

## **Constitutional Value and Principles of the Right to water: A comparative Study.**

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**Abstract:** Water is the essence of life, while safe drinking water and sanitation are indispensable to sustain life and health, and fundamental to the dignity of all.<sup>1</sup> However, the right to water or the right to have access to water is mentioned by name in a few international instruments, notwithstanding its importance. It is nevertheless essential to note that there are legal instruments within continents and nation-states in the world that give explicit recognition to water as a fundamental human right, Such as South Africa. Access to safe drinking water is essential for to the enjoyment of safety and environment that is not hazardous to human health. Water services are of outmost important to health and wellbeing of all people.

**Keywords:** Dignity, Human Rights, Life, Water and Sanitation, Water services.

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### **I. Introduction**

In South Africa, the issue of water has a long history in the context of which water was conceived as a private property, subject to private ownership. With the birth of democracy in 1994, South Africa has since made access to sufficient water a socio-economic right for enjoyment by everyone in the country. This was after the enactment of the South African Constitution.<sup>2</sup> Following the enactment of the Constitution, National Water Act<sup>3</sup> and the Waters Service Act<sup>4</sup> were enacted. These are the main instruments regulating the right to water in South Africa. The national water act has effected an essential and radical transformation of the regulatory regime governing water resource. The 9<sup>th</sup> report on water for food security and nutrition recently launched by the United Nation high level panel of experts, has it in good authority that the report itself is a policy orientated and therefore presents a synthesis of existing evidence on the multiple connections between water, food security and nutrition.<sup>5</sup>

### **II. Objectives**

The objectives of this study is to identify and examine the South African laws regulating access to adequate water, and to examine the human rights implication of lack of access to portable water.

### **III. Materials And Methodology**

The researchers used the following materials: textbooks, journal articles, internet websites and case laws. The methodology employed in this study is the doctrinal research methodology which aids in resolving legal problems within the short space of time.

### **IV. Right To Water: An International Law Perspective**

#### **4.1 Introduction**

Water is recognised by international law as a human right. However its recognition is either explicit or implicit. The international instruments which explicitly provides for the right to water are as follows: Convention of the Right of Children and COnvention on Elimination of all forms of Discrimination Against Women. Whereas those which implicitly provides for the right to water are as follows: International Covenant on Economic, Social and Cultural Rights and Universal Declaration of Human Rights.

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<sup>1</sup> United Nations Children's Fund and World Health Organization, Progress on Drinking Water and Sanitation (2008).

<sup>2</sup> Act 108 of 1996.

<sup>3</sup> Act 30 of 1998.

<sup>4</sup> Act 108 of 1997.

<sup>5</sup> United Nations 9th report on water for food security and nutrition (May 18th 2015).

## 4.2 Discussion

International law instruments provide for the right to water either in express terms or as part of the right to food, nutrition or health. In this context, article 25 (1) of the Universal Declaration of Human Rights (UDHR) stipulates, inter alia, that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food.<sup>6</sup>

According to Dugard, the UDHR was approved by the General Assembly of the United Nations Organization on 10 December 1948, by 48 votes in favor, none against and eight abstentions.<sup>7</sup> Other international law instrument that provide for the right to water include the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child adopted by the General Assembly in 1989 and which came into force in 1990.

The Universal Declaration on Human Rights was adopted in 1948 as a non-legally binding document, however, even before its adoption broad agreement existed that the rights which were enshrined in the Declaration were to be transformed into legally binding obligations through negotiations of one or more treaties. In 1966, two separate treaties, covering almost entirely all the rights enshrined in the Universal Declaration of Human Rights were adopted, it was in fact adopted after twenty years of negotiations: One for civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), and one for economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR was adopted by the United Nations General Assembly on 16th December 1966 and entered into force on 03rd January 1976.<sup>8</sup> The ICESCR aims to ensure the protection of economic, social and cultural rights including: the right to self-determination of all people; the right to non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>9</sup>

The equal rights of men and women to enjoy the rights in the ICESCR,<sup>10</sup> the right to work;<sup>11</sup> the right to form and join trade unions; the right to social security; protection and assistance to the family; the right to equal standard of living; the right to health which in *casu* will incorporate the right to water; the right to education;<sup>12</sup> and the right to cultural freedoms.<sup>13</sup> The international Covenant on Economic, Social and Cultural Rights further states that States parties may, in certain circumstances, limit some rights enshrined in the Covenant.<sup>14</sup> However, such limitations must be determined by law, compatible with the nature of the rights included in the Convention and imposed to promote the general welfare in a democratic society.

