

Respect, Protect, Fulfill: the Implementation of the Human Right to Water in South Africa

INGA T. WINKLER*

Introduction

Water services in South Africa have started a hot debate. On one hand, the state is often regarded as being at the forefront in terms of water services provision particularly due to its explicit acknowledgement of the human right to water and its Free Basic Water (FBW) Policy.¹ On the other hand, South Africa is a country suffering from extreme inequalities. Its GINI index² is extremely high with 57.8.³ Also, access to water is extremely uneven, a legacy of the apartheid era.⁴ Historically 'white' suburbs account for more

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¹ United Nations Development Programme, *Human Development Report 2006, Beyond Scarcity: Power, Poverty and the Global Water Crisis* 64 (New York: Palgrave Macmillan, 2006).

² In the GINI index, a value of zero represents perfect equality and a value of 100 perfect inequality.

³ United Nations Development Programme, note 1 above at 337.

⁴ Rose Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power', 18 *Georgetown International Environmental Law Review* 149, 154 (2005). On the hydrology of apartheid cf. Ken Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* 322 et seqq. (Cambridge: MIT Press, 2006).

than 50 per cent of residential water use with 'whites' just comprising roughly 10 per cent of the population.⁵ A great number of people still lack access to water services, mostly marginalised and vulnerable groups of society. Many more suffer from high prices and the use of unsafe water.⁶ These inequalities in access to safe and affordable water have caused much resistance against water service commercialisation, privatisation and cost recovery on which the government mainly relies to expand services.

This chapter tries to achieve a balanced view from a human rights perspective recognising the country's achievements, but also taking a close look at the challenges in the implementation of the right to water. It analyses the implementation of the human right to water in South Africa in regard to the obligations borne by the state that correspond to the right to water under the common tripartite distinction between obligations to respect, protect and fulfill. The chapter starts by outlining the normative content of the right to water in order to determine the standard against which the implementation is to be assessed and by presenting the set of different obligations as a framework for analysing how South Africa aims to meet these obligations. This analysis starts by presenting the legislative framework and policies aimed at the implementation of the right to water. In the remaining part of the chapter, challenges to the implementation of the right are examined. Several concerns are raised which refer to the different obligations ranging from affordability concerns over widespread disconnections to the complete lack of access.

The Human Right to Water

In international law, the human right to water is guaranteed under the International Covenant on Economic, Social and Cultural Rights (Social Covenant) in particular as being derived from the right to an adequate standard of living and the right to the highest attainable

⁵ Francis, note 4 above at 150. See Jaap de Visser, Edward Cottle and Johann Mettler, 'Realising the Right of Access to Water: Pipe Dream or Watershed', *7 Law, Democracy and Development* 27 (2003).

⁶ South African Human Rights Commission, *The Right to Water 4* (5th Economic and Social Rights Report Series, Financial Year 2002/2003, Johannesburg, 2004).

standard of health.⁷ However, South Africa is not party to that Covenant so its provisions are not binding onto the state. Yet, the South African Constitution itself explicitly recognises the right to water. The Constitution is regarded as being one of the most progressive in the world,⁸ in particular due to its far-reaching commitment to socio-economic rights.⁹ Section 27(1)(b) guarantees the right to have access to sufficient food and water. The second paragraph acknowledges that the full realisation of socio-economic rights such as the right to water is a long term process and is therefore to be achieved progressively.¹⁰

2.1 Content of the Human Right to Water

In order to assess the implementation of the right to water and to identify any deficits, it is important to first establish its normative content. In recent years, the content of the right to water has been determined, rather detailed, mainly as being derived from provisions of the Social Covenant. The General Comment No. 15¹¹ of the Committee on Economic, Social and Cultural Rights – the treaty body monitoring the implementation of the Social Covenant

⁷ Cf. Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002), para. 3. Source: <http://www.iesrc.org/content/e0221.pdf> [hereafter General Comment No. 15] and Eibe Riedel, 'The Human Right to Water', in Klaus Dicke ed., *Weltinnenrecht – Liber Amicorum Jost Delbrück* 585, 596 et seq. (Berlin: Duncker & Humblot, 2005).

⁸ Francis, note 4 above, 156.

⁹ Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise', 16 *South African Journal on Human Rights* 206, 214 (2000) and Sage Russell, 'Minimum State Obligations: International Dimension', in Danie Brand and Sage Russell eds., *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* 11, 13 et seq. (Pretoria: Protea, 2002).

¹⁰ For the discussion about core obligations that aim at guaranteeing an immediate minimum standard and arise regardless of the principle of progressive realisation, cf. below at 4.2.2.

¹¹ General Comment No. 15, note 7 above.

- is particularly relevant in this regard. It is not legally binding,¹² but an authoritative interpretation of the Social Covenant.¹³ Not having ratified the Covenant, the General Comment is however of no direct relevance for South Africa. Yet, some provisions of the South African Bill of Rights are very similar to those of the Social Covenant and Section 39(1)(b) explicitly calls for the consideration of international law when interpreting the Bill of Rights. The right to water as contained in Section 27(1)(b) of the Constitution can thus be interpreted similarly to the right to water under the Social Covenant.¹⁴

Moreover, there are other instruments at the international level that are of direct relevance for countries that have not ratified the Social Covenant such as South Africa, as they are not treaty-based. The Special Rapporteur on the right to water appointed by the Sub-Commission on the Promotion and Protection of Human Rights, El Hadji Guissé, has issued a set of draft guidelines on the right to water.¹⁵ Moreover, the Human Rights Council has

¹² Eckart Klein, 'General Comments: Zu Einem Eher Unbekanntem Instrument des Menschenrechtsschutzes', in Jörn Ipsen and Edzard Schmidt-Jortzig eds., *Recht - Staat - Gemeinwohl, Festschrift für Dietrich Rauschning* 301, 307 et seq. (Cologne: Heymann, 2001) Eibe Riedel, 'The Human Right to Water', in Klaus Dicke ed., *Weltinnenrecht – Liber Amicorum Jost Delbrück* 585, 596 et seq. (Berlin: Duncker & Humblot, 2005). 592 et seq.

¹³ Cf. Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002), para. 3. *Source*: <http://www.ihlrc.org/content/e0221.pdf> [hereafter General Comment No. 15] and Eibe Riedel, 'The Human Right to Water', in Klaus Dicke ed., *Weltinnenrecht – Liber Amicorum Jost Delbrück* 585, 596 et seq. (Berlin: Duncker & Humblot, 2005), at 592.

¹⁴ Anton Kok and Malcolm Langford also interpret the right to water by referring to international law and in particular the interpretation provided by the Committee. See Anton Kok and Malcolm Langford, 'The Right to Water' in Stuart Woolman *et al.* eds., *Constitutional Law of South Africa* 56B–9 et seqq. (Lansdowne: Juta, 2nd ed., 2005). Cf. as well *Government of the Republic of South Africa and Others v Grootboom and Others*, Constitutional Court of South Africa, Judgment of 4 October 2000, 2000 (11) BCLR 1169 (CC) at 1185 [hereafter Grootboom Judgment].

