Realising the Human Right to Water: A Conflict between Realisation and Implementation - The South African Experience

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REALISING THE HUMAN RIGHT TO WATER: A CONFLICT BETWEEN REALISATION AND IMPLEMENTATION – THE SOUTH AFRICAN EXPERIENCE

HADRIAN TULK

ABSTRACT

In his inaugural address, the late Nelson Mandela said:

“Let there be work, bread, water and salt for all.”

Noble words; yet today more than a billion people in the developing world lack safe drinking water and nearly three billion lack adequate sanitation systems; amenities those in the developed world take for granted. Additionally, climate change and rising population both work to deplete the world’s already scarce water resources. This threatens the survivability of all human beings who depend on the substance to maintain life and basic bodily health. This article will examine whether the international and national implementation and enforcement of a human rights legal framework can be effective in ensuring and safeguarding access to water as a universal service for domestic purposes. It will critically analyse whether the existing international legal framework assists States to translate these commitments into specific obligations both at international and national levels to ensure progressive realisation of the right to water. However, the many practical obstacles, both present and future, emphasise that

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it is crucial to set the framework into motion now to protect those who are least able to protect themselves.

The scope of this article is narrowed towards South Africa, as it is the first State to transpose the international legal obligations regarding the provision of a universal domestic water infrastructure into its constitution and legislation.

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PART ONE - INTRODUCTION

A. WATER ESSENTIAL TO ALL HUMAN LIFE

Water is the element that can be found in all living things, flowing continuously to allow life to function. Without it, human beings and most forms of life on Earth would simply not be able to survive. In fact, for a human being in particular, survivability is limited to just three to four days. As aptly described by Tony Allan, water constitutes the basic “building block of the living cell” as it makes up seventy percent of human mass. This provides an undeniable reaffirmation that scientifically, humans cannot survive without water.

The scientific importance of water is but the starting place of the problems facing mankind in the modern world. Population has grown at a significant rate since 1950—from 2.5 billion to 7.5 billion in 2017. However, the renewable water supply per person fell by fifty-six percent from 1962 to 2014. A United Nations (“U.N.”) Population Division report released at the turn of the millennium forecasted that the number of people in the world was likely to jump to 9.3 billion by 2050, with Africa and Asia seeing the greatest growth. As populations rise, water supplies will become increasingly stressed. The need to ensure adequate water supplies will therefore, become even more critical. More damning is the fact that even amongst those who have access to water, eight percent of them are restricted to utilising an average of 150 litres of water a day.

In the same vein, the forecast of less precipitation in subtropical regions further adds to the concerns as to the availability of water for drinking and agricultural needs.
Sadly, drinking from contaminated and infected water remains a large problem for developing countries where diseases stemming from such concerns are rife. These findings, on their face, are perplexing given that water constitutes nearly seventy percent of this planet. The critical observer in these circumstances begs to question the true route, beyond the alleged shortage, that inhibits access to water.

B. MISMANAGEMENT OF WATER AND GLOBAL GOVERNANCE

One may perceive that a hot and crowded future image of Earth is a dangerous situation. As Thomas Friedman highlights, climate change will impact water resources and subsequently the amount of water available for human survival. The World Water Meteorological Organization ("WMO") predicted in 2009 that "[h]igher water temperatures and changes in extreme conditions, including floods and droughts, are projected to worsen water quality," thereby "reducing freshwater availability." The rise in pollution and consistent depletion of Earth's five hundred rivers will make access to water more challenging. Two hundred and fifty of these are already polluted or depleted. For coastal countries, it will be the loss of many natural aquifers.

According to Peter Gleick, the overarching source of the current water crisis has been the governance of water resources. Lack of adequate water institutions, fragmented institutional structures, and excessive diversion of public resources for private gain has impeded the effective management of water supplies. Fred Pearce observes that, despite the impending "crisis," few politicians admit that there is a need to act on the water crisis now. However, there is a need for dynamic measurements and protection. A global progression towards ensuring access to water for domestic purposes should start now. There are currently 783 million people living without access to basic quantity of safe water for domestic purposes.

15. See id. at 171.
16. World Climate Conference, supra note 11.
18. Id. (noting that some of the world’s mightiest rivers “have been reduced to a trickle”).
21. See id.
The problems associated with lack of hygiene and access to clean water do not need to be outlined at great length. However, the recent Ebola pandemic of 2015 that crippled countries such as Guinea, Liberia and Sierra Leone is another poignant and stark example of the need for the provision of clean water to all peoples, so as to ensure hygiene levels are at the highest at times of anxiety such as these.

C. EXAMINATION AND ANALYSIS OF THE INTERNATIONAL HUMAN RIGHT TO ACCESS WATER

In light of the concerns raised towards human survivability from a growing human population and the decreasing of water resources, this Article will demonstrate whether the international and national implementation and enforcement of a human rights legal framework approach can be effective to ensure and safeguard access to water as a universal service for domestic purposes. It will critically analyse whether such theoretical frameworks can assist regulatory frameworks through practical implementation of water infrastructure, capacity, and management of water resources. This Article will critically examine this concept through the narrow prism of a case study on South Africa. It is important to conduct this study on this particular country, as South Africa was the first sovereign State to attempt to recognise, implement, and use in practice the international human right to access water. This Article will research, review, and investigate the lawful outcome from South Africa’s viewpoint and the potential scope of its impact internationally.

Part Two of this Article will incorporate the capabilities approach as a theoretical framework regarding the human right to access water. Part Three will incorporate a specific case study on South Africa and examine the practical implications and shortcomings in the already implemented 1996 constitutional right to water. Additionally, it will demonstrate that there is a need for progressive realisation of the human right to access water in practice.

Part Four will incorporate and demonstrate the implications of the international human right to access water for domestic purposes in South Africa. This Article will undertake this analysis in light of international and national legal frameworks and regulations. Additionally, it will consider the corresponding means of enforcement and State cooperation. This Article proposes that alternative infrastructural methods for sovereign States be adopted so as to achieve implementation and ratification of the human right to access water as a universal service. In proposing an ideal implementation and enforcement strategy, the author will take account of the almost antithetical nature of the discourse on the human right to access water—even with our best efforts at water management, would the surging world population and the effect of global warming not make it disingenuous to grant non-rationed access to water as an inviolable human

er.pdf.

25. CTRS. FOR DISEASE CONTROL AND PREVENTION, CDC'S ONGOING WORK TO CONTAIN EBOLA IN WEST AFRICA: FLARE-UPS OF EBOLA SINCE THE CONTROL OF THE INITIAL OUTBREAK (2016).

right?

PART TWO - ACCESS TO WATER AS A LEGAL RIGHT

A. INTRODUCTION

Part Two examines the theoretical framework for the subsequent analysis of South Africa’s attempts to use the International Human Rights (“IHR”) legal framework to achieve a universal water service for domestic purposes. In order to discuss whether an IHR based approach to the right to water may be effective, it is first necessary to recognise the right to water as a human right in international law. In particular, Part Two will analyse the IHR definition. Also, the Capabilities Approach will examine and use the above theoretical framework for establishing and safeguarding the IHR to water.\(^\text{27}\) In addition, this section will pay particular attention to the recognition of the IHR to water included and established in the United Nations Human Rights Commission (“UNHRC”) General Comment 15, Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), and the Convention on the Rights of the Child (“UNCRC”).\(^\text{28}\) It is necessary to rationalise the explicit and implicit recognitions of other international instruments. Subsequently, the subject matter that this section will address is whether the right to water is a new or an existing right. Part Two argues that the conceptual foundations and expressions of legal recognition demonstrate the viability of the right to water as a human right.

