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Minimum Core Obligations: Re-evaluating the realisation of the right to water and sanitation in South Africa

by

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Rights in the Faculty of Law, University of Pretoria**

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Dedication

This mini dissertation has been a labour of love and is the result of the enduring love and support I have in my life.

I dedicate this mini dissertation to my family, who were my anchors whenever I became untethered:

My father, for his endless patience, insight and belief in me and for always engaging with my ideas, even at 3 am.

My mother, for always making me smile and being my number one cheerleader.

My sister, for being my sounding board and learning alongside me.

Lastly, I dedicate this mini dissertation to myself, for not giving up and for continuously rediscovering the spark that started it all.

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Abstract

May you live, and all your people. I too will live with all my people. But life alone is not enough. May we have the things with which to live it well. For there is a kind of slow and weary life which is worse than death.¹

Water is a prerequisite for leading a life with dignity. Water also plays a key role in fulfilling other human rights and alleviating development issues like poverty, food insecurity, water insecurity and ecosystem degradation all which have been identified in the Sustainable Development Goals, Agenda 2063: The Africa We Want and the National Development Plan 2030 for South Africa. In an attempt to address these deficiencies, this mini dissertation seeks to answer the question, how can the realisation of the right to sufficient water and sanitation in South Africa be improved? In answering this question, an analysis of statistics between different municipalities was done to illustrate the ever-growing disparities in access to water and sanitation in South Africa, despite the robust legislative and policy framework. The statistical analysis revealed that aggregate statistics show that access to water and sanitation has steadily improved since 1994. However, disaggregated statistics show disparities in access between urban and 'rural' provinces – Gauteng generally has higher levels of access when compared to the Free State. The disparities also continue at the municipal level, with the larger metropolitan municipalities displaying better levels of access than local municipalities. Worryingly, statistics also show intra-municipal disparities in access. Using the City of Tshwane (COT) as a case study, the more urban areas within COT, like Pretoria, have greater levels of access to water and sanitation than the peri-urban Hammanskraal, whose water is currently unfit for human consumption. It appears that although progress is being made to increase access to water and sanitation, the current provision methods are generating inequality and inadvertently promoting access to and the benefit of water and sanitation to the privileged parts of society, leaving those living in vulnerability behind.

Although the concept of the minimum core content of socio-economic rights has previously been rejected in South African courts, I assert that the acceptance of a clearly defined minimum core content of the right to sufficient water and sanitation is the first step in ensuring an adequate and acceptable level of access for all – where adequate and acceptable levels of access are understood to mean 'sufficient quality and assurance of supply.' I then reconceptualise the content of the right to sufficient water and sanitation using the minimum core. Consequently, I define the minimum core of the right to sufficient water and sanitation and establish the minimum levels and an accompanying differential minimum. Thus, the minimum core of the right to sufficient water and sanitation is:

¹ Adapted from TS Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Journal* 341, 342.

Access to safe, reliable, and affordable water at a volume of 50 litres per capita per day (l/c/d) of potable water, at a flow rate of no less than 10 litres per minute and within 200m of the dwelling, where supply shall not be interrupted for longer than 48 consecutive hours; and where the minimum level for peri-urban and rural areas can be no less than 60l/c/d. Additionally, the minimum core content of the right to sanitation is access to a safe, affordable, and reliable improved sanitation facility, at the very least, a VIP or an equivalent technology of sufficient quality and assurance of supply, within the vicinity of a dwelling, and accompanied by appropriate handwashing facilities as well as appropriate ongoing health and hygiene awareness and education for communities.

Further, I argue that the minimum core content of the right to sufficient water and sanitation should be utilised as the universal minimum standard below which water and sanitation programmes cannot fall. In this way, the progressive realisation of the right to sufficient water and sanitation will be concerned with the continuous improvement of the nature and quality of access, thus moving beyond the minimum levels.

List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Banjul Charter	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
Constitution	The Constitution of the Republic of South Africa, 1996
COJ	City of Johannesburg Metropolitan Municipality
COT	City of Tshwane Metropolitan Municipality
CRC	Convention on the Rights of the Child
ESC rights	Economic, Social and Cultural Rights
FBWIS	Free Basic Water Implementation Strategy
FBWP	Free Basic Water Policy
FBSan	Free Basic Sanitation Implementation Strategy
GA	United Nations General Assembly
GHS 2019	South African General Household Survey 2019
GHS: SDI	South African General Household Survey Selected Development Indicators 2019
GRWA	Guidelines on the Right to Water in Africa
HC	High Court
HRC	United Nations Human Rights Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
l/c/d	litres per capita per day
Maluti	Maluti-A-Phofung Local Municipality
Mangaung	Mangaung Metropolitan Municipality

MSA	Local Government: Municipal Systems Act 32 of 2000
Norms and Standards	Department of Water and Sanitation 'National norms and standards for domestic water and sanitation services version 3- final'
NWA	National Water Act 36 of 1998
PPM	Prepaid Metres
SANS241	The South African National Standard (SANS) 241 Drinking Water Specification
SCA	Supreme Court of Appeals
UDHR	Universal Declaration of Human Rights
UISP	National Housing Programme: Upgrading Informal Settlements
Rand West City	Rand West Local Municipality
WSA	Water Services Act 108 of 1997

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Chapter 1: Introduction

1.1. Introduction

This chapter provides an overview of the mini dissertation. It sets out the issues to be discussed and the questions to be answered by this research. The chapter will set out the background and approaches to the research and provide the overall structure. The chapter begins with a brief outline of the context concerning access to water in South Africa. It then discusses the methodology used and the scope and limitations of the mini dissertation. After that, a discussion of the current knowledge and theoretical contributions to the study of the minimum core and the right to sufficient water is done. Finally, an overview of the chapters in the paper is provided.

1.2. Background

Cultures in all parts of the world acknowledge the importance of water. Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.¹

Water is of incredible value to humanity.² It is a basic human need, and it plays a critical role in ensuring equitable socio-economic development.³ The role and purpose of water is to enable and facilitate prosperity through its provision to various social and economic sectors for growth and development.⁴ However, access to water resources in South Africa has been marked with historically unequal distribution to the 'detriment of the majority of the population.'⁵ Further, before 1994, water could be owned privately, and riparian rights prevailed.⁶ Thus, reliable access to water was predominantly conditional upon 'land

¹ O'Regan J in *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

² G Muller et al 'Water' in *Silberberg and Schoeman's: The Law of Property* 6th ed (2019) 765.

³ Department of Water Affairs 'National Water Resource Strategy: Water for an Equitable and Sustainable Future' 2nd ed (NWRS 2) (June 2013) iii, v. The NWRS 2 is the legal instrument that enables the National Water Act 36 of 1998.

⁴ NWRS 2 (n 3) 3. Water is identified as a key element in all sectors and as a prerequisite for 'inclusive economic growth, poverty reduction and significant reduction of poverty.'

⁵ J Dugard 'The right to water in South Africa' in Foundation for Human Rights (eds) *Socio-economic rights: Progressive realization?* (2016) 317,31; M Kidd *Environmental Law* (2011) 69.

⁶ Muller (n 2) 766.' Riparian rights allowed a landowner to have the exclusive right to use water sources on their land.' See M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition revision service* 5 (2013) 56B-22.

ownership and wealth'.⁷ Black and other persons of colour were thus precluded from enjoying equitable access to water.⁸

With the dawn of democracy, the oppressive structures of colonialism and apartheid that marked South Africa's water law were examined,⁹ and water law was reformed to address the question of equitable access.¹⁰ To reform the law and answer the question of equitability of access to water and other natural resources, the Constitution of the Republic of South Africa sets out provisions within the Bill of Rights.¹¹ These rights are classified as socio-economic rights. They seek to underscore and address the inequalities within South African society borne of its past.¹² These rights are 'interdependent, interrelated and mutually supporting' and must be read together.¹³ To that end, the right to sufficient water in South Africa supports the rights to dignity¹⁴ and life.¹⁵ To further underscore the importance of water, the right to sufficient water flows from various other provisions in the Constitution, namely, Section 24, which provides for the right to a healthy environment. This right includes the right to have the environment protected for the benefit of 'current and future generations.'¹⁶

Additionally, the right to the environment contains the right to 'secure ecologically sustainable development and use of natural resources.'¹⁷ Consequently, the right to an environment invokes both the principles of intergenerational justice and sustainable development, which are echoed and given due recognition in the National Water Act (NWA), which states that water is a scarce resource in South Africa and must be subject to governance that is guided by the core principles of 'sustainability and equity [and must guide] the protection, use, development, conservation, management and control of water resources' – these guiding principles recognise the basic human needs of present and future generations and the need to protect water resources.¹⁸ The principles of sustainability and equity are also echoed in section 2 of the Water Services Act¹⁹ (WSA).

⁷ Langford (n 6) 56B-1. See also Muller (n 2) 766, ownership of water was vested because land and water were considered inseparable and that a landowner is 'the owner is everything above and beneath the surface of the land.'

⁸ As above. They were precluded from enjoying direct access to water for domestic and productive uses and from enjoying the benefits of water. See also the White Paper on a National Water Policy for South Africa (1997) Preamble.

⁹ Muller (n 2) 768.

¹⁰ Kidd (n 5) 69. Water is designated as a common resource, managed by the State. It must be protected and is subject to sustainable use to the benefit of all citizens and the country at large.

¹¹ Constitution of the Republic of South Africa, 1996 Chapter 2.

¹² Socio-economic rights' inclusion in the Constitution is typical of liberal constitutions and their preoccupation with equality, transformation, and rights protection. See I Currie & J De Waal *The Bill of Rights Handbook* (2013) 565.

¹³ Muller (n 2) 769.

¹⁴ The Constitution of the Republic of South Africa, 1996 (The Constitution) sec 10.

¹⁵ The Constitution sec 11.

¹⁶ The Constitution sec 24(b).

¹⁷ The Constitution sec 24(b)(iii).

¹⁸ 36 of 1998 Chapter 1.

¹⁹ 108 of 1997. This is the enabling legislation of sec 27(1)(b) of the Constitution and is the framework legislation on water service provision in South Africa.

In addition to the environmental right, the Constitution, in section 27(1)(b) makes provision for the right of access to sufficient water. This mini dissertation is concerned with the right to access sufficient water and the associated right to sanitation from the WSA.²⁰

The WSA is the framework legislation on water services. It sets out the obligations and measures for realising the right of access to sufficient water. One of its main objectives is to:

Provide for the right to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being.²¹

Moreover, the 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water'²² (Water Regulations) further set out the minimum levels for the supply of basic water services. Despite the legislatively guaranteed right of access to sufficient water and the robust policy framework – which underscores the importance of water and also seeks to redress the disparities in the access thereof – there remains a high number of peri-urban and rural communities who do not enjoy access to sufficient water and by extension, sanitation.²³ This has left these communities in increasingly vulnerable positions to disease, limited economic advancement, food insecurity and gender-based violence, to name a few.²⁴ In an attempt to give content to the right of access to sufficient water, there has been some litigation, most notably *Mazibuko & Others v City of Johannesburg & Others*²⁵ (*Mazibuko*) – which will be discussed in later chapters – in which residents of Phiri (i) challenged the City of Johannesburg's Free Basic Water Policy²⁶ arguing that it infringed their right to access to sufficient water and (ii) challenged

²⁰ WSA sec 2 & 3. See also *National Sanitation Policy, 2016* p 2, which recognises sanitation as part of the water value chain and 'contributes to human dignity and quality of life and is an essential pre-requisite for success in the fight against poverty, hunger, child deaths, gender inequality and empowerment.'

²¹ WSA sec 2(a).

²² Regulations Relating to Compulsory National Standards And Measures to Conserve Water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001) Regulation 3 which sets out that the minimum standard for basic water supply services is –

(a) the provision of appropriate education in respect of effective water use; and

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

(i) at a minimum flow rate of not less than 10 litres per minute

(ii) within 200 metres of a household; and

(iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

²³ This is evidenced by the increased number of protests regarding the government's failure to further access to water services for all residents. See J Dugard (n 5) See also NDP 2030 p161.

²⁴ South African Human Rights Commission 'Water and Sanitation Brief: Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation' (Water Brief) (March 2018) p22.

²⁵ 2010 (4) SA 1 (CC).

²⁶ City of Johannesburg Metropolitan Municipality Water Services By-laws *Provincial Extraordinary Gazette (Gauteng)*, *Gazette No 179*, Notice 835 of 2004 (21 May 2004) published in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000. See *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC) para 24.

the installation and use of prepaid water metres by the city.²⁷ *Mazibuko* narrowed the content of the right to sufficient water. The consequence of this narrowing is that the robust fulfilment of the right to sufficient water has been delayed.²⁸

Against this background, this mini dissertation will re-evaluate the realisation of the right of access to sufficient water and sanitation. It seeks to reconceptualise the benchmark for such realisation by incorporating the minimum core concept into the expression of the progressive realisation of the right to sufficient water,²⁹ thus ensuring a 'concrete and transformative' effect on society through the realisation of this right.³⁰

1.3. Problem statement

Water and sanitation play a key role in the fulfilment of other human rights and the alleviation of developmental issues like poverty, food insecurity, lack of education, and ecosystem degradation,³¹ all of which have been identified in the Sustainable Development Goals,³² Africa Agenda 2063³³ and in the National Development Plan 2030 for South Africa.³⁴ However, South Africa continues to suffer from unequal access to water, delaying South Africa's transformation project. The inconsistencies in water and sanitation service delivery have resulted in a lack of:

²⁷Langford (n 6) 56B-3. In concluding that prepaid metres did not constitute a form of limitation or indirect discrimination and in finding that the 25l per person per day policy from the City of Johannesburg was reasonable, the court narrowed the scope of the right to access to sufficient water.

²⁸ As above.

²⁹ This is a characteristic identified by the UNCESCR in the ICSECR art 2(1) as part of the realisation of socio-economic rights. It recognises that the full realisation of socio-economic rights cannot happen over a short period. It provides some flexibility in the realisation process of socio-economic rights. See also CSECR General Comment 3 *The nature of State parties' obligations (art 2(1) of the Covenant)* UN Doc E/1991/23.

³⁰ D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 *South African Law Journal* 484,486.

³¹ Sustainable Development Goal 6: Clean Water and Sanitation. See

https://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/6_Why-It-Matters-2020.pdf

Further, SDG 6 aims to 'achieve universal and equitable access to safe and affordable drinking water for all and achieve access to adequate and equitable sanitation and hygiene for all and end open defecation by 2030.' This is also echoed in the NDP 2030 which envisions that 'before 2030, all South Africans will have affordable, reliable access to sufficient safe water and hygienic sanitation. Further, the NDP 2030 envisages that effective management of water and the services derived from it will support a strong economy and a healthy environment, thus drawing a connection between water and development. See NDP p177–178.

³² The SDGs were set out at the United Nations Conference on Sustainable Development in Rio de Janeiro in 2012.

³³ Agenda 2063: The Africa We Want' Agenda 2063 identifies key activities to be undertaken to 'prioritise inclusive social and economic development'. Agenda 2063 Goals can be linked to the SDGs eg A2063 Goal 1: A high standard of living, quality of life and well-being for all citizens can be linked to SDG 6.

³⁴ Department of the Presidency 'National Development Plan 2030: Our Future, make it Work' (15 August 2012) (NDP). The NDP aims to eliminate poverty and reduce inequality. The NDP sets out a commitment to achieve a minimum standard of living which includes access to adequate water and sanitation.

accessible, appropriate, and adequate fulfilment of the right to water and sanitation that impacts society but most significantly affects people that suffer from other vulnerabilities related to associated socio-economic rights like the right to health, environment, and education.³⁵

Consequently, to address these deficiencies, the question arises, how can the realisation of the right to sufficient water and sanitation be improved? This mini dissertation posits that the answer lies within the concept of minimum core obligations.

1.4. Research questions

Main question:

- i) How can the minimum core principle successfully facilitate the robust realisation of the right to sufficient water and sanitation in South Africa?

Sub-questions:

- ii) What is the minimum core of the right to sufficient water and sanitation in South Africa?
- iii) What is the status of access to water and sanitation between urban, peri-urban, and rural areas?
- iv) How can minimum core obligations, progressive realisation and reasonableness be reconciled within a South African context considering the current socio-economic rights jurisprudence?

In responding to these questions, I submit that by applying the minimum core to the right to access to sufficient water, the quantified standard of realisation will help ensure equal access for all. Minimum core obligations are the first step in the progressive realisation of the right to sufficient water and sanitation. Such progressive realisation will no longer be concerned with basic universal access. Rather, it will address improving the nature and quality of access to water and sanitation in its second phase.

1.5. Clarification of terms

The progressive realisation of a right refers to the obligation to take appropriate measures towards the 'full realisation of economic, social and cultural rights within the available resources.'³⁶ States are thus given a measure of flexibility as the full realisation of rights is subject to the availability of resources to facilitate such fulfilment.

³⁵ Water Brief (n 24) p4.

³⁶ ICSECR art 2(1) See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 29–30; S Liebenberg, *Socio-economic rights: Adjudication under a transformative constitution* (2010) 15; M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 66 para 2.37.

1.6. Research methodology

This mini dissertation will be based on a desktop study of primary and secondary sources relevant to the discussion on the content of socio-economic rights, the right to sufficient water and the minimum core. Additionally, statistics will be used to contextualise access to water and sanitation in urban, peri-urban and rural areas. The literature review will be used to illustrate how the minimum core will enhance the interpretation of the right to sufficient water and sanitation and the realisation thereof by positioning minimum core obligations, the reasonableness test and progressive realisation as mutually supporting concepts.

1.7. Scope and limitations of the study

This study will focus on the framework of the right to sufficient water and sanitation in South Africa. The study will utilise the parameters of (i) availability, (ii) quality and (iii) accessibility to extract a minimum core content of the right to sufficient water and sanitation. Through this, this study will establish the interpretative value of the minimum core content of the right to water and sanitation in the facilitation of the robust realisation of the rights. However, this study will not engage the challenge presented by the commercialisation of the provision of water and sanitation services as such a discussion is beyond the scope of this study.

As mentioned in section 1.6 above, statistics will be used to contextualise access to water and sanitation in urban, peri-urban and rural areas to date. This will be done with a particular focus on Gauteng and the Free State at the provincial level and at the municipal level, the metropolitan municipalities of City of Tshwane and Mangaung, as well as the local municipalities of Rand West City and Maluti-A-Phofung. These provinces and their associated municipalities have been chosen for this statistical comparative analysis for ease of comparison of access to water and sanitation in the urban, peri-urban and rural spaces. This is because Gauteng is considered the economic hub of South Africa with primarily tertiary and quaternary services and is thus considered 'urban' whereas the Free State is considered the 'breadbasket' of the country with primarily agricultural and some secondary activities and is thus considered 'rural'.³⁷ Further, no in-person interviews were conducted for this study. Consequently, the current lived experiences of the communities in the abovementioned areas are not included beyond the information obtained in the desktop study.

³⁷See <https://municipalities.co.za/provinces/view/2/free-state> (accessed 20 September 2021) and <https://municipalities.co.za/provinces/view/3/gauteng> (accessed 20 September 2021).

1.8. Literature review

The literature review will cover the legal framework of the right to access sufficient water in the International Covenant on Economic, Social and Cultural Rights³⁸ and the associated General Comments. A brief consideration of the African Charter on Human and Peoples' Rights³⁹ (Banjul Charter) and the African Commission on Human and Peoples' Rights⁴⁰ (ACHPR) recently adopted 'Guidelines on the Right to Water in Africa'⁴¹ and finally, the legal framework in South Africa which includes the Constitution, the WSA and related policies and relevant by-laws will follow. It will also set out the minimum core obligation of the right to sufficient water. Finally, through various academic articles, the literature review will illustrate the gap in South African discourse that the minimum core can fill in realising the right to sufficient water.

1.8.1. International framework

Socio-economic rights are internationally recognised through the ICESCR. The ICESCR places an obligation on countries to:

Take steps...to the maximum of [their] available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴²

The ICESCR does not contain a clear right to water. However, the right to water has been considered an intrinsic part of the right to an adequate standard of living expressed in article 11(1) of the ICESCR. Regionally, the Banjul Charter does not contain an express right to water but, it can be read into its article 16(1), 'the right to enjoy the best attainable

³⁸ International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, concluded on 16 December 1966 and entered into force on 3 January 1976. As of April 2021, the ICESCR has 171 states parties and 71 signatories. South Africa signed the ICESCR in October 1994 and ratified it with a reservation in January 2015.

³⁹ The African Charter on Human and Peoples' Rights (Banjul Charter) 1520 UNTS 217 concluded on 27 June 1981 and entered into force on 21 October 1986. South African ratified the Banjul Charter in July 1996. To date, the Banjul Charter has been ratified by 54 African Union (AU) member states.

⁴⁰ Established in art 30 of the African Charter on Human and Peoples' Rights (Banjul Charter) 1520 UNTS 217 concluded on 27 June 1981 and entered into force 21 October 1986, to protect and promote human and peoples' rights, to interpret the Banjul Charter and to carry out any other tasks assigned to it by the AU Assembly.

⁴¹ African Commission on Human and Peoples' Rights 'General Guidelines on the Right to Water in Africa' (ESCR guidelines)

https://www.achpr.org/public/Document/file/English/achpr_draft_guidelines_on_the_right_to_water_in_africa_eng.pdf

⁴² ICSECR art 2(1).

state of physical and mental health.⁴³ South Africa has ratified both the ICESCR and the Banjul Charter and is bound by their provisions.⁴⁴ The ICESCR has not been domesticated into law. However, section 39(1) of the Constitution of South Africa states that international law must be considered. Therefore, the minimum core should hold greater significance in developing the jurisprudence around socio-economic rights, particularly the right to water.

The United Nations Committee on Economic, Social and Cultural Rights⁴⁵ (CESCR) explicitly recognised the right to water in General Comment 15.⁴⁶ The CESCR recognises that the realisation of the content of the right to water is context dependent. For example, access and provision will be dependent on the resources available.⁴⁷ Despite this, the CESCR does set up the parameters for the normative content of the right to water, focusing chiefly on 'availability, quality and accessibility.'⁴⁸ General Comment 15 states that 'every person is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'⁴⁹ This right includes the adequate provision of water for subsistence farming.⁵⁰

The CESCR does not quantify the amount of water that would be adequate to meet the above purposes⁵¹. However, it requires the quantity of water to correspond with the World Health Organisation (WHO) Guidelines⁵², which quantify 20 litres per capita per day (l/c/d) as a quantity that carries a high risk of health concern and a 100l/c/d as being an optimal amount.⁵³ Gleick's report breaks it down and states that 50l/c/d is the absolute minimum a person should have access to 'to meet basic needs and lead a healthy, dignified life.'⁵⁴ In South Africa, the Water Regulations provide that each person is entitled to a basic

⁴³ The African Commission confirmed this reading in *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995). The government's failure to provide basic services such as safe drinking water was said to constitute a violation of article 16.

⁴⁴ South Africa ratified the ICSECR in 2015. See the country-specific treaty status indicator at <https://indicators.ohchr.org/> (accessed 15 June 2020). South African ratified the Banjul Charter in July 1996. See <https://www.achpr.org/statepartiestotheafricancharter> (accessed 18 April 2021).

⁴⁵ The CESCR was established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to ECOSOC in Part IV of the ICESCR.

⁴⁶ Committee on Economic, Social and Cultural Rights General Comment 15 The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2002/11 (General Comment 15).

⁴⁷ General Comment 15 para 12.

⁴⁸ General Comment 15 para 12. A deeper discussion of this will be conducted in Chapter 2.

⁴⁹ General Comment 15 para 2.

⁵⁰ General Comment 15 para 7.

⁵¹ Dugard (n 5) 320.

⁵² General Comment 15 para 12(a).

⁵³ G Howard & J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) *World Health Organisation Summary* and p 22: http://www.who.int/water_sanitation_health/diseases/WSH0302.pdf

⁵⁴ P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83,88. See also Dugard (n 5) 321.

water supply of 25l/c/d or 6 kilolitres per household per month.⁵⁵ General Comment 15 also sets out the minimum core content of the right to water.⁵⁶ The minimum core concept proposes a minimal level of socio-economic rights that is immediately realisable, regardless of wealth.⁵⁷

1.8.2. Regional framework

The Banjul Charter is the main human rights promotion and protection instrument on the African continent.⁵⁸ It recognises a variety of rights, including some socio-economic rights. However, the Banjul Charter does not contain a direct and specific right to water.⁵⁹ Nevertheless, the right to water is implied in several rights directly protected by the Banjul Charter, including the right to life,⁶⁰ dignity,⁶¹ health,⁶² socio-economic development⁶³ and the right to an environment.⁶⁴ The ACHPR adopted the Guidelines on the Right to Water in Africa (GRWA) to recognise the importance of water and give effect to the right to water contained in these various provisions. All state parties to the Banjul Charter must adopt these guidelines. The GRWA further states that the right to water is of immediate application to all states.⁶⁵ Importantly, Guideline 5 of the GRWA cements the principle of non-discrimination and equal access to water. Further, Guideline 6 includes the principle of non-retrogression, which includes inadequate measures to implement or maintain water services and infrastructure. Part 3 of the GRWA supports the principle of the minimum core,⁶⁶ and accepts the WHO quantities of the minimum levels of water,⁶⁷ – 20l/c/d as the bare minimum – a quantity that carries a very high risk of health concern – and 100l/c/d as being an optimal amount. Finally, the GRWA sets out principles for

⁵⁵ Water Regulations (n 22) Regulation 3.

