

## ARTICLE

# Exploring the Road to Justiciability of the Human Right to Water in Suriname

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In Suriname, the national percentage of population with access to safe drinking water is 72.6 percent and shows that even though Suriname has great wealth in water resources, not everyone is benefiting from it. From a human rights perspective, states carry the responsibility for realizing the human right to water and follow the authoritative interpretation by ensuring that everyone has 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic purposes.' The Court can also play a significant role when individuals and communities can rely on the human right to water in Court. This article explores the avenues for establishing a justiciable human right to water and explains the challenges the judicial system in Suriname might encounter in doing so.

**Keywords:** water; justiciability; human rights; court

## 1. Introduction

Suriname is a small sovereign state in South America with great wealth in natural resources such as soil, timber, water, oil and mineral ores. When it comes to water, Suriname seems to be caught in a paradox. Even though Suriname has an abundance of water resources, a significant portion of the population does not have access to safe drinking water for personal and domestic purposes. The national percentage of population with access to safe drinking water is 72.6 percent and shows that even though there is enough water, not everyone is benefiting from it.<sup>1</sup> When looking at the percentages per region, great disparities appear. The highest percentage of population with access live in the urban areas reaching between 85–90 percent,<sup>2</sup> followed by the rural area with 66.6 percent and lastly the interior with just 20 percent.<sup>3,4</sup> Those who do not have access to safe drinking water, find other means to meet their needs. They make use of water from rivers, wells and other water resources (i.e. rainwater catching) available to them.<sup>5,6</sup> However, the water from these sources is not considered to be safe and appropriate for domestic purposes as it is often untreated with the accompanied health risks.<sup>7</sup> Consequently, these unserved and underserved populations are vulnerable to the many risks unsafe water brings.

Law plays a central role in tackling issues concerning access to water for individuals. Laws and regulations influence the practice of water management as the legal and regulatory framework sets out the requirements on how water resources are managed. This in turn influences whether and how communities have access. Laws can therefore have a positive effect by for instance, ensuring that individuals have a right to a minimum amount of water or a negative effect by for instance re-enforcing private property rights even under circumstances of scarcity. The overall legal framework should therefore be analysed to determine

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<sup>1</sup> Government of Suriname and United Nations Country Team Suriname, 'Suriname MDG Baseline Report' (2005). Currently, the highest percentage of population with access live in the urban areas reaching between 85–90 percent, followed by the rural area with 66.6 percent and lastly the interior with just 20 percent.

<sup>2</sup> NIMOS, 'Environmental and Social Analysis/Environmental and Social Management Framework' (2010).

<sup>3</sup> The interior in the context of Suriname refers to the inland region which largely consists of Amazon rainforest.

<sup>4</sup> Government of Suriname and United Nations Country Team Suriname, 'Suriname MDG Baseline Report' (2005).

<sup>5</sup> According to article 41 of the Suriname Constitution all natural riches and resources are the property of the nation. The government can give out concession to exploit natural resources.

<sup>6</sup> PAHO/WHO, 'PAHO/WHO Country Cooperation Strategy Suriname 2012–2016' (2012).

<sup>7</sup> Ibid.

**Table 1:** Demographic per district.

<b>District<sup>8</sup></b>	<b>Total</b>	<b>%</b>
<i>Paramaribo</i>	240,924	44,5
<i>Wanica</i>	118,222	21,8
<b>Urban</b>	<b>359,146</b>	<b>66,3</b>
<i>Nickerie</i>	34,233	6,3
<i>Coronie</i>	2,887	0,6
<i>Saramacca</i>	17,480	3,2
<i>Commewijne</i>	31,420	5,8
<i>Para</i>	24,700	4,6
<b>Rural</b>	<b>111,224</b>	<b>20,5</b>
<i>Marowijne</i>	18,294	3,4
<i>Brokopondo</i>	15,909	2,9
<i>Sipaliwini</i>	37,065	6,8
<b>Interior</b>	<b>71,268</b>	<b>13,1</b>
<b>Total</b>	<b>541,638</b>	<b>100</b>

whether it supports the realization of the human right to water for everyone. This article focuses on one part of the regulatory and legal framework. Suriname currently does not know an explicit human right to water in its legislation or in any known case law. This article looks into how such a right could be included in the legal framework, either explicitly or implicitly, and what the role of the Court could be, taking into account how other states (i.e. South Africa and India), came to a justiciable human right to water.

Firstly, the article discusses the methodology used followed by an overview of the current water situation in Suriname. After this the justiciability of the human right to water in the Surinamese context will be analysed exploring the relevant provisions at international, regional and national level. This part also explores the manner in which other states have dealt with the same subject. This article ends with suggestions on how the legal and regulatory framework in Suriname can be adjusted in a manner which would increase the justiciability of the right to water for individuals in Suriname.

