

South Africa's 'rights culture' of water consumption

Patrick Bond

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3.3.1 Introduction: Righting water wrongs, or merely revisiting retail rights?

This chapter reviews an emerging debate surrounding a 'human rights culture' that is invoked by both the state and social activists in post-apartheid South Africa. The context includes both the global challenge of water and sanitation delivery to poor people, and the specific problems associated with municipal services in Africa's richest city (Johannesburg), particularly its most politicized neighbourhood (Soweto). In Johannesburg, several thorny technical and political barriers 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 a culture of water rights were defeated in the courts. The conclusion explores their potential move 'out of the box' of liberal rights culture toward a potentially more transformative 'commons' approach to water.

Since the 1948 United Nations Universal 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, healthcare, education and even employment) has become a key framework for politics and political discourse. Invoking discourses of 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' (which critics call a 'culture of entitlement'), social groups use 'rights talk' as a blanket justification for the provision of lifeline supplies of water to all, while in contrast, governments typically dispute their exact responsibilities for water provision and management. The South African government has gone further than any other in the Third World to actualize water rights, but not nearly far enough, according to local activists.

During apartheid, water was a relatively low-cost luxury for white South Africans, who had one of the highest levels of home swimming pools per capita in the world. In contrast, black South Africans were highly vulnerable to inadequate water supplies in both urban townships and the segregated 'Bantustan' system of rural homelands that 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 to a much more limited extent to black urban townships. Women were particularly disadvantaged in the process.

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', i.e., to be sold for, at minimum, the cost of its production), and long-term municipal water management contracts that in some cases were roughly equivalent to privatization. As a result, water was soon priced beyond the reach of poor households. South Africa's 1996 Constitution, however, included socioeconomic clauses meant to do away not only with racial oppression but the

developmental injustices of apartheid. Grassroots water activists in Soweto seized on the guarantee to clean water specified in the Constitution's Bill of Rights, ultimately insisting 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 prepayment. As an opponent, 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.

Resistance against the shift to a market-based system of water access occurred in various ways, including mass protests, informal or illegal reconnections to official water supplies, the physical destruction of prepayment meters and 'trickler' systems which limited water supply, and by 2003, a constitutional challenge over water services emanating from Soweto. There, the Soweto activists learned in 2009 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 is, in its limited form, increasing individualized access within the constraints of liberal democratic capitalism, and in a more expansive way, to make water primarily an eco-social 'public good' (or 'merit good' in economic terminology) that transcends commercial factors. At that stage, including ecosystemic processes in discussions of water rights links consumption processes (including overconsumption by firms and wealthy households) to environmental sustainability. Hence 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 hydropolitical systems in which water extraction, production, distribution, financing, consumption, and disposal occur.

The enormous health impacts of unpurified water use exemplify the challenge. 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 from diarrhoeal diseases are attributable to the 'water, sanitation and hygiene' risk factor, 90% of which occur in children under five. The 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, paralleling rural Darfur, Sudan, where sustained drought catalysed a ferocious war over land and water access.

3.3.2 Water rights culture and denial in Soweto and Johannesburg

In September 2009 South Africa's Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water

access for poor people. In *Mazibuko and others 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 prepayment 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’. 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’ (*Mazibuko & Others v the City of Johannesburg & Others*, paragraph 183.4-183.5; for further details, see Bond and Dugard, 2008). This 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 the *Mazibuko* case, and also retracted the African National Congress’s (ANC) promise of universal free basic water service. In the 2000 municipal election campaign, the ANC campaign statement was 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’.

An extensive record documents the way the right to water was distorted in Johannesburg (Bond 2002, 2006; Bond and Dugard 2008). Initially, in mid-2001, Johannesburg Water officials reinterpreted the ‘right to water’ mandate regressively by adopting a tariff curve with a relatively steep rise, instead of a concave curve starting with a larger free ‘lifeline’ block of only 6 kiloliters/household/month (Figure 1). Stepping up to the second block (above 6 kl), households suffered a dramatic increase in per-unit charges, resulting in no meaningful decline in average monthly bills even though the first 6,000 liters were free. Moreover, the marginal tariff for industrial and commercial users of water, while higher than the residential, actually declines after high-volume consumption is reached. In early 2008, Johannesburg Water’s policy change meant that the 2000 campaign promise of Free Basic Water would be kept only for the small proportion of the population declared ‘indigent’ (once onerous ‘means tests’ were applied), who would get an increase from 6 kiloliters per household each month to 10 kl.