⁵⁶ General Comment 15 para 37.

⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment 3 The nature of State parties' obligations (art 2(1) of the Covenant) UN Doc E/1991/23 (General Comment 3) para 10.

⁵⁸ C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 679–702.

⁵⁹ Guideline adopted by the African Commission on Human and Peoples' Rights on 31 July 2019 on the *Guidelines on the Right to Water in Africa* (GRWA) at p6. Other instruments of the African Union refer to the right to water – the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted 13 September 2000 and entered into force 25 November 2005 art 15(a) and the African Charter on the Rights and Welfare of the Child African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 and entered into force 29 November 1999, art 14(2)(c).

⁶⁰ Banjul Charter art 4.

⁶¹ Banjul Charter art 5.

⁶² Banjul Charter art 16(1).

⁶³ Banjul Charter art 22(1).

⁶⁴ Banjul Charter art 24.

⁶⁵ GRWA guideline 3.1.

⁶⁶ GRWA guideline 12.2.

⁶⁷ See Howard & Bartram (n 53).

equitable access to water for people living in informal settlements,⁶⁸ deprived urban areas and rural areas.⁶⁹

1.8.3. South African framework

As indicated above, the right to sufficient water in South Africa is expressed in section 27(1)(b) of the Constitution. The WSA gives expression to this right in section 2(a). It states that the WSA aims to ensure the provision of access to a basic water supply and basic sanitation to 'secure sufficient water and an environment not harmful to human health or wellbeing.' Additionally, the Free Basic Water Policy was enacted through the Free Basic Water Implementation Strategy, which seeks to provide free basic water to indigent households.⁷⁰ Moreover, South Africa is bound by international obligations stemming from the ICESCR, Banjul Charter, and GRWA. Section 39(1) of the Constitution states that international law must be considered when interpreting the Bill of Rights.⁷¹ Section 39(1) is useful in determining the scope of a right.⁷² Thus, the principles surrounding the minimum core of water from the ICESCR and the GRWA should be utilised. The minimum core should hold greater significance in developing the jurisprudence around socio-economic rights, particularly the right to sufficient water in South Africa.

1.8.4. The minimum core in South Africa

The minimum core concept proposes a minimal level of socio-economic rights that is immediately realisable by the State regardless of wealth.⁷³ Bilchitz⁷⁴ argues that minimum core should be considered when analysing the government's obligations under s27(1) of the Constitution.⁷⁵ He further argues that the minimum core sets up the basic threshold of realising the right to sufficient water. However, the Constitutional Court in South Africa has been reluctant to accept the minimum core of rights as an enforceable entitlement. Langford argues that in rejecting the minimum core and instead relying only on the reasonableness test, the Constitutional Court has inverted the analysis of the content of

⁶⁸ GRWA guideline 18.

⁶⁹ GRWA guideline 19.

⁷⁰ Department of Water Affairs and Forestry 'Free Basic Water Implementation Strategy' (August 2002) <http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf>.

⁷¹ Additionally, in *Grootboom* para 26, the court stated that where a relevant principle of international law binds South Africa, it may be directly applicable.

⁷² Currie & De Waal (n 12) 147.

⁷³ General Comment 3 para 10.

⁷⁴ D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1,2.

⁷⁵ Constitution of the Republic of South Africa, 1996.

the right to sufficient water.⁷⁶ Essentially, through its adjudication process, the Constitutional Court has made the content of the right to sufficient water dependent on the State's action to realise it. Consequently, the actual progressive realisation of the right to water is thus determined by the 'reasonable measures' taken instead of the content of the right informing the nature of the reasonable measures.⁷⁷

Bilchitz argues against the Constitutional Court's assertions that it is impossible to determine the minimum core of socio-economic rights because the needs of various members of society are diverse and require different levels of assistance from the State.⁷⁸ He argues that the needs of society may vary, but the State's obligation does not. Bilchitz advances a persuasive argument that the minimum core should be based on the basic needs we all share. He further asserts that in an unequal society, much like South Africa's, the difference in need lies in 'how far a person is from the minimum core and what must be done to alleviate that need.'⁷⁹ Bilchitz further argues that although a contextual approach to socio-economic rights is necessary, such an approach should not discard the universality of people's 'basic interests in socio-economic rights which can be specified independently of context.'⁸⁰

Chenwi⁸¹ argues that the minimum core concept should be part of the concept of progressive realisation.⁸² She argues that the minimum core and the fulfilment thereof is the initial step in progressive realisation. Therefore, to achieve the progressive realisation of socio-economic rights, the minimum, immediately enforceable basic content of the right should be met.⁸³ Importantly, fulfilling the minimum core of a right does not absolve the State of an obligation to fully realise the right.⁸⁴ Liebenberg argues that progressive realisation means that once everyone has access to the basic content of a right, the State is obligated to improve the nature and quality of that right, thus ensuring the maximum realisation of the right.⁸⁵

Socio-economic rights realisation in South Africa is tested through the reasonableness test. This test was adopted in *Government of the Republic of South Africa v Grootboom*⁸⁶(*Grootboom*). It focuses on the appropriateness of the government's steps

⁷⁶ Langford (n 6) 56B-24.

⁷⁷ Langford (n 6) 56B-25.

⁷⁸ Bilchitz (n 30) 489.

⁷⁹ As above.

⁸⁰ As above.

⁸¹ L Chenwi 'Unpacking 'progressive realisation' its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance' (2013) 39 *De Jure* 742.

⁸² Chenwi (n 81) 747.

⁸³ Chenwi (n 81) 755.

⁸⁴ As above.

⁸⁵ Liebenberg (n 36) 188.

⁸⁶ 2001 (1) SA 46 CC.

to progressively realise socio-economic rights.⁸⁷ In later jurisprudence, namely *Mazibuko*, Wilson and Dugard⁸⁸ argue that the Constitutional Court narrowed the text of reasonableness beyond the parameters set in *Grootboom* by failing to take into account the applicants' lived experiences of poverty and suffering due to the level of access to water they had.⁸⁹ They argue that this was a display of a decontextualized reasonableness test. Thus, Bilchitz's argument for establishing a minimum core content places itself as a solution for any future interpretation of the right to sufficient water – where such interpretation would position the purpose of the right as second fiddle, thus perpetuating the unequal access to water experienced today.

1.9. Overview of the Chapters

Chapter 1: Introduction. This chapter introduces and provides the background of the study. It briefly explains the transition of water from private ownership to a public commodity managed by the State whose use is permitted through water use authorisations. It also provides a brief outline of the constitutional and regulatory framework of the right to sufficient water and sanitation. Additionally, the introduction gives context to key issues and debates through the literature review.

Chapter 2: Legal Framework of the Right to Sufficient Water and Sanitation. This chapter focuses on the legal framework of the right to sufficient water and sanitation. It begins by setting out the South African framework followed by a consideration of the right regionally, paying particular attention to the ACHPR and the recently adopted GRWA. Finally, the international framework of the right to water and sanitation is considered in light of the ICSECR and the associated general comments by the CESCR.

Chapter 3: The Minimum Core of the Right to Sufficient Water and Sanitation. This chapter discusses minimum core obligations. It explores the meaning and importance of the minimum core and addresses some of the criticisms toward it. After that, it sets out the general content of the minimum core of the right to water. Next, the South African jurisprudence on minimum core obligations taking into account progressive realisation and reasonableness is discussed.

Chapter Four: Re-evaluating the Substantive Content of the Right to Sufficient Water and Sanitation in South Africa. This chapter contextualises the right to sufficient water and sanitation by considering statistics on the levels of access. This detailed analysis will expose the disproportionate levels of access at the provincial level, which are also

⁸⁷ S Wilson & J Dugard 'Constitutional Jurisprudence: The First and Second Waves' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or Substance?* (2014) 38.

⁸⁸ As above.

⁸⁹ Wilson & Dugard (n 87) 55.

prevalent at the municipal level—between and within municipalities. The formulation of the content of the right to sufficient water and sanitation based on the minimum core using the objective standards of (i) availability, (ii) quality and (iii) accessibility will come next.⁹⁰ Through this, the paper will ideally set out a process of realisation which considers the universality of the basic need for water and also establishes a differentiated minimum standard for peri-urban and rural communities.

Chapter 5: Conclusion. The concluding chapter will summarise and conclude the study. It will also provide recommendations on analysing the realisation of the right to sufficient water and sanitation and policy development to address the inequalities in access using the minimum core obligations of progressive realisation.

⁹⁰ General Comment 15 para 12.

Chapter 2: Legal Framework of the Right to Sufficient Water and Sanitation

2.1. Introduction

Water and sanitation are key to human life.¹ In light of water's importance, the right to water has progressed from a right often on the periphery of rights discourse² to one that is often viewed as a key component of the realisation of other human rights.³ It has also emerged as a right in its own regard, occupying a central position in law, development and politics.⁴ Recognising that water and sanitation are inextricably linked,⁵ this chapter will set out the legal framework of the right to water and sanitation. This framework is important because the right to water is not only recognised domestically but internationally as well.⁶ The South African Constitution requires that international law be considered in interpreting the rights contained in the Bill of Rights, so understanding the legal framework of the right to sufficient water and sanitation is imperative.⁷ The discussion will begin by

¹ M Motsoeneng 'Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa' *Studies in Poverty and Inequality Institute Working Paper 12* (September 2016) 9.

² The generalised guaranteed right to water was recognised in 2010 through the UN General Assembly's Resolution 64/292 on *the human right to water and sanitation* A/RES/64/292 which explicitly recognised the human right to clean and safe drinking water and sanitation. In South Africa, the right to water is expressed in s27(1)(b) of the Constitution as the right of 'access to sufficient water'.

³ Human rights are 'universal, interrelated and interdependent.' This means that one right cannot be enjoyed fully without another. This was affirmed in June 1993 by the World Conference on Human Rights in The Vienna Declaration and Programme of Action UN doc. A/Conf 157/23, Part I, para. 5. Thus, the right to water is a key component in the realisation of other rights such as those contained in (i) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) UNTS 1249 concluded on 18 December 1979 and entered into force 3 September 1981 art 14(2)(h). As of April 2021, CEDAW has 189 states parties and 99 signatories. South Africa signed and ratified CEDAW in December 1995 (ii) the Convention on the Rights of the Child (CRC) 1577 UNTS 3, concluded on 20 November 1989 entered into force 2 September 1990 art 24(2)(c). As of April 2021, the CRC has 196 states parties and 140 signatories. South Africa signed the CRC in January 1993 and ratified it in June 1995 and (iii) International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, concluded on 16 December 1966 and entered into force 3 January 1976 art 11 and art 12. As of April 2021, the ICESCR has 171 states parties and 71 signatories. South Africa signed the ICESCR in October 1994 and ratified it with a reservation in January 2015.

⁴ M Langford & A Russell 'The Right to Water in Context' in Lanford M and Russell A (eds) *The Human Right to Water: Theory, Practice and Prospects* (2017) 1. Human rights are 'universal, interrelated and interdependent.' This means that one right cannot be enjoyed fully without another. This was affirmed in June 1993 by the World Conference on Human Rights in The Vienna Declaration and Programme of Action UN doc. A/Conf 157/23, Part I, para. 5.

⁵ Motsoeneng (n 1) 9.

⁶ See footnote 2 above.

⁷ The Constitution of the Republic of South Africa, 1996 sec 39(1)(b). See also, I Currie & J De Waal *The Bill of Rights Handbook* (2013) 147; L Du Plessis 'Interpretation' in Woolman, S; Bishop, M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd ed (Revision service 5, March 2013) 173; *Law Society & Others v President of the Republic of South Africa & Others* (CCT67/18) [2018] ZACC 51 (11 December 2018) para 5, courts are required to consider international law, s233 of the Constitution 'insists that [courts] not only give a reasonable interpretation to

setting out the South African framework of the right to water and sanitation. This is followed by considering the right regionally, paying particular attention to the African Commission on Human and Peoples' Rights⁸ (ACHPR). The recently adopted 'Guidelines on the Right to Water in Africa' (GRWA) and finally, the international right to water is considered in light of the International Convention on Economic, Social and Cultural Rights⁹ (ICESCR) and the associated general comments by the Committee on Economic, Social and Cultural Rights.¹⁰

2.2. The South African framework of the right to sufficient water and sanitation

Historically, South Africa's water dispensation was exclusionary.¹¹ Access to water and sanitation depended on 'wealth, land ownership and residence in urban areas.'¹² Through that framework, access to water and sanitation was based on race and privilege.¹³

legislation but also that the interpretation accords with international law.' *S v Makwanyane and Another* 1995 (3) SA 391 para 36-37, international law provides a framework within which the Bill of Rights can be interpreted. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 26, where a relevant principle of international law binds South Africa, it may be directly applicable.

⁸ Established in art 30 of the African Charter on Human and Peoples' Rights (Banjul Charter) 1520 UNTS 217 concluded on 27 June 1981 and entered into force 21 October 1986, to protect and promote human and peoples' rights, to interpret the Banjul Charter and to carry out any other tasks assigned to it by the AU Assembly.

⁹ International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, concluded on 16 December 1966 and entered into force 3 January 1976.

¹⁰ Established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to ECOSOC in Part IV of the ICESCR.

¹¹ B Van Koppen et al 'The Political, Social and Economic Context of Changing Water Policy in South Africa Post-1994' in Schreiner, B & Hassan, R (eds) *Transforming Water Management in South Africa: Designing and Implementing a New Policy Framework* 2. In 1994, out of a population of 30 million, an estimated 12 million and 20 million black people did not have access to safe water and sanitation respectively. According to the statistics contained in the General Household Survey 2019, more households have access to water. Although access has improved nationally, it has also decreased in several provinces and at least 3.1% of the population only has access to water through collection of water from rivers, streams, stagnant water pools, dams, wells, and springs. Additionally, at least 2.4% of the population lives without any access to proper sanitation facilities. See Department of Statistics South Africa 'General Household Survey 2019' (GHS 2019) (December 2020) p38-39; 44-45. See G Muller et al 'Water' in *Silberberg and Schoeman's: The Law of Property* 6th ed (2019) 765. The previous framework perpetuated inequitable access to natural resources, including water; AJ van der Walt 'The public aspects of private property' (2004) 19 *South African Public Law* 676, 683-686 for a discussion on the limitations to private ownership of water i.e. '...because of the public importance of establishing and securing a system of public water controls, it was justifiable for the water law to separate entitlements to use groundwater from private ownership of land, and to subject them to exhaustive public law regulation'. See also G Muller 'Statutory utility rights to realise access to services as a characteristic of adequate housing' (2020) 14(2) *Pretoria Student Law Review* 1, 10.

¹² M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition revision service 5* (2013) 56B-1.

¹³ Department of Water Affairs and Forestry *White Paper on Water Supply and Sanitation Policy* (November 1994) at 3, it is noted that 'the line which divides those with adequate access to water from those without is the same line dividing the rich from the poor, the hungry from the well fed, the line of race and privilege.'

The dawn of democracy brought about the disassembly of the exclusionary water law framework and introduced policy and legislation that seeks to redress the inequalities of the past and create a transformative and socially just water dispensation that will drive sustainable and equitable access to water and sanitation for all.¹⁴

South Africa is often considered the ideal for the right to water¹⁵ because of the express inclusion of the right within the Constitution.¹⁶ Preceding the express right to water, various provisions in the Constitution indirectly recognise and support the right to water. First, section 24 entitles everyone to 'an environment that is not harmful to their health or wellbeing'. Additionally, the right to a healthy environment requires 'secure, ecologically sustainable development and use of resources while promoting justifiable economic and social development.'¹⁷ Second, section 26(1), the right of access to adequate housing plays an important role in the discourse around the right to water. The definition of adequate housing in *Government of the Republic of South Africa & Others v Grootboom & Others*¹⁸ (*Grootboom*) includes access to water services.

Moreover, as mentioned above, water and sanitation are inextricably linked. To that end, although sanitation is not expressly provided for in the Constitution, it can be inferred as part of the right to a healthy environment and the right of access to adequate housing¹⁹ as confirmed by the expansive definition of adequate housing in *Grootboom*.²⁰ Finally,²¹ the right to water is expressly contained in section 27(1)(b) and reads as follows:

¹⁴ White Paper on Water and Sanitation, 1994; White Paper on a National Water Policy for South Africa, 1997; WSA, 1997 and the National Water Act 36 of 1998. See also H Thompson *Water Law: A Practical Approach to Resource Management and the provision of Services* (2006) 1, 138.

¹⁵ J Dugard et al 'Determining Progress on Access to Water and Sanitation: The Case of South Africa' in M Lanford & A Russell (eds) *The Human Right to Water: Theory, Practice and Prospects* (2017) 225.

¹⁶ Constitution of the Republic of South Africa, 1996. S 7(2) requires the State to 'respect, protect, promote and fulfil the in the Bill of Rights.'

¹⁷ The National Environmental Management Act 107 of 1998 (NEMA) is the overarching framework legislation for the right to an environment; the National Environmental Management: Waste Act 56 of 2008 (NEMWA) is the framework legislation for waste and pollution management in South Africa to secure an environment that is not harmful to health and well-being. See NEMWA s 2.

¹⁸ 2001 (1) SA 46 (CC) para 35.

¹⁹ Dugard (n 15) 229; Langford (n 12) 56B-74-75.

²⁰ *Grootboom* para 35. The definition expresses the right to adequate housing in s26(1) as follows, '...It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met there must be land, there must be services, there must be a dwelling. '

Additionally, the right to a healthy environment also infers a right to sanitation. Improper sanitation can affect environmental health which can affect the quality of water in water sources i.e., rivers, dams, and other stagnant bodies.

²¹ Water, as a precondition for the sustenance of human life, can be linked to various other aspects of human life. The right to water, or access thereof as expressed in the Constitution is linked and related to various other rights in

- (1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The Water Services Act²² (WSA) was enacted as the framework legislation on water and sanitation services to give effect to the right to access to sufficient water. In its Preamble, the WSA recognises the right of ‘access to basic water supply and basic sanitation.’ Further, section 2(a) of the WSA echoes the Preamble and sets out the Act’s objective to:

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

This cements the link between ‘water, sanitation, the environment and health.’²³ Additionally, section 3 of the WSA supports the objectives of the Act and explicitly guarantees that everyone has ‘a right of access to basic water supply and sanitation’²⁴ and that ‘water service institutions²⁵ should take reasonable measures to realise these rights.’²⁶ Critical to this is the definition of basic water supply and basic sanitation, which will be a key component of the conceptualisation of the minimum core in later chapters.

The WSA defines basic water supply as:

the Bill of Rights including, the rights to equality, human dignity, life, environment, property (previously, access to water was dependent upon access to land via the riparian principle), housing, health, access to sufficient food, including nutrition and administrative justice. See Constitution of the Republic of South Africa, 1996 s9 – s33. See also Langford (n 12) 56B-21–22.

²² Act 108 of 1997.

²³ A necessary link because neither of those elements can exist in isolation. A lack of water may hamper the functionality of sanitation services which can result in an unsanitary environment not conducive to human health and well-being. See also Motsoeneng (n 1) above.

²⁴ WSA sec 3(1).

²⁵ WSA sec 1. Water service institution is defined in the Act as ‘a water services authority, a water services provider, a water board and a water services committee.’ A water services authority is further defined as ‘a municipality, including a district or rural council as defined in the Local Government Transition Act 209 of 1993, responsible for ensuring access to water services.’

²⁶ WSA sec 3(2). Additionally, sec 152(1) and Schedule 4B of the Constitution state respectively that municipalities are to ‘ensure the provision of services to communities in a sustainable manner’ and that local government is responsible for the provision of water and sanitation services. Additionally, the Local Government: Municipal Systems Act 32 of 2000 (MSA) sec 73(1)(c) states that a ‘municipality must give effect to the provisions of the Constitution and ensure that all members of the local community have access to at least the minimum level of basic municipal services.’

[...] the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

The WSA further defines basic sanitation as:

[...] the prescribed minimum standard of services necessary for the safe, hygienic, and adequate collection, removal, disposal, or purification of human excreta, domestic wastewater and sewage from households, including informal households.

Also of import is section 9 of the WSA. Section 9 requires that the minister prescribe the national standards relating to, among other things, the provision of water services²⁷ and the effective and sustainable use of water resources for water services.²⁸ Additionally, the WSA requires that when prescribing the standards, 'the need for everyone to have a reasonable quality of life'²⁹ and 'the need for equitable access to water services' be taken into account.³⁰ The 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water'³¹ (Water Regulations) were promulgated to give effect to these provisions and quantify the prescribed minimums of basic water supply and basic sanitation. Regulation 2 of the Water Regulations sets out the minimum standards of basic sanitation services as:

(a) the provision of appropriate health and hygiene education;³² and

²⁷ WSA sec 9(1)(a). Two compulsory regulations have been promulgated (i) Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001) (ii) Regulations Relating to Compulsory National Standards for Process Controllers and Water Services Works *Government Gazette* no 36958, Notice R813 of 2013 (23 October 2013).

²⁸ WSA sec 9(1)(c).

²⁹ WSA sec 9(3)(a).

³⁰ WSA sec 9(3)(b).

³¹ Regulations relating to compulsory national standards and measures to conserve water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001).

³² No money has explicitly been allocated for health and hygiene education for the public. However, according to Vote 41, the medium-term expenditure of R 20 500 has been allocated for sanitation planning and management which provides a national strategy for the planning of sanitation services and supports municipalities in planning for the provision of sustainable sanitation services as well as R239 100 for water services and local water management which formulates and develops strategies, guidelines and plans for water services and the management of water at the local level. These plans can theoretically include provision for health and hygiene education. See Department of the National Treasury of the Republic of South Africa 'Water and Sanitation: Vote 41' <http://www.treasury.gov.za/documents/National%20Budget/2020/ene/Vote%2041%20Water%20and%20Sanitation.pdf> (accessed 25 September 2021).

(b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.³³

Regulation 3 sets out the minimum of basic water supply services as:

- (a) the provision of appropriate education in respect of effective water use; and
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month – ³⁴
 - (i) at a minimum flow rate of not less than 10 litres per minute
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

Moreover, the WSA, in section 4 regulates the processes for the discontinuation and limitation of water services.³⁵ This section creates procedures and also provides protections that ensure that notwithstanding any procedural requirements, basic water services cannot be denied to those who cannot afford to pay for them.³⁶ Additionally, section 11 of the WSA imposes a duty on all water services authorities to ‘progressively ensure efficient, affordable, economical and sustainable access to water services to all consumers or potential consumers in its area of jurisdiction.’³⁷

Based on the above, the Free Basic Water Policy (FBWP) has been established to complement the obligations created by the WSA, the Water Regulations, and the policy

³³See *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97 (29 April 2011). *Beja* confronted the provision of unenclosed toilets to a community in Khayelitsha. In para 142–143, the court found that the provision of unenclosed toilets was a violation of their constitutional rights as well as Regulation 2(b) of the Water Regulations.

³⁴ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC). *Mazibuko* challenged (i) the City of Johannesburg’s free basic water policy which provided 25l/c/d or 6 000kilolires/month in line with Regulation 3 of the Water Regulations and (ii) the installation of prepaid meters in Phiri. It was argued that the 6000kl/month provided for in the FBWP violates the constitutional right to sufficient water because it is ‘insufficient and inflexible’ as it is insufficient to meet basic needs including waterborne sanitation needs. The court declined to increase the FBW amount or to define the substantive content of the right to sufficient water.

³⁵ Where water services are discontinued without following due process this includes –constructive evictions– a remedy is available through the *mandament van spolie*. This was established in *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54 (30 March 2012) (*Strümpher*) where the primary issue was whether the City of Cape Town was entitled to disconnect the water supply due to non-payment of arrears by water users despite a dispute over liability. The court in *Strümpher* opined that ‘the respondent’s use of water was an incident of possession of the property and interference by the City with the respondent’s access to the water supply was akin to deprivation of possession of property’. From *Strümpher*, common law principles can be applied to water issues by way of constitutional principles. See also E Couzens ‘Avoiding *Mazibuko*: Water Security and Constitutional Rights in South African Case Law’ (2015) 18 *Potchefstroom Electronic Law Journal* 1162,1171–1174; Muller (n 11) 325 & 342–344.

³⁶ WSA sec 4(3). See also Dugard (n 15) 231.

³⁷ WSA sec 11(1).

objectives set out in the White Paper on a National Water Policy for South Africa,³⁸ namely that, the State should provide a means for poor households to gain access to water services.³⁹ The FBWP is implemented through the Free Basic Water Implementation Strategy (FBWIS). The FBWP allows the State to fulfil its obligation to provide basic water and sanitation services to poor households. The basic levels of water services are provided in line with Regulation 3, at 25 litres per capita per day (l/c/d), which is based on international norms and standards.⁴⁰ Although the FBWIS provides for the 25l/c/d of free basic water,⁴¹ it makes clear that this amount does not include water for toilet flushing where waterborne sanitation is utilised.⁴² This creates a gap in the FBWP that does not account for the intrinsic link between adequate water and sanitation, which can support 'life and personal hygiene'.⁴³ However, as water services authorities, municipalities have the discretion to determine the total amount of free basic water services to be provided for households. The bare minimum is in line with the national target of 25l/c/d.⁴⁴ So, there is room to increase the free basic amount to better meet the needs of communities.⁴⁵ Moreover, the Local Government: Municipal Systems Act⁴⁶ (MSA) stipulates that municipalities must 'give members of the local community equitable access to the municipal services they're entitled to', including water services.⁴⁷

³⁸ Department of Water Affairs and Forestry *White Paper on a National Water Policy for South Africa* (April 1997) at 4.1.

