Integrated Water Resource Management, Public Participation and the ‘Rainbow Nation’

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Abstract

This article provides varied examples of Integrated Water Resource Management (IWRM) and public participation interaction in South Africa. It critically examines the inadequate application of IWRM, and shows how the unbalanced interpretations of IWRM as well as a lack of good development practice and participatory rights manifest in negative outcomes for the poorest and most vulnerable. This paper, first, highlights that if decision-makers are primarily fixed on economic concerns, they induce inefficient IWRM framework that fails to balance water as a social, economic and ecological concern. Second: when the state fails to consult people and violate human and environmental rights, court battles ensue between the state and the people. These court cases are generally expensive for both sides and marred with delay. Third: positive outcomes can be attained through multi-stakeholder dialogue platforms which can operate as a sort of conflict resolution mechanism encompassing divergent views, but still offering beneficial outcomes. The frameworks and practical examples set by the Water Dialogues South Africa can facilitate public participation and capacity building if applied at local levels by decision-makers. IWRM with public participation at its heart engenders an ultimate objective for better water sustainability and water security in South Africa.

Keywords

Integrated water resource management; public participation; right to water; South Africa

1. Introduction

[i]t is not only increasing access to water and sanitation but increasing access to the management of water and sanitation which will determine whether progress can be made and sustained.¹

This article provides varied examples of Integrated Water Resource Management (IWRM) and public participation interaction in South Africa² and critically examines the inadequate application of IWRM in relation to the poorest and

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¹) WSSCC, *Kyoto: the agenda has changed* (Pamphlet from 3rd World Water Forum, Kyoto, Japan), available online at <http://www.wsscc.org/resources/resource-publications/kyoto-2003-agenda-has-changed> (accessed 11 June 2013).

²) This paper will not consider the transboundary watercourses management and its socio-legal impacts.

most vulnerable.³ In this paper, IWRM is viewed to be a wholly inclusive water governance process that places no hegemony on any participant or any of its central themes, rather balancing them in decision outcomes that are collectively reached and set in open and transparent local community-based settings. In South Africa, if full IWRM is implemented from a development perspective, plausibly valued by decision-makers and better ingrained in public consciousness, it can be instrumental in engendering a greater veracity of a participatory democracy offering substantial protection to human rights and better reciprocally owned co-operative outcomes. First, IWRM implementation can serve to negate potentials for ‘violent’⁴ protests by communities spawned from the failure or inadequacies of water service deliveries. These protests can lead to infrastructure damage that ultimately costs more funds to fix. When decision-makers primarily fixate on economic concerns,⁵ they induce inefficient IWRM framework that fail to balance water as a social, economic and ecological concern. This can provoke outcomes which cost decision-makers more of their people’s money (garnished from tax and higher service tariffs) to then rectify the decision. It is enough to diminish arguments promoted by the government that their targets are actually to reduce financial burdens and spend less, and that the decisions are for the benefit of present and future generations if in reality the decision is not cost-effective and lacks public engagement. Moreover, further problems arise when court battles ensue between the state and the people and the state fails to consult people and violates human and environmental rights. These litigations are generally expensive for both sides and marred with delay.

Second, multi-stakeholder dialogue platforms operate as a sort of ‘conflict resolution’ mechanisms encompassing divergent views and ‘confrontative dialogue’,⁶ and can offer beneficial outcomes. This type of platform is needed as there is a ‘constant tug-of-war between poor communities and local municipalities as the logic of commodification comes to define service delivery’.⁷ The frameworks

³ UNDP, *Human Development Report 2011. Sustainability and Equity: A better future for all* (UNDP, New York, NY, 2011), 45–66, available online at http://hdr.undp.org/en/media/HDR_2011_EN_Complete.pdf (accessed 10 June 2013).

⁴ J. Karamoko and H. Jain, *Community Protests in South Africa: Trends, Analysis and Explanations, Local Democracy, Peace and Human Security Project Report* (Community Law Centre at the University of the Western Cape, Cape Town, 2011).

⁵ J. Pape and D.A. McDonald, ‘Introduction’ in D.A. McDonald and J. Pape (eds.), *Cost Recovery and the Crisis of Service Delivery in South Africa*, 1–13, available online at <http://www.hsrcpress.ac.za/product.php?productid=1944&freedownload=1> (accessed 11 June 2013).

⁶ H. Abrahamsson, *The role of dialogue in confronting power*, Discussion paper (2004), available online at <http://www.waterdialogues.org/south-africa/downloads/4Process/Abrahamsson-2004-Confront-Dial-Discuss.pdf> (accessed 10 June 2013).

⁷ P. Naidoo, ‘Struggles around the commodification of daily life in South Africa’, 111 *Review of African Political Economy* (2007), 57–66.

and practical examples⁸ set by the Water Dialogues South Africa (WD-SA)⁹ can facilitate public participation and capacity building if applied at local levels by decision-makers.

Lastly, IWRM with public participation at its heart can engender an ultimate objective for better water sustainability and water security in South Africa as participants representing the whole community can resolve their conflicts by working together with the government agencies.¹⁰ Public participation is executed via meaningful engagement where everyone is equipped and supported to understand and learns from each other, everyone has a voice that counts which can actually shape strategy formations and the final outcome.¹¹ Thus, capacity building, educational provision, growth and participatory decision-making in an open and transparent manner are fundamental for the realisation of public participation.¹² Ultimately balancing the socio-eco¹³-economic decisions needed to be reached in IWRM.

2. IWRM: Conceptual Understandings and Relevance to South Africa

*In most developing countries, institutions are viewed as too weak or too young to adequately carry out IWRM and need therefore to be strengthened.*¹⁴

IWRM, largely under the auspices of the principle of sustainable development,¹⁵ seeks to provide a management framework to deal with the challenges facing

⁸ WD-SA, *Local Dialogues*, available online at <http://www.waterdialogues.org/south-africa/local.htm> (accessed 6 June 2013).

⁹ WD-SA project mandated from the 2001 International Conference on Freshwater in Bonn which gave rise to the 'Bonn Recommendations for Action' where Multi-Stakeholders Dialogue was suggested.

¹⁰ J. Butterworth, *People-centred Integrated Water Resource Management (IWRM)* (WELL, Loughborough, 2006), available online at http://www.lboro.ac.uk/well/resources/fact-sheets/fact-sheets-htm/IWRM.htm#Promoting_participation_in_catchment_level_agencies (accessed 6 June 2013). T. Greyling, *Integration of public issues and technical assessments in Environmental Impact Assessments (EIAs)-Ne'er the twain shall meet?*, available online at http://www.saiea.com/calabash/html/Integration%20of%20public%20issues_%20twain%20shall%20meet.pdf (accessed 5 June 2013). Submitted as part of the 'Calabash project' and originally sourced via the Southern African Institute for Environmental Assessment (SAIEA), available online at <http://www.saiea.com/> (accessed 5 June 2013).

¹¹ R. Pithouse, 'Rethinking Public Participation from below', *Critical Dialogue* (2006), 7–8, available online at <http://abahlali.org/files/Critical%20Dialogue%20ABM.pdf> (accessed 6 June 2013)

¹² J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997), 51–97.

¹³ To mean 'ecological'.

¹⁴ Report of the Expert Group Meeting on Strategic Approaches to Freshwater Management (Harare, Zimbabwe, January 1998) Annex IV: Participation and Institutions for Integrated Water Resources Management Report of working group 4, para. 108, available online at <http://www.un-documents.net/harare-4.htm> (accessed 5 June 2013).

¹⁵ Sustainable development said to be recognised as an internationally established norm: P. Sands, *Principles of International Environmental Law*, second edn (Cambridge University Press, Cambridge, 2009), p. 252. Author cites the International Law Association's New Delhi Declaration of Principles of International Law

water resources and has emerged in many national arrangements.¹⁶ The Global Water Partnership defines IWRM as 'a process which promotes the coordinated development and management of water, land and related resources in order to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital eco-systems'.¹⁷ Thus, IWRM is a sustainable water resource governance process in which many stakeholders¹⁸ have social, economic and environmental interests; and all should be provided a means to participate and receive equal treatment. The Berlin Rules on Water Resources¹⁹ takes a similar approach regarding IWRM.

Effective water governance requires inclusion of community at all levels of decision-making. IWRM as a community based endeavour achieves much by incorporating varying perspectives of participants and balancing them at local catchment levels to maximise benefits for the poor. For a state to identify as a democracy, the people should be represented (not just private sectors) and offered a means of participation in all resource decisions. Democracies serve to protect human rights,²⁰ and it is argued that everyone has a human right to a democracy²¹ and it is 'generally only failed or authoritarian states that do not provide access to water resources'.²²

So, when states are democratic and wholly inclusive of public participation, access to water decisions is typified by achieving sustainability (i.e. the overarching element that IWRM expands from). The state is then able to provide a satisfactory right to water because water is being well managed so as to offer holistically favourable 'socio-eco-economic' outcomes. Water is an environmental resource and IWRM is therefore part of the larger integrated environmental management as well as governance sphere too. Governance of water is generally offered as being

Relating to Sustainable Development (2002); D. Fisher, *The law and governance of water resources: The challenge of sustainability* (Edward Elgar, Cheltenham, 2009), 28–29. Fisher also calls the New Delhi Declaration the 'most comprehensive and authoritative statement' on sustainable development.

¹⁶ UN-Water, *Status Report on IWRM and Water Efficiency Plans*. Prepared for 16th session of CSD (UN, New York, NY, 2008), 5, available online at http://www.unwater.org/downloads/UNW_Status_Report_IWRM.pdf (accessed 5 June 2013). Fisher, *Ibid.*, 323.

¹⁷ GWP definition of IWRM, available online at <http://www.gwp.org/en/The-Challenge/What-is-IWRM/> (accessed 10 June 2013).

¹⁸ Stakeholder is defined as 'a key individual or entity with an interest (a 'stake') in the outcome of a particular policy debate or decision' in J. Stewart, *Dilemmas of engagement: the role of consultation in governance* (ANU E Press, Canberra, ACT, 2009), p. 8.

¹⁹ Chapter II, Articles 4–9. International Law Association Berlin Conference (2004) Water Resources Law, available online at http://www.cawater-info.net/library/eng/1/berlin_rules.pdf (accessed 10 June 2013).

²⁰ Statement by the UN High Commissioner for Human Rights, Navi Pillay, on the International Day of Democracy, Tuesday 15 September 2009, available online at http://www2.ohchr.org/english/issues/rule_of_law/docs/StatementHC15092009.pdf (accessed 10 June 2013).

²¹ T. Christiano, 'An Instrumental argument for a Human Right to Democracy', 39 *Philosophy & Public Affairs* (2011), 142–176.

²² C. Staddon, T. Appleby and E. Grant, 'A right to water? Geographico-legal Perspectives', in F. Sultana and A. Loftus (eds.), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan Water Text Series, Earthscan, London, 2011), 61–77.

the range of political, organizational and administrative processes through which communities articulate interests, their input is absorbed, decisions are made and implemented, and decision makers are held accountable in the development and management of water resources and delivery of water services.²³

The inclusion of all these elements amounts to good governance²⁴ and these are the integral features of IWRM.²⁵ Advancing room for public participation is therefore a key principle within the IWRM structure.

Indeed, public participation can take on wide and varied forms, and many international and regional treaties require its integration within decision-making processes.²⁶ At the national level, it can be constitutionally enshrined as a right, such as the rights to freedom of expression or a right to protest. Public participation is also linked to substantive (e.g., right to a healthy environment, right to water) as well as procedural rights such as right to information and right to access remedy.²⁷ In the environmental law, these rights amalgamate into what has been referred to as 'access rights'²⁸ which are crucially necessary and part of the larger understanding of procedural justice.²⁹ Public participation requirements are contained within legal frameworks which furnish formal procedures for participation at policy-making levels for when new developments may affect water (or the larger environment). Examples include conducting public consultations or hearings and inviting public commentary on new policy or proposals that ultimately provide a platform for the people to mould and shape policy and offer them an opportunity to be part of the governance process. In an environmental law context, public participation in the form of consultation is necessary to conduct environmental impact assessments (EIAs) that include procedural requirements for public engagement involving interested and affected people.³⁰ Treaties as well as many non-binding documents include provisions on public participa-

²³ V.I. Grover, 'Water governance and water economics' in V.I. Grover (ed.), *Water: Global common and Global problems* (Science Publishers, Enfield, NH, 2006), pp. 221–234.

²⁴ According to UNESCAP, 'Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law', available online at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (accessed 2 June 2013).

