *Walker*. The Court's adherence to an unachievable ideal of equal treatment in *Nokotyana* denies access to vastly improved sanitation services to a large number of people.<sup>348</sup> Such a *volte face* is difficult to explain, let alone stomach.

## 56B.5 Right to sanitation

The right to basic sanitation is not mentioned expressly in the Bill of Rights. It has, however, been recognised in statutory law. In international law and in foreign jurisprudence, as we noted above, sanitation is often viewed as an element of other rights, particularly housing, health and the right to environmental health or clean environment. Failure to control sanitary excreta disposal is one of the major causes of environmental pollution and waterborne diseases.

### (a) International Law

#### (i) Express and implied recognition

A range of international human rights and humanitarian law instruments explicitly protect and promote access to sanitation. Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women explicitly obliges states parties to ensure that women in rural areas have the right to 'enjoy adequate living conditions, particularly in relation to housing, *sanitation*, electricity and water supply, transport and communications'. Under the Convention on the Rights of the Child, states parties are to ensure that all segments of society 'are informed, have access to education and are supported in the use of basic knowledge of . . . hygiene and *environmental sanitation*.' Under Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, occupying powers are 'bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics': the article then goes on to specify in some detail the type

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345 Ibid at paras 2 and 21.

346 Ibid at para 33.

347 Ibid at para 54. The Court referred here to FC s 172(1)(b). This section enables courts deciding constitutional cases to make any order that is 'just and equitable'.

348 For trenchant criticism of this glaring inconsistency in the Court's jurisprudence, see D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 SALJ 591, 601-04.

of measures required.<sup>349</sup> The same treatment is required in relation to civilian internees under Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.<sup>350</sup> Water resources and infrastructure, which would

arguably include sewage treatment plants and other sanitation facilities must also be protected during armed conflict.<sup>351</sup>

In the last decade, there have been increasing attempts to recognise a so-called freestanding or independent international human right to sanitation. Until recently, the international recognition of such a right to sanitation has been thin. In 1992, the International Conference on Water and the Environment identified four 'guiding principles'. The fourth principle contained this statement: 'it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.'<sup>352</sup> Two years later, 177 States at the 1994 Cairo Conference on Population and Development, endorsed a Programme of Action that recognises, in Principle 2, that all individuals have the 'right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.'<sup>353</sup> While the 2002 Johannesburg Declaration does not explicitly acknowledge the right to sanitation, it affirms its fundamental connection with human dignity: the principle from which all human rights are said to derive.<sup>354</sup>

The Committee on Economic Social and Cultural Rights was pressed to imply the right to sanitation along with the right to water enunciated in General Comment 15 in 2002. It declined to do so and gave no public reasons. However, in its General

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349 Geneva Convention, Article 29:

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

350 Geneva Convention, article 89.

351 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art 14.

352 *Dublin Statement on Water and Sustainable Development* (1992).

353 The later UN-Habitat Global Plan of Action (1996) contains identical language to the Cairo Conference. UN-Habitat, *The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action* (1996) at para 11:

More people than ever are living in absolute poverty and without adequate shelter. Inadequate shelter and homelessness are growing plights in many countries, threatening standards of health, security and even life itself. Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions.

354 See Committee on Economic, Social and Cultural Rights, General Comment 4, at para 2.



Comment 19, issued in 2008, the Committee began to open the door.<sup>355</sup> This change was largely prompted by a push for recognition within the UN System. In 2001, a Special Rapporteur was appointed by the UN Sub-Commission on Human Rights to report on the right of everyone to drinking water.<sup>356</sup> His draft guidelines begin by identifying sanitation as 'unquestionably a human right'. The guidelines go on to state that '[e]veryone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.'<sup>357</sup> In 2006, the newly formed Human Rights Council asked the High

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Commissioner for Human Rights to prepare a study on the scope and content of relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. The Commissioner acknowledged that the debate as to whether water and sanitation were human rights remained open, but forcefully concluded that she 'believes that it is now time to consider access to safe drinking water and sanitation as a human right'.<sup>358</sup> In 2009, the newly appointed UN Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, submitted her report to the General Assembly with a similar finding.<sup>359</sup>

The issue was finally resolved in 2010 when the UN General Assembly affirmed 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'<sup>360</sup> In September 2010, the UN Human Rights Council confirmed the recognition of the right to sanitation<sup>361</sup> and the CESCR immediately issued a Statement on the Right to Sanitation that declared:

The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally

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355 When discussing the coverage for certain social security benefits, it uses the language of rights in relation to sanitation: 'Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.' CESCR General Comment 19, The Right to Social Security (Thirty-Ninth session, 2007) U.N. Doc. E/C.12/GC/19 at para 6.

