

Article

Water 'Apartheid' and the Significance of Human Rights Principles of Affirmative Action in South Africa

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Abstract: Water is an essential necessity for human beings; however, South Africa has a long history of inequalities dating back to apartheid politics and legislation which denied access to water to disadvantaged black populations mostly residing in rural areas. Although apartheid has officially ended, whether the lack of access to water by such populations who still cannot afford it exists and aligns with international human rights principles of equality and non-discrimination merits an examination. To redress the injustices of the apartheid regime, the right to have access to sufficient water is entrenched in section 27(1)(b) of the 1996 South African Constitution. In addition to embracing equality and non-discrimination, the Constitution informs other instruments and measures such as free basic water policy and pre-paid meters meant to ensure access to water. However, the plight of these populations persists in post-apartheid South Africa, but it is rarely a subject of academic scrutiny how the notion of affirmative action as grounded in the principles of equality and non-discrimination under human rights law can be deployed as a response. Using a doctrinal research approach, this article argues that the continuing struggle of disadvantaged communities with access to water does not only constitute water apartheid, it negates the human rights principles of equality and non-discrimination. The principle of affirmative action is useful in responding to inadequate access to sufficient water by disadvantaged populations in post-apartheid South Africa.

Keywords: affirmative action; apartheid; disadvantaged populations; equality; human rights; non-discrimination; politics; water; South Africa



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1. Introduction

Water is essential for human beings irrespective of race, disability and social status. South Africa has a long history of enormous differences and inequalities regarding service delivery including access to water. Under the apartheid regime, a high level of inequality was a trend in access to water, a development that favoured the minority white populations and unfairly disadvantaged the black rural communities. Although since 1994 when apartheid officially ended, there has been a rework of the South African water law and policy [1], agitations for equality in water access are still rampant and still highly debated in political arena in post-apartheid South Africa [2]. Literature has engaged the political dimension to the access of disadvantaged communities to water and measures meant to allow their access to water in South Africa [3,4]. There is scholarship on the vision and weaknesses of post 1994 water policies and measures including the implementation of the free basic water policy [5] and prepaid water meters [1]. Despite these measures, access to water continues to raise the issues around equality and non-discrimination involving populations disadvantaged by past unfair practices and laws in South Africa. How current experiences reflect a similar consequence as did the unfair discriminatory practices of the apartheid regime merits a scrutiny. In addition, it is a rare discussion in literature regarding the way in which the principles of equality and non-discrimination may be deployed in

responding to the lack of access to sufficient water by populations disadvantaged by past unfair law practices in South Africa.

To be sure, international human rights emphasize the principles of equality and non-discrimination, which also form part of the constitutional and legislative framework on access to sufficient water in South Africa. For instance, international standards of equality and non-discrimination relevant to access to water are evident in the Sustainable Development Goal (SDG) 6 of the United Nations on access to water [6,7], international bill on human rights, namely, the Universal Declaration of Human Rights (UDHR) [8], International Covenant on Civil and Political Rights (ICCPR) [9], the International Covenant on Economic, Social and Cultural Rights (ICESCR) [10], ICRPD [11], CERD [12], CEDAW [13], United Nations General Assembly Resolution [14] and the Human Rights Council [15].

At the domestic level, section 27(1)(b) of the 1996 Constitution [16] guarantees the right of everyone to have access to sufficient water in South Africa. In addition, in terms of section 233, courts may prefer any reasonable interpretation that conforms with international law while interpreting legislation [16], signifying that instruments relevant to equality and non-discrimination in the context of access to water are relevant in South Africa. Section 9(2) of the 1996 Constitution requires that, to promote the achievement of equality, 'legislative and other measures' may be necessary to assist persons disadvantaged by past unfair discrimination. In addition, section 9(3) forbids unfair discrimination on grounds including race, ethnic, or social origin, while section 9(4) calls for the enactment of a national legislation to prevent or prohibit unfair discrimination. There is legislation aimed at correcting past injustices around access to water such as the National Water Act [17] and the Water Services Act [18]. As will be made manifest later, this is inadequate. Consequently, examining how the international standards and domestic framework are legal bases for the application of the notion of affirmative action to address the lack of adequate access to sufficient water is necessary. However, principles of affirmative action have only been established mostly as a measure of redressing equal employment opportunity in South Africa [19,20], and not as the guiding basis for accessing resources such as water by disadvantaged populations.

