

Water rights, climate, 'environmental services' and post-neoliberal strategy from Johannesburg to Rio+20: A critique of liberal NGO and neoliberal Green Economy narratives

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A rights-based climate agenda can potentially challenge the dominant market narrative with respect to climate change reparations, adaptation and mitigation in the countries least responsible for the crisis. But learning from the case of water in the most advanced court challenge to neoliberal state power that has yet been adjudicated, in Johannesburg in 2009, it is just as likely that rights-talk can be coopted by neoliberalism. If that happens more systematically within the climate justice struggle in which court cases will emerge more frequently, momentum towards a genuine breakthrough against 'Green Economy' corporate control of global environmental governance could well be distracted. The classical problems associated with rights-based narratives – liberal individualism and disconnection from broader socio-economic and ecological processes – may continue to be crippling, as witnessed in the example of South African water policy, law and activism. And like the threat from a Paris-based water privatization company (Suez) to Soweto women who sued the city to change policies, the Rio+20 Earth Summit made these ideological arguments yet more critical. There, endorsement of market determinations of nature required a stronger countervailing 'decommodification' narrative. But the question posed here, is whether using human rights considerations will make this task any easier, and the answer arrived at is negative.

Introduction: Rights under attack at Rio

This article reviews the limits to a typical legalistic counterstrategy favoured by liberal NGOs, usually contrasted with neoliberal 'Green Economy' narratives that aim to price environmental services, narratives that dominated the Rio+20 Summit in June 2012. Along with carbon trading and geo-engineering, one of the most disputed aspects of 'neoliberalized nature' is water privatization, and the idea of a Payment for Environmental Services paradigm immediately confronts the strategic approach of a vast set of social movements across the world which, since the late 1990s, adopted the 'right to water' as a central demand. In the pages below, we consider the case of water, drawing on detailed experiences with rights narratives and market pressures in Johannesburg, South Africa (which, coincidentally, hosted Rio+10 in 2002).

The Rio+20 'Zero Draft' initially had a strong statement consistent with standard second-generation rights constitutional language:

67. We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all

human rights. Furthermore, we highlight the critical importance of water resources for sustainable development, including poverty and hunger eradication, public health, food security, hydropower, agriculture and rural development.

This initial language reflected the global debate over water rights, which had advanced rapidly in mid-2010 when the General Assembly (A/Res/64/292) and Human Rights Council (A/HRC/15/L/14) approved resolutions which drew upon and expanded water's role in the UN Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights. Adding a more explicit rights orientation was seen by civil society advocates as critical to assist the roll-back of water commodification, a process contested over the previous fifteen years in various Third World cities (most notably in Cochabamba, Bolivia, as well as in Argentina, Ghana, Tanzania, Mozambique, the Philippines, Indonesia and India) and even a few Northern cities (such as Atlanta, Georgia and Stockton, California).

However, in March 2012, backsliding began. The Zero Draft document was the subject of extensive debate and revision, especially over whether water rights should now be excluded. Anil Naidoo (2012) of the Council of Canadians, the single most active advocacy NGO on the cause, explained:

The whole human rights framework is under direct attack through this process, with a few states calling for deletion or 'bracketing' of all safeguards and protections within this document. Combined with the clear and dangerous neo-liberal framework of the 'Green Economy', removing human rights and other safeguards will have profound implications for the future. In particular, if we see the Human Right to Water and Sanitation removed from this Rio document, it will effectively end any substantial movement at the UN on this critical right.... Canada, the US and Israel are requesting deletion of the right, along with New Zealand and the Republic of Korea who are proposing non-binding language, supported by the UK and Denmark who are working within the EU... the G77, particularly the ALBA countries, remain strong for the right and Switzerland has made a strong intervention supporting the right. I am also happy to report that Japan has taken a very strong position against water pricing and full cost recovery...

This is not simply an environmental agreement with some interesting discussions, this is an attempt to mandate the way that we interact with nature by ensuring it is done through market and financial mechanisms which will guarantee access to capital and deny access to those without. The removal of the human right to water and all safeguards are related to this agenda because they are seen as a barrier to further commodification and financialization.

From Manila-based IBON International, Paul Quintos (2012) added,

We have been witnessing a systematic attempt by some powerful states to weaken, or 'bracket' or outright eliminate nearly all references to human rights obligations and equity principles in the text for the outcome of Rio+20... 'Right to safe and clean drinking water and sanitation' - delete! But they agree to 'efforts to improve access'

because they can always say that they are privatizing water utilities in order to encourage private investments and therefore improve access. Whereas rights assigns the duty to the state. 'Improving efficiency', even better...

So if all of these attempts by powerful states to remove rights, eliminate equity, whittle down Rio principles and avoid concrete commitments to meaningful reforms in social, economic and environmental policies and governance, then what are we left with? CSOs and social movements are already asking the question whether we are better off with a weak agreement in Rio or no agreement at all.

There is a narrative emerging from these negotiations which can only be understood in the current global context. This is happening in the middle of the gravest crisis of the global capitalist system since the Great Depression of the previous century. Capital is desperately seeking new investment outlets, new markets, new sources of raw materials and new ways of squeezing more profits from the toil of working people. But they can't privatize if we assign clear obligations on states to ensure universal access to water and so on which is what rights imply...

