Covenants, Constitution & Commons

International, constitutional, and community responses to achieve access to sufficient water for everyone

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For Sarah: Thank you

For Jesse Emanuel,
Finlay Joachim,
Wilfred Jude,
& Magnolia Ruth:

"How beauteous mankind is!
O, brave new world
that has such people in't!"

Abstract

This thesis considers how best to achieve access to sufficient water for everyone in South Africa. It encompasses international law, national (including constitutional) law and policy, and finally community organisation, and the 'vernacular law'[1] of the commons.

The task of achieving sustainable access to sufficient water for everyone in South Africa is long-standing and considerable, culminating in the inclusion of a right of access to sufficient water in the 1996 Constitution.[2] This right has simultaneously provided an overarching moral framework (through the elaboration of relevant human rights norms), while remaining decidedly remote from the experience of many people, for whom insufficient water remains a daily reality.

Here, the ability of a *right* to water to effectively ensure access to sufficient water for everyone is critiqued. In so doing, the practical and conceptual limits of 'rights-talk' are considered, in two contexts in particular: International human rights law; and the jurisprudence of the South African Constitutional Court.

Crucial to this thesis is a methodology of narrative inquiry, which analyses the stories of people who suffer from access to *in*sufficient water, revealing the disconnection between people's right to water, and their experience of living without the water they need. Flowing from this narrative is an attempt to reconceive water governance from outside the structural and conceptual closures of the dominant paradigm (characterised by individual rights and commodification) and to explore the potential for alternative practical modes of governance to deliver greater sustainability and equity, for communities living with water poverty.

In this thesis, through a blend of contemporary perspectives on vernacular law and multi-level governance, postmodern theories on stories and subjectivity, and empirical observation, a fresh contribution is made to the debate on access to water in South Africa.

Key words: Water, South Africa, (Human) Rights, Sustainable Development, Anthropocene, Narrative inquiry, Constitutional Court, Constitutionalism, Commodification, Reasonableness

[1] D Bollier & BH Weston 'Green Governance: Ecological Survival, Human Rights, and the Law of the Commons' (Cambridge University Press, 2013) 104.
[2] Section 27 (1) (b) Constitution of the Republic of South Africa, 1996.

Contents

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Publications

During the course of researching and writing this thesis I have published papers and articles on various aspects of the right to water. I have developed many of these aspects further in this thesis. The following are my key publications:

Cooper, Nathan John (2010) *The limits of Integrated Water Resources Management and the Right to Water: A Return to the Commons?* The Physics and Chemistry of the Earth, Special Issue: (http://www.waternetonline.ihe.nl/11thSymposium/WaterandSocietyFullPapers2010.pdf)

French, Duncan and Cooper, Nathan John (2012) *The right to water in South Africa: constitutional managerialism and a call for pluralism.* In: Natural resources and the green economy: redefining the challenges for people, states and corporations. Martinus Nijhoff, Leiden.

Swan, Andrew and Cooper, Nathan John (2013) *Innovative funding methods for rural communities and their water pumps.* Water Resources and Rural Development, 1-2. 17-26;

Cooper, Nathan John and Swan, Andrew and Townend, David (2014) *A confluence of new technology and the right to water: experience and potential from South Africa's constitution and commons.* Ethics and Information Technology, 16 (2). 119-134;

Cooper, Nathan John (2015) *After Mazibuko: Exploring the responses of excluded communities to South Africa's water experiment.* Journal of African Law (in press February 2017).

Cooper, Nathan John (2015) *Grassroots responses to water poverty: fertile spaces for 'vernacular law' between the state, market and courts.* Southern African Development Community Law Journal (in press Autumn 2016).

Swan, Andrew and Cooper, Nathan John (2016) *Can SMART pumps help realise Sustainable Development Goal 6?* Engineering Sustainability (in press).

List of abbreviations

ACHPR African Charter on Human and People's Rights

AdA Compania de Aguas de Aconquija

ANC African National Congress

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CESCR Committee on Economic, Social and Cultural Rights

CJ Chief Justice

CMAs Catchment Management Agencies

CODESA Convention for a Democratic South Africa

COP Conference of the Parties

CRC Convention on the Rights of the Child

DNA Deoxyribonucleic acid

DWA Department of Water Affairs

DWAF Department of Water Affairs and Forestry

DWM Developmental Water Management

ECI European Citizens' Initiative

ECtHR European Court of Human Rights

ECOSOC United Nations Economic and Social Council

ESG Earth Systems Governance

FBW Free Basic Water

GC 15 General Comment Number 15 Committee on Economic, Social and Cultural Rights

GHS General Household Survey

HIV/AIDS Human Immunodeficiency Virus/ Acquired Immune Deficiency Syndrome

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic Social and Cultural Rights

ICSID International Centre for the Settlement of Investment Disputes

IFP Inkata Freedom Party

IMF International Monetary Fond

IPCC Intergovernmental Panel on Climate Change

IWA International Water Association

IWRM Integrated Water Resources Management

J Justice of the Constitutional Court

Kl Kilolitre (1000 litres)

