

11th WaterNet WARFSA GWP-SA Symposium



WATER AND SOCIETY

When available water is limited in quantity or quality or its distribution is uneven, it can be both a source of cooperation and/or contestation among its different users. Water access and benefit sharing of it, are a source of power. Any governance system should therefore tackle the issue of resource access and benefit sharing. This sub-theme addresses human development and socio-political aspects of water including conflict management and resolution, resource governance, HIV and AIDS, gender, education and communication.

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ISSUES AND OPTIONS REGARDING RESOURCE ALLOCATION AND BENEFIT SHARING OF SHARED WATERCOURSES IN THE SADC REGION

J. Arntzen^a *, P. Ruthenberg^a, P. Kogomotso and T. Setlhogile^a

^a Centre for Applied Research, P. O. Box 70180, Gaborone, Botswana

*Corresponding author email: jarntzen@car.org.bw

Abstract

Most surface water sources in southern Africa are shared among countries and river basin organizations (RBOs) find it hard to resolve the challenges of resource allocation and benefit sharing. The use of shared water resources is governed by the SADC Protocol on Shared Watercourses. With increasing demand for water, countries are increasingly turning to the use of shared water resources. The main objective of this paper is to review the main issues and options for benefit sharing *and* allocation of shared water resources. The paper is based on a project carried out for SADC and USAID. Methods used were a desk top literature review, case studies of six river basins and results from a small survey and interviews among RBOs, SADC Water Division and ICPs. The survey and interviews showed a lack of common interpretation of key concepts such as equitable and fair use, hampering progress with resource allocation and benefit sharing. The literature review showed a shift in emphasis from resource allocation towards beneficial use and benefit sharing. However, resource allocation, benefit generation and benefit sharing need to be negotiated together in an iterative process until the most suitable and acceptable situation has been achieved. Other conclusions are: 1. All countries need to benefit from joint management; 2. increasing the benefits is important and makes compromises easier; 3. Benefit must be shared between countries, sectors and population groups; 4. Benefit sharing may be an easier way of resolving historical injustices than re-allocation of water rights. The six RBO case studies show that each river basin is unique and RBOs needs to find its own solutions for benefit sharing. Distinctive factors include: the number of riparian countries; degree of homogeneity among riparian countries; level of water use and infrastructure development; existence of prior bilateral forms of cooperation. Finally, the paper outlines a broad mechanism for benefit sharing and allocation of shared water resources based upon: a. principles of best use, sustainable utilisation, conservation, and equitable distribution; recognition of the diversity of each river basin. Resource allocation, benefit generation and benefit sharing should constitute the core of RBO negotiations. The tool of water accounts can assist in this process as they deal with water use, benefit generation and sharing between countries and economic sectors. The RBOs should undertake an assessment of the water resource to identify the stocks, uses, user costs and the benefits emanating from the watercourse. Then identify and negotiate the way of maximizing the benefits of resource allocations while equitably sharing the net benefits.

Keywords: benefit generation and sharing, resource allocation, river basin management; shared water resources.

EXPLORING THE LIMITS OF IWRM AND THE RIGHT TO WATER: A RETURN TO THE COMMONS?

N. J. Cooper*

The University of Sheffield, School of Law, Centre for Law in its International Context

**Corresponding author email: n.cooper@sheffield.ac.uk*

Abstract

This paper considers the degree to which the right to water in South Africa has been realised, and the efficacy of Integrated Water Resources Management (IWRM) in producing equitable and sustainable hydro-socio-ecological solutions. IWRM is a crucial strategic approach to ensure that the actions of sector stakeholders are framed within the constraints of sustainability, economic efficiency, environmental integrity, social equity, transparency and knowledge equity. Competition for scarce water resources naturally gives rise to self-interested actions, but healthy IWRM processes purport to channel self-interest productively and curb the negative effects of inequality. However, disconnection between the science of IWRM and the policies and practices emanating from it demonstrate its limitations for equitable water allocation. The paper explores the way that the South African courts have approached the right to water, drawing into question what place IWRM has in South African jurisprudence. The recent Constitutional Court case *Mazibuko* is central to the analysis. Having explored the limitations of IWRM and a rights-based approach to water, the paper applies the idea of ‘the commons’, 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. Exploration is made of the potential that a reinvigorated concept of the commons could have for making manifest equitable and sustainable water for everyone.

Keywords: Commercialisation, commons, human rights, iwrn, sustainable development.

