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**Water, Human Rights and Social Conflict:  
South African Experiences**

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## Abstract

This article reviews some of the debates regarding the right to water, applying these to the experiences of water delivery in post-apartheid South Africa. Of central importance, we find, are international trends towards cost-recovery and the commercialisation of water, whether through privatisation or corporatisation. Against such trends, which result in water being priced beyond the reach of poor households, popular resistance to water injustice has taken forms ranging from direct protests, to autonomist-style reconnections and destruction of prepayment meters, to a constitutional challenge over water services in Soweto. Do such water wars have the potential to shift the focus from market-based and 'sustainable development' conceptions to policies more conducive to 'social justice', even in the face of powerful commercial interests and imperatives? And can rights mobilisation be part of this struggle for a more socially-just model of water delivery, which views water primarily as a social rather than a commercial good?

## Keywords:

Water rights, social justice, cost-recovery, commercialisation, pre-paid water meters, popular struggles, South Africa

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## 1. Introduction: Ambiguous rights

'The Republic of South Africa is one sovereign, democratic state, founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms'...Everyone has the right to have access to...sufficient water'.

Constitution of the Republic of South Africa, 1996<sup>1</sup>

'We want the water of this country to flow out into a network – reaching every individual – saying: here is this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity...Water – gathered and stored since the beginning of time in layers of granite and rock, in the embrace of dams, the ribbons of rivers – will one day, unheralded, modestly, easily, simply flow out to every South African who turns a tap. That is my dream'.

Antjie Krog, South African writer, 1997<sup>2</sup>

'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'.

African National Congress (ANC) campaign promise, 2000 municipal elections

South Africa first confronted its 'water apartheid' problem when, at the World Summit on Sustainable Development in Johannesburg on 31 August 2002, an estimated 30,000 marchers braved threats of a protest ban to demand that the United Nations (UN) move away from 'Type 2 Partnerships' between government and businesses (Type 1 are government-government). On a daily basis, dissatisfaction has swelled against insufficient and inequitable water services. Of approximately 5900 protests recorded by the South African Police Service between 2004-05 (per capita probably the highest rate in the world), a great many – perhaps the majority – were about inadequate water and sanitation services.<sup>3</sup> Rural areas are underserved due to lack of operating subsidies which mean that many taps installed in the post-apartheid era are now dry. Using the minimalist definition of water access mandated in the Reconstruction and Development Programme – namely, in the short term, 25 litres per person per day within 200 meters of a household) – the most rigorous study to date found 57 percent of projects were either 'not working' or 'problematic'.<sup>4</sup> Using the medium-term objective of 50-60 litres per person per day on site, a tiny proportion of the projects were working. And for those lucky to be on local government municipal water grids, mass disconnections due to inability to afford water prices affect more than 1.5 million South Africans each year, to which even the government has admitted.<sup>5</sup> To what extent, if any, are human rights relevant to such people?

Upendra Baxi has outspokenly illuminated the limits of human rights models that are not based on an understanding of power relations and structural inequalities<sup>6</sup>. Market-friendly rights regimes allow big dam developments, for example, to bulldoze local communities, all the while cloaked in the rhetoric of rights recognition. In important respects the current international human rights framework sustains the inequitable power relations even while aspiring to what Baxi refers to as the 'contemporary', 'inclusive', human rights paradigm.<sup>7</sup> There are simply too few mechanisms for the enforcement and fulfilment of socio-economic rights by disempowered citizens. The result is cynicism about the ability of human rights to curb violations, let alone to promote parity in an increasingly unequal world.

As we will see, activists in South Africa have generated a more progressive articulation of human rights in the context of conflict with, as Baxi puts it, 'concentrations of economic, social, and political formations'<sup>8</sup>. Facilitated by a Constitution with redistributive potential, the progressive articulation of human rights allows us to bring 'to full view the issues of inequity, structural exploitation, impoverishment and unequivocal duties of reasonable help to those who suffer'<sup>9</sup>, as well as offering some hope of redress. Indeed, the South African Constitution compels the kind of interpretation of rights that Baxi ascribes to 'justice'; as necessitating an analysis of power. The transformative nature of the Constitution, as well as its unequivocal focus on equality, is evident in the founding principle quoted at the outset, and also in the equality clauses, which explicitly sanction positive discrimination in the interests of equity and justice on an individual or collective basis:

'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'<sup>10</sup>.

As it relates to water, this justice-based human rights schema goes beyond the constitutional guarantee of access to sufficient water (which, along with all other socio-economic rights, is explicitly justiciable<sup>11</sup>), to encompass a range of legislation, regulations and policy designed to protect peoples' procedural and substantive right to water<sup>12</sup>. Yet, despite this progressive framework, and in the face of numerous water-related violations, until the launching of a water rights case in July 2006 (that we discuss below), there had been no constitutional water challenges in South Africa. Why is this so?

There are at least two reasons why there have been so few socio-economic rights cases generally<sup>13</sup> before the Constitutional Court. First, the Court has failed to advance a pro-poor direct access practice, such as the Indian Supreme Court has done, despite formal rules and a Constitutional provision allowing for direct access<sup>14</sup>. The South African Court's record over the past ten years, in which it has only allowed direct access in a handful of cases, 'reveals a practice of restricting rather than expanding the conditions of direct access ... this has been to the detriment of the Court's ability to act as an institutional voice for the poor as, increasingly, only empowered individuals and groups have the resources to bring litigation through the judicial system to the Constitutional Court'<sup>15</sup>.

Second, the overly tentative and deferential way in which the Constitutional Court has interpreted socio-economic rights in its first decade has further alienated potential claimants. Instead of robustly clarifying the scope of socio-economic rights and measuring government performance against the objective core content of rights to see if there have been violations, the Constitutional Court has tested the positive obligations through inquiring into the reasonableness of government programmes in the context of the states' 'available resources'<sup>16</sup>. This has meant that, although the Court decided in favour of the applicants in four of the five socio-economic rights cases to date<sup>17</sup>, 'none of the judgements provided direct, substantive relief to the applicants, an outcome that gives little incentive to poor litigants to seek relief through constitutional litigation'<sup>18</sup>.

As useless as water-rights talk might appear in the wake of very tentative Constitutional Court jurisprudence, South Africa's constitutional framework does provide us with the tools to examine whether the commercialisation of water,<sup>19</sup> whether by private companies or corporatised municipal utilities, is trumping human rights obligations and undermining the promise of equality, and also to consider whether the Court can potentially redress such violations.

## 2. Water ideologies

To address these issues properly requires some ideological context.<sup>20</sup> There have emerged three main discourses associated with water in South Africa and across the world. Above, we have briefly reviewed the socio-economic rights discourse, and we will later elaborate on the obstacles to the realisation of socio-economic rights in a hostile economic and political context.

In contrast, the still-predominant discourse, 'neoliberalism', has an important advocate in *The Economist* magazine, whose July 2003 survey on water declares this dilemma: 'Throughout history, and especially over the past century, it [water] has been ill-governed and, above all, colossally underpriced.' Identifying this problem, naturally begets this solution: 'The best way to deal with water is to price it more sensibly,' for 'although water is special, both its provision and its use will respond to market signals.' As for the problem of delivering water to poor people, 'The best way of solving it is to treat water pretty much as a business like any other'<sup>21</sup>.

The third discourse, in between, is the often pleasing philosophy termed 'sustainable development' (or more technically, 'ecological modernisation'). It is characterised by this sort of more balanced rhetoric from the World Bank, in its 1996 guidebook *African Water Resources*: 'The strategy developed in this document is based on the principle that water is a scarce good with dimensions of economic efficiency, social equity, and environmental sustainability'<sup>22</sup>.

Notwithstanding such nuanced rhetoric, the Bank consistently commodifies water, and offers ideological assertions such as this cornerstone of the 'Kampala Statement' by the World Bank and African Water Utilities Partnership in 2001: 'the poor are willing and have the capacity to pay for services that are adapted to their needs... poor performance of a number of public utilities is rooted in a policy of repressed tariffs'.<sup>23</sup> Moreover, according to a 2000 Bank staff manual, *Sourcebook on Community Driven Development in the Africa Region*,

‘Work is still needed with political leaders in some national governments to move away from the concept of free water for all... Promote increased capital cost recovery from users. An upfront cash contribution based on their willingness-to-pay is required from users to demonstrate demand and develop community capacity to administer funds and tariffs. Ensure 100 percent recovery of operation and maintenance costs’<sup>24</sup>.

