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Mini-thesis Title

The Right to Water in the Constitution and Sustainable Development in South Africa
ACKNOWLEDGEMENT

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ABSTRACT

The South African Constitution, 1996 has placed the right to sufficient water as a Constitutional right. The provision of this right by the Constitution intends to redress the violation of human rights, to ensure that South Africa’s scarce water resources are protected from pollution and that every South African, including the poor and the marginalised, enjoys them. Consequently, the Constitution has placed a legal obligation on the government to realise the right to have access to sufficient water. In order for the government to fulfil its obligation to provide water as a right for present and future generations, it will need to implement the relevant legislation effectively to protect the country’s water resources. This study analyses Section 27 of the Constitution, which provides for the right to access to water, and the role of sustainability in conserving and protecting water resources, given the recurring water challenges.
# TABLE OF CONTENTS

**KEY WORDS** .................................................................................................................. 6  
**ACRONYMS** ..................................................................................................................... 7  
**CHAPTER 1** ..................................................................................................................... 8  
1.1. Introduction.................................................................................................................... 8  
1.1.1. Background Information ......................................................................................... 8  
1.1.2. South Africa’s Precarious Water Situation ............................................................... 8  
1.1.3. The Constitutional Perspective ............................................................................... 9  
1.1.4. The Issue of Sustainability ..................................................................................... 11  
1.1.5. Water Laws in South Africa ................................................................................... 12  
1.2. Research Question ..................................................................................................... 15  
1.3. Relevance of the study ............................................................................................... 15  
1.4. Provisional Literature Review .................................................................................... 16  
1.4.1. The Inception of Water Rights Debate .................................................................. 16  
1.4.2. Reviewing Water Legislation ............................................................................... 17  
1.4.3. The Role of Sustainability in Giving Effect to Section 27 ..................................... 19  
**CHAPTER 2** ................................................................................................................... 21  
2. International Perspective ............................................................................................... 21  
2.1. Introduction.................................................................................................................. 21  
2.2. The Origin and Development of Water Rights ........................................................... 21  
2.3. General comment 15 .................................................................................................. 29  
2.4. A Critique of General Comment 15 .......................................................................... 32  
2.5. Conclusion .................................................................................................................. 35  
**CHAPTER 3** ................................................................................................................... 37  
3. The Constitution ............................................................................................................ 37  
3.1. Introduction.................................................................................................................. 37  
3.2. Historic Context of Water Rights in South Africa ..................................................... 37  
3.3. Section 27 .................................................................................................................... 39  
3.4. Section 24 .................................................................................................................... 43  
3.5. Interpretation Through Courts ................................................................................... 46  
3.6. Conclusion .................................................................................................................. 56  
**CHAPTER 4** ................................................................................................................... 58  
4. Minimum core vs Progressive realisation ...................................................................... 58  
4.1. Introduction.................................................................................................................. 58  
4.2. Minimum Core Approach ......................................................................................... 59  
4.3. Progressive Realisation ............................................................................................... 62  
4.4. Comparison of Section 27 and the ICESCR ............................................................... 64  
4.5. Conclusion .................................................................................................................. 69  
**CHAPTER 5** ................................................................................................................... 71  
5. The Sustainability of Water Resources ......................................................................... 71  
5.1. Introduction.................................................................................................................. 71  
5.2. Sustainable Development ........................................................................................... 72  
5.3. Sustainable Development Goals ................................................................................. 79  
5.4. Sustainable Development Goal 6 ............................................................................... 82  
5.5. Conclusion .................................................................................................................. 85  
**CHAPTER 6** ................................................................................................................... 86  
6. Recommendations .......................................................................................................... 86  
6.1. Introduction.................................................................................................................. 86  
6.2. Water Sustainability Challenges ................................................................................. 87  
6.3. Aligning General Comment 15 with Section 27 ....................................................... 88  
6.4. The Role of the Courts ............................................................................................... 89
6.5. Aligning SDG 6 with Development Strategies ................................................................. 91
6.6. Integrating all Sectors ........................................................................................................ 92
6.7. Conclusion ........................................................................................................................... 94
Bibliography ............................................................................................................................. 97
KEYWORDS

Right to water

Equality

Human dignity

Socio economic rights

Environmental Degradation

Water contamination

International human rights

Water Sustainability
<table>
<thead>
<tr>
<th>ACRONYMS</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>BoR</td>
<td>Bill of Rights</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>DEA</td>
<td>Department of Environmental Affairs</td>
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<tr>
<td>DMR</td>
<td>Department of Mineral Resources</td>
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<td>DWS</td>
<td>Department of Water and Sanitation</td>
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<tr>
<td>ICESCR</td>
<td>International Convention on Economic, Social and Cultural Rights</td>
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<tr>
<td>NDP</td>
<td>National Development Plan</td>
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<td>NEMA</td>
<td>National Environmental Management Act</td>
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<td>SDG</td>
<td>Sustainable Development Goals</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>WRM</td>
<td>Water Resource Management</td>
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<td>WSA</td>
<td>Water Services Act</td>
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Access to water is a fundamental human need, and therefore a basic human right. Contaminated water jeopardizes both the physical and social health of all people. It is an affront to human dignity – Kofi Annan.

1. Introduction

1.1.1. Background Information

Water is an indispensable element for life, to which social and economic developments are closely tied. It is therefore important to ensure that water resources are protected from pollution and contamination. The protection of water resources is integral at this point in time as the world is facing a water crisis due to factors such as climate change, water scarcity and mismanagement of water resources. It is argued that more than 2 billion people across the world are affected by water shortages in over 40 countries. In addition to this, 1.1 billion people do not have sufficient drinking water, and 2.4 billion people have no provision for sanitation. It is evident that water scarcity is a global challenge, with South Africa being one of the hardest hit countries.

1.1.2. South Africa’s Precarious Water Situation

South Africa is one of the many nations with water challenges as it is the 30th driest country in the world. South Africa is characterised by low annual rainfall along with a high natural evaporation rate. With an average rainfall of 450 mm per annum, South Africa is a water scarce country with 98% of available water already allocated. The recurring water stress is worsened by several factors such as climate change and water pollution that limit the amount of water we have at our disposal. Other contributing factors include population increase, as well as the

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7 Ibid.
modern day-to-day consumption patterns that compromise our water resources; these include energy, industry and mining activities.\(^8\) In some areas, these impacts have resulted in severe degradation of the quality of water, and have impaired the integrity of aquatic life in freshwater systems.\(^9\)

The changing rainfall patterns are resulting in water shortages, but freshwater challenges are not only an issue of water availability; it is perhaps first and foremost an issue of declining water quality.\(^10\) The quality of freshwater resources has been on a steady decline owing to increased pollution meaning 40% of the freshwater systems are now in a critical condition, while 80% are threatened.\(^11\) Given the level of water scarcity in the country, water-intensive industries such as mining will challenge the existing balance.\(^12\)

The CSIR report “Perspective on Water” highlights the deteriorating water quality of South Africa’s major river systems, water storage reservoirs and ground water resources.\(^13\) The report mentions that South Africa faces an enormous task in dealing with the problems posed by key water quality issues such as acid mine drainage, eutrophication (or nutrient enrichment) and salinisation.\(^14\) As a water-scarce country with little arable land and a dependence on coal-fired power, South Africa’s economy is arguably testing the limits of its resource constraints.

1.1.3. The Constitutional Perspective

In the post-apartheid era, the South African Constitution provides the legal foundation and sets out the rights and duties of its citizens as supreme law of the country. It is one of the few Constitutions in the world that recognises the justiciability of socio economic rights. Section 27(1)(b) of the Constitution provides that “everyone has the right to have access to sufficient food and water”.\(^15\) This

\(^8\) Supra note 5 at 5.
\(^9\) Ibid.
\(^10\) Supra note 5.
\(^11\) Ibid.
\(^12\) Ibid.
\(^13\) Supra note 5 at 64.
\(^14\) Ibid.
\(^15\) Ibid.
places a duty on the state to provide the beneficiary with access to the right. The beneficiary is also under an obligation to use his or her own resources to fulfil this right, and the state must provide an opportunity for the beneficiary to realise the right. The phrase presents a bridge between the obligation of the state to respect, protect, promote and fulfil, and the complementary duty of the beneficiary to be an active participant in the provision, use and protection of the right. Section 27(2) states that the state must take "reasonable legislative or other measures, within its available resources, to achieve progressive realisation of this right". Although water cannot be provided to everyone immediately, the duty is on the state to immediately begin to take steps towards the progressive realisation of the rights contained in Chapter 2 of the Constitution.

A number of South African cases have dealt with the issue of socio economic rights. One case that directly dealt with the right to access to sufficient water in Section 27(1)(b) of the Constitution is Lindiwe Mazibuko and Others v City of Johannesburg and Others. Mazibuko is the first South African case to reach the appellate courts regarding water as an affirmative, constitutionally protected right based in the South African Constitution. In this case, the Constitutional Court held that Section 27 of the Constitution obliges the government to take reasonable legislative and other measures to seek the progressive realisation of the right to access to water. The progressive realisation of the right to access to water, contained in the Constitution and applied in the Mazibuko case, denotes an acknowledgement that the attainment of socio economic rights has a progressive vision of achievement and thus cannot be immediate. This approach presents a tension between section 27 of the Constitution and the Committee on Economic, Social and Cultural Rights’ (CESCR) minimum core approach. Given that the South African government ratified the CESCR on 18th January 2015, which entered into

17 Section 27 (2) of the Constitution of the Republic of South Africa, 1996.
19 Ibid.
20 Ibid.
force on 12th April 2015; the “progressive realisation” and “minimum core” debate is invoked.

Both Section 27 and the ICESCR provide for the right to access to water, but they take different approaches, which imposes a tension between the two legal tools. The General Comment No. 15 of the ICESCR deals with the right to water. The contradiction is that in General Comment 3, the Covenant further holds that states have the obligation to ensure the satisfaction of minimum essential levels of the socio economic rights. Section 27 of the Constitution provides for the obligation of the state to take reasonable legislative and other measures to realise human rights, whereas the Covenant refers to “all appropriate means, including particularly the adoption of legislative measures”. Section 27 further limits the input of resources to the resources available, while the Covenant requires an input to the maximum of the state’s available resources. Another significant difference is that section 27 aims at the progressive realization of the right to access to water, while the Covenant aims at progressively achieving the full realisation of the right. These consequential differences are discussed further in the study as well as the ramifications of South Africa’s ratification of the CESCR.

1.1.4. The Issue of Sustainability

Water is at the very core of sustainable development, critical to the survival of people and the planet. Factors such as pollution, population increase and mismanagement of water resources pose a threat to this resource that is crucial to humankind. Sustainable development, as seen in the context of this challenge, is strongly connected to the availability of sufficient quantity and quality of water for the preservation of healthy ecosystems and is critical for socio-economic and

22 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.15, 2002
23 CESCR, General Comment No.3. The nature of States parties obligations (a2(l) of the Covenant) UN doc. E/1991/23, par. 1.
24 Section 27 of the South African Constitution, 1996.
26 Supra note 21.
27 Ibid.
28 Supra note 2.
human development. In response to challenges facing water resources, the UN General Assembly adopted the Sustainable Development Goals (SDGs) in September 2015. The importance of water as an integral part of all human development and ecosystem needs is emphasized through the dedicated Water Goal Sustainable Development Goal 6.

Sustainable Development Goal 6 includes six targets and two suggestions for means of implementation. Targets 6.1 and 6.2 focus on the availability, affordability and quality of water supply and sanitation. Targets 6.3 to 6.6 focus on different dimensions of a sustainable water resources management. Target 6.3 aims to improve the quality of water, halve the share of untreated wastewater and increase recycling and safe reuse. It aims to improve the quality of water by reducing pollution caused mostly by mining impact by year 2030. Target 6.4 focuses on ensuring sustainable water withdrawals in order to address water scarcity and substantially reduce the number of people suffering from water scarcity. These targets share a common purpose with section 27, which is to protect water resources. The success of the SDGs is therefore partly dependent on aligning the stipulated targets and goals with the legislation and governance processes.

1.1.5. Water Laws in South Africa

The constitutional mandate to meet the most basic water requirements is fulfilled through various national policy documents, regulations and statutes. The Department of Water and Sanitation (DWS) is responsible for the governance of water; it is responsible for implementing the legal instruments relating to water, which are the Water Services Act No 108 of 1997, and the National Water Act No.

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31 Transforming Our World: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1, 25 September 2015) (‘2030 Agenda’).
32 Ibid.
33 Ibid.
34 Ibid.
36 of 1998. The National Water Act (NWA) is underpinned by constitutional imperatives to redress past social imbalances.\textsuperscript{35} Both the National Water Act and the Water Services Act must have regard to the constitutional imperatives to have the environment protected from degradation and water resources protected from pollution.

The NWA gives effect to socio economic rights provided for in the constitution. Section 2 of the Act provides the purpose of the Act, which is to protect the nation’s water resources, taking the following factors into account:

\begin{itemize}
\item[a)] Meeting the basic human needs of present and future generations;
\item[b)] Promoting equitable access to water;
\item[c)] Redressing the results of past racial and gender discrimination;
\item[d)] Promoting the efficient, sustainable and beneficial use of water in the public interest;
\item[e)] Facilitating social and economic development;
\item[f)] Provide for growing demand for water use;
\item[g)] Protecting aquatic and associated ecosystems and their biological diversity;
\item[h)] Reducing and preventing pollution and degradation of water resources;
\item[i)] Meeting international obligations;
\item[j)] Promoting dam safety;
\item[k)] Managing floods and droughts.\textsuperscript{36}
\end{itemize}

The abovementioned provisions highlight the firm entrenchment of water rights in the NWA, both in section 2 and section 4 of the Act, which provides that everyone may use water resources to support their livelihoods.\textsuperscript{37} This objective brings the South African water dispensation in line with international standards. Under the NWA, there are several institutions and administrative bodies created to make sure that they give effect to the Act. These institutions include Catchment Management Agencies, Water Management Institutions, Water Use Associations, International Water Management and the Water Tribunal, and their core role is ensure that water resources are managed in a manner that realizes the

\textsuperscript{35} Supra note 30 at 507.
\textsuperscript{36} Section 2 of the National Water Act, 1998.
\textsuperscript{37} Ibid.
constitutional right to access to sufficient water. These will be discussed in-depth later in the study.

The National Water Act is an important legal document in South Africa, and it must be seen against the legislative background of the Water Services Act 108 of 1997, which provides a regulatory framework for local authorities to supply water and sanitation services in their respective areas. While the NWA is concerned with the overall management and conservation of the nation’s water resources, the objective of the Water Services Act is to provide for:

(a) the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health and well-being;
(b) the setting of national standards and norms and standards for tariffs in respect of water services;
(c) The preparation and adoption of water services development plans by water services authorities;
(d) A regulatory framework for water services institutions and water services intermediaries;
(e) The establishment and disestablishment of water boards and water services committees and their duties and powers;
(f) The monitoring of water services and intervention by the Minister or by the relevant Province;
(g) Financial assistance to water services institutions;
(h) The gathering of information in a national information system and the distribution of that information;
(i) The accountability of water services providers; and
(j) The promotion of effective water resource management and conservation.\(^\text{38}\)

More specifically, the Water Services Act is concerned with abstracting, transferring, treating and distributing water and sanitation to users and the removal

\[^{38}\text{Supra note 36.}\]
of waste water and sewerage. The Act however does not deal with issues of water resource management and allocation, such as questions concerning respective rights of different users, the quantity allocated to a particular user and the use to which allocated water is put. These matters are the subject of the National Water Act.

Both the National Water Act and the Water Services Act are complimentary and provide a framework for sustainable water resources management. The Acts have definitely transformed the regulatory regime governing water pollution control in South Africa by abolishing a private rights system of water allocation and replacing this system with a public rights system. This allows for water to be treated in an integrated fashion as a resource common to all wherever it occurs in the hydrologic cycle. They have also provided a mechanism for the state to give effect to certain constitutional obligations, such as the duty to provide equitable access to water, environmental protection and sustainable resource use, justifiable social and economic development, and effective recognition of the country’s international obligations.

1.2. Research question
This study seeks to understand the influence of sustainability in addressing water scarcity and the degradation of water resources, and in giving effect to water rights provided for in section 27 (1)(b) of the Constitution. The study seeks to address this question by analysing Section 27 (1)(c) of the Constitution, which provides for the right to access to water, and the influence of sustainability in conserving and protecting water resources, given the recurring water challenges.

1.3. Relevance of the study

39 Supra note 8 at 538.
40 Supra note 8 at 539.
South Africa is currently experiencing a water crisis as a result of low rainfall, high water demand and water pollution. It is therefore essential to ensure that there is sustainable management of water resources. Over 70% of the water used in both rural and urban areas in South Africa is surface water drawn from rivers, streams, lakes, ponds and springs. The over-use, poor management and contamination of these water sources are significant environmental challenges. Positive changes in legislation implemented in post-apartheid South Africa have begun to address some of the most immediate threats posed by different factors that are straining the country’s scarce water resources, but there are still many areas of water use and regulations that need to be addressed to give effect to the role of sustainability in realising the right to access to water. The contamination of water by activities such as mining poses a threat to this right. Given that Section 27 of Constitution provides for the right to access to water, this study analyses the role that can be played by tools such as the Sustainability Development Goal 6 and water legislation to promote sustainability.

