

Fighting for the Right to the City: Discursive and Political Lessons from the Right to Water

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1. Introduction: Righting urban wrongs, or merely revisiting retail rights?

In his *New Left Review* article on 'The Right to the City', David Harvey (2008) draws upon the historical lessons of capital accumulation and urban form in mid-nineteenth century Paris and the post-war United States, before turning to the recent global property boom – which left very few cities untouched - and locating within it a profound and potentially unifying class struggle:

A process of displacement and what I call 'accumulation by dispossession' lie at the core of urbanization under capitalism. It is the mirror-image of capital absorption through urban redevelopment, and is giving rise to numerous conflicts over the capture of valuable land from low-income populations that may have lived there for many years... The urban and peri-urban social movements of opposition, of which there are many around the world, are not tightly coupled; indeed most have no connection to each other. If they somehow did come together, what should they demand? The answer to the last question is simple enough in principle: greater democratic control over the production and utilization of the surplus. Since the urban process is a major channel of surplus use, establishing democratic management over its urban deployment constitutes the right to the city. Throughout capitalist history, some of the surplus value has been taxed, and in social-democratic phases the proportion at the state's disposal rose significantly. The neoliberal project over the last thirty years has been oriented towards privatizing that control... A 'Financial Katrina' is unfolding, which conveniently (for the developers) threatens to wipe out low-income neighbourhoods on potentially high-value land in many inner-city areas far more effectively and speedily than could be achieved through eminent domain. We have yet, however, to see a coherent opposition to these developments in the twenty-first century. There are, of course, already a great many diverse social movements focusing on the urban question—from India and Brazil

to China, Spain, Argentina and the United States... At this point in history, this has to be a global struggle, predominantly with finance capital, for that is the scale at which urbanization processes now work. To be sure, the political task of organizing such a confrontation is difficult if not daunting. However, the opportunities are multiple because, as this brief history shows, crises repeatedly erupt around urbanization both locally and globally, and because the metropolis is now the point of massive collision—dare we call it class struggle?—over the accumulation by dispossession visited upon the least well-off and the developmental drive that seeks to colonize space for the affluent. One step towards unifying these struggles is to adopt the right to the city as both working slogan and political ideal, precisely because it focuses on the question of who commands the necessary connection between urbanization and surplus production and use. The democratization of that right, and the construction of a broad social movement to enforce its will is imperative if the dispossessed are to take back the control which they have for so long been denied, and if they are to institute new modes of urbanization.

Contrast this analysis with a near-simultaneous statement – in a 2009 booklet, ‘Systems of Cities: Integrating National and Local Policies, Connecting Institutions and Infrastructure’ - from what many consider to be the brain of urban neoliberalism, the World Bank (2009). There is, to be sure, a confession that the neoliberal project was not successful in what the Bank had advertised since at least its 1986 New Urban Management policy:

Starting in the early 1990s, many developing country governments and donors adopted an ‘enabling markets’ approach to housing, based on policies encouraged by the World Bank. This approach focused reforms on securing land rights, providing access and cost recovery for infrastructure, and improving the balance sheets of housing institutions. World Bank and donor projects helped to reform and expand mortgage credit, spreading these systems worldwide. The hope has been that pushing this and other aspects of the formal sector housing systems down market would eventually reach lower income households. Despite some successes, affordability problems persist, and informality in the housing and land sectors abounds. By the mid-2000s, it became clear that the enabling markets approach was far too sanguine about the difficulties in creating well functioning housing markets where everyone is adequately housed for a reasonable share of income on residential land at a reasonable price. The general principles of enabling markets are still valid, but must be combined with sensible policies and pragmatic approaches to urban planning and targeted subsidies for the urban poor... Experience suggests that only a few regulations are critical: minimum plot sizes and minimum

apartment sizes, limitations on floor area ratios, zoning plans that limit the type of use and the intensity of use of urban land, and land subdivision ratios of developable and saleable land in new greenfield developments.

