



# Methodology

Legal Country Mapping for the Rights to Safe Drinking Water and Sanitation and the link with the Right to a Healthy Environment

**SOUTH AFRICA**

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## Table of Contents

|   |    |
|---|----|
| INTRODUCTION.....   | 3  |
| Overview of national water governance for South Africa .....  | 4  |
| CHAPTER 1: WATER GOVERNANCE OVERVIEW.....   | 5  |
| A. Regional Multilateral/Bilateral Treaties.....  | 12 |
| B. International Treaties .....   | 14 |
| C. Regional .....   | 17 |
| CHAPTER 3: DOMESTIC LEGISLATION ON WATER .....  | 18 |
| A. Water law.....   | 18 |
| B. Environmental Law .....  | 22 |
| C. Extraction and/or Use of Water.....  | 24 |
| CHAPTER 4. THE HUMAN RIGHTS TO WATER AND SANITATION & SDG 6 TARGETS including elements of the Human Right to a Healthy Environment..... | 30 |
| A. Availability and accessibility (SDG 6.1, 6.2, 6.4) .....   | 30 |
| B. Quality and safety (SDG 6.1, 6.2, 6.3) .....   | 35 |
| C. Water pollution control (SDG 6.3, 6.6) .....   | 38 |
| D. Affordability (SDG 6.1).....   | 41 |
| E. Acceptability (SDG 6.1, SDG 6.2) .....   | 43 |
| F. Non-discrimination, equality, and universal access (SDG 6.1, 6.2) .....  | 44 |
| G. Right to information, Transparency (SDG 6.b) .....   | 45 |
| H. Public participation (SDG 6.5.1, 6.b).....   | 47 |
| I. Sustainability (SDG 6.4, 6.5, 6.6) .....   | 48 |
| J. Accountability/ Remedies and complaint procedures.....   | 50 |
| CHAPTER 5: JUDICIARY SYSTEM.....  | 53 |
| A. Preliminary questions .....  | 53 |
| B. Remedies and complaint procedures/accountability .....   | 57 |
| C. National human rights institutions .....   | 64 |
| D. Regulation .....   | 67 |
| ANNEX 1: TARGETS AND INDICATORS OF SDG 6 .....  | 69 |
| ANNEX 2: The human rights to water and sanitation and the right to a healthy environment compared                                       | 70 |

## INTRODUCTION

This analysis follows the mapping methodology used by Human Right 2 Water to assess the integration of the human rights to water and sanitation (HRWS) into law and policy at national level. It has been adapted and extended to give voice to the human right to a clean, safe<sup>1</sup>, healthy and sustainable environment (HRHE), with the aim of assessing the combined advantages of recognising both these sets of human rights.

It draws upon the criteria and principles that were originally laid out in General Comment No.15<sup>2</sup> for the human right to water and sanitation, with further elaboration of the right to sanitation after it was recognised as a separate human right in 2015. Alongside this and noting that the HRHE was also recognised as a human right by the General Assembly in July 2022<sup>3</sup>, we have compared the main principles of the HRHE as related to water. For this analysis, we draw upon the Framework Principles from the paper published by the Special Rapporteur on Human Rights and the Environment<sup>4</sup>, Good Practices on the Right to a Safe, Clean, Healthy and Sustainable Environment (2020)<sup>5</sup>, and the paper titled ‘Human Rights Depend on Safe and Sufficient Water’ (2021)<sup>6</sup>.

In addition to the principles of a human rights-based approach<sup>7</sup>, there are the normative criteria of the human rights to water and sanitation which are specific to the realisation of these rights. The substantive elements of the HRHE, as referenced in the Good Practices<sup>8</sup> paper mentioned above, are also considered here, where they are linked to water, specifically element 4 on the access to safe water and adequate sanitation. Given the significant advances in the design and measurement of national indicators for the supply of clean and safe drinking water and sanitation through the Joint Monitoring Programme<sup>9</sup>, General Comment No.15 has been augmented, especially on the topic of sanitation, which was recognised as a separate right in 2015. For the purposes of this analysis, the criteria have been maintained as the five elements of the human rights to water and sanitation, and there are additional questions relating to specific environmental aspects that support these rights.

For reference, Annex 2 collates the two sets of human rights principles, looking at how they relate under each category.

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<sup>1</sup> Note that the word ‘safe’ has been included in several places, including the title of the Special Rapporteur, and the framework principles, but not in the latest UNGA resolution.

<sup>2</sup> General Comment No. 15 on the Right to Water, was adopted in November 2002, by the Committee on Economic, Social and Cultural Rights and then explicitly recognized on 28 July 2010, through [Resolution 64/292](#), the United Nations General Assembly.

<sup>3</sup> The human right to a clean, healthy and sustainable environment, July 2022 (A/76/L.75).

<sup>4</sup> Framework Principles from the paper published by the Special Rapporteur to the Healthy Environment from 2018, ARC/37/59.

<sup>5</sup> Good Practices on the Right to a Safe, Clean, Healthy and Sustainable Environment, March 2020, A/HRC/43/53

<sup>6</sup> ‘Human Rights Depend on Safe and Sufficient Water’, 2021, HRC/26/48.

<sup>7</sup> The elements of the HRBA are Participation, Accountability, Non-discrimination and Equality, Empowerment and Legality.

<sup>8</sup> Good Practices on the Right to a Safe, Clean, Healthy and Sustainable Environment, March 2020, A/HRC/43/53.

<sup>9</sup> JMP, WHO and UNICEF data found at [www.washdata.org](http://www.washdata.org).

# Overview of national water governance for South Africa

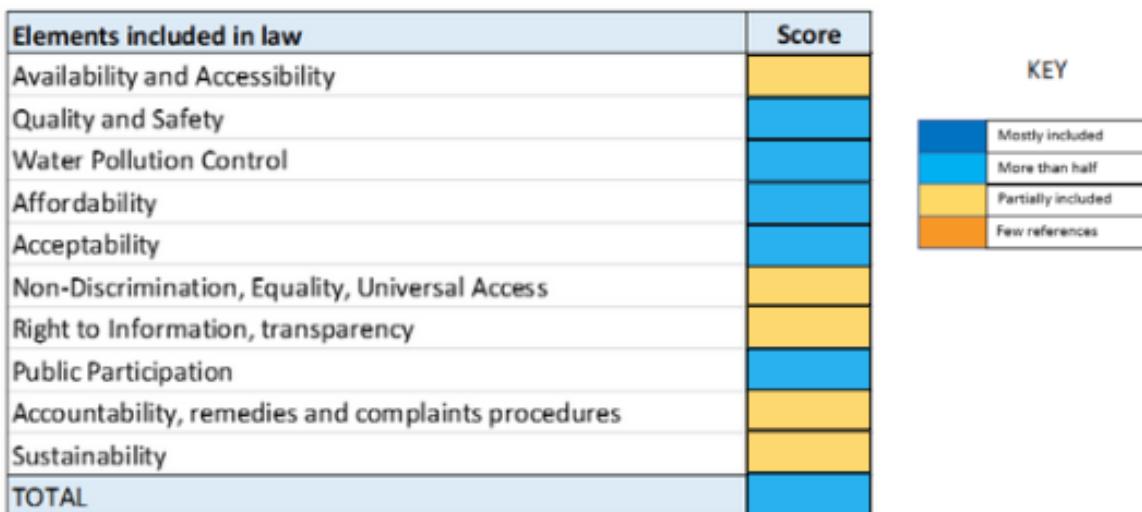
## General Legislation

|       |   |  |
|-------|---|--|
|       | Supreme Law   | Constitution   |
| 1.A.1 | State Organization  | Federal  |
| 1.A.2 | Relationship between International and National Law           | Dualist  |
| 1.A.3 | Name of Institution possessing regulation-making authority    | National Legislator/<br>Department of Water and Sanitation |
| 1.A.5 | Popular consultation as part of governing/legislative process | Yes  |
| 1.A.8 | Member of a regional integration organization                 | Yes/No   |
| 5.C.1 | Independent National Human Rights Institution (NHRI)          | Yes  |

## Water Governance

|       |   |     |
|-------|---|-----|
| 3.A.1 | Right to Water mentioned in Constitution                            | Yes |
| 3.A.2 | Right to Sanitation mentioned in Constitution                       | Yes |
| 3.A.3 | Right to a clean and healthy Environment in Constitution            | Yes |
| 3.A.4 | A water code or a law specific to water resources                   | Yes |
| 3.A.5 | National Strategy, Policy, Action Plan etc. on Water and Sanitation | Yes |
| 1.A.8 | International institution for Transboundary Water Resources         | NA  |
| 3.C.7 | Priorities in the allocation of water for different uses?           | Yes |

## Benchmark Scores<sup>10</sup>



<sup>10</sup> Score up to 10 allowed for each element, with a score of 10 suggesting that all relevant laws are fully included, zero suggests there are no laws to fit this criterion, and scores on a scale of 1-10 represent the degree of inclusion of pertinent laws (double click to activate excel sheet for calculation).

# CHAPTER 1: WATER GOVERNANCE OVERVIEW

## 1.1 Government Framework

South Africa is considered a quasi-federal country, styled as a parliamentary republic.<sup>11</sup> It is widely considered to be a unitary state, even though it has many federal tendencies and specifically delineated governing arrangements, which are based on a system of cooperative governance.<sup>12</sup> This is due to the unrivalled political supremacy of South Africa's national parliament situated in Cape Town and central government based in Pretoria, which lends support to the notion of South Africa as a unitary country. Furthermore, the word "federalism" notably does not appear in the South African Constitution. Following the adoption of the Interim Constitution in 1993, the number of provinces within South Africa increased from four to nine.<sup>13</sup> However, this also resulted in a reduction of the number of municipalities (local government entities) from more than 1,000 to as few as 278 following the 2011 municipal elections.<sup>14</sup>

The government is divided at the national provincial and local levels, with the Parliament and President playing a central role.<sup>15</sup> Parliament consists of the National Assembly and the National Council of Provinces. The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, providing a national forum for public consideration of issues, passing legislation, scrutinizing and overseeing executive action, amending the Constitution, and assigning / delegating legislative powers to governmental bodies. The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."<sup>16</sup>

The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive."<sup>17</sup> The President's responsibilities include:

- (a) *"Assenting to and signing Bills;*
- (b) *Referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;*
- (c) *Referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;*
- (d) *Summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;*
- (e) *Making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;*
- (f) *Appointing commissions of inquiry;*
- (g) *Calling a national referendum in terms of an Act of Parliament;*
- (h) *Receiving and recognising foreign diplomatic and consular representatives;*
- (i) *Appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;*
- (j) *Pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and*
- (k) *Conferring honours."*<sup>18</sup>

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<sup>11</sup> Retrieved from <https://www.oecd.org/regional/regional-policy/profile-South-Africa.pdf> (accessed on 09-11-2022).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Constitution, Article 40(1).

<sup>16</sup> *Id.* at Article 42.

<sup>17</sup> *Id.* at Article 84(1).

<sup>18</sup> *Id.* at Article 84(2).

At the provincial level, the provincial legislature has local legislative powers while the province's Premier is vested with executive authority.<sup>19</sup>

South Africa's judiciary is independent and charged to apply the Constitution in an impartial manner, and the Chief Justice serves as the head official with responsibility to monitor the exercise of judicial authority.<sup>20</sup>

Chapter 9 of South Africa's Constitution creates seven independent organisations which are responsible for protecting and strengthening South Africa's constitutional democracy, which includes upholding the separation of powers between the different organs of state (legislature, executive and judiciary) in accordance with the requirements of the Constitution.

As noted above, the national Parliament has legislative authority at the national state level and the provincial legislatures exercise legislative authority at the provincial level. Also on a local / municipal level, legislative authority is vested in the Municipal Councils.<sup>21</sup>

The negotiating and signing of all international agreements is the President's responsibility.<sup>22</sup> However, an international agreement will only be effective after it has been approved by resolution in both the National Assembly and the National Council of Provinces<sup>23</sup>, unless it is an "*international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession... [and has been] tabled in the Assembly and the Council within a reasonable time.*"<sup>24</sup>

## 1.2 Water Resource Authorities and Stakeholders

### (a) The Department of Water and Sanitation

The Department of Water and Sanitation (**DWS**) (formerly the Department of Water Affairs and Forestry) has been mandated to ensure that South Africa's water resources are protected, managed, used, developed, conserved and controlled in a sustainable manner for the benefit of its citizens and the environment.<sup>25</sup> The DWS is the main entity responsible for South Africa's water administration at the national level. The DWS is the custodian of South Africa's water resources and is primarily responsible for the formulation and implementation of its water policy.<sup>26</sup> The Department is currently led by Minister, Mr Senzo Mchunu<sup>27</sup>.

The DWS is directly responsible for most of the large water resource and infrastructure projects, and it undertakes the planning and implementation of development projects, such as the construction of dams and inter-basin transfer schemes.<sup>28</sup> The DWS operates at the national, provincial, and local levels across all sectors of the water-management process. However, the majority of regional bulk water distribution is managed by local government-owned water boards and municipalities, many of which are designated as WSPs or WSAs.<sup>29</sup>

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<sup>19</sup> *Id.* at Articles 104(1), 125(1).

<sup>20</sup> *Id.* at Article 165.

<sup>21</sup> *Id.* at Article 43.

<sup>22</sup> *Id.* at Article 231(1).

<sup>23</sup> *Id.* at Article 231(2).

<sup>24</sup> *Id.* at Article 231(3).

<sup>25</sup> Retrieved from <https://www.gov.za/about-sa/water-affairs> (accessed on 09-11-2022).

<sup>26</sup> Retrieved from <http://www.dwa.gov.za/default.aspx> (accessed on 09-11-2022).

<sup>27</sup> <https://www.dws.gov.za> (accessed 09-11-2022)

<sup>28</sup> Retrieved from

[https://www.researchgate.net/publication/311451788 State of Water and Sanitation in South Africa](https://www.researchgate.net/publication/311451788_State_of_Water_and_Sanitation_in_South_Africa) (accessed on 09-11-2022).

<sup>29</sup> *Id.*

Local entities operated and controlled by municipalities are primarily responsible for securing access to clean and safe drinking water for South Africa's citizens.<sup>30</sup> Municipalities are also generally in charge of developing plans to ration water in the event of a drought.<sup>31</sup>

Government-owned water boards and some larger metropolitan municipalities are also tasked with purifying water to adhere to potable standards.<sup>32</sup> Water boards also possess a vital role in water management. 15 water boards operate and maintain dams, bulk water supply infrastructure, and some wastewater systems.<sup>33</sup> These boards report directly to the DWS.<sup>34</sup>

Local municipal governments are the entities that generally serve as the WSAs and WSPs in their jurisdictions.<sup>35</sup> However, drinking water is also monitored at the national level, where the DWS regulates drinking water quality and effluent quality against industry standards, while recommending changes to the business environment within which the various other role players must operate.<sup>36</sup>

The administration of water resources is not directly a provincial function.<sup>37</sup> However, the DWS has satellite offices located within each of South Africa's provinces. The provinces may also be required to intervene in municipal water affairs if a certain municipality is not performing up to the required standards.<sup>38</sup> Additionally, provinces participate in water sector planning in conjunction with the national and local governments.<sup>39</sup>

While water allocations and major infrastructure are squarely the responsibility of the national government, the country's nine provinces still provide oversight and support, under which metropolitan and district municipalities manage supply systems for water delivery.<sup>40</sup> South Africa's municipalities are responsible for basic water supply and sanitation services. Municipal governments may also be designated Water Service Authorities (**WSAs**) or Water Service Providers (**WSPs**), entities which are responsible for ensuring access to water supply and sanitation services within a certain municipality.<sup>41</sup> The DWS constantly measures and monitors the overall performance of WSAs.<sup>42</sup>

Furthermore, the Water Services Act 108 of 1997 (the **Water Services Act**) assists municipalities to undertake their role as water services authorities and to look after the interests of consumers.<sup>43</sup> The Water Services Act clarifies the role of other water service institutions as well. In addition, the NWA

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<sup>30</sup> Retrieved from [http://www.durban.gov.za/City\\_Services/water\\_sanitation/Pages/default.aspx](http://www.durban.gov.za/City_Services/water_sanitation/Pages/default.aspx) (accessed on 09-11-2022).

<sup>31</sup> *Id.*

<sup>32</sup> Retrieved from *supra* note 76 (accessed on 09-11-2022).

<sup>33</sup> Retrieved from <http://www.dwa.gov.za/IO/vsi.aspx> (accessed on 09-11-2022).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Retrieved from <https://libguides.lib.uct.ac.za/GovtPubsWaterResources/WaterSouthAfricaProvincial> (accessed on 09-11-2022).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Retrieved from <http://www.globalwaterforum.org/2018/04/17/the-hydropolitics-of-cape-towns-water-crisis-a-perfect-storm/> (accessed on 09-11-2022).

<sup>41</sup> Retrieved from <https://libguides.lib.uct.ac.za/GovtPubsWaterResources/WaterSouthAfricaLocal> (accessed on 09-11-2022).

<sup>42</sup> *Id.*

<sup>43</sup> Retrieved from

<http://www.dwa.gov.za/IO/Docs/CMA/WMI%20Poster%20Booklets/Roles%20&%20Responsibilities%20of%20Local%20Government%20and%20Related%20Institutions.pdf> (accessed on 09-11-2022).

establishes the system wherein municipalities obtain use of the water that they require for distribution to their consumers.<sup>44</sup>

In 2000, the Municipal Systems Act was passed in South Africa and initiated a policy of “free basic water.” The policy allocated a set amount of water to municipalities, and was made possible partially by funding from the national government. However, most municipalities were unprepared for the new policy and complications are currently still being worked out.<sup>45</sup>

As is the case with drinking water, sanitation in South Africa is overseen by both national government entities and local municipal entities. The DWS is the main entity on the national level responsible for maintaining South Africa’s sanitation system, while municipalities and water boards are responsible for sanitation on the local level.

*“Ensuring universal access to basic sanitation is recognised as a Constitutional responsibility of the national sphere of government, with Constitution[al] responsibility of provision of basic sanitation services at the local sphere of government. Local government must take reasonable measures to realise this right.”<sup>46</sup>*

The DWS is also obligated to craft periodic National Sanitation Policies, which define the country’s sanitation standards in accordance with minimum acceptable basic levels of sanitation.<sup>47</sup> The DWS is also charged with analysing the performance quality of wastewater treatment plants.<sup>48</sup> The most recent report, issued in 2016, sought to *“resolve all identified existing sanitation challenges, gaps, and burning issues in order to achieve universal access by 2030.”*<sup>49</sup> The right to sanitation services is guaranteed by both South Africa’s Constitution and the 2001 Free Basic Services Policy, by which the national government committed to providing sanitation, solid waste management, and electricity to each household.<sup>50</sup>

Municipalities on the local level are responsible for operating wastewater collection and treatment systems. The majority of water services infrastructure is located in, and under the management of, municipalities, except for the bulk services provided by water boards.<sup>51</sup> In recent years, there has been increasing evidence of water supply and sanitation backlogs, partly attributed to a disconnect between local and national governments.<sup>52</sup> Additionally, local water boards are partially responsible for operating several wastewater systems.<sup>53</sup> Furthermore, municipalities are required by the Municipal Systems Act of 2000 to develop policies to prioritise Free Basic Services, such as sanitation, to poor households.<sup>54</sup> However, in recent years, municipalities have attempted to keep the oversight of sanitation entirely in-house, even when the capacity for effective oversight is lacking.<sup>55</sup> In fact, most municipalities within South Africa still do not have operational and maintenance procedures and plans for on-site sanitation systems.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Retrieved from

[http://www.dwa.gov.za/Documents/sanitation/17005SC\\_POLICY\\_National%20Sanitation%20Policy%202016%20FINAL310117.pdf](http://www.dwa.gov.za/Documents/sanitation/17005SC_POLICY_National%20Sanitation%20Policy%202016%20FINAL310117.pdf) (accessed on 09-11-2022).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Retrieved from *supra* note 76 (accessed on 09-11-2022).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Retrieved from *supra* note 83 (accessed on 09-11-2022).

<sup>55</sup> *Id.*

The DWS is responsible for the regulation of water use in South Africa and is required to create and maintain a register of all water users in the country. The National Water Act 36 of 1998 (the **National Water Act**) provides for cost recovery on services rendered by the DWS to water users. It is against this background that the DWS created the Water Trading Entity (**WTE**) within its administration.<sup>56</sup> The main function of the WTE is the development, operation and maintenance of specific water resources infrastructure. Furthermore, the Trans-Caledon Tunnel Authority (**TCTA**) is a state-owned entity specialising in project finance, implementation and liability management. It is an agency of the DWS, which is responsible for the country's water resources in respect of usage, equitable allocation and distribution. The TCTA assists the government in its pursuit of water security for South Africa and in realising its constitutional obligation of ensuring universal access to this essential resource for all citizens.<sup>57</sup> It is responsible for the development of bulk raw-water infrastructure and provides financial services to other entities.<sup>58</sup>

The DWS must adhere to the requirements of governmental water-related policies and legislation, including such requirements that are stipulated in the Constitution.<sup>59</sup> The DWS developed the National Water and Sanitation Master Plan (**NWSMP**), which was created in partnership with all relevant organs of the state, in addition to other relevant water-sector stakeholders. In addition, the National Water Resource Strategy (also devised by the DWS) outlines key challenges, constraints and opportunities inherent in water resource management and proposes new approaches to solving these issues.<sup>60</sup>

The Water Tribunal is charged with hearing appeals against directives and decisions made by certain responsible authorities regarding matters related to water. It sits as an independent body that can hold hearings anywhere in the country.<sup>61</sup>

### **(b) Other Participants in South Africa's Water Management**

There are also a wide variety of other participants that have a role in South Africa's water management process. For instance, specially-designated water boards provide water-related services to other water service institutions within their respective service areas.<sup>62</sup> Catchment Management Agencies (**CMAs**) have the responsibility of managing water resources in collaboration with local stakeholders, specifically prioritizing involving local communities in the decision-making processes and promoting equitable access to water.<sup>63</sup> Water-user associations (**WUAs**) are cooperative associations of individual water users who desire to undertake water-related activities at the local level for their mutual benefit.<sup>64</sup> In addition, the Water Research Commission (**WRC**) plays a role by establishing water needs and priorities, stimulating and funding research, and promoting the transfer of information and technology.<sup>65</sup>

## **1.3 Agreements with Neighbouring Countries**

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> <https://www.tcta.co.za/about-tcta/> (accessed on 20-11-2022)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

South Africa shares major river systems with six immediate neighbouring countries namely Botswana, Lesotho, Mozambique, Swaziland, Namibia and Zimbabwe.<sup>66</sup> The Orange-Senqu River Commission (ORASECOM) which was established in 2000 through an agreement between Botswana, Lesotho, Namibia and South Africa. A few years later in 2003, the Limpopo Watercourse Commission (LIMCOM) trans-boundary agreement was established between Botswana, Mozambique, South Africa and Zimbabwe. The purpose of LIMCOM is to advise the four countries on the management of water resources in the Limpopo River Basin.