1.4. Provisional Literature Review

1.4.1. The Inception of Water Rights Debate

The South African Constitution reflects human rights principles that are embedded in international law, and these principles permeate all subsequent water policies and legislation. The analysis of the right to water under the South African Constitution must therefore be referenced against an understanding of the developments that have led to a conceptualisation of water as a human right as this has immediate bearing on the concept of a ‘right to water’ as framed by South African legislation. The debate surrounding water resources and the right to water on a global platform started in earnest in the 1970s. In 1972 the United

44 Supra note 23 at 1.
Nations Conference on the Human Environment, held in Stockholm, identified water as one of the natural resources that needed to be safeguarded.\textsuperscript{46}

Salman\textsuperscript{47} states that this prioritisation of legal protection of water resources on the international platform was also noted in 1977 when the United Nations held the Mar del Plata Water Conference in Argentina.\textsuperscript{48} It is argued that the debate on the right to water can be traced to this conference,\textsuperscript{49} which declared for the first time that “all people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”\textsuperscript{50} The Mar del Plata Water Conference is therefore arguably the starting point for the debate on the right to water, and it has indeed provided the basis for the present-day discussions surrounding issues of the human right to water.\textsuperscript{51}

However, it is argued that the International Convention on Economic, Social and Cultural Rights (ICESCR) was the first main international legislation on socioeconomic rights.\textsuperscript{52} Salman argues that the United Nations Committee on Economic, Social and Cultural Rights (CESCR) heightened the debate on the issue of the human right to water, and how to give effect to it.\textsuperscript{53} The Committee provided clarity on the nature and scope of the ICESCR and formulated a specific General Comment No. 15 on the right to water, which outlines the parameters of states parties’ obligations.\textsuperscript{54}

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\textbf{1.4.2. Reviewing Water Legislation}
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\textsuperscript{47} Supra note 1.


\textsuperscript{49} Supra note 1 at 8.

\textsuperscript{50} Supra note 48.

\textsuperscript{51} Supra note 1 at 9.


\textsuperscript{53} Supra note 1 at 9.

\textsuperscript{54} Committee on Economic, Social and Cultural Rights (CESCR), 2002.
The enactment of the Constitution\textsuperscript{55} brought the South African legal system into a new era, by including a bill of fundamental human rights (Bill of Rights), which makes provision for limited socio economic rights. The Constitution also makes provision for the establishment of state institutions supporting constitutional democracy. The inclusion of section 27 of the Constitution has granted every South African the right to have access to sufficient water\textsuperscript{56} and has resulted in the rare opportunity for South Africa to reform its water laws completely. This is embodied in the enactment of the Water Services Act\textsuperscript{57} and the National Water Act,\textsuperscript{58} which have been briefly discussed above.

These are essential legislative measures taken by South Africa to give effect to water rights. These legal tools are a milestone achievement for the young democracy; however, they have been scrutinised by a number of scholars who engage on the effectiveness of the legislation in realising the right to access to water. Pejan argues that although water legislation refers to human rights principles, it does not expressly incorporate them into its provisions.\textsuperscript{59} This is most apparent in the way which the NWA views violations of water right.\textsuperscript{60} The Act views violation as non-compliance through actions such as polluting water sources or not registering with Catchment Management Areas.\textsuperscript{61} The approach taken by the Act is good at ensuring that water sources are protected from pollution; however, it does not address the violations of the government’s obligations to respect, protect and fulfil the right to water.\textsuperscript{62}

It is also argued that the legislation fails to include adequate remedies for individuals to enforce their right to water.\textsuperscript{63} This raises challenges to the justiciability of the right to water as people, particularly the less privileged are still less

\begin{thebibliography}{99}
\item Constitution of the Republic of South Africa, 1996.
\item Section 27 (1) (b) of the Constitution, 1996.
\item Water Services Act 108 of 1997.
\item National Water Act 36 of 1998.
\item Supra note 13 at 1207.
\item Ibid.
\item Ibid.
\item Ibid.
\item The General Comment reaffirms the fundamental importance of the human right to water by stating that the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.
\item Supra note 13 at 1208.
\end{thebibliography}
empowered to fully enjoy water rights. Taking into account the high inequality in South Africa, it is difficult for everyone to access courts and have their rights enforced. In order to have full access to courts as envisioned by the Constitution, a certain level of literacy, education and resources are required. As a result, many individuals whose rights could be violated may not be able to pursue their claims. Similar arguments have been made by scholars such as Bond and Dugard, who criticized the judgement in the aforementioned Mazibuko case. They argue that the South African Constitutional Court has failed to advance a pro-poor practice. Bond and Dugard also argue that the South African courts have failed to act as an institutional voice for the poor. Njuh Fuo further argues that the Constitution has not provided content as to what qualifies as sufficient quantity or quality of water. This is highlighted in Mazibuko case, where the Court argued that courts are ill-placed to make these assessments. The Courts and legislation are criticized for not appropriately paving a specific role for themselves as institutional voices for the poor. It is argued that violations of the right to water may therefore not be easily adjudicated unless other mechanisms are developed for this purpose.

1.4.3. The role of Sustainability in giving effect to Section 27
The protection and restoration of water resources is a serious challenge. It is therefore essential to examine the role of sustainability when dealing with the right to access to sufficient water. Scholars such as Seetal and Quibell argue that it is increasingly accepted that sustainable development requires improving access to
water resources, particularly to the marginalised poor. Inadequate access to water traps people in a cycle of poverty, poor health, and pollution that they find difficult to escape without active intervention.

The importance of the role played by sustainability is highlighted in Loucks' definition of sustainability in the context of water resource management. He defines sustainability as "water resource systems that are managed to satisfy the changing demands put on them, now and on into the future, without system degradation." Water is at the very core of sustainable development, critical to the survival of people and the planet.

Bhaduri argues that the decision to incorporate a dedicated water goal (SDG 6) among the 17 SDGs is a clear recognition that water is not only part of many other SDGs, but in many aspects their precondition. He argues that there is a well-perceived need to institutionalise an intergovernmental framework which accounts for this importance and cross-cutting features of water and the solution of water related problems. In his argument, he states that many water related problems arise from inadequate and dysfunctional governance settings, irrespective of whether the physical scarcity is prevalent or not. A lack of institutional capacity is the central factor to explain poor performance of water governance in many countries. An effective implementation of the SDGs therefore requires adaptive and effective governance that will align the SDGs with water legislation in order to conserve water resources and protect water rights.

75 Ibid.
77 Supra note 89 at 16.
CHAPTER TWO

2. International Perspective
   2.1. Introduction
The human right to water was recognised as a human right by the United Nations (UN) General Assembly on 28 July 2010. The right entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use.\textsuperscript{78} There is a broad range of international human rights treaties that provide for the access to water. It is essential to understand these because the South African Constitution reflects human rights principles that are embedded in international law, and these principles permeate all subsequent water policies and legislation.\textsuperscript{79} It is therefore imperative that the analysis of the right to water under the South African Constitution is referenced against an understanding of the developments in international law that have led to a conceptualisation of water as a human right as this has immediate bearing on the concept of a ‘right to water’ as framed by South African legislation. This chapter will evaluate these international perspectives of the human right to water and the legal foundations of the right. The potential legal foundations will be considered in detail, particularly the significance of General Comment No. 15 of the Committee on Economic, Social and Cultural Rights (CESCR)\textsuperscript{80} on the right to water, given that the issuance of the General Comment has been a milestone in the emergence of the human right to water.

2.2. The origin and development of water rights
The right to water of sufficient quality and quantity has been acknowledged as a human right globally, and South Africa has embedded this right in the constitution. Thielbörger argues that for the term ‘human right to water’ to be effectively recognised, it should need to meet certain criteria.\textsuperscript{81} It would need to be

\textsuperscript{78} UN Special Rapporteur’s Realising the Rights to Water and Sanitation: A Handbook, 2014, 44.
\textsuperscript{79} Supra note 23 at 1.
\textsuperscript{80} United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15.
comprehensive, legally binding and self-standing. The right must be comprehensive and applicable to all human beings, not only to particular groups or individuals, and must be accepted as binding by states.

To assess the effectiveness of the right to water, this study examines international conventions and treaties that provide for the human right to water. International human rights instruments play a huge role in influencing court decisions in South Africa. The South African Constitution requires South African courts to take into account relevant international law in interpreting the Bill of Rights. Section 233 of the Constitution further mandates that every court must prefer a reasonable interpretation of South African legislation that is consistent with international law norms to one that is not. It is therefore imperative to analyse the international human rights instruments that may influence the efforts to realise water rights in South Africa and to discuss how these instruments may be applied in the South African context to address water challenges and contribute to the realisation of the right of access to water provided in Section 27 of the South African constitution.

There are various international treaties and soft law instruments that recognise the right to water and encourage party States to give effect to this right. It is essential to analyse the relationship between treaties and soft law in order to have an understanding of the role played by these tools in giving effect to water rights. The relationship between treaties and soft law is less often explored, but it is not less important, and has great practical relevance to the work of international organisations. The difference between soft law and treaties lies in that soft law is not binding and treaties are hard law which is always binding. However, an agreement involving states may be binding even if it is not a treaty, which means that the distinction between hard and soft agreements is not simply synonymous with the distinction between treaties and non-treaties. Moreover, in instances

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82 Ibid.
83 Section 39(1)(b) of the South African Constitution, 1996.
84 Section 233 of the South African Constitution, 1996.
86 Ibid.
87 Supra note 85.
where soft law begins to interact with binding treaties, its non-binding character may be lost or altered.\textsuperscript{88} On the other hand, treaties may be either hard or soft, or both.\textsuperscript{89} The distinction between a treaty and soft law is clearly not a clear cut, as these two interact in several different senses as highlighted above. It is therefore imperative to understand the stance taken by international water tools to understand their authoritative power of enforcing their principles and commands.

This realisation of the right to water in international instruments dates back to the 1970s. In 1972 the United Nations Conference on the Human Environment, held in Stockholm, identified water as one of the natural resources that needed to be safeguarded.\textsuperscript{90} This was stated in Principle 2 of the Stockholm Declaration on Human Environment, which states that "the natural resources of the earth including the air, water, land, flora and fauna must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate".\textsuperscript{91} Since the Stockholm Declaration was adopted in 1972, a wide consensus of the world community has undertaken the arduous chore of drafting, adopting, ratifying and implementing a plethora of hard and soft law instruments, and policy documents at the national, regional and international levels.\textsuperscript{92} These sources of international law express many of the aspirations contained within and inspired by both the declarations.

Prior to the 1972 United Nations Conference on the Human Environment, there were basic human rights instruments which did not mention the human right to water, but contributed to the foundation of human rights. These were the 1948 Universal Declaration of Human Rights (UDHR),\textsuperscript{93} and two human rights treaties, the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{94} and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{95} The latter will be

\textsuperscript{88} Supra note 85 at 903.
\textsuperscript{89} Ibid.
\textsuperscript{90} Supra note 1 at 8.
\textsuperscript{93} Universal Declaration of Human Rights (UDHR), 1948.
\textsuperscript{94} International Covenant on Civil and Political Rights (ICCPR), 1966.
\textsuperscript{95} International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.
discussed further in this study as it led to the inception of General Comment 15, which explicitly provides for the right to water. The abovementioned human rights instruments do not expressly define water as a human right, but access to drinking water is described by the United Nations as human right.\textsuperscript{96} The human right to water has been read into such instruments due to its character as an essential ingredient for the existence of human life.\textsuperscript{97}

From abovementioned human rights instruments, the Universal Declaration of Human Rights is termed as a soft law mainly because it was passed by the UN General Assembly as a declaration but has not provided for the stakeholders to be legally bound to abide by the articles or to enforce them.\textsuperscript{98} The preamble of the declaration says that the UDHR is a “common standard of achievement for all people and all nations” and the nations must strive to achieve this standard. Although a soft law, the Universal Declaration of Human Rights served as the foundation for two binding UN human rights covenants, the ICCPR and the ICESCR both mentioned above. The ICCPR and the ICESCR are two legally binding documents that have been signed and ratified by many countries. These two covenants enforce most of the human rights given in the UDHR, but did not focus on water rights. However these instruments did play a role in leading to the realisation of water rights as the ICESCR led to the inception of the Committee on Economic, Social and Cultural Rights (CESCR), which addressed the issue of the human right to water.

The prioritisation of legal protection of water resources on the international platform was also noted five years after the 1972 United Nations Conference on the Human Environment, in 1977 when the United Nations held the Mar del Plata Water Conference in Argentina.\textsuperscript{99} The Conference was devoted exclusively to discussing the emerging water resources problems.\textsuperscript{100} The discussions which led to

\textsuperscript{96} Nigam. A., Right to Water in International and National Perspective. IOSR Journal of Humanities and Social Science, 19 (4) (2014), 11.
\textsuperscript{97} Ibid.
\textsuperscript{100} Ibid.
the designing of the Mar del Plata Action Plan included a number of recommendations and resolutions dealing with various issues including assessment of water resources, water use and efficiency, environment, health and pollution control, as well as policy and planning. Salman\textsuperscript{101} argues that the debate on the right to water can be traced to this conference. Resolution II on 'Community Water Supply' declared for the first time that “all people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”\textsuperscript{102} To meet this statement, the Resolution called for full international cooperation, entailing the mobilisation of physical, economic, and human resources, so that water is attainable and is justly and equitably distributed among the people within the respective countries.\textsuperscript{103}

This Resolution unquestionably represented a milestone towards the realisation that all people have the right to have access to drinking water in quantities and quality equal to their basic needs.\textsuperscript{104} As such, the Mar del Plata Water Conference can be considered the starting point for the debate on the right to water, and it has indeed provided the basis for the present-day discussions surrounding issues of the human right to water.\textsuperscript{105}

Other international declarations and resolutions that considered the right to water include the Convention on the Elimination of Discrimination against women (CEDAW), which in Article 14 (2)(h), obliges State parties to ensure the right to enjoy adequate living conditions, particularly in relation to water supply.\textsuperscript{106} Other international human rights treaties include the Convention on the Rights of the Child (CRC), which commits state parties to implement children’s rights to health by taking appropriate measures to combat diseases and malnutrition through, including among other things, the provision of clean drinking water.\textsuperscript{107} All these

\textsuperscript{101} Supra note 1 at 8.
\textsuperscript{102} Report of the United Nations Water Conference, Resolution II (a), at 66.
\textsuperscript{103} Supra note 50 at 67.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
conventions are hard law which is legally binding on the member parties and hence hold states accountable for realising water rights.

In addition to the aforementioned international instruments, the African region has regional treaties that make reference to human rights and the right to water. These include the African Charter on Human Rights and Welfare of the Child,108 and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.109 These regional treaties provide for the right to water and both require states parties to ensure the entitlement of the rights provided. Article 3 of the African Charter on Human and Welfare of the Child provides that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter. These include the right to health and health services provided in Article 14 of the Charter, which provides that every child shall have the right to enjoy the best attainable state of health, and that state parties to the Charter shall take measures to ensure the provision of safe drinking water.110 This holds State parties accountable for ensuring that every child is guaranteed access to safe drinking water.111

The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa also provides for the right to access to clean drinking water in Article 15 which provides that State parties shall ensure that women have the right to nutritious and adequate food.112 To that end, State parties shall take appropriate measures to provide women with access to clean drinking water.113 These treaties explicitly provide for the right to access to water and are binding to states parties. However, these treaties are limited in categories of persons which they provide with the right. They do not equally apply to all human beings. They protect the rights of women, children or a specific group of people, and exclude other groups that are not considered to be vulnerable. Thielbörger therefore

110 African Charter on Human and Welfare of the Child, (1990), Article 14(c)
111 According to the African Charter on Human and Welfare of the Child, a child is defined as a person under the age of 18.
113 Ibid.
argues that none of these treaties, by themselves can be regarded as sufficient recognition of a human right to water because of their exclusive nature. He argues that a right to water by definition has to be applicable to all humans.114

The provision of the right to access to water to all people regardless of their socioeconomic conditions is emphasised in the 1992 UN Conference on Environment and Development, which highlighted in Agenda 21 that all people have the right to have access to drinking water, regardless of their social and economic conditions.115 Two years later, the programme of Action of the International Conference on Population and Development in Cairo stated that human beings have the right to an adequate standard of living, including adequate water and sanitation.116 The United Nations General Assembly (UNGA) also emphasised the right to food and clean water as a fundamental right in resolution 54/175.117

In 2010 the United Nations General Assembly released resolution 64/292, which is entirely dedicated to "the human right to water and sanitation". It also explicitly recognises the right to safe and clean drinking water and sanitation as a human right.118 All these declarations have recognised the right to water in an explicit way by singling it out and identifying it as a “self-standing” entitlement. They have also assumed the right to be a right for all human beings, regardless of gender, race or socio economic status, making it a comprehensive right.119 Nonetheless, these rights are not directly legally binding, they do not have the status of international hard law, and based on this, Thielbörg argues that they are unsuitable to be the sole legal source for a right to water.120 This entails that they do not provide a legal recognition of the human right to water that would be legally binding for states.

