More work for women: A Rights-based analysis of Women’s access to basic services in South Africa

Jackie Dugard ☼ and Nthabiseng Mohlakoana ☼

Abstract

South Africa has a commendable legislative and policy framework for basic services that explicitly recognises historic disadvantage, including gender. Yet, as explored in this article, inadequate access to water and electricity services has a disproportionately negative effect on women. This is because there is a sexual division of labour within most households meaning that, in addition to typically being singly responsible for childcare, washing, cooking and cleaning, women must usually also take on the role of managing water and energy supplies. In this role, women experience multiple obstacles in accessing these goods, related to the availability, affordability and amount of water and electricity supplied. Analysing such obstacles, this article concludes that, as public services that enter the private realm of the household, water and electricity services are perhaps uniquely resistant to gender-specific legislative and policy recommendations. It suggests that the best way to improve women’s access to basic services is through a socio-economic class analysis, advancing greater access by poor households.

I Introduction: the poverty, gender, and basic services link

In South Africa, poverty is not gender-neutral. Women have less access to land and agriculture, and women make up only 38 per cent of the formal labour force. In terms of poverty indices, the poverty rate among female-headed households is 60 per cent, compared with 31 per cent for male-headed households. According to the 2007 General Household Survey, ‘if you lived in a female-headed household in 2007 you were 63% more likely to experience hunger than if you lived in a male-headed household’. In addition, largely due to their diminished socio-economic status and their associated disempowerment regarding sexual autonomy, women are more vulnerable to HIV infection than men. A 2004 audit found that HIV prevalence is 10 to 20 per cent higher for women than for men. Although all South African women are vulnerable to HIV/AIDS, African women (especially young and poor African women) are particularly at risk. HIV prevalence in Africans is 13.3 per cent, compared with an HIV prevalence of less than two per cent across other race groups (1.9 per cent among coloureds, 1.6 per cent among Indians and 0.6 percent among whites), but HIV prevalence in African women between the ages of 15 to 24 is 24.4 per cent. The high prevalence of HIV among African women has implications for water services because:

Access to affordable, accessible and reliable water and sanitation is crucial for people living with HIV/AIDS, and for providing home based care. Water is needed for taking antiretroviral (ARV) medication, bathing patients, washing soiled clothing and linen and for essential hygiene, which reduces exposure to infections. Toilets are needed nearby for weak patients.

Finally, notwithstanding HIV-status, inadequate access to water and electricity services has a disproportionately negative effect on women. This is because, as explored in other articles in this issue, there is a sexual division of labour within most households meaning that women are ‘often singly responsible for child-care, cleaning the house, fetching and heating water, washing and ironing, shopping, collecting firewood, cooking and washing dishes’. Spending time on such activities negatively impacts women’s ability to secure paid work and, because female children often assist mothers with such work, girls are less likely to remain or do well in school.

As with water services, in respect of electricity services women are exposed to more poverty than men. In rural areas, women are commonly expected to ensure that there are sufficient energy sources for the whole family. This includes firewood, which must often be fetched across long distances in sometimes dangerous terrain, exposing women to attacks by animals or malevolent people. Because female-headed households are generally more impoverished than male-headed households, many poor female-headed households have no option but to use the cheapest and most unhealthy forms of energy. Constant use of wood or other plant material to make indoor fires for cooking or heating is unhealthy, and women and children from these households commonly suffer from respiratory diseases. According to Cecelski, the World Bank has classed indoor air pollution among the four most critical global environmental problems in developing countries. The direct impact is respiratory infections in children and chronic lung disease in non-smoking women. In 2006, the World Health Organization (WHO) estimated that 1.5 million premature deaths per year were directly caused by indoor air pollution from use of solid fuels such as wood. Moreover, where there is no electricity, women have to spend more time cooking as there are limited ways to preserve food without electric fridges. As Tanja Winther explains, if a household has electricity and a fridge, women can bulk-cook and refrigerate, saving cooking time and freeing up time for other activities.

Thus, in South Africa, as in many countries, women bear the brunt of water and energy services-related problems. Insufficient access to resources such as water and electricity increase women’s vulnerability to sexual exploitation and gender violence in the home. For this reason it can be said that both poverty and basic services have a gender.

In examining women’s access to basic services, this article pursues an enhanced substantive equality approach that is sensitive to all social and economic inequality, including gender, and has as its continually progressive objectives ‘the achievement of equality’ and the ‘advancement of human rights and freedoms’ to ‘improve the quality of life of all citizens and free the potential of each person’ (as set out in the Preamble and s 1 of the Constitution of the Republic of South Africa Act 108 of 1996). This broad-based human rights approach incorporates Amartya Sen’s concept of capabilities, as well as Sandra Fredman’s blended version. For example, this approach recognises that merely to bring water taps closer to households is unacceptable

---


7 May (note 2 above) 6.

8 In this article wherever it makes sense to do so, we use the terms electricity and energy interchangeably, while focusing on electricity services more directly. We do so because the article concentrates on women’s access to water and electricity services rather than to the resources of water and energy more generally. However, we do touch on water and energy resources per se, to the extent that they form the basis of basic service systems. Our focus on the public service aspect rather than the good itself means that we are discussing a rather strange set of socio-economic rights – completely public (whether privatised or not) but located or accessed via the home: a private realm with deeply gendered power relationships. We do not deal with water and electricity services to business, agriculture or industry, that is, we are covering basic domestic services.


10 Ibid 27.


without also ensuring the affordability of water services to the poor and the safe location of the taps for women and their accessibility for the disabled, etc. The authors acknowledge that the basic services discussed in this article pose a specific gender challenge in terms of the associated substantive equality-related obligations on the state. This is because, while water and electricity delivery are public services, internal household distribution is largely a private matter that is difficult for the state to regulate beyond ensuring that the criminal justice system is alert to the potential for violent conflict over scarce household resources as a result of domestic power imbalances. While retaining our recognition of gender dynamics, particularly within the home and household (as explored, for example, in Lillian Chenwi and Kirsty McLean’s article in this issue) our main reference point is poor women’s access to basic services.

II The human rights framework for basic services

Within South Africa’s legislative and institutional framework, the Local Government Municipal Systems Act 32 of 2000 (Municipal Systems Act) was enacted to ‘provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all’. According to the Municipal Systems Act, the concept ‘basic municipal services’ is defined as ‘a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment’. In municipal practice and policy, as well as national standards, ‘basic services’ most commonly includes water and electricity services, which we focus on in this article.

(a) The explicit right of access to sufficient water

Access to sufficient water is obviously essential to sustain human life. Indeed, the right of access to sufficient water might be regarded as the most important of all socio-economic rights. It is certainly highly connected with and indivisible from all other rights, whether civil and political or socio-economic.

In recognition of the importance of water, s 27(1)(b) of the Constitution guarantees everyone’s ‘right to have access to ‘sufficient water’.