lpd litres per person per day

MDGs Millennium Development Goals

NGO Non-Governmental Organization

NP National Party

NWA National Water Act

NWRS1 First National Water Resource Strategy

NWRS2 Second National Water Resource Strategy

NWU North West University

P President of the Constitutional Court

PAC Pan Africanist Congress

RDP Reconstruction and Development Programme

SAWC The South African Water Caucus

SCA Supreme Court of Appeals

SDGs Sustainable Development Goals/ Global Goals

SES Social-ecological security

TAC Treatment Action Campaign

UDHR Universal Declaration of Human Rights

UK United Kingdom

UKZN University of Kwa-Zulu Natal

UN United Nations

UNDP United Nations Development Programme

UNEP United Nations Environmental Programme

UNGA United Nations General Assembly

UNICEF United Nations Children's Emergency Fund

US United States

VOC Verenigde Oostindische Compagnie

WFP Water For People

WHO World Health Organization

WMA Water Management Area

WSA Water Services Act

WUA Water Users Association

YWAM Youth With A Mission

ZACC Constitutional Court of South Africa

ZAHC High Court of South Africa

ZAR South African Rand

Prologue

I first visited South Africa in 2003. But my sense of connection with the country began much earlier. As a child in the '80s watching Channel 4 News with my parents, images of violent clashes, bombs and police clampdowns – which with hindsight were the death throes of apartheid - formed part of my regular diet. As a ten-year-old I watched Nelson Mandela walk free from Victor Verster Prison, and on my fourteenth birthday, April 27th 1994, I followed as the ANC won victory in the country's first all-party general election. The anticipation and excitement around the rebirth of South Africa as the 'rainbow nation' was palpable and intoxicating to the teenage me, and, it now seems, left me with an unarticulated, but significant emotional bond with this brave new world 9000 miles away.

So when I arrived in Cape Town in March 2003, with my wife of one day, to start our honeymoon, it felt like the culmination of years of fascination with South Africa. What I didn't know then was that this would also be the beginning of a new and more complicated chapter in my connection with the country. During the trip we visited family friends working as missionaries in Worcester, a farming town in the Western Cape. They showed us their work: feeding children at the beginning and end of the day, in order to encourage them to attend school; helping women to start small businesses, selling crafts. They introduced us to people living in townships, government flats, and informal settlements. People who, over the coming years, we would get to know as friends, and whose experiences of poverty would become part of our own understanding of the world.

For the next three years we visited this work in Worcester, and then moved there to live. Our jobs, managing a micro-enterprise called *People's Crafts*, and leading a youth group, allowed us to see, at first hand, how people living in some communities faced daily struggles of inadequate housing; unemployment and exploitative employment; insufficient income with which to buy food, fuel and clothing; exclusion from education because they couldn't afford to buy school uniforms; prohibitively expensive clean water, and recourse to unsafe water sources.

Upon returning to the UK, I became determined to explore why these socio-economic challenges exist, and to contribute, in some small way, to addressing them. As a lawyer, law was my natural milieu, and so, finding myself back at my alma mater, I began to research rights and obligations around access to sufficient water; a study which has eventually become this thesis.

Why share this personal story? Ultimately this thesis is a human story; the story of my enquiry into the stories of others.[3] Explored through the lens of law, and consequently focusing on structures, institutions and mechanisms at the international and national level, it nevertheless remains grounded in the realities around people's access to water, and the practical and personal consequences of not having enough water. So I endeavour to remember that realising the goal of access to sufficient water in South Africa is essential for people: For Martinus; for Cynthia; for Sabelo; for Quinton; for Leonie, and for millions of others.

[3] See generally S Pinnegar & J G Daynes 'Locating Narrative Inquiry Historically: Thematics in the Turn to Narrative' in D J Clandinin (ed) *Handbook of Narrative Inquiry: Mapping a Methodology* (Sage Publications, 2007); K Plummer *Telling Sexual Stories* (Taylor & Francis, 2004,).

1

Introduction

'There is water within us, let there be water with us. Water never rests. When flowing above, it causes rain and dew. When flowing below it forms streams and rivers. If a way is made for it, it flows along that path. And we want to make that path. 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. With water we will wash away the past, we will from now on ever be bounded by the blessing of water.

Water has many forms and many voices. Unhonoured, keeping its seasons and rages, its rhythms and trickles, water is there in the nursery bedroom; water is there in the apricot tree shading the backyard, water is in the smell of grapes on an autumn plate, water is there in the small white intimacy of washing underwear. 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[4]

'When it rains we collect the water from the roof. It's better than carrying it from the river [200 metres away]. The rainwater can be rusty from the roof, but we put extra Jik [bleach] in it. So it's ok. It doesn't taste nice when I make tea...

If it hasn't rained, I get one of the children to go to the river for us. We still have to put Flash in the water, because the cows shit in it. If not, I get the runs.'

'Gremmah' Mbongwa[5]

The first quotation is from one of South Africa's most famous poets. Published in the preamble to the National White Paper on Water Policy, at the beginning of the democratic era, it declares a new understanding of water; for dignity, for healing, for everyone. For Gremmah Mbongwa, and many others, this remains a dream.

[4] Preamble to the National White Paper on Water Policy, 1997: <https://www.dwaf.gov.za/Documents/Policies/nwpwp.htm> (Last accessed 27 July 2016).
[5] Interview # 1. See appendices.

The task of achieving sustainable access to sufficient water for everyone in South Africa is considerable. Water resource regulation during apartheid formalized and entrenched a profoundly unequal system, where white South Africans enjoyed an abundance of relatively cheap water, while water supply for black and non-white South Africans was impeded by poor infrastructure and lack of essential investment[6]. Indeed access to sufficient water became an avatar of the inequality and illegitimacy at the heart of the apartheid state, and a powerful trope to focus civil and political protest. The culmination of civil and political efforts to counter the systemic inequality of water-access can be seen in the articulation of a specific right of access to water (alongside other essentials) in Section 27 of the 1996 Constitution: 'Everyone has the right to have access to sufficient food and water' [7]

However, access to sufficient water is still not a reality for many, and multiple challenges continue to impede the fulfillment of this most basic human need.

