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At the intersection of neoliberal development, scarce resources, and human rights: Enforcing the right to water in South Africa

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**At the intersection of neoliberal development, scarce resources, and human rights:
Enforcing the right to water in South Africa**

Elizabeth A. Larson

Honors Thesis
Advisor: Professor James von Geldern
Department: International Studies

Abstract

The competing ideals of international human rights and global economic neoliberalism come into conflict when developing countries try to enforce socio-economic rights. This paper explores the intersection of economic globalization and the enforcement of 2nd generation human rights. The focus of this exploration is the right to water in South Africa, specifically the recent Constitutional Court case *Mazibuko v City of Johannesburg*. While a right to water can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

“The trouble with water – and there is trouble with water –
is that they’re not making any more of it...People,
however, they’re making more of...”

Marq De Villiers

“To deny the applicants the right to water is to deny them
the right to lead a dignified human existence, to live a
South African dream: To live in a democratic, open, caring,
responsive and equal society that affirms the values of
human dignity, equality and freedom.”

Judge M. Tsoka

“The wars of the 21st century will be fought over water.”

Ismail Serageldin

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Introduction

Water is essential to human life. It is also a scarce resource. This impasse is the beginning of the debate over the nature of water. Every human on Earth needs water to survive, and yet not every human has access to fresh water. How to guarantee access to fresh water is only a part of a larger controversy over the duties imposed upon states by positive human rights. Positive human rights are socio-economic rights, such as the right to housing, healthcare, and sufficient water. In this thesis, I am disaggregating the issues surrounding states' obligations in positive rights by exploring the nature of water. If water is interpreted as a basic human right that cannot be commodified, then the actor that is responsible for delivering water to citizens is the state. However, if water is a commodity, then it can be delivered to consumers through the market. This dialectic illustrates the extent of states' responsibilities in fulfilling international socio-economic rights that could be considered commodities. Water has no close substitutes, and therefore the method by which it is allocated will have implications for people's ability to access water for survival. Understanding the debate over the nature of water is essential to understanding the complexities surrounding the enforcement of international socio-economic rights in developing countries that are faced with scarce resources.

There are thirty-six million cubic kilometers of fresh water in the world.¹ Yet, the human demands for fresh water are beginning to outstrip the supply. There is no question that, "the problem of water supply...will become more political in the twenty-first century...[I]n an urbanised planet, with nearly eight billion inhabitants by the year 2020,

¹ E. C. Pielou, *Fresh water* (Chicago: University of Chicago Press, 1998), 2.

water will be as strategically vital for living as petroleum.”² The population of the world is facing a global water crisis. This global crisis will be felt mostly in developing countries that face scarce water resources and structural inequalities. South Africa is the threshold of the international definition of a country that is “water stressed”.³ However, access to water has historically been intensely unequal. South Africa first confronted its “water apartheid” problem in 2002 when faced with 30,000 marchers at the World Summit on Sustainable Development in Johannesburg protesting the privatization of water services that resulted in unequal access.⁴ The right to water is enshrined in the South African Constitution, yet hundreds of thousands of South Africans are without access to basic water services. This thesis seeks to unravel the impending water crisis through addressing the viability of an enforceable right to water in South Africa.

There are larger global conversation and debates that frame this thesis. These are conversations about the enforceability of human rights, global economic development, and water privatization. These debates are still contested, and so this thesis enters into an ongoing conversation. In order to frame the academic context for this thesis, it is important to understand some of the arguments that are being made in these conversations.

The enforceability of international human rights is debated on a higher level than will be included in the course of this paper. This debate has to do with the effectiveness of the current human rights regime, and whether or not non-binding treaties will actually

² De Rivero 2001; Shiva 2002, quoted in Peter T. Robbins, "Transnational Corporations and the Discourse of Water Privatization," *Journal of International Development* 15 (2003): 1073.

³ In South Africa in 1997, there was just over 1,200 kiloliters of fresh water for each of the 45 million residents. Michael Kidd, "South Africa: The Development of Water Law," in *The Evolution of the Law and Politics of Water*, by Joseph W. Dellapenna and Joyeeta Gupta (New York: Springer, 2009), 87.

⁴ Patrick Bond and Jackie Dugard, "Water, Human Rights and Social Conflict: South African Experiences," *Law, Social Justice & Global Development*, no. 1 (February 11, 2008): 3.

lead to the enforcement of human rights. The neo-realist school of thought casts a pessimistic shadow on the enforceability of human rights, arguing that weak regimes without strong incentives for compliance or enforcement mechanisms will not lead to enforceable human rights. If things happen because powerful countries want them to happen, as neo-realists reason, then human rights treaties do not seem to be enforceable, since powerful countries rarely employ punitive mechanisms to coerce other countries into improving their human rights records.⁵ The liberal international relations theory does not view the state as a unitary actor, and therefore believes that human rights regimes can be effective if internal actors use them to pressure their governments to conform to human rights standards through lobbying or lawsuits. Thus, the liberal perspective predicts that enforcement of human rights would be more effective in democratic countries where the rule of law prevails.⁶ These are just two of the many perspectives on the enforceability of human rights through the current regime. This thesis will primarily engage the liberal ideal, and investigate if the court system in South Africa can be used to enforce the right to water.

Development can be understood as the “problematic of the transition from agriculture to industry...or, in a word, industrialization.”⁷ Conversations about global economic development span across disciplines, and engage in debates around equity and sustainability. Two of the ideas that are touched upon in this paper are sustainable development and neoliberalism. Sustainable development is a concept that has evolved from the Brundtland Commission to mean creating wealth to meet the needs of the

⁵ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *The Journal of Conflict Resolution* 49, no. 6 (December 2005): 926.

⁶ *Ibid.*, 930

⁷ Jan N. Pieterse, "The Development of Development Theory: Towards Critical Globalism," *Review of International Political Economy* 3, no. 4 (Winter 1996): 547.

present generation without compromising the ability of the future generation to meet their needs.⁸ Since the inception of the term, the environment – development complex has been treated through theories such as ecodevelopment, deep ecology⁹, and political ecology.¹⁰ Political ecology in sustainable development theory takes on significant influence in the context of this thesis in its treatment of nature-society relationships in conditions of the growing polarity in world income and wider political economic factors. Political ecology has contributed a poststructuralist voice in the development conversation that is concerned with power and discourse,¹¹ and serves as one of the major frameworks for the analysis in this thesis.

One of the power structures investigated is the power behind the neoliberal development model. This model is based on the Washington Consensus, a term coined by John Williamson. It includes austere fiscal measures that are aimed at attracting foreign direct investment as a means of economic growth. Proponents of the neoliberal development method include international financial institutions such as the International Monetary Fund and the World Bank. However, it has come under heavy scrutiny, with critics claiming that it does not promote economic growth, it does not allow developing countries to implement the same protectionist policies that allowed developed countries to reach their current industrialized state, and that it crowds out other viable development

⁸ Ellen Walkowiak, "Sustainable development as an Economic Development Strategy," *Economic Development Review* (Winter 1996): 75.

⁹ As coined by Norwegian philosopher Arne Naess.

¹⁰ See Blakie, "The Political Economy of Soil Erosion" (1985) and Blakie and Brookfield "Land Degradation and Society" (1987) for early political ecology.

¹¹ Michael Watts and Richard Peet, "Introduction: Development Theory and Environment in an Age of Market Triumphalism," *Economic Geography* 69, no. 3 (July 1993): 227.

options.¹² This thesis will engage in the debate over the effectiveness of the neoliberal development strategy through critically examining effects of privatization.

Privatization of water resources is one of the more contested methods through which neoliberal development strategies are realized. It is part of a wider debate over whether or not water is a private good. As Ben Page describes, “In the war of ideas around global water management the battle lines have, increasingly, been drawn around whether or not water ought to be treated as a commodity”.¹³ Those in favor of privatization of water argue that privatizing water is the best method to ensure efficient delivery and allocation. Those against privatization cite equity concerns and the ethical implications of treating a basic human need as a private commodity. This debate is further expanded upon in the body of this thesis through a discussion over the nature of water and investigation of the effects of privatization in South Africa.

The central question that drives my thesis is: Is the right to water enforceable? This thesis will be divided into four chapters. The first two chapters will review the literature on either side of the debate over the nature of water. Chapter One explains the origins of the idea of water as a commodity, and illustrates how water is commodified through two examples. The first is the Lesotho Highlands Water Project, wherein water is sold to South Africa by Lesotho. This case sets the scene for later examples, and serves as a geographical and historical introduction to the South African government’s dealings with international neoliberal economic institutions such as the World Bank. The second example is the use of prepayment water meters in Johannesburg. I argue that

¹² Ha-Joon Chang and Ilene Grabel, "Reclaiming Development from the Washington Consensus," *Journal of Post Keynesian Economics* 27, no. 2 (Winter 2004-2005)

¹³ Ben Page, “Paying for water and the geography of commodities,” *Transactions of the Institute of British Geographers* 30, (2005): 294

these meters are indicative of market environmentalism and neoliberal development policies implemented by the South African government after the fall of apartheid. Chapter Two is a review of international law wherein I argue that an international human right to water can be constructed out of existing human rights documents. Chapter Three is the heart of the thesis. In this chapter I reviewed the text of the South African Constitutional Court case *Mazibuko v City of Johannesburg* at every juridical level on which it was heard. I compared the texts of the decisions, and analyzed the reasoning and language used to interpret if the courts view water as a human right or a commodity. *Mazibuko* is the first case concerning the right to water to reach the highest court in a country, and therefore sets an important precedent concerning the possibility of enforcement. This decision represents a new development in the field of water rights, as the Constitutional Court handed it down in October of 2009. The South African Constitutional Court is internationally cited and respected for its progressive enforcement of human rights. South Africa in general offers a unique setting for the meeting of international human rights law as enshrined in the Constitution and neoliberal economics embodied in the economy and long-term interactions with the World Bank. This context makes for a vibrant space to explore the consequences of the meeting of human rights and neoliberalism in the enforcement of socio-economic rights. By the end of this thesis, I will conclude that the right to water can be constructed on an international level, yet is juridically unenforceable in South Africa.

Chapter One: Economic Globalization and Water Privatization

Economic globalization and the ideas of neoliberalism¹⁴ have produced the discourse of water as an economic good. The 1992 Dublin Conference on Water and Environment laid down the definition of water as an economic good for the first time. Principle Four of the statement that was produced by the conference states: “water has an economic value, and should be recognized as an economic good, while also maintaining that access to clean water and sanitation at affordable prices are fundamental human rights.”¹⁵ States and international financial institutions, such as the World Bank, have chosen to focus mostly on the economic value aspect of this definition, as even the portion about human rights maintains that it is primarily an economic item. The UN Panel on Water declared in 1998 that water should be paid for as a commodity rather than treated as an essential resource to be provided for free.¹⁶ This definition has led to a discourse of privatization in which the private sector is believed to be the most efficient venue to deliver water services to the public.¹⁷ Privatization “is a nebulous term, although unambiguous in political origin and coincides with the rise of neoliberalism...for the proponents of privatization it is the very incarnation of the liberal project.”¹⁸ In this way, privatization of water and its definition as an economic good is a result of the global neoliberal project.

¹⁴ Neoliberalism will be taken to mean a “model of capitalism whose underlying principles include the primacy of economic growth, the opening of borders to capital movements, the removal of all restrictions to trade and the removal of government regulations which infringe on the operation of an open and free global market” Harry J. Stephan, Angus F. Hervey, and Raymond S. Fonseca, *The scramble for Africa in the 21st century: a view from the South* (Cape Town: Renaissance Press, 2006), 227.

¹⁵ Dublin Conference, quoted in Robbins, “Transnational Corporations and the Discourse of Water Privatization” p.1077.; Sagie Narsiah, “Discourses of Privatisation: The Case of South Africa's Water Sector,” *Development Southern Africa* 25 (2008): 30.

¹⁶ Bond and Dugard, “Water, Human Rights and Social Conflict” p.6

¹⁷ Robbins, “Transnational Corporations and the Discourse of Water Privatization,” p.1078, 1080

¹⁸ Narsiah, “Discourses of Privatisation” p. 22

One of the central assumptions that paved the way for this definition is that governments, particularly in the Global South, are unable to deliver the necessary water infrastructure due to inefficiency and corruption. Therefore, international financial institutions and regional development banks have shifted their focus to encouraging governments to manage water resources through the private sector because it is believed to be more efficient and therefore more sustainable.¹⁹ Privatization uses the language of sustainability to construct “a subjective reality. And, indeed, privatisation produces particular forms of disciplinary conduct or, as Foucault...conceptualised it, “governmentality.”²⁰ The practical application of this discursive strategy comes in foreign direct investment (FDI) by transnational corporations (TNCs) in the water sector, and neoliberal development strategies used by developing countries.

Though neoclassical economic arguments assert that water is allocated more efficiently through the private sector,²¹ there is a contrary theory known as the “global reach argument.” This logic is based on the idea that FDI is a part of the strategy of globalizing firms as opposed to a simple resource flow. TNCs become global institutions that actively produce imperfect markets in order to increase profits. Instead of increasing efficiency in water delivery and infrastructure, they “reduce it by making markets less perfect as a result of their own need to control, reduce, or eliminate competition and maximise surplus profits.”²² Thus, the constructed reality of efficiency that is conveyed in the discourse of privatization could be seen to as a means to the neoliberal goal of profit maximization. The World Trade Organization (WTO) has yet to rule on issues of water

¹⁹ Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1074

²⁰ Narsiah, "Discourses of Privatisation," p.22

²¹ Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1075; Narsiah, "Discourses of Privatisation," p.22

²² Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1075

privatization, specifically bulk water exports. However, it has traditionally upheld economic interests over environmental and human rights concerns.²³ The WTO disallows obstacles to the trade of commodities. If water continues to be defined as a commodity, it is entirely possible that the WTO will not wish to stop the sale of water.²⁴

Economic globalization in the form of neoliberalism has produced a discourse of privatization and commodification of water, which has affected the governmentality of water management. Water supply has been fundamental in the internal politics of African state-craft, and neoliberal discourses have affected the way in which water policy is formed in these developing countries. Governments in Southern Africa are under increasing pressure to apply “integrated water resource management approaches which strive for economic growth within natural resource availability constraints. According to Dr. Larry Swatuk, the director of the International Development Program at the University of Waterloo, this approach often leads to deepening inequalities in water use and worsening resource degradation.²⁵ The privatization of basic services, including water, became a serious option for municipalities in South Africa during the 1990s when government restructuring made financially sustainable basic service programs untenable.²⁶ Johannesburg privatized its municipal water service in 2001 with a new municipal entity, called Johannesburg Water, completely owned by the City of Johannesburg, but fully corporatized and operating under private laws. Johannesburg

²³ Naser Faruqi, "Balancing between the Eternal Yesterday and the Eternal Tomorrow: Economic Globalization, Water, and Equity," in *Rethinking water management: innovative approaches to contemporary issues*, by Caroline Figuères, Johan Rockström, and Cecilia Tortajada (London: Earthscan Publications, 2003), 57.