Introduction – The Right to Water

Access to sufficient water is a basic requirement for life. Despite not being explicitly mentioned as a human right in the Universal Declaration of Human Rights³ or the International Covenant on Economic Social and Cultural Rights⁴, access to sufficient water has been progressively recognised internationally as a human right since the 1977 UN Water Conference in Mar del Plata⁵. In 2002 General Comment No. 15, issued by the Committee on Economic, Social and Cultural Rights re-emphasised

³ Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948). *Hereafter* UDHR.

⁴ International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec 1966, 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). *Hereafter* ICESCR.

⁵ Resolution II of the conference declared that “All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”

water as a prerequisite for the realisation of other human rights and restated that access to water was itself a human right.⁶

In July 2010 The UN General Assembly adopted a resolution recognising access to clean water and sanitation as a human right⁷, further entrenching access to sufficient water as an internationally accepted human right to which the obligations of States party to the ICESCR apply.

In South Africa, the focus of this paper, access to sufficient water is an explicit right in the Constitution⁸. Other Constitutional rights are related, directly or indirectly to this right, namely the right to equality⁹, right to human dignity¹⁰, right to life¹¹, property rights¹², right of access to housing¹³, rights of children¹⁴, right to have access to courts¹⁵, *locus standi* provisions¹⁶, the Constitutional interpretation clause¹⁷ and the

⁶ (Paragraph 2): *'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'*. The comment exhorts the States Parties to *'adopt effective measures to realise, without discrimination'* the human right to water (Paragraph 1).

⁷ UN GA10967 Adopted 28 July 2010.

⁸ section 27(1)(b) of the Constitution:

(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) *sufficient* food and *water*⁸

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁹ Section 9.

¹⁰ Section 10.

¹¹ Section 11.

¹² Section 25(8). Regarding measures to achieve land, water and related reforms in order to redress the results of past racial discrimination.

¹³ Section 26

¹⁴ Section 28

¹⁵ Section 34

¹⁶ Section 38

¹⁷ Section 39 requires that a court, tribunal or forum must consider international law and may consider foreign law when interpreting any legislation and when developing the common law and customary law. This is particularly relevant to the right to sufficient water as an internationally acknowledged human right.

environmental right¹⁸.

In short, access to sufficient water is an internationally accepted and nationally protected right for all people in South Africa. Despite this, access to sufficient water is not a reality for many in the country. This paper considers the degree to which expressed acknowledgment of a right of access to sufficient water affects those people for whom access to sufficient water is problematic. The current and potential roles of IWRM are discussed within the limits of a rights-based discourse and questions are raised about the need to look beyond a paradigm of individual rights, towards a commons approach to equitable water allocation.

The Shape of Water Provision – Scarcity and Inequality

Any discussion of water rights must be framed within the reality that water in South Africa is a scarce resource.¹⁹ Increasing demand from urban centres for water for domestic use jostle with demands from industry, mining and agricultural sectors.²⁰ These demands are made in a country that has rainfall less than the global average, falling unevenly across the country.²¹ Over a decade ago the South African Department of Water Affairs and Forestry (DWAF) warned of the unsustainable nature of water use:

*With just 1200Kl of available freshwater for each person each year... we are at the threshold of the internationally used definition of “water stress”. Within a few years, population growth will take us below this level. South Africa already has less water per person than countries widely considered to be much drier, such as Namibia and Botswana.*²²

With the advent of majority rule in 1994 it was clear that a significant change in approach to water supply and water rights was necessary, based on the acceptance of two fundamental factors; the extreme inequality of water distribution (pre 1994) and

¹⁸ Section 24: Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

¹⁹ Michael Kidd, *Environmental Law*, 2008, Juta & Co. Ltd., Cape Town. p. 64.

²⁰ *Ibid.* p. 65.

²¹ *Ibid.* p. 64.

²² Department of Water Affairs and Forestry *White Paper on a National Water Policy for South Africa* (April 1997). Paragraph 14. The population of South Africa in 1997 was around 42 million. In 2009 the population had risen to around 48 million.

the overall scarcity of water in terms of the total available to the country. A brief overview of the General Household Survey (2007) gives the most recent picture of the nation's access to water for domestic use. The Eastern Cape currently has the lowest percentage of its population with access to on-site or off-site piped or tap water (72,8% in 2007).²³ Access in other provinces is as follows: Limpopo Province 83.4%; KwaZulu-Natal 83.8%, Mpumalanga 89.1%; Western Cape 99.5%; Free State 96.8%; Gauteng 98%; Northern Cape 96% and North West 89.61%. Average access nationally is therefore 89.3%²⁴. With a total population of 48,700,000, this means that 5,210,900 people lack access to on-site or off-site piped or tap water.²⁵ Of those who received piped water from a municipality, almost 25% experienced interruptions in their piped water supply at least once a month²⁶. Access to sufficient water remains a significant stumbling block to both socio-economic development and political stability.²⁷

These statistics only present a picture of people's access to water *per se*. They do not indicate the quantity of water people access and the reasons why²⁸. Consequently the figure of 89.3% of the national population that has access to water does not indicate that the same percentage of people have access to *sufficient* water as section 27 of the Constitution stipulates.²⁹ This issue has significant bearing not only on people's general level of health and well-being³⁰ but also has been a key feature of the legal

²³ This represents considerable progress since 2002, when only just over half of the population had access. General Household Survey 2007. *Hereafter* GHS 2007.