1. International Human Rights Definition

The UN General Assembly “recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights” and requires States to provide financial and technical assistance in order to attain universal access to water.\(^\text{29}\) To situate the human right to water, the next section examines Amartya Sen and Martha Nussbaum’s theoretical account of the Capabilities Approach.

B. THE CAPABILITIES APPROACH - KEY ASPECTS AND CONSTRUCTIVE THEORETICAL APPLICATION

The Capabilities Approach might be described as a human rights based approach to human development.\(^\text{30}\) Sen and Nussbaum developed human development indices based on this proposition.\(^\text{31}\) As a theoretical framework, it is

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\(^{29}\) G.A. Res. 64/292, ¶ 1–2 (July 28, 2010).

\(^{30}\) Nussbaum, supra note 27, at 276.

centred on the value of ‘choice’ and that people ought to be free to choose their own life-plan, achieve their own well-being, and have an essential understanding of their capabilities. The Capabilities Approach generally justifies the capabilities of human beings and does not invalidate other powerless exercises of specific capability. Therefore, access to water, as a fundamental requirement to human survivability, should be realised for all human beings.

Sen’s formulation of capability has two standpoints: functioning “beings and doings” and “freedom to choose between different functioning” combinations. Nussbaum explained capabilities as real opportunities based on personal and social circumstances. Any circumstances that limit capabilities (i.e., physical disabilities) are framed as capability deprivation. This Article considers the need for human beings to have access to clean water, fit for human consumption and use, as critical to the aspects of individuals being able to achieve Sen’s concept of “life” and “bodily health.” Sen stated that “basic capabilities” represent the threshold level for the functioning of all human beings. Therefore, “being and doing” are probable once human beings achieve these basic capabilities. As a result, legal guarantees, such as freedom of expression, can safeguard and protect aspects of the basic capabilities, as well as human rights law in general.

Based on Sen’s argument that basic capabilities need to be achieved for all aspects of human existence and, for it to be possible for humans to do things in the environments in which they live, the question raised at this stage is whether the right to water is a human right. Thereafter, can it be justified as an aspect of any general capabilities, for instance, freedom of expression. In this case, rationalising the right to water enables legal justification as a human right. Part One of this study established water as a fundamental element of human survivability. Access to basic quantity and suitable quality is necessary for basic capabilities of life and bodily health. Lack of access or meaningful access to water should be classified as a serious capability deprivation, as it prevents use of any human capabilities. As a result, there is a violation of the human right of “being and doing,” as lack of access to water severely limits a person’s freedom to enjoy the pursuit of opportunities in the environment in which he or she

methods for measuring human development based on the Capabilities Approach).
33. Nussbaum, supra note 27, at 292-93.
34. AMARTYA SEN, INEQUALITY REEXAMINED 7, 53 (1992) [hereinafter SEN II]; see Nussbaum, supra note 27, at 276.
35. Nussbaum, supra note 27, at 292.
37. Nussbaum, supra note 27, at 287.
40. Id.; Nussbaum, supra note 27, at 277, 300.
41. See generally Perumatty Grama Panchayat v. State of Kerala, (2004) 1 KLT 731, 741 (Kerala HC) (India), (reiterating the right to unpolluted water as part of the right to life to justify ordering a Coca-Cola bottling facility in southern India to find alternative sources of water).
42. ALLAN, supra note 2.
43. Id.; Nussbaum, supra note 27, at 287.
lives." John Scanlon notes that the right to water "sits at the very essence of right to life and other fundamental human rights." He holds that the right to water is justified as an "essential prerequisite to the fulfilment of many other human rights." Following Scanlon’s interpretation, the realisation of guaranteeing the right to water allows the use of all of Sen’s capabilities to become achievable. Nevertheless, as Eric Bluemel argues, applying the right only to basic personal and domestic use is sufficient to allow life and bodily health. Consequently, the established theoretical justification for ensuring access to water for all human beings requires a legal framework as a form of guarantee, as its protection is necessary to enable human beings to maintain the aforementioned capabilities laid out by Sen.

C. INTERNATIONAL HUMAN RIGHT TO ACCESS WATER: INTERNATIONAL LAW INSTITUTION RATIFICATION, EXPLICIT RECOGNITION, SIGNIFICANCE, AND LIMITATIONS

Scholars have previously argued that the right to water is conceptually a human right. Until 2002, this was not formally recognised in international law. It is now recognised by several key international organizations and legal instruments.

Under CEDAW, signatory sovereign states are bound to ensure women have the right to “enjoy adequate living conditions, particularly in relation to . . . water supply.” The Convention on the Rights of the Child (“CRC”) started combating disease and malnutrition “through the provision of adequate nutritious food and clean drinking water” as necessary. However, as Takele Soboka Bulto explains, the international conventions that are outlined above, which explicitly provide for the IHR to access water, are “far from comprehensive.”

45. SCANLON, supra note 44, at 18.
46. See id. at 18–20.
51. CEDAW, supra note 28, at art. 14, ¶ (2)(h).
52. CRC, supra note 28, at art. 24, ¶ (2)(e).
For instance, the CRC provisions offer no guidance with respect to the water quantity which individuals are entitled to claim.\textsuperscript{44} Furthermore, Bulto notes that both conventions “only place a duty on governments to ensure that the human right to water is provided to persons, without providing corresponding subjective entitlements for human beings in human rights terms.”\textsuperscript{53} Nevertheless, their significance is important since it forms a foundation upon which a standalone right could be established.\textsuperscript{66}

The limitations of CEDAW and the CRC gave rise to the most important recognition of IHR to access water in General Comment 15.\textsuperscript{57} This provision is universal, and it entitles everyone in signatory sovereign states “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” and not just to drinking water.\textsuperscript{58} However, Peter Gleick argues that the right to access water does not entail “a right to an unlimited amount of water.”\textsuperscript{59}

This Article recognizes limitations of the ability to implement the vernacular of the various international legal instruments that have been examined here in Part Two. Constraints include ecological, economic, and political factors, which limit water availability for an individual’s use.\textsuperscript{60} The international community crucially needs to justify a need for further international conventions to satisfy the quantity of water, life sustainability, and sufficient food for a certain economic standard of living. General Comment 15 provides a limited definition of the human right to water; nevertheless, the right to access water could be narrowed further along these lines as one that is limited to domestic and personal use.\textsuperscript{61} The former General Comment 15 committee emphasised that priority in the allocation of water is to be assigned for these purposes.\textsuperscript{62} In similar terms, the Sub-Commission on the Promotion and Protection of Human Rights adopted the Special Rapporteurs recommendations on the Right to Drinking Water and Sanitation.\textsuperscript{63} These recommendations and Gleick’s notion that the vernacular of the right to water could be narrowed in practice to provide controlled amounts are not without further historical indicators. Both the Mar del Plata 1977 Report\textsuperscript{64} and the UN Right to Development 1986 Declaration\textsuperscript{65}