South Africa and Lesotho, a small landlocked country existing entirely within the borders of South Africa, have a strong cooperative relationship regarding water resources.<sup>67</sup> The Orange River is both the longest river in South Africa and Lesotho. The river's source originates in the mountainous border-region between South Africa and Lesotho. The river then traverses through South Africa before draining into the Atlantic Ocean. The river, together with the Vaal, its principal tributary, forms a drainage basin of at least 330,000 square miles.<sup>68</sup>

In regards to the water management cooperation between South Africa and Lesotho (entitled, the Lesotho Highlands Water Project), the Lesotho Highlands Water Commission (**LHWC**), a bi-national commission, is responsible for monitoring all relevant ventures.<sup>69</sup> Reporting to the LHWC is the Lesotho Highlands Development Authority (**LHDA**), which oversees the Lesotho Highlands Water Project's overall implementation works.<sup>70</sup> This includes dams, tunnels, power stations and necessary infrastructure on Lesotho's borders.<sup>71</sup> Additionally, South Africa's TCTA is responsible for tunnelling, delivery, integration and flow control of water. All of these entities are indirectly responsible for the quality of drinking water, based on their mandate to oversee the construction and maintenance of necessary infrastructure.<sup>72</sup>

South Africa also shares both the Maputo and Incomati water basins with the neighbouring countries of Mozambique and Swaziland. In 1992, the Komati Accord between Swaziland and South Africa precisely quantified allocations of water for each nation to receive, while also reserving a share for Mozambique further downstream.<sup>73</sup> While Mozambique did not initially join the agreement due to domestic strife, an encompassing agreement between the three nations was ultimately reached in 2002, when Mozambique joined the Komati Accord.<sup>74</sup> The Komati Basin Water Authority (**KOBWA**) is now charged with overseeing two dams that had been constructed on the basin.<sup>75</sup>

This new agreement aimed to ensure both the protection and sustainable utilisation of the water resources of the two basins.<sup>76</sup> The joint body for cooperation between the nations was established as the

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<sup>66</sup> Retrieved from <https://www.gov.za/speeches/water-and-sanitation-reiterates-commitment-foster-africa-wide-relations-enhance-provision> (accessed on 09-11-2022)

<sup>67</sup> Retrieved from <https://www.britannica.com/place/Orange-River> (accessed on 09-11-2022).

<sup>68</sup> *Id.*

<sup>69</sup> Retrieved from <https://www.water-technology.net/projects/lesotho-highlands/> (accessed on 09-11-2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Retrieved from <http://www.ipsnews.net/2010/04/southern-africa-some-for-you-some-for-me-sharing-the-inkomati-river/> (accessed on 09-11-2022).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Retrieved from <https://www.ecolex.org/details/treaty/tripartite-interim-agreement-between-the-republic-of-mozambique-and-the-republic-of-south-africa-and-the-kingdom-of-swaziland-for-co-operation-on-the-protection-and-sustainable-utilisation-of-the-water-resources-of-the-incomati-and-maputo-watercourses-tre-001811/> (accessed on 09-11-2022).

Tripartite Permanent Technical Committee (**TPTC**), which was first created by an earlier Agreement between the three nations in 1983 in order to oversee rivers of common interest.<sup>77</sup> South Africa is also part of an agreement with Botswana, Zimbabwe and Mozambique which established the Limpopo Basin Permanent Technical Committee (**LBPTC**) in 1986 with respect to the Limpopo River basin and its sub-basins.

In regards to the water management cooperation between South Africa, Mozambique, and Swaziland, KOBWA, a bi-national entity formed in 1993, serves as an international body representing all three nations. KOBWA is currently focused on the operation and maintenance of the dams (Maguga and Driekoppies) implemented pursuant to the Komati River Basin Development Project.<sup>78</sup> KOBWA includes delegations and representatives from both South Africa and Swaziland. KOBWA is also required by various legislations to undertake water quality monitoring in the Komati River Basin.<sup>79</sup> Such legislation includes relevant laws in both South Africa and Swaziland.<sup>80</sup>

Furthermore, all three collaborating nations, South Africa, Mozambique, and Swaziland jointly constitute the TPTC, originally established in 1983. The Committee manages the water flow of shared rivers among the nations, most importantly during times of drought and flood.<sup>81</sup>

#### 1.4 Regional and Continental Memberships

The African Union (**AU**), established in 2002, is composed of 55 Member States, including all countries recognized by the United Nations situated within Africa's borders.<sup>82</sup>

*"The vision of the African Union is that of: An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in [the] global arena. The mission of the [AU] Commission is [to] become "[a]n efficient and value-adding institution driving the African integration and development process in close collaboration with African Union Member States, the Regional Economic Communities and African citizens."*<sup>83</sup>

Decisions made by the AU Assembly are divided into three categories: regulations; directives; and recommendations, declarations, resolutions and opinions.<sup>84</sup> Regulations and directives are binding on members and other organs of the AU, but recommendations, declarations, resolutions and opinions in the third category are not binding on member states.<sup>85</sup> In practice, the AU Assembly mostly uses two terms, 'decisions' and 'resolutions', to denote its binding and non-binding findings, respectively.<sup>86</sup>.

In addition, the decisions of the AU's continental court system are binding on all member states and supersede any domestic court decisions from member states.<sup>87</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> Retrieved from <http://kobwa.co.za/index.php/about-us/profile> (accessed on 09-11-2022).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Retrieved from <https://au.int/en/memberstates> (accessed on 09-11-2022).

<sup>83</sup> Retrieved from <https://au.int/en/about/vision> (accessed on 09-11-2022).

<sup>84</sup> Retrieved from <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e452> (accessed on 09-11-2022).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Retrieved from <https://theconversation.com/could-african-union-law-shape-a-new-legal-order-for-the->

However, while many decisions are made by the AU, very few are actually implemented by its member states, a problem the AU is seeking to rectify.<sup>88</sup>

In 2018, the African Union Commission (**AUC**) and its partners launched a water project allocating USD \$10 billion in funds over a five-year period in order to support infrastructure for transboundary water and hydropower projects.<sup>89</sup>

South Africa is also an integral member of the South African Development Community (**SADC**). The SADC was established on 17 August 1992 and its membership consists of Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

Judgments of the SADC Tribunal are binding and enforceable on member states. Member states are required to take all necessary steps to enforce the judgments, which are enforced in much the same way as foreign judgments. SADC has designated a specific regulatory body, the SADC Water Division, to oversee policies on water resources and sanitation infrastructure in the region and ensure their timely implementation.<sup>90</sup>

South Africa is also a member of the New Partnership for Africa's Development (**NEPAD**). The NEPAD was adopted in July 2001 and its founding membership consists of South Africa, Nigeria, Algeria, Egypt and Senegal.

NEPAD's Implementation Committee meets three times a year and reports to the AU, which makes decisions that are binding on NEPAD.

## CHAPTER 2: INTERNATIONAL AND REGIONAL TREATIES

- 1. What international or regional treaties has the country ratified? Please insert the date of the signature/ratification/accession.**
- 2. What declaration or reservation has the country entered to these instruments?**

### A. Regional Multilateral/Bilateral Treaties

*Table 1. Regional multilateral and bilateral treaties*

| Instruments | Participating States | Entry into force |
|-------------|----------------------|------------------|
|             |                      |                  |

[continent-99245](#) (accessed on 09-11-2022).

<sup>88</sup> Retrieved from <https://issafrica.org/iss-today/au-summit-30-are-states-serious-about-african-union-reform> (accessed on 09-11-2022).

<sup>89</sup> Retrieved from <https://sdg.iisd.org/news/african-union-donors-launch-us10-billion-water-fund-for-projects/> (accessed on 09-11-2022).

<sup>90</sup> <https://www.sadc.int/pillars/water> (accessed on 09-11-2022)

|   |                                    |            |
|---|------------------------------------|------------|
| Revised African Convention on the Conservation of Nature and Natural Resources (2003)   | 55 African states <sup>91</sup>    | 23/07/2016 |
| African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009)                                   | 55 African states <sup>92</sup>    | 06/12/2012 |
| The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)                                      | 55 African states <sup>93</sup>    | 25/11/2005 |
| The Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2004) | 55 African states <sup>94</sup>    | 01/25/2004 |
| African Peer Review Mechanism   | 38 African countries <sup>95</sup> | 2002       |
| African Charter on the Rights and Welfare of the Child (1990)   | 55 African states <sup>96</sup>    | 29/11/1999 |
| African Charter on Human and Peoples' Rights (1981)   | 55 African states <sup>97</sup>    | 21/10/1986 |

<sup>91</sup> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Rep., Cape Verde, Chad, Cote d'Ivoire, Comoros, Congo, Djibouti, Democratic Rep. of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Morocco, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sao Tome & Principe, Sudan, Eswatini, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Algeria, Angola, Benin, Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gambia, Gabon, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Mozambique, Republic of Niger, Namibia, Nigeria, Republic of Congo, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia.

<sup>96</sup> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Rep., Cape Verde, Chad, Cote d'Ivoire, Comoros, Congo, Djibouti, Democratic Rep. of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Morocco, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sao Tome & Principe, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

<sup>97</sup> *Id.*

## B. International Treaties

*Table 2. International binding instruments*

| <b>Instruments</b>   | <b>Signature</b> | <b>Ratification</b> |
|--|------------------|---------------------|
| International Covenant on Economic, Social and Cultural Rights (1966)<br><br><u>Reservation/Declaration:</u><br><br>The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in both Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources.  | 03/10/1994       | 12/01/2015          |
| The Convention on the Rights of Persons with Disabilities (2006)<br><br><u>Reservation/Declaration:</u> N/A  | 30/03/2007       | 30/11/2007          |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)<br><br><u>Reservation/Declaration:</u> N/A  | N/A              | 2005                |
| Optional Protocol to the International Covenant on Civil and Political Rights (1966)<br><br><u>Reservation/Declaration:</u> N/A  | N/A              | 28/8/2002           |
| International Convention on the Elimination of All Forms of Racial Discrimination<br><br><u>Reservation/Declaration:</u><br><br>The Republic of South Africa -<br>(a) declares that, for the purposes of paragraph 1 of article 14 of the Convention, it recognises the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the Republic's jurisdiction claiming to be victims of a violation by the Republic in any of the rights set forth in the Convention after having exhausted all domestic remedies; and<br>(b) indicates that, for the purposes of paragraph 2 of article 14 of the Convention, the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals | 1994             | 1998                |

| Instruments   | Signature                | Ratification |
|---|--------------------------|--------------|
| within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.  |                          |              |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)<br><br><u>Reservation/Declaration:</u><br><br>The Republic of South Africa declares that:<br><br>(a) it recognises, for the purposes of Article 21 of the Convention, the competence of the Committee Against Torture to receive and consider communications wherein one State Party claims that another State Party is not fulfilling its obligations under the Convention;<br><br>(b) it recognises, for the purposes of Article 22 of the Convention, the competence of the Committee Against Torture to receive and consider communications from, or on behalf of, individuals who claim to be victims of torture by a State Party. | 29/01/1993<br>10/12/1998 |              |
| International Covenant on Civil and Political Rights (1966)<br><br><u>Reservation/Declaration:</u><br><br>The Republic of South Africa declares that it recognizes, for the purposes of article 41 of the Covenant, the competence of the Human Rights Committee to receive and consider communications wherein one State Party claims that another State Party is not fulfilling its obligations present under the Covenant.   | 03/10/1994<br>10/12/1998 |              |
| Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)<br><br><u>Reservation/Declaration:</u><br><br>N/A   | 13/08/1997<br>26/10/1998 |              |
| Convention on the Elimination of All Forms of Discrimination against Women (1979)<br><br><u>Reservation/Declaration:</u> N/A  | 1993<br>1995             |              |
| Convention on the Rights of the Child (1989)<br><br><u>Reservation/Declaration:</u> N/A   | 29/01/1993<br>15/12/1995 |              |
| Geneva Convention (III) relative to the Treatment of Prisoners of War (1949)  | N/A                      | 21/11/1995   |

| Instruments   | Signature | Ratification |
|---|-----------|--------------|
| Protocol Additional (II) to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (1977)<br><br><u>Reservation/ Declaration:</u> N/A                      | N/A       | 21/11/1995   |
| Geneva Convention (IV) relative to the protection of Civilian Persons in Time of War (1949)<br><br><u>Reservation/Declaration:</u> N/A  | N/A       | N/A          |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<br><br><u>Reservation/Declaration:</u> N/A  | N/A       | N/A          |
| Protocol Additional (I) to the Geneva Conventions relating to the Protection of Victims of International Armed Conflict (1977)<br><br><u>Reservation/Declaration:</u> N/A                             | N/A       | N/A          |
| Optional protocol to the International Covenant on Economic, Social and Cultural Rights (2008)<br><br><u>Reservation/Declaration:</u> N/A   | N/A       | N/A          |
| Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) (1998)<br><br><u>Reservation/Declaration:</u> N/A | N/A       | N/A          |

Table 3. ILO instruments

| Instruments   | Signature | Ratification |
|---|-----------|--------------|
| ILO Forced Labour Convention, No. 29 (1930)   | unknown   | 05/03/1997   |
| ILO Recruiting of Indigenous Workers Convention, No. 50 (1936) (shelved convention) <sup>98</sup> | N/A       | Not ratified |
| ILO Food and Catering (Ships' Crews) Convention, No. 68 (1946) (instrument to be revised)         | N/A       | Not ratified |
| ILO Plantations Convention, No. 110 (1958)  | N/A       | Not ratified |

<sup>98</sup> NOTE TO READER: This convention has been abrogated by decision of the International Labour Conference at its 107<sup>th</sup> Session in 2018.

| Instruments   | Signature | Ratification |
|---|-----------|--------------|
| ILO Hygiene (Commerce and Offices) Convention, No. 120 (1964)                                   | N/A       | Not ratified |
| ILO Occupational Safety and Health (Dock Work) Convention, No. 152 (1979)                       | N/A       | Not ratified |
| ILO Convention No. 161 concerning Occupational Health Services (1985)                           | N/A       | Not ratified |
| ILO Safety and Health in Construction Convention, No. 167 (1988)                                | N/A       | Not ratified |
| ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) | N/A       | Not ratified |
| ILO Work in Fishing Convention, No. 188 (2007)  | unknown   | 20/06/2013   |

## C. Regional

Table 4. Regional instruments

| Instruments  | Signature | Ratification |
|--|-----------|--------------|
| National Environmental Management Laws Amendment Act 2 (2022)                  | N/A       | N/A          |
| National Water Amendment Act 27 (2014)   | N/A       | N/A          |
| National Environmental Management: Integrated Coastal Management Act 24 (2008) | N/A       | N/A          |
| National Environmental Management: Waste Act 59 (2008)                         | N/A       | N/A          |
| Water Services Amendment Act 30 (2004)   | N/A       | N/A          |
| National Environmental Management: Air Quality Act 39 (2004)                   | N/A       | N/A          |
| National Environmental Management: Biodiversity Act 10 (2004)                  | N/A       | N/A          |
| National Environmental Protected Areas Act 57 (2003)                           | N/A       | N/A          |
| National Environment Management Act 107 (1998)                                 | N/A       | N/A          |
| National Water Act 36 (1998)   | N/A       | N/A          |
| Water Services Act 108 (1997)  | N/A       | N/A          |

## CHAPTER 3: DOMESTIC LEGISLATION ON WATER

### A. Water law

Section 27 of the South Africa Constitution codifies the right to water. The section provides that:

- “(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 dependents, appropriate social assistance.”<sup>99</sup>

While the South Africa Constitution’s Bill of Rights does not explicitly recognize the right to sanitation, Schedule 4 of the Constitution, which describes the “*Functional Areas of Concurrent National and Provincial Legislative Competence*” unique to environmental matters, itemizes, “*water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems*” as matter within of interest, thus providing national and provincial governments with authority to pass legislation addressing the right to sanitation.

The sanitation sector in the country is currently regulated by three policy documents, namely the:

- White Paper on Water Supply and Sanitation (1994);
- White Paper on a National Water Policy of South Africa (1997); and
- White Paper on Basic Household Sanitation (2001).

These policy documents provide a suite of procedures, rules and allocation mechanisms for sanitation in the country, which are implemented through the policy instruments such as: laws and regulations; economic measures; information and education programs; and the assignment of rights and responsibilities for providing services.<sup>100</sup>

The South Africa Constitution contains additional references to water. For example, Section 184.3 of the Constitution states that:

- “[e]ach year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”

As such, each year the South African Human Rights Commission develops seven questionnaires, including

<sup>99</sup> South Africa Constitution, Bill of Rights, Section 27(1).

<sup>100</sup> The National Sanitation Policy (2016) published by the Department of Water and Sanitation, retrieved from [http://www.dwa.gov.za/Documents/sanitation/17005SC\\_POLICY\\_National%20Sanitation%20Policy%202016%20FINAL310117.pdf](http://www.dwa.gov.za/Documents/sanitation/17005SC_POLICY_National%20Sanitation%20Policy%202016%20FINAL310117.pdf) (accessed on 09-11-2022).

questions on the right to water and sanitation, and sends them to relevant government departments for completion. The questionnaires aim to assess steps taken by the government to realize the economic and social rights enumerated under Section 184.3. The Human Rights Commission notes that “[i]nformation from the questionnaires is [thereafter,] used to develop the annual [Section] 184(3) report.”<sup>101</sup>

Section 25.4 of the Constitution provides that the State’s obligation to take water related reforms in order to redress the results of past racial discrimination overrides provisions in Section 25 (all of which relate to the “Right to own property”).

The Constitution further provides the right of all people in South Africa to dignity<sup>102</sup> and the right of access to an environment that is not harmful to their health or well-being and is sustainable and protected from pollution and degradation.<sup>103</sup> The right to sanitation is implied in these rights.

Outside of the South African Constitution, additional laws exists that recognize the right to water and govern water resources. The National Water Act gives effect to the constitutional right of access to water and must be read with its sister statute, the Water Services Act, which gives practical effect to the constitutional right by establishing the framework for the supply of water and sanitation services by local authorities. The National Water Act repealed almost 100 other Acts that previously cluttered the water statute book and needs now only to be read with the Water Services Act, thus consolidating South Africa’s water laws into a unified whole.

The Water Research Act 34 of 1971 was enacted to provide for the promotion of research concerning water affairs. It provides for the establishment of a Water Research Commission and a Water Research Fund in order to enable such research to be conducted.<sup>104</sup>

Water legislation in South Africa is administered by the DWS, but other relevant environmental statutes include the National Environmental Management Laws Amendment Act 2 (2022) (which largely amended the National Environmental Management Act 107 of 1998, and the National Environmental Management: Integrated Coastal Management Act 24 of 2008, as well as minerals and agricultural legislation, insofar as water pollution from mining and agricultural pesticide use affects water resources).

The National Water Act also provides for a national strategy plan on water. The preamble to Chapter 2, Part 1 of the National Water Act “requires”:

- “[T]he progressive development, by the Minister, after consultation with society at large, of a national water resource strategy. The national water resource strategy provides the framework for the protection, use, development, conservation, management and control of water resources for the country as a whole. It also provides the framework within which water will be managed at regional or catchment level, in defined water management areas. The national water resource strategy, which must be formally reviewed from time to time, is binding on all authorities and

<sup>101</sup> Retrieved from

<https://www.ohchr.org/sites/default/files/Documents/Issues/Water/HRViolations/SouthAfricaNHRC.pdf> (accessed on 09-11-2022).

<sup>102</sup> South Africa Constitution, Bill of Rights, Section 10.

<sup>103</sup> *Id.* at Section 24.

<sup>104</sup> Water Research Act 34 of 1971.

*institutions exercising powers or performing duties under this Act.”<sup>105</sup>*

Accordingly, Section 5 of the National Water Act established the National Water Resource Strategy (**NWRS**). The NWRS provides for the management of wastewater but not sanitation.

The National Water Act mandates that the NWRS must contain items delineated in Section 6(1) of the National Water Act, which provides as follows:

- “*The national water resource strategy must, subject to section 5(4)(a)—*
- (a) *set out the strategies, objectives, plans, guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources within the framework of existing relevant government policy in order to achieve—*
  - (i) *the purpose of this Act; and*
  - (ii) *any compulsory national standards prescribed under section 9(1) of the Water Services Act;*
- (b) *provide for at least—*
  - (i) *the requirements of the Reserve and identify, where appropriate, water resources from which particular requirements must be met;*
  - (ii) *international rights and obligations;*
  - (iii) *actions to be taken to meet projected future water needs; and*
  - (iv) *water use of strategic importance;*
- (c) *establish water management areas and determine their boundaries;*
- (d) *contain estimates of present and future water requirements;*
- (e) *state the total quantity of water available within each water management area;*
- (f) *state water management area surpluses or deficits;*
- (g) *provide for inter-catchment water transfers between surplus water management areas and deficit water management areas;*

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<sup>105</sup> National Water Act 36 of 1998, Chapter 2, Part 1.