The state parties are obliged to undertake steps, in accordance with the maximum of their available resources to progressively achieve the full realization of the right enshrined in the ICESCR.<sup>15</sup> The Committee on Economic, Social and Cultural Rights has asserted in its provision that there exists minimum requirements, 'core obligations' the right of everyone to the enjoyment of the highest attainable standard of physical and marital health: The article lists some of the steps to be taken by States parties such as:

- The reduction of stillbirth,
- Improving environmental and industrial hygiene,
- Prevention, treatment and control of diseases, and
- Access to medical care for all.

The Committee on Economic, Social and Cultural Rights has extensively elaborated on what the right to health encompasses and States parties' obligations under article 12.<sup>16</sup> It highlighted that the right to health does not mean the right to be healthy, but rather that it takes into account the individual's biological and socio-economic pre-conditions, and a State's available resources. The committee emphasised that the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions in order

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<sup>6</sup> 'Universal Declaration of Human Rights', available at: [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), (accessed on 12 April 2016).

<sup>7</sup> (note 6 above).

<sup>8</sup> (note 9 above).

<sup>9</sup> (note 9 above).

<sup>10</sup> (note 9 above).

<sup>11</sup> (note 9 above).

<sup>12</sup> (note 9 above).

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

<sup>15</sup> (note 14 above).

<sup>16</sup> 'International Covenant on Economic, Social and Cultural Rights', available at: [http://www.who.int/hhr/Economic\\_social\\_cultural.pdf](http://www.who.int/hhr/Economic_social_cultural.pdf) (accessed 12 April 2016).

to achieve the highest standard of health. The committee also pronounced that the right to health is an inclusive right which does not only obliges States parties to provide timely and appropriate health care, but also to address the underlying determinants of health, such as safe and potable water including adequate sanitation. The committee submitted that;

- An adequate supply of safe food, nutrition and housing,
- Access to healthy occupational and environmental conditions,
- Access to healthy related education and information,
- Including on sexual and reproductive health.

The right to water which although not specifically mentioned in the ICESCR is deemed to be included under article 11 and 12.<sup>17</sup> While water has not been recognized as a self-standing human right in international treaties, international human rights laws entails specific obligations related to access to safe water. These obligations require States to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses. It defined water as water for drinking, personal sanitation, washing of clothes, food preparation and household hygiene.<sup>18</sup> Those obligations also require States to progressively ensure element for human dignity and privacy. The obligations protect the quality of drinking-water-supply and resources.

The concept of basic water requirements to meet fundamental human need was first established at United Nations Water Conference. Regional declarations have also recognized water. The Council of Europe has asserted that everyone has the right to sufficient quality of water for his/her basic needs.<sup>19</sup> The Asia-Pacific leaders agreed to recognize people's right to safe drinking water and basic sanitation as a basic human right and fundamental aspect of human security.<sup>20</sup> In the Abuja Declaration adopted at first Africa-South America Summit in 2006, Heads of States and Government declared that they would promote the right of their citizens to have access to clean and safe water and sanitation within their respective jurisdictions. While these declarations are not legally binding, they do reflect a consensus and a political statement of intent on the importance of recognizing the right to water.

It is clear that there has been a push both in the international community and within developing nations to advance the right to water. It has been demonstrated that a step further was taken to recognize water as justiciable right, thereby allowing citizens to seek legal recourse when their water needs were not realized. South Africa and India were faced with water litigation, as results approaches to justiciability have predominated.<sup>21</sup> The first approach, illustrated by the South African system, explicitly confers a justiciable, affirmative right to access to adequate water, a right enshrined in the country's Constitution and upheld by the country's Constitutional Court.

The second approach, exemplified by the Indian legal system, derives and applied justiciable right to water from broad "right to life." It is common cause that no legislative or jurisprudential solution can immediately solve the crisis of water scarcity. Although justice ability alone is not a panacea, it is a step in the direction of ensuring access to sufficient water. The research argues, that the existing jurisprudential approaches of South Africa and India which pronounce certain forms of justice ability shows more promise than others for achieving the goal of clean water for all. It is submitted that justice ability based on an explicit constitutional provision recognizing an affirmative right to water is preferable to a more implied right to water.<sup>22</sup> It appears that the method to be relied on to achieve a justiciable right to water is the South African example, rather than relying on the implied justice ability right utilized in the Indian legal system.