356 Final report of the Special Rapporteur on the Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, 14 July 2004, E/CN.4/Sub.2/2004/20.

357 The guidelines are available at <http://www2.ohchr.org/english/issues/water/index.htm>.

358 High Commissioner for Human Rights 'Report on the Right to Water and Sanitation as Human Rights' available at [http://www2.ohchr.org/english/issues/water/docs/HRC\\_decision2-104.pdf](http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf) (accessed on 31 May 2011).

359 U.N. Doc A/HRC/12/24 (2009).

360 The human right to water and sanitation, U.N. Doc A/64/L.63/Rev.1 at para 1.

361 *Human Rights and Access to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/15/L.14.

related, among other Covenant rights, to the right to health, ... the right to housing, ... as well as the right to water, which the Committee recognized in its General Comment No. 15. It is significant, however, that sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged.<sup>362</sup>

A number of social rights have also been interpreted by UN human rights treaty bodies to include access to sanitation. According to the CESCR, the right to housing embraces facilities for 'sanitation and washing facilities' and 'site drainage'.<sup>363</sup> With regard to the right to health, the same Committee listed sanitation as one of the underlying determinants of health, and thus part of the right to health, on the basis of the drafting history of the Covenant and the wide wording of the provision.<sup>364</sup> Sanitation is mentioned a number of times in General Comment 14 on the Right to Health, particularly in the context of the availability, the quality and the accessibility elements of the right to health.

Sanitation was given equal attention in the CESCR's General Comment 15 although the degree of recognition was still criticised as paltry by some experts at the Day of General Discussion that preceded its adoption. The content of the

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right to water is said to include water for personal hygiene and sanitation and the Committee was anxious to emphasise that access to sanitation was both 'fundamental for human dignity and privacy' and a 'principal mechanisms for protecting the quality of drinking water supplies and resources'.<sup>365</sup> The effective provision of sanitation was articulated as a clear state responsibility: 'States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.'<sup>366</sup>

The interplay between sanitation and various social rights is particularly visible in foreign jurisprudence. The very first Indian public interest litigation social rights matter engaged sanitation. In *Municipal Council, Ratlam v Shri Vardhichand & Others*, the Supreme Court of India found that the failure of a municipality to provide toilets for informal settlements and drainage not only violated the Municipality Act but threatened human health and implicated human rights due to the assault on decency and dignity.<sup>367</sup> In the first reported cases that invoked General Comment 15, sanitation was at the forefront. Provincial and municipal authorities in Argentina

362 U.N. Doc. E/C.12/45/CRP.1.

363 CESCR General Comment 4 (supra) at para 8(b).

364 CESCR General Comment 14, The Right to the Highest Attainable Standard of Health (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 at para 4.

365 CESR, General Comment 15, The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 at para 29.

366 Ibid.

367 (1981) SCR (1) 97 available at <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=4495> (accessed on 31 May 2011). We are grateful to Justice Krishna Iyer for pointing out this fact to us.

were found to have violated the rights to health and water by failing to provide the degree of sanitation necessary to prevent pollution of communal water sources.<sup>368</sup>

## **(ii) A co-right with water?**

What is interesting about the recognition of the right to water and sanitation is the use of a singular not a plural noun. All the documents refer to water and sanitation as a human right *not* human rights. Sanitation and water appear to be conceived as twins — a co-right as it were. Some environmentalists express some concern that the constant lumping of water and sanitation together in development and now human rights discourse promotes water-based solutions to sanitation. While such a concern may have merit, it is difficult to imagine that all sanitation issues will invariably necessitate the use of water or engagement with the right to water.

An analogy with the civil right to freedom of thought, conscience and religion might shed some light on the relationship between water and sanitation. Although rights to thought, conscience and religion are related and overlap, they each possess relatively distinct characteristics.