- (h) set out principles relating to water conservation and water demand management;
- (i) state the objectives in respect of water quality to be achieved through the classification system for water resources provided for in this Act;
- (j) contain objectives for the establishment of institutions to undertake water resource management;
- (k) determine the interrelationship between institutions involved in water resource management; and
- (l) promote the management of catchments within a water management area in a holistic and integrated manner.”<sup>106</sup>

Because the National Water Act defines “water use” as the “discharging of waste or water containing waste,”<sup>107</sup> NWRS provisions calling for the regulation of water use envision the regulation of wastewater.<sup>108</sup>

The NWRS (First Edition) (**NWRS 1**) was published in September 2004. It emphasizes three fundamental objectives of managing South Africa’s water resources, which are:

- to achieve equitable access to water;
- to achieve sustainable use of water; and
- to achieve efficient and effective water use.<sup>109</sup>

The NWRS (Second Edition) (**NWRS 2**) was published in June 2013. The NWRS 2 builds on the progress that was made with the implementation of NWRS 1. The three fundamental objectives of NWRS 2 are:

- water supports development and the elimination of poverty and inequality;
- water contributes to the economy and job creation; and
- water is protected, used, developed, conserved, managed and controlled in an equitable and sustainable manner.<sup>110</sup>

In addition, in September 2022, the Department of Water and Sanitation engaged key water sector

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<sup>106</sup> *Id.* at Section 6(1).

<sup>107</sup> *Id.* at Chapter 4, Section 21 (“For the purposes of this Act. water use includes ... (f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit; (g) disposing of waste in a manner which may detrimentally impact a water resource; (h) disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process.”); Section 22(2)(c)-(e) (describing the standards and permissibly management practices for waste water).

<sup>108</sup> *Id.* at Chapter 2, Sections 6(1)(a); (b)(iv).

<sup>109</sup> National Water Resource Strategy, page 7.

<sup>110</sup> National Water Resource Strategy (2), page iii.

stakeholders for input on the NWRS (Third Edition) (**NWRS 3**).<sup>111</sup> The NWRS 3 builds upon the prior editions – with the objectives to:

- facilitate the proper management of the nation's water resources;
- provide a framework for the protection, use, development, conservation, management and control of water resources for the country as a whole;
- provide a framework within which water will be managed at local, regional or catchment level, in defined water management areas;
- provide a framework for strengthening the regulation of the water and sanitation sector;
- provide information about all aspects of water resource management;
- identify water-related development opportunities and constraints; and
- provide opportunities for the implementation of innovative technologies and solutions.<sup>112</sup>

A number of published regulations also exist under the National Water Act that relate to pricing, water policing and public domain occupation. The most notable regulations include:

- Regulations requiring that a water user be registered, published by the Minister of Water and Environmental Affairs (**Minister**) in terms of Section 26(1)(c), read together with Section 39 of the National Water Act;
- Regulations regarding the safety of dams made by the Minister in terms of Section 123(1) of the National Water Act;
- Regulations requiring that the taking of water for irrigation purposes be measured, recorded and reported - this was decreed by the Minister in terms of Section 26 of the National Water Act; and
- Regulations regarding the procedural requirements for water use license applications and appeals have also been promulgated and prescribe the procedure and requirements for water use licence applications and appeals, as contemplated in Section 41 of the National Water Act.

## B. Environmental Law

Section 24 of the South Africa Constitution codifies the right to a healthy environment. The section provides that:

<sup>111</sup> Retrieved from <https://www.gov.za/speeches/water-and-sanitation-hosts-3rd-edition-national-water-resource-strategy-public-consultation>; <https://www.esi-africa.com/industry-sectors/water/third-national-water-resource-strategy-for-improved-management/> (accessed on 09-11-2022).

<sup>112</sup> Retrieved from <https://gwd.org.za/news-articles/invitation-written-comments-draft-nwrs-3> (accessed on 09-11-2022).

- “(1) Everyone has the right –
  - (a) to an environment that is not harmful to their health or well-being; and
  - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
    - (i) prevent pollution and ecological degradation;
    - (ii) promote conservation; and
    - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Furthermore, Section 152 of the Constitution states that it is the object of the local government to promote a safe and healthy environment;<sup>113</sup> while Section 184 obligates the South African Human Rights Commission to provide annual assurances that the environmental rights enumerated Section 24 of the Constitution are protected.<sup>114</sup>

South Africa’s National Environmental Laws Act (**NEMA**) also defines “water” as a component of the “environment” and in turn enumerates various protections that apply to water rights as they pertain to environmental rights.<sup>115</sup> The NEMA was enacted in 1998 to “provide for co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment.”<sup>116</sup>

While the NEMA does not specifically contain a provision relating to safe water – it does mandate that the right to a safe environment (and thus, water) must be “protected” and maintained for all citizens:

- “[E]veryone has the right to have the environment protected, for the benefit of present and future generations. through reasonable legislative and other measures that— prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development...”<sup>117</sup>

Notably, a 2008 Amendment to the NEMA provides that the Minister of Water Affairs may designate a member of the Department of Water Affairs as an environmental management inspector;<sup>118</sup> while more recent amendments provide measures for regulating extraneous water and ecological degradation resulting from operations such as mining.<sup>119</sup>

The NEMA also lays the foundation for national action plan on the environment through its creation of a

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<sup>113</sup> South Africa Constitution, Section 152(1)(d).

<sup>114</sup> *Id.* at Section 184. As discussed above, the South African Human Rights Commission develops an annual report on steps the government has taken to realize environmental rights. Retrieved from <https://www.ohchr.org/sites/default/files/Documents/Issues/Water/HRViolations/SouthAfricaNHRC.pdf> (accessed on 09-11-2022).

<sup>115</sup> National Environment Management Act 107 of 1998, Definitions (1)(xi)(i).

<sup>116</sup> *Id.* Preamble.

<sup>117</sup> *Id.* Preamble.

<sup>118</sup> National Environmental Laws Amendment Act 22 of 2008, Section 31(b)(a)(1).

<sup>119</sup> See e.g. National Environmental Management Laws Amendment Act 25 of 2014, Section 24(n)(c).

*“National Environmental Advisory Forum.”* The Forum consists of 12-15 appointed members who are obligated to advise the Minister on *“any matters concerning environmental management and governance and specifically the setting and achievement of objectives and priorities for environmental governance”* and compliance with principles set out in the NEMA.<sup>120</sup> The NEMA also creates the *“Committee for Environmental Co-ordination.”* The objective of this committee is to *“promote the integration and co-ordination of environmental functions by the relevant organs of state and in particular to promote the achievement of the purpose and objectives of environmental implementation plans and environmental management plans as set out”* in the NEMA.<sup>121</sup>

The committee holds various functions such as the obligation to make environmental recommendations and coordinate the application of integrated environmental management plans.<sup>122</sup> The Committee is comprised of various national director-generals from all sectors including the Director-General for DWS.<sup>123</sup>

The committee must meet at least four times a year and present an annual report to the Minister describing municipalities’ compliance with the environmental plans. The committee must also provide recommendations regarding the plans and ensure that they comply with various management principles outlined in Section 2 of the NEMA. The Minister must present the annual report to Parliament.<sup>124</sup>

Another important regulation related to the right to healthy environment is the National Environmental Management Protected Areas Act 57 of 2003 (**NEMPA**). The NEMPA regulates the Minister’s ability to declare natural reserves where an area *“provide[s] for a substantial flow of natural products and services to meet the needs of a local community”* or to *“enable the continuation of traditional consumptive uses as are sustainable.”*<sup>125</sup> Similarly the NEMPA allows a Minister to declare a “protected environment” (including areas of protected water) in effort to protect an area sensitive to development due to its provision of environmental goods and services; to ensure that the use of natural resources in the area is sustainable; or to control change in land use in the area.<sup>126</sup>

### C. Extraction and/or Use of Water

Legislation also exists in South Africa to regulate the right to extract water. In particular, Section 29 of the National Water Act provides various conditions for issuing an authorization or a license to extract water. Regulations by the Minister responsible for water affairs may differentiate between different water resources, different classes of water resources and different geographical areas.<sup>127</sup>

Legislation further distinguishes between the extraction of drinking water and water for other issues. For example, as a component of South Africa’s water protection process, the Minister responsible for water affairs must develop a system to classify the nation’s water resources.<sup>128</sup> With regard to each water

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<sup>120</sup> See National Environment Management Act 107 of 1998, Sections 3-5.

<sup>121</sup> *Id.* at Section 7.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at Section 8.

<sup>124</sup> The National Environmental Management Protected Areas Act 57 of 2003, Section 23.

<sup>125</sup> The National Environmental Management Protected Areas Act 57 of 2003, Section 23.

<sup>126</sup> *Id.* at Section 28.

<sup>127</sup> National Water Act 36 of 1998, Section 26(2)(a)(b).

<sup>128</sup> *Id.* at Section 12(1).

resource, the classification system may establish procedures for determining "the Reserve."<sup>129</sup>

The Reserve consists of: (1) the basic human needs reserve; and (2) the ecological reserve.<sup>130</sup> The basic human needs reserve provides for the essential needs of individuals, including water for drinking, for food preparation and for personal hygiene.<sup>131</sup> The Minister must determine the Reserve for all or part of any significant water resource.<sup>132</sup> Once the Reserve is determined for a water resource, it is binding in the same way as the class and the resource quality objectives.<sup>133</sup>

Section 21 of the National Water Act identifies various water uses, and Schedule 1 lists permissible water uses.

Regulations relating to the compulsory national standards and measures to conserve water provide guidance on the quantity and quality of potable water:

- ***"3. Basic water supply***

*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 liters per person per day or 6 kiloliters per household per month—*
  - (i) *at a minimum flow rate of not less than 10 liters per minute;*
  - (ii) *within 200 meters 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."*<sup>134</sup>

Schedule 5 of the Water Services Regulations obliges water services authorities to frequently sample the water for quality monitoring:

- ***"5. Quality of potable water***

- (1) *Within two years of the promulgation of these Regulations, a water services authority must include a suitable programme for sampling the quality of potable water provided by it to consumers in its water services development plan.*
- (2) *The water quality sampling programme contemplated in sub regulation (1) must specify the points at which potable water provided to consumers will be sampled, the frequency of sampling and for which substances and determinants the water will be tested.*

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<sup>129</sup> *Id.* at Section 12(2)(b)(i).

<sup>130</sup> *Id.* at Part 3 (The Reserve).

<sup>131</sup> *Id.*, generally.

<sup>132</sup> *Id.* at Section 16.

<sup>133</sup> *Id.* at Section 18.

<sup>134</sup> Regulations Relating to Compulsory National Standards and Measures to Conserve Water, Water Services Act 108 of 1997, Schedule 3.

- (3) A water services institution must compare the results obtained from the testing of the samples with SABS 241: Specifications for Drinking Water, or the South African Water Quality Guidelines published by the Department of Water Affairs and Forestry.
- (4) Should the comparison of the results as contemplated in sub regulation (3) indicate that the water supplied poses a health risk, the water services institution must inform the Director-General of the Department of Water Affairs and Forestry and the head of the relevant Provincial Department of Health and it must take steps to inform its consumers—
  - (a) that the quality of the water that it supplies poses a health risk;
  - (b) of the reasons for the health risk;
  - (c) of any precautions to be taken by the consumers; and
  - (d) of the time frame, if any, within which it may be expected that water of a safe quality will be provided.<sup>135</sup>

In 2001, the Minister of Water Affairs and Forestry (which is currently the DWS) announced the government's decision to ensure that poor households were given a basic supply of water free of charge. The Minister said that Cabinet had approved a policy to provide 6,000 liters of safe water per household per month. This standard relating to the amount of a "basic" level of water supply—a level sufficient to promote healthy living—comes from international practices and norms that recommend 25 liters per person per day. This amounts to about 6,000 liters per household per month for a household of eight people. The volume of 6,000 liters per month was therefore set as the target for a "basic" level for all households in South Africa, using eight as an average number of people per household.<sup>136</sup>

Under South African law, a person's right to use water is not connected to land ownership. However, permissible water uses depend on the location and purpose of the water use. For example, in a person's household, that person may take water for reasonable domestic use "*directly from any water resource to which that person has lawful access.*"<sup>137</sup> On land owned or occupied by a person, that person may take water for reasonable domestic use, non-commercial gardening and watering of animals "*from any water source which is situated on or forms a boundary of that land,*" so long as the use is not excessive.<sup>138</sup> In emergency situations, a person may take water from "*any water resource.*"<sup>139</sup>

Under Section 24 of the National Water Act, "[a] license may be granted to use water found underground on land not owned by the applicant if the owner of the land consents or if there is good reason to do so."<sup>140</sup>

Furthermore, licenses are not required for all water use. In general, a person does not need a license for domestic use, but one does need a license for industrial use. A person may use water without a license,

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<sup>135</sup> *Id.* at Schedule 5.

<sup>136</sup> Free Basic Water Implementation Strategy (2007).

<sup>137</sup> National Water Act 36 of 1998 at Section 26(2)(a)(b), Schedule 1.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at Section 24.

in part, for reasonable domestic use, non-commercial gardening, watering animals, emergency situations and recreational purposes.<sup>141</sup> A person may also use water without a license:

- if the use is permissible as a continuation of an existing lawful use,<sup>142</sup>
- if it is permissible under a general authorization;<sup>143</sup> or
- if the responsible authority waives the need for a license."<sup>144</sup>

Unless the water use fits into one of these categories, a license for water use is required.

A person might also need a license for industrial use depending on the activity. A person does not need a license to discharge runoff water from a commercial or industrial site into a canal, sea outfall or other conduit controlled by another person if the person controlling the canal, sea outfall or other conduit consents and is authorized to treat or dispose of waste water.<sup>145</sup> However, a person would need an authorization to irrigate land with waste water generated through an industrial activity.<sup>146</sup> Authorization is also needed for an activity aimed at modifying atmospheric precipitation,<sup>147</sup> a power-generating activity that alters the flow regime of a water resource,<sup>148</sup> or the intentional recharging of an aquifer with waste water.<sup>149</sup>

The Minister responsible for water affairs may determine the quantity of water permitted under a general authorization or license.<sup>150</sup>

A license remains in force until it expires, unless the responsible authority extends the license period or the license is restricted, suspended or terminated.<sup>151</sup> A license may also be restricted, suspended or terminated by the responsible authority where the licensee fails to comply with specific conditions or authorizations enumerated in the National Water Act.<sup>152</sup> A person can appeal the suspension of a license or authorization to the Water Tribunal.<sup>153</sup>

Under South African law water licenses may also be transferred. Section 25 of the National Water Act provides that:

- **"25. Transfer of water use authorizations**

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<sup>141</sup> *Id.* at Section 22(1)(a)(i) and Schedule 1.

<sup>142</sup> *Id.* at Sections 22(1)(a)(ii), 32-25.

<sup>143</sup> *Id.* at Section 22(1)(a)(iii) and Section 39 (enabling an authority to allow a water use by publishing general authorizations in the *Gazette*. The use of water under a general authorization does not require a license unless the general authorization is revoked, in which case a license is necessary. A general authorization does not replace or limit an existing lawful water use or a license.).

<sup>144</sup> *Id.* at Sections 22(1)(c) and 22(3).

<sup>145</sup> *Id.* at Section 22(1)(a)(i), Schedule 1.

<sup>146</sup> *Id.* at Section 37(1).

<sup>147</sup> *Id.* at Section 37(1)(b).

<sup>148</sup> *Id.* at Section 37(1)(c).

<sup>149</sup> *Id.* at Section 37(1)(d).

<sup>150</sup> *Id.* at Section 23(1).

<sup>151</sup> *Id.* at Section 28(2).

<sup>152</sup> *Id.* at Section 53 and 54.

<sup>153</sup> *Id.* at Section 148(1)(l).

- (1) A water management institution may, at the request of a person authorized to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose.
- (2) A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement—
  - (a) in order to facilitate a particular license application under section 41 for the use of water from the same resource in respect of other land; and
  - (b) on condition that the surrender only becomes effective if and when such application is granted.
- (3) The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission granted under subsection (1) or every application granted under subsection (2).<sup>154</sup>

In terms of water allocation, The National Water Act does not identify priorities in the allocation of water for different uses. It does, however, identify water uses that are permissible without a license or authorization from a responsible water authority. Additionally, the preamble to the National Water Act recognizes—

- “that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users; . . . that the protection of the quality of water resources is necessary to ensure sustainability of the nation’s water resources in the interests of all water users; and . . . the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate.”<sup>155</sup>

In regards to monitoring the volume of water extracted from groundwater, The National Water Act does not enumerate specific regulations.

However, the National Water Act does enumerate restrictions for releasing pollutants into water courses including rivers, lakes, seas and groundwater.

While Section 19 obliges anyone owning, controlling or occupying land to “take all reasonable measures” to prevent pollution from occurring, continuing, or reoccurring to any “water resource”; Section 19(2) provides that anyone occupying a land must take the following acts to safeguard water resources:

- (a) cease, modify or control any act or process” causing the pollution;
- (b) comply with any prescribed waste standard or management practice;
- (c) contain or prevent the movement of pollutants;
- (d) eliminate any source of the pollution

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<sup>154</sup> *Id.* at Section 25.

<sup>155</sup> *Id.* at Preamble.

- (e) *remedy the effects of the pollution; and*
- (f) *remedy the effects of any disturbance to the bed and banks of a watercourse."*

Further, Sections 19(3)-(4) authorize a catchment management agency to identify and direct any person who fails prevent or eliminate pollution to water resources to do so before a given date. Should that person fail - the agency is authorized to take measures to first, remedy the situation, and thereafter, impose related costs upon the responsible party.

## CHAPTER 4. THE HUMAN RIGHTS TO WATER AND SANITATION & SDG 6 TARGETS<sup>156</sup> including elements of the Human Right to a Healthy Environment

### A. Availability and accessibility (SDG 6.1, 6.2, 6.4)

#### 1. What laws or regulations ensure that a minimum essential level of water is available to all?

Article 27 of the Constitution provides that everyone has the right to have access to sufficient water.<sup>157</sup> To protect this constitutional right, Section 3 of the Services Act provides that everyone has a right of access to basic water supply and basic sanitation.<sup>158</sup>

Section 1 of the Water Services Act defines “basic water supply” as the “*prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.*”<sup>159</sup> Section 3 of the Water Services Act also provides that every water services institution and authority must take the right of access to basic water supply and basic sanitation into consideration when providing for measures to realise this basic right. Additionally, Section 9 of the Water Services Act allows the Minister to prescribe compulsory national standards for the provision of water services and effective and sustainable use of water resources for water services.<sup>160</sup>

#### 2. What are the standards/policies on the amount of water to be made available?

Section 9(1) of the Water Services Act allows the Minister to prescribe compulsory

national standards for the provision of water services.<sup>161</sup> In lieu of this, the government released the Regulations relating to Compulsory National Standards and Measures to Conserve Water (**National Standards**).<sup>162</sup> The National Standards define a minimum standard for the basic water supply of potable water as 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household. This standard assumes that such that water is available for 350 days per year without interruption for more than 48 hours per incident.<sup>163</sup>

The government also implemented the free basic water policy in 2001, which envisages a minimum of 6000 litres of water that should be made available to be registered to indigent households for free every month.<sup>164</sup>

#### 3. In cases where water is not available on premises, what mechanisms are in place to ensure collection times do not exceed 30 minutes including wait times and queuing?

Regulation 4 of the National Standards mandates a water services institution to take steps to provide alternative water and sanitation services to consumers where such services are interrupted for a period of more than 24 hours. At least 10 litres of potable water per person per day must be provided, and sanitation services sufficient to protect

<sup>156</sup> See Table of the Targets and Indicators of SDG 6, page 9

<sup>157</sup> Constitution, Article 27.

<sup>158</sup> The Water Services Act (1997), Section 3.

<sup>159</sup> *Id.* at Section 1.

<sup>160</sup> *Id.* at Section 3.

<sup>161</sup> *Id.* at Section 9(1).

<sup>162</sup> Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001).

<sup>163</sup> *Id.* at Section 3.

<sup>164</sup> National Norms and Standards for Domestic Water and Sanitation Services (2017), page 10.

health must also be provided.<sup>165</sup> The National Standards do not provide for the limiting of collection and queueing times. ]

#### **4. Does the law ensure continuous supply of water for all?**

The law ensures a *basic* supply of water through the following provisions under the Water Services Act:

- Section 3 of the Water Services Act provides that (i) everyone has a right of access to basic water supply and basic sanitation; and (ii) every water services institution must take reasonable measures to realise these rights. However, the aforementioned rights are subject to the limitations as set out in the Water Services Act.
- Section 4 of the Water Services Act requires that the water service provider set certain conditions that are: (i) accessible to the public; (ii) in accordance with any bylaws; and (iii) amongst other conditions, provide for circumstances under which the water supply may be discontinued or limited.<sup>166</sup>
- Sub-section 3 of Section 4 of the Water Services Act provides that limitation or discontinuation of water services by the water service provider must: (i) be fair and equitable; (ii) provide reasonable notice of the intent to limit or discontinue water unless it would be prejudicial to other consumers, if there is an emergency situation, or if the consumer has interfered with a limited or discontinued service; and (iii) not deny access to basic water services if a person proves that he or she is unable to pay for basic services to the satisfaction of the relevant water service authority.<sup>167</sup>
- Furthermore, as mentioned above, Regulation 4 of the Guidelines for

Compulsory National Standards and Norms and Standards for Water Services Tariffs requires a water institution to take steps to ensure that when the water services are interrupted for a period of more than 24 hours for reasons other than those in (b) above.<sup>168</sup>

Examples of alternative measures would include the use of water tankers to deliver water to households or communal water points; or expanding the use of portable toilets. ]

#### **5. In instances where water availability is not continuous, what measures are implemented?**

[As above, regulation 4 of the National Standards mandates a water services institution to take steps to provide alternative water and sanitation services to consumers where such services are interrupted for a period of more than 24 hours. At least 10 litres of potable water per person per day must be provided, and sanitation services sufficient to protect health must also be provided.<sup>169</sup> ]

#### **6. How is water supply availability ensured for marginalized and vulnerable groups, e.g., economically challenged or less developed rural areas?**

[The Water Services Act states that everyone has a right of access to basic water supply and sanitation, and that every water services institution must take reasonable measures to realise these rights.<sup>170</sup> To this end, every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.<sup>171</sup> This duty must be carried out in an equitable manner, which by implication entails the provision of water to marginalized groups and rural areas that have historically not had

<sup>165</sup> Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001).