All rights contained in the Bill of Rights, including the right of access to water, are explicitly justiciable, and the state is compelled to ‘respect, protect, promote and fulfil’ every right. And, as with most constitutionally

entrenched socio-economic rights, the right of access to sufficient water requires the state to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right’. In the landmark socio-economic rights case, *Government

---

15 We do not suggest that other services such as refuse and sanitation are not critical for the upliftment of local communities. Indeed, sanitation is more important in terms of basic health care and dignity concerns (particularly for women) than electricity services. It also has a strong gender dimension in that, particularly in rural areas, inadequate sanitation facilities mean that women often face indignity and security risks when they have to defecate in the open or have to share limited facilities with men. However, we have not dealt with sanitation specifically (outside of waterborne sanitation services) precisely because, for the majority of South Africans, sanitation is not a service per se, but rather a facility such as a bucket or an un-serviced pit latrine or nothing at all. Clearly, in order to satisfy the kind of approach pursued in this special issue, sanitation should be physically accessible and safe for all people including women, financially affordable, gender segregated and make provision for menstrual waste.
16 For example, access to water directly impacts the rights to life, dignity and health, and it is directly related to the right to housing. It should be noted that, as pointed out by Chenwi & McLean (note 14 above), access to housing is strongly bound in gendered relations, with title ownership most commonly being held by men, making women dependent on men for housing (and by extension for basic services).
17 Constitution s 7(2).
18 With the exception of ss 28(1)(c) – children’s rights to basic nutrition, shelter, basic health care and social services; 29(1)(a) – everyone’s right to basic education; and 35(2)(e) – detainees’ rights to exercise, adequate accommodation, shelter etc, which are unqualified.
19 Constitution s 27(2).
of the Republic of South Africa v Grootboom (Grootboom) (discussed in several articles of this issue including the article on the right to housing), the Constitutional Court established that, to be reasonable, 'measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise'. 20 Moreover, government programmes must ‘respond to the needs of the most desperate’ and must ensure that social and economic rights are ‘made more accessible not only to a larger number of people but to a wider range of people as time progresses’. 21 In such statements the Constitutional Court establishes the kind of enhanced equality approach to access to resources advanced in this article and in this issue more generally.

To provide meaning to the constitutional right, national legislation provides for the right to water in South Africa. For example, s 3 of the Water Services Act 108 of 1997 (Water Services Act) provides that ‘everyone has the right of access to basic water supply and basic sanitation’ and that ‘every water services institution must take reasonable measures to realise these rights’. 22 And reg 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water made under ss 9(1) and 73(1)(j) of the Water Services Act provides:

The minimum standard for basic water supply services is –

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 meters of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year. 23

Giving further effect to these legal iterations, and in recognition of the fact that greater physical access to water (through bringing water infrastructure closer to people’s households) is meaningless if water remains unaffordable, in 2002 the national Department of Water Affairs and Forestry (DWAF) instituted a Free Basic Water (FBW) policy (discussed further in part III(c) below). The Free Basic Water Implementation Strategy establishes a national policy to be

effected at municipal level) to provide 6 kilolitres (6kl) of Free Basic Water per household per month, to be implemented through local municipalities. 24

In many respects the South African water rights framework echoes the international human rights framework. 25 Although, at the international level, the two main international conventions – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) – both dating from 1966, do not explicitly refer to a right to water, there are several reasons to conclude that there is an international right to water. 26 First, because water is absolutely essential to human life and without it, other human rights are meaningless, this implies that the right to water must be inferred from other more general rights. These more general rights include art 11 of the ICESCR, which guarantees everyone’s right to ‘an adequate standard of living’, art 12 of the ICESCR, which guarantees everyone’s right to enjoy ‘the highest attainable standard of physical and mental health’, as well as arts 6 (right to life) and 10 (‘the inherent dignity of the human person’) of the ICCPR. Likewise, although the main African regional human rights convention, the African Charter on Human and People’s Rights (1981), which South Africa ratified in 1994, does not contain an explicit right to water, a right to water might be inferred, for example, from art 21: ‘all

20 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para 44.
21 Ibid paras 44–5.
22 Water Services Act s 1 defines ‘basic water supply’ as meaning ‘the prescribed minimum standard of water supply services (which includes sanitation 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’.
26 For an in-depth analysis of the international right to water see, for example, H Gleick ‘The Human Right to Water’ (1999) 1 Water Policy 487–503.
peoples shall freely dispose of their wealth and natural resources’, and art 24, ‘all people shall have the right to a general satisfactory environment favourable to their development’.

Second, more recent international instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (1979), 27 the Convention on the Rights of the Child (1989) 28 and the African Charter on the Rights and Welfare of the Child (1990), 29 all contain explicit references to water-related rights. Third, in 2002 the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which provides clarity on the nature and scope of the ICESCR through its General Comments, formulated a specific General Comment on the right to water. General Comment 15 on the right outlines the parameters of states parties’ obligations pertaining to water, and clarifies:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival … The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity. 30

Fourth, since 2006, there has been a process of legal and institutional development within the United Nations (UN) human rights system towards formal recognition of the right to water. This started in 2006 with the UN Sub-Commission on the Promotion and Protection of Human Rights adopting the UN Special Rapporteur for water’s 2005 draft guidelines for the realisation of the right to drinking water and sanitation. 31 It culminated in 2008 in the appointment by the Human Rights Council (which succeeded the Office of the High Commission on Human Rights) of a UN Independent Expert on the human right to water and sanitation, Ms Catarina de Albuquerque.

More generally, in all of its General Comments on socio-economic rights, the CESCR has stressed that economic accessibility, availability and affordability are essential elements of each right. Such requirements are even more strongly affirmed regarding vulnerable groups – such as women, children, elderly and disabled – through the germane rights to equality and non-discrimination. As such, the international right to water can be said to be ‘gendered’. For example, General Comment 15 states in para 13: ‘the obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art 2, para 2), and equally between men and women (art 3) pervades all of the Covenant obligations’. It further states in para 16: whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women … States parties should take steps to ensure that (a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated. 32

27 In relation to obligations towards rural women, art 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women compels states parties to ‘ensure the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply …’.
28 Article 24(2)(c) of the Convention on the Rights of the Child obliges states parties to ‘combat disease and malnutrition … through … the provision of adequate nutritious foods and clean drinking-water …’.
29 Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child provides that states parties must ensure ‘the provision of adequate nutrition and safe drinking water’ to children.
32 General Comment 15 (note 30 above).
Somewhat inexplicably, South Africa has not ratified the ICESCR (though it has ratified the ICCPR and the other instruments mentioned above in which specific mention is made of the right to water). Nevertheless, the Constitutional Court has clarified in *S v Makwanyane*, that binding as well as non-binding international law is relevant to the interpretation of the Bill of Rights, also consistent with the 1969 Vienna Convention on the Law of Treaties, state parties that have signed but not ratified a particular treaty such as the ICESCR must still work towards the standards and cannot do anything inconsistent with the treaty. This means that the ICESCR is relevant to the judicial interpretation of socio-economic rights in South Africa.

Taken together, domestic and international law strongly supports an interpretation of the right to water that prioritises access for socio-economically marginalised groups, specifically the poor, and including poor women as a particularly vulnerable grouping. As developed in the next section, a similar argument can be made regarding electricity.

(b) An implied right to electricity

The case for ensuring access to water services in the manner advanced in this article cannot be overemphasised. Nevertheless, the case should also be made for viewing electricity services as a critical public good, particularly in terms of improving women’s lives and freeing women’s potential, because:

- Electricity is a basic necessity and access to it has a wide range of positive developmental benefits for communities. Increased usage of electricity improves the level of welfare, decreases health expenditures and improves opportunities for low-income families, and women in particular.

Yet, unlike the right of access to sufficient water, in South Africa there is no explicit right to electricity (nor is there an elucidated right to energy). However, this right can be inferred from the right of access to adequate housing, found in s 26(1) of the Constitution. The fact that the right to housing implies more than merely having a roof over your head was confirmed by the Constitutional Court in *Grootboom*. According to the Court, the ‘state’s obligation to provide adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person’ and while ‘some may need access to land and no more … some may need access to services such as water, sewage, electricity and roads’. This means that, in the Court’s view, one of the factors relevant to a consideration of the right to housing is electricity provision.