\begin{itemize}
\item [54.] CRC, supra note 28; Bulto, supra note 53, at 297-98.
\item [55.] Bulto, supra note 53, at 298.
\item [57.] Id.; General Comment 15, supra note 28.
\item [58.] General Comment 15, supra note 28, ¶ 2.
\item [60.] Id. at 495.
\item [62.] General Comment 15, supra note 28, ¶ 6.
\item [65.] G.A Res. 41/218, Declaration on the Right to Development, art. 2, ¶ 1, art. 8, ¶ 1 (Dec 4, 1986).
\end{itemize}
make reference to "basic needs" being achieved to ensure that further development opportunities can become possible. These instruments appear to adopt a narrower approach in the sense they recognise that those basic rights, such as the provision of satisfactory amounts of water for human consumption and practical use for health purposes, are the most critical to the survival of human beings. In stating that only the most basic needs must be realisable, the UN publications place the right to water less in danger of being justified as promising "everything" and delivering nothing. This Article also suggests that the language adopted by the Mar Del Plata and the UN Development Declaration recognise that economic, political, and ecological limitations are barriers to the achievement of human rights in general. Conversely, the explicit provisions of the International Covenant of Economic, Social, and Cultural Rights ("ICESCR") and the Universal Declaration of Human Rights ("UDHR") do not address the right to water at all. Having briefly examined the references made to the right to water, the IHR to access water should only guarantee the basic personal needs for drinking, cooking, and fundamental domestic uses. Therefore, the IHR to access water is a limited one, that this Article maintains should be implemented on an ad hoc basis in accordance with the varying needs and capacities of the sovereign State governments that are charged with achieving it. To secure the right to water in practice would arguably mean that individuals could achieve the basic capabilities of life and bodily health, whilst establishing lawful means for realizing Sen's threshold of "functioning" within a civil society to enact their own life plans. Measurements such as General Comment 15 render it to be a priority and a critical goal for sovereign State governments to work towards.

Although it is a non-binding legal instrument, General Comment 15 places the right to water within the ICESCR. If officially adopted by a binding international legal instrument, it would require the progressive realisation of the right, in addition to the immediate obligation to take "concrete and targeted" steps towards the full realisation of the rights specified in the ICESCR. By

68. See Mar Del Plata Action Plan, supra note 64; G.A. Res. 41/218, supra note 65; see Tully, supra note 61 at 36-37; Langford, supra note 67, at 438.
71. Id. at art. 22; Bluemel, supra note 47, at 974.
72. See generally G.A. Res. 14531, supra note 69; see G.A. Res. 217 (III) A, supra note 66.
73. Scanlon, supra note 44, at 1-2.
74. Id. at 5.
75. Id.
recognising the right to water as a human right, it can be used to instigate immediate action." This is reflected in Article 19 of the Millennium Development Declaration.8

The soft laws and action plans are devoid of enforceable claims or binding state obligations.7 However, the debates raised the right to water at these various international forums and their resultant action plans have led towards an increased recognition of the right as well as a fresh appraisal of it within the framework of international human rights laws.8 It also provides credence to General Comment 15, wherein the ICESCR stated that the human right to water has been part of existing rules of international soft law and other Treaties.81 The prevalent recognition of a right to water suggests that the right to water is a new right; therefore it is, in Takele Bulto’s words, “an invention” rather than “a discovery.”82 It can also be argued that the right to water is implicitly recognised in other binding human rights instruments, which suggests a more solid and long-standing foundation to this right.

1. International Human Right to Access Water - Implicit Recognition

As noted by Scanlon, the right to water is intrinsically linked to other human rights.83 Therefore, it must receive indirect recognition and protection through other human rights guarantees. Arguably, the right to water is implicitly recognised as one of the most fundamental human rights and one that is protected under international law. Although the primary international human rights literature does not explicitly recognise the human right to water, it is clearly implied in and derived from the provisions of the International Covenant on Civil and Political Rights (“ICCPR”) and the ICESCR.84 Specifically, Articles Six and Seven of ICCPR guarantee the “inherent right to life” and freedom from “torture or to cruel, inhuman, or degrading treatment, respectively.”85

Other important references are made in several international treaties among, for example, the UDHR Article 25, the ICESCR Article 11, the ICCPR Article 6(1).86 The above international instruments advocate that other human

80. See generally Clara Gonzalez et al., WASH United, Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level: An Overview of Resolutions and Declarations that Recognise the Human Rights to Water and Sanitation (2015) (providing an overview of the position individual states have taken regarding the human rights to water).
82. Id. at 314.
83. Scanlon, supra note 44, at 18–20.
85. Id. at art. 6, 7.
rights provisions should be interpreted, where relevant, with the right to water signified under U.N. Charter Article 55(1). While it may appear to contain no reference to the right to water, it mandates that the U.N. should promote a higher standard of living and set resolutions of international economic, social, health, and related situations. This provision holds particular importance, as the U.N. Charter is considered to be "the Constitution" of modern international law. This norm of promoting a high standard of living should prevail against all other international and legal norms. As the words "right to water" are not stated or included within the U.N. Charter, it seems that there is no realisation of the importance of the right to water by the U.N. Nevertheless, General Comment 15 states that the rights contained within Article 55 are determinate upon recognition of the right to water, which is a prerequisite for its fulfilment.

This is a problematic situation that could be characterised as a double-edged sword, as it creates potentially contradictory implications about the legal basis of the human right to water. On the other hand, the right to water is clearly recognised as a necessary and inherent element of the rights to health and housing. Since the more explicit rights cannot be realised without access to an adequate quality and quantity of water, the human right to water would be treated as part of other rights such as the right to health, life, housing, and dignity. Although implicit recognitions in other human rights suggest that the right to water is far from being a new "invention," it may now present a dilemma rather than a solution when implementing the right.

D. CONCLUSION

While the right to water now possesses explicit legal force in addition to soft law interpretation, it remains an unsecured human right which needs to be progressively realized by all sovereign States. However, some States have avoided


89. Daci, supra note 48, at 73.

90. U.N. Charter art. 55.

91. Id.; General Comment No. 15, supra note 28, at ¶ 1.


94. Bulto, supra note 53, at 304.

95. See id. at 300-03.
ratifying international instruments that incorporate the right to water." Therefore, the potential of the human rights to be the framework ensuring access to water for all human beings becomes hindered. By not ratifying these instruments, it causes deprivation of other fundamental human rights such as life and bodily health, since the right to water is a gateway for these rights to be guaranteed. States that have incorporated the right into their constitutions need to address challenges surrounding its practical implementation. An example of such a state is South Africa. Part Three will conduct a narrowed case study in order to critically evaluate the effectiveness of the international provisions in practice.

PART THREE – A UNIVERSAL SERVICE TO ACCESS WATER IN SOUTH AFRICA – A CASE STUDY

A. INTRODUCTION

This Part seeks to make use of the author’s personal experiences in South Africa by presenting readers with a case study. The overall aim is to critically examine the international human rights framework approach to ensure access to water at a national level—especially in light of the wording in General Comment 15. This Part will demonstrate South Africa’s application by analysing the country’s attempts to implement theoretical human right to water aspects and obligations. Additionally, it will analyse South African jurisprudential interpretation of the right to water in order to assess whether there is need for either reform or review of current conditions. It is important to narrow the scope of this examination on South Africa since it has developed one of the most advanced legislative attempts to implement a universal water service. As such, evaluating the relative successes and weaknesses of its approach are a fitting means of addressing this Article’s main question of whether implementation of human rights based frameworks are an effective means of achieving access to water for domestic purposes and basic human survival.

B. INTERNATIONAL LAW’S APPLICATION IN THE NEW CONSTITUTION OF SOUTH AFRICA

General Comment 15 provides the legal basis of the right to water: “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” However, the focus of this part will be to examine the priority to access water for domestic usage, as established in Part One.