³⁹ Water services refer to water supply and sanitation services. WSA sec 1.

⁴⁰ Free Basic Water Implementation Strategy 2007: Consolidating and Maintaining (FBWIS) sec 3.1 at p5. This will be discussed further in sec 2.4.

⁴¹ As above. This is 25l/c/d for an average of eight persons per household which amounts to 6000 kl per household, per month.

⁴² As above.

⁴³ The FBWIS does mention that if toilet flushing is taken into account, the quantity of the free basic water supply should be increased for the benefit to be enjoyed meaningfully.

⁴⁴ This should be in line with the strategies contained in the FBWIS which will allow municipalities to implement the FBWP in a manner that is sustainable and supports the financial viability of local government; and guards against a slowdown or backlog in the extension (that is provision and improvement) of basic services to those households with inadequate access to water. See FBWIS, sec 6 p29.

⁴⁵ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) was brought by the applicants, some of the residents of Phiri in Soweto. The issues in *Mazibuko* were based on two main challenges (i) the sufficiency of the City of Johannesburg (the City)'s Free Basic Water Policy (FBWP) which provided for 25lcd or 6000kl per month per household,⁴⁵ and (ii) the lawfulness of the installation of prepaid water meters by Johannesburg Water (Pty) Ltd (Joburg Water). The applicants argued that the 6000kl/month provided for in the FBWP violates the constitutional right to sufficient water because it is 'insufficient and inflexible' as it is insufficient to meet basic needs including waterborne sanitation needs. The applicants urged the court to increase their minimum entitlement of 25lcd – which stem from Regulation 3(b) of the Water Regulations to 50lcd. The court reasoned that defining a quantified content of the right of access to water might result in rigidity and be counterproductive to the contextual analysis of right over time as the needs of society will vary as time progresses. Moreover, the court stated that it is inappropriate for it to quantify the content of socio-economic rights as policy decisions are 'best' left to the legislature and the executive as institutes of governments thus, it did not increase the amount of water provisioned by the FBWP and did not apply the minimum core obligations principle.

⁴⁶ 32 of 2000.

⁴⁷ MSA sec 4(2)(f).

In addition to the FBWP, the Free Basic Sanitation Implementation Strategy (FBSan) has been established to assist Water Service Authorities in implementing the National Free Basic Sanitation Policy, which necessitates providing basic sanitation services.⁴⁸ The FBSan is informed by the Strategic Framework for Water Services policy which provides for free basic sanitation.⁴⁹ The purpose of FBSan is to promote affordable access by poor households to at least a basic level of sanitation service. Additionally, FBSan states that municipalities must ensure that poor households are not denied access to basic services due to their inability to pay for such services.⁵⁰ However, beyond suggesting that the following; (i) basic levels of access in urban areas will probably consist of waterborne technologies, for example, flush toilets (ii) peri-urban areas will require that the most appropriate technologies be applied and (iii) that in rural areas 'onsite technologies' like pit latrines will be appropriate, and that the solutions are context-specific,⁵¹ the FBSan is vague and does not offer concrete direction on how these suggested standards should be applied for example, how many households should share communal facilities?⁵² These technicalities are left to the municipalities' discretion which creates an environment that promotes inter and intra municipal disparities in access to sanitation.⁵³

In addition to the framework around water services regulated by the WSA, the National Water Act⁵⁴ (NWA) creates a framework for water resources management and focuses on water demand management. The NWA recognises that water is a scarce resource that must be managed sustainably and result in the equitable use and management of water resources.⁵⁵ Basic uses are given priority in allocative decisions and support the provision in the WSA, which prioritises the provision of basic water and basic sanitation.⁵⁶ The NWA is important within the context of water services provision because mismanaged water resources will negatively impact the availability and quality of water,

⁴⁸ Department of Water and Water Affairs and Forestry 'Free Basic Sanitation Implementation Strategy' (FBSan) (October 2009) p6. Basic sanitation services are defined as ...the provision of a basic sanitation facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene, and related practices. See FBSan executive summary.

⁴⁹ Department of Water Affairs and Forestry 'Strategic Framework for Water Services' (September 2003) p29.

⁵⁰ FBSan p7.

⁵¹ FBSan p6.

⁵² J Dugard 'The right to sanitation in South Africa' in FHR (ed) Foundation for Human Rights *Socio-economic rights: Progressive realization?* (2016) 274.

⁵³ J Dugard 'Urban Basic Services: Rights, Realities and Resistance' in M Langford, B Cousins, J Dugard and T Madlingozi *Socio-economic rights in South Africa: Symbols or Substance?* (2014) 306.

⁵⁴ 36 of 1998.

⁵⁵ NWA Preamble.

⁵⁶ WSA sec 5.

and this will be disproportionately felt by the poor and vulnerable members of society.⁵⁷ Thus, good water resources management and ‘municipal water services [management] is vital for national water security’.⁵⁸

Considering the above analysis, access to sufficient water and sanitation is a matter of priority within the South African policy framework. However, according to the ‘General Household Survey 2019’,⁵⁹ although more households have access to water than they did 18 years ago,⁶⁰ there has been a general decline in access to water in several provinces, including Limpopo, Free State, North-West and Mpumalanga.⁶¹ Additionally, 3.1% of households still have no access to water infrastructure and must access water from rivers, streams, stagnant water pools, dams, wells and springs.⁶² Additionally, according to the ‘General Household Survey: Selected Development Indicators 2019’,⁶³ at least 231 000 households in South Africa have no access to sanitation facilities.⁶⁴ These dismal numbers underscore the importance of establishing a quantified right to water and sanitation, which can help guarantee that all people’s basic water and sanitation needs are met.

2.3. The regional framework of the right to water and sanitation

The African Charter on Human and Peoples’ Rights⁶⁵ (Banjul Charter), the main human rights framework for the region, guides the recognition, promotion, and protection of human rights in Africa. The Banjul Charter recognises civil and political rights as well as socio-economic rights. However, historically, the fulfilment of socio-economic rights in Africa has been marginalised to pursue civil and political rights.⁶⁶ Nevertheless, the Banjul

⁵⁷ K Eales ‘Water Services in South Africa 1994–2009’ in B Schreiner & R Hassan (eds) *Transforming Water Management in South Africa: Designing and Implementing a New Policy Framework* (2011) 34–36.

⁵⁸ Eales (n 57) 34.

⁵⁹ Department of Statistics South Africa ‘*General Household Survey 2019*’ (GHS 2019) (December 2020) <http://www.statssa.gov.za/publications/P0318/P03182019.pdf> (accessed 28 April 2021).

⁶⁰ GHS 2019 (n 59) p38.

⁶¹ As above. The difference in access from 2002 to 2019 ranges from as high as a 5.3% drop to as little as 1%. Conversely, urban, and well-developed areas have good access to water and sanitation services, 97.3% of households in all the metros have access to piped tap water whilst 90% have access to improved sanitation services. See GHS 2019 (n 59) p 40 and p45.

⁶² GHS 2019 (n 59) p39.

⁶³ Department of Statistics South Africa ‘*General Household Survey: Selected Development Indicators 2019*’ (GHS: SDI) (December 2020) <http://www.statssa.gov.za/publications/P03182/P031822019.pdf> (accessed 28 April 2021).

⁶⁴ GHS: SDI (n 63) p13.

⁶⁵ African Charter on Human and Peoples’ Rights (Banjul Charter) 1520 UNTS 217 concluded on 27 June 1981 and entered into force 21 October 1986.

⁶⁶ TS Bulto ‘The human right to water in the corpus and jurisprudence of the African human rights system’ (2011) 11 *African Human Rights Journal* 341,342; C Heyns & M Killander ‘The African Regional Human Rights System’ in F Gómez Isa & K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (2006)516–517.

Charter's catalogue of socio-economic rights still offers protection to the beneficiaries of this Charter. Importantly, the Banjul Charter establishes the African Commission on Human and Peoples' Rights (ACHPR) to promote and protect human and peoples' rights in Africa. The mandate of the ACHPR is set out in article 45. It includes its functions to (i) promote human and peoples' rights, (ii) protect human and peoples' rights, (iii) interpret the provisions of the Banjul Charter and (iv) undertake any other work assigned to it by the AU Assembly.⁶⁷ The two principal functions of the ACHPR, to promote and protect, are especially important when considering the right to water in Africa.

The right to water is not one of the expressly guaranteed rights included in the Banjul Charter. Thus far, the right to water and sanitation has found expression regionally through interpretation by the ACHPR of the rights in the Banjul Charter, namely,⁶⁸ life,⁶⁹ dignity,⁷⁰ health,⁷¹ socio-economic development⁷² and the right to an environment.⁷³ Additionally, other African human rights instruments – the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁷⁴ and the African Charter on the Rights and Welfare of the Child⁷⁵ – mention the right to water. However, the ambit of the right is limited to the beneficiaries of these instruments.

Until 2015, the right to water remained ancillary to other rights in the Banjul Charter – although the right to water and sanitation was recognised in the ACHPR's 2011 Principles and guidelines on *the implementation of economic, social, and cultural rights in the African Charter*⁷⁶ (ESCR guidelines). In February 2015, the ACHPR, in light of its

⁶⁷ Banjul Charter art 45(2) – 45(4).

⁶⁸ This interpretation is done in the African Commission on Human and Peoples' Rights (ACHPR) *Principles and guidelines on the implementation of economic, social, and cultural rights in the African Charter on Human and Peoples' Rights* (ESCR Guidelines) (2011) <https://www.achpr.org/legalinstruments/detail?id=30>.

⁶⁹ Banjul Charter art 4.

⁷⁰ Banjul Charter art 5.

⁷¹ Banjul Charter art 16(1). *Free Legal Assistance & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47, it was found that a government's failure to provide basic service [like] safe drinking water...constitutes a violation of article 16.

⁷² Banjul Charter art 22(1).

⁷³ Banjul Charter art 24. *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 50-54, it was held that the contamination of sources of drinking water by state or non-state parties is a violation of art 16 and art 24.

⁷⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted 13 September 2000 and entered into force 25 November 2005, art 15(a)- All State Parties shall take appropriate measures to provide women with access to clean drinking water.

⁷⁵ The African Charter on the Rights and Welfare of the Child adopted 11 July 1990 and entered into force 29 November 1999, art 14 (2)(c)-State Parties shall take measures to ensure the provision of adequate nutrition and safe drinking water.

⁷⁶ Principles and guidelines adopted on 24 October 2011 by the African Commission on Human and Peoples' Rights on *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights* (ESCR guidelines) <https://www.achpr.org/legalinstruments/detail?id=30> ; ESCR guidelines paras 87–92.

mandate to promote and protect human rights and enabled by article 60⁷⁷ – which allows the ACHPR to draw inspiration from international instruments – adopted Resolution 300 on the Right to Water Obligations⁷⁸ (Resolution 300). Resolution 300 came about after the adoption of Resolutions in the United Nations General Assembly (General Assembly) and the United Nations Human Rights Council (HRC), which recognised the human right to water and sanitation.⁷⁹ Resolution 300 urges member states to:

Meet their obligations in providing clean drinking water for all their populations and to conscientiously cooperate in the management and protection of water resources, and to [...] ensure the rational and equitable use of water resources through the distribution of water resources to meet, in priority, the vital human needs of the populations concerned, in particular access to drinking water in sufficient quantity for personal and domestic use, sanitation, agriculture and other means of subsistence...

In addition to recognising the right to water in Africa, Resolution 300 also requires that guidelines on implementing the right to water be established. These guidelines were adopted in 2019 and will be discussed further below.

2.3.1. Guidelines on the Right to Water in Africa

The Guidelines on the Right to Water in Africa⁸⁰ (GRWA) were adopted in 2019 to give effect to the right to water recognised by Resolution 300. These guidelines apply to and must be adopted by all state parties to the Banjul Charter.⁸¹ The GRWA also recognises the link between water and sanitation⁸² and asserts that states are bound to realise them and other ‘water-related human rights.’⁸³ Further, Guideline 5 recognises the principles of non-discrimination and equitable access. Importantly, Part 3 of the GRWA endorses and guarantees a minimum core of water for basic human needs and survival.⁸⁴ Additionally, the GRWA places an obligation on states to fulfil the right to water in a manner that accounts for the:

⁷⁷ Art 60 provides the ACHPR with interpretative latitude by allowing it to draw inspiration from international instruments on the promotion and protection of human and peoples’ rights. This allows it to address the lacuna created by rights that are covered by the vision of the Banjul Charter but lack explicit recognition and protection eg the right to water.

⁷⁸ ACHPR/Res.300(EXT.OS/XVII)2015.

⁷⁹ Resolution 64/292 and Resolution 15/9 respectively.

⁸⁰ Guideline adopted by the African Commission on Human and Peoples’ Rights on 31 July 2019 on the *Guidelines on the Right to Water in Africa* (GRWA) <https://www.achpr.org/legalinstruments/detail?id=71>

⁸¹ GRWA guideline 3.1. South African ratified the Banjul Charter in July 1996. It is thus bound by its provisions and those of the GRWA.

⁸² GRWA guideline 2.1.

⁸³ GRWA guideline 2.2, including but not limited to ‘right to life, survival and development of children, right to development, right to health, right to an environment...’

⁸⁴ GRWA guideline 12.2, see fnt 27 on p21.

- i) Availability of water – states must ensure reasonable and equitable use of water resources through allocation and distribution of water, which will meet basic human needs.⁸⁵
- ii) Access to a sufficient amount – states must ensure access to a safe and equitable amount of water that is sufficient for a dignified life,⁸⁶ where sufficient water also means ‘an adequate and continuous water supply for each person’s personal and domestic use’.⁸⁷
- iii) Quality of water – states must ensure that all people have access to a safe and clean supply of water.⁸⁸

Guideline 16.9 also requires that states recognise everyone’s right to adequate and safe sanitation that is ‘conducive to the protection of public health and the environment.’⁸⁹ Sanitation is determined to comprise of ‘at least, a clean toilet or latrine, together with the collection, disposal and treatment of human excreta, wastewater, solid waste and stormwater removal and hygiene education.’⁹⁰

In addition to the general right to water, the GRWA creates important obligations related to the right to water for informal settlements, rural areas, and deprived urban settlements – key communities in this paper’s consideration of the minimum core and the right to water.⁹¹ Guideline 18 requires states to ensure that no one is denied access to water services based on their housing or land status. Moreover, it requires that water infrastructure in informal settlements be developed to facilitate adequate access to water.⁹² Guideline 19 addresses the needs of rural and deprived urban areas. States are required to extend ‘safe water services’ to these areas.

⁸⁵ GRWA guideline 13.1.

⁸⁶ GRWA guideline 13.2.

⁸⁷ ESCR guidelines para 89.

⁸⁸ GRWA guideline 16.1.

⁸⁹ It is important to note the wording of this guideline. It requires that states ensure that everyone has the right to sanitation- this can be interpreted to mean that states should formally recognise a free-standing right to sanitation. In many jurisdictions, including South Africa, sanitation is merely an extension of the right to water.

⁹⁰ ESCR guidelines para 91.

⁹¹ See Chapter 1 section 1.5. Additionally, in South Africa, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was enacted to provide ‘inclusive, developmental, equitable and efficient spatial planning...to achieve important urban, rural, municipal, provincial, regional and national development goals and objectives through spatial planning and land use management.’ Sec 7 of SPLUMA sets out several development principles which are supportive of the equitable development of water services infrastructure in all areas, especially informal settlements, rural and urban deprived areas. The principles are spatial justice, spatial sustainability, efficiency, spatial resilience, and good administration.

⁹² GRWA guideline 18.1. Infrastructure development will be discussed further in Chapter 4.

The above shows that the ESCR guideline and the GRWA are important documents that guide states' obligations to 'respect, protect and fulfil the right to water.'⁹³ The influences from international instruments have ensured that it is well-rounded and complements the right to water as envisioned internationally.

2.4. The international framework of the right to water and sanitation

Historically, water was relegated to the side-lines – so much so that the main human rights instruments, namely, the Universal Declaration of Human Rights⁹⁴ (UDHR), the International Convention on Civil and Political Rights⁹⁵ (ICCPR) and the International Convention on Economic, Social and Cultural Rights⁹⁶ (ICESCR), do not contain an explicit right to water.⁹⁷ This relegation began to change as populations exploded and developmental needs grew.⁹⁸ Thus, the transition towards the full and explicit recognition of the right to water came to the fore, and water resources started to receive increased international attention.⁹⁹

The first mention of the right to water internationally was in 1977 through the Mar del Plata Declaration, which announced that all peoples have the right to have access to sufficient water to meet their basic needs.¹⁰⁰ The Dublin Principles, which recognised that water is an important resource for environmental and human development, came next.¹⁰¹ These declarations and principles bolstered the move towards explicit recognition because, at that point, the right to water was read into provisions of the ICESCR, the main instrument for the recognition and protection of socio-economic rights. In the ICESCR, the right to

⁹³ GRWA p4.

⁹⁴ UN General Assembly, Universal Declaration on Human Rights, 10 December 1948, UN Doc. Res 217 A (III).

⁹⁵ International Convention on Civil and Political Rights 999 UNTS 9931 concluded on 16 December 1966 and entered into force 23 March 1976. South Africa ratified the ICCPR in December 1998. It has been argued that because water is necessary for the fulfilment of other rights such as the rights to an adequate standard of living, health and life, the right to water is implicitly recognised as a derivative right and did not necessarily require explicit recognition. See K Moyo 'Privatisation of the commons: Water as a right; Water as a commodity' (2011) 3 *Stellenbosch Law Review* 804, 806. However, in 2002, the Committee on Economic, Social and Cultural Rights, General Comment 15 *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2002/11 recognised an explicit right to water. This will be discussed further in section 2.4.1 of the paper.

⁹⁶ International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, concluded on 16 December 1966 and entered into force 3 January 1976.

⁹⁷ N Ahmad 'Human right to water under international law regime: an overview' (2020) 46 (3) *Commonwealth Law Bulletin* 415,416.

⁹⁸ Ahmad (n 97). Water is necessary for poverty alleviation, human health, and education. The GRWA recognises that water is a 'necessary precondition for menstrual health management' which in itself is a precondition of the right to education of women and girls; see GRWA at fn 53.

⁹⁹ P Gleick, 'The Human Right to Water' (1998) 1 *Water Policy* 487,493. For example, the celebration of World Water Day has occurred since 1993.

¹⁰⁰ United Nations 'Report of the United Nations Water Conference' (March 1977).

¹⁰¹ Langford (n 12) 56B-3.

water was read into Article 11(1) of the ICESCR as an intrinsic part of the right to an adequate standard of living. The right to water can be further read into article 12(1), the right of everyone to the ‘highest attainable standard of physical and mental health’.¹⁰² Importantly, the ICESCR places an obligation on states to take steps to the maximum of their available resources to progressively achieve the full realisation of the rights contained in the ICESCR.¹⁰³

In addition to setting out socio-economic rights, Part IV of the ICESCR sets up the Economic and Social Council (ECOSOC) as the monitoring body to implement the provisions of the ICESCR. However, in 1985, through Resolution 1985/17, the Committee on Economic, Social and Cultural Rights (CESCR), which comprises 18 independent human rights experts, was established to monitor the implementation of the ICESCR.¹⁰⁴ This is done by considering individual country reports, inter-state complaints, individual complaints, and others.¹⁰⁵ The CESCR is also responsible for preparing general comments and substantive statements, which are its interpretation of the provisions of the ICESCR.¹⁰⁶

The international right to water has not only been read into the ICESCR but it has also been recognised in other international human rights instruments, namely, the Convention on the Elimination of all Forms of Discrimination against Women¹⁰⁷ (CEDAW) and the Convention on the Rights of the Child¹⁰⁸ (CRC). CEDAW and the CRC recognise the right to water. However, the application of the right is limited to the scope of the instruments and their beneficiaries, specifically women and children.¹⁰⁹

¹⁰² The CESCR determined that ‘access to safe potable water and adequate sanitation’ are underlying determinants of health. See Committee on Economic, Social and Cultural Rights, General Comment 14 on *the right to the highest attainable standard of health* UN Doc. E/C.12/2000/4 para 12.

¹⁰³ ICESCR art 2(1). Maximum resources do not only refer to financial resources. It also encompasses non-financial resources like human, informational, technological resources. The right to water is contextual and dynamic and it requires the employment of both financial and non-financial resources. See also Human Rights Council ‘Progressive realisation of the human rights to water and sanitation: Report of the Special Rapporteur on the human rights to safe drinking water and sanitation’ UN Doc A/HRC/45/10 at para 19-21.

¹⁰⁴ <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (accessed 18 April 2021). See also International Justice Resource Center <https://ijrcenter.org/un-treaty-bodies/committee-on-economic-social-and-cultural-rights/> (accessed 18 April 2021).

¹⁰⁵ ICESCR arts 16-20.

¹⁰⁶ n 104 above. Also, ICESCR art 21.

¹⁰⁷ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) UNTS 1249 concluded on 18 December 1979 and entered into force 3 September 1981 art 14(2)(h).

¹⁰⁸ The Convention on the Rights of the Child (CRC) 1577 UNTS 3, concluded on 20 November 1989 entered into force 2 September 1990 art 24(2)(c).

¹⁰⁹ Other international instruments also mention the right to water. See General Comment 15 para 4 fnt 5.

The next section will briefly track the contemporary development of the right to water, starting with the seminal General Comment 15 then moving on to the development of the right to water and sanitation through resolutions by the General Assembly and the HRC.

2.4.1. General Comment 15

In 2002, the CESCR released General Comment 15 on the right to water. Although it is a non-binding document,¹¹⁰ General Comment 15 is authoritative and firmly situates water as one of the guarantees for an adequate standard of living, especially since it is critical to our survival.¹¹¹ General Comment 15 determines that in allocating water, priority should be given to the right to water for personal and domestic uses.¹¹² Although the creation of a right to water created some controversy,¹¹³ General Comment 15 succeeds in setting out the objective factors of the normative content of the right to water, namely, (i) availability, (ii) quality and (iii) accessibility, which will be discussed below.¹¹⁴

i) Availability

General Comment 15 defines availability as the sufficient and continuous water supply for each person for personal and domestic use.¹¹⁵ It defines domestic use as use that includes 'drinking, personal sanitation, laundry, food preparation, personal and household hygiene.'¹¹⁶ However, it does not set out the quantities of the water for personal and domestic use.¹¹⁷ Rather, it relies on the standards set in the World Health Organisation (WHO)'s Guidelines.¹¹⁸ The WHO Guidelines determined that access to water – the service level – determines the level of health accessible to the user. This is important as it has already been determined that water and health are intrinsically linked, and adequate access to water can combat the spread of disease.¹¹⁹ To that end, the basic level of

¹¹⁰ Langford (n 12) 56B-4.

¹¹¹ General Comment 15 para 3.

¹¹² General Comment 15 para 8.

¹¹³ Stephen Tully criticised, among other things, the CESCR's interpretation of art 11(1) which led to the creation of new rights. He also argues that the right to water could have been placed within other Covenant rights like the right to food or health. See S Tully 'A Human Right to Access to Water? A critique of General Comment No 15' (2005) 23 *Netherlands Quarterly of Human Rights* 35, 37.

¹¹⁴ General Comment 15 para 12.

¹¹⁵ General Comment 15 para 12 (a).

¹¹⁶ As above.

¹¹⁷ The omission of a quantified amount of water in General Comment 15 has been criticized as a failure to fully establish the normative content of the right to water with specificity. See K Moyo 'Water as a human right under international human rights law: Implications for the privatisation of water services' (PhD thesis, Stellenbosch University, 2013) 82–83.

¹¹⁸ G Howard & J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) *World Health Organisation* 1–33.

¹¹⁹ Howard & Bartram (n 118) 23.

access to water was identified as 20l/c/d within 1km of a dwelling and with a high level of health concern.¹²⁰ This amount covers consumption and should cover basic handwashing and food hygiene but does not assure supply for bathing purposes except at the source.¹²¹ It must be noted that the 20l/c/d of domestic water does not cover productive use. This is of particular concern as domestic water use for productive purposes is often employed by poor households in rural and deprived urban areas and is often the only way for them to meet their nutritional needs and avoid poverty.¹²² Gleick's paper on basic water diverges from the WHO guidelines.¹²³ He asserts that 50l/c/d¹²⁴ is the absolute minimum a person should have to meet their basic needs¹²⁵, comprised of the four basic needs, 'drinking water for survival, water for hygiene, water for sanitation and water for preparing food.'¹²⁶ However, he asserts that water for productive uses should be considered 'independently' from the provision of water for health and survival.¹²⁷ I disagree with this assertion. As Howard and Bartram opine, low-income households often depend on some level of subsistence farming to grow enough food to live healthy lives.¹²⁸ Using water designated for consumption, hygiene or sanitation to grow food compromises those basic needs. Including a quantity for productive purposes within the basic amount would ensure that all basic needs are met. To that end, the basic level of supply should account for productive uses in line with General Comment 15's assertion that 'sustainable access to water to realise the right to adequate food is important and that states should make available adequate access to water for subsistence farming.'¹²⁹

ii) Quality

General Comment 15 defines the quality of water for personal and domestic use as water that is 'safe and free from micro-organisms, chemical substances and radiological hazards' which can threaten human health and is of an 'acceptable colour, odour and taste.'¹³⁰ In formulating this standard, the CESCR did not set out a means to measure

¹²⁰Howard & Bartram (n 118) summary and p 22. Additionally, the quality of the water cannot be assured.