²⁵ M. Rahaman and O. Varis, 'Integrated water resources management: evolution, prospects and future challenges', 1 *Sustainability: Science, Practice, & Policy* (2005), 15–21, at 15, available online at <http://www.scribd.com/doc/12270207/Integrated-Water-Resources-Management> (accessed 2 June 2013).

²⁶ P. van der Zaag, 'Southern Africa: Evolving Regional Water Law and Politics' in J. Dellapenna and J. Gupta (eds.), *The Evolution of Law and Politics of Water* (Springer, Dordrecht, 2009), pp. 245–261.

²⁷ B. Richardson and J. Razzaque, 'Participation in environmental decision making', in B. Richardson and S. Wood (eds.), *Environmental Law for Sustainability* (Hart, Oxford, 2006), pp. 165–194.

²⁸ See Access Initiative, available online at <http://www.accessinitiative.org/about> (accessed 2 June 2013).

²⁹ J. Razzaque, 'Participatory Rights in Natural Resource Management: the role of communities in South Asia', in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, Cambridge, 2009) 117–138.

³⁰ For example, Espoo Convention of Environmental Convention of Environmental Impact Assessment in a Transboundary Context (1991). UNECE Convention on Access to Information, Public Participation in

tion, access to information and access to justice that illustrate their significant importance.³¹ For example, the Aarhus Convention provides guidelines for public participation and, although a regional treaty, allows any UN member states to sign up.³² Recently, the UNEP guidelines on Principle 10 also assist states to fine tune their national legislations.³³ The importance of various informal tools for public participation such as protest, lobbying and attending public hearings³⁴ is recognised in Principle 10 of the Rio Declaration³⁵ and in Agenda 21.³⁶ IWRM is expressly considered in Agenda 21 and its importance lies in the fact that IWRM targets community engagement as ‘integration means not only the coordination between different economic sectors but between different elements of the community’.³⁷

Apartheid policies left South Africa with a great disparity in wealth and access to both services and natural resources. Here, a newly formed theoretical participatory democracy exists where public participation is said to be a cornerstone of its development. Acclaimed for its ‘model social rights constitution’³⁸ that boasts the entrenchment of rights to access of information,³⁹ administrative justice,⁴⁰ freedom of expression,⁴¹ participation in political activity⁴² and protest,⁴³ a clean and

Decision-Making and Access to Justice in Environmental Matters, 38 *International Legal Materials* (1999), 515. South Africa is not a signatory.

³¹ G. Pring and S. Noe, ‘The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development’, in D.M. Zillman, A. Lucas and G. Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford, 2002).

³² Article 19(3). Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (1998).

³³ UNEP, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010), available online at http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf (accessed 24 February 2014).

³⁴ Pring and Noe, *supra* note 31.

³⁵ The Rio Declaration on the Environment and Development (1992) adopted by the UN Conference on the Environment and Development (UNCED), UN.Doc.A/CONF.151/26 (Vol. I) (1992), available online at <http://www.un-documents.net/rio-dec.htm> (accessed 2 June 2013). Resolution of adoption, available online at <http://www.un-documents.net/a47r190.htm> (accessed 2 June 2013).

³⁶ Rio Declaration (*Ibid.*), Agenda 21: Chapter 18: Protection Of The Quality And Supply Of Freshwater Resources: Application Of Integrated Approaches To The Development, Management And Use Of Water Resources, paragraphs 6–11, available online at <http://www.un-documents.net/a21-18.htm> (accessed 2 June 2013).

³⁷ UN-Water, *Implementing Integrated Water Resources Management: The inclusion of IWRM in national plans*. Report from the 4th World Water Forum Theme (UN-Water, 2006), 1–13, at 7, available online at http://www.unesco.org/water/news/pdf/wwf4_report_iwrm.pdf (accessed 5 June 2013).

³⁸ Constitution of the Republic of South Africa No. 108 of 1996 (Herewith ‘the Constitution’) See quote under heading ‘South Africa’ at Right to Water, available online at <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/#SA> (accessed 5 June 2013).

³⁹ Section 32 of the Constitution.

⁴⁰ Sections 33, 34 and 35.

⁴¹ Section 16.

⁴² Section 19.

⁴³ Section 18.

healthy environment⁴⁴ and sufficient water for all,⁴⁵ to name but a few. It has a progressive water law in which water is inherently conceived of as a 'social good'.⁴⁶ Sustainable development is also viewed as having an actual legal status within its environmental law framework⁴⁷ through being 'a legal principle, not just an ill-defined norm'.⁴⁸ Also, IWRM formally exists⁴⁹ and South Africa has a policy which directly contains 'guidelines' for public participation procedure to facilitate and include all stakeholders, and expressly recognise the needs of poorer stakeholders for compensation provisions.⁵⁰ The reality, opinions and some court rulings, considered below, however assert that too many still suffer from lack of access to clean and safe water and sanitation. Examples of protests and civil unrest concerning poor service delivery highlight the lack of accountability and public participation as aggravating factors.⁵¹

A number of challenges restrict the effective water management in South Africa. It is traditionally a water stressed country faced with deteriorating water quality which is put at further risk of decreasing supplies aggravated by climate change.⁵² As a highly industrialised country in Africa,⁵³ it has joined an economic allegiance

⁴⁴) Section 24.

⁴⁵) Section 27(b).

⁴⁶) K. Tissington, M. Dettmann, M. Langford, J. Dugard and S. Conteh, *Water Service Fault Lines: An assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (CALs, COHRE and NCHR, Johannesburg, Geneva and Oslo, 2008), 2, available online at <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf> (last visited 5 June 2013).

⁴⁷) Section 24 of the Constitution. Section 2 National Environmental Management Act. T. Murombo, 'Beyond public participation: the disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development', 11 *Potchefstroom Electronic Law Journal* (2008), 1–31.

⁴⁸) *Ibid.*

⁴⁹) See Preamble to the National Water Act 36 of 1998 (herewith NWA), see DWAF (still relevant for DWA) IWRM webpage: http://www.dwaf.gov.za/iwrm/contents/about/what_is_iwrm.asp (accessed 5 June 2013); and SA IWRM webpage: <http://www.iwrm.co.za/> (accessed 5 June 2013).

⁵⁰) DWAF, *Integrated Water Resource Management: Guidelines for stakeholder participation in integrated waste resources management in water management areas in South Africa*, Edition 1 (DWAF, Pretoria, 2004) 4. See also DWAF, *Integrated Water Resource Management Plan Guidelines for Local Authorities* (Water Research Commission, Pretoria, 2007).

⁵¹) Karamoko and Jain, *supra* note 4.

⁵²) E. Simoungwe and P. Waalewijn, 'Multi-Stakeholder Dissonance in the South African Water Arena', in J. Warner (ed.), *Multi-stakeholder platforms for integrated water management* (Ashgate, Aldershot, 2007), 191–204, at 191. P. Ward, K.M. Strzepek, W.P. Pauw, L.M. Brander, G.A. Hughes and J.C.J.H. Aerts, 'Partial costs of global climate change adaptation for the supply of raw industrial and municipal water: a methodology and application', 5 *Environmental Research Letters* (2010), 044011.

⁵³) UNIDO, *Clean Development Mechanism (CDM) – Investor Guide South Africa* (UNIDO, Vienna, 2003), 4, available online at http://www.unido.org/fileadmin/user_media/Publications/Pub_free/CDM_investor_guide_South_Africa.pdf (accessed 5 June 2013).

with emerging markets like China,⁵⁴ the BRIC⁵⁵ group and now the BRICS.⁵⁶ To remedy past inequalities, economic programmes such as Black Economic Empowerment have been enacted. This was, however, criticised for enriching a small black elite and, later, the 'Broad-Based' Black Economic Empowerment phase was conceived. According to critics, this scheme masquerades for a neoliberal undertone that is establishing a black capitalist class only, in turn, to maintain a white capitalist class and their property rights.⁵⁷ It has been felt that the long arm of the state is over bureaucratic in its administrative control regarding the allocation of water licences and 'use right' set out in the National Water Act of South Africa, particularly when it suffers from administrative incapacity.⁵⁸

Greater economic development plays a crucial role in South Africa's prospective endeavours as some of these development projects demand EIA, enforcements and compliance monitoring. Water is viewed as a fundamental component of its development. This is evidenced by the Water for Growth and Development scheme⁵⁹ which is said to 'bring in the views and suggestions of all sectors of society' and to 'build momentum for integrated sustainable economic development and water planning and implementation'.⁶⁰ The Department of Water Affairs, acting as a custodian of South Africa's water resources, proclaims commitment to

⁵⁴ Beijing Declaration of the Forum on China-Africa Cooperation 2000, available online at <http://www.focac.org/eng/zyzl/hywj/t157833.htm> (accessed 6 June 2013). L. Labuschagne, 'Africa and China sign comprehensive strategic partnership' *Digital Journal online* (25 August 2010), available online at <http://www.digitaljournal.com/article/296574> (accessed 5 June 2013).

⁵⁵ Term coined by Jim O'Neill, present Chairman of Goldman Sachs Asset Management. See: B. Kowitz, 'For Mr. BRIC, nations meeting a milestone' *CNN Money online* (17 June 2009), available online at http://money.cnn.com/2009/06/17/news/economy/goldman_sachs_jim_oneill_interview.fortune/index.htm (accessed 5 June 2013).

⁵⁶ DIRC: Minister Nkoana-Mashabane on SA full membership of BRICS. (24 December 2010) Official Statement, available online at: <http://www.dfa.gov.za/docs/2010/brics1224.html> (accessed 6 June 2013); DIRC: Republic of South Africa. Address by President Jacob Zuma to the plenary of the third BRICS leaders meeting, Sanya, Hainan Island, People's Republic of China, 'Broad Vision, shared prosperity' (14 April 2011), transcript available online at: <http://www.dfa.gov.za/docs/speeches/2011/jzumao414a.html> (accessed 5 June 2013); J. A. Smith, 'BRIC Becomes BRICS: Changes on the Geopolitical Chessboard' *Foreign Policy Journal online* (21 January 2011), available online at <http://www.foreignpolicyjournal.com/2011/01/21/bric-becomes-brics-changes-on-the-geopolitical-chessboard/2/> (accessed 5 June 2013).

⁵⁷ S. Movik, *The Dynamics and Discourses of Water Allocation Reform in South Africa*, STEPS Working Paper 21 (STEPS, Brighton, 2009) 8.

⁵⁸ V. Bronstein, 'Drowning in the hole of the doughnut: Regulatory overbreadth, discretionary licensing and the rule of law', 119 *South African Law Journal* (2002), 469–483; M. Kidd, 'The Development of Water Law', in J. Dellapenna and J. Gupta (eds.), *The Evolution of the Law and Politics of Water* (Springer, Dordrecht, 2009), pp. 87–104.

⁵⁹ DWA adopted the WfGD scheme which inextricably links water to economic and social developmental demands. See DWA, *About Water for Growth and Development*, available online at <http://www.dwa.gov.za/WFGD/about.aspx> (accessed 6 June 2013). See also DWA, *Water for Growth and Development*, available online at <http://www.dwa.gov.za/publications.aspx> (accessed 6 June 2013). DWA, *Water for Growth and Development, Version 6*, available online at <http://www.dwa.gov.za/WFGD/documents/WfGDv6Nov21.pdf> (accessed 6 June 2013).

⁶⁰ DWA (brochure) *Ibid.*, at 'Conclusion'.

provide water equitably. Political speeches have reiterated that ‘as government we will not rest until every citizen has access to clean drinking water’.⁶¹ But, large number of socio-economically deprived people is still exposed to the disconnection of basic water services by the local government⁶² for non-payment and pre-payment water meters installations which limit access to water.⁶³ A free basic water policy exists, promised largely after endemic cholera attacks in 2002⁶⁴ – but, quality and supply are still not ‘sufficient’ on the ground as seen in recent high profile cases.⁶⁵ Many still have to share from limited provisions and people are resorting to polluted water sites for survival which means their ultimate health decline.⁶⁶ It is inferred that access of spaces for participation may be lacking as there is high crime (e.g. violent protests) in ‘informal’ urban community settings. In addition, the poor may not have means to access the spaces the state is setting for dialogues in which they can theoretically participate.