Water quality is largely dependent on the provision of sanitation (water-borne or dry), both water and sanitation services require good hygiene to be effective, and where sanitation is waterborne, infrastructure is often twinned.

However, there are also a number of differences. Responsibility for providing sanitation services is normally spread among many different departments and ministries, and is delivered by a wider range of service providers. The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer. Due to the nature of their delivery, when water services fail, they

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tend to fail in a geographic area, sparking immediate public demand for improvement or replacement services. However, when sanitation services fail, they are more likely to fail by household (full pit or septic tank), so the public demand for improvement is more localised and therefore not as effective. Where only a few people lack sanitation though, all feel the health impact. Nonetheless, it is difficult to assess the weight of such differences. For instance, providing water can be complex if it must be pumped from a distance and if good quality dry toilets are available in a location. The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer because it is simply not prioritised. A manager at a South African local municipality recently commented that the directive from national government was to meet the water targets first and concentrate on sanitation afterwards.<sup>369</sup>

In the South African context, no distinction is drawn between water and sanitation supply and they are lumped together as 'water services'. 'Water authorities' are thus burdened with a range of obligations with respect to them, even where sanitation services are not water-based sewerage services.

## **(iii) Individual or collective right?**

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368 *CEDHA v Provincial State and Municipality of Córdoba*.

369 Communication from local official, 17 February 2009.

The right to sanitation raises the classical issue of individual rights vs. collective rights. It is not even immediately clear into which category it falls. Sanitation is frequently promoted by health and development practitioners and policymakers on the basis of its public health benefits. Human excreta is the leading cause of water pollution and a major cause of preventable illnesses that lead to death. But how does this translate into human rights terms? Does it imply that we are primarily concerned not with a personal right to sanitation but rather a right for *all* people to have sanitation, in order that *everyone* will be protected. Many see 'environmental sanitation' as equally important — focusing not just on human excreta but developing sanitation systems that deal with all types of waste, and which demands not just a collection point of excreta, but also safe transport, treatment and disposal.<sup>370</sup> Sanitation thus possesses the features of a collective right. Could sanitation be better viewed as part of the right to environmental health or merely as a duty stemming from the right to health or water?

International human rights treaty law is largely structured in individual terms and each right is usually premised on a direct connection with human dignity. This question is further complicated in the case of sanitation: practitioners frequently express frustration with a lack of demand for sanitation. 'People need to be educated', they say. How does this fit with human rights? If human rights are meant to spring from universal and basic demands, do we need to be educated about them? Should people not be helped to demand them?

There are two ways to address this conceptual challenge. The first approach denies that the lack of individual access to sanitation is in and of itself an affront to human dignity. A lack of sanitation clearly raises issues of privacy, individual health, personal dignity and equality. Thus the objective impact on the individual

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of a lack of sanitation, whether mental or physical, and its impact on access to other human rights, could be sufficient.

A second, and better, approach is to downplay the theoretical difficulties of recognising a human right with inherent individual and collective characteristics and acknowledge that a right with individual and collective dimensions is acceptable within the international framework. For example, articles 8 and 13(4) of the ICESCR recognise collective rights. The former contains the 'right of trade unions' to establish federations and function freely. Article 13(4) grants '*individuals and bodies*' the liberty from interference in the establishment of educational institutions, although it is constructed more as a defence than a right. Indeed, there are many parallels between trade union rights and the broader civil right to freedom of association and a right to sanitation. If only one person has the right to association, but it is denied to others, it is of little value.<sup>371</sup> The utility of the right to freedom of association lies in the ability of all individuals to exercise it and thus jointly organise, express their opinions and take collective action. The cultural rights in articles 1(a) and 3 of the ICESCR also have strong collective dimensions. Collective rights are also recognised in Article 27 of the ICCPR in relation to ethnic, religious and linguistic minorities.

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370 See WHO *What is Environmental Sanitation?* (2002).