118 United Nations General Assembly. The human right to water and sanitation. Resolution 64/292. 3 August 2010, para 1.
119 Supra note 114 at 59.
120 Ibid.
Selman further argues that the resolutions emanating from the various water conferences and forums have been vacillating between treating access to water as a basic need and as a right, but have not attempted to define either term or distinguish them from one another.  

The debate on the issue of the human right to water, and how to give effect to it, was arguably heightened in November 2002, with the Committee on Economic, Social and Cultural Rights (CESCR) declaration that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”. This was built upon the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, and entered into force in 1976. The ICESCR initially did not explicitly mention the human right to water, but played a huge role in the realisation of the right to water. Article 11 of the ICESCR holds that “the states parties to the covenant recognize the right of everyone to an adequate standard of living”. The human right to water was understood to be an integral part of officially recognised human rights, a necessary precondition for the realisation of the right to an adequate standard of living.

Likewise, the 1948 Universal Declaration of Human Rights (UDHR) implicitly recognised the aforementioned right in article 25, by stating that "everyone has the right to a standard of living adequate for the health and wellbeing of themselves and of their family, including food, clothing, housing, as well as medical care and necessary social services". Gleick argues that in the writing of the aforementioned texts of the UDHR, water, like air, was seen as so fundamental to preserving a right to life that the drafters of these conventions did not consider it necessary to spell it out. Like the legal instruments discussed above that

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121 Supra note 1 at 16.
122 Ibid.
recognise the right to water, the ICESCR does not explicitly mention the human right to water, but plays a huge role in the realisation of the right.

2.3. General Comment 15

In 2002 the United Nations Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 15 on the right to water. In formulating General Comment 15 the Committee acknowledged that it was essential to concentrate on the human rights aspects since all the problems of the world could not be solved under the rubric of water.\textsuperscript{128} The General Comment concerning water was contemplated for many years, and the UN Sub-Commission on Human Rights eventually identified an urgent need for increased attention and commitment by all decision makers to the right of everyone to drinking water supply and sanitation.\textsuperscript{129} The General Comment is by far the most relevant of all judicial or quasi-judicial recognitions of the right to water, and the one which elaborates the most on the normative contents of such a right.\textsuperscript{130}

The General Comment starts by declaring water a limited natural resource and at the same time a public good fundamental for health and life, indispensable for leading a life with human dignity. In paragraph 2, it explicitly states that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable for personal and domestic uses.”\textsuperscript{131} State parties are obliged to respect, protect and fulfil the right to water.\textsuperscript{132} This demonstrates that the CESCR committee recognised the right to water as a fundamental human right.

Given that the General Comment is the most relevant legal instrument providing for the right to water, it is essential to address the provisions of the General Comment in order to understand its implications. The General Comment outlines


\textsuperscript{129} Supra note 127 at 49.

\textsuperscript{130} Supra note 81 at 64.

\textsuperscript{131} United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 2.

\textsuperscript{132} Ibid, para 20.
the normative content of the right to water. While acknowledging that different circumstances and conditions may influence the access to water, the CESCR committee claimed that everyone, on the basis of non-discrimination, has the right to sufficient, safe, accessible and affordable water of an acceptable quality.\footnote{United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 12 (a-c).} Thus, water must be present in continuous sufficiency for personal and domestic use, in particular for the purpose of drinking, sanitation, washing of clothes, food preparation, and personal and household hygiene. According to Thielbörger, water quality refers to the fact that water must be free of microorganisms, chemical substances and radiological hazards so that water quality does not jeopardise people’s health.\footnote{Supra note 81 at 66.} Water accessibility demands that water must be within physical reach.\footnote{Ibid.} Water safety means that physical security is ensured in the process of accessing water from water sources. Water affordability entails that the costs of accessing water must be realisable for all, including vulnerable and marginalised groups.\footnote{Ibid.} State parties are therefore called upon to respect, protect and fulfil the aforementioned aspects of the right to water.

The General Comment obliges state parties to ensure non-discriminatory access to the minimum essential amount of water for personal and domestic use, accessibility in reachable distances, and equitable distribution of water within the limits of availability.\footnote{United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 37.} To meet these obligations, the adoption of national water strategies and action plans, the creation of water access monitoring systems, measures to minimise water related diseases, and programmes to help the most vulnerable groups are requested.\footnote{Ibid.}

The General Comment is clearly a milestone in the recognition of the right to water. It explicitly advocates for the right to water, with great elaboration on the normative content of the right. It establishes normative content and describes the contours of a self-standing right. It argues that the right should not belong to certain groups, but to all human beings. The General Comment is however

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\footnote{United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 12 (a-c).} \footnote{Supra note 81 at 66.} \footnote{Ibid.} \footnote{Ibid.} \footnote{United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 37.} \footnote{Ibid.}
critiqued for only being an authoritative interpretation of the ICESCR and not being part of legally binding international hard law. Critics argue that General Comments are interpretations of an expert committee, and do not have the legal force to create new direct legal obligations for States.\textsuperscript{139} However, as seen in the Mazibuko case, the interpretations of the covenant are highly valuable and influential on court cases.

In Mazibuko, the Johannesburg High Court based its ruling on General Comment No. 15. Tsoka J pointed out that the effect of concepts such as “availability” and “accessibility” in terms of the Comment, “is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population”.\textsuperscript{140} The Court held that the State is under an obligation to provide the necessary water services on a non-discriminatory basis.\textsuperscript{141} The High Court relied on General Comment No. 15, and held that the State was under an obligation to provide necessary water services on a non-discriminatory basis, concluding that the State should allocate 50 litres per person per day. In this finding, Tsoka J recognised that he was supporting the notion of a “minimum core obligation” in relation to water services, which he held to be not inconsistent with the Constitutional Court’s decisions in prior socio economic rights cases that will be discussed in this study such as the Grootboom case and the Treatment Action Campaign case.

The respondents subsequently appealed the High Court’s decision to the Supreme Court of Appeal, which also referred to General Comment 15, reiterating that a right of access to sufficient water cannot be anything less than a right of access to the quantity of water that is required for dignified human existence.\textsuperscript{142} The Court ordered the City to provide households with an amount of 42 litres per person per day; an interim measure while the City reformulated and adopted a water policy that was reasonable, based on the court’s interpretation of section 27 (1)(b) of the

\textsuperscript{139} Supra note 81 at 68.
\textsuperscript{141} Ibid.
\textsuperscript{142} Supra note 140 para 17.
In taking this decision, the Court acknowledged that it would be irresponsible for a court to usurp the function of the City without knowing the cost implications of ordering the City to provide 42 litres per person per day to all its residents who cannot afford to pay for such water. Hence the Court only issued an interim water quantity while the City reviewed and reformulated its water policies.

The applicants appealed against the SCA’s findings to the Constitutional Court, which found that the City’s free basic water policy was reasonable and that the State was under no constitutional obligation to provide any particular amount of water in terms of Section 27(1)(b) of the Constitution, but under an obligation to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within its available resources. The ruling of the Constitutional Court departed from the “minimum core” approach in favour of the progressive realisation of the right of access to sufficient water. However, the Mazibuko ruling demonstrates the influential role of General Comment No. 15 on South African courts. Regardless of South African courts adopting the “progressive realisation” approach, General Comment 15 has a potential role in contributing to the realisation of the right of access to water in South Africa. This role is discussed further in Chapter 4, which analyses the role of the “progressive realisation” and the “minimum core approach” concepts in giving effect to the realisation of the right of access to water, and highlighting the important role that General comment 15 has to play in the South African legal system, which has been strengthened by South Africa’s ratification of the CESCR.

2.4. A Critique of General Comment 15

General Comment 15 is clearly the most relevant international tool that recognises the right to water, explicitly defining the universal entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and

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144 Para 50.
domestic use.\textsuperscript{145} It is also relevant to South African water law as it has been referenced in the Mazibuko case, and because the South African government ratified the CESCR, which entered into force in April 2015.\textsuperscript{146} The relevance of the General Comment in South African law means that one needs to take cognisance of the critiques posed against it.

The General Comment takes a firm minimum core approach, and has been met with criticism from those who oppose the minimum core approach and those who have pointed out shortfalls in General Comment 15. In the South African context, where the constitution provides for a progressive realisation of socio economic rights, the general critique against the General Comment is that it takes the minimum core approach. This approach entails that the right of access to water must be realised immediately. Such an approach may be seen as not accommodating for governments that do not have the capacity to immediately meet the minimum core requirements of the Committee. The South African Constitutional Court therefore held that the right of access to water provided in Section 27 does not require the State upon demand to provide every person with sufficient water at one go, but rather required the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.\textsuperscript{147} The Court highlighted that the purpose of entrenching socio-economic rights in the constitution was to ensure that the State continues to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life,\textsuperscript{148} as it could not have been expected that the State could immediately provide for the millions of South Africans who did not have access.\textsuperscript{149}

The General Comment’s “minimum core” approach is the mainly criticised element as seen in South Africa where the court refused to take this approach in implementing Section 27 of the Constitution. In addition to this general critique,

\textsuperscript{147} Mazibuko, Constitutional Court judgement, para 50.
\textsuperscript{148} Supra note 147, para 94-97.
\textsuperscript{149} Ibid.
scholars have criticised the General Comment for its lack of indication of how minimum water must be measured, and for only focusing on governments whilst ignoring the responsibility of individuals and the private sector to minimise water wastage and pollution. Tully highlights that the General Comment provides little indication of how a clean, reliable, sufficient or minimum water supply is measured.\textsuperscript{150} The Committee defers to guidelines developed by the World Health Organisation (WHO) intended for adoption as national standards. General Comment 15 only defines ‘safe’ as free from microorganisms, chemical substances or radiological hazards and adequacy.\textsuperscript{151} Given this reference to the WHO, there are concerns that there are differing opinions on the question of the quantity of water required to satisfy basic human needs.

The WHO recommends at least twenty litres accessible from a source located within one kilometre of where the users are settled.\textsuperscript{152} This estimation was later increased to forty litres located within two hundred metres of each household.\textsuperscript{153} It has also been suggested that fifty litres will provide sufficient water for drinking as well as meet the requirements of human hygiene including bathing, basic sanitation and food preparation.\textsuperscript{154} By lacking indication of how minimum water must be measured, the committee’s recommendation lacks firm guidance, and it opens room for States to impose different inconsistent interpretations of what they deem a sufficient measurement of adequate water as seen in the Mazibuko\textsuperscript{155} case where both the High Court and Supreme Court of appeal suggested different measurements of water to be considered as adequate.

Critics also argue that General Comment 15 ignores the responsibility put upon individuals and the private sector to minimise the wastage and degradation of water resources.\textsuperscript{156} The principal consumers of General Comment 15 are governments. It is argued that by imposing human rights responsibilities upon


\textsuperscript{151} United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15 (2002).

\textsuperscript{152} Supra note 150.

\textsuperscript{153} Ibid

\textsuperscript{154} Ibid

\textsuperscript{155} Mazibuko v. City of Johannesburg, 2008 (4) All SA 471.

\textsuperscript{156} Supra note 150 at 63.
governments the Committee prefers mechanisms of governance and not markets for ensuring universal water access.\textsuperscript{157} This approach by the General Comment does not effectively address water challenges in countries that have endorsed neoliberal policies such as South Africa. South Africa has neoliberal policies that focus on economic growth as the overriding focus for achieving sustainable development.\textsuperscript{158} For the General Comment to effectively address sustainable development, it needs to take an approach that takes into account all the spheres that influence that realisation of water rights, including all sectors and private individuals that utilise water resources.

General Comment 15 has clearly played a pivotal role in recognising the right to water but it has also been met with a fair amount of criticism as highlighted above. The general critique has been on its minimum core approach which has been explicitly challenged by the South African Constitution. However, the ratification of the CESCR by the South African government means that South Africa is now bound by the General Comment, which may be consequential as the South African Constitutional Court rejected the minimum core approach in favour of the progressive realisation of socio-economic rights. The consequences of ratifying the CESCR by the South African government will be further discussed in Chapter 4 which analyses the interpretation of both the ‘minimum core’ approach and the ‘progressive realisation’ approach towards the realisation of socio-economic rights, and how these two contrasting concepts may both contribute to the realisation of the right of access to water in South Africa.

\section{Conclusion}
The South African Constitution reflects human rights principles that are embedded in international law, and these principles permeate all subsequent water policies and legislation.\textsuperscript{159} This chapter has analysed the right to water under the South African Constitution with reference to the developments in international law that

\begin{itemize}
\item \textsuperscript{157} Ibid.
\item \textsuperscript{159} Supra note 23 at 1.
\end{itemize}
have led to a conceptualisation of water as a human right in South Africa. Of all the international human rights tools discussed in this chapter, General Comment 15 is by far the most relevant of all judicial or quasi-judicial recognitions of the right to water, and the one which elaborates the most on the normative contents of such a right. The General Comment is clearly a milestone in the recognition of the right to water. It explicitly advocates for the right to water, with great elaboration on the normative content of the right. It establishes normative content and describes the contours of a self-standing right arguing that the right should not belong to certain groups, but to all human beings. It has, however, been critiqued for its minimum core approach, (which is discussed in detail in chapter 4) for only being an authoritative interpretation of the ICESCR and not being part of legally binding international hard law, as well as its narrow approach that only focuses on governments. However, regardless of the criticism, the interpretations of the covenant are highly valuable and influential on cases, as seen in the South African cases that are discussed in chapter 3 of the study.

160 Supra note 114 at 64.
CHAPTER 3

3. The Constitution

3.1. Introduction

The increasing level of water stress in South Africa has seen an evolution of water laws and consequent change in the nature and structure of water rights, which is intrinsically related to the increasing demand for water and political scenes that have unfolded in the country.\textsuperscript{161} The need to regulate and control the supply and demand of water by policy measures is necessitated by the need to supply water resources on sustainable basis to all water users.\textsuperscript{162}

The objective of granting water rights is fundamentally related to improving water management and using scarce water resources on a sustainable basis. This section looks at the South African constitution, which is the supreme law of the country, and analyses the role it plays in protecting water rights.

3.2. Historic Context of Water Rights in South Africa

The development of a water policy and legislation in South Africa should be understood within the context of the country’s historic transition from pre-colonial era to the democratic period. The country changed hands from the Dutch to the British and then to the Afrikaners, and very recently to a democratic Government of National Unity representing all ethnic groups in the country. Water rights regulation has also changed throughout this transition.

Prior to colonisation of South Africa, water rights in the precolonial society were governed by African customary law.\textsuperscript{163} During that period, water rights were just common knowledge, not contested among people, and only came up when communities felt that there was an unfair allocation of water resources. Water was

\begin{footnotes}
\footnote{Tewari, D., An evolutionary history of water rights in South Africa, International Water History Association, 35(5), (2009), 693.}
\footnote{Supra note 161 at 694.}
\footnote{Ibid.}
\end{footnotes}
a free resource until the introduction of colonialism which introduced laws that provided water rights to colonialists, the Dutch, British and Afrikaners.\textsuperscript{164}

The immigration of European settlers introduced a paradigm shift in water rights in South Africa. The introduction of colonial water rights policies left the Africans excluded. Various legislations aimed at dispossessing black Africans, preventing their access to land and water.\textsuperscript{165} The arrival of the Dutch in 1652 invoked the application of Roman-Dutch Law in South Africa.\textsuperscript{166} The Roman water law was the primary water governing system. It recognised three classes of water rights, private, common, and public.\textsuperscript{167} The private water is owned by individuals, the common water was for use by everyone, giving everyone the right to use without limit and permissions; and the public water was owned by the state and subject to state control.\textsuperscript{168} However, these laws also excluded the Africans and suppressed their rights by giving them limited access to land and water through policies such as the Group Areas Act of 1950.

When the democratically elected government first came into power in 1994, it was estimated that between twelve and fourteen million people had no access to safe water.\textsuperscript{169} As a result of the legacy of apartheid, the people that are deprived of access to adequate water are mostly the formerly oppressed by the appalling apartheid policies and urban planning.\textsuperscript{170} The post-apartheid government sought to address the social inequities and environmental concerns that were a legacy of apartheid. These concerns were of paramount importance in the South African Constitution as highlighted in Section 24 which provides that"

\begin{quote}
“everyone has the right (a) to an environment that is not harmful to their health or wellbeing, and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative
\end{quote}

\begin{flushleft}
\textsuperscript{164} Supra note 161 at 695.
\textsuperscript{165} Supra note 161 at 702.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} Supra note 161 at 695.
\end{flushleft}

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and other measures that prevent pollution and ecological degradation; promote conservation; secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

The social inequities in relation to water are addressed by Section 27 which provides for the right to water, and states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. These two fundamental rights form the backbone of South African water law, and will be discussed further in this study.

The interpretation of the human right to water in South Africa must therefore be understood within the historical context, and the context of water challenges faced in the country and the socio-economic constraints. The following sections will discuss the right of access to water as provided by the constitution and the role that has been played by the courts in giving effect to this right.