¹⁵ Report of the Special Rapporteur, Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, UN Doc. E/CN.4/Sub.2/2005/25 (2005). *Source*: <http://www.ihlrc.org/content/e0501.pdf> [hereafter Draft Guidelines].

requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct a study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation.¹⁶ After consulting with states and other stakeholders, the OHCHR submitted this study¹⁷ in August 2007. In its most recent resolution on 'Human rights and access to safe drinking water and sanitation',¹⁸ the Human Rights Council decided to appoint an independent expert on the issue. Catarina de Albuquerque has taken up her mandate in November 2008. As these instruments belong to the realm of the former Human Rights Commission and the new Human Rights Council respectively, they are not treaty- but Charter-based and are as such relevant for all member states of the United Nations including South Africa.

2.1.1 Sufficient Quantity

When determining the normative content of the right to water, the first question regards the *quantity* of water guaranteed. This amount has to be sufficient to meet drinking purposes and other basic human needs – personal and domestic uses such as washing, cooking, cleaning and personal hygiene.¹⁹ It is difficult to determine the exact amount of water necessary to fulfill these needs as requirements vary, for example, due to climatic conditions, but also between different groups of people. For example, people living with HIV/AIDS require larger amounts of water.²⁰ Yet, several studies regard 20 to 25 litres per day per person as the absolutely

¹⁶ Human Rights Council, Human Rights and Access to Water, UN Doc. A/HRC/2/L.3/Rev.1 (4 October 2006).

¹⁷ Office of the United Nations High Commissioner for Human Rights, Report on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, UN Doc. A/HRC/6/3 (16 August 2007) [hereafter OHCHR Study].

¹⁸ Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, UN Doc. A/HRC/7/L.16 (20 March 2008).

¹⁹ General Comment No. 15, note 7 above at para. 2 and OHCHR Study, note 17 above at para. 13.

²⁰ Cf. *Lindiwe Mazibuko et al. v The City of Johannesburg et al.*, High Court (Witwatersrand Local Division) of South Africa, Judgment of 30 April 2008. Source: <http://www.cohre.org/store/attachments/Mazibuko%20Judgment.pdf>.

necessary minimum amount²¹ and it can hardly be assumed that basic needs can be met with a smaller amount. The provision of such an amount does not imply the full realisation of the right to water. To achieve this, a larger quantity has to be provided progressively.²² The World Health Organisation (WHO) regards 50 to 100 litres per day as sufficient to meet domestic needs.²³

2.1.2 Other Features

Not only the quantity of water but its *quality* is also important. Water has to be safe and of such quality that it does not pose a threat to human health.²⁴ Furthermore, water has to be *physically accessible* in the household or its immediate vicinity.²⁵ The WHO assumes basic access when water is available at a distance of up to 1000 metres.²⁶ The South African Government aims to supply water at a distance of less than 200 metres to everyone.²⁷ Furthermore, water has to be *affordable*, that is economically accessible. People must be able to realise their right to water without having to compromise other basic needs such as food and

²¹ Guy Howard and Jamie Bartram, Domestic Water Quantity, Service Level and Health 23 (Geneva: World Health Organization, WHO Doc. WHO/SDE/WSH/03.02, 2003). See also United Nations Development Programme, note 1 above at 3; World Health Organisation and United Nations Children's Fund, *Global Water Supply and Sanitation Assessment 2000 Report* 77 (Geneva and New York, 2000); General Comment No. 15, note 7 above at para. 12 (a). OHCHR Study, note 17 above. at para. 14 and World Bank *Technical Notes* 5, available at: <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/English-Full-Text-Report/ch12b.pdf>. Others regard 50 litres as minimum. See Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic Needs', 21 *Water International* 83, 88 (1996).

²² On the distinction between core obligations and the obligation to progressive realisation see below 4.2.2.

²³ Howard and Bartram, note 21 above at 22.

²⁴ General Comment No. 15, note 7 above at para. 12 (b) and OHCHR Study, note 17 above at para. 17.

²⁵ General Comment No. 15, note 7 above at para. 12 (c). See also OHCHR Study, note 17 above at para. 25 and Draft Guidelines, note 15 above at para. 1.3 (a).

²⁶ Howard and Bartram, note 21 above at 22.

²⁷ Department of Water Affairs and Forestry, Strategic Framework for Water Services: Water is Life, Sanitation is Dignity 46 (2003) [hereafter DWAF Strategic Framework 2003]. Source: www.dwaf.gov.za/Documents/Policies/Strategic%20Framework%20approved.pdf.

housing.²⁸ Affordability can be assessed by using the percentage of household income spent on water services as an indicator. It is difficult to determine the exact percentage which exceeds affordability, but international recommendations are in a certain range: the United Nations Development Programme (UNDP) Human Development Report of the United Nations Development Programme (UNDP) regards three per cent of household income as an appropriate benchmark,²⁹ whereas the Camdessus Report assumes five per cent.³⁰

2.2 Concept of Obligations to Respect, to Protect and to Fulfill

Human rights correspond to obligations borne by the state, which can be categorised as duties to respect, to protect and to fulfill. This concept was first developed by Shue³¹ and has become widely used, for example, by the Committee on Economic, Social and Cultural Rights. Most importantly in the South African context, it is also laid down in Section 7(2) of the South African Constitution.³²

The *obligation to respect* requires states to refrain from interfering with the enjoyment of human rights thus aiming to prevent an infringement of rights that have already been realised.³³ States

²⁸ General Comment No. 15, note 7 above at para. 12 (c). See also OHCHR Study, note 17 above at para. 28 and Draft Guidelines, note 15 above at para. 1.3 (d).

²⁹ United Nations Development Programme, note 1 above at 97.

³⁰ Michel Camdessus and James Winpenny, *Financing Water For All 19* (Report of the World Panel on Financing Infrastructure, 2003). Source: <http://www.ielrc.org/content/e0315.pdf>.

³¹ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

³² Republic of South Africa, Constitution of 1996, Act No. 108 of 1996. Source: <http://www.info.gov.za/documents/constitution/1996/a108-196.pdf>.

³³ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development* 109 (Oxford: Oxford University Press, 1995) and Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide, Catarina Krause & Allan Rosas eds, *Economic, Social and Cultural Rights – A Textbook* 9, 23 (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 2nd ed., 2001). See Michael Kidd, 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water', 20 *South African J. Human Rts* 119, 121 (2004).

have to avoid any law or conduct that would result in a deprivation of access to rights. As far as the right to water is concerned, this obligation requires states to respect existing access to water which is particularly relevant for the question whether water supplies may be disconnected in the case of non-payment. Fair procedures must be followed.³⁴ The same holds true for access to public standpipes on which many people rely particularly in rural areas. The state must not arbitrarily stop their operation and maintenance if people are left without an alternative access to water. In any case, it is indispensable that no one may be deprived of the minimum essential level of water under any circumstances.³⁵

The *obligation to protect* refers to the duty of states to prevent third parties from interfering with the enjoyment of human rights.³⁶ This obligation places a duty on states to implement legislation and other measures that prevents (powerful) private parties from undermining the rights of others. Third parties must not interfere with access to safe drinking water, for example, by polluting water resources. Moreover, the obligation becomes particularly relevant in the case of water service privatisation. States have to ensure that private provision does not compromise access to water by establishing an effective regulatory framework.³⁷ The outcome, the state has to ensure, is the same as for the obligation

³⁴ For the South African context, see Kidd, note 33 above at 129 et seqq.