We have to send a resounding message to our purported leaders that we will not allow them to 'delete' our rights and 'bracket' our futures. We must not allow them to backtrack on the Rio principles and on human rights obligations. We must make it clear to them that this is not the future we want!

The base for attacking Rio+20 Green Economy penetration of water and other sectors was the Peoples Summit for Social and Environmental Justice in Defense of the Commons. The idea of meeting on a famous landfill during the Summit, according to the Peoples Summit Editorial Committee (2012) is 'to propose a new way of living on the planet, in solidarity against the commodification of nature and in defense of the commons,' because since the first Rio, 'the lack of action to overcome social and environmental injustice has frustrated expectations and discredited UN.' The demonstration of around 50 000 people on June 20 called attention to the UN's hijacking by corporate capital, and the need for a 'commons' strategy to counteract neoliberalized nature.

What kind of narratives worked best under these circumstances of global class struggle for the environment? Specifically, this article asks, how appropriate is it for influential strategists to emphasize 'rights talk' as a means of countering corporate-neoliberal pressure, such as in the field of water? This debate trails by a few years the same concerns about the efficacy of water rights invoked both by the state and by social activists in post-apartheid South Africa. The simple question is whether by invoking the right to water and attempting to define it in the context of neoliberal municipal management, does a generic commitment to rights trump the market? Or instead, work *within* it in a manner consistent with Payment for Environmental Services principles?

To appreciate the parallels to the global strategy of opposing the emerging Payment for Environmental Services framework with global water rights, we consider background contextual information, including the challenge of water/sanitation delivery, and the specific problems associated with Africa's richest city (Johannesburg), particularly its most politicized neighbourhood (Soweto). The article then addresses thorny technical issues

that have arisen in the course of transforming rights discourse into justiciable service delivery. The limits of liberal capitalist democracy as the basis for social services provision in poor neighbourhoods – under circumstances of extreme inequality and fiscal pressures – became evident in 2009, when Soweto activists promoting water rights were defeated in the courts. Their potential move ‘out of the box’ of the liberal rights narrative, towards a ‘commons’ approach to water, is explored in the conclusion.

In South Africa, righting water wrongs, or merely revisiting retail rights?

Since the UN Declaration of Human Rights, the idea that all individuals have certain basic human rights, or entitlements to political, social, or economic goods (such as food, water, etc.) has become a key framework for politics and political discourse. In appealing to human rights, groups and individuals attempt to legitimize their cause, and to accuse their opponents of ‘denial of rights’. As water is essential to human life, social conflict surrounding water is now framed in the terms of the ‘human right’ to water. In this ‘culture of rights’, social groups use ‘rights talk’ as a blanket justification for the provision of water; in some cases, however, even popularly elected governments dispute their exact responsibilities for water provision and management.

During apartheid, water was a relatively low-cost luxury for white South Africans, with per capita enjoyment of home swimming pools at amongst the world’s highest levels. In contrast, black South Africans largely suffered vulnerability in urban townships and in the segregated ‘Bantustan’ system of rural homelands which supplied male migrant workers to the white-owned mines, factories and plantations. These rural homelands had weak or non-existent water and irrigation infrastructures, as the apartheid government directed investment to the white-dominated cities and suburbs, and also in much more limited volumes to black urban townships.

After 1994, racial apartheid ended but South Africa immediately confronted international trends endorsing municipal cost-recovery, commercialization (in which state agencies converted water into a commodity that must be purchased at the cost of production), and even the prospect of long-term municipal water management contracts roughly equivalent to privatization. As a result, water was soon priced beyond the reach of poor households. South Africa’s 1996 Constitution, however, included socio-economic clauses meant to do away with the injustices of Apartheid. Grassroots water activists seized on the guarantee to clean water specified in the Bill of Rights, and their discourses soon invoked ‘rights talk’. They insisted upon a social entitlement to an acceptable supply of clean water, amounting to at least 50 liters supplied per person per day, delivered via a metering system based on credit, not ‘pre-payment’. Meanwhile, their critics bemoaned a new ‘culture of entitlement’ in which the government was expected to solve all social ills. As Madywabe (2005:1) of the (pro-market) Helen Suzman Foundation put it,

Cynics fear that a culture of entitlement is growing. But the left finds such statements insulting and dehumanising, and argues that it is crass to suggest that people are unwilling to pay for services when unemployment exceeds 40 per cent... A turning point in the African National Congress government's thinking came in

1995, when Nelson Mandela returned from Europe and spoke in favour of privatisation.

In South Africa, the shift to a market-based system of water access has been protested in various ways, including informal/illegal reconnections to official water supplies, destruction of prepayment meters, and even a constitutional challenge over water services in Soweto. While such protests confront powerful commercial interests, they attempt to shift policy from market-based approaches to those more conducive to 'social justice'. Nevertheless, this chapter draws on the 2008-2009 courtroom dramas to argue that a rights discourse has significant limitations so long as it remains primarily focused on the social domain.

The objective of those promoting water rights should be to make water primarily an eco-social, rather than a commercial, good. Including ecosystemic processes in discussions of water rights links consumption processes (including overconsumption by firms and wealthy households) to environmental sustainability. Once we interrogate the limits to rights discourse in the South African context, the most fruitful strategic approach may be to move beyond the 'rights' of consumption to reinstate a notion of 'the commons', which includes the broader hydro-political systems in which water extraction, production, distribution, financing, consumption and disposal occurs.

