

**Realisation of the right to water of rural communities through affirmative action on
water service delivery in South Africa**

An LLM Dissertation Submitted to the School of Law, University of Venda

by

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2017

Declaration

I, Shikwambane Pumzile (11618032), hereby declare that this thesis for a Master of Laws (LLM) degree at the School of Law, University of Venda is submitted by me. It has not been submitted previously for a degree at this or any other university. Further that it is my own work in design and in execution, and that all reference material contained therein has been duly acknowledged.

Signed _____ date _____

Dedication

To my mother Normah Mashele and late father George Shikwambane.

Acknowledgments

Embarking on the research study was made possible by funding from the CHATL Grow Your Own Timber Program. I am grateful to CHATL for your financial support. I would like to thank my supervisors Dr. AO Jegede and Adv. HJ Choma for their guidance and patience with me during the course of this project. I am grateful for the support my colleagues and friends at the School of Law, University Venda gave me, I really felt home away from home and it made the periods away from my family and friends bearable. Lots of love to my mother (Normah Mashele) for encouraging me to pursue my studies further and also for provided great support over the past 6 years. I thank my dear friend Tee for his support throughout the course of my studies. A special thanks to the Sovereign God for giving me the strength to complete the project.

Abstract

Historically, there were enormous differences and inequalities with regard to service delivery in South Africa. Traceable to the apartheid period, these inequalities included, *inter alia*, supply of inadequate and safe drinking water for black communities in particular those at rural areas. Yet, water is an essential necessity for human beings, regardless of race, disability and social status. As a legislative measure to redress the injustices of the apartheid regime, the right to have access to sufficient water is entrenched in Section 27(1) (b) of the South African Constitution of 1996. Also, several legal instruments such as the National Water Act of 1998 and the Water Service Act of 1997 were enacted to uphold the human right to water. The Constitution bestowed the responsibility of water supply and management to the national, provincial and the local government. Despite its inadequacy, the South African government is addressing the water needs of the most impoverished communities by guaranteeing each household a free minimum quantity of potable water of 25 litres per person per day or 6 kiloliters per household per month. Any person who needs more will come under privatisation model which key provisions on the existing law favors.

About 38.4% of the population of South Africa who reside in rural communities are poor and mostly affected by inadequate water service delivery in that they cannot afford payment for water in excess of the minimum for which no fees is charged. As a concept, affirmative action is generally used in the context of work places to ensure that qualified marginalized groups have equal opportunities to get a job, but it is not yet investigated in the context of water service delivery. This study assessed laws governing water service delivery and explored how affirmative action can be used as an instrument to ensure the delivery of potable water to rural population in South Africa.

Key words: Affirmative Action, Right to Water, Privatisation, Rural Communities, Water Service Delivery.

List of Abbreviations

1. AA : Affirmative Action
2. ABA : American Bar Association
3. ACHPR : African Charter on Human and Peoples' Rights.
4. ACHPR : African Charter on Human and People's Rights
5. ACRCWC : African Charter on the Rights and Welfare of the Child.
6. ACRWC : African Charter on the Rights and Welfare of the Child
Against Women
7. CEDAW : Convention on the Elimination of all forms of Discrimination
8. CEELI : Central and East European Law Initiative
9. CESCR : Committee on Economic, Social and Cultural Rights
Comparative Religion
10. CRC : Convention of the Rights of the Child
11. CRPD : Convention on the Right of the Persons with Disabilities
12. DPLG : National Department and Local Government
13. DWA : Department of Water Affairs
14. EEA : Employment Equity Act
15. ICCPR : International Convention Civil and Political Rights
16. ICERD : Elimination of All Forms of Racial Discrimination.
17. ICESCR : International Covenant on Economic, Social and Cultural
18. ICRSCR : International Conference on Religious Studies and
19. NWA : National Water Act
20. RAB : Refugee Appeal Board.
21. SADWAF : South African Department of Water Affairs and Forestry.
22. SAHRC : South African Human Rights Commission
23. SAPS : South African Police Services.
24. UDHR : Universal Declaration of Human Rights
25. UN : United Nations
26. UNISA : University of South Africa
27. WDM : Water Demand Management.
28. WHO : World Health Organisation
29. WSA : Water Service Act
30. WSA : Water Services Authorities.

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CHAPTER 1

INTRODUCTION

1.1 Background

Water is an important necessity for human beings in every part of the world.¹ It is, therefore, not surprising that it is an essential component of international human rights instruments including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),² the Convention of the Rights of Child (CRC)³ and Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (Women Rights Potocol).⁴ There are international instruments which implicitly provide for the right to water. These are: the International Covenant of Economic Social Cultural Rights (ICESCR),⁵ Universal Declaration of Human Rights (UDHR),⁶ and African Charter on the Rights and Welfare of the Child (ACRCWC).⁷ As a result of international recognition of water as a human right, a number of states now provide for the right to water. In South Africa, the domestic instruments dealing with the right to water are: the Constitution,⁸ Water Service Act⁹ and the National Water Act.¹⁰ These are the primary legal instruments and they were enacted to promote the constitutional right to water. The National Water Act provides strong tools to redress inequalities inherited from the apartheid government and it aims at promoting the fundamental reforms of the laws relating to water services, while the primary objective of the Water Services Act is to ensure access to basic water services and sanitation.

¹ HJ Choma & P Ramphabana 'Legislative and Policy Frameworks for Basic Services: A South African Comparative study' (2015) *Vol.4 No 4, Journal of Government and Regulation* 1-6.

² Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1), article 14(2) (h).

³ Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, article 24.

⁴ African (BANJUL) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), see also, MS Semalulu 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) *Vol.1 No.1, African Human Rights Law Journal* 40-64.

⁵ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, articles 11&12.

⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), article 21.

⁷ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, article 14(2) (c).

⁸ Section 27(1) (b) of The Constitution Act 108 of 1996, hereinafter referred to as "The Constitution".

⁹ Act 108 of 1997.

¹⁰ Act 36 of 1998.

However, prior to the enactment of the South African Constitution in 1996, there were enormous differences and inequalities with respect to adequate water supply services. This was due to the apartheid regime.¹¹ Laws governing the right of access to adequate water supply services such as the Water Act of 1956 were designated to satisfy the needs of white Communities.¹² In that period, there was no central governmental department that was devoted to universal supply and administration of water resources. The apartheid government established a system of homelands and the majority of people who lived in those homelands were Blacks.¹³ The main idea of its establishment was to separate Blacks from Whites.¹⁴ Homeland governments (HG) were bestowed with the responsibility to run water services infrastructures.¹⁵ In poor black rural communities, water services were ran ineffectively by uncoordinated homelands structures that were almost completely dependent on the Government for funding.¹⁶ Consequently, there were no enough funds for homelands water service infrastructures. Due to this many did not have access to adequate water supply services.

In post-apartheid South Africa, while one would expect a positive change with the provision on the right to have access to sufficient water in the South African Constitution and other domestic legislation, water service delivery remains problematic. The minimum amount of water for which no fee is charged remains at 25 litres per person per day or 6 kiloliters per household per month.¹⁷ Any person who requires more water will come under privatisation model which key provisions on the existing law favors.¹⁸ This is not helpful for about 38.4% of the population of South Africa who reside in rural communities are poor and mostly affected by inadequate water service delivery in that they cannot afford payment for water in excess of the minimum for which no fee is charged.¹⁹ Whether water should be free in rural communities, and if so, how this can be achieved has not been investigated.

¹¹ J Glazewki *Environmental Law in South Africa* (2005) 509.

¹² Water Act 54 of 1956.

¹³ Encyclopedia Britannica, Land Acts: South African History, available at <http://global.britannica.com/topic/land-Acts> (accessed 04 April 2016).

¹⁴ South African History Online: Towards Peoples History, available at <http://www.sahistory.org.za/special-features/homelands> (accessed 05 April 2016).

¹⁵ Land Administration Act 2 of 1995, section 1(a), see also, Bantu Home Lands Constitution Act 21 of 1971.

¹⁶ PEJ Brooks & CJ Thomas 'Statutory Background to the Economic Development of the Black Homelands and Peripheral Areas in South Africa' (1977) Vol. 10 No. 2, *Comparative and International Law Journal of Southern Africa* 140.

¹⁷ Regulations relating to compulsory national standards and measures to conserve water, available at http://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/SA/SA1%20-%20South%20Africa%20Watsan%20Regulations.pdf (accessed 24 July 2016).

¹⁸ FEW Resources.org, Water Privatization and Global Perspective, available at <http://www.fewresources.org/water-privatization-and-global-prospecting.html> (accessed 19 July 2016).

¹⁹ S Heleba 'Access to Sufficient Water in South Africa; How Far Have We Come?' (2012) Vol.15 No.1, *Law, Democracy, and Development* 1.

Judicial interpretation of the right to water by the Constitutional Court does not offer much to people living in rural communities. For instance, this is well evidenced by the decision in *Mazibuko and Others v City of Johannesburg and Others*.²⁰ A Constitutional Court judgment concerning the right of access to water embedded in section 27(1) (b) of the Constitution and a landmark case as far as the right to water is concerned. The case deliberates the legality of a project (also known as Operation Gcin'amanzi), the City of Johannesburg conducted in a township in Soweto called Phiri in early 2004 to resolve the problem of water losses and inability to pay for water services in Soweto. This project involved rearrangement or rather maintenance of water pipes to improve water supply and lessen water lose problems. To resolve the issues of failure to make payment for water services the city of Johannesburg installed pre-paid meters to charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance.

Consequently, five (5) residents of Phiri, Soweto lodged an application at the South Gauteng High Court alleging the violation of section 27 of the Constitution and challenging the reasonableness of the city's system to progressive realisation of the right to water within maximum available resources and the legality of the prepaid meters. However, reversing the judgement of the South Gauteng High Court and the Supreme Court of Appeal, the Constitutional Court affirmed the reasonableness of the city policy which specifies that the minimum standard of water per household per month is 6 kilolitres and allow the installations of pre-paid meters to charge consumers for use of water in excess of the 6 kilolitres per household monthly free basic water allowance. It is clear from this case that poor population will continue to bear the brunt of lack of water service delivery due to the cost related to access to water, while the wealthy population benefit from the water system of the country in that they can afford it. This study focuses on water delivery to rural communities in South Africa and the place of affirmative action in that context.

Affirmative action was first adopted in the United States of America to prohibit unfair discrimination according to the then adopted civil rights legislation and it had some accomplishment in obliging employers to open up jobs and support the disadvantaged groups.²¹ Similarly, in South Africa it is an important element of the Employment Equity Act, which, according to the South African

²⁰ 2009 (8) BCLR 791 (SCA).

²¹ TM Tladi 'Affirmative Action and Employment Equity Act of South Africa' unpublished MA Dissertation, Rand Afrikaans University, 2001, 14.

Department of Labour, ensures that competent people from disadvantaged groups such as blacks have equal opportunities in the workplace.²² Originally it was introduced to address injustices of the past regime by offering special treatment to competent underrepresented individuals.²³ According to the South African Constitutional Assembly, the core of an affirmative action is to take typical measures to guarantee groups who had been unfairly discriminated against in the past.²⁴ It signifies a rigorous effort to enable them to overcome the hurdles that had been put in their ways. In South Africa, affirmative action has been used to break down the barriers, both distinguishable and indistinguishable in an effort to level the playing field. In other words affirmative action can be used to enhance the status of disadvantaged populations.²⁵ Hence the focus of the study on water delivery to rural communities in South Africa and the place of affirmative action in that context.

1.2 Problem statement

Despite the provision of the Constitution on the right to have access to sufficient water in South Africa and other relevant legislation such as the Water Service Act and the National Water Act, inhabitants in rural communities continue to experience lack of access to adequate and safe drinking water. This is due to inadequacy of the minimum basic water supply provided by state and also commodification or rather privatisation of the water resources. Majority of rural dwellers are unemployed thus cannot afford to buy this essential commodity.

1.3. Aim and objectives

1.3.1 Aim

This study aims at examining the laws governing the right to water and how affirmative action can be applied to enhance water service delivery to rural communities in South Africa.

1.3.2 Objectives

The objectives of this study are as follows:

²² Employment Equity Act 55 of 1998.

²³ Tladi (note 21 above) 14.

²⁴ E Cameroon, Justice: A personal Account, available at <http://www.anc.org.za/show.php?id=283> (accessed 06 April 2016).

²⁵Ibid.

1. To examine whether access to water delivery is a recognised human right under both international legal instruments and South African laws, and policies regulating access to adequate water.
2. To identify and analyse the challenges encountered by the government in general and the local sphere of government in particular, in realising the right to access adequate water in rural communities in South Africa.
3. To explore whether, and if so, how the concept of affirmative action can apply in realising access to water service by rural communities in South Africa.

1.4 Research questions

The study is based on this general question: how can the laws governing the right to water service delivery be applied to ensure their realisation in rural communities in South Africa. To answer this general question, the study raises the following specific questions:

1. Is the delivery of water service a state obligation under international human rights law?
2. What is the domestic legislative frame work in relation to water service delivery in South Africa?
3. What are the documented challenges against access of water service delivery by rural communities?
4. Is affirmative action an option for the state in enhancing the right to water? If so, what is its implication for judicial enforcement for the provision of water services by the government in South Africa?

1.5 Hypothesis

This study is based on the assumption that there is a huge gap between recognition of the right to water and its actual implementation in rural communities of South Africa. The water laws and policy framework fail to effectively implement the right to water as recognised by the Constitution in the rural communities of South Africa. Hence, several rural communities in South Africa still live without access to basic water supply vital for survival.

1.6 Literature review

While there are literatures on the right to have access to water, little is known about affirmative action in that context. Scanty literature also exist on its relevance to other strategies in realising water service delivery to the rural communities. The right to water is guaranteed in a range of human rights instruments, including the CEDAW,²⁶ the CRC,²⁷ Women Rights Protocol,²⁸ the ICESCR,²⁹ the UDHR,³⁰ the ACRCWC),³¹ and the Convention on the right of the persons with disabilities (CRPD).³² There are general comments which provide for the right to water.³³ In particular, United Nation Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.15: The Right to Water (Arts.11 and 12 of the Covenant), 20 January 2003 (General Comment No.15)³⁴ defines the normative content of the right to water and regard water as a human right indispensable for living a dignified life in human dignity and it is a prerequisite for the realisation of other human rights.³⁵

There are several cases dealing with affirmative action in South Africa and other African countries. However, none of them deals with affirmative action on water service delivery. For instance, the case of *Solidary and Others v Department of Correctional Services and Others*,³⁶ is one of the cases which the Court has decided concerning affirmative action.³⁷ The matter came about as a result of certain post advertised by the Department of Correctional Services (Western Cape) in 2011. The individual applicants applied for appointment to some of the posts. Except for Mr. AJ Jonkers who was not recommended, all the other individual applicants were recommended for appointment by the respective interview panels. Except for Ms. LJ Fortuin who was subsequently appointed to the position for which she had applied, the individual applicants were denied

²⁶ Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

²⁷ UN Human Rights, What are Human Rights?, available at <http://www2.ohchr.org/english/law/crc.htm> (accessed 12 May 2016).

²⁸African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, As adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003.

²⁹ International Covenant on Economic, Social and Cultural Rights (note 5 above).

³⁰ Universal Declaration of Human Rights (note 6 above).

³¹ African Charter on the Rights and Welfare of the Child (note 7 above).

³² Convention on the Rights of Persons with Disabilities. Adopted and opened for signature and ratification by General Assembly resolution 61/106 of 13 December 2006, entry into force 3 May 2008.

³³ Resolution A/RES/64/292. United Nations General Assembly, July 2010 General Comment No. 15. The right to water. UN Committee on Economic, Social and Cultural Rights, November 2002.

³⁴ Ibid.

³⁵ Ibid para 3.

³⁶ 2015 (4) SA 277 (LAC).

³⁷ See also, *Unisa v Reyndardt* 2010 (12) BLLR 1272 and *Motala v University of Natal* 1990 (3) BCLR 374 (D).

appointment. In the case of males, the basis for this decision was that they were Coloured persons and Coloured persons were already overrepresented in the relevant occupational levels. In the case of women, the basis was that women were already overrepresented in the relevant occupational levels. The Labour Court held that the Department's Employment Equity Plan (hereinafter referred EEP) was contrary to the provisions of the Employment Equity Act (hereinafter referred EEA) and declared it invalid. This meant that appointing the individual applicants to the positions for which they had applied would not be in accordance with the 2010 EEP. As a result, the applicants have lodged an application for leave to appeal against a decision of the Labour Appeal Court (LAC), related to a dispute between the parties on whether the Employment Equity Plan of the first respondent, the Department of Correctional Services (Department), for the period 2010-2014 (2010 EE Plan) was invalid. Similarly, the Constitutional Court indicated that the Department acted contrary to its obligations in terms of section 44 of the EEA but the court did not declare the 2010 EEP invalid. The case was not in the context of access to water in South Africa, However, arguably the case might have an impact or persuasive force when a Court is required to make a decision in the context of access to water.

Also, the importance of right to water has been a subject of commentary of international institutions. The World Health Organization argues that improved water supply, decent sanitation and better management of water resources can boost the state's economic growth and contribute to the eradication of poverty.³⁸ For example, in the agricultural sector, improved access to water services and improved management of water resources contribute substantially to economic growth through the increase of business productivity and development.³⁹

There are academic writings on the subject of the right to water. Gleick's study focuses on the human right to water and argues that water is a basic and a precondition for the realisation of other human rights, hence lack of access to water can be an obstacle to development and to life itself. The author further argues that it must be recognised as such by both international and local legislation.⁴⁰ Collins' study is based on the implementation of the human right to water in which the author argues that the government in order to ensure effective realisation of the right to water needs to address several key challenges, such as water scarcity which threatens the access to

³⁸ Improving environment and health in Europe: how far have we gotten?, available at <http://www.Who.int/mediacentre/factsheets/fs.391/en/> (accessed 14 July 2015).

³⁹ Generating Economic Benefits with Improved Water Resources Management and Services, available at: <http://www.who.int/water-sanitation-health/watandmacr2.pdf> (accessed 19 April 2016).

⁴⁰ PH Gleick 'The Human Right to Water' (1998) Vol.1 No.5 *Water Policy* 1-5.

sufficient water.⁴¹ While Collins' study is relevant and fundamental basis of the current study, the researcher assesses the laws governing water resources and investigates how affirmative action can be used as an instrument to ensure that there is access to safe drinking water for all.

Choma and Ramphabane's study is based on the legislative frameworks for basic services in South Africa. The study focuses on the government's obligation to supply water services and the judicial enforceability of the right to water by the South African local government. The authors argue, *inter alia*, that as long as the water issue falls within the bounds of reasonableness and not in conflict with the Constitutional provisions in relation to the right to water and with the national legislation regulating water, the local government with the powers and duties vested in it must take full responsibility to deliver water services.⁴² Their study is relevant to the current study, but the authors' argument and focal points are expanded in the research. Gayle and Goodrinch explore the implementation of privatisation as deregulated in global perspective. The authors define privatisation as a process involving the reduction of the role of the government in assets ownership and service delivery and a corresponding increase in the role of the private sector. The argument is that privatisation can only work in an instance where the partnership between the state and a private actor, allows or places the state in a position where it retains some degree of control over the services to be provided by the private actor.⁴³

Moyo's study is about water as a human right under international human rights law and the implications for the privatisation of water services.⁴⁴ According to the author the adoption of privatisation of access to water supply has been motivated by the World Bank, International Monetary Fund and the Regional Development Banks. The author further argues that water is a basic human right and a public good. Therefore its commodification would lead to lack of access to water, especially by poor and vulnerable members of the society.⁴⁵ Furthermore, privatisation of access to water affects the poor segment of the society who lack financial means to access it and they are geographically located within the rural communities.⁴⁶

⁴¹ LM Collins, Implementation of the Right to Water in Canada (2009) 6, available at <http://acuns.org/wp-content/uploads/2012/06/ImplementingtheHumanRighttoWaterinCanadaCollins.pdf> (accessed 19 April 2016).

⁴² Choma & Ramphabana (note 1 above) 6.

⁴³ DJ Gayle & JN Goodrinch *Exploring the Implementation of Privatization as Deregulated in Global Perspective* (1990) 1-3.

⁴⁴ K Moyo 'Privatisation of Commons: Water as a right: Water as a Commodity' (2012) Vol.22 No.3, *Stellenbosch Law Review* 1.

⁴⁵ HJ Choma & Ramphabana (note 1 above).

⁴⁶ MS Semalulu 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) Vol.1 No.1, *African Human Rights Law Journal* 40-64.

Chirwa's study is based on privatisation of water in South Africa. The author focuses mainly on the human right perspective. The author supports the adoption of the model of privatisation as a tool to be used to ensure effective water supply and argues that privatisation as a policy cannot be totally rejected, therefore like other public measures it must be in line with the principle of human rights to be accepted.⁴⁷ This study is based on the assumption that if privatisation results in the infringement of the right to water of rural communities such agreement cannot be accepted. Thus, Chirwa's study is relevant to this investigation.

Lienberg and Pillay's study is based on socio- economic rights. According to the authors, socio-economic rights do not entail that people do not have to pay service charges and other users fee, but those charges should not serve as a barrier that prevent indigents from gaining access to water.⁴⁸ The prices paid for water should differ based on the financial status of the residents of a particular community. Thus rates paid by those residing in undeveloped rural communities should differ from those paid by the ones residing in urban developed areas. The authors do not specifically refer to the concept of affirmative action. Hence, this study, will explore this concept in full to address the question of inequality in the access to water supply in South Africa, particularly in the rural communities.

Olowu's study looks at privatisation of water in two ways. The author looks at privatisation from the perspective of the advocate of privatisation and opponents of privatisation. Advocates of privatisation contend that the technology, efforts and costs involved in the treatment and distribution of water are on a par with any other industrial product. Hence, it is the privilege of the private sectors to treat water as an industrial commodity that would enable them to fix a price that is market dependent. On the other hand, the opponents of privatisation contend that access to water is a basic entitlement that humans and animals automatically gain by being part of the earth eco-system and as such, private co-operation cannot create enclosures and restrict access based on the inability to pay.⁴⁹ Although not advanced in the context of affirmative action, Olowu's arguments will be interrogated further in the context of legal measures and strategies to be employed to assure effective delivery of water services for the rural communities.

⁴⁷ DM Chirwa 'Privatization of water in South Africa; A Human Right Perspective' (2004) *Vol.2 No. 4, African Human Rights Law Journal* 183.

⁴⁸ S Lienbenberg & K Pillay *Socio-Economic Rights in South Africa: A Resource Book* (2000) 27.

⁴⁹ D Olowu, 'Access to Safe Water and the Human Development Quandary in Africa. Implications of the Right- Based Approach' (2014) *Vol.35 No. 2, Obiter* 205-223.

The year 2016 marks 18 years since South Africa's affirmative action (AA) legislation of 1998 took effect. Affirmative action has only been linked with the Employment Equity Act, but, was first provided for by White Paper on Affirmative Action in the Public Service Department of Public Service and Administration in 1998.⁵⁰ Mather-Helm published an article on equal opportunity and affirmative action for South African women. The author examines whether the South African government and its corporate organisations have been successful in employing women as professional equals by utilizing them fully in senior and top management positions after equal opportunity and affirmative action legislation was introduced by the democratic government.⁵¹ The findings of the study show that the government despite the affirmative action legislation still fails to ensure that black women penetrate the private and corporate sectors positions as compared to the public and governmental positions. Burger and Jafta conducted a research study on affirmative action in South Africa and assessed its impact on labour market.⁵² None of their studies consider affirmative action in the context of access to sufficient water in South Africa.