### 3.3. Section 27

The South African Constitution is premised on upholding the rule of law. It seeks to redress the errors of the past through the Bill of Rights. It proclaims in Section 27 (1)(b) that everyone has “the right to have access to sufficient food and water”, and that “the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.” The right to water is one of the various socio economic rights provided in the Constitution such as the right to housing, health care, food and social security. This demonstrates the constitution’s commitment to socio economic rights. The full realisation of this right in South Africa requires considerations regarding sufficiency, physical accessibility, safe and quality, as well as dignity of water services. These dimensions have been referred to in international human rights instruments such as

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171 Section 24 of the South African Constitution, 1996.
172 Section 27 of the South African Constitution, 1996.
General Comment 15 of the Committee on Economic, Social and Cultural Rights in determining the normative content of the right to water.\textsuperscript{174}

Section 27 of the Constitution provides for a right to have access to water. In analysis of this provision, the ‘access to’ qualification means that the State owes a duty only to people without the means to ensure access to water.\textsuperscript{175} The assumption is that those who have means already have access to water, since they can afford it, and thus cannot claim it from the State.\textsuperscript{176} Section 27 goes further to provide that the State must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of each of these rights. The reasonableness provides the specification against which the measures must be tested.\textsuperscript{177} The ‘measures’ will include local, provincial or national government legislation as well administrative measures.\textsuperscript{178}

The right to water as stipulated in the constitution is a substantiated right in that it guarantees sufficient access to the right in the Constitution. This right is given legislative effect by the Water Services Act.\textsuperscript{179} Section 3(1) of the Water Services Act provides everyone with the right to have access to a basic water supply, which is defined as “the prescribed minimum of water supply services needed for reliable supply of a sufficient quantity and quality of water both to formal and informal households, to support life and personal hygiene”.\textsuperscript{180} However, this definition does not state the specific content of the right to basic water supply. This content is developed in the Regulations Relating to Compulsory National Standards and Measures to Conserve Water.\textsuperscript{181} According to Regulation 3 of the aforementioned Water Regulations, the minimum standard for basic water supply is:

\begin{itemize}
\item \textsuperscript{174} Committee on Economic, Social and Cultural Rights General Comment No.15 (2002).
\item \textsuperscript{175} Gabru. N., Some Comments on Water Rights in South Africa, 8(1). (2005), 13.
\item \textsuperscript{176} Ibid.
\item \textsuperscript{177} Ibid.
\item \textsuperscript{178} Ibid.
\item \textsuperscript{179} Water Services Act 108 of 1997.
\item \textsuperscript{180} Section 1(iii) of the Water Services Act 108 of 1997.
\end{itemize}
a) The provision of appropriate education with respect to effective water use and;
b) A minimum quantity of portable water of 25 litre per person per day or 6 kilolitres per household per month:
   a. At minimum flow rate of not less than 10 litres per minute;
   b. Within 200 metres of a household and;
   c. With effectiveness such that no consumer is without a supply for more than 7 full days in any year.\(^\text{182}\)

The 25 litres of water per person per day guaranteed by Regulation 3(b) of the Water Regulations as the quantity of basic water supply is consistent with the WHO’s requirement of minimum amount of water needed to support life in the short term per person per day.\(^\text{183}\) However, this provision must be understood as forming the basic guideline and not necessarily the sufficient quantity of water required for purposes of the right to water as entrenched in international and local human rights instruments.\(^\text{184}\) As seen in Mazibuko, the High Court and Supreme Court of Appeal judgements confirm that the sufficient amount of water for purposes of section 27(1)(b) should vary between 42 litres and 50 litres of water per person per day. The government’s Strategic Framework for Water service acknowledges that 25 litres of water per day is a bare minimum, insufficient for domestic use. The provision is a minimum recommendation. Motsoeneng argues that sufficiency means that water and the sanitation services provided to people must be able to meet their minimum sanitary and water consumption needs to ensure an acceptable standard of living.\(^\text{185}\) The Strategic Framework for Water service also expresses the government’s commitment to continuously and progressively revise the quantity and basic water supply.

The Constitutional Court judgement resists providing explicit guidance as to the meaning of ‘sufficient’ water unlike previous courts. The Constitutional Court

\(^{182}\) Ibid.
emphasized the progressive realisation of socio-economic rights to ensure that the State continues to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. The approach by the Constitutional Court implies that the entitlement provided in Section 27 is an entitlement to hold the State accountable to progressively take measures to ensure that everyone enjoys the basic necessities of life. Section 27 also states that the right must be accessible, which entails that in addition to being sufficient access to water and sanitation must also be physically and economically accessible and take into account the cultural needs of people and their physical vulnerabilities. Water must be accessible to households in the physical and economic sense. Access and use of water services provided must not hinder the health or physical safety of the people using the water, and any provisions created in the realization of the right must not exclude anyone on the basis of costs, disability, or gender.

In determining the components of the right to be progressively realised by the state, guidance may be taken from the General Comment No. 15 which states that the right to water has two main components, of which the first is that the quantity and quality of water should be sufficient and adequate for domestic purposes, the right to health, human dignity and life. Most importantly, the manner adopted for realising the right must ensure intergenerational sustainability. The Comment clearly emphasises that the approach taken towards realising the right to access to water must ensure sustainability for the present and future generations. The second component requires that water must be physically and economically accessible to all, without any discrimination, on a continuous basis. For this to be achieved, information relating to the right to water should be equally accessible to all so as to ensure that people can utilise the

186 Mazibuko, Constitutional Court judgement, para 94-97.
187 Supra note 185.
188 Ibid.
190 UN General Comment No.15 (Contained in Document E.C/12/2002/11), paras 10, 11 and 12.
191 Ibid.
192 Supra note 190, para 12.
information in addressing water issues;¹⁹³ and to ensure sustainability for the present and future generations, the right provided by section 27 of the Constitution must be realised in a way that integrates sustainable practices with the existing water policies and laws. This would give effect to the sustainable development principle provided by Section 24(b) of the Constitution, discussed in the following section, which aims to prevent the degradation of the environment including water resources, and to promote a sustainable use of natural resources.

3.4. Section 24

The analysis of Section 24 of the Constitution is paramount for this study as the study addresses the issue of water rights and water sustainability. South Africa’s definition of sustainable development is influenced by the globally accepted definition provided by the Brundtland Commission, which is entrenched in the Constitution under Section 24. Section 24(b)(ii) of the Constitution guarantees everyone the right to having the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economy and social development.

Whilst, the social inequities in relation to water are addressed by Section 27 discussed above,¹⁹⁴ Section 24 of the Constitution provides for an environmental right which deals with issues such as environmental degradation, socio-economic injustice and the lack of legal gateways for public participation in environmental policy making. Section 27 is directly linked to water whilst Section 24 is linked to water pollution. These two fundamental Sections of the constitution form the backbone of South African water law.

The origin of Section 24 dates back to the interim constitution in 1993. It was initially introduced under the interim Constitution which was promulgated as an Act of the South African parliament in 1993 and replaced by the Constitution in 1996. The interim Constitution contained a Bill of Rights which provided an environmental

¹⁹³ Ibid.
¹⁹⁴ Supra note 172.

http://etd.uwc.ac.za/
right in Section 29. This section provided that “every person shall have the right to an environment which is not detrimental to his or her health or wellbeing”. Section 29 of the Interim Constitution was then replaced with Section 23, which was then redrafted to become the current Section 24. This section of the study discusses the interpretation of Section 24 and its role in contributing to sustainability of water resources.

Section 24 is divided into two parts, (a) and (b), of which section 24(a) provides that "everyone has the right to an environment that is not harmful to their health or wellbeing". This subsection represents what can be described as a negative fundamental human right; whereas section 24(b)(iii) can be seen as a positive social fundamental right which allows for formal participation by the right holder. This right also has an element of a directive principle of State policy directive. It holds the State accountable for developing the law through reasonable legislative and other measures to prevent pollution, promote conservation, and secure ecologically sustainable development, while promoting justifiable economic and social development.

Section 24(a) contains a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right to an environment that is not harmful to health or wellbeing. Section 24(b), on the other hand, implies a positive obligation on everyone by requiring that the environment be protected through legislative and other measures to prevent pollution and ecological degradation, and that the environment be ecologically sustainable. In the context of Section 24(b), 'ecologically sustainable' would mean development or use of resources which allows the ecosystem to cope, adapt, or reorganise.

196 It provided that 'everyone has the right to an environment that is not harmful to their health or wellbeing; and to have their environment protected through reasonable legislative and other measures designed to prevent pollution and ecological degradation; promote conservation; and secure sustainable development and use of natural resources.'
198 Section 24 of the South African Constitution, 1996.
without sacrificing the provision of ecosystem service. From this definition, 'ecologically sustainable' can be inferred to mean prevention of environmental degradation so as to minimise the perturbation or maximise the adaptation. In this sense, Section 24(b) requires that natural resources such as water must be used in an ecologically sustainable manner, which entails avoiding depleting the available water resources, and retaining adequate ecosystems to adapt to the level of water use and water demand. Section 24(b)(iii) requires that in addition to the positive duties imposed by (i) and (ii), the development and use of natural resources must be ecologically sustainable. The overall purpose of Section 24(b) is to protect the environment for the present and long term. The State must therefore take reasonable legislative and other measures to ensure the prevention of pollution and secure ecologically sustainable development, which entails sustaining water resources.

Scholarly analysis of the meaning of Section 24 widely accepts that this provision imposes both negative and positive obligations on the state as mentioned above. These duties arise from an inclusive reading of Sections 24 and 7(2) of the Constitution. Section 7(2) of the Constitution determines that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”. With this said, the judicial interpretation of the state’s obligations contained in this right are crucial to guide the conduct of the legislature and the executive in relation to environmental governance. In this respect, judicial guidance has been limited due to the absence of cases dealing with the positive obligations contained in section 24. However, this limitation does not prevent the legislative or executive branches of government from their duty to design and implement a regulatory framework that gives effect to the provision of Section 24. The State is obliged to

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201 Section 7(2) of the South African Constitution, 1996.


http://etd.uwc.ac.za/
take reasonable legislative and other measures to ensure that the pollution and degradation of water resources is prevented.

Regarding water sustainability and sustainable development, Section 24(b) clearly gives force to the principle of sustainable development by explicitly providing for the wellbeing of present and future generations. In addition, Section 24(b) provides that the right to have the environment protected for the benefit of present and future generations must be achieved through reasonable legislative and other measures. In the Mazibuko case, the views of the Court on the reasonable measures required for the effective content of other socio-economic rights in the Constitution are relevant for interpretation.203 As suggested in Mazibuko, the Court will have regard for the relief sought and the circumstances of the applicants in considering whether or not reasonable measures have been taken.204 Section 24 thus places a positive obligation on the State to make decisions that would ensure the protection of the environment, in this instance protecting water resources from degradation and pollution, and to execute this governance function in a manner that would ensure the sustainability of water resources.

3.5. Interpretation Through Courts

The courts play a huge role in upholding the Constitutional right to water. In South Africa, the Constitutional Court is the Supreme Court established by the constitution to address constitutional matters and matters concerning justice. The Court has a huge role to play as a transformative institution in the realisation of the right of access to water. The Constitutional Court has been praised for upholding human rights and setting a global example, but has also been met with criticism from those who accuse the Court of failing to advance equality of access for poor people. This section will discuss the role played by South African courts in the realisation of the right to access to water and addressing water challenges.

204 Supra note 115.
In an attempt to address water challenges and uphold the constitutional right to water, the first most effective approach is to use the law to enable equal access to water. South Africa is one of the few countries which provide a constitutional right to access to water. While the South African rights-based approach has been described as progressive and innovative, the way in which it could function to address water challenges in South Africa was previously unclear in the absence of judicial interpretation of the right. It was uncertain whether the right would be interpreted as an entitlement to a specified quantity of water, with a corresponding obligation on the State to immediately provide such quantity, or as an expectation that the State would progressively ensure access to sufficient water over time, with a corresponding obligation on the State to take measures to progressively realise the right. Therefore, the first call would be to clarify and challenge the constitutional right to water.

This first step was taken by the Mazibuko case, which provided clarity on the interpretation of the right to water. The case raised two issues, the question of what constitutes access to sufficient water, and whether the State is under a constitutional duty to provide such a specified quantum. In addressing these issues, the Court’s ruling was met with divided views, some praising the Court for its ruling, and some accusing it as a less user-friendly approach, which entails an obligation of the state to respond to the basic social and economic needs of the people by adopting reasonable legislation.

Prior to discussing the different views of the role played by the Mazibuko case in providing clarity on the role of the courts in realising socio-economic rights, it is imperative to look at other socio-economic cases brought to the Court before Mazibuko, which influenced the outcome of Mazibuko and the approach of the Court in dealing with socio-economic issues. Examining relevant court cases that have dealt with socio-economic rights and Section 27 of the Constitution in

206 Ibid.
particular, would provide an understanding of the Court’s interpretation of the right to sufficient water.

There are five important socio economic cases that have reached the Constitutional Court, where the Court has been called to assess whether governmental authorities had complied with their constitutional obligation to take reasonable legislative and other measures, within their available resources, to achieve the progressive realization of specific social and economic rights. These cases are Soobramony v. Minister of Health (Soobramony)\textsuperscript{208}, the Government of the Republic of South Africa v. Grootboom (Grootboom),\textsuperscript{209} Minister of Health v. Treatment Action Campaign (TAC),\textsuperscript{210} Khosa v. Minister of Social Development (Khosa),\textsuperscript{211} and Mazibuko v. City of Johannesburg.\textsuperscript{212} In Soobramony the appellant was refused treatment on the basis that the hospital did not have sufficient resources to provide dialysis treatment to all patients; treatment was only offered to patients that were eligible for a kidney transplant. The appellant challenged this decision, relying on section 27 (3) of the Constitution which provides that no one may be refused emergency treatment.\textsuperscript{213} In Grootboom,\textsuperscript{214} a group of squatters were evicted from a piece of land in a village in the Western Cape Province. They challenged their eviction based on section 26 of the Constitution, which provided them with the right to adequate housing, and section 28 which provides for childcare rights.\textsuperscript{215}

The third case, TAC,\textsuperscript{216} concerned the policy of the South African government which responded to the HIV/AIDS pandemic, in particular with its programme concerning the transmission of HIV between mothers and their children at birth. The government was challenged for restrictions in its drug programme which was only available to limited research and training sites, and to a limited number of mothers with HIV. The applicants contended that these restrictions were

\begin{footnotesize}
\textsuperscript{208} Soobramoney v. Minister of Health, 1997 (12) BCLR 1696 (CC) (S. Afr).
\textsuperscript{210} Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) (S. Afr.).
\textsuperscript{211} Khosa v. Minister of Soc. Dev., 2002 (10) BCLR 1033 (CC) (S. Afr.).
\textsuperscript{212} Mazibuko v. City of Johannesburg, 2008 (4) All SA 471.
\textsuperscript{213} Section 27 (3) of the South African Constitution, 1996.
\textsuperscript{215} Section 26 and 28 of the South African Constitution, 1996.
\textsuperscript{216} Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) (S. Afr.).
\end{footnotesize}
unreasonable when seen from the perspective of the South African Bill of Rights, in particular Sections 7(2), 27, 28(1).

The fourth case, Khosa, involved a number of Mozambican citizens with permanent residence status in South Africa who were disqualified for social assistance under the Social Assistance Act of 1992 and the Welfare Laws Amendment Act because they were not South African citizens. The applicants contended that the exclusion of all non-citizens from the social assistance scheme was inconsistent with the obligations of the state under Section 27(1)(c) of the Constitution to provide social security to everyone.

The Mazibuko case is the final and most important case for this study. This case concerned shacks that caught fire in Phiri, Soweto. Residents attempted to extinguish the fire using the prepaid water meter supply that the Johannesburg Water company had recently installed to control the residents' water supply. However, the water pressure was insufficient to put out the fire and after a while the prepaid meter water supply automatically disconnected due to insufficient water credit. Residents were then compelled to use ditch water scooped with buckets in desperate attempt to put out the fire. The residents only managed to put out the fire after the shack had burnt to the ground. It was only when the tenant occupying the shack returned from work when everyone discovered that the tenant's two children had been sleeping in the shack and both died in the fire. This tragic incident highlights the water problems that result in indignity and inhumanity that people in less privileged areas such as Phiri have had to endure as a result of cost-recovery water meters, which have come at the expense of Phiri residents' basic needs and their human rights guaranteed by the constitution. This case provided the South African Constitution to interpret the right to access to sufficient

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217 Section 7 (2) of the South African Constitution, 1996 provides that the state must respect, protect, promote and fulfil the Rights in the Bill of Rights.
218 Regarding this case, section 27 of the South African Constitution provides everyone with the right to have access to healthcare services, and requires the state to take reasonable legislative and other measures available within its resources, to achieve the progressive realisation of this right.
219 Section 28 (1) provides every child with the right to basic healthcare services.
221 Mazibuko v. City of Johannesburg, 2008 (4) All SA 471.
water for the first time and to clarify the nature of the State’s obligations which flow from this human right.

The Mazibuko case plays a significant role in this study. This section will discuss the three judgements provided by the High Court, Supreme Court of Appeal and the final Constitutional Court judgement, as well as the role played by this judgement in determining South African water rights. The Johannesburg High Court found that regulation 3(b) was in itself unconstitutional in that it established a minimum standard for the provision of water services; it found that the City of Johannesburg’s restriction of its free basic water allocation to 6 kilolitres per household per month was insufficient. It was held that the standard should instead be an allocation of 50 litres per person per day. In this finding, the judge supported the notion of a minimum core obligation.