The challenge is exemplified by the enormous health impacts of unpurified water use. Globally, an estimated 1.2 billion people lack access to purified water supplies, and 'some 2.6 billion people – half of the developing world and 2 billion of whom live in rural areas – live without improved sanitation', according to UNESCO (2006:221). A child dies every 15 seconds from water-related diseases, as ingestion of contaminated water can lead to a variety of illnesses including cholera, typhoid and dysentery. Up to 2.1 million deaths due to diarrhoeal diseases are attributable to the 'water, sanitation and hygiene' risk factor, 90 percent of which occur in children under five. Malnutrition that accompanies diarrhoeal disease places millions more at greater risk of death from other diseases. Water-borne parasites also cause a range of illnesses (Global Health Watch 2005: 207-224). As climate change exacerbates these problems and absolute water scarcity emerges, countries like South Africa – and metropolitan areas such as Johannesburg – will become sites of conflict, paralling rural Darfur, Sudan, where sustained drought catalysed a ferocious war over land and water access.

Water rights and water denial in Soweto and Johannesburg

In October 2009 South Africa's Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water access to poor people. In *Mazibuko et al v Johannesburg Water*, five Soweto women had successfully argued for their right to a larger supply of free municipal water and for abolishing the recently-installed pre-payment meter system. In the ruling, Johannesburg High Court Judge Moroa Tsoka ruled that the 'prepayment water system in Phiri Township' was 'unconstitutional and unlawful', and ordered the city to provide each applicant and other residents with a 'free basic water supply of 50 litres per person per day and the option of a

metered supply installed at the cost of the City of Johannesburg' (Mazibuko & Others v the City of Johannesburg & Others, 2008). Judge Tsoka accused city officials of racism for imposing credit control via prepayment 'in the historically poor black areas and not the historically rich white areas.' He noted that meter installation apparently occurred 'in terms of colour or geographical area', and the community consultation process was 'a publicity stunt' characterised by a 'big brother approach' (for details see Bond and Dugard, 2008). It was the first South African case to adjudicate the constitutional right of access to sufficient water (RSA, 1996).

The case had been appealed by Johannesburg municipal and national government officials who were declared to be in violation of the Sowers' Constitutional right to water by Johannesburg High Court Judge Moroa Tsoka in April 2008. Judge Tsoka ruled that the 'prepayment water system in Phiri Township' was 'unconstitutional and unlawful', and ordered the city to provide each applicant and other residents with a 'free basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg' (Mazibuko & Others v the City of Johannesburg & Others, 2008). It was the first South African case to adjudicate the constitutional right of access to sufficient water (RSA, 1996).

Johannesburg municipal and national government officials appealed *Mazibuko et al v Johannesburg Water*. The appeal was based on the decision by Johannesburg officials, just a few weeks prior to Judge Tsoka's decision, to retract the African National Congress's (ANC) promise of universal free basic water service. In the 2000 municipal election campaign, their statement had been clear: 'The ANC-led local government will provide all residents with a free basic amount of water, electricity and other municipal services so as to help the poor. Those who use more than the basic amounts, will pay for the extra they use.'

There is an extensive record regarding the way the right to water was distorted in Johannesburg (Bond 2002, 2006; Bond and Dugard 2008). Initially, Johannesburg Water officials reinterpreted the 'right to water' mandate regressively by adopting a relatively steep-rising tariff curve. In this fee structure, all households received 6000 liters per month for free, but were then faced with a much higher second block (i.e., the curve was convex-up), in contrast to a concave-up curve starting with a larger lifeline block, which would have better served the interests of lower-income residents. The dramatic increase in their per-unit charges in the second block meant that for many poor people, there was no meaningful difference to their average monthly bills even after the first free 6kl. Moreover, the marginal tariff for industrial/commercial users of water, while higher than residential, actually declined after large-volume consumption was reached.

In early 2008, changes to Johannesburg Water pricing policy meant that although there was a higher Free Basic Water allotment, of 10kl/month, the 2000 promise of free basic water would be kept only for the small proportion of the population declared 'indigent', instead of on a universal basis to all. Facing the lawsuit, and following the departure of the French water company which set the original prices, there was scope for a slightly more redistributive and conservationist pricing system, and the 2008/09 water price increases included very slight above-inflation rises for higher blocks of consumption (Table 1).

Table 1: Johannesburg water tariff changes in 2008

Proposed Domestic Water Tariff – Metered Areas

Kilolitres per connection per month	2007/08 Tariff (R/kl)	2008/09 Tariff (R/kl)
0-6	Free	R2.50
7-10	R4.40	R4.40
11-15	R5.90	R5.90
16-20	R7.40	R7.86
21-30	R8.80	R9.43
31-40	R8.80	R9.52
41 +	R10.40	R11.36

Free basic water is increased from 6kl to 10kl per household per month, for registered indigents.

Proposed Domestic Water Tariffs in Previously Deemed Consumption Areas fitted with Metered Connections as per the Gcin'amanzi Project

Kilolitres per connection per month	2007/08 Tariff (R/kl)	2008/09 Tariff (R/kl)
0-6	Free	R2.50
7-10	R3.40	R3.40
11-15	R4.00	R4.00
16-20	R6.20	R6.58
21-30	R8.50	R9.11
31-40	R8.50	R9.20
41+	R10.40	R11.36

Free basic water is increased from 6kl to 10kl per household per month, for the registered indigents.