The purpose of this present study is to offer a policy framework that gives out the obligatory requirements and steps that national departments and provincial administration should employ to advance and implement their affirmative action programme. Up to this point the Employment Equity Act⁵³ is a prime example, obliging employers to implement affirmative action measures to ensure equal representation of designated groups.⁵⁴ The second legislation which deals with affirmative action is the Black Economic Empowerment Act.⁵⁵ The main purpose of the Act is to empower blacks economically. This is because blacks were economically disadvantaged by the apartheid regime. Several scholars wrote articles on affirmative action and explored its impact in the employment sector and it has shown success since its adoption. However, in all, none of those articles explored the implication of affirmative action on the realisation of the human right to water. Hence, this study assesses the laws governing the right to water and explores how

⁵⁰ White Paper Affirmative Action in the Public Service Department of Public Service and Administration 1998.

⁵¹ B Mathur-Helm 'Equal Opportunity and Affirmative Action for South African Women: Benefit or Barrier?' (2005) Vol.20 No.1, *Women in Management Review* 56-71.

⁵² R Burger & R Jafta, Affirmative Action in South Africa: An Empirical Assessment of the Impact on Labour Market Outcomes' Crises Working Paper No. 76 March 2010, available at <http://www3.qeh.ox.ac.uk/pdf/crisewps/workingpaper76.pdf> (accessed 26 May 2016).

⁵³ Act 55 of 1998.

⁵⁴ Affirmative Action, available at <http://www.hsrc.ac.za/uploads/pageContent/1607/Affirmative%20Action.pdf>, (accessed 15 March 2016).

⁵⁵ Act 53 of 2003.

affirmative action can be applied to ensure that there is water service delivery to rural communities in South Africa.

1.7 Research methodology

Polit and Hungler define methodology as a term which refers to ways of gathering, organizing and analyzing data. This study employed the legal research methodology.⁵⁶ This is a methodology which offers an understanding of the basic type of law and legal resources. The study adopted doctrinal legal research approach to understand laws governing the right to water and to argue for better ways of applying those laws.

The doctrinal legal research approach is also known as the “black letter law”. Pearce, Campbell and Harding define doctrinal legal research approach as a research which provides a systematic exposition of the rules governing a particular legal category, analysis of the relationship between rules and explains areas of difficulty and perhaps predicts future developments.⁵⁷ Doctrinal legal research approach is a two way process because it involves locating the source of the law and then interpreting and analyzing the text. Thus it entails more than a mere description of the law. Knight states that doctrinal research approach is concerned with the formulation of legal doctrine through the analysis of legal rules.⁵⁸

Doctrinal research approach is concerned with arduous reading of literature such as textbooks, journals articles, government reports, policy documents and law reforms documents. Therefore the researcher used doctrinal approach to examine and analyse data concerning the human right to have access to safe and drinkable water.

Through this approach the researcher tested the logical coherence, consistency and technical soundness of law and legal propositions in relation to the right to have access to adequate water for everyone in South Africa. Finally, the researcher used doctrinal analysis of data, to analyze data collected from the legal resources and case laws regarding the right to water in South Africa.

⁵⁶ DF Polit & BP Hungler *Nursing Research: Principle & Method* (2000) 233.

⁵⁷ D Pearce Ecampbel & P Harding *Australian Law School: A Discipline Assessment for the Common Wealth Tertiary Education Commission* (1987) 33.

⁵⁸ A Knight *Advanced Research Methods in the Built Environment* (2008) 29-30.

1.8 Ethical considerations

The study raises no ethical issues because it does not involve human participants. The researcher, however, avoided plagiarism and ensured that every source used are acknowledged with suitable reference.

1.9 Definition of key concepts

Accessibility

According to General Comment No.15 accessibility of water supply entails that water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the State.⁵⁹ This term refers to the ability to acquire, have or use something, for example access to adequate and safe drinking water. WHO advises that the water source has to be within 1km of the home and the collection time should not exceed 30min.⁶⁰

Adequate water

General Comment No.15 provides that water must be adequate to ensure human dignity and a healthy life for all.⁶¹ Furthermore, this term refers to sufficient water for drinking and other domestic uses. The Water Service Act provides that” the minimum standard for basic water supply services is the provision of appropriate education in respect of effective water use; and a minimum quantity of potable water of 25 liters per person per day or 6 kiloliters per household per month at a minimum flow rate of not less than 10 liters per minute; within 200 meters of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year”.⁶² Adequacy of water supply depends on the water need and this varies from one community to another.

Affordability

⁵⁹ General Comment No. 15 (note 33 above).

⁶⁰ World Health Organisation, Accessibility, available at <http://www.who.int/gender-equity-rights/understanding/accessibility-definition/en/> (accessed 11 April 2016).

⁶¹ General Comment No. 15 (note 33 above).

⁶² Water Service Act (note 9 above).

General Comment No.15 provides that water and water facilities and services, must be affordable for all and that the direct and indirect charges associated with securing water must be affordable and must not compromise or threaten the realisation of the human right to safe drinking water.⁶³ This also entails that the financial costs of water should be reasonable and just. Affordability has clear implication for the ability of individuals to have access to the right to water. Thus the financial cost associated with water should not threaten or compromise an individual's ability to satisfy his or her basic needs.

Affirmative Action

Affirmative action falls under the Employment Equity Act.⁶⁴ It makes sure that qualified people from designated groups have equal opportunities in the work place. Tladi defines affirmative action as an intervention designed to redress and develop a country like South Africa, which is characterized by injustices and unfair discrimination of the past.⁶⁵

Availability

General Comment No.15 provides that water should be both physical available.⁶⁶This is an element of the right to water, which means that all beneficiaries of the right should have sustainable access to natural and common resources, safe drinking water, and energy for cooking, heating and drainage and emergency services.⁶⁷

Privatisation

It is a process where the state bodies or services are taken over and controlled by private sectors. Gayle and Goodrich define privatisation as a process and broadly, it entails the reduction of the role of the government in asset ownership and service delivery and an increase in the role of the private sector in these areas.⁶⁸ Privatisation can take different forms for example partnerships between public and private institutions, leasing of business rights by the public sector to private

⁶³ General Comment No.15 (note 33 above) para12.

⁶⁴ Act 55 of 1998.

⁶⁵ Tladi (note 21 above) 13.

⁶⁶ General Comment No.15 (note 33 above) para 12(c)(i)&(ii).

⁶⁷ CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23), para 1.

⁶⁸ DJ Gayle & JN Goodrich (note 43 above).

enterprises, outsourcing or contracting out specific activities to private actors, management or employee buyout, and discontinuation of a service previously provided by the public sector on the assumption that, if it is necessary, a private actor might engage in its delivery.⁶⁹

Rural Community

A rural community comprises a group of inhabitants who lives a rustic life style. Rural communities typically have smaller populations and some areas contains forest.⁷⁰ Rural communities are found within the local spheres of government.⁷¹ Rural communities have low population density and small settlement as compare to urban areas.⁷² The rural communities include all population, housing, and territory not included within an urban area. Rural settlements are not properly planned as compared to the urban settlements which are properly planned and settlements built up according to a process called urbanization.⁷³ Unlike rural communities, urban settlements are defined by their progressive civic facilities, opportunities for education, facilities for transport, business and social interaction and overall better standard of living, this includes access to adequate and safe drinking water.⁷⁴ Rural communities usually experience the following problems: lack of access to adequate and safe drinking water and unemployment.⁷⁵

South Africa is divided into nine (9) provinces, namely; Limpopo, Gauteng, KwaZulu-Natal, Northern Cape, Eastern Cape, and Mpumalanga, North West, Free State and Western Cape. The land areas of these provinces are varied and each province has its own local government. Rural communities are found within the local spheres of government.⁷⁶ Among the areas which qualify to be classified as rural communities and located within one of the provinces are; Mdeni and Ka-Muhlaba. Mdeni area is located within Elundini local municipality in the Eastern Cape.⁷⁷ Whereas

⁶⁹ C Vuylsteke, Techniques of Privatisation of State-owned Enterprises: Methods and implementation World Bank Technical Papers (1988) 8, available at: <http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-1111-5> (accessed 24 June 2016).

⁷⁰ Rural Communities, available at <http://citadel.sjfc.edu/students/rmr00577/e-port/msti260/rural.htm> (accessed 06 July 2015).

⁷¹ State of Local Government in South Africa available at <http://www.gov.za/sites/www.gov.za/files/state-local-gov-rpt1.pdf> (accessed 05 April 2016).

⁷² M Kathleen et al The Health Resources and Services Administration Diversity Data Collection, available at <http://www.publichealthreports.org/issueopen.cfm?articleID=3082> (accessed 14 March 2016).

⁷³ Difference Between Urban and Rural, available at <http://www.differencebetween.net/miscellaneous/difference-between-urban-and-rural/#ixzz42uUd6iE6> (accessed 14 March 2016).

⁷⁴ State of Local Government in South Africa (note 71 above).

⁷⁵ Difference Between Urban and Rural (note 73 above).

⁷⁶ State of Local Government in South Africa (note 74 above).

⁷⁷ Rural Areas in the Eastern Cape Province, South Africa: The right to access safe drinking water and sanitation denied?, available at <http://www.polity.org.za/article/rural-areas-in-the-eastern-cape-province-south-africa-the-right-to-access-safe-drinking-water-and-sanitation-denied-2013-01-24> (accessed 18 April 2016).

Ka-Muhlaba area is located within the Greater Tzaneen Municipality in Limpopo Province.⁷⁸ These areas are examples of rural communities in South Africa that continue to be poorly developed with a number of people lacking access to safe drinking water and sanitation.⁷⁹

Socio-economic rights

These are human rights such as the right to education, the right to housing and the right to water. Socio-economic rights are provided in Chapter Two of the Constitution Act 108 of 1996. According to Curie and De Waal, socio-economic rights are rights which give people access to certain basic needs necessary for human beings to live an honorable life.⁸⁰

Sanitation

It refers to the promotion of health through prevention of human contact with the hazards of wastes as well as the treatment and proper disposal of sewage or waste water.⁸¹ Sanitation is also defined to mean the safe management of human excreta. It therefore includes both the 'hardware' (e.g. latrines and sewers) and the 'software' (regulation, hygiene promotion) needed to reduce faecal-oral disease transmission.⁸²

Water service delivery

According to the White Paper Draft, water service delivery means the abstraction from a water resource, conveyance, treatment, storage and distribution of potable water, water intended to be converted to potable water and water for industrial or other use, where such water is provided by or on behalf of a water services authority, to consumers or other water services providers. Furthermore, it includes all the organisational arrangements compulsory to ensure its provision including, *inter alia*, appropriate health, hygiene and water resource-use education, the

⁷⁸ *Ka-Muhlaba, Limpopo, South Africa*, available at <https://www.mbendi.com/place/ka-muhlaba-limpopo-south-africa-4029734> (accessed 18 April 2016).

⁷⁹ Rural Areas in the Eastern Cape Province, South Africa: The right to access safe drinking water and sanitation denied? (note 77 above).

⁸⁰ I Currie & J De Waal *The Bill of Rights Handbook* (2013)563, see also C Heyns and D Brand Introduction to socio-economic rights in the South African Constitution, available at <http://www.saflii.org/za/journals/LDD/1998/9.pdf> (accessed 08 May 2017).

⁸¹ Water supply and sanitation in India, available at <http://en.wikipedia.org/wiki/sanitation> (accessed 28 July 2015).

⁸² Introduction to water supply and sanitation projects, available at <http://www.lboro.ac.uk/well/resources/Publications/guidance-manual/chapter-1.pdf> (access 29 February 2016).

measurement of consumption and the associated billing, collection of revenue and consumer care.⁸³

1.10 Overview of chapters

The study consists of five chapters:

Chapter one: The first chapter elucidates the fundamental issues that are central to the proposed study. It introduces the readers to a right to have access to adequate and safe water for drinking by focusing on its historical background. The chapter also states the following: research problem, hypothesis, aim and objectives of the study and the research questions.

Chapter two: The second chapter deals with international and regional instruments which protect the right to safe drinking water.

Chapter three: The third chapter examines domestic legislative frame work and the documented challenges posed by the legislative frame work to access of rural communities to water services in South Africa.

Chapter four: The fourth chapter focuses on examining whether affirmative action can be an option for the state in ensuring water supply within the rural communities.

Chapter five: The final chapter concludes the research study. This chapter gives a brief summary of the research study and offers recommendations which may influence change and potential amendments to the laws regulating access to water in South Africa.

1.11 Limitations of the study

The methodology that is used in the research study has limitations. Due to the methodology employed in the research study, the study depends mainly on secondary data obtained from library textbooks, internet websites, conference reports, case laws and journal articles. Unavailability of relevant textbooks in the university library limit the research study. However the

⁸³ Draft White Paper on Water Services, available at http://www.gov.za/sites/www.gov.za/files/draft_SA_water_services_wp6.1.pdf (accessed 06 April 2016).

researcher overcame this limitation by using libraries from other institutions. Costs of travelling was also a challenge which limited the researcher from going to all the institutions.

CHAPTER 2

THE RIGHT TO WATER IN INTERNATIONAL HUMAN RIGHTS LAW

2.1 Introduction

The introductory chapter dealt with the introduction of the research study. The right to water is an internationally and regionally recognised component of human rights. On 28 July 2010, the General Assembly of the UN formally recognised the human right to water,⁸⁴ concluding the debate on whether or not it should be regarded as human rights under international law. Its recognition under international and regional instruments is either explicit or implicit. It encompasses both privileges and duties, hence, this chapter thoroughly examines international human right treaty- based system and African human rights instruments which provide for the right to water and obligations required of states. This chapter offers a detailed discussion of international human rights instruments promoting and protecting the human right to water, and arguably water service delivery. Furthermore, this chapter includes a discussion of international conferences in which the State Parties were encouraged to protect, promote and to progressively realise the human right to water as recognised by both international and regional human rights instruments. It presents not only the international legal framework providing for the promotion and protection of the human right to water, but also the manner in which the relevant institutions charged with supervising the implementation of these treaties have interpreted water as a human right.

2.2 International human rights law

International human rights law is a branch of public international law, that is, the law which has been developed to regulate relations between entities having international personality, such as states, international organisations and possible individuals.⁸⁵ International human rights is an aspect of international law which creates obligations which states are required to adhere to in the context of human rights. These obligations on State Parties are found in international human rights treaties. Under International human rights law, State Parties have the obligation to respect,

⁸⁴ United Nations (2010a). Declaration on the right to water. A/RES/64/292. New York: UN.

⁸⁵ I Currie & J De Waal The Bill of Rights Handbook (2013)563.

protect, promote and fulfil the rights. The obligation to respect entails that states must refrain from interfering with or unduly limiting the enjoyment by an individual of human rights.⁸⁶ The obligation to protect requires the state to protect the right by preventing human rights violation by third parties. The obligation to fulfill entails that states must take reasonable measures to ensure full enjoyment of basic human rights.⁸⁷ While the obligation to promote requires the state to take necessary measures to educate people of the importance of human rights. This chapter encompasses a detailed discussion of international instruments consisting of those established under the United Nations and African Union which explicitly and implicitly provide for the right to water and the obligation from states to ensure water service delivery.

2.2.1 The right to water under United Nation treaty-based human right system

In early United Nations human rights treaties, water was not recognised as a self-standing right but as a tool to guarantee other human rights such as the right to life.⁸⁸ For instance, the Universal Declaration of Human Rights (hereinafter referred UDHR) was adopted by the United Nations General Assembly on 10 December 1948, as a result of the Second World War.⁸⁹ The UDHR is, however, silent on the human right to water. Rather, it encompasses a wide range of civil, political, economic, social and cultural rights from which the right to water can be implied. The right to water, and of course the delivery of water service, is implied from article 25 of the UDHR, which provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁹⁰

The international human rights instrument does not only impose obligations on the state but it also imposes obligations on their bearer. For instance, article 29 of the UDHR provides that:

⁸⁶ G Rona & A Lauren, State Responsibility to Respect, Protect and Full Human Right Obligations in Cyberspace, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract=2859615> (accessed 15 January 2015).

⁸⁷ Ibid.

⁸⁸ J Dugard International Law, A South African Perspective (2005) 314.

⁸⁹ The Universal Declaration of Human Rights was approved by the General Assembly of the United Nations Organization on 10 December 1948, by 48 votes in favour, none against and 8 abstentions December 1948, by 48 votes in favour, none against and 8 abstentions, see History of the Document, available at <http://www.un.org/en/sections/universal-declaration/history-document/> (accessed 31 May 2016).

⁹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) article 29 (1).

Everyone has duties to the community in which one lives; and the rights enshrined in the Universal Declaration of Human Rights should in no case be exercised in a manner contrary to the purposes and principles of the United Nations.⁹¹

Since water is an essential necessity for healthy living the above provision implies that its delivery is a required component of a standard of living that is adequate for healthy living. For this purpose, the UDHR explicitly mandates certain obligations on non-state actors. Its preamble states that every individual and every organ of society must promote respect for the rights and take progressive steps to secure their Universal and effective recognition and observance. As Chirwa noted that no state's structure and no one can be said to exclude corporations.⁹² This signifies that the UDHR anticipates that non-state actors can also be involved in service delivery of water, hence they must view themselves as partners with government in the realisation of the right to water.

After the UDHR came into force a number of international treaties which implicitly and explicitly provide for the right to water were enacted and came into force. The right to water is implicitly covered by the International Covenant on Economic, Social and Cultural rights (hereinafter referred ICESCR)⁹³ and the International Convention Civil Political and Rights (hereinafter referred ICCPR).⁹⁴ In other words, the right to water is derived from other independent human rights such as the right to education, food health and life.⁹⁵ As Bluemel has rightly highlighted that, according to international law, the right to water can be either described as subordinate to other primary human rights, such as health or life, as subordinate and necessary to achieve economic and socio- cultural rights, or as independent human rights.⁹⁶

The ICCPR strongly affirms the right to life through the Human Rights Committee (hereinafter referred HRC), which is the treaty monitoring body for the ICCPR, the HRC consist of a body of independent experts that monitors implementation of the International Covenant on Civil and

⁹¹ Ibid.

⁹² DM Chirwa (note 47 above).

⁹³ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁹⁴ The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 23 March 1976

⁹⁵ A Cahil, 'The Human Right to Water- A Right of Unique Status'; The Legal Status and Normative Content of the Right to water' (2005) Vol.9 No.9, *the international Journal of Human Rights* 391.

⁹⁶ EB Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) Vol.31, *Ecology Law QUARTELY* 967.

Political Rights by its State Parties. Altogether States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. According to this Committee it is compulsory that State Parties submit initial reports one year after its ratification of the Covenant. In addition, the Committee has the duty to inspect each report and gives back its concerns and recommendations to the State Party in the form of "concluding observations".⁹⁷ In adopting General Comment No. 36, the HRC stated that the right to life should be broadly interpreted to include other rights which are not specifically recognised by the ICCPR.⁹⁸ This means that, since the right to water is not recognised in express terms by the Covenant the Committee permits the inclusion of water as a human right whenever interpreting relevant provisions of the Covenant. In relation to the right to water the committee placed more attention to the right to water and it addressed the question of water and sanitation in its General Comments on housing, health and education.⁹⁹ The Committee specified that the right to water forms part of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental requirements for survival.¹⁰⁰

The ICESCR is one of the earliest treaties which does not explicitly provide for the right to water and its implicit recognition of the right to water has resulted in a number of debates. Craven indicated that water, along with other human rights guaranteed by the Convention, such as transport, were considered in the drafting process of Article 11 on the "right to an adequate standard of living" and this article was envisioned to be comprehensive, and the three specifically mentioned rights to food, clothing, and housing were meant to be illustrative.¹⁰¹ Sharmila and Murthy, argue that it also may be that the drafters assumed that water was so essential to life that it was redundant to recognise a right to water.¹⁰²

However, the adoption of the General Comment No.15 by the Committee on Economic, Social and Cultural Rights laid this debates to rest by interpreting article 11 and 12 of the ICESCR to

⁹⁷ The human rights community, including this community is mourning the passing way of our esteemed and much loved Sir Nigel Rodley, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21126&LangID=E> (accessed 20 February 2017).

⁹⁸ General Comment No. 36 - Article 6: Right to life General Discussion on the preparation for a General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, Palais des Nations, Room XIX – 14 July 2015.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ MCR. CRAVEN, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (1995).

¹⁰² L Sharmila and JD Murthy 'The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization' (2013) *Vol. 31 No. 3, Berkeley Journal of International Law* 89-147.

include the right to water as a human right fundamental for the realisation of the other rights included in the ICESCR such as the right to life. The adoption of the General Comment No.15 indicates the commitment of United Nations to the protection of economic, social and cultural rights, particularly the right to water. The General Comment No. 15 also discusses the normative content of the right to water in terms of accessibility.

The Committee on Economic, Social and Cultural Rights (hereinafter referred the Committee), was established to monitor the application of the ICESCR and it was established on 28 May 1985 under the United Nations Economic and Social Council Resolution 1985/17 (hereinafter referred ECOSOC).¹⁰³ This Committee is made up of 18 independent expert and its primary function of the Committee is to monitor the implementation of the Covenant by States parties. the Committee can also assist Governments in fulfilling their obligations under the Covenant by issuing specific legislative, policy and other suggestions and recommendations such that economic, social and cultural rights are more effectively.

The human right to water encompasses both freedoms and entitlements. The freedoms comprise the right to ensure sustainability of current water infrastructures necessary for the realisation of the right to water and the right to be free from any interference either by the state or third party of the existing or future enjoyment of the right to water. The entitlements comprise the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.¹⁰⁴

The Committee further indicates that the elements of the right to water must be adequate for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:¹⁰⁵

- (a) Availability. The water supply for each person must be sufficient and continuous¹⁰⁶ for personal and domestic uses. These uses ordinarily include drinking, personal sanitation,

¹⁰³ The Economic and Social Council Resolution 1985/17, Resolution adopted by the General Assembly on 28 July 2010 [without reference to a Main Committee (A/64/L.63/Rev.1 and Add.1)] 64/292. The human right to water and sanitation.

¹⁰⁴ The Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992.

¹⁰⁵ UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15.

¹⁰⁶ "Continuous" means that the regularity of the water supply is sufficient for personal and domestic uses.

washing of clothes, food preparation, personal and household hygiene. (b) Quality: The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.¹⁰⁷ Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use; (c) Accessibility. Water and water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the State Party. Accessibility has four overlapping dimensions : (i) Physical accessibility: Water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.¹⁰⁸ All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services; (ii) Economic accessibility: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realisation of other Covenant rights; (iii) Non-discrimination: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and Information accessibility: Accessibility includes the right to seek, receive and impart information concerning water issues.¹⁰⁹

The forgoing normative content of the right to water stresses that water service delivery can be hindered by its availability, quality and accessibility. Rural communities often encounter problems with regard to the availability, quality and accessibility of water. This is often due to lack of infrastructures to ensure access to water, poor maintenance of water infrastructures and unequal distribution of water facilities by the local government responsible for such. These result in the lack of access to water for the marginalised groups which in this case are the rural communities. Availability is one of the conditions which the Committee state that it should be fulfilled to ensure the enjoyment of the right to water. If the government can ensure that the above stated conditions are satisfied then there will be less complaint about lack of access to water in rural communities. Furthermore, access to water should be equitable and this does not mean rural communities and urban areas should be treated the same. This suggests, arguably, that there is a need for the application of the principle of affirmative action in rural communities.