Subsequently, the aspects of availability, quality, and accessibility of water under General Comment 15 gained elevated international legal importance as

98. See id. at 3–7.
99. General Comment No. 15, supra note 28, at ¶ 2.
"inextricable" from the fundamental rights to life, health, and dignity. 106 According to General Comment 15, states are obliged by international law to respect, protect, fulfil, and adopt comprehensive strategies and programmes. 107 This Part will, therefore, assess the effectiveness of General Comment 15’s required aspects and obligations through the prism of South Africa’s strategies and programmes to ensure the right. 108

The Constitution of the Republic of South Africa 1997, as amended in 2003, states under Article 27(1)(b) that “everyone has the right to have access to sufficient food and water.” 109 This is also facilitated in the enactment of the Water Services Act (“WSA”) and the National Water Act (“NWA”). 109 Therefore, the State must guarantee that every individual has the right to access water. This duty is a legislative obligation of the State to provide water for all South Africans. 103

In Government of South Africa v. Groothoorn (“Groothoorn”), the South African constitutional court held that “the programmes adopted by the State fell short of the requirements of section 26(2) in that no provision was made for the relief to the categories of people [most desperately in] need.” 106 In Resident of Bon Vista Mansions v. Southern Metropolitan Local Council (“Bon Vista Mansions”), the Witwatersrand Local Division of the Supreme Court of South Africa held that there was a breach of WSA, as disconnecting the applicant’s water supply constituted a prima facie breach of existing rights. 107 It was held that the Council owed a constitutional duty to provide a water service. 106 In regards to the 1997 Act, the court in Manqele v. Durban Transitional Metropolitan Council (“Manqele”) agreed with the respondent water supplier’s argument that there was no regulation implemented by the State to rationalise the exact meaning of access to a basic water supply. 109 As a result, the court found that in the absence of regulations defining the right to access a basic water supply, the applicant’s claims were unenforceable. 110 However, governmental policies such as the Free Basic Water Policy by Department of Water Affairs and Forestry (“DWAF”) and programmes such as Working for Water were established to provide more

100. Id. at ¶ 3.
101. See id. at ¶ 17, 28, 37; see also SCANLON, supra note 44, at 5.
102. See generally General Comment No. 15, supra note 28, at ¶ 17–38.
105. Water Services Act 108 of 1997 § 2(a) (stating that the purpose of the Act is to provide for “the right of access to basic water supply and the right to basic sanitation”); National Water Act 36 of 1998 § 2(a) (stating that the Nation’s water resources shall be “protected, used, developed, conserved, managed and controlled in ways which take into account . . . meeting the basic human needs of present and future generations”).
110. Id.
specific guidelines on how to ensure progressive development of the Constitutional right to access water in practice and the WSA’s provisions.\textsuperscript{111}

C. ASSESSMENT OF SOUTH AFRICA’S FREE WATER POLICY

The implementation of the constitutional right to access water in South Africa and commitment of its national government to its realisation was taken a step further in February 2001 with the formal adoption of the Free Basic Water Policy ("Strategic Framework").\textsuperscript{112} This policy targets the water needs of the most impoverished citizens by guaranteeing each household a free minimum quantity of potable water.\textsuperscript{113} This quantity is set at six kilolitres per household, per month.\textsuperscript{114} These regulations are based on the assumption that each individual needs twenty-five litres of water per day.\textsuperscript{115} Therefore, this policy is justified irrespective of wealth and number of persons in every household.\textsuperscript{116}

Although this is a national policy, the responsibility for implementation rests with local governments.\textsuperscript{117} The local governments are responsible for the delivery of basic water infrastructural services.\textsuperscript{118} The national government provides support to local governments to ensure that they have the capacity to implement the policy.\textsuperscript{119} The services outlined above are financed from local government in two ways. First, equitable shares, constitutionally required portions of the annual budget, are allocated to local governments.\textsuperscript{120} Second, the national government uses cross-subsidisation between users within a supply system or water services authority area where appropriate.\textsuperscript{121} However, this has not fully materialised.\textsuperscript{122}

In order to ensure the financial sustainability of the free water provision, which reflects General Comment 15’s obligation to ensure “affordable access for everyone,” municipalities have adopted a block tariff system.\textsuperscript{123} In South Africa, this price tariff system increases and decreases according to the consumption of water per household, per day by ensuring that those who use large amounts of water subsidise, to some extent, the free provision of six kilolitres

\begin{itemize}
\item \textsuperscript{112} See S. Afr. Dep’t of Water Affairs & Forestry, Strategic Framework for Water Services (2003) [hereinafter Strategic Framework].
\item \textsuperscript{113} Id. at 46.
\item \textsuperscript{114} Id.
\item \textsuperscript{116} See id. at 6, 9.
\item \textsuperscript{117} Id. at 10.
\item \textsuperscript{118} See id.
\item \textsuperscript{119} See id. at 29.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} FBW Implementation Strategy, supra note 115.
\end{itemize}
of water for all households.\textsuperscript{124} Therefore, the policy strengthens the “user pays” principle, since it clearly requires consumption in excess of 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.\textsuperscript{125}

The idea behind this policy is arguably ambitious and progressive. It appears to fall in line with the three core obligations of General Comment 15’s human rights framework, as previously outlined, because 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.\textsuperscript{126} Nevertheless, the implementation of the policy has faced serious practical obstacles which prevented it, to date, from remedying the existing inequalities surrounding water and sanitation provisions.

The first practical limitation is the lack of funding for local governments. As Rose Francis argued, cross-subsidisation has not appeared to be a viable source of funding, especially in rural communities where there is not enough water users who use large amounts of water to cross subsidise the provision of free water for others.\textsuperscript{127} Further, Michael Kidd claimed that private water companies did not consider providing a minimum amount of water for free to be economically viable.\textsuperscript{128} As such, local governments are facing serious problems in providing water and sanitation services, which led them to take drastic cost-recovery measures such as the disconnection of water supplies.\textsuperscript{129} Subsequently, some South Africans are deprived of their right to a free basic amount of water for domestic purposes.\textsuperscript{130} Consequently, national funding remains “the central pillar in the implementation of the Free Basic Water policy” and therefore limiting the effectiveness of the policy.\textsuperscript{131}

The second practical limitation on the implementation under South Africa’s constitution is the country’s infrastructural deficiencies. The implementation of the policy to provide free basic water requires a rapid improvement in water infrastructure, especially for the rural poor.\textsuperscript{132}

The third practical limitation is the allocation of free basic water, which is made on a household basis and not on an individual basis.\textsuperscript{133} Since the average

\begin{itemize}
\item \textsuperscript{124} Id.
\item \textsuperscript{126} General Comment No. 15, supra note 28, at ¶¶ 20–27; Michael Kidd, \textit{Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water}, 20 SAJHR 119, 120-21 (2004).
\item \textsuperscript{127} Francis, supra note 125, at 180.
\item \textsuperscript{128} Id. at 191–92; see SCANLON, supra note 44, at 24, 29.
\item \textsuperscript{129} Peter McInnes, \textit{Entrenching Inequalities: The Impact of Corporatization on Water Injustices in Pretoria}, in \textit{The Age of Commodity: Water Privatization in Southern Africa} 99, 111-12 (David A. McDonald & Greg Ruiters eds., 2005).
\item \textsuperscript{130} Id.
\item \textsuperscript{131} ALIX GOWILLAND-GUALTIERI, \textit{SOUTH AFRICA’S WATER LAW AND POLICY FRAMEWORK: IMPLICATIONS FOR THE RIGHT TO WATER} 7 (Int’l Envtl. Law Research Centre 2003).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} MOSES K. KUMWENDA, \textit{PRE-PAID WATER METERING: SOCIAL EXPERIENCES AND LESSONS LEARNED FROM KLIPHUEWEL PILOT PROJECT}, SOUTH AFRICA 22 (Univ. of the W. Cape 2006).
\end{itemize}
poor household is typically comprised of more than eight individuals, large, poor households are penalised. It is the author’s current view that this oversight, if it can be called that, defies logic. In part of the world, such as South Africa, where there are no controls on population growth internationally or based on household numbers, it is irrational to provide for water in the current measurements.

