

**RESPECT, PROTECT, FULFIL:
THE IMPLEMENTATION OF THE HUMAN RIGHT TO WATER IN SOUTH AFRICA**

Inga T. Winkler

Paper presented at the Workshop on
'Legal Aspects of Water Sector Reforms'
International Environmental Law Research Centre
Geneva, 20 to 21 April 2007

Doctoral Student - Heinrich-Heine-University Düsseldorf - School of Law
inga.winkler (at) uni-duesseldorf.de

Abstract

South Africa is one of the few States that have included the right to water in their Constitutions. Section 27 (1) (b) of the South African Constitution recognizes that everyone has the right to have access to sufficient water. Yet, a great number of people still lack access to water services. The South African Government aims to overcome this deficit with its Free Basic Water (FBW) Policy meaning to provide each household with 6000 litres of water every month free of charge.

There are, however, a number of challenges to the implementation of the right to water. These will be analysed under the framework of the common tripartite distinction between obligations to respect, to protect and to fulfil.

Obligations to respect require States to refrain from interfering with the enjoyment of human rights thus aiming to ensure that existing human rights guarantees are not violated. As far as the right to water is concerned this obligation becomes relevant in cases of disconnection of water supplies. Several such cases have been heard before South African courts and will be presented.

Obligations to protect refer to the duty of States to prevent third parties from interfering with the enjoyment of human rights. They are particularly important in the context of water services privatisation as for example in Johannesburg.

Obligations to fulfil require States to adopt the necessary measures directed towards the full realisation of human rights. This refers to cases where people do not have the means to attain water services for themselves. The FBW Policy is an instrument to meet this obligation. Since its adoption in 2001 enormous progress has been made, but there are also points of critique. For instance, the calculation of the basic water supply on a per-household basis seems unsatisfactory as it does not take into account the number of people living in one household. A recent application to the Johannesburg High Court addresses this issue.

Finally, the implementation of the right to water will be analysed in the light of the South African Constitutional Court's case law on socio-economic rights and in particular its landmark Grootboom judgment. The Constitutional Court has developed the concept of reasonableness which also applies to the implementation of the right to water. It can be assumed that the FBW Policy meets the requirements of the test of reasonableness. The approach, however, also provokes criticism. It is stated that the notion of a minimum core would be more far-reaching and oblige the Government to immediately fulfil the basic needs of all indigent people, for example by expanding its FBW Policy without delay. These opposing views will be discussed.

Keywords

Affordability, Disconnection, Free Basic Water Policy, Human Right to Water, Implementation, Minimum Core, Obligation to Fulfil, Obligation to Protect, Obligation to Respect, Progressive Realisation

Table of Contents

1.	Introduction	4
2.	Concept of Obligations to Respect, to Protect and to Fulfil	5
3.	The Legislative Framework.....	6
3.1.	The Overall Legislative Framework	6
3.1.1.	The South African Constitution.....	6
3.1.2.	The National Water Act.....	7
3.1.3.	The Water Services Act.....	7
3.1.4.	Ministerial Regulation	8
3.2.	Legislation Relating to the Obligation to Respect	8
3.3.	Legislation Relating to the Obligation to Protect.....	9
3.4.	Legislation Relating to the Obligation to Fulfil	9
4.	Policies Aiming at Implementation	10
5.	Content of the Human Right to Water.....	12
5.1.	Sufficient Quantity	13
5.2.	Other Features.....	13
6.	Challenges to the Implementation of the Right to Water	14
6.1.	Obligation to Respect and to Protect.....	14
6.1.1.	Policy of Cost Recovery	15
6.1.2.	Disconnections	16
6.1.2.1.	Controversy over Disconnections	16
6.1.2.2.	Cases Addressing Disconnection of Water Services	17
Manjele v. Durban Transitional Metropolitan Council.....	17	
Residents of Bon Vista Mansions v. Southern Metropolitan Local Council	18	
Highveldrige Residents Concerned Party v. Highveldridge TLC and Others	18	
6.1.2.3.	Conclusion	18
6.1.2.	Price Increases	19
6.1.3.	Installation of Prepayment Water Meters	20
6.2.	Obligation to Fulfil.....	21
6.2.1.	Critique at the FBW Policy	21
6.2.1.1.	Calculation on a Per-Household Basis.....	21
6.2.1.2.	Amount of Only 25 litres per Person per Day.....	22
6.2.2.	Lack of Access to Water Supply	23
6.2.2.1.	Principle of Progressive Realisation	23
6.2.2.2.	The Minimum Core Approach.....	24
6.2.2.3.	Conclusion	26
7.	Conclusion.....	26

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

Inga T. Winkler

1. INTRODUCTION

Water services in South Africa have aroused a hot debate. On the one hand, it is often regarded as being at the forefront in terms of water service provision in particular due to its explicit acknowledgement of the human right to water and its Free Basic Water (FBW) Policy.¹ On the other hand, there is much resistance against water service privatisation and cost recovery. This paper 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.

South Africa is a country suffering from extreme inequalities. Its GINI index² is extremely high with 57.8.³ If one looks at the Human Development Index, the richest 20 per cent of the population have a rank in the Human Development Index 101 places above the poorest 20 per cent.⁴ These inequalities are reflected in the water sector.⁵ Access to water supply is extremely uneven distributed, a legacy of the apartheid era.⁶ White suburbs account for more than 50 per cent of domestic water use with whites just comprising roughly ten per cent of the population.⁷ A great number of people still lack access to water services. Mostly, marginalised and vulnerable groups of society suffer from inferior or completely lacking access in combination with discrimination, high prices and the use of contaminated water.⁸

The paper deals with the implementation of the human right to water in South Africa. The matter is analysed in regard to the obligations borne by the State that correspond to the right to water under the framework of the common tripartite distinction between obligations to respect, to protect and to fulfil.

The paper starts by presenting this 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 for the right to water pointing out which legal provisions exist that aim at specific obligations. Moreover,

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 0 represents perfect equality and a value of 100 perfect inequality.

³ United Nations Development Programme 337, note 1 above.

⁴ United Nations Development Programme 270, note 1 above.

⁵ Arnold M. Muller, *Sustaining the Right to Water in South Africa* 5, Occasional Paper 2006/29, UNDP Human Development Report Office, available at: http://hdr.undp.org/hdr2006/pdfs/background-docs/Thematic_Papers/Muller_Arnold.pdf.

⁶ 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) and Frank Kürschner-Pelkmann, *Das Wasser-Buch, Kultur, Religion, Gesellschaft, Wirtschaft* 402 (Frankfurt am Main: Lembeck, 2005). On the hydrology of apartheid cf. Ken Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* 322 et seqs. (Cambridge: MIT Press, 2006)

⁷ Francis 150, note 6 above. Cf. as well 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) pointing to the low portion of water consumed in black households.

⁸ South African Human Rights Commission, *The Right to Water, 5th Economic and Social Rights Report Series, 2002/2003 Financial Year* 4 (Johannesburg, 2004).

the FBW Policy is introduced. Before examining challenges to the implementation of the right to water in the main part, the paper turns to the normative content of the right to water to determine the standard against which the implementation is to be assessed. Several concerns are raised which refer to the different obligations ranging from widespread disconnections over affordability concerns to the complete lack of access.

2. CONCEPT OF OBLIGATIONS TO RESPECT, TO PROTECT AND TO FULFIL

States are obliged in different ways by human rights bearing duties to respect, to protect and to fulfil. This concept was first developed by Shue⁹ and has become widely used, for example by the Committee on Economic, Social and Cultural Rights. Most importantly in this context, it is also laid down in section 7 (2) of the South African Constitution.¹⁰

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.¹¹ States have to refrain from any law or conduct that would result in a deprivation of access to the rights.¹² As far as the right to water is concerned this obligation becomes relevant when existing access to water is not respected, that is, in cases of disconnection of water supplies.

The *obligation to protect* refers to the duty of States to prevent third parties from interfering with the enjoyment of human rights,¹³ in this case the human right to water. This obligation places a duty on States to implement legislation that prevents (powerful) private parties from undermining the rights of others.¹⁴ It is for example relevant in form of the duty to protect people from the pollution of water resources committed by third parties. Moreover, it becomes particularly relevant in the case of water service privatisation, which will be the focus in this paper.