²⁴ All percentages from the General Household Survey 2007 (embargoed until 10 July 2008): www.statsSA.gov.za/publications/P0318/P0318July2007.pdf.

²⁵ Author's own calculation based on figure for total population of South Africa of 48,700,000 as stated in the GHS 2007.

²⁶ 24.4%. GHS 2007. Fieldwork undertaken in February 2010 in Winterton in rural Kwa-Zulu Natal concurred that interrupted water supply is regularly experienced, with significant associated consequences for health and education as well as discrimination.

²⁷ See generally Alec Russell, *Bring Me My Machine Gun: The Battle for the Soul of South Africa, from Mandela to Zuma*, 2009, Perseus Books, USA.

²⁸ Neither do these statistics give any information on water quality. The Water Services Act, discussed below, aims to regulate water quality as well as quantity (see GN R 509 Government Gazette of 8 June 2001 - Regulation 5). Water quality will be discussed further in relation to the international dimension of the right to water in subsequent chapters.

²⁹ See note at 57.

³⁰ Bond, P & Dugard, J, 'Water, Human Rights and Social Conflict: South African Experiences', 2007(1) *Law, Social Justice & Global Development Journal (LGD)*. Note also that fieldwork affirmed the connection between access to contaminated water and a range of health problems for residents interviewed Winterton and Burlington. See 'Fieldwork' box in research report. Quality of water supply is also a crucial aspect of the definition of the human right to water as detailed by GC15.

disputes over the Constitutional provisions³¹. Sufficient water has been quantified variously between 20 and 50 cubic litres per person per day (lpd). In South Africa the ANC's Reconstruction and Development Programme (RDP)³² set sufficient water at a minimum quota of 25 lpd, within 200 metres of a household.

As discussion below of the recent case of *Mazibuko* shows, defining sufficient water is problematic. But even using the RDP quota of sufficient water (25 lpd), a significant proportion of South Africans still do not have access to even this, 16 years into the democratic era. The recognition, promotion, protection and fulfilment of the right to sufficient water therefore remain crucial aims.

Integrated Water Resources Management (IWRM) and South African law

As a systematic process for sustainable development IWRM considers questions of water allocation within the contexts of economic and social development and environmental protection. Its central conceptual theme - that finite water resources are interdependent - leads to the conclusion that decisions about water use must involve all users since they affect all users. Such an interconnected approach to water allocation encourages long-term sustainability. It also incentivises local self-regulation of water resources more effectively than central regulation and surveillance could.

IWRM also recognises the right of all people to clean water and sanitation at an affordable price. This right should be recognised first in all negotiations of water resources.³³

IWRM thinking has provided the basis for water sector reform across the world, including shaping legislation in South Africa. Two Acts in particular have been promulgated in order to give effect to the right of access to sufficient water in the Constitution. The Water Services Act 108 of 1997 (WSA) is the principal legislative mechanism to actualize the obligations of the state. The WSA aims to provide *inter alia* 'the right of access to basic water supply and the right to basic sanitation

³¹ See discussion of cases *Bon Vista* and *Mazibuko*. Also see note on *Manqele* at 150.

³² See note at 19.

³³ The International Conference on Water Environment, Dublin, Ireland, January 1992 (Dublin Principles). Principle 4. www.archive.cap-net.org.

necessary to secure sufficient water and an environment not harmful to human health or well-being'.³⁴ The Act further addresses the social and ecological purposes of water respectively, setting 'national standards and norms and standards for tariffs in respect of water services' and aiming 'to promote effective water resource management and conservation'.³⁵ Basic water supply is defined in the WSA as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households including informal households, to support life and personal hygiene'.³⁶ The Act sets the minimum quantity for basic water supply as 25 litres of potable water per person per day (25 lpd), or 6 kilolitres per household per month.³⁷ This minimum quota is to be provided free of charge and is designated as Free Basic Water (FBW).³⁸

Water services authorities, including municipalities, are charged with a duty 'to consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services'.³⁹ But there are no explicit provisions within the Act on how 'access' is to be achieved. The National Water Act 36 of 1998 (NWA) is also important in implementing the Constitutional right to water. The chief aim of the Act is the protection of South Africa's water resources and as such the NWA adds ecological aspects of the right to water to the primarily social aspects stressed in the WSA.⁴⁰ Yet, the differing emphases of these two Acts should not encourage incompatible agendas regarding

³⁴ WSA section 2(a).