The fourth practical limitation on implementation is really an expansion of the third limitation as to the allocation and quantity of free water that has been determined by the government as the minimum necessary for survival. Twenty-five litres of water per person per day is considered insufficient to meet basic human needs, and thus is not fulfilling the requirements under Article 27(1)(b) of the South African Constitution. The World Health Organization (“WHO”) stated that twenty litres is the minimum amount of water necessary for basic human survival. The 2003 Strategic Framework encourages national water service authorities to consider “increasing the basic quantity of water provided free of charge . . . to at least [fifty] litres per person per day to poor households.” Although acknowledged, the increase has unfortunately not been implemented yet. The limitation applicable to the amount of free water constitutes a heavy impediment to particularly vulnerable households. Consequently, in accordance with the Strategic Framework, the practical limitations outlined above should be considered as South Africa’s rationale for State responsibility obligations. Whilst the WHO’s framework is largely aspirational, the suggestion it makes as to the total amount of water that should be provided to each person each day could well provide the South African government with a clearly defined objective it can pursue when developing its own water and infrastructural policies.

This assessment of the policy should be regarded as a further step towards a practical achievement and accomplishment of the considerations outlined above. Indeed, achieving the provision of fifty litres of water to each person in South Africa, particularly in the poorer, rural townships such as those within the KwaZulu Natal region, would be an enormous step towards fully accomplishing the realisation of the objectives set out within General Comment 15 and the Free Basic Water Policy. Nevertheless, this article acknowledges that the infrastructure and coordination required to realise the provision of fifty litres of water per person has been and still is at the time of writing, subject to a number of infrastructural, financial and political barriers.

Having recognised the potential policy limitations of the Strategic Framework, the following critical analysis of an application that was submitted in South Africa’s courts by the residents of Phiri against the City of Johannesburg, Johannesburg Water Limited, and the DWAF in 2006, will serve to demonstrate many of the practical limitations that the South African government and the residents face in implementing the principles set out in the Strategic Framework. The court matter is therefore an illustrative example of the difficulties the application of the constitutional privileges has in practice.

134. Id.
135. Id.
138. STRATEGIC FRAMEWORK, supra note 112, at 29.
139. GOWLLAND-GUALTIERI, supra note 131, at 7.


D. MAZIBUKO JUDGMENT – ADVANCEMENTS, LIMITATIONS AND CRITICISM

As outlined above, the court in Bon Vista Mansions first interpreted Article 27(1)(b) of the Constitution and found that when the local authority disconnected the estate’s residents’ water supply, it breached its duty to respect the right to access sufficient water, since it was depriving the residents of their existing access. Therefore, Bon Vista Mansions is seen as an early attempt to be a positive reflection of the practical implementation of the right in terms of General Comment 15’s obligation to respect the availability of physical access to water for domestic purposes. It was enforced with respect to prioritising the survivability of human beings affected over any economic affordability concerns.

It was not until 2009 in Mazibuko and Others v. City of Johannesburg and Others (“Mazibuko”) that the Constitutional Court of South Africa had the chance to truly engage with the meaning of Article 27(1)(b), and analyse how the South African state should carry out its duties to provide access to water. The applicants in Mazibuko challenged: (1) the City of Johannesburg’s Free Basic Water policy, the terms of which provided all households in Johannesburg with six kilolitres of water for free on a monthly basis; and (2) the lawfulness of the installation of pre-paid water meters in Phiri. In South Gauteng High Court, the applicants succeeded to the extent that the Court ruled the installation of pre-paid water meters was unlawful and unfair.

However, the Constitutional Court in Mazibuko held that:

The City’s Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either [Article] 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri is found to be lawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court are set aside.

Additionally, the court in Mazibuko analysed Section 1 of the WSA concerning the basic water supply policy. It found that the term “basic water supply” refers to “the prescribed minimum amount of water necessary for the supply of a sufficient quality of water to support life and personal hygiene.” The Court also determined that Section 9 of the WSA, referred to as regulation 3(b), justified the metric of twenty-five litres per person per day to define the content of basic water supply. However, during the High Court proceedings, Judge...
Tsoka held "the introduction of pre-paid meters constituted administrative action within the meaning of Section 33 of the Constitution" and "the City's Water Services by-laws did not provide for the installation of prepaid meters and that their installation was accordingly unlawful and unfair." Judge Tsoka also found regulation 3(b) "established a minimum content in relation to water services" and he therefore rejected the applicants' argument that regulation 3(b) was "inconsistent with the Constitution." Thus, the High Court held in favour of the applicants and ordered the City of Johannesburg to award a "free basic water supply of [fifty] litres per person per day" and "the option of a metered supply installed at the cost of the City of Johannesburg." The Supreme Court of Appeal held "that [forty-two] litres of water per Phiri resident per day would constitute sufficient water in terms of Section 27(1)."

Some commentators have expressed disappointment at the reversal of the trial courts judgment on appeal, asserting that Judge Tsoka's decision was a true reflection of the obligations of General Comment 15. Tracy Humby and Maryse Grandbois' observations on Mazibuko High Court decision detailed that Judge Tsoka was in accord with the issues of availability and accessibility of water and that he supported a minimum core obligation approach in determining the amount of water that should be supplied by the State. They further remarked that the Constitutional Court's decision was "disappointing" because it missed a crucial "opportunity to quantify the notion of 'sufficient' water in its intersections with both the rights to dignity and life," and failed "to advance social-transformation by articulating a positive, independent, self-standing, directly enforceable right to a specific quantity of free water from the State." Moreover, Judge O'Regan held, by referring to Jaftha v Schoeman, that constitutional rights imposed an obligation on the State, as do social and economic rights. Therefore, Mazibuko identifies the State's obligations in respect of an economic and social right.

Although, on its face, the decision appears flawed and one could argue that the judiciary should have used its discretion to interpret the legislation widely, limiting the application of Article 27(1)(b) is quite practical considering the infrastructural means available. Article 27(1)(b) does not satisfy the right to access water in a comprehensible manner, which is concerning since Article 27 does not issue any elements of affordability and sufficient quality of water. Subsequently, this narrow holding limits the progressive realisation of the right to water in South Africa, as those individuals and communities in situations similar to the residents of Phiri could be left without the means to access a resource.

149. Id. at 10 para. 26.
150. Id.
151. Id. at 10-11 para. 27.
152. Id. at 11-12 para. 29.
154. Id. at 533-34.
155. Id. at 537.
156. Mazibuko 2010 (4) SA at 16-17 para. 47 (referring to Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 160 (CC) at 155-56 paras. 31-34).
157. Francis, supra note 125, at 186-88.
essential to their human survivability, therefore limiting an individual's ability to meet even the minimum standards of bodily health. These are situations which economic and social rights, in their nature, attempt to avoid.

