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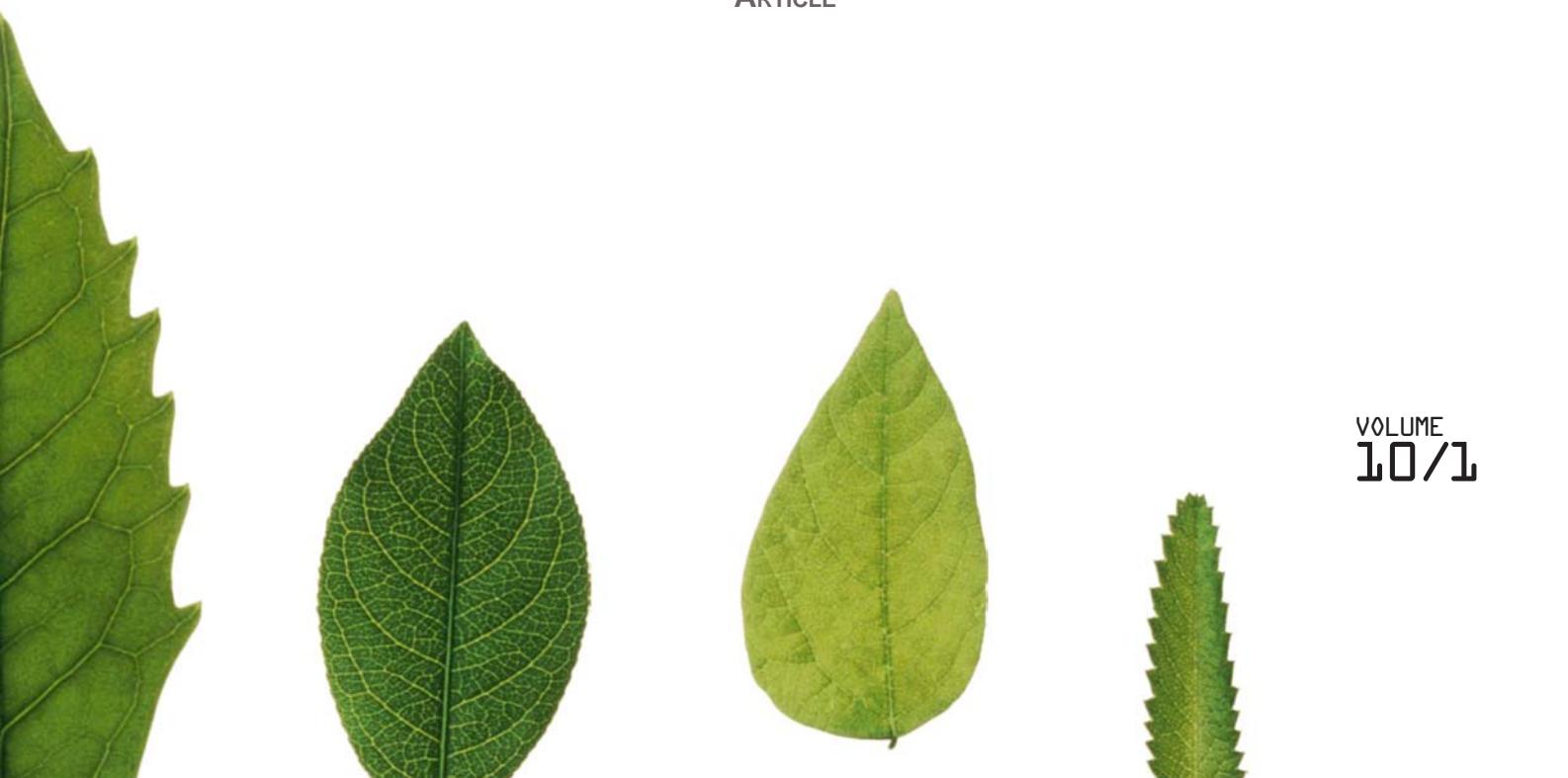
LEAD

WATER DISTRIBUTION IN THE PUBLIC INTEREST AND THE HUMAN RIGHT TO
WATER: SWISS, SOUTH AFRICAN AND INTERNATIONAL LAW COMPARED

Vanessa Rüegger

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1

INTRODUCTION

According to the World Health Organisation and UNICEF, an estimated 768 million people do not have access to sufficient and safe water for domestic use and 2.6 billion people lack access to improved sanitation facilities.¹ By 2025 the number of people directly affected by problems in access to sufficient and safe water is likely to be increased to three to five billion.² The persisting shortcomings in access to water and sanitation are mainly attributed to social inequalities.³

The legal norms governing the distribution of water are an integral part of the complex pattern of factors that influence how access to water is determined. In order to ensure access to water for all people and sustainable resource management, governments all over the world have come under public pressure to reform existing water laws. Claims that water should be used in the interest of the public play a key role in the debate surrounding water distribution. This paper follows the idea that water should be used in the interest of the public. From a legal point of view the paper examines what the notion of ‘public interest’ actually means: it deals with the basic questions, such as how water regimes are currently

structured and what role the public interest clause plays therein. It then asks which uses of water are to be considered as corresponding to the interests of the public; how competing interests are to be balanced against each other; and how particularly vulnerable interests of individual water users and environmental protection of waters can be attributed the status of paramount public interests.

The paper is structured in two parts: the first explains the water law of two countries, Switzerland and South Africa, in which the public interest clause plays a key role in water distribution. These countries were chosen because in both, the public interest clause is a central pillar of the legal norms governing water distribution. While their histories are rooted in the legal dogma of property rights, in both places important changes in the water law took place over the course of the twentieth century. Still, water is governed through centuries-old legal structures in Switzerland, whereas South Africa’s water law is considered the role model for contemporary water management. It is the simultaneity of differences and similarities that enriches the comparative discussion of the public interest clause.

A close look at the notion of ‘water distribution in the public interest’ reveals important insights: water distribution in the public interest equals the balancing of a variety of different economic, ecological and social interests. In the process of balancing it is noticeable that the human right to water is used as a protective shield to safeguard access to water. If decisions on water distribution are taken by balancing different interests, the effective implementation of the human right to water is crucial in order to safeguard water for basic human needs.

In its second part, the paper introduces the human right to water in international, Swiss and South African law. It then points out the shortcomings of the human right to water (in relation to each of the three legal orders) if employed as a protective shield for basic water supply requirements in decisions on water distribution under the public interest clause. The paper concludes by stressing the need to evolve the legal protection of basic human needs because the human right to water — as conceived in

1 WHO & UNICEF, Progress on Sanitation and Drinking Water, 2013 Update 3 (Geneva: WHO & UNICEF, 2013). The statistics describe the situation in 2011.

2 See, e.g., Ulrich Beyerlein & Thilo Marauhn, *International Environmental Law* 87 (Oxford: Hart Publishing, 2011).

3 For evaluations on the reasons for the ‘water crisis’, see United Nations Development Program, *Human Development Report, Beyond Scarcity: Power, Poverty and the Global Water Crisis* (New York: Palgrave Macmillan, 2006); Kassim Kulindwa & Haakon Lein, ‘Water and Poverty: The Inextricable Link’, in David Hemson et al. eds, *Poverty and Water, Explorations of the Reciprocal Relationship* 1 (London/New York: Zed Books, 2008) and Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert, Catarina de Albuquerque, The Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Addendum Mission to Bangladesh, 22 July 2010, UN Doc. A/HRC/C/15/55 (2010).

international law, Swiss law and South African law — does not always meet the requirements to fully exercise its protective function.

Small streams and groundwater basins of limited size are subject to the private property of landowners. This is an expression of the principle of accessoriness, according to which the ownership of the soil implies everything that is above and below it.⁶

2 WATER DISTRIBUTION IN THE PUBLIC INTEREST IN SWISS AND SOUTH AFRICAN LAW

As a first step in the analysis of water distribution in the interest of the public, the basic structures of the legal regimes governing water in Switzerland and South Africa are laid out. The notion of ‘water distribution in the public interest’ is a central concept in both legal orders reviewed in this paper. In a leading decision in 1929, the Swiss Federal Court stated that all water use must be in the interest of the public.⁴ Also in South Africa, since the major water law reform of 1998, the public interest clause is a central pillar of South African water law; all water must be used in the public interest only.⁵

The general understanding of water laws serves as the basis for a more specific analysis of the public interest clause. Thus the explanations of general nature on the water laws are followed by a more specific examination of the public interest clause.