²⁴ Aaron T. Wolf, "The Present and Future of Transboundary Water Management," in *Rethinking water management: innovative approaches to contemporary issues*, by Caroline Figuères, Johan Rockström, and Cecilia Tortajada (London: Earthscan Publications, 2003), 175.

²⁵ Swatuk qtd in Joost Fontein, "The Power of Water: Landscape, Water, and the State in Southern and Eastern Africa: An Introduction," *Journal of Southern African Studies* 34 (2008): 741.

²⁶ Narsiah, "Discourses of Privatisation," p.22

Water entered into a five-year management contract with Suez Environment, a multinational water management company that operated worldwide. The objectives of this management contract were to make Johannesburg Water into a professionally run and efficient corporatized utility that is financially viable (not dependent on subsidies or budget transfers from the City) without drastic increases in water tariffs.²⁷ The effects of the privatization of water services in Johannesburg is further illustrated below in the discussion of pre-paid water meters as a means of fully recovering costs, and in Chapter 4, which discusses the case *Mazibuko v City of Johannesburg*, wherein the prepayment meters were challenged on Constitutional grounds.

1.1 *Market Environmentalism*

One of the ways that neoliberal development strategies have entered the realm of developing-country economic policy is through market environmentalism. Karen Bakker defines market environmentalism as:

[A] virtuous vision of fusion of economic growth, efficiency, and environmental conservation: through establishing private property rights, employing markets as allocation mechanisms, and incorporating environmental externalities through pricing, proponents of market environmentalism assert that environmental goods will be more efficiently allocated if treated as economic goods – thereby simultaneously addressing concerns over environmental degradation and inefficient use of resources.²⁸

Supporters of market environmentalism in the water sector argue that water is an increasingly scarce resource which must be priced at full economic and environmental cost if it is going to be allocated efficiently to its highest value uses. They argue that

²⁷ Jean-Pierre Mas, "The Need to Reconcile Efficiency and Equity - The Johannesburg Case Study," MS IWA-1212R1, JOWAM - Johannesburg Water Management, Johannesburg.

²⁸ Karen Bakker, "The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South," *Antipode* (2007): 432.

water must be managed by private companies that are accountable to customers. This will be more efficient and effective than management by municipalities, whose accountability comes from citizen-elected representatives, and are much slower to respond. Opponents of market environmentalism in the water sector argue that water is a resource that is essential for life and has no substitutes. They say that water is a human right, which they argue places a burden on the state to provide free water and precludes private sector involvement.²⁹

The following case studies illustrate market environmentalism in South Africa. The first is the case of the Lesotho Highlands Water Project, which is framed as a sustainable development project by the World Bank. The second is the installation of prepayment water meters in Johannesburg, a practice that has been described as a water-saving measure by Suez-run Johannesburg Water. In these two cases, it is possible to see the effects of market environmentalism in South African water policy, both on the international and municipal scale.

1.1.1. Lesotho Highlands Water Project

The Orange River originates in Lesotho and runs through South Africa, creating a border with Namibia before finally emptying into the Atlantic Ocean. The Lesotho Highlands Water Project is a product of a deal brokered between the apartheid government of South Africa and a military government in Lesotho in 1986. It was conceived as a plan to export water on an unprecedented scale from Lesotho to South Africa's industrial heartland of Johannesburg and Pretoria. It was accomplished by

²⁹ Bakker, "The 'Commons' Versus the 'Commodity'," p.432

storing the water in the Orange River and channeling it northward through a 115 km-long tunnel. A secondary aim was to provide Lesotho with a source of hydroelectricity.³⁰ The project began with the construction of the Katse Dam (Phase 1A), and the first phase was completed in 1997 with the aid of international organizations, including the World Bank. The second phase of the project (Phase 1B) was appraised by the World Bank in 1996, after the first phase was finished. The remaining phases of the LHWP are seen as an important development project by the government of South Africa that will bring badly needed resources to the water-poor Gauteng province, the province where Johannesburg is located. President Mandela described South Africa's post-apartheid position on the project: "We in South Africa need the water from the LHWP to meet the increase in our demand, and, in particular, to meet the needs of previously neglected communities."³¹ It is exhibited by the government as a project that will benefit the poor of South Africa and Lesotho through the help of the World Bank and transnational corporations that promote the sustainable use of the Orange River basin while stimulating development.

The way in which the project has been framed by the World Bank and the South African government has shaped the way that people view and act toward it. The actors involved in the LHWP have shaped the way it is described to reflect the global environmental ideal of sustainable development, an ideal that can be contradictory to (but is not necessarily in opposition to) neoliberalism. In other words, they have used the language of market environmentalism to describe the Project. These actors include the World Bank on the supply-side and transnational corporations, which manage the

³⁰ Korinna Horta, "The Mountain Kingdom's White Oil," *The Ecologist*, 6th ser. (November 12, 1995): 227.

³¹ Mandela, quoted in Patrick Bond, *Unsustainable South Africa: environment, development and social protest* (Pietermaritzburg: University of Natal Press, 2002), 128.

demand-side of the project. They have used this discourse to describe the way in which the infrastructure introduced as a result of the project will impact people's lives.

Neoliberal discourses and motives are hidden behind the sustainable development rhetoric. This is inevitable given the current global economic situation and the common definition of water as an economic good.³² The World Bank and TNCs use sustainable development discourse in the case of the LHWP to strike a balance between growth and global distributive justice,³³ and thus to appeal to all interest groups involved in the Lesotho and South African sides of the project.

The World Bank's involvement in the LHWP has been extensive from the beginning. The Bank took the role of "central organiser of technical, financial, social and ecological information about the LHWP, and will continue in this vein in the future."³⁴ Although the original loan was given to Lesotho, it was only the nominal borrower. South Africa was actually responsible for repaying the debt and servicing the loans, though at the time of the original loan, they were the subject of economic sanctions and therefore not technically allowed to be a recipient of loans.³⁵ Due to the political climate at the time, it appears that the project was originally "in-part a sanctions-busting, prestige project with...geo-political overtones,"³⁶ which necessitated the involvement of the World Bank at a high level of governance of the project and therefore of the transboundary watercourse that resulted. The Bank and its Inspection Panel moved into a role of "bureaucratic rationality" that is traditionally associated with the nation-state.³⁷

³² Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1074

³³ Harvey, quoted in Bond, *Unsustainable South Africa*, p.162

³⁴ Bond, *Unsustainable South Africa*, p.136

³⁵ Horta, "The Mountain Kingdom's White Oil," p.228

³⁶ Bond, *Unsustainable South Africa* p.162

³⁷ Bond, *Unsustainable South Africa*, p.162

The fact that the World Bank had taken on this role makes the language they used of primary importance for the outcome and impacts of the project. A closer inspection of the actions of the World Bank and its subsidiaries shows that the sustainable development discourse was driven by economic concerns and was working in concert with a neoliberal agenda rooted in an understanding of water as a commodity.

The aim of the LHWP is to divert about 40 percent of the water in the Senqu River basin into South Africa's Vaal River system in Gauteng province, where the water would then go to the area around Johannesburg.³⁸ This is to be achieved by a system of five dams and a tunnel to the Vaal, altering the natural course of the Orange/Senqu River. The LHWP adopted the Bank's "Operational Directive on Environmental Impacts," which requires a thorough investigation of possible environmental consequences, including human health and safety.³⁹ However, no impact assessment was done for Phase 1A. Under pressure following the devastating environmental and social impacts of Phase 1A, an Environmental Impact Assessment was mandated for all aspects of Phase 1B as well as the entire project. Despite the acknowledgement of transboundary impacts by the Environmental Impact Assessment team, no Transboundary Impact Assessment was carried out. The reason for this oversight was that "[The World Bank] feared that assessing these impacts would severely delay implementation of Phase 1B."⁴⁰ Had they conducted the assessment, they would have found that a fully implemented LHWP would give the Lower Orange River an irregular flow, disrupting the livelihoods of those living

³⁸ Lori Pottinger. "A Brief History of Africa's Largest Water Project | International Rivers." International Rivers. <http://www.internationalrivers.org/en/africa/brief-history-africa-s-largest-water-project> (accessed March 29, 2009).

³⁹ Nico Willemse, "Actual versus Predicted Transbounday Impact: A Case Study of Phase 1B of the Lesotho Highlands Water Project," *International Journal of Water Resources Development* 23, 3rd ser. (2007): 459.

⁴⁰ Willemse, "Actual versus Predicted Transbounday Impact," p.460

in the other riparian nations.⁴¹ This dramatic change in the river system is unsustainable in the long run, as many ecosystems and communities downstream depend on the river. Disrupting the flow of the Orange River can be ecologically disastrous at every level, as dry land biota are also specifically adapted to the natural flow cycles of the river and depend on the regular delivery of water.⁴² Socially, the project will also have large impacts, as large-scale water projects are more likely to negatively affect communities living downstream than those living in the project area.⁴³ Downstream communities, if adequately informed of the impact of the project, could have demanded compensation for their losses. However, this concession would have lessened the economic benefits of the project to South Africa, making the project a more expensive option.⁴⁴ A “sustainable development” project would have had to meet the standards of impact assessment that the World Bank itself has mandated. In this case, it failed to do so, which brings into question the sustainability of the project.

Another example of the lack of truly sustainability-focused action on the part of the World Bank is the fact that it did not conduct an adequate assessment of demand-side management options before funding the new supply-side infrastructure. Recent data shows that the project was not necessary at the time that it was implemented. The South African Department of Water Affairs admitted that no new supply of water is needed in Gauteng until 2025.⁴⁵ In addition, the planners at Rand Water, the water supplier in Gauteng, suggested that the project could have been delayed 17–20 years if effective

⁴¹ Anne Marie De Jonge Schuermans, Jacob Helbing, and Roman Fedosseev, "Evaluation of Success and Failure in the International Water Management: Orange River Basin, South Africa," ETH Zurich (2004): 10.

⁴² Willemse, "Actual versus Predicted Transboundary Impact," p.460

⁴³ Horta, "The Mountain Kingdom's White Oil," p.230

⁴⁴ De Jonge Schuermans et al, "Evaluation of Success and Failure," p.13

⁴⁵ De Jonge Schuermans et al, "Evaluation of Success and Failure," p.11

demand-side management (DSM) projects had been implemented.⁴⁶ In response to this evidence, the World Bank argued that postponing the Mohale Dam would increase construction costs.⁴⁷ In choosing to invest in infrastructure that will cause ecological and social harm without investigating whether or not the project is actually needed, the World Bank has contradicted its sustainable development rhetoric, bringing to light the neoliberal drivers that lie beneath the discourse of sustainability.

1.1.2 Johannesburg Water

On the South African side, management of the water that has been transferred from the Orange River to the Vaal is delegated to private companies that are supported by transnational corporations. The failure of the state to provide adequate infrastructure has led the World Bank to strongly encourage the use of the private sector to allocate resources.⁴⁸ This is market environmentalism on the municipal scale. The two main corporations that use LHWP water are Rand Water and Johannesburg Water. For the purpose of this essay, I focus on Johannesburg Water and its operations in Soweto, one of the townships of Johannesburg that supposedly benefits from the LHWP.⁴⁹ Specifically, I investigate the use of prepaid meters and water tariffs that are justified through the logic of market environmentalism, which will later be contrasted with the idea of water as an enforceable human right through the discussion of the South African Constitutional Court case *Maziuko v City of Johannesburg*.

⁴⁶ Pottinger, Lori. "Evaluating the LHWP Against WCD Guidelines | International Rivers." International Rivers. <http://www.internationalrivers.org/en/africa/lesotho-water-project/evaluating-lhwp-against-wcd-guidelines> (accessed March 29, 2009).

⁴⁷ De Jonge Schuermans et al, "Evaluation of Success and Failure," p.11; Pottinger, "Evaluating the LHWP Against WCD Guidelines | International Rivers." (accessed March 29, 2009).

⁴⁸ Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1077

⁴⁹ Bond, *Unsustainable South Africa*, p.150

Johannesburg Water Pty, Ltd. was created as an independent company, with the city of Johannesburg as the sole shareholder. The transnational corporation Suez Water was awarded a five-year management contract with the idea that corporatization of the water sector would increase efficiency and Suez Water would introduce sanctioned business practices into water management and provision. Part of this process was strict enforcement of full-cost recovery beyond the 6,000 liters per month of free water mandated by the Free Basic Water Policy, a 2002 policy that established a basic amount of free water that should be available to all South Africans. This enforcement led to water shutoffs in Soweto, one of Johannesburg's poorest townships.⁵⁰ The World Bank insists that supplying clean water to the poor can be done through the private sector, but evidence suggests that enforcing full-cost recovery allows the rich to use as much water as they like while the poor continue to suffer from lack of access.⁵¹ Johannesburg Water uses pre-paid meters to enforce full-cost recovery, and they justify this through market environmentalism. The introduction of prepayment meters began with a public awareness campaign, Operation Gcin'amanzi, to educate citizens on how to stay within the 6,000 liters a month through water conservation measures, emphasizing that having to pay for the extra water would be the result of wasteful use.⁵² This process conflated the issues of full-cost recovery and sustainability.

The LHWP caused an increase in the price of water because part of the financing plan was to have the end-users pay the increased cost. The end-user, Rand Water and Johannesburg Water, passed this cost on to the consumer through price increases. As

⁵⁰ Antina Von Schnitzler, "Citizenship Prepaid: Water, Calculability, and Techno-Politics in South Africa," *Journal of Southern African Studies* 34 (2008): 903.