It is concurred that water is vital to human survival in number of ways, including basic hydration and food production. Although water abounds in the world's oceans and lakes, only small portion is fit for human consumption, and still less is available to a significant portion of the world's population. The water shortage is felt most strongly in developing countries, where it creates a host of other problems that serves already poor economic conditions. Water has several important non-consumptive purposes beyond basic hydration, it can be used in farming, without which many people in the developing world would lack both adequate nutrition and hope for improved economic development.<sup>23</sup> Within largely agrarian societies, such as those in the Asia-Pacific regions and much of Sub-Saharan Africa, the importance of growing crops or raising livestock in a manner that yields even meager profits can be the key in obtaining access to medical care, education, electricity and

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<sup>17</sup> (note 14 above).

<sup>18</sup> (note 14 above).

<sup>19</sup> (note 14 above).

<sup>20</sup> (note 14 above).

<sup>21</sup> What price for the Priceless? Implementing the justiciability of the Right to Water Reviewed Harvard law Review, Vol 120. No 4 (February 2007) p 1069.

<sup>22</sup> What Price for the Priceless?: Implementing the Justiciability of the Right to Water 1069.

<sup>23</sup> What Price for the Priceless? 1071.

heating.<sup>24</sup> Although the issue is often wafted by the more immediate and widely recognized dangers of insufficient drinking water, the lack of clean water for cooking and maintaining personal hygiene is critical. In many parts of the developing world, the only available water is so unhygienic as to lead to frequent serious illness, such as diarrheal disease.<sup>25</sup> Advocates in the international communities continue to push for protection of water rights. These proponents argue that the general “right” to water inherent in all individuals requires governments both to provide access to water and protect that access from such predatory influences as pollution and market force. The key to government is the justiciability of the water right, the ability of the courts, once the right is recognized, to enforce it.<sup>26</sup> Thus, justiciability enables individuals to seek remedies and hold their governments accountable if the right is violated. The proponents also argue that justice ability is the key in holding governments accountable for not meeting their obligations under international law, which increasingly recognizes access to water as fundamental human rights.<sup>27</sup>

The initial groundwork for this movement was laid in the international sphere. The most significant human rights document to date is the United Nations Universal Declaration of Human Rights. Drafted over fifty years ago, it began as a non-binding document but eventually grew to have some normative force. Although the fundamental rights and freedoms it recognizes do not explicitly include a right to water, the Universal Declaration does contain clauses that provide some measures of justification for such a right.

## **V. Justiciability of The Right To Water**

### **5.1 Introduction**

Justiciability of the right to water, allows all citizens to seek legal remedy when their water needs go unmet. The South African system, explicitly confers a justiciable, affirmative right to adequate water. The Constitutional Court uphold the right to adequate water supply.

### **5.2 Discussion**

The South African Constitution provide citizens with a recourse against government’s failure to fulfill their constitutional obligations. This is done through the involvement of the judiciary. In other words a party whose right has been violated may approach the court of law for a remedy. Evident to this is the case of *Grootboom vs The Republic of South Africa*.<sup>28</sup> This is the case that determined the obligation of the state to fulfil the right to adequate housing as guaranteed in the South African Constitution.

The judgment given by the constitutional court in this case is regarded as the most vital and serves as evidence for the judicial enforcement of socio-economic rights. For this reasons, the Constitution of South Africa is considered as the one of the most advanced and transformative around the world.<sup>29</sup> Furthermore, the judiciary has the responsibility to ensure that there are no legislative and other obstructions to the realisation of the Constitutional guaranteed rights.<sup>30</sup> The court when making decisions about socio-economic rights, may sometimes direct the government to act in a particular manner depending on the circumstances of each case and this might have economic impact. Thus, Socio-economic rights such as the right to housing, the right to food and water, and the right to education were widely considered judicially unenforceable prior to *Grootboom* because of “democratic prerogatives and the limited nature of public resources”.<sup>31</sup> The *Grootboom* case set a precedence to the international communities to considered and deliver socio-economic rights. Justiciability of water rights would play a pivotal role in protecting individuals, particularly the poor and marginalized groups from both the vagaries of the capitalist system and a lack of governmental prioritization.

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<sup>24</sup> What Price for the Priceless?: 1071.