³⁵ General Comment No. 15, note 7 above at para. 56. See also Draft Guidelines, note 15 above at para. 2.3 (d), 6.4 and OHCHR Study, note 17 above at para. 57; Kidd, note 33 above at 120, 132.

³⁶ Craven, note 33 above at 109 and Eide, note 33 above, at 24. A different question discussed under the term horizontal application is whether human rights obligations are extended to the private parties themselves. It has to be considered in light of Section 8(2) of the Constitution. Cf. Anton Kok, 'Privatisation and the Right to Access to Water', in Koen De Feyter and Felipe Gómez Isa eds., *Privatisation and Human Rights in the Age of Globalisation* 259, 269 et seq. (Antwerp: Intersentia, 2005) and Sean Flynn and Danwood Mzikenge Chirwa, 'The Constitutional Implications of Commercializing Water in South Africa', in David A. McDonald and Greg Ruiters eds., *The Age of Commodity, Water Privatization in Southern Africa* 59, 62 et seq. (London, Sterling: Earthscan, 2005).

³⁷ General Comment No. 15, note 7 above at para. 24. See also Draft Guidelines, note 15 above at para. 2.3 (e) and OHCHR Study, note 17 above at para. 38, 53.

to respect – the right to water must not be infringed, but the state has to adopt different measures as it does not itself act as the water supplier, but has to act as a regulator in order to prevent private suppliers from violating the human right to water.

The *obligation to fulfill*³⁸ requires states to adopt the necessary measures directed towards the full realisation of the human rights.³⁹ This obligation aims to ensure that those people who currently lack access gain access to these rights. States have to take positive measures to enable and assist people to enjoy the right to water, in particular by allocating sufficient water resources for personal and domestic needs as well as by maintaining and expanding infrastructure to currently un-served areas such as rural areas and informal settlements. As far as the actual provision of water is concerned it has to be kept in mind that every individual is generally expected to satisfy his or her basic needs through their own efforts and resources.⁴⁰ However, when people do not have sufficient means to provide for themselves, the state is required to adopt the necessary policies to ensure that water is affordable to everyone such as subsidisation mechanisms or even supplying water free of charge to ensure a minimum essential level of water.⁴¹ In so far, South Africa's Free Basic Water (FBW) Policy becomes relevant.⁴²

Legislation and Policies Towards the Implementation of the Right to Water

3.1 The Legislative Framework

This section lays down the legislative framework for human right to water in South Africa. The National Water Act of 1998⁴³ and the

³⁸ The obligation to promote included in Section 7(2) of the South African Constitution can be regarded as part of the obligation to fulfil. Measures to fulfil this obligation could include awareness campaigns, educational programmes, etc. *Cf.* de Visser, Cottle and Mettler, note 5 above at 29.

³⁹ Craven, note 33 above at 109 and Eide, note 33 above at 24.

⁴⁰ Eide, note 33 above at 23.

⁴¹ General Comment No. 15, note 7 above para. 25, 27. *See also* Draft Guidelines, note 15 above at para. 6.1, 6.2 and OHCHR Study, note 17 above at para. 41.

⁴² Section in the text below 3.2.

⁴³ Republic of South Africa, National Water Act, Act No. 36 of 1998. *Source:* www.dwaf.gov.za/Documents/Legislature/nw_act/NWA.pdf.

Water Services Act of 1997⁴⁴ are the most relevant legislative acts in the water sector. The National Water Act is mainly concerned with water resources and their management and protection, whereas the Water Services Act deals with the regulatory framework for water supply.⁴⁵ Important specifications are provided by a number of Ministerial Regulations. Some provisions refer specifically to the obligation to respect, to protect or to fulfill respectively, which will be pointed out.

3.1.2 *The National Water Act*

Section 2 of the National Water Act outlines the purposes of the Act stressing the factors of meeting basic needs, promoting equitable access and redressing historical discrimination.⁴⁶ To this end, the Act establishes the 'Reserve', a certain quantity of every single water resource reserved for basic human needs. It is defined in Section 1(1)(xviii)(a) as referring to the quantity and quality of water required to satisfy basic human needs by securing basic water supply as prescribed in the Water Services Act. It thus provides for the essential needs of individuals relying upon the water resource in question by setting aside the necessary amount. As such, the human needs reserve is an instrument to ensure that basic human needs enjoy priority in the allocation of water resources without being subject to competition with other water demands.⁴⁷ It can be regarded as a unique concept which reflects the human right to water.⁴⁸

3.1.3 *The Water Services Act*

In order to fulfill basic human needs, it is not sufficient to set aside a specified amount of water; rather, it also has to be supplied. As

⁴⁴ Republic of South Africa, Water Services Act, Act No. 108 of 1997. *Source:* <http://www.ielrc.org/content/e9705.pdf>.

⁴⁵ Republic of South Africa, Department of Water Affairs and Forestry, Report of the Department of Water Affairs and Forestry 7, Pretoria, 2007 [hereafter DWAf Annual Report]. *Source:* <http://www.dwaf.gov.za/Documents/AnnualReports/2007/AnRep07full.pdf>.

⁴⁶ Section 2(a), (b) and (c) of the Water Services Act, note 44 above. *See also* Conca, note 4 above at 342.

⁴⁷ Sandy Liebenberg, 'The National Water Bill – Breathing Life into the Right to Water', 1 *Economic and Social Rights Review* 1 (1998).

⁴⁸ Conca, note 4 above at 346.

its title suggests, the Water Services Act is concerned with provision of water services. Section 2(a) lists as the first of the main objectives of the Act to provide for 'the right of access to basic water supply and the right to basic sanitation'. This significance conferred to the fulfillment of basic human needs is reinforced by Section 3 which guarantees the 'right of access to basic water supply and basic sanitation' and stipulates that every 'water services institution must take reasonable measures to realise these rights'. Moreover, Section 5 gives preference to the provision of basic water supply over other uses of water. The term basic water supply is defined in Section 1(iii) 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'.

In the context of the *obligation to respect* an existing water supply, Section 4(3)(c) of the Water Services Act is of particular relevance. It is part of the procedures for the limitation of discontinuation of water services and provides that procedures 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 authority, that he or she is unable to pay for basic services'.⁴⁹ However, Section 11 which determines the duty of water service authorities to provide access states in its paragraph 2(g) that this duty is subject to 'the right of the relevant water services authority to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services'. These two provisions seem contradictory: Section 4(3)(c) prohibits disconnections for non-payment when people are unable to pay for services, whereas Section 11(2)(g) allows disconnections under certain circumstances. The very broad term 'reasonable conditions' in Section 11(2)(g) needs to be interpreted in terms of the more specific Section 4(3)(c). It has to be understood in a way that the disconnection must not lead to the denial of basic services for indigent people.

Section 19 of the Water Services Act is relevant for the privatisation of water services and thus relates specifically to the

⁴⁹ Cf. the analysis by Kidd, note 33 above 131 et seq.

obligation to protect.⁵⁰ The Water Services Act determines the local governments as 'default service provider', but allows them to subcontract that task to private service providers under certain circumstances.⁵¹ However, in this case, the obligation to protect remains with the state. It thus has to ensure through its regulatory framework that the private provider acts in accordance with the human right to water.⁵²

Most important for the *obligation to fulfill* is the duty of water services authorities to provide access to water services. It is laid down in Section 11 of the Water Services Act. However, paragraph 2 qualifies this duty and states that it is inter alia subject to the availability of resources and to the duty of consumers to pay reasonable charges in accordance with any prescribed norms and standards for tariffs for water services.