2.1 Water Rights

The Swiss water regime is based on the classic continental property rights dichotomy: water is divided into public and private ownership. As a general rule, rivers, lakes and large groundwater basins are owned by the public (namely the Cantonal governments, or, exceptionally, the municipalities).

In 1929, the Swiss Federal Court limited the principle of accessoriness in regard to water flowing under the soil of privately owned land. The Federal Court upheld the dichotomy of private and public property rights in water, but limited the scope of private property rights in groundwater to a mediocre amount. Only public control over water — so the reasoning of the Federal Court went — can ensure that the use of water is in the interest of the public. By excluding groundwater streams from the private ownership of the landowners, the Federal Court sought to acknowledge the importance of water for the public.⁷ As a result, Swiss water law leaves little room for private property in water; this means that most water resources in Switzerland are in the public domain. This also means that the majority of private water users are built upon a legal relation between the user and the state. Only a small amount of water users can derive individual user rights directly and without interference by the administration — excepting the laws on environmental protection — from their status as landowner.

The South African water regime was originally based on the civil law dichotomy of public and private property, in combination with riparian rights derived from common law. The South African Water Conservation Act 8 of 1912 divided water into public and private waters. Spring water and water flowing over land belonged —analogous to the

4 BGE 55 I 397 401, Swiss Federal Court, Judgement of 15 November 1929.

5 National Water Act 36 of 1998, Section 3 (1), South Africa, 398 *Government Gazette* 19182 [hereafter NWA] and South African Department of Water Affairs and Forestry, White Paper on a National Water Policy for South Africa, para 5.1.2 (DWAF, 1997) [hereafter White Paper NWA].

6 Swiss Federal Civil Code 1907, Article 704, *Recueil Systématique* 210.

7 BGE 55 I 397 400 ff, note 4 above, confirmed in BGE 65 II 143 149 f, Swiss Federal Court, Judgement of 3 March 1939 and BGE 68 II 14, Swiss Federal Court, Judgement of 26 February 1942. For comments on the reform, see Peter Hänni, ‘Eigentumsschutz, Sozialbindung und Enteignung bei der Nutzung von Boden und Umwelt’ 51 *VVDStRL* 252, 263 (1992) and Peter Liver, ‘Die Entwicklung des Wasserrechts in der Schweiz seit hundert Jahren’ *Festgabe zum Centenarum der Zeitschrift für schweizerisches Recht* 305, 315 (Basel: Helbing & Lichtenhahn, 1952).

regulation in the Swiss Civil Code — as private water to the landowner. Water in large streams was public and regulated by the state, but riparians had a right to use such water according to their needs. The legal situation was largely maintained when the Water Act 54 of 1956 was introduced. Access to and use of water was tightly linked to land ownership. Such ownership was restricted to the white population by the Land Act of 1913 and the Bantu Authority Act of 1952. The legal structure of water user rights under the Apartheid regime was discriminatory throughout and resulted in manifest inequalities in access to water.⁸

Since the end of Apartheid, South Africa has undergone a fundamental change in its water regime. In 1998, the National Water Act 36 was enacted (hereafter NWA).⁹ This law abolished the pre-existing distinction between public and private water, introducing the public trust doctrine instead. All water of the Republic became an indivisible national asset under public trusteeship. The waters belong to the people of South Africa. The government, represented in the person of the minister, acts as public trustee of the water resources. The government has no ownership over the water, but is only its administrator.¹⁰ South Africa's water law reform has been widely praised as best practice to implement the right to access to water for all people and the achievement of sustainable and

integrative water management.¹¹ It is exemplary for the turn to modern water rights in international water politics. Also the reform is unique in its holistic approach to reforming water rights, and the public interest clause is instrumental therein.

At present, in both Switzerland and South Africa, competences over access to water are essentially vested with the decision-making authorities of the respective states. Decisions on the use and distribution of water resources are part of the state's competences. In Switzerland, most water user rights depend upon the state's approval. Water user rights that are vested in private property and need no state approval are limited to a marginal amount of water. In South Africa, such relative rights according to the law no longer exist. Thus in the last century private property rights have either been diminished to a marginal amount of water (Switzerland) or abolished entirely (South Africa). In both countries this has been justified with the argument that only the state is capable of attributing water user rights in the interest of the public. What it means to distribute water in the interest of the public is the subject of the following section.

2.2 The Public Interest Clause

In decisions on the distribution of water, typically three interests enter into cause: first, the use of water by individuals and by communities for their basic water supply; second, the use of water for economic purposes; and third, the protection of water to safeguard the environmental health of the watersheds in question. The worldwide survey conducted by the World Wildlife Fund shows that 92 per cent of all water use serves economic interests, of which 70 per cent are used for agriculture and 22 per cent for industrial purposes. Only eight per cent of water use

8 For details and full references on the legal situation prior to the water law reform, see Gerrit Pienaar & Elmarie Van der Schyff, 'The Reform of Water Rights in South Africa' 3/2 *Law Environment and Development Journal* 179 (2007); Friedrich Soltau, 'Environmental Justice, Water Rights and Property' *Acta Juridica* 229, 237 (1999); Robyn Stein, 'Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System' 83 *Texas L. Rev.* 2167 (2005); Michael Kidd, *Environmental Law* 64 f (Cape Town: Juta, 2nd ed. 2008); Jan Glazewski, *Environmental Law in South Africa* 429 ff (Durban: LexisNexis, 2nd ed. 2005); White Paper NWA, note 5 above, Introduction, notes 2.2.5 and 5.1.1 and Andre van der Walt, *Property in the Margins* 18 (Oxford/Portland: Hart Publishing, 2009).

9 See NWA, note 5 above.

10 *Ibid.* See also Sienna Movik & Fieke de Jong, 'Licence to Control: Implications of Introducing Administrative Water User Rights in South Africa' 7/2 *Law Environment and Development Journal* 66, 71 f (2011).

11 See Pienaar & Van der Schyff, note 8 above; Loretta Feris, 'The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa' 8/1 *Law Environment and Development Journal* 11 ff (2012); Stein, note 8 above; Lee Godden, 'Governing Common Resources: Environmental Markets and Property in Water', in Aileen McHarg et al. eds, *Property and the Law in Energy and Natural Resources* 413 (Oxford/New York: Oxford University Press, 2010) and Christo De Coning, 'Overview of the Water Policy Process in South Africa' 8 *Water Policy* 505 (2006).

is for private households and communities.¹² While the numbers describe the factual situation, this section explores different facets of the legal content of the public interest clause, such as which uses of water are to be considered as corresponding to the interests of the public; how competing interests are to be balanced against each other; and how particularly vulnerable water users can be attributed preferential treatment in this process. Again, the comparative approach to the legal orders of Switzerland and South Africa is instrumental in illustrating the public interest clause. In both countries, decisions on water distribution are embedded in a legal structure that allows for dynamic distribution patterns. I call them dynamic because the decision-makers have significant discretion in deciding what public interests are at stake and how they are to be balanced against each other. This dynamic nature is characteristic of the distribution of water in the public interest and will be the subject of the following section. In contrast, the legal situation in both countries differs considerably, not least because only the South African Constitution accords explicit constitutional protection to basic water needs.

While it is difficult to define the notion of public interest in a general and abstract manner, it is possible to define the public interests at stake in the context of a particular decision to be taken.¹³ From

a legal point of view, public interests are defined by two elements: legal norms and case law. The following two sub-sections analyse these two elements: the first, which I named the positivist element of the public interest clause, and the second, named the casuistic element.

2.2.1 The Positivist Element of the Public Interest Clause

The interests that can be considered as public in a given case are not open-ended. The eligible public interests are first of all defined by the relevant norms in place in the respective national legal order. This factor is what can be named the ‘positivist element’ of the public interest clause. Through their decisions, the legislator or — for case law — the judiciary limit the decision-maker’s latitude when interpreting the public interest clause. In both Switzerland and South Africa the notion of water distribution in the public interest is specified in more detail by the legal and constitutional norms governing water, construction law, environmental law, or even procedural standards. The leeway of the administration to take decisions based on the public interest clause is therefore first of all restricted by all pertinent legal norms of the respective jurisdiction.