1.1 A right to water – definitions and clarifications

Exploring international, constitutional and community responses to achieving access to sufficient water for people in South Africa requires research that goes beyond consideration of a right to water (however that is understood). But inevitably a legal thesis with this focus must place the right to water in a prominent position. Whether conceived of as an internationally recognised human right, or as a constitutional right, or as a 'right-claim' that transcends the legal sphere (preferring to emphasise its alleged inherent moral imperative)[8], discourse around access to water expressed as a right remains a crucial motif throughout the thesis, as it does throughout the wider literature.

Consequently I am particularly interested in the legal form(s) and content of a right to water, how such a right has been, and could be interpreted, and how effective it may be in realising the goal of achieving access to sufficient water for everyone in South Africa. Therefore it comes as no surprise that rights-based approaches to addressing access to water issues appear within the research questions posed. But, as explained below, there are a host of dimensions, which variously complement/co-exist with, contradict, or transcend rights-based approaches to the task of advancing access to sufficient water. Indeed, alongside discussion of a right to water, there is a growing discourse around access to water as a 'development goal', most famously expressed in

[6] P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal of Human Rights* 125, 128.

[7] Section 27 (1) (b) Constitution of the Republic of South Africa, 1996.

[8] M Dembour 'What are human rights? Four Schools of Thought' (2010) 32/1 *Human Rights Quarterly* 1, 2.

the Millennium Development Goals[9] and Sustainable Development Goals[10]. So it is important at the very beginning to clarify that this thesis is not limited to exploring a *right* to water. Rather, in seeking to address the challenge of achieving access to sufficient water, rights-based approaches are given considerable, but not exclusive attention. Consequently, access to sufficient water is described as a right and/or a goal, depending on the particular governance framework under analysis. When neither of these terms directly apply (where measures towards achieving access to sufficient water are not described in relation to rights, nor are they employed formally towards realising a specific goal), access to sufficient water is referred to as an 'aim' or an 'ambition'.

Water and sanitation

Expressed variously through the language of rights and goals, access to water is also often (but not always) linked to sanitation. For example, the recent United Nations General Assembly Resolution on the right to water is entitled the 'human right to water and sanitation'.[11] Similarly, Sustainable Development Goal six aims to 'ensure the availability and sustainable management of water and sanitation for all'.[12] The World Health Organization defines sanitation as follows:

> 'Sanitation generally refers to the provision of facilities and services for the safe disposal of human urine and faeces [...] The word 'sanitation' also refers to the maintenance of hygienic conditions, through services such as garbage collection and wastewater disposal.'[13]

This definition illustrates the natural overlap between water and sanitation. General Comment 15 on the Right to Water, from the Committee on Economic, Social and Cultural Rights, describes the right to water as entitling everyone to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[14] For many people, 'personal and domestic uses' will include sanitation: namely using water to flush or sluice toilets. But

[9] Target 7.C available at: <http://www.un.org/millenniumgoals> (Last accessed 27 July 2016).
[10] Sustainable Development Goals available at: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 27 July 2016).
[11] United Nations General Assembly resolution 64/292 "The human right to water and sanitation", UN Doc. A/RES/64/292 (3 August 2010). Hereafter UN GA resolution 64/292.
[12] Goal 6: Sustainable Development Goals available at: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 27 July 2016).
[13] World Health Organization, Health Topics: Sanitation <http://www.who.int/topics/sanitation/en/> (Last accessed 27 July 2016).
[14] Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002. Available at <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94> (last accessed 9 July 2015). *Hereinafter* General Comment 15.

while the tasks of improving access to water, and access to sanitation often overlap, the focus of this thesis is specifically on (access to) *water*, and not sanitation.

In part, this is in order to delimit the scope of the thesis for the sake of practicality. But it also acknowledges the growing divergence between access to water and emerging best practice on sanitation, in areas of relative water scarcity (which includes South Africa). In such areas, waterless sanitation methods are being pursued, and with some success: reducing the demand for water, as well as minimizing the potential for boreholes (that provide drinking water) to be contaminated by sluiced fecal matter.[15]

Consequently this thesis focuses specifically on water for domestic use, acknowledging the connection to sanitation where applicable. This follows the approach taken by notable authors in the field, including Stephen McCaffrey, Inga Winkler and Pierre Theilborger.[16] For instance in relation to the right of access to sufficient water, in the context of South Africa, and regarding issues raised by the case of *Mazibuko*[17] (where the claimants relied on water-borne sanitation), some discussion around access to water and a right to water inevitably includes reference to sanitation.

Also, returning briefly to the definition of the right to water in General Comment 15 (above) when the word 'water' is used throughout the thesis it can be assumed (unless otherwise stated) that what this refers to is clean water for personal and domestic uses.

Governance

The term 'governance' (including 'water governance') as used in the thesis, has two distinct meanings. The first is a broad description of the full range of regulation (relating to water) in a particular jurisdiction. For instance, Chapter Two: 'Water governance at the international level', refers collectively to the various international human rights and environmental law instruments relating to water, both binding and non-binding; and to international development goals and targets relating to water. Similarly water governance in South Africa encompasses the full national framework for water, including constitutional law, legislation and legislative instruments, policies and case decisions. The second use of the term governance is as in

[15] See for example: A Hendriksen *et al* 'Participatory decision making for sanitation improvements in unplanned urban settlements in East Africa' (2012) 21/1 *Journal of Environment and Development* 98-119, 103-4.
[16] See S McCaffrey & E Brown *et* al (eds), *Fresh Water and International Economic Law* (Oxford University Press 2005); I T Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2014, Hart); P Thielbörger *The right (s) to water* (European University Institute, 2010).
[17] *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC). This case is discussed at length in Chapter Four and throughout the thesis.