<sup>25</sup> Am. Red Cross, Intergrated Management of Childhood Illness: IMCI Target Conditions, <http://www.redcross.org/services/intl/imci/damm.asp> (14 January 2007).

<sup>26</sup> Cook RJ Advancing Safe Motherhood Through Human Rights, in *Giving Meaning to Economic, Social and Cultural Rights* 114 (Isfahan Merali & Valerie Oosterveld eds, 2001).

<sup>27</sup> Naidoo A and Davidson – Harden A, *Water as a Statagic International Resource* (November 18, 2006) (Unpublished manuscript), available at <http://www.cancun2003.org> (31 January 2017).

<sup>28</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR.

<sup>29</sup> ‘South Africa’s new constitution is approved’, available at: <http://www.sahistory.org.za/dated-event/south-africas-new-constitution-approved> (accessed 12 April 2016).

<sup>30</sup> Rosalind Dixon ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’ Vol 5:391 July 2007, available at: <http://icon.oxfordjournals.org/> at *Venda University* (accessed 4 February 2017).

<sup>31</sup> *The Landmark Case of Grootboom versus the Republic of South Africa*. Available at: <http://www.tadamun.info/2014/01/05/> (accessed 04 February 2016).

An actual right to water would involve the right of access to, at a minimum, the quantity of water necessary for survival. This right can be approached in one or two ways<sup>32</sup>:

- There is the negative right approach, which prohibits governments and other parties from infringing on one's right to water through acts such as pollution or diversion or water supplies. The approach includes both "respecting", (for example, governments not polluting) and "protecting" (for example, governments not allowing third parties to pollute) the right.
- There is the positive right approach, which involves not only "respecting and "protecting," but also "fulfilling." Such an approach requires a government not only to prevent interference with access to adequate water supplies, but also to provide the basic quality of water needed, regardless of the expense involved or the recipients' ability to pay.

The research focuses on methods of making justiciable the positive, and more comprehensive, approach to the right to water. In future, since water becomes scarcer and governmental apathy and predatory privatization become increasingly common, justice ability of water rights will depend on their effective enforcement. Key to this enforcement is the existence of domestic and international legal avenues for redress. Such avenues are already in place to protect civil and political rights. Domestic justice ability serves three important functions in the realization of economic and social rights in general and water in particular:

- First, and perhaps most significantly, justice ability acts as a check against government and corporate interests that might otherwise ignore or encroach upon citizens' water rights. The check is particularly critical as water privatization become more common in both the developed and developing world, leading to more widespread abuse. Justiciability would, hopefully, serve as a way to deter abuses of water rights as corporate interests would fear incurring liability for water pollution or illegal water shut offs.
- Second, justice ability of water rights serves as an important signal both to inhabitants of nation and to those looking to the nation for guidance. Even justice ability that is not perfectly effective still has significant normative force. A justiciable water right would bolster norms against prioritizing corporate profit over the human needs for water.
- Third, justice ability allows national tribunals to clarify the meaning of water rights in varying contexts and to establish authoritative interpretations usefully to governments. Despite the benefit of justice ability, there are many challenges to the realization of well-established "rights" in the developing world, including poverty, corruption, and various forms of institutionalized discrimination. Although these challenges hardly offer waivers of responsibility, they do call into question whether simply adding another justiciable right to the generally accepted list will truly make difference.

### **5.3 The implied justiciable right to water: the Indian model**

India does not have an explicit justiciable right to water in its Constitution. The judiciary derives the justiciability of the right to water from the broad, constitutionally recognized right to life. India adopted a progressive Constitution immediately after independence from Britain. The Constitution adopted by India immediately after independence from Britain prohibited discrimination and recognized fundamental human rights. The India Constitution divides its recognized rights into two, broad categories:

- Fundamental Rights, including civil and political rights, and
- Directive Principles of State Policy, covering economic, social, and cultural rights.

While rights in both categories are constitutionally recognized, only "Fundamental Rights," including the right to life and the right to equality, are directly justiciable. Though the Directive Principles of State Policy are made explicitly non-justiciable by Article 37, the Indian Supreme Court has managed to overcome the limitation to justiciability. The right to water, as a Directive Principle, merely represents a guideline for policymakers and is not, on its face, enforceable by a court of law. The court applied a broad interpretation of the Indian Constitution's right to life clause, the court has been able to render justiciable, the economic and social rights it wished to legally protect. The court's expansive view of the scope and content of the fundamental rights to life has allowed it to use the right to provide justiciability for wide range of economic and social rights, including the right to water. The synthesis and integration of fundamental rights with directive principles in the judicial process of constitutionalizing social and economic rights has given momental latitude to the courts in their effort to recognize and protect these rights.