³⁵ WSA sections 2(b) and 2(j).

³⁶ WSA section 1.

³⁷ Water Services Act 1997, Water Services Regulations, Regulation 3 (b) in GN R 509, Government Gazette of 8 June 2001. The figure of 6 kilolitres (6000 litres) is based on 200 litres per household for each 30-day month. This assumes no more than 8 people per household (200 litres divided by 8 people = 25 lpd). The adequacy of the 25 lpd minimum as well as the assumption of no more than 8 people per household were considered in *Mazibuko* discussed below.

³⁸ This commitment to free basic water was reiterated in the Free Basic Water Programme 2001. See www.dwaf.gov.za/dir_ws/fbw/. As of 2009 the South African government was providing 36.5 million people with free basic water, out of a total population of 48.5 million. There remains an estimated 12 million without access to sufficient water, quantified in the WSA as 25 lpd of free basic water.

³⁹ WSA section 11(1). The application of this duty on municipalities can be considered within the broader context of the onus on municipalities to provide basic services and realise basic socio-economic rights. Some commentators question the ability of municipalities to provide such services in the face of severely limited resources and capacity. Such constraints at the municipal level may significantly impair the state's ability to respect, protect, promote and fulfil the right to water as set out in the WSA (and section 27 of the Constitution). See generally A.A Du Plessis, *Fulfillment of South Africa's Constitutional Environmental Right in the Local Government Sphere*, Wolf Legal Publishers, 2009.

⁴⁰ Louis Kotze, 'Access to Water in South Africa: Constitutional Perspectives from a Developing Country', *Ymparistojuridiikka*, 1/2009 s. 70-106. p. 78.

water resources and water services. The WSA and the NWA must be read in conjunction with the aim of facilitating access to sufficient water for all within the context of present and future ecological sustainability.⁴¹ The co-existence of these two Acts illustrates the importance of considering the socio-economic right to water within an environmental context that recognises and responds to competing claims for scarce water resources (including domestic, industrial, human, non-human, present and future). Indeed, the NWA has been described as ‘the ecological *grundnorm* to facilitate access to water’, setting the parameters within which sufficient water can be realised.⁴² However, the Constitution makes no mention of prioritising either the right of access to sufficient water above the environment right⁴³ or visa-versa. Similarly the NWA receives no explicit authority above that of the WSA. Therefore there is no legislative justification for limiting the social aspect of the right to water within the constraints of the NWA without acknowledging a corresponding need to view ecological priorities in light of the Constitutional obligation to provide access to sufficient water to every citizen. The imperative of providing sufficient water to citizens now, provides a pragmatic framework within which ecological aspects of *inter alia* sustainability, conservation, and biological diversity must be addressed⁴⁴. The right of access to sufficient water requires a definition of *sufficiency* and *access*. Neither terms are defined in the Constitution, but as already discussed, *sufficient* water has been defined in the literature variously as between 20 and 50 lpd and has received legislative definition as 25 lpd.⁴⁵ Sufficiency has been described as being dependent on three factors, accessibility, adequate quality and adequate

⁴¹*Ibid* p. 79.

⁴²*Ibid* p. 79.

⁴³See note at 91.

⁴⁴ Aims of the NWA: Section 2: Ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors:

- (a) meeting the basic human needs of present and future generations;
- (b) promoting equitable access to water;
- (c) redressing the results of past racial and gender discrimination;
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
- (e) facilitating social and economic development
- (f) providing for growing demand for water use
- (g) protecting aquatic and associated ecosystems and their biological diversity;
- (h) reducing and preventing pollution and degradation of water resources;
- (i) meeting international obligations;
- (j) promoting dam safety;
- (k) managing floods and droughts.

⁴⁵See notes at 96 and 97.

quantity.⁴⁶ These factors encompass the five components of the human right to water as interpreted by the Committee on Economic, Social and Cultural Rights, namely that water must be sufficient, safe, acceptable, physically accessible and affordable.⁴⁷

Together, the Constitutional right of access to sufficient water and its promulgating legislation have framed the goal of realising access to sufficient water within a rights-based approach. Individuals have the right of access to sufficient water. This right should be progressively realised, according to the State's available resources and subject to certain qualifications. Measures to ensure economic imperatives, social development and environmental protection are included in these instruments and recourse to restitution is available where individual rights are violated unreasonably (ultimately through litigation).