¹²¹ As above. It is noted that effective use of hygiene methods is necessary for this amount of water to allow for health benefits to accrue.

¹²²Howard & Bartram (n 118) 3; 23-24.

¹²³ P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83.

¹²⁴ Does not include the provision of water to grow the food necessary for survival. See Gleick (n 123) 85.

¹²⁵Gleick (n 123) 88.

¹²⁶ Gleick (n 123) 83.

¹²⁷ Gleick (n 123) 86.

¹²⁸ Howard & Bartram (n 118).

¹²⁹ General Comment 15 para 7. This is in line with the interpretation of 'adequate water' required by the General Comment which is to consider adequacy not only in terms of volume but to also be informed by water as a social and cultural good. See General Comment 15 para 11.

¹³⁰ General Comment 15 para 12(b). The acceptability of the taste and odour of drinking water is important to ensure that people make use of safe drinking sources rather than for them to opt for aesthetically acceptable water which

water quality but did refer states to the Guidelines for Drinking Water Quality¹³¹ (Quality Guidelines) developed by the WHO as the yardstick from which quality of water should be measured. Water quality standards must be adhered to when incorporating water reuse into a state's water resource management strategies – the use of grey and brown water must be strictly regulated to safeguard the right to safe water and sanitation for all.¹³² Additionally, measures must be taken to protect water sources from pollution and contamination. This includes establishing testing parameters, which must not fall below the international standards established in the Quality Guidelines.¹³³

iii) Accessibility¹³⁴

Accessibility is defined as both physical and economic accessibility.¹³⁵ Water should be accessible to everyone and without discrimination.¹³⁶ Physical accessibility means that water and water services must be within the vicinity of the users, in other words, households, educational institutions and workplaces. Howard and Bertram¹³⁷ have shown that there is a link between physical accessibility and water available for use. The further a water source and the more time spent accessing it and collecting water, the fewer quantities of water are consumed. Where physical access is not easy, water users collect just enough water to meet their consumption needs, which is often less than 5l/c/d,¹³⁸ an amount that carries very high health risks because hygiene is often not accounted for.¹³⁹ Thus, physical accessibility is key to the fulfilment of the basic water needs of hygiene

may be from unsafe sources. See World Health Organisation 'Guidelines for Drinking Water Quality' 4ed vols 1-3 (Geneva, 2017) p219.

¹³¹ WHO *Guideline for Drinking Water Quality* 2ed vol 1-3 (Geneva, 1993). The Guidelines have been updated over the years. The most current guideline is the 'Guidelines for Drinking Water Quality' 4ed vol 1-3 (Geneva, 2017).

¹³² Human Rights Council 'Progressive realisation of the human rights to water and sanitation: Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' (HRC Report) UN Doc A/HRC/45/10 at para 42. In South Africa, the use of greywater is addressed in the Department of Water and Sanitation 'National norms and standards for domestic water and sanitation services version 3- final' (Norms and Standards) (September 2017) <https://www.gov.za/documents/national-water-act-national-norms-and-standards-domestic-water-and-sanitation-services-8> p18–19; 36–37. Control measures for wastewater re-use are set out in the WRC's *Wastewater Risk Abatement Plan: A W2RAP Guideline*, which emphasises the importance of strategies to address reclaimed water quality and associated exposure risks. See Norms and Standards p 40.

¹³³ HRC Report (n 132) para 42; Norms and Standards (n 132) p40.

¹³⁴ Statistics on access to water in South Africa are briefly discussed in Section 2.2 above and in greater detail in Chapter 4.

¹³⁵ Also includes information accessibility which should allow water users to participate in water management and allow them to access information on water and the associated rights. See General Comment 15 para 48.

¹³⁶ General Comment 15 para 12(c). Water should be accessible to all people, including the most vulnerable and marginalized members of society. The principle of non-discrimination is a strong theme within the framework of the right to water regionally and locally. See sections 2.2 and 2.3 above.

¹³⁷ Howard & Bertram (n 118) 18.

¹³⁸ As above.

¹³⁹ Howard & Bertram (n 118) Table S1 within the Summary.

and sanitation.¹⁴⁰ Physical security should also not be at risk when accessing water facilities.¹⁴¹ Moreover, economic accessibility means that water and water services should be affordable for all. The direct and indirect costs associated with securing access to water should not compromise the enjoyment of the right to water or the enjoyment of other ICESCR rights. An important aspect of General Comment 15 is its recognition of the obstacles to access to water that certain groups and individuals face. Of particular import is recognising states' obligation to ensure access to water and confronting the difficulties faced by, among others, women, children and marginalised groups.¹⁴² Additionally, the General Comment calls for states to pay special attention to and ensure that rural and deprived urban areas have access to 'properly maintained water facilities.'¹⁴³ It also makes special mention of informal settlements and requires that no household be denied access to water-based on their housing or land status.¹⁴⁴

Critically, in addition to the above considerations, General Comment 15 establishes the core content of the right to water.¹⁴⁵ Minimum core obligations are those obligations which states have to ensure the 'satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the [ICESCR].'¹⁴⁶ General Comment 15 sets out several core obligations concerning the right to water, including access to the minimum essential levels of water that is safe and sufficient for domestic and personal use, the right to access water based on non-discrimination, and equitable distribution of water services. The minimum core of water will be discussed further in Chapter 3.

2.4.2. Resolutions on the right to water and sanitation

¹⁴⁰Howard & Bertram (n 118) 18. Urban areas with easy physical access see high levels of water use quantities which easily support hygiene needs.

¹⁴¹ General Comment 15 para 12 (c)(i). Where physical accessibility is not secure, there is a risk of physical injury as well as sexual and gender-based violence. See Dr Jo-Anne Geere 'Safe drinking water should mean safe collection too: how to reduce the risks' *The Conversation* 10 December 2020 <https://theconversation.com/safe-drinking-water-should-mean-safe-collection-too-how-to-reduce-the-risks-150880> (accessed on 12 March 2021).

¹⁴² General Comment 15 para 15. The issues surrounding access to water and women and girls are further considered in the 2019 United Nations General Assembly Resolution on *the human right to water and sanitation* A/RES/74/141. Additionally, the Child Gauge 2020 indicates that up to 55% of children who live in informal settlements have no access to water and only 19% of children living in traditional housing have access to water compared to the 77% of children who live in formal dwellings. Additionally, access to sanitation for children living in large rural populations remains worryingly low. See K Hall 'Children's access to basic services' in J May; C Witten & L Lake (eds) (2020) *South African Child Gauge 2020* (2020) 186–188.

¹⁴³ General Comment 15 para 16(c).

¹⁴⁴ General Comment 15 para 16(c). The obligations around urban deprived areas, rural areas and informal settlements are reflected in the GRWA. See GRWA guidelines 18 and 19.

¹⁴⁵ General Comment 15 para 37.

¹⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment 3 *The nature of State parties' obligations (art 2(1) of the Covenant)* UN Doc E/1991/23 para 10.

In 2010, in Resolution 64/292,¹⁴⁷ the General Assembly recognised the express right to 'safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'¹⁴⁸ Resolution 64/292 granted weight to the idea of water as an independent human right. The HRC affirmed this view in its Resolution 15/9, in which it states that 'the right to safe drinking water is derived from the right to an adequate standard of living.'¹⁴⁹ Further, it affirmed the inextricable links between the rights to health, life and dignity.¹⁵⁰ Additionally, the HRC echoes General Comment 15 and calls upon states to focus on vulnerable and marginalised groups and unserved and underserved areas in their pursuit of the progressive, full realisation of the right to water and sanitation.¹⁵¹ Since 2010, the scope of states' obligations regarding the right to safe drinking water and sanitation continued to be developed. In 2013, General Assembly Resolution 68/157 noted the barriers in access to water and sanitation that women and girls face.¹⁵² To that end, it called upon states to eliminate inequalities in access to water and sanitation that are based on, among other things, race and gender as well as inequalities based on factors such as 'rural-urban disparities, residence in a slum, income levels and other relevant considerations.'¹⁵³ This is meant to ensure that all people get access to water and do not suffer disproportionately on any of the above grounds. The development continued with a new resolution that the General Assembly adopted in 2015. Resolution 70/169 clarified the human right to water and sanitation and established sanitation as a distinct right from water.¹⁵⁴ The human right to sanitation is set out as follows:

The human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, [which] is safe, hygienic, secure, socially, and culturally acceptable and that provides privacy and ensures dignity while reaffirming that both rights are components of the right to an adequate standard of living.

¹⁴⁷ UN General Assembly Resolution on '*The human right to water and sanitation*' A/RES/64/292.

¹⁴⁸ UN General Assembly Res 64/292 (n 148) para 1.

¹⁴⁹ UN Human Rights Council Resolution on '*Human rights and access to safe drinking water and sanitation*' A/HRC/RES/15/9.

¹⁵⁰ HRC Res 15/9 (n 150) para 3.

¹⁵¹ HRC Res 15/9 (n 150) para 8(a) and (e) p3.

¹⁵² UN General Assembly Resolution on '*The human right to safe drinking water and sanitation*' A/RES/68/157 p2. In many parts of the world, women and girls often shoulder the burden of collecting water that they shoulder the main burden of collecting water. This restricts their time for other things including school attendance. See also M Campbell '*Women, Poverty, Equality: The role of CEDAW*' (2018) 47; South African Human Rights Commission '*South African Human Rights Commission 'Water and Sanitation Brief: Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation' (Water Brief) (March 2018) p22.*

¹⁵³ UN General Assembly Res 68/157 (n 153) para 6(d).

¹⁵⁴ UN General Assembly Resolution on '*The human right to safe drinking water and sanitation*' A/RES/70/169 para 2. Reaffirmed by the HRC in 2016. See UN Human Rights Council Resolution on '*The Human Rights to Water and Sanitation*' A/HRC/RES/33/10.

Additionally, Resolution 70/169 affirms that both the human rights to water and sanitation are components of the right to an adequate standard of living and are dependent on one another.¹⁵⁵ Importantly, Resolution 70/169 also calls upon states to consider the Sustainable Development Goals – Agenda 2030 (SDGs), especially the full implementation of Goal 6, which is to ‘Ensure access to water and sanitation for all.’¹⁵⁶ Since then, the development of the human right to water and sanitation has continued to be intensive. Resolutions in 2017 and 2019 lamented the continued crises of water and sanitation around the world.¹⁵⁷ They also noted the barriers women and girls face, especially relating to violence in accessing water and sanitation and menstrual health. These resolutions continue to affirm and develop the human rights to water and sanitation, affirm the needs of vulnerable and marginalised groups, and consider development plans like the SDGs and the New Urban Agenda, keeping the human rights to water and sanitation firmly at the centre of all discourse.¹⁵⁸

2.5. Conclusion

The ICESCR and the Banjul Charter set clear benchmarks on what the progressive realisation of the right to water and sanitation looks like. South Africa has ratified both these instruments and is bound by the obligations stemming from them.¹⁵⁹ Additionally, the non-binding soft law instruments mentioned in the discussion above are significant as they can inform an interpretation of the right to water and sanitation in South Africa which accords with the broader objective of ensuring the full realisation of these rights in a manner that ensures an adequate standard of living for all. Importantly, section 39(1)

¹⁵⁵ UN General Assembly Res 70/169 (n 155) para 1.

¹⁵⁶ UN General Assembly Res 70/169 (n 155) para 5(b). The SDGs apply universally and recognised that development is contingent upon the fulfilment of socio-economic rights. See < <https://sdgs.un.org/goals> > (accessed 18 March 2021). The South African National Development Strategy 2030 echoes the SDGs and includes a commitment from the government to raise the standard of living to the minimum levels which include among other things, access to ‘good quality public services’ although it does not define what the minimum levels are, there is recognition that many citizens do not have access to the minimum levels many services including water and sanitation. See Department of the Presidency ‘*National Development Plan 2030: Our Future, make it Work*’ (15 August 2012) (NDP) p25-26 & 38.

¹⁵⁷ UN General Assembly Resolutions on ‘*The human right to safe drinking water and sanitation*’ Res A/RES/72/178 and Res A/RES/74/141 respectively. ‘785 million people still lack basic drinking water services, and 144 million people collect water directly from surface water sources [...] 2 billion people still lack basic sanitation services, and 673 million people practise open defecation’ See Res A/RES/74/141 p3.

¹⁵⁸ The New Urban Agenda is focused on the realisation of the right to adequate housing as a component of the right to an adequate standard of living and universal access to safe and affordable drinking water and sanitation.

¹⁵⁹ Although these instruments have been ratified, they have not been incorporated into domestic law, however, they are still relevant to this discussion. South Africa has adopted a mixed approach to the incorporation of international law into domestic law, making use of the dualist approach to international law. Thus, the ICESCR and Banjul Charter are important and relevant to the discussion in this dissertation as interpretative guides despite their status as undomesticated. See H Strydom & K Hopkins ‘International Law’ in S Woolman; M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2nd ed (Revision service 5, March 2013) 3–4.

requires that the constitutional interpretation of the Bill of Rights – in this case, section 27(1) – be informed by international law.¹⁶⁰ This will enable the development of South African jurisprudence on the right to water and sanitation in a manner that is consistent with international norms and standards and has the potential to give greater meaning to human rights and, in the context of this mini dissertation, greater meaning to the concept of the minimum core in consideration of the right to sufficient water in South Africa.

¹⁶⁰S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 101–102. Because the Constitution makes provision for the horizontal application of the Bill of Rights in sec 8 (2) and (3), the interpretation of the right to water which includes the minimum core will also be applicable to private bodies that take on the provision of basic services, thus they will be obliged to provide water services in line with the expansive, minimum core informed right to water. See K Moyo & S Liebenberg 'The privatization of water services: The quest for enhanced human rights accountability' (2015) *Human Rights Quarterly* 691, 702–704.

Chapter 3: The Minimum Core of the Right to Water and Sanitation

3.1. Introduction

The International Covenant on Economic, Social and Cultural Rights¹ (ICESCR) is the most comprehensive international instrument on economic, social and cultural rights (ESC rights). It sets out the normative content of these rights.² The Committee on Economic, Social and Cultural Rights³ (CESCR), through its interpretative powers, expands on the rights in the ICESCR through general comments and substantive statements.⁴ The seminal General Comment 15 deepened the content of article 11(1), the right to an adequate standard of living, by recognising an explicit right to water as part of the right to an adequate standard of living.⁵ Additionally, General Comment 15 reiterates and confirms the existence of minimum core obligations for ESC rights as set out in General Comment 3, which states that, ‘a core obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of rights [in the ICESCR] is incumbent upon every state party.’⁶ Regionally, the African Commission on Human and Peoples’ Rights (ACHPR) has also confirmed and established the right to water and sanitation.⁷ This chapter will explore the minimum core of the right to water and sanitation,

¹ International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, concluded on 16 December 1966 and entered into force 3 January 1976 art 11 and art 12. As of April 2021, the ICESCR has 171 states parties and 71 signatories. South Africa signed the ICESCR in October 1994 and ratified it with a reservation in January 2015.

² S Liebenberg ‘South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies’ (2020) 3 *South African Judicial Education Journal* 12, 12.

³ The CESCR is a body of independent experts that was established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to ECOSOC in Part IV of the ICESCR which includes monitoring the implementation of the ICESCR as well as publishing its interpretation of the provisions of the ICESCR.

⁴ M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 29–30 at para 1.55. General Comments have “contributed significantly to the operationalisation of human rights and obligations and...spell out in greater detail the content of the different rights.” See also <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (accessed 18 April 2021).

⁵ Committee on Economic, Social and Cultural Rights General Comment 15 *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2002/11 para 3.

⁶ General Comment 15 para 37; Committee on Economic, Social and Cultural Rights, General Comment 3 *The nature of State parties’ obligations (art 2(1) of the Covenant)* UN Doc E/1991/23 para 10.

⁷ The African regional, human rights system was developed under the Organization of African Unity (OAU) which later transformed into the African Union (AU). The main regional human rights instrument is the African Charter on Human and Peoples’ Rights (Banjul Charter) which opened for signature in 1981 and entered into force in 1986. All fifty-three members of the AU ratified it. The African Commission on Human and Peoples’ Rights (ACHPR) is the supervisory body for the Banjul Charter. The ACHPR’s main functions are to (i) promote human and peoples’ rights (ii) protect human and peoples’ rights (iii) interpret the provisions of the Banjul Charter and (iv) undertake any other

followed by a discussion of the jurisprudence around the content of the minimum core of the right to sufficient water in South Africa.⁸

3.2. Minimum core obligations: economic, social, and cultural rights at the international and regional level

States parties to the ICESCR and the African Charter on Human and Peoples' Rights⁹ (Banjul Charter) are required to take steps to progressively fully realise the rights contained in the ICESCR.¹⁰ Progressive realisation entails the continuous improvement of the conditions of ESC rights.¹¹ Whilst progressive realisation allows states to, over time, attain the full realisation of ESC rights, it cannot be used as a measure to defer the fulfilment of states' obligations under the ICESCR.¹² The CESCR in General Comment 3 requires states to pursue the full realisation of ESC rights 'expeditiously and effectively'.¹³ Moreover, the CESCR has clarified that states are obliged to first tackle the most 'essential and fundamental elements' of the rights contained in the ICESCR, which form the minimum core entitlements and obligations of ESC rights.¹⁴

work assigned to it by the AU Assembly. In its role as an interpretative body, the ACHPR has recognised the right to water in Africa in Resolution 300 (ACHPR/Res.300(EXT.OS/XVII)2015). In addition to explicit recognition in Resolution 300, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which concluded on 11 July 2003 and entered into force 25 November 2005 and the African Charter on the Rights and Welfare of the Child which concluded on 11 July 1990 and entered into force 29 November 1999 also recognise the right to water of women and children respectively. See also C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 679–702.

⁸ There is implicit and express recognition of the right to water in South Africa. Implicit recognition is through s24, the right to a healthy environment and s26(1), the right of access to adequate housing. Explicit recognition is in s27(1)(b), the right of access to sufficient water. Beyond the Constitution, the right to water is also recognised in the Water Services Act 108 of 1997 and its accompanying regulations.

⁹ African Charter on Human and Peoples' Rights (Banjul Charter) 1520 UNTS 217 concluded on 27 June 1981 and entered into force 21 October 1986

¹⁰ ICESCR art 2. See also African Commission on Human and Peoples' Rights (ACHPR) *Principles and guidelines on the implementation of economic, social, and cultural rights in the African Charter on Human and Peoples' Rights* (ESCR Guidelines) (2011) para 13.

¹¹ Considering real world realities, it is recognised that the full realisation of ESC rights cannot happen immediately. See General Comment 3 para 9. Progressive realisation not only calls for gradual improvement in the nature and quality of access but also calls for 'decreasing inequalities between different groups and populations.' See United Nations General Assembly 'Progressive realisation of the human right to water and sanitation: Report of the Special Rapporteur on the human right to safe drinking water and sanitation' (Progressive Realisation Report) UN Doc A/HRC/45/10 para 7.

¹² Ssenyonjo (n 4) 60 para 2.24.

¹³ General Comment 3 para 9. See also UN Commission on Human Rights, dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (Limburg Principles), 8 January 1987 E/CN.4/1987/17, Principle 21; Ssenyonjo (n 4) 60 para 2.24.

¹⁴ General Comment 3 para 10; ESCR Guidelines para 17; Ssenyonjo (n 4) 65 para 2.34. Core entitlements apply to individual rights holders and core obligations apply to states as duty bearers. See also GJ Kondowe 'Implementing economic and social rights in "domestic jurisdictions": Understanding the minimum core obligations approach' (2020) 46 *Commonwealth Law Bulletin* 314, 315.

Minimum core obligations and entitlements refer to the minimum, non-negotiable threshold of ESC rights below which states' fulfilment of these rights cannot fall regardless of the states' level of development or resource availability, and the minimum non-negotiable levels of a right that people are entitled to.¹⁵ There is a strong presumption that retrogressive measures in relation to the right to water and sanitation are prohibited except where the state can show that such retrogression was unavoidable despite utilising all available resources.¹⁶ Minimum core entitlements thus represent that 'level or standard of human rights protection that should [always] be guaranteed.'¹⁷ Minimum core obligations can be determined by using the minimum essential levels of a right and considering the needs of the most vulnerable members of society.¹⁸ Further, minimum core obligations are not subject to progressive realisation. They are thus immediately enforceable as they form the baseline of states' compliance with the obligations in the ICESCR.¹⁹

The concept of minimum core obligations is important as it ensures that all states parties to the ICESCR must provide the minimum essential core content of ESC rights to meet their obligations.²⁰ Additionally, minimum core obligations ensure that the most vulnerable members of society are not left behind in the pursuit of the full realisation of rights, which can take a long time.²¹ Through the years, the concept of minimum core obligations has been criticised for fear that meeting the minimum core content of rights will become states' priority to the detriment of the full realisation of all aspects of a right.²² However, it is important to note that although the priority is to first realise the minimum core content of a right, states are still obliged to move as "expeditiously and effectively' as possible

¹⁵ General Comment 3 para 10-11; ESCR Guidelines para 17; Ssenyonjo (n 4) 66-67. The CESCR has further stated that core obligations are non-derogable and thus continue to exist even during conflict, emergencies, or natural disasters. See also Limburg Principles, Principle 25. Further, core obligations form a performative standard against which states' actions can be measured.

¹⁶ Progressive Realisation Report A/HRC/45/10 (n 11) para 60. There is a strong burden of justification where a state has implemented retrogressive measures. Even in times of austerity, a state must ensure that the minimum core levels of ESC rights are met. Any measure, including fiscal reductions for ESC rights, constitutes a retrogressive action and must duly be justified per the requirements of the ICESCR. See also S Liebenberg 'Austerity in the midst of a pandemic: pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) *South African Journal on Human Rights* 1, 14-18.

¹⁷ M Harris 'Downsizing Rights: Why the "Minimum Core" Concept in International Human Rights Law Should be Abandoned' (2014) 1 *Public Interest Law Journal of New Zealand* 32, 38

¹⁸ General Comment 3 para 10; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 31.

¹⁹ Ssenyonjo (n 4) 66 para 2.35. It is important to note that minimum core obligations apply to developing and developed states. See Ssenyonjo (n 4) 67 para 2.37.

²⁰ General Comment 3 para 10. See also Ssenyonjo (n 4) 67 para 2.37.

²¹ General Comment 3 para 12; ESCR Guidelines para 17. States must make every effort to protect vulnerable members of society even in times of severe resource constraints, economic or otherwise.

²² Harris (n 17) 35.

toward the full realisation of the rights in the [ICESCR]"²³ as minimum core obligations should be viewed, as mentioned above, as a 'springboard' towards full realisation.²⁴ Further criticisms of minimum core obligations will be discussed below.

3.3. Criticisms of minimum core obligations

The concept of minimum core obligations has faced some criticism. These critiques will be discussed here.²⁵

3.3.1. Minimum core obligations are rigid²⁶

There is a fear that the minimum core, as a concretised standard, will not allow states sufficient flexibility to pursue full realisation.²⁷ This criticism of the rigidity of minimum core obligations is valid. However, I would argue, in agreeance with Bilchitz, that it is a justifiable rigidity.²⁸ It is necessary to set a benchmark below which rights guarantees cannot fall. Minimum core obligations require that priority be given to the fulfilment of the basic levels of rights to ensure that all human beings have access to, at the very least, the minimum levels of resources necessary to meet their survival needs.²⁹ This should be done in the spirit of the ICESCR which is to protect all members of society especially, the most vulnerable and to ensure that every person is capable of leading a good life, with an adequate standard of living.³⁰

²³ Committee on Economic, Social and Cultural Rights 'Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights: poverty and the international covenant on economic, social and cultural rights' Statement adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001 (CESCR Statement on Poverty) E/C.12/2001/10, para 18; ESCR Guidelines para 17.

²⁴ Ssenyonjo (n 4) 66 para 2.37.

²⁵ The five main criticisms are summarized succinctly in M Harris 'Downsizing Rights: Why the "Minimum Core" Concept in International Human Rights Law Should be Abandoned' (2014) 1 *Public Interest Law Journal of New Zealand* 32–38.

²⁶ Harris (n 17) 35.

²⁷ As above.

²⁸ D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic jurisprudence' (2003) 19 *South African Journal on Human Rights* 1,15.

²⁹ As above.

³⁰ Bilchitz (n 28) 15 '...there are none so vulnerable as those who lack basic services.' It should be noted that the South African government has made a firm commitment to 'achieve a minimum standard of living' which can be achieved in a 'multi-pronged way' which includes meeting/ [improving] among other things, access to good public services. See Department of the Presidency 'National Development Plan 2030: Our Future-make it Work' (August 2012) at 25–26;38 https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 10 August 2021). Additionally, in its preamble, the Constitution of the Republic of South Africa, 1996, states, 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic to...Improve the quality of life of all citizens and free the potential of each person...' See also sec 1(a).