Against this backdrop, the paper investigates whether evidence exists on water apartheid in South Africa, and, if so, whether the notion of affirmative action can be deployed as a response to the struggle with access to sufficient water.

The article is primarily based on literature study. In examining water 'apartheid' and the significance of human rights principles of Affirmative Action in South Africa, the study assessed and reflected on existing international and domestic instruments, literature and case law dealing with affirmative action and access to water. To find and discuss all literature in relation to the subject in South Africa is impossible. Hence, search engines were used to locate key websites that have important information on relevant documents. The website, www.bayefsky.com, encompasses comprehensive data on the instruments and application of the UN human rights treaty system by its monitoring treaty bodies. The website of the Southern African Legal Information Institute (SAFLII) which publishes legal, policy information and case law, was consulted to elicit domestic instruments, literature and the cases discussed. In relation to 'water apartheid', information was gathered from a Google engine search on the concept, while, regarding court decisions, the Constitutional Court was purposively selected for its status as the final authority on all constitutional rights in South Africa. Using the search terms, 'affirmative action and water', 'water apartheid', 'water politics', 'access to water', 'equality' and 'non-discrimination', disparate information was generated on publications including books, journals, magazines, newspapers, juristic work, reports, literature containing factual and philosophical information. articles, research papers, thesis or dissertations, reports, judgments and commentaries and case laws. These materials were examined and explored to develop the arguments in the article.

The article is structured as follows: following this introduction, Section 2 of the paper assesses trends on legislative framework to demonstrate the extent to which it raises the existence of water apartheid of disadvantaged populations in South Africa. Section 3

investigates whether evidence on the lack of access to water is a negation of a human rights standard of equality and non-discrimination, while Section 4 explores the basis for deploying the notion of affirmative action. Section 5 presents the conclusions.

2. Legal Framework and Water Apartheid against the Disadvantaged

By water apartheid, it is meant here the way in which law and its application discriminates unfairly against certain populations. Despite the optimism that accompanied the end of apartheid regime in 1994 and the subsequent approval of the 1996 Constitution, unfair discrimination of the past remains noticeable in areas including access of disadvantaged populations to water. Arguably, this development constitutes water apartheid, a situation whereby the wealthy can pay to access water while the disadvantaged populations, mostly black populations living in rural settings who cannot afford the cost, are largely left to confront with and suffer lack of access to sufficient water. Even if unintended, as shown in this section, the trend reflects the inadequate access to water that was a core feature of the politics under the apartheid regime, a development that has not considerably changed in post-apartheid South Africa. By access to water, it is meant the availability of minimum standard of between 50 and 100 litres of water per person per day recommended by the World Health Organisation [21].

Under the apartheid regime, using the agency of apartheid politics, governments meted out a range of discriminatory law and practices which unfairly disadvantaged the non-white populations of South Africa. Exemplifying this general trend in the apartheid regime are several pieces of legislation that unfairly allocated water to specific groups and, in so doing, discriminated against non-white populations. In that era, access to free minimum water by disadvantaged populations did not form part of the legal framework. For instance, the Irrigation and Conservation of Water Act [22] mainly favoured the white farming communities in the agriculture sector [23], by granting riparian water rights that limited the access of other population to water [24]. In addition, the 1913 Land Act [25] did not only displace the Black South Africans from urban land, but it also deprived them of access to water infrastructure. Irrigation schemes meant to address social concerns made little difference as they mainly elevated poor whites at the expense of black South Africans [23]. Subsequently, the Water Act [26] reinforced the trajectory. While the underlying reason of the State then was to use water for industrial development rather than agriculture [23], Africans who moved to the cities and those in townships did not receive necessary water services or infrastructure as the authorities knew they could not afford it [23].

Arguably, inequality regarding service delivery, particularly water service delivery featuring in the apartheid regime, continues afterwards. Following the official end of apartheid, measures have been adopted to respond to unfair discrimination relating to water access; however, there has not been much considerable change. In fact, the phrase 'water apartheid' has been used in some literature to highlight the reality that apartheid may have ended in 1994, but water apartheid did not as black rural communities continue to experience perennial problems in relation to access to water [27,28]. However, access to sufficient water is guaranteed to everyone in terms of section 27(1)(b) of the Constitution, while section 9(3) leaves no doubt that such right should be enjoyed without discrimination. This reasoning agrees with the preamble to the Water Act [17] that acknowledges water as a 'natural resource that belongs to all people' and affirms how past politics and their consequential discriminatory laws have been utilized to prevent equal access to water. The Act further identifies equity as a core principle of access to water.