3. IWRM and Public Participation

The question is how IWRM and its constituting elements are internationally weighed up in decision-making processes. Application of some forms of IWRM can be found as far back as ancient Asia and Europe.⁶⁷ These applications and related interpretations have informed as well as influenced the present development of IWRM. It highlights that the dominance of one concern can potentially envelope others into subservience and, in actuality, nullify their balanced incorporation into the IWRM process. Sen, who is deeply influenced by the discourse on both developmental economics and the concept of sustainability, emphasised the

⁶¹ DWA, Keynote address by the honourable Deputy Minister of Water and Environmental Affairs, Ms. Rejoice Mabudafhasi during the public participation programme at Setlagole sports ground, Ratlou Local Municipality, Ngaka Modiri Molema District Municipality (NMMDM) North West, 4 April 2011, available online at <http://www.dwaf.gov.za/Communications/MinisterSpeeches/2011/DMSpeechNorth-WestPPP.pdf> (accessed 6 June 2013).

⁶² SAPA, ‘North West Residents fuming over water cuts’ *News 24 online* (7 November 2011), available online at <http://www.news24.com/SouthAfrica/News/North-West-residents-fuming-over-water-cut-20111107> (accessed 6 June 2013). M. Kidd, ‘Not a drop to drink: Disconnection of water services for non-payment and the right of access to water’, 20 *South African Journal of Human Rights* (2004), 119–137.

⁶³ A. Gowlland-Gualtieri, ‘South Africa’s water law and policy framework. Implications for the right to water’ IELRC working paper (IELRC, Geneva, 2007), 1–13, at 13, available online at <http://www.ielrc.org/content/wo703.pdf> (accessed 6 June 2013).

⁶⁴ UNDP, WBG, WRI, ‘Chapter 3: *Public Participation and Access*’ in *World Resources 2002–2004: Decisions for the Earth: Balance, Voice, and Power* (WRI, Washington, DC, 2003), pp. 47–63.

⁶⁵ J. Dugard, ‘Civic action and the legal mobilisation: The Phiri water meters case’, in J. Handmaker and R. Berkhout (eds.), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (ISS and Hivos, The Hague, 2010), pp. 71–99.

⁶⁶ Gowlland-Gualtieri, *supra* note 63.

⁶⁷ F. Molle, ‘Planning and Managing Water Resources at the River-Basin Level: Emergence and Evolution of a Concept’, *Comprehensive Assessment of Water Management in Agriculture Research Report 16* (IWMI, Colombo, 2006).

importance of institutional integration.⁶⁸ Only a balanced approach to integration of policies, institutions, resource allocation and risks offers a sustainable solution to the challenge of efficient and equitable management of water resources.⁶⁹

3.1 IWRM and the Price Tag

Our planet's surface is engulfed in 70% water⁷⁰ – yet the resource is often referred to as 'scarce'. The case was made that there is an abundance of salt-infused water⁷¹ rather than limited availability⁷² of freshwater resources. Others view that, in reality, access to freshwater is limited. International opinion accepted at the International Conference on Water and the Environment in 1992 highlighted water was a 'finite and vulnerable resource'⁷³ which would give rise to what the World Bank calls the 'instrument principle'.⁷⁴ The wording directly affects perspectives on how it should be managed and regulated as per the 'law of scarcity'⁷⁵ – that is, its economic value.⁷⁶ The allure of economic growth and future benefits it evokes, and the simple fact that society operates through wealth and monetary exchanges allow water to be the ultimate economic good. This approach creates some unease with prospects that those who hold large capital should control and manage freshwater.⁷⁷ Traditionally, water has mostly been considered a

⁶⁸ A. Sen, *Development as freedom* (Oxford University Press, Oxford, 1999), p. 142.

⁶⁹ Global Water Partnership, *Dublin-Rio Principles*, available online at <http://www.gwp.org/The-Challenge/What-is-IWRM/Dublin-Rio-Principles/> (accessed 12 June 2013).

⁷⁰ WBG, *World Development Report 2010, Development and Climate Change* (WBG, Washington, DC, 2010), p. 138.

⁷¹ *Ibid.*, 139, Figure 3.2. 97.5% of water is undrinkable and unusable for agriculture due to heavy salt content. Desalination plants are also no panacea as these require vast amounts of energy (consequently requiring large sums of money, an option out of reach for poor nations and also those not in proximity of the sea) and can cause environmental degradation through the burning of fossil fuels. M. Milstein, 'Desalination No "Silver Bullet" in Mideast' *National Geographic News Online* (22 May 2008), available online at <http://news.nationalgeographic.com/news/2008/05/080522-middle-east.html> (accessed 6 June 2013).

⁷² WBG, *supra* note 70.

⁷³ Principle 1. Dublin Statement on Water and Sustainable Development in Dublin, 1992, International Conference on Water and the Environment, available online at <http://www.un-documents.net/h20-dub.htm> (accessed 6 June 2013).

⁷⁴ World Bank, *Water Resources Sector Strategy. Strategic directions for world bank engagements* (World Bank, Washington, DC, 2004) 1.

⁷⁵ For economic discourse on scarcity, see H.C.K. Liu, 'The coming trade war, Part 4: Scarcity and over-capacity' *Asian Times Online* (28 July 2005), available online at http://www.atimes.com/atimes/Global_Economy/GG28DJo1.html (accessed 6 June 2013).

⁷⁶ J. Dellapenna, 'The Market Alternative' in J. Dellapenna and J. Gupta (eds.), *The Evolution of the Law and Politics of Water* (Springer, Dordrecht, 2009), pp. 373–388. For mainstream economic discourse, see J. McWhinney, 'Water: The ultimate commodity' *Investopedia ULC* (17 July 2011), available online at <http://www.investopedia.com/articles/06/Water.asp?partner=answers#axzz1c4xRUoy4> (accessed 6 June 2013); J. Stepek, 'Put your money in water and watch it grow' 503 *Money Week Magazine* (10 September 2010), 26–28.

⁷⁷ V. Petrova, 'At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water', 31 *Brooklyn Journal of International Law* (2005–2006), 577; I. Shahzad, 'Water, a right, but not for free!', *Asia Overview* (1 Nov 2007), available online at <http://www.amic.org.sg/new/adb/Overview.pdf>

‘public good’.⁷⁸ In addition, there are competing survival needs and varying thirsts for water in developmental use, religious use and physical necessities.⁷⁹ Water resources, ecosystems and their human and non-human inhabitants are intimately linked. Yet, it is the human-centred activity which most often jeopardises the symbiotic balance necessary to maintain the interrelated and sustainable survival of all. It is those in poverty, largely in developing countries, whose wellbeing are worst jeopardised by the pollutions and related consequences when industries and development projects operate in ecologically damaging ways.⁸⁰

In the Dublin Statement,⁸¹ it was expressly stipulated that water be viewed as an ‘economic good’. The Dublin Statement’s guiding principles offer that water management should be perceived in the context of everything water is interconnected with,⁸² and that its management should focus on land and water uses across a whole catchment management area, decentralised as far as it can effectively go. These principles preach incrementing economic value that maximises utility, supposedly resulting in water conservation. It has been critiqued as restrictive and causing the poorest to suffer the most when they cannot afford what is inherently a survival necessity. It is also argued that this economic approach does not necessarily aid meaningful conservation.⁸³ Conservation may be best served through an educative process and explanatory discourse denoting its importance, rather than through measures enacted to just restrict access. It is a state’s traditional role to promote better resource conservation through capacity building. On the one hand, states increasingly outsource water management through privatisation,⁸⁴ and it may be better for profits to encourage dependency, weak engagement and restricted information. On the other hand, shareholders, to whom a business is directly accountable, and stakeholders participation are however imperative for corporate governance. This provides opportunity for those concerned to demand that conservation and ‘green’ ethics be part of business paradigms.

However, reliance on concepts such as corporate social responsibility (CSR) to be applied in a top-down manner without engaging relevant stakeholders and integrating CSR into business agendas can be completely unproductive.

(accessed 6 June 2013); B.B. Ghosh, ‘Water: Right vs need’, *The Statesman* (13 March 2011), available online at http://www.thestatesman.net/index.php?id=36169&option=com_content&catid=39 (accessed 6 June 2013).

⁷⁸) Dellapenna, *supra* note 76.

⁷⁹) Fisher, *supra* note 15, 11–20.

⁸⁰) UNDP, *supra* note 3. This report deals with links between development and the environment.

⁸¹) *Dublin Statement on Water and Sustainable Development* (1992), available online at <http://www.un-documents.net/h2o-dub.htm>.

⁸²) Dublin Statement. Principle No. 1: effective management of water resources demands a holistic approach, linking social and economic development with protection of natural ecosystems.

⁸³) Dugard, *supra* note 65.

⁸⁴) Dellapenna, *supra* note 76.

CSR's overall effect has been criticised as weak⁸⁵ and limited⁸⁶ as essentially 'piecemeal and contradictory, leaving the impression that considerable gaps exist between corporate rhetoric and practice'.⁸⁷ Majority of documents guiding CSR is not derived from legally binding sources – they are largely voluntary and based on self-regulation.⁸⁸ Some feel CSR to be particularly ineffective when the nature of being sustainable is not intrinsically embedded within the core culture of business, and companies operate with 'enlightened self-interest' and aim profit maximisation. It is often argued that the move of corporate actors aligning themselves with sustainability endeavours and utilising its jargon is only a 'green-wash' whilst 'the dominant strategy of economic growth continues to be business as usual'.⁸⁹

Much more can be done to promote conservation through a cultural shift within corporations and government institutions. Much more than just capitulating to arguments which promote 'conservation' through employing raised economic tariffs. The higher price tag equates higher water conservation argument fails as it may not necessarily discourage water waste. If one can and has always been able to pay the water bill comfortably, there exists no real economic incentive to reduce waste. In addition, if the fine or fee paid to prevent water wastage is lower than the benefits received by the company by wasting water, then economic incentives will rather promote waste.

The focus on pure 'economic good' approach has many ramifications, particularly on the right to water⁹⁰ as it sidelines the 'social good' element of water as highlighted in the General Comment 15.⁹¹ Even though this is not legally binding document as it offers only guidance for the application of right to water, it re-affirmed that water should not only be seen economically, it is also necessary for social endeavours and state has a duty to 'respect, protect and remedy' the right to water. Sustainable practices concerning depleted freshwater reserves had also been embedded in international commitments since the Rio Declaration

⁸⁵) Oxfam, Executive Summary Introduction, *Rigged Rules and Double Standards*, available online at <http://www.maketradeair.com/en/index.php?file=26032002105641.htm&cat=3&subcat=2&select=3> (accessed 6 June 2013).

⁸⁶) S. Deva, 'The UN Global Compact for Responsible Corporate Citizenship: Is it still too compact to be Global?', 2 *Corporate Governance Law Review* (2006), 145–190.

⁸⁷) E. Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press, Oxford, 2009).

⁸⁸) *Ibid.*

⁸⁹) P. Utting, 'Corporate Environmentalism in the South: Assessing the Limits and Prospects', in P. Utting (ed.), *The Greening of Business in Developing Countries: rhetoric, reality, and prospects* (Zed Books, London, 2002), pp. 268–269.

⁹⁰) Petrova, *supra* note 77.

⁹¹) UNCESCR, General Comment 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Water (Articles 11 and 12 of the ICESCR) (Doc. E/C.12/2002/11, 29th Session, 26 November 2002).

and Agenda 21. Its definition generally accepted⁹² to as taking on the meaning in the Brundtland Report which prioritises the importance of inter and intra-generational equity⁹³ – that is, the duty of the states, as a trustee, to protect water resource for the present and future generations. In 2000, the MDG commitments also grew as an international commitment to alleviate poverty, growing from desires for greater social justice.⁹⁴ Then, the WSSD⁹⁵ and the Rio+20 (2012) spurred even deeper understandings and linkages of the potentials for integrating all concerns – economic, social and environmental – within the management of water resources. Indeed, its economic status should not be tantamount to just any other economic good.⁹⁶ The economic aspect must make room for the symbolic and physical survival features of water which affect its demand and give it a very distinctive quality which cannot be overlooked by anyone.⁹⁷

3.2 *IWRM and the Access Right*

An overall benefit of public participation in decision-making processes is that it creates a sense of ownership in final outcomes and decisions.⁹⁸ The importance of public participation was articulated in the Dublin Statement as well as in the World Charter for Nature asserts public participation's importance relating to environmental matters in its Principle 23.⁹⁹ Participatory rights of the people are embedded within the ambit of decision-making processes and specified in a number of international and regional treaties.¹⁰⁰ Water purely as an economic good has not sat uncontested or satisfactorily in these international instruments as participatory or access rights (i.e. access to information, participation and remedy) of

⁹² Sands, note 15; S. Bell and D. McGillivray, *Environmental Law* (Oxford University Press, Oxford, 2008), p. 52; A. DuPlessis and C. Rautenbach, 'Legal perspectives on the role of culture in sustainable development', 13 *Potchefstroom Electronic Law Journal* (2010), 27–71.