Unlike Harvey, the Bank has virtually nothing at all to say about 'rights' (except property rights and 'rights of way' for new roads and rail), and nothing at all to say about urban social movements. The closest is the document's reference to 'community-based organisations' which operate in 'partnerships' in Jamaica and Brazil to 'combine microfinance, land tenure, crime and violence prevention, investments in social infrastructure for day care, youth training, and health care with local community action and physical upgrading of slums.' Civil society in its most civilized form hence lubricates markets and acts as a social safety net for when municipal states fail.

Yet notwithstanding the confession, this discursive strategy leaves states with more scope to support markets, because rapid Third World urbanization generates market failures: *'The general principles of enabling markets are still valid, but must be combined with sensible policies and pragmatic approaches to urban planning and targeted subsidies for the urban poor.'* Recall that from the late 1980s, the World Bank had conclusively turned away from public housing and public services as central objectives of its lending and policy advice. Instead, the Bank drove its municipal partners to enhance the productivity of urban capital as it flowed through urban land markets (now enhanced by titles and registration), through housing finance systems (featuring solely private sector delivery and an end to state subsidies), through the much-celebrated (but extremely exploitative) informal economy, through (often newly-privatized) urban services such as transport, sewage, water and even primary health care services (via intensified cost-recovery), and the like. Recall, too, the rising barriers to access associated with the 1990s turn to commercialized (sometimes privatized) urban water, electricity and transport services, and with the 2000s real estate bubble. As a result, no matter the rhetoric now favouring 'targeted subsidies', there are few cases where state financing has been sufficient to overcome the market-based barriers to the 'right to the city', a point we will conclude with.

The case under consideration is the struggle for water in Johannesburg, South Africa. The use of water was, during apartheid, a relatively low-cost luxury for white South Africans, with per capita enjoyment of home swimming pools at amongst the world's highest levels. Low levels of water consumption by black South Africans stemmed from their vulnerability in the segregated 'Bantustan' system of rural homelands which supplied male migrant workers to the white-owned mines, factories and plantations. These areas had weak water and irrigation potential, as the apartheid government directed infrastructural

investments to the white-dominated cities and suburbs, and then in limited ways to black urban townships, mainly for public health rationales.

After 1994, racial apartheid ended but South Africa was not immune from international trends endorsing municipal cost-recovery, commercialization and even attempts at long-term management contracts roughly equivalent to privatization. As a result, water was soon priced beyond the reach of poor households. But South Africa's 1996 Constitution includes socio-economic clauses in the Bill of Rights, such that grassroots discourses turned to what is called 'rights talk' and a 'culture of entitlement'. South Africa's water activists insisted upon a social entitlement to an acceptable supply of clean water, guaranteed in state policies and practices, amounting to at least 50 liters supplied per person per day, delivered via a metering system based on credit (not 'pre-payment'). 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.

At the global scale, a parallel process emerged during the 1990s, the 'Integrated Water Resource Management' perspective, which focuses on retail water provision – in which water becomes an economic good first and foremost - and only to a limited extent links consumption processes (including overconsumption by firms and wealthy households) to ecosystem sustainability. Hence the rights of those affected by water extraction, especially those displaced by mega-dams that supply cities like Johannesburg, are often ignored. Making hydro-socio-ecological connections will be one of the crucial challenges for those invoking water rights.

Tactically, anger about violations of water rights has taken forms ranging from direct protests, to informal/illegal reconnections and destruction of prepayment meters, to a constitutional challenge over water services in Soweto. While having the potential to shift policy from market-based approaches to those more conducive to 'social justice', even in the face of powerful commercial interests and imperatives, the limits of a rights discourse are increasingly evident, as South Africa's 2008-09 courtroom dramas indicated.

If the objective of those promoting the right to the city includes making water primarily an eco-social rather than a commercial good, these limits will have to

be transcended. The need to encompass ecosystemic issues in rights discourses is illustrated by the enormous health impacts of unpurified water use. 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% 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).

Once we interrogate the limits to rights in the South African context, the most fruitful strategic approach may be to move from and beyond 'consumption-rights' to reinstate a notion of 'the commons', which includes broader hydropolitical systems linking extraction, production, distribution, financing, consumption and disposal.