3.1.4 Ministerial Regulations

In line with the authorisation in Sections 9 and 10 of the Water Services Act the Minister has issued 'Regulations relating to compulsory national standards and measures to conserve water' in April 2001.⁵³ Regulation 3 is especially important, as it further specifies the term basic water supply as a 'minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month'.

3.2 Policies Aiming at Implementation

It is not sufficient to put into place a legislative framework for the right to water; rather, its implementation through policies is

⁵⁰ Cf. as well Section 76 et seqq. of the Municipal Systems Act. See Republic of South Africa, Local Government: Municipal Systems Act, Act No. 32 of 2000, 425 Government Gazette No. 21776, 20 November 2000. Source: www.info.gov.za/gazette/acts/2000/a32-00.pdf.

⁵¹ Conca, note 4 above at 353.

⁵² Anton Kok, 'Privatisation and the Right to Access to Water', in Koen De Feyter and Felipe Gómez Isa eds., *Privatisation and Human Rights in the Age of Globalisation* 259, 269 et seq. (Antwerp: Intersentia, 2005), at 319.

⁵³ Republic of South Africa, Department of Water Affairs and Forestry, Regulations Relating to Compulsory National Standards and Measures to Conserve Water, 2001. Source: www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC9DREG-20%20April%202001.doc.

essential. The Government's overall aim is to provide more people with access to water supply. Large parts of the black population did not have access when the African National Congress (ANC) came to power in 1994, an estimated 12 to 14 million people.⁵⁴

According to government statements, ten million people had gained access in 2004 since the end of the apartheid era.⁵⁵ In its 2007/08 Annual Report, the Department of Water Affairs and Forestry (DWAF) states that access has improved from 59 per cent in 1994 to 95 per cent of the population.⁵⁶ However, not all of these water connections meet the level of basic services, in particular because services are only provided at a distance of more than 200 m from the households.⁵⁷

However, these figures refer to access to infrastructure which does not necessarily imply that people can afford these services. The government aims to overcome this deficit with its FBW Policy seeking to provide everyone with a minimum amount of water for free. The idea of FBW dates back to 1994 when the African National Congress (ANC) won the first democratic elections. However, the Policy was only introduced in 2000/01 in the wake of the rising community struggle and controversy over water cut-offs, the

⁵⁴ Republic of South Africa, Department of Water Affairs and Forestry, White Paper on a National Water Policy for South Africa 15, 1997 [hereafter DWAF White Paper 1997]. *Source:* www.dwaf.gov.za/Documents/Policies/nwpwp.pdf; Conca, note 4 above at 319, Eddie Cottle, *The Class Nature of Free Water in South Africa: From Past to Present* 19 (Durban: University of KwaZulu-Natal, Paper for the Centre for Civil Society, 2004). *Source:* www.nu.ac.za/ccs/default.asp?3,28,10,1186, and David A. McDonald, 'The Bell Tolls for Thee: Cost Recovery, Cutoffs, and the Affordability of Municipal Services in South Africa', in David A. McDonald and John Pape eds, *Cost Recovery and the Crisis of Service Delivery* 161, 162 (Cape Town: Human Sciences Research Council Publishers, 2002).

⁵⁵ Republic of South Africa, Department of Water Affairs and Forestry, Parliamentary Media Briefing 1, 10 February 2004, *Source:* [www.dwaf.gov.za/Communications/PressReleases/2004 Parliamentary%20Media%20Briefing%20Release%202004.doc](http://www.dwaf.gov.za/Communications/PressReleases/2004%20Parliamentary%20Media%20Briefing%20Release%202004.doc).

⁵⁶ Republic of South Africa, Department of Water Affairs and Forestry, Annual Report 2007/2008 at 54 (Pretoria, 2008) *Source:* [www.dwaf.gov.za/documents/Annual Reports/ANNUALREPORT2009-2008.pdf](http://www.dwaf.gov.za/documents/Annual%20Reports/ANNUALREPORT2009-2008.pdf) [hereafter DWAF Annual Report 2008].

⁵⁷ DWAF Annual Report 2008, note 56 above at 54.

introduction of prepayment water metres and a cholera outbreak.⁵⁸ In the 2000 local elections, the ANC announced that it would provide all residents with a free basic amount of water.⁵⁹ In February 2001, the policy was officially announced by the Minister of Water Affairs and Forestry.⁶⁰ It means to provide each household with 6000 litres of water every month free of charge which amounts to 25 litres per day per person in a household of eight. FBW is financed via cross-subsidisation through a rising block tariff system. Users who consume more than the basic supply have to pay higher tariffs for additional units which results in a cross-subsidisation from high volume to low volume users.⁶¹ Moreover, financial support is provided to municipalities through the 'equitable share', a portion of the national annual budget transferred to local governments that is calculated on the basis of the percentage of poor people living in a municipality.⁶² According to the 2004/'08 DWAF Annual Report, 90 per cent of the population with access to water infrastructure benefit from FBW which translates to 84 per cent of the South African population.⁶³

⁵⁸ Patrick Bond, *De-Commodification in Theory and Practice: Fighting Human Insecurity in Post-Apartheid South Africa's Water Wars* 15 (Paper Presented to the International Sociological Association, 28 July 2006). *Source:* www.ukzn.ac.za/ccs/default.asp?3,28,10,2650. *See* Julie A. Smith and J. Maryann Green, 'Free Basic Water in Msunduzi, KwaZulu-Natal: Is It Making a Difference to the Lives of Low-Income Households?', 7 *Water Policy* 443, 445 (2005).

⁵⁹ *Cf.* African National Congress, *Local Government Elections 2000 Manifesto – Together Speeding Up Change*, 2000. *Source:* www.anc.org.za/elections/local00/manifesto/manifesto.html.

⁶⁰ Republic of South Africa, Department of Water Affairs and Forestry, Media Statement by the Minister of Water Affairs and Forestry, Mr. Ronnie Kasrils, 14 February 2001. *Source:* <http://www.dwaf.gov.za/Communications/PressReleases/2001/Free%20water%206000%20litres%2014%20February%202001.doc>.

⁶¹ Francis, note 4 above at 180 and United Nations Development Programme, note 1 above at 64.

⁶² *See* Francis, note 4 above at 180. *See also* de Visser, Cottle and Mettler, note 5 above at 37 and Arnold M. Muller, *Sustaining the Right to Water in South Africa* 5 (Geneva: UNDP Human Development Report Office, Occasional Paper 2006/29, 2006). *Source:* http://hdr.undp.org/en/reports/global/hdr2006/papers/muller_arnold.pdf.

⁶³ DWAF Annual Report 2008, note 56 above at 58.

Challenges to the Implementation of the Right to Water

In spite of the progress made by the increasing access to water services and the expansion of the FBW Policy, there are certain areas of concern in the implementation of the right to water. These will be analysed under the framework of obligations to respect, to protect and to fulfill.

