

# Power to the People? Right of Access to Electricity in South Africa

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## Abstract

The provision and distribution of and access to electricity are not only technical and economic matters. Access to electricity is a highly political and ideological issue and has consequences for public policy and human development. Since 2000, South Africa has experienced power outages (euphemistically called load-shedding) and the country has not kept up with increased electricity and socio-economic demands. Globally, access to electricity is increasingly regarded as a basic human right and an important contributor to socio-economic development. However, the position towards and the practice regarding access to electricity by the post-apartheid South African government are contradictory. Although both the South African Bill of Rights and the *Constitution of the Republic of South Africa* of 1996 refer to fundamental human rights, the matter of access to electricity as a human right is not clearly spelled out in these documents. This article outlines international and African norms in respect of the right of access to electricity in the context of the international socio-economic development debate. It proceeds to examine the South African context, policies, legislation and constitutional court judgments in respect of socio-economic development with a special focus on access to electricity—a matter which is closely linked to political, public policy and development issues such as housing and the environment in South Africa. The article calls for the right of access to electricity to be declared a basic human right and to be legislated as such in the South African legal regime.

**Keywords:** South Africa; development; power; electricity; human rights; Constitution; court judgments

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## Introduction

Since 2000, South Africa has experienced power outages (euphemistically called load-shedding), and the country's state-owned power utility, Eskom, has not kept up with increased electricity demands, which has had an adverse effect on the country's socio-economic development (Ramaphosa 2019; Yelland 2020).<sup>1</sup> Globally, the development of electricity supply infrastructure is not merely a technical or economic issue, but also a political and public policy matter determined by fundamental normative values often described in democratic constitutions. South Africa is no exception in this regard. In fact, the South African government has maintained that: "It is universally accepted that energy, and access to it, is essential for human development" (South Africa 2008b). Barely a month into his presidential tenure, President Cyril Ramaphosa (2019), during a speech on Human Rights Day (March 21, 2019), reiterated this position: "Energy, like housing and health care, is a human rights issue. It may not be mentioned in the Bill of Rights, but it is fundamental to the human dignity, safety, health and well-being of our people."

The United Nations General Assembly (UNGA), in its Millennium Declaration, indicated "access to modern affordable energy services" as one instrument to achieving development (UNGA 2011). The Millennium Development Goals (MDGs) of the United Nations (UN), for example, specify the role of electricity in the eradication of extreme poverty and hunger (Goal 1), the achievement of universal primary education (Goal 2), the promotion of gender equality and the empowerment of women (Goal 3), the reduction of child mortality (Goal 4), and the improvement of maternal health (Goal 5). Access to modern energy supplies is regarded as offering major benefits to the health, education and productive activities of women and girls (Barnard 2013, 30). The UN maintains that access to reliable and affordable modern electricity is one of the foundations of sustainable development, which is not achievable "without sustainable energy" (UN 2013).

The UN declared 2012 as the International Year of Sustainable Energy for All. This was in response to the General Assembly's passing of Resolution 65/151 on February 16, 2011, which called on the international community to:

Increase awareness of the importance of addressing energy issues, including modern energy services for all, access to affordable energy, energy efficiency and the sustainability of energy sources and use, for the achievement of the internationally agreed development goals. (UNGA 2011)

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<sup>1</sup> The terms electricity and power are used interchangeably in this article.

The 17 Sustainable Development Goals (SDGs)—successors to the MDGs—adopted by UNGA in 2015 indicate the aim of achieving universal access to clean, affordable and reliable energy and modern energy services by 2030 (Goal 7) (UN 2020).

A global multilateral energy agency, the International Atomic Energy Agency (IAEA) concurs with the UN that adequate, affordable and reliable energy services are necessary to “guarantee sustainable economic and human development” (IAEA 2005, 30).

Despite the above declarations, access to affordable electricity is not indicated expressly as a human right under public international law. However, public international law is not static and allows for *de lege ferenda* (i.e. future law to be established) propositions emanating, in this instance, from the requirements to “promote social progress and better standards of life” (UN 1945). International efforts to conceptualise these requirements function as a propelling dynamic that revamp traditional human rights legal instruments such as the *Universal Declaration of Human Rights* (UN 1948) and international human rights law.