2. Water rights demands and denials in Soweto and Johannesburg

The September 2009 decision of South Africa's Constitutional Court in the case *Mazibuko et al v Johannesburg Water* overturned a seminal rights finding in lower courts that human rights activists had hoped would substantially expand water access to poor people. The Coalition Against Water Privatization and University of the Witwatersrand Centre for Applied Legal Studies had backed five Soweto women (led by Lindiwe Mazibuko) in their demands for a larger supply of free municipal water and an end to the recently-installed pre-payment meter systems which are, in effect, automatic disconnection mechanisms.

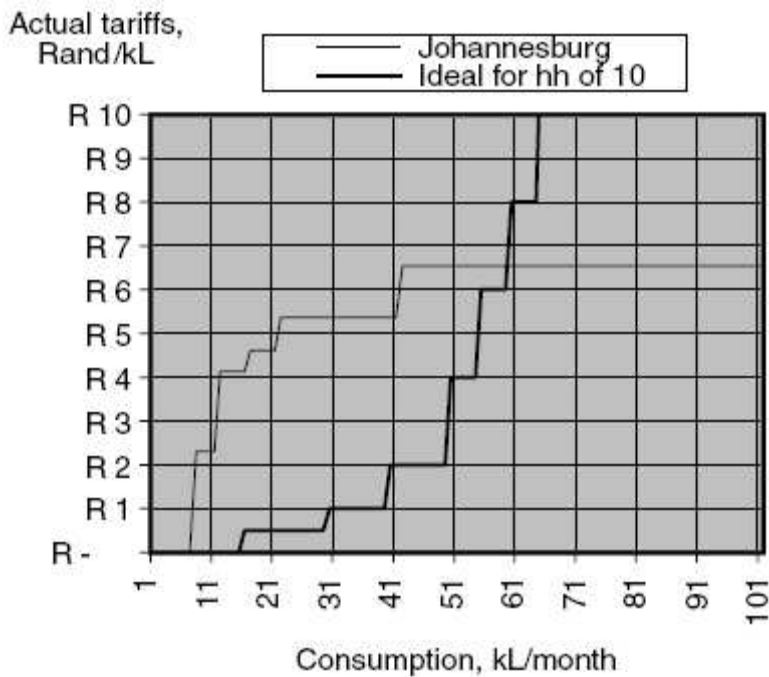
The case had been appealed by Johannesburg municipal and national government officials who were declared to be in violation of the Sowetans' Constitutional right to water by Judge Moroa Tsoka in the Johannesburg High Court in April 2008. Tsoka ruled that the 'prepayment water system in Phiri Township' 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).

A few weeks prior to Tsoka's decision, officials of South Africa's largest city (with more than 3.5 million residents) shocked the rights advocates by retracting

the universal free basic water promise that the ruling African National Congress (ANC) made in the 2000 municipal election: ‘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 this otherwise progressive rights-based mandate regressively, by adopting a relatively steep-rising convex tariff curve, in contrast to a concave curve starting with a larger lifeline block, which would have better served the interests of lower-income residents (Figure 1). The dramatic increase in their per-unit charges in the second block meant that there was no meaningful difference to their average monthly bills even after the first free 6,000 liters. Moreover, the marginal tariff for industrial/commercial users of water, while higher than residential, actually declines after large-volume consumption is reached. In early 2008, the Johannesburg Water policy change meant that the 2000 FBW promise would be kept only for the small proportion declared ‘indigent’, who would get a rise from 6 kiloliters per household each month (25 liters per day for a household of 8) to 10 kl.

Figure 1 - Johannesburg water pricing: existing tariff (2001), and ideal-type tariff



Source: Johannesburg Water tariffs (2001), and author estimates

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).

The 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 councillors on a junket to Argentina the year before, where the 'success story' of Buenos Aires was unveiled. (That contract would fail when in 2002 the Argentine government could no longer afford to allow Suez's substantial hard-currency profit repatriation in the midst of its economic crisis.)

However, at that very point in time, Suez subsidiary Dumez was charged by Lesotho government prosecutors with bribing the manager of the Lesotho Highlands Water Authority (which supplies Johannesburg with water), Masupha Sole. 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, Johannesburg officials were asked by the SA Municipal Workers Union to bar Suez from tendering for the water management contract, but they refused.