Consequently, discussion of access to sufficient water has been conducted largely using 'rights-talk'; framing problems and obligations within a paradigm of individual rights. The case of *Mazibuko* illustrates the limits of rights-talk in realising access to sufficient water. The case also highlights the courts' lack of consideration of sustainability, despite IWRM- influenced legislation. Indeed the interconnectedness of social, economic and environmental factors that IWRM emphasises seems to be recast here as three mutually excluding camps playing a zero-sum game.

Mazibuko and the Limits of Rights-Talk

The case of *Mazibuko* was first heard in the Witwatersrand High Court and was brought by a group of residents from Phiri *in casu*.⁴⁸ It challenged the legality of installing pre-payment water meters in the Phiri area of Soweto, near Johannesburg, in light of the Constitutional right to sufficient water. Installation was undertaken by the City of Johannesburg and its water company, Johannesburg Water in response to acute water losses in Soweto as a result of corroded pipes, an inaccurate tariff system

⁴⁶ Scanlon J, Cassar A and Nemes N, *Water as a Human Right?*, IUCN Environmental Policy and Law Paper No 51, Gland, Switzerland and Cambridge UK, 2004, p. 28.

⁴⁷ United Nations Committee on Economic, Social and Cultural Rights, General Comment 15, *The right to water*, (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003). Paragraph 2. (available at: <http://www.unhcr.org/refworld/docid/4538838d11.html>).

Para 12(c). *Hereafter* General Comment 15.

⁴⁸ *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights & Evictions as amicus curiae)* [2008] JOL 21829 (W). *Hereafter Mazibuko (W)*.

(that meant more water was used than was predicted to be necessary) and a ‘*culture of non-payment*’ for water services that had ‘*arisen originally as part of the resistance to apartheid local government*’⁴⁹.

The case examined the obligations of the City of Johannesburg and Johannesburg Water regarding access to water and the supply of free water for residents who cannot afford to pay. It was contended that since pre-payment water meters, by design, require users to pay for water in advance, access to sufficient water is curtailed if users cannot afford to pre-pay. Such a situation was commonplace for Phiri residents and was raised as incompatible with the Constitutional right to sufficient water. The WSA’s quantification of sufficient water as a minimum standard of 25 lpd was directly challenged in this case on the basis that what is a *sufficient* quantity of water depends on the requirements of users in particular social circumstances. For instance people using waterborne sanitation require a greater volume of water to support life and personal hygiene than those using pit latrines.⁵⁰ The decision of the High Court put great emphasis on the need to redress past injustices (as a result of apartheid policies) and the dire social and material state of many Phiri residents, described as ‘poor, uneducated, unemployed and ravaged by HIV/AIDS’.⁵¹

The applicants challenged the legality and validity of Regulation 3(b) of the WSA (that set the minimum water supply at 25 lpd or 6 kilolitres per household⁵²). They contended that the regulation was based on misconceptions about the amount of water necessary for residents in Phiri individually, but also about the number of people living in each household on average. The 6 kilolitres minimum is based on a household of eight people, while it was submitted that the actual average was more than 16 people.⁵³ As a result it was contended that the regulation failed to provide ‘sufficient water’ as per the Constitution. The inflexibility of the regulation meant

⁴⁹ *Mazibuko and others v City of Johannesburg and others* [2009] JOL 24351 (CC). Hereafter *Mazibuko* (CC). Paragraph 166.

⁵⁰ This is particularly pertinent to the interpretation of sufficient water in the Constitution since section 27 links food and water: ‘Everyone has the right to have access to- (b) sufficient food and water’. Also, since sanitation is not listed in section 27 of the Constitution, but is recognised as a right in the Water Services Act (section 3(1)), the volume of water that is sufficient must depend on the type of sanitation system being used.

⁵¹ *Mazibuko*, (W) Paragraph 5

⁵² Not only does section 3 of WSA reiterate the Constitutional right of access to sufficient water, it expands it to include basic sanitation. The approach of including the right to basic sanitation within the right of access to sufficient water was upheld by the South African High Court in *Manqele V Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D&CLD).