The Indian Supreme Court has affirmed the justiciability of the right to water on many occasions. In *Attakoya Thangala v Union of India*<sup>33</sup>, the plaintiffs argued that the government's plan to extract ground water from their

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<sup>32</sup> Sachs A, Justice, Constitutional Court of South Africa, Social and Economic Rights: Can They Be Made Justiciable (2002) (unpublished manuscript), available at: [http://www.unep.org/dpdl/symposium/Documente/country\\_papers/sachs\\_speech.doc](http://www.unep.org/dpdl/symposium/Documente/country_papers/sachs_speech.doc) (31 January 2017)

community in order to supply potable water to the neighbouring community would upset the fresh water equilibrium and cause long-term harm to the local water by increasing salinity. The court ruled in favor of the plaintiffs and held that the constitutional rights to life, includes a right to water. Water pollution has represented a prominent issue in the court's jurisprudence. In *M.C. Mehta v Union of India*<sup>34</sup>, the court addressed pollution of the Ganga River by the Kanpur Municipal Corporation, holding that Article 51 of the Constitution requires the government to protect and improve the environment. The court ordered the government to improve the sewage system and to end the practice of throwing burned corpses into rivers. The court emphasized the importance of both water and air, stating that the "grave consequences of the pollution of water and air," protection of the natural environment was a paramount state duty under the Constitution. In *Vekore Citizens' Welfare Forum v Union of India*<sup>35</sup>, the Court held that tanneries had violated citizens' rights by dumping untreated effluents into agricultural areas and local drinking water supplies.

Indian courts have also held the State responsible for inaction in cases of third party water pollution. In *M.C. Mehta v State of Orissa*<sup>36</sup>, citizens sued the government for failing to act in the face of sewage flowing into the river, contaminating local water and causing waterborne disease. When the court learned that the government had advance notice of the water's contamination, it held that the State was obligated to immediately control the existing pollution and prevent further pollution, noting the importance of maintaining the wholesomeness of water used for human consumption.

#### **5.4 The explicit justiciable right to water: the South African model**

South Africa operates under one of the most progressive constitutions in the world, one that acknowledges and makes justiciable not simply civil and political rights but social and economic rights as well. In South Africa, a large range of economic and social rights have been recognized in both the Constitution and the Bill of Rights. The Bill of Rights, which is incorporated in the 1996 Constitution, explicitly provides that every person in South Africa has the right to sufficient food, and water, subject to the government's practical ability to provide it. The Constitution recognizes right of access to housing, food, health care, social security, education, and a healthy environment. The Constitution requires that the State respect, protect, and fulfill all the rights in the Bill of Rights, including socio-economic rights.

According to Judge O'Regan, access to water has long been grossly unequal in South Africa despite the fact that rain is falling everywhere.<sup>37</sup> Despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. In order to give effect to the right of access to sufficient water for all, the South African Constitution bestows the responsibility of carefully managing this scarce resource to the local/municipal sphere of government.

South African courts affirmed the justiciability and legal enforcement of economic and social rights. In *Government South Africa v Grootboom*<sup>38</sup>, which is the landmark case in South Africa, the Constitutional Court addressed the justiciability of socio-economic rights in the context of force eviction and the right to housing. The Court referred to section 26 of the Constitution, which states that everyone has the right to have access to adequate housing and that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right. The Constitutional Court affirmed that the victims of economic and social rights violations can resort to courts for appropriate legal relief. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*<sup>39</sup>, the High Court found that the disconnection of a water supply was a justiciable issue and represented a prima facie breach of the State's constitutional duty to respect the right of access to water. The plaintiff, residents of blocks of flat in Hillbrow, Johannesburg had their municipal water supply disconnected by the defendants for non-payment, and they sought to have their access restored. After three days of unsuccessful attempts to convince the manager of the premises to restore service, the residents petitioned for relief from the courts on the grounds that their inability to pay the water fees made shut off unlawfully. The Court held that the Constitution mandated that everyone had the right of access to water<sup>40</sup> and that the Local Council, as an organ of the State, had the responsibility, as detailed in the Constitution, to take reasonable legislative and other measures within its available resources to achieve the

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<sup>33</sup> *Attakoya Thangal v. Union of India W.P.*, available at <http://www.elaw.org/resources/text.asp?ID=1267> (accessed 12 April 2016)

<sup>34</sup> (1990) 1 KLT 580, available at: [https://en.wikipedia.org/wiki/M.\\_C.\\_Mehta\\_v.\\_Union\\_of\\_India](https://en.wikipedia.org/wiki/M._C._Mehta_v._Union_of_India) (accessed 12 April 2016).

