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SOUTH AFRICA'S WATER LAW AND POLICY FRAMEWORK

IMPLICATIONS FOR THE RIGHT TO WATER

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INTRODUCTION

The post-apartheid reforms in South Africa which put into place the existing water framework were intended to redress the disparities inherited from the prior racial segregation policies which had resulted in stark inequalities between black and white communities in the face of access to water.¹ The natural scarcity of national freshwater resources have also contributed to diminishing availability of water and increasing competition between the various users. Consequently, water reform policy and water justice were a central aspect of the new government's policy of reconstruction and development² and indeed remain very topical issues a decade later.

South Africa has adopted a progressive law and policy framework for water which is based upon the constitutional recognition of the right of access to water. This paper examines some of the implications of the constitutional right to water. While on the one hand the implementation of the right to water has resulted in the development of a policy of free entitlement to water for consumption and domestic use, there remain today huge disparities in access to basic water services and allocation of water, mostly as a legacy from the apartheid regime but also as the result of the application of an economic approach to water policy. Indeed, the integration of such concepts as cost-recovery and privatisation in water policy have contributed to maintain the poorest segments of the population with little or no access to water for household needs and sanitation, and limited water infrastructure. This creates tensions that underpin the management of water resources at the national level. In terms of water policy, it seems therefore that radical legal change has not translated into significant, substantive improvements for the majority of the poorest citizens.

The paper is divided into three main sections. The first section examines the right of access to water as it is consecrated in the country's constitution. In a second part, it focuses on the implementation of the constitutional right, inter alia through the adoption in 2001 of the Free Basic Water policy. The paper turns in a third section to some of the challenges observed in the realisation of the right to water. These relate more specifically to the application of economic policies to water that characterises the South African water framework.

I. CONSTITUTIONAL PROTECTION OF THE RIGHT TO WATER

South Africa is remarkable in that it formally recognised the right of access to water at the constitutional level, where it underpins the whole law and policy water framework.³ The constitution adopted on 8 May 1996 represented the cornerstone of the sweeping water policy reform that was undertaken in the period of transition following the end of the apartheid regime.⁴ It embraces human rights principles and contains a comprehensive bill of rights which sets forth the right of access to water as part of a lengthy list of social and economic rights. These include inter alia the right to a healthy environment; housing; health care, food and social security; education; and culture.⁵ The relevant provision is Section 27, which reads:

'(1) Everyone has the right to have access to -
[...]
b. sufficient [...] water; and
[...]

1 On the history of water in South Africa, *see, e.g.*, R. Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power', 18 *Georgetown Intl Envtl L.Rev.* 149 (2005); D.D. Tewari, 'A Brief Historical Analysis of Water Rights in South Africa', 30 *Water International* 184 (2005).

2 *See, e.g.*, South Africa, White Paper on Water Supply and Sanitation Policy (1994) [hereafter 1994 White Paper]; South Africa, White Paper on Reconstruction and Development (1994) [hereafter 1994 White Paper on Reconstruction and Development]; South Africa, White Paper on a National Water Policy for South Africa (1997) [hereafter 1997 White Paper].

3 Since 1994, the constitution of Uruguay includes the right of access to potable water and to sanitation. *See* article 47, Uruguay, Constitución política de la República Oriental del Uruguay de 1967 (actualizada hasta la reforma del 31 de Octubre de 2004). *See* also Article 65 (right to water and sanitation) of the draft Constitution of Kenya (2005). Other countries that have included the right to water in their constitutions include Ecuador, Ethiopia, Gambia, Uganda and Zambia. There have also been efforts to include the human right to water in the Belgian constitution.

4 South Africa, Constitution of 1996 (Constitution Act 108, 1996) [hereafter 1996 Constitution].

5 *Id.* at Sections 24, 26, 27, 29 and 31. On the inclusion of environmental rights in the South African Constitution, *see, e.g.*, J. Glazewski, 'Environmental Rights and the New South African Constitution', in A. Boyle and M. Anderson, *Human Rights Approaches to Environmental Protection* 177 (Oxford: Clarendon Press, 1996).

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

The inclusion of the right to water goes beyond the main international human rights instruments, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, where it is not explicitly mentioned.⁶ The right to water was only officially recognised at the international level with the adoption by the Committee on Economic, Social and Cultural Rights of General Comment 15 on the right to water.⁷ General Comment 15 sets forth the right to water as a fundamental one because a necessary component of the right to an adequate standard of living and to the right to health found in articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

The 1996 Constitution binds all three spheres of government to realise the right of access to water. The content of the right relates both to allowing for physical and for economic access to water. This obligation is qualified by the fact that the state has to take only 'reasonable' legislative and other measures 'within its available resources' to achieve the 'progressive realisation' of the right of access to water.⁸ The Constitution does not provide for the right of individuals to access water, but rather places an obligation on the government to take reasonable action to give effect to the general rights of the population. While the national government is required to establish a framework to ensure the realisation of this right, local governments have the responsibility to ensure the delivery of water to their communities. The 1996 Constitution also addresses the question of limiting rights, providing that constitutional rights may only be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors [...]'.⁹ Relevant factors include inter alia the nature of the right and the importance and purpose of the limitation.

The question of whether the social and economic rights enshrined in the Constitution are justiciable has been a central one when addressing the implications of the right to water.¹⁰ While the Constitutional Court has not yet ruled on a case concerning the right to water, a lower court has found that an alleged violation of the right is indeed a justiciable matter.¹¹ In 2000, the Constitutional Court adopted the so-called 'Grootboom' decision, which concerned the justiciability of the right of access to housing.¹² The case addressed more specifically what is entailed by the obligation of the state to take reasonable legislative and other measures within the available resources of the state so as to progressively fulfil socio-economic rights.¹³ It focused on whether the government's housing policy made provision for persons whose housing needs were the most desperate and reviewed the failure of a particular housing programme to assist a group of people evicted from their homes in light of the right to adequate housing. The Court found the government in violation of the Constitution for failing to provide immediate housing for the most desperate and needy segments of the population. The case is important in describing how state policies can be reviewed by a court on the basis of reasonableness. The reasonableness inquiry examines first whether responsibilities and tasks have been allocated to the different spheres of government and whether appropriate financial and human resources are available. Second, it dictates that programmes for socio-economic rights obligations must be balanced and flexible, and include the appropriate provision for responding to crisis situations. While the Constitutional Court has found that socio-economic rights are justiciable, its case-law shows that it is

6 Using the South African constitutional recognition of the right to water as supporting the existence of an international right, see, e.g., P.H. Gleick, 'The Human Right to Water', 1 *Water Policy* 487, 494 (1998).