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% use communal standpipes and 20% receive small amounts from water tankers (the other 15% have outdoor yard taps). For sanitation, 52% have dug pit latrines themselves, 45% rely on chemical toilets, 2% have communal flush toilets and 1% use ablution blocks. Needless to say, these conditions are both particularly hostile to vulnerable people: they breed opportunistic infections at a time when Johannesburg's HIV rate has soared above 25%, and in the last decade cholera and diarrhea epidemics have killed many tens of thousands of people, especially children.

Instead of expanding supply to these unserved 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, contradicting the claim on the Department of Water Affairs and Forestry's website that Johannesburg offers 100% of its residents Free Basic Water. For municipal bureaucrats and Suez, the point of disconnecting low-income people and maintaining low water/sanitation standards was a strategy, quite simply, to save money.

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.

As for the payment system, unlike conventional meters in wealthy suburbs which provide due warning of future disconnection (and an opportunity to make representation) in the form of notification in red writing at the bottom of the monthly bill, 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. As the

Mazibuko et al plaintiffs argued, the pre-payment water meter represents 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, a system which if designed properly would also 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 and within four months had achieved a one-third cut in per capita peak demand for bulk water with a one-fifth rise in revenue, although the redistributive component was limited due to adverse power relations and a pro-rich council (Wolfe, 2007). In Johannesburg, in contrast, the block tariff adopted in 2001 was highly convex so that the additional marginal increases for wealthier, high-volume users were negligible.

This, in turn, reflected the fact that Suez opposed water conservation, for it aimed to sell more water to those people who could pay their bills, given that a vast new inflow of water to the city was being piped hundreds of miles across the Lesotho mountains in Africa's largest cross-catchment water transfer. During the late 1990s, Johannesburg water customers became liable for Lesotho dam loan repayments, resulting in a 69% increase in the nominal cost of water supply from 1996-99. 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 – and hence cross-subsidization - to a bare minimum. This was the countervailing pressure to rights advocates, and to this end, they accused the city of adopting the following strategies:

- 1) imposition of water prices that soar after a very small, token free amount of roughly two toilet flushes per day for 8-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 (at their peak, Johannesburg municipal services disconnections reached 20 000 per month during 2002, the Council revealed just prior to the World Summit on Sustainable Development);

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 in turn creates a bias against larger families and those who have backyard shackdwellers or tenants who also draw upon the per-household supply;

4) installation 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 the unclogging of faeces by hand when pipes periodically clog); and

5) provision of differential technology according to geography, race and class, such that water-saving hardware is only imposed on people in townships and informal settlements who then suffer additional transport and time-wasting costs acquiring meter cards, in contrast to wealthier and whiter suburbs with sophisticated infrastructure and technology.

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

1) recommitment to the failed indigency register – which records only a small proportion of the city's poor - thus dropping a huge group of low-income people from free water allocations, including those residents who lack formal papers either because of Home Affairs Department inefficiency or their foreign origin;

2) introduction of 'means testing', even though gaining indigency status entailed acceptance of invasive – and inevitably inaccurate, ad hoc – state surveillance (including linkage of various Johannesburg databases so as to monitor poor people's consumption); and

3) termination of universal free water services for all, even though that directly contradicted the Constitution, the RDP and the ANC municipal election promise that 'all residents' would receive free services (it has long been established that division of citizens into stratified classes of consumers diminishes political support for state services such as Free Basic Water).

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% 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.

Following Suez's departure, the city council attempted to impose a slightly more redistributive, pro-poor, and conservation-minded pricing system in early 2008. Thus the 2008/09 water price increases included very slight above-inflation rises for higher blocks of consumption, so as to contribute to a 'culture of conservation' (Figure 2).

Figure 2: Johannesburg water tariff changes, April 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

3. Rights technicism

Durban provides the best data to judge the efficacy of pricing measures in Demand Side 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% reduction in use. (What was proposed by Johannesburg for high-volume users was not a 100% real increase, but a meagre 3% rise – 10% in nominal terms but inflation was 7%.) 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, in which an ecological, rational and more egalitarian approach to water provision... However, eleven months later, the Supreme Court judgment ordered, whimsically, a decline in free water available per person from 50 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 judgement to the Constitutional Court, which handed down a ruling completely vindicating Johannesburg Water in October 2009. The judgement confirmed the original 25 liters per person per day plus prepayment meters as 'reasonable and lawful'. The Coalition Against Water Privatization (2009b:1-2) was infuriated, charging the 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.