Access to affordable and reliable electricity is a requirement for the fulfilment of several rights described in the *Constitution of the Republic of South Africa* of 1996 (hereafter the Constitution), including the right of access to adequate housing (section 26), the right to health care, food, and water (but no reference to sanitation) (section 27), children’s rights (section 28), and the right to education (section 29) (South Africa 1996). The issue of access to sanitation amenities (assimilated into the socio-economic rights cluster) and the right of access to electricity have been considered by the Constitutional Court (hereafter abbreviated as ConCourt in the citations). An example of a case is *Mkontwana v Nelson Mandela Metropolitan Municipality* (ConCourt 2004a). Nevertheless, in the case of *Joseph and Others v City of Johannesburg and Others* (2009) (hereafter the Joseph case), the Constitutional Court referred to legal norms other than the Constitution, such as the *Local Government: Municipal Systems Act 32 of 2000* (South Africa 2000) and the *Housing Act 107 of 1997* (South Africa 1997), indicating access to electricity as a responsibility of local government and not as a basic right (ConCourt 2009b).

The purpose of this article<sup>2</sup> is three-fold. First, it argues that access to electricity is an international human right that has public policy and developmental consequences that merit constitutional protection. Many international human rights and human development instruments (e.g. the MDGs and the SDGs) have positioned access to

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<sup>2</sup> This article draws partly on the following source: Qasaymeh, K. 2014. “South Africa’s Peaceful Use of Nuclear Energy under the Nuclear Non-Proliferation Treaty and Related Treaties.” Unpublished thesis, University of South Africa, Pretoria. Accessed July 13, 2020. <http://hdl.handle.net/10500/13855>.

electricity in the heart of achieving adequate standards of living and socio-economic rights (i.e. development). Consequently, considering and advocating access to affordable and reliable electricity as a human right could place a legal and political obligation on the South African government to develop an adequate electricity supply infrastructure in order to make electricity available to all its citizens. The second aim of the article is to explore the role of electricity in promoting development, adequate standards of living, and the achievement of socio-economic rights. The third aim of the article is to examine South Africa's approach to the right of access to electricity by referring to public policies, legislation and court judgments that are relevant in this regard. The significance of this article lies in its contribution relating to the ongoing development debate in South Africa, and the country's persistent socio-economic inequality and decades-long energy crises. Moreover, despite Constitutional Court rulings on the right of access to electricity as a basic human right, legal and policy innovation in this area remains lacking and contradicts post-apartheid South Africa's commitment to upholding human rights.

This article, which follows a qualitative approach, describes and analyses international legal instruments and South African policy and rulings by the South African Constitutional Court. Moreover, the article follows a constitutional, intentionalist approach (also referred to as an originalist approach, which refers here to the original intent of the Constitution) and it relies on domestic and international judicial precedents to argue the case for the right of access to electricity as a basic human right (Thomas 2011, 1–12). For this purpose, major international human rights conventions, treaties and declarations are referred to. In addition, reference is made to the South African Constitution, various pieces of legislation, and the most authoritative Constitutional Court rulings on the issue.

The article proceeds as follows. The next section explores the link between socio-economic human rights and development as outlined in international, African and Southern African normative and legal instruments. Next, an analysis of the principle of adequate living standards follows to show that this principle includes electricity as a development imperative. Thereafter, the article focuses on the South African legal framework on electricity. The penultimate section refers to rulings of the South African Constitutional Court and links access to electricity to the principle of adequate housing as a basic human right. The final section presents the main findings and conclusions of the article.