The Bretton Woods Institutions’ central coordinating and strategising role in water management deserves more consideration, not only because of their influence in South Africa, but because they are key agents in the commodification of water across Africa and the Third World. The International Monetary Fund (IMF) has drawn many water-related issues into its own structural adjustment programs, whether the Enhanced Structural Adjustment Facility, Poverty Reduction and Growth Facility or Poverty Reduction Strategy Program<sup>25</sup>. Water privatisation still features strongly in the World Bank’s Public Private Investment Advisory Facility, which resulted in the two progressive European governments – Norway and Italy – withdrawing millions of dollars of financial support in 2007.

The World Bank has had primary intellectual, water policy, and project promotion roles consistent with water commodification, and even sits as judge in arbitrations regarding contract disputes. The Bank is a regular coordinator of, and leverage-point for, donor resources. It is a catalyst for several large dam projects, a project and water sector lender, a ‘Knowledge Bank’ source of information, a facilitator of civil-society involvement and a promoter of a limited version of ‘community participation’ in water projects. The Bank is also a government policy adviser, an investor in privatised water infrastructure (through the International Finance Corporation), a host to numerous African water agencies’ Water Utilities Partnership, and the main agency imposing stipulations upon water sector management via structural adjustment and debt relief conditionality. The Bank can, therefore, claim not only to have a coherent perspective and wide-ranging market-oriented framework, but also to have applied these to water projects and policies across Africa.

Also of critical importance is the role of Bank water management in development projects such as water supply enhancement or via restructuring Riparian water law so as to end centralised administrative allocation of water, to be replaced by water trading in specially-designed markets. In virtually all such cases, the Bank has developed policies and projects that further the commodification of water.

Commodifying (and also commercialising) water entails highlighting its role mainly as an economic good, attempting to reduce cross-subsidisation that distorts the end-user price of water (tariff), promoting a limited form of means-tested subsidisation, establishing shadow prices for water as an environmental good, solving problems traditionally associated with state control of water (alleged inefficiencies, excessive administrative centralisation, lack of competition, unaccounted-for-water, weak billing and political interference), and in the process, fostering the conditions for inequitable water services. Social disasters ensuing from such rigid neoliberal policy directives in other domains are strewn across Africa, resulting in low-income households not being able to afford any state services and parents cutting back on girls’ schooling or healthcare because the user fees were too high. In October 2000, the Bank was instructed by the US Congress never to impose these user-fee provisions on education and healthcare, and in 2002 a campaign by progressive NGOs in the US expanded to decommodify water as well, so far unsuccessfully.

Struggles against commodified water often erupt on global platforms, such as the triannual World Water Forum – at The Hague in 2000, Kyoto in 2003 and Mexico City in 2006 - and related meetings of the water establishment such as World Trade Organisation summits. There, activists have battled a series of opponents:

- the Global Water Partnership (created by the World Bank, UN Development Programme and Swedish aid);
- the Marseilles-based World Water Council (founded by Suez, Canadian aid and the Egyptian government and joined by 300 private companies, government ministries, and international organisations);
- the International Private Water Association (privatisation firms plus the World Bank, US Credit Export Agency and Overseas Private Investment Corporation and the European Bank for Reconstruction and Development);
- the World Bank itself (which in USD 20 billion worth of 1990s water projects imposed privatisation as a loan condition in a third of the transactions);

- Mikhael Gorbachev's Green Cross (in ongoing dispute with Council of Canadians over global-scale water rights and property rights in the UN);
- Aquafed (a federation set up by a former Suez managing director); and
- the World Panel on Financing Infrastructure<sup>26</sup>.

The UN administration has generally sided with the establishment. The UN Panel on Water declared in 1998 that 'water should be paid for as a commodity rather than be treated as an essential staple to be provided free of cost'<sup>27</sup>. At the World Summit on Sustainable Development, 'Public-Private Partnerships' were endorsed for water, and a few weeks later, the UN formally adopted the New Partnership for Africa's Development (NEPAD, championed by South African president Thabo Mbeki), which calls for increased foreign investment in privatised African infrastructure. NEPAD and the UN's Millennium Development Goals are cited by Rand Water – the water catchment management agency for Johannesburg – as justification for its joint venture (with a Dutch company) to privatise the water system of Accra, Ghana, in a World Bank funded project.

Moreover, a new pre-paid meter technology that leads to automatic-disconnection when the credit runs out was pioneered by Conlog, a South African firm directed by the late ANC leader Joe Modise once he retired as minister of defence in 1999. Conlog is manufacturing these devices and installing them across the African continent. Soweto activists have taken the lead in ripping out pre-paid meters – both water and electricity - and periodically marching to municipal offices to dump the hated technology, as well as preparing a court case arguing that the meters are unconstitutional, as reviewed below. There are also growing links between the Ghanaian National Coalition Against the Privatisation of Water and the Johannesburg-based South African Coalition Against Water Privatisation.

In turn, while microeconomic techniques have developed since 1992, when Rio and Dublin water conferences established water as an economic good, the same principle was applied in South Africa in 1994, the year of political liberation, when, in the country's *Water Supply and Sanitation White Paper*, the minimum price of water was set at marginal cost – i.e. the operating and maintenance expenses associated with covering the next unit of water's production cost<sup>28</sup>. As we will see, this commercialised approach to water services soon had a lethal impact.

### 3. Commercialisation of South African water

As apartheid came to a close in 1994, the French company Suez was landing water contracts in small Eastern Cape provincial towns (Stutterheim, Queenstown, Fort Beaufort), leading to the company's capture of the massive Johannesburg water management contract in 2001, for an initial five-year contract. Suez was not encouraged to apply for – and probably did not desire - an additional 25 years, as the company had initially hoped would be feasible. The story behind the dramatic controversies in South African post-apartheid water commercialisation which led to Suez's retreat is broadly reflective of the sector's global conflicts, but has been confused by the new government's progressive, rights-based rhetoric.

Given that the vast majority of black people lacked access to direct household water and sanitation in 1994<sup>29</sup>, the ANC government's democratic mandate included, in the 'short-term', the provision of '20 – 30 litres per capita per day (lcd)' of 'clean, safe water'. In the 'medium-term', this amount was to rise to '50 – 60 lcd'<sup>30</sup>. South Africa's first democratic development policy document, the Reconstruction and Development Programme (RDP) established a 'lifeline tariff to ensure that all South Africans are able to afford water services sufficient for health and hygiene; in urban areas, a progressive block tariff to ensure that the long-term costs of supplying large-volume users are met and that there is a cross-subsidy to promote affordability for the poor and in rural areas, a tariff that covers operating and maintenance costs of services, and recovery of capital costs from users on the basis of a cross-subsidy from urban areas in the cases of limited rural affordability'.<sup>31</sup> For progressive human rights analysts and social activists, the only way to interpret the RDP phrase 'lifeline' was that at least this minimum amount should be provided free of charge. This interpretation appears to make sense of the Constitutional obligation to provide everyone with access to sufficient water, which, without reference to affordability in the context of widespread unemployment, is meaningless.

Proper implementation of the RDP mandate would have required a national redistributive water pricing policy with higher unit amounts for higher-volume water consumers, especially large firms, mines and (white) farms. (The latter use more than half the country's raw water.) It also would have required the state to intervene in the functioning and autonomy of local government to ensure equitable tariffs, including

regulation of appropriate cross-subsidies between rich and poor consumers within a municipality. This was not an impossible task, but the first post-apartheid water minister, Kader Asmal, refused to grasp the nettle:

‘The positions I put forward are not positions of a sell-out, but of positions that uphold the policy of the South African government and the ANC ... The RDP makes no reference to free water to the citizens of South Africa. The provision of such free water has financial implications for local government that I as a national minister must be extremely careful enforcing on local government’<sup>32</sup>.

Asmal, formerly a respected constitutional lawyer (based at Trinity University, Dublin while in exile), interpreted the RDP and Constitution selectively, to redefine water rights as being about only physical access rather than to encompass the critical issue of affordability. Under his management, disconnections of poor South Africans unable to pay for water reached more than one million people per year.<sup>33</sup> Instead of redistributing water through cross-subsidies within the tariff system, Asmal’s first policy mandated the supply of water to consumers at a price equivalent to the operating and maintenance costs (the marginal cost). Under the influence of his own leading bureaucrats and the World Bank, this slippery semantic solution was applied with increasing ruthlessness during the late 1990s.