⁹³ *Our Common Future*, Report of the World Commission on Environment and Development, 1987. Published as Annex to GA document 42/427, Development and International Co-operation: Environment, 1987, available online at <http://www.un-documents.net/wced-ocf.htm> (accessed 6 June 2013).

⁹⁴ N. Kabeer, *Can the MDGs provide a pathway to social justice? The challenge of intersecting inequalities* (Institute of Development Studies, Brighton, 2010).

⁹⁵ Declaration of the World Summit on Sustainable Development in Johannesburg, 2002, UN Doc.A/CONF.199/L.6/Rev.3, available online at <http://www.un-documents.net/jburgdec.htm> (accessed 6 June 2013).

⁹⁶ H. Savenije, 'Why water is not an ordinary economic good, or why the girl is special', 27 *Physics and Chemistry of the Earth* (2002), 741–744.

⁹⁷ M.W. Hanemann, 'The economic conceptions of water', in P. Rogers, M. Ramón Llamas and L. Martínez-Cortina (eds.), *Water Crisis: myth or reality?* (Taylor & Francis, Oxford, 2006), pp. 61–91, at 88, available online at <http://are.berkeley.edu/~hanemann/The%20economic%20conception%20of%20water.pdf> (accessed 2 June 2013).

⁹⁸ Richardson and Razzaque, *supra* note 27.

⁹⁹ UNGA Resolution on The World Charter for Nature, 37 *International Legal Materials* (1982) 7, available online at <http://www.un.org/documents/ga/res/37/a37r007.htm> (accessed 6 June 2013).

¹⁰⁰ Pring and Noe, *supra* note 31.

the people act as a balance where too much emphasis is placed on the economic aspect of the resource which sidelines social and environmental concerns. Indeed, sustainability is essentially expressed in the Dublin Statement as having a key role to play in the IWRM purview.¹⁰¹ It used the language of equity in viewing that the traditionally marginalised should be central to its functioning and decentralisation (which can benefit the rural population only if the management is actually happening locally and inclusive of them) should occur.¹⁰²

This is important as environmental degradation is analogous with social deprivation. Additionally where there is high inequity like gender inequality,¹⁰³ it can amount to a reduced level of participation and correspondingly less environmental protection. Also, just institutionalising the presence of woman in administrative roles and processes via affirmative action programs as an example may not be enough. Capacity and skills building is still a crucial necessity (relying on education) as this helps more effective decision-making.¹⁰⁴ IWRM can be instrumental in serving the larger body of environmental justice objectives through its incorporative approach of women – capacity is the key in this process as it skilfully and effectively balances ‘the need for water development for socio-economic development, whilst keeping ecosystems healthy’.¹⁰⁵

Thus, the overall objective of IWRM is to achieve sustainability. Its theoretical evolution grew temporally and it is not opposed directly by states suggest that it is the unbalanced interpretation that creates the problem in its sustainable implementation. ‘Integrative’ has the synonyms of ‘holistic’ and ‘inclusive’; therefore, IWRM should not be determined by one concern and any participant within the IWRM process should not be hegemonic. IWRM works better locally with direct community engagement that aims to improve it and benefit collectively from it.

4. Showcasing South Africa: Linking IWRM and Public Participation

The essence of the ICCPR¹⁰⁶ and ICESCR¹⁰⁷ suggests that, in a recognised democracy, choices for economic, political and cultural governance pursued should

¹⁰¹ The Dublin Statement, para. 1.

¹⁰² The Dublin Statement, Principles 3 and 1, respectively.

¹⁰³ Women are still largely categorised as ‘vulnerable’. Gender inequality is still relevant as disparities exist in education, employment and payment, political power and inclusion. UNDP, note 3, 60–67.

¹⁰⁴ UNDP, *supra* note 3, 64.

¹⁰⁵ W.B. Snellen and A Schrevel, ‘IWRM: for sustainable use of water. 50 years of international experience with the concept of integrated water management. Background document to the FAO/ Netherlands Conference on Water for Food and Ecosystems’ (Ministry of Agriculture, Nature and Food Quality, The Hague, 2004), 4, available online at http://www.fao.org/ag/wfe2005/docs/IWRM_Background.pdf (accessed 16 June 2013).

¹⁰⁶ Article 1.1, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁰⁷ Article 1.1, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

be 'based on the consent of the governed'.¹⁰⁸ The consensual or non-consensual determinants of those governed then need to inform the decisions taken by the state. Normatively, it has been said that public participation is a 'legally significant notion, the principle is – at best – still emerging as a binding norm of international law'.¹⁰⁹ Indeed, permanent sovereignty over natural resources¹¹⁰ should be enacted for the 'well-being of the people of the State concerned'.¹¹¹ So the governed should be given a means to public participation in resource decisions where all participants collectively determine and legitimise the decisions that will be employed.

Water resource is also subject to human rights claims attached to them. The General Comment 15 right to water means right to 'sufficient, safe, acceptable, physically accessible and affordable water'.¹¹² This international development within the UNCESCR highlights that the right to water and sanitation is derived from the right to an adequate standard of living.¹¹³ This prompted the UNGA Resolution that recognised right to water in 2010¹¹⁴ and the subsequent UNHRC Resolution affirming it in September 2010¹¹⁵ making these rights 'justiciable and enforceable'.¹¹⁶ That access to water is still largely part of economic decision is highlighted in several UN documents that reiterated that 'human rights framework does not provide for a right to free water'.¹¹⁷ In South Africa, this economic approach is clear as the World Bank strategy communicates it.¹¹⁸ Here, water is

¹⁰⁸ L. Diamond, *What is Democracy?*, Lecture at Hilla University for Humanistic Studies (21 January 2004), available online at <http://www.stanford.edu/~ldiamond/iraq/WhatsDemocracy012004.htm> (accessed 6 June 2013).

¹⁰⁹ K. Botttriell and M.-C. Cordonier Segger, 'The Principle of Public Participation and Access to Information and Justice', Draft working paper for CISDL 'Recent Developments in International Law Related to Sustainable Development' Series (CISDL, Montreal, QC, 2005), available online at http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/CISDL_P4_Participation.pdf (accessed 16 June 2013).

¹¹⁰ UNGA Resolution on Permanent Sovereignty over Natural Resources, 2 *International Legal Materials* (1963), 223; UNCTAD Trade and Development Board Resolution on Permanent Sovereignty over Natural Resources, 11 *International Legal Materials* (1972), 1474. UNGA Resolution on Environmental Cooperation Concerning Natural Resources Shared by States, 13 *International Legal Materials* (1974), 232.

¹¹¹ UNGA Resolution on Permanent Sovereignty over Natural Resources, *Ibid.*, para. 1.

¹¹² General Comment 15, *supra* note 91, para. 2.

¹¹³ ICESCR Article 11(1).

¹¹⁴ UNGA Resolution on The Human Right to Water and Sanitation, 64 *International Legal Materials* (2010), 292.

¹¹⁵ UNHRC Resolution on Human rights and access to safe drinking water and sanitation, 15 *International Legal Materials* (2010), 14.

¹¹⁶ United Nations News Centre, 'Right to Water and Sanitation is Legally Binding, Affirms Key UN Body', Press Release, 1 October 2010, available online at <http://www.un.org/apps/news/story.asp?NewsID=36308> (accessed 24 February 2014).

¹¹⁷ OHCHR, *The Right to Water. Fact Sheet No. 35* (UN, New York, NY, 2010) 11, available online at <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf> (accessed 2 June 2013).

¹¹⁸ World Bank, *supra* note 74, 16.

largely a 'usufructory' right¹¹⁹ where the 'reserve'¹²⁰ is under state ownership. The international development on the right to water does not have a great bearing on South Africa. South Africa has not signed the ICCPR and while it has signed, it has not ratified the ICESCR. The OP-ICESCR¹²¹ which places greater socio-economic obligations on states does not have any application to South Africa.¹²²

Indeed, many progressive rights are embedded in the Constitution. Its construction corresponds to the new post-apartheid South Africa self-identifying as a new participatory democracy. Its construction has also been said to be the largest participatory project in South Africa's history.¹²³ The government structure of South Africa is constituted to be national, provincial and local; all legislatures are interdependent¹²⁴ but distinct.¹²⁵ The Constitution mandates that Parliament, Provincial Legislatures and the Local Government (Municipalities) are required to involve public participation when enacting their decision-making processes as stipulated in sections 72(1)(a), 118(1)(a) and 152(1)(e), respectively.¹²⁶ Duties in this regard can be interpreted as proactive but indirect participation. It involves asking for commentary from people when new law and policy proposals are published in the Government Gazette and a 30 day period from when published proposals are allocated for commentary. The Department of Water Affairs is nationally tasked with water administration, while the municipalities are charged with local administration as well as tasked to 'ensure' provision of services in a sustainable manner¹²⁷ to 'promote' social and economic development¹²⁸ and to 'promote' a safe and healthy environment.¹²⁹ However, while complying with these duties, the Department of Water Affairs 'must' adhere to its financial capacity.¹³⁰

¹¹⁹ Section 21 of NWA defines water use and exposit its regulation.

¹²⁰ As it is called in the National Water Act, part 3, available online at http://www.dwaf.gov.za/Documents/Legislature/nw_act/NWA.pdf (accessed 16 June 2013).

¹²¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008) 435 CNT 34 (OP-ICESCR).

¹²² 'Campaign to ratify the ICESCR', available online at: http://www.blacksash.org.za/index.php?option=com_content&task=view&id=1410&Itemid=187 (accessed 11 June 2013).

¹²³ R. Scott, 'Analysis of public participation in the South African legislative sector' (MPA thesis, Stellenbosch University, Stellenbosch, 2009), available online at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott%20c%20R.pdf?sequence=1> (accessed 6 June 2013).

¹²⁴ Chapter 3, Section 40 of the Constitution tries to give effect to 'co-operative Government'.

¹²⁵ Section 43 of the Constitution delegates the legislative authority between the residual spheres.

¹²⁶ Constitution of the Republic of South Africa, No. 108 of 1996, available online at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (accessed 16 June 2013).

¹²⁷ Section 152(1)(b) of the Constitution.

¹²⁸ Section 152(1)(c).

¹²⁹ Section 152(1)(d).

¹³⁰ Section 152(2).

4.1 *Calls for Effective Public Participation*

The State of the Nation Address in 2011 professed the utilisation of social-networking sites to prompt public participation.¹³¹ While the government thinks their indirect participatory tools are adequate, the reality tells an entirely different story. There is high unemployment and huge economic inequalities mean many will not be able to provide any comment due to lack of internet access. Many are even unable to access television broadcasts as they live in informal settlements with limited or no electricity. The Address to the Nation also highlighted the dissatisfaction regarding water provisions and service deliveries. Within the water service provisions ambit,¹³² policies facilitating public participation exist in guideline documents entitled 'Generic Public Participation Guidelines'.¹³³ IWRM policy guidelines also exist.¹³⁴ The level of utilisation depends on the selective discretion of the Department of Water Affairs and water authorities in any new initiatives they embark upon. As such, these could be considered as weak provisions for securing the participatory processes they embed. Thus, for greater efficacy, these policy instruments need to be transmuted into binding laws. An in-depth analysis of the effectiveness in South African law suggests that there is a 'lack of a uniform approach and standardised policies and strategies for implementing public participation across the legislative sector' as well as challenges of 'disinterested public and members of the legislative institutions'.¹³⁵

The Constitutional Court rulings in cases showed that it was the legislative arm that lacked the desire to commit to or facilitate public participation. This was seen in *Doctors for Life International v The Speaker of the National Assembly*¹³⁶ where Sachs J stipulated that

All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration.¹³⁷

The legislators, similar to the Department of Water Affairs, largely employ invitations to the public to comment on proposed legislation as tantamount to effective public participation. This commentary period is only accepted within a 30 day

¹³¹) Official Presidential Address, *supra* note 56.

¹³²) As part of the Water Services Act 108 of 1997, Section 2 uses the language of 'effective management' and 'conservation' indicating a high regard for the 'instrument' principle that the World Bank denotes states should employ.

¹³³) DWAF, *Generic Public Participation Guidelines* (DWAF, 2001), available online at <http://www.dwaf.gov.za/Documents/Other/GPPG/guide.pdf> (accessed 6 June 2013).

¹³⁴) DWAF, IWRM guidelines, *supra* note 50.

¹³⁵) Scott, *supra* note 123.