⁵¹ Robbins, "Transnational Corporations and the Discourse of Water Privatization," p.1078

⁵² Von Schnitzler, "Citizenship Prepaid," p.904

prices rose, the ability of municipalities to collect payments from low-income residents, such as those in Soweto, fell.⁵³ The use of pre-paid meters not only implemented full-cost recovery under the ideas of market environmentalism, but it changed the residents' relationship with the state and water accessibility. During the apartheid era, nonpayment for services was one of the only means by which township residents could protest the state. Having to pay for water before use eliminated this channel of protest, therefore changing their relationship with the state and limiting expressions of agency. Von Schnitzler argues, "neoliberal reforms are seen to hinge on the construction of new forms of agency and, indeed, to *work through* the promotion of new conceptions and practices of citizenship."⁵⁴ The introduction of pre-paid meters under the vocabulary of sustainability, and the implementation of full-cost recovery through privatization, turned water into a measureable commodity and transformed the residents' relationship with the state. The meters force residents to calculate how much water they are using and attach a monetary value, turning water into an exchangeable commodity. Their agency and relationship to the state is expressed through their ability to manage and purchase water as such.⁵⁵ The language of sustainability that Johannesburg Water uses to justify the pre-paid meters does not fully encompass the impact that it has had on the concept of water and citizenship in Soweto. It appears to be a thin veil over the economic considerations that drive the use of pre-paid meters to achieve full-cost recovery.

Chapter Three will delve further into the introduction of prepayment meters in Soweto, and cut to the crux of the tension between neoliberal development policies, scarce resources, and human rights in South Africa. This chapter will provide some

⁵³ Bond, *Unsustainable South Africa*, p.151

⁵⁴ Von Schnitzler, "Citizenship Prepaid," p.901

⁵⁵ *Ibid*, p.914

background for, and then follow the arguments of the Constitutional Court case *Mazibuko v City of Johannesburg*, wherein Soweto residents challenged the introduction of the prepayment meters as unconstitutional, asserting that they have a right to free water.

Chapter Two: The International Right to Water

There is a central tension between the view of water as an economic good and an international humanitarian perspective that sees water as a human right. The tension between these two views has increased as globalization has expanded, bringing with it multinational corporations such as Suez and national neoliberal reforms which have led to privatized water resources in developing countries. Opponents of water privatization argue that introducing the logic of the market into water management is incompatible with guaranteeing basic rights to water, and invoke a human rights approach to support their claims.⁵⁶ Water is essential for life and the fulfillment of other human rights, yet there is no explicit right to water in the major international human rights instruments. This section argues that the right to water can be constructed from other rights, as well as from less prominent documents and statements from the Committee on Economic and Social Rights. First, I will review the major international human rights covenants and highlight the portions that support the right to water. In the review of the International Covenant on Economic, Social, and Cultural Rights, I will discuss the Committee's General Comment 15, which explains the right to water. Then, I will highlight relevant regional covenants that support the human right to water in Africa. Finally, I will discuss mechanisms for the enforcement of this right.

1.1 *International Covenants*

Three international covenants dominate the literature surrounding human rights: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and

⁵⁶ Bakker, "The 'Commons' Versus the 'Commodity'," p.437

Cultural Rights (ICESCR). The right to water is not explicitly protected in any of these documents. However an argument can be made that water is a necessary precondition to the fulfillment of other rights. Scholars who argue for the existence of a right to water have based arguments in each of these documents.

1.1.1 UDHR

The Universal Declaration of Human Rights was adopted in 1948, and articulated the basic ideas of human rights, including universality and internationalism. There are three provisions in this document that can be used to construct a right to water. Article 3, which states “everyone has the right to life, liberty, and security of person”, Article 22 provides that everyone have a right to “realization...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”, and Article 25, which provides for every person to have the “right to a standard of living adequate for the health and well-being of himself and his family”.⁵⁷ The wording of Article 25 makes clear that the list of specific provisions, such as food and housing, were not meant to be all inclusive, but representative of the sorts of provisions that would allow people an adequate standard of living. One of the essential components not listed is water, as satisfying the conditions of Article 25 would not be possible without the use of water. Water is an underlying requirement to satisfy the rights protected under the Articles listed. Logic suggests that the framers of the UDHR would have considered water to be implicitly needed in order to meet the right that they described. The right to

⁵⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

air is also not included, yet no one would deny how fundamental air is to human existence and the realization of human rights.⁵⁸

These two articles are seen to be a basis for the right to water, as water is a precondition to realize these rights. The UDHR is not binding upon states, and therefore neither are the two articles that imply a right to water.⁵⁹ The subsequent covenants, the ICCPR and ICESCR, are not binding upon states either, but the ICCPR does contain enforcement mechanisms and the ICESCR has been clarified to include the right to water. Therefore, these documents can serve as stronger bases upon which to place the right to water.

1.1.2 ICCPR

A basic supply of fresh water is essential to sustaining human life. It is possible that a right to water can be implied under Article 6 (1) ICCPR, which states: "Every human being had the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."⁶⁰ The right to life is subject to well-developed international enforcement mechanisms, and countries subject to the First Optional Protocol have a strict duty of compliance. Article 6(1) is generally understood to be enforceable under national legal systems, if the given state has enacted such legislation, therefore if the right to water could be implied under this article, it would carry

⁵⁸ Peter H. Gleick, "The Human Right to Water," *Water Policy* (1998): 491.

⁵⁹ Sarah I. Hale, "Water Privatization in the Philippines: The Need to Implement the Human Right to Water," *Pacific Rim Law & Policy Journal* 15 (2006): 780.

⁶⁰ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art 6 (1)

significant weight.⁶¹ However, the ICCPR is generally understood to contain negative rights, and the subsequent duty on the state is to not interfere. Therefore, “it follows that article 6(1) ICCPR does not require a states party to take positive steps in order to ensure its citizens’ access to life-sustaining resources, but is limited to the state obligation to refrain from arbitrary deprivations of life”.⁶² Kiefer and Brölmann support a broader vision of the right to life, one that imposes a duty on states to preserve life and promote the right to live. This would put states in a position where they would have to provide every citizen with the basic means of subsistence and a decent standard of life. Kiefer and Brölmann write: “...the right to life in its modern meaning should be understood as belonging to both the realm of civil and political rights, and that of economic, social, and cultural rights; a view which incidentally provides an eloquent illustration of both the indivisibility and interrelatedness of all human rights”.⁶³ According to this reasoning, the right to life would encompass positive subsistence rights such as the right to water.

Finding the right to water under the right to life would greatly expand the scope of Article 6 (1), which has been treated by states parties exclusively as a duty of non-interference. There is little evidence that states would support such a liberal interpretation; the article is read as a *right* to life, not a safeguard on all life. Human life itself is not protected by law, what is protected is the right to not have life arbitrarily taken. Keifer and Brölmann admit that “In the context of freshwater as a survival requirement, article 6(1) ICCPR cannot conclusively be considered to go beyond the evident negative guarantee against water being employed *as a means* for arbitrary

⁶¹ Thorsten Kiefer and Catherine Brölmann, "Beyond State Sovereignty: The Human Right to Water," *Non-State Actors and International Law* 5 (2005): 187.

⁶² Kiefer and Brölmann, "Beyond State Sovereignty," p.188

⁶³ *Ibid*

deprivations of life”.⁶⁴ The ICCPR can be used to construct a right to water, but it is a weak base.

1.1.3 ICESCR

The ICESCR protects and promotes positive socio-economic and cultural rights, and serves as a much stronger basis for a constructed right to water. The juridical basis for the right to water can be derived from Articles 11 and 12. Article 11 recognizes “the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, and Article 12 enshrines the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.⁶⁵ While these two articles do not expressly mention the right to water, water is a necessary precondition to the fulfillment of these rights.⁶⁶ As with the UDHR, water is a derivative right that can be logically inferred based on the stated contents of these articles.⁶⁷

Economic, social, and cultural rights are a stronger basis for the right to water than civil and political rights, as they are regarded as welfare rights. Welfare rights impose positive duties on the state to promote and fulfill the content of the right. The realization of these rights depends largely upon state intervention.⁶⁸ State intervention can take three forms; to respect, protect, and fulfill. A state’s duty to respect a right is essentially a negative duty of non-interference similar to the duties imposed by the

⁶⁴ *Ibid*, p.190

⁶⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Art 11, 12

⁶⁶ Hale, "Water Privatization in the Philippines," p.780

⁶⁷ Gleick, "The Human Right to Water," p.492

⁶⁸ Kiefer and Brölmann, "Beyond State Sovereignty," p.191

ICCPR. The duty to protect refers to the state's obligation to prevent third parties from interfering with the enjoyment of the right in question. Fulfillment of rights is a last resort, and can be broken down into facilitating the realization of the right, and providing the content of the right itself. The duty to facilitate can also be understood as the duty to promote. In the case of the right to water, promotion of the right would take the form of providing sufficient information and education for people to realize the right. The use of water saving practices and technologies may also be important where indigent citizens are restricted to a small amount of water.⁶⁹ Provision of resources, such as providing water free of charge, only occurs when citizens are unable to access the content of the right themselves.⁷⁰ In the case of the right to water, the last resort is providing a basic amount of free water to those who cannot pay.

An advantage to basing the legal right to water in economic, social and cultural rights is the idea of a "minimum core" content to this type of right. The core content of a right is the "essential elements of the right, without which it loses its significance".⁷¹ Implicit in the idea of a minimum core is a basic amount of water that would be needed in order to meet requirements for certain human and ecological functions. Peter Gleick writes: "A true minimum human need for water can only be defined as the amount needed to maintain human survival, approximately 3-5 l per day. However, setting a minimum at this level would have little meaning: except in accidental rare circumstances, no one dies solely from a lack of water and studies show improvement in human health can be realized by increasing amounts of clean water up to about 20 l per person per

⁶⁹ Sean Flynn and Danwood M. Chirwa, "The Constitutional Implications of Commercializing Water in South Africa," in *The age of commodity: water privatization in Southern Africa*, by David A. McDonald and Greg Ruiters (London: Earthscan, 2005), 62.

⁷⁰ Kiefer and Brölmann, "Beyond State Sovereignty," p.192

⁷¹ *Ibid*, p.194

day”.⁷² This number is in line with amounts that have been recommended by the USAID, the World Bank, the WHO, and the standards from the UN International Drinking Water Supply and Sanitation Decade and Agenda 21 of the Earth Summit. The international consensus then, is that 20 liters of water per person per day is the minimum core content of the right to water.

1.1.4 General Comment 15

The UN Committee on Economic Social and Cultural Rights confirmed that the right to water is implied in the ICESCR in its General Comment no. 15, entitled “*The Right to Water* (Articles 11 and 12 of the International Covenant on Economic Social and Cultural Rights)”. In this document, the Committee defines the right to water as: “the right of everyone to have at his or her disposal sufficient clean, acceptable, accessible and obtainable water for personal and domestic uses”. The Committee argued that the right to water is included in Article 11 of the ICESCR, as the text of the right is such that the bases for an adequate standard of living are not exhaustive.⁷³ Some, but not all, of the bases for adequate living are listed in the document. Water is among the bases not listed, but it is integral to those listed such as food and shelter. As A.E. Irujo wrote, “It is not a question of linking the right to water with an economic or social activity but of providing the elements for the development of life under basic conditions that are minimal (but sufficient) in terms of quality”.⁷⁴ The Comment establishes a state obligation to realize the right to water, and to move as quickly and efficiently as possible towards the full

⁷² Gleick, "The Human Right to Water," p.496

⁷³ Antonio E. Irujo, "The Right to Water," *Water Resources Development* 23, no. 2 (June 2007): 269; Kiefer and Brölmann, "Beyond State Sovereignty," p.201

⁷⁴ Irujo, "The Right to Water," p. 270

realization of this right. States are obligated to prevent the infringement of this right by third party actors, including private water companies.⁷⁵ This point is important, as it reflects the tension between water privatization and state protection of human rights. That the Committee specifically mentions protection of rights against private water companies implies that they view privatization as a potential obstacle to the full realization of the right to water.

Although the ICESCR and General Comment no. 15 serve as convincing bases for the international right to water, neither of these documents are binding upon states. States are only obligated to take steps within their resources to reach the goals outlined in these documents, essentially giving them free rein to implement these rights as they will.⁷⁶

1.2 *Regional Covenants*

Regional human rights covenants are not covered in the literature that I reviewed for the purpose of this paper, however they can serve as compelling bases for a legal right to water. In the South African case that will be thoroughly discussed later in this work, Judge Tsoka of the High Court cites two African regional human rights documents. Given that Judge Tsoka places his interpretation of this right partially in these documents, it is a worthwhile exercise to investigate how they protect the right to water.

⁷⁵ Hale, "Water Privatization in the Philippines," p. 781; Flynn and Chirwa, "The Constitutional Implications of Commercializing Water in South Africa," p.62

⁷⁶ "What Price for the Priceless?: Implementing the Justiciability of the Right to Water," Harvard Law Review 120 (2007): 1074.

1.2.1 African Charter

The African Charter of Human and People's Right, created in 1981 and also known as the Banjul Charter, guarantees everyone the "right to enjoy the best attainable state of physical and mental health."⁷⁷ This is similar to Article 12 of the ICESCR, which was found by the Committee on Economic, Social and Cultural Rights to be a basis for the right to water. The African Commission on Human Rights found that failing to provide basic services, such as water, is a violation of this article.⁷⁸ South Africa has signed and ratified this Charter, as well as the Protocol on the Establishment of an African Court on Human and People's Rights. The African Court on Human and People's Rights is a regional court that rules on states' compliance with the Banjul Charter. That South Africa has ratified both the Charter in 1996 and the Protocol in 2002 means that it is subject to the Court's jurisdiction, and therefore can be held accountable to the provisions of the Charter. This enforcement mechanism makes the Charter a strong base for the right to water in the states party to it.

1.2.2 African Convention on Rights of the Child

The African Convention on the Rights of the Child (ACRC) is the other regional convention that is mentioned by Judge Tsoka in his decision. Article 14 concerns health and health services. This article reflects Article 16 of the Banjul Charter, and goes a step further in saying:

⁷⁷ African Charter on Humans and People's Rights (African Charter), OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982), Article 16

⁷⁸ African Commission on Human and People's Rights, *Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*, 7 September 2009, Section II(A)(3)(ii).