4.1 *Obligation to Respect and to Protect*

The obligations to respect and to protect are two separate obligations as outlined above. However, they are associated with the same challenges in the implementation of the human right to water:⁶⁴ Increases in water tariffs can be implemented either by public or private water service providers. Similarly, disconnections of water services can be carried out and prepayment metres be installed by both types of service providers. Depending on their type, the role of the state changes and it bears different obligations: the obligation to respect when measures are carried out by public water providers and the obligation to protect in cases of water service privatisations with the state acting as regulator.

4.1.1 *Policy of Cost Recovery*

Increases in tariffs, water service disconnections and the installation of prepayment water metres cannot be understood without reference to the principle of cost-recovery. It signifies that consumers are charged the full (or nearly full) cost of providing water services⁶⁵ and is the basis for privatisation as municipalities try to attract private (foreign) investment.⁶⁶ In 1996, the principle

⁶⁴ David A. McDonald and Greg Ruiters, 'Theorizing Water Privatization in Southern Africa', in David A. McDonald and Greg Ruiters eds., *The Age of Commodity, Water Privatization in Southern Africa* 13, 18, 28 et seq. (London, Sterling: Earthscan, 2005). It is pointed out that commercialised public utilities are very similar to privatised water services.

⁶⁵ David A. McDonald, 'The Theory and Practice of Cost Recovery in South Africa', in David A. McDonald and John Pape eds., *Cost Recovery and the Crisis of Service Delivery* 17 (Cape Town: Human Sciences Research Council Publishers, 2002).

⁶⁶ Francis, note 4 above at 157 et seq. and McDonald and Ruiters, note 64 above at 18 et seq.

of cost recovery became official policy with the adoption of the 'Growth, Employment and Redistribution' (GEAR) policy. It includes the government's commitment 'to the application of public-private sector partnerships based on cost recovery pricing where this can practically and fairly be effected'.⁶⁷

4.1.2 *Increases in Water Tariffs*

While many water activists in South Africa demand water to be provided free of charge, this is not necessarily required from a human rights perspective.⁶⁸ Only if people live in extreme poverty and have hardly any income at all, does water have to be provided for free. As long as people can fulfill their basic human needs, there is no violation of the human right to water, even if people have to pay in order to do so. The decisive criterion is that of affordability. If people spend a large percentage of their income on water supply, services have to be regarded as unaffordable.

As a consequence of the introduction of the principle of cost recovery and the privatisation of water supply, there have been steep price increases in many areas. In Johannesburg, for example, tariffs have doubled while they have even tripled in Queenstown, Eastern Cape. People spend an average one-fifth of their income on their water bill.⁶⁹ In many cases, residents of poor black communities pay higher tariffs than residents of more affluent, historically white communities.⁷⁰ Such percentages are far beyond

⁶⁷ Republic of South Africa, *Growth, Employment and Redistribution, A Macroeconomic Strategy*, 1996, para. 7.1. *Source*: www.info.gov.za/otherdocs/1996/gear.pdf. For more details on cost recovery and its underlying rationale *cf.* David A. McDonald, 'The Theory and Practice of Cost Recovery in South Africa', *in* David A. McDonald.

⁶⁸ Kok, note 36 above at 274 and Kok and Langford, note 14 above at 56B–13.

⁶⁹ Lena Partzsch, 'Wasser in der Krise – Das Beispiel Südafrika', 196 *Solidarische Welt* 4 (2007).

⁷⁰ *Cf.* the example at Cottle, note 54 above at 31. Some authors point out that full-cost recovery may include the initial costs of infrastructure thus leading to higher prices for historically disadvantaged areas with no water services infrastructure. *See* Hameda Deedat and Eddie Cottle, 'Cost Recovery and Prepaid Meters and the Cholera Outbreak in KwaZulu-Natal, A case study in Madlebe', *in* David A. McDonald and John Pape eds., *Cost Recovery and the Crisis of Service Delivery* 81, 94 (Cape Town: Human Sciences Research Council Publishers, 2002), McDonald, note 66 above at 27 and Flynn and Chirwa, note 36 above at 65.

the international recommendations of three to five per cent of household income. In these cases, water services can no longer be regarded as affordable and thus fail to meet this criterion of the human right to water.

Price increases can be a problem even with the provision of FBW when prices increase very steeply after the basic amount of six kilolitres. For example, Johannesburg sets a high price increase for the second block of consumption of seven to ten kilolitres. After this initial increase, prices level off even resulting in a flat tariff after 40 kilolitres per month.⁷¹ Such a tariff system does not help to decrease luxury consumption and encourage water conservation. Rather, it puts a high burden on poor households that use a little more water than the six kilolitres provided for free.⁷² However, tariffs are not necessarily structured in this way in all municipalities. A different trend can also be observed. In its 2007/'08 Annual Report, DWAF states that the highest price increases were found in the upper blocks.⁷³

In order to determine whether tariffs meet the standards set by the human right to water, it is critical to look at affordability. It has to be answered in the negative whenever people have to spend a large percentage of their income on water.

4.1.3 Disconnections

To implement cost recovery, it seems a logical consequence to disconnect water supplies of people who do not pay their water bills which is often the result of increasing tariffs. The main controversy in South Africa is concerned with such disconnections due to non-payment. However, interruptions of service delivery that are caused by management problems and nonexistent or dysfunctional infrastructure also pose a huge problem.⁷⁴

⁷¹ Johannesburg Water, Schedule of Water Tariffs 2006/2007. *Source:* www.johannesburgwater.co.za/uploads/documents/TARIFFS-WS-%202006-2007.xls. *See also* South African Human Rights Commission, note 6 above at 26, 53; Bond, note 59 above at 17 and McDonald, note 66 above at 28.

⁷² Bond, note 59 above at 17.

⁷³ DWAF Annual Report 2008, note 56 above at 62.

⁷⁴ South African Human Rights Commission, note 6 above at 19, 37, 43 et seq.

There has been a significant number of disconnections in South Africa,⁷⁵ particularly between 1994 and 2000.⁷⁶ The exact number is subject to extensive debate and controversy. According to a survey of the *Municipal Services Project*, whose estimates were widely spread, it is assumed that as many as ten million people in South Africa had experienced water cut-offs since 1994.⁷⁷ The DWAF refuted these figures, but admitted that two per cent of connected households may have suffered from the discontinuation of services and that disconnections by local authorities are therefore a matter of concern.⁷⁸ Furthermore, a survey conducted by the Department in 2004 found that 30,000 households reported to have water services cut off due to non-payment in the past year.⁷⁹

Until 2003, the government did not take a clear stand on disconnections.⁸⁰ This ambivalence corresponds to the Water Services Act's seemingly contradictory provisions on the discontinuation of water services. Only in 2003, after reports in high-profile media such as the *New York Times*,⁸¹ DWAF adopted the position that municipalities should refrain from complete disconnection.⁸² The DWAF 2003 Strategic Framework stresses the importance of fair procedures and establishes that domestic water supply connections must be restricted in the first instance, and not disconnected in order to ensure that at least a basic supply of

⁷⁵ Ashfaq Khalfan and Anna Russell, 'The Recognition of the Right to Water in South Africa's Legal Order', in Henri Smets ed., *Le Droit à l'Eau dans les Législations Nationales* 121, 128 (Nanterre: Académie de l'Eau, 2005). See also Francis, note 4 above at 174.

⁷⁶ Partzsch, note 69 above at 4.