⁹ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

¹⁰ Republic of South Africa, Constitution of 1996, Act No. 108 of 1996, available at: www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1.

¹¹ 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).

¹² Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights*, 5 (Cape Town: Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, 2002) available at: www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/research/socio-economic-rights-jurisprudence/evolving_jurisprudence.pdf.

¹³ Craven 109, note 11 above and Eide 24, note 11 above. 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 s. 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); 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) and Reynaud N. Daniels, *Right of Access to Water in South Africa* 12 et seq. (Berkeley: ExpressO Preprint Series, 2005), available at: <http://law.bepress.com/expresso/eps/1364>.

¹⁴ Liebenberg 5 et seq., note 12 above.

The *obligation to fulfil*¹⁵ requires States to adopt the necessary measures directed towards the full realisation of human rights.¹⁶ This obligation aims to ensure that those people who currently lack access gain access to these rights.¹⁷ This refers in particular to cases where people do not have the means to attain water services for themselves and the State is thus required to provide water at least in the form of emergency relief.

3. THE LEGISLATIVE FRAMEWORK

3.1. The Overall Legislative Framework

This section lays down the overall legislative framework for the human right to water in South Africa then turning to legislative provisions that refer specifically to the obligation to respect, to protect or to fulfil.

3.1.1. The South African Constitution

The South African Constitution of 1996 is characterised by a strong focus on individual rights, social justice and the need for national healing in light of the inequities and oppression under the apartheid era.¹⁸ It is regarded as being one of the most progressive in the world,¹⁹ in particular due to its far-reaching commitment to socio-economic rights²⁰ including the human right to water in section 27.

It reads:

- (1) Everyone has the right to have access to
 - a. ...
 - b. sufficient food and water
 - c. ...
- (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 second paragraph recognizes that the full realisation of socio-economic rights such as the right to water is a long term process.²¹

Moreover, the rights to human dignity (section 10), life (section 9), health (section 27) and an environment protecting human health and well-being (section 24) as well as children's rights (section

¹⁵ The obligation to promote included in s. 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. Liebenberg 6, note 12 above and de Visser, Cottle and Mettler 29, note 7 above.

¹⁶ Craven 109, note 11 above and Eide 24, note 11 above.

¹⁷ Liebenberg 6, note 12 above.

¹⁸ Conca 333, note 6 above.

¹⁹ Francis 156, note 6 above.

²⁰ Liebenberg 2, note 12 above; 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).

²¹ Muller 2, note 5 above. 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 6.2.2.

28) are relevant in this context as they are closely linked to the right to water. The South African Constitutional Court has ruled that these rights are justiciable²² and thus enforceable by the courts.

3.1.2. *The National Water Act*

The National Water Act of 1998²³ and the Water Services Act of 1997²⁴ are the most relevant legislative acts in the water sector. The National Water Act is mainly concerned with water resources and their management, protection and usage, whereas the Water Services Act deals with the regulatory framework for water supply and provision.²⁵

The National Water act codifies the government's framework for water resource management. In its section 2, it outlines the purposes of the act stressing the factors of meeting basic needs, promoting equitable access and redressing historical discrimination.²⁶

To this end, it establishes the 'Reserve', a certain reserved quantity of every single water resource consisting of two parts: the basic human needs reserve and the ecological reserve. The basic human needs reserve 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 a 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 and includes water for drinking, food preparation and personal hygiene.²⁷ According to section 16, the Minister is obliged to determine the Reserve for each water resource ensuring adequate allowance for its purposes.

Hence, the human needs reserve is an instrument to ensure that basic human needs enjoy priority in the allocation of water resources. It aims to secure that sufficient water of each water resource is set aside to satisfy these needs by prioritising them over other kinds of water usage. Water necessary for these purposes is not subject to competition with other water demands as the necessary amount for the Reserve is set aside before water is allocated to any other purpose.²⁸ As such, the Reserve can be regarded as a unique concept which reflects the human right to water.²⁹

3.1.3. *The Water Services Act*

However, in order to fulfil basic human needs, it is not sufficient to set aside a specified amount of water; rather, it also has to be supplied to the people. As its title suggests, the Water Services Act is not concerned with the resource side, but with the provision of water services. Its 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

²² Cf. s. 38 of the Constitution; *In re: Certification of the Constitution of the Republic of South Africa*, Constitutional Court of South Africa, Judgment of 6 September 1996, 1996 (10) BCLR 1253 (CC) at 1252 et seq.; cf. as well Liebenberg 2, note 12 above and Johan de Waal, Iain Currie and Gerhard Erasmus, *The Bill of Rights Handbook* 434 (Lansdowne: Juta, 4th ed., 2001).

²³ Republic of South Africa, National Water Act, Act No. 36 of 1998, available at: www.dwaf.gov.za/Documents/Legislature/nw_act/NWA.pdf.

²⁴ Republic of South Africa, Water Services Act, Act No. 108 of 1997, available at: www.dwaf.gov.za/Documents/Legislature/a108-97.pdf.

²⁵ Department of Water Affairs and Forestry, *Report of the Department of Water Affairs and Forestry* 10 (Pretoria, 2006) [hereafter DWAFA Annual Report].

²⁶ Section 2 (a), (b) and (c) Water Services Act; cf. as well Conca 342, note 6 above.

²⁷ Cf. as well introduction to Part 3 of the National Water Act.

²⁸ Sandy Liebenberg, 'The National Water Bill - Breathing Life into the Right to Water', 1 *Economic and Social Rights Review* 1 (1998).

²⁹ Conca 346, note 6 above.

the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being’.

This significance conferred to the fulfilment 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, which gives preference to basic water supply over other uses of water, sets forth:

5. If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.

In so far, the Water Services Act specifies the Constitutional provisions.

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’.

3.1.4. Ministerial Regulation

Section 9 and 10 of the Water Services Act authorise the Minister to prescribe national standards for water services. The Ministerial ‘Regulations relating to compulsory national standards and measures to conserve water’ from 20 April 2001 are based on this authorisation.³⁰ Regulation 3 further specifies the term basic water supply and refers to the minimum standard.

3. The minimum standard for basic water supply services is
 - (a) ...
 - (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month ...

Another Ministerial Regulation refers to tariffs for water services.³¹ Regulation 3 (2) requires that

3. (2) A water services 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 subsidized.

3.2. Legislation Relating to the Obligation to Respect

Within this general legislative framework there are some legal provisions that refer specifically to certain types of obligations borne by the State. 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

³⁰ Republic of South Africa, Regulations relating to compulsory national standards and measures to conserve water, available at: www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC9DREG-20%20April%202001.doc.

³¹ Republic of South Africa, Norms and Standards in respect of Tariffs for Water Services in terms of Section 10 (1) of the Water Services Act (Act. No. 108 of 1997), available at: [www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC10\(1\)REGS-11%20JUNE%202001.doc](http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC10(1)REGS-11%20JUNE%202001.doc).

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

However, section 11 which determines the duty of water service authorities to provide access states in its para. 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, in particular due to the very broad term ‘failure to comply with reasonable conditions’. 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. However, it has to be understood in a way that the disconnection must not lead to the denial of basic services for indigent people. Otherwise, section 4 (3) (c) would have hardly any meaning.

3.3. Legislation Relating to the Obligation to Protect

Section 19 of the Water Services Act is relevant for the privatisation of water services.³² The Water Services Act determines the local governments as ‘default service provider’, but allows them to subcontract that task to private service providers.³³ Section 19 (2) reads:

(2) A water services authority may only enter into a contract with a private sector water services provider after it has considered all known public sector water services providers which are willing and able to perform the relevant functions.

Due to this provision, some interpret the Water Services Act to allow private providers only as a last resort.³⁴ In any case, the Water Services Act allows the local governments to transfer their duties to private water providers under certain circumstances. 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 meets the obligations and acts in accordance with the human right to water.³⁵

3.4. Legislation Relating to the Obligation to Fulfil

Most important for the obligation to fulfil is the duty of water services authorities to provide access to water services which corresponds to the right to have access to water. It is laid down in section 11 of the Water Services Act whose para. 1 reads:

11. (1) Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.

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

³³ Conca 353, note 6 above.

³⁴ Cf. Conca 354, note 6 above.