2. State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: ...
 - (c) to ensure the provision of adequate nutrition and safe drinking water⁷⁹

This convention was signed and ratified by South Africa, and specifically highlights the right to safe water. While there is no enforcement mechanism for this convention that is equivalent to the African Court, the explicit mention of safe drinking water serves to clarify the meaning of physical and mental health that is enshrined in the Banjul Charter. The Articles are very close to one another in content, and the ACRC was written in 1990 and adopted in South Africa in 2002. The ACRC is nine years younger than the Banjul Charter was written, and was adopted by South Africa six years later than the Charter was adopted. Based on the similarity between the two articles, as well as the clarification by the African Commission that the provision of basic services is included in Article 16, it is possible to see that the ACRC is a logical continuation of the Banjul Charter. Therefore, the explicit mention of safe water in the ACRC serves to strengthen the legal basis for a right to water under the Charter.

1.3 *Enforcement*

One of the major problems with basing a right to water in international human rights documents is that these documents are not binding upon states. Therefore, it is difficult for the international community to enforce of the rights guaranteed in the documents. The ICCPR has an Optional Protocol that allows individuals to make complaints for quasi-judicial review, but the ICESCR has no such resource. Given that

⁷⁹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, Article 14(2)(c)

the ICESCR is a stronger basis for the right to water, this section will investigate possible enforcement mechanisms for the right to water as found under the ICESCR.

1.3.1 International Monitoring

There is no procedure for individuals to make a complaint based on the ICESCR, as is allowed by the Optional Protocol to the ICCPR. The rights guaranteed under the ICESCR can be seen as vague, as there is no body of case law to clarify the content of the rights. However, given the recent clarification of rights through the General Comments, as well as developments in the academic literature such as the Limburg Principles and the Maastricht Guidelines, it is becoming more difficult for states to argue that the expectations of the ICESCR are unclear. Kiefer and Brölmann argue that there is no reason why the right to water should not be subject to quasi-judicial enforcement, and suggest a method by which to enforce it. They offer an “integrated approach”, used by the Human Rights Committee in the past to assert that the non-discrimination clause of article 26 of the ICCPR is also applicable to social, economic, or cultural rights. That is to say “...if a state party to the ICCPR, the First Optional Protocol and the ICESCR seeks to implement the right to water as implied in the ICESCR through legislation, and the national law were to prove discriminatory in the sense of article 26 ICCPR, the injured individual in principle would have recourse to the individual complaints procedure under the First Optional Protocol to the ICCPR”.⁸⁰ This could offer possibilities for enforcement that are greater than the current system of state reporting, but the judgment

⁸⁰ Kiefer and Brölmann, "Beyond State Sovereignty," p.205

would still be under article 26, not under the right to water. Therefore, the right to water would not actually be enforced under this system.

1.3.2 Justiciability

The international covenants encourage states parties to adopt their tenets into domestic law. Domestic legislation that incorporates the rights contained in the ICESCR would make those rights justiciable on the national level. There are several advantages to a justiciable right to water. First, the ability to enforce the right to water in courts would act as a check against government and corporate interests that could interfere with citizen's ability to access basic water. This balance of power is particularly important in the face of increasing instances of privatized water companies operating at full-cost recovery. Second, it would send the message to the nation that socio-economic rights are as important as civil and political rights, and should be approached with equal respect. Third, justiciability would allow national courts and tribunals to practically apply and therefore clarify the meaning of water rights in different contexts.⁸¹ A body of case law could be compiled to guide future decisions about water rights, and the meaning of "progressive realization" could become more concrete.

Until recently, the only court cases concerning the right to water had been decided in lower national courts. The first water rights case to reach the highest court in a state is *Mazibuko v City of Johannesburg*, which was decided by the South African Constitutional Court in October of 2009. This was the most significant test of the justiciability of water rights to date. This case also contains important themes concerning

⁸¹ "What Price for the Priceless?," p.1078

the tension between the right to water, scarce resources, and the neoliberal development scheme of the South African government. The next chapter will delve into the circumstances surrounding the *Mazibuko* case, and trace the case as it moved up through the South African court system. *Mazibuko* is at the intersection of competing development ideals, and thus serves as an important case study for the consequences of the intersection between human rights, scarcity, and economic globalization.

Chapter Three: Mazibuko

Mazibuko v City of Johannesburg was the first case concerning the human right to water to reach the highest court in a state. The progressive history of the Constitution of South Africa and the Constitutional Court underpin the importance of this case to the future of a justiciable right to water. Essentially, some of the residents of Phiri, a neighborhood in Soweto, claimed that the introduction of prepaid water meters under Johannesburg Water's Operation Gcin'amanzi was unconstitutional. In order to fully delve into the issues that this case addressed in its three hearings on different levels of the South African court system, it is essential to understand the setting in which this case took place. To this end, I will provide a brief overview of the water policies in South Africa, the procedural issues when approaching a case based on the Constitution, and finally the Phiri case.

3.1 *South African Water Law*

Water law in South Africa has evolved since the fall of the apartheid government. The 1996 Constitution contains a right to water in section 27. Water legislation in South Africa must be considered in light to this right, as well as others included in the Constitution such as the right to equality, dignity, life, property, and administrative justice. The new government extensively reviewed water law with an eye for issues of equity. It initiated a consultative process for developing new guidelines for future water legislation, and the result was the *White Paper on a National Water Policy for South Africa*. This White Paper explained that in 1997 12-14 million South Africans, out of 40

million, were without access to safe water.⁸² This was a result of inequitable water infrastructure that was installed during apartheid. The government's new water legislation would be driven by its initial development vision, the Reconstruction and Development Programme (RDP), issued in 1994. The RDP promised to meet basic needs, develop human resources, build the economy, and democratize the state.⁸³ Water was one of the fundamental municipal resources specifically mentioned in the RDP. Improved access to sufficient, sanitary water was seen as part of the government's promise to redress historical injustice exercised against poor black citizens.⁸⁴

However, the new South African government bowed to pressure from the International Monetary Fund and the World Bank and in 1996 adopted the Growth, Employment, and Redistribution Strategy (GEAR). GEAR purports to implement the RDP, but actually fundamentally transitions the national development strategy away from social welfarism and towards neoliberal principles of development.⁸⁵ Andrew Magaziner explains the effect GEAR had on water policy, saying: "GEAR thrust water delivery responsibility firmly on the shoulders of local municipalities, while the government simultaneously decreased its social spending and financial support for city council operations."⁸⁶ Magaziner argues that in this situation, cities such as Johannesburg made the inevitable choice to privatize municipal services and institute cost recovery mechanisms. Some citizens, including the applicants in the *Mazibuko* case, saw this as a

⁸² Kidd, "South Africa: The Development of Water Law," p.92

⁸³ *Ibid*

⁸⁴ Andrew L. Magaziner, "The Trickle Down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water," *North Carolina Journal of International Law & Commercial Regulation* (Spring 2008): 523.

⁸⁵ Rose Francis, "Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power," *Georgetown International Environmental Law Review* 18, no. 149 (2005): 157.

⁸⁶ Magaziner, "The Trickle Down Effect," p.523

betrayal of the promises made under the RDP. The first post-apartheid water minister, Kader Asmal, stated: “The RDP makes no reference to free water to the citizens of South Africa. The provision of such free water has financial implications for local government that I as a national minister must be extremely careful enforcing on the local government.”⁸⁷ Indeed, his first policy mandated the supply of water to consumers at the marginal cost – the price equivalent to the cost of operating and maintenance costs for an additional unit of water. John Roome offered him the advice that private management contracts would be more difficult to establish and maintain if consumers had an expectation of receiving free water. John Roome is also the World Bank’s task manager for the Lesotho Highlands Water Project.⁸⁸ It was in this political climate that new water legislation was drafted in South Africa.

3.1.1 National Water Act 36 of 1998

The National Water Act (NWA) of 1998 transformed South Africa’s laws governing water resources. The NWA was a comprehensive reform, abolishing private ownership of water, placing all water resources in a public trust, and establishing a compulsory licensing system that promised to facilitate equitable distribution of the country’s water resources. However, it also adopts or facilitates a number of neoliberal policies, including decentralizing water resource management to municipalities, privatization, and full cost recovery. Rose Francis argues that in this way the NWA blocks the government’s objective of universal access to clean water.⁸⁹ The NWA decentralized the management of water resources by establishing parastatal catchment

⁸⁷ Asmal qtd in Bond and Dugard, "Water, Human Rights and Social Conflict," p.7

⁸⁸ *Ibid*

⁸⁹ Francis, "Water Justice in South Africa," p.161

agencies to manage water on the level of broad watersheds.⁹⁰ Each municipality then either manages its own water services infrastructure or issues a contract to a private firm to manage water services. The water catchment agency for Johannesburg is Rand Water,⁹¹ and the water management body in Johannesburg is Johannesburg Water.

A portion of the NWA that is relevant to the *Mazibuko* case is section 59(4), which provides that a person must be given the opportunity to make representations, or explain to the water services agency why they should not have their water cut off, within a reasonable period before any restriction or shut-off of water services is imposed.⁹² The residents of Phiri contend that they were not able to make representations before their water was restricted or shut off by Johannesburg Water. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) includes a similar provision in section 3, stating that administrative decisions must be procedurally fair. This definition of fair includes adequate notice to citizens, and the opportunity for citizens to make representations.⁹³

3.1.2 Water Services Act 108 of 1997

The NWA operates along with the Water Services Act (WSA). The WSA outlines the establishment, the powers, and the responsibilities of water service agencies such as Johannesburg water. The WSA secures in Section three the right of everyone to have access to basic water supply and sanitation, thereby conforming to the Constitutional right to water, and mandates the construction of sufficient pipes to bring

⁹⁰ Kidd, "South Africa: The Development of Water Law," p. 95

⁹¹ Bond and Dugard, "Water, Human Rights and Social Conflict," p.6

⁹² Water Services Act 108 of 1998 s.59(4)

⁹³ *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W), Mazibuko founding affidavit

piped water within two hundred meters of every dwelling.⁹⁴ The WSA gives the duty to water service providers, including private suppliers, to take “reasonable” measures to realize these rights. The procedures for the limitation or discontinuation of water services must be fair and equitable, and should not be enacted as punishment for non-payment in the event that a customer can prove that he or she is unable to pay.⁹⁵ In the *Mazibuko* case, the applicants say that Johannesburg Water did not follow the law of the Water Services Act when it installed pre-paid water meters and shut off water to those who could not pay.

3.1.3 Free Basic Water

The Free Basic Water Policy (FBW), as detailed in August 2002, defines the amount of free basic water as “25 litres per person per day, which is a level sufficient to promote healthy living. This amounts to about 6000 litres per household per month for a household of 8 people.”⁹⁶ It takes note of the fact that 6000 liters may not be enough to cover waterborne sanitation needs, and that local authorities have the discretion to either provide less water where the infrastructure does not exist or more water where it is needed.⁹⁷ The policy Regulations Relating to Compulsory National Standards and Measures to Conserve Water of June 2001 hold the same numbers, and add that the source must be within 200 meters of the household, with a minimum flow rate of 10 liters per minute, and be with an effectiveness that no consumer is without water supply for

⁹⁴ Francis, "Water Justice in South Africa," p.161

⁹⁵ Water Services Act 108 of 1998

⁹⁶ *Free Basic Water Implementation Strategy*, Version 2, August 2002

⁹⁷ *Mazibuko and Others v City of Johannesburg and Others*, Mazibuko founding affidavit

more than seven full days.⁹⁸

The 2003 Strategic Framework for Water Services formally recognized the FBW Policy, which all local municipal authorities are legally obliged to implement. FBW, while mandating a lifeline amount of free water, makes clear that any water consumed above the 6kl per person per day must be paid for, in accordance with the principle of full cost recovery.⁹⁹

3.2 *Procedural Issues*

There are certain procedural issues that go along with Constitutional litigation. The plaintiffs – or “applicants” as they are referred to in South African civil cases - in the *Mazibuko* case challenged the installation of prepayment water meters in Phiri on constitutional grounds. They argued that the plan that included prepayment meters was unconstitutional under section 27, which concerns the right to water. In this section, I will discuss the conditions that must be met before a case can be heard under Chapter Two of the Constitution, the Bill of Rights.

3.2.1 Conditions for Bill of Rights litigation

Section 38 of the Constitution considers standing before a court, and qualifies that anyone protected under the Bill of Rights and acting in their own interest, acting as a member of or in the interest of a group, or acting in the public interest may bring a complaint before a court.¹⁰⁰ The applicants in the *Mazibuko* case have standing before

⁹⁸ Regulations Relating to Compulsory National Standards and Measures to Conserve Water, GN R509, GG 22355, 8 June 2001, s.3(b)(i-iii)

⁹⁹ Francis, "Water Justice in South Africa," p. 179

¹⁰⁰ Magaziner, "The Trickle Down Effect," p. 541

the court, as they are citizens of South African acting in their own interest, the interest of their group, and the public.

There are certain conditions that must be met for Bill of Rights litigation. The court must initiate compliance with certain procedural guidelines before considering the substantive claims made in a case. These compliance procedures include determining the breadth of the specific Bill of Rights provision in question, how it should be interpreted, and if any Section 36 limitations apply in the case at hand.¹⁰¹

The breadth of Section 27 was considered individually by each court, and to different outcomes. These considerations are discussed in depth in the second part of this chapter, wherein I dissect the rulings made by each court. The other standard that must be explored by the court before addressing substantive issues is whether or not the rights infringement is allowed under the Constitution. Section 36 of the Constitution is the “limitations clause”, it establishes the boundaries on generally applicable rights, and outlines the types of situations in which the rights guaranteed in the Bill of Rights can be intruded upon or restricted. The limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom, and the specific nature of the right in question.¹⁰² Whether or not the limitations clause is applicable is decided on a case-by-case basis, and each judge that heard the *Mazibuko* case made their own judgment on section 39, and each found that it did not apply in this case.¹⁰³

¹⁰¹ *Ibid*, p.561

¹⁰² *Ibid*, p.538

¹⁰³ Though Justice O’Regan found in favor of the City of Johannesburg, she did so on the grounds that the Free Basic Water policy and the steps taken by the City to implement this policy were reasonable given present scarce natural and economic resources, and were working towards the progressive realization of the right to water. This is not a limitation of the right, but fulfillment of obligations to realize the right.