The World Bank’s criticism of the RDP’s lifeline-plus-progressive-block-tariff model – i.e. a free, zero-rated, basic amount, followed by rising prices for each additional unit according to levels of consumption beyond a necessary amount - offered to Asmal by water official John Roome (the taskmanager of the controversial Lesotho Highlands Water Project), was that municipal privatisation contracts ‘would be much harder to establish’ if poor consumers had the expectation of getting something for nothing. If consumers didn’t pay, Roome continued, Asmal needed a ‘credible threat of cutting service’<sup>34</sup>. This advice, according to the Bank’s 1999 *Country Assistance Strategy* for South Africa, was considered ‘instrumental’ in a ‘radical’ shift towards the market in water policy under Asmal.<sup>35</sup>

Not only in the water sector, hostility to subsidies was a general phenomenon within the post-apartheid state. In 1996, Dr Chippy Olver, then deputy director-general of the Department of Constitutional Development and subsequently the director-general of the Department of Environmental Affairs and Tourism (and main manager of the 2002 World Summit on Sustainable Development) told the *Mail & Guardian* newspaper that low-income people should *not* receive lower-priced electricity (also a basic service, which is meant to be based on equitable pricing policies)<sup>36</sup> than large firms, such as the energy-guzzling Alusaf aluminum smelter (they pay, on average, four times more). He remarked, ‘If we increase the price of electricity to users like Alusaf [so as to cross-subsidise low-income consumers], their products will become uncompetitive and that will affect our balance of payments’<sup>37</sup>. Here the imperatives of globalised trade clearly contradict a rights-based approach to basic services.

Under the cost-recovery rubric – manifest especially in the Department of Water Affairs and Forestry (DWAF)’s 1994 *Water Supply and Sanitation White Paper* and in a 1998 *Water Pricing Policy* - the logical implications are the formal privatisation or at minimum corporatisation of services and, in the process, the fragmentation of the public sector and public services. A municipal public health unit complaining about a diarrhoea outbreak in central Johannesburg, for example, might once have asked the City to turn supply back on in a building that had been disconnected due to non-payment of water bills, so as to save the health system *more* than the water provider was losing; that scenario (quite common) is now impossible because the corporatised utility, Johannesburg Water Pty (Ltd), physically moved to separate offices in 2001 and it operates as an arms-length corporation immune to such holistic considerations.

Privatisation or even merely corporatisation of water has led inexorably to an increasingly fractured relationship between water and health departments (as well as other social services) across South Africa. The national Department of Health acknowledged this problem more than a year before the infamous 2000-02 cholera outbreak, which affected several hundred thousand people:

‘It is common knowledge that lack of water and sanitation is a common cause of cholera, diarrhoea or other illnesses that afflict so many in our country and that there is a relationship between various communicable diseases, including TB, and conditions of squalor. Yet we often have not structured our institutions and service delivery systems in ways that can easily respond to these realities’<sup>38</sup>.

One indication of the problem of water commercialisation was the rash of disconnections to people who could not afford water services, affecting 275,000 households in 2003 alone, conceded DWAF director-general Mike Muller<sup>39</sup>. To illustrate, the commercialisation of water services in Ngwelezane in KwaZulu-

Natal in August 2000 resulted in the the disconnection of thousands of people from their previously free water supply in August 2000, which caused the outbreak of South Africa's worst recorded cholera epidemic. The *Sunday Times* reported,

'This week, a startling picture emerged of the sequence of events that led up to the outbreak around Ngwelezane. Authorities discovered that some areas were still receiving free water in terms of a 17-year initiative of the former KwaZulu government to deal with the 1983/4 drought. 'It was eventually noticed, and it was decided to switch off the supply', said the chief executive of the Uthungulu Regional Council, [Mr] B.B. Biyela. 'The people were given sufficient warning and the supply was cut off at the beginning of August'. The first cases indicating cholera were noticed in Matshana and Nqutshini in the second week of August. The first case confirmed was on August 19.'<sup>40</sup>

The South African experience clearly demonstrates that commercialised companies – whether multinational corporations like Suez or corporatised municipalities and water boards driven to maximise profits - do not take responsibility for the health, social and personal costs of inadequate water consumption by poor people who are unable to afford market-driven water tariffs. The health-related costs to the poor and society in general include cholera, diarrhoea, dysentery and tuberculosis and other HIV/AIDS-opportunistic infections. But health-costs are not the only excluded costs in commercialised basic services. Commercialised utilities take no responsibility for the environmental damage caused when, for example, women are forced to cut down trees to heat their families' food. Similarly, they pay none of the local economic costs when electricity cut-offs prevent small businesses from operating. Nor do they pay when workers are less productive because they have lost access to even their water and sanitation services.

As the South African poor can attest, the key determinant is not whether water or electricity are privately or publicly owned or managed, but rather whether they become commercialised services. At that point, men like Mr Biyela are just as lethal in the public sector as they would be if acting as chief executive officers of a privatised water company. And, as discussed below, publicly-owned but corporatised water providers such as Johannesburg Water can pose just as strong an opposition to social justice as do private water companies.

#### 4. Free water?

In August 2000, when the cholera crisis emerged in poverty-stricken KwaZulu-Natal province and social protest against water disconnections rose to new heights, Asmal's replacement (after a 1999 cabinet reshuffle), Ronnie Kasrils, acknowledged that the RDP promise meant access to basic water for *free* for those who could otherwise not afford water services, illustrating the situation graphically with the Eastern Cape province case of a rural woman (with baby) who could not afford a then US\$1 access fee for water provided in a new government project.<sup>41</sup> Under Kasrils' command, and in line with a campaign promise made during the municipal elections of December 2000, the government's Free Basic Water (FBW) policy was formalised in DWA's *Free Basic Water Implementation Strategy Document (Version 1)* in May 2001.<sup>42</sup>

Widespread dissatisfaction quickly arose especially amongst municipal bureaucrats responsible for water services delivery, who saw the imposition of this obligation as a fetter on local government autonomy and finances, and whose allies in the Palmer Development Group (traditional opponents of free lifeline water) ensured wiggle room, from political promise to policy to implementation. To illustrate, the FBW policy called for every household to be provided 6,000 litres (six kilolitres) of water per month for free, a substantial retreat from the RDP's medium-term<sup>43</sup> promise of 50 – 60 litres per person per day (lcd).

The six kilolitres per household per month calculation has been publicly acknowledged to have been influenced by the precedent of a pilot project in Durban municipality<sup>44</sup>, which, between 1997 and 1998, involved the municipality giving away 220 litre drums of water each day to each shack (with an average of seven persons per shack) in an informal settlement because it was cheaper to give away the water than to administer bills for it. In the words of the architect of Durban's Free Basic Water policy, Neil Macleod: 'During 1998, the new Council assessed the system in operation and it became apparent that the amount of money that was collected by the Council for the water supply was in fact equivalent to or less than the costs of administering the collection of the amounts from the relevant communities'<sup>45</sup>. In other words, the basis of the policy was cost-efficiency rather than meeting basic needs.



Extrapolated by DWAF to national policy, by reference to the RDP's short-term goal (20 – 30 lcd) and a 2001 census-derived household average, the six kilolitre amount allows 25 lcd in a household of eight (higher than the national average, but not locally sensitive). Although pressed to do so in the Phiri water rights case discussed below, the government has never offered any evidence that the six kilolitre amount per household per month – or its individuation as 25 lcd - is an adequate (or 'sufficient' amount to use constitutional terminology) amount of water to meet basic needs. Indeed, the World Health Organisation (WHO) states that a level of consumption around 20 lcd carries a 'high health concern'<sup>46</sup>.

Extending this logic, Peter Gleick (President of the Pacific Institute for Studies in Development, Environment and Security) considers 50 lcd to be the minimum 'Basic Water Requirement' to meet the human needs of drinking (five lcd), sanitation (20 lcd)<sup>47</sup>, bathing (15 lcd) and food preparation (ten lcd)<sup>48</sup>. In its General Comment No. 15 on the right to water, the UN Committee on Economic, Social and Cultural Rights references Gleick's Basic Water Requirement of 50 lcd as being the basis for 'the quantity of water' that should be 'available for each person'<sup>49</sup>. The South African calculation of 25 lcd is half of this basic minimum and consequently, by reference to the only needs based calculation of minimum water requirements, cannot be said to fulfil the requirement of access to sufficient water for all in the context of the unaffordability of water beyond the FBW amount.