⁷⁷ McDonald, note 54 above at 170. See Ginger Thompson, 'Water Tap Often Shut to South Africa Poor', *New York Times*, 29 May 2003; Conca, note 4 above at 353; Partzsch, note 69 above at 4; Cottle, note 54 above at 26 and Francis, note 4 above at 174.

⁷⁸ Republic of South Africa, Department of Water Affairs and Forestry, Minister Kasrils Responds to False Claim of 10 Million Cut-Offs, 8 June 2003. Source: www.dwaf.gov.za/Communications/Articles/Kasrils/2003/cutoffs%20article%20WEBSITE.doc.

⁷⁹ Mike Muller, 'Keeping the taps open', *Mail and Guardian*, 30 June 2004.

⁸⁰ Bond, note 59 above at 19.

⁸¹ Ginger Thompson, 'Water Tap Often Shut to South Africa Poor', *New York Times*, 29 May 2003.

⁸² Bond, note 59 above at 19.

water is available. Disconnection is only regarded as appropriate in the case of tampering with the service equipment.⁸³

Some of these cases of water disconnections have been heard before South African courts. *Residents of Bon Vista Mansions*⁸⁴ can be regarded as the most important one. The residents launched an urgent application for interim relief as their water supply had been disconnected which they regarded as unlawful. In order to interpret Section 27(1)(b), the judge considered international law as stipulated by Section 39(1)(b) of the Constitution. He held that the matter relates to the duty to respect access to water and that the state has to refrain from actions that deprive individuals of their rights.⁸⁵ The discontinuation of water services is *prima facie* in breach of this obligation and requires constitutional justification.⁸⁶ The onus rests on the respondent who has to show that the disconnection was legal.⁸⁷ At the time of the interim order, the respondent had not yet discharged that onus. Thus, the Court ordered the restoration of water supply to the residents pending the final determination of the application.⁸⁸

Irrespective of the exact figures, water cut-offs have been widespread in South Africa. In cases where they left people without access to basic water supply, they constitute a violation of the human right to water. A public water supplier violates its obligation to respect existing water supply, while the state fails to meet its obligation to protect when disconnections are carried out by private providers. An indigent person may not have access to basic water services denied for reasons of non-payment. Water services may

⁸³ DWA Strategic Framework 2003, note 27 above at 37.

⁸⁴ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, High Court (Witwatersrand Local Division) of South Africa, Judgment of 5 September 2001, 2002 (6) BCLR 625 (W). Cf. as well *Manqele v Durban Transitional Metropolitan Council*, High Court (Durban and Coast Local Division) of South Africa, Judgment of 7 February 2001, (2002) 2 All SA 39 (D), and *Highveldridge Residents Concerned Party v Highveldridge TLC and Others*, High Court (Transvaal Provincial Division) of South Africa, Judgment of 17 May 2002, 2003 (1) BCLR 72 (T).

⁸⁵ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, note 85 at 629.

⁸⁶ *Ibid.*, 630.

⁸⁷ *Ibid.*, 632.

⁸⁸ *Ibid.*, 633.

be limited to the basic amount as stipulated in Section 4(3)(c) of the Water Services Act in conjunction with Regulation 3, but not be completely disconnected.⁸⁹ It has to be ensured that no one is 'deprived of the minimum essential level of water'⁹⁰ under any circumstances.

4.1.2 Installation of Prepayment Water Metres

The installation of prepayment metres is also a measure to implement the principle of cost recovery very similar to cut-offs of conventional connections. The first prepayment water metres were installed in rural communities in 1997.⁹¹ To use the metres people are required to obtain water cards which work like prepaid phone cards. Usually, these cards are charged with six kilolitres of water per household per month (the FBW amount). Once this amount is exhausted, people are required to purchase water units. When they cannot afford to do so, people are no longer able to obtain water from the metre which has the same effect as the disconnection of services.⁹²

The installation of prepayment metres can result in people not having the possibility to access safe water when they cannot pay for it and then turning to unsafe water,⁹³ which can have serious consequences. In 2000, South Africa experienced one of the worst cholera epidemics. The reasons were traced back to the installation of prepayment water metres in Kwazulu. As thousands of people were unable to pay for water, they turned to the use of polluted river water,⁹⁴ which resulted in a cholera outbreak that affected about 120,000 people and caused at least 265 deaths.⁹⁵

⁸⁹ Kidd, note 33 above at 133.

⁹⁰ General Comment No. 15, note 7 above at para. 56.

⁹¹ Cottle, note 54 above at 20 et seq.

⁹² *Cf.* Mazibuko Judgment, note 20 above at para. 84.

⁹³ South African Human Rights Commission, *The Right to Water 4* (5th Economic and Social Rights Report Series, Financial Year 2002/2003, Johannesburg, 2004), at 45.

⁹⁴ For details see Deedat and Cottle, note 71 above.

⁹⁵ Conca, note 4 at 353. *See also* Cottle, note 54 above at 22; Smith and Green, note 59 above at 445; Bond, note 59 above at 13 and Francis, note 4 above at 174 et seq. These figures are confirmed by the Cholera statistics of the South African Department of Health. *Source:* www.doh.gov.za/facts/index.html.

Prepayment metres raise further concerns. In the case of malfunctioning – which is not uncommon – repairing the metres often takes a long time and people are without access to water in the meantime.⁹⁶ The judgment in the *Mazibuko* case, in which the issue of prepayment metres has been raised, states that the installation of prepayment metres is unlawful and unreasonable as it amounts to a violation of Section 33 of the Constitution providing for lawful, reasonable and procedurally fair administrative action.⁹⁷ In the case of prepayment metres, cut-offs occur without reasonable notice and do not allow for making representations and explaining financial difficulties.⁹⁸ This does not agree with fair and equitable procedures for the discontinuation of water services as stipulated in Section 4(3) of the Water Services Act.⁹⁹

Furthermore, the installation of prepayment metres is regarded as being discriminatory on the basis of colour. While historically ‘white’ areas receive water services on credit with the opportunity to settle arrears and make arrangements in the case of financial difficulties, prepayment metres are installed in poor and predominantly ‘black’ areas such as in Phiri, the township in question in the *Mazibuko* case.¹⁰⁰ The judgment therefore declared the prepayment water system to be discriminatory and unconstitutional and ordered that the residents of Phiri must be provided with the option of a metered supply.¹⁰¹

4.2 *Obligation to Fulfill*

The analysis now turns to challenges in the implementation of the right to water regarding the obligation to fulfill. It raises some points of critique at the FBW Policy and then concentrates on the more fundamental issue of the complete lack of access to water supply. Apart from the issue of prepayment metres, the *Mazibuko* judgment is the first judgment that also addresses a number of questions related to the obligation to fulfill.

⁹⁶ Deedat and Cottle, note 71 above at 89.

⁹⁷ *Lindiwe Mazibuko* at para. 92.

⁹⁸ *Ibid.*, para. 93.

⁹⁹ *Cf.* Flynn and Chirwa, note 36 above at 71.

¹⁰⁰ *Mazibuko Judgment*, note 20 above at para. 94, 151, 153.

¹⁰¹ *Ibid.*, para. 183.

4.2.1 Critique of the FBW Policy

The FBW Policy is an instrument to meet the obligation to fulfill the right to water. Since its adoption in 2001, enormous progress has been made and many people benefit from the policy, but there are also some concerns.