contrast to government. As such, discussion particularly in Chapters Five and Six around moves away from government and towards governance, reflect this second meaning: Here government refers to traditional, hierarchical, state-centric modes of regulation, which are variously complemented/challenged/marginalised by emerging modes of governance, characterised as informal, flexible and multi-layered. Use of this government/governance distinction may be in relation to specific examples. But it also relates to a broader trend, and consequence of globalisation.[18]

1.2 Aim and research questions

The title of this thesis is 'Covenants, Constitution and Commons: International, constitutional, and community responses to achieve access to sufficient water for everyone'. The thesis focuses on legal measures to achieve access to sufficient water. Therefore, the following research question is designed in order to explore the thesis theme:

- *To what extent can a right to water achieve access to sufficient water in the context of South Africa?*

Five sub-questions aim to guide the research further:

- *How is the goal of achieving access to sufficient water understood, facilitated, and implemented at the level of international law[19]?*
- *How is the right of access to sufficient water understood, facilitated, and implemented in South African domestic law?*
- *What impact does relevant international law have on South Africa's regulatory framework for access to water?*
- *To what extent can the current international and domestic regulatory frameworks achieve access to sufficient water for everyone in South Africa?*
- *What role can commons/community organisations play in creating effective water governance[20] to help achieve access to water for all?*

[18] P Jon 'Introduction: Understanding governance' in P Jon (ed) *Debating Governance: Authority, Steering and Democracy* (OUP, 2000) 2.

[19] For the purpose of this question 'international law' is understood to encompass not only the authorities as set out in the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355, Arts 38 (1) (a)-(c)), but also the relevant United Nations General Assembly Resolutions, despite not being binding on Member States, and other 'soft law', or non-legally binding instruments including for instance the 1992 Rio Declaration on Environment and Development. *See* A Boyle 'Soft law in international law-making' in M Evans (ed) *International Law* (4th ed, Oxford, 2014) 118, 119-120.

1.3 Methodological approach

This research uses a combination of doctrinal, theoretical, and empirical research methods in order to address the research questions above. Traditional doctrinal methodology is employed by identifying and analysing the relevant legal instruments, cases and secondary legal material. This methodological approach is designed primarily to establish 'what is', in relation to a particular area of enquiry.

For this thesis it is necessary to identify and analyse the national and international law relating to the goal and/or the right of access to sufficient water. Most notably this includes the Universal Declaration of Human Rights[21], the International Covenant on Economic Social and Cultural Rights (ICESCR),[22] UN General Assembly resolution 64/292 on the right to water and sanitation,[23] the Constitution of the Republic of South Africa, as well as several seminal cases, domestic promulgating legislation, and secondary legal material including General Comment 15 from the Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations Economic and Social Council (ECOSOC)[24]. Alone, such a doctrinal approach lends itself to a positivist understanding of law, summarised by Bentham's Command Theory of law[25]. Here, law is no more and no less than the rules that have been commanded by a sovereign, supported by a sanction for failing to comply[26] (or translated to the level of international law; 'no more or less than the rules that states have agreed to'[27]).

In order to develop this thesis towards a more critical and contextualised position, it is necessary to reconceptualise law as a 'dynamic set of processes' rather than 'primarily as a body

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[20] Here the term 'governance' is deliberately used in contrast to the traditional, hierarchical notion of regulation referred to in the previous two sub-questions. Instead, governance, which emphasises flexible, informal and multi-level regulation, is proffered as potentially a more appropriate regulatory strategy, more complementary to commons thinking. *See variously* R Bellamy & A Palumbo (eds) *From government to governance* (Ashgate, 2010), P Jon 'Introduction: Understanding governance' in P Jon (ed) *Debating Governance: Authority, Steering and Democracy* (OUP, 2000). These definitions and themes are considered further in chapter five.

[21] 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.

[22] 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.

[23] United Nations General Assembly resolution 64/292 "The human right to water and sanitation", UN Doc. A/RES/64/292 (3 August 2010): 'recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights' (paragraph 1).

[24] General Comment 15.

[25] H McCoubray & N White *Jurisprudence* (3rd ed, Blackstone Press, 1999) 13.

[26] Ibid.

[27] RW Tucker 'Hans Kelsen Principles of International Law' (1966) 438-39 in SR Ratner & AM Slaughter 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *American Journal of International Law* 291, 293.

of rules'[28]: A move which replaces the ontological question 'what is the law?' with the more purposive question 'what is the law for?'[29] Such a development has been pursued in a number of ways. First, relevant literature is critically discussed in order to develop a 'qualitative' approach to this research[30]; identifying the focus of the enquiry (access to sufficient water) as a *legal* issue with *socio-economic* and *ecological* consequences, and developing arguments aimed at influencing law and policy accordingly. Second, further qualitative research in the form of semi-structured interviews were undertaken (the purpose of these interviews and the methodology and method employed, are discussed below).

Because this thesis has been designed to evaluate the extent to which conferral of a right to water can achieve access to sufficient water, this necessarily involves consideration of how the right to water (and indeed other approaches to water governance) is interpreted, applied and experienced by people 'on the ground', particularly those whose access to sufficient water is problematic. Such qualitative research like interviewing has been described as 'a situated activity that locates the observer in the world'[31]. This allows the researcher to 'study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them'[32]. Therefore in the context of this research, interviews are a crucial way to discover the 'gap' between the law and the reality for many.