371 See S Woolman 'Freedom of Association' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

Interestingly enough, the right to both a basic water supply and basic sanitation in s 2 of the Water Services Act is framed in such an individual and collective fashion: 'the right of access to a basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'. Thus the purpose of the right to sanitation is to protect other people's human health and well-being. Similar language is used in the UN Sub-Commission guidelines, which arguably go further since they aim to protect the environment generally, and not just human health.<sup>372</sup>

#### (iv) Content

In the case of sanitation, one challenge is the level of technology. Does everyone have the right to a flush toilet or a dry toilet with equivalent effect? Are ventilated pit latrines or community toilets acceptable in any case or only in communities with insufficient resources? How much should be left to progressive realisation and national interpretation? These questions are the subject of a growing debate. Many development agencies favour the use of Ventilated Improved Pits ('VIPs'). VIPs entail lower water demand and maintenance and no need for cost-recovery and revenue collection. However, some question the appropriateness of 'dry systems' for humid environments where, in fact, faecal matter does not easily dry. A further problem with VIPs is that they need to be emptied regularly, which often does not happen. In South Africa, Kathy Eales notes that—

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Many VIPs are now full and unusable. In many areas, VIPs are now called full-ups. Some pits were too small, or were fully sealed ... . South Africa's household sanitation policy is grossly inadequate. It speaks primarily to dry systems, and does not clarify roles and responsibilities around what to do when pits are full. National government underestimated the scale of technical support required.<sup>373</sup>

This assessment suggests that, even leaving the issue of personal dignity aside, VIPs are not a panacea. They are *not* necessarily more affordable. The key issue becomes prioritisation.

The WHO guidelines describe sanitary excreta disposal as the isolation and control of faeces from both adults and children so that they do not come into contact with water sources, food or people. The UN Independent Expert has proposed a definition for the *right* to sanitation which was endorsed by the CESCR in 2010:<sup>374</sup> 'a system for the collection, transport, treatment and disposal or re-use of human excreta and associated hygiene ... which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.'<sup>375</sup> She then went on to lay out the system's various substantive elements:

1. *Availability*. There must be a sufficient number of sanitation facilities (with associated services) within, or in the immediate vicinity, of each household,

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372 UN Sub-Commission on the Promotion and Protection of Human Rights Guidelines for the Realization of the Right to Drinking Water and Sanitation (2006) available at [www.ielre.org/content/e501.pdf](http://www.ielre.org/content/e501.pdf) (accessed on 1 June 2011) 2. (Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.)

373 B Amisi, P Bond, D Khumalo, & S Nojiyeza 'The neoliberal loo' (18 February 2008) available at <http://www.ukzn.ac.za/ccs/default.asp?2,40,5,1514> (accessed on 15 October 2008).

374 U.N. Doc. E/C.12/45/CRP.1 (2010) at para 8.

health or educational institution, public institutions and places, and the workplace. There must be a sufficient number of sanitation facilities to ensure that waiting times are not unreasonably long....

2. *Quality.* Sanitation facilities must be hygienically safe to use, which means that they must effectively prevent human, animal and insect contact with human excreta. Sanitation facilities must further ensure access to safe water for hand washing as well as menstrual hygiene, and anal and genital cleansing, as well as mechanisms for the hygienic disposal of menstrual products. Regular cleaning, emptying of pits or other places that collect human excreta, and maintenance are essential for ensuring the sustainability of sanitation facilities and continued access....
3. *Physical Accessibility.* Sanitation facilities must be physically accessible for everyone within, or in the immediate vicinity of, each household, health or educational institution, public institutions and places, and the workplace. Physical accessibility must be reliable, including access at all times of day and night. The location of sanitation facilities must ensure minimal risks to the physical security of users....
4. *Affordability.* Access to sanitation facilities and services, including construction, emptying and maintenance of facilities, as well as treatment and disposal of faecal matter, must be available at a price that is affordable for all people without limiting their capacity to acquire other basic goods and services, including water, food, housing, health and education guaranteed by other human rights. Water disconnections resulting from an inability to pay also impact on waterborne sanitation, and this must be taken into consideration before disconnecting the water supply....