## 2. Methodology

As mentioned, this chapter analyses and provides recommendations on how the human right to water can be made justiciable in the context of Suriname. In order to do this, the strengths and weaknesses of the legal framework are reviewed in general and special attention is given to how economic, social and cultural rights are dealt with. The information was obtained through the use of classic legal methods and social science methods. The classic legal methods entail ‘the classic technique of legal methodology’<sup>9</sup> namely analyzing the conventional sources of law such as legislation, general principles, case law and doctrine through desk research. In addition, the existing relevant (academic) literature has been studied to assist in interpreting the sources of law. The legal analysis for Suriname included reviewing the Constitution and relevant international law instruments and other relevant rules and regulations. An in-depth analysis of the case law in Suriname is unfortunately not possible, as not all judgments from the courts are publicly accessible. Through interviews with judges and law clerks it however became clear that cases concerning access to water are very limited and through the decision database only one case was identified.<sup>10,11</sup> For this reason

<sup>8</sup> Algemeen Bureau voor de Statistiek – Suriname, Conservation International and UNDP, ‘Environment Statistics’ (2014).

<sup>9</sup> Esin Örüçü, ‘Developing Comparative Law,’ in Comparative Law. A Handbook, ed. Esin Örüçü and David Nelken (Hart Publishing 2007).

<sup>10</sup> Hooplot t. Skyfarmers 19 February 1999, GR-14038. ‘Defendants are furthermore aware that the local residents, including the plaintiff, depend on rainwater for his drinking water and domestic needs which is collected in barrels via the roofs of the houses. During the spraying activities of the defendant the chemicals also end up on the roofs of the houses, including the house of the plaintiff, as a result of which the drinking water of the plaintiff is poisoned and thus becomes a life-threatening situation for plaintiff and his family.’

<sup>11</sup> Surinamese courts started the process of uploading case-law to an online database in April, 2019: <<https://rechtspraak.sr/uitspraken-databank/>>. As of January 2020, the database holds decisions which have been published in the Surinaams Juristenblad (Surinamese Journal for Jurists) between 2010 and 2018. So far 500 decisions have been uploaded.

the analysis in this chapter will be primarily based on 'law in the books' and the recommendations will have predictive and design elements.

Limited social science methods were also used such as stakeholder and expert interviews and the analysis of other sources explaining the context of the water sector.<sup>12</sup> Adding these methods was necessary as certain information, was not accessible through merely classic legal methods. This is because Suriname lacks capacity to develop data and make it readily available such as statistical analysis or measurements concerning the environment. Therefore, the necessary data was collected through a number of interviews with government officials, legal experts, water resources analysts, NGOs and other relevant parties.<sup>13</sup> These experts and stakeholders provided knowledgeable information as they often did have access to information which was not publicly available. They also provided legitimate opinions and represented different perspectives in order to assess the legal framework and fill in the previous mentioned knowledge gaps and outdated information.

### 3. Water situation in Suriname

Suriname is rich in fresh water resources having 228,000 per capita cubic meters of renewable freshwater resources available annually.<sup>14</sup> Most of it can be found in rivers, swamps, reservoirs and aquifers.<sup>15</sup> Freshwater from surface water resources such as rivers, lakes, creeks and swamps is mainly used for agriculture, for irrigating rice and banana fields for instance. While groundwater is mostly used for potable purposes. However, due to excessive extraction in some areas, saltwater has intruded.<sup>16</sup> As a consequence, other freshwater sources, like lake water, are now also used to realize drinking water needs in certain areas. Water is a main source for transportation in areas other than the coastal area. Approximately 1,200 kilometers of rivers are used in this manner.<sup>17</sup>

Suriname knows two major contributors to water pollution. Improper sewage and solid waste disposal and non-existent wastewater treatment on the one hand and on the other hand pollution of surface water from gold-mining processes, industry and agriculture. Most households in the urban and rural area, use flush toilets. The wastewater from these toilets passes through septic tanks (which are poorly maintained) and is usually discharged directly into open ditches or rainwater sewerage systems under the streets and roads.<sup>18</sup> Water from bathrooms and kitchens is discharged either into ditches or sewers in front of houses. In addition, natural drainage is inadequate due to flat topography and poor maintenance of ditches. Because of these factors especially the lack of proper sewerage systems it is expected that open waters are highly contaminated.<sup>19</sup> Over half of the population in the interior has no means of excreta disposal; most excreta go straight into the rivers and creeks which at the same time serve as the main water supply.<sup>20</sup>