No doubt, the access to sufficient water provision is subject to progressive realization as enunciated in section 27(2) of the Constitution. Arguably too, progressive realization measures such as free basic water policy and pre-paid water meters have been adopted pursuant to enabling legislation. The free basic water policy comprises a minimum quantity of portable water of 25 litres per person per day or 6 kilolitres per poor household per month [29,30]. This is in line with section 3 of the 2001 Regulations relating to compul-

sory national standards and measures to conserve water which deals with basic water supply [31]. The 2001 Regulations was made by the Minister of Water Affairs and Forestry pursuant to sections 9(1) and 73(I) (j) of the Water Services Act [18]. By 2017, this policy was implemented in 95% of all relevant municipalities, which are responsible for utility management in South Africa [32]. The prepaid meters measure allows a certain amount of free water per month to be dispensed while indigent populations pay for the extra water before they use it [33]. The pre-paid approach allows cost recovery for consumption over and above the free basic allocation. It is reasoned that this can help users to control their finances, manage their debts and conserve water [34]. The approaches are in fact justified in terms of section 10(1) of the National Water Act [17], which highlights that the right to have access to water does not necessarily mean that water services should be free of charge.

Nonetheless, the above measures do not guarantee adequate access to sufficient water, a situation that shows that, whereas apartheid has ended as an official state policy, the unfair discrimination which it typified to disadvantaged populations continues in the form of their lack of access to water in post-apartheid South Africa. While findings show some improvement in supplying free basic water [35], several poor households still lack access for the required standards [35], which in fact is also inadequate. The 2019 General Household Survey (GHS) released by Statistics South Africa (Stats SA) found that access to drinking water recorded the lowest progress over the review period. Between 2002 and 2019, access to water declined in provinces including Mpumalanga, Limpopo and Free State [36]. Generally, less than 50% of households had access to piped water in their dwellings in 2019, while 31% of households still had to fetch water from rivers, streams, stagnant water pools, dams, wells and springs in 2019 [36]. This development confirms earlier findings that large numbers of South African citizens, mostly black and living in the poorest sections of townships or in so-called 'informal settlements', do not have continuous access to safe water [37]. To further show the continuing nature of the challenge, issues around access to sufficient water by disadvantaged populations still form an important subject of controversial discussion in the political terrain in post-apartheid South Africa [3,4]. To illustrate, recently the 2020 official release of the Department of Water and Sanitation dismisses the allegation that intervention works around the sewer spillages into the Vaal River forms part of a broader strategy to influence the outcome of their local government elections [38]. This is not surprising as the primacy of access to water has been generally shown to be key in local elections [39]. Other writings indicate that it forms part of the agenda of social movements and political parties [40], activities nongovernmental organisations [NGOs] and community leaders in South Africa [34].

The consequence of this inadequacy of access is evident in the indignity that disadvantaged populations continue to suffer as they lack sufficient water for basic needs and sanitation which those with means possess [41]. While the current discrimination is not deliberately based on race as happened under the apartheid laws, the lack of access to water now thrives on a lack of means by poor and mostly black rural populations to access sufficient water. It may be argued that the development is not strange as it merely brings to light the age-old question as to whether water is perceived by the decision makers as a 'human right' or valued as a vital but limited resource that entails costs and requires care [42]. Even more so, recent findings confirm the need for costs as they suggest that free basic water is not sustainable and does not create any revenue for municipal institutions. It only increases costs and thereby reduces profits [35,43]. However, the argument is questioned, in that it has been demonstrated that water costs can deprive vulnerable groups' access to water [44]. Hence, the continuing lack of access to sufficient water in post 1996 South Africa suggests that the tension around economic concerns, environmental issues and social justice have not been resolved in favour of disadvantaged populations in South Africa, as they continue to suffer exclusion due to a lack of means. Also, the fact that populations mostly affected are black who cannot afford water costs portray that just as it was under apartheid, the racial factor cannot be excluded from the discussion. It remains

to be seen how this trend offends the principle of equality and non-discrimination which are required core standards in human rights to water.