¹⁰⁷ WHO, Guidelines for drinking water quality, 2nd edition, vols. 1-3 (Geneva, 1993).

¹⁰⁸ See also General Comment No. 4 (1991), paragraph 8 (b), general comment No. 13 (1999), paragraph 6 (a) and general comment No. 14 (2000), paragraphs 8 (a) and (b).

¹⁰⁹ General Comment No. 15 Paragraph 48.

Access to water has featured considerably in the work of the Committee while examining the state reports of the parties to the ICESCR. On 25 February 2015, the Committee considered the initial report of Gambia on implementation of the ICESCR. In relation to the right to water the Committee appreciated the progress achieved in improving access to safe drinking water and sanitation. The Committee expressed its concern that access by the population in rural areas to safe drinking water and sanitation (article 11) remained problematic. The Committee therefore called upon the State Party to strengthen its determination to ensure universal access to safe drinking water and to adequate sanitation facilities, particularly in rural areas, and draws the State Party's attention to the Committee's general comment no.15 (2000) on the right to water.¹¹⁰

On 30 April 2014, the Committee considered the initial report of Indonesia on the implementation of the provision of the ICESCR. The Committee indicated its concern that almost a quarter of the rural population lack access to safe drinking water, in spite of the implementation of the National Policy for community based water supply and environmental sanitation (article 11 and 12). The Committee calls on the State Party to strengthen effort for the improvement of access to safe and clean drinking water, particularly in rural areas. The Committee in this matter also referred the State Party to its General Comment no. 15, 2000 on the right to water.¹¹¹ Until today South Africa has not yet submitted a report in relation to the implementation of the right to water as provided for by the Committee's General Comment No: 15 for recommendation.

As shall be examined below, there are other treaties under the United Nations which recognise the right to water either expressly or implicitly. These are: Convention on the Right of the Child (hereinafter referred CRC); Convention on the Elimination of all Forms of Discriminations Against Women (hereinafter referred CEDAW); International Convention on the Right of the Persons with Disabilities (hereinafter referred ICRPD).

2.2.2 Convention on the Right of the Child (CRC)

On 20th November 1989, the United Nations adopted the Convention on the Rights of the Child (hereinafter referred Convention). A number of states participated at the ratification ceremony

¹¹⁰ UN Committee on Economic, Social and Cultural Rights, concluding observation on initial report of the Gambia 20 May 2015, E/C/2/GMB/CO/1, available at <http://www.refworld.org/docid/550ab124.html> (accessed 17 January 2017).

¹¹¹ UN Committee on Economic, Social and Cultural Rights, concluding observation on the initial report on Indonesia, 19 June 2014 E/C: 12/IDN/CO/1, available at <http://www.refworld.org/docid/53c78826.html> (accessed 17 January 2017).

and it was first in the history of United States treaties ratification ceremonies.¹¹² The Convention defines a child as a person below the age of eighteen, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to assess the age of majority if it is set below eighteen and to enhance the level of protection for all children under eighteen.¹¹³ The Convention contains range of entitlements and freedoms to be enjoyed by all children.

Article 24 of the Convention explicitly provides for the protection of the human right to water and it proclaims that State Parties shall work towards full implementation of the right to water. The State Parties are required to take suitable measures to fight against various water related diseases. This is to be done through, *inter alia*, the provision of clean drinking water. Furthermore, State Parties are obliged to provide all communities, including rural communities with proper education about the right to water and to support them in application of basic information with regards to water supply and its delivery.

On 27th February 1991, the Convention on the Right of the Child created a Committee which consist of independent experts which deal with monitoring and reporting on implementation of the United Nations Convention on the Rights of the Child by states that ratify the Convention, which is referred to as the Committee on the Rights of the Child (the CRC Committee). Additionally, the CRC Committee monitors effective implementation of the Optional Protocol on the Involvement of Children in Armed Conflict (hereinafter referred OP-AC)¹¹⁴ and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereinafter referred OP-SC).¹¹⁵ These are protocols which strongly fight against violations of the right of children. On 19 December 2011, the United Nations General Assembly approved a third Optional Protocol on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols.

¹¹² Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

¹¹³ Ibid (Article 1).

¹¹⁴ Wikipedia, Optional Protocol on the Involvement of Children in Armed Conflict, available at https://en.wikipedia.org/wiki/Optional_Protocol_on_the_Involvement_of_Children_in_Armed_Conflict (accessed 06 September 2016).

¹¹⁵ Wikipedia, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, available at https://en.wikipedia.org/wiki/Optional_Protocol_on_the_Sale_of_Children,_Child_Prostitution_and_Child_Pornography (accessed 06 September 2016).

Submission by State Parties of Initial and periodic reports on the national situation of children's rights to the Committee for examination is compulsory.¹¹⁶ The Committee then examines each report submitted. The Committee may after examining each report advance concerns or make recommendations to the State Parties. In addition, it provides asymmetrical general comments on the interpretation of Convention on the Right of the Child's obligations. Annually, the Committee submits a report to the Third Committee of the United Nations General Assembly, which also hears a statement from the CRC Chair, and the Assembly adopts a Resolution on the Rights of the Child.¹¹⁷ The Committee does not receive nor consider complains from individuals.

The Committee may make suggestions and general recommendations based on information received in accordance with articles 44 and 45 of the present Convention. Communication by the Committee is made to any State Party regarding those suggestions and general recommendations, there after it gives a report to the General Assembly, together with comments, if any, from States Parties.¹¹⁸

The adoption of the Convention on the Right of the Child indicates the worldwide acceptance of the fact that rights of certain categories of people, are well protected if there are contained in their single instruments designated for such purpose. Article 24 is explained by the Committee as follows:

Safe and clean drinking water and sanitation are essential for the full enjoyment of life and all other human rights. Government departments and local authorities responsible for water and sanitation should recognise their obligation to help realize children's right to health, and actively consider child indicators on malnutrition, diarrhea and other water related diseases and household size when planning and carrying out infrastructure expansion and the maintenance of water services, and when making decisions on amounts for free, minimum allocation and service disconnections. States are not exempted from their obligations, even when they have privatized water and sanitation.¹¹⁹

¹¹⁶ Ibid.

¹¹⁷ General Comments of the Committee on the Rights of the Child A Compendium for child rights advocates, scholars and policy makers January 2014.

¹¹⁸ Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

¹¹⁹ UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15.

The above connotes that privatisation of water service cannot be an excuse for failure and that vulnerability is a strong factor when making minimum allocation of water service delivery. In 2000 the Committee on the Right of the Child released a report on the initial reports submitted by State Parties. Several recommendations in light of the right to water were made by the Committee in respect of each report.¹²⁰ For the purpose of this study and in the interest of their relevance to the right to water, the researcher will focus on the reports submitted by Korea, Benin and Chad in which recommendations concerning the right to water are extensively outlined.

On 22 May 1998 the Committee considered the initial report of the Democratic People's Republic of Korea¹²¹ and adopted several observations. In light of Article 24 of the CRC, an article providing for the right to water, the Committee recommended that the State Party should pay more attention to the impact of environmental pollution on children access to water service delivery. It further recommended that the state should undertake a study on this subject.¹²² On 26 and 27 May 1999 the Committee considered the initial report of Benin¹²³ In respect of the right to water, the Committee recommended that the State Party allocate appropriate resources and develop comprehensive policies and programmes to increase access to safe drinking water and sanitation.¹²⁴

On 24 and 25 May 1999, the Committee considered the initial report of Chad.¹²⁵ The Committee realised that the State Party is faced with health problems resulting from insufficient or inadequate access to safe water for drinking and other domestic uses. Hence, it recommended that the State Party should put more effort in ensuring access to safe drinking water to all children, in order to combat water related diseases.¹²⁶

On 4 December 1997 South Africa submitted its initial report for consideration by the Committee and on 26 January 2000, the Committee considered its report and at the 615th meeting, held on 28 January 2000 the following concluding comments were adopted: The Committee noted that the principle of non-discrimination (article 2) is reflected in the 1996 Constitution as well as in

¹²⁰ Report of the Committee on the Right of the Child, General Assembly Official Records. Fifty-fifth session supplement No.41 CA/55/41), 8 May 2000.

¹²¹ (CRC/C/13/Add.41).

¹²² Ibid.

¹²³ (CRC/C/33/Add52).

¹²⁴ Ibid.

¹²⁵ Consideration of Reports Submitted By States Parties under Article 44 of the Convention. Concluding observations: Chad CRC/C/15/Add.107 24 August 1999, (CRC/C/3/Add.50).

¹²⁶ Ibid.

domestic legislation, it is still concerned that insufficient measures have been adopted to guarantee that all children are guaranteed access to education, health and other social services; the Committee indicated its concern of vulnerable groups of children, including black children, girls, children with disabilities, and those with learning disabilities; and in relations to the right to water Committee recommends that the State Party facilitate greater access to primary health services increase access to safe drinking water and sanitation.¹²⁷

2.2.3 Convention on the Elimination of all Forms of Discriminations Against Women (CEDAW)

On 18 December 1979, two (2) years after the adoption of the Mar del Plata Action Plan the United Nations General Assembly adopted the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter referred CEDAW).¹²⁸ The instrument entered into force as an international treaty on the 3 September 1981, nine (9) months after its adoption. This Convention is described as an International Bill of Rights for women.¹²⁹ The Convention is aimed at eliminating discrimination against women, particularly women residing in rural areas. The right to water is dealt with in article 14 of the Convention, which provides that:

State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure on a basis of equality of men and women that they participate in and benefit from rural development and in particular, shall ensure to such women the right:...(h) to enjoy adequate living conditions, particularly in relation to housing sanitation, electricity and water supply, transport and communication.

CEDAW establishes an agenda for action by countries to guarantee the enjoyment of the rights it provides. This includes the human right to water.¹³⁰ A Committee was established to monitor compliance by the State Parties with obligations as provided by the CEDAW and it comprises of 23 experts. The Committee on the Elimination of Discrimination Against Women (hereinafter referred Committee) receives direct communications and reports. Annually, State Parties are required to submit reports detailing compliance with the provision of the CEDAW. The Committee

¹²⁷ Committee on The Rights of The Child Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Initial reports of States parties due in 1997, Addendum, SOUTH AFRICA [4 December 1997], Distr. GENERAL CRC/C/51/Add.2 22 May 1999.

¹²⁸ Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

¹²⁹ Ibid.

¹³⁰ The Committee on the Elimination of Discrimination against Women (CEDAW), available at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx> (accessed 15 January 2017).

is entitled to make recommendations based on the reports received, however, they are not legally binding on the State Parties but has persuasive force.¹³¹ In addition to this the Central and East European Law Initiative (hereinafter referred CEELI) of the American Bar Association hereinafter referred to as (ABA) has lately established and adopted a tool with which to monitor State compliance with the Convention on the Elimination of all Forms of Discrimination Against Women.¹³²

The CEDAW is the first instrument to recognise explicitly the rural-urban difference. It does so by reckoning specific rights for rural women in its Article 14,¹³³ which includes the right to water supply. The CEDAW puts emphasis on the rights of women in rural areas and also provides that the state should take necessary or appropriate measure to ensure that women residing in rural areas have access to water supply. This signifies that the international community understands the challenges faced by women residing in rural communities on a daily basis and its effort on eliminating those challenges to ensure equality in all aspects including access to water. Since the ratification of the CEDAW South Africa has submitted its initial CEDAW report in 1998, indicating its achievement over the past few years of attaining democracy and acknowledge that it has not yet attained most of its objectives which is to entirely eliminate any form of discrimination against women. Furthermore, it indicated that special emphasis in its government policies and programmes is given to women, particularly those residing in rural communities, since they are the ones who suffered the brunt of the apartheid regime. It was stated that the Constitution provides for the use of affirmative action to affirm women who belong to the marginalised groups with regard to public services. Arguably, this includes water service delivery in rural communities.

Furthermore, an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred Optional Protocol) was adopted and entered into force in 2000. The Optional protocol permitted for the first time that complaints under the complaint-recourse procedure to be lodged to the Committee on the Elimination of Discrimination Against Women.¹³⁴ This protocol enhances the competency of the Committee by permitting it to

¹³¹ UN Committee on the Elimination of Discrimination Against Women, available at <http://hrlibrary.umn.edu/svaw/law/un/enforcement/CEDAW.htm> (accessed 06 September 2016).

¹³² Ibid.

¹³³ N Gabr, General Recommendation on Article 14 of CEDAW Rural Women, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/30anniversary/GeneralRecommendationOnArticleNaelaGabr.pdf> (accessed 15 January 2017).

¹³⁴ Ibid.

receive complaints directly from both individuals and groups.¹³⁵ Additionally, the optional protocol creates both communication procedures and inquiry procedures.

Where there is violation of the provision of the Convention, the Committee may at any time request that the state issue interim measures to protect victims whose rights have been violated.¹³⁶ The Committee will make a determination and issue findings on behalf of the victims and transmit it to the State Party concerned. The State Party has six months to file its response which indicates efforts made to redress the violation.¹³⁷

On 25 February 1998 South Africa submitted its initial report to the Committee on the Elimination of Discrimination Against Woman for consideration. South Africa indicated its initiatives on the implementation of the rights of women as provided for by the Convention, including the right to water as provided for in article 14 of the Convention. The Committee considered the report submitted by South Africa on its 19th Session.¹³⁸ General recommendations on other rights such as the right to health has been made by the Committee, however, the Committee did not make any recommendation with regard to the right of women to have access to water service delivery.¹³⁹ The initial reports submitted by other State Parties to the Committee for consideration were silent on the context of the right to have access to water.

Despite the effort of the Committee on the Elimination of all Forms of Discriminations Against Women¹⁴⁰ of recognising the right to water for women in rural areas, the majority of women in rural communities are still experiencing the challenges with regards to access to water services and this is due to the fact that most of the residents of rural communities are indigent and as such they cannot afford to pay for municipal services.¹⁴¹ This entails that there is still more to be done

¹³⁵ Ibid.

¹³⁶ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014

¹³⁷ Ibid.

¹³⁸ CEDAW 19th Session 22 June-10 July 1998, available at <http://www.un.org/womenwatch/daw/cedaw/19thsess.htm> (accessed 20 February 2017).

¹³⁹ General recommendations made by the Committee on the Elimination of Discrimination against Women, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 20 February 2017).

¹⁴⁰ CEDAW, Article 14 (2) (h).

¹⁴¹ M Mothetha, Z Nkuna and V Mema. 2013. The challenges of rural water supply: a case study of rural areas in Limpopo Province. In: Third Southern African regional YWP conference, Stellenbosch, Western Cape, South Africa, 16- 18 July 2013

to ensure absolute enjoyment of access to water for women residing in rural communities and to ensure that residents of rural areas are not discrimination against.

The Department of Water Affairs is entrusted the responsibility of ensuring that every individual in the country have access to water. This includes indigent residents of rural communities who are unable to pay for municipal services. In addition the Water Service Act provides that every individual is entitled to free basic water at an amount of 25 litres per person per day and 6 kilo litres per house hold per month. According to Mothetha, a number of municipalities vested with the responsibility to ensure water service delivery in rural communities face challenge in supplying basic services in these communities.¹⁴²

2.2.4 International Convention on the Right of the Persons with Disabilities (ICRPD)

The Universal Declaration of Human Rights encapsulates rights adequate to protect the rights of all individuals. However, because we live in an imperfect world full of different people with different challenges of life, there was the felt need for the recognition and protection of the rights of people living with disabilities. People living with disabilities come across a number of obstacles either physical or social that prevent them from receiving quality education, prevent them from access of water supply, and prevent them from obtaining jobs.¹⁴³

In view of the above reasoning, the Convention on the Right of the Persons with Disabilities (hereinafter referred ICRPD) was adopted by the United Nations General Assembly on 13 December 2006 to protect the rights of people living with disabilities.¹⁴⁴ Opened for signature on 30 March 2007, it has 160 signatures and 164 parties, including 163 states and the European Union.¹⁴⁵ All states who ratified this Convention accept its legal obligations. In other words the States Parties to the Convention are committing to respect, protect, and to fulfil the rights of persona with disabilities. Parties to the Convention are required to promote, protect and ensure the full enjoyment of human rights by person with disabilities and ensure that they enjoy full quality under the law.¹⁴⁶ The adoption of this Convention is a huge step towards changing people's view

¹⁴² Ibid.

¹⁴³ N Groce N Bailey R Lang JF Trani and M Kett 'Water and sanitation issues for persons with disabilities in low- and middle-income countries: a literature review and discussion of implications for global health and international development' (2011) *Vol.9 No.4, Journal of Water and Health*, 617.

¹⁴⁴ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

of disabilities and ensure that all people obtain equal opportunities to live life with dignity and to their full potential. The ICRPD does not create new entitlements or rights but express existing rights in a manner that addresses the needs and situation of persons living with disabilities.¹⁴⁷

The Convention explicitly mentions the right to clean drinking water. This right is provided for in article 28 which states that:

State Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination the basis of disabilities and shall take appropriate steps to safeguard and promote the realisation of this rights, including measures: to ensure equal access by person with disable to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability- related needs.

A Committee on the Right of the Persons with Disabilities was established to monitor the implementation of the rights of persons with disabilities. It is a United Nation body of 18 experts who converge twice in a year in Geneva to consider the reports submitted by 153 UN member states.¹⁴⁸ State Parties to the Convention are required to report regularly on their progress to the Committee.

South Africa indicated its commitment to implementing the provision of the Convention. After an extensive consultation with governmental institutions, it compiled a report that drafted over a periodic of three (3) years. In relation to the right to water which is contained in article 28 of the Convention, the reports indicate that South African people living with disabilities and low monthly income or without income qualifies for government assistance such as housing. It further indicates that the government and the disability sector acknowledged that a number of individuals with living disabilities residing in informal settlement and shacks are further disadvantaged by not having access to basic amenities and these include sanitation and water.¹⁴⁹

¹⁴⁷ Draft first country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities for Public Comment 26 November.

¹⁴⁸ Committee on the Rights of Persons with Disabilities, available at https://en.wikipedia.org/wiki/Committee_on_the_Rights_of_Persons_with_Disabilities (accessed 12 September 2016).

¹⁴⁹ Draft first country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities for Public Comment 26 November.

In remote rural communities there is a number of people living with disabilities and accessing medical support is often difficult. Some of these disabilities are incurable and those living with disabilities face barriers with regard to access to adequate water supply. These barriers can either be social or financial. There is a need for the construction of basic services such as water facilities, to reduce daily challenges faced by disabled people in rural communities, particularly women. Lack of access to safe drinking water has health implications, and deteriorates their human dignity.

2.3 The right to water under United Nations soft law

The right to water is explicitly proclaimed by a number of international soft laws. Following is a detailed discussion of the Resolutions made concerning the right to water and conferences held in which the realisation and protection of the right to water were the matters open for discussion: United Nations General Assembly Resolution A/RES/54/175” The Right to development 1998; General Assembly Resolution A/RES/64/292 2010; Human Rights Council Resolution A/HRC/RES/15/9 2010; Human Rights Council Resolution A/HRC/RES/16/2 2011; Mar del Plata United Nations Water Conference 1977; International Conference on Water and Sustainable Development. Dublin Conference 1992; United Nations Conference on Environment and Development. Rio Summit 1992; and United Nations International Conference on Population and Development 1994.

2.3.1 General Assembly Resolutions

2.3.1.1 Human Rights Council Resolution A/HRC/RES/16/21

Resolution 16/21 was approved and adopted by the Human Rights Council (hereinafter referred HRC) in April 2011.¹⁵⁰ The approval and adoption of this Resolution was made shortly after several consultations with the relevant parties. In relation the right to water, the HRC extended the duty of the special rapporteur on the human right to safe drinking water and for a period of three years. Therefore, the HRC requires the Special Rapporteur to fulfil its obligation which is to promote the full realisation of the human right to safe drinking water and sanitation by continuing to give particular emphasis to practical solutions with regard to its implementation, specifically in

¹⁵⁰ Human Rights Council Sixteenth session, Agenda item 1, Organizational and procedural matters: Resolution adopted by the Human Rights Council 16/21, Review of the work and functioning of the Human Rights Council, A/HRC/RES/16/21 Distr.: General, 12 April 2011.

the context of country missions, and following the criteria of availability, quality, physical accessibility, affordability and acceptability.¹⁵¹

It is clear that residents of rural communities like other individual found in South Africa have the right to water, however the challenge experienced by these communities is not the recognition of this right, but the challenge lies in the full realisation of this right. This is because it is not sufficient to recognise the right to water without actually ensuring that it is equally available, accessible, affordable and acceptable. In other words the right to water should not only be recognised on paper but it should be progressively realised and it is the mandate of the special Rapporteur to ensure that this objective is carried out by all State Parties. According to Irujo, what exists is a right to the supply of water. What is proposed is the development of an activity of the state (or by the competent authorities) that aims to provide a service of this very object.¹⁵² Therefore to encourage its full realisation, the supply of water should meet all aspects of the right: the mandate holder proposes to talk on the one hand about five normative criteria (availability, quality, physical accessibility, affordability and acceptability) and on the other hand the three cross-cutting criteria (non-discrimination, participation and accountability) (United Nations, 2010).¹⁵³ Also in referring to practical solutions to address the problem, one would imagine that the concept of affirmative action falls within the realm of practical solutions to ensure the realisation of the right to water.

2.3.1.2 General Assembly Resolution A/RES/64/292

In July 2010, the United Nation General Assembly authoritatively recognised the human right to safe drinking water through Resolution 64/292 with 122 votes in favour to non against.¹⁵⁴ The Resolution calls on states and international organisations to put more effort to provide safe, clean, accessible and affordable drinking water and sanitation for all. The right to water in international human rights law gained full political recognition through Resolutions by the Human Right Council and the United Nations General Assembly from 2010. The United Nations Resolution guarantees in express terms the right to water and also recognises that safe and clean drinking water are

¹⁵¹ The Human Right to Water and Sanitation, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/124/85/PDF/G1112485.pdf?OpenElement> (accessed 24 May 2016).

¹⁵² A E Irujo 'The right to water' (2007) *Vol. 23 No.2, International Journal of Water Resources Development*, 267–283.

¹⁵³ United Nations (2010c). Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque. A/HRC/15/31. New York: UN.

¹⁵⁴ Resolution adopted by the General Assembly on 28 July 2010 [without reference to a Main Committee (A/64/L.63/Rev.1 and Add.1)] 64/292. The human right to water and sanitation.

integral to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.¹⁵⁵ A number of people residing in rural communities are indigents hence they cannot afford to pay for their own water resources. According to this Resolution the government is obliged to provide for access to water for drinking and other domestic uses for rural dwellers through its budgetary means. In other words rural communities should not be discriminated due to lack of financial means to access water independent from the government.