3.3 *Phiri water case*

The *Mazibuko* case is also known as the Phiri Water Case, as all of the applicants are residents of Phiri, a neighborhood in Soweto. This section will provide some context for the *Mazibuko* case by describing the Phiri neighborhood, and then explaining the stories of the applicants and their specific complaints against the City and Johannesburg Water. Then I will review the response by the City to these complaints. After setting the context to this specific case, I will review the arguments made by the judges in the High Court, the Supreme Court of Appeals, and the Constitutional Court that go to the larger debate of enforcement of socio-economic rights in a context of scarce resources and neoliberal development policies.

3.3.1 Phiri

Phiri is a township in Soweto, in Johannesburg, that is bordered by Mapetla and Moraka. It was established during the apartheid era as an ethnic enclave for Sotho and Tswana peoples. Tens of thousands of low cost homes were constructed in its early development, most of which lacked indoor plumbing or working toilets. Homes were gradually electrified during the course of the 20th century. Following the end of the apartheid government in the 1990s, a housing shortage occurred in Phiri, resulting in some two thousand informal backyard dwellings. Phiri has a population density of over 180 persons per hectare, which is overcrowded even by Soweto standards. Households rarely have a separate bathroom, and there is generally a high level of water loss through outside taps and antiquated standpipes.¹⁰⁴ Water service delivery came through taps or

¹⁰⁴ Magaziner, "The Trickle Down Effect," p.521-22

standpipes, and households paid a flat rate based on an assumed consumption level. Around 10% of households in Soweto paid their water bills in the early 2000's.¹⁰⁵ It was in this environment that Johannesburg Water, along with the City of Johannesburg, introduced Operation Gcin'amanzi, a form of market environmentalism, by installing prepaid water meters to reduce non-payment and increase efficiency in Soweto. The first area to receive these meters was Phiri.

3.3.2 Complaint by applicants

The applicants in the case of *Mazibuko v City of Johannesburg* protested the use of these prepayment water meters on several grounds. In this section I will introduce the applicants whose stories illustrate the relevant complaints against the prepayment meters, and the grounds upon which they challenged Operation Gcin'amanzi in the court system. The basis of the case, as well as the arguments made therein, is more extensive and detailed than the portions covered in this thesis. The debate over market environmentalism versus the human right to water is only one of the many issues that this case addresses. However, only the portions that pertain to the issue at hand in this thesis will be highlighted.

The first applicant, Lindiwe Mazibuko, was 39 years old at the time of the case. Sadly, she passed away from an illness not long after the decision of the High Court was handed down.¹⁰⁶ She had 20 people in her household, including 6 boarders, 3 babies, and 6 school-age children. Many of these people, including her aging mother, had health problems. The total monthly income of the household was R1300, which was not enough

¹⁰⁵ Mas, "The Need to Reconcile Efficiency and Equity - The Johannesburg Case Study"

¹⁰⁶ Dugard, Jackie. "A judge of the first water." Mail & Gaurdian Online, June 03, 2008. <http://www.mg.co.za/article/2008-06-03-a-judge-of-the-first-water> (accessed January 2, 2010).

money to pay all expenses and the water bill beyond the free basic amount allocated to them. Ms. Mazibuko says that the free water never lasted the entire month, and usually ran out by the 12th or 15th of each month. Her household was without water for more than half of every month, and could not always afford to buy more water. After the 6000 liters was finished, it was shut off without any warning. In a household of 20, such as Ms. Mazibuko's house, 6000 liters a month makes for only 10 liters per person per day, which is well below the 25 liter minimum standard required for direct consumption, food preparation, and personal hygiene. Ms. Mazibuko herself states in her affidavit: "The amount of 6 kilolitres free water we are supplied with is simply not enough for our entire household's basic needs. This is despite the fact that we use water only for our basic needs. We cannot use less water in our household than what we are using at the moment."¹⁰⁷ Ms. Mazibuko is affiliated with the Coalition Against Water Privatisation (CAWP), a community group that is part of the Anti-Privatisation Forum (APF). Trevor Ngwane, a former African National Congress (ANC) councilor and head of the regional ANC in Soweto, who was dismissed from the ANC because of his critique of privatization of municipal services, founded the APF at the start of Operation Gcin'amanzi.¹⁰⁸ A research report from CAWP that Mazibuko cites in her affidavit found that there are an average of 16 people per household in Phiri, twice the number the government assumes.¹⁰⁹ She claims that her quality of life has significantly decreased since the installment of the pre-paid water meters.

The second applicant is Grace Munyai, a 43 year old unemployed adult woman who owns a property in Phiri along with her husband, who is employed. Her household

¹⁰⁷ *Mazibuko and Others v City of Johannesburg and Others*, Mazibuko Founding Affidavit, pp 111

¹⁰⁸ Mas, "The Need to Reconcile Efficiency and Equity - The Johannesburg Case Study"

¹⁰⁹ *Mazibuko and Others v City of Johannesburg and Others*, Mazibuko Founding Affidavit, pp 121

consists of six people, and she had a niece, Sizile, who died of AIDs in April of 2004. Her household's only source of water is a standpipe in the yard that was connected in November of 2004.¹¹⁰ When the standpipe was installed they were only given the choice between the pipe and prepaid water meter. Before the pipe was installed they went without water in their home for six months while the community was protesting the installment of prepaid water meters. During this time Sizile was very sick, in the terminal stage of AIDs. The family members had to walk 3 kilometers to collect water for household use and to wash Sizile's blankets. Grace Munyai states: "There was no way to get sufficient water for our most basic needs: caring for Sizile, our personal hygiene, cleaning the house, drinking and cooking".¹¹¹ Even after the pipe was installed, it is inconvenient for them to have to run into the yard for water, and Johannesburg Water workers check on them often to make sure that they have not tampered with the standpipe.

The third applicant is Jennifer Makoatsane, a 35-year-old unemployed woman, living in Phiri with her 61 year old mother and 7 others. There are a total of 9 people in her household. They received a prepayment water meter in November of 2004, and the water did not last through the month. The family had to change their cleaning habits in order to conserve water, which proved especially challenging given that there was a newborn baby. In January, her father suffered a stroke, and his foot became infected with gangrene. They were forced to buy more water after the free amount ran out because her father's foot needed to be cared for lest his health deteriorate further. Her father died on February 14th, 2005, and their whole family came for the funeral, putting further stress on

¹¹⁰ *Mazibuko and Others v City of Johannesburg and Others*, Munyai Affidavit, pp 6

¹¹¹ *Mazibuko and Others v City of Johannesburg and Others*, Munyai Affidavit, pp 17

the water supply. Makoatsane states, “I feel that my rights to water and human dignity have been violated”.¹¹²

The applicants argued that the pre-payment meters are not a reliable source of water, as they only provide water for about half of the month. Furthermore, the installation of pre-paid meters has reduced residents’ access to water, representing a step backward in the progressive realization of the right to access sufficient water as protected in the Constitution. The applicants asserted that the National Standards Regulation 3(b), which legally sets the minimum standard of basic water supply outlined in the Free Basic Water Policy at 25 liters per person per day or 6 kiloliters per household per month, is unconstitutional, as it does not meet the standard of access to sufficient water that is guaranteed in the Constitution. Even if 25 liters per person per day were sufficient, the clause of 6 kiloliters per household per month violates section 9(3) of the Constitution, as it incidentally directly or indirectly discriminates against poor black people who live in large households and cannot pay for water beyond the basic free water allotment.¹¹³ All of these charges cut to the heart of the critiques of market environmentalism. Operation Gcin’amanzi uses neoliberal development techniques through enforcing payment for water services, while the applicants argue that this strategy violates their constitutional and human right to water because they are unable to pay for the service.

3.4 *Mazibuko v City of Johannesburg*

The *Mazibuko* case was decided in three different courts over the course of two years. This section aims to pit these three decisions against each other, compare their

¹¹² *Mazibuko and Others v City of Johannesburg and Others*, Makoatsane Affidavit, pp 18

¹¹³ *Mazibuko and Others v City of Johannesburg and Others*, Mazibuko founding affidavit

arguments, and gauge the reactions of the South African people through commentary in the print and online media. The main topics of contention between the three courts are as follows: the interpretation of section 27 of the Constitution (s27), the role of foreign and international law in influencing South African courts, the definition of “sufficient” water and if there is minimum core content to s27, the concept of progressive realization of socio-economic rights, and the constitutional test of reasonableness. Each of these topics will be considered in turn, as will their significance to the tension between neoliberal development strategy and human rights. However, before considering the reasoning behind the decisions, it is important to know the outcome of each decision.

The High Court of South Africa, Witwatersrand Local Division, was the first body to hear this case. The hearing was from the 3rd to the 5th of December, 2007, and the judgment was handed down by Judge M P Tsoka on April 30th, 2008. Judge Tsoka ordered that the forced installation of the pre-payment water meters in the Phiri Township by the City of Johannesburg and Johannesburg Water without the choice of only a pre-payment meter or a standpipe is unconstitutional and unlawful. He found that the prepayment system as a whole in Phiri is unconstitutional and unlawful. Judge Tsoka, through his decision, makes clear that he supports the human rights side of the debate at hand, and ordered City of Johannesburg and Johannesburg Water¹¹⁴ to provide each of the applicants and similarly placed residents of Phiri with 50 liters per person per day of free basic water, and the option of a metered supply of water to be installed at the cost of the City.

The order of the Supreme Court of Appeals was technically a victory for the Mazibuko team. However, once the text is further inspected, it is possible to glean the

¹¹⁴ Hereafter, the City of Johannesburg and Johannesburg Water will be known collectively as “the City”.

ground gained by the City in this appeal. The order as written by Judge Streicher is as follows:

The appeal is upheld and the order by the court below [the High Court] is replaced with the following order:

1. The decision of the first respondent and/or the second respondent to limit the free basic water supply to the residents of Phiri to 25 liters per person per day or 6kl per household per month is reviewed and set aside.
2. It is declared:
 - (a) That 42 liters water per Phiri resident per day would constitute sufficient water in terms of s 27 (1) of the Constitution.
 - (b) That the first respondent is, to the extent that it is in terms of s 27(1) of the Constitution reasonable to do so, having regard to its available resources and other relevant considerations, obliged to provide 42 liters free water to each Phiri resident who cannot afford to pay for such water.
3. The first and second respondents are ordered to reconsider and reformulate their free water policy in the light of the preceding paragraphs of this order.
4. Pending the reformulation of their free water policy the first and second respondents are ordered to provide each account holder in Phiri who is registered as an indigent with 42 liters pf free water per day per member of his or her household.
5. It is declared that the prepayment water meters used in Phiri Township in respect to water service level 3 consumers are unlawful.
6. The order in paragraph 5 is suspended for a period of two years in order to enable the first respondent to legalise the use of prepayment meters in so far as it may be made possible to do so.¹¹⁵

While Judge A. Streicher, seems to have followed the ruling of Judge Tsoka, he deviates from the harder precedent set by the High Court in two important respects. First, he lowers the amount of water considered to be the minimum core amount that the City should provide free of charge from 50 liters to 42 liters per person per day. Second, he gives the City leeway in saying that it should reconsider its water policy in light of its available resources and by suspending the removal of prepaid water meters for two years so that the City can amend its bylaws to make the meters legal. By ordering the City to provide a high amount of water for free, Judge Streicher is supporting the argument that

¹¹⁵ *City of Johannesburg v L Mazibuko* (489/08) [2009] ZASCA (25 March 2009)

there is a right to water. However, he also allows the City to legalize prepayment meters, signaling that he also supports the privatization of water services.

Justice Kate O'Regan wrote the Constitutional Court's decision. The case was heard on September 2nd, 2009, and the decision was given on October 8th of the same year. Justice O'Regan set aside the orders of the two lower courts. She found the Free Basic Water policy to be fair, and the system of prepayment meters to be constitutional. Her decision supports the market environmentalism and neoliberal development policies of the state on the surface, but has an underlying argument for the right to water. She makes the case that the City is making progress towards the realization of the right to water through the use of prepayment meters. Given scarce resources and the expense of delivering water services, the court does not have the power to challenge the City's plan so long as it is working towards fulfilling its obligations under Section 27 of the Constitution.

Now, with the three decisions in mind, I will turn to the reasoning behind these orders, and explore how each court interpreted the major issues in this case. Through this analysis, it is possible to see the right to water disappear as the courts attempt to reconcile it with the existing development strategies of the South African government.

3.4.1 Interpretation of Section 27 of the Constitution

The constitutional basis of this case is section 27, parts 1 and 2, of the Constitution. This section states:

27. Health care, food, water and social security
 1. Everyone has the right to have access to -
 1. ---
 2. sufficient food and water; and
 3. ---
 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.¹¹⁶

The three courts had different interpretations of s27. Judge Tsoka of the High Court only briefly addresses his interpretation of this section of the Bill of Rights. He views section 27 through the lens of section 39(1)(b), which states that a Court interpreting the Bill of Rights must consider international law, and in terms of section 233, which provides that a interpretation of legislation consistent with international law must be preferred.¹¹⁷ His conclusion is that “...the State is obliged to provide free basic water to the poor”¹¹⁸ under s27 (1), and under s27(2) the respondents are obliged to provide more than the minimum amount of water if the residents need more water, and if the City is able to provide more water within its available resources. The amount of water that Judge Tsoka found “sufficient”¹¹⁹ was 50 liters per person per day, he ordered the City to provide this amount to citizens for free.

¹¹⁶ Constitution of the Republic of South Africa Act 108 of 1996

¹¹⁷ *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) at para 31

¹¹⁸ *Ibid* at para 40

¹¹⁹ See below for further discussion of how this figure was decided.

The implication of this order for the City was sizeable, considering that at the time of the ruling they were providing free water at only 6kl per household per month. The City contended that free water is not fiscally or environmentally sustainable, and that they are under pressure to collect payments since they do not get the water for free from their suppliers.¹²⁰ This argument reflects the pressure of neoliberal economic development on government facing scarce resources with high demand. Not only does the City see the practice of providing free water as environmentally unsustainable given the arid climate where Johannesburg is located, they are also under an obligation to profit from the water industry. This tension makes the fulfillment of the socio-economic right to water, as ordered by Judge Tsoka and based in his use of international law, logistically difficult.