The right of access to electricity services can also be inferred from the right to access ‘an environment that is not harmful to health or well being’ in s 24(a) of the Constitution, as well as the right to have a protected environment for the benefit of the present and future generations where measures to prevent pollution and ecological degradation are taken (s 24(b)(ii) of the Constitution). In this context, use of fuels such as wood, which pose a threat to human health and life in terms of collecting it and breathing in emissions, infringe the right to a safe environment. It is worth noting, particularly in the context of the interconnectedness of socio-economic rights, that without electricity or appropriate energy services, access to sufficient food and water is very difficult. In order to prepare nutritional, well-cooked meals and, where water is not adequately reticulated, ensure purified water, households require a reliable, safe energy source (such as, ideally, provided by electricity generated by whatever means). Where such

---

33 1995 (3) SA 391 (CC) para 35.
34 Section 39(1)(b) of the Constitution stipulates that, when interpreting the Bill of Rights, a court ‘must consider international law’.
37 The role of housing rights as indivisible within the matrix of other rights is emphasised in the article on housing by Chenwi & McLean in this issue (note 14 above).
38 *Grootboom* (note 20 above) para 37.
access is not available, there are obvious healthcare- and human development-related consequences.

In terms of policy, the South African Energy Policy White Paper (1998) sets out government’s aim to improve the lives of people living in poor and impoverished areas by providing safe, accessible, affordable and reliable energy sources for all. The policy recognises that the injustices of the past that have led to people living in areas where development is hard to reach have to be corrected. Notwithstanding such inferences to a right to electricity, it remains to be seen how, or indeed if, a right of access to electricity would be considered justiciable by the Constitutional Court, which has thus far failed to provide much clarification of the state’s positive obligations to promote the socio-economic rights of individuals (as opposed to a general right of everyone to a reasonable government programme in respect of the right). Nevertheless, our interpretation of an implied right to electricity is supported in international law by the CESCR.

The CESCR has construed the right to electricity as being inherent to the enjoyment of other socio-economic rights in a similar way to how it has construed the right to water (as mentioned above, the right to water is also not explicitly elucidated in main international human rights treaties).

In the case of electricity, in General Comment 4 on the right to adequate housing (1991), the CESCR has stipulated that ‘all beneficiaries of the right to adequate housing should have sustainable access’ to ‘energy for coking, heating and lighting’.

Although General Comment 4 refers to energy rather than electricity specifically, the UN Special Rapporteur on Adequate Housing As A Component Of The Right To An Adequate Living, Miloon Kothari, has clarified in his reports that the right to adequate housing ‘includes access to essential civic services such as electricity’. Kothari’s 2002 report states that ‘the right to adequate housing – broadly defined’ must be taken to ‘include access to land, as well as other essential services such as water, electricity and sanitation …’. Moreover, in specific relation to the rights of women, art 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979), which South Africa ratified in 1995, states:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas … to ensure … the right … to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply …

It can therefore be argued that there is a strongly implied right to electricity in international and South African domestic law. This thesis is strengthened by the inclusion of electricity in the South African government’s free basic services’ package. Arguably, the allocation of Free Basic Electricity (FBE) and Free Basic Alternative Energy (FBAE) to qualifying households, alongside Free Basic Water (FBW), is an implicit acknowledgement of a right to ‘sufficient’ electricity along the same lines as the constitutional right, found in s 27(1), of everyone to ‘access to sufficient food and water’.

Like DWAF’s FBW policy, the Department of Minerals and Energy (DME)’s FBE policy of 2003 was formulated to assist impoverished households that could not afford electricity services.

---

39 The Grootboom judgment established that, regarding positive obligations, the right of access to housing requires the state to formulate and to execute housing programmes that are ‘reasonable’ (note 20 above para 41). The judgment explicitly steered away from any reference to individual rights to housing per se.

40 The African Charter on Human and Peoples’ Rights (ACHPR) is silent on the subject of housing or electricity rights. The only article that could possibly be interpreted to contain an implied right to electricity is art 24, the right of everyone to ‘a generally satisfactory environment favourable to their development’. However, the ACHPR has not thus far in its communications interpreted art 24 as implying a right to electricity.


44 FBE & FBAE are discussed further below.

45 Constitution s 27(1)(b).
In 1998 the then National Electricity Regulator (NER) – subsequently reconstituted as the National Energy Regulator of South Africa (NERSA) – proposed a poverty tariff costing between R30 and R100 per household identified as poor. In 2001, the NER further stated that the poverty tariff would only apply to the first 50 kWh per month per household identified as poor. In the same year (2001), then Minister of Minerals and Energy, Phumzile Mlambo-Ngcuka announced that the DME would be developing an implementation strategy for the Electricity Basic Services Tariff (EBSTT now known as FBE) in order to alleviate the negative impact of poverty. The finalised FBE policy was launched on 30 June 2003. In terms of the national FBE policy, the 50 kiloWatt hours (kWh) that the government agreed to provide to these households was viewed as a sufficient amount to ensure basic energy services such as lighting for at least four hours per day, playing a small radio and a black and white television. The FBE allocation was informed by the low-level of energy consumption especially in (mostly rural) newly electrified areas, which was associated with low-income households.

In 2006, the DME formulated a FBAE policy, which focuses on the provision of energy subsidies for households that are not connected to grid electricity. In the main, this entails providing subsidised Solar Home Systems (SHS) through the government’s Integrated National Electrification Programme (INEP). The FBAE policy is meant to be implemented by local municipalities, which identify indigent households in their areas and may choose various energy carriers and these should be ‘safe and environmentally friendly supply channels’. As detailed in part III(b) below, however, the subsidy is inadequate for very poor households.

The inference of an implied right to electricity is that it is subject to the same obligations as the other socio-economic rights in the Bill of Rights, as outlined above, requiring the state to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right’. This means that, as with water, the state is constitutionally obliged to provide more electricity to more people (but especially to vulnerable groups such as the poor) over time. However, as noted above, the extent to which any socio-economic right in its constitutional right form is enforceable as an individual right to a resource or service is, as yet, unclear.

Nevertheless, over and above the implications of an explicit right to water and an implied right to electricity, water and electricity services, as public services, exist within a broader framework of substantive equality, capabilities and dignity. Of the rights (and obligations) that attach to the provision of essential public services such as water and electricity, the most important are the rights to equitable and justly administered basic services.

(c) The right to equitable water and electricity services

Regardless of the commercialisation or corporatisation of municipal services entities such as Johannesburg Water (Pty) Ltd and City Power (Pty) Ltd (the corporatised, but wholly publicly-owned, agencies that provide Johannesburg residents with water and electricity services respectively), for the most part,
mandated. As recognised by the Constitutional Court in achievement of socio-economic equality, are not only permitted, they are constitutionally

services has occurred yet, although varying degrees of commercialisation is fairly common. This means other service providers in other municipalities.

Johannesburg Water (Pty) Ltd and City Power (Pty) Ltd are municipal entities wholly owned by the City of Johannesburg. But both operate as ring-fenced corporations as between each other and also vis-à-vis discriminatory laws and practices in the past are not recognised and dealt with’.