In Switzerland for example, both the law on the use of hydraulic forces as well as the law on the protection of water set up a catalogue of legitimate public interests to be considered by the decision-makers.¹⁴ In Switzerland interests that are to be considered by the administration are namely: the public interests of the water user; the economic interests of the region and the water user; the energy supply; environmental interests in protecting the landscape, the water quality, as well as animals and plants; future water use for drinking water supply; and agricultural water use.¹⁵ Additionally, hydropower stations under specific circumstances enjoy absolute protection of their water use as their economic production is protected by so-called

¹² World Wildlife Fund Switzerland, *Der Fussabdruck der Schweiz, Ein Gesamtbild der Wasserabhängigkeit der Schweiz* 9, 15 f (Zürich: DEZA, 2012).

¹³ In the international context, see Mario Martini, *Der Markt als Instrument hoheitlicher Verteilungslenkung* 189 (Tübingen: Mohr Siebeck, 2008) and Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World* 93 (New York: Routledge, 2012). For Switzerland, see Martin Philipp Wyss, *Öffentliche Interessen – Interessen der Öffentlichkeit? Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht* 2, 16 (Bern: Schulthess, 2001); Ulrich Häfelin, Georg Müller & Felix Uhlmann, *Allgemeines Verwaltungsrecht* 538 (Zürich/St. Gallen: Schulthess, 6th ed., 2010) and Alain Griffel, *Die Grundprinzipien des schweizerischen Umweltrechts* 326 (Zürich: Schulthess, 2001). For South Africa, see Ziyad Motala & Cyril Ramaphosa, *Constitutional Law, Analysis and Cases* 306 f (Oxford: Oxford University Press, 2002). For cases, see decisions by the Swiss Federal Court in *BGE 136 I 18*, Swiss Federal Court, Judgement of 13 January 2010, *BGE 136 I 17 26*, Swiss Federal Court, Judgement of 23 November 2009 and *BGE 106 Ia 267 271 f*, Swiss Federal Court, Judgement of 9 May 1980.

¹⁴ See Swiss Federal Law on the Protection of Waters 1991, Article 33 and Article 80 para 2, *Recueil Systématique* 814.20 [hereafter WPL] and Swiss Federal Law on the Use of Hydraulic Forces 1916, Article 22, *Recueil Systématique* 721.80 [hereafter HFL].

¹⁵ *Id.*

'acquired rights' (in German 'wohlerworbene Rechte') against interference by other water user's legitimate interests.¹⁶

In South Africa, the NWA states that the protection of the environment and of basic human needs are public interests of absolute priority if balanced against other interests at stake.¹⁷ The NWA also contains a list of relevant factors to be taken into account by the authority when issuing a general authorisation or water user licence.¹⁸ Relevant interests mentioned in the South African NWA (section 27) include for example the need to redress the results of past racial and gender discrimination; efficient and beneficial use of water in the public interest; the socio-economic impact of the water use; the likely effect of the water use on the water resource and on other water users; the quantity of water in the water resource which may be required for the Reserve and for meeting international obligations; and the investments already made and to be made by the water user in respect of the water use in question.¹⁹

These norms therefore significantly limit the legitimate interests; sometimes they even oblige the decision-makers to attribute priority to certain interests. While some norms establish a specific catalogue of public interests or even set up a priority list, other norms simply oblige the decision-maker to consider all relevant public interests at stake without any further specification.²⁰ Still, both types of legal norms — those that specify particular interests and those that merely oblige the decision-makers to consider all relevant interests at stake — leave a more or less broad range of discretion to the decision-maker. According to which scheme the decision-makers interpret the public interest clause

in compliance with its positivist element, the legal norms, is the subject of the following complementary sub-section.

2.2.2 *The Casuistic Element of the Public Interest Clause*

The decision taken by the competent authority is not only determined by the positivistic element — the relevant legal norms — but also implies a casuistic element. The application of the public interest clause to the facts underlying a particular decision to be taken lies first of all with the competence of the administration and only in case of redress with the judiciary. In the decisional phase of water distribution, the decision-maker cannot just take any decision that pleases him, but is limited not only by the relevant legal norms (as explained in section 2.1. above) but also by the rules applicable to their interpretation. The methodologically structured process of decision-making is what is meant by the casuistic element of the public interest clause in this paper. The process of identifying, evaluating and weighing of relevant interests is structured by the predefined methodology, acting as a barrier to the arbitrariness of the decisional process.

It is in this context of identifying, evaluating and weighing of relevant interests under the public interest clause that the principle of sustainable development is of importance. The principle of sustainable development is an integral part of Swiss and South African jurisprudence.²¹ According to

16 See HFL, note 14 above, Article 43; *BGE 107 Ib 140* 149 ff, Swiss Federal Court, Judgement of 17 June 1981 and *BGE 110 Ib 160* 165, Swiss Federal Court, Judgement of 28 February 1984. On acquired rights in Swiss law, see Häfelin, Müller & Uhlmann, note 13 above, paras 1008 ff.

17 See NWA, note 5 above, Section 1 (1) (xviii) in conjunction with section 16.

18 *Id.*, Section 27.

19 For a detailed description of the licensing procedure in South Africa, see Movik & de Jong, note 10 above, at 73 ff.

20 See, e.g., Swiss Federal Law on Land Use Planning 1979, Article 24, *Recueil Systématique* 700.

21 For Switzerland, see Swiss Federal Constitution 1999, Article 2 para 2 and Article 73, *Recueil systématique* 101 [hereafter Swiss Const.]; Swiss Federal Law on Environmental Protection 1983, Article 1 para 1, *Recueil Systématique* 814.01; WPL, note 14 above, Article 1; Griffel, note 13 above, at 16 f, 22, 27 and Ulrich Häfelin, Walter Haller & Helen Keller, *Schweizerisches Bundesstaatsrecht* paras 187 ff (Zürich, Basel & Geneva: Schulthess, 8th ed. 2012). For South Africa, see Constitution of the Republic of South Africa 1996 [hereafter SA Const.], section 24 (b) (iii); South African National Environmental Management Act 107 of 1998, 33306 *Government Gazette* 547 [hereafter NEMA], section 2 (3); *BP Southern Africa v. MEC for Agriculture, Conservation Environment and Land Affairs*, High Court of South Africa (Witwatersrand Local Division), Judgement of 31 March 2004, 2004 (5) SA 124 (W) [hereafter *BP v. MEC*], para 144; Glazewski, note 8 above, at 80 ff and Kidd, note 8 above, at 16 f.

current knowledge, the relationship between the interests in safeguarding healthy watersheds and the man-made use of water is key to secure access to water in the long term.²² This idea is expressed in the principle of sustainable development. In both legal orders, the principle of sustainable development has no predefined legal content, but merely obliges the decision-maker to first consider the relevant interests, and second balance them against each other so as to safeguard the environmental health of the watersheds.²³ The principle of sustainable development thus sets a specific methodological procedure to be followed by the decision-makers.

The principle of sustainable development is made effective through the procedure of compulsory licensing. In both Switzerland and South Africa, any water use that goes beyond the mere occasional satisfaction of the most basic needs is subject to

retrieve a licence from the administration.²⁴ The aim of the compulsory licensing system is to ensure that only those water users whose water use is in the interest of the public are granted a licence. The administration succumbs to the task of determining which water use corresponds to the interests of the public and which one does not for each specific case. To fulfil its duty, the administration usually proceeds in two steps: First, it identifies all potential users and their relevant interests at stake. As noted, the most common interests in water use are for agricultural, industrial or domestic purposes, as well as water needed to maintain the ecological balance of the watershed in question. At this stage of the procedure, the choice of interests to be considered by the administration might also be limited by the relevant legal norms applicable to the case. In a second step, the administration attributes values to the public interests at stake and weights them against each other to arrive at its decision.²⁵

²² See Beyerlin & Marauhn, note 2 above, at 87; Philippe Cullet, 'Water Law in a Globalised World: The Need for a New Conceptual Framework' 23 *J. of Env. L.* 233, 234 f (2011) (with references to the relevant publications of the Intergovernmental Panel on Climate Change (IPCC)); Report of the Office of the United Nations High Commissioner for Human Rights, *The Relationship between Climate Change and Human Rights*, 15 January 2009, UN Doc. A/HRC/10/61 (2009), para 29 [hereafter Climate Change Report HCHR]; United Nations Development Program, *Human Development Report, Fighting Climate Change: Human Solidarity in a Divided World* 94 (New York: Palgrave Macmillan, 2007/08); Małgorzata Fitzmaurice, 'Environmental Degradation', in Daniel Moeckli et al. eds, *International Human Rights Law* 622, 623 (Oxford: Oxford University Press, 2010); Richard Hiskes, 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local 'Fulfilment' of the Human Right to Water' 32 *HR Quart.* 326, 339 (2010) and Antoinette Hildering, *International Law, Sustainable Development and Water Management* 28 ff (Delft: Eburon Publ, 2004). On the relationship between climate change and water occurrences in Switzerland, see Bundesamt für Umwelt, *Auswirkungen der Klimaänderung auf Wasserressourcen und Gewässer, Synthesebericht zum Projekt 'Klimaänderung und Hydrologie in der Schweiz'* (Bern: BAFU, 2012).