¹³⁶) 2006 (12) BCLR 1399 (CC).

¹³⁷) *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) Sachs J, para. 235.

period from publications in the Government Gazette and by writing. As a large percentage of the South African populace is still illiterate, this 'token' participatory provision serves them no real benefit.

Example of procedural fairness can be found in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which explains what the constitutional right to just administrative action may mean and it describes that the action taken by the state that may affect the rights of any person needs to follow fair procedures. The National Environment Management Act 1998 (NEMA) stipulates procedures that generally link to PAJA in that any actions which may affect the environment will need to comply with certain principles (like that of sustainable development) and consequently may require EIA. Further guidelines and regulations under these Acts outline procedures and rules as to how people need to be included and informed. In addition, the Promotion of Access to Information Act 2000 (PAIA) outlines the content and quality of information that needs to be given to the public and defines how well people need to understand their rights and information connected to projects which may affect them. All of these Acts highlight the importance of the awareness of marginalised groups regarding their rights and decisions affecting their rights that be given special consideration. However, as cases below illustrate, marginal groups such as the poor are still not being adequately involved in the participatory process.

4.2 Cases Related to Water and Public Participation

The *Grootbooms* case¹³⁸ was the 'landmark case signifying the undeniable justifiability of economic and social rights'¹³⁹ in South Africa. It promised change for South Africans living in 'crisis situations' and their rights to access adequate housing, which would encompass adequate basic services. This means there should also be no disconnections to water flow. This did not amount to much success as can be seen in later case laws that still show violations by the state. In *Residents of Bon Vista Mansions*,¹⁴⁰ the appellant's water supply was cut. As it was a matter of survival, the appellant requested interim relief in the form of a court order to restore the water supply effective immediately whilst the case was to be heard. Here, the court relied on Section 27 of the Constitution and the ICESCR General Comment 12 linking food and water to provide access rights to the community. This is a good illustration of legal reasoning that integrates what IWRM has been

¹³⁸) *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

¹³⁹) E. Wickeri, 'Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?', Centre for Human Rights and Global Justice, New York, NY, 2004), available online at <http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf> (accessed 6 June 2013).

¹⁴⁰) *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* High Court of South Africa, Case No. 01/12312.

contemplating. The court found the local council to be in *prima facie* violation of constitutional rights as it unlawfully interfered with existing water use rights.

In the *Mazibuko* case, much commented on as being the first water rights test cases,¹⁴¹ Lindiwe Mazibuko in 2006 filed a case against the Minister of Water Affairs and Forestry, the City of Johannesburg and Johannesburg Water. She was a resident of Phiri which is one of the poorest suburbs of the apartheid created township of Soweto. Johannesburg Water was a public private partnership with the French Multinational Suez and owned via a corporate model by the city of Johannesburg. Disconnections to water supply was imposed by installing pre-payment water meters (PPM) which was set to cut flow after the newly decided Free Basic Water Policy of 25 litres per person per day for a household of eight had been exhausted. This is a fundamental shift from the unlimited water enjoyed before via a flat-rate fee. The High Court decided that there was lack of proper public consultation facilitated by the City when it implemented the development of PPM installations without due consideration of the residents and without providing adequate information to them. The information in notice form was also felt to be 'intimidatory and presumptive'.¹⁴²

The PPM affected women the worst as it is they who largely require water for domestic chores in South Africa.¹⁴³ This is important as Tsoka J's decision regarding empowering women is central to IWRM. It was also felt that, due to many competing for water within the informal settlement, 25 litres per person as employed in the Free Basic Water Policy was insufficient.¹⁴⁴ The Constitution of South Africa clearly states that sufficient water is everyone's right and should cover the necessities for health which is another constitutional right. The judgement ruled that the city is capable of providing 50 litres of water per person per day.¹⁴⁵

This judgement by the High Court was criticised in the political sphere. Thus, in *Mazibuko 2*, the Constitutional Court ruled that PPM were not unlawful or discriminatory and that the city could rightly implement them under the auspice of aiding water conservation. In the opinion of the Constitutional Court, the government is in a better position to decide what is sufficient water-supply and the Court ignored the *amicus curiae* brief submitted by COHRE which indicated that the case would have implications for the whole of Africa and not just South Africa. Effectively, the ruling stipulated that the residents in Phiri were being supplied with other services they were not being charged for and that access to sufficient

¹⁴¹ *Lindiwe Mazibuko & Others v. The City of Johannesburg & Others* 2008 High Court of South Africa (Witwatersrand Local Division) Case No. 06/13865 3 (hereafter *Mazibuko 1*), available online at http://www.iatp.org/files/451_2_102539.pdf (accessed 6 June 2013); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (hereafter *Mazibuko 2*), available online at <http://www.saflii.org/za/cases/ZACC/2009/28.html> (accessed 6 June 2013).

¹⁴² *Mazibuko 1*, para. 110.

¹⁴³ *Ibid.*, para. 159.

¹⁴⁴ *Ibid.*, para. 169.

¹⁴⁵ *Ibid.*, para. 181.

water could be progressively realised by the city – it need not be given immediate effect.¹⁴⁶ The ruling was met with great despondency.¹⁴⁷ Bond feels that the *Mazibuko* case had limitations due largely to its solely human-rights based analytical framing, and that it was more individualist than public interest based. Thus, the case lacks the potential ‘extra punch’ of conceptual analysis that links ‘the full set of hydro-political connections between social and ecological’.¹⁴⁸ He suggests that prospective cases regarding water rights should follow a more integrative analysis that centres a debate on ‘water commons’, drawing in and integrating ecological and anti-neo-liberal, even feminism perspectives.

Dugard reflected on the injustices these decisions have inflicted on the poor. From an IWRM perspective, the notion of conservation of water could have been better served had the City fixed the broken infrastructures and leaking pipes that were amounting to larger amounts of water waste than the poor in Phiri were allegedly responsible for.¹⁴⁹ The Court’s views are quite limited as it imposes restrictions on access before administrative duties of water infrastructure maintenance (e.g., tending to pipes) are fulfilled. The potentially negative effects on citizens are not just the lack of justice in courts – it is also evidenced that entering into litigation may not always be worthwhile.¹⁵⁰ Regarding the *Mazibuko* case, Dugard however noted how activists did not feel the process of litigation was wholly unsuccessful as the litigation process gave a formal platform to voice concerns which attracted mainstream media.¹⁵¹ The platform can be powerful in alerting people’s focus to issues showcased as a conduit for mainstreaming information on social and ecological concerns.

In South Africa, the human right to water does not imply a right to access free water. Here, private companies deliver water to homes and it is difficult to achieve a balance between their aim to maximise profit and the constitutional right of individuals to receive sufficient amount of water regardless of their financial capacity. Individual’s entitlement, be it 25 litres or 50 litres, is a matter of progressive realisation. The people in South Africa are not aware of the hierarchy of various rights including the social and economic rights. The view that most people are unaware of their legal rights – let alone the status and scope of these rights in the academic discourse – is not uncommon as seen in Tsoka J’s views in *Mazibuko 1*. Dugard, in

¹⁴⁶ *Mazibuko 2*, paras 166–169.

¹⁴⁷ Coalition Against Water Privatization (CAWP) Public Statement 8 October 2009 on the Phiri Water Case, available online at <http://www.uusc.org/files/CAWPstatement-PhiriWater.pdf> (accessed 6 June 2013).

¹⁴⁸ P. Bond, ‘The Right to the City and the Eco-Social Commoning of Water: Discursive and Political Lessons from South Africa’, in F. Sultana and A. Loftus (eds.), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan Water Text Series, Earthscan, London, 2011), pp. 190–205.

¹⁴⁹ Dugard, *supra* note 65.

¹⁵⁰ *Ibid.*

¹⁵¹ Video documentary, *Amanzi Ngawethu* (2010), Interviews with Jackie Dugard. Posted Monday 24 January 2011, available online at <http://apf.org.za/spip.php?breve29> (accessed 6 June 2013).

interviews, has said that jubilation after the High Court ruling had amounted to many people feeling legitimated in their actions to consequently break PPM as they saw that the High Court declared these PPMs unlawful.¹⁵²

The nagging question is whether the state is playing an effective role to respect and remedy the right to water and guaranteeing the protection and satisfaction of the constitutional right to water for the present and future generations. Indeed, environmental provisions are included in the Bill of Rights in Chapter 2 of the Constitution of South Africa. Section 24 states that:

Everyone has the right:

- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
- (iii) secure ecologically sustainable development and use of natural resources[...]

Consequently, IWRM is part of the larger picture of sustainable management of natural resources as mentioned, and this applies to integrating environmental protection generally.¹⁵³ South Africa is committed to sustainable development through its Constitution. The national framework and implementation strategies for sustainable development are evolved through public participation processes. Mostly this is done through calling for public commentary at every new juncture of their construction. This reinforces that IWRM, within the sustainable development framework, is principally committed to participatory processes and that those authorised at any level of government in South Africa managing water should value this fact.

In South Africa, international discourse has moulded the interpretation of sustainable development.¹⁵⁴ These discussions help to formulate the national steps which lay out national strategy/ies on sustainable development that relay the need to balance the accelerated growth whilst sustainably using natural resources. In July 2008, the Cabinet passed the National Framework for Sustainable Development¹⁵⁵ which is designed to 'initiate a broad framework for sustainable development in South Africa that can serve as a basis from which to develop and consolidate a national strategy and action plan'. It therefore proposed a general national vision, guiding principles and certain priority areas of action. In 2010, the Department of Environmental Affairs published the final draft of the National

¹⁵²) *Ibid.*

¹⁵³) For sources on SA's Integrated Environmental Management (IEM), see http://www.environment.gov.za/Documents/Publications/2003Jun24_1/eia_info_series_24062003.html (accessed 6 June 2013).

¹⁵⁴) The Stockholm Declaration (1972) where environment was recognised as a development concern. Agenda 21 was agreed as the route for sustainable development and reflected global commitment to integrate environmental concerns into socio-economic decision-making processes. The MDGs have linked the issues further and then the WSSD 2002 reaffirmed commitments to sustainable development, poverty alleviation and inter/intra-generational equity.

¹⁵⁵) See <http://www.environment.gov.za/HotIssues/2008/nfsd/nfsd.html> (accessed 6 June 2013).

Strategy on Sustainable Development and Action Plan 2010–2014 where it invited written representations and comments from the public.¹⁵⁶

Another entry point for the people in the consultation is through EIA procedure. NEMA's guidelines promote the right to be consulted before the environment (including water) may be harmed. The current framework derives from NEMA – Environmental Laws Amendment,¹⁵⁷ and its corresponding EIA regulations passed in 2010.¹⁵⁸ In terms of timeframes for EIAs, there had previously been no consequences for authorities themselves when they failed to meet regulatory time frames. Under the new regulations, authorities are compelled to reach decisions on information after reasonable extensions of the time frames have lapsed. The participatory processes that the EIA regulation embed have been said to focus too much on notice and comment procedures, and lack requirements for active involvement of people from early stages in the decision-making processes and after projects have been authorised.¹⁵⁹ The stakeholder engagement guideline documents tend to utilise the International Association for Public Participation's spectrum for participatory processes. However, there is disjuncture in what is written on paper and what is discretionally applied in reality. To strengthen public engagement processes, the Legal Resources Centre which is committed to increasing access to justice by the poor has provided some recommendations as to the changes required within these processes to make them more meaningful.¹⁶⁰ Indeed, better public engagement processes in binding laws that include people through various stages of planning could aid better IWRM leading to more effective outcomes and better public services. This may transform the 'token' commitments into reality.

5. Views from the Ground

In South Africa, IWRM aims to integrate social concerns like health, safety and dignity (to name a few) into administrative decisions that build water service delivery. Some water storage units or access points utilised to self-administer water¹⁶¹ are problematic and inadequate, at times not properly consulted for, and in some cases directly impair health, safety or dignity. These inadequacies

¹⁵⁶ See http://us-cdn.creamermedia.co.za/assets/articles/attachments/27651_33184.pdf (accessed 6 June 2013).

¹⁵⁷ No. 14 of 2009 (G-32267), available online at <http://www.environment.co.za/documents/legislation/NEMA-National-Environmental-Management-Act-Laws-Amendment-14-2009-G32267.pdf> (accessed 6 June 2013).

¹⁵⁸ See http://www.environment.gov.za/environmental_impact/NEMAp1.pdf.

¹⁵⁹ Murombo, *supra* note 47.

¹⁶⁰ See http://www.lrc.org.za/images/stories/Desktop/Subtheme_3_Summary_-_Public_Participation.pdf (accessed 6 June 2013).