4. The limits of rights talk

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 rights talk 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 (China’s was slightly higher in early 2009, but I know of no other close). 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', a strategy that also entails the 'personalization of need and dependence'.

Bakker (2007:447-447) notes a variety of other problems associated with the application of human rights 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.

5. From water 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 a 'commons' strategy and indeed an entire culture of sharing, of 'ubuntu'. 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 is not merely that water is demanded as an individualized consumption norm in the one culture (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 culture of the commons.

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: common-pool, mobile resources such as fisheries are more amenable to marketization, whereas natural monopolies such as water supply networks are more amenable to privatization. In other words, 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 the human rights discourse as applied to water? In order to make the case, the Soweto activists and their lawyers focused centrally upon the consumption needs of low-income residents. Hence several other processes were

obscured, ignored or 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.

Beyond the necessary environmental factors, it is important to recognize potential false steps in jumping scale to micro-level redeterminations of water politics. 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.

If larger-scale norms, values and practices are not more decisively infused into public consciousness and daily life, then a tradition of 'neoliberal populism' may well emerge to re Commodify commons processes – for example through faddish techniques of microfinancing and 'self-help' entrepreneurial ideologies drawing on a 'culture of social entrepreneurship'. The damage to a commons of social trust – in the form of schemes that go sour, even in the case of Muhammad Yunus' Grameen Bank (Bond 2007) – should not be underestimated. 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 to fundamentally redirect our inherited patterns of extraction, production, distribution, financing, consumption and disposal.

For example, in September 2009, the African Union demanded \$67 billion per annum from wealthy industrialized countries as reparations for damage done by climate change, and \$400 billion/year was the figure adopted by South advocates of climate debt repayment at Copenhagen in December 2009. Numerous other forms of 'ecological debt' could be calculated and paid for by overconsumers in the Global North (Bond 2009).

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 electricity usage in South Africa, 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.

Countervailing pressures that can transcend mere consumption-based rights demands, and tackle the full range of practices that undermine water as a commons, as well as so many interrelated eco-social processes, are long overdue. These pressures 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 the commons appears as a new frontier. What, then, of the right to the city?

6. Broader implications for social resistance and the 'right to the city'

What we have learned, mainly, from the South African struggle for water is that social protests will need to intensify and ratchet up to force concessions that help remake Johannesburg's built environment. As Harvey (2009) puts it, 'My argument is that if this crisis is basically a crisis of urbanization then the solution should be urbanization of a different sort and this is where the struggle for the right to the city becomes crucial because we have the opportunity to do something different.'

One of the first strategies, however, is defense. The struggle for water rights entails staying in place in the face of water disconnections and even evictions. Apartheid-era resistance to evictions is one precedent, but another is the moment in which a prior downturn in South Africa's 'Kuznets Cycle' (of roughly 15-year ups and downs in real estate prices) occurred, the early 1990s. The resulting 'negative equity' generated housing 'bonds boycotts' in South Africa's black townships. The few years of prior financial liberalization after 1985 combined with a class differentiation strategy by apartheid's rulers was manifest in the granting of 200,000 mortgage bonds to first-time black borrowers over the subsequent four years. But the long 1989-93 recession left 500,000 freshly unemployed workers and their families unable to pay for housing. This in turn helped generate a collective refusal to repay housing bonds until certain conditions were met. The tactic moved from the site of the Uitenhage Volkswagen auto strike in the Eastern Cape to the Johannesburg area in 1990, as a consequence of two factors: shoddy housing construction (for which the homebuyers had no other means of recourse than boycotting the housing bond)

and the rise in interest rates from 12.5 per cent (-6 per cent in real terms) in 1988 to 21 per cent (+7 per cent in real terms) in late 1989, which in most cases doubled monthly bond repayments (Bond 2000).