Source: City of Johannesburg tariff chart

Undeterred by the change in policy, Tsoka agreed with the Soweto plaintiffs that Johannesburg Water's pre-payment water meters and inadequate free water supply violated their rights. He insisted on a doubling of the per capita amount to 50, and accused city officials of racism by imposing credit control via prepayment 'in the historically poor black areas and not the historically rich white areas.' Meter installation apparently occurred 'in terms of colour or geographical area', and the community consultation process was 'a publicity stunt' characterised by a 'big brother approach' (for details see Bond and Dugard, 2008).

What ideology informed Johannesburg officials' orientation to water pricing? The top-down neoliberal approach to meters and consultation conformed to the city's overall strategy of decentralization and geographical differentiation of service provision according to ability to pay. The World Bank reported on its

local economic development methodology developed for the City of Johannesburg in 1999. The latter sought to conceptualize an optimal role for a fiscally decentralized

City in the form of a regulator that would seek to alleviate poverty by applying a two-pronged strategy. The first prong would focus on reducing 'income-poverty' through job creation by creating an enabling business environment for private sector investment and economic growth in Johannesburg. The second prong would address non-income poverty reduction by directly tracking the effects of local government expenditures on service delivery to poor households in the city.

The 'enabling business environment' kept prices low for business but high for the poor, notwithstanding the 'second prong'. Moreover, the Bank encouraged the commercialization of the municipal water company, which led to one of the world's largest management contracts, won by the French firm Suez for the period 2001-06. As the world's second largest water company, Suez came to South Africa just before the end of apartheid, picking up three small water concessions in Eastern Cape towns during the early 1990s. The firm won the bid for a five-year trial contract to manage Johannesburg Water, in part by taking the city's councilors on a junket to Argentina the year before, where the 'success story' of Buenos Aires was unveiled. (The Suez contract in Buenos Aires would fail when the Argentine government disallowed Suez's substantial hard-currency profit repatriation in the midst of the 2002 economic crisis.)¹

In South Africa, Suez inherited a dysfunctional retail water system, especially in Johannesburg's vast shack settlements which are home to nearly a third of the city's 3.2 million residents. There, according to city surveys, 65 percent of the population use communal standpipes and 20 percent receive small amounts of water from tankers (the other 15 percent have outdoor yard taps). For sanitation, 52 percent have dug pit latrines themselves, 45 percent rely on chemical toilets, 2 percent have communal flush toilets and 1 percent use ablution blocks. These conditions are particularly hostile to vulnerable people: they breed opportunistic infections at a time when Johannesburg's HIV rate has soared above 25 percent, and in the last decade cholera and diarrhea epidemics have killed many tens of thousands of people, especially children.

Instead of expanding water access in these underserved areas, Suez initiated massive water disconnections. In early 2002, just before community resistance became an effective countervailing force, Johannesburg officials were disconnecting more than 20,000 households per month from power and water (citation), contradicting the claim on the Department of Water Affairs and Forestry's website that Johannesburg offers 100 percent of its residents Free Basic Water. For municipal bureaucrats and Suez, disconnecting low-income people and maintaining low water/sanitation standards was a strategy, quite simply, to save money.

¹ Also in 2002 the Lesotho government prosecutors charged Suez subsidiary Dumez with bribing Masupha Sole, the manager of the Lesotho Highlands Water Authority (which supplies Johannesburg with water). Sole allegedly received \$20,000 at a Paris meeting in 1991 to engineer a contract renegotiation providing Dumez with additional profits in excess of \$1 million, at the expense of Johannesburg water consumers. On those grounds, the South African Municipal Workers Union asked Johannesburg officials to bar Suez from tendering for the water management contract, but this request was refused.

Suez began its management of Johannesburg's water by installing 6500 pit latrines, a pilot 'shallow sanitation' system and thousands more pre-payment water meters in poor areas, including Soweto. Pit latrines require no water. The shallow sewage system was only attempted sporadically due to consumer dissatisfaction. With this system, maintenance costs are transferred to so-called 'condominium' residential users, where a very small water flush and slight gravity mean that the pipes must be manually unclogged every three months (or more frequently) by the residents (typically women) themselves. The water-borne system breaks down, thus, not by accident – but *by design*, so as to save the city water.

As for the payment system, unlike conventional meters in wealthy suburbs which provide due warning of future disconnection (and an opportunity to make representation), pre-payment meter disconnection occurs automatically and without warning following the exhaustion of the 6,000 liter free water supply. If the disconnection occurs during the night or over a weekend when water credit vendors are closed, the household has to go without water until the shops are open again, and if the household does not have money for additional water, it must borrow either money or water from neighbours in order to survive. The Mazibuko et al plaintiffs argued that the pre-payment water meter represented not only a threat to dignity and health, but also a direct risk to life in the event of a fire. Dangers from inadequate water resulting from self-disconnecting pre-payment meters were starkly illustrated when two children died in a in a Soweto shack fire in 2002, which in turn catalysed the Mazibuko lawsuit.

Johannesburg managers were also reluctant to offer a rising block tariff so as to redistribute water from rich to poor. If designed properly such systems penalize luxury consumption and promote conservation. In 1996, this potential was demonstrated in Hermanus municipality, which raised prices on high consumption through a steep block tariff. Within four months, per capita peak demand for bulk water was reduced by one-third, while revenues increased by one-fifth (Wolfe, 2007). In Johannesburg, in contrast, the block tariff adopted in 2001 was highly convex so that the additional marginal price increases for wealthier, high-volume users were negligible.