2.3.1.3 Human Rights Council Resolution A/HRC/RES/15/9

The Human Rights Council adopted Resolution 15/9 on the 6th day of October 2010. It was adopted following the United Nations General Assembly Resolution 64/292. This Resolution explicitly mentions the human right to water. Furthermore, the United Nations Human Rights Council affirms that the right to water and sanitation are part of existing international law and confirms that these rights are legally binding upon states. It also affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health as well as the right to life and human dignity.¹⁵⁶ It then calls upon states to develop suitable tools and mechanisms to achieve progressive realisation of the human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas.¹⁵⁷ It has been noted that in South Africa during the apartheid era, that there were huge inequalities with regard to water service delivery and rural communities were amongst the underserved communities. Since this Resolution calls upon states to advance suitable measures to achieve progressive realisation of the human rights obligation related to access to safe drinking water, one would expect South Africa to devise means to ensure access to water for rural communities since there were previously disadvantaged by the apartheid system and they still bear the brunt of such system.

¹⁵⁵ Human Rights Council Resolution, available at

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292 (accessed 22 May 2016).

¹⁵⁶ Human right and access to safe drinking water and sanitation. Human Rights Council A/HRC/RES 15/9.

¹⁵⁷ European Citizens' Initiative for implementation of the human right to water and sanitation in European law, available at <http://daccess-dds-ny-un/doc/UNDOC/DEN/G10/166/33/PDF/G1016633.pdf> (accessed 22 May 2016).

2.3.1.4 United Nations General Assembly Resolution A/RES/54/175, The Right to development

The United Nations General Assembly Resolution A/RES/54/175¹⁵⁸ was adopted following Resolution 46/91 of 16 December 1991 and the Declaration on the Right to Development of 1986 which states in Article 8 that States shall ensure notably, the equality of opportunity for all in their access to basic resources. Drinking water can clearly be considered one of these basic resources. The above provision entails that the right to water is fundamental for human survival and as such States are under the obligation to ensure its equal access. Article 12 of this Resolution further provides that in order to attain total realisation of the right to development, the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community. Arguably, this entails that there cannot be development without the realisation of the right to water.¹⁵⁹

2.3.2 International conferences

In response to the global water crisis a considerable number of conferences were held around the globe, in which action plans on how to combat water crisis were prepared. These international conferences signify the effort given by the international communities in combating water crisis faced globally by many countries and ensuring that every individual has inequitable access to water which is a basic human right. Through these conferences governments are encouraged to enhance the effort to supply water, particularly in rural communities. This is because rural communities at large are affected by lack of access water due to unavailability of water infrastructure or poor maintenance of infrastructures. The following are conferences in which issues relating to water were deeply discussed.

2.3.2.1 Mar del Plata United Nations Water Conference

The idea of a human right to water first emerged at international environmental conferences, in response to water justice scuffles all over the world. On 25 March 1977, the United Nations General Assembly held a water conference in which several recommendations known as the Mar del Plata Action Plans were made. The United Nations urges the States Parties to effectively implement in the recommendations of this conference effectively and bona fide. The Mar del Plata Action Plan recognises water as a right for the first time by declaring that “all people,

¹⁵⁸ Resolution Adopted by the General Assembly [on the report of the third Committee (A/54/605/Add.5)] 54/175. The right to development A/Res/54/175, 15 February 2000.

¹⁵⁹ Ibid.

whatever their stage of development and social and economic conditions , have the right to have access to drinking water in quantity and of a quality equal to their basic needs”.¹⁶⁰ The beginning of the explicit recognition of the right to water can be traced back to the 1977 Mar del Plata conference in Argentina. This is the conference in which an action plan was given which focused on water supply in the community and it was also stated that every individual have the right to have access to drinking water in quantities and quality.

2.3.2.2 United Nations Conference on Environment and Development: Rio Summit

From 3 to 14 June 1992, the United Nations held a conference on environment and development in Rio de Janeiro Brazil. Chapter eight of the agenda 21 deals with the protection of the quality and supply of freshwater resources and the application of integrated approaches to the development, management and use of water resources.¹⁶¹ Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges that it might encounter in the future. Furthermore, Agenda 21 chapter 18 endorsed the Resolution of the Mar del Plata water conference in which it was stated that all people have the right to have access to drinking water and called this “the commonly agreed premises”.¹⁶² This conference affirmed the principle on the right to have access to water as recognised by the action plan adopted in the 1977 Mar del Plata conference in Argentina.¹⁶³

The primary objective of this conference was to ensure that adequate supplies of water of good quality are maintained for the entire population of planet earth while preserving the hydrological, biological and chemical function of ecosystem, adapting human activities within the capacity limit of nature and combating water related diseases.¹⁶⁴ The conference provides basic action to be taken by government and the means of implementation of those action. The means of implementation includes among others things, financing and cost evaluation, scientific and technology means and human resource development.¹⁶⁵ The conference report indicates that the

¹⁶⁰ United Nations Water Conference, Mar del Plata, Mar. 14-25, 1977, Report of the United Nations Water Conference, U.N. Doc. E/CONF.70/29 (1977).

¹⁶¹ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Agenda 21, U.N. Doc. A/CONF.151/26 (1993).

¹⁶² Review of implementation of Agenda 21 and the Rio Principles, available at <http://www.un.org/esa/dsd/agenda21> (accessed 23 May 2016).

¹⁶³ Ibid.

¹⁶⁴ (note 161 above).

¹⁶⁵ (note 161 above).

United Nations acknowledges that water is needed in all aspects of life, hence it is a necessity to protect and sustain the water resources.¹⁶⁶

2.3.2.3 International Conference on Water and Sustainable Development: Dublin Conference

The right to water was further recognised at the International Conference on Water and Environment held in Dublin in 1992. The main focus was water as an economic good. The conference's focus was on the following four values: Fresh water is a limited and susceptible resource; indispensable for living a healthy and dignified life; fresh water is a finite and vulnerable resource, essential to sustain life; development and the environment; water development and management should be participatory; women play an important role in the provision; management and safeguarding of water and Water has an economic value in all its competing uses and should be recognised as an economic good.¹⁶⁷

The Dublin statement highlights the dilemma which affects the global community. The objectives of this conference was to establish Resolutions to the dilemmas affecting humanity to ensure future survival of millions of people. The Dublin report statement contains four principles and principle four (4) explicitly deals with recognition of water and it states that it is vital to recognise first the basic rights of all human beings to have access to clean water and sanitation at an affordable price.¹⁶⁸

The Dublin principle focused on the recognition of the right to water as well the price that comes with it. Principle four essentially directs that access to water resources should not be free to ensure that water resources are not unexploited. However, the cost connected to access to water resources should be affordable by all. Managing water as an economic good it is said to be an important way of achieving efficient equitable use and a way of encouraging conservation and protection of water resources.¹⁶⁹ Furthermore, the conference participants urged all governments to study cautiously the specific activities and means of implementing recommendations comprised in the conference report and to translate those recommendations into urgent action programs for

¹⁶⁶ United Nations Conference on Environment and development Rio-de Janero; Brazil, 3 to 14 June 1992. Agenda 21.

¹⁶⁷ International Conference on Water and the Environment, Dublin, Ir., Jan. 26-31, 1992, The Dublin Statement on Water and Sustainable Development (June 1992).

¹⁶⁸ The Dublin Statement on Water and Sanitation Development. The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment.

¹⁶⁹ The Dublin Statement: International Conference on water and the Environment: Development issues for the 21st Century. 26-31 January 1992, Dublin Ireland.

water and sustainable development.¹⁷⁰ The conference establishes an agenda for action by states to ensure access to water resources and sustainable development. The agenda includes, *inter-alia*, resolving of water conflicts.¹⁷¹

A considerable number of people in rural communities are indigent and they cannot afford basic services. This means that water should be affordable to rural communities and the water service provider must not cut water supply in rural communities due to their inability to pay for water services. In other words, water should not be totally free but not costly and the minimum for daily use should be available where they are unable to pay for the services, this is because water is fundamental for human survival. It is worth-noting that water should be treated as a social and cultural good, and not mainly as an economic good.

2.3.2.4 United Nations International Conference on Population and Development: Cairo in 1994

On 5-13 September 1994, the United Nations coordinated an International Conference on Population and Development (hereinafter referred ICPD) in Cairo. About 20000 delegates from a number of governments gathered for a discussion on a number of population issues and these includes the right to water.¹⁷² According to the United State (UN) programme of action, the UN indicated that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. Furthermore, that people are the most vital and valuable resource of the states. Thus, Countries should ensure that all individuals are granted the opportunity to make the most of their potential. This text explicitly provides for the human right to safe water for drinking by affirming that all individuals have the right to an adequate standard of living for themselves and their families including adequate food, clothing, housing, water and sanitation.¹⁷³

2.3.2.5 World Summit on Sustainable Development

The World Summit on Sustainable Development (WSSD) or ONG Earth Summit 2002 took place in Johannesburg, South Africa from 26 August to 4 September 2002. It was arranged to discuss

¹⁷⁰ Ibid.

¹⁷¹ (note 169 above).

¹⁷² Programme of Action, Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994.

¹⁷³ Ibid.

sustainable development by the United Nations.¹⁷⁴ The Political Declaration of the Summit reiterates water as a critical necessity for human dignity and calls upon states to make targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, energy, health care, food security and the protection of biodiversity.¹⁷⁵ The outcomes of this conference suggest that there is a need for government to realise the right to water of rural communities since water is fundamental for human dignity and according to the Constitution everyone has the right to human dignity.¹⁷⁶ The conference indicates the need for urgent intervention by the government to speedily increase access to basic requirements such as clean water and this includes other basic human rights such as the right to health.

2.3.2.6 Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation .E/CN.4/Sub.2/2005/25

These guidelines are in line with the relevant international documents on the right to water in particular the General Comment No.15 on the right to water adopted by the Committee on Economic, Social and Cultural rights.

Guideline No. 2 imposes an obligation on the state and indicate that all tiers of government have responsibility progressively and expeditiously to realise the right to water service delivery. It further provides that national governments should ensure that other arms of government have the necessary resources and skills to discharge their responsibilities.¹⁷⁷ The draft guidelines are for the assistance of all arms of government such as the government policymakers, international agencies and members of civil society working in the water and sanitation sector in implementation of the fundamental rights to drinking water and sanitation.

The above discussion shows that the right to water was not recognised explicitly in early UN treaties. However, with the passing of the time it gained recognition as a human right in a number of UN treaties. The explicit recognition of this right indicates the UN's dedication to the progressive

¹⁷⁴ Earth Summit 2002 - Wikipedia, the free encyclopedia, available at https://en.wikipedia.org/wiki/Earth_Summit_2002 (accessed 24 May 2016).

¹⁷⁵ World Summit on Sustainable Development, available at http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm (accessed 24 May 2016).

¹⁷⁶ Section 10 of the Constitution Act 108 of 1996, provides everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁷⁷ Economic, Social and Cultural Rights; Realization of the right to drinking water and sanitation Report of the Special Rapporteur, El Hadji Guissé, E/CN.4/Sub.2/2005/25 11 July 2005.

realisation of the right to water and ensuring access to water for all including rural communities. The UN understands the challenges faced daily by rural communities with regard to access to water. Hence, it encourages State Parties in a number of treaties to adopt measures necessary for the progressive realisation of the right to water.

2.4 The right to water under African Union human right system

2.4.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (hereinafter referred the African Charter) was adopted by the OAU Assembly in 1981.¹⁷⁸ This was after it was received and ratified by a number of African states. The African Charter finally came into force in 1986. It promotes and protects human rights and this includes the right to water. The African Charter has a monitoring body and that is the African Commission on Human and Peoples' Rights (hereinafter referred ACHPR).

The ACHPR is a legal entity established in 1986, the same year that the African Charter came into force. The ACHPR is responsible for the monitoring and the interpretation of the human rights encapsulated on the African charter. Despite this authority, it has the duty to report to the Assembly of Heads of State and Government of the African Union. The ACHPR comprises of eleven members appointed through voting at the OAU Assembly of Heads of State and Government.¹⁷⁹ These members are independent from their states.

In August 2015, the Republic of South Africa submitted its combined second periodic report under the African Charter on Human and People's Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa. In relation to the right to water, South Africa indicated its progress and stated that:

Approximately 89, 9% of South African households had access to piped water in 2013 and the access to improved sanitation facilities increased from 62, 3% in 2002 to 77, 9% in 2013.¹⁸⁰

¹⁷⁸ African Charter on Human and Peoples Rights, Adopted in Nairobi June 27, 1981, Entered into Force October 21, 1986

¹⁷⁹ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Entry into force: 21 October 1986.

¹⁸⁰ combined second periodic report under the African Charter on Human and People's Rights and initial report under the protocol to the African Charter on the Rights of Women in Africa, available at http://www.achpr.org/files/sessions/58th/state-reports/2nd-20022015/staterep2_southafrica_2003_2014_eng.pdf (accessed 21 February 2017).

It further indicated that a great number of households, especially those who were previously disadvantaged, receive basic services from the municipalities in which they reside and this includes access to water service delivery. Environmental hygiene plays an essential role in the prevention of many diseases and it impacts on the natural environment and the preservation of important natural assets, such as water resources.

Since the submission of these reports, the Commission has not yet made any considerations nor recommendations in right of the right to water in South Africa. In relation to the right to water, the African Charter does not protect the right to water in express terms but rather implicitly protect in through a number of rights such as the rights to life, dignity, work, food, and health. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal, domestic, and agricultural uses.¹⁸¹ In *Free Legal Assistance Group and Others v Zaire*,¹⁸² the Commission held that the inability of the government to ensure the provision of basic services such as safe drinking water and electricity and the shortage of medicine constitutes a violation of article 16 of the ACHPR dealing specifically with the right to water. The decision on this case entails that the court regards water as a human right fundamental for the realisation of the right to health. In other word the right to water can be implicitly recognised by article 16.

The African Court on Human and People's Rights which was created to ensure protection of human and peoples' rights in Africa are important to the application of the African Charter.¹⁸³ It has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter. The court's first judgement on merit of a case was issued on June 14, 2013, in a case involving Tanzania. The court found Tanzania had violated its citizens' right to freely participated in government directly or through representative regardless of their party affiliation, and ordered Tanzania to take constitutional, legislative, and all other measures necessary to remedy these violation. So far, no case relating to the right to water has been tried by the court. However, this does not entail that water is not a problem in Africa. Water remains a

¹⁸¹ Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights.

¹⁸² (2000) AHRLR 74 (ACHPR 1995).

¹⁸³ African Court on Human and Peoples' Rights, available at: <http://www.achpr.org/about/afchpr/> (accessed 20 February 2017).

challenges to most Africans, particularly residing in rural community and there is a need for urgent intervention.

2.4.2 African Charter on the Rights and Welfare of the Child (ACRWC)

In 1990 the Organisation of African Unity (hereinafter referred OAU) adopted the African Charter on the Rights and Welfare of the Child (hereinafter referred ACRWC) and it was entered into force in 1999.¹⁸⁴ This instrument promotes and protects the rights of the child. The ACRWC and the CRC are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic, social and cultural rights. In 2016 the number of states which ratified the ACRWC was 47 of the 54 states of the African Union.¹⁸⁵ State Parties to the ACRWC are required to submit initial reports within two years of ratification. In 2008, the Committee of Experts started the process of reviewing the first four state reports that had been received from Egypt, Mauritius, Nigeria and Rwanda.¹⁸⁶

The Adoption of the African Charter on the Rights and Welfare of the Child called for the establishment of a Committee of Experts on the Rights and Welfare of the Child. The Committee is vested with the responsibility of monitoring and enforcing of the rights guaranteed under the ACRWC.¹⁸⁷ The Committee is responsible for the interpretation of the rights contained in the Charter. The African Charter on the Rights and Welfare of the Child, obliges non-state actors to take positive steps to ensure the protection of various recognised rights.¹⁸⁸ In relation to the right to water, article 14 of the ACRWC explicitly provides for the right to water and states that:

Every child shall has the right to enjoy the best attainable state of physical, mental and spiritual health. This includes the provision of nutritious food and safe drinking water, as well as adequate health care.”

The African Charter provides that State Parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions.¹⁸⁹ In 2014, Djibouti submitted its initial

¹⁸⁴ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

¹⁸⁵ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁸⁶ Ibid.

¹⁸⁷ The Committee was formally established in July 2001 during the Assembly of Heads of State and Government of the OAU 74th Summit in Lusaka, Zambia.

¹⁸⁸ A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to The African Charter on the Rights and Welfare of the Child' (2002) *Vol. 2 No.1, African Human Rights Law Journal*, 11-32.

¹⁸⁹ African Charter on the Rights and Welfare of the Child, Art 18(3).

and combined periodic reports for the period 1993 to 2013.¹⁹⁰ The Committee did not make any recommendation in relation to the right to water. Up to this point, South Africa has not yet submitted a report in relation to the right to water of the child.

2.4.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter referred to as the Protocol), better known as the Maputo Protocol, was adopted by the African Union in Maputo, Mozambique in July 2003 and finally came into force in 2005. One of the short comings of the African Charter is that it does not extensively protect the right of women in Africa, hence, the African Protocol was established.¹⁹¹ The Protocol explicitly protect and promote the rights of women in Africa and this includes, *inter alia*, the right to have access to safe drinking water. The Protocol was enacted to compensate for the normative inadequacy of the African Charter.¹⁹² The right to have access to safe drinking water is provided for in express term in article 15 of the Protocol. Article 15 of the protocol calls upon the governments to ensure access to clean drinking water for women in African countries such as South Africa South Africa ratified the protocol on 17 December 2004, and that is a year post its adoption. ¹⁹³ According to human rights activists the Protocol was established due to the lack of intensive protection of the rights of women in the African Charter.¹⁹⁴

2.5 Conclusion

This chapter dealt with the international and regional instruments providing for the right to water. As it has been indicated the right to water has been recognised in a wide range of international documents, including treaties, declarations and other standards and however, these international instruments do not only recognise the right to water but it promotes and protect it. According to international law, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Apart from

¹⁹⁰ Republic of Djibouti Unity – Equality – Peace: Combined Initial and Periodic Report Under The African Charter on Human and Peoples' Rights.

¹⁹¹ I Eze-Anaba 'Domestic Violence and Legal Reforms in Nigeria: Prospects and challenges' (2007) *Vol.14 Cardozo Journal of Law & Gender*.

¹⁹² VO Ayani (2016) *The Impact of the African Charter and the Maputo Protocol in Selected African States*, Pretoria University Law Press, Pretoria.

¹⁹³ African (BANJUL) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹⁹⁴ JD Muluzi, *The protocol to the African charter on human and people's rights on the right of a women in Africa: South Africa's reservations and interpretative declaration*, Doctoral research and society prison reform initiative, community law centre, University of the Western Cape 2008.

guaranteeing everyone the right to have access water adequate water supply, it imposes on the state the obligation to take reasonable legislative and other measures to ensure progressive realisation of the right to water in accordance with the water laws.

The state's obligation is limited to the available resources. However, as it has been stated the state must strive to ensure that the marginalised groups have access to safe water for drinking. The subsequent chapter examines domestic legislative frame work and approaches in relation to water service delivery in South Africa, particularly in rural communities of South Africa.

CHAPTER 3

AN OVERVIEW OF WATER LEGISLATION IN SOUTH AFRICA

3.1 Introduction

The previous chapter examined international and regional legal instruments which provide and protect the human right to water. The chapter responds to the question: what are the documented challenges against access of water service by rural communities. Following this introduction, this chapter sketches the historical perspective of the right to water in South Africa; Constitutional framework on the right to water; the right to water under other South African legislation; access to water: a state's responsibility in South Africa; and documented challenges posed by legislative frame work to access of rural communities to water service in South Africa. The chapter ends with a conclusion which summarises the whole discussion.

3.2 A historical perspective of the right to water in South Africa

Prior to democracy in South Africa, water was a relatively low cost luxury for white South Africans, while, black South Africans largely suffered vulnerability in urban townships and in the segregated rural homelands, which supplied male migrant workers to the white- owned mines, factories and plantations.¹⁹⁵ The Constitution of South Africa was enacted to redress these injustices and the right to access to sufficient water is contained in the Bill of Rights which is incorporated in the 1996 Constitution. During the apartheid era, the Water Act was the Act which regulated access to water and access to water was based on land ownership.¹⁹⁶ This entails that access to water was determined largely by land ownership. Since land ownership was reserved only for white minority, while blacks were left without ownership of land,¹⁹⁷the blacks generally lived without access to water due to lack of land ownership and discriminatory water policies. During the colonial legislation, water courts were established which dealt with dispute related to water.¹⁹⁸ A number of cases were reported of which few were tried in those court.

¹⁹⁵ The "Right to the City" Limits to Rights Talk and the need for rights to the Commons Patrick Bond, available at http://revista-theoai.unq.edu.ar/NUMERO_27-28/Bond.pdf (accessed 21 February 2017).

¹⁹⁶ 1956.

¹⁹⁷ Native Land Act 27 of 1913.

¹⁹⁸ DD Tewari 'A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present' (2009) *vol.35 No.5, Water SA* 693-710.

The courts were later abolished by the National Water Act, 1998.¹⁹⁹ With the advent of democracy, it is understood that the South African society is required to do more than that to eliminate the indirect and racial discrimination. Otherwise, the effects of discrimination may continue indefinitely unless there is a commitment to eradicate it. In the *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court observed that:

It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.²⁰⁰

The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution.²⁰¹ The provision makes it clear that under the Constitution:

Equality includes the full and equal enjoyment of all rights and freedoms. And more importantly for present purpose, it permits legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. These measures may be taken to promote the achievement of equality.

The next unit discusses the Constitutional framework on the right to water in South Africa.

3.3 Constitutional framework on the right to water

3.3.1 The Constitution

Access to safe and adequate water supply is basic to life and is recognised as a fundamental human right. To sustain healthy human life requires sufficient and safe water. The right to water forms part of the second generation of rights. It is included in section 27 (1) (b) which encapsulates that “everyone has the right to have access to sufficient food and water”. The use of the word ‘access’ signifies that water service delivery is crucial to the realisation of the right to water. It

¹⁹⁹ U Maritz, Water Law of South Africa 1912-1998, Report to the water Research Commission (March 2008), WRC Report NVKV 203/08 ISBN 978 – 77005-675-6, Page 5.

²⁰⁰ National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

²⁰¹ Act 108 of 1996

does not mean that only those who have the means should afford it. Thus, it is not surprising that the Constitution further extends the obligation of the states in section 27(2) which provides that “the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”. Following is the detailed discussion of the obligations imposed by the Constitution of the State.²⁰²

The inclusion of section 27(1) (b) in the Constitution resulted in the rare opportunity for South Africa to entirely reform its water laws. The South African Constitution affords citizens with a recourse against government’s failure to fulfil its Constitutional obligations. This is done through the active involvement of the judiciary. In other words, aggrieved individuals may approach the court of law for a remedy against the state’s failure to realise the right to have access to water. The judiciary has the obligation to ensure that there are no legislative and other hindrances to the progressive realisation of the constitutionally guaranteed rights. In a nutshell, the right to have access to water is a justiciable human right and it protects the rights of individuals, particularly those who were previously disadvantaged.