³⁵ Kok 280 et seq., note 13 above.

However, para. 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.

4. 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 essential. These will therefore be considered in this section.

The Government's overall aim is to provide more people with access to water supply. It was estimated that twelve to fourteen million people did not have access to water supply when the ANC came to power in 1994.³⁶ This amounts to large parts of the black population, in particular in rural areas.

According to government statements, ten million people had gained access to water supply in 2004 since the end of the apartheid era.³⁷ In its most recent Annual Report, the Department of Water Affairs and Forestry (DWAFF) states that access has improved from 59 per cent to 93 per cent of the population. 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 metres from their households.³⁸ Leaving these out, 83 per cent of the population have access to basic water services.³⁹ By 2008, the government expects to reach the target of universal access.⁴⁰

However, these figures refer to access to supply infrastructure which does not necessarily imply that people can afford these services.⁴¹ The government aims to overcome this deficit with its FBW Policy seeking to provide everyone with a minimum amount of water for free.

³⁶ Department of Water Affairs and Forestry, *White Paper on a National Water Policy for South Africa* 15 (1997), available at: www.dwaf.gov.za/Documents/Policies/nwpwp.pdf [hereafter DWAFF White Paper 1997]; Conca 319, note 6 above; Lena Partzsch, 'Wasser in der Krise – Das Beispiel Südafrika', 196 *Solidarische Welt* 4 (2007); Eddie Cottle, *The Class Nature of Free Water in South Africa: From Past to Present* 19 (Durban: Centre for Civil Society, University of KwaZulu-Natal, 2004), available at: www.nu.ac.za/ccs/default.asp?3,28,10,1186; Muller 3, note 5 above 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). Still assuming these figures in 1997/98: Alain Mathys, 'Application du Droit à l'Eau en Afrique du Sud, Quelques exemples tirés de l'expérience de Suez-environnement', in Henri Smets ed., *Le Droit à l'Eau des Législations Nationales* 116 (Nanterre: Académie de l'Eau, 2005); 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 des Législations Nationales* 121, 122 (Nanterre: Académie de l'Eau, 2005) and Liebenberg, note 28 above.

³⁷ Department of Water Affairs and Forestry, *Parliamentary Media Briefing* 1, 10 February 2004, available at: www.dwaf.gov.za/Communications/PressReleases/2004/Parliamentary%20Media%20Briefing%20Release%202004.doc; Partzsch 4, note 36 above; Cottle 25, note 36 above.

³⁸ Department of Water Affairs and Forestry, *Strategic Framework for Water Services, Water is life, sanitation is dignity* 46 (2003), available at: www.dwaf.gov.za/Documents/Policies/Strategic%20Framework%20approved.pdf, [hereafter DWAFF Strategic Framework 2003].

³⁹ DWAFF Annual Report 44, note 25 above.

⁴⁰ DWAFF Strategic Framework 2003, 6, note 38 above; cf. as well United Nations Millennium Project, *Health, Dignity, and Development: What Will it Take? Report of the Task Force on Water and Sanitation* 77 (London: Earthscan, 2005).

⁴¹ Stressing the importance of both physical and economic access Jaap de Visser, Edward Cottle and Johann Mettler, 'The free basic water supply policy, How effective is it in realising the right?', 3 *Economic and Social Rights Review* 1 (2002).

The idea of FBW dates back to 1994 when the ANC came to power. The goal of access to basic water for everyone was for the first time articulated in the ANC's election manifesto, the Reconstruction and Development Program (RDP).⁴² It refers to a supply of 20 to 30 litres of clean and safe water per person per day and a lifeline tariff to ensure that all people are able to afford water services sufficient for health and hygiene requirements. The White Paper on Water Supply and Sanitation from 1994 reiterated this aim referring to a minimum quantity of 25 litres.⁴³ Government subsidies and the adoption of lifeline tariffs are considered for poor communities that are not able to afford basic services.⁴⁴ It included the government's commitment to ensure universal access within seven years,⁴⁵ that is, by 2001, a target that has obviously been missed and has now been postponed to 2008.

However, the FBW Policy was only introduced in 2000/01 in the wake of the rising community struggle and controversy over water cut-offs and the introduction of prepayment water meters and a cholera outbreak.⁴⁶ In the 2000 Local Elections, the ANC announced that it would provide all residents with a free basic amount of water.⁴⁷ In February 2001, the Policy was officially announced by the Minister of Water Affairs and Forestry.⁴⁸

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 a national policy. However, as outlined above, service provision itself is the duty of the municipalities.⁴⁹ The national government has, however, the regulatory power and used it to require that all municipalities should endeavour to provide this minimum amount free of charge.⁵⁰

FBW is financed via cross-subsidisation through a rising block tariff system. Users who consume more than the basic supply have to pay more for the additional units which results in a cross-subsidisation from high volume to low volume users.⁵¹ Moreover, financial support is provided to municipalities through the 'equitable share', a portion of the national annual budget transferred to

⁴² African National Congress, *Reconstruction and Development Program, A Policy Framework* Para. 2.6.6. and 2.6.10.1 (1994), available at: www.anc.org.za/rdp/rdp.html; cf. as well Conca 340, note 6 above and Cottle 3 et seq., note 36 above.

⁴³ Department of Water Affairs and Forestry, *Water Supply and Sanitation Policy, White Paper, Water – an indivisible national asset* 15 (Cape Town, 1994), available at: www.dwaf.gov.za/Documents/Policies/WSSP.pdf [hereafter DWAF White Paper 1994].

⁴⁴ DWAF White Paper 1994, 18, 22, note 43 above.

⁴⁵ DWAF White Paper 1994, 14, note 43 above.

⁴⁶ Partzsch 5, note 36 above; Patrick Bond, *Decommodification 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, available at: www.nu.ac.za/ccs/default.asp?3,28,10,2650 and 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); cf. as well Ginger Thompson, 'Water Tap Often Shut to South Africa Poor', *New York Times*, 29 May 2003.

⁴⁷ Cf. African National Congress, *Local Government Elections 2000 Manifesto, Together Speeding up Change*, available at: www.anc.org.za/elections/local00/manifesto/manifesto.html.

⁴⁸ Department of Water Affairs and Forestry, *Media Statement by the Minister of Water Affairs and Forestry, Mr. Ronnie Kasrils*, 14 February 2001, available at: www.dwaf.gov.za/FreeBasicWater/scripts/FrmShowDoc.asp?DocID=24.

⁴⁹ Schedule 4, Part B of the Constitution.

⁵⁰ Muller 5, note 5 above.

⁵¹ Muller 5, note 5 above; Cottle 29, note 36 above; de Visser, Cottle and Mettler, note 41 above; Francis 180, note 6 above and United Nations Development Programme 64, note 1 above.

local governments that is calculated on the basis of the percentage of poor people living in a municipality.⁵²

Currently, 80 per cent of the population with access to water infrastructure benefit from FBW which translates to 74 per cent of the South African population.⁵³ 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 as it is very difficult to identify poor families.⁵⁴ This leads to the peculiar result that a greater percentage of the entire population than of the poor population is served by FBW. Only 68 per cent of the poor people⁵⁵ are served by FBW compared to 74 per cent of the entire population. This means that 15.6 million people out of 23 million poor people receive FBW.⁵⁶ Indeed, it can be assumed that the number of non-poor people profiting from the policy is larger than the number of poor people.⁵⁷ In particular the poorest in society are excluded from the implementation of FBW.⁵⁸ However, the policy has been overall progressing and the number of poor people benefiting from it is also constantly rising.⁵⁹

5. CONTENT OF THE HUMAN RIGHT TO WATER

In order to identify any deficits in the implementation of the human right to water in the next part, it is important to determine what is meant by the human right to water by establishing 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 International Covenant on Economic, Social and Cultural Rights. However, South Africa is not party to that Covenant so that its provisions are not binding onto the State. Yet, some norms of the South African Bill of Rights are very similar to those of the Social Covenant. Furthermore, section 39 (1) (b) explicitly calls for the consideration of international law when interpreting the Bill of Rights. As such, the High Court (Witwatersrand Local Division) states in a judgment relating to the disconnection of water supplies that international law is particularly useful for the interpretation when the language used in international instruments and the South African Bill of Rights is similar, as in the case of the Social Covenant.⁶⁰

Thus, the right to water as contained in section 27 (1) (b) of the Constitution can be interpreted similarly to the right to water in international law as being derived from the Social Covenant. In this

⁵² Muller 5, note 5 above; Francis 180, note 6 above and de Visser, Cottle and Mettler 37, note 7 above.