<insert> Figure 1 - Johannesburg water pricing: existing tariff (2001) and ideal-type tariff Source: Johannesburg Water tariffs (2001), and author estimates

The Johannesburg Water imposition of prepayment meters and its inadequate consultation were consistent with 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 World 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 2001-2006. 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 company unveiled the 'success story' of Buenos Aires. (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.)

After longstanding allegations and lengthy investigations, in 2002 the Lesotho government's 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 to engineer a contract renegotiation providing Dumez with additional profits in excess of \$1 million, at the expense of Johannesburg water consumers, at a Paris meeting in 1991. This was one of more than a dozen bribery cases opened up against Sole, and he was convicted on most counts, leading to the disbarment and eventual collapse of at least one multinational civils engineering firm (Acres International of Canada). 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 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% of the population use communal standpipes and 20% receive small amounts of water from 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 other communal sanitation. These conditions are particularly hostile to vulnerable people, for inadequate sanitation breeds 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 water access in these underserved areas, Suez initiated massive water disconnections. In early 2002, just before community resistance became an effective countervailing force, disconnections reached more than 20,000 households per month from power and water (*Sunday Times Gauteng Metro*, 19 May 2002), contradicting the claim on the Department of Water Affairs and Forestry's website that Johannesburg offered 100% of its residents Free Basic Water. For municipal bureaucrats and Suez, disconnecting low-income people and maintaining low water and sanitation standards were strategies, quite simply, to save money.

Suez began its management of Johannesburg's water by installing 6,500 pit latrines and thousands more prepayment water meters in poor areas, including Soweto. Pit latrines require no water. The company even attempted a 'shallow sanitation' system, which features smaller pipes and lower gradients, no cistern for flushing, and manual unclogging of faeces when pipes periodically clog. With this system, maintenance costs

are transferred to so-called ‘condominium’ residential users (typically women), who must clean the pipes every three months (or more frequently).

As for the retail water payment system, unlike conventional meters in wealthy suburbs that provide due warning of future disconnection (and an opportunity to make representation), prepayment 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* plaintiffs argued that the prepayment water meter represented not only a threat to dignity and health, but also a direct risk to life in the event of a fire. In fact, the deaths of two children in a Soweto shack fire in 2002 starkly illustrated the dangers of the self-disconnecting prepayment meters and catalysed the *Mazibuko* lawsuit.

Johannesburg managers were also reluctant to offer a ‘rising block’ tariff of several steps that would redistribute water from rich to poor by charging the former far more than the cost of supply (Figure 1). If designed properly, such systems penalize luxury consumption and promote conservation. In 1996, the Hermanus municipality raised prices on high consumption through a steep block tariff and within four months, per capita peak demand for bulk water fell by one-third, while revenues increased by one-fifth (Wolfe 2007). In Johannesburg, in contrast, the highly convex block tariff adopted in 2001 rendered the additional marginal price increases for wealthier, high-volume users negligible.

Even before commercialization, which militated against conservation because it was in Suez’s self-interest to sell more water to those people who could pay for it, Johannesburg’s water prices had been rising sharply. The city’s water was piped hundreds of miles across the Lesotho Mountains in Africa’s largest cross-catchment water transfer, causing a five-fold increase in water prices, from US\$0.30 to US\$1.50/kl, during the late 1990s. As Johannesburg water customers became liable for Lesotho dam loan repayments, they faced an average 69% increase in the nominal cost of water from 1996-1999, 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 were already more regressive (i.e., they had a flatter slope in the block tariff) than they had been even during the apartheid era.

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, a policy that in turn required limiting the provision of water in low-income neighbourhoods. In this context, rights advocates accused the city of adopting the following strategies:

- 1) Imposing water prices that soar after a very small free amount (roughly two toilet flushes per person per day for member households), so that the next block of consumption becomes unaffordable;

- 2) Disconnecting people too poor to pay for any water beyond the 6 kl free 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 (RDP) recommendation of 50 liters per *person* per day), which penalized larger families and those who have backyard shack dwellers or tenants who also draw upon the household’s water supply;

4) Providing low-quality water and sanitation technology (prepayment meters, pit latrines, chemical toilets, and shallow sewage systems) to tens of thousands of poor households with the objective of reducing consumption; and

5) Providing 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 on those living in wealthier and whiter suburbs.