As a result of the resistance, township housing foreclosures which could not be consummated due to refusal of the defaulting borrowers (supported by the community) to vacate their houses, and the leading financier's US\$700 million black housing bond exposure in September 1992 was the reason that its holding company (Nedcor) lost 20 per cent of its Johannesburg Stock Exchange share value (in excess of US\$150 million lost) in a single week, following a threat of a national bond boycott from the national civic organization. Locally, if a bank did bring in a sheriff to foreclose and evict defaulters, it was not uncommon for a street committee of activists to burn the house down before the new owners completed the purchase and moved in. Such power, in turn, allowed both the national and local civic associations to negotiate concessions from the banks (Mayekiso 1996).

However, there are few links between the early 1990s civics which used these micro-Polanyian tactics successfully, and the 2000s generation of 'new social movements' which shifted to decommodification of water and electricity through illegal reconnections (Desai 2002). The differences partly reflect how little of the late 2000s mobilizing opportunities came from formal sector housing, and instead related to higher utility bills or forced removals of shack settlements. Still, there are profound lessons from the recent upsurge of social activism for resistance not only to the implications of world capitalist crisis in South Africa, but elsewhere.

The lessons come from deglobalization and decommodification strategies used to acquire basic needs goods, as exemplified in South Africa by the national Treatment Action Campaign and Johannesburg Anti-Privatization Forum which have won, respectively, antiretroviral medicines needed to fight AIDS and publicly-provided water (Bond 2006). The drugs are now made locally in Africa - in Johannesburg, Kampala, Harare, and so on - and on a generic not a branded basis, and generally provided free of charge, a great advance upon the US\$ 15,000/patient/year cost of branded AIDS medicines a decade earlier (in South Africa, half a million people receive them).

The ability of social movements such as in the health, water and housing sectors to win major concessions from the capitalist state's courts under conditions of crisis is hotly contested, and will have further implications for movement strategies in the months ahead. Huchzermeyer (2009, 3-4) argues that the Constitution mandates 'an equal right to the city'. However,

It was only in 2000 that the Bill of Rights was evoked by a marginalized and violated urban community (represented by Irene Grootboom) in the Constitutional Court. In what was received as a landmark ruling, the Court interfered with the Executive, instructing the Ministry of Housing to amend its housing policy to better cater for those living in intolerable conditions. It took 4 further years for the policy changes to be adopted into housing policy. Chapters 12 and 13 were added to the national Housing Code: Housing in Emergency Circumstances and Upgrading of Informal Settlements. In the following 5 years, these two policies have not been properly implemented, if at all. Unnecessary violations have continued and marginalized communities have had to resort to the courts. However, the landscape has changed significantly. Whereas the Grootboom case involved an isolated community with only a loose network of support through the Legal Resources Centre which acted as 'Friends of the Court', today cases reach the Constitutional Court through social movements such as Landless People's Movement, Inner City Tenant Forum, Abahlali base Mjondolo, Anti-Privatization Forum and the Anti-Eviction Campaign. These movements coordinate, exchange, and take an interest in one another's legal struggles.

Huchzermeyer (2009, 4) suggests this strategy fills a 'gap in left thinking about the city (the gap derived from the Marxist ideology of nothing but a revolution)' and that the 'Right to the City' movement articulated by Henry Lefebvre and David Harvey should include marginal gains through courts: 'Urban Reform in this sense is a pragmatic commitment to gradual but radical change towards grassroots autonomy as a basis for equal rights.' After all, 'three components of the right to the city - equal participation in decision-making, equal access to and use of the city and equal access to basic services - have all been brought before the Constitutional Court through a coalition between grassroots social movements and a sympathetic middle class network' (even though 'this language is fast being usurped by the mainstream within the UN, UN-Habitat, NGOs, think tanks, consultants etc., in something of an empty buzz word, where the concept of grassroots autonomy and meaningful convergence is completely forgotten').