The State is the custodian of the national water resources. The Constitution divides the government into three, which is the national, provincial and local spheres of government. To give effect to the right of access to water for all, the Constitution bestowed the primary responsibility of prudent management of the water resources on the local sphere of government.²⁰³ Despite its primary responsibility, realisation of the right to water is a shared competency of the national, provincial and local government.

Apart from the recognition of the right to water the Constitution of South Africa imposes certain obligations upon the state to ensure the progressive realisation of the rights as encapsulated in the Bill of Rights.²⁰⁴ Section 27(2) of the Constitution imposes four different types of obligations on the state on the realisation of fundamental human rights, such as the human right to water. The Bill of Rights provides for the obligation to protect, prevent, fulfill and promote. The state is

²⁰²Section 27 of the Constitution provided that: Everyone has the right to have access to—(a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights; (3) No one may be refused emergency medical treatment.

²⁰³ Section 152 of the Constitution Act 108 of 1996.

²⁰⁴ J De Visser , E Cottle & JN Mettler, Realising the right of access to water:

Pipe dream or watershed?’ available at: <http://www.saflii.org/za/journals/LDD/2003/3.pdf> (accessed on 16 August 2016).

required to adhere to its obligations as outlined in the Constitution to ensure the progressive realisation of these rights. Despite the fact that each sphere has its own status, competence and responsibilities which other spheres of government may not encroach without reason, all the spheres of government are jointly responsible for the above stated obligations and they are required to perform their obligations with diligence.

The obligation to protect against any form of human rights abuse within its jurisdictional area by third parties, including private actors involves taking suitable steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.²⁰⁵ In relation to the right to have access to water of rural communities, the South African state has the duty to ensure the protection of the individual's right to have access to, such as unlawful disconnection and unjustifiable limitation of this right by third parties.

It is worth noting that the state is not responsible for the interference with the right to have access to water by third parties, however it can only be held liable for such if the matter was brought to its attention and failed to investigate, punish and to redress the interference. The obligation to protect is not limited to ensuring that there is no abuse of human rights or interference but the State is vested with the obligation to protect and promote the rule of law. This includes taking legislative or other measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.²⁰⁶

Furthermore, the government should exercise adequate oversight in order to meet its obligation to protect when entering into a contract with private sectors (business entities) to provide services that may impact upon the enjoyment of human rights, particularly the human right to water.²⁰⁷ Both national and international law does allow privatisation of service delivery. According to Moyo, privatisation of water services to non-state actors has the potential to assist in the realisation of the right to water.²⁰⁸ However, such privatisation should not negatively affect the enjoyment of human rights. The State's failure to ensure that private sectors carrying out service delivery,

²⁰⁵ Guiding Principles on Business and Human Rights' available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 27 June 2016).

²⁰⁶ Guiding Principles on Business and Human Rights' (note 19 above).

²⁰⁷ Ibid.

²⁰⁸ K Moyo 'Privatisation of the Commons: water as a right; water as a commodity' (2011) *Vol. 22 (3) Stellenbosch Law Review* 821.

such as delivery of water to societies operate in a manner inconsistent with the state's Constitutional duties and obligations and may cause legal consequences for such State.²⁰⁹

In relation to the right to have access to water, the state has the obligation to respect, which requires it to refrain from interfering directly or indirectly with the existing enjoyment of the rights to water.²¹⁰ Any measures taken by the state or third parties that worsen an individual's access to water are considered a violation of these rights unless they can be fully justified. This obligation requires the state to ensure that any measure it takes such as disconnection of water supply is justifiable in an open and democratic society based on democracy and fairness.²¹¹ The obligation to promote as entrenched in the Bill of Rights entails that the state must encourage and advance the realisation of the fundamental rights as entrenched in the Bill of Rights.²¹² The duty to promote includes ensuring public awareness.²¹³ The obligation to fulfil on the other hand entails that the state must take appropriate legislative, administrative, economical, judicial and other measures to ensure the progressive realisation of the fundamental rights as provided for in the Bill of Rights.²¹⁴

In rural communities the local government, specifically municipalities with the assistance of the national and provincial governments have a constitutional obligation to ensure that those residing in those communities have access to sufficient drinking water. In so doing they would be fulfilling the constitutional objective which is to redress the injustices of the past regime. It is worth noting that these should be done within the available state resources. However, it was held in *Government of the Republic of South Africa and Others v Grootboom and others*²¹⁵ that the government cannot use unavailability of resources as a justification for its failure to ensure access to water. In addition, the government is responsible for ensuring equitable access to water in South Africa, particularly in rural communities, giving its commitment to international law.

²⁰⁹ Ibid.

²¹⁰ Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

²¹¹ Constitution Act 108 of 1996, sec 36(1).

²¹² Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

²¹³ Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

²¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

²¹⁵ CCT11/00 [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 14.

3.3.2 Application of international law and the right to water in South Africa

The government of South Africa is bound to apply the provisions relating to the right to water, in particular, water service delivery, under international treaties which it ratified. The Vienna Convention on the Law of Treaties defines a treaty as “ an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”²¹⁶ Ratification refers to the international act so named in which a State institutes on the international level its agreement to be bound by a treaty.²¹⁷

Ratification of a treaty by a state implies that the domestic legislation of that particular state must conform to the provision of the treaty to which that state is party and cannot contravene its obligations.²¹⁸ South Africa in ratifying the following water related international treaties, agreed to be bound by the provision of the treaty and to comply with its provision when enacting its domestic water laws. The water related international treaties ratified by South Africa are: International Covenant on Economic, Social and Cultural Rights(hereinafter referred ICESCR²¹⁹); Convention on the Right of the Child (hereinafter referred CRC);²²⁰Convention on the Rights of Person with Disabilities (hereinafter referred CRPD)²²¹; Optional Protocol to the Convention on the Rights of Person with Disabilities²²²; Convention on the Elimination of all Forms of Discrimination Against Women (hereinafter referred CEDAW);²²³ African Charter on Human and Peoples’ Rights

²¹⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, and p. 331, available at <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 5 November 2016).

²¹⁷ Ibid.

²¹⁸ WW, Park and AA, Yanos ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ (2006) *Vol. 58 No.251, Hastings Law Journal*.

²¹⁹ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, articles 11&12.

²²⁰ Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, article 24.

²²¹ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/10, Adopted without vote, 76th plenary meeting; Issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-2.

²²² UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex II, Adopted by the General Assembly by its Resolution 61/106, at its 76th plenary meeting on 13 December 2006. In accordance with its article 10, the Optional Protocol is open for signature by all signatory States and regional integration organizations of the Convention on the Rights of Persons with Disabilities at United Nations Headquarters in New York as of 30 March 2007.

²²³ Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1), article 14(2) (h).

(hereinafter referred ACHPR)²²⁴ and African Charter on the Rights and Welfare of the Child (hereinafter referred ARWC).²²⁵ While it is true that domestication of treaty is required before it can be justiciable in South Africa,²²⁶ at least the ratification of these treaties requires that states should not act in a way or manner that contradicts its commitment to such treaties. It suggests that the government should not act in a manner that is inconsistent with its commitment to instruments which mandate water service delivery as a core requirement in the realisation of the right to water.

The CRC was the first international treaty to be ratified by South Africa on 16 June 1995.²²⁷ This treaty led to the inclusion and protection of the right of children by domestic legislation of South Africa and this includes water related legislation.²²⁸ South Africa ratified the ICESCR on 12 January 2015.²²⁹ However, this treaty does not explicitly provide for the right to water but to some extent the right is implicitly recognised. Ratification of this treaty requires South Africa's compliance with some of the provision of the ICESCR which implicitly provide for the right to water.²³⁰ The decision to ratify the treaty was welcomed by the South African Human Rights Commission (hereinafter referred SAHRC). The SAHRC urged the government to apply the covenant domestically.²³¹ In March 1995, South Africa signed and ratified the CEDAW and on 15 December 1995, it consented to the Optional Protocol to Convention.²³² Furthermore, in 2007 South Africa signed and ratified the CRPD and its Optional Protocol.²³³

All the above mentioned treaties either explicitly or implicitly provides for the right to water. Being a member State Party to the above treaties, South Africa is obliged to fulfil the obligations enforced by the treaties and to ensure that it implement the provisions related to the right to water of these

²²⁴ African (BANJUL) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

²²⁵ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, article 14(2) (c).

²²⁶ Ibid.

²²⁷ The UN Convention on the Rights of the Child, South Africa's combined Second, Third and Forth Periodic State Party Report to the Committee on the Rights of the Child (Reporting period: 1998 - June 2012).

²²⁸ 20 years of the CRC, available at <http://www.unicef.org/rightsite/237.htm> (accessed 04 November 2016).

²²⁹ South Africa: Ratification of Human Rights Treaty Reaffirms SA's Commitment to Socio-Economic Rights and Internationalism, available at <http://allafrica.com/stories/201502021128.html> (accessed 21 February 2017).

²³⁰ The Government of South Africa ratifies the ICESCR, available at: <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr/> (accessed 05 November 2016)

²³¹ Government hailed for ratifying UN treaty, available at

<http://www.news24.com/SouthAfrica/News/Government-hailed-for-ratifying-UN-treaty-20150118> (accessed on 14 January 2017).

²³² Hassim S (2005), *Gender, welfare and the developmental state in South Africa*, United Nations Research Institute for Social Development (UNRISD), available at <http://www.sarprn.org.za/documents/d0001335/index.php> (accessed 05 November 2016).

²³³ Ubuntu Centre of South Africa, available at <https://ubuntucentre.wordpress.com/crpd/>, (accessed 05 November 2016)

treaties in its domestic legislation. More importantly, section 39 (1) of the Constitution enables courts, tribunal or forums to use international law when interpreting any provision of the bill of rights.²³⁴ In relation to the use of international law, section 39(1) (a) of the Constitution permits the use of international law and explicitly indicate that:

When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.²³⁵

Accordingly section 39(1) (a) is one of the foundations of South Africa's Constitutional structure and it is one of the main gears which the Constitution is intended to do its groundbreaking work, by necessitating that all legislation, common law and customary law be interpreted and developed in accordance with the spirit, purport and objects of the Bill of Rights.²³⁶ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,²³⁷ Ngcobo J stated:

The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.

This indicates that the Constitution necessitates a purposive approach to statutory interpretation and in so doing it permits the use of international law. South Africa is bound by international treaties which it ratified, while the rest only has persuasive force. In other words when interpreting the provision of the Bill of Rights South Africa will only be bound by the treaties to which it is a party.

²³⁵ Section 9 (1) (a) (b) and (2) (3) of the Constitution Act 108 of 1996.

²³⁶ D Cornell and Friedman' In Defence of the Constitutional Court: Human Rights and the South African Common Law' (2011) VOL.5 No. 1, *Malawi Law Journal* 1-36.

²³⁷ [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

For these reasons, one can conclude that international human rights law in relation to access to water is of significance application in South Africa. Besides, there are provisions within other legislation which govern access to sufficient water in South Africa.

3.4 The Right to Water under other South African Legislation

3.4.1 National Water Act

The enactment of the Constitution led to the enactment of the Water Service Act²³⁸ and the National Water Act (hereinafter referred NWA).²³⁹ This is due to the Constitutional provision recognising water as a human right. This Act was enacted to regulate the implementation of this basic human right. The NWA was enacted during the transition to the post-apartheid eras and is broadly recognised in policy cycles as one of the most inclusive water laws in the world.²⁴⁰ The Act is enacted, adopted and implemented in a society associated with socio-economic imbalances. Hence, it provides with a robust tool to redress the inequalities and imbalances of the past regime.²⁴¹

The NWA is simply a water law approved by the parliament in 1998 which applies to the whole of South Africa.²⁴² This Act is responsible for protecting, managing and equitable allocating water resource to relevant individuals. It recognises the need for a more equitable distribution of water. The NWA requires peoples' participation in water resources management, this is because it recognises the importance of access to water supply.²⁴³ The NWA is aimed at doing away with the apartheid ideals of privileged access to water service delivery.²⁴⁴ The NWA is based on three principles and that is; Sustainability, Equity and Efficiency. Sustainability means promoting social and economic development while ensuring that the environment is protected both now and for future. Equity, entails that every individual must have access to water and to the benefit of using

²³⁸ Act 108 of 1997.

²³⁹ Act 36 of 1998.

²⁴⁰ Ibid.

²⁴¹ JS Kemerink, R Anlers and P Van der Zaag 'Contested water rights in post-apartheid South Africa: the struggle for water at catchment level' (2011) *Vol.37 No.4, Water South Africa* 585.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

water. Lastly, efficiency entails that water should not be wasted but must be used to the best possible social and economic advantage.²⁴⁵

3.4.2 Water Service Act

The Water Service Act provides that a person has a right of access to basic water supply and basic sanitation.²⁴⁶ The Act extends an obligation on the water services authority to provide measures in its water services development plan to realise these rights.²⁴⁷ The right access to water is however subject to limitation contained in the Water Service Act.²⁴⁸ Section 1(iii) of the Act defines basic water supply as the minimum standard of water supply services necessary for the reliable and equitable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

According to Regulation 3²⁴⁹ made by the Minister of Water Affairs and Forestry under sections 9(1) and 73(l) (j) of the Water Services Act 1997, the prescribed standard for basic water supply is a minimum quantity of portable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute. Furthermore, the basic water supply should be within 200 metre of a household and with such effectiveness that consumers are not without supply for more than seven days in a year.²⁵⁰ In light of international law this is not the best that South Africa can offer to its citizens. According to the International Convention on Economic, Social and Cultural rights²⁵¹ the State Parties must adopt appropriate measure to ensure that it carry out its international obligation. Arguably, since there are still a lot of people in South Africa who are living without access to water irrespective of the free basic water supply the state has to offer, South Africa has not yet done its best according to international standards.

The right to have access to water does not necessarily mean that water services should be free of charge. Hence the Minister of Water Affairs may prescribe by regulations norms and

²⁴⁵ Guide to the National Water Act, available at <https://www.dwa.gov.za/documents/publications/NWAguide.pdf> (accessed 13 October 2016).

²⁴⁶ Water Service Act 108 of 1997, sec 3(1).

²⁴⁷ Water Service Act 108 of 1997, sec 3(3).

²⁴⁸ Water Service Act 108 of 1997, sec 3(4).

²⁴⁹ Regulations Relating to Compulsory National Standards and Measures to Conserve Water. The Minister of Water Affairs and Forestry has under sections 91(i) and 73(l) (j) of the Water Services Act, 1997 (Act No. 108 of 1997), made the Regulations in the Schedule. Regulation Gazette No. 7079 Vol. 432 Pretoria 8 June 2001 No. 22355.

²⁵⁰ WATER Regulations relating to compulsory national standards and measures to conserve water (note 31 above).

²⁵¹ International Convention on Economic, Social and Cultural rights, article 11&12.

standards²⁵²in respect of tariffs for water service after considering the national standards prescribed by him or her; social equality; the recovery of cost reasonably associated with providing the water services; the financial sustainability of water services in the geographic area in question; the redemption period of any loans for the provision of water services; the need for a return on capital invested for the provision of water services; and the need to provide for drought and excess water availability.²⁵³ However, it is not expected that such exercise of power should be inconsistent with the obligation of government under international human rights law.

3.5 Access to water as a shared responsibility of arms of government

Every state has its own system of government which enables them to operate efficiently. In South Africa the Constitution is the supreme law of the country.²⁵⁴ As the supreme law it divides the government into three spheres and these are; National, Provincial and local spheres of government. Furthermore, the Constitution declares that the three spheres of government are distinctive, interdependent and interrelated. This entails that each sphere has its own unique area of operation, that they are required to co-operate and acknowledge each other's area of jurisdiction and lastly that there should be a system of co-operative governance and intergovernmental relations among the three spheres.²⁵⁵ In other words there is a clear separation of powers between there spheres. However, despite the separation of powers they are all required to work together without duplicating each other's' functions. No sphere of government can escape the general responsibility for realising socio- economic rights. This comes within the purview of the term cooperative governance which is explained in the Constitution that cooperative governance indicates that all arms of government in South Africa has definite political and legal obligations to support and refer to each other on matters of common concern, to cooperate and maintain friendly associations.

Furthermore, section 41 of the Constitution encourages the three spheres of government to cooperate with one another in good faith and to promote effective inter-governmental relations, ensure effective communication and coordination, respect the constitutional status, institutions, powers and functions of government, and avoid taking their disagreements to court.

²⁵² National Water Act 36 of 1996, sec 10(1).

²⁵³ National Water Act 36 of 1996, sec 10(3).

²⁵⁴ G Devenish A Commentary on the South African Bill of Rights (1999)10.

²⁵⁵ Ibid.

3.5.1 The role of the national and provincial government

The national sphere of government consists of the cabinet, which comprises the president as the head of the state and not a member of parliament and 39 national departments.²⁵⁶ The members of the cabinet are accountable to the parliament either collectively or individually for the manner in which they exercise their duties and perform their functions. South Africa has the following provinces: Eastern Cape; Northern Cape; Free State; Gauteng; KwaZulu-Natal; Limpopo; Mpumalanga; North West; and Western Cape. The provincial sphere of government comprises the provincial legislature and the provincial executive. To ensure that essential national standards are maintained or to set minimum standards for service delivery, the provincial government is required to supervise local government.

The responsibility to manage water is vested with the national government, while the management of water service delivery for all is vested on the local government. Hence, there are two acts regulating both functions and these are; National Water Act and Water Service Act. The National Water Act focuses mainly on the management of water resources and the Water Service Act deals with the management of water services.

Sections 154(1) and 115(7) of the Constitution of the Republic of South Africa tasks both provincial and national government by legislative and other measures to support and strengthen the local government to manage their own affairs, to exercise their powers and to perform their functions. The Bill of Rights gives both provincial and national governments the legislative and executive authority to see the effective performance by municipalities of their functions in respect of matters listed in schedule 4 and 5²⁵⁷ by regulating the exercise of their executive authority.²⁵⁸ The legislative competence of national parliament is provided for in the Constitution in section 43 and 44 read with schedule 4 and 5. Similarly the legislative competence of provincial governments is provided for in section 104 read with the same schedules. In terms of section 44 (1) (a) (iii), the

²⁵⁶ Public Service Act 103 of 1994, Schedule 1.

²⁵⁷ Schedules 4 and 5 to the Constitution provide a list of functional areas in which Parliament and the Provincial legislatures are competent to make laws. Schedule 4 lists those functional areas in which Parliament and the Provincial legislatures jointly have the power to make laws (for example matters relating to agriculture, consumer protection, health, housing, public transport and regional planning and development). Schedule 5 lists the functional areas in which the Provincial legislatures may make laws (for example matters relating to provincial planning, liquor licensing, provincial roads and traffic and provincial sport). Municipal Councils may make and administer by-laws for the administration of local government matters listed in Part B of Schedule 4 (for example building regulations, municipal health services and trading regulations) and Part B of Schedule 5 (for example control of public nuisances, fencing and fences, local amenities and street trading) to the Constitution.

²⁵⁸ Constitution Act 108 of 1996.

national legislative has powers: “to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 5.” This entails that both national and provincial governments have the power to pass any law in relation to the implementation of the affirmative action policies with regard to access to water service delivery in rural communities of South Africa.

In the case of *Grootboom v Oodtenberg Municipality*²⁵⁹, the applicants were all squatters who lived in Wallacedene, Kraaifontein, Western Cape for a long period of time. Their living conditions were extremely poor and as a result they illegally moved to what they considered to be vacant land. The owner of the land intended on evicting the applicants and as a result, brought an application in the Kuilsriver Magistrate’s Court for the removal of the applicants in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. An agreement was reached between the applicants and the owner that the applicants will vacate the land on or before 15 May 1999, on a condition that should they fail to do as agreed the sheriff would be authorised to take necessary procedures to evict them. The High Court held that, in terms of the Constitution,²⁶⁰ the State was obliged to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children; that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of the Constitution;²⁶¹ and that the State was bound to provide this basic shelter regardless of the availability of resources. The appellants were accordingly ordered by the High Court to provide those among respondents who were children, as well as their parents, with shelter. As a result an appeal was lodged by the appellants against this judgment.

The case landed in the Constitutional Court which judgement to an extent implied that where a municipality has failed to progressively plan and implement strategies to address the needs of its consumers, and where a municipality does not have the financial resources to address those needs through a strategy of progressive realisation. It is the responsibility of the provincial government in the first instance and thereafter that of the national government to support, strengthen and regulate to ensure the provision of basic service to those in need.²⁶²

In relation to rural communities, this would mean that in an event where the local municipalities as the water authorities or water service provider fails to provide access to safe drinking water for

²⁵⁹ The Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC).

²⁶⁰ Section 28 (1) (c) of the Constitution.

²⁶¹ Section 26 of the Constitution.

²⁶² Draft White Paper on Water Services: Water is Life Sanitation is Dignity. October 2002.

the rural communities, the provincial government has to interfere by adopting legislative and other measures necessary to ensure full progressive realisation of the right to water in rural communities. Likewise, section 63 of the Water Services Act seems to provide the national Minister with a legal instrument to intervene if a municipality fails to meet these standards. The Minister can intervene by assuming responsibility for that function in an event where the relevant provincial government has failed to do so effectively.

In case where the provincial government fails to provide access to safe drinking water to rural communities the national government may intervene to ensure that the Constitutional right is protected and promoted. As Ackermann J in *Fose v Minister of Safety and Security*²⁶³ that an appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Likewise, the governments should use the resources they have in ensuring equitable access to water services in all communities, including rural communities and in so doing it will be protecting and upholding the Constitutional provisions.

3.5.2 Local government

Local government is the third sphere of government which is interdependent and interrelated to the other spheres of government. The local sphere of government consists of municipalities.²⁶⁴ These municipalities are headed by municipal councils with legislative and executive authority over matters related to their respective communities. Like other spheres of government the local government comprises government departments which ensure that government policies are well implemented. However, to ensure unity of the state, municipal governmental policies and action plans have to be in line with the national and provincial legislation.

South Africa comprises 283 municipalities which is constitutionally divided into three categories, namely, metropolitan municipal, district municipality and local municipality. Section 152 of the Constitution sets out the objectives of the local government and these are: to provide democratic and accountable government of local communities, to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, to promote

²⁶³ 1996 (2) BCLR 232 (W).

²⁶⁴ Ibid.

a safe and healthy environment, and to encourage the environment of communities and community Organisation in the matters of local government.²⁶⁵

The local government bears the primary responsibility for water service provision. In terms of section 84 of the Municipality Structure Act,²⁶⁶ the responsibility for providing water service is vested on the district and metropolitan municipalities. Schedule 4 part B of the Constitution tasks local government with providing water, limited to potable water supply system. These municipalities are referred to as water authorities. Municipalities as water service authorities have the following primary responsibilities; firstly the responsibility to realise the right of access to basic water supply.²⁶⁷ The term basic water supply implies the prescribed minimum standard of water supply necessary for the reliable supply of a sufficient quality of water to households, including informal households, to support life and personal hygiene.²⁶⁸

The Water Service Act²⁶⁹ provides that the function for water supply is vested with the municipalities which it refers to as the water service authorities. According to this Act water service authorities can be any of the following: municipality, district, or rural council as defined in the Local Government Transition Act,²⁷⁰ responsible for ensuring access to water services. The Water Service Act provides that every water services authority has the duty to all consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water.²⁷¹ Subsection 2 of the Water Service Act provides that the duty of the water service authorities is subject to the availability of resources. This entails that the municipalities' duty for water supply is limited to the availability of resources.