However, it is the State's duty under Article 27(2) to take legislative or any other measures to ensure that these rights are progressively realised. The State needs to clarify what constitutes sufficient quality and quantities of water. Failure to address this issue will undermine the goal of progressive realisation, as it will merely require the judiciary to apply legislation that does not further any economic and social rights. General Comment 15's guidance methods prescribe how the State should modify the language of national legislation to incorporate the right to water in a manner that will truly reflect the international human rights standards and assist local authorities to utilising their resources and infrastructure. The current decision has sparked a need for reform.

The international human right to access water is of paramount importance, as it inextricably linked to "dignity," which is a fundamental core right. This makes it even more imperative that reform and progressive realisation is achieved, notwithstanding the caveat that limited resources must be factored in when applying theoretical considerations to reality, especially when drafting legislation. However, one cannot ignore the core value of the right to access water. Therefore, it is apparent that the first step should be taken by the State. If the State will not reform the current legislation, it should provide measures under the Constitution and other international law to ensure the right is progressed.

Critics such as Stephen McCaffrey and Kate Neville argue that the decision in Masibuko will implicate the significance of a constitutional right to access water in international law and domestic jurisdictions. Both critics recommended additional analysis of the right to access water in South Africa. On this point, Judge O'Regan's statement regarding constitutional rights as an obligation to the State gives rise to the first qualification relating to the character of the obligation imposed by Article 27. This formulation of the positive obligation applies to most of the social and economic rights entrenched in the Constitution and is therefore consistent with the international legal principles. This judicial interpretation of Article 27 as implementing constitutional rights as an obligation for the South African Government and local authorities, such as that of the city of Johannesburg, arguably mirrors the vernacular of General

158. See, e.g., Nussbaum, supra note 27, 286-87.
159. See Mazibuko 2010 (4) SA at 17-18 paras. 49-50.
160. See generally General Comment No. 15, supra note 28.
161. Id. at ¶ 1.
163. Id. at 11.
165. Id.
166. Mazibuko 2010 (4) SA 1 at 19 para. 40.
167. Id. at 19–20 para. 40.
Comment 15. The resulting direction provided by Judge O'Regan aptly confirms this when he states: "The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved."168

Taking a dissenting stance to that of McCaffery and Neville, Louis Kotze contended that whilst the Constitutional Court adopted a constructive argument, it lost an opportunity to set a precedent for the establishment of social and economic rights and social justice in South Africa.169 Andrew Magaziner emphasised the inherent difficulty the South African judiciary faces in reforming social and economic policy.170 However, Maganizer noted that while there is a need for progressive realisation of the right, it will only be achieved by the South African government following the High Court's Mazibuko decision.171 Similarly, Humby and Grandbois asserted that whilst the Constitutional Court's decision in Mazibuko challenged the process of enforcement of the right to access water in South Africa, other test cases such as Mazibuko will not proceed and Article 27(1)(b) of the Constitution will "remain unfulfilled and unenforced."172 "Ultimately, the legitimacy of the system of socio-economic rights and the capacity of the Constitutional Court and other courts to uphold such rights and advance actual physical and economic access to water services could be called into question."173

It is imperative for one to take a holistic approach in critiquing the "right to water" policy. In ascertaining the appropriate quantity, one should consider various factors including the need for sustainability.174 Furthermore, providing clean water should be a continuous duty; exercising that duty involves taking into account the need to maintain a real prospect of sustainable access to water for the foreseeable future. This means the discourse about the right to water must occur in a broader context and draw on management and conservation policies, practical infrastructural challenges, climate change, and the rising world population.

When viewed in isolation, the Mazibuko judgment seems to undermine the right to water as it is codified in the WSA and the South African Constitution. Nonetheless, when one takes into account the position of the preceding paragraph, it appears the Court was caught between a laudable ideal, the reality, and

168. Id.
171. Id. at 576.
172. Humby & Grandbois, supra note 153, at 538.
173. Id.
sensibility.\textsuperscript{175} From this point of view, it would be difficult to question the constructive approach adopted by the court. To rule on quantity of water in a regime with inadequate infrastructure would be to make a mess of the law and the judicial institution because the goal of providing the necessary water would not be achieved anyway.\textsuperscript{176} From this point of view then, it appears the decision in \textit{Mazibuko} preserved the sanctity of the right to water by making a ruling that could be followed at the time with the practical demands required for implementing the right changing in light of climate and political changes.

It should be noted that the aim is not to water down the need for stronger initiatives on the right to water. Rather, it is more about identifying the limitations of direct, right-based judicial action concerning water quantity. This much at least is admitted by Judge O'Regan, who noted that the courts are ill-equipped to calculate what is or what is not a sufficient amount of water in addition to the free Basic Water Policy's provisions.\textsuperscript{177} The next Part of this article will identify potential effective enforcement mechanisms that will resonate at both local and international levels.

E. CONCLUSION

From the analysis of South Africa's water policies, its Constitution, and relevant legislation, it appears a human rights-based approach allows for judicial accountability to be invoked against municipal and state water providers by individuals who want to enforce the right to access safe water for domestic purposes. That, in itself, is arguably one of the greatest successes of South Africa's rights-based framework, as it provides an avenue for community involvement in the progressive development of the right at the highest level.

However, the main limitations of a human rights-based approach, as revealed in \textit{Mazibuko} where the Court narrowed the ruling in \textit{Bon Vista Mansions}, may leave the question of appropriate quantity to local authorities. The Constitutional Court may weaken the interpretation of the right to water in South Africa, directing questions toward what the point is in having such a rights-based framework if what is decided is necessary for certain groups of individuals cannot be delivered. On the one hand, it becomes a less solid foundation upon which to ensure a universal domestic water service for everyone. These practical limitations on the theoretical aspirations of the right to access water could be seen then to limit, as opposed to expand the right.\textsuperscript{178}

On the other hand, the decision could be viewed as an attempt to maintain the prospect of a right to water and to avoid turning the letter of law into a toothless paper tiger. At the least, the decision leaves open the possibility of fashioning better measures to realising the right to water.

\begin{footnotes}
175. See Humby & Grandbois, \textit{supra} note 153, at 540.
\end{footnotes}
In summary, the result of this case study on South Africa is, despite obvious practical limitations, that it is better to have a clear initiative on the right to water than to have nothing at all. A human rights-based framework ultimately safeguards the need for central government and local authorities to find solutions to water infrastructure difficulties as well as to manage the resources they actually have effectively and proportionately. However, to improve these safeguards and ensure universal access to water, there is a need for practical development of infrastructure, something which, despite its best efforts, the South African government has not been able to fully develop. Therefore, the overall effectiveness of a rights-based framework has only worked to a limited extent in realising the aspects and obligations under General Comment 15. Consequently, there is need for further examination as to whether cooperation between the sovereign states and the creation of national infrastructure mechanisms can assist and support additional development whilst maintaining local communities' social norms.

PART FOUR – PROGRESSIVE REALISATION OF THE INTERNATIONAL HUMAN RIGHT TO ACCESS WATER ACHIEVED IN SOUTH AFRICA

A. INTRODUCTION

This Part will evaluate whether the approach taken by the Supreme Court of South Africa is an effective means of ensuring a right to access water, or whether a different approach is required. It is important to first analyse the ways in which South Africa could improve its infrastructure and legislation to achieve its rights-based legislative approach in practice, in light of the difficulties previously identified. Secondly, the analysis of how South Africa could improve its infrastructure will allow for wider conclusions to be drawn from the narrow prism of this case study as to what the meaning of the right to water, what it achieves, and what could be achieved if nations such as South Africa and developing countries were provided with external assistance from already developed nations. Thirdly, it will recommend that with additional means of enforcement of the right internationally, as well as state cooperation, the human rights-based approach to access to water for domestic purposes is the best possible method of ensuring progressive realisation of the right. However, this recommendation will be qualified to ensure it meets the aim of progressive realisation.