3.3.2. Minimum core obligations undermine the full realisation of rights

The concern here is that minimum core obligations may limit the full realisation of a right because they set a lower standard for states, which may result in the neglect of other aspects of a right. This fear can be assuaged by an interpretation of minimum core obligations that first, does not view them as setting weak obligations for states and second, understands them as the “starting point not the arrival point.”³¹ The immediate and partial fulfilment of a right should not prejudice its full realisation since all rights are subject to progressive, full realisation – where progressive realisation is understood to mean the ‘continuous improvement of the conditions of ESC rights’.³² Additionally, states’ inertia to fully realise ESC rights because of the fulfilment of the minimum core obligations of a right will not pass scrutiny as it would be contrary to the object and spirit of the ICESCR.³³

3.3.3. Minimum core obligations are difficult to adjudicate

This criticism is based on the argument that courts will not always have sufficient information to determine the minimum core. I would argue, in agreement with Bilchitz,³⁴ that courts do not need a wide reference of materials to determine people's basic needs.³⁵ Indeed, this problem can be addressed on a case-by-case basis and should not prove fatal to the concept of minimum core obligations.³⁶

3.3.4. Minimum core obligations are indeterminate

This criticism asserts that the concept of the minimum core lacks specificity. General Comment 3 does not set out exactly what elements constitute the minimum core. Thus, it has been argued that the indeterminacy of the minimum core makes it an oblique measure for ESC rights realisation.³⁷ However, indeterminacy can be remedied through elaboration over some time.³⁸ The CESCR elaborated on the minimum core content of the right to water in General Comment 15 – it stands to reason that the minimum content of other ESC rights can be established through reasoned elaboration.

³¹ Ssenyonjo (n 4) 68 para 2.39. See also Harris (n 17) 37.

³² Ssenyonjo (n 4) 59 para 2.21.

³³ General Comment 3 para 9. In South Africa, government inertia on those grounds may not stand up to constitutional scrutiny based on the reasonableness review. See *Grootboom* para 43–45; S Liebenberg, *Socio-economic rights: Adjudication under a transformative constitution* (2010) 152.

³⁴ D Bilchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 119 *South African Law Journal* 484–501.

³⁵ Bilchitz (n 34) 488.

³⁶ Harris (n 17) 37; Bilchitz (n 34) 488.

³⁷ Harris (n 17) 35.

³⁸ Harris (n 17) 36.

3.3.5. Minimum core obligations only focus on the developing world

There is a concern that minimum core obligations overly emphasise action in the developing world. Indeed, developing nations often have lower levels of ESC rights fulfilment. However, minimum core obligations apply to all states and are significant to the developed world's deprived and economically disadvantaged groups.³⁹ The applicability of the minimum core in the developed world will ensure that robust implementation of plans to realise ESC rights do not falter. Where they do, the minimum core can serve as an accountability measure and ensure that no one suffers from a deprivation that goes below the minimum standards.⁴⁰

Despite these criticisms, minimum core obligations are a necessary mechanism in pursuing the progressive, full realisation of ESC rights. They guarantee, at the very least, 'some for all rather than all for some',⁴¹ which is particularly important when discussing the right to sufficient water and sanitation, which is often subject to uneven fulfilment due to socio-geo-economic contexts. The minimum core obligations to the right to water and sanitation will be discussed further below.

3.4. **Minimum core obligations: the right to water and sanitation**

General Comment 15 authoritatively sets out the normative content of the right to water. It also identifies the minimum core obligations concerning the right to water.⁴² These core obligations of the right to water and sanitation are also set out in the ESCR guidelines.⁴³ The core obligations relating to water are as follows:⁴⁴

- i) To ensure access to the minimum amount of water that is sufficient and safe for personal and domestic uses to prevent disease and must include access to adequate sanitation.⁴⁵ These minimum amounts were previously discussed in the preceding

³⁹ Ssenyonjo (n 4) 67 para 2.37.

⁴⁰ Harris (n 17) 37.

⁴¹ Department of Water Affairs and Forestry 'White Paper on Water Supply and Sanitation Policy' (November 1994) policy principles at 34 <https://www.gov.za/documents/water-supply-and-sanitation-white-paper#> (accessed 12 August 2021).

⁴² The normative content of the right to sanitation and the corresponding minimum core obligations are not yet set out within a General Comment but can be established using the ladders adopted to measure the fulfilment of SDG goals by the Joint Monitoring Programme for Water Supply, Sanitation and Hygiene of the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF). See <https://washdata.org/monitoring/sanitation>.

⁴³ In addition to the factors that will be discussed in (i) to (vii), the ESCR guidelines also include the obligation to not use access to water as a political tool. Interestingly, access to water and sanitation has been used as a talking point in municipal elections in South Africa for example the "toilet elections" of 2011. See JWN Tempelhoff 'From Makhaza to Rammulotsi: Reflections on South Africa's "toilet election" of 2011' (2012) 57(1) *Historia* 82–104.

⁴⁴ See General Comment 15 para 37(a)-(h) and ESCR guidelines para 92.

⁴⁵ General Comment 15 para 37(a); ESCR guidelines para 92(a).

chapter but will be briefly set out here. According to Howard and Bartram, the level for basic access is 20 litres per capita per day (l/c/d) with a high level of health concern, and use for domestic uses like laundry and bathing cannot be assured in the household but can be done at the source of water.⁴⁶ Thus, it can be argued that 20l/c/d does not sufficiently meet the definition of water for domestic water supply and use.⁴⁷ Gleick diverges from the above and determines the minimum basic level to meet personal and domestic uses to be 50l/c/d.⁴⁸

- ii) To ensure access to water on a non-discriminatory basis,⁴⁹ programmes must account for the vulnerable and marginalised members of society – non-discrimination is a core principle within the ICESCR – thus, no persons may be excluded from the benefits of the ESC rights in the ICESCR on any internationally prohibited ground.⁵⁰
- iii) To ensure physical access to water that is sufficient, safe, and regularly available and limits excessive waiting times and is available within a reasonable distance.⁵¹
- iv) Additionally, access to water facilities should be provided in a manner that does not risk the personal security of water consumers – water connections should be close to a dwelling to eliminate the need to travel great distances, which often leaves women and girls vulnerable to assault.⁵²
- v) To ensure equitable access to water and sanitation. There should be equitable distribution of water and sanitation facilities. Underserved areas must be addressed and provided with water and sanitation facilities to ensure equitable access.⁵³
- vi) States must also adopt national strategies to give effect to the right to water and sanitation. Strategies must include benchmarks and indicators to measure progress.⁵⁴

⁴⁶ G Howard & J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) *World Health Organisation* Table S1.

⁴⁷ Howard & Bartram (n 46) 2. Domestic water supply is defined as water for 'all usual domestic purposes including consumption, bathing and food preparation.' See also General Comment 15 para 12(a).

⁴⁸ P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83. However, this amount excludes water for productive purposes. See also ESCR guideline para 91 which sets out adequate and safe sanitation as sanitation that 'comprises at least, a clean toilet or latrine, together with collection, disposal and treatment of human excreta, wastewater, solid waste and storm water removal and hygiene education.' See Chapter 2, section 2.4.1 for further discussion.

⁴⁹ General Comment 15 para 37(b).

⁵⁰ General Comment 15 para 37(c); Guideline adopted by the African Commission on Human and Peoples' Rights on 31 July 2019 on the *Guidelines on the Right to Water in Africa* (GRWA) principles 13 and 18. See also Ssenyonjo (n 4) para 2.71 p87.

⁵¹ See discussion in Chapter 2, section 2.4 (iii) for the discussion on the link between distance and consumption, the greater the distance the lower the consumption, increasing health risks.

⁵² General Comment 15 para 37(d); 'Water and Sanitation Brief: Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation' (Water Brief) (March 2018) p22.

⁵³ General Comment 15 para 37(e). Underserved areas include rural areas, deprived urban areas (per urban) and informal settlements.

⁵⁴ General Comment 15 para 37(f). For example, the '*Strategic Framework for Water Services*' (September 2003) in South Africa and the '*National norms and standards for domestic water and sanitation services version 3- final*' (Norms and Standards) (September 2017).

Additionally, states must take measures to prevent, treat and control diseases linked to water and must ensure access to adequate sanitation.

- vii) Adopt low-cost measures that provide for the most vulnerable and marginalised groups and members of society.⁵⁵ No person should be economically excluded from access to, and the associated benefits of, access to water and sanitation.

Some of these principles are reflected in the legal framework of the right to sufficient water and sanitation in South Africa. However, the courts in South Africa have been reticent to adopt the minimum core obligation interpretation of ESC rights, including the right to sufficient water. Despite this, it appears as though the State adopts the principle in practice through legislation and policy and a large contingent of scholars support it. This dichotomous perception of minimum core obligations in South Africa will be explored below.

3.5. Minimum core obligations: the South African perspective

3.5.1. Minimum core obligations through the courts

In South Africa, the right to sufficient water and sanitation is set out through the Water Services Act⁵⁶ (WSA) and its accompanying regulations and policies.⁵⁷ Despite this strong legislative framework and a legislated basic level, South African courts have been reluctant to adopt a minimum core obligations interpretation of states' obligations relating to ESC rights. The current tepid interpretation of the minimum core in South Africa will be discussed here.

To date, the most significant judgments regarding the right to sufficient water and sanitation are *Government of the Republic of South Africa and Others v Grootboom and Others*⁵⁸ (*Grootboom*), *Mazibuko and Others v City of Johannesburg and Others*⁵⁹ (*Mazibuko*) and *Beja and Others v Premier of the Western Cape and Others*⁶⁰ (*Beja*). These three cases are concerned with the right of access to housing, water, and sanitation, respectively. As mentioned previously, the rights in the Bill of Rights are interrelated, interdependent and mutually supportive – that means that no rights can be

⁵⁵ This includes people who are vulnerable on the grounds of race, gender, and socioeconomic status as well as children and persons living in informal settlements. See GRWA Part 4.

⁵⁶ Act 108 of 1997.

⁵⁷ The legal framework is discussed extensively in Chapter 2.

⁵⁸ 2001 (1) SA 46 (CC).

⁵⁹ 2010 (4) SA 1 (CC).

⁶⁰ (21332/10) [2011] ZAWCHC 97 (date).

fully realised without the others.⁶¹ Although *Grootboom* was concerned with the right of access to housing, it is relevant to the right to sufficient water and sanitation because it fully articulated the position on the State's positive obligations relating to socio-economic rights.⁶²

In *Grootboom*, the court dealt with a matter concerning the respondents – Ms Grootboom and others – who were former residents of the Wallacedene informal settlement located in a waterlogged area on the edge of the Oostenberg municipality area.⁶³ Whilst living in Wallacedene, the respondents had no access to basic services, including access to potable water, sanitation services and refuse collection. Additionally, only a small percentage of the Wallacedene residents had any access to electricity.⁶⁴ To escape this untenable situation, many of the residents of Wallacedene applied for low-cost, subsidised housing from the Oostenberg municipality. However, they were left on the housing waiting list for seven years with no improvement in their living conditions.⁶⁵ With no discernible end in sight, the respondents moved out of Wallacedene. They settled onto vacant, privately-owned land, where they erected their informal shelters. Subsequently, the respondents were evicted from this new settlement and with nowhere else to go, they settled on a sports field in Wallacedene.⁶⁶ The onslaught of the winter rains quickly worsened the respondents' position. Consequently, they launched an urgent application in the Western Cape Division of the High Court, Cape Town, after the municipality failed to adequately respond to their pleas to meet its constitutional obligations by providing them with temporary accommodation.⁶⁷

The High Court, in its judgment, ordered the municipality to provide the applicants with “tents, portable latrines and a regular supply of water.”⁶⁸ However, in its consideration, the High Court rejected the applicants' argument that the right of access to adequate housing under section 26(1) contains a minimum core entitlement.⁶⁹ The Constitutional Court in *Grootboom* further addressed the issue of the minimum core in its judgement as follows:

⁶¹ This was affirmed in June 1993 by the World Conference on Human Rights in The Vienna Declaration and Programme of Action UN doc. A/Conf 157/23, Part I, para. 5. See also *Grootboom* para 23–24. See further Liebenberg (n 33) 52 footnote 132.

⁶² J Dugard et al 'Determining Progress on Access to Water and Sanitation: The Case of South Africa' in M Lanford & A Russell (eds) *The Human Right to Water: Theory, Practice and Prospects* (2017) 238.

⁶³ *Grootboom* para 7.

⁶⁴ *Grootboom* para 7.

⁶⁵ *Grootboom* para 8.

⁶⁶ *Grootboom* para 11. Their spots in the Wallacedene informal settlement had been taken up by other people.

⁶⁷ As above.

⁶⁸ G Muller 'Statutory utility rights to realise access to services as a characteristic of adequate housing' (2020) 14 (2) *Pretoria Student Law Review* 1, 2.

⁶⁹ *Grootboom* para 14.

The court in *Grootboom* developed a systematic approach to the justiciability of socio-economic rights.⁷⁰ Additionally, the court's interpretation of the right to adequate housing as more than 'bricks and mortar' echoed the international formulation of the right to an adequate standard of living under article 11(1) of the ICESCR, which includes 'adequate food, clothing and housing and the continuous improvement of living conditions.'⁷¹ This definition was later expanded to include water, the subject matter of this mini dissertation.⁷² The *amici* in *Grootboom* argued that the CESCR's General Comments should be used as interpretative tools in line with the Constitution.⁷³ Thus section 26(1) should be interpreted to include a minimum core necessary for a dignified life.⁷⁴ However, the court rejected this argument and instead developed a standard of review based on reasonableness.⁷⁵ In its rejection of the minimum core, the court determined that:

- i) it is impossible to determine the minimum core for the progressive realisation of the right in section 26(1) considering the diverse and varied needs of the various communities in South Africa;⁷⁶
- ii) lack of sufficient access to information precludes the determination of the minimum core content of a right and.⁷⁷
- iii) complexity and difficulty of defining the minimum core obligations – 'should it be defined generally or with regard to a specific group of people?'⁷⁸

Based on the above reasons, the court instead formulated the reasonableness review in which the question is, are the legislative and other measures taken by the State reasonable?⁷⁹ The court further reasoned that the right in section 26(1) is qualified by the provision of section 26(2), which states that 'the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' Thus, access to adequate housing and other socio-economic rights is limited by 'reasonable measures' and resource constraints.⁸⁰ This creates an environment in which the substantive content of a right is dependent on the State's measures.⁸¹

⁷⁰ *Grootboom* para 20. See also J Dugard 'Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation' (2007) 20(4) *Leiden Journal of International Law* 965,975.

⁷¹ ICESCR art 11(1).

⁷² General Comment 15. Refer to the discussion in Chapter 2.

⁷³ See the discussion in Chapter 2, section 2.1 and sources cited in footnote 7.

⁷⁴ *Grootboom* para 29.

⁷⁵ *Grootboom* para 33. Although the court spurned minimum core obligations, it did leave the door open for the concept to be utilised in the consideration of reasonableness.

⁷⁶ *Grootboom* para 32.

⁷⁷ *Grootboom* para 33.

⁷⁸ As above.

⁷⁹ *Grootboom* para 41.

⁸⁰ Liebenberg (n 33) 150; K Mclean 'Housing' in Woolman, S; Bishop, M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd ed (Revision service 5, March 2013) 10.

⁸¹ *Grootboom* para 94. See also Mclean (n 80) 11.

Additionally, when analysing the fulfilment of the right of access to adequate housing and broadly, socio-economic rights, the court's assertion that sections 26(1) and (2) be read together muddles the distinction between the scope of the right and the alleged infringement, and the State's justification for any limitation thereof.⁸² This interpretation continues in *Mazibuko*, the seminal case that dealt with section 27(1)(b), the right to access sufficient water. To fully engage with the minimum core of the right to water in South Africa, it is necessary to briefly set out the parameters of the case.

Mazibuko was brought by the applicants, some of the residents of Phiri in Soweto. The issues in *Mazibuko* were based on two main challenges (i) the sufficiency of the City of Johannesburg (the City)'s Free Basic Water Policy (FBWP) which provided for 25l/c/d or 6000kl per month per household,⁸³ and (ii) the lawfulness of the installation of prepaid water meters by Johannesburg Water (Pty) Ltd (Joburg Water).⁸⁴ The prepaid meters (PPM) installation was part of Joburg Water's plan – Operation Gcin'amanzi – to change water usage patterns in Soweto and upgrade the water infrastructure and billing systems.⁸⁵ As part of this plan, the residents of Phiri were offered two choices, the installation of a tap with restricted flow in each yard, within 200m of the dwelling, which would provide 6000kl each month or the installation of PPM, which would include the 6000kl. However, once the free basic water (FBW) amount was exhausted, credit needed to be purchased and loaded. Until such credit was loaded, access to water would be discontinued.⁸⁶

The applicants' case was heard in both the High Court (HC) and the Supreme Court of Appeals (SCA).⁸⁷ In both cases, the City's policy was set aside on the grounds of unreasonableness and an error of law, respectively.⁸⁸ Both courts also deemed the installation of the PPMs unlawful.⁸⁹ In addition to the above, both these courts took steps

⁸²G Muller 'Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to the reasonableness review model' (2015) 30 *Southern African Public Law* 71,78.

⁸³ This amount is in line with Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001) which prescribes the basic water supply in line with s9 of the Water Services Act 108 of 1997. For further information refer to the discussion in Chapter 2 section 2.2.

⁸⁴ *Mazibuko* para 6,8 and 13. Joburg Water, a company wholly owned by the City, is responsible for the provision of water services to the residents of Johannesburg. *Mazibuko* para 5.

⁸⁵ *Mazibuko* para 13.

⁸⁶ The discontinuation policy in Phiri was criticised as being antipoor because households in richer neighbourhoods in the City that had PPM were provided with water on credit once the 6000kl was exhausted.

See J Dugard 'The right to water in South Africa' in Foundation for Human Rights (ed) *Socio-economic rights: Progressive realization?* (2016) 332.

⁸⁷ *Mazibuko v City of Johannesburg and Others* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA).

⁸⁸ *Mazibuko* para 27, 29. See also G Muller et al 'Water' in Silberberg and Schoeman's: *The Law of Property* 6th ed (2019) 770.

⁸⁹ *Mazibuko* para 27,29.

to give substantive content to s27(1)(b), although they offered differing quantities. The HC agreed with the applicants' argument for 50l/c/d based on Gleick's paper, referenced in General Comment 15, as the minimum amount necessary to lead a life of dignity.⁹⁰ The SCA revised this amount and quantified 'sufficient water' as 42l/c/d.⁹¹

In *Mazibuko*, the applicants essentially sought the reinstatement of the original HC order. They argued that 50l/c/d is the appropriate amount of water under s27(1)(b) for a dignified life.⁹² Further, they argued that the 6000kl/month provided for in the FBWP violates the constitutional right to sufficient water because it is 'insufficient and inflexible'.⁹³ The applicants urged the court to increase their minimum entitlement of 25l/c/d, which stems from Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water⁹⁴ (Water Regulations) – to the aforementioned 50l/c/d. The applicants' argument essentially brought up the concept of minimum core and invited the court to quantify the minimum core of the right to access to 'sufficient' water.⁹⁵

The court in *Mazibuko* followed the same prevailing narrow line of reasoning from previous judgements on socio-economic rights.⁹⁶ The court declined the invitation to determine the substantive content of the right to access to sufficient water. First, in its reasoning, the court echoed *TAC*. It stated that in determining the extent of the State's obligations, section 27(1)(b) and section 27(2) must be read together as 'defining the scope of the positive rights everyone is entitled to and the corresponding obligations on the State to "respect, protect, promote and fulfil" such rights.'⁹⁷ Further, the court in *Mazibuko* expressed its reading of these provisions to mean that the socio-economic rights in the Constitution acquire substantive content subsequent to the State's adoption

⁹⁰ A discussion of Gleick's paper on basic water requirements is done in Chapter 2. Gleick is referenced in General Comment 15 para 12(a) footnote 14.

⁹¹ *Mazibuko* para 29.

⁹² *Mazibuko* para 51.

⁹³ *Mazibuko* paras 44(c)& 82; Dugard (n 62) 240. The applicants argued that the FBW provided was insufficient to meet basic needs including waterborne sanitation needs.

⁹⁴ Regulations Relating to Compulsory National Standards and Measures to Conserve water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001).

⁹⁵ *Mazibuko* para 52, 56.

⁹⁶ *Grootboom and Minister of Health and Others v Treatment Action Campaign and Others (No 2) (TAC)* 2002 (5) SA 721 (CC). Briefly, this case concerned the right to access to health care services in s27(1)(a). It was a constitutional challenge of the State's restrictive measures on the provision of ARVs to HIV positive pregnant women to limit mother to infant transmission. The amicus curiae argued that everyone is entitled to basic health care which consists of the minimum levels necessary for a dignified life. The amicus curiae further argued that such minimum entitlement should not be subject to the qualifications in s27(2). Thus, the obligations on the State stemming from s27(2) would be distinct from those of the minimum core obligations of the right to health. The court rejected this argument and brought up similar objections to those in *Grootboom*. The court in *TAC* further opined that minimum core obligations would impose unreasonable demands on the State as it would be 'impossible to immediately provide everyone with access to a core service.' See *TAC para* 37; Liebenberg (n 33) 149–151.

⁹⁷ *Mazibuko* para 49 citing *TAC* para 39.

of 'legislative and other measures'. It is that content that is subject to the 'constitutional standard of reasonableness.'⁹⁸ This is to say that the content of the right of access to sufficient water is dependent on the reasonableness of the State's measures to progressively realise it.⁹⁹

Second, the court reasoned that defining a quantified content of the right of access to water might result in rigidity and be counterproductive to the contextual analysis of the right over time as the needs of society will vary as time progresses. I disagree with this perspective of the function of minimum core obligations – this will be discussed further in section 3.5.2 below.

Lastly, the court stated that it is inappropriate for it to quantify the content of socio-economic rights as policy decisions are 'best' left to the legislature and the executive as institutes of government.¹⁰⁰ This position has the effect of narrowing aspects of the reasonableness standard from *Grootboom*, which require some engagement with the substantive content of a right.¹⁰¹

In addition to rejecting the minimum core obligation formulation of socio-economic rights, the court applied and further endorsed the reasonableness standard from *Grootboom*.¹⁰² The central question being, can the measures taken reasonably facilitate the realisation of the right?¹⁰³ The *Grootboom* criteria for reasonableness regarding socio-economic rights is summarised eloquently by Liebenberg as follows,¹⁰⁴ the measure(s) must be:¹⁰⁵

- i) Capable of facilitating the realisation of the right;

⁹⁸ *Mazibuko* para 66.

⁹⁹ *Mazibuko* para 50. This 'inverted analysis' is the same as the one from *Grootboom*. See Dugard (n 86) 333.

¹⁰⁰ *Mazibuko* para 61. In para 67, the court does set out the situations in which it will enforce the positive obligations stemming from socio-economic rights as follows:

(i) Where the State has taken no steps to realise the rights (ii) where the steps taken are unreasonable (iii) where the measures taken contain unreasonable limitations or exclusions, (iv) where the State's measures do not provide for those most desperately in need and (v) where the obligation of progressive realisation obligates compels the State to continually review its policies to ensure the progressive realisation of a right. See also Muller (n 88) 771.

¹⁰¹ Liebenberg (n 33) 470. To address the separation of powers concern, Mavedzenge has envisioned a secondary role of the courts. He argues that where there is an urgent need (emergency) and the state has not established a minimum core, the courts 'must set a temporary minimum core content to be delivered to the rights bearers by government.' Such relief must be temporary and will subsist until the state establishes a reasonable prescribed minimum. See JA Mavedzenge 'Revisiting the Role of the Judiciary in Enforcing the State's Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya' (2020) 7 *Journal of Comparative Law in Africa* 60, 83–84.

¹⁰² The court in *Mazibuko* also asserts that in some cases, minimum core obligations could emerge in the assessment of reasonableness.

¹⁰³ Liebenberg (n 33) 151.

¹⁰⁴ Criteria can be discerned from a reading of *Grootboom* paras 41–44.

¹⁰⁵ Liebenberg (n 33) 152. See also Muller (n 82) 75.

- ii) Comprehensive and coordinated;
- iii) Balanced and flexible, accounting for short-, medium- and long-term needs;
- iv) Reasonable both in conception and implementation; and
- v) Must account for the needs of the vulnerable and needy members of society whose needs are urgent.

The court's application of the reasonableness review in *Mazibuko* does not do much to establish the content of the steps the State can take to progressively realise the right of access to sufficient water.¹⁰⁶ Beyond confirming the features of reasonableness from *Grootboom* and acknowledging that reasonable measures relating to the right of access to sufficient water must be flexible, the court has taken a decidedly narrow and deferential position in its approach to socio-economic rights.