## Socio-economic Human Rights and Development: International, African and Southern African Normative and Legal Instruments

The maintenance of socio-economic rights is universally, regionally and nationally relevant. International normative rules propagate the achievement of the “economic and

social advancement of all peoples” (UN 1945). The UN Charter obliges UN organs, including the UN General Assembly and the Economic and Social Council, to promote “economic and social progress and development” and offer “solutions of international economic, social, health, and related problems; and international cultural and educational co-operation” (UN 1945). In other words, UN members have resolved to employ the international instruments at their disposal to achieve economic, social and cultural rights, including the rights to education, housing, an adequate standard of living, and health (UN 1945). These UN guidelines have contributed to the progressive development of norms protecting socio-economic rights enshrined in the aforementioned instruments and also in the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN 1965) and the *Convention Relating to the Status of Refugees* (UN 1951).

The enforcement of these conventions and covenants generally require state parties to ensure the realisation of these rights.<sup>3</sup> The universality of socio-economic rights as contemplated in the UN Charter and the other international human rights instruments has inspired the development of regional and international instruments such as:

- the preamble to the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (African Union [AU] 2005), which refers explicitly to, for example, the *Universal Declaration on Human Rights* (UDHR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and its protocol, the *African Charter on the Rights and Welfare of the Child*, which refers to “all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights” (AU 2005).

The Charter of the Organisation of African Unity (OAU) also affirms Africa’s obligation to adhere to the principles of the UN and the UDHR. Moreover, the Constitutive Act of the AU obliges African states to “promote the socioeconomic development of Africa” (AU 2001). Another African instrument, the *African Charter on Human and People’s Rights* (ACHPR) (OAU 1981), supports this notion by referring to the OAU’s instruments as well as those instruments adopted by the Non-Aligned Movement and the UN. The preamble to the ACHPR assures the right to development, and links civil and political rights with socio-economic rights. Moreover, in section 20, the ACHPR promises that, “all peoples ... shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen” (OAU 1981). Therefore, this Charter complements other African

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<sup>3</sup> See section 2.1 of the ICESCR (UN 1967).

regional instruments such as the *African Youth Charter* (AU 2006) and the *African Charter on the Rights and Welfare of the Child* (AU 1990).

The norms pertaining to socio-economic rights can be traced to sub-regional instruments as well. For example, the preamble to the *Declaration on Poverty Eradication and Sustainable Development* of the Southern African Development Community (SADC) (SADC 2008) evokes the objectives of the SADC to “promote sustainable development and equitable economic growth and socio-economic development” and “enhance the standard and quality of life of the people of SADC.” Section 5.1(a) of the *Treaty of the Southern African Development Community*, the SADC’s founding document, states that the objectives of the SADC, among others, are to “promote sustainable and equitable economic growth and socio-economic development” to alleviate and eradicate poverty; and improve the quality of life in the region through regional integration” (SADC 1992). The protection of socio-economic rights within the SADC is international in character and most SADC members have ratified the main international human rights instruments (Pieters 2003, 120–121).

### Adequate Standards of Living, Human Development and Electricity

The obligation on the international community to “promote social progress and better standards of life” originated in the UN Charter (UN 1945). Although the UN Charter does not refer to electricity expressly, the role of electricity in development is central in achieving the Charter’s goals. Section 55 of the Charter, for example, obliges all UN member states to promote,

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions to international economic, social, health, and related problems, and international cultural and educational cooperation; and
- c. universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion (UN 1945).

The UN Charter also compels states to create “conditions of stability and well-being which are ... based on respect for the principle of equal rights and self-determination of peoples and promote ... higher standards of living” (UN 1945). The notion of adequate living standards has become a universal norm entrenched in most international human rights instruments. Section 25 of the UDHR, for example, confers on everyone the right to “a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” Similarly, section 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (UN 1967) obliges state parties to recognise the right of all

people to adequate living standards, which include food, clothing and housing, as well as to the continuous improvement of these conditions. In the third instance, section 27(1) of the UN's *Convention on the Rights of the Child* (UNCRC) prescribes "the right of the child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (UN 1989).