7 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) [hereafter General Comment 15]. A detailed study of the scope and content of the human right to water will be submitted by the Office of the United Nations High Commissioner for Human Rights prior to the sixth session of the Human Rights Council. See Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', UN Doc. A/HRC/2/L.3/Rev.3 (2006).

8 Section 27 (2), 1996 Constitution, note 4 above. Note that Section 28 (1)(c), which concerns the right of 'every child [...] to basic nutrition, shelter, basic health care services and social services', does not include such a qualification.

9 *Id.* at Section 36 (1).

10 Traditionally, only civil and political rights have been considered justiciable. See, e.g., S. Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights', 21 *South African J. Human Rts* 1; M. Swart, 'Left Out In The Cold? Crafting Constitutional Remedies For The Poorest Of The Poor', 21 *South African J. Human Rts* 215 (2005).

11 See *Higveldridge Residents Concerned Party v Higveldridge Transitional Local Council* [2002] 6 SA 66 (T).

12 See *South Africa v Grootboom* [2000] 11 BCLR 1169 (CC). Discussing different interpretations that have been assigned to the judgment, see, e.g. M. Wesson, 'Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South Africa Constitutional Court', 20 *South African J. Human Rts* 284 (2004).

13 See also C. Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence', 23 *South African L.J.* 264 (2006).

difficult to prove a violation of the Constitution, in particular because the plaintiff bears the burden of proving that the government's actions are unreasonable. This might constitute a significant obstacle to bringing a case based on alleged violations of the constitutional right to water.

The right to water found in the Constitution has been concretised in a number of legislative and policy documents adopted as part of the restructuring of the water framework. The two main acts are the 1997 Water Services Act (WSA) and the 1998 National Water Act (NWA).¹⁴ The Constitution allocates the management of water resources to the national government, while local governments (municipalities) are responsible for the management of water and sanitation services. Accordingly, the NWA creates a comprehensive legal framework for the management of water resources, that is, rivers, streams, dams and groundwater, which is the responsibility of the national government. On the other hand, the WSA regulates water services which remain the responsibility of local government.¹⁵ This covers drinking water and sanitation services supplied by municipalities to households and other municipal water users. Other important documents include regulations adopted to give effect to the right of access to water, most recently the 2003 Strategic Framework for Water Services, which sets out the national framework for the water services sector, that is, water supply and sanitation.¹⁶

II. IMPLEMENTATION OF THE RIGHT TO WATER IN NATIONAL LAW AND POLICY

A) Guiding Principles

The NWA, which was adopted in 1998, is the principle legal instrument relating to water resources. It transformed South Africa's water legal framework by setting forth a comprehensive agenda for water resource management. The Act is built on several guiding principles that aim to remedy past inequalities in the face of water distribution and further the realisation of the right of access to water. On the other hand, it does adopt or facilitate the application of economic approaches to water management.¹⁷

The preamble to the NWA embraces the human rights principles found in the 1996 Constitution, recognising that 'the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users.' The main purpose of the Act is to 'ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors': 'meeting the basic human needs of present and future generations'; 'promoting equitable access to water'; 'promoting the efficient, sustainable and beneficial use of water in the public interest'; 'facilitating social and economic development'; and 'protecting aquatic and associated ecosystems and their biological diversity'.¹⁸

On this basis, four basic principles can be seen as underlying the water resource management strategy set out under the NWA. First, the Act rests on the principle of the unity of the hydrological cycle. It does not include a distinction between surface and groundwaters but subsumes all water resources including watercourses, surface waters, estuaries and aquifers, recognizing that these are all linked to each other.¹⁹ Water management strategies must therefore be based on the principle of integrated management in order to achieve sustainability, equity and efficiency.²⁰ According

14 South Africa, Water Services Act 108 (1997) [hereafter WSA]; South Africa, National Water Act 36 (1998) [hereafter NWA].

15 On the relationship between the two aspects, the preamble to the WSA, n. 14 above, provides that 'the provision of water supply services and sanitation services, although an activity distinct from the overall management of water resources, must be undertaken in a manner consistent with the broader goals of water resource management'.

16 South Africa, *Strategic Framework for Water Services* (2003) [hereafter 2003 Strategic Framework].

17 See further Section III below.

18 Article 2, NWA, note 14 above.

19 *Id.* at Article 1 (1)(xxvii).

20 On integrated water management, see, e.g., Paragraphs A(d)-(g), Commission on Sustainable Development (CSD), Resolution 13/1: Policy options and practical measures to expedite implementation in water, sanitation and human settlements, in Report on the thirteenth session, 30 April 2004 and 11-22 April 2005, UN Doc. E/2005/29 and E/CN.17/2005/12 (2005).

to the national agency responsible for formulating and implementing water policy, the Department of Water Affairs and Forestry (DWAFF):

'Integrated water resource management is a process for co-ordinated planning and management of water, land and environmental resources. It takes into account the amount of available water (surface and groundwater), water use, water quality, environmental and social issues as an integrated (combined) whole to ensure sustainable, equitable and efficient use [...] A further key aspect of integrated water resource management is participation of people in decision making where decisions are decentralised.'²¹

A second principle that buttresses the NWA is that the nation's water resources are managed through a public trust which is created to replace private ownership.²² The national government acting through the Minister of Water Affairs and Forestry is the public trustee.²³ As the trustee, the government must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons, and in accordance with its constitutional mandate.

Third, the NWA bases the comprehensive protection of all water resources on the need to protect basic human and ecological needs. For this purpose, it creates the 'Reserve' which is meant to fulfil the constitutional right of access to water. The Reserve consists first of a basic human needs reserve, which 'provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene' and second of an ecological reserve, which 'relates to the water required to protect the aquatic ecosystems of the water resource.'²⁴ This is the only right to water found in the NWA and it has priority over all other water uses; in other words, the amount of water required for the Reserve must be ensured before water resources are allocated to other water users.