<sup>35</sup> (1998) 1 SCC 471.

<sup>36</sup> (1996) 5 SCC 647.

<sup>37</sup> (note 31 above).

<sup>38</sup> 2002(5) SA 721 (CC).

<sup>39</sup> 2002 (6) BCLR 625 (W).

<sup>40</sup> Section 27(1) (a).

progressive realization of the right.<sup>41</sup> The Court further held that disconnection procedures must be fair and equitable, and should in no circumstance result in a person's being denied access to basic water services for non-payment where the person proves, to the satisfaction of the water services authority, that he/she is unable to pay for the basic services. The Court ordered the defendants to reinstate the water supply to the residents.

In *Mazibuko and Others v City of Johannesburg and Others*<sup>42</sup>, the applicants in the case were poor residents of Phiri in Soweto where pre-paid water meters had been installed by Johannesburg Water, a wholly government owned water provider, as part of a new program known as Operation Gcin'amanzi (to save water). Under this program, the City of Johannesburg supplied six kiloliters of free water per household that is twenty five liters of free water per person per day, after which water supply was cut off if the residents had not pre-purchased water. The residents claimed, among other things, that the:

- Halting of water supply after the exhaustion of the free basic supply constituted unlawful and unreasonable discontinuation.
- Pre-paid meter system was discriminatory in that residents of Soweto were not given the option of credit meters provided to other residents.
- Procedure followed by the City to install pre-paid meters was unlawful and unfair, and
- That the City's basic water policy should be set at fifty liters per person per day rather than twenty five liters.

The High Court held that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution were fifty liters per person per day. The court further held that the forced installation of pre-payment water meter system without the choice of all available water supply options is unconstitutional and unlawful. As a result, the Court ordered amongst other things that the City provide the residents of Phiri with a free basic supply of fifty liters per person per day of water and the option of installing a metered supply. The city appealed the decision to the Supreme of Court of Appeal. The Supreme Court held that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution was forty-two liters per person per day and referred the formulation of the water policy back to the city to be revised in the light of the determination. The Supreme Court of Appeal also concluded that the City had no authority in law to install pre-paid meters and that the cut off in water supply that occurs when the free basic water limit has been exhausted constituted an unlawful discontinuation of the water supply.

The Appellants appealed the decision, requesting that the decision of the High Court be reinstated and the respondents cross-appealed to the Constitutional Court. The Constitutional Court's role was to determine whether the policy of the state authority in regards to the provision of water was reasonable in all the circumstances. The Constitutional Court declined to set a fixed quantity of water, which would constitute the content of the right to water under the Constitution as:

- The requirement of the right would change over time, and
- It would be institutionally inappropriate for the Court to impose such conditions on the Executive and Legislature.

The Court held that the ceasing of water after the exhaustion of the free water policy constituted a temporary suspension of water rather than discontinuation of services and was therefore not unconstitutional. It was a temporary suspension of water. The court further hold that the installation of water meters was not discriminatory given the complex policy circumstances surrounding supply of water to Soweto.

## **VI. A Critique Of Litigation (Judicial Enforcement) As A Strategy For Ensuring Implementation Of The Right To Water By South African Local Governments**

The Constitution provides for three spheres of government. Adequate delivery of clean water may fall within the competence and jurisdiction of all three spheres of government, depending on whether one is referring to water resources in general or to potable water supply systems. The legislative competence of the national parliament is provided for in the Constitution in section 43 and 44 read with Schedule 4 and 5. Similarly the legislative competence of provincial governments is provided for in section 104 read with the same schedules. In terms of section 44 (1) (a) (iii), the national legislative has powers: to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 5. On the other hand, provincial legislatures have powers to legislate on any Schedule 4 and 5 matters and any matters that are not listed in either schedule that have been expressly assigned by national legislation to provincial legislature. Any matter that is not listed in both schedule and that has not been assigned to the provinces remains an area of national legislative competence.