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

1) use of an inaccurate register of indigency 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' that combined a variety of municipal databases, 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 for nonpayment (in 2001, 13% of the connections in Gauteng province, where Johannesburg is located, were illegal) - and added a socialist, self-empowering ideological orientation. Within a few months of Johannesburg Water's official commercialization in 2000, the newly formed Anti-Privatization Forum united nearly two dozen community groups across Gauteng, and sponsored periodic mass marches of workers and residents. The network also shared information with water activists across the world, for example those in Cochabamba, Bolivia; Buenos Aires, Argentina; Accra, Ghana; and Detroit, USA. And from the Anti-Privatization Forum came the Coalition Against Water Privatization, which assisted Soweto's Phiri neighbourhood women to launch the constitutional 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 25-year extension option available in the original water commercialization business plan. That plan had anticipated that after-tax profits from the 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), although profits were nowhere near this amount. Although reasons are disputed, one factor behind 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 and conservationist pricing system in early 2008. Thus the 2008-2009 water price increases included very slight rises above the rate of inflation for higher blocks of consumption, so as to contribute to a 'culture of conservation' (Figure 2).

<insert> Figure 2: Johannesburg water tariff changes, April 2008. Source: City of Johannesburg tariff chart

3.3.3 Rights technicism

The city of 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 highest-income third of the city's population was 0.10. A doubling of the real (after inflation) water price from 1997 to 2004 generated less than a 10% reduction in use. (What Johannesburg's leaders proposed for high-volume users was not a 100% real increase but a meagre 3% rise - 10% in nominal terms but inflation was 7%.) The research in Durban revealed that the impact of higher prices was mainly felt by low-income people, who recorded a much larger 0.55 price elasticity (Bailey and Buckley 2005).

Likewise, international studies suggest that although 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. Increasing consumption by the well-to-do in turn creates demand for more bulk water supply projects - including another Lesotho Highlands Water Project dam - which all groups will then have to pay for and which will have major environmental impacts.

The hope was that Tsoka's April 2008 High Court ruling 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 the free water available per person from 50 liters each day to 42, *if the consumer could prove household indigency*. The Supreme Court also found that prepayment meters were illegal according to Johannesburg Water's own water policy, but ruled that the city did not have to remove its illegal meters in Phiri. They could be regularized by changing city policies on disconnections to permit imposition of prepayment meters 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 baseline and termed prepayment meters '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.

3.3.4 The limits of the rights culture

Some argue that the whole basis of rights discourse (not just judgments like that of the Constitutional Court of South Africa) exhibits the problems described above, in part because of the rights movement's 'domestication' of the politics of need (see Madlingozi 2007). Roithmayr (2009: 1) 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 [Truth and Reconciliation Commission]. 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'. Pieterse provides a delightful illustration of this alienation – one we suspect that the Phiri residents feel – 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 in her reading, 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: 1).

The same week, South Africa Deputy Police Minister Fikile Mbalula (2009: 1) 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’.

Ramphela 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 6,000-10,000 'incidents' under the Gatherings Act (whereby a protest of 15 or more people is recorded) annually from 2005-2009. 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 Johannesburg's 2008 free water expansion (from 6 to 10kl/hh/m, and in Durban from 6 to 9 in 2009).

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 (2007:447-448) notes a variety of other problems associated with a culture 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.

3.3.5 From rights to commons culture

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 www.onthecommons.org 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 of 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>, accessed 10 December 2009)

For Michael 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). Bakker (2007:436) explicitly analyzes other contrasts between the political cultures of

rights and commons; she insists that 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, dating to the 'enclosure' of non-commercial areas by British landowners in the 18th century (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". In addition, a commons movement would logically integrate ecological matters at the core of their political strategy. 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'. Arguing more forcefully against luxury water consumption by rich and corporate customers, and by extension a city's need for bulk-water enhancement, is an example of how a commons approach transcends a narrower retail rights strategy. 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 ecosocial 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 they downplayed several other processes: 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 (which drove the bulk system demands higher, to the point of requiring new dams); 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 one additional factor in the 'commoning' of 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 recommodify 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). There is, here, potential damage to a community commons that has been constructed upon social trust, especially when neoliberal populist schemes go sour. This problem affects even Muhammad Yunus' Grameen Bank, a pioneering microfinance institution, and is taken further by one of the most influential micro-entrepreneur advocates, Hernando de Soto, who 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 not only ignores the economic efficiencies that Eleanor Ostrom won her 2009 Swedish Bank Nobel prize for researching. They are also in conflict with changes required at the national scale, and potentially globally, to fundamentally redirect our inherited patterns of extraction, production, distribution, financing, consumption, and disposal (Leonard 2010).