3. Water Apartheid as Negation of Principles of Equality and Non-Discrimination

While it is not difficult to regard the various laws on access to water under the apartheid regime as unfair and discriminatory, the persistent existence of the challenge in post-apartheid Africa raises a different question as to whether a lack of access to water of disadvantaged populations who cannot afford it is unfair and necessarily offends the human rights' principles of non-discrimination and equality in South Africa. It is argued that, while not all discrimination is unfair, the lack of these populations who lack means to access sufficient water constitutes an unfair discrimination because it undermines the principles of non-discrimination and equality as known to international human rights law and entrenched in the South Africa Constitution.

Equality and non-discrimination are the most widely recognized human rights in international law [45,46]. The two principles are evident in the pillar instruments constituting international human rights law: UDHR [8], ICCPR [9] and ICESCR [10]. While the principles are expressed throughout human rights instruments, there are two significant provisions. Article 2 of UDHR entitles everyone to human rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' [8]. Article 2 in both the ICCPR and the ICESCR contains a similar non-discrimination provision based on these same enumerated grounds [9,10]. That the principles apply in the context of access to water is not difficult to imagine. In grounding the right to water in articles 11 and 12 of the ICESCR, the Committee of Social Economic Rights, the treaty monitoring body of the ICESCR explains through General Comment No. 15 that the legal content of the right to water includes availability, accessibility, safety, acceptability and non-discrimination which States must adhere to as a minimum [46] (paras 10–12). The principles also reflect in the reference to universal access and equity used in the framing the UN 2030 Sustainable Development Goals No. 6 on water and sanitation [6]. The combined reading of these provisions suggests that access to water on any of the listed grounds is forbidden.

In the context of South Africa, historically, most of the disadvantaged populations affected by lack of access are black, in that access to water has racial and colour connotation that lacks any fair purpose. The fact that the populations mostly live in townships and rural settings also suggests that lack of access to water compared with populations living elsewhere has bearing on social origin. As has been earlier indicated, these populations often lack the wherewithal to pay for additional water services more than the litres allowed under programs of the free basic water and prepaid water systems. This raises a question as to whether, compared to the wealthy, the lack of access to sufficient water by populations that cannot pay the cost does not amount to unfair discrimination on the ground of means, in particular, considering that these populations were the most impoverished under apartheid.

While it is not apparent in the non-discrimination provisions of the UDHR and the ICESCR, one can argue that lack of access to water on the ground of means falls within the grounds of 'property' or 'other status' mentioned in the instruments. On the former, commentators have regarded the listing of 'property' as one of the prohibited grounds of discrimination as suggesting prohibition on the ground of economic status such as wealth or poverty is unfair [47–49]. As the non-discrimination grounds apply to all the rights enumerated in the instruments, it arguably prohibits only means based enjoyment of socio-economic rights inclusive of access to water. To interpret the word 'property' otherwise is incompatible with the human rights principle of non-discrimination under the UDHR and the ICESCR, as it will mean that only those who can afford it should enjoy socio-economic resources such as access to sufficient water. Such an understanding is insensitive to past racial injustices that have slowed down the economic development of disadvantaged populations.

Besides the above, the continuing lack of access to sufficient water by populations disadvantaged by unfair discriminatory practices of the past offends the principle of equality. While the meaning of the notion is not indicated anywhere in the UDHR and ICESCR, article 7 of the UDHR entitles everyone to 'equality before the law' as well as 'equal protection of the law.' The preamble to the ICESCR refers to equality while its article 3 guarantees the equal rights of men and women to enjoyment of socio-economic rights. The work of the Human Rights Committee, the treaty monitoring body for the ICCPR offers insight on the meaning of equality and its link to discrimination. Through its General Comment No. 18 [50], the Committee considered Articles 2 and 3 as well as other references to equality and non-discrimination in the ICCPR. In linking equality with the term 'discrimination', the Committee drew on the definitions provided in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and defined discrimination in the ICCPR as:

'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms' [50].