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5. *Acceptability.* Sanitation facilities and services must be culturally acceptable. Personal sanitation is still a highly sensitive issue across regions and cultures and differing perspectives about which sanitation solutions are acceptable must be taken into account regarding design, positioning and conditions for use of sanitation facilities. In many cultures, to be acceptable, construction of toilets will need to ensure privacy.<sup>376</sup>

In relation to the first element, the UN Independent Expert particularly notes that 'it is tempting to determine a specific minimum number of toilets.'<sup>377</sup> However, she concedes that that specifications can be 'counterproductive' and that it is crucial that the 'assessment of the sanitation requirements of any community is informed by the context' as well as 'the characteristics of particular groups which may have

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375 *Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation* U.N. Doc A/HRC/12/24 (2009) available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24\\_Epdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24_Epdf) (accessed on 1 June 2011) ('*Report of Independent Expert*') at para 63.

376 U.N. Doc A/HRC/12/24 (2009) at paras 70–80. These elements are also mentioned, but not elaborated upon, in the United Nations Sub-Commission on the Promotion and Protection of Human Rights, Promotion of the *Realization of the Right to Drinking Water and Sanitation*, (2006) UN Doc. A/HRC/Sub.1/58/L11, adopting the *Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation* (2005), UN Doc. E/CN.4/Sub.2/2005/25, section 1.3.

377 *Report of Independent Expert* (supra) at para 71.

different sanitation needs'. However, she emphasises the importance of participation in determining such acceptable standards. Of equal significance to the South African context, and the tasking of informal settlement residents to emptying pit latrines, is her comment that:

Ensuring safe sanitation requires adequate hygiene promotion and education to encourage individuals to use toilets in a hygienic manner that respects the safety of others. Manual emptying of pit latrines is considered to be unsafe (as well as culturally unacceptable in many places, leading to stigmatization of those burdened with this task), meaning that mechanized alternatives that effectively prevent direct contact with human excreta should be used.<sup>378</sup>

## (v) Obligations

In its 2010 Statement, the Committee expressed the view that the right to sanitation requires full recognition by states parties in compliance with the human rights principles related to non-discrimination, gender equality, participation and accountability. Following the logic of respect, protect and fulfil, the UN Independent Expert has again attempted to articulate the general contours of state obligations. States are to:

- Refrain from measures which threaten or deny individuals or communities existing access to sanitation. States must also ensure that the management of human excreta does not negatively impact on human rights.
- Ensure that non-State actors act in accordance with human rights obligations related to sanitation, including through the adoption of legislative and other measures to prevent the negative impact of non-State actors on the enjoyment of sanitation. When sanitation services are operated by a private provider, the State must establish an effective regulatory framework.
- Take steps, applying the maximum of available resources, to the progressive realization of economic, social and cultural rights as they relate to sanitation. States must move as expeditiously and effectively as possible towards ensuring access to safe, affordable

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and acceptable sanitation for all, which provides privacy and dignity. This requires deliberate, concrete and targeted steps towards full realization, in particular with a view to creating an enabling environment for people to realize their rights related to sanitation. Hygiene promotion and education is a critical part of this obligation.

- Carefully consider and justify any retrogressive measures related to the human rights obligations regarding sanitation.
- Take the necessary measures directed towards the full realization of economic, social and cultural rights as they relate to sanitation, inter alia, by according sufficient recognition of human rights obligations related to sanitation in the national political and legal systems, and by immediately developing and adopting a national sanitation strategy and plan of action.
- Provide effective judicial or other appropriate remedies at both the national and international levels in cases of violations of human rights obligations related to sanitation. Victims of violations should be entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition....

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378 Report of Independent Expert (supra) at para 74.

- [P]ay special attention to groups particularly vulnerable to exclusion and discrimination in relation to sanitation, including people living in poverty, sanitation workers, women, children, elderly persons, people with disabilities, people affected by health conditions, refugees and IDPs, and minority groups, among others....
- [E]nsure that concerned individuals and communities are informed and have access to information about sanitation and hygiene and are enabled to participate in all processes related to the planning, construction, maintenance and monitoring of sanitation services....<sup>379</sup>

However, she cautions that human rights law 'does not aim to dictate specific technology options, but instead calls for context-specific solutions' and that a 'safe and otherwise adequate facility in close proximity would suffice as an intermediate step towards full realization of related rights.'<sup>380</sup> States are also not obliged to provide 'sanitation free of charge'.<sup>381</sup>