FBW is still not provided to a great number of people: As of 2008, 16 per cent of the entire population and 27 per cent of those defined as poor do not receive FBW¹⁰² signifying that the affordability of the minimum amount of water remains critical for several million people in South Africa. Originally, FBW was intended as an instrument to provide the poor with free water. But due to management reasons it is served to everyone in many communities.¹⁰³ This leads to the peculiar result that a greater percentage of the entire population than that of the poor population is served by FBW. In particular, the poorest in society are excluded from its implementation¹⁰⁴ as they often live in areas that lack the necessary infrastructure by which FBW could be provided. Moreover, many poor municipalities do not have sufficient financial resources to implement the FBW Policy, as cross-subsidisation is difficult to realise in communities with only a small number of affluent high-volume users.¹⁰⁵

Another concern refers to the calculation of the basic water supply on a per-household basis which seems unsatisfactory as it does not take into account the number of people living in one household.¹⁰⁶ Depending on the household's size 200 litres per household per day may or may not result in the minimum amount of 25 litres per person per day.¹⁰⁷ Households of more than eight people are not unusual, especially in poor black communities. According to the Census 2001, approximately 620,000 households had nine or more members.¹⁰⁸ Thus, the right to a sufficient amount

¹⁰² DWAF Annual Report 2008, note 45 above at 60.

¹⁰³ South African Human Rights Commission, note 73 above at 111.

¹⁰⁴ South African Human Rights Commission, note 6 above at 44.

¹⁰⁵ *Ibid.*, 47. See Francis, note 4 at 180 and de Visser, Cottle and Mettler, note 5 above at 43, 50.

¹⁰⁶ South African Human Rights Commission, note 6 above at 37. See also Francis, note 4 above at 182 and McDonald, note 66 above at 29.

¹⁰⁷ Smith and Green, note 58 above at 449.

¹⁰⁸ South African Human Rights Commission, note 6 above at 58 endnote 8.

of water of several million people is infringed due to this form of calculation. It is indispensable to supply large households with an increased amount of FBW that adequately reflects the number of people and guarantees a minimum of 25 litres to everyone. In so far, it has to be noted that the *Mazibuko* judgment requires the calculation on a per capita basis.¹⁰⁹

A further point of critique is that only 25 litres per day are provided (assuming the government maximum of eight people per household). This was the second main issue addressed in the *Mazibuko* case apart from the question of prepayment metres. The judgment concluded that an amount of 25 litres is insufficient, particularly where water is also used for water-borne sanitation systems¹¹⁰ as well as for people living with HIV/AIDS.¹¹¹ The City of Johannesburg was ordered to provide 50 l/c/d of free basic water. In this regard, the decisive question was whether the City had the resources to do so, which it did not contest.

Moreover, DWAF considers generally increasing the free basic amount to at least 50 litres per day for poor households in its 2003 Strategic Framework.¹¹² However, it remains to be seen whether this will be turned into practice. The *Mazibuko* judgment can provide an important impetus in this regard.

4.2.2 Lack of Access to Water Supply

An even more fundamental question related to the obligation to fulfill refers to the situation of those who still completely lack access to water supply. According to government estimates in the 2007/'08 DWAF Annual Report, this affects 2.4 million people.¹¹³ Can they claim to be connected to water services and receive a minimum quantity of water necessary to satisfy their basic needs? Does the state have a positive duty to fulfill this obligation?

The question of positive duties to fulfill the right to water is related to the discussion about the minimum core content of the

¹⁰⁹ *Mazibuko Judgment*, note 20 above at para. 168, 183.

¹¹⁰ *Mazibuko Judgment*, note 20 above at para. 179. See also Francis, note 4 above at 181; Bond, note 58 above at 17; Cottle, note 54 above at 30 and de Visser, Cottle and Mettler, note 5 above at 43.

¹¹¹ *Mazibuko Judgment* note 20 above at para. 179.

¹¹² DWAF Strategic Framework 2003, note 27 above at 29.

¹¹³ DWAF Annual Report, note 45 above at 58.

right. As outlined above, Section 27(2) stipulates that the state must take reasonable measures within its available resources to achieve the progressive realisation of the right to water. Article 2(1) of the Social Covenant contains a similar clause. An extensive debate has evolved around the interpretation of this clause, in particular around the question whether states have minimum core obligations that are to be fulfilled immediately. In this context, the landmark Grootboom judgment¹¹⁴ of the South African Constitutional Court has to be taken into account. It is primarily concerned with the right to housing, but the Court also refers to the right to water¹¹⁵ and emphasises that all socio-economic rights have to be interpreted together.¹¹⁶ The notion of reasonableness developed in the Grootboom judgment has become the litmus test against which the realisation of socio-economic rights is tested.¹¹⁷

According to the Constitutional Court, Section 27(2) obliges the state to establish a coherent programme directed towards the progressive realisation of socio-economic rights.¹¹⁸ It has to be ensured that measures are reasonable in their conception and their implementation. Programmes must be balanced and flexible and take account of short, medium and long term needs.¹¹⁹ Moreover, the Court explicitly states that it must be guaranteed that a significant number of people in desperate need are afforded relief.¹²⁰ Following the Court's view, water legislation and policy have to be tested against the concept of reasonableness. Access to infrastructure and the implementation of the FBW policy both show progress in their extension and even though the FBW policy does not only aim at the indigent population, it reaches a significant number of poor people. The DWAF reports specifically on the

¹¹⁴ *Grootboom Judgment*, note 14 above.

¹¹⁵ *Ibid.*, 1204, 1208.

¹¹⁶ *Ibid.*, 1181, 1184.

¹¹⁷ *Cf. Kok*, note 36 above at 274. *See* South African Human Rights Commission, note 6 above at ix and DWAF Strategic Framework 2003, note 27 above at 51. The Constitutional Court itself used the concept again in the TAC Judgment *Minister of Health and Others v Treatment Action Campaign and Others*, Constitutional Court of South Africa, Judgment of 5 July 2002, 2002 (10) BCLR 1033 (CC) [hereafter TAC Judgment].

¹¹⁸ *Grootboom Judgment*, note 14 above at 1190.

¹¹⁹ *Ibid.*, 1191.

¹²⁰ *Ibid.*, 1202.

extension of FBW to the indigent population which underlines the special consideration of this population group. Therefore, it can be assumed that the state's policy meets the requirements set out by the Constitutional Court in *Grootboom*.¹²¹

However, the Court does not demand that all people in desperate need are afforded immediate relief and has rejected to apply the minimum core approach.¹²² In this regard, its approach has been criticised for not being far-reaching enough.¹²³ The minimum core approach developed by the Committee on Economic, Social and Cultural Rights¹²⁴ would be more far-reaching. It aims at guaranteeing a minimum essential level of each right,¹²⁵ which is indispensable for human survival and dignity. These minimum needs, such as the need for a basic amount of water, are more urgent than others, have to be accorded priority¹²⁶ and are therefore

¹²¹ Likewise Francis, note 4 above at 194 et seq.

¹²² TAC Judgment, note 117 above at 1046 and *Grootboom Judgment*, note 14 above at 1188. See Sandra Liebenberg, 'The Interpretation of Socio-Economic Rights', in Stuart Woolman et al. eds., *Constitutional Law of South Africa* 33-30 (Lansdowne: Juta, 2nd ed., 2005).