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<sup>41</sup> Section 27(2).

<sup>42</sup> *Mazibuko and Others v City of Johannesburg and Others* Case CCT 39/09 [2009] ZACC 28.

Schedule 4 of the Constitution lists the areas in respect of which both the national and the provincial legislatures have legislative competence. Schedule 5 lists areas which the provincial legislatures have exclusive legislative competence. Neither Schedule 4 nor Schedule 5 specifically list water, its supply, management or the development of water resources as an area of competence. These functions are therefore regarded as being within exclusive competency of national government and reside within the Draft White Paper on Water Services. It reflects the national importance of water resources in a water scarce country. The central body for water resources is the national DWEA, which has provincial departments.

Part B of Schedule 4 provides for local governments, that is, municipalities, to have exclusive authority to administer water and sanitation services limited to potable water supply systems and domestic waste-water and services disposal systems. The Constitution states that the objects of local government are to ensure the provision of the services to communities in a sustainable manner, to promote social and economic development and to promote a safe and healthy environment. Municipalities must strive, within their financial and administrative capacity, to achieve these objects.

It was recently confirmed in the Mazibuko case<sup>43</sup>. The court held as follows:

In terms of the Constitution, one of the objects of the local government is to ensure the provision of services to communities in a sustainable manner (section 152 (1) (b)). Like the other objects of local government, a municipality must strive, within its financial and administrative capacity, to achieve that object (Section 152 (2)). It has executive authority in respect of, and has the right to administer, among others, water and sanitation services. (Section 156 (1)), and may make by-laws for the effective administration of these services 156 (2)).

The municipality must structure and manage its administration and budgeting and planning processes to give priority to the community's basic needs and to promote its social and economic development. The responsibility of ensuring access to water services lies, in terms of the Water Services Act (WSA), with water services authorities, defined by the Acts as municipalities including districts or rural councils.

Access to water services must be the rough a water services provider nominated by water service authority in the area. A water services authority may contract a water services institution. The responsibility of water services authorities is to ensure access to both water supply services and sanitation services. Section 4 provides for conditions for the provision of water services, which must be provided in terms of conditions set by the water services provider. If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation. In case of an emergency, basic water supply and sanitation services must be provided, even at the expense of the water services authority. The procedures for the limitation or discontinuation of water must be a "fair and equitable" and "provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations. The Water Services Act acknowledges the constitutional rights of access to basic water supply and sanitation and provides that every services institution must take reasonable measure to realize these rights. Every water services authority must, in its water services development plan, provide for measures to realize these rights. Basic water supply means "the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informed households, to support life and personal hygiene." Basic sanitation means "the prescribed 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" Sanitation Services imply "the collection, removal, disposal or purification of human excreta, domestic waste water, and sewage resulting from the use of water for commercial purpose". The jurisprudence of the South African Constitutional Court in *Mazibuko* confirms that water users and providers should expect states to regulate the use and supply of water, as part of their duty to prevent third party interference with socio-economic rights. It would as demonstrated by South African jurisprudence and policy, extend to the regulation of the amount and quality of water to be supplied to households as well the affordability of water. The principles of cooperative government discourage litigation between and among government departments and spheres of government, with the repercussion that neither national nor provincial governments have the political will to take municipalities to task where they fail to deliver services. Even the environmental management inspectors appointed in terms of the National Environmental and Management Act, NEMA may find it difficult to enforce water and environmental legislation against municipalities. It is precisely so in the light of the fact that some offenders of municipality can be appointed as inspectors. It therefore requires an active civil society that can vindicate the right of the communities served the municipalities. These rights include those based on legislation and also common law rights that can be used at grassroots level.

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<sup>43</sup> CCT 39/09 [2009] ZACC.



## **VII. Reasonable Failure Of The Water Authorities To Provide Access To Water Services**

There are several reasons for water services authorities' failure to deliver water services. The provision of water services requires money, and while municipalities can rely for part of the financing on a combination of subsidies from national government and transfers from other municipal account, the rest of the financing is intended to come from the local tariffs. In certain areas, however, municipalities have faced shortfalls in collecting tariffs.

It is questionable whether a failure by a local authority to give access to water services as a result of inefficient administration or inadequate allocation of funds is reasonable, the meaning and interpretation of "reasonable" is relevant in the case. A water services authority may, however, impose reasonable limitations to the use of water services in order to regulate beneficial uses, the abuse of the service and pollution. However, unless municipality have the financial and technical assistance and qualified human resources to comply with national water policy and standards, their ability to deliver is severely compromised, and it gives rise to inequitable delivery of services, depending on the resources of the municipality.