B. WATER AS A QUANTIFIABLE LEGAL RIGHT IN AFRICA

Sustaining the right to water requires, without doubt, costly investment in infrastructure.\(^\text{179}\) Given the limited means available to most governments, it is only sensible that a portion of water service costs be shouldered by the public. To enhance the sustainability of the project, the World Bank and International Monetary Fund ("IMF") encouraged the South African government to implement a cost-recovery scheme into their water policy and legislation.\(^\text{180}\) The idea behind the cost recovery system is that the costs associated with operation and
maintenance of water utilities are covered by fees water consumers pay. The real societal costs in ensuring access to water, in theory, are reflected by the price for water usage. Consequently, the Water Services Act ("WSA") assumes this cost recovery approach by placing a water pricing scheme on water intended for domestic use. The right to access water can then moderate the price in the sense that cost of access is proportionate to the value of the use as a means to ensure people do not have to sacrifice other basic needs. The WSA only makes provisions for affordability and not for tariffs according to people's capabilities to pay.

Additionally, the 2003 Strategic Framework reinforces the notion that people will have to pay for access to water when they use more than the basic free amount. Tariffs take into account affordability of water service access for the poor and subsidise, as necessary, to ensure affordability. Despite the legislative framework postulating water service providers should guarantee people within their remit affordable access to water, it again emphasises a duty to pay reasonable charges for water use. This demonstrates the tensions that exist between the economic policy of cost recovery from water users and the progressive-rights framework that seeks to achieve equitable access to water for all—regardless of their means. One could not legislate against either of these ideals. Therefore, efforts must be made to strike the correct balance between them.

In the context of adopting a cost recovery approach to providing water access, limits, and disconnections from water services, on the surface there appears to be options for providers when people cannot pay. The question of whether the provision of a resource essential to the realisation of other basic fundamental rights protected by South Africa's Constitution, such as life and bodily health, can be legally interrupted is concerning in terms of the operation of a rights-based framework. The 2001 regulations provide that when services are interrupted for over twenty-four hours for reasons other than the user's non-compliance with service conditions, a water service provider must ensure the consumer has access to alternatives, providing at least ten litres of water per person, per day. The criterion applicable to limitations or disconnections of

184. Id. at § 10.
185. See STRATEGIC FRAMEWORK, supra note 112, at 28-29.
186. See Kidd, supra note 126, at 132-33.
190. DEP'T OF WATER AFFAIRS & FORESTRY, GUIDELINES FOR COMPULSORY NATIONAL STANDARDS: REGULATIONS UNDER SECTION 9 OF THE WATER SERVICES ACT (ACT 108 OF 1997) & NORMS AND STANDARDS FOR WATER SERVICES TARIFFS: REGULATIONS UNDER SECTION 10
water services found in WSA and policies appear similar to those outlined in General Comment 15, as they go so far as to include the fundamental condition that “under no circumstances will an individual be deprived of the minimum essential level of water.” However, water service disconnection means individuals are deprived from even a basic quantity of water for domestic usage.

Moreover, the application of a cost recovery policy employing pre-paid water meters as the main means of ensuring payment for water use is concerning. On one hand, it is an efficient means for water providers to ensure maximum recovery because water is paid for as an initial lump sum and maintenance requires minimal administrative work. On the other hand, it creates challenges in practice for the poor and their access to basic water, as the system implies people need to pay for water before using it. Because, in cases of non-payment, water is immediately disconnected, there is no space for reasonable notice to be given and ability to pay to be taken into account as the WSA mandates. Additionally, availability of water is made dependant on correct functioning of the pre-paid meters themselves. These have been occasionally criticised as unreliable and complex to manage. This implies a lack of a “human element” in the regulation of water services. For instance, households containing large families within the KwaZulu Natal region of South Africa, which are often comprised of three generations, would simply neither find the basic provisions allotted for them to be wholly adequate for their needs, nor would they be able to adequately manage to attend to the needs of vulnerable groups of individuals such as the elderly and small children, were their water supply to be severed for any reason.

Ultimately, the three core aspects of General Comment 15 failed to fully realise the right to access water for domestic purposes in South Africa. This is not, however, due to a fault in the rights-based framework itself. Sustainability is a key concern in South Africa and in any state attempting to realistically implement a human rights-based framework in practice. In South Africa’s context, sustainability would mean satisfying the needs of current and future generations through both constitutional environmental rights and the right to water. The NWA and Article 24 enshrine ecological aspects of the right to water whilst WSA and Article 27 concern the socio-economic aspects. Despite their legal separation, in practice these methods could cumulatively provide people with

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<td>KUMWENDA, supra note 133, at 61-62 (stating that, while most users have never experienced problems with pre-paid water meters in terms of technical malfunctioning of the meter, there were a few instances when the meters malfunctioned during the initial stages of the project).</td>
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sufficient access to water if implemented in a balanced way. The rights-based approach can therefore be a powerful tool for a government to use in "intervening in social and economic reordering, via natural resource management."\textsuperscript{199}

However, as we know, the effectiveness of this approach in safeguarding a right to water was tested in Mazibuko.\textsuperscript{200} Kotze argued the judgment "neither improved access to water, nor did it result in any concrete or substantial improvements in the health and well-being of those people who do not have access to water."\textsuperscript{200} This suggests that whilst Mazibuko confirmed that rights assume an important part in a state’s approach to looking after its people, it does not always lead to tangible results.\textsuperscript{200} The importance of the rights-based approach, however, is that its aspirations outweigh the practical limitations in the short term and aid in the stimulation of progression towards solutions and increasing access to justice.\textsuperscript{201}

\textbf{C. INTERNATIONAL DIMENSION TO THE IMPLEMENTATION OF UNIVERSAL ACCESS TO WATER}

The significant attempts to judicially enforce socio-economic rights, such as the right to water, has attracted much critical commentary.\textsuperscript{203} A lot can be extrapolated from South Africa’s own jurisprudential approach if applied on an international level. As such, the courts continually narrowed scope can be used to determine whether these mechanisms could be effective. Furthermore, judicial enforcement of a right to access water is a means of holding water service providers accountable, identifying rights violations, and facilitating remedies for violations.\textsuperscript{206} Perhaps in practice, judicial enforcement should be a last resort—only to be used when other mechanisms cannot guarantee accessibility, affordability, or sustainability,\textsuperscript{208} as all individuals and groups ought to have the right to effective remedies at both national and international levels.\textsuperscript{208} This demonstrates the potential for the human rights framework approach to become more effective through formal, legal enforcement.\textsuperscript{209} The problem is that the international community has only issued declarations and statements secondary to exhaustion of domestic remedies.\textsuperscript{210}

Moreover, in regards to the development the right to water’s justiciability through the national courts, enforcement proceedings can rely on international statements and obligations, the International Covenant of Economic, Social,
REALISING THE HUMAN RIGHT TO WATER

and Cultural Rights ("ICESCR"), or national provisions. Consequently, there is an tangled relationship between international and national law provisions surrounding the right to water. As such, for the right to be enforced at a national level, as recognised in public, international law, it needs to be given effect in national legal systems through the monist or dualist approaches. In any case, the right can be given effect. Some States, however, have contested that the right to water only sets aspirations instead of legally binding obligations; when incorporation also fails to take place, the right cannot be invoked in national courts.