Third, theoretical insights, both from legal scholarship and beyond, are employed in order to better challenge assumptions, and to clarify the purpose, structure and methods of this research. Of particular note are those insights drawn from narrative inquiry, which assisted in the design and use of interview data, but also offer an important justification for the connection (made explicitly in Chapter Five) between narrative approaches[33] to this type of research, and commons approaches to effective water allocation. Similarly 'constitutionalism' and 'governance' are influential to the argument and discussion in various places.

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[28] AM Slaughter & SR Ratner 'The Method is the Message' (1999) 93/2 *American Journal of International Law* 410, 410.
[29] Ibid.
[30] I Dobinson & F Johns 'Qualitative legal research' in M McConville & W Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 40.
[31] NK Denzin & YS Lincoln *Handbook of Qualitative Research* (Thousand Oaks, California, 2005) 1-32 in S Sarantakos *Social Research* (Palgrave MacMillan, 2013) 37.
[32] Ibid.
[33] The narrative approach referred to here is 'narrative analysis', defined by Bryman as 'an approach to the elicitation and analysis of data that is sensitive to the sense of temporal sequence that people, as providers of accounts (often in the form of stories) about themselves or events by which they are affected, detect in their lives and surrounding episodes and inject into their accounts': A Bryman *Social Research Methods* (4th ed, Oxford University Press, 2012) 582. This method is also referred to variously as 'narrative inquiry' and 'narrativity'. The importance of this analysis is explained in Chapter Five.

Together the doctrinal, qualitative/empirical and theoretical research methods combine to form what may be best described as a socio-legal research methodology, which Abrams characterises as 'forcing us to think concretely but to remember socially'.[34] Legal research does pertain to the study of tangible laws and legal materials. But such study always, necessarily happens within a social context. This allows the law to be understood from a constructivist perspective; as being part of the wider social, economic and political structures in which it operates.[35]

1.3.1 Interviews: Purpose, methodology and method

During research for this thesis I have conducted interviews with people in marginalised communities in South Africa and Malawi, as well as with academics, legal practitioners, and NGO workers. The interviews were conducted during various research trips between 2010 and 2015. This relatively long time span has allowed interview data to be collected both from a variety of people and areas, but also at different points in time, which has given some insights around the pace of change regarding access to sufficient water, as well as people's experience of access to water at any one instant. The purpose of these interviews was mainly to hear first-hand accounts of people's experience of access to water, including the implications for them of living with insufficient water. Therefore when interviewing community members I was particularly interested in locating communities where people's access to sufficient water was likely to be problematic.

The interviews are used to complement and humanise the evidence put forward that many people in South Africa currently suffer from access to insufficient water. They also supplement the arguments made regarding the efficacy and limitations of rights-based approaches to water, as well as anchoring discussion of community/commons approaches to water allocation within the realities of people's experiences. The interviews therefore primarily capture the 'voices' and the 'stories' of water-poor people living in South Africa at various points in time and space. By including these voices and stories, the intention is not to claim to provide data that can be generalised and extrapolated to map nation-wide trends. Rather, the interviews are used to animate the legal and theoretical analysis in the thesis, adding perspectives from those who would normally be considered as *other*[36] in a developing economy - the urban and rural poor.

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[34] K Abrams 'Hearing the Call of Stories' *California Law Review* (1991) 1052.
[35] R Banakar & M Travers (eds) Theory and Method in Socio-Legal Research (Hart Publishing, 2005) xi.
[36] GWF Hegel *Phenomenology of Spirit* (Clarendon Press, 1977) at 111.
Although the concept of the Other is applied in many ways, it is used here in its simple Hegelian definition, to distinguish the *same* from the *other*. As such the Other is imperative for national identities (those in and those out) as well as any institution or identity espousing absolute values. Hegel's Master-Slave dialectic illustrates the phenomenon of the Other in action. It also shows the association of imbalanced power relations implicit in the

This approach is methodologically important as it seeks to incarnate the value of engaging multiple and multifarious voices within the discourse, in order to legitimise and humanise the research. It also aims to forge a strong link between this empirical work and a theoretical understanding of how the ambition of access to sufficient water might be made manifest. Such a combination of a unique mixture of voices with legal and theoretical analysis is intended to produce research, which makes an original and meaningful contribution to the state of the art.

Having previously worked in South Africa for an NGO called *Youth With A Mission* – YWAM[37] (originally a Christian missionary organisation, but more recently also involved in community development, poverty reduction projects and health and social education campaigns) my point of departure for finding interviewees was to contact this NGO, which has bases throughout Africa. I chose not to interview in the communities where I had previously worked, in order to avoid interviewing people whom I knew personally, or at least people who recognised me in my previous employment. While interviewing acquaintances may have been the easier option, the personal nature of my enquiry, coupled with our familiarity, had the potential to create embarrassment for both parties and discomfort for the interviewees. Therefore I chose to exclude these people from my sampling frame. However, any resulting sampling bias was offset by the fact that my sample was extremely small, compared to the population of the communities, and by the fact that those interviews that were conducted included people in very similar material conditions, and from similar socio-economic backgrounds as those in the communities I excluded.[38] I arranged to visit two bases, one in Winterton, in rural Kwa-Zulu Natal, the other in the city of Durban. At each base a member of staff kindly acted as a guide (and where necessary a translator) and we travelled together to the various communities where the NGO worked. Once in each community, I was introduced to local people, given the opportunity to explain the purpose of my research and of my visit, and to ask for volunteers to be interviewed. Prospective interviewees were given an information sheet (which was also explained by my guide, because a sufficient level of literacy among prospective participants could not be assumed), and it was clearly stated first that there was no remuneration for taking part in interviews, and second, that there was no likelihood of immediate improvement in people's access to water as a result of my research (in particular

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phenomenon. In Hegel's illustration neither man is satisfied to acknowledge the existence of the other without challenging the other for dominance. The Master-Slave relationship is the culmination of this challenge. Consequently, the Other signifies not simply *another* besides oneself, but someone/thing different, dichotomised, or rejected. In the context of this thesis, where socio-economic power is a particular focus, the *other* signifies those who do not benefit (and indeed who suffer) from the dominant capitalist system of wealth creation: The poor.