Fourth, the NWA de-links water rights and land ownership. It replaces the previous riparian system of allocation, which linked water rights to land ownership, with a compulsory licensing regime to achieve more equitable water redistribution in the population.²⁵ The de-linking of water use claims and land ownership is necessary in ensuring that those not owning or controlling land have equal access and use of water.²⁶

B) Accessibility of Water

The WSA is the instrument that regulates the accessibility of water by domestic users. It secures the right of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being, thereby codifying Section 27, Paragraph 1(b), of the Constitution.²⁷ The WSA defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.²⁸ The contours of the notion of basic supply have been determined in later regulations issued by the DWAFF. These provide that the minimum standard for basic water supply services subsumes inter alia a minimum quantity of potable water of 25 litres per person per day or six kilolitres per household per month, available within 200 metres of a household and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.²⁹ The 2003 Strategic Framework confirms the constitutional duty of the government

21 South Africa, Department of Water Affairs and Forestry (DWAFF), Guide to the National Water Act, 15 [hereafter Guide to the NWA].

22 Article 3, NWA, note 14 above.

23 According to the DWAFF, '[p]ublic trustee means that the Minister has authority over water throughout the country. Water is a natural resource that belongs to all people. As the public trustee of the nation's water resources, the Minister is responsible for public interest and must ensure that all water everywhere in the country is managed for the benefit of all people, including future generations.' [emphasis in text]. See Guide to the NWA, note 21 above at 12.

24 Chapter 3, part 3, NWA, note 14 above. See also Article 1 (1)(xviii). See further note 28 below and related text.

25 Chapter 4, part 1, NWA, note 14 above.

26 Although there do exist exceptions to this rule that allow existing lawful water use. See Chapter 4, Part 3, NWA, note 14 above.

27 See Preamble and Section 3 (1), WSA, note 14 above.

28 *Id.* at Section 1 (iii).

29 See Paragraph 6.5.3, 1997 White Paper, note 2 above; Paragraph 3, DWAFF, Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001) [hereafter 2001 Regulations].

to ensure that all people have access to at least a basic water supply and sanitation service which is affordable, and provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to water.³⁰ In particular, the Strategic Framework defines 'basic water supply facility' and 'basic water supply supply'.³¹ The government has determined that this basic amount of water should be available for free for each individual. This is discussed in the next section.

The WSA stipulates that water service authorities have the duty to all consumers or potential consumers in their area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.³² This duty is subject to, inter alia, the availability of resources, equitable allocation of resources to all current and potential consumers and the duty of consumers to pay reasonable charges.³³ A water service authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction, but may impose reasonable limitations on the use of water services.³⁴ It however provides that in emergency situations, an authority must take reasonable steps to provide basic water supply and sanitation to all persons and may do so at the cost of the authority.³⁵ Disconnections of water services, and the criteria set forth under the WSA, are discussed below.

The WSA also provides for certain provisions on transparency, for instance stipulating that every water service authority must prepare and report on the implementation of a water services development plan.³⁶ Amongst other things, the development plan must indicate the number and location of people to whom services cannot be provided in the next five years, the reasons for this and a time-frame within which basic water and sanitation may reasonably be expected to be provided to these persons.³⁷ The Act also stipulates that if the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, preference must be given to the provision of basic water supply and basic sanitation to them.³⁸

The WSA contains criteria applicable to the quality of water.³⁹ Regulations under the Act require that water service authorities include a suitable programme to sample the quality of potable water provided by it to consumers in its development plan. The WSA also requires that no person may dispose of industrial effluent without approval from the requisite authority.⁴⁰ It empowers the national government to set compulsory national standards relating to the quality of the water discharged into any water services or water resource system.⁴¹ Regulations also address responsibilities of water services institutions to carry out measures to prevent entry of objectionable substances into drains and watercourses.

C) The Free Basic Water Policy: Towards Implementation of the Right to Water

The implementation of the constitutional right of access to water, and commitment of the national government to its realisation, was taken a step further in February 2001 with the formal adoption of the policy of Free Basic Water.⁴² The Free Basic Water policy targets the water needs of the most impoverished citizens by guaranteeing each household a free minimum quantity of potable water. This quantity is set at six kilolitres per household per month. These regulations are based on the assumption that each individual person needs 25 litres of water per day. The amount of free water is the same for every household, irrespective of wealth and number of persons comprising it.

30 Paragraph 4.1, 2003 Strategic Framework, note 16 above.

31 *Id.* at Paragraphs 5.1 and 5.2.

32 Sections 3 (2) - (3) and 11 (1), WSA, note 14 above.

33 *Id.* at Section 11 (2).

34 *Id.* at Section 11 (6).

35 *Id.* at Section 11 (5).

36 *Id.* at Sections 12, 15 and 18.

37 *Id.* at Section 13.

38 *Id.* at Section 5.

39 *Id.* at Section 9 (1)(a).

40 *Id.* at Section 7 (2).

41 *Id.* at Section 9 (1).

42 *See* South Africa, DWAF, Free Basic Water Implementation Strategy Document (2001) [hereafter FBW Implementation Strategy].

Rather than a new policy as such, the Free Basic Water policy was perceived 'as a vehicle for expedient delivery by [the South African government] within context of [the] Constitution and the fundamental rights to basic services.'⁴³ Hailed as part of the government's strategy to alleviate poverty and improve public health, the policy was a response to the significant problems that remained with respect to access to basic water and sanitation services of large parts of the population. Although strides had been made since the end of apartheid in providing citizens with basic water supplies, government figures show that in 2001 11 percent of the population still had no access to safe water supply, a further 15 percent did not have defined basic service levels and 41 percent did not have adequate sanitation services.⁴⁴ The 2000-2001 massive outbreak of cholera in Kwazulu-Natal and other parts of the country which killed several hundred people had brought the critical situation faced by millions of citizens to the forefront of national and international attention.⁴⁵ Many blamed the government policies of full cost-recovery for water⁴⁶ and consequent lack of access to water by the poor, including the residents of the district where cholera first appeared. The Free Basic Water policy can also be seen to arise in the wake of the Constitutional Court's Grootboom decision, which entrenched the justiciability of the social and economic rights found in the Constitution.⁴⁷ It has however been strongly opposed by private operators and multilateral financial institutions.