Judge Moroa Tsoka's ruling sparked a debate in the South African media. On one side, the supporters of the applicants hailed his decision as a landmark case, the first case in which the courts ruled on the side of the poor and disadvantaged, setting a precedent for juridical enforcement of socio-economic rights in South African jurisprudence and worldwide.¹²¹ The other side, including Johannesburg mayor Amos Masondo, criticized Judge Tsoka for making policy, and overstepping the boundaries of the power of the courts.¹²² While supporters in the media hailed Judge Tsoka's approach of setting a hard line for the enforcement of rights, ultimately the arguments in favor of neoliberal development and market environmentalism proved stronger in the minds of Judges

¹²⁰ *Reuters AlertNet*. "South Africa: Court ruling on water sets "global precedent"" May 06, 2008.

¹²¹ *UN Integrated Regional Information Networks*. "South Africa; How Much Free Water is Enough." Africa News, December 14, 2007.

¹²² Liebenberg, Sandra. "Crucial leaks in mayor's attack on water ruling." *BusinessDay*, May 20, 2008. <http://www.businessday.co.za/Articles/Content.aspx?id=47901> (accessed February 22, 2010).

Streicher and O'Regan, and the other two courts took a less hard-line interpretation of Section 27.

Judge Streicher of the Supreme Court of Appeals addressed the interpretation of s27 with a method used by the Constitutional Court in *Soobramoney v. Minister of Health (KwaZulu-Natal)*. In that decision, Chief Justice Chaskalson wrote:

“...the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them...an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”¹²³

In other words, according to Section 27, everyone may have the right to access to sufficient water, but everyone does not have a claim to immediate fulfillment of that right if the resources are not available to the government to provide the infrastructure and services that the right requires. Citizens' ability to claim their rights under Section 27 is subject to the availability of resources. This interpretation is a reflection of the logic of neoliberal development and limited resources, in this case the limited amount of water and money to build water infrastructure. If the City cannot pay to provide this water and water delivery infrastructure to the citizens for free, then it is not under obligation to do so. The responsibility of securing access to water falls to the consumers, who must be able to pay for the water in order to access an amount beyond the six kiloliters per household per month mandated by the FBW policy. Their right to access water is constrained by their ability to pay for the service. This is a departure from Judge Tsoka's claim that everyone has right to immediate fulfillment of the right to water, expressed

¹²³ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 11

through the order on the City to provide “sufficient” water in the amount of fifty liters per person per day for free.

The Constitutional Court’s interpretation of Section 27 largely agrees with that of the Supreme Court of Appeals, though is expressed much more clearly. Justice O’Regan writes that Section 27(1) of the Constitution creates a right to access sufficient water. The creation of this right imposes certain obligations on the state. Justice O’Regan then investigates what kind of obligations are imposed on the state in her discussion of the relationship between Section 27 (1) (b) and Section 27(2), which reads “The state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realization of each of these rights”¹²⁴ She says that the state’s role in the protection of human rights is traditionally to uphold negative rights, otherwise known as non-interference. However, in this case the question is to what extent the state can be held to a positive obligation to fulfill the right to water. To answer this question, Justice O’Regan turns to two previous decisions, *Grootboom*¹²⁵ and *Treatment Action Campaign No. 2*,¹²⁶ to illustrate how the Constitutional Court has dealt with questions of obligations imposed on the state by positive human rights in the past. Basing her opinion on these earlier decisions, Justice O’Regan asserts that it is clear that the right does not require the state to provide every person with sufficient water upon demand, but rather requires the state to take reasonable legislative and other measures, *within available resources*, in order to work towards the progressive realization of the right to water. As long as the

¹²⁴ South African Constitution s27(2) qted in *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (8 October 2009), emphasis added

¹²⁵ *Government of the Republic of South Africa and Others v Grootboom and others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

¹²⁶ *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033

state is taking steps towards fulfilling the right, it is considered to be fulfilling its constitutional obligation. Therefore, citizens cannot appeal to the Constitution for immediate fulfillment of the right to water. Given that governments face limited resources, the immediate fulfillment of this right is impossible, and the Court cannot place impossible demands on the City. The City does not have the resources to provide water beyond FBW amount, because it cannot afford to do so. It cannot afford to provide this water, because it is operating under a development strategy that requires it to recover the full cost of the service that it provides. Again, the logic of neoliberal development overcomes the arguments for a human right to water in the court's interpretation of Section 27.

3.4.2 Role of Foreign & International law

An important and unique part of the South African Constitution is Section 39, which instructs courts in the interpretation of the Bill of Rights. This section states:

39. When interpreting the Bill of Rights, a court, tribunal or forum -
1. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 2. must consider international law; and
 3. may consider foreign law.¹²⁷

Section 39 of the Constitution is important to the larger theme of this paper, the intersection of development and human rights in developing countries. As was seen in Chapter Three, a right to water can be constructed in international law. If the courts choose to rely heavily on international law in their decisions, then we could expect to see a consensus that there is an immediate right to water. However, if the courts did not rely

¹²⁷ South African Constitution, s39

heavily on international law and instead based their decisions on domestic law and the constraints of resource availability, we would see a consensus that there is not an immediate right to water. All three courts had unique interpretations of their duties under Section 39, with significant effects on the outcomes of their rulings.

The High Court interpreted Section 39 differently than the other two courts, as Judge Tsoka was the only authority to rely upon foreign law to support his reasoning. He relies on case law from lower courts in Brazil and Argentina to illustrate the unlawfulness of that discontinuation of water supply to indigent people due to non-payment. The highest court in the State of Parana in Brazil found in 2002 that “the disconnection of needed water supply constitutes a violation of human rights – even if it is the result of a non-payment”.¹²⁸ In the matter of *Users and Consumers in Defence v Aguas del Gran Buenos Aires* in 2002 an unspecified Argentine court found that the water company is not entitled to interrupt service and supply of water, as access to fresh water is a human right which all inhabitants of a country must be granted, regardless of ability to pay. The Civil and Commercial First Instance Court of Cordoba, Argentina, found again in 2002 in *Quevedo Miguel Angel y otros cl Aguas Cordobesas SA Amparo, Cordoba City, Juez Sustituta de Primera Instancia 51 Nominacion en 10 Civil y Comercial de la Gudad de Corboda* that the disconnection of water supply to low-income and indigent residents because they could not pay was unlawful. These decisions support the human rights approach to water delivery services, as they condemn the logic that access to water should be limited by access to the market, or the ability to pay.

Judge Tsoka made use of international law in his investigation of the existence of the international right to access to fresh water. He justified his use of international law in

¹²⁸ *Mazibuko and Others v City of Johannesburg and Others*, at paragraph 86

this case through two previous cases in South Africa, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2006 (6) BCLR 625 (W) and *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

Both of these cases stress the importance of international law when interpreting the Bill of Rights, including both binding and non-binding international law. On this basis, he turns to several sources of international law to support the right to water. First, Judge Tsoka looked to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and argued that Article 11 and 12 implicitly recognize the right to water through the rights to an adequate standard of living and the highest attainable standard of physical and mental health. United Nations Committee on Economic, Social, and Cultural Rights General Comment No. 15 of 2002 emphasizes the right to accessibility and availability of fresh water. Accessibility means that water should be both physically and economically accessible to all people regardless of economic status, while availability means that water supply must be sufficient for each person for personal and domestic use as well as continuous. Judge Tsoka writes: “The effect is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the populations. It is in this context that the State is under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis.”¹²⁹ He takes a logical leap with the use of the word “obligation” to describe the responsibilities of the state to the poor, and does not provide a basis for this conclusion.

Judge Tsoka highlights in his decision that General Comment 15 explicitly states that the State has a constant and continuing duty to work towards the progressive

¹²⁹ *Ibid* at paragraph 36

realization of the right to water. While the term “progressive realization” is somewhat intentionally vague, the Committee also says that retrogressive measures are prohibited, so the State cannot do anything that would reduce existing accessibility or availability of water. The applicants argued that the prepayment meters greatly reduced the availability and accessibility of water in Phiri. The Convention of the Rights (CRC) of the Child and its African equivalent (ACRC) specifically state in Article 24 of the CRC and Article 14 of the ACRC that the State has an obligation to fully implement the right of children to the highest possible standard of health and to combat disease through the provision of adequate food and drinking water. The African Charter on Human and People’s Rights guarantees in Article 16 the right to enjoy the highest attainable standard of physical and mental health. The African Commission on Human Rights found that failure by the State to supply basic services, such as water, is a violation of this right. Judge Tsoka finds that it is clear from this international law, along with the South African Bill of Rights, that the State is obligated to provide free basic water to the poor. This conclusion is another logical leap for which he provides no basis; however it does show Judge Tsoka’s support to the human right to water regardless of the existence of scarce environmental or financial resources.

Judge Streicher of the Supreme Court of Appeals made use of international law for a more limited purpose than did Judge Tsoka. He employed international law to answer the question of whether or not the City must provide access to sufficient water for free.¹³⁰ In his written decision, he first turns to General Comment 15, as did Judge Tsoka. He points out that this General Comment says that water, along with water facilities and services, must be affordable and accessible for all, including the most

¹³⁰ *City of Johannesburg v L Mazibuko* at paragraph 28

vulnerable or marginalized sections of the population. This must be true in law and in fact. He dismisses the City's assertion that it does not have to provide free water under the Water Services Act, which expressly states that a person who has demonstrated that they cannot pay for water must not be denied water service because of non-payment. He says that the City has realized that it holds the responsibility to provide free water, as evidenced by its, as of the time of the case, unimplemented Free Basic Water Implementation Strategy Document. This document recommends 10kl free water per household per month be provided to households based on land valued below a certain amount, and that no free water be given to households valued above that amount. This policy was to be implemented in July of 2008. While the whole strategy has not been adopted, the City adopted interim measures in 2007 that include using the indigents list to determine which households are eligible to receive 10kl of free water per month. The City argued to the court that it has limited resources and must recover the full cost of its services. High-income users already heavily subsidize water use by lower income users, and the City cannot afford to give more free water than the basic amount to those who cannot pay for the service. There are other demands on the City's resources, such as the many more households without any basic access to water. Judge Streicher finds that the current free water policy was adopted because the City made an error when it assumed that the Water Services Act superseded Section 27(1) of the Constitution, and thought that while they were obligated to provide 25 liters per person per day or 6kl per household per month, it was not for free. Therefore, having found that the City must provide sufficient free water under international law and domestic law, Judge Streicher decided to set aside the free water policy of the City on the grounds that a right to access

sufficient water exists, and the City has demonstrated that it has the ability to grant this access. This decision straddles the two extremes in the debate over the nature of water. On one side, Judge Streicher finds that there is a right to water, and that the City must provide sufficient water free of charge. However, he finds that it must provide free water only based on the conclusion that the City can afford to provide this service because it is within its available resources. This condition supports the idea that water must be paid for by someone, and idea that is unavoidable in a market economy.

Justice O'Regan of the Constitutional Court does not rely on international or foreign law when considering the constitutionality of the Free Basic Water policy and the use of prepayment meters. She mentions it only once, when considering the concept of progressive realization, and how it relates to the existence or non-existence of a minimum core content to Section 27. The concept of "minimum core" originates in international law, in General Comment 3 (1990) of the United Nations Committee on Economic, Social, and Cultural Rights.

The use of foreign and international law decreased as the case moved up the hierarchy of the courts. As the use of foreign and international law substantively decreased, so did the benefits of the decision for the applicants. From this pattern it is possible to conclude that an enforceable right to water begins to disappear as the court moves away from the international level, i.e. human rights documents, and grounds its decisions more in domestic law and policy. The next step is to investigate why this happens, and this will be addressed in the next sections, which address the existence or non-existence of a minimum core content to s27, the legality of prepayment meters, and the Constitutional Court's interpretation of progressive realization.

3.4.3 “Sufficient” water and minimum core

Section 27 of the Constitution states that everyone has a right to sufficient water. In this case, the applicants claimed that the state was not fulfilling that right, since 6kl of water per household per month is not sufficient. Therefore, it fell to the courts in this case to weigh evidence presented to them in order to determine an amount of water that is “sufficient”. This exercise was designed to give a core content to the right, and was followed by the High Court and the Supreme Court of Appeals. The Constitutional Court, however, rejected the idea of a minimum core content to the right to water, as it had with other socio-economic rights in previous decisions.

Judge Tsoka of the High Court referenced the World Health Organization (WHO) guidelines in order to determine what is meant by sufficient water. The WHO guidelines provide 25 liters per person per day as the basic amount of water required to maintain life over the short term. These 25 liters per person per day for purposes of consumption, and does not assure hygiene. The Free Basic Water Policy in South Africa states that the minimum quantity of potable water provided should be 25 liters per person per day. “Minimum” means that cities are free to provide more at their discretion, and some places such as Volksrust in KwaZulu-Natal do provide more than the minimum amount to their residents. Given that water is a scarce resource, and that South Africa must import water from other countries such as Lesotho, Judge Tsoka finds it understandable that the minimum amount provided for in the Free Basic Water Policy be 25 liters per person per day.

Judge Toska found that under Section 27(2) of the Constitution the respondents are obliged to provide more than the minimum amount of water if the residents needs

demand it, and if they have the available resources to provide more water. He found that the residents do have a need for more than the six kiloliters per household per month that the City provides them. Many households contain more than eight people, the number of people used to calculate the allowance, and many households have heightened sanitation needs due to illness. These two circumstances require more than six kiloliters per household per month of free basic water. Judge Tsoka ordered that each resident be giving fifty liters of water per person per day.

To support this decision, he relies on the affidavits of an expert that was presented to the court by the applicants, Peter Henry Gleick, the President of the Institute for Studies in Development, Environment, and Security. Gleick argues that, based on his substantial international comparative research, the Basic Water Requirement (BWR) for human needs is 50 liters per person per day. These 50 liters encompass cleaning, hygiene, drinking, cooking, and basic sanitation. Gleick goes on to state that the residents of Phiri need this much water every day due to their specific situation. They live in a hot, dry climate, and therefore require drinking water. Phiri is a crowded urban environment where the residents need to maintain sanitation, and cannot rely on rivers for bathing. Food needs to be washed and cooked in order to assure healthy eating. Six kiloliters per household per month is not enough to provide 25 liters per person per day in a place where the average household size is 16, and is certainly not enough to provide 50 liters per person per day.