[37] <http://www.ywam.org> (Last accessed 27 July 2016).

[38] A Bryman *Social Research Methods* (4th ed, Oxford University Press, 2012) 187-188.

here it was made clear that I was not working for national or provincial government). Volunteers were asked to give informed consent to interviews being recorded, were offered the option of giving their names or of remaining anonymous (most people gave their names, although some gave first names, or nicknames only), and were informed that they could stop the interview at any time.

Each interview was semi-structured, using an interview schedule,[39] with questions being asked in the most appropriate order given in relation to each conversation. Particular attention was given to allowing interviewees to speak at some length about their experiences around access to water, without unnecessary interruption, in order to best capture each person's story. This combination of having a set of guiding questions, while also encouraging open conversation allowed me to ask broadly similar questions to each participant, while not stifling each person's responses. The information sheet and interview guide are included in the Appendix to this thesis.

During interviews it was important to remember that my position as a stranger, a foreigner, and a perceived 'expert' would affect the power dynamics present in any interview. These factors were mitigated against as far as possible by deliberately selecting an informal and semi-structured interview style, and by interviewing two or three community members together at one time (allowing the interviewees to 'outnumber' the interviewer).

After each set of interviews the recorded audio files were downloaded, saved on to a secure computer (initially a laptop which was locked in a safe during this fieldwork, when not in use; then a desktop personal computer at the University of Sheffield Law School postgraduate facility). Files were organised using the interviewee's name, location and date of interview, and password protected. Copies of annotated interview schedules, as well as hand-written notes in a notebook were also kept securely and seen only by me. Preparation for the interviews, their execution, and subsequent use of the data collected have all met the University of Sheffield, School of Law ethics committee requirements as stated when ethics approval was given for this work.

In addition to the interviews conducted with community members, I also interviewed the base leader at YWAM Winterton, as well as several academics working in fields related to this research, at North West University (NWU), Potchefstroom, and the University of Kwa-Zulu Natal (UKZN), Durban. Finding interviewees in these institutions followed a 'snowball

[39] MW Bauer & G Gaskell (eds) *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (Sage Publications, 2000) 40.

sampling' method.[40] An initial contact was made with a Professor of Environmental Law at NWU, who kindly recommended colleagues in his institution and at UKZN. These contacts were then pursued, and in some instances, resulted in subsequent recommendations also. Interviews with these participants constituted what Gillham describes as 'elite interviewing'[41]: Interviewing experts or other authoritative people in your field of research[42]. Consequently, the structure of these interviews was different to those conducted through YWAM, as Dexter explains:

> 'In standardized interviewing... the investigator defines the questions and the problem; he is only looking for answers within the bounds set by his presuppositions. In elite interviewing... the investigator is willing, and often eager to let the interviewee teach him what the problem, the question, the situation is.'[43]

Yet despite these legitimate differences, there remained a continuity of emphasis on hearing people's voices and stories. Because of this I was willing and eager to be taught more about the problem(s) faced, as well as about what questions to ask, when interviewing both community members and conducting 'elite' interviews. The interviews with academics are not explicitly quoted from in this thesis. Rather, they have contributed to my understanding of the legal, social and cultural context within which the right to water, and water governance operates in South Africa.

A subsequent research trip to communities partnering with the NGO *Water for People*, in Malawi in 2014, and a return visit to communities working with YWAM in Durban in 2015 utilized the same interviewing methods as already explained, and followed the same ethics requirements.

Together this empirical work includes 12 interviews with 'water-poor'[44] community members in South Africa, three in Malawi, one interview with a retired Constitutional Court Judge, and three with NGO workers. This constitutes a considerable number of hours of interview footage, which, as already stated, is not intended to underpin generalised claims. Instead, interviews were transcribed and analysed in order to identify themes. Quotations were then used which best encapsulated these themes in order to help meet the challenges already identified of

[40] *See* MR Gabor 'Types of Non-Probability Sampling used in Marketing Research: Snowball Sampling' (2007) 2/1 *Managing and Marketing*; R Maisel & CH Persell *How Sampling Works* (Sage, 1996).
[41] B Gillham *Case Study Research Methods* (Continuum, 2000) 63-64.
[42] Ibid.
[43] LA Dexter *Elite and Specialized Interviewing* (ECPR Press Classics, 2006) 19.
[44] This phrase refers to the state of water poverty, described as 'the condition of not having access to sufficient water, or water of an adequate quality to meet one's basic needs'.

bridging the gap between the law and reality. Despite best efforts it is important to acknowledge that this part of the empirical research conducted is the most vulnerable to unconscious bias on my part; selecting quotes that reinforce my argument or preconceptions. In order to address this, where possible, assertions of fact were 'triangulated'[45] with information provided by other interviewees, or checked with other sources.

Quotations from interviews appear in several chapters, are indented, and referenced with a footnote. In Chapter Five the interviews are incorporated and analysed in more detail. A full list of interviewees, along with their locations and/or organisations is given in the appendix.