Moreover, the per household allocation automatically unfairly discriminates against the large households with multi-unit dwellings that are common in poor urban areas in South Africa in that in any such household with more than eight members, each person receives much less than even 25 lcd, exposing them to multiple health and dignity risks as well as human rights violations. Even in a household of eight, the six kilolitre allocation represents just two toilet flushes a day per person, for those lucky enough to have flush toilets. It leaves no additional water to drink, wash with, or clean clothes or the house, let alone water a vegetable garden. (In contrast, a progressive interpretation of the Bill of Rights' universal entitlement to socio-economic rights recognises that that access to 'sufficient water'<sup>50</sup> is utterly meaningless to poor people without addressing affordability.)

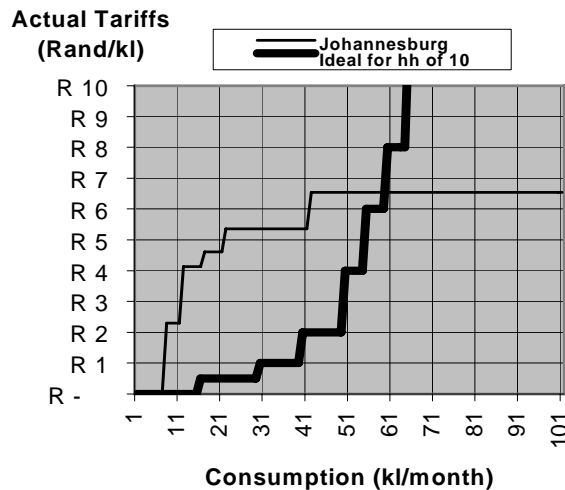
The contradictions associated with the partial Free Basic Water commitment, along with poverty and popular resistance (and *potential* legal obligations to supply even poor customers), together mean that there have been no new South African water commercialisations since 2001. Moreover, some of the major pilot privatisations proved to be commercial failures. For example, Saur had to renegotiate its Dolphin Coast contract in mid-2001 due to lack of profits, with research showing that it regularly denies services to poor people. For similar reasons, Saur also pulled out of its Maputo, Mozambique contract in late 2001. Having been thrown out of the small town of Fort Beaufort (also known as Nkonkobe), Suez's subsidiary is responding with a lawsuit for millions of dollars in damages - much as did Bechtel (unsuccessfully) in the celebrated case of the uprising against water privatisation in Cochabamba, Bolivia.

More generally, in the absence of any formal regulation or intervention by DWAF on behalf of victims of iniquitous and inequitable practices, corporatised (but state-owned) water providers have implemented cost-recovery measures that violate constitutional protections. Johannesburg Water Pty (Ltd), under Suez management from 2001-06, is controversially introducing pit latrines, in spite of porous soil and the spread of the E.Coli bacteria, to prevent poor people flushing their toilets. If these are unacceptable because of South Africa's dolomitic soils, Johannesburg Water offers a low-flush shallow sewage system to residents of condominium (single-storey) houses arranged in rows, connected to each other by sanitation pipes much closer to the surface. Given the limited role of gravity in the gradient and the mere trickle of water that flows through, community residents are required to negotiate with each other over who will physically unblock sewers every three months. Prepayment meters are also being installed in poor areas and, as we note below, are the subject of current constitutional litigation.

In order to break-even or to still make a profit despite the obligation to provide FBW, many water service providers utilise non-progressive tariff structures. These tariffs, typically, provide the six kilolitre FBW, followed by a very steep, convex curve, such that the next consumption block is unaffordable to many households, leading to even higher rates of water disconnections in many settings. Optimally, a different strategy based on commodification only above a sufficient threshold would provide a larger FBW allocation, ideally based on a per-person rather than a per-household calculation, and then rise in a concave manner to penalise luxury consumption (Figure 1). Johannesburg's tariff was set by the council with help from Suez, and has an extremely high price increase for the second block of consumption (the block immediately after the zero-rated FBW allocation). Two years later, the price of that second block was raised 32 percent, with a ten percent

overall increase, putting an enormous burden on poor households that used more than six kilolitres each month. Conversely, the rich got off with relatively small increases and a flat tariff after 40 kilolitres/household/month, which did nothing to encourage water conservation and very little to promote genuine redistribution in a tariff cross-subsidy sense.

Figure 1: *Divergent water pricing strategies Johannesburg (2001) v. ideal tariff for large household*

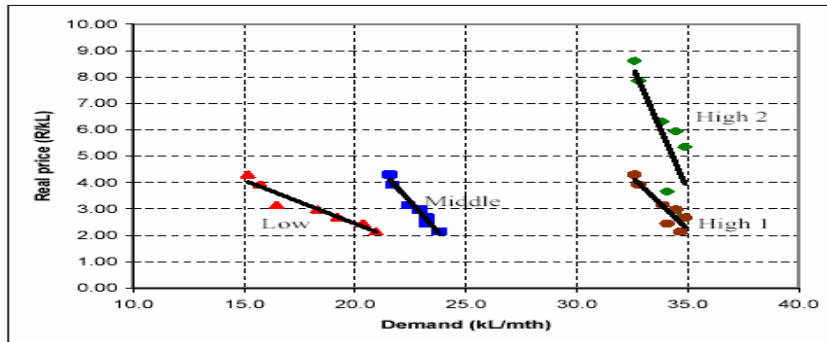


Source: Johannesburg Water (thin) and own projection (thick)

In Durban, the South African municipality with the highest cash reserves, a similar process has recently been measured. The 1997 consumption of water by the one third of the city's residents who have the lowest income was 22 kilolitres/household/month. Shortly afterwards, a 'Free Basic Water' strategy was adopted (for just the first six kilolitres/household/month), but steep increases in price for the next blocks of water were imposed. By 2003, the price of the average litre of water consumed by the lowest-income third of billed residents had doubled from South African Rand (ZAR) 2 in 1997 (about USD 0.30) to ZAR 4 (Figure 2). According to Durban municipal water official Reg Bailey, this price increase resulted in average consumption by low-income consumers diminishing to 15 kilolitres/household/month during the same period. (The price elasticity for water was, hence, a disturbing  $-0.55$ ; an extremely large impact for what should be a basic need, hence relatively impervious to price change.) In contrast, for middle- and high-income consumers, the price rise was a bit higher, but the corresponding decline in average consumption was much less (the price elasticities, respectively, were  $-0.14$  and  $-0.10$ )<sup>51</sup>.

In sum, although they provided the pilot case of FBW, Durban officials established a system in the late 1990s and early 2000s that led to much greater inequality. Like the Johannesburg case, it simply goes to show that the 'devil is in the details', and that the struggle over the shape and slope of the tariff curve is indeed a proxy for class struggle.

Figure 2: *The impact of price increases on water consumption by different income groups in Durban from 1997 (lower prices, higher consumption levels) through 2003.*



Source: Bailey, R. and C. Buckley (2005), 'Modelling Domestic Water Tariffs', Powerpoint presentation to the University of KwaZulu-Natal Centre for Civil Society, Durban, 7 November.

However, the sabotage via municipal pricing was condoned at the highest levels, where politicians and bureaucrats continued to find ways to blame the victim. According to newspaper advertisements widely placed by Kasrils periodically beginning in December 2002,

'If you cannot afford to pay for your water, you are still entitled to a free basic water supply. It is a criminal offence to connect to a public supply without the Municipality's permission since this could harm other water users. If you are unable to pay your water bill, you should make arrangements with your Municipality. Although they may not withhold the basic supply, they may restrict you to this basic amount. If you interfere with the restrictor system you can face a total cut-off because you may harm other people in the community. Also note that even if you do not receive an account, you are still responsible to ensure payment.'<sup>52</sup>

The complicated and highly contradictory phrasing reveals the government's ambivalence on disconnections. In May 2003, after embarrassing, high-profile media revelations about disconnections, Kasrils promised in his parliamentary budget speech to 'name and shame' municipalities that disconnected residents without a nearby standpipe backup supply or 'trickler' restrictor device (such as a washer with a tiny hole in the middle inserted across the diameter of the water pipe, allowing mere drips through). But in 2003 Kasrils admitted that the three largest cities in South Africa were still disconnecting 17,800 households a month.<sup>53</sup>

Meanwhile, new ways were found to restrict people to only the six kilolitres/household/month. Prepayment meters - which automatically disconnect the water supply if there is no additional credit following the exhaustion of the FBW allocation (no matter what the household circumstances) - began to be implemented in poor areas across South Africa. One response to the commercialisation of water, high and regressive tariffs, disconnections, restrictors and prepayment meters, was the illegal reconnection of water, as one of several strategies adopted by activists in South Africa and many other sites, as a more direct way of 'decommodifying' water.