Although it is a policy of the national government, the responsibility for implementation of the Free Basic Water policy rests with local governments which are responsible for the delivery of basic services.⁴⁸ The national government however provides support to local governments to ensure that they have the capacity to implement the policy. Free basic water services are to be financed from the local government equitable share, which is a constitutionally required portion of the annual national budget allocated to local governments, as well as through cross-subsidisation between users within a system of supply or water services authority area where appropriate.⁴⁹ In order to ensure the financial sustainability of the provision of free water, municipalities are required to adopt a block tariff system. According to this system, the cost of water increases with usage, subject to the requirement that the first block of water for up to six kilolitres per household per month should be provided free. The price of water then increases for every additional block of water used by a household to ensure that those who use large amounts of water subsidise to some extent the free provision of six kilolitres of water for all households. Thus, 'the free basic water policy strengthens the ["user pays" principle] in that it clearly requires consumption in excess of the *basic water supply service* to be paid for while enabling free access by the poor to a basic water supply service necessary to sustain life.'⁵⁰ The stated overall target of the government is to provide all people with free basic water by 2008.⁵¹

The idea behind the Free Basic Water policy is an ambitious and progressive one. It implies that every person has the right to an affordable, basic amount of water and access to sanitation services in line with the constitutional requirement to progressively realise access to water for all South Africans. The implementation of the policy has nevertheless faced serious obstacles which have prevented it to date from remedying the existing inequalities in the face of water and sanitation provision. Several shortcomings can be mentioned.

The first concerns the lack of funding for local governments. Cross-subsidisation has not appeared to be a viable source of funding especially in rural communities where there are not enough high volume water users to cross-subsidise the provision of free water. Neither do private water companies consider providing a minimum amount of water for free as economically viable. Local governments are facing serious problems in providing for water

43 Statement by the DWAF [available at http://www.dwaf.gov.za/DIR_ws/ASP/Include/IE_Content.asp?mnuID=mnuIntervention&path=/DIR_ws/Content/ops/FreeWater.htm]. See also Paragraph 2.6.6, Reconstruction and Development Programme; 1994 White Paper, note 2 above at p. 15.

44 See 2003 Strategic Framework, note 16 above at p. iii.

45 See, e.g., D. Hemson et al., *Still Paying the Price: Revisiting the Cholera Epidemic of 2000-01 in South Africa* (Human Sciences Research Council, Occasional Papers Series Number 8, February 2006 [available at http://www.hsrc.ac.za/research/output/outputDocuments/4077_Hemson_Stillpayingtheprice.pdf]).

46 On the application of cost-recovery policies, see Section III (A) below.

47 See note 12 above and related text.

48 Paragraph 2, 2003 Strategic Framework, note 16 above. See also Schedule 4, Part B, 1996 Constitution, note 4 above.

49 See Paragraph 4.4.1, 2003 Strategic Framework, note 16 above. The Strategic Framework notes that the equitable share should have been temporarily increased for the 2003-2004 period specifically to assist local governments implement free basic services. This has not been the case so far.

50 *Id.* [emphasis in text]

51 World Water Council, *The Right to Water: From Concept to Implementation* (2006), at 17. See also the speech by the Minister of Water Affairs and Forestry, Policy Review Debate of the National Council of Provinces (NCOP), 31 May 2005 (on file with the author).

and sanitation services in general, which have led them to take drastic cost-recovery measures such as disconnections that deprive their residents of any access to water.⁵² This in turn means that people are deprived of their free basic amount of water altogether. Consequently, national funding remains the central pillar in the implementation of the Free Basic Water policy.⁵³

Second, there are very important infrastructural problems in many areas of South Africa which means that water delivery of any kind is simply not possible. The implementation of the policy to provide free basic water therefore requires a rapid improvement in water infrastructure, especially for the rural poor.

The third problem concerns the quantity of free water that has been determined by the government as the minimum quantity necessary for survival. In a household of eight people, the six kilolitre per household per month amount translates as 25 litres per person per day. To illustrate concretely what this means, it allows the household 40 baths per month (i.e. five baths per person) or 16 toilet flushes a day (i.e. two visits to the toilet per person per day).⁵⁴ The amount of 25 litres of water per person per day is considered insufficient to meet basic human needs, particularly for the urban poor, and thus has been considered not to fulfil the requirements found in Section 27, Paragraph 1(b), of the Constitution.⁵⁵ For instance, while the World Health Organization (WHO) has stated that 20 litres per person per day is the minimum amount of water necessary for basic human survival, it stresses that 100 litres of water are needed for optimal access to water.⁵⁶ The 2003 Strategic Framework accordingly encourages water service authorities to increase the basic quantity of water provided free of charge to at least fifty litres per person per day to poor households, although this has not happened to date.⁵⁷ It further provides that the national government will give consideration to increasing the national subsidy over time to make this feasible in all water services authority areas.⁵⁸ The limitation applicable to the amount of free water constitutes a heavy impediment to particularly vulnerable households, including those headed by women or children, and those affected by HIV/AIDS.⁵⁹ The constitutionality of the level of free basic water has been contested in an application submitted in July 2006 by five residents of Phiri, Soweto, against the City of Johannesburg, Johannesburg Water (PTY) Ltd and the DWAF.⁶⁰ In particular, the applicants' motion includes an affidavit by Peter Gleick maintaining that a flat level of six kiloliters of water per household per month is insufficient to meet minimum basic requirements in the urban context of Phiri for all households.⁶¹ The Court is consequently being asked to order Johannesburg Water to provide a free basic water supply of 50 litres per person per day, which is viewed as the minimum starting point to provide people in the applicants' position with access to sufficient water as guaranteed under Section 27, Paragraph 1(b), of the Constitution.

Fourth, the allocation of free basic water is made on a household basis and not an individual one. Since the average poor household is typically comprised of more than eight individuals, large, poor households are penalised.

Finally, as developed in the following sections, the Free Basic Water policy is meant to be implemented in a framework that has encouraged economic approaches to water management. In particular, coupled with a policy of cost-recovery, this means that once a household goes over the amount of free water allocated and cannot pay, it will face having its water supply disconnected. Indeed, once consumption exceeds the free amount, charges are

52 On disconnections, see further Section III C(1) below.

53 Funding is generally a problem since both the NWA and the WSA introduced the decentralization of water resource management and water services without providing for specific and mandatory sources of funding for local governments and bodies.