The respondents appealed the High Court’s decision to the Supreme Court of Appeal, and just like the High Court, the Supreme Court of Appeal read section 27(1)(b) as a requirement for the Court to determine what constitutes sufficient water, and determine whether the State had taken reasonable measures to progressively realise what had been determined as sufficient. The Court referred to General Comment No. 15 and held that the right to access to sufficient water cannot imply anything less than the quantity of water that is required for dignified human existence. However, unlike the High Court’s recommendation of 50 litres per person per day, the Supreme Court of Appeal ruled that 42 litres per person per day should be the sufficient quantity. The Court ordered the City of Johannesburg to reformulate and adopt a water policy that was reasonable, based on the Court’s interpretation of Section 27(1)(b).

The applicants applied against the Supreme Court of Appeal’s findings to the Constitutional Court, which is the highest court in constitutional matters. The Constitutional Court found that the installation of prepaid water meters in Phiri was lawful, and that the City’s free basic water policy was reasonable. In reaching this conclusion, the Court found that the State was under no constitutional obligation to provide any specific amount of water in terms of Section 27(1)(b) of the Constitution. The Court held that the right does not require the State upon demand
to provide every person with sufficient water at one go, but rather required the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.\textsuperscript{222}

The Court clarified that it had rejected the 'minimum core' argument in both the \textit{Grootboom} and \textit{Treatment Action Campaign} cases. The Court however pointed out that what applicants were asking for in \textit{Mazibuko} went beyond the minimum core, as they were asking for the amount deemed necessary for a dignified life. The Court expressly rejected the argument that it should adopt a quantified standard determining the content of the right and not merely its minimum content.\textsuperscript{223} In substantiating its decision, the Court highlighted that at the time the Constitution was adopted; millions of South Africans did not have access to the basic necessities of life. It could have not been expected that the State could immediately provide those necessities. The Court stated that the purpose of entrenching the socio-economic rights in the South African Constitution was to ensure that the State continues to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life.\textsuperscript{224} This implies that the entitlement provided in Section 27 is an entitlement to hold the State accountable to progressively take measures to ensure that everyone enjoys the basic necessities of life.

The aforementioned cases demonstrate that the socio economic rights entrenched in the Constitution enable or challenge the government to pursue substantive equality by enacting policies that enable previously disadvantaged groups to have their basic needs met. However, the Constitutional Court’s approach to the socio-economic cases discussed above has been met with scholarly criticism, particularly the \textit{Mazibuko} case which was seen as a significant case in addressing water issues in South Africa. Critics of the judgement argue that

\textsuperscript{222} Mazibuko, Constitutional Court judgement, para 50.
\textsuperscript{223} Supra note 222, para 52-56.
\textsuperscript{224} Supra note 222, para 94-97.
the Constitutional Court demonstrated a limited understanding of its role in enforcing social and economic rights.\footnote{De Vos, P., Water is life (but life is cheap). Centre for Law and Social Justice. Available at http://www.writingrights.org/2010/07/21/waterislifebutlifeischeap/ (Accessed on 27 March 2017).}

Dugard highlights that the Constitutional Court was designed to promote a post-apartheid vision founded on values of dignity, equality, non-racialism, and non-sexism, the supremacy of the constitution and the rule of law.\footnote{Dugard, J., Court of first instance? Towards a prop-poor jurisdiction for the South African Constitutional Court. South African Journal on Human Rights. University of the Witwatersrand. (2006), 261.} She argues that despite this clear pro-poor approach, the Constitutional Court has not yet appropriately forged a specific role for itself as an institutional voice for the poor.\footnote{Ibid.}

The Court is accused of failing to utilise its direct access mechanism in the interests of poor people.\footnote{Ibid.} The people in South Africa do not have easy access to the justice system; the difficulties of accessing justice are exacerbated by socio-economic inequalities and the remoteness of law from most people’s lives.\footnote{Supra note 226 at 266.} In absence of legal aid for constitutional matters, poor people are largely unable to take cases through the normal judicial process, which is both lengthy and costly.\footnote{Ibid.}

The Constitutional Court’s exclusive approach is noticeable in its uptake of cases. The Court receives an average of 50 registered cases per year, and delivers an average of 23 judgements per year.\footnote{Ibid.} This means that the Court only hands down a written judgement in roughly half the cases it registers and the remaining cases are decided by the judges privately in chambers.\footnote{Ibid.} These figures indicate that the Court has a low caseload compared to constitutional courts elsewhere in the world, and hands down written judgements in a comparatively high proportion of the registered applications.\footnote{Ibid.} To effectively redress the existing inequalities and realise socio-economic rights such as the right of access to water, the Court must actively utilise the direct access mechanism to the benefit of poor people and do all that it can to facilitate access by the poor.

The South African Constitution is designed to protect everyone’s rights; however, for such rights to be protected there is a need for legal representation. Legal representation lies at the core of access to justice and poor people are unlikely to be able to afford legal representation. To address this challenge, Section 35(3)(g) of the Constitution gives accused persons the right to a legal practitioner at state expense.\(^{234}\) However, in civil matters and non-criminal constitutional matters there is no general right to legal representation.\(^{235}\) This gap in the legal system leaves poor people at a vulnerable position with no access to legal representation.

Given such challenges, it is argued that the South African Constitution has not been actively pro-poor in comparison to other countries, despite the existence of rules standing favourable to public interest litigation.\(^{236}\) Section 38 of the Constitution provides that anyone may approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.\(^{237}\) Regardless of this provision, the South African experience has been to some extent opposite to that of comparable countries such as India.\(^{238}\) Although the Court’s direct access rules are premised on an inclusive public interest ideal, in practice the Court has interpreted these rules in a very restrictive manner. In comparison to India, the number of cases involving poor people decided by the South African Constitutional Court, and taking into account the vast difference in the size of population between the two countries, the South African Constitutional Court is arguably a less accessible institution than the Indian Supreme Court.\(^{239}\) The Indian Supreme Court is able to treat each letter or petition addressed to it as a court order initiating legal proceedings, allowing direct access to many poor litigants each year.\(^ {240}\) On the other hand, the South African Constitutional Court refuses many applications for direct access by stating that applicants for direct access should show that they have exhausted all other remedies of procedures.\(^ {241}\) and

\(^{234}\) Section 35(3)(g) of the South African Constitution
\(^{235}\) Supra note 233 at 268.
\(^{236}\) Supra note 233 at 272.
\(^{237}\) Section 38 of the South African Constitution, 1996.
\(^{238}\) Supra note 233 at 272.
\(^{239}\) Ibid.
\(^{240}\) Ibid.
\(^{241}\) Besserglik v Minister of Trade, Industry and Tourism 1996 (4) SA 331 (CC) para 6.
that the applicant must have reasonable prospects of success based on the substantive merits of his or her case.242

A study examining how people are treated when they directly apply for assistance from the Constitutional Court found that applications presented to the Court’s registry office by unrepresented applicants, consisting mostly of poor people who cannot afford legal fees for representation, are usually turned away with the advice to seek legal support elsewhere.243 They are usually advised to take their complaint to the South African Human Rights Commission or to the Legal Aid Board.244 The lack of success rate from the limited cases brought to the Court by institutions such as the South African Human Rights Commission provides evidence that the alternative avenues for redress recommended by the Court do not prove very useful.245 Given this trend, it is of concern that the Constitutional Court does not monitor the outcomes of cases turned away due to lack of legal representation.

The Constitutional Court’s approach to granting access is seen as conservative; critics argue that the Court increasingly risks becoming an elite institution that is failing poor people with regard to access, and favouring socio-economically empowered individuals and groups.246 This is seen in the abovementioned socio economic cases where non-government organisations had to intervene to represent the poor people that could not afford legal representation. In defence of the approach taken by the Constitutional Court, it is argued that allowing widespread access to courts would lead to courts getting flooded with applicants and that the quality of the legal procedures will be reduced.247 Dugard counters this argument by stating that the Constitutional Court is currently not under threat of receiving excessive applications and that it may have the capacity to hand

242 Dormehl v Minister of Justice 2000 (2) SA 825 (CC) para 5; MEC for Development Planning and Local Government in Gauteng v Democratic Party 1998 (4) SA 1157 (CC) para 32.
247 Supra note 233 at 277.
down decisions in more than the approximately 25 cases it currently does a year.\textsuperscript{248} She argues that the Constitutional Court judges can address this concern by not entertaining all applications themselves and instead introduce a system of screening and assigning legal assistants to filter spurious claims from meritorious ones, forwarding only genuine constitutional complaints to the judges.\textsuperscript{249} This may help address the Court’s concern of taking up too many cases.

The Court has clearly played a huge role in promoting a post-apartheid vision founded on values of dignity, equality, and the supremacy of the constitution and the rule of law. However, there is still a need to implement a pro-poor approach by appropriately forging a specific role for itself as an institutional voice of the poor and ensuring that the poor have equal access to justice and to have their rights protected.

In addition to the issue of accessibility for the poor, the Court has also been criticised for focusing on the meaning of the right to access and quantity of water sufficient for purposes of Section 27 (1)(b) of the Constitution, without giving much attention to the quality of water.\textsuperscript{250} The Constitution guarantees everyone the right to have access to sufficient water, but it does not provide content as to what qualifies as sufficient quantity or quality of water.\textsuperscript{251} The Court argued that courts are ill-placed to make these assessments for both institutional and democratic reasons.\textsuperscript{252} However, it does address the issue of quantity when arguing against using the minimum core approach, and neglected the issue of water quality, which is essential for sustainability. Water quality is essential for SDG 6, as one of its targets is to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling, and implementation of safe reuse globally by 2030.\textsuperscript{253} These targets are non-binding, which means states are not legally obliged to meet the targets, but they provide guidance for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{248} Ibid.
\item \textsuperscript{249} Supra note 233 at 278.
\item \textsuperscript{251} Ibid.
\item \textsuperscript{252} Mazibuko 2010 (3) BCLR 239 (CC), 62, 65-68.
\item \textsuperscript{253} United Nations Sustainable Development Goals, SDG 6, 2015.
\end{enumerate}
\end{footnotesize}
states to address issues such as water challenges. The South African government also played a key role in the negotiations and processes that led to the development of the 2030 Agenda for Sustainable Development, including its 17 SDGs.\textsuperscript{254} It is therefore essential for the government to work towards aligning its policies with SDGs and for the Courts to realise and address the importance of water quality in the transition towards sustainability in an attempt to meet SDG 6 targets.

3.6. Conclusion

The Constitution has a huge role to play in addressing water challenges. Its Sections 24 and 27 discussed above, provide for the provision and sustainability of water resources in South Africa. Given that the degradation and mismanagement of water resources mostly affects the poor and the marginalised, the constitution seeks to protect people’s water rights by providing for the right to an environment not harmful to health and wellbeing, for the present and future generation, as well as the right to sufficient water.

Section 27 plays an essential role in law by providing for the right of access to sufficient water. The provision and role of this section has been previously unclear and ambiguous, however the Mazibuko case provides clarity on the provision of this section, and on the roles of the government and the courts respectively. From this case, it is understood that Section 27 obliges the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to water, and the courts play the role of a watchdog, monitoring whether the government progressively works towards fulfilling their constitutional obligation. As discussed above, General Comment 15 may be used as a guiding instrument to determine the components of the right to be progressively realised by the State. The Comment provides that the quantity and quality of water should be sufficient and adequate for domestic purposes, the right to health, human dignity and life;\textsuperscript{255} and that the manner adopted for


\textsuperscript{255} UN General Comment No.15 (Contained in Document E.C/12/2002/11), paras 10, 11 and 12.
realising the right must ensure intergenerational sustainability. These provisions seek to enable the sustainability of water resources in a way that takes into consideration the quantity and quality of water resources in the short term and long term.

On the other hand, Section 24 does not directly speak to water resources; it is rather linked to water pollution through its provision that the environment must be protected from pollution for the present and future generations. It provides that natural resources such as water must be used in a way that is ecologically sustainable. The integrated application of Section 27 and Section 24 is therefore fundamental for the sustainability and provisions of water resources as these address the issue of access to water, pollution and sustainability.

Taking into account the provisions of the constitution’s Section 24 and Section 27, the role played by the Constitution may have been met with criticism for its reluctance in taking a firm stance on the issue of the minimum content of water deemed sufficient and for taking a non-poor approach; the constitutional challenge of the right to water is seen as a major intervention that addresses the lack of water services from a strategic point of view.

As highlighted in socio economic cases such as Mazibuko discussed in this study, the constitution holds the state accountable for setting reasonable standards and upholding the constitutional right to access to water by effectively implementing water policies and progressively working towards fulfilling socio economic rights. If effectively implemented and obliged to, the provisions of the constitution may play a huge role in the sustainability of water resources in a way that prevents the degradation of water resources, while striving towards ensuring that everyone has access to sufficient water.

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256 Ibid.
4. Minimum core vs Progressive realisation

4.1. Introduction

There are two primary competing conceptual approaches to the realisation of socio economic rights. One embraces a resolute “minimum content” of rights and the other takes a “reasonable” approach to realising human rights.\textsuperscript{257} It is essential to understand the interpretation of these two conceptions as they are at the core of socio-economic rights and play an influential role in interpretation of South African water legislation. The South African Constitution, which is the supreme law of the country, takes the “progressive realisation” approach towards the realisation of socio-economic rights and redressing issues such as the lack of access to water, especially in poor communities. This approach entails taking reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life.

On the other hand, General Comment 15, which has also been referenced by South African courts, takes the “minimum core approach”, which obliges member States to give immediate effect to ensure access to the minimum essential amount of water that is sufficient for personal and domestic use.\textsuperscript{258} Given that South Africa is bound both by the Constitution and the ICESCR as of 2015, it is imperative to understand the “minimum core” approach and the “progressive realisation” concepts, and their role in strengthening the realisation of the right of access to water in South Africa and the transition towards sustainability.

An analysis of both the “minimum core” approach and the “progressive realisation” concepts is essential for this study as these two concepts play a huge role in the realisation of socio economic right, particularly the right of access to water. Given the limited amount of water resources, an essential element for wellbeing, which is also at the core of socio economic rights; it is imperative that the implementation of socioeconomic rights is subjected to obligations that hold the state accountable to realise the rights provided. The “progressive realisation”


\textsuperscript{258} CESCR, General Comment No. 15.
approach and the “minimum core” approach are the two main concepts guiding the realisation of socio economic right. An analysis of these two approaches is essential for this study because they play an influential role in South African water law and have been extensively discussed in the Constitutional Court. The South African Constitution recognises that socio economic rights have to be recognised over time and that the progress towards full realisation is dependent on the availability of resources. However, the minimum core approach has also played an influential role in South African law, and has proven to be valuable in the realisation of socio economic rights. This chapter will therefore discuss both the minimum core approach and the progressive realisation approach concepts, and the role they can play in contributing towards the realisation of the right or access to water and the sustainability of water resources.

4.2. Minimum Core Approach

The minimum core approach seeks to confer a minimum legal content for socioeconomic rights. The approach inherits its structure from German basic law, which protects the essential content of a constitutional right from potential limitation. The United Nations Committee on Economic and Social Rights was the first international body to articulate the notion of a minimum core. General Comment 3 of the Committee states that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party”. Article 12 of the ICESCR further states that “a State party cannot under any circumstance whatsoever, justify its non-compliance with core obligations which are non-derogable”. As highlighted in Chapter 3, General Comment 15 clearly outlines that the minimum core approach provides for core obligations that need to be fulfilled immediately. The approach is based on the assumption that there are fundamental obligations

263 Committee on Economic, Social and Cultural Rights, General Comment No 15, para 37.
appertaining to each right, the immediate fulfilment of which is of such central importance for the realisation of the right that failure to achieve it would lead to the right losing its significance as a human right.\textsuperscript{264}

General Comment 15 identifies a number of obligations that are of immediate effect, namely the obligation:

- to ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent diseases;
- to ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times and that are at a reasonable distance from the household; and
- to take measures to prevent, treat and control diseases linked to water, particularly ensuring access to adequate sanitation.\textsuperscript{265}

These core obligations apply unless the state can show that its resources are demonstrably inadequate to allow it to fulfil its duties.\textsuperscript{266} It is believed that by articulating a concrete minimum content to a certain right, it is possible to achieve maximum gains in realising the right, as deviations will be more easily ascertained.\textsuperscript{267} Scholars holding this view argue that the failure to identify tangible content within the socio economic rights makes these rights a meaningless rhetoric.\textsuperscript{268} They argue that people who are deprived of essential services such as water are ill-served by rights which do not translate into any tangible guarantees. In their argument, they hold that the minimum core approach is essential because it prevents governments from citing the lack of resources for lack of progress, whilst people are deprived of their rights.