## 5. Conclusion: Resistance and Rights Rhetorics

This article has surveyed some of the rhetorics and realities surrounding the right to water. One reaction to the experiences in South Africa and to co-optation of the 'right to water' by mainstream agencies the world is to reject rights discourses and establish a decommodification agenda via the notion of a water commons.

This is the conclusion Karen Bakker reaches:

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 privatisation. 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. In contrast, the 'alter-globalization' debate opened up by disrupting the public/private binary has created space for

the construction of alternative community economies of water. These 'alter-globalization' proposals counterpose various forms of the commons to commodity-based property and social relations. Greater progressive possibilities would appear to be inherent in the call of alter-globalization activists for radical strategies of ecological democracy predicated upon calls to decommodify public services and enact 'commons' models of resource management.<sup>54</sup>

While entirely sympathetic to Bakker's concerns about co-option and her desire for a water *commons* narrative that transcends current capitalist and state limitations, we however see in the contemporary water wars a much more durable use of rights discourses that confirms Baxi's own work, as well as Critical Legal Scholars' healthy scepticism about the contingency of rights within the broad trajectory of capitalist legal traditions.<sup>55</sup> That scepticism is often framed in terms of the way rights-based rhetorics disempower social movements and reify state and capital.

But what if the reverse is true, in this case? Extending Baxi's concept of justice<sup>56</sup>, we conclude from South Africa that a justice-based rights rhetoric, particularly in the context of struggles against the state, can have a beneficial impact in unveiling core contradictions behind commercialisation and other cost-recovery related state malfeasance in the water sector, and enhancing local accountability and responsiveness to community needs.

To make the case more generally requires a review of *processes* and local/global networks of resistance. So far, the highest profile citizens' campaign against commodified water was in Bolivia in April 2000, when the people of the third-largest city, Cochabamba, fought the US firm Bechtel, backed by the World Bank. This struggle was one of the reasons Bolivia's poor mobilised for a change of government in 2004. The first-ever water minister chosen by president Evo Morales was Abel Mamani, a neighbourhood activist veteran of another water war, in El Alto, who cut his teeth battling the French water company Suez. Mamani made five points in a speech just prior to the March 2006 World Water Forum:

- Water is a fundamental human right and a pre-requisite to the realisation of other human rights;
- Water belongs to the earth and all living beings including human beings and it is the duty of everyone to protect access to water for all forms of life and for the earth itself;
- Water is a public good and therefore its management needs to be in a sphere that is public, social, community-based, participative and not based on profit;
- Water should not be privatised and should be withdrawn from all free trade and investment agreements; and
- There should be profound change in the organisation of the World Water Forum to allow majority and decisive participation in the negotiations by the poorest and those who most need water.

Rights rhetorics have become important in Bolivia, as well as other sites where the balance of forces has shifted left. Other major battles – not always victorious - have been fought in Manila, Jakarta and Detroit. Biwater was kicked out of Dar es Salaam in mid-2005, to the regret of its advisor, the Adam Smith Institute, funded by British taxpayers through the Department for International Development. Civil society movements and governments forced Suez to retreat from major cities ranging from Atlanta to Buenos Aires to Montevideo to Johannesburg in the mid-2000s.

The goals of these progressive civil society activists – known as 'water warriors' - are the decommercialisation of water, improved access by poor people, better conditions for water workers, and more appropriate eco-management of water. The latter should include penalties for hedonistic consumption. Additional water campaigns are waged against megadams, inappropriate irrigation, fish destocking, water pollution, bulk water diversions, bottled water, abuse of water by golf courses and extractive firms like Coca Cola and Nestle, and looming water scarcity. On one crucial battleground, control of water by the World Trade Organisation (WTO), activists appear to have won in 2006, by exempting water from the WTO's General Agreement on Trade in Services.

Who are the contemporary water warriors engaging in these struggles? Aside from community campaigns in cities of the Global South like Detroit's Highland Park suburb (which faces a higher disconnection rate than Johannesburg) or Cochabamba, strong critics of neoliberal water policies can be found in radical citizens'/consumers' organisations (especially the Council of Canadians in Ottawa

and Public Citizen in Washington); trade unions (Public Services International and their affiliates); indigenous people's movements; environmental groups (led by the International Rivers Network and Friends of the Earth); and think-tanks (e.g., the PSI Research Unit at Greenwich University, Polaris in Ottawa, the TransNational Institute in Amsterdam, the Agriculture and Trade Policy Center in Minneapolis, the Municipal Services Project in South African and Canadian universities, Parivartan and the Centre for Science and the Environment in New Delhi, Food and Water Watch in Washington, and the International Forum on Globalisation in San Francisco).<sup>57</sup> The World Social Forum in Porto Alegre, as well as regional Social Fora, have provided spaces for water activist assemblies during the early 2000s. Email listserves such as 'water warriors', 'reclaiming public water' and 'right to water' permit information exchange and coordination. A People's World Water Forum was held in Delhi in 2004, preceded by the 2001 'Blue Planet' conference in Vancouver, as well as periodic European gatherings. In the three major South continents (Latin America, Africa and Asia), there are formidable networks of activists who work closely together in campaigns against common enemies such as regional development banks. Because the water movements have generated superb examples of cooperation across borders, campaigns against commodified services will continue to serve as a model for global civil society.

To illustrate in an event reminiscent of the Johannesburg World Summit on Sustainable Development protest, the March 2006 World Water Forum gathering in Mexico City was confronted by thousands of grassroots water warriors who marched against an equivalent number of establishment delegates from governments, corporations and international agencies. The activists were stopped a kilometre away from their establishment opponents. But as the *Associated Press (AP)* reported, 'Youths in ski masks attacked journalists and fought with police, smashing a patrol car and hurling rocks during largely peaceful Water Forum protests involving about 10,000 marchers.'<sup>58</sup>

As the Mexico confrontation shows, protesters are linking up with vigour. No one disputes that with at least 2.6 billion people lacking adequate sanitation and 1.1 billion lacking access to improved water sources, there is an urgent need for dramatic improvements in investment, management and affordability. In a setting as unequal as South Africa (with roughly 40 percent unemployment and amongst the world's highest income disparities), the neoliberal policies adopted during the 1990s pushed even essential state services such as water beyond many households' ability to pay; municipal services now account for a third of average household expenditures.<sup>59</sup> Some of these policies were adopted before political liberation from apartheid in 1994, but many were the result of influence on Nelson Mandela's government by the World Bank, United States Agency for International Development (USAID) and other global and local neoliberals during the late 1990s.

The first stage of resistance to the commercialisation of water and electricity often takes the form of a popular demand for a short-term, inexpensive flat rate applicable to all consumers. More compellingly, for medium-range policy a redistributive demand for decommercialisation is advanced by groups like the SA Municipal Workers Union, Rural Development Services Network, Johannesburg Anti-Privatisation Forum and Soweto Electricity Crisis Committee (SECC): a specific minimal daily amount of water (50 litres) and electricity (one kilowatt hour) to be supplied to each person per day *free*. The free services should be financed not only by subsidies from central government, but also by a rising block tariff in which the water bills for high-volume consumers and corporations rise at a more rapid rate when their usage soars to hedonistic levels. When charged at ever-higher rates, the consumption of services by hedonistic users should decline, which would be a much better way to manage water demand than to depress the demand of the poor to below minimum levels through insufficient FBW and unaffordable tariffs beyond the FBW amount.