Mazibuko v City of Johannesburg

interesting to note the approach of Johannesburg High Court Judge, Moroa Tsoka in the case of Mazibuko v City of Johannesburg, regarding the issue of the additional burden placed on women by the automatic disconnection of water supply by a prepayment water meter:

South Africa is a patriarchal society. Many domestic chores are performed by women. Many households in poor black areas are headed by women. Phiri Township is no exception. It is understandable therefore that the first applicant travelled 3 kilometres to access water on behalf of her household. In this context it seems to me that the prepayment meters discriminate against women unfairly because of their sex. Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful.

Going beyond the prohibition against unfair discrimination into the realm of advancing substantive equality, s 9(2) requires the state to take steps to ‘promote the achievement of equality’. In other words, municipal services not only may not unfairly discriminate on listed grounds but, in addition, where necessary to counteract historical inequality, municipalities should pursue redistributive policies. Against the backdrop of apartheid’s legacy of unequal municipal services provision based on unfair discrimination on the grounds of race (and, concomitantly, on class), s 9(2) enjoins the state to take

‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’. In the case of Pretoria City Council v Walker the Constitutional Court clarified that positive discrimination policies aimed at correcting past inequalities between formerly advantaged and disadvantaged groups do not amount to unfair discrimination. Indeed, such essentially redistributive policies, designed to promote the achievement of socio-economic equality, are not only permitted, they are constitutionally mandated. As recognised by the Constitutional Court in Walker, the constitutional objective of equality ‘will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with’. In relation to basic services, this means that the state is obliged to ensure that positive steps are taken to make water and electricity increasingly accessible and affordable to poor people.

51 Very little actual privatisation of domestic water services, and no privatisation of domestic electricity services has occurred yet, although varying degrees of commercialisation is fairly common. This means that, almost without exception, services are provided by wholly state-owned entities. For example, Johannesburg Water (Pty) Ltd and City Power (Pty) Ltd are municipal entities wholly owned by the City of Johannesburg. But both operate as ring-fenced corporations as between each other and also vis-à-vis other service providers in other municipalities.

52 Although there has not been much actual privatisation of water and electricity services, it is worth noting in the context of possible future developments, that the Bill of Rights is not limited to state action. Section 8(2) of the Constitution provides that ‘a provision of the Bill of Rights binds a natural or a juristic person (eg a company) if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. The prohibition against unfair discrimination must be viewed as one such right in that s 9(4) of the Constitution stipulates ‘No person may unfairly discriminate directly or indirectly against anyone’ on any ground listed in subsection 2. Similarly, in relation to the right to just administrative action outlined below, over and above organs of the state, s 1(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) binds ‘a natural or juristic person’ when exercising a public power or performing a public function in terms of an empowering provision’. However, regarding the right to equality, it is unlikely that a private water or electricity company would be required to go as far as a state-owned company to take ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’, as enjoined by s 9(2) of the Constitution.

53 Mazibuko v City of Johannesburg 2008 (4) All SA 471 (W) para 159. Unfortunately, when Mazibuko was taken on appeal, neither the Supreme Court of Appeal nor the Constitutional Court dealt with this aspect of gender discrimination.

54 Pretoria City Council v Walker 1998 (2) SA 363.

55 Ibid para 46.

56 The connotation of the right to equality of electricity services is therefore almost the same as that of the implied right to electricity. The difference is that the right to equality is an explicit right, and one that the
words, the right to equitable water and electricity services incorporates the right to redistributive basic services-related policies and practices that aim to redress socio-economic inequality in all its forms. At the national policy level, this aspect of water and electricity services is concretised in FBW and FBE/FBAE rationale, as well as in tariff standards. As discussed in part III, however, on the ground, local government does not always pursue even the prohibition on unfair discrimination, let alone s 9(2)’s call to advance substantive equality.

The constitutional mandate to promote equality is recognised in national policy. In the context of water services, the first macro-economic policy of the post-apartheid government – the 1994 Reconstruction and Development Programme (RDP) – recognised the apartheid legacy of vastly and unfairly unequal access to water (and sanitation):

Water is a natural resource, and should be made available in a sustainable manner to all South Africans. Today, more than 12 million people do not have access to clean drinking water and 21 million people do not have adequate sanitation (toilets and refuse removal). Less than half the rural population has a safe and accessible water supply, and only one person in seven has access to adequate sanitation … Access to water resources is dominated by a privileged minority while the majority of the population enjoy little or no water security.

Similarly, the introduction to the 1997 White Paper on Water Services makes the point that ‘South Africa’s water law comes out of a history of conquest and expansion’ and that:

The victory of our democracy now demands that national water use policy and the water law be reviewed. Our Constitution demands this review, on the basis of fairness and equity, values which are enshrined as cornerstones of our new society.

Section 2.1.4 of the White Paper on Water Services points specifically to the gender and class aspect of unequal access to water, along with the more usual understanding of racial discrimination:

Apartheid was an inefficient racial spoils system under which the distribution of water-use was racially based, and access to water and the benefits of its use a privilege of those with access to land and political and economic power. In the context of the reform of water law, the right to equality requires equitable access by all South Africans to, and benefit from the nation’s water resources, and an end to discrimination with regard to access to water on the basis of race, class or gender.

The government’s 2002 FBW policy was premised on the recognition to promote substantive equality in respect of water services, and was based on the RDP’s aims which, in the short term, were to provide ‘all households with a clean, safe water supply of 20 – 30 litres per capita per day (lcd) within 200 metres’ and, in the medium term, to ‘provide an on-site supply of 50 – 60 lcd of clean water’.

The government is also cognisant of the need to extend and to maintain affordable electricity services to everyone. In terms of connecting households to the electricity grid, the 1994 RDP urged future energy policy to ‘concentrate on the provision of energy services to meet the basic needs of poor households’. It also stipulated that ‘an accelerated and sustainable electrification programme’ should be introduced to provide electricity to all citizens. This gave rise to the DME’s INEP, which in recognition of the critical importance of electricity to community and personal development, aimed to provide electricity for all. Specifically, INEP seeks to eradicate the electricity backlog of 3.4 million households by 2012 through making at least 150 000 connections per year.

courts seem readily willing to accept.

57 The RDP was an essentially redistributive economic manifesto, which was replaced by the more austere (and not very accurately named) Growth, Employment and Redistribution (GEAR) programme in 1997.
59 Ibid para 2.6.6.
60 Ibid para 2.6.7.
61 Ibid para 2.7.3.
62 Ibid para 2.7.7.
Between 1994 and 1999, 2.5 million households were connected to the electricity grid as a result of the programme. However, this was mainly in urban and peri-urban areas as it is much more difficult to provide electricity to rural areas than urban areas because of high costs of installing grid lines across difficult terrain and areas of sparse population. Increasingly, therefore, SHS (one of the off grid options) are installed as part of the electrification strategy in rural areas. Nonetheless, as discussed below, despite being subsidised, the SHS remain too expensive for most rural households.

In terms of the objective of ensuring the affordability of electricity services, the DME ministerial foreword of the White Paper on the Energy Policy of the Republic of South Africa (1998) (White Paper on Energy) states:

the state must establish a national energy policy which will ensure that the national energy resources shall be adequately tapped and developed to cater for the needs of the nation. Energy should therefore be available to all citizens at an affordable cost. Energy production and distribution should not only be sustainable, but should also lead to an improvement of the standard of living for all the country’s citizens.

Similarly, the Eskom Conversion Act 13 of 2001, for example, provides that in the process of converting Eskom to a public company, ‘the Minister must take into account … the promotion of universal access to, and the provision of, affordable electricity’ (s 6(5)(b)).