\textsuperscript{265} CESCR, General Comment No. 15.
\textsuperscript{268} Marius Pieterse, Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited, 29 HUMAN RIGHTS QUARTERLY 796 (2007).
However, the minimum core approach has encountered some criticism, particularly in the South African context where the Court referred to the concept in a number of cases. The South African Constitutional Court held that it is impossible to provide everyone with immediate core services; it held that the State can only be expected to reasonable.\textsuperscript{269} In the Mazibuko case, the Constitutional Court rejected the “minimum core” approach. It held that although certain rights are guaranteed in the Constitution, they will not be realised immediately and must be subject to “progressive realisation.”\textsuperscript{270} The Court found that the Constitution requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources.\textsuperscript{271}

Critics of the minimum core approach argue that it creates the danger that courts will transgress the boundaries of their institutional legitimacy and capacity. It is argued that through defining and enforcing minimum core obligations, courts may be tempted to usurp government’s policy-making functions.\textsuperscript{272} They also argue that the minimum core approach may encourage minimalism in social provisioning.\textsuperscript{273} Liebenberg argues that the minimum core concept lacks responsiveness to the diverse needs and circumstances of different groups of people.\textsuperscript{274} The underlying concern is that the concept of minimum core obligations may result in the exclusion or marginalisation of the needs of various groups of people that do not fit the background norms informing the definition of core obligations.\textsuperscript{275} This argument takes the view that the minimum core approach does not consider factors such as gender and location as people have different needs, and countries have differing capacities to meet people’s needs. Another critique of the minimum core approach is its dependence on a two-tiered approach to the adjudication of positive socio-economic rights claims.\textsuperscript{276} This approach requires distinguishing between core needs, those that implicate survival and non-core

\begin{itemize}
\item \textsuperscript{269} Minister of Health v Treatment Action Campaign. \textit{Butterworths Constitutional Law Report} (2002), 1945.
\item \textsuperscript{270} Mazibuko, para 58.
\item \textsuperscript{271} Mazibuko, para 57.
\item \textsuperscript{272} Liebenberg. S., \textit{Socio-Economic Rights: Adjudication under a transformative constitution}. (2010), 165.
\item \textsuperscript{273} Supra note 272 at 169.
\item \textsuperscript{274} Ibid.
\item \textsuperscript{275} Ibid.
\end{itemize}
needs, those that relate to fulfilling a range of purposes and flourishing as a human being. However, the difficulty is that social needs are interconnected and there is no clear-cut distinction between core and non-core needs.

Clearly, it is difficult to effectively implement the minimum core approach due to complexities of challenges that encounter the realisation of socio-economic rights, particularly in the South African context. As argued by the Constitution, it is difficult to provide everyone with immediate core services due to the limit of resources and the extent of challenges faced. However, the minimum core concept does have the potential to play a valuable role in socio-economic rights adjudication by signalling the high priority, which should be attached in social policy, to ensuring that the urgent material needs of vulnerable and disadvantaged groups receive immediate attention. The minimum core concept can encompass other foundational constitutional values such as participatory democracy, equality, freedom and human dignity. The minimum core concept can also be important in the evaluation of the reasonableness of the State’s measures in realising socioeconomic rights.

4.3. Progressive Realisation

The “progressive realisation” approach requires states to take steps towards the realisation of human rights. These steps have to be deliberate, concrete and targeted, and must be undertaken with the aim to progressively achieve the full realisation of rights. States thus must take steps forward continuously toward the full realisation of the human right to water. They have to effectively make an expeditious move towards the full realisation of the right to water and to show progress towards the goal, even during periods of resource scarcity.

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277 Ibid.
279 Ibid.
281 Ibid.
There are three arguments concerning the understanding of progressive realisation. First, there must be immediate and tangible progress towards the realisation of rights. This approach requires the state to take steps and make efforts to fulfil their obligations and ensure full realisation. The second argument is that states cannot pursue deliberate retrogressive measures, as progressive realisation implies that deliberate retrogressive measures are not permissible and have to be fully justified by reference to the totality of rights. Retrogressive measures can only be justifiable where the state can show that retrogressive measures are necessary to achieve equity in the realisation of the right or a more sustainable basis for adequate realisation of the rights.

The third argument is that progressive realisation requires that special measures for vulnerable and disadvantaged groups be put in place. States are required to do more than simply abstain from taking measures that might have a negative impact on the enjoyment of their rights. States are obliged to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalized groups. This understanding of the “progressive realisation” concept is adopted by the South African Constitution and implemented by the Courts; as seen in Grootboom where the Court observed that though the right could not be realised immediately, the state must take steps to achieve the goal of the Constitution, which is that “the basic needs of all in our society be effectively met”. The Court also expressed this view in Mazibuko, where it held that water policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved.

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283 Ibid.
284 Supra note 282 at 745.
287 Ibid.
288 Ibid.
289 Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC), par 45.
290 Mazibuko v City of Johannesburg 2010 3 BCLR 239 (CC) para 40 and 67.
As highlighted in the arguments presented above, to achieve the full realisation of socio-economic rights progressively; the State must take steps that:

- Are balanced and flexible, and provide appropriately for short, medium and long-term needs;
- Facilitate access over time by lowering legal, administrative, operational and financial hurdles to fulfilling the rights;
- Make a service accessible to a greater number of people over time and also ensure that a wide range of people benefit as time progresses; and
- Include concrete targets and goals that are linked to timeframes.\(^{291}\)

Setting goals and targets with specified time frames would allow the State to plan and monitor its own progress. This would also help institutions such as South African Human Rights Council (SAHRC), the Commission for Gender Equality (CGE), non-governmental organisations and the general public to monitor and hold the State accountable for realising socio economic rights progressively.

The “progressive realisation” concept recognises that the full realisation of socio-economic rights would generally not be achieved in a short period of time due to complexities and challenges in providing basic needs to all. The provision provides the Court, non-governmental organisations, civil society and other institutions with the platform to monitor and hold the state accountable of utilising the available resources to progressively fulfil the constitutional mandate of providing access to basic needs. It also ensures that where there is a shortage of resources, the state still takes reasonable legislative and other measures, or to at least demonstrate that that necessary measures have been taken thereof.

### 4.4. Comparison of Section 27 and the ICESCR

The South African Constitution and General Comment 15 both recognize the realization of socio-economic rights. Both instruments provide for the realization of the right of access to water, but apply different concepts in their provisions to fulfill the right, the “minimum core” approach and the “progressive realization” approach.

approach. It is important to note that even though General Comment 15 takes the minimum core approach, the Covenant does recognize the progressive realization of socio economic rights in General Comment 3. However, this study puts more emphasis on General Comment 15 in comparison to Section 27 as it is directly linked to the right to water.

Given that the South African government ratified the ICESCR as of 2015 and is now bound by both the Constitution and the ICESCR, these instruments must be analysed in terms of water rights and their role in giving effect to the realization of water rights in this country. After all, the South African Constitution requires the South African courts to take into account relevant international law in interpreting the Bill of Rights. Section 233 further mandates that every court must prefer a reasonable interpretation of South African legislation that is consistent with international law norms to one that is not. It is therefore imperative that the application of the constitution is reviewed against the background of relevant international laws.

Section 27 and General Comment No. 15 of the CESCR covenant take different approaches to realising human rights. Section 27 provides for the obligation of the state to take reasonable legislative and other measures to realise human rights, while Article 2(1) of the CESRC Covenant refers to “all appropriate means, including particularly the adoption of legislative measures”. Section 27 further limits the input of resources to the resources available, while the Covenant requires an input to the maximum of the state’s available resources. Another significant difference is that section 27 aims at the progressive realization of the right to access to water, while Article 2(1) of the Covenant aims at progressively achieving the full realisation of the rights. These are consequential differences that need to be addressed in order to have consistency in national and international laws.

292 Section 39(1)(b) of the South African Constitution, 1996.
293 Section 233 of the South African Constitution, 1996.
294 Section 27 of the South African Constitution, 1996.
296 Supra note 105.
297 Supra note 106.
The aforementioned difference is demonstrated in the Mazibuko\textsuperscript{298} case where the High Court and the Supreme Court of Appeal referred to the international human rights jurisprudence, which determined a minimum core content of the right in section 27(1) (b) of the Constitution by quantifying the amount of water deemed sufficient for a dignified life.\textsuperscript{299} Contrary to that, the Constitutional Court overturned the Appeal Court's decision and held that the right of access to sufficient water does not require the state to provide upon demand every person with sufficient water.\textsuperscript{300} Rather, it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.\textsuperscript{301} The Court stated that, the positive obligations imposed upon government by the constitutional social and economic rights will be enforced by courts in at least the following ways: (a) where government takes no steps to realise the rights; (b) where the government's adopted measures are unreasonable; and (c) where the government fails to give effect to its duty under the obligation of progressive realization to continually review its policies to ensure that the achievement of the right is progressively realised.\textsuperscript{302}

This brings into question the available resources and the minimum core debate, in which the Constitutional Court has said that the availability of resources is a determining factor in what can be justified as reasonable action by the state to progressively realise socio economic rights.\textsuperscript{303} The ICESCR holds that States Parties must apply the maximum of their available resources to realise the socio economic rights of their citizens.\textsuperscript{304} General Comment 3 of the ICESCR holds that states have the obligation to ensure the satisfaction of minimum essential levels of the socio economic rights.\textsuperscript{305} In South Africa, the Constitutional Court in

\textsuperscript{298} Supra note 101.
\textsuperscript{300} Supra note 101.
\textsuperscript{301} Ibid.
\textsuperscript{302} Ibid.
\textsuperscript{303} Supra note 91 at 22.
\textsuperscript{304} Supra note 205.
\textsuperscript{305} CESC, General Comment No.3. The nature of States parties obligations a2(l) of the Covenant) UN doc. E/1991/23, par. 1.
Grootboom avoided the issue of providing direction or criteria on the obligation to take measures using available resources.\(^{306}\) The Court stated that “it is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.”\(^{307}\)

This establishes that the South African Courts have an institutional role of holding the government accountable while leaving the primary policy-making function of assessing, calibrating and realizing social economic rights to the legislative and executive branches.\(^{308}\) If the government takes no steps to realize economic and social rights; the courts must intervene and take action to make sure that the government takes reasonable measures. The obligation of progressive realization imposes a duty on the government to continually review its policies.\(^{309}\)

The progressive realisation and the minimum core approach have both proven to be important for the realisation of water rights. However, the Constitutional Court rejected the minimum core approach but it made this ruling before the South African government ratified the CESCR in 2015. The ratification of the CESCR entails that South Africa is bound by the Covenant; which brings into question how Section 27 and General Comment 15 can be applied in South African water law, given their different approaches to realising water rights.

In terms of Section 231(2) of the South African Constitution, South Africa is bound by international agreements that have been approved by resolution in the National Assembly and the National Council of Provinces.\(^{310}\) This entails that the South African government is bound by international laws and treaties ratified by the government. However, regarding the Bill of Rights, the Constitution in Section 39(1)(b) employs public international law only as an aid to interpret the rights contained in the Bill.\(^ {311}\) In this respect, based on a similar provision in the Interim Constitution, the Court held that there is no duty on South Africa to give effect to public international law; the provision merely requires a court to consider it in view

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\(^{306}\) Supra note 94.
\(^{307}\) Ibid.
\(^{308}\) Supra note 110.
\(^{309}\) Ibid.
\(^{310}\) Section 231(2) of the Constitution, 1996
\(^{311}\) Section 39(1)(b) of the Constitution, 1996
of the peculiarities of the South African Bill of Rights.\textsuperscript{312} This implies that international law must be employed as aid interpretative aid.\textsuperscript{313} Section 233 of the Constitution provides that a Court must prefer any reasonable interpretation of legislation that is consistent with international law.\textsuperscript{314} The Constitution clearly requires courts to follow international law where possible. Given this understanding, the South African courts have a duty to fulfil the constitution, and to do so, need to refer to relevant international law. This role of the courts has been highlighted in the cases discussed above, where the Court referred to the minimum core approach provided in CESCR in deciding whether the State fulfilled its role of providing basic services.

The minimum core approach may play a valuable role in socio-economic rights adjudication by signalling the high priority that should be attached in social policy to ensure that immediate attention is given to water challenges. The minimum core approach may be used to provide a common platform from which states can embark on the “progressive realisation” of socio economic rights. It could be used to set a minimum target of which the state may progressively work towards achieving. Under General Comment 3, the Committee states that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.\textsuperscript{315} General Comment 3 references Article 2(1), which obligates each State party to take necessary steps to the maximum of its available resources to ensure that the minimum core obligations are met, and where they cannot be met, the State must demonstrate that every effort has been made to use all resources in attempt to meet the minimum obligations.\textsuperscript{316} The Covenant imposes a duty on State parties to take steps “to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including the adoption of legislative measures.”\textsuperscript{317} According

\textsuperscript{312} S v Makwanyane 1995 3 SA 391 (CC) para [35].
\textsuperscript{314} Section 233 of the Constitution, 1996.
\textsuperscript{315} CESCR General Comment No. 3. Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights. (14 December 1990), para 10.
\textsuperscript{316} Supra note 315, para 11.
\textsuperscript{317} ICESCR, art, 2.
to General Comment 3, the concept of progressive realisation constitutes recognition of the fact that full realisation of socio economic rights will not be achieved in a short period of time. It acknowledges that countries may face challenges towards the realisation of recognised rights. Thus, it imposes an obligation to effectively take an initiative to move towards the goal. Under this view, the minimum core approach under General Comment 15 may lay a foundation for State parties’ journey in progressively meeting their legal commitment to provide for social and economic rights. This approach entails that the minimum core content of a particular right may contribute to preparing the steps the progressive realisation efforts should take.

The minimum core concept can also encompass other foundational constitutional values such as participatory democracy, equality, freedom and human dignity. Therefore, while applying the progressive realisation approach to address water challenges in South Africa as provided in Section 27 of the Constitution, the minimum core approach in General Comment 15 can play an important role in the evaluation of the reasonableness of the State’s measures in realising socio economic rights.

4.5. Conclusion

There are two primary competing conceptions of socioeconomic rights, one embracing a resolute “minimum content” of rights and the other taking a “reasonable” approach to realising human rights. The minimum core approach seeks to confer a minimum legal content for socio economic rights; whereas the progressive realisation approach entails taking reasonable legislative and other measures progressively to achieve the realisation of the rights. These two concepts have played an influential role in South African Courts on the issues of socio-economic rights provided in the constitution.

318 CESC General Comment No. 3. Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights. (14 December 1990), para 9.
320 Supra note 278.
The minimum core approach is criticised for creating the danger that courts may transgress the boundaries of their institutional legitimacy and capacity. It is argued that through defining and enforcing minimum core obligations, courts may be tempted to usurp government’s policy-making functions. 321 This approach has also been criticized for encouraging minimalism in social provisioning. 322 There are concerns that the concept lacks responsiveness to the diverse needs and circumstances of different groups of people. 323 The Constitutional Court rejected the minimum core approach and held that in the South African context it is difficult to provide everyone with immediate core services due to the limit of resources. The Court held that although certain rights are guaranteed in the Constitution, they will not be realised immediately and must be subject to progressive realisation. However, the ratification of the CESCR by the South African government meant that South Africa could not ignore the Covenant’s General Comment 15, which took the minimum core approach.

This opens an opportunity for the South African government to use the minimum core to provide a platform from which the government can embark on the progressive realisation of the right of access to water. The minimum core approach may contribute to preparing the steps that progressive realisation efforts should take. The two concepts may play a huge role in giving effect to the progressive realisation of socio economic rights and contribute towards the sustainability of water resources through holding the state accountable to protect water rights and ensuring that water resources are used in a sustainable way.

322 Supra note 321 at 169.
323 Ibid.
CHAPTER 5
5. The Sustainability of Water Resources
   5.1. Introduction

The availability and use of water varies depending upon the needs and the circumstances of each society. Although water is a renewable resource in theory, its availability at any particular location and at any particular point in time is a reflection of the vagaries of the hydrosphere, in particular those of the water cycle and climate change.\textsuperscript{324} The demand on water resources both in South Africa and globally has been increasing dramatically because of industrialisation, urbanisation, demographic changes and economic growth. The pressure on the scarce water resources has inspired and justified the move towards sustainability.

Water resources play an essential role in sustaining human life. In many parts of the world there is not enough water to sustain life, or at least water that is drinkable without causing diseases. Alongside water scarcity and increasing water use for various industries, the population of the world has doubled over the last 60 years, while at the same time the use of water across the world has increased fourfold.\textsuperscript{325} This has resulted in increasing pressure on water resources. There are a number of indicators of pressure on water resources, which include:

- a reduction in water supply notwithstanding measures to save water and to rationalise its use;
- deteriorating quality of water with implications for public health;
- the impacts of climate change upon ecosystems;
- increasing salinity in estuaries and the movement of sea water into aquifers;
- increasing salinisation of the soil;
- increasing salinisation of groundwater;
- more frequent catastrophic floods and droughts; and
- increasing water pollution.\textsuperscript{326}

\textsuperscript{325} Supra note 325 at 16.
\textsuperscript{326} Ibid.
These pressures on water resources are likely to produce an increasingly uneven availability of water in many areas, accompanied by increasing degradation of the water resources themselves and of the environment of which they are part. This is seen in South Africa where the current water crisis is worsening. The water crisis experienced in South Africa is caused by a combination of low rainfall, high evaporation rates, an expanding economy and an increasing population whose geographical demands for water do not conform to the distribution of exploitable water supplies. The situation is worsened by the declining supply of freshwater resources as a result of increased pollution caused by industry, urbanisation, afforestation, mining, agriculture and power generation. The hardest hit area is the Western Cape Province as it at the brink of running out of water supply. Other parts of the country are also at a threat of running out of water supply. It is reported that in the Eastern Cape the dam levels have dropped drastically over the past year. In May 2017, three districts in the Eastern Cape declared a state of disaster due to the water drought, and two more were said to follow suit. The Gauteng Province also faces a potential water shortage as water levels in Lesotho dams that supply the province with water are also reported to have low water levels.