²³ For Switzerland, see Griffel, note 13 above at 11; Vallender, 'St. Galler Kommentar zu Art. 73 BV', in Bernhard Ehrenzeller et al. eds, *Die schweizerische Bundesverfassung, Kommentar* paras 30 ff (Zürich & St. Gallen: Dike & Schulthess, 2nd ed., 2008) and *BGE 132 II 305* 319 f, Swiss Federal Court, Judgement of 11 April 2006. For South Africa, see Glazewski, note 8 above, at 14 f, 80 ff; Kidd, note 8 above, at 16 f and *BP vs MEC*, note 21 above.

Two primordial differences between the South African and the Swiss procedure of licensing are crucial to the topic of this paper: first, in both Switzerland and South Africa water law is based upon the logic of residual water flow quota. This vision of environmental protection of water resources is firmly rooted in the belief that science has enabled mankind to take control over natural resources and manage them in a 'sustainable' manner through calculations of residual quantities to be attributed to nature, offering a quantifiable free yield to humans in control.²⁶ In South Africa, the residual flow quota is called the 'Reserve'. The Reserve destined to protect the waters and the Reserve destined to protect the domestic water needs enjoy absolute protection.²⁷ The Reserve is identified in

²⁴ For Switzerland, see WPL, note 14 above, Article 29. For South Africa, see NWA, note 5 above, Chapter 4 and schedule 1. In both the countries the use of small amounts of water is exempt of the compulsory licensing system. The supply of domestic water users by water supply services does not fall within this category and is subject to compulsory licensing.

²⁵ See, e.g., *BGE 120 Ib 233* 240, Swiss Federal Court, Judgement of 24 August 1994.

²⁶ On the historical origins of the ideology of scientific conservation, see Ramachandra Guha, *Environmentalism, A Global History* 25-43 (New York: Longman, 2000).

²⁷ See NWA, note 5 above, Chapter 1, Section 1 (xviii) and Part 3.

an independent procedure prior to the licencing procedure. In this separate procedure the minister has to follow clear guidelines when determining the Reserve.²⁸ In the licencing procedure itself, the Reserve is one factor amongst others to be considered by the administration. But as its quantity is already predetermined it should normally remain untouched in the licensing procedure.²⁹ By contrast, in Switzerland the quantification of the residual flow quota and licencing take place in the same procedure.³⁰ While standardised residual flow quotas exist, the Swiss water protection law foresees certain exceptions thereto. Thus the decision-maker can decide to increase or decrease the residual flow quota according to his assessment of the interests at stake. Considerable decisive power in the determination of the residual flow quota succumbs to the administration within the licensing procedure.³¹ Consequently while the regulation of the procedures under the public interest clause in Switzerland and South Africa is similar, one important difference is the level of statute law: In South Africa, the Reserve by law out values any other water user. In Switzerland, water use for drinking water supply or the safeguard to environmental health is one interest to be balanced amongst others within the same procedure. The preceding statement should not deceive the fact that in South Africa water supply services still have to undergo the authorisation or licencing procedure. And because no particular legal protection is attributed to their interests on statutory level, their interests are balanced against other interests by the administration.

This brings us to the second paramount difference between Swiss and South African decision-making under the public interest clause: in both legal orders, special attention is attributed to domestic water users and the environment. Thus the administration has a duty to consider domestic water users or the environment as important public interests at stake. But no particular right attributed to these users is to be treated preferentially over any other interest on statutory level. The insecurity in regard to the statutory law is increased by the fact that the interests

of domestic water users are neither in Switzerland, nor in South Africa mentioned as trumping per se any other water user's interests. This seems odd in regard of the primordial importance of water for human and environmental health. Reason for this absence of explicit legal valuation in Switzerland is, to speculate about, simply the absence of significant pressure on drinking water supply. It might also be the expression of a kind of implicit confidence that the interests in drinking water supply anyhow out value any other water user's interests. In South Africa the absence of legal guarantee for domestic water users in statutory law can be explained by their explicit protection on constitutional level. In the South African water law reform statutory water law and constitutional guarantees were designed to complement each other.

Thus the human right to water's role in the process of water distribution under the public interest clause is to guarantee the priority of such water use if competing against other interests at stake. While the South African water law is conceptually interlocked with the constitutionally guaranteed human right to water, such an explicit connection is absent in Swiss statutory law. The need for constitutional complement of the Swiss statutory water laws has been illustrated in a case decided by the Administrative Court of the Canton of Fribourg: The Administrative court had to weigh the economic interests of the private owner of a water source against the public interests of the community to use the water for the domestic water supply of its inhabitants. While the interests of the owner were constitutionally protected by the right to property from state interference (article 26 Swiss Const.), the community itself had no explicit constitutional right to base its claims on. In a leading decision, the Administrative Court from its own initiative accorded preferential treatment to the domestic water users based on the fundamental right to emergency assistance as guaranteed in the Swiss Federal Constitution.³² The Administrative Court was the first Swiss court ever to apply the right to emergency assistance as a constitutional norm to protect the

28 On the procedure, *Id.*, Section 16.

29 See NWA, note 5 above, Section 16 in conjunction with section 27 (1) (j).

30 See WPL, note 14 above, Article 33.

31 *Id.*, Articles 31-33.

32 Swiss Const., note 21 above, Article 12 and *C Waeber c Direction des Institutions de l'Agriculture et des Forêts du Canton de Fribourg et Commune de Barberêche* 17 ff, 2nd Administrative Court of the Canton of Fribourg, Judgement of 1 September 2009 [hereafter *Waeber*].

domestic water supply against other water user's interests. The case illustrates the necessity to complement the Swiss statutory law with a further reaching protection for domestic water users. In light of this comparison between Switzerland and South Africa, thus, the function of the human right to water with regard to the public interest clause comes into play: the human right to water is crucial in decisions on water distribution under the public interest clause to guarantee the priority of such water use if competing against other interests at stake.

Summing up, the procedure of water distribution in the public interest can be characterised as follows: the competences for decisions on water distribution in Switzerland and South Africa are vested with the state; the content of the public interest clause is determined by the positivist and casuistic elements; and the public interests that come into play are manifold. In the case to case procedure of balancing competing interests, it is crucial that the interests of domestic water users and the environment are attributed priority by law. In the South African and Swiss legal orders water supply is listed as an important public interests. The administration is obliged to consider water supply as an important public interest, but neither absolute priority to domestic water users, nor justiciable rights to be treated with priority are guaranteed thereby. Thus while the normative function of the public interest clause is to guarantee that water is exclusively used in the public interest, the normative function of the human right to water is to guarantee that in the process of water distribution priority is attributed to water use for domestic purposes. The public interest clause with the human right to water together oblige the administration to attribute priority to the interests of domestic water users. The administration must not only consider the domestic water supply as public interest, but must also treat such an interest as obliging if compared against other potential water users' interests. The human right to water is thus an important complement to the public interest clause if basic human needs are to be attributed priority and legal protection.³³

³³ For Switzerland, see Swiss Const., note 21 above, Article 76 para 3 and WPL, note 14 above, Article 1 and 29. For South Africa, NEMA, note 21 above, Section 2 (4) and 3, NWA, note 5 above, Chapter 4 and schedule 1.

Having identified the interaction between the public interest clause and the human right to water as being necessary complementary, the question remains whether this protective function can actually be filled by the human right to water as conceived in the relevant legal orders. Thus the next part of the paper focuses on whether the human right to water, as conceived in South African, Swiss and international law, is actually apt to fill the protective function within the public interest clause to an extent found necessary in view of the paramount importance of the public interest in domestic water supply and environmental protection.

3

THE HUMAN RIGHT TO WATER AS PROTECTIVE SHIELD IN SWISS, SOUTHAFRICAN AND INTERNATIONAL LAW

The normative function of the public interest clause is to guarantee that water is used in the public interest only. The normative function of the human right to water is to ensure that in this process absolute priority is attributed to water use for domestic purposes. The human right to water thus enters decisions on water distribution under the public interest clause as the protective shield for domestic water need. Legitimate expectation is thus, that the human right to water is sufficiently stringent so as to attribute priority and protection to basic human needs in any decision that might affect such water use. To fulfil its protective function, the human right to water must attribute not only a duty to treat such water users preferentially, but also an individual right to be treated preferentially. As such, the human right to water must assume a dual protective function as a governmental duty and as an individual right.