1.4 Contribution to relevant academic debates

This thesis is located within the discipline of law. Consequently areas of legal enquiry relevant to the research questions posed necessarily include human rights law (in particular social and economic rights) law and development; sustainable development; and wider concerns of environmental law (each at the national/domestic and international level), as well as constitutional (public and administrative) law and legal theory, and water regulation within the specific context of South Africa. But identifying the thesis as socio-legal research requires that themes including poverty; gender; power relations; social impacts of new water technology; and water governance more generally feature to greater or lesser degrees.

This thesis makes an original contribution to the existing knowledge on how best to pursue access to sufficient water for people in South Africa by equitable, sustainable and efficient legal/regulatory/governance means. More specifically the thesis contributes to three key academic debates: the appropriate developmental role of the South African Constitution, and Constitutional Court; the role of rights in achieving eco-socio-sustainable access to water; and the potential of 'commons thinking' for water governance, and the extent to which such thinking could contribute to more sustainable, equitable access to water for everyone.

In so doing, the thesis builds on wider debates around judicial restraint and judicial activism, applying them here to South Africa's unique socio-legal context; including its expansive and decidedly transformative Bill of Rights, its on-going battle with significant impoverishment (in the aftermath of centuries of systemic discrimination), and its evolution towards liberal

[45] The process of triangulation in social science research involves using more than one method of gathering data, or more than one source of data in the study of a social phenomenon. This is considered an advantage, as it allows for confirmation, and consequently for increased confidence in the reliability of the data: A Bryman *Social Research Methods* (4th ed, Oxford University Press, 2012) 717.

democracy. Similarly, the reappraisal of the role of socio-economic rights takes places primarily in the context of the South African Constitution (which, regarding the right to water in particular, has been so heavily influenced by the international human right to water). Also, the recent resurgence of interest in the commons, as well as in local and 'glocal' dimensions to debates on (climate) justice are focused upon the South African context, and upon commons struggles in the country. Most importantly, ideas around water rights and commons thinking are considered in relation to the 'on the ground' experiences and actions of people in communities where access to water is problematic.

1.5 Understanding water paradigms

Water, and access to water can be understood in different ways, and through different paradigms. A paradigm can be defined as 'the basic belief system or worldview that guides the investigator... in ontologically and epistemologically fundamental ways". [46] These paradigms may be socially constructed, and may have direct or indirect legal implications. Some may only be unconsciously experienced; assumed without being thought. For many of us, especially those of us living in 'developed countries' the ubiquity of safe, clean water is an ordinary part of daily life. If familiarity really does breed contempt, then it is likely we do not give water the respect it deserves. Clean water, in abundance, available directly and cheaply, is considered an entitlement. Consequently it is difficult to reconceive of water as a precious, finite, nay scarce resource, a gift, a relief, and not as a foregone conclusion. Such associations with water are largely alien to my experience. But it is important at the beginning of this research to consider the most prevalent paradigms that frame people's thinking about water and access to water, and consequently which help shape different approaches to water governance; no matter how interconnected or (un)conscious or (in)formal these paradigms may be.

1.5.1 Water as life

Water is a necessary constituent of every cell of every plant and animal on Earth.[47] Present on the planet long before the evolution of life, water is a prerequisite for all living organisms.[48] Water also forms a significant proportion of the mass of many organisms, including around 70% of adult humans. Most of this water acts to distribute nutrients throughout the body, and to

[46] EG Guba & YS Lincoln 'Competing paradigms in qualitative research' in *Handbook of Qualitative Research 2.* 105, 105.
[47] F Franks (ed) *Water, A Comprehensive Treatise: Volume 1: The Physics and Physical Chemistry of Water* (Plenum Press, 1983) 4
[48] Ibid 5.

remove waste products. Additionally the water content of all biological fluids, including saliva, gastric juices and plasma, is between 90 and 99%.[49]

Consequently, not only is water essential for the beginning of life, but also for its continued survival. Adult humans take in around 2.5 litres of water per day, in the form of liquid water, and from solid food. Much less than this volume results in dehydration, which impedes physical and mental functions. Severe dehydration leads to morbidity and ultimately death.[50] While clean water is essential for life, water contaminated with diseases is a leading cause of death in the developing world, especially among children.[51] Cholera, typhoid, and diarrhoea are all caused by drinking 'dirty' water, which leads to the death of nearly 4000 children every day.[52]

In short, life and clean water are inseparable. It is not surprising then that across cultures, philosophies and religions, as well as in science, life and water are inextricably linked.

1.5.2 Water as element(al)

> 'Water is H_2O, hydrogen two parts, oxygen one, but there is also a third thing that makes it water and nobody knows what it is.'
>
> DH Lawrence – *Pansies*[53]

Water appears to play a profoundly significant role both in biological life, and in creating spiritual/existential understandings of life. Such an 'elemental' dimension to water has been reflected in literature and philosophy since antiquity. Ovid's *Metamorphoses* uses water to symbolize fundamental truth as constantly moving, and changing.[54] Thales – widely regarded as the first Greek philosopher – declared water as the source of all things.[55] Mazisi Kunene relates the Zulu belief that 'from water is born all peoples of the earth.'[56]

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[49] Ibid 6-7.
[50] D Andrews *et al* 'Dehydration: Evaluation and Management in Older Adults' (1995) 274/19 *The Journal of the American Medical Association* 1552-1556.
[51] World Water Assessment Programme *United Nations World Water Development Report 2: Water, a Shared Responsibility* (Paris, 2006) 204.
[52] Ibid.
[53] DH Lawrence *Pansies: Poems by DH Lawrence* (Fedonia Books, 2002)
[54] R J Tarrant (ed) *Ovid Metamorphoses: Oxford Classical Texts* (Oxford University Press, 2004).
[55] D Macauley *Elemental Philosophy: Earth, Air, Fire and Water as Environmental Ideas* (State University New York, 2010) 43.
[56] M Kunene *The Ancestors & the Sacred Mountain* (Heinemann Educational, 1982).