Regarding basic services delivery more generally, water and electricity, along with the other basic services (sanitation, and refuse collection), are governed by the overall policy framework for municipal service delivery, which stresses the need to advance equal services to all members of the local community. Thus, the White Paper on Local Government (1998) requires municipalities ‘to assume a developmental role in providing basic services’ and the Municipal Systems Act stipulates that municipalities must ensure that access to basic services should be ‘equitable’.

On tariff policy specifically, the Municipal Systems Act requires municipalities to ensure that users are treated ‘equitably in the application of tariffs’, ensuring that ‘poor households’ have access to at least basic services’ through, inter alia, ‘life line tariffs’ and ‘any other direct or indirect method of subsidisation of tariffs for poor households’.

(d) The right to justly administered water and electricity services

Supplementing the right to equitable services, s 33 of the Constitution provides everyone with the right to just administrative action that is ‘lawful, reasonable and procedurally fair’. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was promulgated to give effect to this right. There are two aspects of PAJA that are particularly relevant to water and electricity services, as public services falling within PAJA’s definition of administrative action. First, s 4(1) of PAJA stipulates that all administrative decisions that materially or adversely affect the public must be preceded by public participation, such as public inquiry or commentary processes. This means that when a new water or electricity service is contemplated for a specific area, or where an administrator wishes to change an existing service, she must solicit public commentary on the proposals before making a decision.

Second, in terms of existing services, s 3(2)(b) of PAJA sets out the requirements for procedural fairness, including (i) adequate notice of proposed action, (ii) reasonable opportunity to make representations, (iii) a clear statement of the administrative action, (iv) adequate notice of any right to internal appeal where applicable, and (v) adequate notice of the right to request reasons in terms of s 5. Principles of administrative justice extend also to other relevant legislation. For example, the Water Services Act stipulates in s 4(3) that:

Procedures for the limitation or discontinuation of water services must – (a) be fair and equitable; (b) provide for reasonable notice of intention to limit or discontinue water

66 Ibid s 74(2)(a).
67 Ibid s 74(2)(c)).
services and for an opportunity to make representations …; and (c) not result in a person being denied access to basic water services nor non-payment, where that person proves, to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services.

Until its repeal by the Electricity Regulation Act 4 of 2006, the Electricity Act 41 of 1987 (Electricity Act) provided a similar protection against the unprocedural disconnection of electricity supply. 68 With the repeal of the Electricity Act, electricity services are now governed mainly by municipal by-laws, many of which reinforce the principle of the requirements for notice and opportunity to make representation prior to disconnection. These administrative justice requirements are particularly important in the context of disconnections of water and electricity services (for failure to pay municipal bills), which must comply with the notification and representation elements of PAJA and other legislation outlined above.

III The reality of poor women’s access to water and electricity

Despite the progressive human rights framework within which water and electricity services are located, the reality on the ground is that many poor South Africans still struggle to access adequate water and electricity services. Access to basic services is largely a function of availability, affordability and amount. Each of these factors is impacted by socio-economic and gender inequality, which, in turn, affect women’s ability to enjoy healthy and dignified lives. Within low-income population groups, and by virtue of being the poorest class of women, poor African women are disproportionately affected by all of these water and electricity services-related issues and continue to suffer diminished access, which compromises their ability to enjoy life and to advance socio-economically.

(a) Availability

In this article we cover three problematic scenarios regarding the availability of water and electricity services for low-income households which we discuss in this section. The first applies in many rural areas: non-connection to the water or electricity grid, meaning long distances to fetch water and alternative energy sources (this is not dealt with in depth as this article focuses on basic services, ie where there is some infrastructural connection). The second applies in some rural areas and most informal settlements: communal taps and low-amperage electricity supply. And the third applies in township, inner-city, poor urban settings and some rural areas: technical mechanisms to restrict water and electricity use according to ability to pay, namely water flow-restrictors, prepayment water or electricity meters, and low-amperage electricity supply.

(i) Rural areas without grid access to water or electricity

The first problem, experienced mainly in deep and poverty-stricken rural areas, is the long distance many individuals (usually women and girl children) have to walk to access water from rivers, and to collect alternative energy sources from the veld or shops where no basic services exist. In terms of water, while the post-1994 government’s rural water supply programme has increased access to water, in 1999, 10,2 per cent of non-urban African households still live more than one kilometre away from a water source and 25,4 per cent were between 200 metres and one kilometre from a water source. 69 Where water sources are a long distance from the homestead, it is usually women who have to devote additional time and energy to fetching and carrying water for the household’s needs. For example, where a water source is one kilometre or more from the household dwelling, female members of the household are almost three times more likely than male members to collect water, spending an average of 71 minutes per day on this task, 70 and exposing themselves to the risk of attack from animals and humans.

68 In terms of s 11(b) of the Electricity Act, electricity supply could not be discontinued without written notice of the intention to do so.


In terms of energy, in a study conducted in KwaZulu-Natal rural areas in 2006 of Maphumulo and Tugela Ferry, Annecke and Mohlakoana found that in 64 per cent of 131 households interviewed to examine energy use amongst rural households, it was a woman’s task to collect wood, and in 31 per cent of the households, it was reported that this task was given to girl children. And, in a study conducted by the Human Sciences Research Council (HSRC) and the South African National Roads Agency Limited (SANRAL), out of 237 households that were interviewed in the rural areas of the Eastern Cape under the OR Tambo District Municipality, in 80 per cent of the households interviewed, girl-children were responsible for firewood and cow dung collection for cooking and heating purposes, whilst only 18 per cent of the households reported that boy-children performed such activities. According to the study, from a young age, girls are overburdened with responsibilities such as collecting wood without any mode of transportation, putting their lives in danger and having to assist their mothers with taking care of the household’s energy needs rather than focusing on their schooling.

(ii) Informal settlements and rural areas with some basic service supply

Typically, in informal settlements there are no in-house water supplies, and households must rely on communal taps. Although not requiring women to walk as far as a river, communal taps pose particular problems for women, who are primarily responsible for accessing water. Not only are communal taps situated some distance from households (typically more than 200 metres), but they often entail women having to walk through densely populated and potentially hostile terrain. Moreover, access to communal taps is often restricted. For example, in the Jeppe’s Reef peri-urban settlement in Mpumalanga, water is only supplied to the communal taps between 6am and 10am. Such restrictions increase the burden of managing supplies on women, who must ensure that they collect enough water each morning by 10am to last until the following morning. Carrying the necessary water to last each night may negatively impact women’s health.

Regarding electricity services, in these areas, low amperage electricity supply is common. Such electricity supply does not support much more than basic lighting. In the 1990s when Eskom was energetically working on meeting their electrification targets, different supply options were offered, especially to low-income households. Those in rural areas received installations of between 2.5Amp and 10Amp (without having to pay a connection fee) which they could only use for lights, a small TV, a small radio and an additional small appliance for a limited number of hours. Often, these appliances cannot be plugged in all together as the supply is not strong enough for the load. Households in semi-urban and urban areas were, and still are, fitted with a 20Amp supply of electricity (with a connection fee costing R150). Although this is much stronger and has more capacity than a 10Amp supply, it is still not enough for a household that can afford to purchase and use most electrical appliances, especially if they want to use these appliances at the same time. Households that want to use more electricity and which are defined by the DME and Eskom as middle class, have to apply for a 40Amp connection supply that costs R500 or a 60Amp supply that costs R1 000. Rural households that have SHS installed in their homes are also not better off than their counterparts with grid electricity. Even though these households pay up to R62.