The foregoing at least shows that every ground of discrimination except allowed has the propensity to impair equal enjoyment of rights. This signifies that, as far as the international human rights law to water is concerned, discrimination on the listed grounds can unfairly disturb equal enjoyment of the right to water.

South Africa is a State Party to human rights instruments that offer normative guidance on the principles of equality and non-discrimination and arguably access to water [9–13], and has endorsed the UNSDG [51] (SDGs). Hence, one expects the understanding of the principles to apply in the context of access to sufficient water not only because international law is applicable in courts. The Constitution has provisions of its own, the interpretation of which can be complemented by international law. Regarding the application of international law, for instance, in terms of section 233 of the Constitution [22], courts may prefer any reasonable interpretation that conforms with international law while interpreting legislation. In *Glenister v President of the Republic of South Africa and Others* [52], Ngcobo CJ enunciated the significance of international law to the Constitution as follows:

'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution' [52].

Key provisions in international instruments that are consistent with the Constitution or an Act of Parliament, may qualify as customary international law, which is applicable by section 232 of the Constitution.

Section 9(1) of the Constitution has a similar provision as in the ICESCR that guarantees everyone the right to equal protection and benefit of the law. In terms of section 9(3)(3), neither direct nor indirect unfair discrimination of the State may be allowed to deny rights on one or more grounds, including 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. The list of grounds is more than it is in the international instruments like the UDHR and the ICESCR, a feature that does not only suggest that grounds of unfair discrimination are never closed. The use of the word 'on one or more grounds including . . . ' when combined with section 233 of the Constitution on the application of international law, arguably, accommodates other grounds which may be present in international instruments but missing in section 9(3)(3). For instance, it should accommodate the word 'property' understood as referring to distinction on the ground of wealth under the ICESCR and UDHR even if not listed as part of the grounds under the 1996 Constitution. Besides, the lack of means has the potential to impair the fundamental human dignity of persons as

human beings in that it reflects on them badly when compared with populations with means. Consequently, the inability to access water by the disadvantaged populations due to lack of means constitutes unfair discrimination based on means and therefore negates the principles of equality and non-discrimination.

However, the foregoing reasoning has not found an express recognition in cases where courts examined the right to water in the context of non-discrimination and equality in South Africa. In *Mazibuko & Others v City of Johannesburg & Others* [53], the Constitutional Court was invited to consider whether installing pre-paid, 'pay as you go' water meters in the Phiri community constituted a violation of the constitutional right to water and unfair discrimination on the basis of race. The plaintiffs had challenged, among other things, the way in which the pre-paid meter automatically cut off water supply once the money on a card was gone and the free basic water supply exhausted. On the issue of unfair discrimination, the Court found that pre-paid meters were reasonable as a way of recovering costs from a community from which bill collection had historically proved difficult, and reasonable because the price of water was cheaper for those with pre-paid meters than those who enjoyed credit meters [53]. In relation to equality, the Court found that pre-paid meters were not unfair discrimination against the black, historically poor Phiri community. In fact, the Court held, compared to the inequality that such communities experienced under apartheid, prepaid meters were an improvement. Not only were rates cheaper than regular meters but, in addition, an automatic cut-off can help residents not to go into debt or be subject to collection actions [53].

To be sure, the Court was right in a sense that not all discrimination is unfair. Section 9 is not an absolute right as it is subject to a general limitation provision in section 36 [54]. Nonetheless, that the situation around access to water has improved is relative to populations, and to hold that the discrimination is reasonable and fair is to ignore the impact of alleged discrimination on the complainants and others in their situation. The Court seems to have attached more weight to the debts that may likely arise from allowing more use of water over the basic access to water without much persuasion by the sufficiency of the allowed basic. It ignores the reality that the water dispensed by prepaid water metres per month is usually not enough to sustain a household [33]. It does not conform with the WHO recommendation [21]. It does much more; per Holland, prepaid meters undermine procedural protection and consumer safe guards available to a person whose water gets cut. The only option which an individual whose water has been cut has is to pay for water services [55]. There was less attention of the Court on whether the allowed minimum was adequate for a community who could not afford it, and, if not, the effect of such inadequacy on the thinking of such communities who rarely see that happening in middle class communities. It is not surprising that the judgement has been further criticised for its lack of attention to the reality that disadvantaged populations suffer the indignity of knowing middle class South Africans are spared from the water regulations via prepaid meters [34].