<sup>166</sup> The Water Services Act (1997), Sections 4(1)-(2).

<sup>167</sup> *Id.* at Section 4(3).

<sup>168</sup> Guidelines for Compulsory National Standards Regulations and Norms and Standards for Water

Services Tariffs Regulations and Water Services Provider Contract Regulations (2002).

<sup>169</sup> Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001).

<sup>170</sup> The Water Services Act (1997), Sections 3(1)-(2).

<sup>171</sup> *Id.* at Section 11(1).

access to adequate water and sanitation services. This notion is entrenched in South Africa's Constitution and is a theme throughout its environmental legislation.]

**7. Does the law/policy prioritize water for domestic uses over other uses?**

[Yes, the law prioritises water for domestic uses over other uses (such as industrial and agricultural uses). Section 3 of the Water Services Act provides the right to basic sanitation, which is defined 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.<sup>172</sup> Section 11 of the Water Services Act stipulates that it is the duty of a water services authority to take reasonable steps to provide basic water supply and sanitation within its area of jurisdiction in times of emergency.<sup>173</sup>]

**8. What are the grounds for disconnecting, interrupting or altering water supply and sanitation services (e.g., authorities may alter water supply in case of droughts or emergencies, in which cases are disconnections possible...)?**

Section 21 of the Water Services Act provides that the water services authority must make bylaws to provide circumstances under which water may be discontinued or limited. There are a number of these water services bylaws which have been put in place on certain provinces and metropolitan areas.<sup>174</sup> For example, The Municipal Manager of the City of Johannesburg Metropolitan Municipality, in terms of section 13(a) of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), has published the Water Services By-laws for the City of Johannesburg Metropolitan Municipality.<sup>175</sup> The Water Services Act under Section 11 makes it the prerogative of the water

services authority to limit or discontinue water if there is failure to comply with reasonable conditions for the provision of such services. Some of the conditions for disconnecting/altering/interrupting water supply that are specified under the Water Services Act are: (i) consumer fails to meet his or her obligation to pay for services or any other conditions of a water service authority or (ii) general conditions of discontinuation of water services, which would include national disasters causing disruption in provision of services or when sufficient water is not available for some reason.<sup>176</sup>

The Guidelines for the National Standards for regulations under Sections 9, 10 and 19(5) of the Water Services Act provide guidance on this matter (**Guidelines**). The Guidelines state that an interruption in water supply may be because of planned or unplanned maintenance of the water distribution network or because of emergency interruptions, which occur without any warning.<sup>177</sup> The National Norms and Standards for Domestic Water and Sanitation Services, 2017 (**National Norms**) further state that a slow onset situation, such as a drought, would not be an emergency, for the people are not displaced from their normal abodes. However, the Minister for Water Affairs and Forestry (or any other Minister responsible for water and sanitation services) has the right to declare a slow onset event as an emergency for which emergency water supply services should be provided.<sup>178</sup>]

**9. What are the procedural standards/criteria for permitting interruption, disconnection or alteration of water supply and sanitation services?**

Under Section 4 of the Water Services Act, the discontinuation of water services by a water service provider must: (i) be fair and equitable; (ii) provide reasonable notice of

<sup>172</sup> The Water Services Act (1997), Section3.

<sup>173</sup> *Id.* at Section 11.

<sup>174</sup> *Id.* at Section 21(2)(b).

<sup>175</sup> Accessed at

[https://www.joburg.org.za/documents /Documents](https://www.joburg.org.za/documents/Documents)

[/By-Laws/water.pdf](#)

<sup>176</sup> *Id.* at Section 21(2).

<sup>177</sup> Guidelines for Compulsory National Standards, page 15.

<sup>178</sup> *Id.* at page 27.

the intent to limit or discontinue water, unless it would be prejudicial to other consumers, there is an emergency situation, or the consumer has interfered with a limited or discontinued service; and (iii) not deny access to basic water services if a person proves that he or she is unable to pay for basic services to the satisfaction of the relevant water service authority.<sup>179</sup> ]

#### **10. Are alternative ways of water supply and sanitation services provided for in case of alteration of supply and/or service?**

If the water supply is interrupted, disconnected or altered because of planned and unforeseen interruptions for periods exceeding 24 hours, water services institutions must take reasonable measures to ensure that certain minimum levels of services are maintained. Minimum levels of potable supply would mean at least 10 litres of water supply per person per day and sanitation services enough to meet the basic requirements for health and hygiene to affected consumers through alternative water services such as water tankers to deliver water to households or communal water points and the provision of portable toilets, urinals, hand washing facilities.<sup>180</sup> ]

#### **11. Does law/policy provide guidance on:**

##### **The number of water outlets?**

The law does provide guidance on the number of water outlets for specific facilities. For example, the 2016 National Sanitation Policy provides for sanitation services to public institutions. It defines public institutions as schools, academic institutions, clinics, hospitals, crèches and day-care centres, libraries, old-age homes, churches, sporting facilities, police stations and correctional facilities, and public areas and spaces. There are detailed guidelines on the number of toilets, urinals and hand-washing facilities for different types of public institutions.<sup>181</sup> ]

**The safety, distance and time from a dwelling or structure to reach water outlet or sanitation facilities (e.g., laws that specify water outlets must be available within a certain distance from a school or household)?**

The National Norms provide guidelines on the safety, distance and time from a dwelling or structure to reach a water outlet or other sanitation facilities.

##### *Household:*

The National Norms provide detailed guidelines for basic water supply services. As per paragraph 5.2.2, the water must have an access or delivery point of at least a yard connection, which is metered and tariffed as per the guidance.<sup>182</sup>

If households want to avail themselves of higher quality services, there are other levels, such as middle level of service and full level of service, which the households can opt for with extra payment.

##### *Educational facilities:*

The National Norms under paragraph 5.9.1 provide that the access/delivery point shall be one hygienic water terminal on the premises for every 130 learners and within 100m of the main building, and all water use to be metered and tariffed.<sup>183</sup>

##### *Child and healthcare facilities:*

The National Norms under paragraph 5.9.2 provide that the access/delivery point shall be one hygienic water terminal on the premises for every 130 patients and within 100m of the main building.<sup>184</sup>

##### *Other public facilities:*

The National Norms under paragraph 5.9.3 provide that the access/delivery point shall be one hygienic water terminal on the premises for every 130 users and within 100m of the main building for all other ‘public facilities’.

‘Public facilities’ has a very broad definition. It refers to people’s demand for potable water when not at home in an integrated

<sup>179</sup> The Water Services Act (1997), Sections 4(1)-(2).

<sup>180</sup> Guidelines for Compulsory National Standards, page 15.

<sup>181</sup> *Id.* at page 11.

<sup>182</sup> *Id.* at page 22.

<sup>183</sup> *Id.* at page 29.

<sup>184</sup> *Id.* at page 30.

manner where it is practical, affordable, financially viable and sustainable.<sup>185</sup>

*Sanitation facilities:*

For free basic services to the indigenous population, the indicators are –

- Toilet seats – 1 seat per 20 users
- Urinal units – 1 unit per 50 users
- Hand washing – 1 basin per 4 toilet seats

For basic services in households, consideration must be had and effort must be made to provide people living with chronic illnesses and disabilities with easy access to a toilet due to reduced mobility.<sup>186</sup>

For private lands the detailed sanitation requirements under contained under the 2016 National Sanitation Policy. “Privately-owned” land is mainly commercial farms, mine owned farms, church owned land, industrial owned land including privately owned enterprises, sectional title / residential complexes and estates, tribal and communal owned land and game parks.<sup>187</sup> ]

**12. Technical safety of water outlets or sanitation facilities (e.g., law requiring that certain standards are applied in the construction of those facilities or of buildings)?**

[The level of quality for all must comply with SANS 241 quality standards. For technical safety, the standards are as follows the National Building Regulations and Building Standards Act, 1977.<sup>188</sup> ]

**13. Are there any standards that protect healthy natural water bodies to guarantee sustainable sources of water for drinking or other household uses?**

[The National Water Act introduced the concept of The Reserve.<sup>189</sup> The Reserve consists of the basic human needs reserve and the ecological reserve.

The basic human needs reserve provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene. The ecological reserve

relates to the water required to protect the aquatic ecosystems of the water resource. The Reserve refers to both the quantity and quality of the water in the resource, and will vary depending on the class of the resource. Section 16 of the National Water Act sets out the steps the Minister must take to determine the Reserve for all or part of a water resource. Such determination must be in accordance with the class of water resource and must ensure that adequate allowance is made for each component of the Reserve. ]

**14. Do groundwater sources and aquifers have an allocation of water volume protected from extraction to ensure long term sustainability?**

[Yes, the allocation of water volume is done in terms of sections 16, 17 and 18 of the National Water Act, which sets out the requirements for the determination of the Reserve. ]

**15. Is there any provision in the law/policy for the availability and accessibility of clean and healthy environmental spaces in non-domestic places such as schools, hospitals, workplaces, prisons, refugee camps, etc.?**

[Yes. Section 24(a) of the Constitution provides at the outset that everyone has the right to a healthy environment that is not harmful to their health or well-being, which includes non-domestic places. From this, stems the specific promulgated legislation which has been put in place in order to ensure that this constitutional right is upheld in all environments, such as schools, prisons hospitals etc. One of the main pieces of legislation which give effect to this constitutional right is the National Health Act, 2004 which is the cornerstone to regulate national health and to provide uniformity in respect of health services by, inter alia, establishing a national health system. Further, provision of made for availability and accessibility of clean and healthy environmental spaces pursuant to

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at page 50.

<sup>187</sup> *Id.* at page 56.

<sup>188</sup> *Id.* at page 50.

<sup>189</sup> National Water Act 36 of 1998, Section 16.

specific legislation for children and workers, such as the Child Care Act, 1983 (Act 74 of 1983); the Domestic Violence Act, 1998 (Act 116 of 1998); the South African Schools Act 1996 (Act 84 of 1996) and, in respect of those persons at a workplace, the Occupational Health and Safety Act, 1993 (Act 85 of 1993). In addition, for persons whom are incarcerated, the Correctional Services Act (111 of 1998) would regulate the availability and accessibility of clean and healthy environmental spaces.]

**16. Is there any provision in the law/policy for availability and accessibility of water and sanitation facilities in non-domestic places such as schools, hospitals, workplaces, prisons, refugee camps, etc.?**

Yes. As above, the 2016 National Sanitation Policy provides for sanitation services to public institutions. It defines public institutions as schools, academic institutions, clinics, hospitals, crèches and day-care centres, libraries, old-age homes, churches, sporting facilities, police stations and correctional facilities, and public areas and spaces. There are detailed guidelines on the number of toilets, urinals and hand-washing facilities for different types of public institutions.<sup>190</sup>

As above, the National Norms under paragraph 5.9.1 provide that the access/delivery point for water at educational facilities shall be one hygienic water terminal on the premises for every 130 learners and within 100m of the main building, and all water use to be metered and tariffed.<sup>191</sup> This also applies to public facilities, prisons and so forth.]

## B. Quality and safety (SDG 6.1, 6.2, 6.3)

**1. Are there parameters of quality and safety for drinking water established under law?**

The provision of safety is included in the definition of “basic sanitation” and sufficient

quality in the definition of “basic water supply” under the Water Services Act.<sup>192</sup>

The term water quality describes the physical, chemical, microbiological and aesthetic properties of water that determine its fitness for a variety of uses and for protecting the health and integrity of aquatic ecosystems. For water to be potable, primary standards regulate substances that potentially affect human health, and secondary standards prescribe aesthetic qualities, those that affect taste, odour, or appearance.<sup>193</sup>

Potable water is thus water that is clear, tastes and smells good, and is free of contaminants and pollutants that could affect human health. Water quality standards are tested mainly through SANS 241 released by the DWA.<sup>194</sup>

Other key legislations for safe drinking waters are:

- Water Services Act (108 of 1997)
- National Water Act (36 of 1998)
- Municipal Structures Act (117 of 1998)
- Compulsory National Standards for the Quality of Potable Water (2001)
- Strategic Framework for Water Services (2003)
- National Health Act (61 of 2003)
- National Water Resources Strategy (2004)
- Framework for Drinking Water Quality in South Africa (2005).<sup>195</sup> ]

**2. Is monitoring of drinking water quality or wastewater required by law/policy? If so, which actor is required to monitor it and how often (according to the law/policy)?**

Yes, one of the main objectives under Section 2 of the Water Services Act is to monitor water services.<sup>196</sup> As per Section 27 of the Water Services Act, it is the responsibility of every WSA to monitor the

<sup>190</sup> Guidelines for Compulsory National Standards at page 11.

<sup>191</sup> *Id.* at page 29.

<sup>192</sup> The Water Services Act (1997), Section 3.

<sup>193</sup> Guidelines for Compulsory National Standards at

page 15.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at page 87.

<sup>196</sup> The Water Services Act (1997), Section 2.

performance of water services intermediaries within its area of jurisdiction such that all standards and norms and standards of tariffs, conditions or additional standards set by the WSA and any contract conditions are complied with.<sup>197</sup>

Section 52 further states that it is the responsibility of the Minister and any relevant Province to ensure compliance and performance of every WSA with all National Norms and prescribed norms and tariffs, development plan and policies under the Act.<sup>198</sup> The requirement for monitoring is seen throughout in the National Norms for all categories of water supply and sanitation.]

**3. Are there any regulations to control or monitor the quality of groundwater aquifers so that they do not become contaminated?**

The monitoring of groundwater is primarily a condition of water use licences or other similar entitlements to use water. Where no water use entitlement is required, one must adhere to the standards set out in the Water Quality Guidelines.

Monitoring of groundwater is also informed by section 19 of the National Water Act, which imposes a general duty on persons to take reasonable measures to prevent pollution of water resources. A similar duty to take reasonable steps to protect the environment from pollution or degradation is provided for in section 28 of the NEMA. The reasonable measures to be taken depend on the circumstances of each case.]

**4. Do laws/regulations include guidance on the safe construction of water and sanitation Infrastructure (e.g. to ensure no contact with excreta, ventilation, respect construction guidelines)?**

Section 9 of the Water Services Act requires that the Minister prescribe national standards for detailed guidance on, amongst other things, the construction and functioning of water services works and consumer installations.<sup>199</sup>

The requirement to practice the safe construction of water and sanitation infrastructure is seen throughout in the National Norms for all categories of water supply and sanitation.]

**5. Do laws/regulations include requirements or guidance on safe emptying of latrines as well as safe treatment and disposal of treated sludge?**

Yes, the National Norms prescribe guidance in safe emptying of latrines as well as safe treatment and disposal of sludge.

*Safe emptying of latrines.* <sup>200</sup> A services authority must ensure that, in the disposal of all excreta, the following are adhered to:

- Appropriate excreta containment measures shall be implemented at all times throughout the sanitation service chain;
- All excreta disposal and/or containment measures shall protect surface water, groundwater and groundwater sources from faecal contamination. Therefore:
  - All excreta containment measures, i.e. trench latrines, Ventilated Improved Pit (VIP) toilets and soakaway pits, shall be at least 50 metres away from any groundwater source. This distance needs to be increased for fissured rocks and limestone, or decreased for fine soils.
  - The bottom of any toilet or soak-away pit shall be at least 1.5 metres above the water table. Again, this distance needs to be increased for fissured rocks and limestone, or decreased for fine soils.
  - Drainage or spillage from sanitation facilities shall not contaminate freshwater resources or create health risks for people or the environment.

*Disposal of Sludge*

<sup>197</sup> *Id.* at Section 27.

<sup>198</sup> *Id.* at Section 52.

<sup>199</sup> The Water Services Act (1997), Section 9.

<sup>200</sup> Guidelines for Compulsory National Standards, pages 35-36.

The National Norms provide detailed guidelines on treatment and disposal of sludge, as follows:

- Sludge is managed by local authorities and service providers in an environmentally acceptable manner by adhering to the Guidelines for the Utilisation and Disposal of Wastewater Sludge Volumes 1 to 6.
- Treatment:<sup>201</sup>
  - The nature of the sludge can vary widely and this shall be taken into account when designing the treatment works.
  - The technology or combination of technologies used at a treatment works shall depend on the quality of the effluent to be treated; the contributions of any unusual constituents (derived from light or heavy industrial effluents) to the domestic wastewater stream; the volume of effluent to be treated and its rate of increase in volume over time; the sensitivity of the receiving river system where the effluent is discharged; the financial resources available to the local authority responsible for operating the treatment works; and any specific conditions contained in the plant's wastewater discharge licence.<sup>202</sup>
  - Emptying facilities at treatment works shall consist of an apron onto which to discharge the contents of the vehicle and a wash-down facility.
  - Pond systems can be very effective in treating sludge from on-site sanitation systems. If the ponds treat only sludge from VIP toilets it may be necessary to add water to prevent the ponds from drying out before digestion has taken place.
  - Sludge from on-site sanitation systems can be treated by

composting at a central treatment works, using forced aeration.

- *Disposal of sludge*<sup>203</sup>
  - Unless the sludge has been allowed to decompose until no more pathogens are present, it may pose a threat to the environment, particularly where the emptying of pits is practised on a large scale. The design of disposal facilities for the disposal of sludge shall be carefully considered, as the area is subject to continuous wet conditions and heavy vehicle loads.
  - The type of equipment employed in the disposal effort shall be known to the designer, as discharge speed and sludge volume need to be taken into account.
  - Cognisance shall be taken of the immediate environment, as accidental discharge errors may cause serious pollution and health hazards.
  - Pit-toilet sludge can be disposed of by burial in trenches of at least 0.8m to 0.9m wide, 6.0m long and 2.0m deep. These trenches shall only be allowed at appropriate and licensed disposal sites.
  - Dehydrated faecal matter from urine-diversion toilets can be safely re-used as soil conditioner, or, alternatively, disposed of by burial or incineration.
  - Dehydrated faecal matter may be co-composted with other organic waste.
  - Sludge from septic tanks, aquaprivies, etc., shall be disposed of only in accordance with the prescribed methods in the Guidelines for the Utilisation and Disposal of Wastewater Sludge Volume 3: Requirements for the on-site and off-site disposal of

<sup>201</sup> *Id.* at pages 37 - 38.

<sup>202</sup> Ashton, et.al., 2012

<sup>203</sup> Guidelines for Compulsory National Standards, page 37.

- sludge.<sup>204</sup> ]
6. Do laws/regulations establish requirements on household water treatment and storage (e.g. quality requirement with respect to water containers, rainwater harvesting limitations, etc.)?

[The National Environmental Management: Waste Act (No 59 of 2008) places the duty of care on any persons or institutions who may cause significant pollution or degradation of the environment, requiring them to institute measures to either prevent pollution from occurring, or to minimise and rectify the pollution or degradation where it cannot reasonably be avoided.<sup>205</sup>

To this effect, the National Norms provide that:<sup>206</sup>

- All households shall have access to refuse containers or skips that are emptied at least twice a week and are no more than 100 metres from a communal refuse pit. All waste generated by populations living in settlements shall be removed from the immediate living environment on a daily basis, and from the settlement environment at least once a week.
- Waste buried or incinerated on-site in either household or communal pits, shall be covered daily with a thin layer of earth to prevent it attracting and breeding vectors, such as flies and rodents. Where domestic refuse is not buried on site, at least one 100L refuse container should be available per 10 households.
- Children's faeces/nappies shall be disposed of by directly covering them with earth. Disposal sites shall be fenced off to prevent accidents and access by children and animals. Care must be taken to prevent any leachate contaminating the groundwater.
- A timely and controlled safe disposal

of solid waste with a consequent minimum risk of solid waste pollution to the environment shall be put in place.

- Recycling of solid waste within communities/settlements shall be encouraged, provided it presents no significant health risk.
- An effective and sustained communication drive shall be implemented on a monthly basis to raise awareness and increase users' knowledge about the benefits of solid waste management. This communication programme shall accommodate the users' socio-cultural traditions and beliefs; needs and expectations.]

### C. Water pollution control (SDG 6.3, 6.6)

1. Are there legislative provisions concerning waste disposal activities? Which authorities are responsible for monitoring to determine if waste has caused pollution of bodies of water?

[The DWS, as the regulator of water services (that includes sanitation services) in South Africa, is obliged to monitor Water Services Institutions as specified in Section 62 of the Water Services Act.<sup>207</sup> The WSA is responsible for introducing norms and standards for treatment and disposal under Section 62 of the Water Services Act. Water services institutions are therefore bound to provide the necessary information required to conduct analyses on the quality of water services and performance. It is illegal for WSA and water services providers to refuse, withhold, or provide, false information Section 82 of the Water Services Act.<sup>208</sup>

Section 19 of the National Water Act deals with pollution prevention, which person/legal entity who owns, controls, occupies or uses land is responsible for

<sup>204</sup> Herselmann & Snyman, 2009

<sup>205</sup> *Id.* at page 44.

<sup>206</sup> *Id.*

<sup>207</sup> The Water Services Act (1997), Section 62.