Can rights rhetorics support these struggles by becoming rights *tactics*, which can be deployed by activists alongside more direct methods of opposition? In 2006, a crucial case – the Phiri water rights case – was launched in Johannesburg's High Court that will shed light on how far constitutional and legal strategies can advance the decommercialisation and water rights-as-justice cause. In their application, Lindiwe Mazibuko and five other poverty-stricken applicants from Phiri, Soweto – who are supported by a social movement, the Coalition Against Water Privatisation, and whose legal team is a rights-based legal organisation at the University of the Witwatersrand (the Centre for Applied Legal Studies) – have asked the court to declare pre-paid water meters unlawful and to order Johannesburg Water to provide everyone in Phiri with a FBW supply of 50 lpd and the option of a conventional water meter at the cost of the City of Johannesburg. The case, likely to be heard in the High Court in late 2007, will test the limits of the enforcement of socio-economic rights through legal and judicial means as it is likely to

finally end up in the Constitutional Court. It is hoped that, in the context of growing criticism of the Constitutional Court's weak socio-economic rights jurisprudence, this case fare better than other socio-economic rights cases and that it will have important implications for the clarification of socio-economic rights and, most importantly, for their realisation. The case also provides an interesting model for combining social activism with human rights tactics, particularly constitutional litigation.

What are the challenges for those in South Africa arguing for justice-based traditions of human rights (both civil/political and socio-economic), and decommodification? In coming months and years, several tasks present themselves:

- link up the currently diffuse demands, campaigns, strategies, tactics and alliances for free water/sanitation and electricity services, medicines and universal-entitlement income grants, including linking social movements with public interest litigation options;
- translate these from the spheres of consumption to production, beginning with creative re-nationalisation of privatised services, restructured municipal delivery, expansion of the nascent cooperative sector and establishment of state-driven local generic drug manufacturing to handle essential medicines;
- mobilise for local government to provide decommodified social services rather than commercialised services;
- strengthen the basis for longer-term alliances between poor and working people that are in the first instance rooted in civil society and that probably within the next decade will also be taken up by a mass workers' party; and
- regionalise and internationalise these principles, strategies and tactics, just as Pretoria politicians and Johannesburg capital intensify their own expansive ambitions across Africa.

One very hopeful sign of the last point is the emergence of radical urban social movements in the largest South African cities. But linkage into related areas, such as the partially-successful campaign for access to AIDS medicines, remains of enormous importance. While these urban social movements are bound to have an increasing impact upon South African politics, a potential split between the trade unions and the ruling party in coming years is probably the most important objective precondition for the renewal of a bottom-up political programme that would offer genuine rights-based strategies as the basis for post-neoliberal public policy. In this merging of human rights and social movements, there is great potential for opening up 'sites of resistance', but also for social justice outcomes based on 'inclusive participation'<sup>60</sup>.

Perhaps the greatest attribute of rights is hope. In Baxi's words, justice-based human rights:

... empower peoples' movements and conscientious policy-makers everywhere to question political practices ... human rights languages are all we have to interrogate the barbarism of power, even when these remain inadequate to humanise fully the barbaric practices of politics ... Thus the universality of human rights symbolises the universality of collective human aspiration to make power more accountable, governance progressively just, and state incrementally more ethical.<sup>61</sup>

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## Notes:

<sup>1</sup> Section 1(a), Founding Provisions, and Section 27(1)(b), Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

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<sup>2</sup> Krog, A (1997) 'Preamble: Water in our lives', in Department of Water Affairs and Forestry (DWAF) White Paper on A National Water Policy for South Africa <<http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf>> accessed on 5th February 2008.

<sup>3</sup> Bond, P (2006) 'Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition', *Journal of International Affairs* 60(1), pp 141-156.

<sup>4</sup> Hemson, D (2003) 'Rural Poor Play a Role in Water Projects', *Business Day*, 1 July 2003.

<sup>5</sup> Muller, M (2004) 'Turning on the Taps', *Mail and Guardian*, 25 June 2004.

<sup>6</sup> See for example, Baxi, U (2001) 'What Happens next is Up to You: Human Rights at Risk in Dams and Development', *American University International Law Review* 16, pp 1507-1529.

<sup>7</sup> Baxi, U (1998) 'Voices of Suffering and the Future of Human Rights', *Transnational Legal & Contemporary Problems* 8, pp 125-169. There is not the space here to delineate the international human rights regime generally or the international right to water specifically. For a comprehensive account of the international right to water see for example Gleick, P (1998) 'The Human Right to Water' *Water Policy* 1, pp 487-503, and also United Nations Committee on Economic, Social and Cultural Rights (2002) *General Comment No. 15: The Right to Water* (New York: United Nations) (General Comment No. 15).

<sup>8</sup> Baxi, U (1998) 'Voices of Suffering and the Future of Human Rights,' p.135.

<sup>9</sup> Baxi, U (2007) 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations', University of Liverpool Law School Conference on Global Health and Human Rights: Theoretical Perspectives, April 19-20, p 2.

<sup>10</sup> Section 9(2) of the Constitution.

<sup>11</sup> The issue of whether the socio-economic rights, including the right to water, in South Africa's Constitution are justiciable was settled in the affirmative by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)*, paras 77-78.

<sup>12</sup> These include: National Water Act 36 of 1998, Water Services Act 108 of 1997, Local Government: Municipal Systems Act 32 of 2000 and Norms and Standards In Respect of Tariffs for Water Services in Terms of Section 10(1) of the Water Services Act 108 of 1997 (2001), as well as a range of policy documents including two White Papers on water.

<sup>13</sup> There have been five socio-economic rights cases to date: *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (healthcare), *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (housing rights), *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (healthcare), *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) (social security, but really about equality), and *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (housing rights).

<sup>14</sup> Section 167(6) of the Constitution stipulates: 'National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court - (a) to bring a matter directly to the Constitutional Court'. The rules of the Constitutional Court, similarly, allow – in theory – for such direct access: <<https://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm>>. However, in practice, the Court has only allowed direct access in a handful of cases, and never in order to remedy a situation in which a poor or marginalised person would otherwise be excluded from the judicial process due to being unable to afford to bring a case through the normal judicial hierarchy. See for example Dugard, J and Roux, T (2006) 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004', in Gargarella, R, Domingo, P and Roux, T (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (London: Ashgate), pp 107-125.

<sup>15</sup> Dugard, J (2006) 'Court of First Instance? Towards a Pro-poor Jurisdiction for the South African Constitutional Court', *South African Journal on Human Rights* 22, pp 261 – 282 at p 266.

<sup>16</sup> The South African right to water, along with most socio-economic rights, has two parts. The first part states the right and the second part sets out that the state must 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.

<sup>17</sup> *Soobramoney*, the first socio-economic rights case, was the exception. Mr Soobramoney, who was suffering from chronic renal failure, applied to the Court challenging a hospital decision to deny him life-saving medical treatment. The Court ruled against Mr Soobramoney, finding that the hospital's policy to deny dialysis treatment to patients with incurable disorders was not an infringement of the applicant's rights. Mr Soobramoney died of kidney failure soon after the judgment.

<sup>18</sup> Dugard and Roux (2006), p 113.

<sup>19</sup> In this article, following Karen Bakker – Bakker, K (forthcoming), 'The "Commons" versus the "Commodity": Alter-globalization, anti-privatization and the human right to water in the global South', *Antipode* - we use the term 'commodification' to describe a regime in which water is viewed as an economic good that is *privately* managed and owned. As we shall see, this term does not completely accurately describe current South African water delivery systems which, on the whole, are publicly owned (albeit in corporatised institutions) but still essentially view water as an economic good rather than a social good. We refer to this public but corporatised regime as commercialisation, and view the distinction as important. There is no doubt that public ownership of water supply, as advocated by northern activists, is necessary. However, as the South African experience has proven, it is not sufficient to ensure that water remains a social good.