Furthermore, mercury pollution from gold mining activities in the Interior, as well as excessive pesticide use on agriculture lands in coastal areas and the uncontrolled wastewater dumping by industries contribute to water quality issues. Mining and other extractive industries, such as timber extraction, are of economic necessity. Export of alumina, gold and oil make approximately 60 percent of GDP. The extraction of natural resources at high rates is done in an unsustainable manner and has social and environmental costs. One

<sup>12</sup> Lisa Webley, 'Qualitative Approached to Emperical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

<sup>13</sup> Experts and stakeholders which took part in interviews can be divided in three categories:

- "1. Policy and law makers, representing the viewpoint of authorities, both national and local, which apply and create law and policy. The value of their contributions rests on their expertise concerning the application, origins and intentions behind the relevant laws and policies.
2. Civil society experts and members of communities located in the rural interior providing insight into the impact of law and policy on vulnerable groups, their needs, and how these needs might be met.
3. Academic scholars, providing expert opinions about legal aspects and sustainability issues."

Daphina Misiedjan, *Towards a Sustainable Human Right to Water* (Intersentia 2019).

<sup>14</sup> Algemeen Bureau voor de Statistiek – Suriname, 'Environment Statistics' (2016).

<sup>15</sup> Riad J Nurmohamed, 'The Impact of Climate Change and Climate Variability on Th Water Resources in Suriname' (Anton de Kom Universiteit van Suriname 2008).

<sup>16</sup> Ministry of Labour, Technological Development and Environment, UNDP and GEF, *Second National Communication to the United Nations Framework Convention on Climate Change*, (Ministry of Labour, Technological Development and Environment 2013).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 5.

<sup>19</sup> Exact data on how the lack of wastewater management has affected water quality of open water is absent as studies have not been conducted.

<sup>20</sup> United Nations Suriname, 'Water, Sanitation and Hygiene', <<http://sr.one.un.org/water-sanitation-hygiene/>>, accessed 31 August 2020.

of them being the pollution of water, while wastewater treatment is not practiced in Suriname.<sup>21</sup> Gold-mining activities mostly occur in the Interior both legally and illegally. Mercury used for gold mining ends up untreated in the surface water and contaminates water ways, damaging ecosystems and making surface water unsuitable for drinking purposes. In the Interior districts of Brokopondo and Sipaliwini, the main source of water for drinking purposes is surface water from rivers and ponds. This surface water is generally seen as unsafe due to mercury contamination by mining and poor sanitary practices. The use of appropriate water treatment methods is the lowest in these districts. Only 11.2 percent of households apply these treatment methods.<sup>22</sup>

In the rural areas, large quantities of pesticides and fertilizers are used for agriculture. These chemicals and substances are not controlled or regulated. Some farmers have admitted to using 4 to 7 times the amount advised by the National Rice Institute ADRON.<sup>23</sup> These chemicals have high potential for contaminating surface water.<sup>24</sup> In the urban areas on the other hand, water pollution also results from waste dumping by companies such as factories, construction companies and laundromats. These examples illustrate that in general, wastewater and solid waste are not treated and indiscriminately dumped in surface water causing freshwater to become unsuitable not only for drinking purposes but also other uses.<sup>25</sup>

Data collection concerning issues of quality and quantity relating to water are limited in Suriname. For instance, consistent research concerning how wastewater management affects water quality has not been conducted. And consistent data on the public health effects of the lack of access to clean water is also lacking. Therefore, significant data needed for developing well-informed policies is limited. And the public does not have access to information about water issues which might affect them.<sup>26</sup> These are several issues which could be settled in court and assist in realizing the human right to water. Thereby having a justiciable human right to water could be of added value in the Surinamese context.

#### 4. Added value of a justiciable human right to water

The justiciability of economic, social and cultural rights is under development within national and international law providing them with similar enforcement to civil and political rights. Economic, social and cultural rights are traditionally seen as non-justiciable and second generation of rights.<sup>27</sup> One of the reasons for limiting the justiciability of economic, social and cultural rights is that some argue that national courts lack the democratic legitimacy to get involved in decisions of social policy and judge issues that are highly complex and intricate.<sup>28</sup> The courts are said to lack the capacity and therefore these decision should be left for the politically accountable branches of government to decide.<sup>29</sup> However, under the circumstances that the government is lagging behind, by not addressing the needs of underserved and unserved communities, it could be beneficial for individuals to engage in the discussion of the enforceability of economic and social rights in general and the right to water in particular.

Having a justiciable human right to water has a few important benefits for individuals and possibly communities. Firstly, having a justiciable right can assist in balancing the interests of government and private parties and that of individuals. Individuals have the possibility to seek redress and can bring rights-violators to court by which private parties can be mandated to restore water services and governments can be obliged to enact the necessary policies.<sup>30</sup> In this manner the human right to water does not only reach

<sup>21</sup> Ibid 17.