<sup>208</sup> *Id.* at Section 82.

taking measures to prevent pollution of water resources and will be liable for all costs related to prevention of pollution or remedying the effects of pollution on the land in question.<sup>209</sup> ]

## 2. Is there legislation which regulates the contamination of groundwater? How is it addressed in practice?

The National Water Act under Section 139 requires the Minister to establish national groundwater information system. The DWS policies and strategies for groundwater quality management in South Africa seek “*to manage groundwater quality in an integrated and sustainable manner within the context of the National Water Resource Strategy and thereby to provide an adequate level of protection to groundwater resources and secure the supply of water of acceptable quality.*”

The National Norms stated that the guidelines made available in the publication *A protocol to manage the potential of groundwater contamination from on-site sanitation*, by the Directorate of Geohydrology of the Department of Water Affairs & Forestry (DWAF, 1997a), must be observed.<sup>210</sup>

The 2016 National Sanitation Policy emphasises the ‘polluter pays’ principle, suggesting a levy/penalty for anyone discharging water that contains pollutants.<sup>211</sup>

The DWS has also issued the Water Quality Guidelines in several volumes. Volume 8 is a compilation of all the different Target Water Quality Ranges (TWQR) for all the different water use sectors dealt with in volumes one to seven. These include Domestic Water Use (Volume 1), Recreational Water Use (Volume 2), Industrial Water Use (Volume 3), Irrigation Water Use (Volume 4), Livestock Watering (Volume 5), Aquacultural Water Use (Volume 6) and Aquatic Ecosystems (Volume 7).

The Water Quality Guidelines for the various sectors set out the range of concentrations or levels at which the presence of a specific constituent would have no known adverse or anticipated effects on the fitness of the water assuming long-term continuous use, and is also aimed at safeguarding the health of aquatic ecosystems.<sup>212</sup>

In practice, section 19 of the National Water Act imposes a general duty on persons to take reasonable measures to prevent pollution of water resources. A similar duty to take reasonable steps to protect the environment from pollution or degradation is provided for in section 28 of the NEMA. The reasonable measures to be taken depend on the circumstances of each case. Undertaking of activities that result or may result in the contamination of groundwater in terms of the National Water Act or the environment in terms of the NEMA, may breach this duty.

In terms of both the NEMA and the National Water Act, directives may be issued by the relevant authority to the owner of land, person in control or person who uses or occupies the land requiring such persons to take steps to prevent or address the pollution or degradation.

If the recipient of the directive fails to comply with the conditions of the directive, the competent authority may seek to implement the requirements set out in the directive and reclaim the costs from any person responsible for causing the pollution, the owner of land, any person in control of the land or any person that negligently failed to implement remedial measures. ]

## 3. Do laws/regulations provide constraints on the levels of nitrates and phosphates that are released into groundwater through agricultural land use?

Yes. As per the relevant Water Quality Guidelines, the level of nitrates and phosphates (among other constituents) that are released into groundwater through

<sup>209</sup> The National Water Act (1998), Section 19.

<sup>210</sup> Guidelines for Compulsory National Standards, page 35.

<sup>211</sup> *Id.*

<sup>212</sup> South African Water Quality Guidelines, Volume 8, page iii.

agricultural land use (including irrigation and livestock watering) are regulated.

However, this will primarily be regulated in terms of a water use licence and the conditions therein. If pollution or degradation occurs in contravention of a condition of an entitlement to use water in terms of the National Water Act (such as a water use licence), the relevant authority may take steps to suspend or withdraw such an entitlement.]

**4. Is permission required to discharge effluents? What are the criteria used for considering applications and granting permits?**

Yes, under 6 and 7 permission of the WSA is required to approve discharge of any effluent.<sup>213</sup> Under Section 32 it is the duty of the water board obtain a permit, authorisation or licence from the relevant authority for abstracting water or discharging any effluent.

All water services providers shall be licensed in terms of the National Water Act. Natural water sources can only handle a limited pollution load. Every institution that discharges effluent into a water body (river, stream, lake, and reservoir) shall have an authorisation to do so from the DWS. The authorisation specifies the types and maximum levels of contaminants that the effluent is allowed to contain.<sup>214</sup>

The criteria used by the WSA are as follows:<sup>215</sup>

- existing lawful water uses;
- the need to redress the results of past racial and gender discrimination;
- efficient and beneficial use of water in the public interest;
- the socio-economic impact of the water use or uses if authorised and of the failure to authorise the water use or uses;

- any catchment management strategy applicable to the relevant water resource;
- the likely effect of the water use to be authorised on the water resource and on other water users;
- the class and the resource quality objectives of the water resource;
- investments already made and to be made by the water user in respect of the water use in question;
- the strategic importance of the water use to be authorised;
- the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
- the probable duration of any undertaking & which a water use is to be authorised.]

**5. Can waste discharge permits be lost/suspended/modified during their lifespan? Under what circumstances? Is compensation payable?**

Yes, during the general review process of the licences the responsible authority may review a licence only at the time periods stipulated for that purpose in that licence. Under Section 50 of the National Water Act, a responsible authority may amend or substitute a licence condition, under the following circumstances:

- If the licensee or successor-in-title has consented to or requested the amendment or substitution;
- To reflect one or more successors-in-title as new licensees; and
- To change the description of the property to which the license applies, if the property described in the licence has been sub-divided or consolidated with other property.<sup>216</sup>

The amendment may only be made if the conditions of other licences or similar water use from the same water resource in the

<sup>213</sup> The Water Services Act (1997), Sections 6 -7.

<sup>214</sup> Guidelines for Compulsory National Standards, page 39.

<sup>215</sup> *Id.*

<sup>216</sup> The National Water Act (1998), Section 50.

same vicinity (determined by the responsible authority have also been amended in an equitable manner through a general review process).<sup>217</sup>

If the amendment or substitution of conditions severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the National Water Act makes provision for a claim for compensation.]

**6. Are instances of pollution of water sources subject to penalties / fines? Which institution is in charge of the administration of the penalties?**

[Yes, as per Section 151 of the National Water Act, no person may unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource. Any person who does so is guilty of an offence and liable:

- on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment; and
- in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.<sup>218</sup>
- The Water Tribunal established under the National Water Act is in charge of the administration of the penalties.]

#### D. Affordability (SDG 6.1)

**7. How does law/policy address affordability of water supply and sanitation services?**

[Under the Water Services Act, it is the duty of every WSA to ensure affordable access to water services and sanitation. The law provides for basic water supply for everyone and free level of water supply to the indigenous communities.<sup>219</sup>

The National Norms also show that there are intermittent and full level of services for people willing to pay more or for separate categories like public institutions (schools,

work places etc.). Affordability is a principle underpinning all norms and standards. This is assured by implementing proper standards and tariffs in every household and public institutions.]

**8. What mechanisms must be established by law/policy to ensure affordability of water and sanitation services?**

[Under the Water Services Act to ensure affordability of water and sanitation services, the Minister must prescribe compulsory national standards relating to<sup>220</sup>—

- the provision of water services;
- the quality of water taken from or discharged into any water services or water resource system;
- the effective and sustainable use of water resources for water services;
- the nature, operation, sustainability, operational efficiency and economic viability of water services;
- requirements for persons who install and operate water services works; and
- the construction and functioning of water services works and consumer installations.

The above standards may differentiate between different users of water services and different geographic areas taking into account among other factors. The socio-economic and physical attributes of each area are also taken into account.]

**9. How are tariffs established and what is the process for updating these tariffs?**

[Under Section 10 of the Water Services Act, the Minister may from time to time prescribe norms and standards in respect of tariffs.<sup>221</sup> The norms and standards may differentiate on an equitable basis between different users of water services, different types of water services, and different geographic areas. In addition, in prescribing the norms and standards, the Minister must consider certain factors, including social equity, the

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at Section 154.

<sup>219</sup> The Water Services Act (1997), Section 3.

<sup>220</sup> *Id.* at Section 9.

<sup>221</sup> *Id.* at Section 10.

need to provide for drought and excess water availability, the recovery of costs associated with providing the water services, and the need for return on capital invested in the provision of water services, amongst others.<sup>222</sup>

The DWS has also released the Norms and Standards in respect of Tariffs for Water Service Authorities and Bulk Water Service providers dated 9 October 2015.

As per the National Norms a services provider/authority must set its sanitation tariffs so that its revenue, inclusive of all account transfers and grants allocated to sanitation services, is sufficient to recover:<sup>223</sup>

- all reasonable costs directly and indirectly associated with the operation, maintenance, refurbishment and development of sanitation services, sanitation services customer care and all costs associated therewith;
- payments required to redeem its sanitation services related loans over a reasonable period;
- a net surplus of a minimum of 6% per annum.<sup>224</sup>

The process for setting tariffs is set out in section 6 of the Norms and Standards in respect of Tariffs for Water Service Authorities and Bulk Water Service Providers, and requires a water services authority to, before determining the tariff that it charges for services to its consumers:

- estimate the revenue required to provide sanitation services on a sustainable basis over a period of 3 years for each scheme or sanitation services supply within its area of jurisdiction;
- estimate the future water consumption over a period of 3 years for each scheme or water supply area within its area of jurisdiction;

- propose a tariff structure that would provide the revenue required as per (a) above;
- consult with its consumers on its proposed tariffs and the assumptions it used to determine the proposed tariffs; and
- submit its assumptions and proposed tariffs to the Minister.<sup>225</sup> ]

**10. Does the tariff vary depending on the regions/circumstances?**

Yes, the tariff varies depending upon the social equity, financial sustainability of the water services in the geographic area and the need to provide for drought and excess water availability.

However, no water services institution may use a tariff, which is substantially different from any prescribed norms and standards.<sup>226</sup> ]

**11. Which actors are responsible for and involved in setting and/or approving tariffs for water supply and sanitation services?**

The Minister (with the concurrence of the minister of Finance) is responsible for prescribing compulsory national standards for applicable tariffs for water services.<sup>227</sup>

It is also the responsibility of every WSA to make by laws which amongst others would provide for determination and structure of tariffs. It is the responsibility of the WSAs to ensure that systems are in place for effective, efficient and timely collection of all revenue due.<sup>228</sup> ]

**12. Is disconnection from water supply and sanitation services for non-payment allowed? What procedures must be followed in such cases prior to disconnecting the supply and service? Are there any further consequences (other than shutoffs) for bill non-payment?**

Yes, the Water Services Act states that every WSA could place conditions under which services are provided. This includes limitation or discontinuation of water

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at Section 43.

<sup>224</sup> Guidelines for Compulsory National Standards, pages 43 - 44.

<sup>225</sup> Norms and Standards in respect of Tariffs for

Water Service Authorities and Bulk Water Service Providers, Section 6.

<sup>226</sup> The Water Services Act (1997), Section 10.

<sup>227</sup> *Id.* at Section 10(4).

<sup>228</sup> *Id.* at Section 21.

services where a consumer fails to meet his or her obligations to the water services provider. A payment defaulter may be obligated to pay a reconnection fee after disconnection of services or may require a payment defaulter to pay a higher tariff for water services, where that defaulter gains access to water services through a communal water services work and the provision thereof cannot be disconnected or limited without other consumers being prejudiced.

Procedures for the limitation or discontinuation of water services and sanitation must<sup>229</sup>

- be fair and equitable;
- provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless (i) other consumers would be prejudiced; (ii) there is an emergency situation; or (iii) the consumer has interfered with a limited or discontinued service; and
- not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.]

## E. Acceptability (SDG 6.1, SDG 6.2)

1. Is there provision in the law or contracts with service providers that relate to the need to take into account cultural and social dimensions of acceptability (e.g. colour or odour of water, or the positioning of a facility)?

Yes, the water and sanitation services are planned and delivered to ensure that their design, positioning and conditions of use as well as management are sensitive to people's cultures and priorities.

For example, in respect of the construction of a toilet the fact that different cultures may

require toilets of different dimensions (sitting vs squatting), and specific features that need to be taken into account to make the toilets easy and comfortable to use, are taken into account (as per the National Norms).<sup>230</sup>

The DWS's Strategy for Mainstreaming Appropriate Technologies includes, amongst other various social factors such as:<sup>231</sup>

- socio-cultural aspects;
- individual, domestic and collective behaviour regarding the links between health, water, hygiene and sanitation;
- the demand or perceived need for an improved service;
- social and emotional acceptability of technologies and services;
- the feeling of ownership;
- community participation (men/women, social groups) in all project phases, including
- planning, designing, constructing and managing the services, and in the O&M of the services;
- equity in provision of services;
- the capacity and willingness to pay;
- management through a locally organized and recognized group;
- the financial and administrative capacity of management;
- the technical skills to operate and maintain the service, implement preventive maintenance activities and perform minor and major repairs are all present in the community. ]

2. Is there provision in the law or contracts with service providers that relate to the need to ensure dignity and privacy (e.g., in workplaces, but also in the design of shared sanitation facilities for certain communities)?

The National Norms provide numerous instances where dignity and privacy are considered (this includes all public institutions like schools, hospitals etc.):<sup>232</sup>

<sup>229</sup> *Id.* at Section 4(3).

<sup>230</sup> Guidelines for Compulsory National Standards at pages 65.

<sup>231</sup> *Id.* at pages 93 - 94.

<sup>232</sup> *Id.* at pages 56 - 57.

- Sanitation services for toilets to ensure that they can be used conveniently and safely. Entrances must be positioned to provide maximum privacy in entering and leaving a toilet block. The location of toilets must consider the need to minimise odours (taking account of prevailing winds) and avoid contamination of water supplies and food. All toilets and infiltration systems must be located at least 50m from any groundwater source, and at least 1.5 m above the groundwater table.<sup>233</sup> Provision must be made for toilets for learners and educators living with disabilities.
  - The sanitation service should also ensure privacy and security to minimise the risk of violence, including sexual violence, and to ensure sufficient privacy, toilets must be carefully located, and they and their access routes should be lit if they are used at night. Toilets should be lockable and should be unlockable when not used so that they are accessible at all times.
  - Sanitation services shall ensure that menstruation is considered. Toilets should include provision for appropriate disposal of menstrual material or private washing facilities.]
- 3. Is there provision in the law or contracts with service providers that relate to the need to ensure that people affected by the service do not suffer from a reduction in the health of their environment?**
- [As above, under the Water Services Act, to ensure affordability of water and sanitation services, the Minister must prescribe compulsory national standards relating to<sup>234</sup> *inter alia* the quality of water taken from or discharged into any water services or water resource system. These standards apply to all water services providers (such as municipalities).

There is no specific provision in contracts for water provision with service providers, however these service providers are subject to the relevant legislative provisions governing water quality.]

#### F. Non-discrimination, equality, and universal access (SDG 6.1, 6.2)

- 1. Is there any legislation about the prohibition of direct and indirect discrimination (on all grounds) and promotion of equality in accessing water and sanitation services?**

The National Water Act is the primary legislation governing the protection, use, development, conservation, management and control of water resources.<sup>235</sup> The purpose of the National Water Act is “*to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors ... promoting equitable access to water; [and] (c) redressing the results of past racial and gender discrimination.*”<sup>236</sup> Further, the National Water Act allows the Minister to disestablish a CMA or makes changes to its water management area if it “*has acted unfairly or in a discriminatory or inequitable way towards any person within its water management area.*”<sup>237</sup>

In addition, the Water Services Act specifically recognizes that “[e]veryone has a right of access to basic water supply and basic sanitation” and “[e]very water services institution must take reasonable measures to realise these rights.”<sup>238</sup> ]

- 2. Are there any legal measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities?**

Yes. Article 24 of the Constitution guarantees the right of everyone to an

<sup>233</sup> Franceys, et.al, 1992

<sup>234</sup> The Water Services Act (1997), Section 3.

<sup>235</sup> The National Water Act (1998), generally.

<sup>236</sup> *Id.* at Chapter 1, Section 2.

<sup>237</sup> *Id.* at Chapter 7, Section 87.

<sup>238</sup> The Water Services Act (1997), Chapter 1, Section 3.

environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.<sup>239</sup> Article 9 of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>240</sup> ]

**3. Is there any legal recognition for women in the empowerment, leadership, decision-making and full, equal and meaningful participation of women and girls, and the role that women play as managers, leaders and defenders of natural resources and agents of change in safeguarding the environment and water resources?**

The National Water Act has as one of its purposes the need to redress the results of past racial and gender discrimination as part of the protection, use, development, conservation and management of South Africa's water resources.<sup>241</sup>

The National Environmental Management Act, as South Africa's overarching framework environmental legislation, sets out the environmental management principles on which it is based in section 2. A component of the principle of sustainable development is that the vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.<sup>242</sup> ]

## G. Right to information, Transparency (SDG 6.b)

**1. Is there any specific legislation about the right to seek, receive and impart**

**information held by public authorities? Does the law expressly set out the right to seek, receive and impart information on water related issues?**

Part 2 of the National Water Act “*requires the Minister, as soon as it is practicable to do so, to establish national information systems, each covering a different aspect of water resources, such as a national register of water use authorisations, or an information system on the quantity and quality of all water resources. The Minister may require any person to provide the Department with information prescribed by the Minister in regulations. In addition to its use by the Department and water management institutions, and subject to any limitations imposed by law, information in the national systems should be generally accessible for use by water users and the general public.*”<sup>243</sup> In addition, the Water Services Act requires the establishment of a national information system:

“(1) The Minister must ensure that there is a national information system on water services; (2) The information system may form part of a larger system relating to water generally. (3) The public is entitled to reasonable access to the information contained in the national information system, subject to limitations necessitated by the rights enshrined in Chapter 2 of the Constitution. (4) The Minister must take reasonable steps to ensure that information provided is in an accessible format.”<sup>244</sup>

The national information system established is the National Integrated Water Information System (NIWIS). ]

**2. Does the right to information require the payment of a fee? Is there a provision on the affordability of such fee?**

The National Water Act states that “[i]nformation contained in any national information system established in terms of this Chapter must be made available by the

<sup>239</sup> Constitution, Article 24.

<sup>240</sup> Constitution, Article 9.

<sup>241</sup> National Water Act 36 of 1998, Section 2(c).

<sup>242</sup> National Environmental Management Act 107 of

1998, Section 2(4)(q).

<sup>243</sup> The National Water Act, Chapter 14.

<sup>244</sup> The Water Services Act (1997), Chapter 10, Section 67.

*Minister, subject to ... the payment of a reasonable charge determined by the Minister.”<sup>245</sup>*

The WSA states that “[t]he Minister or the provider of the national information system may charge a reasonable fee for making information available.”<sup>246</sup> ]

**3. Are there any exceptions with regard to who or what type of water and environment related information held by public authorities can be accessed?**

[The National Water Act states that “[i]nformation contained in any national information system established in terms of this Chapter must be made available by the Minister, subject to any limitations imposed by law.”<sup>247</sup>

The Water Services Act states that the purpose of the national information system is “to provide information to water services institutions, consumers and the public— (i) to enable them to monitor the performance of water services institutions; (ii) for research purposes; and (iii) for any other lawful reason.”<sup>248</sup> ]

**4. Which institutions are required by law/policy to make information on water public? Does it reference only the right to access information or also the obligation to make public such information on water related issues (e.g., are institutions obligated to provide information only upon demand, or are they obligated to publish or make available information at certain periodic intervals, on the occurrence of certain circumstances, etc.)?**

[The National Water Act states that the national information system is to be established by the DWS’s Minister of Water Affairs and “water management

*institutions”<sup>249</sup> such as the government-owned Water Boards that report to the DWS. The WSA also requires that the DWS’s Minister of Water Affairs “ensure that there is a national information system on water services.”<sup>250</sup> ]*

Both the National Water Act and WSA require that the information be made available upon demand but do not specifically require that the information be published. ]

**5. Are there requirements in relation to the language, locations, format, timing and means used for providing water and environment related information to the public? What mechanisms are in place to ensure information is made available to all including to minorities?**

[Neither the National Water Act nor the Water Services Act list any requirements with regard to the language, locations, format, timing or means used to providing water-related information to the public.<sup>251</sup> ]

**6. Are there any mechanisms to ensure that education on the importance of a healthy environment is included in school curricula, and that the link is made with sustainable drinking water supplies?**

[No. ]

**7. Are there any legal provisions requiring certain authorities to educate the population on water related issues?**

[The Water Services Act states that “[i]n performing its activities, exercising its powers and carrying out its duties a water board must ... take[e] reasonable measures to promote water conservation and water demand management, including promoting public awareness of these matters.”<sup>252</sup> ]

<sup>245</sup> The National Water Act (1998), Chapter 14, Section 142.

<sup>246</sup> The Water Services Act (1997), Chapter 10, Section 70.

<sup>247</sup> The National Water Act (1998), Chapter 14, Section 139.

<sup>248</sup> The Water Services Act (1997), Chapter 10, Section 68.

<sup>249</sup> The National Water Act (1998), Chapter 14, Section 139.

<sup>250</sup> The Water Services Act (1997), Chapter 10, Section 67.

<sup>251</sup> The National Water Act (1998).

<sup>252</sup> The Water Services Act (1997), Chapter 6, Section 34.

8. Are there any requirements in relation to access to information in contracts with water and sanitation operators?  
[No.]

#### H. Public participation (SDG 6.5.1, 6.b)

1. Is there a law/policy which addresses public participation?

Yes. Section 2 of NEMA promotes public participation of all interested and affected parties in environmental governance as a fundamental principle and objective of NEMA and states that people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation. NEMA provides for public participation as a minimum requirement (among others) when, *inter alia*, (i) introducing new legislation and/or regulations; (ii) applications are submitted for environmental authorisations (for purposes of conducting the requisite environmental impact assessment); (iii) the Minister concludes environmental management cooperation agreements in accordance with the provisions of NEMA. ]

2. What are the criteria listed in the law/policy in relation to participation in water-related issues (e.g. allocated time to provide comments, invitation to public hearings, etc.)?