<sup>20</sup> Some of the key statements about these struggles are Barlow, M and Clarke, T (2002) *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (New York: The New Press); Friends of the Earth International (2003) *Water Justice for All: Global and Local Resistance to the Control and Commodification of Water* (Amsterdam: Friends of the Earth International); Grusky, S and Fiil-Flynn, M (2004) *Will the World Bank Back Down? Water Privatisation in a Climate of Global Protest* (Washington, D.C.: Public Citizen); McDonald, D and Ruiters, G (2005) *The Age of Commodity: Water Privatisation in Southern Africa* (London: Earthscan); Petrella, R (2001) *The Water Manifesto: Arguments for a World Water Contract* (London: Zed Books), People's World Water Forum (2004) 'Declaration of the People's World Water Movement' <<http://www.citizen.org/cmep/Water/conferences/articles.cfm?ID=11053>> 19 June 2007; Polaris Institute (2003) *Global Water Grab: How Corporations Are Planning to Take Control of Local Water Services* (Polaris Institute: Ottawa); Public Citizen (2003a) *The Evian Challenge: A Civil Society Call for the EU to Withdraw Its GATS Water Requests* (Public Citizen: Washington); Public Citizen (2003b) *Water Privatization Fiascos: Broken Promises and Social Turmoil* (Public Citizen: Washington); Shiva, V (2002) *Water Wars: Privatization, Pollution, and Profit* (New Delhi: India Research Press); Transnational Institute (2005) *Reclaiming Public Water* (Amsterdam); *General Comment No. 15*; Water for All Newsletter (2000-present), *Defend the Global Commons* newsletter.

<sup>21</sup> *The Economist* (2003) 'Survey of Water', 19 July 2003.

<sup>22</sup> World Bank (1996) *Technical Paper 331: Africa Water Resources* (World Bank: Washington, D.C.), p. ix.

<sup>23</sup> The Kampala Statement was drafted at the World Bank but attempted to speak for 'a total of 270 participants drawn from government, the utilities (including the private sector), financial institutions, external support agencies, and civil society ...' Quotations are from the final E-mail version sent from the Bank on 14 March, 2001.

<sup>24</sup> World Bank (2000) *Sourcebook on Community Driven Development in the Africa Region Community Action Programs* (World Bank: Washington, D.C.), Annex 2.

<sup>25</sup> Grusky, S (2001) 'IMF Makes Water Privatisation Condition of Financial Support', *PSIRU Update* <<http://www.psiru.org>> Accessed on 5<sup>th</sup> February 2008.



<sup>26</sup> The latter was chaired by former IMF managing director Michel Camdessus during 2002-03, with major multilateral development banks, Citibank, Lazard Freres, the US Ex-Im Bank, private water companies (Suez, Thames Water), state elites (from Egypt, France, Ivory Coast, Mexico, and Pakistan) and two Non Governmental Organisations (Transparency International and WaterAid). It proposed much greater amounts of public subsidies for privatisers, via a risk insurance mechanism to safeguard companies like Suez against currency crises which devastated the firm's Argentina operations after 2001.

<sup>27</sup> *New York Times*, 22 March 1998.

<sup>28</sup> Department of Water Affairs and Forestry (DWAF) (1994), *Water Supply and Sanitation White Paper*, (Government Printer: Cape Town).

<sup>29</sup> In 1994, 'more than 12 million people [did] not have access to clean drinking water and 21 million people do not have adequate sanitation', according to the African National Congress (1994) *Reconstruction and Development Programme: A Policy Framework* (RDP) (Johannesburg: Umanyano Publications), p 28.

<sup>30</sup> African National Congress (1994) *Reconstruction and Development Programme: A Policy Framework* (RDP), p 29.

<sup>31</sup> African National Congress (1994) *Reconstruction and Development Programme: A Policy Framework* (RDP), p 30.

<sup>32</sup> Asmal, K (1998) 'Policy Directions of the Department of Water Affairs and Forestry', Letter to Bond, P (Pretoria) 8 May 1998.

<sup>33</sup> Bond, P. (2002), *Unsustainable South Africa: Environment, Development and Social Protest*, (London: Merlin Press).

<sup>34</sup> Roome, J (1995) 'Water Pricing and Management: World Bank Presentation', SA Water Conservation Conference, Johannesburg, South Africa, 2 October 1995.

<sup>35</sup> World Bank (1999) *Country Assistance Strategy: South Africa* (World Bank: Washington, D.C.), Appendix 2.

<sup>36</sup> See for example section 74 of the Local Government Municipal Systems Act 32 of 2000, which stipulates in s. 74(2)(c): 'poor households must have access to at least basic services [water, electricity, sanitation, refuse] through – (ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or (iii) any other direct or indirect method of subsidization of tariffs for poor households'.

<sup>37</sup> *Mail & Guardian*, 22 November 1996.

<sup>38</sup> Department of Health (1999) *Health Sector Strategic Framework, 1999-2004* (Department of Health: Pretoria).

<sup>39</sup> Muller, 'Turning on the Taps'. For a lengthier study, see McDonald, D and Pape, J (eds) (2002), *Cost Recovery and the Crisis of Service Delivery in South Africa*, (London: Zed Books).

<sup>40</sup> *Sunday Times*, 9 October 2000.

<sup>41</sup> *Business Day*, 11 February 2000.

<sup>42</sup> According to Karen Brits, the Director of Legal & Compliance of the City of Johannesburg, the FBW promise was first announced in an address by President Thabo Mbeki to the COSATU 7th National Congress on 19 September 2000 and was later discussed 'at a parliamentary media briefing on 19

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September 2000 by Minister Ronnie Kasrils' and then 'first used as part of the party's election manifesto in Beaufort West by President Mbeki on 8 October 2000' (answering affidavit of Karen Brits, Case no. 06/13865 *Mazibuko & Others v City of Johannesburg & Others* at para 30.25). This case, which we refer to as the Phiri water rights case, is being defended by CALS and all the legal papers, including Ms Brits's affidavit (called CoJ answering affidavit on the website), are available on the CALS website: <<https://www.law.wits.ac.za/cals>>.

<sup>43</sup> In our view, it is reasonable to surmise that seven years (the RDP was published in 1994) represents the medium, rather than the short-term.

<sup>44</sup> Answering affidavit of Barbara Gay Schreiner, (former) Deputy Director-General in Policy and Regulations, DWAF, Case no. 06/13865 *Mazibuko & Others v City of Johannesburg & Others* at para 114: <https://www.law.wits.ac.za/cals> (called DWAF answering affidavit on the website).

<sup>45</sup> Answering affidavit of Neil Alastair Macleod, Head: Water and Sanitation of the eThekweni Municipality (formerly Durban Metropolitan Municipality), Case no. 06/13865 *Mazibuko & Others v City of Johannesburg & Others* at para 12: <<https://law.wits.ac.za/cals>>.

<sup>46</sup> Bartram, J and Howard, G (2003), 'Domestic water quantity, service level and health: what should be the goal for water and health sectors', WHO <[http://www.who.int/water\\_sanitation\\_health](http://www.who.int/water_sanitation_health)>.

<sup>47</sup> Gleick points out that his calculation of 20 lcd for sanitation is a very bare minimum that does not cover in-house sanitation using wasteful high-flush toilets (typical in South African townships and other poor localities) and that such contexts, much more water is required for sanitation.

<sup>48</sup> Gleick, P (1996) 'Basic Water Requirements for Human Activities: Meeting Basic Needs', *Water International* 21, pp 83-92.

<sup>49</sup> *General Comment No. 15*, para 12 with reference to footnote 14.

<sup>50</sup> Section 27(1)(b) of the Constitution.

<sup>51</sup> Bailey, R and Buckley, C (2005), 'Modelling Domestic Water Tariffs', *Presentation to the University of KwaZulu-Natal Centre for Civil Society* (Durban) 7 November 2005.

<sup>52</sup> Kasrils, R (2002) 'Concerned about water supply and sanitation... concerned about free basic water and water cut-offs?', Advertisement, *Sunday Independent*, 8 December 2002.

<sup>53</sup> Kasrils, R (2003) 'Report on Water Cut-offs a Case of Sour Grapes among US Populists', *Sunday Independent*, 8 June 2003.

<sup>54</sup> Bakker, K (forthcoming), 'The 'Commons' versus the 'Commodity': Alter-globalization, anti-privatization and the human right to water in the global South'.

<sup>55</sup> Tushnet, M. (1984), 'An Essay on Rights', *Texas Law Review*, 62, pp. 1363-1403; Kennedy, D (no date) 'The Critique of Rights in Critical Legal Studies'. <http://duncankennedy.net/documents/The%20Critique%20of%20Rights%20in%20cls.pdf> Accessed on 5<sup>th</sup> February 2008.

<sup>56</sup> Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice'.