In this part of the paper the centre of attention is drawn upon the protective function of the human right to water. The question is whether the human right to water — as conceived in Swiss, South African and international law — is capable of fulfilling its protective function against competing water demands. To answer this question attention is devoted to those

aspects of the human right to water that critically affect its capacity to work as protective shield against competing interests. The shortcomings of the human right to water as protective shield can be placed within three categories: the first relates to the concept of the human right to water as minimal guarantee; the second concerns the unequal protection of different categories of domestic water users; the third stands in relation to the inherent anthropocentricity of the human right to water. Each section introduces the legal structure of the human right to water in Swiss, South African and international law and points out the resulting shortcomings of the human right to water in its function as protective shield for domestic water needs in decisions on water distribution under the public interest clause. Finally, the outcomes of this section confirm the thesis of this paper according to which human right to water – as conceived in Swiss, South African and international law – is not always sufficiently stringent to ensure the protective function with which it is attributed in the respective legal orders.

Before entering the discussion, two preliminary remarks have to be added. First, the choice to include international law in the second part of this paper is determined by the object of investigation: on the one side, the regulation of water as a natural resource is a matter of national sovereignty (with the exception of international environmental law) and thus regulated by national law. On the other side, the state by subscribing to international human rights treaties loses its tradition to treat its citizens as it sees fit.³⁴

³⁴ Walter Kälin & Jörg Künzli, *The Law of International Human Rights Protection* 16, 185 (New York/Oxford: Oxford University Press, 2009) and James Nickel, *Making Sense of Human Rights* 36 (Malden/Oxford/Victoria: Wiley-Blackwell, 2nd ed. 2007). According to the Vienna Convention on the Law of Treaties, every treaty in force must be performed by a state in good faith. A state may not invoke its internal law as a justification for its failure to perform a treaty, articles 26 and 27 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 (1980). With regard to the implementation of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has issued General Comment No. 9, The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1998/24 (1998) [hereafter GC 9]. Therein (para 1) the Committee has elaborated that the Covenant adopts a 'broad and flexible approach, which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account'.

Thus international human rights law simply cannot be ignored when entering the debate on the role of the human right to water in water distribution under the public interest clause. Attitudes of Switzerland and South Africa towards its international obligations derived of the human right to water differ considerably: while Switzerland has ratified the Convention and is also in favour of the recognition of the human right to water, it refuses to consider the rights guaranteed therein as individual rights. Besides repeated objection by the Committee on Economic, Social and Cultural Rights [hereafter ESCR Committee], the Swiss government considers most of the provisions of the Covenant merely as programmatic objectives and social goals rather than legal obligations.³⁵ South Africa has not yet ratified the treaty and is thus not bound by any norms of the Convention that are not part of customary law. The Constitutional Court's interpretation of constitutionally guaranteed socio-economic rights deviates deliberately from the Committee's interpretation of the Covenant.³⁶

The second preliminary remark concerns the diverging nature of the legal basis of the right to

³⁵ Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Switzerland, UN Doc. E/C.12/CHE/CO/2-3, 26. November 2010. For an overview of the Swiss Federal Court's case law on the matter see Thomas Hugi Yar, 'Die Praxis des Bundesgerichts im Bereich der wirtschaftlichen, sozialen und kulturellen Rechte' *Jusletter* (3 Dezember 2012).

³⁶ Notably the Constitutional Court has rejected the ESCR Committee's concept of justiciable minimal content, Heinz Klug, *The Constitution of South Africa, A Contextual Analysis* 144 f (Oxford/Portland: Hart Publishing, 2010); Danie Brand, 'Introduction in Socio-Economic Rights in the South African Constitution', in Danie Brand & Christof Heyns eds, *Socio-Economic Rights in South Africa* 49 ff (Pretoria: Pretoria University Law Press, 2005); *Government of South Africa and others v Irene Grootboom and Others*, South African Constitutional Court, Judgement of 4 October 2000, 2001 (1) SA 46 (CC), 2000 (11) BCLE 1169 (CC) [hereafter *Grootboom* (CC)], paras [39 ff], [64 ff], [99]; *Minister of Health and Others v Treatment Action Campaign and Others*, Judgement of 5 July 2002, 2002 (4) BCLR 356 (T) [hereafter *TAC* (CC)] and *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*, Constitutional Court of South Africa, Judgement of 8 October 2009, CCT 39/09 [hereafter *Mazibuko* (CC)], paras [67], [91 ff], [98 ff].

water in the three legal orders: in international law, the human right to water has not been mentioned explicitly in any of the three documents that constitute the Universal Bill of Human Rights.³⁷ Whether the human right to water is implicitly contained in articles 11 para 1 and 12 para 2 CESCR is still subject of dispute.³⁸ A series of important events – namely the publication of General Comment No. 15 on the right to water (hereafter GC 15) by the UN Committee on Economic, Social and Cultural Rights (hereafter ESCR Committee)³⁹ and the resolutions of the UN Human Rights Council and the UN General Assembly promulgating the right to safe and clean water and sanitation⁴⁰ – have step by step led to broad ranging acceptance of the inclusive interpretation of the

CESCR in regard of the human right to water.⁴¹ This paper therefore accepts articles 11 and 12 CESCR as binding legal basis of the human right to water in international law.⁴² Similarly to the Convention, the human right to water is not mentioned explicitly in the Swiss Constitution, but implicitly contained in the right to emergency assistance as guaranteed by article 12 of the Swiss Constitution. As the right guarantees satisfaction of the most basic human needs, its protection of fundamental material goods such as food, clothes, shelter and water is undisputed.⁴³ In comparison, the South African Constitution is famous for its justiciable socio-economic rights.⁴⁴ The human right to water is guaranteed by section 27 (1) (b) of the SA Constitution and thus its legal basis is undisputed. Consequently in both Switzerland and South Africa, the human right to water is guaranteed in the respective constitutions, although in very different form. Additionally, Switzerland is bound by the Covenant, while South Africa is not.⁴⁵

³⁷ The following three documents are considered to form the Universal Bill of Human Rights: the UN General Assembly Resolution 217 A (III), The Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/810/71 (1948) [hereafter UDHR]; the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3 (1976) [hereafter CESCR] and the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (1976) [hereafter CCPR].

³⁸ The human right to water is also partly based on the Universal Declaration of Human Rights, namely the right to life and human dignity (articles 1 and 3 UDHR, *id.*). The ESCR Committee also underlined that the right to water has been recognised in a wide range of international documents, such as the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child. For full references, see General Comment No. 15, The Right to Water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2002/11 (2002) [hereafter GC 15], para 3 f.

³⁹ As the ESCR Convention constitutes the most important legal basis for the right to water in international law, I will base my reflections and assumptions on the Convention and the interpretation the ESCR Committee has given it in GC 15.

⁴⁰ UN Human Rights Council Resolution 16/2, Human Right to Water and Sanitation, 8 April 2011, UN Doc. A/HRC/Res/16/2 (2011); UN Human Rights Council Resolution 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 6 October 2010, UN Doc. A/HRC/Res/15/9 (2010) and UN General Assembly Resolution 64/292, The Human Right to Water and Sanitation, 3 August 2010, UN Doc. A/Res/64/292 (2010).

⁴¹ The teleological interpretation of articles 11 and 12 CESCR by the ESCR Committee in GC 15 has not been accepted by all parties to the Convention. They have mainly based their opposition on a literal interpretation of the Covenant. See Matthew Craven, 'Some Thoughts on the Emergent Right to Water', in Eibe Riedel & Peter Rothen eds, *The Human Right to Water* 37 (Berlin: BWV Berliner Wissenschafts-Verlag, 2006).

⁴² The case is researched and argued for in detail in Vanessa Rüegger, *Der Zugang zu Wasser als Verteilungsfrage, Das Verhältnis zwischen dem Menschenrecht auf Wasser und den Herrschafts- und Nutzungsrechten an Wasservorkommen* 111-139 (Zürich, Basel & Geneva: Schulthess, 2013).