Therefore, state parties to international human rights instruments are obliged to ensure adequate living standards for their countries' citizens. The scope of application of section 27 of the UNCRC incorporates the content of both section 25 of the UDHR and section 11 of the ICESCR (Eide 2006, 15). These instruments have established the components of adequate living standards such as the right to housing and also other socio-economic rights. In this context, electricity provision directly affects the realisation of the objectives of most human rights instruments relating to adequate living standards. The recognition of the right of access to electricity is expressly formulated in section 14 of the CEDAW, which reads:

2. State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. (UNGA 1981)

In *General Comment No. 4: The Right to Adequate Housing*, the ICESCR (1991) refers to energy that is required for cooking, heating and lighting (Tully 2006, 519-521). This right includes access to electricity (Dugard and Mohlakoana 2009) because the lack of access to modern electricity services inhibits the advancement of available economic opportunities, which is a condition for elevating living standards (Bradbrook, Gardam, and Cormier 2008, 528).

A re-contextualisation of section 14.2(h) of the CEDAW in terms of international human rights instruments questions whether the right to affordable, reliable and clean electricity obliges governments in terms of section 2(2) of the *International Covenant on Civil and Political Rights* (UNGA 1966) and section 2 of the ICESCR (UN 1967) to declare access to electricity as a human right.

## Electricity in South Africa: Legal Framework

South Africa's electricity legal framework is encapsulated in its Constitution and other pieces of legislation such as the *National Energy Act 34 of 2008* (South Africa 2008a), the *Electricity Regulation Act 4 of 2006* (South Africa 2006) as amended in 2017 (South Africa 2017), the *Local Government: Municipal Systems Act 32 of 2000* (South Africa

2000), and the *Housing Act 107 of 1997* (South Africa 1997) as amended by the *Housing Amendment Act 4 of 2001* (South Africa 2001), and the *Housing Second Amendment Act 60 of 1999* (South Africa 1999). This legal framework compels the national government to maintain an adequate electricity supply infrastructure. In terms of the *National Energy Act 34 of 2008* (South Africa 2008a), the government is required to “ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and poverty alleviation.” Section 6(1) of this Act specifically obliges the Minister of Energy to develop an integrated energy plan annually to address the supply, transformation, transport, storage of and demand for energy to secure power supply, “providing affordable and reliable clean electricity supply.”

In addition to the *National Energy Act 34 of 2008* (South Africa 2008a), the *Electricity Regulation Act 4 of 2006* (South Africa 2006) instructs government to establish a “national regulatory framework for the electricity supply industry” and to facilitate the “universal access to electricity.” Further, section 2(a) of this Act instructs government to expand the “efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure” in consideration of “the interests and needs of present and future electricity customers.” Moreover, section 2(b) of this Act instructs the state to govern the electricity supply industry efficiently, effectively and sustainably. One of the institutions that govern this industry is the National Energy Regulator established in terms of this Act.

Although the two pieces of legislation referred to in the previous paragraph mention access to electricity provision, the Joseph case, which was mentioned earlier, demonstrated the non-inclusion of access to electricity within the cluster of rights protected in the Bill of Rights (ConCourt 2009b). In *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (ConCourt 2009a) (hereafter the Nokotyana case), the Constitutional Court acknowledges that the Constitution “explicitly” recognises socio-economic rights with regard to housing, health care, food, water and social security. In the Joseph case, the Court judged the right of access to electricity against the right of access to water. Judge Skweyiya ruled that, in contrast to water, there is “no specific provision in respect of electricity in the Constitution” (ConCourt 2009b). However, he added that electricity remained “an important basic municipal service which local government is ordinarily obliged to provide.” Skweyiya focused his ruling on the right of the applicants to receive electricity as a basic municipal service (ConCourt 2009b). He established a link between the obligation of local government to provide municipal services as stipulated in section 152 of the Constitution and its obligations stipulated in the *Local Government: Municipal Systems Act 32 of 2000* (South Africa 2000) and the *Housing Act 107 of 1997* (ConCourt 2009b). For example, in its preamble, the *Housing Act 107 of 1997* (South Africa 1997) recognises section 26 of the Constitution according to which everyone has the right of “access to adequate



housing, and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” This raises the fundamental question whether the criteria of adequate housing include access to electricity. This aspect is explored in the next section.