## **(b) South African law and jurisprudence**

### **(i) The constitutional and legislative position**

This section began by noting that there is no explicit constitutional right to sanitation in South Africa. At most, other rights in the Constitution could be read to contain some concession to sanitation. The right to water is often understood to include an amount of water for sanitation, but it should be noted that sanitation can be achieved through means other than water-borne sewerage systems. The FC s 24(a) right to an environment that is not harmful to health or well-being could be read to ensure that sanitation systems capable of safely processing human waste are in place. The link between health and effective sanitation has been alluded to above, but in the South African context there is a right only to health care, not to health, or to be healthy.<sup>382</sup> Finally, the right to adequate housing

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could be understood to include sanitation systems as an element of the meaning of 'adequate housing'. The latter argument was made before the Constitutional Court in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality*.<sup>383</sup> The Court chose not to engage with this argument. It held, in the first place, that the principle of constitutional subsidiarity prevented the applicants from relying on anything other than the legislative provision that it held had been enacted to give effect to the right to housing. It then held, in the second place, that the applicants had failed to challenge the constitutionality of the relevant legislative provisions in terms of FC's s 26 right to adequate housing.<sup>384</sup> At the very least, however, the Court has not ruled

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379 U.N. Doc A/HRC/12/24 (2009) at para 64.

380 Ibid at para 67.

381 Ibid.

382 On the distinction between these concepts, see N Daniels *Just Health: Meeting Health Needs Fairly* (2008). See also N Daniels *Just Health Care* (1985).

383 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*') at para 47.



out the possibility that a right to basic sanitation is contained within the right to housing or other rights in the Bill of Rights.

There is, on the other hand, statutory recognition of the right to basic sanitation. The Water Services Act treats water supply services and sanitation services as co-extensive or at least complimentary. The preamble to the Act begins by recognising the rights of access to basic water supply and basic sanitation, and to an environment that is not harmful to health or well-being.<sup>385</sup> Further, the operative provisions of the Act deal with both water and sanitation. Section 3(1) provides that everyone 'has a right of access to basic water supply and basic sanitation'. Section 1 of the Act in turn defines 'basic sanitation' to mean 'the prescribed basic minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households. 'Water services' is further defined to include both water supply services and sanitation services.

Regulations promulgated in terms of the Act prescribe that the basic minimum standards of basic sanitation include:

- (a) the provision of appropriate health and hygiene education; and
- (b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.<sup>386</sup>

In *Nokotyana*, the applicants sought to rely on these provisions before the Constitutional Court to establish a free-standing right to basic sanitation and to support their prayers for ventilated improved pit latrines. Note in this regard that the legislative right to sanitation, insofar as a toilet meeting the requirements set out in the regulations does not need to be connected to a water-borne sewerage system, is not derived from the right to water. It is telling then that the applicants in *Nokotyana*

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did not pray for flush toilets, but for pit latrines. The Court did not engage with the argument based on the Water Services Act and its regulations. Despite referring directly to these legislative and regulatory provisions, the Court said little more about them. It appears that the Court refused to entertain arguments based on a statutory right to basic sanitation because they were raised for the first time in the Constitutional Court.<sup>387</sup> Again, the Court has not denied that a right to basic sanitation exists. It has simply chosen not to decide if such a right exists. It is

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384 Ibid at paras 47 - 49.

385 The preamble itself is rather oddly worded in this regard. It reads:

Recognising 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;...Be it enacted...

Clearly, the second clause of this sentence is nonsense. It is submitted that this is a drafting error, and the paragraph should rather be read as follows: 'Recognising the rights of access to basic water supply and *sufficient water necessary to ensure basic sanitation* and an environment not harmful to health or well-being...' This result is achieved by neither adding nor removing words, but by rearranging them.

386 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water', *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001), Regulation 2.

presumably open to another set of litigants to raise the argument that such a right exists in a form that will allow the Constitutional Court to engage directly with it.