⁵³ DWAF Annual Report 45, note 25 above; for up to date information cf. DWAF's site on the Implementation Status of Free Basic Water Services available at: www.dwaf.gov.za/freebasicwater [hereafter DWAF Implementation Status].

⁵⁴ Mathys 118, note 36 above and South African Human Rights Commission, *6th Economic and Social Rights Report* 111 (Johannesburg, 2006).

⁵⁵ With poor referring to households earning less than R 800 per month, cf. DWAF Annual Report 45, note 25 above.

⁵⁶ DWAF Annual Report 45, note 25 above.

⁵⁷ South African Human Rights Commission 25, note 8 above.

⁵⁸ South African Human Rights Commission 44, note 8 above.

⁵⁹ Cf. DWAF Implementation status, note 53 above.

⁶⁰ *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) at 629; 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, Liebenberg, note 28 above and de Waal, Iain and Erasmus, note 22 above.

regard, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights⁶¹ is of special importance. It is not legally binding,⁶² but an authoritative interpretation of the Social Covenant.⁶³

5.1. 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 larger than water for mere drinking purposes necessary for survival. Water has also to be provided for other basic human needs. General Comment No. 15 covers water for personal and domestic use such as washing, cooking, cleaning and personal hygiene. It is difficult to set an exact amount of water necessary to fulfil these needs as requirements vary for example due to climatic conditions. However, several studies regard 20 litres per day per person as the absolutely necessary minimum amount.⁶⁴ General Comment No. 15 also refers to these studies thus regarding 20 litres as the necessary minimum.⁶⁵

However, these 20 litres only constitute the absolute minimum. They can be regarded as the core content of the human right to water, but it cannot be said that the right is completely fulfilled as soon as 20 litres per person per day are provided. To achieve this, a larger quantity has to be provided progressively.⁶⁶ The WHO regards 50 litres per day as sufficient to meet domestic needs, even though this is still not considered optimal.⁶⁷

5.2. Other Features

Not only the water quantity but also its *quality* is important. Water has to be safe and of such quality that it does not impose a threat to human health.⁶⁸ Furthermore, water has to be *physically accessible*.

⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 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, 26 November 2002 [hereafter General Comment No. 15]. 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, cf. Anton Kok and Malcolm Langford, 'The Right to Water' in Stuart Woolman et al. eds., *Constitutional Law of South Africa* 56B-9 et seqs. (Lansdowne: Juta, 2nd ed., 2005) and Anton Kok and Malcolm Langford, 'The right to water', in Danie Brand and Christof Heyns eds., *Socio-Economic Rights in South Africa* 191, 197 et seqs. (Pretoria: Pretoria University Law Press, 2005).

⁶² Emilie Filmer-Wilson, 'The Human Rights-Based Approach to Development: the Right to Water', 23 *Netherlands Quarterly of Human Rights* 213, 228 (2005); 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 et al.: Heymann, 2001); Eibe Riedel, 'The Human Right to Water', in Dicke, Klaus ed., *Weltinnenrecht - Liber amicorum Jost Delbrück* 585, 592 et seq (Berlin: Duncker & Humblot, 2005) and Oliver Lohse, *Das Recht auf Wasser als Verpflichtung für Staaten und nichtstaatliche Akteure, Art. 11 Abs. 1, Art. 12 Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte* 73 (Hamburg: Kovac, 2005).

⁶³ Filmer-Wilson 228, note 62 above and Riedel 592, note 62 above.

⁶⁴ Guy Howard and Jamie Bartram, *Domestic Water Quantity, Service Level and Health* 23 (Geneva: World Health Organization, 2003); United Nations Development Programme 3, note 1 above; World Bank *Technical Notes* 5, available at: <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/English-Full-Text-Report/ch12b.pdf> and World Health Organization and United Nations Children's Fund, *Global Water Supply and Sanitation Assessment 2000 Report* 77 (Geneva and New York, 2000). Others regard 50 litres as minimum, cf. Peter Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic Needs', 21 *Water International* 83, 88 (1996).

⁶⁵ General Comment No. 15 Para. 12 lit. a, note 61 above.

⁶⁶ On the distinction between core obligations and the obligation to progressive realisation cf. below 6.2.2.

⁶⁷ Howard and Bartram 22, note 64 above.

⁶⁸ General Comment No. 15 Para. 12 lit. b, note 61 above.

This means that it has to be available in the household or its immediate vicinity.⁶⁹ The WHO assumes basic access when water is available at a distance of up to 1000 metres.⁷⁰ The South African Government aims to supply water at a distance of less than 200 metres to everyone.⁷¹

Last but not least, water has to be *affordable*. It would not be sufficient if water was physically accessible, but at such high prices that large parts of the population could not afford it. Affordability means that people must be able to realise their right to water without having to compromise other socio-economic rights,⁷² for example the basic needs for food or housing.⁷³ It can therefore be assessed by looking at the percentage of the household income spent on water services. It is difficult to determine the exact percentage which exceeds affordability, but international recommendations are in a certain range: The UNDP Human Development Report regards three per cent of household income as an appropriate benchmark,⁷⁴ whereas the Camdessus Report assumes five per cent.⁷⁵

6. 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 fulfil.

6.1. Obligation to Respect and to Protect

The obligation to respect and to protect are two separate obligations as outlined above. However, they are closely related and are associated with the same challenges in the implementation of the human right to water⁷⁶. Disconnections of water services can be carried out by either public or private water service providers. Similarly, price increases can be implemented and prepayment meters can be installed by both types of service providers. These measures refer to the obligation to respect when carried out by public water providers. The obligation to protect, however, becomes relevant in cases of water service privatisations as foreseen in section 19 of the Water Services Act.

Currently, there are five private concessions or contracts for water service delivery in South Africa:

- a 30-year concession to Biwater in Nelspruit since 1999
- a 30-year concession to a local affiliate of SAUR in Dolphin Coast since 1999
- long-term contracts with Water Services South Africa, a Suez-Lyonnaise subsidiary in two Eastern Cape municipalities (Stutterheim and Queenstown)

⁶⁹ General Comment No. 15 Para. 12 lit. c, note 61 above.

⁷⁰ Howard and Bartram 22, note 64 above.

⁷¹ DWA Strategic Framework 2003, 46, note 38 above.

⁷² General Comment No. 15 Para. 12 lit. c, note 61 above.

⁷³ De Visser, Cottle and Mettler, note 41 above and Lyla Mehta, *Unpacking rights and wrongs: do human rights make a difference?*, *The case of water rights in India and South Africa* 9, Working Paper 260 (Sussex: Institute of Development Studies, 2005).

⁷⁴ United Nations Development Programme 97, note 1 above.

⁷⁵ Michel Camdessus and James Winpenny, *Financing Water For All, Report of the World Panel on Financing Infrastructure* 19 (2003).

⁷⁶ 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) point out that commercialised public utilities are very similar to privatised water services.

- a partnership between Johannesburg Water (a private company whose sole shareholder is the City of Johannesburg) and Suez since 2001.⁷⁷

Thus, only five municipalities have chosen private water service delivery,⁷⁸ which, however, service at least five million people.⁷⁹ Subsequently to the adoption of the FBW Policy in July 2001 there have been no new water service privatisations⁸⁰ and further concessions seem unlikely at present.⁸¹

There is a strong anti-privatisation movement in South Africa consisting of a coalition of local residents committees, anti-privatisation groups, environmental justice activists, the landless people's movement, Jubilee South Africa and trade unions (The South African Municipal Workers Union – SAMWU and the Congress of South African Trade Unions – COSATU).⁸² Protests against water privatisation have become widespread with a particular focus on Johannesburg.⁸³

The anti-privatisation movement often refers to the right to water.⁸⁴ However, water service privatisation does not per se violate the human right to water.⁸⁵ Yet, it is often associated with certain measures that have to be examined in regard to their coherence with the human right to water. This refers to disconnections, steep price increases and the installation of prepayment water meters.