As another example, in September 2009, the African Union demanded that 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 (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 site of extremely intensive electricity usage, its main resource (gold) is wasting and nearly exhausted, and its manufacturing base is not competitive 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, capital flight, excessive real estate speculation and an extremely unstable currency, as well as the social protests (not to mention crime and xenophobia) that are generated in the world's most unequal large society (Bond 2010).

New ideas and strategies that can transcend consumption-based rights demands and offer coherent critiques of the full range of practices that undermine water as a commons are needed. These strategies may emerge through fusions of community, environmental, and labour in the alliance formation that necessarily occurs during ecosocial justice struggles, as rights-talk meets its limits and the commons appears as a new frontier.

Resources

- Bailey, R., and C. Buckley. 2005. Modeling domestic water tariffs. Paper presented to the University of KwaZulu-Natal Centre for Civil Society, Durban, South Africa, 7 November.
- Bakker, K. 2007. The 'commons' versus the 'commodity': Alter-globalization, anti-privatization and the human right to water in the global South. *Antipode* 39(3):430-455.
- Bond, P. 2002. *Unsustainable South Africa*. London: Merlin Press.
- . 2006. *Talk Left Walk Right*. Pietermaritzburg, South Africa: University of KwaZulu-Natal Press.
- . 2007. Microcredit evangelism, health and social policy. *International Journal of Health Services* 37(2):229-249.
- . 2009. Repaying Africa for climate crisis: Ecological debt as development finance alternative to carbon trading. In *Upsetting the Offset: The Political Economy of Carbon Markets*. S. Böhm and S. Dabhi, eds. London: MayFlyBooks.

- . 2010. South Africa's bubble meets boiling urban social protest. *Monthly Review*, June, 17-28.
- Bond, P., and J. Dugard. 2008. The case of Johannesburg Water: What really happened at the pre-paid 'parish pump'. *Law, Democracy and Development* 12(1):1-28.
- Brand, D. 2005. The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa. In *Theories of Social and Economic Justice*. A. J. van der Walt, ed. Stellenbosch, South Africa: Stellenbosch University Press.
- Centre for Applied Legal Studies. 2009. Press Statement. Johannesburg, 25 March.
- Coalition against Water Privatization. 2009a. Press Statement: 'One Step forward, two steps back'. Johannesburg, 25 March.
- . 2009b. Press Statement: 'Phiri water case: Constitutional court fails the poor and the Constitution'. Johannesburg, 2 October.
- Global Health Watch. 2005. *Global Health Watch*. London: Zed Books.
- Green, P. 2009. 100 days, 11 issues. *City Press*, 19 August.
- Guardian*. 2008. Rich countries owe poor a huge environmental debt. 18 January.
- Hardt, M. 2009. Politics of the common. Paper presented to the Reimagining Society Project, ZCommunications, Boston, 6 July.
- Leonard, A. 2010. *The Story of Stuff*. New York: Free Press.
- Madlingozi, T. 2007. Good victim, bad victim: Apartheid's beneficiaries, victims and the struggle for social justice. In *Law, memory and the legacy of apartheid: Ten years after AZAPO v President of South Africa*. W. le Roux and K. van Marle, eds. Pretoria, South Africa: University of Pretoria Press.
- Madywabe, L. 2005. Compelling need for African innovation. Johannesburg: The Helen Suzman Foundation, 2 March. <http://www.hsf.org.za/resource-centre/focus/issues-31-40/issue-37-first-quarter-2005/compelling-need-for-african-innovation>
- Mazibuko and Others v the City of Johannesburg & Others* 2008. Unreported case no. 06/13865 in the Johannesburg High Court.
- Mbalula, F. 2009. Speech delivered at the Nelson Mandela Bay Crime Prevention Summit by the Deputy Minister: Police. 13 August.
- Pieterse, M. 2007. Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited. *Human Rights Quarterly* 29, 796-822.
- Republic of South Africa. 1996. Constitution of the Republic of South Africa, Act 108 of 1996. Cape Town.
- Strang, V. 2004. *The Meaning of Water*. Oxford: Berg Publishers.
- UNESCO. 2006. *World Water Development Report 2: Water, A Shared Responsibility*. Oxford: Berghahn Books; www.unesco.org/water/wwap/wwdr/wwdr2/.
- Wolfe, S. 2007. Reforming and rebuilding: Water efficiency initiatives in Hermanus, South Africa. *Water Efficiency* (Nov./Dec.) <http://www.waterefficiency.net/november-december-2007/american-water-purveyors-2.aspx>
- World Bank. 2002. South Africa: Monitoring service delivery in Johannesburg. Washington, D.C.: Southern Africa Department, Africa, April.