

SOME COMMENTS ON WATER RIGHTS IN SOUTH AFRICA

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Summary

Human life, as with all animal and plant life on the planet, is dependant upon fresh water. Water is not only needed to grow food, generate power and run industries, but it is also needed as a basic part of human life. Human dependency upon water is evident through history, which illustrates that human settlements have been closely linked to the availability and supply of fresh water.

Access to the limited water resources in South Africa has been historically dominated by those with access to land and economic power, as a result of which the majority of South Africans have struggled to secure the right to water. Apartheid era legislation governing water did not discriminate directly on the grounds of race, but the racial imbalance in ownership of land resulted in the disproportionate denial to black people of the right to water. Beyond racial categorisations, the rural and poor urban populations were traditionally especially vulnerable in terms of the access to the right.

The enactment of the Constitution of the Republic of South Africa 1996, brought the South African legal system into a new era, by including a bill of fundamental human rights (Bill of Rights). The Bill of Rights makes provision for limited socio-economic rights. Besides making provision for these human rights, the Constitution also makes provision for the establishment of state institutions supporting constitutional democracy.

The Constitution has been in operation since May 1996. At this stage, it is important to take stock and measure the success of the implementation of these socio-economic rights. This assessment is important in more ways than one, especially in the light of the fact that many lawyers argued strongly against

the inclusion of the second and third generation of human rights in a Bill of Rights. The argument was that these rights are not enforceable in a court of law and that they would create unnecessary expectations of food, shelter, health, water and the like; and that a clear distinction should be made between first generation and other rights, as well as the relationship of these rights to one another.

It should be noted that there are many lawyers and non-lawyers who maintained that in order to confront poverty, brought about by the legacy of apartheid, the socio-economic rights should be included in a Bill of Rights. The inclusion of section 27 of the 1996 Constitution has granted each South African the right to have access to sufficient food and water and has resulted in the rare opportunity for South Africa to reform its water laws completely. It has resulted in the enactment of the Water Services Act 108 of 1997 and the National Water Act 36 of 1998.

In this paper the difference between first and second generation rights will be discussed. The justiciability of socio-economic rights also warrants an explanation before the constitutional implications related to water are briefly examined. Then the right to water in international and comparative law will be discussed, followed by a consideration of the South African approach to water and finally, a few concluding remarks will be made.