⁵³ *Mazibuko*, (W) Paragraph 166.

that it failed to distinguish between those residents with waterborne sanitation and those without and consequently failed to provide a sufficient quantity of water to this group of residents (who used waterborne sanitation).⁵⁴

In determining the applicants' grounds, the High Court looked to General Comment Number 15 of the United Nations Committee on Economic, Social and Cultural Rights.⁵⁵ Applying the General Comment, the court's view was that:

*The State is under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis.*⁵⁶

Moreover, the progressive realisation of the Constitutional right of access to sufficient water meant that:

*Retrogressive measures taken by the state are prohibited. If such retrogressive measures are taken, the onus is on the state to prove that such retrogressive measures are justified with reference to the totality of the rights provided for in the Covenant*⁵⁷. *The state is obliged to respect, protect and fulfil the right to water.*⁵⁸

The installation of prepayment meters was held to be just such a retrogressive step, preventing residents from access to sufficient water that they had previously enjoyed (before the prepayment meters, Phiri residents had access to a constant supply of water - despite many accruing arrears as a result⁵⁹). The retrogressive step was taken without adequate justification.

It was held that, given the particular needs of the Phiri community (including the need to use waterborne sewerage) a volume of 50 lpd would be a more appropriate quantification of sufficient water than the statutory 25 lpd limit. Satisfied that the

⁵⁴ *Mazibuko*, (W) Paragraph 27.

⁵⁵ *Ibid* at 106.

⁵⁶ *Mazibuko*, (W) Paragraph 36.

⁵⁷ International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec 1966, 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). *Hereafter* ICESCR.

⁵⁸ *Mazibuko*, (W) Paragraph 37.

⁵⁹ *Mazibuko*, (W) Paragraph ???. Note: Prior to installation of pre-payment meters and the associated improvements made to water pipes as part of the City's water services improvement project in Soweto, 'Operation Gcin'amanzi', water services were poor, but the volume of water available was unlimited (except when affected by intermittent technical problems).

respondent could provide this increased amount ‘without restraining its capacity on water and its financial resources’⁶⁰ the High Court decided wholly in the applicants’ favour, granting a declaratory order that Regulation 3(b) is unconstitutional and invalid and ordering that 50 lpd be provided to Phiri residents, free of charge for those without means to pay.

The City of Johannesburg and Johannesburg Water appealed to the South African Supreme Court of Appeal in February 2009.⁶¹ The quantity amounting to sufficient water for Phiri residents was reduced on appeal to 42 lpd. But the High Court’s approach was otherwise upheld. The Supreme Court of Appeal addressed the questions of whether the appellants must provide Phiri residents with access to that quantity of water and whether the appellants must provide such access or access to a lesser quantity of water free of charge.⁶²

It was held that the Constitutional right to sufficient water was not a right of immediate fulfilment. Rather, this right like those regarding housing, health care and food are rights to be progressively realised, their progression being limited by lack of resources. Consequently, the right to sufficient water is not an ‘unqualified obligation’.⁶³ However, the appellant’s concern was not the quantity of water it may be obliged to provide, (the appellant did not contest that a volume of 42 lpd was deliverable) but whether this quantity must be provided free of charge. Referring to General Comment 15 the court accepted that the accessibility of water ‘*must be affordable for all*’⁶⁴. Consequently not being able to pay for water means no access to water. The Constitutional right to sufficient water (revised to 42 lpd) must therefore be provided at an affordable price. Where residents cannot afford to pay for this sufficient water and can prove this to the satisfaction of the water services authority, the appellants have an obligation to provide it free of charge in so far as this can reasonably be done having regard to the appellant’s available resources. The City of

⁶⁰*Mazibuko*, (W) Paragraph 181.

⁶¹ *City of Johannesburg & others v Mazibuko & others (Centre on Housing Rights & Evictions as amicus curiae)* [2009] JOL 23337 (SCA). Hereafter *Mazibuko* (SCA).

⁶² *Mazibuko* (SCA). Summary.

⁶³ *Mazibuko*, (SCA). Paragraph 16. Quoting Chaskalson CJ in *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 11.

⁶⁴ *Ibid*, para 12(c)(ii).

Johannesburg and Johannesburg Water were directed to formulate a revised water policy accordingly.⁶⁵

Mazibuko in the High Court and Supreme Court of Appeal was heralded as an important milestone in socio-economic jurisprudence in South Africa.⁶⁶ It showed the courts' willingness to push the legislature towards concrete manifestations of Constitutional rights and not to allow the 'progressive realization' of these rights to result in unconstitutional policies. The impetus to promote and fulfill the right of access to sufficient water was clearly discernible (particularly in Tsoka J's High Court judgment⁶⁷) in the acceptance of the need for sufficient water to be a quantity that promotes dignity and goes beyond the minimum of Free Basic Water already set.⁶⁸ The potential implications of *Mazibuko* for people living in similar situations to the Phiri residents were significant. Such judicial decisions demonstrate the courts' engagement with polycentric matters in order to help realize socio-economic Constitutional rights more quickly and more explicitly than would otherwise be the case. But the environmental implications of *Mazibuko* may have been significant too, potentially doubling the demand for water from a significant portion of the population⁶⁹, in a 'water-stressed' country.⁷⁰