Judge Tsoka finds that waterborne sanitation is essential to life in Phiri, and for the respondents to expect the applicants to conserve water through the use of prepayment meters to the detriment of their health is to deny them the right to lead a healthy and

dignified life. In this context, twenty-five liters per person per day of free water is insufficient. The city has the financial capacity to increase the amount of water provided to the applicants. The policies that have been adopted by the respondents to partially relieve water shortages while still imposing prepayment meters show that they also have the resources to provide more than 25 liters per person per day. Judge Tsoka reasons that the respondents can provide 50 liters per person per day without straining their capacity to provide water or their financial resources. He does not give a basis for this reasoning.

Jackie Dugard, a senior researcher and director of the Centre for Applied Legal Studies at the University of Witwatersrand, and a member of the applicants' legal team expressed the importance of Judge Tsoka's ruling in an interview with the Inter Press Service. Dugard described how South Africa has a constitution that is very strong on socio-economic rights, however the Constitutional Court has chosen to adopt a test of reasonableness rather than a minimum core standard.¹³¹ They look at whether or not the government policy that provides the context for the rights is reasonable. Judge Tsoka went beyond the reasonableness test and investigated if the minimum core of the right to water was being respected in this case. He relied heavily on international law in order to determine the content of the right to water to provide the state with a meaningful standard by which to judge reasonableness. Judge Tsoka stated in his decision that the Constitutional Court had not rejected the concept of the minimum core; it had just not seen fit to use it in the two socio-economic cases that it had heard,¹³² as the minimum core in those cases was too difficult to determine due to the nature of the rights in question. However, in the case of water rights, "without providing a basic content to the

¹³¹ Inter Press Service. "South Africa: Unlocking the Power of Constitutional Rights." Africa News, January 23, 2009. www.africanews.com (accessed February 22, 2010).

¹³² *Grootboom and Treatment Action Campaign*

right to have sufficient water, the right remains devoid of content”.¹³³

The City of Johannesburg argued that it had fulfilled its duty to the progressive realization of the applicants’ right to water through the prepaid water meter system, since the applicants were paying less than under the meter system and receiving free water for the first time. In its view, market environmentalism was working in Phiri by delivering an economically efficient amount of water. The residents are better off now, according to the City, especially after the amount of free water was increased to ten kiloliters per person per day for registered indigents and people with HIV/AIDS.¹³⁴

The legal team for the Phiri applicants, along with the Anti-Privatisation Forum and the Coalition Against Water Privatization, were optimistic that the High Court’s hard-line human rights based ruling concerning the core content of the right to water would be respected in the Supreme Court of Appeals. Jackie Dugard released a statement saying, “Judge Tsoka showed that socio-economic rights have teeth. His judgment shows a careful and sensitive understanding of the law, the City’s obligations, but above all our client’s lives”.¹³⁵

Judge Streicher of the Supreme Court of Appeals did indeed find that there is a core content to the right to water. He reasoned that, since the heart of the Constitution is a commitment to equality and human dignity, it follows that the right to access sufficient water is a right to access the amount of water that is necessary for a person to live a dignified life. He finds support for this conclusion in General Comment 15, specifically

¹³³ *Business Day* (South Africa). "Refreshing measure of a better life for all." May 09, 2008, Crime, Law, and Justice sec.

¹³⁴ Franny Rabkin. "Jo'burg to challenge Phiri water ruling." *Business Day* (South Africa), February 23, 2009, Social Issues sec.

¹³⁵ *News24.com*. "Appeal in water case." February 19, 2009.

http://www.news24.com/Content/SouthAfrica/News/1059/3be29d9b5c374ba3a054b024ab48e490/19-02-2009-01-03/Appeal_in_water_meter_case_ (accessed February 22, 2010).

the portion which discusses the necessity of water for the realization of other rights, and that the amount of water must be adequate for human dignity. The amount of water which is considered to be adequate relies on the circumstances in which the person or people in question are living. Judge Streicher goes on to analyze how much water is needed to live a dignified life in Phiri. He looks to the Water Services Act minimum amount of twenty-five liters per person per day, or six kiloliters per household per month, and concludes that this minimum must have been set in terms of communities that do have waterborne sanitation, since the evidence suggests that a flush toilet dispenses of approximately 10 liters of water with each flush. Phiri does have waterborne sanitation, and nobody had suggested that twenty-five liters per person per day is enough water to lead a dignified life in Phiri, nor could anyone suggest this given the evidence provided.

Judge Streicher questions the claims of the applicant's expert witness, Peter Gleick, concerning the core content to the right to water, and weighs them against the assertions of the expert witness called by the City, I.H. Palmer. Palmer is a civil engineer and the managing director of a consultancy company that offers expertise on water supply and sanitation. He takes a different view on how much water is required for a dignified life in a Highveld climate, such as the one in which Phiri is situated, concluding that 41.2 liters per day would be sufficient. Judge Streicher sees no reason offered by either party as to why Gleick's testimony should be given more weight than Palmer's, and concludes that forty-two liters of water per person per day would constitute sufficient water in terms of Section 27(1) of the Constitution.

Justice O'Regan of the Constitutional Court also addresses the claim of the applicants that the Court should give content to the right to water by setting a minimum

amount that is considered to fill the definition of “sufficient”. Historically, the South African Constitutional Court has rejected the concept of a minimum core. In *Grootboom* the Court rejected this notion, citing concerns of the Court’s ability to determine a minimum core that would facilitate the progressive realization of the right without all of the information about what the deliverance of the right entails. Justice O’Regan also cites *Treatment Action Campaign*, in which the Court explained that it is not in the position to issue orders that could have multiple unforeseen social and economic consequences. The role of the Court is to hold the state to its constitutional obligations and determine the reasonableness of its actions, not to make decisions that have budgetary implications. Decisions that would affect the budget should be left to the legislature, where the democratic process can take place. In other words, the Court does not find it appropriate to interfere with the development strategy that has been implemented by the government.

This is the point where we see the ability to enforce socio-economic rights vanish. The Constitutional Court stands by the assertion that the legislature and the executive should be the primary places for socio-economic rights to be realized, and the Court does not want to interfere with this process by setting a minimum standard. They do not insert a rights-based approach to development into the market-based strategy that is used by the government. The right to water, as understood in international law, vanishes when the Court does not intervene in the market-based system of development that grants access to resources based on the ability to pay.

3.4.4 Progressive realization and standard of reasonableness

The idea of progressive realization supports neoliberal development strategies through giving states some leeway in the enforcement of rights. The text of Section 27 (2), which states that the state must take steps towards the progressive realization of the right to water, implies that the right cannot be fulfilled immediately. Justice O'Regan argues that this means the people cannot demand immediate fulfillment of the right to water. The Constitution and the Courts are in place to hold the state accountable for the manner in which they seek to pursue these rights, to make sure that they are working towards the realization of socio-economic rights. Progressive realization gives the government an obligation to continually review its policies in order to work towards the achievement of the right for all people, but frees it from the obligation to grant the right immediately. The fact that the City has, within the period of litigation, reviewed its social services policy and amended it in an effort to bring basic water to more people is evidence that the City is working towards the progressive realization of the right to water.

The Constitutional Court has rejected the idea of a minimum core content to socio-economic rights, and instead employs a test of "reasonableness" of the policies used to implement these rights. Justice O'Regan considers the reasonableness of the City's Free Basic Water policy as it was in 2007 when the High Court rendered its judgment. Recognizing that the policy has since changed, she explains the three levels of service that are offered to consumers: Service Level 1, which provides for communal taps that consumers do not pay for, Service Level 2, which provides for yard standpipes for which consumers pay a fixed fee, and Service Level 3, which provides for metered connections and consumers pay according to their usage. Every consumer in the City

receives six kiloliters of water for free every month, and beyond that must pay for their consumption. The tariff system for water is a rising-block system, so every unit of water is more expensive than the last unit. Water is priced at the marginal cost of producing the next unit, a strategy employed in the logic of market environmentalism. As water gets more expensive, the cost will deter waste. The effect of this tariff system is that heavy water users cross subsidize those that use less water, normally poor households. Poor households that have an income of less than twice the highest government grant plus R1 are able to register for the City's indigent registry. Once on the registry, they must accept the installation of prepayment meters for water and electricity, and they receive ten free kiloliters of water per person per household.

The applicants argued that the City's Free Basic Water policy is unreasonable because it provides free water to everyone regardless of income, it is formulated per household instead of per person, it is based on the misconception that they were under no obligation to provide free water, and the amount of water allocated is insufficient for large households. Justice O'Regan takes each of these arguments in turn. She found that the policy of providing all households with free water to be reasonable on the grounds that households that use more water are charged for their heavier water use, and it is difficult to establish a method to target households that are more deserving of free water than others. Justice O'Regan found the City's policy of allocating water per household rather than per person to be reasonable because, given the number of informal settlements and the continual movement of people within the city, it is too administratively difficult to determine how many people occupy each household. The applicants also argued that the policy was based on the City's misunderstanding that it was not under an obligation

to provide a specific amount of water for free. However, given Justice O'Regan's conclusion that the City is not obligated to provide a minimum core amount of water for free, but simply to work towards the progressive realization of the right to water, she concluded that the policy is not inconsistent with the Constitution or unreasonable. Justice O'Regan found the FBW Policy to be reasonable despite the fact that the amount allocated may be insufficient for large households. The fact that the amount of free basic water may be insufficient is an unavoidable result of establishing a universal allocation. It is difficult to determine where large households are, as often they are located in informal settlements such as Phiri. However, raising the basic level of services to accommodate these large households would be expensive and inequitable, since it will still disproportionately benefit residents with smaller households.

An article in *Business Day* by Eusebius McKaiser celebrates the tight legal arguments made by Justice O'Regan in her decision. He examines the court's reasonableness test for the enforcement of socio-economic right in government policy, saying, "This requires a delicate balancing act. The court should not dictate the content of socioeconomic policies. That is the government's prerogative, and it is desirable because the government has a popular mandate for policy creation, while the courts do not."¹³⁶ The Court did not attempt to establish a minimum core to the right to water, instead investigating whether or not the government had demonstrated that it is working towards the progressive realization of the right to water. McKaiser discusses how this case illustrates the importance of the Constitutional Court not overstepping its boundaries, and believes that the reasonableness test is a powerful tool for accountability to the rights

¹³⁶ Eusebius McKaiser. "Court Strikes Right Balance on water for poor people." *BusinessDay*, October 13, 2009. <http://www.businessday.co.za/articles/Content.aspx?id=83847> (accessed March 15, 2010).

guaranteed in the Constitution, while maintaining the market-based development policies.

Jackie Dugard responded to McKaiser's article, saying she believes that the litigation was strategic and successful, even though the Court did not rule in their favor. It was successful because it raised the profile of issues surrounding water privatization and the right to water. The loss itself can be used strategically to show the gap between constitutional ideals and the real conditions of poverty, and perhaps to push the legislature towards adopting legislation to bridge these gaps and end inequalities.¹³⁷

Not all members of the Phiri team were so gracious in their defeat. The Coalition Against Water Privatization wrote a post on the Western Cape Anti-Eviction Campaign's blog accusing Justice O'Regan of lazy legalism and bias. The post mentions that the decision was unanimous among the Constitutional Court justices, but does not allow this to be an excuse for what they believe to be a clear mistake on the part of the judges. The CAWP's major complaint, beyond the fact that the Court seemed to take the City and Johannesburg Water at their word about the success of the programs, is that the judges accept that the City has a duty to work towards sufficient water for all people, however they refuse to set a minimum core quantity as a goal. They argue that there is "no foundational of time/spatial basis upon which to adjudge what constitutes 'progressive realization.'"¹³⁸

This is a problem inherent in the idea of progressive realization that is at the heart of the debate over the nature of water. However the reasonableness test may be the best option for the present, given that South Africa was not left with many economic

¹³⁷ Jackie Dugard. "Losers can be winners." BusinessDay, October 20, 2009. www.businessday.co.za (accessed February 22, 2010).

¹³⁸ Dale McKinley. "Phiri Water Case: Constitutional Court Fails the Poor and the Constitution." Western Cape Anti-Eviction Campaign. Web log entry posted October 11, 2009. <http://antieviction.org.za/> (accessed March 17, 2010).

resources after the end of apartheid. The CAWP as well as legal experts were disappointed that the Constitutional Court did not engage the content of the right to water by establishing a minimum core, arguing that progressive realization is meaningless without a normative goal to aspire to.¹³⁹ The Court's ruling does limit the ability of people to hold the state accountable to a goal, but it does assert the fact that the state must continue to make changes and work towards fulfilling the right to water. In essence, the Constitutional Court's decision supports the argument that a right to water exists theoretically, but cannot be enforced in the face of market-based development strategies and limited resources.

¹³⁹ Sandra Liebenberg. "Water rights reduced to a trickle." Legalbrief Today, October 21, 2009. <http://www.legalbrief.co.za/> (accessed March 2, 2010).

Chapter Four: Implications of *Mazibuko* for Right to Water

The larger tensions between neoliberal development schemes and the idea of the right to water came together in the *Mazibuko* case. All three courts had to weigh concerns of individual rights, sustainability, and economic development while deciding how to proceed in this application. This case was the first right to water case to be heard in the highest court of a state, and South Africa has taken a role as a leader in national enforcement of socio-economic rights.¹⁴⁰ Therefore, the approach that the Constitutional Court took to the case sets an important precedent for the feasibility of judicial enforcement of the right to water. This judgment, as well as the larger trends in the Constitutional Court's history of socio-economic rights cases, must be investigated in order to distill lessons that could affect the enforcement of the right to water in other developing countries.