Consequently, it constitutes an unfair discrimination and negates the principles of equality and non-discrimination where the society fails to take adequate measures to ensure the access to sufficient water by disadvantaged populations who are poor and lack the income to pay. To argue otherwise is to downplay the relevance of status of means and social origin and its consequences on disadvantaged populations while testing a practice against the twin principles of equality and non-discrimination. To ignore such reality is a negation of the principle of equality and non-discrimination. The next section discusses the relevance of the notion of affirmative action in the context of equality and non-discrimination and how it may respond to the persistent lack of access to water faced by disadvantaged populations.

4. Affirmative Action as a Response Strategy

From the onset, in justifying the consideration of affirmative action in the context of the realising the right to access sufficient water, it should be set out that there has been a range

of call on the need to reflect more carefully on the established profit-oriented measures for delivering access to water to needy populations. For instance, a 2018 report by Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights argues the need to: ‘reverse the presumption, now fully embraced by actors such as the World Bank, that privatization is the default setting and that the role of the public sector is that of a last-resort actor that does what no one else can or wants to do’ [56]. Ubani explains that profit-oriented approach in the delivery of water may fail its inherent social, cultural, spiritual and historical value for local communities [57]. The caution on a profit-oriented approach resonates with the non-discrimination provision of the UDHR, which, as authors note, is intended by the drafters of the UDHR to be fulfilled through far-reaching egalitarianism measures [47,58].

Arguably, while profit oriented measures do not necessarily stifle realization of rights, a pro-poor approach to access water should include alternative state interventions that prioritize the need of the disadvantaged above profit making. Hence, this section explores how the notion of affirmative action, a fair discrimination measure, as grounded in the principles of equality and non-discrimination in human rights law can be deployed to address the perennial challenge that disadvantaged populations continue to face on the issue of access to water in post-Apartheid South Africa. It is reasoned that, except for the continuation of the challenge being alleviated, it may continue for a substantial period of time. Hence, an alternative measure is required to serve populations who have suffered considerable unfair discrimination in the past which continues to have contemporary negative consequences on their access to water.

4.1. Affirmative Action and Principles of Equality and Non-Discriminations’ Access to Sufficient Water

Affirmative action is not new to both international human rights law and domestic law in South Africa. It connotes special measures, often discriminatory, aimed at guaranteeing rights to communities and peoples who have suffered historic injustices to put them at an equal standing with other parts of the populations [59,60]. In explaining affirmative action, scholarship distinguishes between formal and substantive forms of equality. Formal equality or equality require that similar cases be consistently treated the same and that people should not be treated differently because of characteristics such as religion, race or age or similar conditions [60]. Finley states that formal equality ‘marginalizes, disempowers, and renders invisible those such as women, who have seemed the most unlikely to ever melt into the white male model of homogeneity.’ [61]. Conversely, according to Smith, substantive equality turns the right to equality from a negatively-oriented right of non-discrimination to a positively-oriented right to substantive equality [62]. Adopting a substantive notion of equality helps to fulfil four essential objectives in the Fredman thesis. These are: ending the trend of disadvantage linked to group identity; encouraging respect for equal respect and dignity, thereby reducing stereotypes associated with their culture; offering positive measures to individuals as members of the group; and enabling integration and full participation in society [63]. It also allows ‘equality of results or outcomes’ to achieve an equal distribution of social goods [64]. Thus, to apply affirmative measures in the context of a right to access sufficient water is to offer opportunities that favour disadvantaged groups in order to achieve in the end a society where all populations have sufficient access to water.

The incorporation of affirmative action is supported by several international human rights treaties, such as the UDHR [8], ICCPR [9], ICESCR [10] and ICERD [12], which provide special measures as the normative anchor for the redistribution of basic resources to benefit the underrepresented groups [65]. The UDHR does not specifically mention affirmative action in any of its provisions, but contains two elements of equality and non-discrimination that have a bearing on the concept of affirmative action. In addition to accommodating similar elements, the use of special measures to safeguard the interest of the underrepresented groups in the context of the right to water came into light in the CESCR General Comment No. 15 on the right to water. The Committee stated that:

‘States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees’ [66,67].