<sup>22</sup> Ibid 19.

<sup>23</sup> Social Solutions, 'Waterbewustzijn En Waterbewust Gedrag Rapport in Opdracht van Overliggend Waterschap MCP' (OWMCP 2015).

<sup>24</sup> It is unknown if water resources have been contaminated as a result of overusing pesticides as the water has not been tested recently. However, the assumption is there.

<sup>25</sup> The Ministry of Labour Technological Development and Environment, 'The Fourth National Report to the Convention on Biological Diversity' (2013).

<sup>26</sup> The right to information is an essential component of the human right to water. See: Catarina De Albuquerque and Virginia Roaf, 'Legislative, Regulatory and Policy Framework', *Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque* (2014).

<sup>27</sup> Anonymous, 'What Price for the Priceless? Implementing the Justiciability of the Right to Water' (2007) 120 Harvard Law Review 1067.

<sup>28</sup> Mikva, Abner., Why judges should not be advice givers, Stanford Law Review 50 (1998).

<sup>29</sup> Jeff King, 'Institutional Approaches to Judicial Restraint', *Judging social rights* (Cambridge University Press 2014).

<sup>30</sup> Ibid 27.

state authorities, but also where applicable, reach third parties which international human rights law rarely reaches.<sup>31</sup> Secondly, national courts will be allowed to clarify the meaning of the human right to water under the different contexts that the cases provide for. The clarifications given by the courts will assist the governments with implementation by establishing an authoritative interpretation of the right which is useful for governments to base their policies on.<sup>32</sup>

A justiciable human right to water will allow those individuals whose rights have been violated to seek a remedy through the court and assistance in realizing their right.<sup>33</sup> And as explained, courts could assist in realizing the right for others by influencing policies. Therefore, implementing the right at the national level and creating legal accountability by, for instance including it in the Constitution,<sup>34</sup> can play an important role in realizing the human right to water.

The following sections will discuss the several avenues for justiciability in the Surinamese context. The first avenue delves into the possibility for individuals to rely on international provisions in the national Surinamese courts. The second avenue discusses the possibility for the Surinamese court to read the human right to water into already existing provisions of the Constitution, often referred to as the Indian approach. And the last avenue analyses whether Suriname could add a constitutional human right to water which would fall under the judicial review of the Surinamese Constitutional Court.

## 5. International legal foundations of the human right to water and the challenge of self-executing agreements

### 5.1. Doctrine of self-executing provisions

The Surinamese legal system adopts a (predominantly) monistic approach which gives international law a higher status than national law and requires international law to take precedence over national law in the event of conflict between norms.<sup>35</sup> Provisions from international agreements therefore supersede national law but only when those provisions are self-executing and therefore enjoy direct effect. This is clarified in article 105 of the Constitution where it is explained that provisions from international agreements such as treaties 'which may be directly applicable to anyone shall have this binding effect as from the time of publication.'<sup>36</sup> These kinds of provisions are considered to be self-executing. Non-self-executing international agreements require translation into the national legal system. As a result, those human rights that are considered self-executing directly bind the state and could possibly provide protection for individuals. **Table 2** provides an overview of the international instruments that include provisions on which a human

**Table 2:** Selection of relevant international instruments that Suriname is a party to.

Instrument	Entry into force
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	1976
<i>Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR)</i>	1976
<i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	1977
<i>American Convention on Human Rights (ACHR)</i>	1987
<i>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (APACHR)</i>	1990
<i>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i>	1993
<i>Convention on the Rights of the Child (CRC)</i>	1993
<i>Convention on the Rights of Persons with Disabilities (CRPD)</i>	2017

<sup>31</sup> In relation to privatization, when a human right to water is established, states are obliged to keep a close eye on the actions of companies. UN Human Rights Council, 'Protect, respect and remedy: A framework for business and human rights (2008) A/HRC/8/5.

<sup>32</sup> Ibid 27.

<sup>33</sup> Greenwell Matchaya, O'brien Kaaba and Charles Nhemachena, 'Justiciability of the Right to Water in the SADC Region: A Critical Appraisal' (2018) 7 *Laws* 1.

<sup>34</sup> Jeff King, 'The Value of Courts in Light of the Alternatives' in Jeff King (ed), *Judging social rights* (Cambridge University Press 2012).

<sup>35</sup> Article 106 Constitution of Suriname.

<sup>36</sup> Article 105 Constitution of Suriname.



right to water can be based and of which the Surinamese judge must decide whether or not it can be considered self-executing.