## The South African Constitution and the Right to Adequate Housing

The right to housing in South Africa is a constitutional right enshrined in section 26 of the country’s Constitution, which provides that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. (South Africa 1996)

The right to adequate housing has been legislated in terms of section 1(vi) of the *Housing Act 107 of 1997* (South Africa 1997) to provide for housing development to establish and maintain “habitable, stable and sustainable public and private residential environments.” In section 2, this Act also ensures:

viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to

- a) Potable water, adequate sanitary facilities and domestic energy supply. (South Africa 1997)

The *Housing Act 107 of 1997* (South Africa 1997) also connects the constitutional right to water that is enshrined in section 27(1)(b) of the Constitution with “the right to receive electricity as a basic municipal service.” Further, section 9(1)(a)(iii) of this Act provides for the following:

- (1) Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

- (a) ensure that—

- (iii) Services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically efficient. (South Africa 1997)

In the Joseph case, the applicants argued that their constitutional right to adequate housing was negatively affected by the termination of electricity supply (ConCourt 2009b). Similarly, in the Nokotyana case, the counsel for the applicants argued that the right of access to adequate housing (enshrined in section 26 of the Constitution) included “basic sanitation and electricity” (ConCourt 2009a). In this context, it was expected that the Constitutional Court would have ruled whether “electricity is a component of the right to access to adequate housing.”<sup>4</sup> In the Joseph case, the Constitutional Court linked access to electricity with basic municipal services and reached the finding that municipalities had a legal obligation to provide access to electricity. Judge Skweyiya remarked that “although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide” (ConCourt 2009b) because the *Housing Act 107 of 1997* (South Africa 1997) “imposes a specific obligation on municipalities to provide basic municipal services, including electricity” (ConCourt 2009b).

In the landmark case in 2000 of *Grootboom and Others v Government of the Republic of South Africa and Others, Order of Court* (hereafter the Grootboom case) (ConCourt 2000), which examined the right to housing and the components of adequate housing (Mhone and Edigheji 2004, 152), the Constitutional Court failed to establish a general standard in determining what constituted “adequate housing” in terms of section 26(1) of the Constitution. In the Nokotyana case, the Constitutional Court maintained that municipalities “are *obliged* to provide water and *electricity* to the residents in their area *as a matter of public duty*” [italics added] (ConCourt 2009a). Further, in *Mazibuko and Others v City of Johannesburg and Others* (ConCourt 2009c) (hereafter the Mazibuko case), the Constitutional Court ruled that the municipality “has sought to ensure that those with the lowest incomes are provided, not only with an additional free water allowance, but also with relief in relation to the charges levied for other services provided by the City such as electricity, refuse removal and sanitation services.”

Although the South African Constitutional Court has not established standards relating to the consideration of access to electricity as a component of the right to adequate housing, the country’s *National Housing Code* of 2009 (South Africa 2009) describes technical and general housing guidelines, which include electricity. For example, the code stipulates the norms and standards in respect of standalone permanent residential structures (houses) as follows:

The minimum size of permanent residential structures to be provided by means of the housing subsidy, is 40 square metres of gross floor area.

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<sup>4</sup> See footnote 6 in the *Nokotyana* case (ConCourt 2009a).

Each house as a minimum must be designed on the basis of:

- a) Two bedrooms;
- b) A separate bathroom with a toilet, a shower and a hand basin;
- c) A combined living area and kitchen with wash basin; and
- d) A ready board electrical installation where electricity supply in the township is available. (South Africa 2009, 27)

It is clear that a ready board electrical installation is a standardised component of adequate housing. In the Grootboom case, Judge Yakoob ruled that:

Housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. (ConCourt 2000)

Judge Yakoob analysed a number of relevant international law instruments in order to reach the above inference (ConCourt 2000). He identified provisions contemplated in the ICESCR and the UNCRC and further referred to the UN Committee on Economic, Social and Cultural Rights according to which “every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing.”<sup>5</sup> Similarly, in the case of *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (hereafter the Jaftha case) (ConCourt 2004b), Judge Mokgoro sought guidance from international law and attempted to examine “the concept of adequacy” which is “particularly significant in relation to the right to housing” (UNCESR 1991).