The block tariff system applied in Johannesburg reflected Suez's logical opposition to water conservation, for its self-interest is selling more water to those people who could pay for it. The increasingly expensive water Suez supplied to Johannesburg was piped hundreds of miles across the Lesotho mountains in Africa's largest cross-catchment water transfer, which caused a five-fold increase in water prices, from US\$0.30 to US\$1.30/kl during the late 1990s. As Johannesburg water customers became liable for Lesotho dam loan repayments, they faced an average 69 percent increase in the nominal cost of water supply from 1996-99, with high-volume users paying a much lower increase. By the time the city's commercialization strategy was established in 1999, Johannesburg's water prices had become more regressive than even during the apartheid era (i.e., with a flatter slope in the block tariff).

In sum, rights advocates argued, the underlying problem was that across South Africa, the self-interest of powerful municipal constituents – large businesses, farms and rich

ratepayers – was to keep water prices relatively low which in turn required limiting provision in low-income neighbourhoods. In this context, rights advocates accused the city of adopting the following strategies:

- 1) imposition of water prices that soar after a very small, free amount of roughly two toilet flushes per person/day for-member households, so that the next block of consumption becomes unaffordable;
- 2) disconnection of people too poor to pay for any water beyond the 6 kl allocation;
- 3) offering Free Basic Water on the basis of a *household* as a unit (rather than the ANC's 1994 Reconstruction and Development Programme recommendation of 50 liters per *person* per day), which penalized larger families and those who have backyard shackdwellers or tenants who also drew upon the per-household supply;
- 4) provision of low-quality water and sanitation technology to tens of thousands of poor households, with the objective of reducing consumption (the technology includes pre-payment water meters, chemical toilets, Ventilated Improved Pit Latrines, and 'shallow sewage' systems featuring smaller pipes and lower gradients, no cistern for flushing, and manual unclogging of faeces when pipes periodically clog); and
- 5) provision of differential technology according to geography, race and class, such that water-saving hardware was only imposed on people in townships and informal settlements and not in wealthier and whiter suburbs.

In March 2008, the water rights activists complained about three new Johannesburg Council innovations:

- 1) use of an inaccurate register of indigency, one that recorded only a small proportion of the city's poor and thus excluded a large number of low-income people from free water allocations;
- 2) a new system of 'means testing', even though gaining indigency status initially entailed an invasive process of surveillance; and
- 3) termination of the policy of universal free water services for all, even though termination directly contradicted the Constitution, the RDP and the ANC municipal election promise that 'all residents' would receive free services.

Resistance strategies and tactics developed over time. Initially, activists took what was already a popular township survival tactic – illicitly reconnecting power once it was disconnected by state officials due to nonpayment (in 2001, 13 percent of Gauteng's connections were illegal) – and added a socialist, self-empowered ideological orientation. Within a few months of Johannesburg Water's official commercialization in 2000, the Anti-Privatization Forum was formed to unite nearly two dozen community groups across

Gauteng, sponsoring periodic mass marches of workers and residents. The network also shared information with water activists across the world, for example in Cochabamba, Bolivia, Argentina, Accra, and Detroit. And from the Anti-Privatization Forum came the Coalition Against Water Privatization, which assisted Soweto's Phiri neighbourhood women to launch the constitutional court case in 2004.

Suez's water management in Johannesburg generated not only social conflict but also strife within the council, and the company's contract was not renewed in 2006, in spite of the desired 25-year extension option available in the original water commercialization Business Plan. That plan had anticipated that (after-tax) profits from Johannesburg water supply would soar from R3.5 million (roughly \$300 000) in 2000-2001 to R419 million (\$50 million) in 2008-2009 (Bond 2002). One reason for Suez's departure was that Johannesburg Water's tactics were so hotly contested by the rights advocates, who had expected the Bill of Rights socio-economic clauses to be enacted.

Rights technicism

Durban provides the best data to judge the efficacy of using pricing measures as a mechanism of demand management. Research conducted at the University of KwaZulu-Natal by Chris Buckley and former city official Reg Bailey showed that water 'price elasticity' – the negative impact of a price increase on consumption – for the city's highest-income third of the population is 0.10. A doubling of the real (after-inflation) water price from 1997-2004 generated less than a 10 percent reduction in use. (What was proposed by Johannesburg for high-volume users was not a 100 percent real increase, but a meagre 3 percent rise – 10 percent in nominal terms but inflation was 7 percent.) Durban research revealed that instead, the impact of higher prices is mainly felt by low-income people, who recorded a much larger 0.55 price elasticity (Bailey and Buckley 2005).

Likewise, international studies suggest that while levels of water consumption may dip following large price increases, patterns of use generally reassert themselves fairly quickly in all but the lowest income groups (Strang 2004). Ironically, as the 'right to water' was fulfilled through Free Basic Water, the result of price changes at higher blocks in Durban and Johannesburg was further water deprivation for the poor alongside increasing consumption in the wealthier suburbs, which is in turn creating demand for more bulk water supply projects – including another Lesotho Highlands Water Project dam – which will then have to be paid for by all groups, and which will have major environmental impacts.