The monist approach concerning the effect of international law is a remnant of Suriname's history as a former colony of the Netherlands, which has a similar provision under article 93 of its Constitution of the Kingdom of the Netherlands stating: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' As a result, for legal doctrine reference is often made to the Dutch system. Due to several challenges, the development of specific Surinamese legal doctrine and jurisprudence has been limited.<sup>37</sup> Therefore, it is practice in Suriname to follow the Dutch doctrine on this topic.

Within the Dutch legal system, in order to know whether a provision is self-executing, depends on whether it obliges 'the Netherlands legislator to make rules of a certain content or import or is that provision of such nature that it can be applied as objective law right away'.<sup>38</sup> In addition, the following criteria have been developed:

- the way in which the engagements of the States parties to a treaty have been couched;
- is a provision fit to be applied by the courts;
- is it sufficiently concrete;
- is gradual implementation provided for;
- is the provision binding the State in its relations to other States only;
- does the provision contain a 'positive' obligation<sup>39</sup>

In relation to the provision of the ICESCR and other conventions which include fundamental social rights the Dutch courts have found that these provisions, with a few exceptions, are not self-executing and therefore do not have direct effect.<sup>40</sup> This reasoning is based on article 2 of the ICESCR allowing for the progressive realization of the rights in the Covenant and not definitively requiring immediate realization. This would therefore prevent individuals from using these provisions in the courts. This requires further exploration in the context of Suriname.

It is expected that Suriname follows the same line of reasoning. The Surinamese court, before deciding whether an international provision has been violated, needs to consider whether the provision is self-executing or directly applicable. The follow sections will provide an overview of the relevant provisions and will analyze whether these are self-executing.

## **5.2. Legal foundations of the human right to water under international law**

The human right to water is not explicitly included in the catalogue of human rights existing of the: Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular, the ICCPR and the ICESCR provide several legally binding foundations from which the human right to water can be derived such as the right to life and the right to health. These Covenants are legally binding and enjoy wide support by states.<sup>41</sup> In addition, other relevant conventions and treaties which apply to specific groups also assist in providing a legal often explicit basis for a human right to water.

Suriname has substantial obligations which relate to the human right to water, focusing on different groups as well as a universal right. However, these provisions cannot be considered self-executing because they all include further implementation measures by the state. Even the provisions from the ICCPR, cannot be considered as self-executing.<sup>42</sup> Because of this, individuals in Suriname will not be able to rely on these directly in court.

<sup>37</sup> Therefore, in order to understand the Surinamese system, Dutch materials are used in this article to support certain arguments.

<sup>38</sup> Supreme Court HR 30 May 1986 (NS/FNV), NJ 1986, 688 § 3.2.

<sup>39</sup> Joseph Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) 57 Netherlands International Law Review 245.

<sup>40</sup> EA Alkema, 'International Law in Domestic Systems' (2010) 14 Electronic Journal of Comparative Law 1. p. 8.

<sup>41</sup> Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, G Garcia and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014).

<sup>42</sup> Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 Para. 2' (2001) 5 Max Planck Yearbook of United Nations Law 418.

## Legal foundations of the Human Right to Water.

Right to life (article 6 ICCPR)	Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
Right to be free from cruel, inhumane, degrading treatment (article 7 ICCPR)	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
Right to food (article 11 ICESCR)	The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.
Right to housing (article 11 ICESCR)	(see above)
Right to health (article 12 ICESCR)	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
Right to sanitation (article 11 & 12 ICESCR)	(see above)
Right to an healthy environment (article 12 ICESCR)	(see above)
Right to partake in culture life (article 15 ICESCR)	The States Parties to the present Covenant recognize the right of everyone:
Article 24(2)(c) of the 1986 Convention on the Rights of the Child (CRC)*	<p>(a) To take part in cultural life;</p> <p>States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:</p> <p>(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and <u>clean drinking-water</u>, taking into consideration the dangers and risks of environmental pollution;</p>
Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD)*	<p>States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:</p> <p>(a) To ensure equal access by persons with disabilities to <u>clean water services</u>, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs</p>
Article 14(2)(h) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*	<p>States 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:</p> <p>(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and <u>water supply</u>, transport and communications.</p>

### 5.3. Legal foundations of the human right to water within the Inter-American Human Rights systems

Similar to the other international treaties, the Inter-American system also does not include treaties that have (explicitly) enshrined the human right to water in them. Therefore, the manner in which this system can establish a right to water is through deriving the right from already existing rights. In its case law, the Court indeed references the importance of access to water.<sup>43</sup> However, it seems to do so under specific circumstances such as protecting access to water for detainees and specific vulnerable people.