54 Public Citizen, Orange Farm, South Africa: The Forced Implementation of Prepaid Water Meters (June 2004), at 7 [hereafter Orange Farm Case Study].

55 See, e.g., M. 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 (2004).

56 World Health Organization, *The Right to Water* (2003).

57 See Paragraph 4.4.1, 2003 Strategic Framework, note 16 above.

58 See Paragraph 3.3, FBW Implementation Strategy, note 42 above ('Again it needs to be recognised that local authorities should still have some discretion over this amount. In some areas they may choose to provide a greater amount, while in other areas only a smaller amount may [be] possible [...] In some areas where poor households have waterborne sanitation the total amount of water seen as a "basic supply" may need to be adjusted upwards (if financially feasible) to take into account water used for flushing.').

59 See Paragraph 4.4.1, 2003 Strategic Framework, note 16 above.

60 High Court of South Africa (Witwatersrand Local Division), *In the matter between: Lindiwe Mazibuko, Grace Munyai, Jennifer Makoatsane, Sophia Malekutu, Vusimuzi Paki (Applicants) and The City of Johannesburg, Johannesburg Water (Pty) Ltd, the Minister of Water Affairs And Forestry (Respondents)* (July 2006).

61 Peter Gleick, Supporting Affidavit, Paragraph 8 (on file with the author).

levied for the *full* amount. Disconnection of course means that the household will have no water at all including the free basic amount. This constitutes a severe impediment to the realisation of access to water for all. Moreover, households with outstanding water debt are not eligible for their allocation of free water until their debt is paid off, and families whose service has been disconnected for non-payment forfeit their right to free basic water.⁶²

III. CHALLENGES TO THE REALISATION OF THE RIGHT TO WATER

While on the one hand the South African water framework includes a human rights approach to water, including the provision of a basic amount of free water, it has also been seen as embracing the economic approaches to water management actively promoted by international donors including the World Bank and International Monetary Fund (IMF).⁶³ These approaches can be viewed as creating challenges to the realisation of the right to water. In particular, the relevant documents applicable to water have put in place a policy of cost-recovery which has been accused of impeding the access of the poorer segments of the population to a basic quantity of clean water. At the same time, the legal framework has, although not explicitly, allowed some privatisation of the water services sector.⁶⁴ The application of economic approaches to water has led to increasing use of disconnections of service in the face of non-payment and to the installation of pre-paid water meters.

A) Cost-Recovery

Access to water has been increasingly determined by a policy of cost-recovery, which implies that the full cost of the operation and maintenance of water utilities should be financed through fees paid by water consumers.⁶⁵ The idea is that water usage should be priced in order to reflect the true societal cost of consuming the resource and to finance the cost of managing and delivering it to end-users. The other side of the coin is that accessibility of water services is contingent upon ability to pay.

The WSA subsumes a policy of cost-recovery by putting in place a pricing scheme for water intended for domestic use.⁶⁶ Full cost-recovery is tempered by the right of access to water, which implies that the cost of accessing water must be set at a level that ensures that people can have access to water without having to forgo access to other basic needs. While the WSA does make provisions for affordability, it does not explicitly set tariffs according to ability to pay.

Accordingly, norms and standards for water tariffs may differentiate on an equitable basis between different users of water services, the types of water services and geographic areas, taking into account amongst other factors the socio-economic and physical attributes of each area. In setting these standards, the government is required to consider among other imperatives social equity, the financial sustainability of the water services and the recovery of reasonable costs.⁶⁷ Water tariffs are based on block tariffs, which are aimed at allowing for redistribution of water resources from richer to poorer areas through cross-subsidisation. The WSA moreover prescribes that the government can establish compulsory provisions and requirements for any contracts with a water service provider so as to ensure that water services are provided on a fair, efficient, equitable, cost-effective and sustainable basis and comply with the Act.⁶⁸ However, while it gives competence to the Minister to raise funds, including from Parliament, to provide subsidies to a water service institution,⁶⁹ the WSA does not provide specific guarantees of funding to local governments without an adequate tax base to support affordable water supply services. The 2001

62 See Francis, note 1 above at p. 182.

63 See, e.g., A. Baietti et al., Characteristics of Wellperforming Public Water Utilities, World Bank, Water Supply & Sanitation Working Notes (May 2006).

64 See Section 19, WSA, note 14 above.

65 See, e.g., Paragraph 6.5.3, 1997 White Paper, note 2 above ('To achieve the objectives of water management [...] all significant water resource use will be charged for, regardless of where it occurs, and including the use of water for effluent disposal or the interception of water to the detriment of other users [...] The only exception will be in respect of the Reserve for basic human needs.').

66 Water pricing also occurs under the NWA with regard to the cost of developing and managing water resources so that they are protected and conserved for beneficial use. These costs are recovered from water users by means of water use charges. See Chapter 5, Part 1, NWA, note 14 above.

67 Section 10 (3), WSA, note 14 above.

68 *Id.* at Section 19 (5).

69 *Id.* at Section 64.

Regulations on Water Tariffs provide that a water service institution must consider the right of access to basic water supply and the right of access to basic sanitation when determining which water services tariffs are to be subsidised.⁷⁰ When setting tariffs, the institution must differentiate between both the category and the level of services provided. Tariffs on water services designed to provide an uncontrolled volume of water must include a volume based charge which supports the viability and sustainability of water supply services to the poor, discourages inefficient water use and takes into account the incremental cost of increasing the capacity of the water supply infrastructure.