The hope from the April 2008 High Court ruling was that Tsoka had begun a new era of ecological, rational and more egalitarian water provision. However, eleven months later, the Supreme Court judgment ordered, whimsically, a decline in free water available per person from 50 liters each day to 42, *if the consumer can prove household 'indigency'*. The Supreme Court also found that prepayment meters were illegal according to Johannesburg Water's own water policy, but that the city didn't have to remove its illegal meters in Phiri, and instead could 'legalise the use of prepayment meters' by changing policies on disconnections to permit them without any administrative-justice process.

On the first point, the Coalition Against Water Privatization (2009a:1) argued that 42 liters per person per day

falls short of what is universally accepted and recognised as the minimum amount of water needed for basic human needs and dignity. Even more problematic though, is that the Supreme Court's order to the City to provide this amount, is conditional. The very same City that has, at every opportunity, resisted the legitimate claims and demands of poor communities for adequate amounts of free basic water, is effectively allowed carte blanche (through its own assessment of what constitutes 'reasonableness' and 'through available resources') to determine the timing, character and extent of changes to its existing 'free water policy'.

The Centre for Applied Legal Studies (2009:1) agreed, 'The relief granted by the Court is neither appropriate nor effective... [and] fails to address the City's constitutional obligations to progressively realise the amount of water it provides.' But neither the activists nor the lawyers were persuasive in the final test, the appeal of the Supreme Court's judgment to the Constitutional Court, which handed down a ruling completely vindicating Johannesburg Water in October 2009. The judgment confirmed the original 25 liters per person per day plus pre-payment meters as 'reasonable and lawful'. The Coalition Against Water Privatization (2009b:1-2) was infuriated, charging the Court with

a lazy legalism and wholly biased and contradictory reasoning... It is as if the thousands of pages of evidence and testimony provided by the Phiri applicants in countering the same from Johannesburg is simply ignored and/or considered irrelevant...

Eight years after the implementation of the state's Free Basic Water policy and with no change in that policy throughout those eight years, the court can find that this constitutes 'progressive realisation' and that those who now seek to redefine what this means are guilty of seeking 'immediate' remedy. In logical terms, it is a circular absurdity. One is left to seriously ponder then if the constitutional phrase – 'progressive realisation' – has any practical meaning at all when it comes to the most basic of all socio-economic rights, other than to allow the state to do whatever it pleases, whenever it pleases and at whatever pace pleases it...

The judgment dismisses the applicants' argument that the automatic cutting off of water after the free basic amount is dispensed from pre-paid water meters, does not constitute 'discontinuation' (and thus an illegal/unconstitutional act). It makes this finding using the following reasoning: 'the ordinary meaning of 'discontinuation' is that something is made to cease to exist. The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.' Here then, we have the highest court in the land saying that those poor people with pre paid water meters must not think that their water supply has discontinued when their taps run dry because the meter has cut the supply ... they

must imagine that it is 'temporarily suspended' until such time as they can find the money to buy more water credit or until the next month arrives. Such 'logic', and even worse that it is wrapped up in legal dressing and has such crucial practical consequences, is nothing less than mind boggling and an insult both to the poor and to the constitutional imperatives of justice and equality.

The limits of the rights narrative

Some argue that the whole basis of rights discourse (not just judgments like the SA Constitutional Court's) exhibit the problems described above, in part because of the rights movement's 'domestication' of the politics of need (see Madlingozi 2007). But more can be said about the intrinsic role of rights law from this standpoint, which allows us to question the legalistic reliance upon the rights narrative for popular access to water.

To this end, Roithmayr (2009) debates a central assumption in liberal rights analyses:

The liberal perspective is that when human rights aspirations are not being fulfilled, it is because a sound idea suffers flawed implementation. In contrast, the radical critique of human rights suggested that the whole project is flawed from the ground up in its design. This is because as framed, human rights discourse serves not to resist but to legitimize neoliberalism.

The discourse of human rights pulls a sleight of hand by giving moral claims a legal form that dilutes them, waters them down, and robs them of any real power. The legalization of human right does this in two ways. First, human rights discourse offers only very limited recognition of moral claims in certain circumstances. Second, even these limited moral claims by design are then converted into bureaucratic, technical legal problems that cannot be solved because legal rights are indeterminate.

In South Africa, every protected right is immediately watered down because, under the Constitution's limitations clause, government can restrict people's rights so long as they are doing so 'reasonably.' Likewise, socio-economic rights are only progressively realizable and only within available resources.

Second, these limited claims become technical problems with no determinate answers. We should not be at all surprised that the right to reparations and access to justice became a technical question over the scope and reach of the TRC. We should not be surprised that a universal moral human right to housing was converted to a technical question over the reach of supervisory jurisdiction, as we see in the Constitutional Court's wrangling over housing in Grootboom. This isn't failure of implementation. This is failure by design.

Maybe more importantly, human rights discourse leaves in place the class structure that reproduces racial inequality in SA. Human rights discourse bleeds off any real move to dismantle these processes by making change all about consciousness raising and recognition rather than redistribution and reparation.

Pieterse (2007) argues that 'the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo...the social construction of

phenomena such as 'rights' and 'the state' legitimize a collective experience of alienation (or suppression of a desire for connectedness) while simultaneously denying the fact of that experience.' He provides a delightful illustration of this alienation – one we suspect is felt by Phiri residents – in asking us to conceive of

the South African socioeconomic rights narrative as a dialogue between society (as embodying the social and economic status quo) and certain of its members (a social movement, interest group, or individual seeking to assert herself against the collective of the status quo) over the satisfaction of a particular socioeconomic need. Behold, accordingly, the following three-act drama:

ACT 1: On the Streets

Member/Citizen: I am hungry.