Furthermore, the responsibilities of water service authorities involve ensuring progressive realisation of the right to basic water service subject to available resources, preparing water services development plans to progressively ensure efficient, affordable, economical and sustainable access to water. Secondly, the responsibility to select, procure and contract with

²⁶⁵ State of Local Government in South Africa: overview Report national state of Local Government Assessments (2009).

²⁶⁶ Act 117 of 1998.

²⁶⁷ Water Service Act 108 of 1997.

²⁶⁸ HJ Choma and P Ramphabana' legislative and policy frame works for basic services: a South African comparative study' (2015) *Vol. 4 No.4, Journal of governance and regulation* 1-6.

²⁶⁹ Water Service Act (note 227 above).

²⁷⁰ Act 209 of 1993, Chapter XIX.

²⁷¹ Water Services Act 108 of 1997, sec 11 (1) which provides that every water service 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.

water service provider. In other words the local municipality as a service authority, has the right to extend the provider function to an alternative agent (private sector) acting under its authority (contract). The process of engaging an external agent governed by the Municipality System Act²⁷² and lastly, the responsibility to educate consumers on the importance of water as a scarce natural resource.²⁷³

Local government has the mandate to provide the services and infrastructures that are necessary to meet the needs of those in deep need and this mandate flows from Section 11 of the Water Services Act. Hence, the Act creates a comprehensive legal framework in which the municipalities must operate. It requires the water service authority to ensure access to sufficient, affordable and sustainable access to water services for all consumers, make by laws, prepare a water services development plan; and devise an appropriate mechanism for providing water services. The Department of Water Affairs (hereinafter referred DWA) in the ministry of water and environmental affairs is primarily responsible for the formulation and implementation of policy governing water resources management as well as drinking water supply.²⁷⁴ The role of local government is performed in partnership with the other spheres of the government.²⁷⁵ This entails that the local government should work hand in hand with the national and provincial government to ensure equal access to water by rural communities still living without adequate access to safe drinking water.

3.5.3 Limitation of the right to water

Like any other constitutional right, the right to water is subject to limitations set out in 36(1) of the Constitution. Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited in terms of general application. The section requires any limitation of the constitutional rights to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In determining whether any limitation of the right water service delivery and other right, the court needs to consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose; and, less restrictive means to achieve the purpose. This entails that the right to water

²⁷² Act 32 of 2000.

²⁷³ Ibid.

²⁷⁴ K Tissington ('Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (2011), Socio-Economic Rights Institute of South Africa, 69.

²⁷⁵ J De Visser, E Cottle & J Mettler, Realising the right of access to water: 'Pipe dream or watershed?' available at <http://www.saflii.org/za/journals/LDD/2003/3.pdf> (accessed on 16 August 2016).

is not absolute, in that it can be limited and such limitation should be in line with section 36(1) of the Constitution.

If limitation of the right to water does not stand against the scrutiny of section 36(1) of the Constitution, it then means that such a limitation is not justifiable and fair in a democratic society and it is contrary to the position of the Constitution. Section 2 of the Constitution provides that if any law is contrary to any provision of the Constitution such law is null and void, arguably, this provision applies to an unjustifiable and unfair limitation. A limitation will only be regarded as being reasonable and justifiable if the purpose of the limitation is sufficiently important and consistent with an open and democratic society based on human dignity, equality and freedom. In determining whether a limitation is fair or justiciable. The court needs to consider the factors outlined in section 36(1) of the Constitution. The application of the provision of section 36(1) of the Constitution was canvassed in the case *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others*.²⁷⁶ In this case the second respondent, Mr. Radovan Krejcir, applied for asylum in South Africa in 2007. After his application for asylum was refused, Mr. Krejcir appealed to the Refugee Appeal Board (hereinafter referred RAB). The applicants, comprising three newspaper companies, requested the RAB's permission to have journalists present during Mr. Krejcir's appeal hearing in order to report on the proceedings and their requests were refused.

The legal issue in this case was whether the requirement of absolute confidentiality in proceedings before the RAB is a justifiable limitation of the Constitutional right to freedom of expression. In a unanimous judgment written by Zondo J, the Constitutional Court held that, to the extent that Section 21(5) of the Refugees Act²⁷⁷ does not confer a discretion upon the RAB to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable in terms of Section 36 of the Constitution and accordingly invalid.

In an event where the state has breached its positive duty the court usually uses the reasonableness model, to test whether the state's conduct is justifiable or not. It is not easy for the state to use lack of resources as a justification for its failure to fulfil its positive duty, because the court will assess the state's allocation decision and appropriation resources to determine whether there are in line with the vision of the Constitution or not. If the results are negative, the

²⁷⁶ CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) (27 September 2013).

²⁷⁷ 130 of 1998.

state won't be justified.²⁷⁸ This entails that the state must use all its resources to ensure that those who are in great need of access to water gain such access, in this case those who are in great need are rural communities.

3.5.4 Justiciability of the right to water

The right to water is a justiciable human right in the general courts and specific court, such as the Water Tribunal in South Africa. The case of *Mazibuko v City of Johannesburg* is an example of the justiciability of the right to water.²⁷⁹ In that case, reversing the judgement of the South Gauteng High Court and the Supreme Court of Appeal, the Constitutional Court affirmed the reasonableness of the city policy which specifies that the minimum standard of water per household per month is 6 kilolitres and allow the installations of pre-paid meters to charge consumers for use of water in excess of the 6 kilolitres per household monthly free basic water allowance. Even though criticized, the case illustrates that the right to water is justiciable.

The doctrine of justiciability provides the party claiming the violation of the right as provided for in the Bill of Rights the authority to approach the independent judicial body to determine the claim. To be justiciable a claim must be based on the alleged infringement of a substantive right.²⁸⁰ According to Devenish an individual having a *locus standi* in terms of section 38 can make an application to a competent court for Constitution.²⁸¹ The party striving to justify the infringement would have to prove that the right has not been restricted in accordance with the limitations set out in section 36 of the Constitution.²⁸²

Not all claims can be heard in the court of law. Claims which the court cannot hear are claims which do not involve the application of the law, these are known as administrative decisions. These claims can be heard by the Water Tribunal established in terms of the National Water Act.²⁸³ The Water Tribunal is an independent body with jurisdiction in every province in South Africa and it may conduct a hearing anywhere in the country.²⁸⁴ The distinction between the court

²⁷⁸ Ibid.

²⁷⁹ LA Williams 'The Justiciability of Water Rights: *Mazibuko v City of Johannesburg*' (2013) *Vol.8 (2) Willamette Journal of International Law and Dispute Resolution* 211-255.

²⁸⁰ National Water Act (58) Section 146(2). See also; H Thompson *Water Law: A Practical Approach to Resource Management and Provision of Services* (2006)604.

²⁸¹ Devenish G A *Commentary on the South African Bill of Rights* (Butterworths 1999)10.

²⁸² Ibid.

²⁸³ National Water Act 36 of 1996, section 146(1).

²⁸⁴ National Water Act (58) Section 146(2). See also; H Thompson *Water Law: A Practical Approach to Resource Management and Provision of Services* (2006)604.

of law and the water tribunal is that the court deals with judicial decisions whilst the water tribunal deals with administrative decision. This entails that the party may approach one of the two for relief depending on the nature of the claim. This means that individuals or members of any community, including rural communities may approach the court or the Water Tribunal for a relief whenever their constitutional right to water has been unfairly limited or they are unduly denied of the right to access to water. Despite the foregoing potentials in the legislative environment on the right to access to sufficient water, there are documented challenges relation to the right among rural communities in South Africa.

3.6 Challenges to access of rural communities to water service in South Africa

In 2000 the Department of Water Affairs introduced the free basic water policy, through which the Water Services Authorities (hereinafter referred WSA) and Water Services Providers (hereinafter referred to as WSP) are delegated by the Department of Water Affairs (hereinafter referred DWA) to make sure that everyone in the country, including poor households who cannot pay for water services, have access to at least a basic level of service (defined as 25l per person per day) at no cost.²⁸⁵

Despite the effort made by the DWA to ensure that indigent people receives free basic water for survival, South Africa is experiencing a number of challenges with regard to the implementation of the free basic water policy. Following are some of the reported challenges faced by the rural communities with regard to water service delivery in South Africa.²⁸⁶In rural communities water infrastructures are not in good condition due to poor maintenance; shortage of skills particularly in the engineering and scientific profession.²⁸⁷In early 2013 Mothetha, Nkuna and Mema conducted a study in a number of rural communities in Limpopo province. The authors found that those municipalities lack capacity, unequal distribution of the available water resources, poor operation and maintenance of existing infrastructures, illegal connections and finally political interference.²⁸⁸ In other words, lack of skills and capacity within municipalities has a way of impacting adversely on matters of operation and maintenance and other matters compulsory in facilitating service provision, leaving municipalities incapable of addressing some of the

²⁸⁵ DWA (2002) Free Basic Water Implementation Strategy Version 2, available at <http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf/> (accessed 03 November 2016)

²⁸⁶ Ibid.

²⁸⁷ M Marsden, Facing challenges in the water sector, Mail & Guadiana , 27 March 2014, 13;38.

²⁸⁸ M Mothetha, Z Nkuna and V Mema, The challenges Facing Several Rural Water Supply: A Case Study of Rural Areas in Limpopo Province, available at researchspace.csir.co.za/dspace/bitstream/10204/7593/1/Mothetha,2013. (accessed 27 January 2017).

challenges as desired. In 2008 a report was received by the National Department and Local Government (hereinafter referred DPLG) informing the DPLG of the problems relating to service delivery in several municipalities in South Africa.²⁸⁹ These service delivery problems include lack of water service delivery in rural communities. These challenges create a gap between recognition, limited supply and cumulative demand for water supply.

Up to this point, a number of municipalities are unable to maintain their water service infrastructures to ensure sustainability of water service delivery. This often results to service delivery protest by members of the community.²⁹⁰ Majority of people experiencing the challenges of access to water are those residing in rural communities due to their inability to pay municipality tariffs for service delivery and this includes water supply.²⁹¹

In rural communities of South Africa, there is an increasing demand for water causing severe strain on this limited natural resource. In 2012 Minister of Water Affairs, Edna Molewa, stated that South Africa is staring down the barrel of a 'near crisis situation' with regards to water supply.²⁹² South African communities are already facing challenges with regard to access to safe drinking water, particularly in rural communities. Hence, there is a need to take appropriate action.

Due to lack of access to water, a considerable number of residents of the Vhembe district decided to engage on service delivery protest in October 2014.²⁹³ They demonstrated against Nandoni dam, which is the dam aimed at solving water shortage problems within the district. It took five years for the completion date for residents in the district to finally gain access to purified water from the dam, although at a cost.²⁹⁴ The construction of the dam came at a cost in that those who were residing near the construction site had to be relocated. In addition, for residents to access the purified water from the dam they had to pay a specified amount of money for house hold connection. This was to the surprise of the residents in that region, since they were under the

²⁸⁹ Department of Local Government, available at http://www.gautengonline.gov.za/Publications%20and%20Reports/Local_Government_Annual_Report_2008.pdf (accessed 19 February 2017).

²⁹⁰ Challenges in smaller municipalities, available at <http://www.infrastructurene.ws/2013/03/11/challenges-in-smaller-municipalities/> (accessed 03 November 2016).

²⁹¹ M. Mothetha, Z. Nkuna and V. Mema, The challenges of rural water supply: a case study of rural areas in Limpopo Province, available at http://researchspace.csir.co.za/dspace/bitstream/10204/7593/1/Mothetha_2013.pdf (accessed 03 November 2016).

²⁹² Statement by Minister of Water and Environmental Affairs Edna Molewa at the Release of the National Blue Drop Water Quality Assessment Report, available at <http://www.gov.za/statement-minister-water-and-environmental-affairs-edna-molewa-release-national-blue-drop-water> (accessed 25 January 2017).

²⁹³ M. Mothetha, Z. Nkuna and V. Mema (283 note above).

²⁹⁴ Ibid.

impression that access to water would be free of charge.²⁹⁵ Residents of rural communities engage on service delivery protests because it has become a tradition that for their whims and claims to be heard they have to fight for it. These protest often lead to destruction of infrastructures such as road.

In 2014, Tou wrote an article for the City Press newspaper in which he indicated debates regarding the Nandoni Dam project which the surrounding communities view as a failed project since it does not guarantee them access to free water.²⁹⁶ The author cited a number of stakeholders and the most crucial thing is that the author indicated that one stakeholder indicated that only two villages out of 21 had access to water and out of those two villages only 3% had access to water.²⁹⁷ With a situation such as this the locals find public demonstrations of their disappointment and frustrations as the only recourse.

Poverty is the most profound challenge to access to water which is currently facing rural communities of South Africa. A considerable number of people in rural communities are from poverty stricken families and they cannot afford basic water services.²⁹⁸ Most people in rural community face the challenge of developing themselves economically, meaning that little income is available to invest in water. Lack of access to sufficient water contributes to poverty status of populations in rural communities. This is because water contributes to economic development. In light of the rural communities, water is vital because of the agricultural activities occurring in rural communities and without water they cannot engage in those activities. In other words, lack of access to adequate water has negative impact on economic growth.²⁹⁹

Additionally, inefficient management of water infrastructures in rural communities remains a challenge. Inadequate and unreliable infrastructure services are common in the majority of rural communities in most African states.³⁰⁰ Access to basic infrastructure services is essential to attain social development goals and ensure equal opportunity for all people to participate in a country's economy.³⁰¹ This is a best solution for poverty and inequalities in rural communities. It is the duty

²⁹⁵ Water Supply for Rural Areas and Small Communities, available at:

http://www.who.int/water_sanitation_health/dwq/monograph42.pdf (accessed 20 February 2017).

²⁹⁶ P Tou (2014) Dam the rich, City Press, available at <http://www.citypress.co.za/news/dam-rich/> (accessed 31 January 2017).

²⁹⁷ P Tou (note 290 above).

²⁹⁸ Ibid.

²⁹⁹ 3 rd Economic and Social Rights Report, available at

https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter_8.pdf (accessed 25 January 2017).

³⁰⁰ Rural Infrastructure in Africa, Unlocking the African Moment, Development Support Monitor - Paper Series No.1, 2012.

³⁰¹ Gnade H (2013) Basic Infrastructure Delivery and Its Welfare Effect on Rural and Urban Municipalities Paper to Be Presented At the Conference of the Economic Society of South Africa, Bloemfontein, September.

of the government to provide people with basic water service infrastructures. Access to such infrastructure is actually considered a basic human right. As a human right each and every individual is entitled to it regardless of where they reside, this includes rural communities. Access to water infrastructure service has a great impact in elevating poverty and inequalities.³⁰² In this case, it is vital for government to develop comprehensive measure to ensure that there is adequate water infrastructure in rural communities as compared to urban areas to ensure equality. A number of rural communities in South Africa have no access to water infrastructure while those with water infrastructures have no access to water. This is not surprising, most rural communities in South Africa depend on ground water and maintenance of ground water is often expensive, which results in its failure to maintain the water infrastructures. This is because maintenance of infrastructure requires sustainable financial resources.³⁰³ Rook confirms that monitoring and evaluation of ground water can be costly due to poor understanding of many of the location, quality and functions in rural system of ground water resources³⁰⁴. This entails that having access to water infrastructure does not necessarily mean there is access to water for drinking or other domestic uses. Rademeyer indicated that the fact that a person has a tap does not mean they have clean water or access to pipe water.³⁰⁵

The development of rural infrastructure will not only reduce the cost of inputs and transport to markets as mentioned above; it will increase farmers' access to enlarged markets, facilitate trade flows and spur value addition and crowd-in investments.³⁰⁶ As rightly put by Shimokawa, growth in agricultural productivity depends largely on an effective rural infrastructure, functioning domestic markets, appropriate institutions and access to appropriate technology.

No doubt, in South Africa there is the Free Basic Water Policy which entitles that every individual in the country to access 25 litres per person per day and 6 kilolitres per household per month. This standard agrees with the international standards. This is covered by the Water Service Act.³⁰⁷ Also the organization in charge of water allocation, the South African Department of Water Affairs and Forestry (hereinafter referred SADWAF), is ineffective at determining what amount of water

³⁰² Ibid.

³⁰³ J Briscoe 'Invited opinion interview: two decades at the centre of world water policy' (2011) *Vol.13, Water Policy*, 147-160.

³⁰⁴ J Rook 'Formation of Heliiform during Chlorination of Natural Waters' (1974) *Vol.23, Water Treat Exam*, 234-243.

³⁰⁵ J RADEMEYER, claims that 94% in South Africa have access to safe drinking waterdoesn't hold water, published 29 April 2013, available at <http://africacheck.org/reports/claim-that-94-in-sa-have-access-to-safe-drinking-water-doesnt-hold-water/> (accessed 30 January 2017).

³⁰⁶ Ibid.

³⁰⁷ Section 9 and 10 of the Water Service Act.

people use per month in rural areas where there is a lack monitoring devices.³⁰⁸ This is due to the lack of resources to monitor water consumptions in rural areas and this results in the running out of funds by the government which they could use to maintain the infrastructures. However this cannot be used by the government as a justification of its failure to ensure that there is equitable access to water supply infrastructures in rural communities as compared to monitored urban areas. This is because the Constitution requires the government to provide equal access to water for all within its available resources.

It is evident from the above discussion that despite the legal environment, rural communities are yet to realise the right to access sufficient water. Lastly, lack of political will, in particular, at the municipal level is hindering the successful implementation of Water Demand Management (hereinafter referred WDM)³⁰⁹ and other comprehensive strategic interventions in many rural communities in South Africa and is a major cause for failure of interventions which could debatably have been effective in various political environment.³¹⁰ In many cases it is reported that the politicians, particularly at the local municipal level do not support WDM interventions despite the growing pressure being placed upon them by Department of Water Affairs. Without proper support from the local politicians, it could prove difficult to implement many of the obvious and highly effective WDM measures.³¹¹ Political support is necessary to ensure that there is equitable distribution of water infrastructures in a number of communities of South Africa particularly the marginalised rural communities.

3.7 Conclusion

This chapter began with a detailed examination of the historical perspective of the right to water in South Africa. It has been demonstrated that to prior the enactment of the Constitution there were enormous inequalities with regard to water service delivery in South Africa, particularly in rural communities where majority of black people resided. However, change in water service delivery was anticipated after the enactment of the Constitution Act 108 of 1996. The Constitution consist of the Bill of Rights, which provides for the right to water in section 27 of the Constitution. Section 27 (1) (b) guarantees every individual the right to have access to water. The inclusion of

³⁰⁸ Water Access in South Africa: Background: South Africa's Current Water Situation, available at <http://12.000.scripts.mit.edu/mission2017/case-studies/water-access-in-south-africa/>, (accessed 27 January 2017).

³⁰⁹ RS Mckenzie and W Wegelin, Challenges facing the implementation of water demand management initiatives in Gauteng Province, available at <http://www.scielo.org.za/pdf/wsa/v35n2/a05v35n2.pdf> (accessed 17 February 2017).

³¹⁰ RS Mckenzie and W Wegelin (note 309 above).

³¹¹ Ibid.

the right to water in the Bill of Rights and the application of international human rights laws offer opportunity for South Africa to completely restructure its water laws.

As enunciated the enactment of the Constitution resulted in the enactment of a number of Acts such as the Water Service Act and the National Water Act. Both Acts were enacted to promote and protect the right to water as provided by the 1996 Constitution. The National Water Act is responsible for protecting, managing and equitable allocating water resources to relevant individuals, this specifically includes to rural communities. Furthermore, it recognises the need for a more equitable distribution of water for drinking and other domestic uses. While on the other hand, the Water Service Act prescribes the minimum quantity of portable water of 25 litres per person per day or 6 kilolitres per household per month.

The chapter also discussed the role of different arms of government in relation to the right to water. The responsibility to manage water as indicated is vested on the national and provincial government while the management of water service delivery for all is vested on the local governments which are the municipalities. Furthermore, sections 154 and 115 of the 1996 Constitution of the Republic of South Africa task both national and provincial government by legislative and other necessary measures to support and strengthen the local government to manage their own affairs, to exercise their power and to perform their functions. This chapter also dealt with the examination of the documented challenges being faced by rural communities, despite the domestic legal framework.

Notwithstanding the effort made by the Constitution and other legislation by recognising, protecting, promoting and ensuring that those who were previously disadvantaged by the apartheid laws receive free basic water for survival, there are still a number of challenges with regard to access to water and the implementation of the free basic water policy. The next chapter focuses on the examination of the suitability of affirmative action as a measure enhance access to safe drinking water and the implication for judicial enforcement in realising effective water service delivery in South Africa.

CHAPTER 4

AFFIRMATIVE ACTION AS A RESPONSE TO ENSURE ACCESS TO WATER IN RURAL COMMUNITIES OF SOUTH AFRICA

4.1 Introduction

The previous chapter dealt with the right to water under other South African legislation; access to water: a state's responsibility in South Africa; and documented challenges posed by legislative frame work to access of rural communities to water service in South Africa. This chapter aims at examining whether affirmative action can be a suitable measure to enhance access to safe drinking water and its implication for judicial enforcement for the provision of water services by the government in South Africa. This chapter begins with the meaning and evolution of the concept of affirmative action. This is followed by a discussion of the following: affirmative action under international human rights law; affirmative action on the right to water; affirmative action in South Africa; application of affirmative action as a response to water delivery in rural communities; and lastly conclusion.

4.2 The meaning of affirmative action

The Black Law Dictionary describes affirmative action as a situation when an employer must consider employing any race or minority that applies for a job,³¹² while Faundez describes affirmative action as measure concerning giving of special treatment to individuals belonging to an identified group to enable them to gain equitable share of the specified public good.³¹³ The concept of affirmative action is commonly regarded as the enactment of particular "public good" policy formulation, a mechanism whereby to attain certain social justice goals, and means where by political concerns vis-a-vis issues of representatively and envisaged social change within society change within the society are dually addressed.³¹⁴ Furthermore, Adejumo defines

³¹² The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed: Law Dictionary: An Information and Definitions from Black's Law Dictionary, available at <http://thelawdictionary.org/letter/a/page/64/> (accessed 21 February 2017).

³¹³ J Faundez 'Promoting Affirmative Action' (1994) *Vol. 11 No. 4, Indicator South Africa*, 57-60.