Even in cases relating to sanitation, the courts continue to apply a conservative hand to the interpretation of the minimum core. *Beja* is a sanitation case brought before the Western Cape Division of the High Court, Cape Town. It was brought by the residents of Makhaza Khayelitsha, an informal settlement in Cape Town. They called for a declaration of unconstitutionality on some 55 unenclosed toilets erected by the municipality.¹⁰⁷ Following an onsite inspection, during which Erasmus J stated, 'the communal toilets are in a bad state and can hardly be said to satisfy the minimum requirements to promote dignity'.¹⁰⁸ An interim order was made directing the municipality to enclose the toilets.¹⁰⁹ In the final judgement, the court considered the legal framework of the right to sanitation which stems from section 26 of the Constitution – the right of access to adequate housing – which in *Grootboom* was determined to constitute more than just 'bricks and mortar' and cannot be considered in isolation from other rights in the Constitution.¹¹⁰ The enabling Housing Act,¹¹¹ the National Housing Programme: Upgrading Informal Settlements¹¹² (UISP), and section 3 of the WSA which provides that everyone has a right of access to basic water supply and basic sanitation. Additionally, Regulation 2(b) of the Water Regulations prescribes the minimum standard of basic sanitation as:

¹⁰⁶ Dugard (n 86) 335.

¹⁰⁷ *Beja* para 7.

¹⁰⁸ *Beja* para 30.

¹⁰⁹ *Beja* para 32.

¹¹⁰ *Grootboom* para 24, 35. Additionally, the State is required to meet the needs of those living under intolerably inadequate housing.

¹¹¹ 107 of 1997. Whose definition for housing development is formulated thus, '...[it] is the establishment and maintenance of habitable, stable and sustainable public and private residential environments [...] in which all citizens and permanent residents of the Republic will, on a progressive basis, have [...] potable water, adequate sanitary facilities and domestic energy supply.'

¹¹² Which aims to improve the living conditions within informal settlements by providing basic services and housing. *Beja* para 59.

(b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

Considering the above legislative framework, the court found that the provision of unenclosed toilets violated several constitutional rights.¹¹³ The court further held that the provision of unenclosed toilets was contrary to the prescribed minimum standards in Regulation 2(b).¹¹⁴

In the context of this chapter, *Beja* is an important case that reinforces the right to sanitation that can be drawn from various legislation and policy documents. Unfortunately, despite its substantive engagement with legislation and policy, the court still declined the invitation to quantify the minimum core of the right to sanitation. However, as with water, the provisions of Regulation 2 and 3 can be interpreted as the minimum levels of the right to basic water and sanitation. Moreover, *Beja* provides somewhat of a departure from the Constitutional Court's jurisprudence on socio-economic rights. In its reasonableness review, it centres the rights to dignity, privacy, and security of a person as interrelated and mutually supportive of the right to access adequate housing.¹¹⁵

These three cases reflect the prevailing South African jurisprudence on socio-economic rights and minimum core obligations, which is disappointingly conservative. However, the Constitutional Court has stated that, where the facts allow, the minimum core can potentially be used in the reasonableness analysis.¹¹⁶ A more robust interpretation of the minimum core obligation of the right to sufficient water, the subject of a considerable amount of literature, will be discussed below.

3.5.2. Deepening the interpretation of minimum core obligations

This subsection will attempt to draw together the various arguments in support of minimum core obligations. These arguments address the concerns that occlude the courts' ability to interpret and apply minimum core obligations to the socio-economic rights in the Constitution.

¹¹³ Sec 10 human dignity, sec 12 freedom and security of the person; sec 14 privacy; sec 24 right a healthy environment; sec 26 right of access to adequate housing and sec 27(1)(a) and (b).

¹¹⁴ The court also references the sec 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 (MSA) provision 'the minimum level of basic municipal services' relating to municipal obligations thus drawing a connection between the provision in the Water Regulations and the delivery of sanitation and fundamental rights. See *Beja* para 142–143.

¹¹⁵ *Beja* para 181.

¹¹⁶ *TAC* para 34; *Grootboom* para 33. See also Liebenberg (n 33) 151.

First, the courts have reasoned that they will often have insufficient access to information concerning the ‘needs and opportunities for the right’.¹¹⁷ Bilchitz argues that the courts do not necessarily need access to voluminous records to determine basic needs.¹¹⁸ In fact, the communities in the cases above were clear about the content and nature of their basic needs. Moreover, I would argue that although the courts approach the content of the right to sufficient water as though it is in dispute, the State has clarified the minimum content of the right to sufficient water through legislation and various policy documents.¹¹⁹

Second, the needs of society are diverse, and in an unequal society like South Africa,¹²⁰ diverse and flexible strategies must be employed to address these disparities. However, as Bilchitz convincingly argues, basic needs are universal.¹²¹ That is to say, despite variances in socio-economic positions and needs, all people have the same basic needs – access to potable water of acceptable quality and availability and basic sanitation services.¹²² Minimum core obligations recognise the urgency of some needs, like those people who have no access to water.¹²³ The South African courts have incorrectly concluded that such an interpretation creates a self-standing right from the right in s27(1).¹²⁴ The minimum core does not seek to establish a new right, rather it is part of the existing right of access to sufficient water, which is, per a minimum core interpretation, subject to a two-step process of realisation.¹²⁵ First, the provision of the minimum levels necessary for survival, followed by the obligation to improve such access, that is to say, progressively realise the full content of the right in line with s27(2).¹²⁶ In conceiving the

¹¹⁷ *Grootboom* para 32.

¹¹⁸ Bilchitz (n 34) 488.

¹¹⁹ Department of Water Affairs and Forestry ‘*Strategic Framework for Water Services: Water is Life, Sanitation is Dignity*’ (SFWS) (September 2003) at p1; p39. <https://www.gov.za/documents/strategic-framework-water-services> (accessed 20 August 2021) The SFWS states that ‘...it is appropriate for water services polic[ies] to focus on ensuring access of the poor to adequate, affordable and sustainable levels to...a defined water supply...’. It is usually the poor and vulnerable whose access is insecure and who benefit directly from the existence of a basic level of access. It must be noted that everyone is entitled to access to the basic levels of water of 25l/c/d. See also Norms and Standards (n 54) at p24-26; WSA Preamble, secs 1 and 9; Water Regulations Regs 2 and 3.

¹²⁰ See generally Department of Statistics South Africa ‘*Inequality Trends in South Africa: A multidimensional diagnostic of inequality*’ (2019) <https://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf> p26–45.

¹²¹ Bilchitz (n 34) 488. However, in an unequal society like South Africa, the question of access to water is ‘how far from the minimum core, with the minimum core being the base of access, is a person and what must be done to alleviate their need. This is in line with the idea of first, providing basic access to everyone, as some do not have it, then improving such access over time. See Bilchitz (n 34) 489.

¹²² SFWS (n 119) p22.

¹²³ Bilchitz (n 28) 11.

¹²⁴ TAC para 34.

¹²⁵ Bilchitz (n 28) 12.

¹²⁶ To take reasonable steps to progressively realise the right of access to water. See Bilchitz (n 28) 11–12. I concede that full realization will look different for various groups so progressive realization beyond basic needs should be context driven. See SFWS which makes provision for different levels of access and the appropriate technologies. See also Department of Water and Sanitation ‘*National Water and Sanitation Master Plan*’ (October 2018).

minimum core content of a right as ‘those levels necessary for survival and thus life’, it is important to note Young’s concerns regarding such a needs-based interpretation.¹²⁷ She opines that a needs-based assessment of socio-economic rights can be restrictive and does not account for dignity, quality of life and freedom,¹²⁸ all of which are intrinsic to the prevailing interpretations of the right to life.¹²⁹ I agree with Young. There is a danger that the minimum core can be restrictive. It is undeniable that survival is possible under the most extraneous conditions that do not necessarily promote an acceptable quality of life.¹³⁰ Thus, survival in its simplest form cannot be used as the benchmark. Survival needs should be interpreted in light of living a life of dignity and appropriateness in context.¹³¹ South African courts have repeatedly asserted that socio-economic rights should be interpreted in light of all the rights in the Constitution.¹³² *Beja*, in particular, emphasises the importance of dignity in the consideration of measures to fulfil socio-economic rights.¹³³ Consequently, the restrictive nature of the minimalist, needs-based approach can be averted by composing the minimum content with dignity and quality of life in mind.

The court has also opined that minimum core obligations can lead to rigidity in interpreting socio-economic rights. As mentioned earlier in the Chapter, there is some rigidity within the minimum core. Interestingly, it is the reasonableness analysis that can lend flexibility to the minimum core. Although the minimum core obligations are immediately realisable, there is a possibility that it might be impossible to meet a quantified standard under extreme resource constraints. In this case, the State must show that it has taken all reasonable steps to meet the minimum core obligations. For example, South Africa faces severe water scarcity.¹³⁴ In times of scarcity, it might be impossible to meet the prescribed 25l/c/d of water for everyone.¹³⁵ Scarcity of water may thus affect the State’s capacity to realise the right to sufficient water, but it does not affect the existence of the right.¹³⁶ This means the government can provide lesser amounts in times of scarcity. However, it must be done in light of the rights in the Constitution, namely equality and non-discrimination.¹³⁷ Once the scarcity has passed, the State must resume its process to meet minimum core

¹²⁷ See generally KG Young ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale International Law Journal* 113, 130.

¹²⁸ Young (n 127) 120–133.

¹²⁹ Young (n 127) 130.

¹³⁰ Liebenberg (n 33) 168.

¹³¹ Liebenberg (n 33) 173. I will discuss appropriateness in the following chapter when I reconceptualize the minimum core of the right to water in South Africa.

¹³² *Grootboom* para 83.

¹³³ *Beja* para 1, 141.

¹³⁴ M Kidd *Environmental Law* (2011) 64.

¹³⁵ Bilchitz (n 28) 20.

¹³⁶ Sec 5 of WSA places an obligation on water services authorities to, when they are unable to meet the full needs of their customers, *prioritise* providing all customers with basic water and basic sanitation.

¹³⁷ Bilchitz (n 28) 22. ‘...realising the rights of all individuals to the greatest possible extent.’

obligations.¹³⁸ Additionally, in the case of scarcity, the reasonableness standard supports the *raison d'être* of minimum core obligations – to ensure access to basic levels necessary for survival, especially to poor, vulnerable and marginalised groups – by requiring that the State should take ‘short term measures for the provision of relief for those whose needs are urgent’.¹³⁹

The final factor is whether the minimum core should be defined generally or with regard to a specific group of people. The minimum core sets out to meet the basic needs of all people. Thus, the quantified amount of water that will constitute the minimum core will apply to all people. To reiterate, this is because the minimum core is the baseline for realisation. Additionally, the minimum core serves to especially meet the needs of the most vulnerable members of our society. They cannot provide for their own basic needs. In practice and contrary to the jurisprudence of the courts, the State has determined the minimum level of water necessary to meet basic needs. In its SWFS, it states that 25l/c/d is the minimum that all people are entitled to. However, I have argued that the minimum core should be determined with dignity and context in mind. Thus, the question now is; is the provisioned 25l/c/d sufficient to meet people's basic needs? After *Mazibuko*, the City of Johannesburg raised the FBW amount it provides to 50l/c/d and up to 15 000kl per household each month.¹⁴⁰ However, the fact remains, the courts have yet to reconcile themselves with the minimum core. Instead, they have contrived a reasonableness test that limits socio-economic rights.

3.5.3. Concepts in concert: minimum core obligations, progressive realisation, and reasonableness

Building upon the preceding subsection, the discussion below will consider minimum core obligations as complementary to progressive realisation, and the court endorsed reasonableness.¹⁴¹

The South African courts have taken the position that the minimum core cannot be read into socio-economic rights but that it can be seen as ‘possibly being relevant to reasonableness...’¹⁴² On its reading of the obligations created by the socio-economic

¹³⁸ As above.

¹³⁹ *Grootboom* para 44; Liebenberg (n 33) 197.

¹⁴⁰ J Dugard ‘Urban Basic Services: Rights, Realities and Resistance’ in M Langford, B Cousins, J Dugard and T Madlingozi *Socio-economic rights in South Africa: Symbols or Substance?* (2014) 301. It is important to note that this was the amount the applicants requested to begin with, and the court ruled against them. This is a policy that applies only to this municipality showing once again the existing disparities in the facilitation of access to water between municipalities.

¹⁴¹ The scope of this mini dissertation does not allow for an extensive study on progressive realisation and reasonableness, however, salient points relating to the minimum core will be discussed

¹⁴² *Grootboom* para 33, *TAC* para 34 and not as an entitlement under s26(1) or s27(1).

rights in the Constitution – which excludes the minimum core – it has further said ‘...all that can be expected of the state is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.’¹⁴³ However, contrary to the courts, the reading of s 27(1) advanced in this paper and by various other scholars conceives of the minimum core as more than a potential consideration but as a concept in concert with progressive realisation and reasonableness.

The minimum core obligation of the right to sufficient water and sanitation and the provision of basic levels to all is immediately enforceable, making it the first step in the process of progressive realisation of the right.¹⁴⁴ Progressive realisation of the full right must then follow in line with s27(2). In this reading, progressive realisation means the ‘continuous, gradual and ongoing advancement’¹⁴⁵ of the right to sufficient water. This would take the form of continuous improvement in the nature and quality of water and sanitation services from the basic minimum levels.¹⁴⁶ Progressive realisation is a flexible concept which accounts for real-world issues, including the fact that such realisation is resource dependent. So, progressive realisation allows for the State to, over time, take whatever steps it can within the resources available to it, to realise socio-economic rights. However, this does not absolve it of the obligation to ‘act with due diligence and without delay’ to meet the full realisation of the right.¹⁴⁷ Thus, minimum core obligations are part of progressive realisation and lend some immediacy and traction to progressive realisation.¹⁴⁸ Further, the measures the State takes to progressively realise the right to sufficient and sanitation water must be capable of withstanding the constitutional analysis of reasonableness.

The courts in South Africa have cemented the question on the content of socio-economic rights as ‘can the measures taken facilitate the realisation of the right?’¹⁴⁹ To answer this question, the courts have to take part in some determination of the content of the right.¹⁵⁰ This is one of the drawbacks of reasonableness as contemplated by the courts.¹⁵¹ The courts must spend some time first establishing the scope of the right before analysing the reasonableness of the State’s measures.¹⁵² This weakens the reasonableness review

¹⁴³ TAC para 35.

¹⁴⁴ L Chenwi ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance’ (2013) 46 *De Jure* 742,754.

¹⁴⁵ Ssenyonjo (n 4) 59 para 2.22.

¹⁴⁶ Liebenberg (n 33) 187.

¹⁴⁷ As above. See also Chenwi (n 144) 755.

¹⁴⁸ Song Yun-Kwan *What are minimum core obligations? Conceptualizing a performative standard for economic, social & cultural rights to complement progressive realization* (Master’s thesis, Seoul National University, 2018) 40.

¹⁴⁹ Liebenberg (n 33) 151; *Grootboom* para 41.

¹⁵⁰ Bilchitz (n 28) 6 & 8.

¹⁵¹ Liebenberg (n 33) 175.

¹⁵² As above.

because, as Bilchitz aptly states, the contemplation of the content of a right in relation to reasonableness occurs in a ‘normative vacuum’.¹⁵³ Therefore, the question is; reasonable in relation to *what*? Wilson and Dugard also question, ‘in relation to what needs, and interests must the State’s measures be reasonable?’¹⁵⁴ Some context of a right must exist against which the reasonableness of measures can be assessed. Based on this, I do not think the minimum core obligations are necessarily incompatible with reasonableness. The two are not mutually exclusive and can be mutually reinforcing.¹⁵⁵ The minimum core obligations can be a performative tool that indicates the defining content of the right to sufficient water – the minimum essential levels – and the reasonableness review can be the model for evaluating the measures taken in the pursuit of the full progressive realisation of the right to sufficient water.¹⁵⁶ In this conceptualisation of reasonableness, minimum core obligations do not gloss over it, rather, the reasonableness review’s flexibility is upheld whilst minimum core obligations provide it with a foundation upon which measures can be assessed.¹⁵⁷ Thus, minimum core obligations, progressive realisation and reasonableness are concepts in concert. Together they can create a more substantive understanding of socio-economic rights and the obligations thereof in South Africa.

3.6. Conclusion

Minimum core obligations have been cemented regionally and internationally. Unfortunately, South African courts have been reticent to establish a normative minimum core content of socio-economic rights, including the right to sufficient water. However, in practice, a prescribed minimum has been established in water policy. A richer interpretation that centres the interests socio-economic rights seek to protect and promote is necessary.¹⁵⁸ Minimum core obligations provide a viable interpretation that is context-driven, flexible, and fully incorporates progressive realisation and reasonableness. Minimum core obligations form the initial stage of the progressive realisation of the right to water and sanitation. Moreover, the reasonableness review of socio-economic rights can, through the minimum core, be developed beyond its current narrow, conservative,

¹⁵³ Liebenberg (n 33) 176.

¹⁵⁴ S Wilson & J Dugard ‘Taking poverty seriously: The South African Constitutional Court and Socio-Economic Rights’ (2011) 22 *Stellenbosch Law Review* 664, 669.

¹⁵⁵ S Yeshanew ‘Combining the “minimum core” and “reasonableness” models of reviewing socio-economic rights’ (2008) 9(3) *ESR Review: Economic and Social Rights in South Africa* 8, 11; NJ Cooper ‘After Mazibuko: Exploring the responses of communities excluded from South Africa’s water experiment’ (2017) 61 *Journal of African Law* 57, 71.

¹⁵⁶ Yeshanew (n 155) 12; Cooper (n 155) 71.

¹⁵⁷ Bilchitz (n 28) 10. A general understanding of the content of a right can only enrich the reasonableness review.

¹⁵⁸ Wilson & Dugard (n 154) 672.

and amorphous standard into a more principled and substantive gauge upon which socio-economic obligations can be measured.¹⁵⁹

¹⁵⁹ Bilchitz (n 28) 10–11.

Chapter 4: Re-evaluating the Substantive Content of the Right to Sufficient Water and Sanitation in South Africa

4.1. Introduction

There are disparities in access to sufficient water and sanitation in South Africa.¹ These disparities are visible both within and between municipalities and are often experienced depending on the socio-economic status of consumers, geographical location, and geopolitical classification of an area. To further demystify and defend the incorporation of minimum core obligations in the right to sufficient water and sanitation as argued in the preceding chapter, I will present data from the South African General Household Survey 2019² (GHS 2019) and the South African General Household Survey Selected Development Indicators 2019³ (GHS: SDI) to express the uneven access to water and sanitation in South Africa.

The statistical analysis will first set out the macro statistics on access to water and sanitation. This will involve data on the provinces of Gauteng – the so-called 'engine room' of the country⁴ – and the Free State – the 'breadbasket' of South Africa.⁵ In Gauteng, the analysis will be centred on the City of Tshwane Metropolitan Municipality (COT) and the Rand West City Local Municipality (Rand West). In the Free State, Mangaung Metropolitan Municipality (Mangaung) and the Maluti-A-Phofung Local Municipality (Maluti) will be considered.⁶ These locations have been chosen to show the disparities in access to water and sanitation between urban, peri-urban and rural areas, as well as

¹ J Dugard, 'The right to water in South Africa' in Foundation for Human Rights (ed) *Socio-economic rights: Progressive realization?* (2016) 317, 338.

² Statistics South Africa 'General Household Survey 2019' (GHS 2019) (December 2020) <http://www.statssa.gov.za/publications/P0318/P03182019.pdf> (accessed 28 April 2021).

³ Statistics South Africa 'General Household Survey Selected Development Indicators 2019' (GHS: SDI) (December 2020) <http://www.statssa.gov.za/publications/P03182/P031822019.pdf> (accessed 1 May 2021).

⁴ In addition to some manufacturing, Gauteng is primarily the centre of tertiary and quaternary services like finance, real estate, and business services in South Africa. See <https://municipalities.co.za/provinces/view/3/gauteng> (accessed 20 September 2021).

⁵ The economy in the Free State is dominated by primary and secondary activities namely, agriculture, mining, and manufacturing. See <https://municipalities.co.za/provinces/view/2/free-state> (accessed 20 September 2021).

⁶ Maluti-A-Phofung falls under the Thabo Mofutsanyana District Municipality in the Free State. For purposes of this study, the focus will specifically be on Maluti-A-Phofung which substantially comprises of all the former Bantustans of QwaQwa. See Stats SA Municipal Profile: Maluti-A Phofung http://www.statssa.gov.za/?page_id=993&id=maluti-a-phofung-municipality (accessed on 20 September 2021). See also <https://www.globalsecurity.org/military/world/rsa/southern-sotho.htm> (accessed on 20 September 2021).

metropolitans and lower municipalities.⁷ Using COT as a subject, the analysis will also reveal intra-municipal disparities in the nature and quality of access.⁸ These findings will highlight the inequity of water and sanitation provision, which I argue can be rectified if a concrete baseline of the right to sufficient water and sanitation is established. Additionally, in this chapter, I will reformulate the content of the right to sufficient water and sanitation based on the objective standards of (i) availability, (ii) quality and (iii) accessibility. Through this, I will ideally set out a process of progression that considers the universality of the basic need for water and sanitation but also accounts for the differentiation in needs between urban, peri-urban, and rural communities.

4.2. Statistical analysis of access to water and sanitation in South Africa

Section 27(1)(b) of the Constitution of the Republic of South Africa, 1996 expressly sets out the constitutional right of access to sufficient water.⁹ Such expression has material benefits, such as empowering individuals and communities to challenge state non-compliance.¹⁰ In addition, constitutionalisation also creates an accountability standard – policies relating to a constitutionalised right are often created ‘within the shadow of the law, as states ‘constitution-proof’ their policies.’¹¹ Shiel, Langford and Wilson have noted that the constitutionalisation of the right to sufficient water does not on its own ensure

⁷ Please note that the definitions of rural and urban in South Africa are complex and lack standardisation thus, urban areas can range from formal to informal, and rural areas vary widely according to ‘population density, levels of modern agriculture, and types of social governance.’ So, urban metropolitan municipalities can contain some functionally rural areas. In the same vein, ‘rural’ areas contain areas that are functionally urban eg Phuthaditjhaba in the Free State which is the urban centre for QwaQwa and serves as the administrative head office of Maluti-A-Phofung Local Municipality. See Statistics South Africa ‘*Census 2001: Investigation into appropriate definitions of urban and rural areas for South Africa: Discussion document*’ (2003) http://www.statssa.gov.za/census/census_2001/urban_rural/urbanrural.pdf (accessed 21 September 2021) 4,33–35; D Atkinson ‘Rural-Urban Linkages: South Africa Case Study’ *Working Group: Development with Territorial Cohesion: Territorial Cohesion for Development Program Working Paper Series N° 125* (October 2014) 5–7 and 16–17. Additionally, peri-urban areas are densely populated urban/rural areas that border traditional urban areas. They are a result of the apartheid system of relocating black labour close to white-owned industrial and commercial areas to supply their labour, eg Hammanskraal which is part of COT and is thus a ‘metro peri-urban area’. See Atkinson (n 7) 16–17.

⁸ I will use Hammanskraal and Pretoria for this analysis, both are areas within the Tshwane Metropolitan Municipality. See Statistics South Africa Municipal Profile: The City of Tshwane http://www.statssa.gov.za/?page_id=993&id=city-of-tshwane-municipality (accessed on 20 September 2021).

⁹ The right to (waterborne sanitation) can also be inferred from this provision. Refer to the discussion in Chapter 2 on the legal framework of water and sanitation.

¹⁰ R Schiel et al ‘Does it Matter: Constitutionalisation, Democratic Governance, and the Human Right to Water’ (2020) 12 *Water Journal* 1, 2.

¹¹ Langford draws a causal connection between *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) and the creation and implementation of a housing plan for the Wallacedene area. This is a good example of the material impact of a constituted right and government ‘constitution-proofing’ its policies. See M Langford ‘Housing Rights Litigation: *Grootboom* and Beyond’ in Langford, M; Cousins, B; Dugard J & Madlingozi, T (eds) *Socio-economic rights in South Africa: Symbols or Substance?* (2014) 187, 195–198.

access to water.¹² It should be accompanied by right claiming and democratic governance to yield some results¹³. This is where statistics can prove useful as they can objectively illustrate the current levels of access. This is an important exercise – the analysis of numerical data relating to the provision of basic services can be advantageous in various ways, including directing policy development, decision-making and creating accountability measures.¹⁴ Statistics relating to the provision of water and sanitation will be presented below.

4.2.1. A macro perspective on access to water and sanitation

This section will focus on the broader statistics on access to water and sanitation nationally and provincially, specifically, Gauteng and Free State.

According to the statistics, there has been a significant advancement in the rollout of water and sanitation services at the national level. The number of households with access to piped or tap water in their dwelling, on site or off site, increased from 84.4% in 2002 to 88.2% in 2019.¹⁵ Additionally, the number of households with access to improved sanitation has increased from 61.7% in 2002 to 82.1% in 2019.¹⁶ These impressive figures continue at the provincial level. In Gauteng and the Free State, 97.6% and 91.9% of households have access to piped or tap water in their dwelling, on site or off site, respectively.¹⁷ Further, 90% and 82.3% of households have access to improved sanitation within Gauteng and the Free State, respectively.¹⁸

¹² Schiel (n 10) 4–6.

¹³ As Above. Rights claiming involves challenging deficits in rights fulfilment using accountability mechanisms like courts, human rights commissions, regional organisations, and even United Nations bodies. See <https://www.cesr.org/supporting-rights-claiming> (accessed 21 September 2021).