The increasing demand for water, deteriorating water quality and the uneven distribution of the available scarce water resources across the country has raised the question of how the law can address these challenges through enforceable rules designed to achieve sustainable development. This chapter discusses the notion of sustainable development and its role in addressing water challenges. The study will analyse the Sustainable Development Goals, particularly Goal 6 and its targets to understand how this goal may contribute to addressing water challenges and the realisation of the right of access to water.

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328 Ibid.
330 Ibid.
5.2. Sustainable Development

The notion of sustainable development has long been recognised. It only became institutionalised and formalised recently due to unsustainable developments that have led to challenges such as the deterioration of water resources. It has been a globally agreed upon approach that the key to good governance of water resources is sustainable development. The idea of sustainable development is to integrate the social, economic and ecological aspects of the use and development of natural resources for present and future generations in making decisions about these resources and in undertaking operations in relation to them. Over recent years there have been diverse analyses of sustainable development. This notion famously became the basis for the discourse about managing natural resources after the publication of the report of the World Commission on Environment and Development in 1987, known as the Brundtland report.332

A useful point of commencement in discussing the notion of sustainable development is to consider the literal meaning of the relevant expressions. The term ‘sustainable’ in relation to the resources of the environment, means that these resources are able to be kept continuously in their current state. If this is linked to development, it means that the use or transformation of the resources of the environment is able to be continued for the future.333 Sustainable development thus incorporates a combined notion of the development of resources and of their conservation. Fisher identifies three elements of sustainability, namely:

- the economic perspective, which focuses on resource development;
- the ecological perspective, which focuses on environmental protection;
  and
- the social perspective, which focuses on conservation for the present and future human needs.334

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334 Ibid.
The idea of sustainable development was historically developed in a fragmented way. While aspects of sustainability appear among the principles stated in the Stockholm Declaration of 1972, it was probably not until the publication of the World Conservation Strategy in 1980, that an attempt was made to formalise the meaning of sustainable development. It was therein stated to be “the integration of conservation and development to ensure that modifications to the planet secure the survival and wellbeing of all people”. The strategy went on to explain how development may be sustainable, stating that “for development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the short term as well as the long term advantages and disadvantages of alternative action”. This explanation incorporates the notion of conserving resources for the future as well as social, ecological and economic factors in making decisions and undertaking activities in relation to resources. The WCED’s “Our Common Future” Brundtland report defined sustainable development as a process of change in which the exploitation of resources, the direction of investments, the orientation of technology development and institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspirations. This entails that development must meet the needs of the present generation without compromising the ability of future generations to meet their own needs.

Other subsequent international instruments such as the Rio Declaration of 1992 and the Johannesburg Declaration of 2002 have also reiterated this notion. It is therefore clear that sustainable development incorporates the assessment of economic, ecological and social perspectives. The integration of these three perspectives arguably brings together not only three disciplines and their

335 Ibid.
337 Ibid.
methodologies, but also three different sets of underlying values that may improve the governance of water.

The notion of sustainable development prioritises working towards achieving basic needs for all humankind including those living in poverty.\(^{339}\) It also points to the limitation imposed by the technological, cultural and social structures on the environment’s ability to meet the needs of present and future generations.\(^{340}\) The definition of sustainable development provided by the Brundtland report clearly advocates for equity between the current and future generations. It aims to simultaneously promote environmental protection and economic growth to achieve full economic potential in a sustainable manner. Sustainable development should therefore ensure a progressive transformation of the economy and society in a manner that promotes equity and protects the rights of present and future generations.

Regarding the role of sustainable development on the management of water resources, in many discussions sustainable development is usually applied to natural resources at large, not specifically on water. This is mostly because water is a natural resource and part of the environment. Therefore any reference to natural resources of the environment necessarily includes water and water resources unless they are specially excluded. This is seen in a number of international instruments such as the Stockholm Declaration of 1972 and the Rio Declaration of 1992 which were concerned with the environment and with natural resources generally. Neither declaration dealt specifically with water, although the Stockholm Declaration specifically included water as one of the natural resources of the earth. However, prior to the Rio Conference in 1992, the international community had directed its attention to water resources at a conference convened in Ireland earlier that year. At the Ireland conference, the international community subscribed to the Dublin Statement on Water and Sustainable Development of 1992. The preface of the Dublin Statement on Water and Sustainable Development states that "concerted action is needed to reverse the


\(^{340}\) Ibid.
present trends of overconsumption, pollution, and rising threats from drought and floods".\textsuperscript{341} It listed four guiding principles as the basis for future action, namely:

\begin{itemize}
  \item freshwater is a finite and vulnerable resource, essential to sustain life, development and the environment;
  \item water development and management should be based on a participatory approach involving users, planners and policy-makers at all levels;
  \item women play a central part in the provision, management and safeguarding of water; and
  \item water has an economic value in all its competing uses and should be recognised as an economic good.\textsuperscript{342}
\end{itemize}

The first and the fourth principles are substantive and they incorporate the three elements of sustainable development, namely social, economic and environmental. Based on these four guiding principles, the Conference participants developed recommendations which enable countries to tackle their water resources problems on a wide range of fronts. The major benefits to come from implementation of the Dublin recommendations will be:

\begin{itemize}
  \item sustainable urban development;
  \item water conservation and reuse;
  \item protecting aquatic ecosystems;
  \item resolving water conflicts;
  \item alleviation of poverty and disease;
  \item agricultural production and rural water supply; and
  \item protecting against natural disasters.\textsuperscript{343}
\end{itemize}

It is evident that the notion of sustainable development is relevant for the management of water resources. The notion has a function to perform within legislation and the governance water resources. However, the sustainability of water resources has been met with several challenges. The main challenge to the

\textsuperscript{342} Ibid.
\textsuperscript{343} Ibid.
sustainable management of water resources is that the concept of sustainable water resources management is poorly understood and implemented by policymakers as well as water resources planners and managers. There is a lack of specific measures of sustainability when it comes to allocating water and setting water quality objectives; this complicates the task of defining acceptable or allowable levels of change in quantity or quality, and this can result in an ambiguous level or degree of compliance to stipulated provisions.

In the South African context, many of the challenges facing the sustainability of water resources and the gaps towards the practical implementation of water legislation lie in the domain of cooperation structures within institutional and political agencies. The existing governance systems and their performances are characterised by knowledge gaps and a scarcity of the necessary data pertaining to aquifers. Water managers and policy makers need to make the adaptive water management approach a high priority as a means to overcome the challenges facing the water sector. It is crucial that the principles taken to assist in the implementation of adaptive water management are consistent with ecological and socio-economic requirements.

Another challenge is that the economy of South Africa is dependent on water intensive activities such as industries, agriculture, energy and mining. The South African economy has historically been built on water intensive sectors that contribute to the degradation of water resources. Activities such as mining pose a severe strain on the environment in the form of acid mine drainage (AMD). According to the South African Environment Outlook Report, acidification as a result of mining activities is one of the biggest water quality threats to the environment in South Africa. Clearly, water intensive industries pose a threat to

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345 Supra note 344 at 13.
347 Ibid.
348 Supra note 32 at 46.
the scarce water resources of South Africa and they make the transition towards sustainability a challenge because they are the pillar of the economy.

The sustainable use and development of water must seek to balance the water available at any particular point in time and space with the demand for water for various uses identified above, as well as domestic water use and the need for enough water to safeguard human health and the aquatic ecosystem. The available water must be of sufficient quality to satisfy the different users of water and safeguard life. This is reiterated in Aswathanayara’s translation of the Brundtland Report’s definition of sustainable development. The Brundtland Report defines sustainable development as the kind of development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. Aswathanayara translates this definition specifically in relation to water resources, wording it as follows: “sustainable development of water resources encompasses those patterns of water resources utilisation that will enhance social and economic benefits for the present and future generations, without impairing the eco-hydrological processes”. This implies that for water use to be considered sustainable, it must not lead to the degradation of water resources, avoid irreversible damages to water resources and conserve the ability of the resource to extend its services.

The concept of sustainability and its translation to water resources plays a pervasive role in strategies to avoid and alleviate water scarcity. However, it is a simple idea, its translation into effective institutional and legal arrangements is difficult, as well as its application in particular sets of circumstances. Its functions within the legal system remain a mystery. However, sustainability’s essential role in addressing water scarcity and water degradation issues cannot be overlooked. It is certainly emerging as an element of the context in which water resources are used and developed. The international community has accepted sustainable development as a goal, with the United Nations’ Sustainable Development Goal 6

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353 Ibid.
striving to ensure access to water for all the people. Thus, while the normative status of sustainable development is likely to remain somewhat ambiguous, it certainly has a function to perform within the legal arrangements for water resources governance.

5.3. Sustainable Development Goals
The Sustainable Development Goals (SDGs) were formulated to succeed the Millennium Development Goals (MDGs). The development of SDGs was widely seen as an ambitious challenge, as these goals cover a much broader range of issues than their predecessors. They are also universal unlike the MDGs which mostly focused on developing countries, and have to serve as guideposts for a difficult transition to sustainable development, which eluded the international community since the Earth Summit in 1992. The provision of water plays a key role as it is linked to many of the 17 SDGs. The goals are formulated as individual goals, but they are interlinked. The targets and indicators relating to freshwater systems are found not only in the dedicated water goal, SDG 6, but also in other goals and indicators. Water challenges are addressed in SDG 6, but are also linked to SDG 2 on food security, SDG 3 on human health, SDG 11 on resilient cities and SDG 15 on protecting ecosystems and conserving biodiversity. To achieve SDG 6, one needs to understand all the SDGs as a whole as they are interlinked and designed to be advanced simultaneously.

The SDGs were drafted by the UN General Assembly’s Open Working Group on Sustainable Development Goals in 2014 when it submitted a proposal for a set of goals that consider economic, social and environmental dimensions to improve peoples’ lives and protect the planet for future generations. These goals and targets seek to build on the MDGs and complete what they did not achieve. The MDGs were adopted to address inhuman conditions that people lived under, particularly in developing countries. The MDGs were adopted as an outcome of

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the Millennium Summit of the UN Millennium Declaration in 2000, and were to be achieved by 2015. The eight goals were:

1. The eradication of extreme poverty;
2. To achieve universal primary education;
3. To promote gender equality and empower women;
4. To reduce child mortality;
5. To improve maternal health;
6. To combat HIV/AIDS, malaria and other diseases;
7. To ensure environmental sustainability and;
8. To build a global partnership for development.\textsuperscript{356}

These goals were meant to be achieved by 2015 and several of the targets set aside each goal were achieved.\textsuperscript{357} According to the MDGs Report, the number of people living in extreme poverty had declined by more than half in 2015.\textsuperscript{358} The report also highlights improvements in primary education enrolment, gender disparities, health care and environmental performance. However, the report also accepts that despite these successes, the poorest and most vulnerable people have been left behind. Regardless of the 15 year struggle to achieve the MDGs, there are continuing challenges being faced by humanity such as a widening gap between the rich and poor, poverty and hunger, climate change and environmental degradation.\textsuperscript{359} Thus, the UN felt the need to define a new set of goals with a new deadline. This led to the emergence of the 17 SGDs as part of the 2030 Agenda for Sustainable Development. The 17 SDGs with 169 targets cover a broad range of sustainable development issues.\textsuperscript{360}

\textsuperscript{360} The SDGs in their specific order are, to end poverty in all its forms everywhere; end hunger, achieve food security and improved nutrition, and promote sustainable agriculture; ensure healthy lives and promote well-being for all at all ages; ensure inclusive and equitable quality education and promote life-long learning opportunities for all; achieve gender equality and empower all women and girls; ensure availability and sustainable management of water and sanitation for all; ensure access to affordable, reliable, sustainable, and modern energy for all; promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; reduce inequality within and
These goals and targets seek to build on the MDGs by seeking to realise human rights for all. These goals and targets came into effect as of 1 January 2016 and will guide decisions taken over the next 15 years. South Africa played a key role in the negotiations and processes that led to the development of these goals. Aspects of these negotiations were informed by the priorities of South Africa’s National Development Plan (NDP). The involvement of South Africa in the formulation of SDGs makes the SDG goals important for South Africa, and requires that South Africa takes necessary steps to achieve the goals. These goals are focused on the five Ps of people, planet, prosperity, peace and partnership. They also have an underlying objective of ensuring development for all. However, while the goals are comprehensive and their associated targets are practical, the achievement of the SDGs may be easier said than done. This is because of some inherent inadequacies in the understanding and adoption of the concept of sustainable development.

The notion of sustainable development has been around since 1987. However, it is argued to not have been able to improve the development paradigm. The notion of sustainable development incorporates three sectors, the economic, social and environmental sectors. However, since the adoption of sustainable development, the transition towards achieving it has been skewed towards only the environmental sector. The other two sectors have contributed little, though consistently, towards ensuring a shift to the sustainable development paradigm.

among countries; make cities and human settlements inclusive, safe, resilient and sustainable; ensure sustainable consumption and production patterns; take urgent action to combat climate change and its impacts; conserve and sustainably use the oceans, seas and marine resources for sustainable development; protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; strengthen the means of implementation and revitalize the global partnership for sustainable development.

362 Supra note 355 at 8.
366 Supra note 364.
367 Supra note 365.
368 Supra note 364.
369 Ibid.
There is a need for this approach to change if sustainable development is to be effectively achieved. The three elements of sustainability need to be incorporated in the pursuit of sustainable development; the economic element may contribute to the development of water resources, the social element may contribute to achieving human rights, and the environmental may contribute to the conservation of water resources. All three elements have an equally important role to play towards achieving each sustainable development goal, none of which can be met in isolation.

To achieve sustainable development, states need to work to implement the development agenda at national, regional and global levels by setting their own national targets guided by the global level of ambition but taking into account national circumstances. The targets of the SDGs are defined as aspirational and global, with each government setting its own national targets guided by the global ambition but taking into account national circumstances. Each government is expected to decide how these aspirational and global targets should be incorporated into national planning processes, policies and strategies. States are expected to develop response actions to the implementation of the agenda. These response actions should support the transition to the Sustainable Development Goals and build on existing policies, legislation and planning strategies.

5.4. Sustainable Development Goal 6

The role of SDG 6 is to ensure access to water and sanitation for all by 2030. This goal is set on the basis that clean water for drinking and domestic use has been a long-term challenge in developing countries mainly due to lack of sufficient material to make available water safe for domestic water use, and partly due to the scarcity of water resources as a result of less rainfall, climate change and high water demand.

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370 Supra note 355 at 8.
371 Supra note 355 at 14.
Sustainable Development Goal 6 was discussed by international leaders at the summit on Sustainable Development Goals, which led to the following eight targets set with regard to the implementation of SDG 6 by the year 2030:

- To ensure each and every person can access a source of safe drinking water at an affordable cost by ensuring appropriate treatment is done to fresh but unclean water sources, and ensuring that there is sufficient supply of safe water to residential areas such that no one is more than 100 metres away from the nearest tap;
- To achieve equitable global access to adequate hygiene and sanitation, and end open defecation, giving more priority to the needs of children under five, girls, women and people in vulnerable situations. This will be done by providing free sanitary towels to girls and women in developing nations who cannot afford them, potties to mothers of little children, portable toilets and sinks to people living in slums, and special sanitation facilities for the disabled and people in other forms of vulnerable situations;
- To increase quality of water for drinking and household use by eliminating release of hazardous substances into water sources and reducing pollution in general, substantially reducing the global percentage of untreated waste water, and promoting safe reuse and recycling, especially in countries with dry climates where water shortage is likely to be experienced;
- To increase efficiency in water-use in all sectors by holding global campaigns to teach people how to minimise water wastage, and why it is necessary;
- To enhance proper management of freshwater resources at all levels, including via transboundary cooperation if necessary. Most natural freshwater sources such as lakes and rivers are not, or are poorly managed, and thus pollution is not controlled, contributing to the gradual deterioration of general water conditions, and diminution of the proportion of safe water for drinking and indoor use;
- By 2020, to ensure all water-catchment areas such as forests and mountains are well protected by discouraging human settlement and preventing the uncontrolled and illegal cutting of trees in these areas;
• To promote and support participation of immediate communities in enhancing and improving sanitation and water management; and
• To expand capacity-building support and international cooperation to developing countries in sanitation and water related programmes and activities, including reuse and recycling technologies, waste water treatment, water efficiency, desalination and water harvesting.372

The implementation of the eight targets of SDG 6 mentioned above was set to start immediately as of 2016. An effective implementation of these targets should assist with curbing the effects of the current water and sanitation situation before it hits an uncontrollable and unmanageable level.