In order to give effect to the abovementioned sections allowing for public participation, the following is required:  
In respect of public participation processes undertaken in terms of NEMA, before the submission of an application for an environmental authorisation, a public participation process must be undertaken and for at least 30 days after submission of the application for an environmental authorisation, the relevant competent authority and interested and affected persons must be provided with an

opportunity to comment on reports. For each public participation process, all organs of state which have jurisdiction in respect of the activity to which the application relates must comment on the reports within a period of 30 days (failing which they will be regarded as having no comment). Written comments on reports and plans submitted by registered and interested and affected persons must be recorded in the reports and plans by the person conducting public participation and such written comments, including responses to such comments and records of meetings should be attached to the reports and plans that are submitted to the competent authority.<sup>253</sup> Where a public participation process has already been undertaken through the Environment Impact Assessment processes (under and in terms of NEMA) or any other public consultation process, and that public participation process contains and covers all issues pertaining to water use activities, then that public participation process report may, subject to approval by the responsible authority, be submitted for the requirements of the water use licence application. Notice of the application must be provided to interested and affected parties by: (a) fixing a written notice board at a visible and accessible place to the public at the boundary or on the fence of: (i) the site where the water use activity to which the application relates is or is to be undertaken; or (ii) any alternative site mentioned in the application. Alternatively, where no public participation process has been undertaken pursuant to a water use licence application, then public participation must be conducted as contemplated in section 41(4) of the National Water Act, which requires that the relevant responsible authority may, at any stage of the application process, require the applicant to (a) give suitable notice in newspapers and other media: (i) describing

<sup>253</sup> Public Participation Guideline in terms of National Environmental Management Act, 1998, Environmental Impact Assessment Regulations.

Sourced at

[https://www.dffe.gov.za/sites/default/files/docs/publicparticipationguideline\\_intermsofnemaEIRegulations.pdf](https://www.dffe.gov.za/sites/default/files/docs/publicparticipationguideline_intermsofnemaEIRegulations.pdf)

the licence applied for; (ii) stating that written objections may be lodged against the application before a specified date, which must not be less than 60 days after the last publication of the notice; (iii) giving an address where written objections must be lodged; and (iv) containing such other particulars as the responsible authority may require; (b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested person and the general public; and (c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.<sup>254</sup> ]

3. **Do the contracts between governmental authorities and operators of water and sanitation services impose upon the operators an obligation to ensure or provide for public participation at any levels at which the applicable services are delivered?**

[The Water Services Act states that: “[a] water services provider must give such

1. **How does legislation/policy ensure that water and sanitation services are delivered in an improved and sustainable manner, considering the availability of water resources, competing demands and generally the needs of present and future generations?**

[Article 24 of the Constitution guarantees the right of everyone to an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.<sup>257</sup> This principle is entrenched in South Africa’s water-related legislation (the National Water Act and the Water Services Act).]

*information concerning the provision of water services as may reasonably be called for by— (a) the water services authority having jurisdiction in the area in question; (b) the relevant Province; (c) the Minister; or (d) a consumer or potential consumer.”<sup>255</sup> ]*

4. **Is the establishment of an IWRM mechanism including regional or local associations or other groupings of water users provided for and regulated by laws or regulations? How do they interact with or connect into other agencies or regulators?**  
[The National Water Act provides for the “progressive establishment by the Minister of [CMAs]. The purpose of establishing these [CMAs] is to delegate water resource management to the regional or catchment level and to involve local communities, within the framework of the national water resource strategy.”<sup>256</sup> See Section 1(A)(6) for further information regarding CMAs.]

## I. Sustainability (SDG 6.4, 6.5, 6.6)

2. **How does legislation/policy ensure that water and sanitation services are delivered in a sustainable manner to rural and deprived urban areas?**

[As per the answer to Question A(5) above, the Water Services Act states that everyone has a right of access to basic water supply and sanitation, and that every water services institution must take reasonable measures to realise these rights.<sup>258</sup> To this end, every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.<sup>259</sup> This duty must be carried out in an equitable manner, which by implication entails the

<sup>254</sup> National Water Act, 1998 & Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Appeals. Sourced at [https://www.gov.za/sites/default/files/gcis\\_document/201703/40713rg10701gon267.pdf](https://www.gov.za/sites/default/files/gcis_document/201703/40713rg10701gon267.pdf).

<sup>255</sup> The Water Services Act (1997), Chapter 4, Section 23.

<sup>256</sup> Guidelines for Compulsory National Standards at Chapter 7.

<sup>257</sup> Constitution, Article 24.

<sup>258</sup> The Water Services Act (1997), Sections 3(1) and 3(2).

<sup>259</sup> *Id.* at Section 11(1).

provision of water to marginalized groups and rural areas that have historically not had access to adequate water and sanitation services. This notion is entrenched in South Africa's constitution and is a theme throughout its environmental legislation.]

**3. How does the legislation/policy ensure that delivery of water and sanitation services are economically sustainable, with sufficient expenditure for operation and maintenance and the protection of the environment?**

[Section 9 of the Water Services Act allows the Minister to prescribe compulsory national standards for the provision of water services and effective and sustainable use of water resources for water services.<sup>260</sup> Such standards relate to *inter alia* the effective and sustainable use of water resources for water services.]

[In addition, the National Water Act states that the role of the governing board of a CMA is “*to ensure that the institution exercises its powers or performs its duties in a proper, efficient, economical and sustainable manner.*”<sup>261</sup> The National Water Act also states that a water services authority must consider, to the extent that it considers it to be relevant, the “*economic and financial efficiency of ... the water services in question.*”<sup>262</sup>] ]

**4. How does the legislation/policy reduce the number of people suffering from water scarcity by optimising water use efficiency across all sectors, and ensuring sustainable withdrawals?**

[The National Water Act introduced the concept of The Reserve.<sup>263</sup> The Reserve consists of the basic human needs reserve and the ecological reserve.

The basic human needs reserve provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene. Principle 8 of the White

Paper on a National Water Policy for South Africa (1997) states that the amount of water required to give effect to the basic human needs reserve is that amount which ensures that all people have access to sufficient water. This amount must be reserved.]

**5. Is there any legislation/policy to protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes?**

[The National Water Act, NEMA and the Conservation of Agricultural Resources Act 43 of 1984 serve as the primary legislation for the protection of the water-related ecosystems and the environment. Principles such as the ‘duty of care’, enshrined in section 28 of the NEMA, require that landowners must take reasonable measures to prevent, minimise and rectify environmental degradation on their properties. In addition, these regulatory frameworks ensure that urban and commercial developments do not affect or alter the natural state of wetlands. Currently, governmental initiatives such as Working for Wetlands (a joint initiative of the Departments of Environmental Affairs (DEA), Water and Sanitation (DWS) and Agriculture, Forestry and Fisheries (DAFF)) are in place to ensure protection and restoration of water-related ecosystems. This illustration of cooperative governance and partnerships comes to life through projects that focus on the rehabilitation, wise-use and protection of wetlands. Further, the Conservation of Agricultural Resources Act of 1984 also provides for control over the utilisation of the natural agricultural resources of South Africa in order to promote the conservation of the soil, the water sources and the vegetation and the combating of weeds and invader plants; and for matters connected therewith.]

<sup>260</sup> *Id.* at Section 3.

<sup>261</sup> *Id.* at Schedule 4, § 1.

<sup>262</sup> *Id.* at Chapter 1, Section 8.

<sup>263</sup> National Water Act 36 of 1998, Section 16.

## J. Accountability/ Remedies and complaint procedures

### 1. Are there remedies provided by law/regulations to file complaints or other ways of accessing justice in reference to water, sanitation and a healthy environment? Who may file them? Are the decisions appealable?

In terms of section 33 of NEMA, any person can institute action in respect of any breach or threatened breach of any duty (barring a public duty owed by an organ of state) under any law, including in relation to licences, permission or authorisations granted under that law (i.e. NEMA, National Water Act etc.), where that duty is concerned with the protection of the environment. An individual can institute a private prosecution, in the public interest, or in the interest of the protection of the environment. Further, the Promotion of Administrative Justice Act (PAJA) provides a framework to seek administrative review of decisions made by public authorities. A review of administrative decisions in terms of the PAJA can be used to rectify institutional and structural deficiencies in the delivery of water services. Further, sections 28 and 32 of NEMA include various prescribed remedies for non-compliance of the act and requires responsible persons to take reasonable measures to remedy such harm. For example, section 28(12) of NEMA provides that any person may, after giving the Director-General or provisional head of department 30 days' notice, apply to a competent court for an order directing the Director-General or any provincial head of department to take prescribed steps (provided for in terms of section 28(4) of NEMA) if the Director-General or provincial head of department fails to take any such remedial steps. In addition, NEMA also creates a framework for environmental

management inspectors to enforce any environmental management law, including the National Water Act and the Water Services Act. Notwithstanding the foregoing, common law remains relevant in terms of providing gateways for enforcement and obtaining remedies where legislation is unhelpful. Civil society and local communities in particular can benefit from enforcing common law based remedies such as the interdict and damage claim. Similarly, regulatory agencies can use the common law to control pollution and enforce statutory requirements.<sup>264</sup>

Further, section 146 of the National Water Act establishes the Water Tribunal to hear appeals against certain decisions made by a responsible authority, CMA or water management institution under this act. The Water Tribunal is an independent body whose members are appointed through an independent selection process. The Tribunal may conduct hearings anywhere in South Africa. Complaints to the Water Tribunal can be brought by any person whom, under the National Water Act, is responsible for water affairs (this includes an organ of state and the Minister). Certain decisions by the Water Tribunal are appealable. Under section 149, a person may appeal to a High Court against a decision of the Tribunal regarding a question of law.]

### 2. Are there possibilities for financial assistance for legal counsel in cases concerning water, sanitation and a healthy environment?

Yes. Independent activist groups, non-profit organisations and other legal centres, such as the Centre for Environmental Rights, Legal Resources Centre, Lawyers for Human Rights etc. provide and/or facilitate access to pro bono environmental legal services and advice.<sup>265</sup> For example, the Centre for Environmental Rights engages in strategic litigation, advocacy, and supports community groups in defending their right to

<sup>264</sup> <https://cer.org.za/wp-content/uploads/2011/11/LHR->

[DBSA Water Report.pdf](#)

<sup>265</sup> <https://cer.org.za/about/accessing-cer-services>

a healthy environment through training and other support initiatives. However, there is specific criteria for people to qualify for the free legal advice and representation of the centre. In accordance with South African Law Society requirements, the centre will only consider cases where the person or organisation requesting advice is unable:

- to afford to engage the services of private environmental attorneys; or
- reasonably to access the resources required to engage such services (this last requirement particularly applies to non-public interest organisations).

Note however that there are no specific constitutional duties placed upon the South African government to provide financial assistance to obtain a legal practitioner for litigants in civil cases.<sup>266</sup> ]

### **3. Who monitors water & sanitation service providers?**

Under Section 3(1) of the National Water Act, the National Government is the “*public trustee of the nation’s water resources*” and must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, pursuant to its constitutional mandate. The DWS, as the regulator of water services (that includes sanitation services) in South Africa, is obliged to monitor Water Services Institutions as specified in Section 62 of the Water Services Act. The Minister and any relevant Province must monitor the performance of every water services institution in order to ensure, inter alia, (a) compliance with all applicable national standards prescribed under the Water Services Act; (b) compliance with all norms and standards for tariffs prescribed under the Water Services Act; and (c) compliance with every applicable development plan, policy statement or business plan adopted in terms of the Water Services Act. At the regional level, the DWS has nine regional offices, one in each region,

implementing the DWS’ policy, as well as controlling and monitoring services. These regional offices correspond nine Water Management Areas, each managed by a CMA involving local communities. Further, the Department of Agriculture, Forestry and Fisheries, through its Directorate of Water and Irrigation Development, ensures the efficient development and revitalization of irrigation schemes. ]

### **4. Is there a possibility to appeal against the decisions of service providers? With whom would such an appeal be lodged, and under which conditions is such an appeal possible?**

[Under Section 148(1) of the National Water Act, a person may appeal the Water Tribunal decisions by a CMA, a responsible authority, a water management institution or the Minister responsible for water affairs. The complaint must be commenced within 30 days after publication of the decision in the Gazette, notice of the decision is sent to the person or reasons for the decisions are given—whichever occurs the latest. Part 2 of Schedule 6 of the National Water Act provides the procedure for lodging and hearing appeals and applications at the Water Tribunal. ]

### **5. Are there any protective mechanisms to ensure that there is a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence?**

Yes. The South African Human Rights Commission (the “SAHRC”) is an entity established and regulated by the South African Human Rights Commission Act 40 of 2013 (the SAHRC Act) pursuant to sections 115 and 184 of the Constitution. According to the Preamble to the SAHRC Act, the Constitution requires the SAHRC to:

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights;

<sup>266</sup> *Id.* at Section 38.

(c) monitor and assess the observance of human rights in South Africa; and

(d) annually require relevant organs of state to provide information on the measures that they have taken towards the promotion of rights concerning, *inter alia*, water, social security, and the environment. The SAHRC consists of eight “commissioners” who:

(a) must serve impartially and independently and exercise their powers in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law;

(b) may not use the position or privileges of a commissioner or a member of staff for private gain or to benefit another person improperly; and

(c) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission. The SAHRC also imposes an obligation on all organs of state to afford the SAHRC such assistance as may be reasonably

required for the protection of the independence, impartiality and dignity of the SAHRC and in pursuit of the objects stated above. ]

6. **Is there any legislation to respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters?**

Yes. The Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. Section 16 of the Bill of Rights (contained in Chapter 2 of the Constitution) provides that everyone has the right to freedom of expression (noting that this right does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm), freedom of association and assembly, demonstration, picket and petition. This right extends to all environmental matters. ]

## CHAPTER 5: JUDICIARY SYSTEM

### A. Preliminary questions

#### 1. What is the relationship between international law and national law (i.e. is the state a monist or dualist system--how is international law interpreted in relation with domestic law)?

South Africa's approach to international law has both monist and dualist features. South Africa follows a monist approach with regard to customary international law and a dualist approach with regard to treaties.<sup>267</sup>

Customary international law is directly enforceable in South African courts. Under Section 232 of the Constitution, customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of Parliament.<sup>268</sup>

A treaty must be incorporated into domestic law by implementing legislation before it becomes enforceable. Under Section 231(2) of the Constitution, an international agreement can bind South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.<sup>269</sup> Section 231(3) provides that some international agreements—such as those of a technical, administrative or executive nature - or those that do not require either ratification or accession - bind South Africa without approval by the National Assembly or the National Council of Provinces.<sup>270</sup> Under Section 231(4), any international agreement becomes law in South Africa when it is enacted into law by domestic legislation, excluding a so-called

self-executing provision of an agreement, unless it is inconsistent with the Constitution or an act of Parliament.<sup>271</sup>

The monist-dualist distinction appeared in the Constitutional Court's decision in *Glenister v President of the Republic of South Africa and Others*, where the Court was divided on the correct interpretation of a number of constitutional provisions dealing with the binding nature of international treaties in domestic law.<sup>272</sup> In *Glenister*, the Court considered whether the Constitution requires Parliament to establish an independent anti-corruption unit and, if so, whether Parliament complied.

A minority of the Court concluded that Section 231(2) does not imply that an international agreement ratified by Parliament becomes domestic law; it becomes law only once it has been incorporated in terms of Section 231(4) into domestic law by an act of Parliament.<sup>273</sup> While ratification is not without consequence, it merely indicates South Africa's intention to be bound *on the international level* and a concurrent responsibility to other states,<sup>274</sup> ratification does not bind South Africa *on the domestic level* by transforming obligations under treaties into constitutional rights.<sup>275</sup>

By contrast, the majority of the Court concluded that Section 231(2) has domestic effect: the fact that South Africa is bound *on the international level* has a significant impact on the state's domestic obligations in

<sup>267</sup> Ferreira, G. & Ferreira-Snyman, A. (2014). The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism. *Potchefstroomse Elektroniese Regsblad (PER)*. 17(4). Retrieved from [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812014000400009#top4](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812014000400009#top4) (accessed on 09-11-2022).

<sup>268</sup> *Supra* note 5, Article 232.

<sup>269</sup> *Id.* at Section 231(2).

<sup>270</sup> *Id.* at Section 231(3).

<sup>271</sup> *Id.* at Section 231(4).

<sup>272</sup> See *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC).

<sup>273</sup> *Id.* (Ngcobo CJ, Brand AJ, Mogoeng J and Yacoob J) at paras 89 - 92.

<sup>274</sup> *Id.* at paras 91 - 92.

<sup>275</sup> *Id.* at para 103.

protecting and fulfilling the Bill of Rights.<sup>276</sup> The obligations inherent in the international agreements the Court refers to<sup>277</sup> impose on South Africa a duty under international law to create an independent anti-corruption unit. The Court emphasised that this duty exists not only in the international sphere, but that it also exists in the domestic sphere because the Constitution requires the state to fulfil the duties contained in the international agreements within the domestic sphere as well.<sup>278</sup> Nonetheless, the majority stressed that the result of its approach was not to incorporate international agreements into the Constitution.

Some legal scholars suggest that South Africa's approach to international law is one of harmonisation because it is primarily aimed at making consistent public international law and South African domestic law.<sup>279</sup>

Furthermore, South African courts consider public international law when interpreting the Constitution's Bill of Rights and domestic legislation. With regard to the Bill of Rights, Section 39(1)(b) employs public international law as an aid to interpret the rights contained in the Bill.<sup>280</sup> The Constitutional Court in *S v Makwanyane* confirmed that this provision includes public international law that is both binding and non-binding on South Africa.<sup>281</sup> The Court nevertheless emphasised that there is no duty on South Africa to give effect to public international law; courts are merely required to consider it

in the context of the peculiarities of the South African Bill of Rights.<sup>282</sup> What must be enforced is the Bill of Rights, not the relevant norms of public international law.

With regard to domestic legislation, courts will adhere to public international law wherever possible. Under Section 233, a court must favor any reasonable interpretation of legislation that is consistent with international law.<sup>283</sup> Moreover, South African law honors a presumption that Parliament does not legislate in violation of international law.<sup>284</sup>

## 2. What is the hierarchical structure of the legal system?

Although South Africa is divided into nine provinces, the country has a single national court system.

Sections 165 to 180 of the Constitution ("Courts and Administration of Justice") set out the structure of South Africa's court system and define the role of each court.

Section 165 provides that the judicial authority of South Africa is vested in the courts, and Section 166 identifies these courts as: (1) the Constitutional Court; (2) the Supreme Court of Appeal (replacing the Appellate Division); (3) the High Courts (designated by provincial division); (4) the Magistrates' Courts; and (5) any other court established or recognized by an Act of Parliament.<sup>285</sup>

High Courts function as trial courts, the Court of Appeal as an intermediate appellate court and the Constitutional Court as the apex court in South Africa.<sup>286</sup> Since the adoption

<sup>276</sup> *Id.* (Mosenke DCJ, Cameron J, Froneman J, Nkabinde J and Skweyiya J) at para 182.

<sup>277</sup> Among other international agreements, the Court refers to the United Nations Convention against Corruption (2004) and the African Union Convention on Preventing and Combating Corruption (2004). See *id.* at para 167.

<sup>278</sup> *Id.* at paras 189-92.

<sup>279</sup> Dugard, J., et al. (2005). *International Law: A South African Perspective*. Juta, pages 42-43.

<sup>280</sup> *Supra* note 5, at Section 39(1)(b); *see also* Section 35(1) of the Interim Constitution.

<sup>281</sup> *S v Makwanyane* 1995 (3) SA 391 (CC), para 35;

*see also* *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC), para 39.

<sup>282</sup> *Id.* at paras 36-37.

<sup>283</sup> *Supra* note 5, at art. 233; *see also* *International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), paras 42-44, 83-85.

<sup>284</sup> See Du Plessis, L.M. (2015). *Re-Interpretation of Statutes*. LexisNexisSouthAfrica, page 173.

<sup>285</sup> Retrieved from <https://ox.libguides.com/>

<sup>286</sup> Retrieved from <http://www.justice.gov.za/about/sa-courts.html> (accessed on 09-11-2022).

of the 17th Amendment of the Constitution in 2012, the jurisdiction of the Constitutional Court has been significantly broadened. That amendment made the Court the highest court of appeal not just for constitutional issues, but also for all cases that raise an arguable point of law of general public importance, of which the Court ought to consider.<sup>287</sup>

Specialist courts have also been established for various matters, including Labour Courts, the Land Claims Court, Equality Courts, Community Courts, Sexual Offences Courts and Children's Courts.<sup>288</sup> African customary law is administered by the courts for chiefs and headmen, subject to the Council of Traditional Leaders. ]

**3. Has the State ratified the relevant international conventions establishing regional or international complaint mechanisms?**

Currently, eight<sup>289</sup> international human rights treaties allow an individual to bring complaints alleging violations of treaty rights.<sup>290</sup> For each treaty, a committee of experts monitors the implementation of treaty provisions by state parties. The committees may consider individual complaints against a state party only if the state party has ratified an optional protocol to the relevant treaty or, in some cases, has made a declaration under a provision of the treaty.<sup>291</sup> An individual can bring a complaint

<sup>287</sup> See *supra* note 5, at Section 167(3)(b)(ii).

<sup>288</sup> Retrieved from

<http://www.justice.gov.za/about/sa-courts.html> (accessed on 09-11-2022).

<sup>289</sup> (1) The International Covenant on Civil and Political Rights; (2) the International Convention on the Elimination of All Form of Racial Discrimination; (3) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (4) the Convention on the Elimination of All Forms of Discrimination against Women; (5) the Convention on the Rights of Persons with Disabilities; (6) the International Convention for the Protection of All Persons from Enforced Disappearance; (7) the International Covenant on Economic, Social and Cultural Rights; and (8) the Convention on the Rights of the Child or its two Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict.

<sup>290</sup> Retrieved from

<https://www.ohchr.org/en/hrbodies/tbpPetitions/pages/hrbpPetitions.aspx> (accessed on 09-11-2022).

<sup>291</sup> *Id.* The Human Rights Committee may consider individual complaints alleging violations of the International Covenant on Civil and Political Rights by state parties to the First Optional Protocol to the Covenant.

The Committee on Elimination of Discrimination against Women may consider individual complaints alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by state parties to the Optional Protocol to the Convention.