¹⁴ Statistics South Africa 'Community Survey 2016 Municipal Profile: Free State' (CS: FS 2016) (27 June 2018) p49 'statistics create an enabling environment for the monitoring of water [and sanitation] provision related targets and programmes'; Langford (n 11) 119–206 for a discussion on the systemic impacts of *Grootboom*; Socio-Economic Rights Institute 'Human Rights and Water Integrity: Implications for informal Settlement Water and Sanitation' (December 2022) 26 on how contextualising a right is important because it strengthens the right and creates a measure upon which accountable governance can occur. See also WC Curtis & LE Wilson 'The use of statistics and statisticians in the litigation process' (1979) 20 *Jurimetrics Journal* 109–120.

¹⁵ GHS 2019 (n 2) Figure 10.1 p38. The 2019 percentage is lower than the percentages measured since 2007. Piped or tap water in the dwelling or onsite includes piped water inside the household's own dwelling or in their yard. It excludes water from a neighbour's tap or a public tap that is not on site. Off site piped or tap water includes piped water on community stand 'off site' or water from a neighbour's tap.

¹⁶ GHS 2019 (n 2) Figure 11.1 p43. Improved sanitation refers to flush toilets connected to a public sewerage system, a septic tank, or a ventilated pit latrine eg Ventilated Improved Pit Latrine (VIP).

¹⁷ GHS 2019 (n 2) Figure 10:1 p38.

¹⁸ GHS 2019 (n 2) Figure 11.1 p43.

Worryingly, despite the seemingly upward trajectory of household access to water and sanitation, the GHS 2019 shows that 3.1% of households do not have access to any piped water and rely on rivers, streams, stagnant pools, dams, wells and springs.¹⁹ Additionally, 16% of households in South Africa have been utilising unimproved – and thus unacceptable sanitation technologies, including chemical toilets and the bucket system.²⁰ Disturbingly, 1.3% of households – at least 230 000 households – have no access to any sanitation facilities and are presumably practising open defecation, urination and sanitary practices.²¹

Table 1: Percentage of unimproved sanitation technologies by province: Gauteng and Free State

	Gauteng	Free State
Pit latrine without ventilation pipe	6.5	13.6
Chemical toilet	1.2	0.1
Bucket system collected by municipality	1.6	1.3
Bucket system emptied by household	0.3	1.0
None ²²	0.2	1.0
Total	9.7	17

Generally, statistics show that the more urbanised provinces have better access to water and sanitation. Gauteng, the more urban of the two provinces considered here, has better levels of access. In fact, between 2002 and 2019, access to water in the Free State

¹⁹ GHS 2019 (n 2) Table 10:1 p39. Unfortunately, this number does not include households that fetch their water from other sources. It is also unclear what 'other' sources entail. Moreover, the GHS: SDI shows that over 2 million households do not have any water supply infrastructure. See GHS: SDI (n 3) Table 2.8 p13.

²⁰ GHS 2019 (n 2) Table 11.1 p44. This percentage can be broken up as follows: Pit latrine without ventilation 14.3% (2 457 000); Chemical toilets 0.7% (112 000); Bucket system collected by municipality 0.9% (149 000); Bucket system emptied by household 0.2% (37 000). See also J Dugard 'The right to sanitation in South Africa' in Foundation for Human Rights (ed) *Socio-economic rights: Progressive realization?* (2016) 263,283 for a discussion on the unacceptability of the bucket system.

²¹ GHS (n 2) Table 11.1 p44; GHS: SDI (n 3) Table 2.8 p13. This number does not include those households who utilise 'other' types of sanitation facilities. It is unclear what 'other' refers to.

²² Having no sanitation facility falls below the scope of unimproved sanitation. It is included here for expediency. According to the WHO Joint Monitoring Programme, unimproved sanitation facilities are 'facilities that do not ensure hygienic separation of human excreta from human contact. [They] include pit latrines without a slab or platform, hanging latrines and bucket latrines.' Unimproved sanitation is the first step on the sanitation ladder, above open defecation which is intimated by a lack of access to sanitation facilities. See World Health Organization & United Nations Children's Fund Joint Monitoring Programme for Water Supply and Sanitation (JMP) 'Progress on Drinking Water and Sanitation: Special Focus on Sanitation' (2008) p6 & 16. See also World Health Organization & United Nations Children's Fund Joint Monitoring Programme for Water Supply and Sanitation (JMP) 'Progress on household drinking water, sanitation, and hygiene 2000-2020: Five years into the SDGs' (2021) p28 & 48.

declined by 3.7%.²³ Additionally, the Free State reported higher levels of reported interruption in the water supply at 32.6% of households compared to Gauteng's 9.5%. Furthermore, the utilisation of unimproved sanitation technologies is higher in the Free State at 17% than in Gauteng at 9.7%, as evidenced in Table 1 above.²⁴

Despite the deficiencies mentioned above, it cannot be denied that statistically, there has been an improvement in access to water and sanitation. However, it is important to note that these statistics belie the fact that access to water and sanitation infrastructure does not guarantee the quality, nor does it account for assurance of supply.²⁵ Statistics on formal water connections do not clearly reflect the degree of progress in moving the water connection closer into the home.²⁶ Additionally, sanitation statistics do not account for households that do not use their provisioned sanitation facility due to dysfunction.²⁷ To further understand the scope of access to water and sanitation, statistics on access at the municipal level will be presented below.

4.2.2. Comparative analysis of access to water and sanitation: Metropolitan Municipalities and Local Municipalities

To fully understand the condition of access to water and sanitation, the micro perspective must be considered. The executive power to deliver water and sanitation services falls under local government, in other words, municipalities.²⁸ So, to accurately gauge the levels of water and sanitation beyond the national statistics, statistics on municipalities must be considered. For this study, the statistics will focus only on COT, Mangaung, Rand

²³ GHS 2019 (n 2) Figure 10:1 p38. From 95.6% in 2002 to 91.9% in 2019.

²⁴ This data is based on the information in GHS 2019 (n 2) Table 11.1 p44.

²⁵ Dugard (n 1) 337; Dugard (n 20) 287–288. Nationally, 25.8% of households reported water interruptions. See GHS 2019 (n 2) Figure 10.3 p41.

²⁶ Dugard (n 1) 337. Progressive realisation of the right to sufficient water is about the continuous improvement of the nature and quality of access thus moving communal taps into yards or yard taps into houses would be indicative of progressive realisation.

²⁷ Dugard (n 20) 287; M Langford et al 'The Human Right to Sanitation' in Lanford, M & Russell, A (eds) *The Human Right to Water: Theory, Practice and Prospects* (2017) 372 fnt 132, VIPs are disturbingly known as 'full-ups' because municipalities fail to empty them timeously thus household are unable to fully enjoy the benefits of the sanitation facility because it is dangerous and unhygienic. See also Department of Water Affairs 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of sanitation services in South Africa' (March 2012) p3, sanitation services which do not meet the standards are the result of the deterioration of infrastructure caused by a lack of technical capacity to ensure effective operation, timely maintenance, refurbishment and/or upgrading, pit emptying services and/or insufficient water resources.

²⁸ WSA sec 3(2). Additionally, sec 152(1) and Schedule 4B of the Constitution state respectively that municipalities are to 'ensure the provision of services to communities in a sustainable manner' and that local government is responsible for the provision of water and sanitation services. Moreover, the Local Government: Municipal Systems Act 32 of 2000 (MSA) sec 4(2)(f) stipulates that municipalities must 'give members of the local community equitable access to the municipal services to which they are entitled' and sec 73(1)(c) further states that a 'municipality must give effect to the provisions of the Constitution.

West and Maluti-A-Phofung, metropolitan and local municipalities, respectively.²⁹ The data for this localised discussion will be extracted from the Community Survey of 2016, which was published in 2018.³⁰

Table 2: Percentage of access to water: Metropolitan Municipalities v Local Municipalities³¹

Access to Water ³²				
	Metropolitan Municipality		Local Municipality	
	COT	Mangaung	Rand West	Maluti
Piped water in dwelling, on site or off site ³³	91.4	98.5	91.4	91.2
Safe drinking water	90.4	91.1	90.8	83.0
No safe drinking water	9.6	8.9	9.2	17
Main source of drinking water supplier: Municipality	93	94	85	96.6
Main source of drinking water supplier: Own service (private borehole etc.)	2.9	3.1	7.6	0.7
Main source of drinking water supplier: Flowing water, stream, river, spring, rainwater	0.2	0.1	0.1	1.6

²⁹ Sec 151(1) of the Constitution establishes three categories of municipalities, Category A: Metropolitan municipalities that have executive authority over their jurisdictions; Category B: Local municipalities that share authority with district municipalities and Category C: District municipalities that share authority with local municipalities. District municipalities are often responsible for boarder matters whilst local municipalities are responsible for functions not handled by the district municipalities especially service provision. Rand West is a Category B municipality within the borders of the West Rand District in the Gauteng. Maluti is a Category B municipality situated within the Thabo Mofutsanyana District in the Free State Province. See N Steytler & J de Visser 'Local Government' in S Woolman; M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2nd ed (Revision service 5, March 2013) 22-17–19. See also Atkinson (n 7) 5–6; Understanding Local Government <http://www.etu.org.za/toolbox/docs/localgov/webundrstdlocgov.html> (accessed 9 October).

³⁰ Statistics South Africa 'Community Survey 2016 Municipal Profile: Free State' (CS: FS 2016) (27 June 2018) and Statistics South Africa 'Community Survey 2016 Municipal Profile: Gauteng' (CS: GP 2016) to be referred to collectively as the 'Community Surveys'. Although the Community Survey is over 2 years old, it is the most recent, municipal specific publication available. The data utilised here must be interpreted in light of this. Where possible, numbers from the GHS 2019 and GHS: SDI will be indicated and utilised.

³¹ This table is based on data from CS: FS 2016 (n 14) and CS: GP 2016 (n 30).

³² CS: FS 2016 (n 14) p51 & 53 and CS:GP 2016 (n 30) p42 & 44.

³³CS: FS 2016 (n 14) p50 and CS:GP 2016 (n 30) p44. This refers to piped water inside the dwelling, inside the yard or water on a community stand. Additionally, the data is offered in the form of ranges therefore the mean percentage of the range is used here.

It is widely accepted that metropolitan municipalities, as sites of increased urbanisation, have better capacity to provide access to basic services – on average, COT and Mangaung have a higher percentage of households with access to safe drinking water and improved sanitation.³⁴ Further, based on the Community Surveys, Maluti appears to be the lowest scoring municipality on all fronts although it has the highest number of households utilising the municipality as their main source of water. Unfortunately, Thabo Mofutsanyane District Municipality – which Maluti falls under– also experiences the highest rate of water interruptions at 41.5% compared to the 13.7% of West Rand District Municipality – which Rand West falls under– and 13.6% for COT.³⁵ This shows that despite the impressive rollout of municipal water supply infrastructure, the precarity of actual access to water persists. Thus, it is imperative that there be improvements in the quality and assurance of water supply.

Table 3: Percentage of access to sanitation: Metropolitan Municipalities v Local Municipalities³⁶

Access to Sanitation ³⁷				
	Metropolitan Municipality		Local Municipality	
	COT	Mangaung	Rand West	Maluti
Improved sanitation ³⁸	81.3 ³⁹	79.2 ⁴⁰	86	52.8
Unimproved sanitation ⁴¹	17.8	17.2	11.8	43.8
Other including ecological toilet	0.5	1.9	0.3	1.6
None	0.4	1.7	1.8	1.7

The levels of access to sanitation are generally quite low across the board. In this case, the best performing municipality is Rand West. Both municipalities from the Free State

³⁴ Safe drinking water: 90.8% for COT & Mangaung compared to 86.9% for Rand West & Maluti; Improved sanitation: 80.3% for COT & Mangaung compared to 69.4% for Rand West & Maluti. See CS: FS 2016 (n 14) p51 & 56 and CS:GP 2016 (n 30) p 42 & 46.

³⁵ The district municipality percentages for Thabo Mofutsanyane District Municipality in the Free State and West Rand District Municipality in Gauteng, are used here because the statistics do not provide data on water interruptions for specific local municipalities within the districts. See CS: FS 2016 (n 14) p54 and CS:GP 2016 (n 30) p45. The exact number for Rand West is 6.4%.

³⁶ This table is based on data from CS: FS 2016 (n 14) and CS: GP 2016 (n 30).

³⁷ CS: FS 2016 (n 14) p56 and CS:GP 2016 (n 30) p46.

³⁸ Improved sanitation refers to flush toilets connected to a public sewerage system, a septic tank, or a ventilated pit latrine. Unlike CS: GP 2016, the CS: FS 2016 does not differentiate between flush toilets connected to public sewerage or septic tanks. For the purposes of this study, it is assumed that 'flush toilet' in CS: FS 2016 includes both public sewerage and septic tank connections.

³⁹ According to the GHS 2019 (n 2) p45 this has increased to 83.1%.

⁴⁰ According to the GHS 2019 (n 2) p45 this has declined to 76.5%.

⁴¹ Unimproved sanitation refers to chemical toilets, pit latrines without a slab or platform, hanging latrines and bucket latrines.'

do not have very high levels of access. In fact, Maluti has the highest percentage of households utilising unimproved sanitation facilities, followed by COT.⁴² Interestingly, both Mangaung and Maluti have identical percentages of households with no access to sanitation facilities. So, although levels of access are often better in metropolitan municipalities, the reality is that other factors, beyond capital, can influence the nature and quality of access possible. For the Free State, the low levels of sanitation potentially indicate the effects of its geographic position. In the metropolitan, infrastructure is old and requires extensive maintenance and upgrading.⁴³ In Maluti – which is constituted where the former Bantustan of QwaQwa was located – the effects of apartheid-era ‘patterns of underdevelopment prevail’.⁴⁴

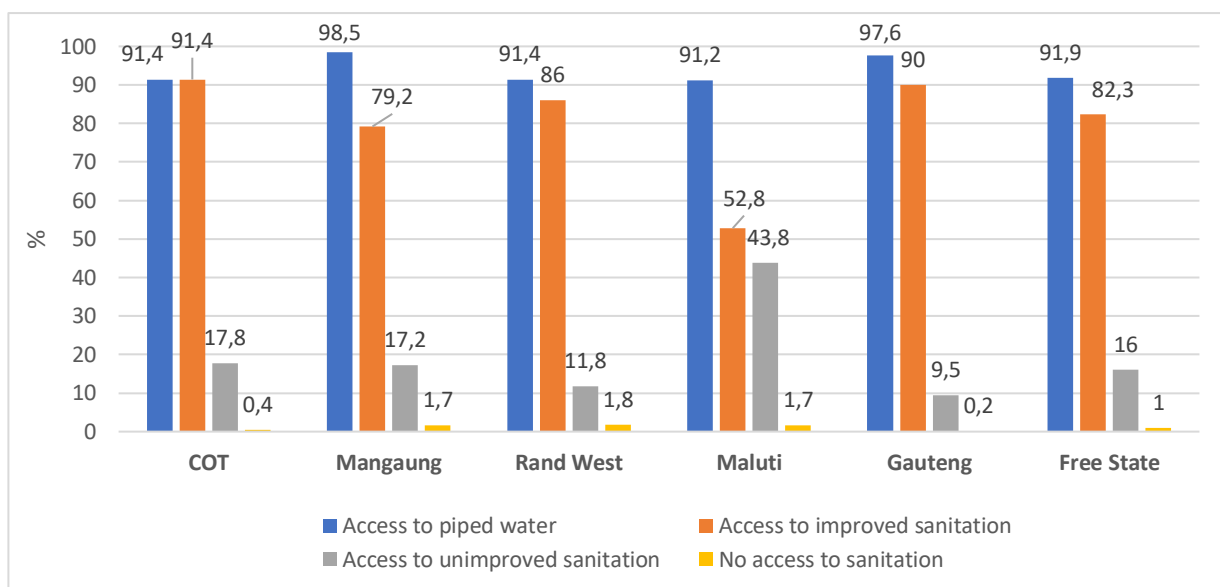


Figure 1: Comparative statistics on access to water and sanitation⁴⁵

Figure 1 summarises that access to water and sanitation at the municipal level is much lower than what the aggregate national statistics suggest. There are disproportionate

⁴² Nationally, according to the GHS 2019 (n 2) p45, at 95.8% Nelson Mandela Bay Metropolitan Municipality located in the Eastern Cape has the best levels of access to improved sanitation among the metropolitan municipalities, whilst Mangaung at 76.5% has the lowest levels of access. However, the data from the Community Surveys of 2016 shows that overall, the lowest levels of access to improved sanitation are in OR Tambo District Municipality located in the Eastern Cape and the highest levels of access are in the City of Cape Town Metropolitan Municipality. See ‘Statistics South Africa Community Survey 2016 Municipal Profile: Eastern Cape’ (27 June 2018) p57 and ‘Statistics South Africa Community Survey 2016 Municipal Profile: Western Cape’ (27 June 2018) p52.

⁴³ South African Human Rights Commission ‘Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014’ (2014) (SAHRC 2014) p41.

⁴⁴ Dugard (n 20) 284 this is a factor that is often not reflected in the aggregate macro statistics on access to basic services. See also SAHRC 2014 (n 43) p40.

⁴⁵ Disaggregated data on the municipalities is based on the Community Surveys whilst the provincial data is based on the GHS 2019.

levels of access between provinces and the type of municipalities in those provinces. Access to improved sanitation in the Free State and the associated municipalities is much lower than in Gauteng and the associated municipalities. This could be because of the increased urbanisation and the prevalence of metropolitan municipalities, unlike in the Free State.⁴⁶ Regardless, access is very unevenly spread out, leaving many households to suffer the indignities of insufficient water and inadequate access to sanitation services and allowing the gaps in access to continue to grow.

4.2.3. Comparative analysis of localised access to water and sanitation in the City of Tshwane: Pretoria and Hammanskraal

Aggregated statistics on metropolitan municipalities show that COT has high levels of access to water and sanitation.⁴⁷ However, disaggregated statistics show that there are disproportionate levels of access within single municipalities. This applies within COT, where historically underserved areas continue to experience deprivation of their right to sufficient water and sanitation.⁴⁸ To present this issue, I will use Pretoria, which is in Region 3 of COT and Hammanskraal located in Region 2 of COT.⁴⁹ Data from Statistics South Africa (Stats SA) on the profiles of each place will be used for this study.⁵⁰

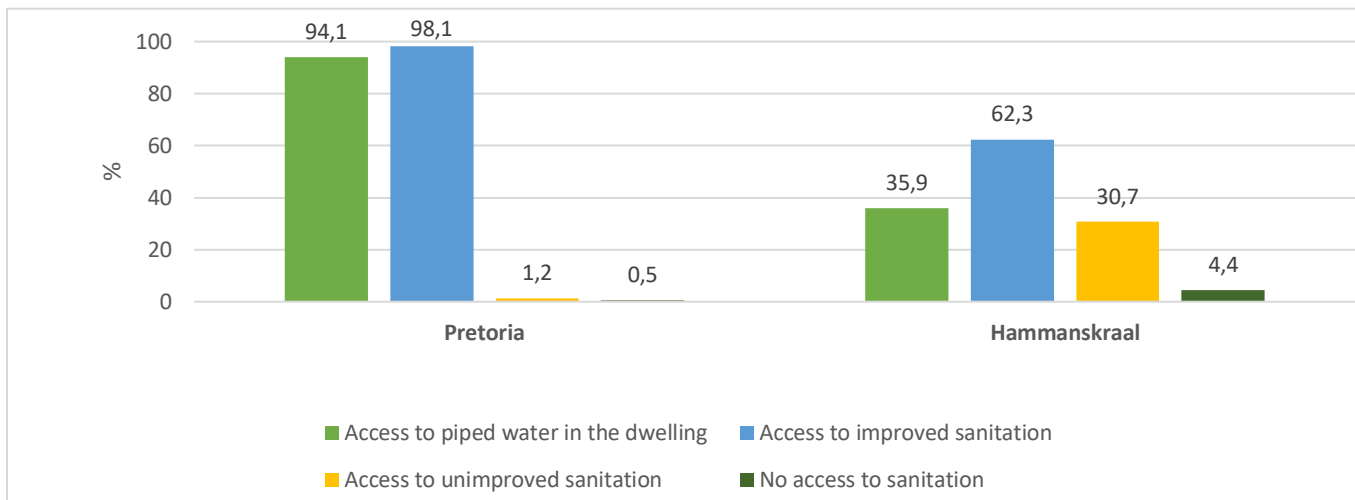
⁴⁶ Gauteng has the most metropolitan municipalities in South Africa, namely, COT, City of Johannesburg, and City of Ekurhuleni. See <https://municipalities.co.za/municipalities/type/1/metropolitan> (accessed 26 September 2021). On average, between the three metropolitan municipalities, the average settlement area is 97.1% urban. See Stats SA municipal profiles living conditions.

⁴⁷ See Figure 1 in section 4.2.2 above. The mean aggregate percentage of access to piped water and improved sanitation is 91.4% compared to Mangaung at 88.6%. GHS 2019 (n 2) p40& 45 show that COT levels of access to water and sanitation are at 95.1% and 83.1% respectively.

⁴⁸ Dugard (n 1) 337; Dugard (n 20) 284. See also SAHRC 2014 (n 43) p7.

⁴⁹ https://www.tshwane.gov.za/sites/about_tshwane/Regionalisation/Pages/Regions.aspx (accessed 26 September 2021). Stats SA Place Profile: Hammanskraal http://www.statssa.gov.za/?page_id=4286&id=11343; Stats SA Place Profile: Pretoria http://www.statssa.gov.za/?page_id=4286&id=11366

⁵⁰ It must be noted that as far as can be discerned, the data is based on the 2011 census but is regularly updated according to the disclaimer on each page. 'Statistics South Africa (Stats SA) monitors the quality of the information available on this website and updates the information regularly'. Therefore, the accuracy of the conclusions cannot be guaranteed.

Figure 2: Percentage of access to water and sanitation: Pretoria and Hammanskraal⁵¹

The disaggregated statistics on water and sanitation within one municipality paint a bleak picture. The City of Tshwane is the fourth-largest municipality in South Africa. It has a sizeable budget allocated to water and sanitation.⁵² Despite this, it is evident that Hammanskraal, a metro peri-urban area within COT,⁵³ has low levels of access to water and sanitation when compared to Pretoria. This difference might be because (i) Pretoria has been identified as the priority area in COT whilst Hammanskraal falls under the third priority area,⁵⁴ (ii) the urban influx of poorer citizens has placed pressure on COT,⁵⁵ and (iii) COT struggles with balancing the divergent ideals of establishing a modern, efficient city and also fulfil a pro-poor mandate to correct the deficiencies of apartheid segregation policies.⁵⁶

⁵¹ This is based on the place profiles. See note 49 above.

⁵² According to the City of Tshwane 'City of Tshwane Integrated Development Plan: Revision for 2020/21 and Service Delivery and Budget Implementation (SDBIP) Scorecard' (June 2020) p 455, R 5 025 249 379 has been allocated for water and sanitation. Additionally, according to the City of Tshwane '2021/22 Medium term Revenue and Expenditure Framework for the City of Tshwane' p15, R 172 926 733 and R 133 622 101 have been allocated toward the repair and maintenance of water supply and sanitation infrastructure respectively. A further R138 million has been set aside for the refurbishment of water networks and backlog eradication. See also <https://www.tshwane.gov.za/Lists/CurrentNewsHome/CustomDispForm.aspx?ID=554&ContentTypeId=0x0100348F2425A35F3045BF18657362861A62> (accessed 26 September 2021).

⁵³ Atkinson (n 7) 16–17. Hammanskraal consists of rural and urban settlements and is considered an urban core otherwise referred to as the 'underserviced township areas.'

⁵⁴ Department of Cooperative Governance and Traditional Affairs & City of Tshwane 'Profile: City of Tshwane Metropolitan Municipality' (COGTA: COT) (August 2020) p8–9.

⁵⁵ COGTA: COT (n 54) p25.

⁵⁶ South African Human Rights Commission 'Water and Sanitation Brief: Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation' (Water Brief) (March 2018) p4. The absence or inadequate application of a rights-based approach to service delivery particularly at a local government level has resulted in disproportionate and inappropriate service provision. See also K Sartorius & B Sartorius 'Service delivery inequality in South African municipal areas: A new way to account for inter-jurisdictional differences' (2016) 53 *Urban Studies Journal* 3336, 3349.

Further engagement with the data in Figure 2 emphasises the disparities in access. Of the 30.7% of access to unimproved sanitation, 30.3% of households in Hammanskraal use pit latrines without a ventilation pipe compared to the 0.6% in Pretoria. Additionally, 4.4% of households in Hammanskraal do not have any access to sanitation facilities. Shockingly, where there is access to piped water in Hammanskraal,⁵⁷ the water quality is not fit for human consumption due to failures of water treatment plants.⁵⁸ Unfortunately, the intra-municipal gap in access will continue to widen in the face of sanitation backlogs and water infrastructure development delays,⁵⁹ leaving people who live in the less developed areas of COT without any hope of resolution in the near future.⁶⁰ Massive infrastructure development is necessary to ensure that the residents of Hammanskraal enjoy the benefits of their right to sufficient water and sanitation, much like their neighbours in Pretoria.

4.3. Evaluating and reconstructing the right to sufficient water and sanitation in South Africa

Based on the above statistical analysis, although there is progress in providing access to water and sanitation, there are access gaps that leave the less urban and poorer areas of the country behind. I propose that quantifying the minimum core entitlements and obligations of the right to sufficient water and sanitation will help to recalibrate how the right to sufficient water and sanitation is realised and will optimistically, narrow the gaps in access across the country and propel the full realisation of the right to sufficient water and sanitation forward. A clear, quantified standard will enable municipalities to realign their water services provision policies along the proposed national standard whilst also leaving room for municipalities to progressively go beyond the required minimum levels.