¹⁶¹ See WD-SA Bushbuckridge Case Study Summary, available online at <http://www.waterdialogues.org/south-africa/documents/p.104BushbuckridgeCaseStudySummary.pdf> (accessed 6 June 2013).

prompted public protests verbalising angst at poor basic services delivery (or lack of it) that were promised in governmental policies and pre-election commitments. These protests are a serious issue as ‘the country has witnessed unprecedented rates of violent protests’.¹⁶² This is detrimental to the well-being of communities and government relations. Another aspect which the IWRM is concerned with, that is, the infrastructure (such as standpipes) which if damaged by the violent protests leads to financial losses and can affect poor taxpayers.

Standpipes can be defined as an ‘improved water source’.¹⁶³ Even though they provide a point of access to some water (which, of course, is better than none), they are still inadequate and ‘the poorest households are 12 times less likely than the richest households to enjoy the convenience and associated health benefits of having a piped drinking water supply on premises’.¹⁶⁴ They do not always yield unlimited water which could grant more sufficient provisions to all.¹⁶⁵ Competition for use can exist amongst people living close to one site. Disputes invariably arise when some have gained access and others have not. In the end, those have-nots may have to potentially walk long distances to collect water and then carry heavy loads back causing a greater struggle for survival.¹⁶⁶

Sen has noted that women are at the heart of sustainable development.¹⁶⁷ IWRM recognises this too and surrounding literature also explicitly references women as running the domestic sphere and their role in domestic water use and collection. In South Africa, their struggles are still not adequately addressed. It is women who traditionally fetch water and who are put most at risk as ‘they have to walk long distances or fetch water from rivers in unsafe areas, putting themselves at risk of crime, animal attacks and being hit by cars’.¹⁶⁸ Lack of standpipes means woman will walk to fetch more from other sites to their potential detriment. It seems ironic that legal and policy frameworks exist which demand the inclusion of woman in public services¹⁶⁹ when inadequate basic public water services put women at such risk. The Sabie River provides an example of a traditional water

¹⁶²) Karamoko and Jain, *supra* note 4.

¹⁶³) WHO and UNICEF, *Meeting the MDG Drinking Water and Sanitation Target: The Urban and Rural challenge of the Decade* (WHO and UNICEF, Geneva, 2006), 4, available online at http://www.who.int/water_sanitation_health/monitoring/jmpfinal.pdf (accessed 6 June 2013).

¹⁶⁴) UN, *The Millennium Development Goals Report 2011* (UN, New York, NY, 2011) 54.

¹⁶⁵) WD-SA Bushbuckridge, *supra* note 161.

¹⁶⁶) Naidoo, *supra* note 7.

¹⁶⁷) Sen, *supra* note 68, 203.

¹⁶⁸) WD-SA Bushbuckridge, *supra* note 161.

¹⁶⁹) Section 187 of the Constitution actually mandates for a commission to promote the respect for gender equality and the protection, development and attainment of gender equality. See also: The Commission for Gender Equality Act, 1996 (Act No. 39 of 1996). Department of Public Services Administration (DPSA), *A strategic framework for gender equality within the Public Service (2006–2015)* Consultation Document (DPSA, 24 November 2006), available online at <http://www.info.gov.za/view/DownloadFileAction?id=126557> (accessed 2 June 2013). SALGA also has a Gender Working Group Oxford University Press to aid local government in understanding gender issues.

site where some women have travelled for water appropriation, but the risk is palpable as animals from the Kruger National Park like ‘crocodiles, buffalo and elephants, use the river as a watering hole’.¹⁷⁰ The consequences directly pit human against animal for basic survival necessities, where one or both may die. Environmental conservation may also be disrupted and potential legal ramifications may befall on those who were indirectly forced to enter conservation sites causing harm to the biodiversity.

5.1 *Inadequate Sanitation and More: The Beja Case*

The 2008 WHO report showed that ‘the world is not on track to meet the MDG sanitation target, and 2.5 billion people still lack access to improved sanitation, including 1.2 billion who have no facilities at all’.¹⁷¹ This is reflected in South Africa as some community members, particularly in informal settings, suffer the worst. Attempts to provide ‘improved’ sanitation led to a court battle between two leading political parties, as well as much public protest.¹⁷² In *Ntombentsha Beja and Others v Premier of the Western Cape and Others*¹⁷³ (the *Beja* case), the polemic view is that while economic development should have been guided by the desire to ‘improve’ living standards,¹⁷⁴ there was ineffective IWRM in practice which neglected social concerns and did not engage the community. This amounted in protest, political and media induced debacle and furthered rifts in public trust of government officials. Here, the court ruling did vindicate the struggles of the poor as adequate sanitation provision is now seen as a necessity in safeguarding their constitutional rights.¹⁷⁵

¹⁷⁰ WD-SA Bushbuckridge, *supra* note 161.

¹⁷¹ WHO and UNICEF, ‘Progress on drinking water and sanitation: Special focus on Sanitation’, (2008), available online at http://www.who.int/water_sanitation_health/monitoring/jmp_report_7_10_lores.pdf (accessed 6 June 2013).

¹⁷² Anonymous, ‘South Africa: Landmark ruling on right to sanitation ends Cape Town “toilet wars”’, *Sanitation Updates*, available online at <http://sanitationupdates.wordpress.com/2011/05/06/south-africa-landmark-ruling-on-right-to-sanitation-ends-cape-town-toilet-wars/#more-5199> (accessed 6 June 2013).

¹⁷³ [2011] ZAWCHC 97, available online at <http://www.saflii.org/za/cases/ZAWCHC/2011/97.html> (accessed 6 June 2013).

¹⁷⁴ This was started so as to meet the MDG of improving the lives of slum dwellers. South Africa follows the Vancouver Declaration on Human Settlements (1976), Istanbul Declaration on Cities and Other Human Settlements (1996) and the Habitat Agenda (1996). This is consequently why the Upgrading of Informal Settlements Programme (UISP) scheme was included in the National Housing Code 2009. The code is instituted by Section 3(4) (g) of the Housing Act, 1997 (Act No. 107 of 1997). This UISP scheme can serve to actualise the SA constitutional right in s.26(1) to have access to adequate housing. See Erasmus J in *Beja* case ruling (n 173), paras 9 and 10.

¹⁷⁵ South Africa’s Water Services Act, Act 108 of 1997. Section 3(1) states that: ‘Everyone has a right of access to basic water supply and basic sanitation.’ The High Court was giving effect to positive state duties.

This case unfolded in 2009 when Cape Town municipal authorities attempted to provide improved sanitation¹⁷⁶ by installing 1316 unenclosed toilets in Makhaza and its surrounding informal settlements under an 'agreement'¹⁷⁷ that local residents build their own enclosures. Fifty five residents were unable to afford this and African National Congress Youth League (ANCYL) members who had engaged with them filed a complaint with the South Africa Human Rights Commission (SAHRC)¹⁷⁸ stating that violation of human dignity as residents had to cover themselves with blankets whilst relieving themselves in full public view. The appellant, Mrs Beja, herself had been stabbed one evening after she used these amenities. The SAHRC tried to provide platforms for amicable mediation¹⁷⁹ but to no avail as the municipal authority would not admit any wrongdoing. Had the municipal authority resolved issues during the alternative dispute resolution process, it could have stopped court disputes ensuing and subsequent tax monies being used to defend themselves. The SAHRC proceeded with investigation and published its report with findings of violations of the constitutional right to human dignity.¹⁸⁰ The municipal authority openly contested the credibility of the report. According to the officials, they had been trying to erect corrugated tin enclosures around toilets but were met with protests. They added that ANCYL members were violently demolishing these structures,¹⁸¹ thus miring efforts of enclosure. Community protest was fuelled by the belief that the wood and corrugated iron enclosures proposed did not provide adequate standards of sanitation they deserved. The SAHRC report had also said these were inadequate and officials removed a large number of these toilets. When the matter was challenged in the court, the Cape Town High Court acceded to the assertion of the SAHRC. Erasmus J held that

¹⁷⁶ Prior to this communal toilets were provided, but these are not seen as 'improved sanitation'. WHO and UNICEF, *supra* note 171, 4. A main reason for this is that communal toilets make woman and girls susceptible to sexual violence.

¹⁷⁷ The court ruling found this alleged agreement lacks effective public participation.

¹⁷⁸ The SAHRC derives a constitutional mandate as per Section 184 of the Constitution. This is as follows: 1. The South African Human Rights Commission must (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. Human Rights Commission Act 54 of 1994, available online at <http://www.justice.gov.za/legislation/acts/1994-054.pdf> (accessed 6 June 2013).

¹⁷⁹ Mandated to mediate in disputes as per Section 8(a)–(b) of Human Rights Commission Act 54 of 1994.

¹⁸⁰ South African Human Rights Commission Report in the matter of: African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents and City of Cape Town. Case Reference No: WC/2010/0029, paras 3.2 and 3.3, available online at <http://www.sahrc.org.za/home/21/files/Makhaza%20Finding%202010.pdf> (accessed 6 June 2013).

¹⁸¹ The city went on to lay criminal charges against those who had supposedly damaged property. At a later press conference the Cape Town City Mayor then also made heated and unwise comments saying 'I want to throw it back at the community ... that you need to tell those rude hooligans, those thugs, that you must march and burn tyres against those hooligans'. See *Beja* case, *supra* note 173, Erasmus J ruling, para. 25.

the City violated the residents' rights as included in sections 10, 12, 14, 24, 26 and 27 of the South African Constitution.

Had the municipality engaged with the community to understand why they were actually allocated with the administrative tasks, to know how community members were experiencing their lives and what was needed before the start of their activity, the decision of the municipality would have been better informed. It was crucial for the decision maker to be aware of the fact that closed toilets which were not communal could protect woman from sexual violence and attacks. The High Court held that the municipal officials had not consulted sufficiently with residents. Erasmus J found that the City could not prove that agreements with the community existed, thus the agreement could not be upheld. Procedurally, unreasonable time was allotted (only 4 days of notice) for the proposals which, on the agenda, did not even include entry of the toilets and sanitation.¹⁸² Only one percent of the population attended and no formal minutes were taken. The overall consequence being no reasonable mandate could be officiated from the public to proceed ahead as reasonableness requirement under section 26(2) of the Constitution was not fulfilled.¹⁸³ Processes of information disclosure also lacked technical support needed by the community for effective understanding of the impact of the decision in relation to better sanitation.¹⁸⁴

Erasmus J. also noted that both the Democratic Alliance (a Political Party of South Africa) and the ANCYL politicised the issue at the expense of the dignity of community members. The media had also been mocking the whole issue as a 'toilet-war' and elucidated that both political parties were providing inadequate toilets.¹⁸⁵ There appeared a deep chasm between people, their political parties and their government. Had full IWRM been employed here with adequate participation of local community, special consideration of woman and information provision – it could have served to negate the expenditure of money in court battles between civilian and the government. These effectually erode social cohesion whilst delaying other matters pending before the court. This type of experience affects communities' trust in their local institutions, and this distrust leads to disengagement with the public agencies that play a crucial role in improving and securing the right to water and sanitation.¹⁸⁶ Conclusions from various

¹⁸²) *Beja* case, *supra* note 173, para. 80.

¹⁸³) *Ibid.*, paras 81–83.

¹⁸⁴) *Ibid.*, para. 98.

¹⁸⁵) F. Grobler and M. Montsho, 'Open toilets symbolize lack of delivery', *Public Eye*, available online at <http://www.publiceyenews.com/2011/05/14/open-toilets-symbolize-lack-of-delivery/> (accessed 6 June 2013); SAPA, 'City of Cape Town loses open-toilet battle' *Mail & Guardian online* (29 April 2011), available online at <http://mg.co.za/article/2011-04-29-city-of-cape-town-loses-opentoilet-battle> (accessed 2 June 2013); M. Nkosi, 'South Africa: Does the ANC still have people power?' *BBC News Africa online* (20 May 2011), available online at <http://www.bbc.co.uk/news/world-africa-13475966> (accessed 2 June 2013).