6.1.1. Policy of Cost Recovery

Water service disconnections, price increases and the installation of prepayment water meters 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 services⁸⁶ and is the starting point and basis for privatisation as municipalities try to attract private (foreign) investment.⁸⁷ In 1996, the principle 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

⁷⁷ Conca 353 et seq., note 6 above; cf. as well Bond 12, note 46 above; Cottle 19 et seq, note 36 above; Mehta 5, note 73 above; Thompson, note 46 above; Jacques Pauw, *Metered to Death: How a Water Experiment Caused Riots and a Cholera Epidemic* (Johannesburg: The Center for Public Integrity, 2003) available at: www.publicintegrity.org/water/report.aspx?aid=49; Francis 177, note 6 above; Daniels 35 et seq., note 13 above and Greg Ruiters, 'Debt, Disconnection and Privatisation, The Case of Fort Beaufort, Queenstown and Stutterheim', in David A. McDonald and John Pape eds., *Cost Recovery and the Crisis of Service Delivery* 41, 42 et seqs. (Cape Town: Human Sciences Research Council Publishers, 2002).

⁷⁸ Department of Water Affairs and Forestry, *Minister Kasrils Responds to False Claim of 10 Million Cut-Offs*, 8 June 2003, available at: www.dwaf.gov.za/Communications/Articles/Kasrils/2003/cutoffs%20article%20WEBSITE.doc [hereafter Kasrils 2003].

⁷⁹ Daniels 11 at note 30, note 13 above and McDonald and Ruiters 28, 37 note 2, note 76 above.

⁸⁰ Bond 16, note 46 above.

⁸¹ Pauw, note 77 above.

⁸² Conca 353 et seq., note 6 above and McDonald and Ruiters 35 et seqs., note 76 above.

⁸³ Partzsch 5, note 36 above.

⁸⁴ Cf. e.g. Bond, note 46 above.

⁸⁵ Cf. General Comment No. 15 Para. 24, 27, note 61 above. For a more detailed analysis of this question cf. Kok, note 13 above; Kok and Langford 56B-21 et seqs., note 61 above and Daniels 17 et seqs., note 13 above who, however, comes to the conclusion that the privatisation of water services is unconstitutional.

⁸⁶ 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).

⁸⁷ Francis 157 et seq., note 6 above and McDonald and Ruiters 18 et seq., note 76 above.

be effected'.⁸⁸ Moreover, the Municipal Systems Act of 2000 is based on the principle that local governments must recover costs when they deliver basic services such as water supply.⁸⁹ According to its section 74 (2) (d) and (e) the tariff policy must reflect the costs associated with rendering the service and must facilitate its financial sustainability.

6.1.2. Disconnections

The obligation to respect and protect the human right to water respectively can be violated by not respecting existing access to water services, that is, by disconnecting these services. In order to implement cost recovery, it seems a logical consequence to disconnect water supplies of people who do not pay their water bills. The main controversy in South Africa is concerned with such disconnections due to non-payment. However, interruptions of service delivery that are caused by technical or management problems of unsustainable projects and dysfunctional infrastructure due to lack of maintenance also pose a huge problem.⁹⁰

6.1.2.1. Controversy over Disconnections

There have been a significant number of disconnections in South Africa,⁹¹ in particular in the period between 1994 and 2000.⁹² The exact number of disconnections 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 1994.⁹³ 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.⁹⁴ 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 and therefore had to obtain water from other sources.⁹⁵

Until 2003, the government did not take a clear stand on disconnections, but was ambivalent.⁹⁶ This ambivalence corresponds to the Water Services Act considering its seemingly contradictory provisions on the discontinuation of water services as outlined above.

Only in 2003, after reports about cut-offs in high-profile media such as the New York Times,⁹⁷ DWAF adopted the position that municipalities should refrain from complete disconnection.⁹⁸ Instead, they should reduce the quantity of water supplied to the free basic amount for example by using a trickle-supply.⁹⁹ The DWAF 2003 Strategic Framework reinforces this position and restricts the use of disconnections as credit control mechanism. The framework stresses the importance of information,

⁸⁸ Republic of South Africa, *Growth, Employment and Redistribution, A Macroeconomic Strategy* Para. 7.1 (1996), available at: www.polity.org.za/html/govdocs/policy/gear-02.html; cf. as well Mehta 4, note 73 above; Francis 157, note 6 above and de Visser, Cottle and Mettler 40, note 7 above.

⁸⁹ De Visser, Cottle and Mettler, note 41 above. For more details on cost recovery and its underlying rationale cf. McDonald, note 86 above.

⁹⁰ South African Human Rights Commission 19, 37, 43 et seq., note 8 above.

⁹¹ Khalfan and Russell 128, note 36 above; Mehta 4, note 73 above and Francis 174, note 6 above.

⁹² Partzsch 4, note 36 above.

⁹³ McDonald 170, note 36 above; Conca 353, note 6 above; Pauw, note 77 above; Partzsch 4, note 36 above; Cottle 26, note 36 above; Thompson, note 46 above and Francis 174, note 6 above.

⁹⁴ Kasrils 2003, note 78 above.

⁹⁵ Mike Muller, 'Keeping the taps open', *Mail and Guardian*, 30 June 2004.

⁹⁶ Bond 19, note 46 above.

⁹⁷ Thompson, note 46 above.

⁹⁸ Bond 19, note 46 above.

⁹⁹ Kasrils 2003, note 94 above; cf. as well Khalfan and Russell 128, note 36 above.

warnings and due process prior to any discontinuation or limitation of service. Even more important though, it determines 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 water is available. Disconnection is only regarded as appropriate in the case of tampering with the service equipment or interference with the restriction of water supplies in a manner that renders the limitation less effective (in the case that the person's water supply has been restricted).¹⁰⁰

6.1.2.2. *Cases Addressing Disconnection of Water Services*

Some of these cases of water disconnections have been heard before South African courts.

Manqe v. Durban Transitional Metropolitan Council

The first reported case which deals with a disconnection of water services is *Manqe v. Durban Transitional Metropolitan Council*.¹⁰¹ Due to the non-payment of her water account, the applicant's water services had been disconnected.

The applicant claimed that the disconnection was illegal as it resulted in her being denied even access to basic services, even though she was unable to pay for these. She relied on section 3 (3) (c) of the Water Services Act, but not specifically on the constitutional right to water.¹⁰²

The Court held that the right of the Water Services Act was at that point incomplete and therefore unenforceable. It has to be noticed that the regulation defining the term 'basic water supply' as a minimum of 25 litres per day per person had not yet been promulgated. Thus, the Court concluded that it had no guidance from the legislature or government for the interpretation of the right embodied in section 3 of the Water Services Act. The judge argued that these are policy matters linked to the availability of resources and thus outside of his purview.¹⁰³

In the end, the judge reasoned that the applicant chose not to limit herself to the six kilolitres per month provided free of charge, but to consume additional quantities. In the opinion of the judge, she cannot rely on the inability to pay for water services as a consequence of this behaviour. Thus, the judge concluded that the disconnection had not been illegal.¹⁰⁴

This judgment has been widely criticised. It is argued that the Court fails to distinguish between a person's past behaviour and his or her current ability to pay. Therefore, a person falls in the ambit of section 4 (3) (c) if he proves that he is currently unable to pay for water services. The result is that an indigent person may not be denied basic water services for non-payment.¹⁰⁵ Instead water services could be limited.¹⁰⁶ Thus, the Court could have concluded that the respondent was obliged to continue to supply a minimum amount.

¹⁰⁰ DWA Strategic Framework 2003, 37, note 38 above.

¹⁰¹ *Manqe 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).

¹⁰² *Id.* at 41

¹⁰³ *Id.* at 43 et seq.

¹⁰⁴ *Id.* at 46.

¹⁰⁵ Michael Kidd, 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right to Access Water', 20 *South African Journal on Human Rights* 119, 131 (2004).

¹⁰⁶ Kidd 132 et seqs., note 105 above.

It is questionable whether a court would come to a similar result in the future considering that the regulations defining basic water supply are now in place.¹⁰⁷ Furthermore, the Court would have been required to undertake a more detailed analysis¹⁰⁸ and to interpret the constitutional right to water, if the applicant had based her application on her constitutional rights.