Communities who lack the means and have been disadvantaged by discriminatory practices that unfairly deprived them of access to water, arguably, fall within the scope of the above position of the Committee. In the context of access to water, such special attention entails that deploying affirmative action can ensure that populations that suffer historic unfairness are empowered to enjoy equal access to sufficient water.

At the domestic level in South Africa, affirmative action can further be inferred from the Bill of Rights as an interim measure to redress the inequalities which exist as a legacy of the apartheid regime. Section 9(2) of the 1996 Constitution provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Based on the above, affirmative action is said to be indirectly covered by the terms ‘other measures’ which should be adopted by the relevant stakeholders to protect individuals forming part of the previously disadvantaged group [68]. In addition, as demonstrated in section 1, the Constitution of South Africa seeks to redress past injustices of the apartheid government through substantive equality. In *Bato Star Fishing (Pty) Ltd. v The Minister of Environmental Affairs and Tourism and Others* [69], Ngcobo CJ observed that:

‘In this fundamental way, our Constitution differs from other Constitutions that assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it’ [69].

The Constitution expressly provides in its preamble and other provisions including the right to property (article 24) for policy and legislation to be formulated to allow efforts to redress the inequities of the past. In the context of the right to water in South Africa, this would mean that affirmative action policies would enable the government to give those who were previously disadvantaged by the apartheid water laws, particularly those residing in rural communities’ preferential treatment to ensure that they obtain an equitable share of this scarce natural resource. Overall, affirmative action, although discriminatory, is necessary to ensure substantive equality that is at the heart of the principles of equality and non-discrimination as envisaged under international human rights law and domestic legislation. How this can legally be applied in the context of communities disadvantaged by water law and practices who cannot afford to pay is the focus of the next section.

4.2. Applying Affirmative Action as a Response to Lack of Access to Sufficient Water

There is a need for governmental stakeholders at different levels of water governance to accommodate affirmative action in the political discussions and application of water laws in South Africa. To empower disadvantaged populations who could not access sufficient water, the government may trigger the potentials for affirmative action in some of the laws regulating access to water such as the Water Service Act [18] and the National Water Act [17].

Applying affirmative action to aid the access to sufficient water of such populations can be done through total cutting of water tariffs for which residents of rural communities are expected to pay and the provision of water in line with the minimum standard of between 50 and 100 litres of water per person per day recommended by the World Health Organisation (WHO) [21]. To achieve this end, there is the need to amend section 3 on basic water service of the 2001 Regulations [32] to reflect international best practice. The recommended amount is necessary to ensure that most basic needs are met and few health concerns arise. It is noteworthy that the overturned decision of the High Court in

Mazibuko [53] had followed this direction in asking the City of Johannesburg to provide Phiri residents with 50 litres of free water per person per day, highlighting the need to take into consideration the reality of HIV/AIDS and that the City did not lack the financial resources to provide 50 litres per person per day, and could utilise funds provided by the national government for that purpose. The argument of the High Court responded to the often-touted excuse for failing disadvantaged populations on access to water. It shows that, with appropriate prioritisation of resources and political will as seen in implementing affirmative actions in other areas of national life such as equal employment in the public service [19,20], ensuring access to water to disadvantaged populations who cannot afford it is not an uphill task. The approach will satisfy the substantive equality dimension of access to water as it will reverse past and ongoing injustices associated with lack of access to water. It will also help meet more recent challenges of water security consequence such as climate change and global pandemics such as COVID-19 which disparately adversely impact such communities [70]. It will prevent spread of diseases as enough water will be available for purposes including sanitation. It will have a positive impact on women and girl children in those communities who often become victims of sexual abuse due to walking long distances in search of water. Affirmative action will ensure that water and basic health needs of those at lower ends of income distributions are effectively met.

Achieving the foregoing is not inconsistent with the enabling law on water right applicable in South Africa. It is grounded in section 3(1) and (2) & (3) of the Water Service Act [18], which provide that everyone has a right of access to basic water supply and imposes on the water services authority the duty to adopt necessary measures to realise the right to water. It is also compatible with the constitutional guarantee on access to sufficient water, equality and non-discrimination along with the respect for international law applicable in South Africa. In particular, the Water Act defines basic water supply as the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene. The increase of access to water in such communities could also diminish the rate of violence since lack of access to sufficient water for drinking and other domestic uses is a contributing factor to its prevalence.