⁴³ See Margrith Bigler-Eggenberger, 'Art. 12 BV', in Ehrenzeller et al., note 23 above and Guillaume Grisel & Pierre Mercier, 'La mise en œuvre du droit à l'eau, Le cas de la Suisse', in Guillaume Grisel ed, *La mise en œuvre du droit à l'eau* 416 (Geneva, Zurich & Basel: Schulthess, 2006). Until now, no judgement on the matter has been issued by the Swiss Federal Court, see Waeber, note 32 above, 17, 2.c: 'La mesure litigieuse vise à fournir de l'eau potable à la commune afin que cette dernière puisse desservir à son tour les douze ménages raccordés à son réseau, qui à défaut seraient privés du droit fondamental de bénéficier de conditions minimales d'existence'.

⁴⁴ See, e.g., Cass Sunstein, *Designing Democracy, What Constitutions Do* 221 ff (New York: Oxford University Press, 2001). See also Klug, note 36 above, at 113, 132.

⁴⁵ The International Covenant on Economic, Social and Cultural Rights is in force for Switzerland since 18 September 1992 (see *Recueil Systématique* 0.103.1). South Africa has signed the Convention on 3 October 1994, but not yet ratified it.

3.1 Legal Content

The first critical limitation of the human right as protective shield derives from the fact that the right to water by its very concept is limited to a minimal protection of water for basic human needs only. Its content is therefore by definition limited to a minimum. As such, the human right to water takes on an important role as protective shield in decisions on water distribution. At the same time the protection of water for human needs remains limited to this very minimum. No further claims within the public interest clause (e.g. for more far reaching social redistribution of water) can be derived from the human right to water.

Additionally, the legal content of the human right to water has been interpreted restrictively in all three legal orders analysed in this paper, thus further limiting its protective potential if employed as protective shield in decisions on water distribution. In international law, the interpretation by the Committee on Economic, Social and Cultural Rights in General Comment No. 15 is particularly narrow and explicit. By adopting this narrow and explicit approach, the Committee's intent was to facilitate the acceptance and implementation of the human right to water by state parties. Whether the Committee has succeeded in its strategy is beside the point of this paper; what matters is that by this approach, the Committee has limited the protective potential of the human right to water. The Committee has defined the normative content of the right to water as the entitlement of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.⁴⁶ The WHO has quantified reasonable access as being the availability of at least 20 litres per person per day from a source within one kilometre of the user's

dwelling.⁴⁷ This precision of a specific quantity of water stands in contradiction to the fact that the human right to water in international law is derived from the right to an adequate standard of life. Thus its normative content includes not only the absolute minimal water quantity needed for human survival, but also the relative minimal water quantity needed for an adequate standard of life. As a relative term, the precise quantity protected by the word 'adequate' can only be determined according to the circumstances of each case in question.

Another important restriction in international law that particularly concerns the human right to water's protective function is the exclusion of protection for water used for subsistence farming. In decisions under the public interests clause, no protection for water used for subsistence farming can be derived by reference to the international human right to water. Constitutional protection for those users is also lacking in Swiss and South African law. As the compulsory licensing system is the operationalisation of water distribution in the public interest and the human right to water has the function of protecting the interests that are considered particularly important against competing interests, the exclusion of certain water users that depend on water for their livelihood only warranted by subsistence farming has important consequences on vulnerable interest groups. Only those water users whose interests are backed by a legal norm attributing priority to their interests can actually claim preferential treatment in the compulsory licensing system. Of course it can be said that such users can alternatively base

⁴⁶ See GC 15, note 38 above, para 2.

⁴⁷ Jamie Bartram & Howard Guy, *Domestic Water Quantity, Service Level and Health* 1 (Geneva: WHO, 2003). The ESCR Committee also refers to a paper written by Peter Gleick, in which he quantifies a figure of 50 litres per capita per day as the basic water requirement for domestic water supply. See Peter Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic Needs' 21 *Water Int.* 83 (1996). The quality of water should be free of any substances that constitute a threat to a person's health. Water should also be of an acceptable colour, odour and taste. Water facilities must be within safe physical reach for all sections of the population and not threaten physical security. Water must be affordable for all, including direct and indirect costs and charges. Accessibility also includes information about concerning water issues. Additionally, the ESCR Committee pointed out that the normative content of the right to water has to be interpreted in light of the principles of sustainability, non-discrimination and equality. See GC15, note 38 above, paras 11-13.

themselves on the legal protection of their water needs by the right to food.⁴⁸ As this might be an option to be considered in the future, no such reference has come to the forefront in either jurisprudence considered in this paper.

Conceptual tensions between absolute and relative minimal content can also be observed in both South Africa and Switzerland. Even though South Africa has not yet ratified the Convention on Economic, Social and Cultural Rights,⁴⁹ the wording of section 27 of the South African Constitution follows closely the Convention.⁵⁰ According to section (1) (a) South African Constitution, everyone has the right to have access to sufficient water. The normative content of the South African right to water is specified amongst other legislation most notably by the Water Services Act (hereafter WSA). In its section 1 (iii) WSA basic water supply is defined in close resemblance to the definition employed in GC 15 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’.⁵¹ Based upon section 9 WSA, the Department of Water Affairs (hereafter DWAF) has issued the Free Basic Water Strategy, which sets a national minimal standard for basic water supply services. Thus the minimal standard in South Africa is 25 litres of potable water per person per day or six kilolitres per household per month.⁵²

48 The subject is treated by the ESCR Committee in GC 15, note 38 above, para 7.

49 See note 45 above.

50 See Sandra Liebenberg, *Socio-Economic Rights, Adjudication under a Transformative Constitution* 19 (Claremont: Juta, 2010) and Craig Scott & Alston Philip, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’ 16 *SAJHR* 206 (2000).

51 South African Water Services Act 108 of 1997, 390 *Government Gazette* 18522 [hereafter WSA].

52 South African DWAF, Free Basic Water Implementation Strategy Document (2001) [hereafter Free Basic Water Policy]. The document further specifies, that the minimal water flow rate must be 10 litres per minute, that the closest water tap must be not more than 200 metres of a household, and that no consumer should be without a supply for more than seven days in any year. For a critical analysis of the Free Basic Water Policy, see Mike Muller, ‘Free Basic Water – A Sustainable Instrument for a Sustainable Future in South Africa’ 20 *Environment and Urbanization* 67 (2008).

In South Africa, the question whether the normative content of the right to water is limited to the minimum standard as provided for by the Free Basic Water Policy or on the contrary encloses a relative dimension that goes beyond the minimum remains critical so far. The wording of the Constitution, which guarantees access to ‘sufficient’ water points into the direction that the normative content is not limited to the absolute minimal water quantity as prescribed in the Free Basic Water Policy. If we are to follow the logic employed in international law, the sufficient amount of water as guaranteed by the South African Constitution protects not only the absolute, but also the relative minimum of water. Thus it can only be determined in regard to the specific needs of each individual. This said, the Constitutional Court so far has followed a different line of reasoning and developed a peculiar approach to the interpretation of the normative content of sections 26 and 27 the South African Constitution. By doing so it has limited the determination of the right’s legal content to the procedural standard of reasonableness review, evading substantial material interpretation of the normative content of the right.⁵³ The Constitutional Court thus has accepted the Free Basic Water Policy as minimal standard, but not determined whether section 27 (1) (b) the South African Constitution protects also the relative dimension of its material content.

In Switzerland, no specific water quantity protected by the right to emergency assistance has been identified by law or jurisprudence. But article 12

53 See *Mazibuko* (CC), note 36 above, paras [83 ff], [90 ff]. In contrast, see the substantial interpretation of section 27 (1) (b) by the lower levels of jurisdiction in *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*, Johannesburg High Court, 4 All SA 471 (W) N 181 and *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*, South African Supreme Court of Appeal, Judgement of 25 March 2009, 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA), paras [16]-[24]. For detailed analysis and further references on the reasonableness review, see Liebenberg, note 50 above, at 65, 131 ff, 466 ff; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* 139 ff (Oxford: Oxford University Press, 2007) and Jackie Dugard, ‘Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa’s Transformation’ 20 *Leiden J. of Int. L.* 965 (2007).

Swiss Constitution is by its very concept limited to the protection of the most elemental human needs only. Even though the protective scope of the right has to be interpreted in light of the particular circumstances of each case, its normative content does not enclose an adequate standard of living, but only emergency provision of the most fundamental goods.⁵⁴ Its normative content is thus already by the wording of the constitutional norm limited to the absolute minimum. The normative content of the right to emergency assistance is narrower than the normative content of the human right to water, which protects the vital needs in their relative dimension.