Similarly, questions raised on the legitimacy of socio-economic rights (such as the right to water), in terms of their enforcement allegedly breaching separation of powers, can be contemplated in relation to policy decisions on allocation of resources and the corresponding costs. If the judiciary obliged water providers to take necessary steps for enjoyment of the right, it could be argued the political aspects fall within their jurisdiction. Therefore, the judiciary becomes a political entity. However, under the ICESCR, it is stipulated: “it is appropriate to acknowledge that courts are generally involved in a considerable range of matters which have important resource implications.” South Africa’s Constitutional Court’s stated task of adjudicating socio-economic rights cases, which is not so different from that ordinarily conferred on them by a bill of rights, results in a breach of the separation of powers. The importance for the judiciary to be involved in decisions regarding the allocation of water resources is that it can check the activities of the legislators and executive in this regard. The “primary duty of courts is to the Constitution and the law, ‘which they must apply impartially and without fear, favour or prejudice.’ The Constitution requires the State to ‘respect, protect, promote, and fulfil the rights in the Bill of

214. See Hampson, supra note 212, at 10-11; BROWNLIE, supra note 213, at 31-32.
218. Id.
Rights. Ultimately, what the courts of law decide might influence policy decisions and resource allocation, but those rights must be defined by non-judicial branches of government before they become justiciable and enforceable.

D. CONCLUSION

This Article is clearly worded in favour of a global initiative of the right to water. Nevertheless, it recognises the prime role of States in actualisation of such a right. South Africa has taken a bold step by adopting a right-based mechanism that resonates with international sentiments. However, there are still challenges bedevilling the actualisation of the laudable goal that is providing clean and affordable water to the people.

The judiciary has been actively involved in protecting the right of the people, but their impact has been curtailed by practical realities associated with the inadequacy of infrastructure and funding. Whilst this deficit is very much a national issue within South Africa, it is beyond cavil that most other countries would also face similar problems as those reflected in the Mazibuko case if they chose to follow a rights-based approach to water provision. Consequently, it is imperative that we assess concretely how the right to water as provided by the General Assembly can be actualised and enforced.

At the international level, a possible means of ensuring the right to water is to make it inviolable. By taking a grassroots reasoning, political actions at the international level would have to take due consideration of the inviolability of the right to water. For example, it is not uncommon for the international community to impose economic sanctions on other nations for action or inaction considered to be in violation of certain principles of international law. In such an instance, it is imperative that such economic sanctions have no material impact on a citizen’s right to water. In the broader context of socio-economic rights, the Economic and Social Council in 1997 considered the negative effect that economic sanctions have on human rights. A safe starting point to entrenching a human rights-based approach to water provisions, at the international level, is to allow no justification explicit denial.

Secondly, the international community must take proactive steps in facilitating mechanisms that would generate clean water to people. In this regard, international institutions such as the World Bank, the International Monetary Fund (“IMF”), and regional development banks must be willing to widen the scope of their financial contribution and technical support—particularly for developing countries.

222. Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) at para. 99 (internal citation omitted).
223. Vierdag, supra note 217, at 93.
224. G.A. Res. 64/292, supra note 29.
Equally important to the prospect of vindicating a right to water at the international level, is the need for a realistic policy implementation and enforcement mechanism at the domestically.\textsuperscript{228} With South Africa as an example, it is clear that the legislative intent behind the Water Services Act and constitutional guarantees are by all means laudable. However, as explained, the direct rights-based approach adopted by the country in the face of the infrastructural and financial challenges could well have undermined the whole programme as the government would have been unable to respect rights of all citizens. The caution adopted by the Constitutional Court should therefore be commended rather than dismissed. For instance, the court in \textit{Mazibuko} could have ruled that fifty litres of water should be made available to the claimant, but a pronouncement such as this does not guarantee implementation as the City of Johannesburg might simply be unable to meet that demand. Consequently, it is proposed that for an international initiative on a right to water to work, progressive realisation must be the key ideology.

To start, the right to water in developing countries should be exercised as a negative right, which is a right not to be subjected to any action of a third party.\textsuperscript{229} This could be protected by national and international instruments. Citizens should have a direct right to challenge certain usages of resources that would adversely affect the availability of water. In the Indian case of \textit{Perumatty Grama Panchayat v. State of Kerala}, action was successfully brought against the state government and Coca Cola for its excessive use of ground water.\textsuperscript{230} Such a right could also be invoked as a check on various other projects (such as mining and exploration) that could have a negative impact on the people’s right to water.

A positive right to water—a right obliging others to act—should be exercised to challenge legislative and executive actions rather than to enforce an individual’s right.\textsuperscript{231} This administratively inclined human rights approach will have the effect of preserving the sanctity of the fundamental right to water. For example, action could be brought against the government to implement international best practice in water treatment, conservation, and distribution. If such administrative orders and judicial reviews are adopted, this will inevitably trickle down to the grassroots with the attendant effect that the quantity and quality of water enjoyed by the public would be enhanced.\textsuperscript{232}

\textbf{PART FIVE – CONCLUSION}

This Article has sought to critically evaluate the international and national implementation and enforcement of a human rights-legal framework approach in order to analyse their effectiveness at safeguarding access to water as a universal service for domestic purposes. Part One details the importance of water as an essential instrument for the sustenance of life, revealing the present and

\textsuperscript{231} Tomuschat, \textit{supra} note 229, at 19, 21.
\textsuperscript{232} See Magaziner, \textit{supra} note 170, at 577–80.
impending challenges that would dramatically impact access to water unless concerted efforts are made to forestall crisis. Part Two provides the theoretical framework for the discourse on a right to water, which tests Sen’s Capabilities Approach of adopting and fashioning out the essentiality of water in aiding people in achieving their sets of functioning’s within their capability set, which, subsequently, leads people to self-actualisation of being who they want to be and pursuing a life they wish to pursue. Whilst effort has been made at the international level regarding access to water to specific groups such as women and children, Part Two identifies the absence of such affirmative instrument with a more general base. However, due reference was made to relevant provisions in the International Covenant of Economic, Social, and Cultural Rights (“ICESCR”), International Covenant on Civil and Political Rights (“ICCPR”), United Nations Human Rights Commission (“UNHRC”), and the United Nations Charter from which one could tease out the right to water. Nevertheless, that law being a soft law, the right remained unsecured.

Part Three placed focus on South Africa’s attempt to provide universal access to water. This initiative has been shown to be progressive, but the country has faced challenges in effectively implementing them. Here, the need to guarantee appropriate quantity of water was emphasised. The decision of South Africa’s Constitutional Court was thoroughly scrutinised and criticised. However, readers’ attention was also drawn to the need to balance the need to provide access to water against the need to ensure sustainability for future use.

Part Four addresses the means through which South Africa aims to progressively realise the goal of providing universal access to water and critically reviewed the requirement that users should pay for usage of water above a certain quantity. Ultimately, the Part Four proposes practical initiatives at the international and national levels that would aid in attaining the aim of providing universal access to water.

Conclusively, this Article emphasises the need to strengthen the right-based regime for the universal access to water, in light of South Africa’s own experience. It is imperative that convergence is reached, at the international level, on how policies are to be implemented. There should also be checks and balances in place to ensure that every government pays adequate attention to the right of its citizens to access clean water.

Mandela’s wish for water may well have come true; but his wish was not quantified. It is not arguable, with any certainty, that he would look upon the current situation and rest assured that his aspiration had come true.