The 2003 Strategic Framework confirms that over and above basic water services and sanitation, consumers will have to pay for water services.⁷¹ Tariffs must take into account the affordability of water services for the poor and the 'subsidies necessary to ensure the affordability of water services to poor households.' The Framework also provides that the approach of water services authorities must be guided by a number of principles, the first of which is 'compassion' and that consequently local governments must develop and implement credit control policies that are 'compassionate, especially towards poor and vulnerable households'.⁷²

Although the WSA and other documents require of water service authorities to provide consumers in their jurisdiction with affordable access to water and the corresponding duty of consumers to pay reasonable charges for water use, cost-recovery is used as a guiding principle in water services management. In particular, national policy has been to price water at a level reflecting the full cost of providing water and sanitation services to households; there has been only minimal cross-subsidisation from rich to poor households. This evidences the tensions that exist between application of full cost-recovery policies, and of more progressive and equitable social policies. According to the 2003 Strategic Framework, '[t]he prices of water and sanitation services reflect the fact that they are both social and economic goods [...]'.⁷³ The application of a policy of cost-recovery has created serious obstacles in the realisation of the right of access to water.⁷⁴ It has firstly led to dramatic increases in the price of water, leading to substantial debt in low-income households.⁷⁵ Since during apartheid white South Africans and the industrial sector benefited from heavily subsidised municipal services, charging communities the full cost of service delivery has led to higher rates in poor, black neighbourhoods which require the installation of basic water supply infrastructure. At the same time, provisions for financial assistance have not been sufficient or not implemented in many regions. A second issue linked to cost-recovery has been that of arrears on water bills. Great emphasis has been placed by local governments on recovering the massive arrears debt that exist in the poorest communities, despite the evident impossibility of consumers to afford current service bills. Many households have very high municipal services arrears, which include electricity, water and waste removal, which can amount to R80,000.⁷⁶ A policy of cost-recovery in the water sector has also led to increases in disconnections of water services as well as the establishment in some communities of a system of prepayment for water. These latter two aspects are further developed below.

B) Involvement of the Private Sector

A further factor that has proved an obstacle to the realisation of the right to water is the growing tendency towards the involvement of the private sector in water management, whether through what is referred to as 'corporatisation' of institutions or through more direct privatisation mechanisms. In the first case scenario, water services are owned and operated by the local government but are restructured following market principles in order to increase their efficiency. In the second, the management of state-owned water services is delegated to private corporations.⁷⁷ South Africa is increasingly involving the private sector in the delivery and management of services, and for this

70 Section 3 (2), South Africa, Norms and Standards in Respect of Tariffs for Water Services in terms of Action 10(1) of the Water Services Act (Act No. 108 of 1997) (2001) [hereafter 2001 Regulations on Water Tariffs].

71 See Paragraph 4.5.3, 2003 Strategic Framework, note 16 above.

72 *Id.* at Paragraph 4.5.8.

73 *Id.* at Paragraph 2.

74 See, e.g., United Nations, Department of Economic and Social Affairs, Interagency Task Force on Gender and Water, A Gender Perspective on Water Resources and Sanitation, Background Paper No. 2, DESA/DSD/2005/2, submitted at the Twelfth Session of the UN Commission on Sustainable Development, 14-30 April 2004, at 16 (Proposals on the application of a sustainable cost-recovery policy).

75 See Francis, note 1 above at p. 172.

76 P. McInnes, 'Entrenching Inequalities: The Impact of Corporatization on Water Injustices in Pretoria', in D.A. McDonald and G. Ruiters (eds.), *The Age of Commodity: Water Privatization in Southern Africa* 99, 99 (London: Earthscan, 2005).

77 In South Africa, there is no full privatisation, or divestiture of public water service infrastructure to private companies. See Paragraphs 3.4.7 and 4.1, Strategic Framework, note 16 above.

purpose municipalities have adopted business models for water services.⁷⁸ Indeed, corporatisation of services is commonly the first step towards direct involvement of the private sector. Whether water systems are fully state-run but commercialized, or whether they have been taken over by private corporations, the focus is on the promotion of cost recovery and other market principles often at the detriment of more human rights-oriented considerations. It is thus important to note that the institutional arrangement is not necessarily the most important factor in terms of application of human rights and equity principles in water service delivery.

These developments have occurred in line with the more general perception that traditional, state-owned and run water services are inefficient, and have contributed to existing water crises. Privatisation is promoted by private companies themselves, as well as by international donors including bilateral development agencies and the multilateral development banks. South Africa is also a signatory to number of international agreements endorsing privatisation, including the General Agreement on Trade in Services (GATS). A general shift towards private sector participation and privatisation of network utilities can also be observed in other African states.⁷⁹ In particular, the WSA and the NWA entrenched the opportunities for private sector involvement in post-apartheid South Africa⁸⁰ and private investment represents one of the key principles buttressing the 2003 Strategic Framework.⁸¹

Since 1999, several local governments have entered into long-term contracts with international water corporations. These include Nelspruit,⁸² Dolphin Coast and Johannesburg. The involvement of large multinational corporations in the delivery of water services in Johannesburg has been particularly controversial. Johannesburg Water is a corporatised municipal water utility which signed in 2001 a five-year management contract with Johannesburg Water Management Company; the Johannesburg Water Management Company is a joint venture between Ondeo (a water subsidiary of Suez), Northumbrian Water (acquired by Suez in 1996) and Water and Sanitation Services South Africa (the South African local services subsidiary of Ondeo). The City of Johannesburg, as the sole shareholder of Johannesburg Water, has delegated to it the authority to act as water services provider, as contemplated under the WSA. Suez, one of the largest water multinational corporation, in effect maintains control over the whole contract through its subsidiaries. The venture has been denounced as leading to significant rate increases particularly for smaller users, substantial debt and draconian services cutoffs.

Opposition to privatisation in the water sector has been active in South Africa, particularly from NGOs and unions which point to the detrimental effects on health and safety resulting from a focus on economic profit and the incentive by private service providers to provide water to wealthier areas. The question has also arisen of whether the policy of privatisation of essential services, and in particular water, is consistent with constitutional obligations relating to social and economic rights.⁸³ The bill of rights found in the 1996 Constitution is indeed not limited to state action, since its Section 8, Paragraph 2, binds natural and juristic persons also. This would imply that some constitutional duties apply directly to private entities, although in the absence of related judicial cases it is unclear how a court would treat the applicability of constitutional obligations such as the right to water to private actors.⁸⁴ In any case, the delegation by the state of the provision of basic services to private actors does not mean that the state can delegate its human right obligations; thus, a policy to privatise or corporatise water services to any extent must still comply with the duty to progressively realise socio-economic rights. In particular, the duty to respect and fulfil the right to water requires that the state must ensure that pricing will not make water unaffordable and that efforts are made to realise access to services for all. Decisions to restructure basic service delivery should also be based on participatory processes.

78 See S. Flynn and D. Mzikenge Chirwa, 'The Constitutional Implications of Commercializing Water in South Africa', in McDonald and Ruiters, note 76 above at p. 59.