Many South African and international legal instruments consider access to electricity as a fundamental component of the criteria that form part of the principle of adequacy in respect of access to housing. For example, the *National Housing Code* (South Africa 2009) and the *Housing Act 107 of 1997* (South Africa 1997) consider access to electricity as an integral part of adequate housing. If the investigation into what constitutes integral components of the right to adequate housing was extended to include the obligations prescribed in section 14.2(h) of the CEDAW, as well as the provisions in the ICESCR, South African courts would have to embrace the right of access to electricity as protected by international human rights, and thus as equally protected by the South African Constitution. Further, if Judge Mokgoro (ConCourt 2004b) and Judge

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<sup>5</sup> The United Nations Committee on Economic, Social and Cultural Rights consists of 18 independent experts. Its purpose is to assist the United Nations Economic and Social Council to carry out its responsibilities relating to the implementation of the Covenant.

Yakoob (ConCourt 2000) had fully considered the inference made in the case of the *City Council of Pretoria v Walker* (ConCourt 1998) where the court stated that “the white area had adequate facilities and the necessary infrastructure; it was equipped with meters which were relied on for the calculation of service charges for water and electricity,” it would have been possible to deduce that electricity installations ensuring supply were components of adequate housing, in that way clarifying and advancing the definition of what constituted adequate housing.

## Conclusion

The article set out to determine whether the right of access to electricity was a basic human right. It situated the issue in the context of universal norms and legal instruments on basic socio-economic human rights. Neither the South African Bill of Rights nor the South African Constitution refers to access to electricity as a fundamental human right. However, the South African Constitutional Court has examined, as indicated by the cases and rulings cited, the right of access to electricity based on constitutional and statutory obligations, and has confirmed the responsibilities of the South African authorities to guarantee equality, development, and adequate housing including all their constitutive components such as access to electricity.

However, the constitutional requirement to guarantee access to adequate housing as enshrined in section 26(1) of the Constitution needs to be further developed and legislated by the South African government to set the standard for defining the principle of adequate housing. Although the Constitution guarantees everyone “the right to have access to adequate housing,” in the Grootboom case it was ruled that South African case law was unclear about whether access to electricity was included in this right (ConCourt 2000). In the Nokotyana case it was argued on behalf of the applicants that:

The right of access to adequate housing, recognised in section 26 of the Constitution, must be interpreted to include basic sanitation and electricity. Counsel for the applicants also urged this Court to find that its previous decisions on section 26 were wrong in as much as the right of access to adequate housing was not given content and to find that the right in fact has a minimum content. (ConCourt 2009a)

Currently, the cluster of socio-economic rights does not include the specific constitutional standards that would be required to allow for an indisputable inclusion of access to electricity in the definition of adequate housing. The Constitutional Court acknowledged the problem of including access to electricity in the definition of access to adequate housing because, as Judge Skweyiya ruled in the Joseph case, “in contrast to water” there was no “specific provision in respect of electricity in the Constitution” (ConCourt 2009b). It seems that the Constitutional Court hesitated in giving a ruling in this regard because there was no specific written stipulation about providing access to electricity (Malzbender 2005, 14–15).

This article has argued that addressing the issue of electricity in South Africa is an integral part of the constitutional reconstruction and national development project. Before 1994, electricity supply was designed to serve a “modern industrial urban society to meet the needs of the industrial sector” (South Africa 1998) (e.g. the mining, chemical and agricultural industries—the “backbone of the South African economy” (Malzbender 2005, 14–15)), and the needs of a “privileged white minority” (South Africa 1998). In the post-apartheid era, account should be taken of the norms that are intended to remedy previous injustices, norms that identify the connection between access to energy and poverty alleviation, development and social welfare (Hathaway and Pottinger 2009). Such recognition requires a shift in the adjudication of the right of access to electricity in a manner that allows for an amenable interpretation of the South African Bill of Rights and international human rights instruments.

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