State/Society: (*Silence*) . . .

Member/Citizen: I want food!

State/Society: (*Dismissive*) You can't have any.

Member/Citizen: Why?

State/Society: You have no right to food.

Member/Citizen: (*After some reflection*) I want the right to food!

State/Society: That would be impossible. It will threaten the legitimacy of the constitutional order if we grant rights to social goods. Rights may only impose negative obligations upon us. We cannot trust courts to enforce a right to food due to their limited capacity, their lack of technical expertise, the separation of powers, the counter-majoritarian dilemma, the polycentric consequences of enforcing a positive right, blah blah blah. . .

Member/Citizen: (*Louder*) I want the right to food!!

State/Society: (*After some reflection*) All right, if you insist. It is hereby declared that everyone has the right to have access to sufficient food and water and that the State must adopt reasonable measures, within its available resources, to progressively realize this right.

Member/Citizen: Yeah! I win, I win!

State/Society: Of course you do.

ACT 2: In Court

Member/Citizen: I want food, your honor.

State/Society (Defendant): That would be impossible, your honor. We simply do not have the resources to feed her. There are many others who compete for the same social good and we cannot favor them above her. If you order us to feed her you are infringing the separation of powers by dictating to us what our priorities should be. We have the democratic mandate to determine the pace of socioeconomic upliftment, and currently our priorities lie elsewhere.

Member/Citizen: (*Triumphantly*) But I have the right to food!

State/Society (Court): Member/Citizen is right. It is hereby declared that the State has acted unreasonably by not taking adequately flexible and inclusive measures to ensure that everyone has access to sufficient food.

Member/Citizen: Yeah! I win, I win.

Everyone: Of course you do.

ACT 3: Back on the Streets

Member/Citizen: I am hungry.

State/Society: (*Silence*) . . .

Member/Citizen: I want food!

State/Society: We have already given you what you wanted. You have won, remember? Now please go away. There is nothing more that we can do.

Member/Citizen: But I am hungry!

State/Society: Shut up.

(*Member/Citizen mutely attempts to swallow the judgment in her favor.*) (Pieterse, 2007:816-817)

In a more thoughtful way than 'shut up', a former Black Consciousness movement revolutionary leader, Mamphela Ramphele (a Managing Director at the World Bank during the early 2000s and later a wealthy venture capitalist), argued forcefully against the rights-based strategy, for it soon becomes a classic culture of entitlement:

The whole approach of the post-apartheid government was to deliver free housing, free this, free the other. This has created expectations on the part of citizens, a passive expectation that government will solve problems. It has led to a 'disengaged citizenry' coupled with a style of leadership in the previous administration that neither accommodated nor welcomed criticism. Thus when people's expectations are not met, they revert to the anti-apartheid mode of protest which is destroy, don't pay, trash. We are yet to grasp the role of citizens as owners of democracy (cited in Green, 2009).

The same week, SA Deputy Police Minister Fikile Mbalula (2009) alleged, 'We have just established recently that in actual fact, there is an element of criminality perpetrated by aboTsotsi [bandits] within our communities who have other intentions not related to service delivery, but use service delivery protests as a tool to commit their intended crime.'

Ramphele and Mbalula were amongst many who criticized activists demanding water rights. Yet the activists refused to disengage, and instead continued to protest vigorously, at one of the world's highest per capita rates. Police recorded 6000-10,000 'incidents' under the Gatherings Act (whereby a protest of 15 people or more are recorded) annually from 2005-09. Moreover, the strategy of refusing to pay for water and electricity proved to be effective in pushing the state to make concessions such as the 2000 ANC Free Basic Water promise and the 2008 free water expansion in Johannesburg, Durban and a few other cities.

But the state's overall objective has been to define rights-based protest as illegitimate, and instead to channel the radical language of grassroots activists towards the courts. According to Brand (2007:18-19), 'The law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation.' Brand specifically accuses courts of 'domesticating issues of poverty

and need' so that they become depoliticized, 'cast as private or familial issues rather than public or political'.

Bakker (2007:447-447) notes a variety of other problems associated with a narrative of human rights applied to water:

The adoption of human rights discourse by private companies indicates its limitations as an anti-privatization strategy. Human rights are individualistic, anthropocentric, state-centric, and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatization. Moreover, 'rights talk' offers us an unimaginative language for thinking about new community economies, not least because pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.

From rights to commons

Based on the experiences in the Johannesburg water conflicts, the most logical route through and beyond the limitations intrinsically imposed by rights-based strategies is *not* to defend the Right to Water at Rio+20. The alternative is to explore and shift advocacy efforts towards a 'commons' strategy and indeed an entire culture of sharing, of 'ubuntu', that cuts against the grain of individualized liberties and their potential cooptation within a Green Economy regime. According to the 'onthecommons' website,

The commons is a new way to express a very old idea-that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good and all. The commons are the things that we inherit and create jointly, and that will (hopefully) last for generations to come. The commons consists of gifts of nature such as air, oceans and wildlife as well as shared social creations such as libraries, public spaces, scientific research and creative works. (<http://onthecommons.org/content.php?id=1467>)

For Hardt (2009:1),

On the one hand, the common refers to the earth and all of its ecosystems, including the atmosphere, the oceans and rivers, and the forests, as well as all the forms of life that interact with them. The common, on the other hand, also refers to the products of human labor and creativity that we share, such as ideas, knowledges, images, codes, affects, social relationships, and the like.