To understand the significance of the minimal content for the human right to water's function as protective shield it is important to retain that the human right to water is conceptually limited to the protection of a minimum. When employed to secure access to water against competing demands on resources, no more can be derived of the human right to water than the protected minimum. This minimum has been defined in different ways: in Switzerland only the absolute minimum is constitutionally protected. In international law, the protection includes a relative dimension, but its restrictive interpretation by the ESCR Committee in GC 15 leaves the legal situation open to discussion. In South Africa, the wording of the constitutional norm eludes a relative scope, but the Constitutional Court so far seems to represent an absolute notion of protection. Limiting the human right to water to an absolute minimum also automatically limits its potential to protect domestic water users against competing public interests. Thus the scope of protection is of primordial importance if the human right to water is employed as place holder for basic human needs in the public interest clause. In light of its significance in the legal order, reducing the human right to water to the absolute minimum (as is clearly the case in Switzerland) does not seem to

be responsive. If the human right to water is to be effective in its protective function under any circumstances, its normative content should be considered in a relative dimension.

3.2 Individual Protection

The second critical aspect of the human right to water's function as protective shield is whether it accords protection to every single human being. The human right to water can only be considered as reliable protective shield in decisions on water distribution if it is actually conceived in a manner so as to attribute protection to every single person under any circumstances. In this regard an important shortcoming in international and South African law prevails: in decisions on water distribution the protective function of the human right to water — within its limited normative content — is safeguarded for the 'haves', but fragmentary for the 'have-nots'. This is due to the fact that in both legal orders states' obligations with regard to the human right to water differ considerably subject to whether an individual already has access to sufficient water or not.

From a general point of view, the right to water imposes three types of obligations on state parties: obligations to respect, obligations to protect and obligations to fulfil.⁵⁵ The obligation to respect

⁵⁵ For international law, see GC15, note 38 above, para 20; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997, para 7; General Comment No. 12, The Right to Adequate Food (article 11 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1999/5 (1999) [hereafter GC 12] and General Comment No. 14, The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/4 (2000) [hereafter GC 14]. See also Brand, note 36 above, at 27 f; George Devenish, *The South African Constitution* 149ff (Durban: LexisNexis, 2005); Residents of Bon Vista Mansions v Southern Metropolitan Local Council, High Court of South Africa, Judgement of September 2001, 2002 (6) BCLR 625 (W) and *S v Makwanyane and Another*, South African Constitutional Court, Judgement of 6 June 1995, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), para [104]. See Rüegger, note 42 above, at 44 (with further references); BGE 122 I 101 104 ff, Swiss Federal Court, Judgement of 24 May 1996 and Waeber, note 32 above, 17, 2.c.

⁵⁴ Walter Schmid, 'Die Stellung der Sozialhilfe im System der sozialen Sicherheit', in Gabriela Riemer-Kafka & Alexandra Rumo-Jungo eds, *Soziale Sicherheit – Soziale Unsicherheit, Festschrift für Erwin Murer zum 65. Geburtstag* 757, 763 (Bern: Stämpfli Verlag, 2010) and Kathrin Amstutz, *Das Grundrecht auf Existenzsicherung, Bedeutung und inhaltliche Ausgestaltung des Art. 12 der neuen Bundesverfassung* 142-147 (Bern: Schulthess, 2002).

requires that state parties refrain from interfering directly or indirectly with the enjoyment of the right to water, for example polluting water through waste from state-owned facilities or destroying water services as a punitive measure. The obligation to protect requires state parties to prevent third parties from interfering in any way with the enjoyment of the right to water, for example inequitably extracting from water resources or denying others equal access to water. The obligation to fulfil requires state parties to adopt the necessary measures directed towards the full realisation of the right to water, such as sufficient recognition of this right within the national political and legal system.⁵⁶

In all three legal orders taken into account, the state's obligation to respect and protect the already existing water supply is defined as an immediate obligation of the state. However, in international and in South African law, the state's obligation to fulfil the right to water only encloses an immediate obligation of the state to take steps towards the fulfilment of the right. In international law, this is expressed in article 2 para 1 CESCR, according to which: 'each State party to the present Covenant undertakes to take steps, (...) with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means(...)'.

In South African law, the progressive realisation of the right to water is regulated by section 27 (2) of the South African Constitution: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Thus no immediate individual right to be supplied with water can be derived from the human right to water as currently defined in international and South African law. In the decision on the *Mazibuko* case, the Constitutional Court has even stated explicitly that no individual right to be supplied with water can be derived from section 27 (1) (b) of the South African Constitution.⁵⁷

In contrast to the unequal protection of the haves and the have-nots in international and South African law, the Swiss fundamental right to emergency assistance does give rise to an individual right to be provided with the most fundamental material goods.

56 See GC 15, note 38 above, paras 21-29.

57 See *Mazibuko* (CC), note 36 above, para [50].

The only prior condition to benefit of the constitutional right is that the individual is incapable of providing these goods by his or her own means. Thus the State has an immediate duty to provide each individual in need with the most fundamental material goods, including water. As the right is limited to the absolute minimum, its fulfilment cannot be restricted under any circumstances. Thus even though the scope of protection is strongly limited (see the chapter on legal content above III.1.), at least the protection afforded to those in need gives rise to an individually enforceable fundamental right to be provided with material goods, namely also with water.⁵⁸

This serious conceptual shortcoming in international and South African law of the human right to water's function as protective shield cannot fully be compensated by the fact that both legal orders presume that the State is *per se* in violation of its duties if no immediate actions are taken to fulfil at least the absolute minimal content of the human right to water. In this regard the ESCR Committee specified that 'while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'.⁵⁹ Besides the obligation that states move as expeditiously and effectively as possible towards the full realisation of the rights, states must also live up to specific minimum core obligations, such as the immediate provision of the minimum

58 BGE 130 I 71 75, Swiss Federal Court, Judgement of 14 January 2004; BGE 131 I 166 177, Swiss Federal Court, Judgement of 18 March 2005; Amstutz, note 54 above, at 135 ff; Jörg Paul Müller & Markus Schefer, *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* 776 f (Bern: Schulthess, 4th ed. 2008) and Astrid Epiney & Bernhard Waldmann, 'Soziale Grundrechte und soziale Zielsetzungen', in Detlef Merten und Hans-Jürgen Papier eds, *Handbuch der Grundrechte in Deutschland und Europa, Band VII/2, Grundrechte in der Schweiz und in Liechtenstein* § 224 note 27 ff (Heidelberg, Zürich & St. Gallen: C.F. Müller & Dike, 2007).

59 General Comment No. 3, The Nature of State Parties' Obligations (article 2 para 1 of the International Covenant on Economic, Social and Cultural Rights) para 1, Committee on Economic, Social and Cultural Rights, 14 December 1990, UN Doc. E/1991/23 (1990) [hereafter GC 3].

core content of each right.⁶⁰ In a similar approach, the South African Constitutional Court has included in its reasonableness review the obligation for the administration to provide for short-term measures to ensure that desperate people in need are afforded relief.⁶¹

For the distribution of water under the public interest clause the ‘unequal protection problem’ might or might not have consequences, depending on the attitude of the decision-makers. If in their procedure of attributing priority to certain water users the decision-makers base themselves upon the normative content of the human right to water, no unequal treatment of demands of water supply for already existing or new domestic water users will occur. But if on the contrary the decision-makers base their decision upon the state’s obligations to provide access to water, no clear-cut obligation to attribute priority to the water needs of the have-nots persists. Consequently, the state has the duty to treat water for basic needs with priority. But no individual claim for priority treatment in decisions can be deducted from the human right to water in international and in South African law. Thus the human right to water as protective shield provides only incomplete protection for those that need it most. On the contrary Switzerland is a positive example guaranteeing all three dimensions (respect, protect, fulfil) necessary to the effective fulfilment of the human right to water’s function as protective shield in the public interest clause. Consequently in Switzerland, the human right to water can effectively be considered as fulfilling its function for every single human being that might be concerned by decisions on water distribution (although with very limited scope). In South African law the legal fiction of absolute protection for basic water needs in water distribution by complementing the public interest clause with the human right to water is deceiving. Feigning individual legal protection - by complementing the public interest clause with the human right to water - where there is little or none exposes particularly vulnerable individual’s interests to the risk of being trumped by other interests at

stake. Employing the human right to water as general place holder despite its shortcomings renders decision-making on water distribution under the public interest clause precarious.