<sup>57</sup> From the struggles have emerged inspiring leaders, intellectuals and politicians, including Accra campaigners Rudolf Amenga-Etego (who was awarded the 2004 Goldman environmental prize) and Alhassan Adam, Canadians Maude Barlow and Tony Clarke (who won the 2005 Right Livelihood Award) and writer Varda Burstein, Paris-based Danielle Mitterrand, Cochabamba movement leader Oscar Olivera, Washington-based water watchdogs Maj Fiil-Flynn and Sara Grusky, Olivier Hoedeman and Satoko Kishimoto of 'Reclaiming Public Water' at the Transnational Institute, filmmakers Alan Snitow and Deborah Kaufman, European campaigner Ricardo Petrello, anti-dam strategists Paddy

McCully and Lori Pottinger, and extraordinary Indian activists like Sunita Narrain, Medha Patkar, Arundhati Roy, Vandana Shiva and Shiney Varghese. South Africans who are well-known internationally include Bryan Ashe and Lianne Greef of the South African Water Caucus, Dale McKinley of the national Campaign Against Water Privatisation, researchers Ebrahim Harvey and Anil Naidoo (based in Ottawa), trade unionist Roger Ronnie, and Sowetans Trevor Ngwane and Virginia Setshedi.

<sup>58</sup>. Stevenson, M (2006) 'Protesters Say Water Wars Turning Deadly', *Associated Press*, 17 March 2006.

<sup>59</sup>. Statistics South Africa (2002), 'Database on Expenditure and Income, 2000' (Pretoria: Statistics South Africa).

<sup>60</sup>. Baxi, U (1998) 'Voices of Suffering and the Future of Human Rights', p.135 and p.141.

<sup>61</sup>. Baxi, U (1998) 'Voices of Suffering and the Future of Human Rights', pp.126-127, p.151.

## References

African National Congress (1994) *Reconstruction and Development Programme: A Policy Framework* (RDP) (Johannesburg: Umanyano Publications)

Bailey, R and Buckley, C (2005), 'Modelling Domestic Water Tariffs', *Presentation to the University of KwaZulu-Natal Centre for Civil Society* (Durban) 7 November 2005.

Bakker, K (forthcoming), 'The 'Commons' versus the 'Commodity': Alter-globalization, anti-privatization and the human right to water in the global South', *Antipode*.

Barlow, M and Clarke, T (2002) *Blue Gold: the Fight to Stop the Corporate Theft of the World's Water* (New York: The New Press).

Bartram, J and Howard, G (2003) 'Domestic water quantity, service level and health: what should be the goal for water and health sectors', WHO <[http://www.who.int/water\\_sanitation\\_health](http://www.who.int/water_sanitation_health)> Accessed on 5th February 2008.

Baxi, U (1998) 'Voices of Suffering and the Future of Human Rights', *Transnational Legal & Contemporary Problems* 8, pp 125-169.

Baxi, U (2001) 'What Happens next is Up to You: Human Rights at Risk in Dams and Development', *American University International Law Review* 16, pp 1507-1529.

Baxi, U (2007) 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations', University of Liverpool Law School Conference on Global Health and Human Rights: Theoretical Perspectives, April 19-20.

Bond, P. (2002), *Unsustainable South Africa: Environment, Development and Social Protest*, London, Merlin Press.

Bond, P (2006) 'Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition', *Journal of International Affairs* 60(1), pp 141-156.

Department of Health (1999) *Health Sector Strategic Framework, 1999-2004* (Department of Health: Pretoria).

Department of Water Affairs and Forestry (DWAf) (1994), *Water Supply and Sanitation White Paper*, (Government Printer: Cape Town).

Dugard, J (2006) 'Court of First Instance? Towards a Pro-poor Jurisdiction for the South African Constitutional Court', *South African Journal on Human Rights* 22, pp 261 - 282.

*The Economist* (2003) 'Survey of Water', 19 July 2003.

Friends of the Earth International (2003) *Water Justice for All: Global and Local Resistance to the Control and Commodification of Water* (Amsterdam: Friends of the Earth International).

Gargarella, R, Domingo, P and Roux, T (eds) (2006) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (London: Ashgate).

Gleick, P (1996) 'Basic Water Requirements for Human Activities: Meeting Basic Needs', *Water International* 21, pp 83-92.

Gleick, P (1998) 'The Human Right to Water', *Water Policy* 1, pp 487-503.

Grusky, S (2001) 'IMF Makes Water Privatisation Condition of Financial Support', *PSIRU Update* <<http://www.psiru.org>> Accessed on 5<sup>th</sup> February 2008.

Grusky, S and Fiil-Flynn, M (2004) *Will the World Bank Back Down? Water Privatisation in a Climate of Global Protest* (Washington, D.C.: Public Citizen).

Hemson, D (2003) 'Rural Poor Play a Role in Water Projects', *Business Day*, 1 July 2003.

Kasrils, R (2002) 'Concerned about water supply and sanitation... concerned about free basic water and water cut-offs?', Advertisement, *Sunday Independent*, 8 December 2002.

Kasrils, R (2003) 'Report on Water Cut-offs a Case of Sour Grapes among US Populists', *Sunday Independent*, 8 June 2003.

Kennedy, D (no date.), 'The Critique of Rights in Critical Legal Studies'.  
<http://duncankennedy.net/documents/The%20Critique%20of%20Rights%20in%20cls.pdf> Accessed on 5<sup>th</sup> February 2008.

Krog, A (1997) 'Preamble: Water in our lives', in Department of Water Affairs and Forestry (DWAF) White Paper on A National Water Policy for South Africa  
<<http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf>> accessed on 5th February 2008.

McDonald, D and Pape, J (eds) (2002), *Cost Recovery and the Crisis of Service Delivery in South Africa*, (London: Zed Books).

McDonald, D and Ruiters, G (2005) *The Age of Commodity: Water Privatisation in Southern Africa* (London: Earthscan).

Muller, M (2004) 'Turning on the Taps', *Mail and Guardian*, 25 June 2004.

People's World Water Forum (2004) 'Declaration of the People's World Water Movement'  
<<http://www.citizen.org/cmep/Water/conferences/articles.cfm?ID=11053>> Accessed on 19 June 2007.

Petrella, R (2001) *The Water Manifesto: Arguments for a World Water Contract* (London: Zed Books).

Polaris Institute (2003) *Global Water Grab: How Corporations Are Planning to Take Control of Local Water Services* (Polaris Institute: Ottawa).

Public Citizen (2003a) *The Evian Challenge: A Civil Society Call for the EU to Withdraw Its GATS Water Requests* (Public Citizen: Washington).

Public Citizen (2003b) *Water Privatization Fiascos: Broken Promises and Social Turmoil* (Public Citizen: Washington).

Roome, J (1995) 'Water Pricing and Management: World Bank Presentation', SA Water Conservation Conference, Johannesburg, South Africa, 2 October 1995.

Shiva, V (2002) *Water Wars: Privatization, Pollution, and Profit* (New Delhi: India Research Press).

Statistics South Africa (2002), 'Database on Expenditure and Income, 2000' (Pretoria: Statistics South Africa).

Stevenson, M (2006) 'Protesters Say Water Wars Turning Deadly', *Associated Press*, 17 March 2006.

Transnational Institute (2005) *Reclaiming Public Water* (Transnational Institute: Amsterdam).

Tushnet, M. (1984), 'An Essay on Rights', *Texas Law Review* 62, pp. 1363-1403.

United Nations Committee on Economic, Social and Cultural Rights (2002) *General Comment No. 15: The Right to Water* (New York, United Nations).

World Bank (1996) *Technical Paper 331: Africa Water Resources* (World Bank: Washington, D.C.).

World Bank (1999) *Country Assistance Strategy: South Africa* (World Bank: Washington, D.C.)

World Bank (2000) *Sourcebook on Community Driven Development in the Africa Region Community Action Programs* (World Bank: Washington, D.C.)

#### Cases:

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC),

*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

*Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC)

*Mazibuko & Others v City of Johannesburg & Others* Case no. 06/13865

*Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC)

*Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)

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

#### Legislation:

Local Government: Municipal Systems Act 32 of 2000

National Water Act 36 of 1998

Norms and Standards In Respect of Tariffs for Water Services in Terms of Section 10(1) of the Water Services Act 108 of 1997 (2001)

Water Services Act 108 of 1997