The difference in the two discourses is not merely that water is demanded as an individualized consumption norm in one (rights) and is 'shared' in the other (commons). Other contrasts between the political cultures of rights and of commons are explicitly analysed by Bakker (2007:436), who insists rights advocates suffer a 'widespread failure to adequately distinguish between different elements of neoliberal reform processes, an

analytical sloppiness that diminishes our ability to correctly characterize the aims and trajectories of neoliberal projects of resource management reform.’ The rebuttal from Johannesburg activists is that rights discourses – even as purely rhetorical demands for a constitutional entitlement, used to empower ordinary people – can serve as a step towards the commons narrative.

This debate has recurred over centuries of social resistance to commodification and ‘enclosure’ (Strang 2004). Today, Bakker (2007:433) suggests, the water sector includes “alterglobalization’ movements engaged in the construction of alternative community economies and cultures of water, centred on concepts such as the commons and ‘water democracies’”. A crucial missing element in the rights discourses is environmental, Bakker (2007:436) insists: ‘The biophysical properties of resources, together with local governance frameworks, strongly influence the types of neoliberal reforms which are likely to be introduced.’ Bakker is concerned that ‘in failing to exercise sufficient analytical precision in analyzing processes of ‘neoliberalizing nature,’ we are likely to misinterpret the reasons for, and incorrectly characterize the pathway of specific neoliberal reforms.’

Does the eco-social critique apply to the South African water-rights activists and does it condemn their human rights discourse? In order to make their case, the Soweto activists and their lawyers focused upon the consumption needs of low-income residents. Hence several other processes were downplayed: the source of a large amount of Johannesburg’s water in the Lesotho dams; the manner in which Rand Water – the catchment management agency between the dams and Johannesburg – processed and distributed the water; the financing of the bulk system through the World Bank and other creditors; the extremely high consumption norms of Johannesburg’s wealthier residents and large corporations; and the disposal of water through the system’s sanitation grid into a water table and groundwater beset by ecological crises.

Adding environmental factors is only the first step to ‘commoning’ water. Much more important is establishing a base amongst water consumers for a different way of arranging water distribution and disposal. Bakker (2007:444) warns that

appeals to the commons run the risk of romanticizing community control. Much activism in favour of collective, community-based forms of water supply management tends to romanticize communities as coherent, relatively equitable social structures, despite the fact that inequitable power relations and resource allocation exist within communities.

The challenge, thus, is to introduce a strong culture of water commons as an ideology, so that public consciousness and daily life are suffused with the vision of access ensured through collective action. That will serve as an antidote to the ‘neoliberal populism’ that may well emerge to re Commodify commons processes. For example, faddish techniques of microfinancing and ‘self-help’ entrepreneurial ideologies drawing on a ‘culture of social entrepreneurship’ are now applied to public goods such as water and healthcare (Bond 2007). In the name of the ‘right to credit’, there has been enormous damage to a commons of social trust, even in the case of Muhammad Yunus’ Grameen Bank, given that microcredit

is now increasingly held responsible for thousands of small-farmer suicides in South Asia and other manifestations of market/society failure. One of the most influential micro-entrepreneur advocates, Hernando de Soto, rests his vision of property rights upon the collateralization of land, shacks, livestock and other goods informally owned by poor people, all the better to invoke microfinance and in turn an often mythical successful rise to market-based wealth generation. Such capture of commons processes at local level should be contrasted with the changes required at the national scale, and potentially globally once the balance of power improves, to fundamentally redirect our inherited patterns of extraction, production, distribution, transport, financing, consumption and disposal.

As another example, in September 2009, the African Union demanded wealthy industrialized countries pay reparations for damage done by climate change under the rubric of 'climate debt'. Numerous other forms of ecological debt could be calculated and paid for by overconsumers in the Global North, but in a manner that avoids subjecting climate justice politics to 'Greenhouse Development Rights' which individualize the climate crisis and which potentially commodify the air (Bond 2009, 2012). In the water sector, activist awareness of the ecological aspects of water as commons is growing especially because of climate change. The Johannesburg region is crucial because it is the most intensive site for (non-smelting) electricity usage in South Africa, its water tables are being ruined through Acid Mine Drainage, its main resource (gold) is nearly exhausted, and its manufacturing base is uncompetitive with imports from East Asia. As a financial and services centre it has thrived, but the sustainability of such activity is limited given the country's vast problems with current account balances, foreign debt and an unstable currency.

What was and is necessary, for exploration in Johannesburg, in Durban after the COP17, at anywhere influenced by the 2012 Rio+20 Summit, as well as in all the future sites of struggle over water and environmental services across the world, are new ideas and strategies that can transcend consumption-based rights demands, along with coherent critiques of the full range of practices that undermine our ability to perceive and respect water and other aspects of nature as a commons. These strategies may emerge through fusions of community, environmental and labour in the alliance-formation that necessarily occurs during eco-social justice struggles, as rights-talk meets its limits, and as the commons appears as a new frontier.

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