Given that the South African Constitution requires the South African courts to take into account relevant international instruments in interpreting the Bill of Rights, it is essential that the targets of SDG 6 are aligned with South African water laws in order to ensure that the government works towards meeting these targets and realising the right of access to water. SDG 6 aims to ensure that everyone has access to safe drinking water by 2030, a target which is in line with Section 27’s provision that everyone has the right to access to sufficient water and that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights. In the realisation of these rights, the State must ensure that its actions are aligned with the SDG targets as a way of progressively realising the right to access to water. Policy documents such as the NDP provides that the vision of sustainable development is to create investment in infrastructure and services to provide South Africans with access to clean water,373 but it does not provide the steps to be taken and has not set targets to achieve this vision. The plan focuses on the transition to a low carbon economy and focuses less on addressing water challenges. The inclusion of SDG 6 in the formulation of SDGs shows the importance of water when planning for development and the need for a solution to water challenges to be included in policy documents. It is therefore important that policies and development plans

are reviewed to include the vision of SGD 6 and its targets. These targets may be deemed ambitious but they provide the State with a guideline towards achieving the realisation of rights provided in Section 27.

5.5. Conclusion

Water resources play an essential role in sustaining human life. It is at the very core of sustainable development, critical for the survival of people and the realisation of other sustainability goals in the UN Sustainable Development Goals. The increasing demand for water, deteriorating water quality and the uneven distribution of the available scarce water resources has raised the question of how the law can address these challenges through enforceable rules designed to achieve sustainable development. This led to the prioritisation of sustainable development goals, particularly SDG 6 that ambitiously aims to address water challenges.

The notion of sustainable development is relevant for the management of water resources. It has a function to perform within legislation and the governance water resources. However, as discussed above, the sustainability of water resources has been met with a number of challenges, the main challenge being the poor understanding and implementation of the concept of sustainable water resources management by policymakers and water resources planners and managers.

Knowledge gaps and the scarcity of the necessary data pertaining to water resources is a huge challenge facing the government. Water managers and policy makers need to make the adaptive water management approach a high priority as a means to overcome the challenges facing the water sector. SDGs can offer an opportunity to strategically formulate policy interventions and solutions. Having an effective implementation of SDG 6 and other water related goals and targets will contribute towards achieving water rights. Reviewing the South African water legislation against the SDG 6 targets will assist the government to work towards meeting these global targets, whilst locally fulfilling the provisions of the constitution.
CHAPTER 6

6. Recommendations
6.1. Introduction
Water is an important element for life that is at the core of sustainable development and is critical for socio economic development, healthy ecosystems and for human survival. The increasing water demand and water scarcity calls for urgent intervention in the management of water resources. The growing population, and focus on economic growth and development is straining scarce water resources and this is worsened by the current drought as a result of low rainfall and poor management of water infrastructure. South Africa currently faces a water crisis; it is expected to face a water deficit of 17% by 2030, and this shortage will be worsened by climate change. The water situation has seen the drought being declared a national disaster due to its magnitude and the impact on businesses and livelihoods.

Socio economic development has been directly hampered by the current drought. The drought has taken its toll on all sectors and shaved off 0.2 percentage points from South Africa’s economic growth in 2015. These water challenges are affecting economic growth and are making the realisation of the right to access to water and sustainable development (provided in Sections 27 and 24 of the Constitution respectively) a challenge as water resources are depleting. Given the challenges discussed in this study, it is imperative to ensure that there is a sustainable management of water resources. State institutions must work towards protecting water resources and supplying people with sustainable, safe water. The private sector as well as civil society also have a role to play in efforts towards a sustainable future. This chapter discusses the water challenges highlighted in this study, and makes recommendations based on preceding arguments, for addressing water challenges and giving effect to sustainability and the progressive realisation of the right to access to water.

6.2. Water Sustainability Challenges

The water challenge in South Africa is mainly a result of several factors such as climate change, water pollution, population increase, and the growth of water-intensive industries such as mining, agriculture, and production. As seen in many parts of South Africa, the changing rainfall patterns are also largely contributing to water shortages, and the quality of freshwater resources has been on a steady decline.

The protection and restoration of water resources is a serious challenge in South Africa. This has led the notion of sustainability to be at the centre of discussions on water challenges. It is increasingly accepted that sustainable development requires improving access to water resources, particularly to the marginalised poor. Inadequate access to water traps people in a cycle of poverty, poor health, and pollution that they find difficult to escape without active intervention.

Water is at the very core of sustainable development, critical to the survival of people and the planet. These challenges are worse in South Africa, but they are also experienced in many countries. In response to these challenges facing water resources, the UN General Assembly adopted the Sustainable Development Goals (SDGs) in September 2015, with SDG 6 explicitly dealing with water issues. The decision to incorporate a dedicated water goal (SDG 6) among the 17 SDGs is a clear recognition that water is not only part of many other SDGs but in many aspects their precondition. There is clearly a need to institutionalise an intergovernmental framework that would account for water related problems and provide solutions. This would address the water related problems that arise from inadequate and dysfunctional governance settings. As witnessed in South Africa amid the water crisis, the lack of cooperation within the government has led to the

379. Ibid.
worsening of the water crisis through political tensions and delays in implementing mitigation measures to address the crisis. The lack of institutional capacity is clearly the central factor to explain poor performance of water governance. In order to effectively implement the SDGs, there must be an adaptive and effective governance strategy that will align the SDGs with water legislation in order to conserve water resources and protect water rights.

6.3. Aligning General Comment 15 with Section 27

The South African Constitution is one of the few constitutions that provide for the right to access to water. It reflects human rights principles that are embedded in international law, and these principles permeate all subsequent water policies and legislation.\textsuperscript{381} As such, the South African Constitution requires the South African courts to take into account relevant international law in interpreting the Bill of Rights.\textsuperscript{382} It is therefore imperative to take into consideration international human rights instruments that may contribute to the realisation of water rights and sustainability in South Africa. The study discussed various international instruments that address socio economic rights, but had more emphasis on General Comment 15 as it is by far the most relevant of all judicial or quasi-judicial recognitions of the right to water, and it elaborates on the normative contents of such a right.\textsuperscript{383} It is also relevant to South African water law as it has been referenced in Mazibuko case. The South African government also ratified the CESCR, which entered into force in April 2015.\textsuperscript{384} This made the relevance of the General Comment more imperative in South African water law.

The South African Constitution and General Comment 15 both recognize the realisation of socio-economic rights. Both instruments provide for the realization of the right of access to water, but apply different concepts in their provisions to fulfil the right, the “minimum core” approach and the “progressive realization”

\textsuperscript{381} Supra note 23 at 1.
\textsuperscript{382} Section 39(1)(b) of the South African Constitution, 1996.
\textsuperscript{383} Thielbörger. P., The Right(s) to Water, The Multi-level Governance of a Unique Human Right. Institute for International Law of Peace and Armed Conflict (2014), 64.
approach, both discussed in Chapter 4. The argument presented in this study holds that regardless of the different approaches between General Comment 15’s “minimum core” approach and Section 27’s “progressive realisation” approach, they both have proven to be important for the realisation of water rights, and have a role to play in the realisation of the right to access to water and sustainability of water resources. After all, even though General Comment 15 takes the minimum core approach, the Covenant does recognize the progressive realisation of socio economic rights in General Comment 3.

The minimum core approach may play a valuable role in addressing water challenges in South Africa by signalling the high priority that should be attached in social policy to ensure that immediate attention is given to water challenges. This approach may be used to provide a common platform from which states can embark on the “progressive realisation” of socio economic rights. It may be used to set a minimum target by which the state may progressively work towards achieving and may lay a foundation for the government’s journey to progressively meet its legal commitment to provide access to water in a sustainable way.

The minimum core concept can also encompass other foundational constitutional values such as participatory democracy, equality, freedom and human dignity. As such, while applying the progressive realisation approach to address water challenges in South Africa as provided in Section 27 of the Constitution, the minimum core approach in General Comment 15 may play an important role in the evaluation of the reasonableness of the State’s measures in realising socioeconomic rights.

6.4. The role of the Courts

The courts play a huge role in upholding the Constitutional right to water. As discussed in the study, the Constitutional Court provided clarity of Section 27 and the duty of the government in realising the right to access to sufficient water. This

highlights the important role of the courts in interpreting water laws, and as a watchdog to ensure that the government does fulfil its role to realise the right to access to water and the sustainability of water resources as stipulated in Section 27 and Section 24 respectively.

Prior to Mazibuko, it was uncertain whether the right would be interpreted as an entitlement to a specified quantity of water, with a corresponding obligation on the State to immediately provide such quantity, or as an expectation that the State would progressively ensure access to sufficient water over time, with a corresponding obligation on the State to take measures to progressively realise the right.386 The Court played a huge role in providing clarity on the interpretation of the right to water. In dealing with the Mazibuko case, the Court raised two issues, the question of what constitutes access to sufficient water, and whether the State is under a constitutional duty to provide such a specified quantum.387 In addressing these issues, the Court held that it is an obligation of the state to respond to the basic social and economic needs of the people by adopting reasonable legislation.388 By so doing, the Court provided clarity on the role of the State, which is to take reasonable legislative and other measures progressively to achieve the realisation of the right to access to water. This demonstrates that the courts gave a role to contribute to sustainability by providing clarity on the provisions of the Constitution, and holding the government accountable to take all the necessary steps to provide access to sufficient water and protect water resources.

The State therefore needs to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources. It needs to continuously review its policies and development plans to make sure that they stay updated to address the faced water challenges. As highlighted that development documents such as the NDP are designed to address development and water challenges, these development documents need to be aligned with the targets of SDG 6 in order to have an

387 Ibid.
integrated effort to address water challenges and work towards a set target. This would help the government to work towards a goal, with clearly outlined initiatives to be taken, and for progress to be easily measured against set targets. Such an integrated approach would combine the objectives of all instruments designed to address water challenges and provide the platform for all organs of state to work together towards realising the right to access to sufficient water and achieve water sustainability.

The Court has clearly played an effective role in providing guidance towards the realisation of the right to access to sufficient water. However, the Court has been criticised for only focusing on the meaning of the right to access and quantity of water sufficient for purposes of Section 27 (1)(b) of the Constitution, without giving much attention to the quality of water. In order to effectively play the role of interpreting law and holding the State accountable to fulfil its duties, the Court needs to also address the issue of water quality because it is essential for sustainability. SDG 6 emphasizes the importance of water quality by providing a target to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally by 2030. This is in line with the Constitution’s Section 24, which deals with the pollutions of water resources. The Courts must therefore highlight the importance of water quality, and challenge the government to protect water resources from any form of pollution and degradation through aligning its efforts with the targets of SDG 6. In so doing, the courts would play an important role in the effort towards water sustainability and the realisation of the right to access to water, in partnership with the government and the civil society.

6.5. Aligning SDG 6 with Development Strategies

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The SGDs, although not binding, have an important role in addressing the current water crisis in South Africa. The goal and targets of SDG 6 may be used as a guideline to set plans towards the goal for eradicating drought within set timeframes. It is therefore essential for SDG 6 to be aligned with South African water legislation and development plans.

The SDGs were designed to consider economic, social and environmental dimensions to improve people’s lives and protect the planet for future generations. Given that South Africa played an important role in the development of SDGs, SDG 6 should be taken into consideration in plans designed to deal with the water drought. As highlighted in the study, some aspects of South Africa’s input to the formulation of SDGs were informed by the priorities of South Africa’s National Development Plan (NDP). It is therefore essential for documents such as the NDP to be aligned with SDG 6. Like the SDGs, the NDP has set a vision to be achieved by 2030. However, the development plan does not provide a detailed outline of the importance of water resources and the urgent need for water sustainability, as well as the steps towards addressing water challenges. It only emphasises on creating investment in infrastructure and services to provide South Africans with access to clean water, but does not provide how the government aims to do so nor provides the steps to be taken to address water challenges. This study argues that development plans such as the NDP and water legislation should be aligned with SDG 6 and its targets to achieve a sustainable water resources management.

Efforts towards addressing water challenges need to fulfil Section 24’s principle of sustainable development and to progressively give effect to Section 27. Aligning development plan and water management strategies, as well as policies with SDG 6 would help integrate the efforts to achieving sustainable water management and provide guidance to the government in fulfilling its constitutional obligation to provide access to sufficient water and protect water resources from degradation.

391 Supra note 355 at 3.
393 Supra note 392 at 199.
6.6. Integrating all Sectors

South African water legislation shares the same vision with SDG 6, which is to address water challenges and improve access to clean water for all. For this to be achieved, the current water policies, water management plans, and their implementation, need to be aligned with instruments designed to address water challenges such as the UN’s SDG 6. In efforts to achieve water sustainability, there needs to be an inclusion of all sectors in efforts towards addressing water challenges. It is important to note that the existing water challenges cannot be resolved through government interventions alone. There is a need to involve the private sector through inviting investors and getting both the private sector and civil society involved in water management.

Many of the challenges in dealing with the water crisis in South Africa lie in the domain of cooperation structures within institutional and political agencies. This has been witnessed in Cape Town where it was known that there would be water shortages, but mitigation measures were delayed. Poor preparation for the crisis and political indifferences worsened the situation. As seen in Cape Town, the South African Human Rights Commission had to intervene and monitor the situation as it had received complaints from various individuals and organisations regarding the poor management of the water crisis. Political tensions have led to the Human Rights Council being involved to monitor the situation and ensure that there is cooperation in dealing with the water crisis. This highlights a lack of accountability from the government and the need for the Courts, civil society organisations to intervene and hold the government accountable of dealing with the water crisis. The government needs to proactively review its strategies and water management plans to ensure that they are designed to address the

394 Supra note 346.
increasing water demand and to mitigate factors such as climate change and pollution that have contributed to the water crisis.

The country’s economic development paradigm needs to recognise the increasing pressure on water resources and shift towards a more balanced approach that is based on the interlinked management of waters resources. Its vision needs to be aligned with the targets of SDG 6 in a way that explicitly outlines the measures to be taken to meet these ambitious goals. This can be achieved through involving all sectors of society as everyone has a role to play in addressing water challenges.

The government needs to build effective institutions to pursue water sustainability with transparency, accountability, clear metrics, and openness to the participation of all key stakeholders. Strategies designed to address the water crisis need to be aligned with SDG 6 targets in order achieve sustainability and progressively work towards mitigating the water crisis in order to realise the right to access to water. The Courts need to monitor the government and hold it accountable ensuring that it takes all necessary measures to protect water resources, whilst striving towards progressively providing access to water. The private sector has a huge role to play through developing technologies, organisational models and management systems needed for the sustainability of water resources. The civil society needs to hold both government and the business sector accountable, while also practicing a sustainable use of water resources.

6.7. Conclusion

South Africa is experiencing a water crisis, which has led to the notion of water sustainability being the focal point of addressing water challenges. There is a decline in freshwater resources as a result of various factors including climate change, low rainfall, population increase, and growing industries. This has led to many areas across the country facing water shortages, with the City of Cape Town facing the possibility of being the first major city in the world to run out of water.
Sustainability is strongly connected to the availability of sufficient quantity and quality of water for the preservation of healthy ecosystems and is critical for socio economic and human development. It is therefore essential for water management plans put in place to be implemented in a way that gives effect to water sustainability. This study has discussed the issues surrounding water provision in South Africa in the context of sustainability and the realisation of the right of access to sufficient water. The study’s arguments are based around the Constitution’s provisions for the right to access to sufficient water in Section 27, and for the protection of water resources in Section 24. Section 27 is directly linked to water provision and Section 24 is linked to water pollution. These two fundamental Sections of the constitution form the backbone of South African water law. They play an important role in the protection of people’s water rights, taking sustainability into consideration to ensure that these rights are enjoyed by the present and the future generations.

In the South African context, many of the challenges facing the sustainability of water resources and the gaps in the practical implementation of water legislation lie in the domain of cooperation structures within institutional and political agencies. The study has argued that these provisions by the constitution can be empowered by aligning national water legislation and water management plans with international water laws and development goals such as the ICESCR’s General Comment 15 and the UN’s SDG 6. These instruments aim to address water challenges and promote the provision of water to all and the protection of water resources.

The ICESCR’s General Comment 15 may play a valuable role in addressing water challenges in South Africa. It may be used to signal the high priority that should be attached in social policy to ensure that immediate attention is given to water challenges, and to provide a common platform from which states can embark on the “progressive realisation” of socio economic rights. The General Comment’s “minimum core” approach may be used to set a minimum target that the state may progressively work towards achieving; and may lay a foundation for the

government’s journey to progressively meet its legal commitment to provide access to water in a sustainable way. The UN’s SDG 6 may also contribute immensely to addressing water challenges in South Africa. The goal aims to ensure access to water and sanitation for all by 2030 and minimise water pollution, a purpose shared with both Sections 24 and 27 of the Constitution. Aligning SDG 6 with South Africa’s development plans and water management plans will ensure that SDG 6’s targets are embedded in the strategies designed to address water challenges and hold the government accountable to progressively work towards meeting the provided targets.

To address the water crisis, the government needs to build effective institutions to pursue water sustainability and provide the platform for the participation of all key stakeholders from all sectors. Water management plans need to be aligned with SDG 6 targets and the government needs to be monitored by the Courts as well as civil organisations. Combined efforts between all sectors, and an effective implementation of water sustainability measure should assist with mitigating the water drought and contribute towards the progressive realisation of the right to access to water.

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