Residents of Bon Vista Mansions v. Southern Metropolitan Local Council

Several months later, a second case was decided: *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*.¹⁰⁹ 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 the Bill of Rights and in particular 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 the access to water and that the State has to refrain from actions that deprive individuals of their rights.¹¹⁰ The discontinuation of water services is prima facie a breach of the obligation to respect the right to water and requires constitutional justification.¹¹¹ The onus rests on the respondent who has to show that the disconnection was legal, that is, in compliance with the Constitution and the Water Services Act.¹¹² At the time of the interim order, the Council had not yet discharged that onus. Thus, the Court ordered to restore the water supply of the residents pending the final determination of the application.¹¹³

Highveldrige Residents Concerned Party v. Highveldridge TLC and Others

A third case is *Highveldrige Residents Concerned Party v. Highveldridge TLC and Others*.¹¹⁴ It deals with an application for interim relief aiming at the restoration of water supply as well. The judgment, however, is primarily concerned with the *locus standi* of the applicant, a voluntary association. In regard to the interim relief, the Court assessed the balance of convenience and argued that any potential pecuniary losses of the respondents could not outweigh the human need and suffering that would occur due to the lack of fresh water.¹¹⁵ The judge therefore ordered the respondent to reinstate the water supply pending the finalisation of the matter.¹¹⁶

6.1.2.3. Conclusion

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 clearly constitute a violation of the human right to water. An indigent person may not have the access to basic water services denied for reasons of non-payment. Water services may be limited to the basic amount as stipulated in section 4 (3) (c) of the Water Services Act in conjunction with the Regulation 3, but not be completely disconnected.¹¹⁷ In

¹⁰⁷ Khalfan and Russell 127, note 36 above.

¹⁰⁸ Jaap de Visser, 'From the Courts: Manqele v Durban Transitional Metropolitan Council, Disconnection of Water Supplies', 3 *Local Government Law Bulletin* 1 (2001).

¹⁰⁹ *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, note 60 above.

¹¹⁰ Id. at 629.

¹¹¹ Id. at 630.

¹¹² Id. at 632.

¹¹³ Id. at 633.

¹¹⁴ *Highveldrige 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).

¹¹⁵ Id. at 86.

¹¹⁶ Id. at 89.

¹¹⁷ Kidd 132, note 105 above.

line with General Comment No. 15, it has to be ensured that no one is “deprived of the minimum essential level of water”¹¹⁸ under any circumstances.

6.1.2. *Price Increases*

Many activists in South Africa request water to be provided free of charge. Partly, this demand can be explained by experiences under the apartheid era. In that period, water was not provided at all to the vast majority of black communities. But if services existed, water was provided free of charge (or at highly subsidised flat rate).¹¹⁹ There is thus a historical understanding in some areas of water supply to be free. In other areas, people have become used to not paying bills in the years when people refused to pay their utility bills in support of boycotts against the apartheid regime.¹²⁰ Moreover, many communities understood that they would have to stop paying for water with the implementation of the FBW Policy.¹²¹

From a human rights perspective, however, water does not necessarily have to be provided for free.¹²² The decisive criterion is that of affordability. As long as people can fulfil their basic human needs, it is no violation of the human right to water, even if people have to pay in order to do so. Thus, it is critical to look at the affordability of water services. 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. In that case, people spend on average one fifth of their income to pay their water bill.¹²³ Similarly, a recent study in Msunduzi revealed that a significant number of poor households spend more than one third of their income on water expenses.¹²⁴ In many cases, residents of poor black communities pay higher tariffs than residents of more affluent, historically white communities.¹²⁵ These percentages are far beyond the international recommendations of three to five per cent of the household income. In such 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. This is the case when prices increase very steeply after the basic amount of six kilolitres. This is, for example, the case in Johannesburg which 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

¹¹⁸ General Comment No. 15 Para. 56, note 61 above.

¹¹⁹ Cottle 19, 22, 25, note 36 above; DWAF White Paper 1994, 23, note 43 above; Francis 171 et seq., note 6 above; Pauw, note 77 above and McDonald 20, note 86 above.

¹²⁰ Thompson, note 46 above.

¹²¹ Mehta 6, note 73 above.

¹²² Kok 274, note 13 above, Kok and Langford 56B-13, note 61 above and Kok and Langford 200, note 61 above.

¹²³ Partzsch 4, note 36 above.

¹²⁴ Smith and Green 456, note 46 above.

¹²⁵ Cf. the example at Cottle 31, note 36 above. 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, cf. Daniels 41, note 13 above; Hamed 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 27, note 86 above and Flynn and Chirwa 65, note 13 above.

month.¹²⁶ 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.¹²⁷

A similar tariff structure can be observed in Msunduzi. It consists of only two blocks with the second one starting after the free basic amount and being charged at 5.62 Rand per kilolitre. As such, the structure does not reflect any affordability considerations for relatively low-consumption users and shows no disincentives for high-volume users as tariffs do not increase any further.¹²⁸

However, tariffs are not necessarily structured in this way in all municipalities. A different trend can also be observed. In its latest annual report, DWAF states the highest price increases were found in the upper blocks. On average, tariffs increased by eight per cent in the block from six to 20 kilolitres, by fourteen per cent in the block from 20 to 60 kilolitres and by 23 per cent for a consumption of more than 60 kilolitres.¹²⁹

In any case, 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 when people spend a percentage of their income on water that exceeds three to five per cent.

6.1.3. Installation of Prepayment Water Meters

The installation of prepayment meters is also a measure to implement the principle of cost recovery. The first prepayment water meters were installed in rural communities in 1997 as part of the BoTT programme.¹³⁰ To use prepayment meters 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 meter which leads to self-disconnection.¹³¹

For the water service provider, this technology has the advantage that people cannot fall into arrears with their payments as they have to pay in advance.¹³² Prepayment meters have therefore been named the 'ultimate cost-recovery mechanism'.¹³³

¹²⁶ Johannesburg Water, *Schedule of Water Tariffs 2006/2007*, available at: www.johannesburgwater.co.za/uploads/documents/TARIFFS-WS-%202006-2007.xls; cf. as well South African Human Rights Commission 26, 53, note 8 above; Bond 17, note 46 above; Daniels 41, note 13 above and McDonald 28, note 86 above.

¹²⁷ Bond 17, note 46 above.

¹²⁸ Smith and Green 454, note 46 above.

¹²⁹ DWAF Annual Report 42, note 25 above; cf. as well South African Human Rights Commission 112, note 54 above.

¹³⁰ Cottle 20 et seq., note 36 above. BoTT stands for 'Build Operate Train and Transfer' referring to a privatised management contract to deliver water projects to rural communities, cf. de Visser, Cottle and Mettler 41, note 7 above.

¹³¹ Cf. In the matter between *Lindiwe Mazibuko and others and the City of Johannesburg and others*, Founding Affidavit Para. 96, High Court of South Africa (Witwatersrand Local Division), Case No. 06/13865, available at: www.law.wits.ac.za/cals/phiri/MAZIBUKO_Founding_affidavit_Final.pdf [hereafter Founding Affidavit Mazibuko] and Pauw, note 77 above.

¹³² Francis 174, note 6 above.

¹³³ McDonald 19, note 86 above.

In order to test prepayment water meters against the requirements of the human right to water, one has to distinguish between meters that are set to provide a minimum basic amount for free and meters that charge for the entire amount. In the former case, it is at least guaranteed that people have access to this minimum quantity. Yet, prepayment meters raise certain concerns. In particular, in the case of malfunctioning of the meters – which is not uncommon –, it often takes a long time to handle the problems and people often have difficulties to reach anyone responsible. In the meantime, people are then without access to water.¹³⁴

Moreover, it has to be considered that prepayment meters result in immediate self-disconnection as soon as people are no longer able to afford more water units. 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.¹³⁵ The immediate self-disconnection does neither provide for reasonable notice of the intention to discontinue services nor for an opportunity to make representations.¹³⁶

When no FBW is provided via the prepayment meters, their installation is extremely critical and raises serious concerns in terms of affordability. People then simply do not have the possibility to access safe water when they cannot pay for it and then use unsafe water.¹³⁷ In contrast to the usual metered water supply they do not even have the possibility to postpone payment which can have serious consequences. In 2000, South Africa experienced one of the worst cholera epidemics. The reasons for the outbreak were traced back to the installation of prepayment water meters in Kwazulu. As thousands of people were unable to pay for water, they turned to the use of polluted river water.¹³⁸ This resulted in the cholera outbreak that affected about 120,000 people and caused at least 265 deaths.¹³⁹

6.2. Obligation to Fulfil

The analysis now turns to challenges in the implementation of the right to water regarding the obligation to fulfil. 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.