71 C Potgieter, R Pillay & S Rama ‘Women, Development and Transport in Rural Eastern Cape, South Africa’ (2006) 20. The study was conducted to explore gender-based dimensions of rural women’s travel activities, experiences and needs, with a view to providing gender-informed interventions into SANRAL’s policy and planning.

72 Ibid.

73 Potter & Molose (note 6 above) 19.


75 When the SHS were first introduced through the DME’s off-grid concessions programme to provide rural households with an alternative to grid electricity, it cost up to R70 per month as a fee-for-service to the service provider per household with a compulsory installation fee of R120. In 2006, municipalities in the Maphumulo and Tugela Ferry areas in KwaZulu-Natal paid R40 towards the fee-for-service for households depending on when their systems were installed as part of the FBAE subsidy, W Annecke & N Mohlakoana ‘Socio-economic Characteristics and Impact Assessment of the KwaZulu Energy Services Programme of Solar Home Systems Installation’ (2006).
per month as a fee-for-service they are receiving from the service provider, their supply is much less than that which grid electrified households receive per month. The SHS electrified households can only use four lights, a small TV, a small radio and plug in a cell phone charger. The SHS gives a household power that lasts up to four hours per day.

(iii) Poor urban and peri-urban areas

In urban areas where there is on-site water and electricity supply, many municipalities have used technical mechanisms to attempt to maximise cost-recovery in low-income households or, to put it differently, to minimise loss of revenue due to non-payment of basic services. For water, these mechanisms are water flow-restrictors and prepayment water meters. A flow-restriction is a metal disk with a tiny hole in the middle, which is inserted into the water pipe to dramatically reduce the diameter of the pipe, thereby limiting the flow-rate. A 2003 study of flow-restrictors in KwaMashu township, eThekwini (formerly Durban), indicates that, notwithstanding the length of time taken to collect enough water (for example, it can take an hour to fill a 10-15l bucket), the flow-restrictors are ‘notoriously unreliable’, forcing the residents to ‘restrict their water supplies to a level that is threatening to their own personal health’. 76

For both water and electricity, some municipalities have resorted to installing prepayment meters in low-income areas as a form of municipality-imposed debt management. Prepayment meters operate like ‘pay-as-you-go’ cell phone systems, ie you are only able to access water or electricity through buying prepaid water tokens. From the perspective of the water or electricity service provider, prepayment meters minimise the transaction costs associated with billing, late payments and disconnections, as well as those associated with the administrative requirements and procedural protections for individuals who cannot afford or who dispute their water bills. From the perspective of end-users, prepayment meters transfer the social and administrative costs to households. The outlets selling prepaid tokens are often far from households and not open at night. Worst of all, if there is not enough money in the household to purchase the tokens, the water or electricity supply is automatically disconnected, with negative social and health consequences. For example, studies conducted in Phiri show that prepayment water meters are having a devastating effect on poor communities. Fearing cut-offs, people are forced to ‘live according to how much they can afford, rather than how much they need’. 77

Women typically are most adversely affected by prepayment water meter-related problems. A survey in Stretford Extension 4 (Orange Farm informal settlement, Johannesburg) indicates that in 52 per cent of households surveyed, women were responsible for buying the water tokens, whereas men were responsible in only 27 per cent of households, and in 16 per cent this was a shared responsibility. 78 When money is in short supply, women’s attempts to secure cash for water tokens exacerbates tensions within the household and has led to increased problems with domestic violence in houses with prepayment water meters. 79

Moreover, women also have to shoulder most of the burden of managing prepayment water meters’ so-called ‘silent disconnection’ 80 – the constant threat that the water credit will run out, prompting an automatic disconnection of the water supply. In the face of this oppressive threat, it is mainly women who have to make difficult choices between going for days without water and conserving water in ways that compromise health or dignity. For example, mothers forgo bathing in favour of their children, carers cannot wash soiled sheets and household members do not wash their hands or flush toilets regularly enough. Lindiwe Mazibuko, the lead applicant in the

76 A Loftus ‘ “Free Water” as a Commodity: The Paradoxes of Durban’s Water Service Transformations’ in McDonald & Ruiters (note 69 above) 194.
79 Coalition Against Water Privatisation (note 77 above) 24.
Mazibuko water rights case, outlined her extended household’s suffering under a prepayment water meter system in her founding affidavit as follows:

We use very little water to bath with. We are now forced to do our laundry at my sister’s house in Protea South, approximately 4 kilometres from our house. Sometimes I do not drink sufficient water. This weakens my health. We often do not flush our toilets. If we do, we use water that was used for bathing or washing to flush our toilets. I used to have a small food garden but I abandoned it … Now I have to buy vegetables that I used to plant in my garden. 81

The other Mazibuko applicants suffered similar or even worse burdens as a result of prepayment water meters. For example, Jennifer Makoatsane, the third applicant, did not have enough water to wash nappies for her newborn baby, look after her chronically ill father and host a funeral for him in the same month. 82 Vusimuzi Paki, the fifth applicant, tragically recounts how one of the backyard shacks on his property burnt down, killing two small children, because neither he nor any of his neighbours had sufficient water credit to put out the fire. 83

Prepayment electricity meters result in similar – if not quite as acute – problems for low-income households. For such households with grid electricity, but prepayment electricity meters, women typically have to manage the electricity consumption and purchase electricity units every time they run out. Income in such households is extremely unstable and members often do not have enough money to buy electricity credit to last the whole month. In such cases, as with prepayment water meters, household members (again, usually women) have to make multiple trips to electricity vendors that are sometimes located far from where they live. This is the same with households fitted with SHS in the rural areas where they have to go into town and pay their fee-for-services on a monthly basis, to avoid the system being removed from their homes. 84 Other low-income households in urban or peri-urban areas have low amperage supplies such as for rural areas outlined above.

(b) Affordability

As outlined in part II above, the Municipal Systems Act provides for an essentially redistributive framework for tariffs that promotes, inter alia, the use of cross-subsidies to ensure the affordability of domestic water and electricity service tariffs to poor households. 85 However, within the constitutional devolution between spheres of government, water and electricity reticulation are local government functions over which national government has limited power to intervene. 86 Although there are some standards that local government is meant to adhere to in setting tariffs, municipalities enjoy a relatively wide discretion to establish tariffs. Moreover, while there is a national energy regulator that sets electricity tariffs, there is no national water regulator. As a consequence, a patchwork of different water and electricity tariffs persists across the 284 municipalities, with varying cross-subsidies and pricing. In many municipalities, water and electricity tariffs remain too expensive for low-income households.

Regarding water tariffs, while the implementation of pro-poor tariffs is prescribed in s 10 of the Water Services Act, and DWAF can require Water Service Authorities to implement pro-poor tariffs, it cannot prescribe the precise levels or prices of tariffs. Moreover, although s 6(1) of the Norms and Standards in Respect of Tariffs for Water Services (20 July 2001) stipulate that all water tariffs should have a rising block tariff structure that includes ‘three or more tariff blocks with the tariff increasing for higher consumption blocks’ (which are meant to promote socio-economic equity through cross-subsidisation between luxury users and low-income users), the absence of a national water regulator to monitor municipal tariffs and ensure compliance with the

81 Ms Mazibuko had severe diabetes, which was exacerbated by inadequate intake of water. In May 2008, just after the Johannesburg High Court judgment was handed down, she died. She was 41 years old.
84 Annecke & Mohlakoana (note 75 above) 38.
85 Specifically, ss 4(2)(f), 74(2)(a) & 74(2)(c).
86 Constitution schedule 4B.
standards means municipalities are able to get away with non-compliance. The result is that, at municipal level water tariff structures typically reflect a concave curve, meaning that the FBW amount is followed by a very steep tariff rise, 'such that the next consumption block becomes unaffordable', but then flattens out relatively soon after the second block, meaning that water prices remain too expensive for low-income households.