As we have seen, however, critics point to the opposite processes in the water case, and consider a move beyond human rights rhetoric necessary on grounds not only that – following the Critical Legal Scholarship tradition - rights talk is only conjuncturally and contingently useful. In addition, the limits of neoliberal capitalist democracy sometimes stand exposed, when battles between grassroots-based social movements and the state must be decided in a manner cognisant of the costs of labor power's reproduction. At that point, if a demand upon the state to provide much greater subsidies to working-class people in turn impinges

upon capital's (and rich people's) prerogatives, we can expect rejection, in much the same way Rod Burgess (1978) criticized an earlier version of relatively unambitious Urban Reform (John Turner's self-help housing), on grounds that it fit into - not fought against - the process by which capital lowered its labor reproduction costs. It may be too early to tell whether court victories won by social movements for AIDS medicines and housing access are the more durable pattern that reifies rights talk, or whether the defeat of the Soweto water-rights movement is more typical. Sceptics of rights talk suggest, instead, a 'Commons' strategy, by way of resource sharing and illegal commandeering of water pipes and electricity lines during times of crisis (Bakker 2007, Desai 2002, Bond 2009, Naidoo 2009, Ngwane 2009).

The challenge for South Africans committed to a different society, economy and city is combining requisite humility based upon the limited gains social movements have won so far (in many cases matched by the worsening of regular defeats) with the soaring ambitions required to match the scale of the systemic crisis and the extent of social protest. Looking retrospectively, it is easy to see that the independent left - radical urban social movements, the landless movement, serious environmentalists and the left intelligentsia - peaked too early, in the impressive marches against Durban's World Conference Against Racism in 2001 and Johannesburg's World Summit on Sustainable Development in 2002. The 2003 protests against the US/UK for the Iraq war were impressive, too. But in retrospect, although in each case they out-organized the Alliance, the harsh reality of weak local organization outside the three largest cities - plus interminable splits within the community, labor and environmental left - allowed for a steady decline in subsequent years.

The irony is that the upsurge of recent protest of a 'popcorn' character - i.e., rising quickly in all directions but then immediately subsiding - screams out for the kind of organization that once worked so well in parts of Johannesburg, Durban and Cape Town. The radical urban movements have not jumped in to effectively marshal or even join thousands of 'service delivery protests' and trade union strikes and student revolts and environmental critiques of the past years. The independent left's organizers and intelligentsia have so far been unable to inject a structural analysis into the protest narratives, or to help network this discontent.

Moreover, there are ideological, strategic and material problems that South Africa's independent left has failed to overcome, including the division between autonomist and socialist currents, and the lack of mutual respect for various left traditions, including Trotskyism, anarchism, Black Consciousness and feminism. A synthetic approach still appears impossible in 2010. Aside from a campaign against a \$3.75 billion World Bank loan to Eskom that unites red (including labor

and community) and green against electricity privatization, extreme price increases (127% in real terms over four years) and climate damage, nor do strategic convergences appear obvious. For example, one strategic problem – capable of dividing major urban social movements - is whether to field candidates at elections. Another problem is the independent left's reliance upon a few radical funding sources instead of following trade union traditions by raising funds from members (the willingness of German voters to vote Die Linke may have more than a little influence on the SA left).

By all accounts, the crucial leap forward will be when leftist trade unions and the more serious SA Communist Party members ally with the independent left. The big question is, when will Cosatu reach the limits of their project within the Alliance. Many had anticipated the showdown in 2007 to go badly for unionists and communists, and they (myself included) were proven very wrong. There is probably no better national trade union movement in the english-speaking world than Cosatu, so that error requires a rapid correction. By March 2010, after a disappointing State of the Nation speech by Zuma followed by a reactionary budget speech that opened up a two-tier labor market (characterized by hated labor-broking outsourcing) and retained orthodox monetary policy, the showdown appears much closer. It may hinge around Zuma's alliance with his radical-sounding youth, led by Julius Malema, whose 'tenderpreneur' skills in accessing state contracts reeked of corruption.

These challenges are not particularly new nor unique, with many leftists in Latin America and Asia reporting similar opportunities during this crisis but profound barriers to making the decisive gains anticipated. It is, however, in South Africa's intense confrontations during capitalist crisis that we may soon see, as we did in the mid-1980s and early 2000s, a resurgence of perhaps the world's most impressive urban social movements. And if not, we may see a degeneration into far worse conditions than even now prevail, in a post-apartheid South Africa more economically unequal, more environmentally unsustainable and more justified in fostering anger-ridden grassroots expectations, than during apartheid itself.

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