The Court's approach in *Nokotyana* is somewhat different to its approach in *Joseph & Others v City of Johannesburg & Others*. In *Joseph*, the applicants had argued that the right to adequate housing entails a right to electricity.<sup>388</sup> As in *Nokotyana*, the Court declined to engage with this submission, preferring to approach the matter on the basis of whether the requirements of the Promotion of Administrative Justice Act 3 of 2000 required the City to follow fair procedures and afford the applicants a hearing before terminating the electricity supply.<sup>389</sup>

Having declined to decide whether a right to electricity can be derived from the right to adequate housing, the Court went on to hold that a right to receive electricity does arise from the broad duties on local government to provide services.<sup>390</sup> Referring to its earlier judgment in *Mkontwana*,<sup>391</sup> and the Local Government: Municipal Systems Act 32 of 2000 read together with the National Housing Act 107 of 1997, the *Joseph* Court concluded that municipalities are under an obligation to provide electricity as 'an important basic municipal service.'<sup>392</sup>

One might expect that on this basis, a right to basic sanitation services follows from the obligations that municipalities bear to their constituents to provide basic municipal services. It is puzzling, then, that the Court in *Nokotyana* did not rely on *Joseph*, decided a month previously, to say something about the existence of a right to sanitation.

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## (ii) Sanitation, health and the environment

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387 *Nokotyana* (supra) at paras 29–31 and 45. The Court would appear to be wrong on this point. In the Court below, the Johannesburg High Court, the applicants relied quite explicitly on regulation 2 of the regulations in terms of the Water Services Act in submitting that the respondent municipality had a duty to comply with 'constitutional and statutory obligations to provide basic sanitation. *Nokotyana and Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZAGPJHC 14 at paras 34–35. Even if the applicants did not raise the argument in the court below, David Bilchitz argues that the Court's formalist insistence on rules of pleading has allowed it to shirk its constitutional responsibility to those who are most vulnerable in society to adjudicate fundamental rights claims. See D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor?' *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591, 595–96, 600–01.

388 2010 (4) SA 55 (CC) [2009] ZACC 30 ('*Joseph*').

389 *Ibid* at paras 12, 21 and 32–32.

390 *Ibid* at paras 34–40. It is apparent that the Court felt it necessary to consider whether a right to electricity existed, since the protections of the Promotion of Administrative Justice Act only apply to actions which affect 'rights'.

391 *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government & Housing, Gauteng, & Others (KwaZulu-Natal Law Society & Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) [2004] ZACC 9 at para 38.

392 *Joseph* (supra) at para 40.

Effective sewage reticulation systems are linked to people's health and to a healthy environment in South Africa. This is because limitation of water supplies forces people to make unhealthy choices about water usage. A link exists between sickness and poorly functioning household and community sewage systems. Poorly functioning sewage treatment plants have an effect on the environment, and particularly water sources.

In the debate over the government's free basic water policy, which provides only six kilolitres of free water per household per month, it is often pointed out that families or households who cannot afford more water than the free basic water policy

are forced to make undignified and unhealthy choices about basic hygiene and health. For example, people living with HIV/AIDS must choose between bathing or washing their soiled bed sheets, and parents must choose between providing their children with body washes before they go to school or flushing the toilet.<sup>393</sup>

In the English litigation which led to the statutory prohibition on the use of prepayment water meters, the Queen's Bench acknowledged the municipalities' concern that the increase in disconnections due to prepaid meters had an effect on public health, which in turn stressed the municipalities' capacity to meet public health demands.<sup>394</sup> In the court of first instance in *Mazibuko*, Tsoka J made a similar observation, saying that 'to expect the applicants to restrict their water usage, to compromise their health, by limiting the number of toilet flushes in order to save water, is to deny them the rights to health and to lead a dignified lifestyle.'<sup>395</sup>

The South African government, too, has recognised the link between poor sanitation and poor health. In a 1999 policy document the National Department of Health acknowledges that a lack of water and sanitation is a cause of cholera, diarrhoea and other illnesses, and that communicable diseases like TB are more easily spread in conditions of squalor.<sup>396</sup> The disconnection from free water services in Natal in 2000 was linked to a massive outbreak of cholera in which 182 people died.<sup>397</sup> At the same time, the government has recognised the connection between inadequate sewage treatment and processing and pollution, and the

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associated health risks it poses.<sup>398</sup> The breakdown of sewage treatment facilities in the Free State municipality of Emfuleni near Parys, between 2005 and 2010, is a dramatic example of the environmental and health effects of poor sanitation

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393 J Dugard 'Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 593, 606.

394 *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB).

395 *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)* [2008] 4 All SA 471 (W) at para 160.

396 *Health Sector Strategic Framework, 1999-2004* (1999).