For electricity (and energy more generally), there is a national regulator, NERSA. This means that there is more national regulation of electricity tariffs than of water tariffs. Municipalities that distribute electricity – along with Eskom, which distributes electricity to many historically black township and rural areas – apply to NERSA each year to have their electricity tariffs approved. Nevertheless, there are still substantial, and in many instances irrational, differences between electricity tariffs, resulting in some 2 000 varying tariffs across the country. Of critical importance, particularly in the context of the recent electricity crisis in South Africa, is that most electricity tariffs are flat-rates, rather than the rising block tariffs found in water tariffs. Such tariffs do not incentivise lower electricity consumption among luxury users and result in the poor paying a disproportionate amount of their household income for relatively low levels of consumption (with a flat-rate, the per kWh rate is the same for a household that only uses 200 kWh as for a household that uses 20 000 kWh, whereas with a rising block tariff, there would be a lower per kWh charge for lower levels of consumption and a higher per kWh charge at the luxury end of consumption). As with insufficiently progressive water tariffs, such electricity tariffs do not appropriately cross-subsidise to ensure affordable pricing for low-income households. Across municipalities, electricity prices have been rising dramatically (way above inflation), particularly in the wake of the national electricity crisis that began in January 2008. The cost of other energy sources has increased as well, with paraffin wholesale prices jumping from R2.26 and R2.05 per litre in inland and coastal areas respectively in July 2003 to an average of R9.49 and R9.25 in July 2008. According to the Central Energy Fund, in 2008, the maximum allowed retail price (set by the DME to ensure that consumers are not overcharged by the retailers) increased from R7.69 to R12.56 per litre.

More generally, in the absence of effective standardisation and national intervention, many water and electricity tariffs continue to benefit historically empowered individuals and groups (including agriculture and industry) and most are based more on cost-recovery and reflectivity than on social or economic justice. Water and electricity tariffs, if carefully formulated and regulated, should be able to achieve three linked goals through appropriate cross-subsidisation between income groups: low prices for low-income households; and, through high prices for top-end users, revenue security as well as resource demand management. Unfortunately, the reality is that such rationale is not often apparent in municipal tariffs.

87 DWAF is in the process of attempting to establish a national water regulatory function.
89 From a redistributive point of view, the ideal tariff structure would have a sufficient free basic amount followed by a convex curve of slowly rising price blocks, which get progressively steeper, so serving to penalise ‘luxury consumption’ (Bond ibid).
90 Usually Eskom applies first and municipalities follow Eskom’s lead, eg if NERSA approves a 12 per cent domestic electricity tariff increase for Eskom, municipalities will request a similar increase across their various tariff structures.
91 In January 2008 it became apparent that Eskom electricity supply could not meet the rising demand for electricity from mainly mining and industrial ventures. The result was rolling blackouts and load shedding across the country. One of the responses was for Eskom to request much higher than normal tariff increases during 2008 (resulting in a total average increase of 27.5 per cent over the year). At the time of writing this article it was widely known that Eskom was about to ask for another big tariff increase for 2009 (estimated to be around 34 per cent). Particularly because of the typical flat-rate of electricity, such price hikes are disproportionately severe on poor households.
92 The data was downloaded from the South African Petroleum Industry Association (SAPIA), which has records of paraffin wholesale prices for each month dating back to the year 2001 <http://www.sapia.co.za/stats/parafin.htm>.
Rising water and electricity prices, as well as inappropriate tariff structures, mean that on the whole, water and electricity charges are too expensive for low-income households. The effect in poor communities is widespread rising debt, which can result in disconnection or the imposition of punitive prepayment meters. In poor communities, the relatively high cost of water and electricity charges compared with household income necessitates difficult trade-offs between essential household expenses, with negative consequences for health, safety, social relations and cultural practices. In such circumstances, it is usually women who ‘find ways of making the household cope’ by going without other essentials such as food and face the potential of violent household conflict when they fail to secure ongoing basic services.

(c) Amount (of FBW and FBE)

Many of the above-mentioned problems of affordability come into play because of the insufficiency of the government’s FBW and FBE/FBAE amounts. In respect of water, the FBW amount is 6kl per household per month, which provides 25 litres of FBW per person per day in a household of eight persons. International expertise indicates that not only should the amount be doubled to 50 litres per person per day, but that the amount should not be based on a household calculation, which disadvantages the larger and multi-dwelling households that are common in poor communities. It also reinforces the burden on women as primary carers. This is because, without a per person per day allocation, there may be insufficient water to cover children and elderly or sick household members and women might compromise their usage to ensure adequate allocation to such members.

According to the WHO, basic human water needs can only be met with each person being able to access between 50 and 100 litres per day or above. Confirming this, international water expert, Peter Gleick suggests that the minimum amount of water to ensure a basic standard of living is 50 litres per person per day (lpppd), which he breaks down as follows:

- Minimum for drinking: 5lpppd
- Basic sanitation: 20lpppd
- Basic bathing: 15lpppd
- Basic food preparation: 10lpppd.

It is clear that, particularly in extended family and multi-dwelling households, the FBW amount of 6kl per household per month does not ensure that everyone in a low-income household has access to sufficient water throughout the month. Research in Phiri, for example, has shown that the average household has more than eight people and that, in the vast majority of households (63.5 per cent), the FBW amount only lasts between one and three weeks, meaning

94 In Laila Smith’s study of the Cape Town and Tygerberg administrations, 159,886 households had their water cut-off for reasons of non-payment between 1999 and 2001; most of these households were in poor areas where people struggle to pay their water bills (L Smith ‘The Murky Waters of Second Wave Neoliberalism: Corporatization as a Service Delivery Model in Cape Town’ in McDonald & Ruiters (note 69 above) 180).

95 Menahem Libhaber, the World Bank’s senior water and sanitation engineer in Latin America argues that for water and sanitation services to be acceptable, they should not exceed payment thresholds of three to four per cent of household income (cited in J Smith & M Green ‘Water Service Delivery Model in Pietermaritzburg: A Community Perspective’ (2005) 1 Water South Africa 440 <http://ajol.info/index.php/wsa/article/viewFile/5134/12783>). Most surveys of low-income households in South Africa indicate that charges for water and sanitation services constitute over ten per cent of low-income households’ incomes. For example, Smith & Green’s survey of low-income households in Pietermaritzburg shows that the average monthly bill for water and sanitation was R109.80 and the average household income was R932.17 per month, meaning that 11.78 per cent of household income needed to be spent on water bills in the average low-income household. For 23.9 per cent of households in the survey with an income mid-point of R300 a month (the range was between R0 and R600 per month), water-related charges comprise approximately 36.6 per cent of income (Smith & Green ibid 441).

96 In many African traditions, cultural practices revolve around communal and collective approaches to water, as a social good. These include communal celebrations and mourning, which require large amounts of water. We have outlined in part III(a) how Jennifer Makotsane (third applicant in Mazibuko) struggled to make her household’s FBW amount last in the month that her father died (note 82 above).