However, in September 2009 the Phiri residents appealed to the Constitutional Court (unhappy with the Supreme Court of Appeal's order to reduce the amount water deemed to be sufficient from 50 to 42 lpd). This was the first time the Constitutional Court had considered the proper interpretation of the right of access to sufficient water. The orders made by the High Court and Supreme Court of Appeal respectively were set aside. The Constitutional Court maintained that litigation regarding the positive obligations of socio-economic rights was an important element of government accountability.⁷¹ However, it was held that:

⁶⁵ *Mazibuko*, (SCA). Summary. Note, because the SCA found that 42 lpd was the quantity of sufficient water, not 50 lpd as decided by the High Court, the appeal was upheld.

⁶⁶ L.J van Rensburg, *The Right of Access to Adequate Water [Discussion of Mazibuko v The City of Johannesburg Case No 13865/06]*, Stellenbosch Law Review, 2008, 3. p. 434.

⁶⁷ See generally *Mazibuko* (W).

⁶⁸ *Mazibuko* (W). Paragraph 1.

⁶⁹ *Ibid.* at 136.p. 434.

⁷⁰ Michael Kidd, *Environmental Law*, 2008, Juta & Co. Ltd., Cape Town. p. 64.

⁷¹ *Mazibuko* (CC). paragraph 160.

*The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government.*⁷²

The City's Free Basic Water policy was held not to be in conflict with section 27 of the Constitution or section 11 of the Water Services Act⁷³ and the installation of pre-paid water meters was lawful. The court was satisfied that while the Free Basic Water Policy was flawed, it was consistent with the Constitutional right of access to sufficient water.⁷⁴ This was particularly so since the City of Johannesburg had continually amended its Free Basic Water Policy during the course of the litigation.⁷⁵

The Constitutional Court's decision reflects an impetus to maintain a clear separation of powers and to refrain from encroaching on matters of resource allocation, under the purview of the legislature and executive.⁷⁶ Also the reiteration that the Constitution does not require perfection imports a pragmatic approach to the right of access to sufficient water. Here the right is contextualized within broader government policy and its progressive realization is accepted where there is evidence of

⁷²*Mazibuko* (CC). paragraph 161.

⁷³Water Services Act 1997 (108 of 1997), the duty on the part of the Water Services Authorities to provide access to water services is clearly spelled out in section 11(1):

‘Every water service authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.’

Note: While this duty is subject to a number of conditions including *inter alia* the availability of resources and the duty of consumers to pay reasonable charges (11(2)), the *Water Services Act* entrenched this duty by stating in section 11(4) that a water services authority may not unreasonably refuse to give access to water services to a consumer or potential consumer in its area of jurisdiction. Further in section 11(5), the act states that in emergency situations a water service authority must take reasonable steps to provide basic water supply and basic sanitation services to any person within its jurisdiction and may do so at the cost of that authority.

⁷⁴*Mazibuko* (CC). paragraph 163.

⁷⁵*Mazibuko* (CC). paragraph 163.

⁷⁶ This reflects the approach of the High Court in *Manqele V Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D&CLD). The volume of water deemed sufficient for the purposes of the Constitution section 27 and the WSA section 3 had not yet been prescribed (The WSA had been enacted, but the associated regulations [GN R 509 of 8 June 2001] had not been promulgated). The court held that the minimum volume of water must be prescribed by regulation. In the absence of the regulation the applicant relied on an incomplete right, rendering it unenforceable. Determining sufficient water was ‘a policy matter which falls outside the purview of the role and function of the court and is inextricably linked to the availability of resources’. Paragraph 427.

improving and continually revised policy. Such an approach is perhaps understandable in a country with limited resources and manifold social and economic problems. But it emphasizes the tension at the heart of the justiciability of socio-economic rights: The pragmatism of progressive realization versus the necessity of immediate fulfillment. To those Phiri residents now denied a quantum of water commensurate with their needs and necessary for their dignity, their right to water rings hollow. The Constitutional Court's decision illustrates the limitations of using rights to achieve real access to sufficient water.