To ensure access to water for those detained and imprisoned the Court looks to Article 5 of the American Convention on the right to human treatment.<sup>44</sup> The Court established that access to water is the minimum a state is required to provide when someone has been deprived of his liberty. Those imprisoned have a right to life which respects their human dignity.<sup>45</sup> From its case law it can be concluded that access to water is an important aspect that requires protection during imprisonment. States are obliged to provide access to sufficient water for personal and hygiene needs.

The Inter-American Court also considers the situation of indigenous people to be in need of protection in relation to the right to water,<sup>46</sup> especially when indigenous people are at risk of losing their connection with their ancestral lands. The cases concerned indigenous communities that have been forcefully relocated and as a result have been living under precarious circumstances. The Court used the right to life to argue that the right not only includes the negative obligation not to deprive individuals of their lives arbitrarily, but also not to create conditions which interfere with a decent existence.<sup>47</sup> The Inter-American Court derived the right to water from other rights in its treaties such as the right to life and the right to humane treatment. However, it has done so in specific situations dealing with specific groups. A general and independent right to water has not yet been developed by the Court.

The case law of the Court is limited. However, in addition to the case law, the Court has also issued an Advisory Opinion on the Environment and Human Rights, which touches on the right to water. In this Advisory Opinion, the Court recognizes an independent right to a healthy environment by deriving it from Article 26 of the American Convention on Progressive Development.<sup>48</sup> When realized, the right to a healthy environment can assist communities in meeting their own needs. Especially those who depend on traditional sources of water.

Similarly, to the provisions of the UN treaties, the Inter-American system creates substantial obligations that relate to the human right to water. However, these provisions also do not meet the requirement of self-executing provisions. This is an obstacle for individuals to rely on them directly in court. Nevertheless, Surinamese judges could use the above-mentioned international norms in their judgments to support their arguments and not as the primary basis for their decision. However, this practice has not developed in Suriname yet. From the information gathered, only one case has been identified where the court referred to the Convention of the Rights of the Child to support its argument that children have a right to access information about the identity of their parents.<sup>49</sup> It seems that the Surinamese Court is reluctant to rely on international law and prefers only utilizing national laws.

## 6. Relying on the Constitution: approaches to justiciability of the human right to water

The previous sections explained that individuals and communities are unable to rely on international provisions to support their claims as they are not self-executing. Another option to bring about justiciability is to rely on national laws. This article focuses on the Constitution as it is the highest law in the land. Currently,

<sup>43</sup> Jimena Murillo Chávarro, 'The Right to Water in the Case-Law of the Inter-American Court of Human Rights' (2014) ACDI, Bogotá 7, 39.

<sup>44</sup> See cases: IACtHR; *López Álvarez vs Honduras*, Judgment of 1 February 2006, [106]; IACtHR, *Vélez Loor v Panama* (Judgment of 23 November 2010) para 197.

These cases relate to Articles 5 (1), (2) and (4) of the American Convention.

<sup>45</sup> IACtHR, *Vélez Loor v Panama* (Judgment of 23 November 2010) para 198.

<sup>46</sup> IACtHR, *Indigenous Community Sawhoyamaya v Paraguay* (Judgment of 29 March 2006) para 73(1); iacthr, *Indigenous Community Sawhoyamaya v Paraguay* (Judgment of 29 March 2006) para 73(69); iacthr, *Indigenous Community Xákmok Kásek v Paraguay* (Judgment of 24 August 2010) para 195.

<sup>47</sup> Ibid 43.

<sup>48</sup> Inter-American Court of Human Rights, *The environment and human rights – State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – Interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*–, Advisory Opinion OC-23/18, (ser. A), N° 23, 15 November 2017, paras 57–58.

<sup>49</sup> Anonymous t. de Staat Suriname 21 February 2012, AR-072614 <<https://rechtspraak.sru-k1-2012-11/>> accessed 10 February 2020.



there are two approaches for making the human right to water justiciable at domestic level using Constitutional provisions. This can be done by creating an explicit constitutional right to water (referred to as the South African Approach) or by the Constitutional Court interpreting the right under an already existing constitutional right (referred to as the Indian Approach). The next sections will explore these options in the Surinamese context. As mentioned, Suriname does not have an explicit mention of a right to water in its Constitution. However, Article 14 of the Constitution does include the right to life. For this reason, Suriname could take either of the approaches. The following section explores these possibilities.