6.2.1. Critique at the FBW Policy

The FBW Policy is an instrument to meet the obligation to fulfil 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.

6.2.1.1. Calculation on a Per-Household Basis

A first point 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.¹⁴⁰ When

¹³⁴ Pauw, note 77 above and Deedat and Cottle 89, note 125 above.

¹³⁵ Cf. as well s. 33 (1) of the Constitution that provides for procedurally fair administrative action.

¹³⁶ Cf. Daniels 40, note 13 above and Flynn and Chirwa 71, note 13 above.

¹³⁷ South African Human Rights Commission 45, note 8 above.

¹³⁸ For details cf. Deedat and Cottle, note 125 above.

¹³⁹ Conca 353, note 6 above; Partzsch 5, note 36 above; Cottle 22, note 36 above and Smith and Green 445, note 46 above; cf. as well Bond 13, note 46 above; Thompson, note 46 above; Pauw, note 77 above and Francis 174 et seq., note 6 above. These figures are confirmed by the Cholera statistics of the South African Department of Health, available at www.doh.gov.za/facts/index.html.

¹⁴⁰ South African Human Rights Commission 37, note 8 above; Francis 182, note 6 above; Daniels 40, note 13 above and McDonald 29, note 86 above.

determining the figure of 200 litres per day per household the government assumed a maximum of eight people living in one household as only 5.5 per cent of households had more members.¹⁴¹ This may or may not result in the minimum amount of 25 litres per person per day depending on the household's size.¹⁴² A recent application to the Johannesburg High Court addresses this issue.¹⁴³

Provision on a per household basis very much simplifies the supply of FBW as the number of people living in a household does not have to be taken into account. It leads, however, to great inequalities as a two-person-household receives the same amount of water as a sixteen-person-household. Such big households are not unusual, especially in poor, black communities.¹⁴⁴ The household of Lindiwe Mazibuko in the application to the Johannesburg High Court provides an example of a 20-person-household.¹⁴⁵ Their FBW usually lasts only two weeks compelling them to buy additional water quantities.¹⁴⁶

A recent study in Msunduzi, KwaZulu-Natal, found that more than ten per cent of the households in the study area were larger in size than eight people.¹⁴⁷ According to the Census 2001, approximately 620,000 households had nine or more members.¹⁴⁸ Thus, the right to a sufficient amount of water of several million people is infringed due to this irrational distinction.

If it is too complicated to calculate FBW on a per person basis, a possible simplification could be to provide a greater quantity of FBW to households in poor communities where large households are common. Another possible procedure could be a possibility for large households to apply for an extended amount of FBW.

In any case, it is indispensable to supply large households (of more than eight people) with an increased amount of FBW that adequately reflects the number of people and guarantees a minimum of 25 litres for everyone.

6.2.1.2. *Amount of Only 25 litres per Person per Day*

A further point of critique is that only 25 litres per day are provided per person per day (assuming the government maximum of eight people per household). Some claim that this amount is not sufficient, in particular in cases where water is also used for water-borne sanitation systems.¹⁴⁹ These critiques therefore demand an extension of the free basic amount to a minimum of 50 litres.¹⁵⁰

However, as outlined above, 25 litres (or even 20 litres) can be regarded as the absolutely necessary minimum amount. It has to be kept in mind that many people in South Africa still lack any water services at all. The first concern which enjoys priority is therefore to supply everyone with this basic amount¹⁵¹ which can be justified by considerations of equitableness.

¹⁴¹ Muller 5, note 5 above.

¹⁴² Smith and Green 449, note 46 above.

¹⁴³ Founding Affidavit Mazibuko, note 131 above.

¹⁴⁴ Founding Affidavit Mazibuko Para. 121, note 131 above.

¹⁴⁵ Founding Affidavit Mazibuko Para. 68, note 131 above.

¹⁴⁶ Founding Affidavit Mazibuko Para. 101, 103, note 131 above.

¹⁴⁷ Smith and Green 448, note 46 above.

¹⁴⁸ South African Human Rights Commission 58 endnote 8, note 8 above.

¹⁴⁹ Founding Affidavit Mazibuko Para. 144, note 131 above; Francis 181, note 6 above, Bond 17, note 46 above; Cottle 30, note 36 above and de Visser, Cottle and Mettler 43, note 7 above.

¹⁵⁰ Cf. as well Gleick 88, note 64 above.

¹⁵¹ Muller 5, note 5 above.

Yet, this implies by no means that the right to water has been fully realised as soon as this minimum quantity of 25 litres per day is provided to everyone. Rather, it only signifies the absolute minimum and calls for a further progressive realisation of the right.¹⁵² In so far, one has to recall the WHO recommendations of 50 to 100 litres per day. The RDP regards 50 to 60 litres per day as goal in the medium term and DWAF considers increasing the free basic amount to at least 50 litres per day for poor households in its 2003 Strategic Framework.¹⁵³ However, it remains to turn these promises into practice.

6.2.2. *Lack of Access to Water Supply*

A different, more fundamental question related to the obligation to fulfil refers to the situation of those who still lack access to water supply. 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 fulfil this obligation?

This question is very relevant as millions still lack adequate water services, especially in rural areas. Even if South Africa boasts to have already met the MDG on access to water supply, long before 2015,¹⁵⁴ this is not satisfactory from a human rights perspective. Rather, the goal is universal access.

According to government estimates in the latest DWAF Annual Report, 3.3 million people still lack access to a basic level of water supply. Moreover, a further 4.9 million only have access to a water supply that does not meet basic service level, in particular because services are only provided at a distance of more than 200 metres from their households.¹⁵⁵

As far as FBW is concerned, it is still not provided to a great number of people in spite of progress being made. 26 per cent of the entire population and 32 per cent of poor people do not receive FBW signifying that the affordability of the minimum amount of water remains critical for 7.4 million out of 23 million poor people in South Africa.¹⁵⁶ Many poor municipalities lack the financial resources to implement the FBW Policy,¹⁵⁷ in particular as cross-subsidisation is difficult to operationalise and has no meaningful effect in communities with only a small number of affluent high-volume users.¹⁵⁸

Thus, the question is whether people without access to sufficient, safe and affordable water can claim to get access and whether the state has a positive obligation to fulfil the right to water. This question is related to the discussion about a minimum core content of the human right to water.

6.2.2.1. *Principle of Progressive Realisation*

As outlined above, the right to water is qualified by section 27 (2) stipulating that the State must take reasonable measures within its available resources to achieve the progressive realisation of the right to

¹⁵² South African Human Rights Commission 56, note 8 above, cf. as well DWAF White Paper 1997, 25, note 36 above and David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance', 119 *South African Law Journal* 484, 494 (2002).

¹⁵³ DWAF Strategic Framework 2003, 29, note 38 above.

¹⁵⁴ Partzsch 4, note 36 above.

¹⁵⁵ DWAF Annual Report 44, note 25 above.

¹⁵⁶ DWAF Annual Report 45, note 25 above.

¹⁵⁷ Mehta 6, note 73 above and Daniels 9, note 13 above.

¹⁵⁸ South African Human Rights Commission 47, note 8 above; Francis 180, note 6 above and de Visser, Cottle and Mettler 43, 50, note 7 above.

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 besides their obligations to progressive realisation.