The Committee against Torture may consider

individual complaints alleging violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by state parties who have made the declaration under article 22 of the Convention.

The Committee on the Elimination of Racial Discrimination may consider individual complaints alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by state parties who have made the declaration under article 14 of the Convention.

The Committee on the Rights of Persons with Disabilities may consider individual complaints alleging violations of the Convention on the Rights of Persons with Disabilities by state parties to the Optional Protocol to the Convention.

The Committee on Enforced Disappearances may consider individual complaints alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by state parties who have made the declaration under article 31 of the Convention.

The Committee on Economic, Social and Cultural Rights may consider individual complaints alleging violations of the International Covenant on Economic, Social and Cultural Rights by state parties to the Optional Protocol to the Covenant.

The Committee on the Rights of the Child may consider individual complaints alleging violations of the Convention on the Rights of the Child or its two Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict by state parties to the Third Optional Protocol on a

against South Africa for five of the eight treaties.<sup>292</sup>

The African Charter on Human and People's Rights (the **Charter**) is the foremost legal instrument for the promotion of human rights in Africa. The Charter establishes duties for states and individuals and recognizes civil and political rights,<sup>293</sup> as well as economic, social and cultural rights.<sup>294</sup> The African Commission on Human and Peoples' Rights (the **Commission**) is tasked with interpreting the Charter<sup>295</sup> and monitoring state compliance by considering reports on measures implementing the Charter.<sup>296</sup> The Charter empowers the Commission to "*resort to any appropriate method of investigation.*"<sup>297</sup> Anyone, either on his or her own behalf or on behalf of someone else, may bring a complaint to the Commission alleging that a state party to the Charter has violated one or more of the rights.<sup>298</sup> These complaints are received under Article 55 of the Charter, entitled "[o]ther communications," which provides:

1. *Before each session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.*
2. *A Communication should be considered by the Commission if a simple majority of its members so decide.*<sup>299</sup>

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communications procedure.

<sup>292</sup> Individual complaints are not permissible for the International Convention for the Protection of All Persons from Enforced Disappearance (Convention never ratified); the International Covenant on Economic, Social and Cultural Rights (Optional Protocol never ratified); or the Convention on the Rights of the Child or its two Optional Protocols (third Optional Protocol on a communication procedure never ratified).

<sup>293</sup> See Articles 2-3, 5-13 of the African Charter on Human and People's Rights.

<sup>294</sup> *Id.* at Articles 14-18.

<sup>295</sup> *Id.* at Article 45(3).

<sup>296</sup> *Id.* at Article 62.

However, where the Commission receives "*one or more communications [that] apparently relate to special cases that reveal the existence of a series of serious or massive violations of human and peoples' rights,*"<sup>300</sup> the Charter requires the Commission to bring such cases to the attention to the Assembly of Heads of State and Government, who "*may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.*"<sup>301</sup>

Where the Commission considers the case to be an emergency, it can refer the case to the Chairman of the Assembly, who may request that the Commission undertake an in-depth study.<sup>302</sup> Currently, there have been three decisions by the Commission on communications involving South Africa.<sup>303</sup> The African Court of Human and People's Rights (the **Court**) can also hear individual complaints. A Protocol of the Charter established the Court;<sup>304</sup> however, the Court's jurisdiction applies only to the 24 states that have ratified the Protocol.<sup>305</sup> South Africa is one of these states and, therefore, is subject to the Court's jurisdiction. Although Article 5(3) of the Protocol allows individuals to bring cases directly before the Court,<sup>306</sup> a state party must make an optional declaration under Article 34(6) of the Protocol in order to enable this individual complaint procedure.<sup>307</sup> As of November of 2018, only

<sup>297</sup> *Id.* at Article 46.

<sup>298</sup> Retrieved from <http://www.achpr.org/communications/> (accessed on 09-11-2022).

<sup>299</sup> *Supra* note 246, Article 55.

<sup>300</sup> *Id.* at Article 58(1).

<sup>301</sup> *Id.* at Article 58(2).

<sup>302</sup> *Id.* at Article 58(3).

<sup>303</sup> <https://achpr.au.int/en/category/decisions-communications> (accessed on 12-12-2022).

<sup>304</sup> Retrieved from <http://www.achpr.org/>

<sup>305</sup> *Id.*

<sup>306</sup> Article 5(3) of the Protocol, retrieved from <http://www.achpr.org/>

<sup>307</sup> *Id.* at Article 34(6), retrieved from

nine AU member states<sup>308</sup> have made optional declarations.<sup>309</sup> South Africa has not made an optional declaration under Article 34(6), so the Court cannot receive individual complaints from South Africa. ]

## B. Remedies and complaint procedures/accountability

### 1. Are there remedies provided by law to file complaints or other ways of accessing justice in reference to water and sanitation? Who may file them? Are the decisions appealable?

[Yes, there are legal remedies to challenge administrative decisions by water and sanitation authorities.

Chapter 15 of the National Water Act governs the processes for appealing administrative decisions and dispute resolution.

Section 146 of the National Water Act establishes the Water Tribunal to hear appeals against certain decisions made by a responsible authority, CMA or water management institution under this act.<sup>310</sup> The Tribunal is an independent body whose members are appointed through an independent selection process. The Tribunal may conduct hearings anywhere in South Africa.<sup>311</sup>

Complaints to the Water Tribunal can be brought “*by a person*”,<sup>312</sup> which the National Water Act defines as including “a natural person, a juristic person, an unincorporated body, an association, an organ of state and the Minister [responsible for water affairs].”<sup>313</sup>

<http://www.achpr.org/>

<sup>308</sup> Benin, Burkina Faso, Côte d’Ivoire, Ghana, Malawi, Mali, Tanzania, The Gambia and Tunisia.

<sup>309</sup> Retrieved from

<https://www.acdhrs.org/2018/11/the-gambia-african-court-directly/> (accessed on 12-12-2022).

<sup>310</sup> *Supra* note 93, Section 148 lists the various administrative decisions that can be appealed to the Water Tribunal.

<sup>311</sup> *Id.* at Section 146; *see also*

<http://www.justice.gov.za/about/sa-courts.html>

(accessed on 12-12-2022).

Yes, decisions by the Water Tribunal are appealable. Under Section 149, a person may appeal to a High Court against a decision of the Tribunal regarding a question of law.<sup>314</sup>

Section 150 of the Act also provides for dispute resolution through mediation if directed by the Minister responsible for water affairs.<sup>315</sup> ]

### 2. Are such complaint procedures required to be provided in conformity with human rights principles (such as non-discrimination, equity)?

[Yes. The supremacy clause of the Constitution provides that the Constitution is the supreme law, and that “*law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*”<sup>316</sup> Thus, complaint procedures established under the National Water Act would need to conform to the Constitution. Additionally, Section 8 ensures that the Bill of Rights applies to all organs of state.<sup>317</sup> Thus, all rights codified in the Bill of Rights, including rights embodying principles of non-discrimination<sup>318</sup> and equity,<sup>319</sup> necessarily apply to complaint procedures established pursuant to other provisions of the Constitution. ]

### 3. Does the law provide for financial assistance for legal counsel in cases concerning water and sanitation?

[No. There are no specific constitutional duties placed upon the South African government to provide financial assistance to obtain a legal practitioner for litigants in civil cases.<sup>320</sup>

<sup>312</sup> *Id.* at Section 148(1).

<sup>313</sup> *Id.* at Section 1(1).

<sup>314</sup> *Id.* at Section 149.

<sup>315</sup> *Id.* at Section 150.

<sup>316</sup> *Supra* note 5, Section 2.

<sup>317</sup> *Id.* at Section 8(1).

<sup>318</sup> *See id.* at Section 9.

<sup>319</sup> *See id.* at Section 29 (education); Section 25 (freedom of religion, belief and opinion); Section 25 (property) of the Constitution.

<sup>320</sup> *Id.* at Section 38.

The South African Legal Aid Board (the **Board**) has been the main vehicle for the delivery of legal aid services. Most of the Board's budget is dedicated to criminal legal aid.<sup>321</sup> South Africa has tried a variety of mechanisms for delivering civil legal aid services, including:

(1) uncompensated private counsel (pro bono); (2) state-compensated private counsel (judicare); (3) state-funded candidate attorneys in rural law firms; (4) state-funded law clinics; (5) state-funded justice centres (one-stop legal aid shops); (6) private, specialist law firms; (7) independent university law clinics; (8) paralegal advice offices; and (9) legal insurance schemes. More recent developments include the proposed recognition of contingency fees.<sup>322</sup>

#### 4. Who monitors the administrative level bodies and/or service providers?

Under Section 3(1) of the National Water Act, the National Government is the "*public trustee of the nation's water resources*" and must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, pursuant to its constitutional mandate.<sup>323</sup>

Two Departments are involved in water management and irrigation development:

- The DWS, replacing the former Department of Water Affairs, is the custodian of South Africa's water resources. It is primarily responsible for the formulation and implementation of policy governing this sector. It also has an overriding responsibility for water services provided by local government. In addition to striving to ensure that all South Africans gain access to clean water and safe sanitation, the water

sector also promotes effective and efficient water resources management to ensure sustainable economic and social development. The Minister is ultimately responsible for ensuring that water is allocated in the public interest whilst promoting environmental values.<sup>324</sup>

- The Department of Agriculture, Forestry and Fisheries, through its Directorate of Water and Irrigation Development, ensures the efficient development and revitalization of irrigation schemes and water use.

At the regional level, the DWS has nine regional offices, one in each region, implementing the DWS's policy, as well as controlling and monitoring services. These regional offices correspond nine Water Management Areas, each managed by a CMA involving local communities. The Water Tribunal was established in 1998 to decide issues related to water management and actions taken by CMAs.

SANCID is the South African National Committee of the International Commission on Irrigation and Drainage. The South African Irrigation Institute is a national NGO providing irrigation standards and norms.<sup>325</sup>

Regarding water supply and sanitation at the regional level, the Water Boards are organs of state that provide water services (bulk potable water and wastewater treatment) in their respective service areas.<sup>326</sup>

WSAs are municipalities ensuring access to water services. A WSA has ultimate responsibility for ensuring that end-users have access to water and sanitation services within their area of jurisdiction.<sup>327</sup> The Water Services Provider is contracted to sell water or treat wastewater and includes water boards, water committees and other agencies.<sup>328</sup>

<sup>321</sup> Retrieved from

<http://clarkcunningham.org/LegalEd/SouthAfrica-MM-Fordham.pdf> (accessed on 12-12-2022).

<sup>322</sup> *Id.*

<sup>323</sup> *Supra* note 93, Section 3(1).

<sup>324</sup> *Id.* at Section 3(2).

<sup>325</sup> Retrieved from <https://www.sabi.co.za/>

<sup>326</sup> *Supra* note 130, Sections 28-50.

<sup>327</sup> *Id.* at Sections 11-21.

<sup>328</sup> *Id.* at Sections 22-23; see also DWA. (2013)

The Minister of Water Affairs and Forestry must monitor the performance of every water services institution.<sup>329</sup> If the WSA has not effectively performed its function, the Minister may request the relevant Province to intervene;<sup>330</sup> if the Province fails to intervene or intervenes ineffectively, the Minister may take over any function of the WSA.<sup>331</sup> The National Council of Provinces may review the Minister's takeover of WSA functions and may make recommendations to the Minister.<sup>332</sup> ]

**5. Is there a possibility to appeal against the decisions of service providers? With whom would such an appeal be lodged, and under which conditions is such an appeal possible?**

[Water boards provide water services (bulk potable water and wastewater treatment) to other water services institutions within their respective service areas.<sup>333</sup> There are 15 water boards in South Africa.<sup>334</sup>

Under Section 148(1) of the National Water Act, a person may appeal the Water Tribunal decisions by a CMA, a responsible authority, a water management institution or the Minister responsible for water affairs.<sup>335</sup>

The complaint must be commenced within 30 days after publication of the decision in the Gazette, notice of the decision is sent to the person or reasons for the decisions are given—whichever occurs the latest.<sup>336</sup>

Part 2 of Schedule 6 of the Act provides the procedure for lodging and hearing appeals and applications at the Water Tribunal. ]

**6. What remedies are available at an administrative level?**

National water policy review (updated policy to overcome the water challenges of our developmental state to provide for improved access to water, equity and sustainability) Department of Water Affairs.

<sup>329</sup> *Supra* note 130, Section 62.

<sup>330</sup> *Id.* at Section 63(1).

<sup>331</sup> *Id.* at Sections 63(2) - (6).

<sup>332</sup> *Id.* at Section 63(7).

<sup>333</sup> Retrieved from <https://www.gov.za/about-sa/water-affairs> (accessed on 12-12-2022).

The Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>337</sup>

The Constitution also requires national legislation to provide for the review of administrative action by a court or an independent and impartial tribunal.<sup>338</sup>

The Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) is that national legislation. It governs remedies at the administrative level. Section 3(2)(b) of PAJA provides that in order to give force to the right to procedurally fair administrative action, an administrator must give: "(i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; and (v) adequate notice of the right to request reasons."<sup>339</sup>

Under Section 59(4) of the National Water Act provides, "A person must be given an opportunity to make representations within a reasonable period on any proposed restriction or suspension before the restriction or suspension is imposed."<sup>340</sup>

Section 6 of PAJA provides that "[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action"<sup>341</sup> or the review of the failure to make a decision.<sup>342</sup>

Proceedings for judicial review are instituted in the High Court or another court having jurisdiction.<sup>343</sup> Before instituting review proceedings in a court or tribunal, an applicant must pursue "any internal remedy

<sup>334</sup> *Id.*

<sup>335</sup> *Supra* note 93, Section 148(1).

<sup>336</sup> *Id.* at Section 148(3).

<sup>337</sup> *Supra* note 5, Sections 33(1) - (2).

<sup>338</sup> *Id.* at Section 33(3).

<sup>339</sup> Section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

<sup>340</sup> *Supra* note 93, Section 59(4).

<sup>341</sup> *Supra* note 296, Section 6(1).

<sup>342</sup> *Id.* at Section 6(3).

<sup>343</sup> *Id.* at Section 7(4).

*provided for in any other law;*<sup>344</sup> however, a court or tribunal may exempt an applicant from exhausting any internal remedy if it is in the interest of justice to do so.<sup>345</sup>

Section 8 governs remedies in proceedings for judicial review. In proceedings reviewing an administrative action, a court or tribunal may grant orders:

In proceedings reviewing a failure to take a decision, a court or tribunal may grant orders:

- (a) *directing the taking of the decision;*
- (b) *declaring the rights of the parties in relation to the taking of the decision;*
- (c) *directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or*
- (d) *as to costs.*<sup>346</sup>

#### 7. Who monitors these administrative level bodies?

[See response to question 4.]

#### 8. Are such administrative bodies legally independent entities according to the law?

Yes. The Constitution also requires national legislation to provide for the review of administrative action by a court or an independent, impartial tribunal.<sup>347</sup>

Chapter 5 of the National Water Act establishes the Water Tribunal and explicitly states that it is an independent body whose members are appointed through an independent selection process.<sup>348</sup>

#### 9. Is there any evidence (e.g., case law) that courts in the country have (or may have) jurisdiction to enforce any economic, social or cultural rights?

Yes. The South African Constitution codifies several socio-economic rights. These rights are located in the Bill of Rights (Chapter 2 of the Constitution).<sup>349</sup>

Sections 26<sup>350</sup> (right to housing) and 27<sup>351</sup> (rights to food, water, health care and social assistance) are the most visible socio-economic rights. They establish the right of “everyone”<sup>352</sup> to “have access to” adequate housing, health care services, sufficient food and water and social security. They require the state to “take reasonable legislative and other means, within its available resources, to achieve the progressive realisation of each of these rights.”

A second category of provisions establishes a set of “basic” rights consisting of children’s socio-economic rights,<sup>353</sup> the right to basic education,<sup>354</sup> and detainees’ rights to adequate accommodation, nutrition, reading material and medical treatment.<sup>355</sup> These rights, unlike those in Sections 26 and 27, are not qualified by reference to reasonable measures, progressive realisation or resource constraints.

The Bill of Rights also contains provisions protecting “third-generation” rights. These are the collective rights to both environmental protection “for the benefit of present and future generations”<sup>356</sup> and a number of rights protecting aspects of self-determination<sup>357</sup> and the protection of minorities.<sup>358</sup>

<sup>344</sup> *Id.* at Section 7(2)(a) - (b).

<sup>345</sup> *Id.* at Section 7(2)(c).

<sup>346</sup> *Id.* at Section 8(2).

<sup>347</sup> *Supra* note 5, Section 33(3).

<sup>348</sup> *Supra* note 93, Section 146(2).

<sup>349</sup> On the drafting history of the socio-economic rights, see Liebenberg, S. (2010). *Socio-Economic Rights: Adjudication under a Transformative Constitution*. Juta, Chapter 1.

<sup>350</sup> *Supra* note 5, Section 26.

<sup>351</sup> *Id.* at Section 27.

<sup>352</sup> “Everyone” in sections 26 and 27 encompasses all people, not just South African citizens. *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), paras 46-47.

<sup>353</sup> *Supra* note 5, Section 28(1)(c).

<sup>354</sup> *Id.* at Section 29(1)(a).

<sup>355</sup> *Id.* at Section 35(2)(e).

<sup>356</sup> *Id.* at Section 24(b).

<sup>357</sup> *Id.* at Section 30.

<sup>358</sup> *Id.* at Section 31.

The Constitutional Court discussed the nature of socio-economic rights and the problems associated with judicial enforcement of them in the *First Certification* judgment.<sup>359</sup> The Court confirmed that the socio-economic rights in the 1996 Constitution are justiciable.]

**10. Do courts in the country have jurisdiction to hear cases regarding the obligations to respect, protect and fulfil the human rights to water and sanitation? Is there any existing case law?**

Yes. Under Section 27(1)(b) of the Constitution, everyone has the right to access sufficient water. In *Mazibuko*, the Constitutional Court recognised the importance of this right. However, it held that the right of access to sufficient water does not require the state to provide each person with water upon demand; it instead requires the state to take reasonable legislative and other measures in order to realise the achievement of access to sufficient water, considering available resources.<sup>360</sup> The Court did not provide a quantified standard determining the exact definition of the right to water. Instead, the Court concluded that the City's Free Basic Water policy was reasonable. It ruled that the evidence before the Court did not

indicate that a quantity of six kilolitres per month per household was insufficient.<sup>361</sup>

The Court also stated that courts will enforce the positive obligations imposed upon government by the constitutional social and economic rights and:

- If the government takes no steps to realise the rights, the courts will require government to take such steps;
- If the government's adopted measures are unreasonable, the courts will similarly require that they be reviewed to meet the constitutional standard of reasonableness. A measure will be unreasonable if it makes no provision for those most desperately in need.<sup>362</sup>

In *Leon Joseph*, the Constitutional Court considered whether an electricity service provider had a duty to guarantee procedural fairness to tenants, with whom the service provider had no contractual relationship, before disconnecting the tenants' electricity.<sup>363</sup> The Court unanimously held that there was a duty of procedural fairness, even if there was no contractual relationship between the service provider and the tenants. It reasoned that the service provider fulfils the constitutional and

<sup>359</sup> *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment)* 1996 (4) SA 744 (CC), paras 77-78; see also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), para 20 ("[W]hether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the [First] Certification judgment.").

<sup>360</sup> In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the Constitutional Court set out criteria for reasonableness. A reasonable policy must: be comprehensive, coherent and effective; have sufficient regard for the social economic and historical context of widespread deprivation of access to basic services for communities; make short, medium and long-term provision for water supply; give special attention to

the needs of the poorest and most vulnerable; be aimed at lowering administrative, operational and financial barriers over time; allocate responsibilities and tasks clearly to all three spheres of government; be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations; respond with care and concern to the needs of the most desperate; and achieve more than a mere statistical advance in the number of people accessing water, by demonstrating that the needs of the most vulnerable are catered for. A programme that excludes a significant segment of society cannot be said to be reasonable.

<sup>361</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), paras 86-89.

<sup>362</sup> *Id.* at para 67.

<sup>363</sup> *Leon Joseph v City of Johannesburg* 2010 (4) SA 55 (CC), paras 1-2.

statutory duties of local government to provide basic municipal services to all persons, and tenants have a right to receive basic municipal services. Thus, the service provider is obliged to guarantee procedural fairness before taking a decision that would materially and adversely affect that right.<sup>364</sup> The Court emphasized that there is a “*special cluster of relationships*” between a municipality and its citizens that is fundamentally cemented by the public responsibilities that a municipality bears under the Constitution.<sup>365</sup> Moreover, “*the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider.*”<sup>366</sup> Although the decision concerns the provision of electricity, its reasoning would similarly apply to the supply of water as a basic municipal service.

The Constitutional Court has confirmed that municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.<sup>367</sup>

In *Bon Vista Mansions*, the High Court held that the municipality is the organ of state that bears the duties set out in Section 7 of the Constitution.<sup>368</sup>

Courts are more willing to order that free potable water be provided where the state has itself quantified the entitlement. In *Federation for Sustainable Environment v Minister of Water Affairs*, following the interruption of water supply as a result of

acid mine drainage, the North Gauteng High Court ordered a municipality to provide temporary potable water in the quantity provided for in the Regulations relating to the Compulsory National Standards and Measures to Conserve Water.<sup>369</sup> ]

**11. Provide a brief overview of the judicial procedure involving a human rights violation case.**

[In addition to bringing a complaint in a court of law,<sup>370</sup> an individual may report a human rights violation to the following bodies: the South African Human Rights Commission (the **Commission**); the Independent Police Investigative Directorate; the Public Protector; the Commission on Conciliation, Mediation and Arbitration; and the Commission on Gender Equality.<sup>371</sup>

These institutions have their respective complaint procedures, and some allow individuals to file complaints online.<sup>372</sup> ]

**12. Is there a Constitutional/Supreme Court?**

**Cases are heard as the last appeal or may cases be referred directly?**

Yes. The Constitution established the Constitutional Court as the country’s highest court.<sup>373</sup> The Constitutional Court has jurisdiction over constitutional matters and any other matter that raises an arguable point of law of general public importance that the court ought to consider.<sup>374</sup>

Section 167(6) of the Constitution provides that, when in the interests of justice and with leave of the Court, a person may bring a matter directly to the Constitutional Court or appeal directly to the Constitutional Court from any other court.<sup>375</sup> ]

<sup>364</sup> *Id.* at para 47.