79 See, e.g., A. Jerome, *Infrastructure Privatization and Liberalization in Africa: The Quest for the Holy Grail or Coup de Grace?* (Palma de Mallorca, Spain: 4th Mediterranean Seminar on International Development, University of Balearic Islands, September 2004).

80 See, e.g., Section 19, WSA, note 14 above.

81 See Paragraph 3.1, 2003 Strategic Framework, note 16 above. Examining the financial role of Great Britain in this push towards privatisation, see G. Monbiot, 'Exploitation on tap: Why is Britain using aid money to persuade South Africa to privatise its public services?' in *The Guardian Unlimited* (19 October 2004) [available at http://www.guardian.co.uk/comment/story/0,,1330405,00.html#article_continue].

82 See L. Smith et al., *Testing the limits of market-based solutions to the delivery of essential services: the Nelspruit Water Concession* (Johannesburg: Centre for Policy Studies, September 2003).

83 There have been few studies in South Africa on the effects of privatisation from a human rights perspective.

84 Note that the Constitutional Court has suggested that the duty to respect socioeconomic rights binds private actions. See *Grootboom decision*, note 12 above at Paragraph 34.

C) Consequences of the Application of an Economic Approach to Water: Disconnections and Prepayment

1) Limitations and disconnections of water services

In the context of a policy of cost-recovery, limitations and disconnections of water services appear as logical options for water providers (whether public or private) in case of non-payment by users. In recent years, there has been a rise in water disconnections as a response to a household or neighbourhood's inability to pay for water services. The question of whether the provision of such an important resource, and indeed one that is protected in the Constitution, can legally be interrupted has therefore become very pertinent.⁸⁵

The WSA sets forth legal procedural and substantive criteria applicable to limitations and disconnections of water services by water providers. Overall, such procedures must be fair and equitable.⁸⁶ They must provide for reasonable notice of intention to apply the measure and for an opportunity to make representations, unless other consumers would be prejudiced, there is an emergency situation or the consumer has interfered with a limited or discontinued service. Section 4, paragraph 3(c) of the Act provides that a person may not be 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. The WSA does however not provide for the situation in which the individual suffering from the disconnection of the water supply is not the same as the person responsible for paying the bill, for instance children in schools or renters whose rent includes the provision of water. The 2001 Regulations further provide that where services are interrupted for more than 24 hours for reasons other than the user's non-compliance with conditions of service, a water service institution must ensure that the consumer has access to alternative water service comprising at least 10 litre of potable water per person per day.⁸⁷ The 2003 Strategic Framework refers more explicitly to water disconnections for domestic users. It grants service providers the right to disconnect water services to domestic consumers, although service cut-offs should only be used as a last resort.⁸⁸

While the criteria applicable to limitations or disconnections of water services found in these documents are in general similar to those outlined in General Comment 15, they do not go as far as to include the essential condition that '[u]nder no circumstances shall an individual be deprived of the minimum essential level of water.'⁸⁹ Indeed, when water services are disconnected, individuals are deprived from even a basic amount of water, thereby seriously comprising the government's Free Basic Water policy and the realisation of the constitutional right to water. As a result, the DWAF has called upon municipalities to refrain from complete disconnection and that even when consumers do not respect payment orders, water supply should be reduced to a 'trickle supply' to provide the free basic amount rather than being disconnected.⁹⁰ This has not appeared to be widely implemented by local governments.

The question of disconnection of water services has been the object of several judicial decisions. In the *Manquele* decision, the Durban High Court made clear that beyond the free water quota water must be paid for, and that once a household is no longer able to pay for the excess it can be cut off completely for non-payment.⁹¹ A different approach was adopted in the *Bon Vista Mansions* decision which found that the disconnection of water supply would constitute a prima facie breach of the state's constitutional duty to respect the right of access to water, and that procedures employed to effect a disconnection have to be fair and equitable. They should not result in a person being denied access to basic water services for non-payment where the person proves, to the satisfaction of the water services authority, that he or she is unable to pay for the basic services. Therefore, the onus rests on local authority to show that it has legally valid grounds for disconnecting the water supply and has acted in

85 To be noted that water cut-offs are prohibited by law in many countries, including Argentina, Australia, Austria, Belgium, Brazil, Ireland, Luxembourg, Mexico, New Zealand, Norway, Spain, Sweden Switzerland, the United Kingdom and Ukraine.

86 See Section 4 (3), WSA, note 14 above.

87 See Section 4, 2001 Regulations, note 29 above.

88 See Paragraph 4.5.8, 2003 Strategic Framework, note 16 above.

89 See Paragraph 56, General Comment 15, note 7 above (emphasis added). The other conditions found in this clause refer to the need for genuine consultation with those affected, timely and full disclosure of information on the proposed measures, reasonable notice of proposed actions, legal resource and remedies for those affected and legal assistance for obtaining such remedies. The capacity to pay must also be taken into account.

90 See R. Kasrils, Minister of Water Affairs and Forestry, Pre-paid water meters serves peoples rights, 13 April 2004 (on file with the author).

91 *Manquele v Durban Transitional Metropolitan Council* [2001] JOL 8956 (D).

compliance with the Constitution and the WSA.⁹² In the *Highveldridge* decision, the Transvaal Provincial Division granted an association of water users that was not properly incorporated standing to bring an urgent application for reconnection of their water supply.⁹³ The Court noted that a constitutional right was allegedly threatened when their water supply had been cut off. A more recent application considers the validity of disconnections in conjunction with the installation of pre-paid water meters.⁹⁴

2) *Pre-payment of water services*

As another consequence of the application of a policy of cost-recovery, the installation of pre-paid water meters mainly in the poorest neighbourhoods is becoming a means employed to ensure payment for water use.⁹⁵ Pre-paid meters represent a convenient tool for public or private water providers because since they charge for water up-front, they allow for full cost-recovery with little administrative paperwork.⁹⁶ The system however creates significant hurdles for the poor and contributes to impeding their access to basic water.⁹⁷

First, the system implies that people have to pay for water before they use it. Since in case of non-payment water is immediately disconnected, there is no room for application of the criteria found in the WSA, which require inter alia that reasonable notice of disconnections be provided and ability to pay taken into consideration. Second, the availability of water is made dependent upon the correct functioning of the devices, which in reality have proven to be complex, unreliable and faulty.⁹⁸ Third, the system of pre-paid water meters prevents communication between communities and water providers and thus does not allow for adequate public participation in water management. The experience of the main applicant in a recent case involving the system of pre-paid meters, illustrates well the absence of a human component in the context of access to water:

'When the free 6 kilolitres of water is finished, the water supply is discontinued without any notice. There is no person to whom I can explain the reason why I cannot pay, or why I need the water to remain connected. The prepayment meter automatically cuts off the water.'⁹⁹

Fourth, pre-paid meters are often installed without the provision of correct information to and consultation with local communities, and even without their consent or knowledge.¹⁰⁰ As a result, the installation of pre-paid water meters has forced people in the most deprived neighbourhoods to look for other, often contaminated, sources of water when they cannot afford to pay for the resource.