¹⁸⁶) See WD-SA, *Synthesis Report: Research findings and Conclusions*, 14, available online at <http://www.waterdialogues.org/south-africa/downloads/new/Attac14-28.pdf> (accessed 6 June 2013).

studies have shown that the intended level of communication with the people is not being adequately fulfilled and more institutional strengthening and access to remedy is required.¹⁸⁷

5.2 *Participatory Processes and Access to Remedy*

In the report of the Access Initiative,¹⁸⁸ South Africa seemed to score strongly. However, there are critical views. First, some courts may be distinctive of a conservative or elitist realm traditionally unrepresentative of the 'subaltern'.¹⁸⁹ Indeed, the South African courts did once legitimise the apartheid regime, and some distrusts remain as to how the judiciary functions.¹⁹⁰ The apartheid segregation may have embedded senses of despair and acceptances of being a 'victim' in some.¹⁹¹ Consequentially, litigating may not be seen as a satisfying option. Second, the court can only provide remedy once the right is breached. It has been suggested that the human rights 'culture' is seen as antithetical to what is traditional.¹⁹² Hence some may not lay claims for their rights. While cases can be designed by lawyers, these cannot work unless clients are encouraged to claim the rights.¹⁹³ Third, when the court attempts to redress community concerns by holding the state legally responsible, they have been openly criticised by politicians.¹⁹⁴ In addition, courts may be incurring loss of public faith as the people may feel little justice is served when the 'rights' and promises assured to them in political campaigns cannot be upheld in the court unless these are enacted into policy and laws. Fourth, while options to access remedy have widened¹⁹⁵ in the new South Africa, the widening is still inadequate. Legal-aid does exist,¹⁹⁶ but there are criticisms regarding the limits

¹⁸⁷ T. Smith, *The role of ward committees in enhancing participatory local governance and development in South Africa. Evidence from six ward committee case studies* (Community Law Centre, Cape Town, 2008).

¹⁸⁸ The Access Initiative, available online at <http://www.accessinitiative.org/> (accessed 6 June 2013). See: UNDP, WBG, WRI, *supra* note 64, Chapter 3.

¹⁸⁹ R. Young, *Postcolonialism: A Very Short Introduction* (Oxford University Press, Oxford, 2003); L. de Kock, 'Interview With Gayatri Chakravorty Spivak: New Nation Writers Conference in South Africa', 23 *Review of International English Literature* (1992), 29–47, available online at <http://ariel.synergiesprairies.ca/ariel/index.php/ariel/article/viewFile/2505/2458> (accessed 6 June 2013).

¹⁹⁰ M. Pieterse, 'Malema denounces 'racist' courts, 'apartheid legacy', *IOL online* (15 September 2011), available online at <http://www.iol.co.za/capeargus/malema-denounces-racist-courts-apartheid-legacy-1.1138233> (accessed 6 June 2013).

¹⁹¹ G.L. Thom, 'Restorative Justice and Transformation Under fire in Soweto, South Africa' (2003), 2–3, available online at <http://www.sfu.ca/cfrj/fulltext/thom.pdf> (accessed 6 June 2013).

¹⁹² *Ibid.*, 4.

¹⁹³ G. Budlender, 'Public Interest Law: The South African Experience', in J. Klaaren, J. Dugard and J. Handmaker (eds.), *Public Interest Litigation in South Africa: Special Issue of the South African Journal on Human Rights* (Juta, Lansdowne, 2011)

¹⁹⁴ Dugard, *supra* note 65.

¹⁹⁵ For a list of extensive courts see the Southern African Legal Information Institute website, <http://www.saflii.org/content/south-africa-index> (accessed 6 June 2013).

¹⁹⁶ Legal Aid Act (Act 22 of 1969) and the Legal Aid Act (Act 20 of 1969), Legal Aid South Africa, available online at <http://www.legal-aid.co.za/> (accessed 6 June 2013).

in granting financial access which affects the accessibilities of the poor. Breach of socio-economic rights does not receive funding for access to constitutional court proceedings and public interest litigation has many pitfalls.¹⁹⁷

Thus, it may seem then that social protest is the default option used to claim rights instead of litigation for the socio-economically disadvantaged. Law clinics and pro-bono work is offered by universities and other law practitioners to the affected communities.¹⁹⁸ However, the crux of argument is that it may still not promote wide legal access. Online paralegal advice on public participation encompasses extensive information on what it is and how to pursue litigation are also available.¹⁹⁹ For some people, this is inaccessible due to lack of access to internet or lack of computer knowledge.

Regarding options for conflict resolutions, an ombudsman exists for informal disputes settling entitled the 'Public Protector'.²⁰⁰ A Water Tribunal has jurisdiction over water disputes and contains a panel of experts in water resource management, law and engineering. An example of a case²⁰¹ listed in the tribunal includes water licensing and time allowances given to apply for an appeal on decision. Licensing for water use disputes raise several concerns including the level of state discretion, the balancing of various interests and the capacity of government authorities to satisfy all types of water demands. Licensing may be 'an almost insurmountable task and a questionable use of government resources. Even in developed country settings the process of attempting to accurately quantify the portion of resources to which a user holds rights is fraught with problems'.²⁰² In this case, the information was sent by the authority to the appellant during the December holiday period while the Appellant was away. The Tribunal felt that the 30 day period in which the Applicant had to appeal during this holiday time was unreasonable. The Tribunal allowed the delay in lodging of the appeal against the decision on the application for a licence to use water on the appellant's farm.²⁰³

¹⁹⁷ S. Wilson and J. Dugard, 'Taking poverty seriously: The South African Constitutional Court and Socio-Economic Rights', 22 *Stellenbosch Law Review* (2011), 664–682; J. Dugard, 'Courts and the poor in South Africa: A critique of systemic Judicial failures to advance transformative justice', 24 *South African Journal of Human Rights* (2008), 214–238.

¹⁹⁸ University of the Western Cape, Faculty of Law: Legal Aid Clinic, available online at http://www.uwc.ac.za/index.php?module=cms&action=showfulltext&id=gen20Srv23Nme0_2313_1270816331&parent=gen1Srv7Nme54_8909_1210050527&menustate=faculty_law (accessed 6 June 2013); Law Society of South Africa website lists 'pro-bono' attorneys, available online at <http://www.lssa.org.za/?q=con,89,Pro%20bono%20services%20by%20attorneys> (accessed 6 June 2013); Legal Resources Centre, available online at <http://www.lrc.org.za/access-to-justice> (accessed 6 June 2013).

¹⁹⁹ Education and Training Unit (ETU), *Paralegal Advice*, 'Chapter 3: Democracy, Government and Public Participation: Public Participation', available online at <http://www.paralegaladvice.org.za/docs/chap03/04.html> (accessed 6 June 2013).

²⁰⁰ Public Protector, available online at <http://www.pprotect.org/> (accessed 6 June 2013).

²⁰¹ *Vermaak v The Department of Water Affairs* (WT 24/01/2011) [2011] ZAWT 1 (3 June 2011), available online at <http://www.saflii.org/za/cases/ZAWT/2011/1.pdf> (accessed 6 June 2013).

²⁰² Movik, *supra* note 57, 29.

²⁰³ *Vermaak v The Department of Water Affairs* (WT 24/01/2011) [2011] ZAWT 1 (3 June 2011), 6.1.1.

However, lack of a national water regulator²⁰⁴ weakens the commitments of South Africa to fulfil the MDGs as an independent regulator

encodes poverty reduction and social justice goals in transparent and formal legal form, also enhances their efficacy, in part because such transparency and formality does not detract from the stability investors seek. Otherwise put, the institutional vehicle of independent regulators can enhance the chances of achieving poverty reduction goals.²⁰⁵

For environmental monitoring there exists the Environmental Monitoring Inspectorate (EMI) or ‘green scorpions’, a unit that can review environmental issues and work with the South African police service to ensure enforceability.²⁰⁶ In a recent magistrate court case, an environmental consultant was charged as he had inadequately provided information which led to some wetlands being damaged. The court found a wilful disregard of the standards that should be reached by a specialist undertaking the project.²⁰⁷ The impacts of these cases highlight a move from rhetoric paper commitment to protect the environment as well as better protection of the constitutional right to a healthy environment.

5.3 Access to Information

Access to information is crucial for effective public participation. The Parliamentary Monitoring Group (PMG),²⁰⁸ a NGO, gives insight into current issues being discussed and at what stage they are in whilst also detailing public hearings available so people wishing to participate can attend. They provide information on government committee meeting reports and briefing documents, request public comments on proposed bills and policy as well as their amendments. They also provide recordings of meetings,²⁰⁹ media briefings, and updates on parliamentary proceedings. For example, the PMG provided information on a parliamentary discussion on the National Environmental Management Laws Amendment (NEMLA) Bill, 2011.²¹⁰ The PMG was established in 1995 in partnership with

²⁰⁴ WD-SA Research Findings, *supra* note 186.

²⁰⁵ B. Morgan, ‘Building bridges between regulatory and citizen space: Civil society contributions to water service delivery frameworks in cross-national perspective’ Paper presented at the conference on ‘Poverty Reduction through Better Regulation’ (Johannesburg, South Africa 2005), 11, available online at <http://seis.bris.ac.uk/~lwbmm/publications.html> (accessed 16 June 2013).

²⁰⁶ EMI webpage, available online at <http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx> (accessed 6 June 2013).

²⁰⁷ *Frylinck and others v state of Pretoria*, Regional Division of North Gauteng, Case No 14/1740/2010, para. 52, available online at <http://www.environment.co.za/documents/law-crime/Stefan-Frylinck-2011-EIA-judgement.pdf> (accessed 6 June 2013).

²⁰⁸ See <http://www.pmg.org.za/> (accessed 6 June 2013).

²⁰⁹ However, most are in English and, therefore, problematic as not upholding the 11 official languages, and sound quality can be poor.

²¹⁰ Government Gazette No. 34558, General Notice No. 586, available online at <http://www.pmg.org.za/files/docs/110826nemabill.pdf> (accessed 6 June 2013).

Black Sash, Human Rights Committee and Idasa to provide a type of Hansard of South Africa's legislative arm. Prior to this, there had been no official records publicly available of committee proceedings. Currently, PMG contains information on almost all legislative functioning's, except on intelligence which is closed to the public.

Problems surrounding freedom of access to information in South Africa have recently been hotly debated. Section 32(1) of the Constitution entrenches the right to information. According to PAIA, every individual has the right of access to all information held by the state or any of its organs that is necessary to effect and protection of any of their other rights. The Protection of State Information Bill²¹¹ (often referred to as the 'secrecy bill')²¹² had been criticised in both the political and civil spheres. Academics have aired concerns by stating that the bill mandates for the state's ability to classify what may and may not be researched.²¹³ It can affect people's right to water as they may not be able to effectively access relevant information to show violation of the right. In addition, this bill has wider ramifications on the accessibility and quality of environmental information.

6. Social Mobility, Causal Integration and Dialogue Spaces

The poorest in South Africa are still not able to afford the water tariffs set for their survival. While the reliance for water is strongly set on the arguably meagre 'free basic water', it is not being applied across the board.²¹⁴ The fears of the 'Empire' reflected in the drops of the taps²¹⁵ in South Africa are also not entirely displaced. The government grants concessional arrangements for water operations in South Africa that can be as joint-ventures or public private partnership. Issues of privatisation and the lack of consultation have largely enraged social mobilisation in South Africa.²¹⁶ Dugard also noted that water is largely not privatised *per se* in South Africa. Multinational corporation's operations are not actually the main problem. The arguments are against corporatisation and the neo-liberal paradigms employed by the government and municipalities as their operational approach

²¹¹ This Bill was amended in 2013, available online at http://www.gov.za/speeches/docs/2013/info-bill_amendmended.pdf (accessed 24 February 2014).

²¹² " 'Secrecy bill' a step backwards", *News 24* (17 September 2011), available online at <http://www.news24.com/SouthAfrica/Politics/Protection-of-Information-Bill-a-step-backwards-20110916> (accessed 6 June 2013).

²¹³ J. Duncan, 'The prevention of scholarship bill', *The Media online* (31 June 2011), available online at <http://themediainline.co.za/2011/06/the-prevention-of-scholarship-bill/> (accessed 6 June 2013).

²¹⁴ Dugard, *supra* note 65.

²¹⁵ B. Morgan, 'Social Protest against Privatization of Water: Forging Cosmopolitan Citizenship?' in M.-C. Cordonier-Segger and J. Weeramantry (eds.), *Sustainable Justice: Reconciling International Economic, Environmental and Social Laws* (Martinus Nijhoff, Leiden, 2005) 3.

²¹⁶ Morgan, *supra* note 205.

that identifies people as consumer.²¹⁷ It is the government who is responsible to provide sufficient and affordable water, and people through participatory processes or social mobility can hold them accountable.