⁵⁷ 35.9% of households have access to piped water inside their dwellings.

⁵⁸ Over the years, Hammanskraal families have contended with contaminated water caused by the ageing infrastructure at the water treatment plant discharging sludge into the Apies River and Leeuwkraal (Temba) Dam which provides the Hammanskraal community with water. In 2019 the South African Human Rights Council (SAHRC) declared that the water in Hammanskraal was unfit for human consumption after the Council for Scientific and Industrial Research's (CSIR) independent sample analysis. Further, in August 2021, COT shut down the Temba Water Purification Plant leaving the Hammanskraal with no access to water for a week. See SAHRC 'Water warning for Hammanskraal residents' <https://www.sahrc.org.za/index.php/sahrc-media/news/item/2089-water-warning-for-hammanskraal-residents-issued-by-sahrc> (accessed 25 September 2021); M Rafapa 'Lack of clean water in Hammanskraal is a violation of rights, says SAHRC' *GroundUP* (Gauteng) 7 September 2021 <https://www.groundup.org.za/article/water-hammanskraal-brown-and-smells-say-residents/> (accessed 25 September 2021).

⁵⁹ 14.2% of households in Hammanskraal depend on water tankers for water because they have no access to piped or tap water.

⁶⁰ COGTA: COT (n 54) p25.

This includes recalibrating the financing of water services provision and infrastructure development.⁶¹

The re-evaluation of the right to sufficient water and sanitation will expand on the current prescribed minimum standards in Regulations 2 and 3 of the 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water'⁶² (Water Regulations). In addition, the parameters for the normative content of the right to sufficient water and sanitation; (i) availability, (ii) quality and (iii) accessibility will be considered.⁶³ The minimum core of each factor will culminate in the determination of the minimum core content of the right to sufficient water and sanitation in South Africa. The minimum core content will be used as the universal baseline above which progressive realisation can occur and below which no government plan, action or policy may fall.⁶⁴ Additionally, a differential minimum standard will also be established to account for the needs of rural and peri-urban households whose water use extends beyond just domestic use and also prioritises other functions.⁶⁵

4.3.1. Availability

Availability is defined as 'the sufficient and continuous supply of water for each person for personal and domestic use' where domestic use refers to 'drinking, personal sanitation, laundry, food preparation and personal and household hygiene.'⁶⁶ To quantify the amount

⁶¹ This requires very clear policy frameworks within the municipality which must align with the minimum core and includes streamlining water services provision under any indigent policies. See Dugard (n 1) 328–330.

⁶² Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Water Regulations) *Government Gazette* no 22355, Notice R509 of 2001 (8 June 2001).

⁶³ Committee on Economic, Social and Cultural Rights, General Comment 15 *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2002/11 (General Comment 15) para 12. Please note that, although water and sanitation have been treated as a single right within South Africa's legal and policy framework and in this paper, for purposes of quantifying the minimum essential levels of water and sanitation, it should be noted that they are not a single homogenous right. This is because sanitation does not necessarily need to be water-borne, so, water concerns are not necessarily sanitation concerns. See IT Winkler 'The human right to sanitation' (2016) 37 *University of Pennsylvania Journal of International Law* 1331, 1375.

⁶⁴ This is discussed extensively in Chapter 3 sections 3.5.2 & 3.5.3.

⁶⁵ General Comment 15 para 7 it has been established that the right to water includes adequate provision for subsistence farming. See also M Langford 'Rethinking the Metrics of Progress: The Case of Water and Sanitation' in M Langford; A Sumner & AE Yamin (eds) *The Millennium Development Goals and Human Rights: Past, Present and Future* (2013) 475. In *Grootboom* paras 32–33, Yacoob J reasons that there is a diversity of need within communities thus the nature of assistance required will vary. So, these differences necessitate a measured consideration of the minimum core – which should only be established after a careful consideration of the diversity of needs. In Chapter 3 I argue that the diversity of needs does not negate the existence of a basic, universal level of need and so a contextual minimum core of water and sanitation can be established here.

⁶⁶ General Comment 15 para 12.

of 'sufficient water', I will take guidance from Gleick⁶⁷ and Howard and Bartram.⁶⁸ According to Howard and Bartram, the basic level of access to water is 20 litres per capita per day (l/c/d) within 1km of a dwelling and with a high level of health concern.⁶⁹ This amount covers consumption and should cover basic handwashing and food hygiene but does not assure supply for bathing purposes except at the source.⁷⁰ Gleick diverges from this and asserts that 50l/c/d is the absolute minimum a person requires to meet their basic needs and does not include water for productive purposes, which he argues should be considered independently from water for basic needs.⁷¹ The current prescribed minimum level of water supply in South Africa is 25l/c/d at a minimum flow rate of 10 litres per minute, within 200m of a dwelling and with an assurance of supply that no consumer will be without a supply for more than 48 consecutive hours and seven full days in any year.⁷²

I agree with Gleick's assertion and argue that the current prescribed minimum should be increased from the provisioned 25l/c/d to 50l/c/d. This is because a significant amount of water available in South Africa is not even used for domestic or household use.⁷³ So, increasing the volume of the minimum standard will help increase the quantity of water secured for households.⁷⁴ Moreover, according to the Strategic Framework for Water Services (2003),⁷⁵ water services authorities were always meant to increase the basic water supply from 25l/c/d to 50l/c/d. However, local municipalities have a skewed perception of progressive realisation and do not work toward improving the minimum levels.⁷⁶

Consequently, the minimum core content of water which should be made available is 50l/c/d. This amount is currently classified as the middle provision of service level in the 'National Norms and Standards for Domestic Water and Sanitation Services' (Norms and

⁶⁷ P Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83–92.

⁶⁸ G Howard & J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) *World Health Organisation* (2003) 1–33.

⁶⁹ Howard & Bartram (n 68) summary & p22. Additionally, the quality of the water cannot be assured.

⁷⁰ As above. It is noted that effective use of hygiene methods is necessary for this amount of water to allow for health benefits to accrue. This amount also does not cover water use for productive purposes.

⁷¹ Gleick (n 67) 85–88.

⁷² Water Regulations Regulation 3.

⁷³ Department of Water Affairs 'National Water Resource Strategy: Water for an Equitable and Sustainable Future' 2nd ed (NWRS 2) (June 2013) p9. Only 27% of all water in South Africa is used for domestic use (24% urban & 3% rural).

⁷⁴ Langford (n 65) 475.

⁷⁵ Department of Water Affairs and Forestry 'Strategic Framework for Water Services' (September 2003) <https://www.gov.za/documents/strategic-framework-water-services> p29.

⁷⁶ SAHRC 2014 (n 43) p4.

Standards) (September 2017).⁷⁷ It must be reclassified as the minimum provision of service level. Thus, the minimum standard of provision of water should be:

50l/c/d of potable water at a flow rate of no less than 10 litres per minute and within 200m of the dwelling, where supply shall not be interrupted for longer than 48 consecutive hours.

The 50l/c/d has been established as the most appropriate minimum level of water supply to meet most needs, including the use of waterborne sanitation.⁷⁸ The full provision service level of water can remain as is prescribed in the Norms and Standards.⁷⁹ The proposed 50l/c/d does not account for water for productive use. Instead, a differentiated minimum amount should be provisioned for households in the rural and peri-urban spaces that rely on subsistence farming. A differentiated minimum standard for rural and peri-urban areas is necessary to ensure that their productive use of water for survival,⁸⁰ does not prejudice their full enjoyment of the provisioned water for domestic and personal use resulting in increases in the health and nutritional spin-off benefits of the right to sufficient water.⁸¹ This differentiated amount should be between 10l/c/d to 15l/c/d. Thus, the minimum standard for rural and peri-urban areas should be no less than 60l/c/d.⁸²

In terms of sanitation, Regulation 2 perfectly sets out the minimum standard for sanitation services.⁸³ Sanitation is complex and requires flexibility; thus, specific elements are not prescribed.⁸⁴ However, I would argue that some specificity would help set a solid standard

⁷⁷ Department of Water and Sanitation 'National norms and standards for domestic water and sanitation services version 3- final' (Norms and Standards) (September 2017) <https://www.gov.za/documents/national-water-act-national-norms-and-standards-domestic-water-and-satination-services-8> p20.

⁷⁸ Gleick (n 67) 83, 88. 50l/c/d is the absolute minimum a person should have to meet their basic needs which are comprised of the four basic needs, 'drinking water for survival, water for hygiene, water for sanitation and water for preparing food'. See also Langford (n 65) 476.

⁷⁹ Norms and Standards (n 77) p26. An unlimited volume of potable water, no less than 90l/c/d at full pressure where the water connection is at the very least within the yard. I argue that full realisation should equate to a water connection within the dwelling.

⁸⁰ Howard & Bartram (n 68) 23–24. Poor rural or urban households often depend on small scale subsistence farming to meet nutritional requirements and to generate additional income from small-scale sales.

⁸¹ Langford (n 65) 475–477.

⁸² Langford (n 65) 476. According to the data in Figure 19.4, 50-100l/c/d should be sufficient to meet all domestic personal and small-scale agricultural needs.

⁸³ Regulation 2 of the Water Regulations sets out the minimum standards of basic sanitation services as:

(a) the provision of appropriate health and hygiene education; and
(b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

⁸⁴ A key component of resilience is adaptability. Sanitation facilities must be adopted after measured consideration of the environment in which they will be provisioned. Eg flush toilets should not be the default solution without due consideration of climate and the environment. Isolated areas with no bulk reticulation systems should not be

against which provision can be measured. Thus, the minimum level of availability for a sanitation facility should be:

A Ventilated Pit Latrine (VIP) or any other improved sanitation structure,⁸⁵ which fulfils the basic requirements of a sanitation facility per Regulation 2 and is acceptable based on the context and is also available within each household, or its immediate vicinity.⁸⁶

4.3.2. Quality

Water should be 'safe and free from microorganisms, chemical substances and radiological hazards and be of an acceptable standard, colour, odour and taste.'⁸⁷ All potable water in South Africa must comply with the South African National Standard 241 Drinking Water Specifications (SANS 241).⁸⁸ Key indicators include acceptable levels of alkalinity, microbiological determinands and chemical determinands such as ammonia, fluoride and chloride, to name a few.⁸⁹ Additionally, the Norms and Standards set out the parameters for the adequate management and disposal of wastewater, excreta, and sludge in a manner that will protect people's health and safeguard everyone's right to sanitation.⁹⁰ Further, the quality of a sanitation facility must ensure that it is hygienically safe to use and easy to clean and must include functional handwashing facilities.⁹¹ Moreover, sanitation facilities must be sustainable and should be built according to technical specifications to avoid failure.⁹² Thus, the minimal level of quality for water and sanitation is:

provisioned with traditional flush toilets. Additionally, South Africa is a water scarce country so sanitation facilities should increasingly move toward dry systems. See Dugard (n 20) 289.

⁸⁵ This is based on the Strategic Water Services Framework p46 which sets out that a Ventilated Improved Pit toilet (VIP) complies with the definition of a basic sanitation facility.

⁸⁶ Winkler (n 63) 1380 sanitation facilities must be available within each household, or its immediate vicinity to ensure security and minimize violence against users.

⁸⁷ General Comment 15 para 12(b).

⁸⁸ South African National Standard 241 Drinking Water Specifications (SANS 241

https://www.mwa.co.th/download/prd01/iDW_standard/South_African_Water_Standard_SANS_241-2015.pdf (accessed 11 October 2021).

⁸⁹ These levels are categorised in terms of (i) Health risks: falling outside these limits may cause acute or chronic health problems in individuals e.g. no detectable levels of microbiological determinands like E.coli; (ii) Aesthetic risks: falling outside these limits indicate that water is visually, aromatically or palatably unacceptable e.g. no more than 1.5mg/l of ammonia nitrate; (iii) Operational risks: falling outside these limits may indicate that operational procedures to ensure water quality standards may have failed. e.g. drinking water at 25°C should have a pH level of ≥ 5 to ≤ 9.7 .

⁹⁰ Norms and Standards (n 77) p116–120. We have seen from the statistical discussion above that there are disparities in the quality of water thus there should be more frequent water testing to ensure compliance with the quality standards.

⁹¹ Winkler (n 63) 1384; Norms and Standards (n 77) p149 'people should access at least a pleasant, safe, reliable and well-maintained improved toilet and hand washing facility within their yard.'

⁹² Dugard (n 20) 287.

Water that is safe and regularly tested and a safe, reliable and well-maintained improved toilet and handwashing facility.

4.3.3. Accessibility

Everyone should have equitable physical and economic access to water and sanitation.⁹³ Physical accessibility is strongly linked to infrastructure. Howard and Bartram have confirmed the link between physical accessibility and water availability.⁹⁴ The statistical analysis above shows that there continue to be accessibility issues in South Africa, especially for rural areas and the urban poor. Central to this problem is infrastructure development and the intrinsic relationship between water and sanitation supply and the provision of housing.⁹⁵ To address and prioritise these infrastructure backlogs, Strategic Integrated Projects have been established through the Infrastructure Development Act⁹⁶ to accelerate the development of water and sanitation infrastructure to better meet the water and sanitation needs of South Africa.

Accessibility is complex and can be broken down to mean that (i) people should have easy access to water and sanitation facilities,⁹⁷ (ii) water and sanitation facilities should accommodate persons with special needs,⁹⁸ and (iii) water and sanitation should be affordable. Municipal cost recovery strategies often leave poor households labouring under financial strain despite the provision of Free Basic Water and Free Basic Sanitation.⁹⁹ Based on these three factors, the minimum levels of accessibility should thus be:

⁹³ General Comment 15 para 12(c).

⁹⁴ Howard & Bartram (n 68) p18 the further the source, the fewer the quantities of water consumed due to distance and excessive collection/waiting times.

⁹⁵ J Dugard et al 'Determining Progress on Access to Water and Sanitation: The Case of South Africa' in M Lanford & A Russell (eds) *The Human Right to Water: Theory, Practice and Prospects* (2017) 258. Upgrading townships, informal settlements, and rural areas by the Department of Human Settlements (DHS) takes a long time and whilst that is happening, access levels continue to drop. Note that at the national level, DHS is responsible for sanitation infrastructure, this has resulted in institutional incoherence around sanitation which exacerbates access issues. See Dugard (n 20) 272.

⁹⁶ 23 of 2004. Schedule 1 establishes that water and waste infrastructure can be designated as Strategic Integrated Projects (SIP) & Schedule 3 establishes the existence of SIP 18 which relates to water and sanitation e.g., Rustfontein Water Treatment Works: Free State. See Strategic Integrated Projects: Strategic Integrated Project No 19: Water and Sanitation Government *Gazette* no 43547, Notice 812 of 2020 (24 July 2020).

⁹⁷ Dugard (n 1) 343; Norms and Standards (n 77) p24; Regulation 3 Water Regulations.

⁹⁸ Including children, old persons, and persons with disabilities. See Winkler (n 63) 1382. Sanitation facility technology should only be implemented after extensive consultation with the community and should be reflective of this factor. See also Dugard (n 20) 289; Norms and Standards (n 77) p115.

⁹⁹ Dugard (n 95) 253–255; Dugard (n 1) 344–345; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 124. The court in *Mazibuko* incorrectly supported the City of Johannesburg's cost recovery mechanism and endorsed rationing access to water based on the ability to pay which prejudices poor households. See also E

Physical access within the vicinity of a water connection or sanitation service where water and sanitation services are subject to low-cost measures for poor households.

Considering the above discussion on availability, quality, and accessibility, I will reconceptualise the core content of the right to sufficient water and sanitation as:

Access to safe, reliable, and affordable water at a volume of 50l/c/d of potable water, at a flow rate of no less than 10 litres per minute and within 200m of the dwelling, where supply shall not be interrupted for longer than 48 consecutive hours; and where the minimum level for peri-urban and rural areas can be no less than 60l/c/d. Additionally, the minimum core content of the right to sanitation is access to a safe, affordable, and reliable improved sanitation facility, at the very least, a VIP or an equivalent technology of sufficient quality and assurance of supply, within the vicinity of a dwelling, and accompanied by appropriate handwashing facilities as well as ongoing appropriate health and hygiene awareness and education for communities.

This minimum standard will form the universal baseline for access to water and sanitation. Consequently, the progressive realisation of the right to sufficient water and sanitation will be to improve the nature and quality of access and reduce levels of inequality.¹⁰⁰

4.4. Conclusion

This chapter utilised statistics to contextualise the levels of access to water and sanitation in South Africa and emphasise the need for a universal standard for access. Aggregate statistics show that there has been a marked improvement in access to water and sanitation since 2002. However, the disaggregated statistics reveal that access to water and sanitation is spread disproportionately. This chapter only focused on the provinces of Gauteng and Free State and two municipalities within each province, one a metropolitan and the other a local municipality. The data showed that the more urban

Couzens 'Avoiding *Mazibuko*: Water Security and Constitutional Rights in South African Case Law' (2015) 18 *Potchefstroom Electronic Law Journal* 1162, 1169–1170.

¹⁰⁰ United Nations General Assembly 'Progressive realisation of the human right to water and sanitation: Report of the Special Rapporteur on the human right to safe drinking water and sanitation' (Progressive Realisation Report) UN Doc A/HRC/45/10 para 7& 49. Full realisation of the right to sufficient water will be concerned with meeting people's demand for water for all uses: unlimited access to potable water but no less than 90l/c/d at high pressure not exceeding 9 bars, with water connections inside the dwelling and supply cannot be interrupted for longer than 24 consecutive hours. See Norms and Standard p26. It is difficult to establish what full realisation should look like however, I would argue that full realisation of the right to sanitation should be centred upon establishing, without discrimination, sustainable, acceptable, and accessible facilities; where no facilities are shared by more than two households, and such facilities are properly maintained and are close to the dwelling to minimise the risk of physical harm to users especially women and girls. See Norms and Standards (n 77) p52–53; Dugard (n 20) 286–289 and Winkler (n 63) 1137.

province, Gauteng, and its municipalities experienced higher levels of access compared to the Free State.

Similarly, data on metropolitan versus local municipality access revealed that metropolitan municipalities experienced higher levels of access to water and sanitation. In that same vein, the disaggregated statistics also show that there are significant intra-municipal disparities in access to water and sanitation, with the more urban Pretoria experiencing higher levels of access than its neighbour, the metro peri-urban Hammanskraal. This shows that although there is improvement in access to water and sanitation, there is also a growing trend towards inequality. There is a growing access gap between urban and rural centres, which travels down to the municipal level, thus inadvertently promoting access to water and sanitation to the more privileged parts of South Africa to the exclusion of the poor and vulnerable areas.

The reconceptualised minimum core of the right to sufficient water and sanitation as envisioned here, with its higher standards and auxiliary differential minimum standard, should optimistically assist with the fulfilment of the right to sufficient water and sanitation by creating a universal standard upon which municipalities can realign their priorities – centring the principle of ‘some for all not all for some’ – and form an accountability standard upon which water and sanitation provision can be measured.

Chapter 5: Conclusion

*'Not having access to water and sanitation is a polite euphemism for a form of deprivation that threatens life, destroys opportunity and undermines human dignity.'*¹

It is undisputed that a right to sufficient water and sanitation exists. Indeed, the importance of water cannot be overestimated. However, despite a seemingly robust legislative and regulatory framework, a significant number of people do not have access to sufficient water and sanitation. Key to this is the lackadaisical approach the courts have taken in quantifying the content of the right to sufficient water, in combination with the State's disproportionate provision of water and sanitation services. This has created disparities in access between urban, peri-urban and rural areas, widening the access gap and exacerbating the marginalisation of those living in vulnerability. Thus, the question of equitable access to sufficient water and sanitation is an important one.

Minimum core obligations should be adopted into South Africa's socio-economic rights discourse to address these disparities. They can serve as a mechanism to create a minimum core content of the right to sufficient water and sanitation, which can be used as (i) the minimum universal standard of service provision – the minimum core entitlement – and (ii) a performative standard against which the State's 'reasonable measures' in pursuit of full progressive realisation of the right to access sufficient water and sanitation can be assessed. In this conceptualisation, the minimum core content of the right to sufficient water can lend some immediacy to progressive realisation whilst providing the courts with some context against which reasonableness can be examined. Thus, a minimum core content of the right to sufficient water and sanitation has been formulated in this paper as:

Access to safe, reliable, and affordable water at a volume of 50 litres per capita per day (l/c/d) of potable water, at a flow rate of no less than 10 litres per minute and within 200m of the dwelling, where supply shall not be interrupted for longer than 48 consecutive hours; and where the minimum level for peri-urban and rural areas can be no less than 60l/c/d. Additionally, the minimum core content of the right to sanitation is access to a safe, affordable, and reliable improved sanitation facility, at the very least, a VIP or an equivalent technology of sufficient quality and assurance of supply; within the vicinity of a dwelling and accompanied by appropriate handwashing facilities as well as ongoing appropriate health and hygiene awareness and education for communities.

¹ K Watkins 'Human Development Report 2006 - Beyond Scarcity: Power, Poverty and the Global Water Crisis' (November 9, 2006). *UNDP Human Development Reports* (2006) at 9. Available at SSRN <https://ssrn.com/abstract=2294691>

This reformulated minimum core should be reflected in all water policies and regulations. It must be established as the national standard. This paper's minimum core content of the right to sufficient water and sanitation establishes higher standards than the currently prescribed minimums in an effort to secure more water for domestic use. Moreover, the 'new' minimum standard acknowledges the diversity of water needs within society; thus, a universal base standard is established along with a differential minimum standard to address the needs of peri-urban and rural communities.

For the conceptualised minimum core content of the right to sufficient water and sanitation to be effective, municipalities – local government – are obliged to provide the quantity and quality of water and sanitation as established here and where possible, local government should exceed the minimum standard as due process of progressive realisation.² Municipalities, as the competent authorities of the provision of water and sanitation services,³ are required to 'contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.'⁴ Ultimately, the minimum core forms part of the rights-based provision of basic services. However, suppose such service provision is unsustainable and prone to failure, in that case, the promises of this minimum core approach will ring hollow. Thus, to actualise the minimum core and give effect to the equitable access of water and sanitation, municipalities must ensure that the minimum core of the right to sufficient water and sanitation is included in their planning, including the Integrated Development Plans (IDPs), Performance Management Systems as well as municipal by-laws.⁵ Additionally, effective financial management and funding capitalisation are also important to the actualisation of the minimum core content of the right to sufficient water and sanitation, and municipal budgets should reflect this.⁶

The judiciary also has a role to play. The courts must embrace the concept of minimum core obligations for socio-economic rights. Undoubtedly, a reading of the minimum core into socio-economic rights interpretation will, as Bilchitz fittingly states, 'give socio-

² Full realisation of the right to water and sanitation involves the provision of water beyond these minimums. Such provision must be context-specific thus, the benchmarks for full realisation will be different in a water stressed municipality versus a water abundant municipality. However, neither may provide less than the minimum basic amounts established in this paper.

³ Municipal competency to provide water and sanitation services stems from sec 152(1) and Schedule 4B of the Constitution of the Republic of South Africa, 1996 which state respectively that municipalities are to 'ensure the provision of services to communities in a sustainable manner' and that local government is responsible for the provision of water and sanitation services. Additionally, the Water Services Act 108 of 1997 (WSA) sec 3(2) and the Local Government: Municipal Systems Act 32 of 2000 (MSA) secs 4(2)(f) & 73(1)(c).

⁴ MSA sec 4(2)(j).

⁵ IDPs and PMS are addressed in Chapters 5 and 6 of the MSA. See also O Fuo & A Du Plessis 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) 19 *Law, Democracy and Development* 1, 20–27.

⁶ It is beyond the scope of this paper to discuss the financial and financing framework beyond an indication that financing is important in the provision of basic services.

economic rights teeth'.⁷ Indeed, the minimum core can serve to enrich the favoured reasonableness review and reverse the prevailing culture of deferential and normatively thin socio-economic rights interpretation⁸– which unnecessarily narrows the scope of rights and provides superficial analyses of the State's policies and actions as evidenced in *Mazibuko and Others v City of Johannesburg and Others*.⁹

I believe that substantive engagement with the right to sufficient water and sanitation, informed by the proposed minimum core content of the right to sufficient water and sanitation, will address the deficiencies discussed in this paper and pave the way for the equitable realisation of the right to sufficient water and sanitation in South Africa. It should be noted that the minimum core obligations approach is not a silver bullet that will solve all water access issues. However, the minimum core content of the right to sufficient water and sanitation will provide the government with a standard against which its policies and framework can be improved and realigned. The courts also stand to benefit from establishing a quantified measure against which reasonableness can be assessed. Further, quantifying the minimum core content of the right to sufficient water and sanitation will empower rightsholders in rights-claiming. They will have a concrete, articulated content of the right to sufficient water and sanitation that they are entitled to. Thus, the minimum core obligations of water and sanitation are well placed to enrich the discourse on water and sanitation and advance the fulfilment of the right to water and sanitation in South Africa.

⁷ D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484–501.

⁸ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 480.

⁹ 2010 (4) SA 1 (CC). See also a discussion on this in Liebenberg (n 8) 467–480.

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