In this context, the landmark Grootboom Judgment¹⁵⁹ 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 water¹⁶⁰ and emphasises that all socio-economic rights have to be interpreted together.¹⁶¹ The notion of reasonableness developed in the Grootboom judgment has become the litmus test against which the realisation of socio-economic rights is tested.¹⁶²

According to the Constitutional Court, section 27 (2) obliges the State to establish a coherent programme directed towards the progressive realisation of the rights.¹⁶³ It has to be ensured that measures are reasonable in their conception and their implementation. This means that programmes must be balanced and flexible and take account of short, medium and long term needs.¹⁶⁴ Moreover, the Court explicitly states that a programme that excludes a significant group of society cannot be reasonable. Thus, a statistical advance regarding the progressive realisation of rights is not sufficient. Rather, the needs of the most desperate have to be taken into account. It must be guaranteed that a significant number of people in desperate need are afforded relief,¹⁶⁵ a prerequisite for reasonableness that can be called the indigent component.¹⁶⁶

When testing the water legislation and policy against the concept of reasonableness, in particular the FBW policy has to be considered. Both, access to infrastructure and the implementation of the FBW policy 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 extension of FBW to the indigent population which underlines the special consideration of this population group in the FBW policy. Therefore, it can be assumed that the State's policy meets the requirements of the Constitutional Court as set up in Grootboom.¹⁶⁷

6.2.2.2. *The Minimum Core Approach*

However, the Court does not demand that all people in desperate need are afforded immediate relief and stresses that the Constitution confers no individual rights entitling to a minimum core.¹⁶⁸ In this

¹⁵⁹ *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC), note 60 above.

¹⁶⁰ *Id.* at 1204, 1208.

¹⁶¹ *Id.* at 1181, 1184.

¹⁶² Cf. Kok 274, note 13 above; South African Human Rights Commission ix, note 8 above and DWAF Strategic Framework 2003, 51, note 38 above. 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).

¹⁶³ *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at 1190, note 60 above.

¹⁶⁴ *Id.* at 1191.

¹⁶⁵ *Id.* at 1202.

¹⁶⁶ Francis 187, note 6 above.

¹⁶⁷ Likewise Francis 194 et seq., note 6 above.

¹⁶⁸ *Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (CC) at 1046, note 162 above; cf. as well John Fitzpatrick and Ron C. Slye, 97 *American Journal of International Law* 669, 678 et seq. (2003); 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) and Sandra

regard, its approach has been criticised for not being far-reaching enough.¹⁶⁹ The minimum core approach developed by the Committee on Economic, Social and Cultural Rights,¹⁷⁰ which the Court, however, has explicitly rejected,¹⁷¹ would be more far-reaching. The approach acknowledges that there are certain minimum needs, such as the need for a minimum amount of water, that are more urgent than others and therefore enjoy priority.¹⁷² They aim at guaranteeing a minimum essential level of each right,¹⁷³ which is indispensable for human survival and dignity and thus has to be secured immediately. Therefore, these needs are not only subject to progressive realisation, but are to be fulfilled immediately.¹⁷⁴ Such a minimum core content is the baseline from which the progressive realisation of the right to water has to start. Progressive realisation means that the state is required to improve the level of realisation of the rights over time.¹⁷⁵

The approach is based on the assumption that the Covenant would be largely deprived of its *raison d'être* without such minimum core obligations.¹⁷⁶ It acknowledges that there are fundamental obligations appertaining to each right whose immediate fulfilment is of central importance for the realisation of the right¹⁷⁷ as it would otherwise lose its significance as human right.¹⁷⁸ Moreover, without protecting at least people's survival interests all other human rights become meaningless.¹⁷⁹

Liebenberg, 'Needs rights and transformation, Adjudicating social rights in South Africa', 6 *Economic and Social Rights Review* No. 4 p. 5 et seq. (2005).

¹⁶⁹ Bilchitz 484, note 152 above; cf. as well Scott and Alston 262 et seqs, note 20 above; Kok and Langford 56B-19, note 61 above; Kok and Langford 206 note 78, note 61 above and Liebenberg 33-27 et seqs., 41, note 168 above; but also Elisabeth Wickeri, 'Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa', *Center for Human Rights and Global Justice Working Paper*, No. 5/2004, 19, available at: www.nyuhr.org/docs/wp/Wickeri%20Grootboom's%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 seqs. (2004). In concrete terms this critique can be underlined by the fact that the housing situation of the community involved in the Grootboom litigation has not yet improved, cf. Wickeri 6, 21.

¹⁷⁰ Committee on Economic, Social and Cultural Rights, *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]. Also cf. already 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). For a detailed analysis of the approach cf. Kristina Klee, *Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte, Eine Interpretation von Art. 2 Abs. 1 des Internationalen Pakts für wirtschaftliche, soziale und kulturelle Rechte* 182 et seqs. (Stuttgart et al.: Boorberg, 1999).

¹⁷¹ *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at 1188, note 60 above.

¹⁷² 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, 11 (2003) and Bilchitz 485, note 152 above.

¹⁷³ General Comment No. 3 Para. 10, note 170 above; General Comment No. 15 Para. 37, note 61 above; Bilchitz 12, note 172 above and Russell 15, note 20 above.

¹⁷⁴ General Comment No. 15 Para. 37, note 61 above; Bilchitz 11 et seq., note 172 above and *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* Para. 9 (1997), reprinted in 20 *Human Rights Quarterly* 691 (1998).

¹⁷⁵ Bilchitz 493, note 152 above; Bilchitz 11 et seq., note 172 above, Liebenberg 33-41, note 168 above and Scott and Alston 250, note 20 above.

¹⁷⁶ General Comment No. 3 Para. 10, note 170 above.

¹⁷⁷ Lohse 102 et seq, note 62 above.

¹⁷⁸ Cf. Klee 186, note 170 above and Russell 15, note 20 above.

¹⁷⁹ Bilchitz 12, note 172 above.

Thus, the State is obliged to immediately guarantee the minimum core content of the right to water to everyone.¹⁸⁰ As outlined above, 20 litres of safe and affordable water can be regarded as the minimum essential level of the right to water.

However, the minimum core approach does not prescribe the impossible. It has to be recognized that it is not only impossible to achieve the full realisation of socio-economic rights in a short period of time,¹⁸¹ 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 this is possible.¹⁸² 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 all available resources have been used to satisfy these minimum needs as a matter of priority.¹⁸³

On the one hand, 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. On the other hand, the extension of FBW to all indigent people in need 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'.¹⁸⁴

6.2.2.3. *Conclusion*

According to this reasoning, South Africa is obliged to immediately realise the core content of the right to water for everyone. The state thus has to extend water services by all possible means to secure access to water supply for everyone and it has to extend its FBW policy to all indigent people in order to assure affordability of water services. It seems, however, unlikely that the South African Constitutional Court adopts this approach.

7. CONCLUSION

South Africa's commitment to the human right to water in its Constitution, legislation and regulations is outstanding and hardly found in any other country. Moreover, the country has also made significant progress in the implementation of the right to water.

Yet, there remain a number of concerns in implementing the right to water. It is essential to clearly prohibit disconnections that leave people without access to basic water supply.¹⁸⁵ The increasing access to water infrastructure and expansion of FBW turns meaningless if a significant number of people lose access at the same time. A way has to be found that leaves people at least with access to a minimum amount of water to satisfy their basic needs even if they cannot pay for it.

The FBW Policy addresses the issue of inability to pay for water services and secures a minimum amount of free water for a great number of people. Yet, it remains inadequate as millions of people

¹⁸⁰ General Comment No. 15 Para. 37 lit. a, note 61 above.

¹⁸¹ General Comment No. 3 Para. 9, note 170 above.

¹⁸² Bilchitz 18, note 172 above.

¹⁸³ General Comment No. 3 Para. 10, note 170 above; Scott and Alston 250, note 20 above; Fitzpatrick and Slye 680, note 168 above; Bilchitz 16, note 172 above; Klee 192, note 170 above, Liebenberg 33-31, note 168 above and Russell 16, note 20 above.

¹⁸⁴ DWAF Strategic Framework 2003, 29, note 38 above.

¹⁸⁵ Khalfan and Russell 132, note 36 above.

still are not supplied with FBW and affordability therefore remains critical. Moreover, many people are affected by steep price increases and the installation of prepayment water meters.

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, that is, at least 20 litres of water per day. This can be realised by using all possible means to develop infrastructure and to extend the FBW policy to all indigent people. It includes as well supplying large households with an amount of more than 200 litres per day in order to ensure that every person has access to the necessary minimum amount. 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. However, as the adoption of the minimum core approach in South Africa does not seem realistic, it is to hope that the government reaches its goal of universal access by 2008.

Furthermore, 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.