### **6.1. The South African approach: including a constitutional right to water**

If Suriname would take the first approach to create legal accountability concerning the human right to water, it could follow South Africa's example. The South African legislator included an explicit right to have access to sufficient water,<sup>50</sup> which has been upheld by the country's Constitutional Court.<sup>51</sup> The South African approach has been successful in maintaining judicial restraint.<sup>52</sup> 'The key to the South African model is that, while the courts do not decide the rights that should be legally protected, they retain the power to review, the "reasonableness" of policies implementing such protections.'<sup>53</sup>

If the Surinamese parliament wishes to include a constitutional right to water according to Article 72 of the Constitution, they will need 'a majority of at least two-thirds of the constitutional number of members of the National Assembly' to revise the Constitution.<sup>54</sup> This is of course a political process and if the right would be successfully included the Surinamese Constitutional Court will be mandated to review acts and legislation of the government in accordance with the Constitution.<sup>55</sup> This would allow individuals and communities to rely on the right in court and have the court assess their particular case.

### **6.2. The Indian approach: interpreting existing constitutional norms to include the human right to water**

India has chosen to interpret the already existing Constitutional right to life as formulated in such a way that it implies a justiciable right to water.<sup>56</sup> Even though, Suriname could take both approaches, using norms which are already present within the legal framework would require less political support and could be accomplished within a shorter time frame. However, it would require the court to take historic steps by using national provisions where possible to, (implicitly) establish a right to water. Like many constitutions, the Surinamese Constitution includes provisions on fundamental rights. Chapter V states basic rights or what could be classified as civil and political rights such as the right to life and the right to legal assistance. Chapter VI mentions social, cultural and economic rights and obligations including the right to family. The following sections discuss which provisions the Courts could use and in which manner to base the human right to water on.

#### **6.2.1. Right to life (art. 14 Constitution of Suriname)**

The right to life could provide protection of the right to water for individuals in Suriname. Article 14 Constitution of Suriname (CoS) states: 'Everyone has a right to life. This right shall be protected by the law.' In several states the right to life has been used by courts to establish a right to water. The Indian Constitution lacks an explicit human right to water, even so it includes the right to life under article 21: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'<sup>57</sup> The Supreme Court and lower Indian courts have used the right to life to interpret the right to a healthy environment.<sup>58</sup> In connection to this right, the Courts explained that the right to life includes 'the right of enjoyment of

<sup>50</sup> See Section 27 of the South African Constitution.  
Ibid 27.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 34.

<sup>53</sup> Ibid 27.

<sup>54</sup> Art. 83 CoS.

<sup>55</sup> According to Article 12 of the Law on the Constitutional Court which have been approved by parliament in October 2019. See: De Nationale Assemblée, 'Wet Constitutioneel Hof' <<http://www.dna.sr/wetgeving/surinaamse-wetten/wetten-na-2005/wet-constitutioneel-hof/>> accessed 31 August 2020.

<sup>56</sup> For more examples of states who have recognized the right to water read: Centre on Housing Rights & Evictions, Legal resources for the right to water and sanitation: International and National Standards – 2nd edition (2008) prepared by Thorsten Kiefer and others.

<sup>57</sup> Government of India, 'Constitution of India', <<http://legislative.gov.in/hi/constitution-of-india>>, accessed 31 August 2020.

<sup>58</sup> Subhash Kumar v. State of Bihar and Others, AI.R. 1991 S.C.

pollution free water and air for full enjoyment of life.<sup>59</sup> Because of this interpretation India has developed a constitutionally protected right to water.

An advantage of this approach to the human right to water is that it allows the right to develop case-by-case, allowing the right to reflect the specific water challenges. For India pollution is one of the major threats to access to water and therefore the courts chose to connect the right to water with a pollution free environment.<sup>60</sup> This is also important in the Surinamese context, as many communities still depend on traditional water sources to foresee their own needs.<sup>61</sup> However it should also be kept in mind that:

*Though there seem to be many benefits to the Indian model of justiciability, including giving governments the flexibility of not explicitly obligating themselves to provide access to water, there are also drawbacks. First, deriving a justiciable right to water from the broad right to life greatly limits the extent of justiciability. Just as the right to life has traditionally been considered a negative right, placing upon the State the responsibility of not take a citizen's life, so the right of access to water under the Indian model, seems limited to protecting the citizen from interference with access to water.*<sup>62</sup>

### 6.2.2. Right to health (art. 36 Constitution of Suriname)

The interrelation between the right to health and the right to water are self-explanatory and as such recognized in General Comment No. 15. Article 36 (1) Constitution of Suriname states that 'Everyone shall have a right to health.' And the second paragraph includes an obligation for the state and reads: 'The State shall promote the general health care by systematic improvement of living and working conditions and shall give information on the protection of health.' Differently from India, Argentina used the right to health to imply the right to water. The case establishing this concerned the contamination of a river as a result of a spillage of untreated sewage water.<sup>63</sup> The Court concluded that the right to health also establishes a right to water and refers to several international instruments such as the UNDHR and the ICESCR. Therefore, the right to health also provides an opportunity for the Surinamese Court to base their judgment on.