3.3 Environmental Protection

The third critical conceptual limitation of the human right to water as protective shield is linked to its inherent anthropocentricity. As explained before, safeguarding healthy watersheds is a key to secure access to water in the long term. As the local availability of clean water is dependent upon the regional and global water cycle (especially in the long-term), only a holistic concept of the (natural) environment seems appropriate for the conservation of the water resources.⁶² The deterioration of the water resources in the long term affects the access to water and the living conditions of individuals. This said, the human right to water is conceived as anthropocentric right. Such a concept is by no means capable of advocating for the holistic protection of the water resources. By ‘holistic’ I mean the idea that access to water is dependent upon the availability of clean water, which again is linked to environmental health. In contrast to holistic approaches to the protection of the environment, the human right to water is conceptually limited to the protection of human beings. It can thus only accord punctual protection of water resources in case human beings are directly affected in the satisfaction of their basic needs.

According to the ESCR Committee’s interpretation, the human right to water comprehends certain aspects that relate to environmental protection, such as to prevent threats to health from unsafe and toxic water conditions or to ensure the protection of drinking water sources.⁶³ Also in Swiss and South African constitutional law the duty to respect and protect drinking water sources can implicitly be derived from the human right to water on constitutional level.⁶⁴ But its use for environmental protection is limited to cases in which human beings’

60 See GC 3, *id.*, para 9 f.

61 See *Grootboom* (CC), note 36 above, para [44]; *Mazibuko* (CC), note 36 above, para [144]; Klug, note 36 above and Liebenberg, note 50 above, at 151 ff and 163 ff.

62 See Beyerlin & Marauhn, note 2 above, at 87 and Cullet, note 22 above, at 234 f.

63 See GC 15, note 38 above, paras 8 and 29.

64 For South Africa, see Brand, note 36 above, at 27 f. For Switzerland, see Rüegger, note 42 above, at 44.

adequate access to safe water is imperilled. They, thus, do not attribute protection to the environment as such, but only in its relation to human needs.⁶⁵ Even though the human right to water in international, South African and Swiss law can be instrumental as protective shield in a limited number of cases, no priority for a holistic approach to water environmental protection within the public interest clause can be derived thereof.⁶⁶ Emphasis on this aspect must come from other legal instruments, such as the environmental and water protection law, the law on hydraulic forces or international environmental and water law.

The South African human right to water is subject to the same limited environmental protection. Still the legal situation in South Africa differs considerably due to the fact that the South African Constitution in section 24 specifically guarantees the right to a healthy environment.⁶⁷ By according protection to the environment as such, this right goes beyond the protection of interests that are directly linked to human needs.⁶⁸ The guarantee of a constitutionally protected and justiciable right to a healthy environment fills an important gap in decisions under the public interest clause and thus complements the human right to water in an important point. In comparison to conventional

approaches to environmental protection of water on legislative level, the constitutional right acts as complementary protective shield in decisions under the public interest clause. The importance of such a right is threefold: first, all legislation must be in conformity with the higher ranking constitutional norm. Second, the administration is not only held to treat the environment as prioritarian user, but has a constitutionally entrenched obligation to do so. This priority prevails even against legislation that might leave the administration lee-way for decisions that would lead to a different appreciation of the various interests at stake. And third, the behaviour of the administration can be submitted to judicial review by representatives of the civil society, exerting more control on how the administration makes use of its discretionary power in decisions under the public interest clause.

Relying on the combination of statutory environmental law and the inherently anthropocentric constitutional guarantee of the right to water for the protection of the water resources seems inappropriate.⁶⁹ The statutory provisions enjoy no priority treatment, the possibilities to challenge the administration's decision remain limited. The human right to water can only in a very limited set of situations provide the normative bases for preferential treatment of the environment as such. The quest for a more profound and holistic relationship between human beings and nature cannot be accommodated therein. Even though the human right to water can effectively exert a protective function under some circumstances, further reaching constitutionally entrenched environmental rights would be an important complement. The added value of its use in addition to the human right to water is rudimentary illustrated by the South African case law.

65 See GC15, note 38 above, paras 8 and 29.

66 Günther Handl, 'Human Rights and Protection of the Environment', in Asbjørn Eide, Catarina Krause & Allan Rosas eds, *Economic, Social and Cultural Rights, A Textbook* 303, 316 f, 326 f (Den Haag: Martinus Nijhoff, 2nd ed. 2001); Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* 280, 285 (Oxford: Oxford University Press, 3rd ed. 2009); Nickel, note 34 above, 97 f and Climate Change Report HCHR, note 22 above, paras 70 f, 72 ff. A broader scope of protection through human rights is attributed by Hiskes, note 22 above, at 331 ff.

67 See Kidd, note 8 above, at 19-23, 241 f; Glazewski, note 8 above, at 67, 72-81; Devenish, note 55 above, at 122 ff and Fitzmaurice, note 22 above, at 632.

68 *Director, Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*, South African Supreme Court of Appeal, Judgement of 12 March 1999, 1999 (2) SA 709 (SCA), para [20]. See also *Macsand (Pty) Ltd v City of Cape Town and Others*, South African Constitutional Court, Judgement of 12 April 2012, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC), paras [5] and [8] and *BP v MEC*, note 21 above.

69 The anthropocentricity of the human right to water has also been laid out in the following two publications: Rüegger, note 42 above, at 171 f and Vanessa Rüegger, Through the Eyes of the Beholder – In Quest of Queer Approaches to Legal Writing on Water and Gender, 103 *Feminist Review* 140, 146 f (2013).

4 CONCLUSION

In its first part the paper dealt with the way water regimes are currently structured and the role the public interest clause plays therein. It then went on to identify the uses of water to be considered as corresponding to the interests of the public and to analyse how competing interests are to be balanced against each other. It then highlighted the protective function of the human right to water in decisions on water distribution under the public interest clause. An analysis of the human right to water as guaranteed in international, Swiss and South African law made it apparent that the human right to water has certain shortcomings in regard to the fulfilment of its protective function. In the process of water distribution, the human right to water as conceived in the three legal orders ensures protection of domestic water users under some, but not all circumstances. The shortcomings of the human right to water as protective shield mainly concern three aspects: first, the human right to water is conceptually limited to a minimal guarantee; second, the interests of those users whose access to water is not yet sufficient do not receive adequate legal protection; and third the human right to water is conceptually anthropocentric and remains too limited in its scope to accredit the primordial interests in water conservation with legal protection complying with the importance of the matter.

In spite of the shortcomings of the human right to water as protective shield, and from what this analysis revealed of the issue's legal aspects, the human right to water remains an important factor within the complex pattern in which access to water is determined. Even though little case law exists so far (few constitutional law cases in South Africa, only one case making reference to the constitutional protection of the right in Switzerland) they all point into the direction that the human right to water, besides its shortcomings, is a necessary complement to the statutory law regulating the distribution of water under the public interest clause. The human right to water first of all sets clear priorities in the licensing procedure under the public interest clause.

Instead of being one amongst many, the interests of domestic water users have to be considered as absolute priority by the administration. And second, the right gives a tool to question decisions on water distribution by the administration by legal means. Even if (as is the case in South Africa) no individual right to be treated as such can be claimed, at least judicial review of the administration's decisions can be enforced. And third, the analysis of the human right to water's protective function points out that fragmentary legal protection of basic human needs might expose vulnerable water users' interests to inadequate consideration in the licensing procedure when competing against other water user's interests.

Consciousness of the importance of the human right to water in decisions on water distribution under the public interest clause should encourage evolving the concept of the human right to water towards comprehensive constitutional protection of basic human needs. Efforts should particularly be to work towards: the recognition of the human right to water's full normative content in its relative dimension; the achievement of equal protection of the haves and the have-nots; the substantive material review by the judiciary of the legislation's conformity with constitutional law; the recognition of an independent constitutional right to a healthy environment as a complement to the human right to water.

The social responsibility charged on the human right to water as protective shield under the public interest clause justifies an informed approach to its use in decisions on water distribution. It is irresponsible to employ the legal fiction that the human right to water guarantees the preferential treatment of basic human needs when competing against other water users under the public interest clause while this is actually not always the case. Feigning legal protection where there is little or none exposes particularly vulnerable individual to the risk of being trumped by other interests at stake. Knowledge about the possible consequences of employing the human right to water as general place holder despite its shortcomings will hopefully encourage the establishment of alternative and further reaching individual protection as an indispensable complement to the public interest clause.

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