The social, economic and environmental considerations central to an IWRM approach to water allocation are visible to differing degrees in the courts' engagement with the *Mazibuko* case. But it is the social concerns of the Phiri residents pitched against the economic impetus of Johannesburg Water that are seen most clearly. The High Court and Supreme Court of Appeal afforded more weight to those social considerations of individual necessity for water and dignity; the Constitutional Court emphasized the nature of water as an economic good and the pragmatic limitations of progressive realization. The question of sustainability was raised at the Constitutional Court in relation to the ability of Johannesburg Water to provide a particular quantity of sufficient water per person. But this was distinctly a question of economic sustainability linked to the assumption that the water provider must be able to operate competitively. Concerns about environmental protection and the potential ecological implications of doubling the quantum of sufficient water were conspicuous by their absence from the judgments of the High Court and Supreme Court of Appeal. Neither court mentioned the environmental right (particularly sustainable development) in section 24 of the Constitution⁷⁷. Despite environmental protection and sustainability featuring heavily in the legislation, these considerations appeared neither in the *obiter* or *ratio* of the *Mazibuko* judgments. Indeed the absence of environmental considerations is common to rights-talk in general as individuals' rights claims are

⁷⁷Section 24: Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

contested largely in isolation from the realities of resource scarcity. The limitations of a rights-based approach to basic resource allocation are briefly sketched below.

A liberal analysis of the limitations of rights tends to focus on flawed implementation. Sound ideas suffer from insufficient resources or poor application. But a radical critique suggests that the limitations of using rights to achieve genuine socio-economic improvements lie in the way that rights (internationally accepted human rights or constitutional rights) give moral claims legal form. In so doing the moral claim is diluted, turning it into a technical legal problem and bureaucratizing away the imperative to meet the claim⁷⁸. When conceived as a legal problem, considerations like progressive realization, reasonableness and available resources become acceptable explanations for unmet claims. The moral claim that everyone should have access to the quantum of water required for dignified existence is immediately diminished because of the Constitution's limitations clause which provides the State can restrict rights if it is doing so reasonably⁷⁹. Similarly the Constitution provides for the progressive realization of socio-economic rights, but only within available resources. Lack of available resources is therefore a legitimate reason for unfulfilled rights, despite the size and nature of available resources remaining undisclosed. Such a critique does not deny that the right of access to sufficient water has helped reduce the number of people living with insufficient water in South Africa. The right has had positive substantive and normative effects and has underpinned significant legal victories.⁸⁰ But Pieterse (2007)⁸¹ and Bond (2009)⁸² assert that human rights generally and Constitutional rights specifically in South Africa concentrate on consciousness-raising and recognition of individual's right to necessities, rather than focusing on redistribution and reparation. Their potential for social transformation is therefore limited.

⁷⁸ Patrick Bond, *South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?*, 2009, Draft paper, presented at Syracuse conference, Cape Town, February 2010. p. 12.

⁷⁹ Constitution: Section 36.

⁸⁰ See: *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* [2002] JOL 9513 (W). Hereafter *Bon Vista*.

⁸¹ Pieterse, M. (2007). 'Eating Socio-economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited.' *Human Right Quarterly*, 29. Pp. 796-822.

⁸² *Ibid* at 77

A Return to the Commons

Having seen that the prominence given to IWRM thinking in South African Jurisprudence differs considerably between the legislation and the courts' decisions, it seems there is a long way to go before IWRM can be said to underpin water access and allocation. It seems also that the human and constitutional right to water cannot be relied on to provide equitable and sustainable water allocation: To this end the right to water remains useful but limited.

Perhaps the most logical route beyond the limitations of rights-talk and the incongruence within IWRM implementation is a 'commons' strategy for water allocation. 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 all⁸³. In contrast to individualised consumption within a rights-based paradigm, a commons strategy emphasises shared consumption. This echoes the emphasis on interconnectivity within IWRM. But unlike IWRM a commons strategy avoids emphasising individual water rights, in favour of communal needs. This shift in focus may offer a more effective model of implementing sustainable water allocation, while avoiding the pitfalls of rights-talk inherent in the right to water. A commons strategy would encourage decisions on water allocation to be made at the lowest appropriate level, involving all users to input into collective decisions that transcend a compromise of competing interests, in favour of corporately 'owned' allocation decisions that best serve each community.

Romanticizing community control of resources must be avoided, since inequitable power relations can exist at small as well as large scale. But, driven in part by the failure of rights-talk to effectively incorporate environmental protection and even to deliver resources to all individuals effectively, commons ideas are on the rise⁸⁴.

A commons strategy, if innovatively applied to water allocation may be able to avoid the limitations of the right of access to sufficient water, restating sufficient water as a moral claim, made corporately by and for people within their community. Given the social, economic and environmental imperative for sustainability that any commons

⁸³ www.onthecommons.org/content.php?id=1467

⁸⁴ *Ibid* at 77

strategy must consider, IWRM too could find its functional imperative of sustainability rejuvenated beyond the limitations of rights-talk.