### 6.3. Fundamental rights and judicial review in Suriname

The Constitution includes these two provisions, Articles 14 and 36 of the CoS on the right to life and health, which could provide the legal foundation for a human right to water. However, there are limitations for the Surinamese Courts to use Constitutional provisions. The current state of the judicial system in Suriname is complicated in relation to the protection of fundamental rights. Here several challenges can be identified. The first challenge relates to the judicial system of constitutionality. Suriname has, what could be classified as a moderate concrete control system, which means that only a Constitutional Court may subject actions, legislation and policies of the government to judicial review of their constitutionality as mentioned in Article 144 Constitution of Suriname. Nonetheless, this Constitutional Court has not been established and these provisions have not been implemented even though the Constitutional Court Act has been approved in October 2019.<sup>64</sup> Therefore, it could be said that this is problematic and limits the protection of constitutional rights in Suriname.

However, the reason why Suriname has a moderate concrete control system lies in the fact that other courts than the Constitutional Court are allowed to review the individual rights and freedoms mentioned in Chapter V (Articles 8 to 24) of the Constitution, such as the right to life, personal liberty and safety and the right not to be discriminated against.<sup>65</sup> This results in the Courts being able to rely only on the right to life to derive a human right to water from and not the right to health as it is exempted from judicial review. The rights mentioned in Chapter VI, including the right to health, are not able to be legally enforced through the Court at this time.<sup>66</sup>

<sup>59</sup> Ibid n 61 at 424.

<sup>60</sup> Inga Winkler, 'Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India' (2008) 1 Law, Social Justice & Global Development Journal 2.

<sup>61</sup> Inga Winkler, *The Human Right to Water Significance, Legal Status and Implications for Water Allocation* (First, Hart Publishing 2012).

<sup>62</sup> Ibid 27.

<sup>63</sup> Ibid 61.

<sup>64</sup> Nancy Del Prado, 'An Analysis of Land Rights of the Indigenous Peoples and Maroons in Suriname. Adaptation of Legislation in Suriname' (2006). Also see the official database for up to date information about the status of the Constitutional Court <<http://www.dna.sr/wetgeving/surinaamse-wetten/wetten-na-2005/wet-constitutioneel-hof/>>.

<sup>65</sup> Ibid.

<sup>66</sup> Ellen-Rose Kambel and Fergus MacKay, *De Rechten van Inheemse Volken En Marrons in Suriname* (KITLV Uitgeverij 2003).

The abovementioned demonstrates that the Surinamese Court has legal norms available from which the human right to water can be derived. For the judges not to use these opportunities could also be related to the lack of capacity of the Courts. Currently, the Court are working beyond capacity. As of January 2020, there are only 26 judges while the appropriate minimum is said to be 40. The workload of these judges in 2016 entailed 1445 judgments per judge compared to the 687 judgements that a judge produced on average in the Netherlands. This extensive workload has been the situation for several years. This could be the reason behind the lack of legal doctrine development. And explains why judges have been reluctant to take new roads.<sup>67</sup>

## 7. Conclusion

The legal and regulatory framework play an important role in water management but also in providing redress for those individuals who have their human right to water infringed upon. Suriname currently does not provide an option for individuals to use the court system in this manner. Even though there are avenues that the Court could use to realize access to water for all in Suriname.

The use of international law in the predominantly monist system of Suriname demands provisions to be self-executing. Even though, many UN treaties know legal foundations for the human right to water none of these are self-executing, as the Surinamese Constitution requires, including the right to life in the ICCPR. As a result, individuals and communities cannot rely on international law provisions in the national Surinamese courts.

The second option would be for the Surinamese court to rely on Constitutional provision. As the Constitution does not include an explicit human right to water, this could either be included through the democratic parliamentary process or judges could depend on already existing provisions in the Constitution to derive the right from.

In the Surinamese context, using the already existing constitutional right to life would be the most accessible option for individuals because, the right to life, unlike the right to health, is open to judicial review (while the Constitutional Court is still being established). This would require bold steps from the judiciary as demonstrated by Courts in India and Argentina. Nevertheless, it would allow for change and the justiciability of economic, social and cultural rights within a shorter timeframe than awaiting the political support for constitutional reform.

## Competing Interests

The author has no competing interests to declare.

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<sup>67</sup> Based on presentation by G.N. Best of Essed & Sohansigh advocaten on 11 April 2018 during symposium 'De waarde van de rechtsstaat voor de Surinaamse samenleving. Een verhaal van moed en hoop' organised at Ernst and Young, Amsterdam.

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