¹²³ David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance', 119 *South African Law Journal* 484 (2002). See Scott and Alston, note 9 above at 262 et seqq.; Kok and Langford, note 14 above at 56B-19 and Liebenberg, note 123 above at 33-27 et seqq., 41; Elisabeth Wickeri, *Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa* 19 (New York: Center for Human Rights and Global Justice, Working Paper No. 5/2004, 2004). Source: www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf, and Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court', 20 *South African Journal on Human Rights* 284, 300 et seqq. (2004).

¹²⁴ General Comment No. 3: The Nature of States' Parties Obligations para. 10, UN Doc. E/1991/23 Annex III (14 December 1990) [hereafter General Comment No. 3]. See also Philip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* 332, 352 et seq. (1987).

¹²⁵ General Comment No. 3, note 124 above at para. 10. See General Comment No. 15, note 7 above at para. 37; David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence', 19 *South African Journal on Human Rights* 1, 12 (2003) and Russell, note 9 at 15.

¹²⁶ Bilchitz, note 125 above at 11 and Bilchitz, note 124 above at 485.

not subject to progressive realisation, but are to be fulfilled immediately.¹²⁷ The minimum core content is the baseline from which progressive realisation of the right to water has to start improving the level of realisation over time.¹²⁸

The approach is based on the assumption that the rights would be largely deprived of their *raison d'être* without such minimum core obligations.¹²⁹ It acknowledges that there are fundamental obligations appertaining to each right whose immediate fulfillment is of such central importance for the realisation of the right that it would otherwise lose its significance as human right.¹³⁰ Moreover, without at least protecting people's survival interests all other human rights become meaningless.¹³¹ Thus, the state is obliged to immediately guarantee the minimum core content of the right to water to everyone.¹³²

However, the minimum core approach does not prescribe the impossible. It has to be recognised that it is not only impossible to achieve the full realisation of socio-economic rights in a short period of time,¹³³ but not even always possible to guarantee the minimum core of every right to everyone immediately. Yet, the minimum core approach requires that the minimum essential level is realised whenever and as soon as this is possible.¹³⁴ Moreover, it signifies a significant change – the onus then rests on the state. The state *prima facie* fails to meet its obligations and has to demonstrate that every effort has been made and that all available resources have been used to satisfy these minimum needs as a matter of priority.¹³⁵

¹²⁷ General Comment No. 15, at para. 37. *See also* Bilchitz, note 126 above at 11 et seq. and *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* para. 9 (1997), reprinted in 20 *Human Rights Quarterly* 691 (1998).

¹²⁸ Bilchitz, note 123 above at 493. *See also* Bilchitz, note 125 above at 11 et seq.; Liebenberg, note 122 above at 33–41 and Scott and Alston, note 9 above at 250.

¹²⁹ General Comment No. 3, note 124 above at para. 10.

¹³⁰ *Cf.* Russell, note 9 above at 15.

¹³¹ Bilchitz, note 125 above at 12.

¹³² General Comment No. 15, note 7 above at para. 37 (a).

¹³³ General Comment No. 3, note 124 above at para. 9.

¹³⁴ Bilchitz, note 125 above at 18.

¹³⁵ General Comment No. 3, note 124 above at para. 10. *See* Scott and Alston, note 9 above at 250; Bilchitz, note 125 above at 16; Liebenberg, note 122 above at 33–31 and Russell, note 9 above at 16.

The *Mazibuko* judgment deals with the minimum core approach in depth and provides an interpretation to combine it with the reasonableness review of the Constitutional Court. Admitting that the Constitutional Court has not applied the minimum core approach in the *Grootboom* judgment, the High Court held in *Mazibuko* that it has nevertheless left a caveat to potentially consider it.¹³⁶ While the Constitutional Court had argued that the determination of the minimum core presents difficult questions,¹³⁷ the High Court held that it is possible to determine the minimum core if the Court is provided with sufficient information.¹³⁸

According to this reasoning, South Africa is obliged to immediately realise the core content of the right to water for everyone. Yet, it has to be acknowledged that water infrastructure cannot be built overnight and that it is thus impossible to immediately supply all people with access to water. However, the state has to make use of all possible means. Moreover, the extension of FBW to all indigent people in need with access to infrastructure would be possible in relatively little time. The DWAF itself admits that '[t]he cost associated with providing free basic water to poor households is not large for a country of our economic size and strength'.¹³⁹

Conclusion

South Africa's commitment to the human right to water in its Constitution and legislation is outstanding and hardly found in any other country. Its acts, regulations and policies set up a very detailed and precise framework for the implementation of the right to water. Moreover, the country has also made significant progress in turning these into practice by expanding access to infrastructure as well as to FBW.

Yet, there remain a number of concerns in implementing the right to water. The overall policy of cost recovery entails increases in water tariffs, disconnection of services and the installation of prepayment metres. Price increases have often occurred after water

¹³⁶ *Mazibuko Judgment*, note 20 above at para. 131.

¹³⁷ *Grootboom Judgment*, note 14 above at 1188.

¹³⁸ *Mazibuko Judgment*, note 20 above at para. 131 et seqq.

¹³⁹ DWAF Strategic Framework 2003, note 27 above at 29.

services were privatised thus relating to the obligation to protect, but public water providers have also increased tariffs. When water services become unaffordable the human right to water is violated.

Disconnection of water services has been a widespread concern in South Africa. When people are left without access to basic water supply, they constitute a violation of the obligation to respect or to protect the right to water depending on the type of service provider. In recent years, disconnections seem to have become less common. Court decisions that judge them illegal such as in the *Bon Vista Mansions* case are an important signal in so far. Also, the DWAF adopted the position that water service providers have to refrain from complete disconnections in 2003. It is critical to ensure that no one is deprived of minimum essential water services even without payment. The increasing access to water infrastructure and expansion of FBW would turn meaningless if a significant number of people lose access at the same time.

Currently, the installation of prepayment metres poses a greater concern than cut-offs of conventional connections, but they can have the same effect. Whenever they leave people without access to basic water supply they violate human right to water. The *Mazibuko* judgment has declared the installation of such metres to be unconstitutional, particularly because they do not allow for fair procedures and have been installed in a discriminatory manner.

The FBW Policy relates to the obligation to fulfill and addresses the issue of inability to pay for water services by securing a minimum amount of free water for a great number of people. Yet, it remains inadequate as millions of people are still not supplied with FBW and affordability remains critical. Moreover, it has to be ensured that all indigent people in need receive the minimum of services without putting people living in large households at a disadvantage.

The complete lack of access to water supply due to missing water infrastructure is the most fundamental concern. Under its minimum core obligations the state has the duty to provide everyone with minimum services. This can be realised by using all possible means to develop infrastructure. The FBW policy allows ensuring that services are affordable to everyone and therefore needs to be extended to all indigent people. To this end, increasing financial resources available to poor communities is crucial. This could be achieved by augmenting allocations from the national

budget or via a cross-subsidisation mechanism between municipalities. It is to hope that the Government reaches its goal of universal access as soon as possible. Even then, it is important to keep in mind that the human right to water is not completely fulfilled as soon as everyone has access to minimum services. Rather, it is an ongoing obligation of the state to progressively realise the right to water until everyone has access to sufficient water for an adequate standard of living.