## **VIII. Water Boards**

A water services institution may request the water board within its service area to provide water services. A water board may only refuse such a request if, for sound technical or financial reasons, it would not be viable those water services. The water boards may also provide management services, training and other support services to water service institutions, in order to promote cooperation in the provision of water services. In the spirit of cooperative governance the water board must promote the efficiency of water services authorities and take into account national and provincial policies, objects and developments.

The board is required to publish a policy statement, which must be revised at least every five years. The minister may direct the board to revise its policy statement if it is not in the best interests of the general population within its service area or does not meet the parameters of its functions. The board is also required to publish a business plan every five years with similar provisions allowing the Minister to direct an amendment for the business plan.

## **IX. Water Services Committees**

The minister may establish water services committees with the function of providing water services to a community. In setting up these committees, the Minister needs to consult with the inhabitants of the proposed service area, the water services authority and the Minister for Provincial Affairs and Constitutional Development in the province. The function of a water services committee is to provide water services to consumers within its service area.

## **X. Financial Assistance**

Chapter 6 of the Water Service Act provides for financial assistance by means of grants, loans or subsidies to be given by the Minister, after consultation with the relevant province, to the water service institution. In approving an application for financial assistance, the Minister must consider, inter alia, the requirements of equity and transparency, the purpose of the loan or subsidy, the main objects of the Act and the financial position of the applicant. The Minister may, in terms of section 56 of the National Water Act (NWA), establish a pricing strategy for charges for any water use within the framework of existing relevant government policy by setting water use charges for funding water resource management, water resource development and use of waterworks.

## **XI. Mandatory By-Laws**

It is mandatory for every water services authority to draft by-laws regulating conditions for the provision of water services. Those must make provision for the standard of services, the technical conditions of supply, the installation alteration, operation protection and inspection, operation and protection of water services works and consumer installations, tariffs, collections of charges, circumstances under which services may be discontinued or limited, prevention of unlawful connections to water services works and unlawful or wasteful use of water.

## **XII. Obligatory Planning By Water Services Authority**

Every water services authority has a duty to prepare a draft water services development plan and the contents of the plan are set out in the Act. The plan must include an implementation structure for five years, details of the proposed infrastructure, the estimated capital and operating costs, financial arrangements for funding, the number and locations of persons to whom water services cannot be provided within the five year period, the reason therefore and a delivery timeframe. A copy of the draft plan must be made available for public comment and thereafter must be submitted to the Minister, the relevant provincial and all neighbouring

water service authorities. The adopted plan must be submitted to the Minister, the Minister for Provincial Affairs and Constitutional Development, the relevant province and all neighbouring water services authorities.

### **XIII. Conclusion**

It is clear that the legal framework for cooperative governance in the provision of water services provides for key gateways towards ensuring that there is sustainable use of water resources and that there is efficiency in the delivery of water services. What is undoubtedly equally apparent is that when it comes to the practical implementation, there is no obvious cooperation between the different spheres of government, especially the national government and municipalities in those areas where the former must set norms and standards that must underpin and guide service delivery. The National Water Resource Strategy and norms and standards set at the national level, if properly implemented and used as guidelines by municipalities and water services providers, have the potential to lead to improve service delivery. However, in order for it to happen, there must be incentives for municipalities to execute their statutory responsibilities with vigor. Apart from positive incentives, of which there are quite few, legislation can put in place enforcement mechanisms to ensure that regulatory infractions are dealt with effectively.

### **XIV. Recommendations**

The paper recommends that the Minister of Water and Sanitation including any relevant province must monitor the performance of every water services institution to ensure compliance with prescribed national standards and norms. And compliance with every applicable development plan, policy statement or business plan adopted. If a water services authority has not effectively performed any function imposed on it, the Minister, after consultation with the Minister for Provincial Affairs and Constitutional Development, must request the relevant province to intervene in terms of section 139 of the Constitution. Section 139 makes provision for provincial supervision of local government. If the province fails to intervene or effectively intervene, the Minister may assume responsibility for the function, subject to notice to the National Council of Provinces and its approval. The Minister must appoint a water service institution to perform the function, and he/she may utilize all financial and other resources available to the suspended water services authority relating to that function.

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