Arguably, one also expects that the Court will not find the application of affirmative action in water access problematic. Although it is not decided in the context of affirmative action, evidence that the notion is possible in access to water context can be found in the case of *City Council of Pretoria v Walker* [71]. This is an appeal case relating to differential treatment of three areas in public services delivery which includes water service. The respondent, Walker, was a resident of old Pretoria, an overwhelmingly white district. Old Pretoria was amalgamated with two black townships to form a new administrative district under the authority of the appellant council (City Council of Pretoria). The City Council of Pretoria continued the practice of charging for electricity and water on a differential basis, the residents of old Pretoria being charged a consumption-based tariff and those of the townships being charged a lower flat rate. A programme to install meters in all properties in the townships was implemented, but the council decided not to start charging those residents in the townships who had meters installed at the consumption-based tariff until all the installation work had been completed. The Council's officials also adopted a policy of selective enforcement against defaulters; they continued to take legal action to recover arrears from residents of old Pretoria but failed to take similar action in the townships, where a culture of non-payment for services existed. Instead, the officials took a strategic decision to encourage payment of arrears by residents in those areas but not to take legal action against them while the installation of meters was still in progress [71]

The respondents alleged discrimination and the violation of section 8 of the Constitution which deals with equality. The claim was based on the policy which the council implemented calling for residents of (white) old Pretoria to comply with the legal tariff and to pay the charges, while the (black) residents of Atteridgeville and Mamelodi were expected to pay only flat rates that were lower than the tariff. The legal question addressed

by the court in the matter was whether the differentiation between these three residential areas constituted unfair discrimination. The Court held that the councilor when dealing with diverse communities should ensure that there is no discrimination. However, when dealing with complex societies occupied by those who were previously disadvantaged and advantaged, the councilor may adopt measures to eliminate the injustice and disadvantages that are consequences of the policies of the past to bring about equality within its available resources to the disadvantaged populations [71].

The foregoing case at least shows that differential measures can be deployed to ensure better access of disadvantaged populations to water. Although the word affirmative action is not used, it is argued that the Court could have come up with a similar decision if the case was analyzed using the concept of affirmative action. Indeed, had the concept being used, it would have enriched further the jurisprudence on the right to water in the context of affirmative action in South Africa. Therefore, the case of *City Council of Pretoria v Walker* offers useful guidance on the application of affirmative action in the context of water delivery to populations disadvantaged by apartheid regime that still cannot afford to pay for water, rural communities of South Africa. Unsurprisingly, the Court stated that:

‘The differentiation was rationally connected to legitimate governmental objectives. Not only were the measures of a temporary nature, but they were designed to provide continuity in the rendering of services by the council while phasing in equality, in terms of facilities and resources, during a difficult period of transition’ [71].

South Africa is still a state of considerable inequalities and in a period of economic transition where there is the need to cater for those, who, due to lack of means, cannot assess basic survival resources such as water. Hence, municipalities and indeed other stakeholders should adopt measures which will ensure that disadvantaged populations who lack the means gain access to sufficient water. As Schiel et al. note, effective allocation of resources is necessary for the realisation of the right to water [72]. Hence, at all levels of water governance-national, provincial and municipal, stakeholders should generate and commit funds for the purpose of ensuring access to sufficient water of disadvantaged populations in a similar manner that funds and political will are devoted to other matters of affirmative action in South Africa.

5. Conclusions

During the apartheid regime, the lack of access to water was one of the unfair inequalities suffered mostly by black and rural communities. As has been shown, the inadequate access to water has not considerably changed for these disadvantaged communities in post-apartheid South Africa. This reality negates the principles of non-discrimination and equality as known to international human rights law and embodied in the South Africa Constitution. An alternative measure in form of affirmative action is required for implementation by stakeholders in order to cater for the interest of populations who continue to suffer lack of access to sufficient water. At the very least, this should involve the basic minimum provision in terms of WHO recommendation. Whether, if followed, the WHO recommendation would be considered sufficient may be disputed. However, implementing the recommendation is not only consistent with international standards. Even if considered insufficient, its implementation will show that considerable efforts are being made to enhance the access of disadvantaged populations to water. The approach will ensure, in line with international standards, the water and basic health needs for poor communities at the lower ends of income distributions in South Africa.

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