³¹⁴ A Badroodien (EM) Bodying Affirmative action within a Society of Meaning Making (2010) *Vol. 24 No.2, South Africa journal of Higher Education*, 346-357.

affirmative action as policies designed to address inequalities and discrimination, and to manage a wide range of diversity in all spheres of life, particularly after the democratic dispensation.³¹⁵

Sabbagh, generally defines affirmative action to involve measures that assigns goods such as, admission into universities, jobs, promotions, public contracts, business loans, and rights to enter into a contract of sale and purchase, to individuals forming part the identified group. This is done for the purpose of increasing the number of members of that group in the relevant labor force and other sectors where they are presently underrepresented as a result of past laws which promoted or promotes discrimination.³¹⁶ According to Grogan, affirmative action is a programme or policy in terms of which a group of people are accorded preferential treatment on the basis of some common characteristic.³¹⁷ As such, affirmative action is an unavoidably distinction against members of all groups who do not possess those characteristics. For its protagonists, affirmative action is defensible because it seeks to make good the effects of past discrimination.³¹⁸ In defining affirmative action Chibundu stated that:

Affirmative action is about the legitimacy of a limited departure from established modes of selection in order to afford members of identified “underrepresented or disadvantaged” person in a society preferential access to social, economic and political goods including employment, education, contractual opportunities and ballot process.³¹⁹

From the above definitions of affirmative action from various scholars, it is clear that affirmative action basically entails enabling access to social benefits by those who were previously denied due to the laws governing access to such benefits. Advocates of affirmative action largely view affirmative action as a retributive measure to ensure that marginalised groups have access to service delivery and it is without doubt that this includes water service delivery.

4.3 International human rights law and affirmative action on the right to water

³¹⁵ O Adejumo ‘Affirmative Action in South Africa’ (2013) *Vol.3 No. 1, Journal of Psychological Issues in Organisational Culture*, 14-27.

³¹⁶ D Sabbagh (2004) United Nations Development Programme Human Development Report Office OCCASIONAL PAPER Background paper for HDR 2004: Affirmative Action Policies: An International Perspective.

³¹⁷ J Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2008) Juta & Co Ltd, Cape Town, 163

³¹⁸ Ibid.

³¹⁹ M O Chibundu ‘Affirmative Action and International Law’ [online], (1997) *Vol. 15 No.2, Law in Context* 11-50, available at <http://search.informit.com.au/documentSummary;dn=323163974525252;res=IELHSS> > ISSN: 0811-5796 (accessed 13 February 17).

The incorporation of affirmative action within the international law model was influenced by two factors: firstly it is the prevalence of unequal treatment based on culture, economic cleavages and social status; and effective articulation of a legal right to relief by representatives of the previous disadvantaged groups.³²⁰ The use of affirmative action is supported by a number of international treaties, such as the Universal Declaration of Human rights Universal Declaration Human Rights (hereinafter referred UDHR),³²¹ the International Covenant on Economic, Social and Cultural Rights (hereinafter referred ICESCR),³²² International Covenant on Civil and Political Rights(hereinafter referred ICCPR),³²³ International Conference on Religious Studies and Comparative Religion (hereinafter referred ICRSCR)³²⁴ and International Covenant on the Elimination of All Forms of Racial Discrimination (hereinafter referred ICERD)³²⁵ which provide the normative anchor for the redistribution of basic resources to benefit the underrepresented groups.

Affirmative action is viewed as an instrument that comprises both negative liberties and progressive realisation of material equality among disadvantaged groups to ensure that there is equitable access to basic needs for human survival and maintenance of human dignity and self-worth.³²⁶ Under classical international law model a claim based on affirmative action on the international community can be asserted only by nation state.³²⁷ The UDHR does not explicitly mention the word affirmative action in any of its articles, but contains two elements which have bearing on the concept affirmative action. Firstly, the UDHR emphasises the principle of human equality and secondly, it proclaims that every individual has the right to work, to an adequate standard of living, and to education. The words adequate standard of living has been interpreted by the Committee on Economic, Social and Cultural Rights to include the right to have access to water.³²⁸

³²⁰ Ibid.

³²¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), article 21.

³²² International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (entered into force 3 January 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

³²³ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

³²⁴ ICRSCR 2017: 19th International Conference on Religious Studies and Comparative Religion, available at <https://www.waset.org/conference/2017/09/prague/ICRSCR> (accessed 19 February 2017)

³²⁵ The United Nations. "International Convention on the Elimination of All Forms of Racial Discrimination." Treaty Series 660 (1966): 195. Print.

³²⁶ C Romany & J Chu 'Affirmative action in international human rights law: a critical perspective of normative assumption' (2004) *Vol.36 No.831, Connecticut Law Review*.

³²⁷ M O Chibundu (note 310 above).

³²⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights.

Affirmative action is commonly referred to as special measures under international law system. The first endorsement of special measures in international law was made by the Government of India at the time of drafting the ICESCR. India recommended that a descriptive section should be encompassed in the text of article 2 of the covenant stipulating that:

Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear.³²⁹

The above comment, however, did not make it into the final draft of the ICESCR, hence, the ICESCR does not provide for the use of affirmative action in express terms. The concept of affirmative action is provided by its General Comment No 22.³³⁰ The General Comment states that:

States must also take affirmative measures to eradicate social barriers in terms of norms or beliefs that inhibit individuals of different ages and genders, women, girls and adolescents, from autonomously exercising their right to sexual and reproductive health. Social misconceptions, prejudices and taboos about menstruation, pregnancy, delivery, masturbation, wet dreams, vasectomy and fertility should be modified so that these would not obstruct individual's enjoyment of the right to sexual and reproductive health.

Craven indicated that the ICESCR does not envisage an absolute equalization of result in the sense of achieving an equal distribution of material benefits to all members of society.³³¹ It does, however, recognise a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society, based on the idea of equality of opportunity.³³² The use of special measures to ensure that the underrepresented groups came into light after the adoption of the General Comment No.15 to the Convention. In relation to the right to water the Committee stated that:

States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority

³²⁹ United Nations document A/C.3/SR.1182, para. 17.

³³⁰ General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22, para 48.

³³¹ M Craven The International Covenant on Economic, Social and Cultural Rights, a Perspective on its development, Oxford, Clarendon Press (1995) 158.

³³² Ibid.

groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees.³³³

In respect of the right to water the Committee further required the State Parties to ensure that:

Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated; Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency; Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status; Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water; Nomadic and traveler communities have access to adequate water at traditional and designated halting sites; Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals; Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners; Groups facing difficulties with physical access to water, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water."³³⁴

The General Comment indicates that the State Parties needs to give "special attention" to the previously disadvantaged individuals who could not access water or who does not have access to water up to this point. The special attention which the states are required involves the application of the concept of affirmative action to ensure that there is equal enjoyment of water

³³³ Twenty-ninth session (2002) General comment No. 15: The right to water (arts. 11 and 12 of the Covenant).

³³⁴ Ibid.

which is a fundamental and yet scarce natural resource. During the drafting of the ICRSCR³³⁵ and the ICCPR,³³⁶ it was generally accepted that a prohibition of discrimination and distinction, respectively, did not exclude adoption of positive measures in favour of underrepresented groups. Some authors believe that the gist of the general comments is that affirmative action to implement the ICCPR's non-discrimination obligations is mandatory. According to Thornberry, it can be concluded that the concept of affirmative action is not contrary to the law of the Covenants.³³⁷ Article 1(4) of the International Covenant on the Elimination of All Forms of Racial Discrimination on the other hand provides that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The International Covenant on the Elimination of All Forms of Racial Discrimination enables the adoption of special measure if need be to ensure the equal enjoyment of the right guaranteed by the Covenant. In light of the right to water, it entails that the State Party in terms of this covenant is not prohibited from applying affirmative action to ensure that those who previously or who still do not have access to water enjoy equal access to water service delivery as provided by the covenant.

In the case *Stalla Costa v. Uruguay*,³³⁸ the author complained of the preferential treatment, regarding the reinstatement to the public service of former public officials who had previously been unfairly dismissed on ideological, political, or trade union grounds. The author argue that preferential treatment unfairly prejudiced his own chances of gaining a public-service job. This case dealt with a complaint regarding preferential treatment regarding the reinstatement to the

³³⁵ ICRSCR 2016: 18th International Conference on Religious Studies and Comparative Religion.

³³⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976, in accordance with article 49, for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41.

³³⁷ P Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1991, 284.

³³⁸ Communication No. 198/1985 9 July 1987.

public service of former public officials who had previously been unfairly dismissed on ideological, political, or trade union grounds. It is submitted that had this case dealt with the issue of access to water delivery the decision would not have been different at all.

In all, it is evident from the above discussion that the International human rights law does not only guarantee the right of water as established in chapter two of this dissertation, it permits the use of affirmative action, which arguably applies to ensure access to water service delivery to previously disadvantaged or underrepresented groups, specifically rural communities. A number of rural communities in South Africa have been previously disadvantaged with regard to access to safe drinking water and they continue to bear the brunt of these past discrimination. States like South Africa as indicated in the preceding chapter can be legally expected to apply affirmative action in the context of water service delivery to its rural communities who bear the brunt of lack of access to water on a daily basis. Also since international human rights law endorses affirmative action, based on section 39(1) of the Constitution which allows the application of international law in South Africa, one can argue the application of affirmative action in South Africa.

4.4 Affirmative action in the South African legal system

From 1948 until 1994 South Africa was under the apartheid regime. A number of statutes enacted during the apartheid era promoted racial discrimination and people were grouped according to their race and labeled; white, coloreds, Indians and blacks.³³⁹ This was done for the purpose of allocating benefits which come with being a South African citizen to white people. White people were perceived as the most important people in South Africa thus deserving special treatment. This was done in exclusion of the other groups more especially black people.³⁴⁰ This resulted in imbalances and inequality with regard to service delivery, particularly water service delivery. The people who bore the brunt of apartheid regime were mostly blacks, in that they were prohibited to live, travel, work, and share public resources, get married, educated and to mingle with white people.³⁴¹ In most townships and rural communities where the majority of black people resided there was lack of access to sufficient water supply.

³³⁹ Regulated in terms of the National States Citizenship Act 26 of 1970. See the Promotion of Bantustan Self-government Act 46 of 1959, replaced by the National States Citizenship Act 26 of 1970; the Constitution of Bantu Homelands Act 21 of 1971; the Status of the Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1977; the Status of Ciskei Act 110 of 1981.

³⁴⁰ Ibid.

³⁴¹ Ibid.

Affirmative action was consequently established to redress the gender as well as racial imbalances and to ensure that there is equal share of public services. According to Adejumo, affirmative action is generally understood as affirming and promoting equal opportunities for individuals to empower themselves so as to have full engagement in the society.³⁴² Affirmative action in South Africa included in the Bill of Rights as an interim measure to redress the inequalities which exist as a legacy of the apartheid regime.³⁴³ Section 9 (2) of the 1996 Constitution provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

It is apparent that section 9 (2) does not provide for affirmative action in express terms. However, affirmative action is said to be indirectly covered by the terms “other measure” which should be adopted by the relevant stakeholders to protect individuals forming part of the previously disadvantaged group.³⁴⁴ The Constitution of South Africa was promulgated to redress the injustices caused by the former government which is the apartheid government. Thus, the Constitution promotes substantive equality.³⁴⁵ Realisation of substantive equality will result in transformation of the rural communities in South Africa and the Constitution is dedicated to eradicating inequalities in South Africa, thus its commitment to substantive equality is demonstrated in section 1 of the Constitution. Substantive equality can transform rural communities both socially and economically.³⁴⁶ The Constitution does not expressly provide for affirmative action but does make provision for policy and legislation to be formulated to allow efforts to redress the inequities of the past.³⁴⁷ The Constitution permits the use of affirmative action provided its purpose is to ensure equality and the courts sometimes can be asked to determine the justiciability of the use of measures similar to affirmative action.

³⁴² O Adejumo 'Affirmative Action in South Africa' (2013) *Vol.3 NO.1, Journal of Psychological Issues in Organisational Culture*, 14-27.

³⁴³ Section 9(2) of the Constitution.

³⁴⁴ AM Louw, The employment equity act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) part 1, available at www.saflii.org/za/journals/PER/2015/28.rtf (accessed 08 may 2017).

³⁴⁵ See the preamble.

³⁴⁶ L M Katiyatiya (2014) Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry, Dissertation presented for the degree of Doctor of laws in the Faculty of Law at Stellenbosch University.

In addition to the above, there is the Employment Equity Act³⁴⁸ (hereinafter referred EEA) which was enacted to support the constitutional initiative to ensure that all individuals in the country are equally treated. Up to this point the EEA remains the only Act in South Africa which unambiguously provides for the adoption of affirmative action policies. Its section 15 states that:

Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer. Affirmative action measures implemented by a designated employer must include measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; measures designed to further diversity in the workplace based on equal dignity and respect of all people; making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; subject to subsection, measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.³⁴⁹

The EEA also obliges the employer to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.³⁵⁰ The 2010 Employment Equity Plan defines the term affirmative action as meaning:

Corrective steps that must be taken in order that those who have been historically disadvantaged by unfair discrimination are able to derive full benefits from an equitable employment environment.³⁵¹

In light of the right to water in South Africa, this would mean that affirmative action policies would enable the government to give those who were previously disadvantaged by the apartheid water laws, particularly those residing in rural communities' preferential treatment to ensure that they obtain equitable share of this scarce natural resource. Milne views affirmative action as the key of

³⁴⁸ 55 of 1998.

³⁴⁹ Sections 15 (1) & (2) (a), (b), (c) & (d) of the (Employment Equity Act.

³⁵⁰ Section 20 of the Employment Equity Act.

³⁵¹ *Solidarity v Department of Correctional Services* [2016] ZACC 18, para 11.

South Africa public service reform.³⁵² Whereas the White Paper on the transformation of the public service describes affirmative action as laws, programmes or activities designed to redress past imbalances and to enhance the conditions of individuals and groups who have been disadvantaged on the ground of race colour, gender and disabilities.³⁵³

The historic community of South Africa was filled with a range of inequities. This includes, *inter alia*, racial discrimination. Through legislation and policy the former government was able to exclude blacks and women from having rights in the workplace, as well as socially by ensuring that their progression economically or socially was reduced.³⁵⁴

There is rich jurisprudence on the application of affirmative action in South Africa. In *Van Heerden v Minister of Finance*³⁵⁵ the Constitutional Court was requested to protect an affirmative measure pursued to equalize pension benefits by promoting the contributions of members of a disadvantaged group and the court concluded that such use of affirmative action was justified and lawful. In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*³⁵⁶ Ngcobo J observed that:

In this fundamental way, our Constitution differs from other Constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.³⁵⁷

In *Solidarity Obo Barnard and Another v South African Police Service*,³⁵⁸ an application was brought on behalf of Mrs. R M Barnard, a member of the South African Police Services

³⁵² C Milne 'Affirmative Action in South Africa: From targets to Empowerment' (2009) Vol.44 No.1, Journal of Public Administration, 969-990.

³⁵³ Department of public service & administration (DPSA) 1995 White paper on the Transformation of the Public Service, available at: <http://www.dpsa.gov.za/document/acts®ulations/framesworks/white-papers/wpstoc.pdf> (accessed 2 February 2017).

³⁵⁴ M Mushariwa 'Who are the Beneficiaries of Affirmative Action? –Solidarity obo Barnard V SAPS 2010 5 BLLR 561(LC): Case (2011) Vol. 32 No.2, *Obiter* 439-452).

³⁵⁵ 2004 (6) SA 121 (CC).

³⁵⁶ 2004 (7) BCLR 687 (CC).

³⁵⁷ *ibid* at para 74.

³⁵⁸ *Solidarity obo Barnard and Another v South African Police Services* (JS455/07) [2010] ZALC 10; 2010 (10) BCLR 1094 (LC); (2010) 31 ILJ 742 (LC); [2010] 5 BLLR 561 (LC) (24 February 2010).

(hereinafter referred SAPS) since 1989. In 2005 the National Commissioner advertised a position within the department. The applicant applied twice for this position. Despite being shortlisted, interviewed and recommended as the best suited candidate, she was unsuccessful on each occasion. This matter however, only concerns her second attempt. The National Commissioner's reasons for not appointing applicant were that it would not enhance racial representation at that particular salary level and that since the post was not critical to service delivery, it was not necessary to fill the vacancy immediately. In other words their decision was based on affirmative action.

The relief sought by the applicant was for unfair discrimination based on race. The applicant alleged that she was denied promotion on two occasions for the sole reason that she is white. The matter was decided in terms of the provisions of the Employment Equity Act 55 of 1998. The court held that the failure to promote the Applicant was unfair and therefore inconsistent with the provisions of the Employment Act and an order was made by the court directing the respondent to promote the Applicant to the post of Superintendent. Dissatisfied by the judgment of the Supreme Court, the respondent lodged an appeal to the Constitutional Court. Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. In handing in the judgment of the majority Moseneke ACJ held that:

The SAPS Employment Equity Plan is a restitutionary measure contemplated in section 9(2) of the Constitution and section 6(2) of the Act.

The Constitutional Court found that the Supreme Court of Appeal misconceived the issues before it, as well as the controlling law. The Supreme Court of Appeal was obliged to examine the equality claim through the prism of section 9(2) of the Constitution and section 6(2) of the Act because the validity of the SAPS Employment Equity Plan was not under challenge by Ms. Barnard. The Constitutional Court found that the appeal in that case was decided on the wrong principle. The Court also held that the other cause of action, the review of the National Commissioner's decision, was only raised for the first time on appeal and was therefore not properly before the Constitutional Court. The Constitutional Court also held that on the facts this cause of action was, in any event, without merit.

The use of affirmative action to ensure equality was an issue in the case between *Unisa v Reyndardt*.³⁵⁹ The respondent in this case is a white male, appointed as the Dean of the Faculty of Science at the University of South Africa (hereinafter referred UNISA) for single term. The respondent applied for an additional term to serve as a dean of the above mentioned school. However, another candidate who is a colored was appointed instead of him. As a result the respondent alleged in the Labour Court that his non-employment resulted to unfair discrimination based on race. The labour Court decided in favor of the respondent. The court held that even though the employment equity plan that had been designed by UNISA was in accordance with the values and standards of the Constitution, its implementation was prejudicial. The above mentioned plans provided that as soon as they have achieved the equitable representation the suitable candidates will be employed and they will no longer apply affirmative action. The Labour Court in giving its judgment on the matter held that the employment of the colored male constituted a breach of UNISA's employment equity plan and thus, it resulted in racial discrimination against the respondent. Due to this UNISA took the matter on appeal to the Labour Appeal Court and which held that the aims of the *Employment Equity Act* is to eliminate unfair discrimination. Secondly, the court held that the key test in disputes of unfair discrimination is found in the case of *Harksen v Lane and Others*,³⁶⁰ where it was held that the questions to be asked were:

Does the differentiation amount to discrimination on a specified ground? If the differentiation amounts to discrimination; does it amount to unfair discrimination? Unfairness is presumed where discrimination is on a specified ground that has been identified and that the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation.

The question which the court asked was whether the measure target personal categories of persons who have been disadvantaged by unfair discrimination; is the measure designed to protect or advance such persons or categories of persons; and does the measure promote the achievement of equality. The Labour Appeal Court held that the appointment of a colored man instead of the respondent was not unfair due to its aim of affirmative action, which is to identify individuals who have been the victims of unfair discrimination, and to seek to advance such individuals so as to achieve equality. In terms of normal equality every individual should be treated equally However, in terms of the substantive equality measures should be implemented which

³⁵⁹ 2010 (12) BLLR 1272.

³⁶⁰ (CCT9/97) [1997] ZACC.

will ensure that those who were previously disadvantaged by the system of the previous government receives equal treatment.³⁶¹ This is an exceptional case where direct discrimination is permitted is for the purpose of correcting the wrongs of the past regime and ensuring equal enjoyment of freedoms and rights as provided by the Constitution.

In *Alexandre V Provincial Administration of the Western Cape Department of Health*,³⁶² The applicant, a white male, alleged unfair discrimination based on race following his non-appointment to a position to which he applied, was interviewed and had previously filled in a temporary capacity. The position was filled by a colored male. The applicant sought an order in terms of s 50 (2) of the Employment Equity Act 55 of 1998 compelling the respondent to retrospectively place him in a commensurate position to that of the contested position, alternatively an award of compensation or damages. The respondent argued that the successful candidate was appointed primarily on merit and the successful candidate's race was of secondary importance. The case was on the following legal question; whether the non-appointment of the applicant amounted to unfair discrimination on the basis of race in terms of s 6 of the EEA? Judge Murphy AJ held that the aim of affirmative action is to achieve substantive equality hence, a claim of unfair discrimination based on the application of affirmative action cannot stand before the court of law as unfair discrimination. Affirmative action will ensure that there is substantive equality with regard to access to water and allocation of more free basic water for the rural communities occupied by those who were previously disadvantaged (blacks) in exclusion of the urban areas this does not amount to discrimination because of its purpose which is to redress the injustices of the past regime.

The issue of affirmative action was also canvased in *the President of the Republic of South Africa and Another v Hugo*.³⁶³ This is an appeal case against the judgment of Magrid J of the Durban and Cost Local Division of the Supreme Court.³⁶⁴ The applicant (hereafter referred respondent) in this case was a male prisoner. The respondent was serving a sentence of fifteen and half years. Prior his imprisonment, he got married and out of the marriage a child was born. However, later on his wife passed on. In 1994, the then president of South Africa signed the Presidential Act, 17, which had a provision for special remission of sentences for an identified group of prisoners

³⁶¹ M Mushariwa (note 344 above).

³⁶² (2005) 26 ILJ 765 (LC); (2005) 6 BLLR 539 LC.

³⁶³ (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).

³⁶⁴ *Hugo v President of the Republic of South Africa and Another* 1996 (4) SA 1012 (D).

and only mothers in prisoners formed part of the identified group eligible for special remission of sentence.³⁶⁵ As a result, the respondent was not eligible for special remission of sentence.

The respondent sought for an order declaring the Act unconstitutional and directed the first appellant to correct it in accordance with the provision of the interim Constitution³⁶⁶ and because he was discriminated against on the ground of sex and that it indirectly discriminated against his son.³⁶⁷ Goldstone J emphasised the need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is the goal, that goal cannot be achieved by insisting upon identical treatment in all circumstances.

Based on the foregoing, it can be argued that the inclusion of affirmative action in legislation and its application by courts reflect the Constitution's commitment to redressing the injustices of the past regime. Arguably, this includes the injustices concerning access to water in South Africa, particularly by rural communities. Substantive equality as envisaged under international human rights law and domestic legislation envisage that inequality associated with access to water for rural communities should be urgently addressed in South Africa.

4.5 Application of affirmative action as a response to water delivery in rural communities

As earlier indicated, the role of the international human rights law is governed by the South African Constitution. Section 39 indicates that courts and other relevant institutions, when interpreting the provisions of the Bill of Rights must consider the provisions of international law. Furthermore, Section 231 of the Constitution indicates that South Africa will only be bound by the provision of a treaty after its ratification by the National Assembly and the National Council of Provinces, unless it is self-executing, or of a technical, administrative or executive nature. In terms of section 232 of the, Constitution customary international law is the law in South Africa, except if its provision is contrary with the provision of the Constitution. Section 2 of the Constitution indicates that the Constitution is the Supreme Law of the Country and any inconsistent with it is null and void. Section 233 provides that, when interpreting legislation, courts: "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative

³⁶⁵ The Presidential Act provided, inter alia, the following: "In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to : all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who has escaped and are still at large) all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years; all disabled prisoners in prison on 10 May 1994 certified as disabled by a district surgeon.

³⁶⁶ Act 200 of 1993.

³⁶⁷ Section 8 (1) & (2) of the interim Constitution.

interpretation that is inconsistent with international law”. The use of affirmative action is allowed in international law and since international human rights law allows for affirmative action, then its interpretation for water delivery equally also applies in South Africa. It can be argued that except domesticated or fall within the above exceptions, international human rights instruments relating to water service delivery are not operative in South Africa. However, the counter argument is that since the trend for courts is to apply international human rights law, its application in relation to affirmative action to ensure substantive justice on the right to water to those living in the rural communities cannot be an exception.