<sup>365</sup> *Id.* at para 25.

<sup>366</sup> *Id.* at para 34.

<sup>367</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), para 38.

<sup>368</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), paras 11-12.

<sup>369</sup> *Federation for Sustainable Environment v Minister of Water Affairs* [2012] ZAGPPHC 140.

<sup>370</sup> See answer to question 2 in Chapter 5, subsection A above.

<sup>371</sup> See *supra* note 5, Section 181(1).

<sup>372</sup> For a description of each body and links to online complaint forms, see

<https://www.westerncape.gov.za/service/complaints-regarding-human-rights-violations> (accessed on 12-12-2022).

<sup>373</sup> Retrieved from

<http://www.justice.gov.za/about/sa-courts.html> (accessed on 12-12-2022); *see also supra* note 5, Section 166(a).

<sup>374</sup> *Supra* note 5, Section 167(3)(b).

<sup>375</sup> *Id.* at Section 167(6).

**13. Have domestic courts applied international human rights law in past cases or have they referred to decisions from international human rights bodies?**

Yes. South African courts consider public international law when interpreting the Constitution's Bill of Rights and domestic legislation.<sup>376</sup> The application of international human rights law in domestic courts is most noticeable in the Constitutional Court's socio-economic jurisprudence.

The socio-economic rights in the Constitution were modelled on those in the International Covenant on Economic, Social and Cultural Rights of 1966 (the **Covenant**). Given that enforcement of the Covenant lies with the United Nations Committee on Economic, Social and Cultural rights (the **Committee**), the Committee's interpretations of the Covenant (**General Comments**) and its comments on periodic reports submitted by member states are a valuable source of guidance for South African courts. Although the General Comments do not bind South Africa, they are generally regarded as a primary source for determining the content of international socio-economic rights, and the Constitutional Court regularly refers to them.<sup>377</sup> ]

**14. Are court proceedings conducted in only one principal language, or are they also conducted in local languages, including minority and indigenous languages? Does the law require that information is made available in local languages?**

English is the only language of record in South African courts.<sup>378</sup> The Constitution recognizes eleven official languages,<sup>379</sup> and language is a protected category in the equality clause of the Constitution.<sup>380</sup> Section 35(3)(k) provides that every accused person has a right to a fair trial, which includes the right "*to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.*" Additionally, whenever Section 35—governing the rights of arrested, detained and accused persons—"requires information to be given to a person, that information must be given in a language that the person understands."<sup>381</sup> ]

**15. Have domestic courts applied (or referenced) recommendations of national human rights institutions?**

No. The Commission promotes and monitors the protection of human rights in South Africa.<sup>382</sup> It has the authority: (1) to investigate<sup>383</sup> and to report on the observance of human rights; (2) to take steps to secure appropriate redress where human rights have been violated; (3) to carry out research; and (4) to educate.<sup>384</sup> It "*must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.*"<sup>385</sup>

<sup>376</sup> See *supra* note 5, Sections 39(1)(b) and 233; see also response to question 1 in Chapter 5, Section A.

<sup>377</sup> See, for example, *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) at fn 11; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 29; and *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para 52. See also Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Water (Articles 11-12).

<sup>378</sup> Retrieved from

<https://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929> (accessed on 12-12-2022).

<sup>379</sup> *Supra* note 5, Section 6.

<sup>380</sup> *Id.* at Section 9(3).

<sup>381</sup> *Id.* at Section 35(4).

<sup>382</sup> *Id.* at Section 184(1).

<sup>383</sup> See Section 15 of the South African Human Rights Commission Act 40 of 2013.

<sup>384</sup> *Supra* note 5, Section 184(2).

<sup>385</sup> *Id.* at Section 184(3).

As an independent institution,<sup>386</sup> it must report on its activities to the National Assembly at least once a year.<sup>387</sup> The Commission may inform in writing any finding, point of view or recommendation concerning an investigation to (1) any person, (2) the head of the organization or institution, or (3) the executive authority of any national or provincial department.<sup>388</sup> The head of the organization or the executive authority must respond in writing within 60 days after becoming aware of such finding or recommendation whether the organization or department intends to give effect to the finding or recommendation.<sup>389</sup> The Commission serves an inquisitorial function; thus, its findings and recommendations do not bind domestic courts. Nonetheless, the Commission occasionally participates as *amicus curiae* in court proceedings, and courts have recognized its involvement in investigating alleged human rights violations.<sup>390]</sup>

### C. National human rights institutions

#### 1. Is there an independent national human rights institution?

[Yes.

The South African Human Rights Commission (the **SAHRC**) is an entity established and regulated by the South African Human Rights Commission Act 40 of 2013 (the **SAHRC Act**) pursuant to Sections 115 and 184 of the Constitution. The SAHRC is known as a ‘Chapter 9 Institution’ and is responsible for protecting and promoting democracy in accordance with South Africa’s Constitution. According to the Preamble to the SAHRC Act, the Constitution requires the SAHRC to:

- promote respect for human rights and a culture of human rights;
- promote the protection, development

and attainment of human rights;

- monitor and assess the observance of human rights in the Republic; and
- annually require relevant organs of state to provide information on the measures that they have taken towards the promotion of rights concerning housing, health care, food, water, social security, education and the environment.

The SAHRC consists of eight “commissioners”<sup>391</sup> who:

- must serve impartially and independently and exercise their powers in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law;
- may not use the position or privileges of a commissioner or a member of staff for private gain or to benefit another person improperly; and
- may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission<sup>392</sup>.

The SAHRC also imposes an obligation on all organs of state to afford the SAHRC such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the SAHRC and in pursuit of the objects stated above.<sup>393</sup>

#### 2. Does the mandate of the national human rights institution cover the entire human rights framework, including economic, social and cultural rights?

[Yes.

The Bill of Rights contains a number of socio-economic rights, which are considered “second generation” rights, and an important component of the Constitution’s

<sup>386</sup> *Id.* at Section 181(1) - (2).

<sup>387</sup> *Supra* note 5, Section 181(5); *see also supra* note 342, at Section 18.

<sup>388</sup> *Supra* note 342, Section 18(3).

<sup>389</sup> *Id.* at Section 18(4).

<sup>390</sup> See, for example, *Government of the Republic of*

*South Africa v Grootboom* 2001 (1) SA 46 (CC), paras 17, 97; *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA), para 6.

<sup>391</sup> *Supra* note 342, Section 5(1).

<sup>392</sup> *Id.* at Section 4(1).

<sup>393</sup> *Id.* at Section 4(2).

transformative vision. Sections 26 (*Housing*) and 27 (*Health care, food, water and social security*) are the most visible of these.

Section 27(2) of the Constitution requires the state to “*take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation*” of the socio-economic rights entrenched in the Constitution.

As noted in question 1 of Section C above, the Preamble to the SAHRC Act mandates that the SAHRC require the relevant organs of state to provide it with information on the measures that have been taken towards the realisation of various rights. This implies that the state’s compliance with its obligation under Section 27(2) of the Constitution, in relation to the socio-economic rights entrenched in Section 27(1) of the Constitution, is monitored by the SAHRC in accordance with the provisions of the SAHRC Act.

In relation to cultural rights, Section 13(1) (*Powers and functions of the Commission*) of the SAHRC Act indicates that the SAHRC has the powers and functions conferred on or assigned to it by virtue of, *inter alia*, Section 184(2) of the Constitution.

Section 184(2) of the Constitution details the functions and composition of a “*Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities*” (the **Commission**). There is a separate Act that provides for the establishment of the Commission; however, according to Section 185(3), the Commission may report any matter which falls within its powers and functions to the SAHRC for investigation. ]

### **3. Is the national human rights institution authorized to receive and adjudicate complaints of violations of human right to water and sanitation right?**

[Yes. Under of Section 13(3) of the SAHRC, the SAHRC is able to:

- investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights; and if, after

due investigation, the SAHRC is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able, assist the complainant and other persons adversely affected thereby, to secure redress. Where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and

- to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group of persons. The SAHRC defines “*human rights*” as the rights contained in Chapter 2 (*Bill of Rights*) of the Constitution. The human right to water (and, indirectly, sanitation) is entrenched in Section 2 of the Constitution and therefore, a dispute relating to the right to water falls within the ambit of the SAHRC’s jurisdiction. ]

### **4. Does the national human rights institution have a legal basis or authority to initiate an action to address systemic human rights violations?**

[There are no express provisions in the Constitution or the SAHRC Act providing for the power of the SAHRC to initiate action to address systemic human rights violations. There are, however, certain indirect provisions in the Constitution and the SAHRC Act that appear to confer this power on the SAHRC.

According to Section 184(2) (*Functions of South African Human Rights Commission*) of the Constitution, the SAHRC has the powers, as regulated by national legislation, necessary to perform its functions, including the power:

- (a) *to investigate and to report on the observance of human rights; and*
- (b) *to take steps to secure appropriate redress where human rights have been violated.*

The powers of the SAHRC are further expanded in Section 13 (*Powers and*

*functions of Commission), which provides that the SAHRC is competent and is obliged to:*

- make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law;
- request any organ of state to supply it with information on any legislative or executive measures adopted relating to human rights;
- maintain, as much as practical, close liaison with institutions, bodies or authorities with similar objectives to the SAHRC in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances; and
- consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source. ]

**5. What type of remedies does the national human rights institution have the authority to impose?**

[To secure redress to complainants in a human rights dispute, the SAHRC may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.<sup>394</sup> ]

The SAHRC may, by mediation, conciliation or negotiation endeavour (a) to resolve any dispute or (b) to rectify any act or omission emanating from or constituting a violation of or threat to any human right.<sup>395</sup> ]

**6. Is the institution allowed to initiate investigations/hearings?**

[ Yes. See question 3 of Section C above. ]

**7. Does the national human rights institution have the authority to monitor how**

**remedies for violations of rights to water and sanitation are implemented by governmental authorities, service providers or others agencies/entities?**

[There are no express provisions in the SAHRC Act that detail how the SAHRC may monitor violations of the right to water and sanitation by organs of states, service providers and/or other agencies. There are however implicit provisions in the SAHRC Act that provide for such a function by the SAHRC.

According to Section 13(1)(b), the SAHRC must:

- as far as is reasonable, maintain close liaison with institutions, bodies or authorities with similar objectives to the SAHRC in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances;
- review government policies relating to human rights and to make recommendations;
- monitor the implementation of, and compliance with, international and regional conventions and treaties; international and regional covenants; and international and regional charters relating to the objects of the Commission; and
- prepare and submit reports to the National Assembly pertaining to any such convention, treaty, covenant or charter relating to the objects of the Commission.

In addition, the SAHRC may, in the manner it deems fit, in writing, make known to any person; the head of the organisation or institution; or the executive authority of any national or provincial department any

<sup>394</sup> *Id.* at Section 13(3).

<sup>395</sup> *Id.* at Section 14.

finding, point of view or recommendation in respect of a matter investigated by it.<sup>396</sup> If the SAHRC makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution, or the executive authority of any national or provincial department concerned, these heads and executives must within 60 days after becoming aware of such findings or recommendations, respond in writing to the SAHRC. This writing must indicate whether a certain organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required.<sup>397</sup> ]

## D. Regulation

### 1. Is there a water regulator established by law?

[No. There is currently no independent water regulator established by law in South Africa. The DWS acts as the custodian of South Africa's water resources. The primary responsibility of the DWS is the formulation and implementation of policy governing the water resources sector. The DWA's mandate is derived from the Constitution, the National Water Act and the Water Services Act. ]

### 2. Is the water regulator an independent entity?

[As indicated in question 1 of Section D above, there is currently no independent water regulator established in South Africa. The DWS has, however, announced that it is working toward the establishment of a National Water Resources and Services Regulator. This announcement follows calls from the Organisation Undoing Tax Abuse and Water Shortage South Africa for the establishment of an independent water regulator for the following reasons:

- there is no clear separation of functions

in the DWS, as the DWS is policymaker, operator, as well as regulator;

- the responsible manager for water services regulation in the DWS must seek approval of the Minister of Water and Sanitation before the publication of results. This is clearly a form of political scrutiny;
- since reports (such as the Blue Drop and Green Drop reports) have not been published or have been published very late on the DWS's website, a perceived lack of transparency and limited opportunities for the public to engage exist.<sup>398</sup> ]

### 3. What are the oversight mechanisms and responsibilities related to drinking water supply and sanitation services of the regulator?

[As indicated in question 1 of Section D above, there is currently no independent water regulator established in South Africa. In the absence of such an independent regulator, the DWS assumes the oversight mechanisms related to drinking water supply and sanitation services in South Africa. In general, the scope of water regulation by the DWS encompasses the following:<sup>399</sup>

- Water use authorisation: to ensure the equitable and sustainable use of water in the public interest. Water use may be authorised in terms of Schedule 1 of the National Water Act, a general authorisation, an existing lawful use, or in terms of a water use licence.
- Drinking water quality and wastewater discharge regulation, which ensures minimum standards for drinking water provision and for wastewater discharge, regulated through programmes such as the Blue Drop and Green Drop certification programmes and through national minimum norms and standards.
- Infrastructure regulation, which ensures that water infrastructure is functional;

<sup>396</sup> *Id.* at Section 18(3).

<sup>397</sup> *Id.* at Section 18(4).

<sup>398</sup> Retrieved from <https://viewer.joomag.com/water-sewage-effluent-may-june->

[2019/086342000155859991?short&](https://www.dws.gov.za/) (accessed on 12-12-2022).

<sup>399</sup> <https://www.dws.gov.za/> (accessed on 12-12-2022).

properly operated and maintained; appropriate for present and future needs; meets public health and safety standards; and is sufficiently durable for a realistic economic life expectancy. This includes dam safety regulation to ensure the on-going protection of public health and safety in relation to dams with a hazardous potential.

- The Green Drop and Blue Drop programmes, which include water and wastewater quality monitoring, reporting and compliance certification, have substantially improved the quality of drinking water and the quality of municipal wastewater discharges.
- A Pricing Strategy for raw water use has been implemented and is under review by the DWS.
- Norms and standards for water services tariffs have been developed by the DWS.
- A project to determine suitable institutional arrangements for economic regulation from source to tap and back to source has been initiated. ]

## ANNEX 1: TARGETS AND INDICATORS OF SDG 6

| TARGET   | INDICATOR (CUSTODIAN AGENCIES)  |
|--|---|
| 6.1 By 2030, achieve universal and equitable access to safe and affordable drinking water for all  | 6.1.1 Proportion of population using safely managed drinking water services (World Health Organization (WHO)/United Nations Children's Fund (UNICEF))   |
| 6.2 By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations  | 6.2.1a Proportion of population using safely managed sanitation services (WHO/UNICEF)<br><br>6.2.1b Proportion of population using a handwashing facility with soap and water available (WHO/UNICEF)  |
| 6.3 By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally                           | 6.3.1 Proportion of wastewater safely treated (WHO/United Nations Human Settlements Programme (UN-Habitat/United Nations Statistics Division (UNSD))<br><br>6.3.2 Proportion of bodies of water with good ambient water quality (United Nations Environment Programme/UNSD)   |
| 6.4 By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity                                      | 6.4.1 Change in water-use efficiency over time (Food and Agriculture Organization of the United Nations (FAO))<br><br>6.4.2 Level of water stress: freshwater withdrawal as a proportion of available freshwater resources (FAO)  |
| 6.5 By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate   | 6.5.1 Degree of integrated water resources management implementation (0–100) (United Nations Environment Programme)<br><br>6.5.2 Proportion of transboundary basin area with an operational arrangement for water cooperation (United Nations Educational, Scientific and Cultural Organization (UNESCO)/United Nations Economic Commission for Europe (UNECE)) |
| 6.6 By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes  | 6.6.1 Change in the extent of water-related ecosystems over time (United Nations Environment Programme/Ramsar Convention)   |
| 6.a By 2030, expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies | 6.a.1 Amount of water- and sanitation-related official development assistance that is part of a government-coordinated spending plan (WHO/United Nations Environment Programme/Organization for Economic Co-operation and Development (OECD))   |
| 6.b Support and strengthen the participation of local communities in improving water and sanitation management   | 6.b.1 Proportion of local administrative units with established and operational policies and procedures for participation of local communities in water and sanitation management (WHO/United Nations   |

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|  | Environment Programme/OECD) |
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Source: Sustainable Development Goal 6 - Synthesis Report on Water and Sanitation (2018), Table 1

## ANNEX 2: The human rights to water and sanitation and the right to a healthy environment compared

*Table 1: Comparison of the human rights principles*

| Principles of the Human Right to a Healthy Environment (from Framework Principles)   | Principles of the Human Rights to Water and Sanitation (from General Comment No.15)   |
|--|---|
| <b>Human Rights</b>  |   |
| Principle 1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.       | <p>GC 1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.</p> <p>GC 20. The right to water, like any human right, imposes three types of obligations on States parties: obligations to respect, obligations to protect and obligations to fulfil.</p>  |
| <b>Sustainable environment</b>   |   |
| Principle 2. States should respect, protect and fulfil human rights in order to ensure <u>a safe, clean, healthy and sustainable environment</u> | <p><i>Respect:</i> GC 21: The obligation to <i>respect</i> requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, <i>inter alia</i>, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; <u>unlawfully diminishing or polluting water</u>, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.</p> <p><i>Protect:</i> GC 23. The obligation to <i>protect</i> requires States parties to prevent third parties from</p> |

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|  | <p>interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, <i>inter alia</i>, adopting the necessary and effective legislative and other measures to restrain, <u>for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.</u></p> <p><i>Fulfill:</i> GC26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. ... and facilitating improved and <u>sustainable access to water, particularly in rural and deprived urban areas.</u></p> <p>GC.11. The manner of the realization of the right to water must also be <u>sustainable, ensuring that the right can be realized for present and future generations.</u></p> |
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#### Non-Discrimination

Principle 3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

GC. 15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

#### Safety and freedom of expression

Principle 4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation

GC. 44,b Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.

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| and violence   |   |
| Principle 5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.  |   |
| <b>Public Awareness and education</b>  |   |
| Principle 6. States should provide for <u>education and public awareness on environmental matters.</u>   | <p>GC, 25. The obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. The obligation to promote obliges the State party to take steps to ensure that there is <u>appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage.</u></p> <p>Article 24, para. 2, of the Convention on the Rights of the Child requires States parties to “To ensure that <u>all segments of society [...] have access to education and are supported in the use of basic knowledge of [...] the advantages of [...] hygiene and environmental sanitation.</u>”</p> |
| <b>Access to Information</b>   |   |
| Principle 7. States should provide <u>public access to environmental information</u> by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request. | GC 48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. <u>Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.</u>  |
| <b>Accountability</b>  |   |
| Principle 8. To avoid undertaking or authorizing actions with environmental impacts that interfere with the full   | 56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the   |

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| <p>enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.</p> | <p>relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies</p> <p>GC 24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment.</p> |
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### Public Participation

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| <p>Principle 9. States should provide for and facilitate <u>public participation in decision-making related to the environment</u> and take the views of the public into account in the decision-making process.</p> | <p>GC 48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. <u>The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.</u> Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.</p> |
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### Remedies

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| <p>Principle 10. States should provide for <u>access to effective remedies for violations of human rights and domestic laws</u></p> | <p>55. Any persons or groups who have been denied their right to water should have <u>access to effective judicial or other appropriate remedies</u> at both</p> |
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| relating to the environment   | national and international levels   |
| <b>Standards and Indicators</b>   |   |
| Principle 11. States should establish and maintain <u>substantive environmental standards</u> that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.  | 53. To assist the monitoring process, <u>right to water indicators</u> should be identified in the national <u>water strategies or plans of action</u> . The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control. |
| <b>Violations</b>   |   |
| Principle 12. States should ensure the effective enforcement of their environmental standards against public and private actors.  | GC 55. All victims of violations of the right to water should be <u>entitled to adequate reparation</u> , including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.   |
| <b>International Cooperation</b>  |   |
| Principle 13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights. | GC 30. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.<br><br>GC 38. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables  |

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|   | developing countries to fulfil their core obligations indicated in paragraph 37 above.  |
| <b>Non-Discrimination</b>   |   |
| Principle 14. States should take additional measures to <u>protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm</u> , taking into account their needs, risks and capacities.  | 16. Whereas the right to water applies to everyone, States parties should give <u>special attention to those individuals and groups who have traditionally faced difficulties in exercising this right</u> , including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.  |
| Principle 15. States should ensure that they <u>comply with their obligations to indigenous peoples</u> and members of traditional communities, including by: <ol style="list-style-type: none"> <li>Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used.</li> <li>Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources.</li> <li>Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories, and resources.</li> <li>(d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories, or resources.</li> </ol> | GC 7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment No.12 (1999)). Attention should be given to <u>ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology</u> . Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is <u>adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples</u> .<br>GC 16 (d) 16... In particular, States parties should take steps to ensure that:<br>... <u>(c) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;</u> <u>(d) Indigenous peoples' access to water resources on their</u> |

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|  | <p><u>ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;</u> (e) Nomadic and traveler communities have access to adequate water at traditional and designated halting sites; (f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals;</p>   |
| <b>Sustainability</b>  |   |
| Principle 16. States should respect, protect and fulfil human rights in the actions they take to <u>address environmental challenges and pursue sustainable development.</u> | <p>11. The elements of the right to water must be adequate for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of <u>the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.</u></p> <p>26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; <u>and facilitating improved and sustainable access to water,</u> particularly in rural and deprived urban areas.</p> |