Citing IWRM's 1990s nexus of being concerned with bulk supply and retail water provision to larger city consumers, Bond views IWRM as having contradictory aims that made water an 'economic good' primarily.²¹⁸ This nexus can be seen as inadequate application of IWRM that prioritised economic interests. Facets of ill application need not have to taint the whole IWRM concept – IWRM is more about who is applying the concept and how it is being interpreted. Conceptually, it still has merits as its real value exists in its premises to integrate all scopes of dialogue, including those of the critiques, which can shape better governance. IWRM can reclaim the lost space by highlighting that these dialogues interlink the economic, social and ecological concerns and promote inclusive, beneficial and sustainable policies. If IWRM includes adequate participatory processes through multi stakeholder dialogue platform, it can lead to sustainable water governance. It has been suggested in studies that '(i)mproving the effectiveness of dialogue with communities with respect to development issues and the delivery of services can assist in easing the alienation protesters often feel toward local government, reducing the perception that there are few outlets for public participation'.²¹⁹ Therefore, IWRM dialogue spaces need to be available and accessible at local levels in South Africa.

Are these IWRM dialogue spaces accessible to the poor? First, one of the key IWRM dialogues recently offered in South Africa directly linked land and water as per 'phase 2' of IWRM, known as the '1st Agriculture and Water Dialogue'.²²⁰ This was held as an 'African event for Africans that creates a platform that brings together various institutions, individuals from the private and public sector, academia and NGO's, to discuss solutions on the impact of Climate Change on agriculture and sustainable land and water management'.²²¹ The dialogue was held at the Indaba Hotel and Conference Centre in Johannesburg which have been argued by some to be too exclusive as a public or social space and inaccessible by the poorest of the population who may lack money for travel²²² or had to arrange a

²¹⁷ Interview with Jackie Dugard by Frederique Demeijer and Marlieke Kierboom (date unknown), *Knowledge and Change Dialogue: Theory and practice of development dilemmas*, available online at <http://www.hivos.net/Hivos-Knowledge-Programme/Themes/Knowledge-Change-Dialogue/Interviews/Interview-with-Jackie-Dugard> (accessed 6 June 2013).

²¹⁸ See Bond's writings on the 'Lesotho Water Highlands Project': P. Bond, 'A Political Economy of Dam Building and Household Water Supply in Lesotho and South Africa' in D. McDonald (ed.) *Environmental Justice in South Africa* (Ohio University Press, Columbus, OH, 2002), pp. 223–269.

²¹⁹ Karamoko and Jain, *supra* note 4.

²²⁰ DWA, 'Events 2011, 1st Agriculture and Water Dialogue, 24–27 May 2011', available online at <http://www.dwa.gov.za/events/1stAgri.aspx> (accessed 6 June 2013).

²²¹ *Ibid.*

²²² Anonymous, 'Taxi commuters to pay more' *IOL online* (8 November 2011), available online at <http://www.bizcommunity.com/Article/196/487/66817.html> (accessed 6 June 2013).

more dangerous means of transportation.²²³ While some IWRM policy guidelines do mention that expenses should be taken into account and reimbursed when needed – these are discretionary. It appears that the state is still not adequately addressing ‘social homogenisation’ for participatory water governance spaces that is accessible to all. Civil society groups and NGO’s may form to collect funds to make it to these dialogue spaces. But, these larger civil society groups have been aired as too ‘popularist’ that potentially leave out views of the marginal groups or individuals.²²⁴

Second, the catchment management area (CMA)²²⁵ can provide another dialogue space for grassroots levels within an IWRM framework. However, lack of progress in this sector in South Africa includes technical difficulties in implementation, language barriers and lack of dedicated staff with effective capacity to facilitate meaningful public participation.²²⁶ Relationships take time to grow, and the CMA is typified as a young couple who is newly in love via the Department of Water Affairs. Critics such as the Environmental Monitoring Group has voiced their concerns about the problems with the agencies associated to CMA.²²⁷ Third, in 2000, the South African Cabinet passed the participation programme called ‘izimbizo’ as a means of ‘interactive governance and unmediated participation’. The Department of Water Affairs is in charge of holding events²²⁸ where ministers present speeches to the public.²²⁹ According to the Water Dialogue- South Africa (WD-SA) findings, community members found these meetings unhelpful as they were not ‘service delivery meetings’.²³⁰ This is a problem area as, in South Africa, people have rights to free basic services but their access is restricted as delivery by the state to provide access to these services is still not wholly adequate.

7. Concluding Comments

The challenges of public participation are more of the same. First, the impacts of climate change challenge water reserves and scientific understanding asserts that freshwater is rapidly depleting in warmer climates like those in sub-Saharan

²²³ M. Sekhonyane and J. Dugard, ‘A Violent Legacy. The taxi industry and government at loggerheads’, 10 *Crime Quarterly* (2004), 13–18.

²²⁴ Pithouse, *supra* note 11.

²²⁵ CMA’s can be established under Sections 77–90 of the NWA, available online at http://www.dwaf.gov.za/iwqs/nwa/tmp_Chapter_7.html (accessed 6 June 2013).

²²⁶ E. Simpungwe, P. Waalewijn and B. Raven, ‘Multi-Stakeholder Dissonance in the South African Water Arena’, in J. Warner (ed.) *Multi-stakeholder platforms for integrated water management* (Ashgate, Aldershot, 2007), pp. 191–204.

²²⁷ EMG website, <http://www.emg.org.za/> (accessed 6 June 2013).

²²⁸ DWA, ‘Events 2011. Public Participation Programme, 5 April 2011’, available online at <http://www.dwa.gov.za/events/PPP5Apr.aspx> (accessed 6 June 2013).

²²⁹ DWA, *supra* note 61.

²³⁰ WD-SA Synthesis Report, *supra* note 186.

Africa with adverse impacts on agriculture, food security and also on water rights. International commitments under the UN Climate Change Convention along with scientific information which has reached the highest level of consensus inevitably inform policy-makers' and regulators' decision-making processes regarding water management issues.²³¹ New water infrastructure development to compensate for climate change effect and to ensure water security will therefore mean more to development projects.²³² These will require new types of EIA (and strategic impact assessment) and other public participation platforms to occur. Leaving aside the scepticisms about the green development agenda, transfer of clean technology and 'eco-imperialism',²³³ there is no denying the negative impact of climate change on freshwater reserves. It underscores that decision-making should not exist in a vacuum populated by only science.²³⁴ IWRM while integrating climate change concerns into development decisions must include participatory processes.

As it stands, greater horizons of human activity and development pursuit cannot be halted but they should be environmentally balanced. These developments ought to be centred on alleviating poverty for all as set out in the MDGs that promote social justice.²³⁵ It is not just Goal 7: Target 7.C²³⁶ which commonly is viewed will be directly affected, but all of the MDGs are affected.²³⁷ However, if information regarding climate change is overtly technical, complications in dialogues grow deeper. Indeed, communities understand struggles with the land and freshwater better than hypothetical and over scientific climate models.²³⁸ Dialogues and information need to be accessible – not just physical access in local spaces but in content as well allowing everyone to feel included. South Africa is committed to climate change adaptation and it has produced its White Paper on National

²³¹) Sands, *supra* note 15, 5–11.

²³²) Ward, *supra* note 52.

²³³) Term coined by Paul Driessen, *Eco-Imperialism: Green Power, Black Death* (Academic Foundation, New Delhi, 2005), available online at <http://www.eco-imperialism.com/main.php> (accessed 6 June 2013); R.H. Grove, *Green imperialism: colonial expansion, tropical island Edens and the origins of environmentalism, 1600–1860* (Cambridge University Press, Cambridge, 1997).

²³⁴) Sands, *supra* note 15, 5–11.

²³⁵) J. Sachs, 'The world wants the millennium development goals to work', *The Guardian online* (21 September 2010), available online at <http://www.guardian.co.uk/global-development/2010/sep/21/millennium-development-goals-jeffrey-sachs> (accessed 6 June 2013).

²³⁶) UN, *The Millennium Development Goals Report 2011* (UN, New York, NY, 2011), 53–56: Target is to 'Halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation'. Report, available online at http://www.beta.undp.org/content/dam/undp/library/MDG/english/MDG_Report_2011_EN.pdf (accessed 6 June 2013).

²³⁷) UNWWAP, 'Water for the Millennium Development Goals: Why managing water resources wisely is key to achieving the MDGs', available online at <http://www.unesco.org/water/wwap/publications/> (accessed 6 June 2013).

²³⁸) Butterworth, *supra* note 10; Greyling, *supra* note 10.

Climate Change Response.²³⁹ It contains ambitious claims such as integrating climate change considerations into water planning processes across relevant sectors, implementing the 'best' catchment and water management, and provide human, legal, regulatory, institutional, governance and financial resources and capacity to deal with climate change.²⁴⁰ Considering the views from the ground and from what has been observed in legal cases, these claims look good on paper but are met with some scepticism.

Second, while laws exist to guard against water pollution, water can be wasted and made unfit for use in ways that may not necessarily constitute 'pollution' (e.g., adding salt to water; other high mineral contents that may be released during mining). These activities can consequently keep freshwater reserves at a further minimum and deprive people of water they need. It may also take a long time to purify the wastewater and make it safe for human use and consumption. This purification requires reliance on the energy sector to power the process. In the South African context, access to energy services to purify water is difficult and likely to be sidelined as the energy sector lacks operational capacity to provide power for the ever increasing demands from all other sectors (e.g. domestic, business, agriculture).²⁴¹ Wastewater and water shortages create more pressure on freshwater leading to further water scarcity. IWRM approaches need to integrate these concerns in relation to energy security. A more complicated problem is the serious pollutants of Acid Mine Drainage.²⁴² Freedom for the media to inform the public about these pollutions should not be restricted. As the South African government is pushing through some modifications in the Protection of State Information Bill, it may have consequential effects on media freedom as well as access to and quality of information being disclosed to the public.

It appears that South Africa is still fighting hard to be a more participatory democracy where information and remedy are accessible to all its members within IWRM decision-making processes and dialogues. It strives to give equal

²³⁹ DEA, *National Climate Change Response White Paper* (DEA, Pretoria, 2011), available online at <http://www.climateresponse.co.za/> (accessed 24 February 2014).

²⁴⁰ *Ibid.*, 18.

²⁴¹ The South African Government, as an example, openly affirmed electricity shortages in a statement entitled 'National response to South Africa's electricity shortage' in 2008, available online at <http://www.polity.org.za/article/national-response-to-south-africas-electricity-shortage-january-2008-2008-01-30> (accessed 24 February 2014). The DA viewed that as the Government had not taken heed of warnings about the electricity problems, so too could a 'water crisis' emerge in the country through it not taking heed of further warnings related to water. See: 'Statement by Gareth Morgan MP DA Spokesperson for Environmental Affairs and Tourism, and Mpowele Swathe MP DA Spokesperson for Water Affairs and Forestry' transcript available online at <http://www.environment.co.za/environmental-issues-news/south-africas-looming-water-crisis.html> (accessed 16 June 2013).

²⁴² SAPA, 'Illegal River Mining Company Sentenced' *IOL online* (29 September 2011), available online at <http://www.iol.co.za/news/south-africa/kwazulu-natal/illegal-river-mining-company-sentenced-1.1147211> (accessed 6 June 2013). See 'Acid Mine Drainage: Blood, Gold and Water', *Mail & Guardian Series*, available online at <http://mg.co.za/specialreport/acid-mine-drainage> (accessed 6 June 2013).

democratic voice and representation in IWRM dialogues that should exist to improve everyone's quality of life. Social, economic and ecological concerns must equally co-exist in strategy and development outcomes for the legal principle of sustainable development to materialise. The Constitution of South Africa reflects the progressive desires to protect people and the environment. The right to a clean and healthy environment places responsibility squarely on people for it to be so maintained. The recognition and enforcement of the constitutional right to water suggest a revitalisation of economic and social rights in the South Africa, stimulated by the domestic application of this right in the case laws.

Although there are some progress, the poor and the vulnerable, the environment and the natural resources including water resource are still not adequately protected in South Africa. South Africans, through their Constitution, want democracy, opportunities to self-govern and public participation. When inclusive public participation is not truly at the heart of any development, how could there be hope for sustainable outcomes? Participatory dialogues within IWRM rushed for the sake of economic development detriment all involved. A suggestion is that multi-stakeholder dialogue platforms can provide a forum where varying interests are represented through their values and beliefs, and ultimately their representation help to form a better decision. Decision-makers should value public participation as it informs them and their administrative tasks better. Also, decisions made via technocratic decision-making cannot account for what local knowledge on the ground can. Sustainable water governance is crucial in South Africa and inclusive decision-making processes are essential for we all commune in water.