97 Coalition Against Water Privatisation (note 80 above) 23.


100 Coalition Against Water Privatisation (note 80 above) 12.
that the average Phiri household goes without water for at least a week a month. In her founding affidavit in Mazibuko, Lindiwe Mazibuko explained that, despite using water very conservatively, her household of 20 people’s FBW would usually run out around the 12th or 16th day each month and, because everyone was unemployed, they often had to survive without water for days on end each month.

While national FBW policy provides for 6kl of FBW per household per month, it is up to municipalities to implement the policy as they see fit. The policy encourages better resourced municipalities to provide more than 6kl per household per month, and it leaves open the question of whether FBW should be a universal allocation to all households, or whether it should be limited to poor households, as defined and targeted by each municipality. Further research is needed to assess the impact of means-tested allocation of benefits via municipal indigency registers, and particularly how this affects women. Initial research from the Mazibuko case, however, suggests that indigency registers are highly exclusionary – in the City of Johannesburg, after ten years, only one fifth of the formerly qualifying poor households is registered. More generally, there is much international and South African evidence that means-tested social benefits tend to stigmatise recipients, are exclusionary and do not reach the intended beneficiaries.

There are several principled and practical reasons to question the efficacy and appropriateness of using an indigency register (or other means-tested system) for allocating such an essential resource as water. Some of these reasons, including the concern that means-testing may limit the capabilities of particularly the most disadvantaged because of the stigma attached to means-testing benefits, are outlined in Sandra Fredman’s article in this issue. From a practicalities perspective, apart from the social stigma of having to apply for and prove your poverty, municipal indigency registration is highly onerous, typically requiring identity documents, proof of income and evidence of being a municipal account-holder. The latter requirement is particularly exclusionary because usually only property owners are account-holders, thereby necessarily excluding tenants, unlawful occupiers (who otherwise enjoy housing rights-related protections), and those women who may be household heads but are not formally account-holders. It may be that women, along with other vulnerable groups such as migrants and disabled persons, are disproportionately excluded from such means-tested registration. There is, however, as yet no research to confirm this. Any such research would have to investigate why women do not apply for or qualify for indigency registration, while (as pointed

---


102 Founding affidavit of Lindiwe Mazibuko, Mazibuko, available at <http://web.wits.ac.za/NR/rdonlyres/789545BC-025F-4046-8B82-69A63E7497D2/0/MAZIBUKO_Founding_affidavit_Final.pdf>. It should be noted that, contrary to the findings of the High Court and the Supreme Court of Appeal, in its judgment of 8 October 2009 the Constitutional Court did not find the City’s FBW policy to be unreasonable (Mazibuko v City of Johannesburg CCT 39/09 (as yet unreported)).

103 DWAF 2002 (note 24 above) paras 3.2 & 3.3.


105 For a policy critique of the City of Johannesburg’s proposals to remove the universal allocation of FBW and to restrict it to households on the indigency register, see ‘CALS Comment on City of Johannesburg Proposed Tariffs, FBW and FBE’ (25 April 2008) <http://web.wits.ac.za/NR/rdonlyres/FF60C3E4-0944-45AB-9F99-42F8DCBD2160/0/CALSSubmissiononCoJtariffproposals_April08.doc>.

106 Note 13 above.

107 However, in such situations where a man in the household is the account-holder, it remains open for him to register and thereby to ensure the household receives the FBW allocation.
Out in Beth Goldblatt’s article in this issue, women are the largest group of recipients of social grants. Finally, a further criticism of means-testing generally, and indigency registers in South Africa more specifically, is that they are administratively very complex to develop and manage. Universal allocation is more administratively simple to allocate than FBW and FBE/FBAE allocations in kind (particularly as it is almost impossible to work out how much water or electricity to allocate in each case and how best to allocate these transfers in kind, particularly where households are not connected to formal grids) – perhaps in the form of one of the components of a Basic Income Grant (BIG). Another issue to examine is whether cash transfers would be more effective from a gender perspective, and would empower women to make their own choices as to priorities and allocation.

In terms of electricity, outside of Eskom areas of reticulation, for the most-part, FBE implementation has occurred at the local government level. As with FBW, most municipalities use their own indigency policy definitions of poverty for the FBE threshold, which means that household qualification thresholds differ from municipality to municipality and compared with the DME definition. Some municipalities use the level of household consumption of electricity as a threshold for allocating FBE. In this system, a specified low level of consumption qualifies households for FBE allocation.

Notwithstanding the threshold for qualifying, there is also the problem of the insufficiency of the amount of FBE. The 50 kWh amount was conceived of as a very low allocation to mainly rural households in order to provide basic lighting. According to the FBE policy document, ‘50kWh per month is considered adequate electrical energy to meet the needs for lighting, media access and limited water heating and basic ironing (or basic cooking) for a poor household’. Based on a qualitative study conducted in the peri-rural areas of Limpopo, it was established that 50kWh of electricity can enable the household to use ‘four electricity lights for four hours per day, power a television set for 2-4 hours per day, use an electric iron for 3 days a week, use a hotplate stove for a few days per month and use an electric kettle about 5 times per month’.

The monetary value of FBE for households with 10A and 20A electricity supply options is R 29.47 per month if they receive 50kWh. This is calculated by using Eskom’s electricity tariff for single-phase and low-usage residential supplies in urban areas where each kWh costs 58,94 cents.

In terms of FBAE, the policy provides households not on the grid with up to R40 per month towards household energy services. However, a study of households with solar home systems (used for electrical power for lighting, radio and TV) in the villages of Maphumulo and Tugela Ferry in KwaZulu-Natal, indicated that municipalities and local authorities do not always have the capacity to deliver on FBAE subsidies to households.

Many households in the survey were paying the full amount each month for their solar home system service. Ninety-three per cent of the households interviewed were not even aware that they qualified to receive the FBAE subsidies. When they were introduced, the FBE and FBAE measures were viewed as a breakthrough for female-headed households in low-income areas to relieve them of energy poverty. While such measures are undoubtedly steps in the right direction of recognising systemic adversity, they are not sufficient to ameliorate the entrenched poverty suffered in low-income households.

IV Conclusion

In South Africa, basic services exist within a commendably rights-oriented framework. This framework explicitly recognises historic disadvantage, including gender, and seeks to remedy this through advancing substantive equality. However, as examined in this article, on the ground at local government level the reality is far more complex, with low-income households facing...
multiple obstacles in accessing water and electricity services. In our analysis, such problems – mainly related to the availability, affordability and amount of water and electricity supplied – do not occur primarily because of an insensitivity to gender dynamics. Rather, they occur because of a more generalised exclusionary paradigm in which there is insufficient attention to the needs of the poor. Yet, regardless of the underlying reasons, as a sub-group of poor people, poor (mainly African) women suffer such problems of lack of access disproportionately because of their disempowered position within the home and society more generally.

As authors of an article about women’s access to basic services, we have struggled to identify specific policy and/or legislative recommendations to improve women’s access to basic services per se. We suspect this relates to the nature of basic services, as public services that enter the private realm of the home. More research is necessary to determine whether providing cash transfers in lieu of FBW/FBE or universal allocation of FBW/FBE would be more effective from a gender empowerment perspective than the current, mainly means-tested, transfers in kind. But, more generally, we are of the view that – beyond advancing women’s access to education, employment, housing, healthcare, social security etc – the best way of promoting women’s access to basic services is to advocate for greater access by poor households.