The main question is: Can the right to water be enforced on a national level? In order to answer this question, it is necessary to discuss two topics. First, I will discuss the justiciability of socio-economic rights in South Africa, and how the *Mazibuko* case reinforced previous decisions by the Constitutional Court. Then, I will review how the implications of the *Mazibuko* judgment and the Constitutional Court's approach to socio-economic rights affect the enforceability of the right to water through the judicial system. I will conclude that, while the right to water can be constructed on an international level, national enforcement is not currently feasible. Finally, I will offer some of my own

¹⁴⁰ Inga Winkler, "Judicial Enforcement of the Human Right to Water - Case Law from South Africa, Argentina, and India," *Law, Social Justice & Global Development* 1 (October 9, 2008): 4, http://www.go.warwick.ac.uk/elj/lgd/2008_1/winkler (accessed March 2, 2010).

thoughts concerning how activists for the right to water in South Africa, as well as the nation of South Africa, can move forward towards realizing the right to water.

4.1 *Justiciability of socio-economic rights*

The justiciability of socio-economic rights is an emerging subject. Civil and political rights are generally negative rights, the right to be free from state interference. These are generally considered to be justiciable, as they require the court to order the state to stop an action. Socio-economic rights, however, are generally positive rights that require supplemental state action. Enforcement of these rights would require courts to order the state to do something, such as supply all citizens with sufficient water. The 1996 Constitution contains a Bill of Rights that includes civil and political rights as well as socio-economic rights, and was envisioned to be fully justiciable.¹⁴¹ Since the adoption of the Bill of Rights, the ability of the Constitutional Court to enforce socio-economic rights has been tested in several cases that include the Mazibuko judgment. The Mazibuko case served as a test for the Court to either solidify the approach that it has taken in previous socio-economic rights cases, or to diverge from their trend and take a different approach. The two possible approaches that the Court could have taken were the “reasonableness” test that was developed with the case of *Soobramoney v Minister of Health*, or to adopt a “minimum core” approach, which would have given solid content to the right to water. First, I will explain the origin of “minimum core”, and why the Constitutional Court has rejected this notion in its previous cases and in this case. Then, I will explain the development of the “reasonableness” test and how it was applied in the Mazibuko case.

¹⁴¹ Magaziner, "The Trickle Down Effect," p.5

4.1.1 Minimum core

The United Nations Committee on Economic and Social Rights developed the concept of minimum core content to a socio-economic right in 1990, equating it to a legal entitlement and an obligation of strict liability that the state has to its citizens.¹⁴² In the Committee's General Comment no.3, they reflect upon the language contained in Article 2.1, which encourages states to "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."¹⁴³ The right to water in section 27 of the South African Constitution contains the same language in s27 (2), providing that the state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization"¹⁴⁴ of the right to water. The idea of progressive realization could be interpreted to give states an excuse for not implementing the rights in the Covenant, and for cities to not enforce the right to water. In order to prevent this shortcoming, the Committee developed the idea of a minimum core content to each socio-economic right. Without a minimum core, the Committee is of the opinion that the Covenant would lose its reason for being, as there would be no content to the rights contained within. A minimum core would also establish a way to measure the progress of the states party to the agreement, and assure that the citizens of those states would have their rights fulfilled. The core content would function as the floor below which no

¹⁴² Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *The Yale Journal of International Law* (Winter 2008): 115.

¹⁴³ ICESCR, Art 2.1

¹⁴⁴ South African Constitution s27(2)

state can fall, and “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”¹⁴⁵ In the case of the right to water, having a minimum core content would make the right to water more easily enforced by the judiciary. It would give the court a standard by which to measure the actions of the state, and it could judge whether or not the state had met the standard.

The High Court and the Supreme Court of Appeals both adopted the minimum core standard in their judgments, while the Constitutional Court rejected it. The reasoning behind the Court’s rejection of the minimum core standard lies in previous cases heard since the 1996 Constitution came into effect. The central concern of the Court has been the availability of state resources. This concern was first voiced in *Soobramoney v Minister of Health*, a case that brought the right to healthcare to the Constitutional Court. The Court ruled that the applicant, Mr. Soobramoney, was not entitled to weekly dialysis under s27,¹⁴⁶ as ruling in his favor would have mistakenly prioritized terminal illnesses over preventing threatening medical conditions and therefore limited the state’s ability to fund preventative healthcare programs. This decision showed extreme deference, signaling an early indication of its continued hesitation to assert a judicial voice in traditionally legislative or administrative matters.¹⁴⁷ The Court outright rejected the minimum core standard in *Minister of Health and Others*

¹⁴⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, available at: <http://www.unhcr.org/refworld/docid/4538838e10.html> [accessed 19 April 2010], paragraph 10

¹⁴⁶ The same section of the Constitution that includes the right to water also mentions the right to healthcare.

¹⁴⁷ Magaziner. "The Trickle Down Effect" p. 564-5

v Treatment Action Campaign and Others in 2002, asserting that “it is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected from the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”¹⁴⁸

The practice of not interfering with other branches of the state that began with *Soobramoney* developed into a rejection of the minimum core content of a right, as asserting a minimum core could have policy and budgetary repercussions. The implication of a rejection of minimum core for the right to water is that there is no quantity that can be asserted as the minimum amount of water that the state must supply in order to comply with the Constitution. Citizen’s ability to seek immediate relief under the Constitution is therefore significantly limited.

The Court rejected the minimum core in the *Mazibuko* case because they believed that asserting a minimum core content to the right to water would have budgetary implications. The Constitutional Court maintained that it is not their place to make decisions that are best left to the executive and legislature, where the democratic process should take place. Justice O’Regan writes: “The Constitution envisages that the legislative and other measures will be the primary instrument for the achievement of social and economic rights.”¹⁴⁹ Therefore it is beyond the power of the Court to decide the quantity of water that should be the minimum amount provided.

4.1.2 Reasonableness

The Court has developed an alternate standard by which to judge progressive realization. This standard is a test of reasonableness, and was developed in the course of

¹⁴⁸ *Minister of Health and Others v Treatment Action Campaign and Others* at paragraph 35

¹⁴⁹ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (8 October 2009) at paragraph 66

Government of the Republic of South Africa and Others v Grootboom and others, a case that addressed the right to housing in 2001. In this case, the Court rejected the minimum core argument, instead focusing on whether or not the housing policy adopted by Cape Town's provisional government was a reasonable method to fulfill its obligations under s26 of the Constitution.¹⁵⁰ The reasonableness test looks at plans, policies, or programs of the government that are designed to achieve the progressive realization of the rights contained within the Constitution. The general evaluation of reasonableness consists of three parts. First, the action must have "substantive measures that are comprehensive, coherent, flexible, balance, and feasible. It must have a workable legal and administrative infrastructure (mere framework legislation is insufficient), and it cannot exclude large swaths of people."¹⁵¹ If the plan does exclude a large portion of the population, then it must provide a justification for why those people are not included. Second, the rate at which the action is implemented must reflect progressive realization. In order for the government to satisfy its constitutional obligations it must move towards the goal as quickly as possible, but does not need to achieve the goal immediately. Finally, the reasonableness of an action is weighed against the government's available resources. However, the indigent component of a plan must be implemented with more urgency, and must be entirely government funded, therefore the state has less budgetary discretion than with non-indigent programs. If a party sues the government to contest the constitutionality of an action, as happened in the Mazibuko case, the burden of proof rests

¹⁵⁰ The right to access adequate housing.

¹⁵¹ Francis, "Water Justice in South Africa," p.189

with the plaintiff.¹⁵² That is, the applicants must prove that the state's plan is unreasonable.

The Constitutional Court has been criticized for this approach. Critics claim that the reasonableness test is not far-reaching enough, and does not provide grounds for immediate relief from hardships. The minimum core approach would provide a minimum baseline standard for the Court to enforce as a starting point for progressive realization.¹⁵³ In the case of the right to water, a minimum core approach would provide a minimum quantity of water that the state is obliged to provide, whereas with the reasonableness test it must only prove that it is implementing policy and infrastructure to expand water services.

4.2 Implications for the right to water

The approach that the Constitutional Court took in the Mazibuko case, coupled with the overarching circumstances in South Africa, has consequences for the justiciability of right to water. One of the main reasons that the Constitutional Court cites for rejecting the minimum core approach to socio-economic rights is that it would interfere with the budget. The Court shies away from decisions that would influence the macro-economic policy of the state, and the water infrastructure falls under the umbrella of macroeconomic policy. As demonstrated earlier in this thesis, South Africa's water policy is influenced by its larger neoliberal economic strategy. This neoliberal economic strategy was adopted under the pressure of globalization, and has not succeeded in improving the conditions of those living in poverty or in the delivery of water

¹⁵² *Ibid*

¹⁵³ Winkler, "Judicial Enforcement of the Human Right to Water," (accessed March 2, 2010).

infrastructure to all citizens.¹⁵⁴ Rose Francis predicted in 2005 that the government's Free Basic Water policy would stand the test of reasonableness, stating "given that the Constitutional Court will interpret the constitutional right to water as merely a governmental obligation to the population rather than the right of an individual to a specified quantity of water, the government is not legally required to provide *every single* person with *immediate* access to potable water."¹⁵⁵ Justice O'Regan makes a similar argument in *Mazibuko*, saying that the obligation imposed on the government under s27 (1) and (2) of the Constitution "...requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim 'sufficient water' from the state immediately."¹⁵⁶

Why does the Constitution not give citizens the right to claim sufficient water immediately? The government does not have the means to provide sufficient water immediately, and even if the Court were to order it to do so, it would be unable to. Given that the government runs public utilities under a system of full-cost recovery,¹⁵⁷ and that there are multiple socio-economic rights that require government funding and implementation,¹⁵⁸ "the lack of government institutional capacity to finance and deliver public goods might undermine the right to water."¹⁵⁹ It is clear from the *Mazibuko* judgment that the City of Johannesburg lacks the capacity to immediately fulfill the right

¹⁵⁴ Francis, "Water Justice in South Africa," p.195

¹⁵⁵ *Ibid*, 192

¹⁵⁶ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (8 October 2009) at para 57

¹⁵⁷ Greg Ruiters, "Contradictions in municipal services in contemporary South Africa: Disciplinary commodification and self-disconnections," *Critical Social Policy* 27, no. 4 (2007): 489.

¹⁵⁸ Such as the rights to housing, healthcare, and education.

¹⁵⁹ Stephen C. McCaffrey and Kate J. Neville, "Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries," *Willamette Journal of International Law & Dispute Resolution* 21 (Summer 2009): 693.

to water, and to that end the Court asks it to demonstrate a reasonable plan for the progressive realization thereof. The right to water can be constructed on an international level, but when taken to enforcement at the national level in South Africa, the state lacks the ability to enforce and deliver access to sufficient water.

4.3 Flowing Forward

More than a year of research on the topic of water rights enforcement has lead me to a bleak conclusion. It appears that the current global economic system and natural resources limitations make the enforcement of water rights impossible. Water is the ultimate common resource; all people need it and yet there is not enough for all of the demands to be met. As illustrated by this thesis, the commodification and privatization of water contributes to its economic inaccessibility. In this section, I will discuss what tactics are used by non-governmental organizations to promote water rights, and then offer my opinion concerning tactics that would be more effective.

There are community, national, and international organizations that have made it their mission to assist with access to clean water. These organizations range from the Mvula Trust, established in 1993 in South Africa to support community-driven water and sanitation projects¹⁶⁰ to Charity:Water and the Global Water Initiative, which are large international non-governmental organizations. Charity: Water works to install wells and sanitation facilities in developing countries to provide direct relief,¹⁶¹ while the Global Water Initiative builds its projects on the Integrated Water Resources Management Approach (IWRM). This approach stresses protection of the environment, improving

¹⁶⁰ "About Mvula." The Mvula Trust. <http://mvula.org.za/about/> (accessed April 19, 2010).

¹⁶¹ "Projects." Charity: water. <http://www.charitywater.org/projects/projects.php> (accessed April 19, 2010).

access to water and sanitation through community capacity building, and supports lobbying in favor of improved water policies.¹⁶² These organizations all work from a grassroots based, and include community empowerment as part of their goals. Their tactics are noble, but do not seem to generate the kind of widespread change that would be necessary to immediately fulfill the right to water.

The trend that runs through these three examples as well as the others that I have encountered is that they have two targets for their work. The first target is people without access to water, the rural or urban poor that lack the infrastructure or economic ability to easily obtain sufficient water. They are supported through community building and technological transfer. The second target is government agencies responsible for water policy, which are targeted through lobbying. This approach leaves out a major actor in the water services sector: private water companies. Corporate Accountability International, as well as the Anti-Privatization Forum that aided the applicants in the *Mazibuko* case, are two organizations that have specifically targeted the privatization of water.¹⁶³ However, even in these cases the organizations approach water access from a human rights perspective, a tactic that we saw failed in the *Mazibuko* case.

Water rights need to be re-examined in the context of the larger conversations that served as a framework for this thesis. There are many different debates that serve as a background for understanding the complex nature of enforcing the right to water, so why are water rights activists using limited discourses in advocating for the right to water? As we have seen with the Lesotho Highlands Water Project case, there are global processes

¹⁶² "OUR APPROACH - Global Water Initiative." Global Water Initiative. <http://www.globalwaterinitiative.com/index.php/our-approach/> (accessed April 19, 2010).

¹⁶³ "Protecting Against Privatization." Corporate Accountability International. <http://www.thinkoutsidethebottle.org/> (accessed April 19, 2010).

at work behind development strategies and resource scarcity. The LHWP was constructed in order to provide Johannesburg with more water because the city was growing, and the current amount of water was not enough to support the anticipated economic growth. In order to understand the nature of the water scarcity problem in Johannesburg and the resulting lack of access to water experienced by Ms. Mazibuko and the other residents of Phiri, there must be an understanding of more than the international right to water. Scholars of water rights need to conduct further research into how global phenomena affect the ability of individuals to access fresh water. Research must be done on the effects of industrial agriculture in water stressed areas, and if and how efficiency gains can be made to increase the amount of water available for personal use. If the amount of water used by agriculture is protected, then why is it protected? Scholars must delve deeper into the politics around water use, as well as the science of hydrological systems. Are large inter-basin transfers such as the LHWP an effective remedy for water shortages? Is there a future in desalinization programs? There are only a few of the many questions that need to be asked, and are being asked, about the right to water.

Although a right to water can be constructed from international human rights law, it is impossible to enforce the right to water in a developing country that employs a neoliberal development strategy and faces scarce resources. This thesis has demonstrated the limits of a human-rights approach to ensuring universal access to clean water, but it has also begun the search for a new approach to enforcing the right to water.

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