397 See C Mugero and A Hoque, 'Review of Cholera Epidemic in South Africa, with Focus on KwaZulu-Natal Province' (2001); D Roithmayr 'Lessons from *Mazibuko*: Shifting from Rights to Commons' (2010) 3 *Constitutional Court Review* (forthcoming).

systems.<sup>399</sup> The pollution of water sources, moreover, poses a threat to the right to water itself. The integrity of water sources must be maintained if fresh and clean water is to be available to people for drinking, washing and cooking. The need to control pollutants, including sewage, is thus directly related to the capacity to provide clean water.<sup>400</sup>

Even if no explicit right to sanitation exists in the South African Constitution, the need for sanitation and the government's obligations to provide this service has direct statutory protection in the Water Services Act and its regulations. But we need not give up on the basic law. On the basis of the Constitutional Court's approach in *Joseph*, a right to sanitation arises from local government's ordinary obligations to provide municipal services. However, in a recent, extremely significant judgment, the Western Cape High Court has given the right to sanitation genuinely meaningful content in terms of FC s 27 and the rights to dignity,

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- 398 The former Minister of Water Affairs and Forestry, Ronnie Kasrils, reported to Parliament that 'Unacceptable sanitation services resulting in severe water pollution, especially bacteriological pollution, is a grave concern in Gauteng' quoted in P Bond & J Dugard 'The Case of Johannesburg Water: What Really Happened at the Pre-Paid "Parish Pump" ' (2008) 12 *Law, Democracy and Development* 1, 22.
- 399 Save the Vaal Environment, an NGO representing property owners along the banks of the Vaal River, was successful in court applications seeking to interdict the municipality from continuing to release untreated sewage into the river. The enforcement of these court orders left much to be desired. There are seven separate High Court judgments dealing with the matter, with the only written judgment in the matter lamenting the municipality's persistent failure to comply with court orders, stop polluting the Vaal River, and fix its sewage treatment operations (*SAVE v Emfuleni Local Municipality* (Unreported), Johannesburg High Court Case No 2009/20978, 3 June 2009).
- 400 The Constitutional Court recognised this in *Mazibuko*, highlighting 'the connection between the rights of people to have access to a basic water supply and government's duty to manage water services sustainably' *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 at para 3. Further, Water Services Act s 9 empowers the executive to prescribe quality standards for drinking water and for water discharged into water resources. The Minister of Water Affairs has done this in terms of regulations which, among other things, deal with the contamination of water resources. The 'Regulations relating to compulsory national standards and measures to conserve water' Notice No R509, *Government Gazette* 22355 (8 June 2001) provide:

**Control of objectionable substance**

6(1) A water services institution must take measures to prevent any substance other than uncontaminated storm water to enter—

(a) any storm water drain; or

(b) any watercourse, except in accordance with the provisions of the National Water Act.

(2) A water services institution must take measures to prevent storm water from entering its sewerage system.

The National Water Act 36 of 1998 referenced in regulation 6(1)(b) above delegates to the executive the discretion to determine how water resources may be used, including for the purposes of disposing of waste water. In 1999, the Department of Water Affairs promulgated regulations governing the discharge of waste or water containing waste into water resources, and set out 'wastewater limit values' 'General Authorisations in terms of section 39' Notice 1191, *Government Gazette* 20526 (8 October 1999). These values specify maximum concentrations of pollutants like faecal coliforms, ammonia, arsenic, cadmium, cyanide, chlorine and suspended solids. They also set standards of water quality based on chemical oxygen demand and electrical conductivity.

FC s 10, and to privacy, FC s 14.<sup>401</sup> Finally, it is clear that sanitation is an important element of a network of interrelated rights, and the denial of sanitation services will adversely limit the realisation of the rights to water and to an environment that is not harmful, to health or well-being.

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401 *Beja & Others v Premier, Western Cape & Others* (Unreported), Western Cape High Court Case No. 21332/10, 29 April 2011 (Court holds that Local Government: Municipal Systems Act 32 of 2000 echoes the constitutional precepts and obliges a municipality to provide all members of communities with 'the minimum level of basic municipal services', which includes the provision of sanitation and toilet services: 'Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with [FC] s 26 . . . and would be in violation of the constitutional rights to privacy and dignity.')