Hence, to ensure equitable access to water particularly for the rural communities, there is a need to trigger the potentials for affirmative action in some of the laws regulating access to water such as the Municipality Act, Water Service Act and the National Water Act and other laws. There is a need for the formal recognition of affirmative action in water laws.

Applying affirmative action to aid water delivery can be done through total cutting of water tariffs which residents of rural communities are expected to pay and the provision of free basic water supply. The researcher is of the view that substantive equality in relation to access to water supply can only be achieved through the use of affirmative action. Affirmative action can assist in reversing the injustices. It is the view of the author that affirmative action is the most relevant measure which can be adopted to ensure that there is access to water and such access should be equal in rural communities of South Africa. Furthermore, that affirmative action will ensure that water needs of those at lower ends of income distributions are effectively met.

A case in South Africa relevant to water delivery and affirmative action is *the City Council of Pretoria v Walker*.³⁶⁸ This is an appeal case relating to differential treatment of three areas in public services delivery and this includes water service. The respondent, Walker, was a resident of old Pretoria, an overwhelmingly white district. Old Pretoria was amalgamated with two black townships to form a new administrative district under the authority of the appellant council (City Council of Pretoria). The City Council of Pretoria continued the practice of charging for electricity and water on a differential basis, the residents of old Pretoria being charged a consumption-based tariff and those of the townships being charged a lower flat rate. A programme to install meters in all properties in the townships was implemented but the council decided not to start charging

³⁶⁸ 1998 (2) SA 363 (cc), 1998 (3) BCLR 257.

those residents in the townships who had meters installed at the consumption-based tariff until all the installation work had been completed. The Council's officials also adopted a policy of selective enforcement against defaulters; they continued to take legal action to recover arrears from residents of old Pretoria but failed to take similar action in the townships, where a culture of non-payment for services existed. Instead, the officials took a strategic decision to encourage payment of arrears by residents in those areas but not to take legal action against them while the installation of meters was still in progress.

The respondents in this case alleged discrimination and the violation of section 8 of the Constitution which deals with equality. The claim was based on the policy which the councilor implemented calling for resident of (white) old Pretoria to comply with the legal tariff and to pay the charges, while the (black) resident of Atteridgeville and Mamelodi were expected to pay only flat rates which was lower than the tariff. The legal question addressed by the court in the matter was whether the differentiation between these three residential areas constituted unfair discrimination in terms of section 8(2) of the Constitution. The Court held that the councilor when dealing with diverse communities should ensure that there is no discrimination. However, there is an exception to this when dealing with complex societies occupied by those who were previously disadvantaged and previously advantaged, where disadvantaged suffered the injustices of the past regime the councilor may resort to measure directed at eliminating the injustice and disadvantages that are consequences of the policies of the past to bring about equality within its available resources.³⁶⁹

In the foregoing case, it is clear from the above stated brief background of the case, that the case involved equal access to water for previously disadvantaged townships in Pretoria. Although the word affirmative action is not used by court, it is argued that the Court could have come up with a similar decision if case was analyzed using the concept of affirmative action. Indeed, had the concept being used, it would have enriched further the jurisprudence on the right to water in the context of affirmative action in South Africa.

Therefore, the case of *City Council of Pretoria v Walker* can provide guidance on the application of affirmative action in the context of water delivery to rural communities of South Africa. The court in this case stated that:

³⁶⁹ (note 358 above) para 49.

The differentiation was rationally connected to legitimate governmental objectives. Not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality, in terms of facilities and resources, during a difficult period of transition. Therefore there was no violation of s. 8(1).³⁷⁰

As a result, the use of affirmative action in relation to water service delivery of rural communities by the South African government will not constitute unfair discrimination if its use would be for legitimate governmental objectives which in this case is to ensure equal access to water in rural communities.

Municipalities as the water authorities must adopt measures which will ensure that residents of rural communities have access to water for them to be competitive either in the work place or any level of life. Affirmative action in relation to access to water supply can be enforced in the following manner; with regard to free basic water supply, the communities who were previously disadvantaged by the previous law dealing with access to water should be afforded free access to water up until to the point where they can be able to afford to pay for access to water. In other words they should be not treated the same as those residing in urban areas who are charged for the water they consume on a daily basis. This is because those living in the above stated areas can afford to buy extra water in case they run out of the free water supplied. In other words, the needs of those residing in rural communities should be prioritised because of the hardship they face with regard to service delivery, particularly water service delivery. The use of affirmative action will not in any way threaten or disadvantage those who are residing in urban areas because most of them are better-off and they were not previously disadvantaged with regards top access to water and most water infrastructures in urban areas are well and functioning. According to Sachs J, the use of affirmative action in relation to access to water would be considered as unfair discrimination if it had an effect of undermining one's dignity or sense of self-worth.³⁷¹

The advantage of using affirmative action to ensure access to water would be; reduction of unemployment, prevention of diseases caused by the use of contaminated water and prevention sexual abuse of women and girl children. This is because women and girl children in rural

³⁷⁰ City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC).

³⁷¹ City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC).

communities often become victims of sexual abuse because of walking long distance at night in order to access adequate water for drinking and other domestic uses. They usually walk at night to avoid standing on long queues the whole day for water and this is because most of them are young people still attending school and they need to attend school during the day.

Equal access to water supply does not mean receiving the same amount of water as those who reside in urban areas because that would be like adding the same amount to water on a water full tank and an empty tank and expect the tanks to be full at the same level. It is evident that the one which already had water will have more water and it will take time to finish as compared to the one without water. In the context of rural communities, affirmative action will ensure that rural communities and urban areas do not have equal access to basic water supply and make sure that they are in the same level. The argument can be reinforced by the 1996 South African Constitution which states that all citizens have the right to adequate amount of safe water.³⁷² For this reason, the free basic water policy was implemented. Both provincial and local government are responsible for ensuring that there is free basic water supply. Also the Water Service Act provides that everyone has a right of access to basic water supply and every water services institution must take reasonable measures to realise these right. It also imposes on the water services authority the duty to adopt necessary measures to realise the right to water through its water services development plan.³⁷³ The Act further defines basic water supply as the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.³⁷⁴ If viewed from that lens, it means the concept of affirmative action can be accommodated in the Water Service Act.

When making a determination regarding the right to water, the State should be thoughtful of the needs of those residing in rural communities (disadvantaged groups). In so doing, the state will see the necessity of adopting affirmative action in water laws of South Africa to address the problem of unequal water service delivery and complete lack of access of water. The increase of access to water in rural communities could diminish the rate of violence against women and children in rural communities, since lack of access to sufficient water for drinking and other

³⁷² L Farrar, Is South Africa's free basic water policy working? A quantitative analysis of the effectiveness of the policy implementation, available at <http://www.ewisa.co.za/literature/files/ID252%20Paper315%20Farrar%20L.pdf> (accessed 19 November 2016).

³⁷³ Section 3 (1) and (2) & (3) Water Service Act 108 of 1997.

³⁷⁴ Section 1 Water Service Act 108 of 1997.

domestic uses is a contributing factor to its prevalence. Hence, the state when implementing policies such as the installation of prepaid meters should consider the situation of those residing in rural communities.

According to Holland, prepaid meters removes procedural protection and consumer safe guards which are avenue available to a person whose water gets cut. The only option which an individual whose water has been cut has is to pay for water services but it becomes a dilemma when such person who is expected to pay has no source of income.³⁷⁵ This means that although there is nothing wrong with the use of prepaid meters to recover costs of services, the society cannot shun the fact or reality that majority of people residing in rural communities are poor.

4.6 Conclusion

This chapter started with a general introduction to affirmative action. Then followed a comprehensive definition of affirmative action where affirmative action are measures employed to ensure equal enjoyment of public service through recognition of the past injustice suffered by identified groups. The chapter further discussed affirmative action in context of the South African legal system, where it was pointed out that the genesis of affirmative action can be traced back to the introduction of the Employment Equity Act in South Africa. The current study advocates for the use of affirmative action to ensure equal access to water in rural communities of South Africa. The chapter indicates that affirmative action in South Africa is contained in section 9 of the Bill of Rights as an interim measure to redress the inequalities which exist as a legacy of the apartheid regime.

This chapter also examined international human rights law and affirmative action on the right to water. As indicated in this chapter, affirmative action is not foreign to international law. A number of international instruments provide for the use of affirmative action in the work place and to ensure gender equality. This chapter dealt with the examination of affirmative action as suitable option for the state in enhancing the right to water. it has been indicated that the use of affirmative action is supported by a number of international treaties, such as the universal declaration of human rights Universal Declaration Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), International Conference on Religious Studies and Comparative Religion (ICRSCR) & International Covenant on the Elimination of All Forms of Racial Discrimination

³⁷⁵ ACS Holland The Water Business: Corporations versus People; Dhaka, Bangladesh (2005).

(ICEFRD) and it provides the normative anchor for the redistribution of basic resources to benefit the underrepresented groups. It has been indicated that affirmative action has not yet been used in relation to access to water in South Africa nor any other state, hence there are no articles indicating the efficiency of affirmative action in relation to water.

The last discussion in this chapter focused on the application of affirmative action as a response to water service delivery in rural community. This is an important chapter of the research study, in that it introduces a new concept to elevate the problems faced by South Africa, particularly the residents of rural communities which is affirmative action. A number of case laws has been cited which indicated the efficacy of affirmative action in the employment sector and it has been argued that should affirmative action policy be applied in the water sector many rural communities of South Africa will not continue to live without access to safe water for drinking.

As it has been indicated, the water crisis faced by the country calls for the introduction of affirmative action within the water sector. International law is however silent about the use of affirmative action in the water sector. Affirmative action is a tool used to level the playing field in the employment sector. Lack of access to clean and sufficient water for drinking in rural communities affects women and children. As a result, ensuring access to clean and sufficient basic water for drinking can alleviate violence against women.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATION

5.1 Introduction

The research study has been conducted with the aim of examining the laws governing the right to water and how affirmative action can be applied to enhance water service delivery to rural communities in South Africa and the question it sought to answer is how can the laws governing the right to water service delivery be applied to ensure their realisation in rural communities in South Africa. In respect of the foregoing, the following conclusions and recommendations are made in the dissertation.

5.2 Conclusions

5.2.1 The delivery of water service as a state obligation under international law

The research study showed a considerable number of international instruments recognising water as a human right. Water is an important necessity for human beings in every part of the world. It is therefore, not surprising that its delivery is an essential component of international human right instruments. There is implicit and express recognition of water service delivery by international and regional human rights instruments as critical in the protection, promotion and realisation of the right to water in South Africa.

The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural rights does not directly guarantee the right to water. There is implicit reference under article 29 of the Universal Declaration of Human Rights and articles 11 and 12 of the International Covenant on Economic, Social and Cultural rights. There is express recognition by article 24 of the Convention on the Right of the Child which unambiguously provides for the protection of the human right to water and it proclaims that State Parties shall work towards full implementation of the right water and that State Parties are required to take suitable measures to safeguard access to water so as to fight against various water related diseases affecting children. It is apparent from the provision of the above mentioned article that this convention guarantees protection of the right to water and South Africa as a member state to this convention has obligation which it should obey.

Article 14 of the Convention on the Elimination of all Forms of Discrimination Against Women provides for the right to water of rural women. According to the above articles the stake holders of the government responsible for water supply are obliged to take part in the adoption of appropriate machineries to rural women and rural residents and these machineries that are being adopted are those which save time and energy and reduce walking distances for women to collect safe water for drinking and other domestic uses. The Convention on the Elimination of all Forms of Discrimination Against Women further provides for elimination of discrimination against women in rural areas in order to ensure, on basis of equality of men and women benefit from rural development, in particular, to benefit in water service delivery. Convention on the Right of the Persons with Disabilities affords everyone in article 28 the right to water by explicitly stating that State Parties must recognise the right of persons with disabilities to social protection; and to the enjoyment of that right without discrimination on the basis of disabilities and ensure equal access by person with disabilities to clean water services as it is a basic necessity.

The study basically confirms that South Africa has ratified these instruments and has an international obligation to provide access to water for every individual found in the country and it has a duty to adhere to its obligations as provided.

5.2.2 The domestic legislative frame work in relation to water service delivery in South Africa and challenges

It is the finding of the research study that South Africa has a legislative framework which protects, promotes and fulfils the human right to water. The legal framework for the right to water include and not limited to Constitution,³⁷⁶ Water Service Act,³⁷⁷ National Water Act,³⁷⁸ and the Municipality System Act 32 of 2000.³⁷⁹ These are the main legal instruments and they were enacted to promote the Constitutional right to water. National Water Act offers strong tools to redress inequalities inherited from the apartheid government. While the primary objective of the Water Services Act is to ensure access to basic water services and sanitation. The Municipality System Act on the other hand outlines the duties of municipalities in relation of water supply within its areas of jurisdiction.

³⁷⁶ Act 108 of 1996.

³⁷⁷ 108 of 1997.

³⁷⁸ 36 of 1996.

³⁷⁹ 35 of 2000.

It is the finding of the research study that despite the explicit recognition of the right to water by the Constitution and the protection by the other supporting legislation such as the National Water Act, Water Service Act and the Municipality System Act, there is still huge number of people living without access to basic water supply, particularly those residing in rural communities. This means that the law is yet to translate into access to water service delivery of rural communities. Because of the failure of government to provide its citizens with equitable access to water services in rural communities. Thus, the research study shows the failure of different arms of government, particularly, the local government to fulfil its Constitutional mandates. The research discusses challenges, namely: lack of sufficient water infrastructures, poor maintenance of the existing water infrastructures, lack of institutional skills with regard to water management, unequal distribution of water resources and lack of political will.

Challenges to access rural communities to access water service in South Africa were outlined and discussed in chapter three (3) of the research study. With regard to financial constraints it has been found that the government bestowed less money on the local government budget concerning water supply of rural communities and as a results it fails to meet the day-to-day water needs of rural dwellers and the maintenance of existing water infrastructures becomes difficult with less to spend. It is the finding of the research study that lack of political support is hindering the successful implementation of Water Demand Management Programs and other comprehensive strategic interventions in many rural communities in South Africa. It is also the finding of the research study that lack of institutional capacity contributes largely to lack of proper water infrastructures in rural communities. It is therefore recommended that the government should improve the capacity of the water providers or rather employ capacitated water service providers and increase the water service budget.

It has been indicated in chapter three (3) of this research study that in 2008, a report was received by the National Department and Local Government (hereinafter referred DPLG) informing them of the problems relating to service delivery in several municipalities in South Africa.³⁸⁰ While in early 2013 Mothetha, Nkuna and Mema conducted a study in a number of rural communities in Limpopo province. The authors found that in those municipalities there is lack of capacity, unequal distribution of the available water resources, poor operation and maintenance of existing

³⁸⁰ Department of Local Government, available at http://www.gautengonline.gov.za/Publications%20and%20Reports/Local_Government_Annual_Report_2008.pdf (accessed 18 February 2017).

infrastructures, illegal connections and finally political interference.³⁸¹ Drawing from the above reports it is the finding of the research study that up to this point municipalities are incapable of maintaining their water service infrastructures to ensure sustainability and equitable water service delivery and there is a likelihood of continues service delivery protest by members of the community.³⁸²

The *Mazibuko & Others v City of Johannesburg & Others* (hereinafter referred *Mazibuko case*),³⁸³ *Soobramoney v Minister of Health, Kwazulu-Natal*³⁸⁴ and *Government of the Republic of South Africa v Grootboom*³⁸⁵ case shared considerable light as to the recognition of socio-economic rights in South Africa, which include the right to water and the Constitutional obligation of the government to take legislative and other necessary measures to ensure the progressive realisation of these rights. However, it is also the finding of the research study that the *Mazibuko* case did not offer much of protection for the rural communities and that had the Constitutional Court applied affirmative action the court decision would have been different.

5.2.3 Affirmative action as a legal response to water services challenge in rural communities

The research study shows that applying affirmative action to ensure water service delivery in rural communities is consistent with the provisions of a number of international human right instruments, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights³⁸⁶ International Covenant on Civil and Political Rights³⁸⁷ International Conference on Religious Studies and Comparative Religion³⁸⁸ and International Covenant on the Elimination of All Forms of Racial Discrimination.³⁸⁹ The study also reveals that

³⁸¹ M Mothetha, Z Nkuna and V Mema, The challenges Facing Several Rural Water Supply: A Case Study of Rural Areas in Limpopo Province, available at researchspace.csir.co.za/dspace/bitstream/10204/7593/1/Mothetha,2013. (accessed 27 January 2017).

³⁸² Challenges in smaller municipalities, available at <http://www.infrastructurene.ws/2013/03/11/challenges-in-smaller-municipalities/> (accessed 03 November 2016).

³⁸³ 2009 (8) BCLR 791 (SCA).

³⁸⁴ (1) SA 765 (1999).

³⁸⁵ 2001(1) SA 46 (CC).

³⁸⁶ International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (entered into force 3 January 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

³⁸⁷ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

³⁸⁸ ICRSCR 2017: 19th International Conference on Religious Studies and Comparative Religion, available at <https://www.waset.org/conference/2017/09/prague/ICRSCR> (accessed 19 February 2017)

³⁸⁹ The United Nations. "International Convention on the Elimination of All Forms of Racial Discrimination." Treaty Series 660 (1966): 195. Print.

these provisions are of legal significance in South Africa due to section 39 of the Constitution which enables the use of international law when interpreting the provision of the Bill of rights.³⁹⁰

Affirmative action in the context of the right to water of rural communities is also compatible with the 1996 Constitution which guarantees the right to equal treatment to each and every individual³⁹¹ and to achieve this goal it provides for the use affirmative action as a retributory or rather a restorative measure.³⁹² This is the significance of section 9 (2) of the Constitution.

The section does not explicitly mention affirmative action. However, affirmative action is said to be indirectly covered by the terms “other measure” which should be adopted by the relevant stakeholders to protect individuals forming part of the previously disadvantaged group. Basically, this section permits the application of affirmative action to enable enjoyment of public benefits by those who were previously deprived. The Constitution also outlines all the prohibited grounds of unfair discrimination and it does not consider affirmative action as a prohibited ground of unfair discrimination,³⁹³ rather as a measure to ensure equal enjoyment of public services and this includes the right to water. It is therefore the finding of this research study that affirmative action was introduced into the Bill of Rights as a cautionary and interim measure.³⁹⁴

³⁹⁰ Section 39 of the Constitution which stipulates that, when interpreting the bill of rights, a court, tribunal or forum may consider foreign law. See also the following constitutional cases where the South African Constitutional Court considered binding as well as non-binding international law, when interpreting the Bill of Rights: *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin* NO 1996 1 SA 984 (CC); *S v Rens* 1996 1 SA 1218 (CC); *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC); *In re Gauteng School Education Bill* 1995 1996 3 SA 165 (CC); *The Government of the Republic of South Africa and others v Grootboom and others* 2000 11 BCLR 1169 (CC) par 26.

³⁹¹ Section 9 of the Constitution Act 108 of 1996 provides that (1) everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3).

³⁹² The following cases are some examples where the Constitutional Court considered the application of affirmative action to maintain equality in public sectors: *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC); *Minister of Finance v Van Heerden* 2004 (6) SA 121.

³⁹³ Section 9(3) of the Constitution gives an outline of the following prohibited grounds of discrimination; race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁹⁴ Chapter 3 Historical and Theoretical Foundation: South Africa, available at <http://uir.unisa.ac.za/bitstream/handle/10500/2531/06chapter3.pdf.txt?sequence=29> (accessed 19 February 2017).

Furthermore, the research study indicates that section 2 of the Employment Equity Act³⁹⁵ gives effect to section 9(2) of the Constitution and lays the basis for affirmative action in employment environment. The section unambiguously provides that the purpose of the Act is to achieve equity in the work place by encouraging equal opportunities and fair treatment in the working place by eliminating discrimination and applying affirmative action measures to redress the injustices experienced by previously disadvantaged groups in order to ensure that there is equitable representation in all occupational categories and levels in the work place. It has been indicated also in chapter four that affirmative action has not been applied in relations to the right to water. However, the research study promotes the application of affirmative action by the relevant governmental organs when making decisions concerning distribution of water resources.

Chapter four of the research study focused, inter alia, on the discussion of the following cases: *Van Heerden v Minister of Finance*,³⁹⁶ *Stalla Costa*³⁹⁷ *v. Uruguay*; *Solidarity obo Barnard and Another v South African Police Service*,³⁹⁸ *Harksen v Lane and Others*; *Alexandre V Provincial Administration of the Western Cape Department of Health*,³⁹⁹ *City Council of City Council of Pretoria v Walker*,⁴⁰⁰ which shared a light on how affirmative action can be legally employed.. These cases can guide courts and other state bodies in determining whether the use of affirmative action in the context of the right of rural communities to the right to water.

However, it has been indicated that these instruments do not explicitly mention affirmation action but affirmative action is implied from the other provisions of this instruments. Thus, it is the finding of the study that South Africa as a party to some of these instruments as ratified it has a duty to adhere to their provisions including the use of affirmative action.

5.3 Recommendations

The following recommendations would serve as measures that can be employed to realise the right to water of rural communities of South Africa.

³⁹⁵ 55 of 1998.

³⁹⁶ 2004 (6) SA 121 (CC).

³⁹⁷ Communication No. 198/1985 9 July 1987.

³⁹⁸ 2015 (4) SA 277 (LAC).

³⁹⁹ (2005) 26 ILJ 765 (LC); (2005) 6 BLLR 539 LC.

⁴⁰⁰ 1998 (2) SA 363 (CC).

5.3.1 South Africa should strictly adhere to and comply with its obligations as they affect affirmative action in relation to the right to water as provided for by the Constitution and ratified international instruments.

5.3.2 The local government should endeavor to implement the free basic water policy in rural bearing in mind the legal recognition of affirmative action.

5.3.3 The Minister of Water and Sanitation including any relevant province should monitor the performance of every water services institution to ensure compliance with prescribed national standards and norms and compliance with every applicable development plan taking into consideration the notion of affirmative action.

5.3.4 The Minister of Water Affairs should appoint a water service institution to perform the function, and he/she may utilize all financial and other resources available to the suspended water services authority relating to that function.

5.3.5 The local government with the assistance of the national and provincial governments should adopt affirmative action as a measure to ensure equitable water service delivery in rural communities.

5.3.6 The local government should establish a monitoring body which will monitors the equal distribution of water resources to realise the needs of all citizens of South Africa.

5.3.7 The local government should maintain existing water service infrastructures.

5.4 Concluding remarks

Human rights are universal in nature and thus applicable to each and every individual. In South Africa rural communities like other communities are equally entitled to the right to water service delivery by the government. This research study has revealed that the previously disadvantaged rural communities of South Africa continue to face the challenge in terms of access to adequate safe drinking water and this due to the failure of the local government, particularly municipalities to ensure equitable access to water service delivery and lack of proper water infrastructures in these communities. The study recommends the use of affirmative action to ensure equitable distribution of water infrastructures in South Africa and by so doing, it will lessen the challenges faced by residents of rural communities on a daily basis.

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