Failed experiences with prepayment of water are evidence of these problems. In the KwaZulu Natal Province, for instance, where pre-paid meters were installed in 2000 to existing, free communal taps, the inability of many households to buy the plastic cards and units to access water forced women and children to collect water from streams, leading to a massive cholera outbreak less than six months after the installation of the meters.¹⁰¹ The stream where the Madlebe community fetched water was found to contain cholera bacteria. As a result, the pre-paid meter system in Madlebe was abandoned. In Cilliers, Northern Province, this system was also abandoned after it was found that the meters were unworkable.

Despite these experiences, the installation of water meters has continued unabated and without adequate public consultation. In particular, they have been introduced in Johannesburg's surrounding townships in parallel with the privatisation of delivery of water services. Experiences include the two poorest districts, Orange Farm and Phiri, with plans for expansion to the rest of the city and country.¹⁰² In Orange Farm, a township of 500,000 people, water meters were installed in 2002 by the local water supplier on the grounds that this system would

92 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* [2002] (6) BCLR 625 (W).

93 See note 11 above.

94 See note 60 above.

95 See, e.g., Statement by R. Kasrils, note 90 above.

96 The production of pre-paid water meters has also been identified as a lucrative export market in South Africa.

97 Note that pre-paid meters have been illegal in the United Kingdom since 1998 due to the adverse effects on health for the poor. They are however still used in other countries, including Brazil, Egypt, Lesotho, Namibia, Sudan, the Philippines and the United States.

98 See, e.g., Orange Farm Case Study, note 54 above at pp. 28-9.

99 L. Mazibuko, Founding Affidavit, Paragraph 102 (on file with the author), in the case referred to at note 60 above.

100 See, e.g., Orange Farm Case Study, note 54 above at pp. 12-15.

101 *Id.* at p. 11.

102 Although in September 2001 the City of Cape Town announced its decision not to implement pre-paid water meters in the city.

provide sewer and sanitation systems for every household that paid a fixed fee. These regulations forced local residents who were unable to afford to pay for water to seek and obtain water from unhealthy and unsanitary means such as lakes and rivers. A recent judicial application has asked the Johannesburg High Court to declare the decisions of Johannesburg Water to unilaterally install prepayment meters in Phiri unlawful and unconstitutional.¹⁰³

The effects of the application of a policy of cost-recovery, particularly the practice of water prepayment and of disconnections, have in effect prevented the realisation of the right of access to water found in the Constitution in impoverished communities. They have had disastrous health consequences and the massive cholera outbreak of 2000-2001 has been directly linked to lack of access to clean water. Service cut-offs have also caused social unrest and violence in many communities, including the Johannesburg townships of Soweto and Orange Farm.¹⁰⁴ Moreover, the high administrative costs of performing service cut-offs and meter installations, or hiring collections agencies and lawyers, has meant that the provision of water has operated at a net economic loss.¹⁰⁵

CONCLUDING REMARKS

The law and policy framework for water established after the apartheid era in South Africa is noteworthy particularly because the main thrust of the reforms undertaken was to entrench the right to water at the constitutional level. This reflects the international recognition of the right which was subsequently well-established by the Committee on Economic, Social and Cultural Rights in its General Comment 15. This constitutional right of access to water for all has constituted the grounding for the legislation on water adopted in the late 1990s, in terms both of the management of water resources at the national level and the management of water and sanitation services at the local one. The water framework based on the fundamental right to water has more recently translated through the government's Free Basic Water policy into an entitlement for every individual to a basic amount of water that is to be provided free of charge.

The recognition of water as a necessary and basic resource, and indeed a right for each person, has to date however not ensured access of every individual to basic water needs. Particularly under pressure from international donors including the international financial institutions, the government has applied conservative fiscal policies which require that public services such as water pay for themselves. Full cost-recovery policies, as well as corporatisation and privatisation measures, have resulted in increased commodification of the resource and have contributed in effect to posing significant challenges to the realisation of the constitutional right of access to water especially for the poorer segments of the population. Despite the recognition that '[t]he cost associated with providing free basic water to poor households is not large for a country of our economic and size',¹⁰⁶ there remain persistent inequalities in the face of access to water services and infrastructure, and the implementation of the government's Free Basic Water policy has met with serious obstacles in addressing problems of accessibility and affordability of water. Local governments are increasingly resorting to disconnection of water services for non-payment and to the installation of pre-paid water meters which allow people to access water only if they pay for it. These measures have dramatic health consequences as people are forced to resort to polluted rivers, streams and even open pits to draw water for daily survival.

Section 27, Paragraph 1(b), of the 1996 Constitution mandates that the right of access to sufficient water should continually be progressively realised. Additionally, it implies that the right to water should not be constrained by water resource limitations or allocation of water for economic development. The state's obligations to ensure access to water to the most economically disadvantaged groups must comply with a sufficient amount of water to meet basic needs. For the Free Basic Water policy to be effectively implemented, it has been suggested that the present allocation of 25 litres of free water per person per day be increased and that a more important financial commitment be undertaken by the national government in ensuring implementation of the policy. In addition, the constitutionality of such measures as disconnections of water services and pre-payment of water should be reviewed. Overall, the increasing commercialisation of the water sector should be curtailed in order to achieve the fulfilment of the human right to water.

¹⁰³ See note 60 above.

¹⁰⁴ P. Bond, *The Battle over Water in South Africa* (AfricaFiles) [available at <http://www.africafiles.org/article.asp?ID=4564>].

¹⁰⁵ See Francis, note 1 above at p. 170.

¹⁰⁶ See Paragraph 4.4.1, 2003 Strategic Framework, note 16 above.

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