The biblical creation poem in Genesis describes how water was present before life was made:

> 'And the earth was without form and void, and darkness was upon the face of the deep. And the Spirit of God moved upon the face of the waters.'[57]

The Qur'an, how life came from water:

> 'And God hath created every animal of water: of them there are some that creep on their bellies; some that walk on two legs; and some that walk on four.'[58]

The elusive third element in DH Lawrence's poem is perhaps that which the traditions above intuitively experience and seek to articulate. But what is important to an understanding of water paradigms is to acknowledge that the necessity of water for life as a scientific fact is echoed across philosophical and religious traditions. Together these lead to a paradigmatic understanding of water as a *necessity* in the fullest sense.

1.5.3 Water as necessity

Water (or more accurately, access to clean water) is necessary for existence. Therefore it must be understood as a necessity if existence is to continue. But a paradigm of 'water as necessity' goes further than existence, affirming that water is necessary for *dignified life*. Regarding humanity's need for water, General Comment 15 describes access to water as 'indispensable for leading a life in human dignity'.[59] This paradigm has been, and continues to be, hugely influential in shaping attitudes towards water access, and water governance that effectively meets this necessity.[60] The preamble to the Universal Declaration of Human Rights makes clear the link between human dignity and human rights.[61] Human rights flow from the 'inherent dignity' of the 'human family'.[62] Therefore the concept of a human right to water (as to anything else) rests on an acknowledgment of human dignity, and aims to affirm and to protect people's dignified existence, not simply their existence. Consequently the ensuing discussion on the human right to water in this thesis, and the implications of such a right for water governance, may be understood as predicated upon a paradigm of water-as-necessity. Similarly, the explicit connection between human dignity and the Millennium Development Goals, articulated in the

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[57] The Holy Bible containing the Old and New Testaments [Authorised King James Version]. (Collins Bible) Book of Genesis 1, verse 2.
[58] *The Qur'an* Translated by Tarif Khalidi. (Viking, 2008) Sura 24, 44.
[59] CSECR, General Comment No 15.
[60] One such example of this paradigm's influence on attitudes to water access is the 2014 European Citizens' Initiative (ECI) on the right to water. This gained 1.68 million signatures across the European Union. In response to this the European Commission committed, amongst other things, to 'advocate universal access to safe drinking water and sanitation as a priority area for post-2015 Sustainable Development Goals'. <http://europa.eu/rapid/press-release_IP-14-277_en.htm> (Last accessed 27 July 2016).
[61] UDHR at *preamble.*
[62] Ibid.

United Nations Millennium Declaration,[63] suggests that the goal of halving the number of people without sustainable access to water[64] may also be understood as flowing from a water-as-necessity paradigm.

Water is also a necessity for all non-human animals, and for all ecosystems. Recent work on planetary boundary theory, pioneered at the Stockholm Resilience Centre at Stockholm University, proposes a framework for human interaction with the Earth's systems, in order to define a safe operating space for humanity.[65] Nine planetary boundaries are identified, including ocean acidification, climate change, biochemical flows, and freshwater use. The theory states that crossing any of the nine boundaries may lead to 'irreversible and abrupt environmental change',[66] which will be compounded by multiple breaches. It is estimated that three boundaries have already been breached (biodiversity loss, climate change, and the atmospheric nitrogen cycle), and that the remaining boundaries may also be crossed by 2050.[67] Overexploitation of freshwater sources (including lakes and aquifers) is increasing (whereby water is extracted at a rate that exceeds the recharge rate of the source), leading some hydrologists to call for 'a global limit on water consumption'.[68] More positively though, there is huge potential to improve the efficiency of human's water-use, thereby reducing the risk of crossing the freshwater boundary.[69] What is certain though, is that water is a necessity for everyone and everything that shares this planet.

1.5.4 Global water

Echoing the call for a global limit on water consumption, approaches that conceptualise water (and water governance) from global perspectives, are rising in prominence. Earth Systems Governance (ESG) is one such perspective, defined as:

> 'the interrelated and increasingly integrated system of formal and informal rules, rule-making systems, and actor-networks at all levels of human society (from local to global) that are set up to steer societies towards preventing, mitigating, and adapting to global and local environmental

[63] General Assembly *United Nations Millennium Declaration* (18 September 2000) A/Res55/2 para 2.
[64] Millennium Development Goals, goal 7, target 10. Available at <http://www.unmillenniumproject.org/goals/gti.htm#goal7> (Last accessed 27 July 2016).
[65] The Nine Planetary Boundaries – Stockholm Resilience Centre: <http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html> (Last accessed 27 July 2016).
[66] J M Anderies *et al* 'The Topology of Non-linear Global Carbon Dynamics: From Tipping Points to Planetary Boundaries' (2012) *Center for the Study of Institutional Diversity* Working Paper Series #CSID-2012-009.
[67] Ibid.
[68] D Molden 'Planetary Boundaries: The Devil is in the Detail' (2009) *Nature Reports Climate Change* 119.
[69] Ibid.

change and, in particular, earth system transformation, within the normative context of sustainable development.'[70]

In the specific context of water governance, ESG seeks to acknowledge all actors involved in the regulation of societal activities and behaviours with regards to earth system dynamics, and to analyse the myriad layers and interconnections between public and private actors and actor networks at all levels of policy and decision-making. To this end, such a conceptual approach complements the international, national and local/community layers of water governance considered in this thesis. Contemporary ESG research also links to ideas of the anthropocene, and of socio-ecological security, which are examined below.

Integrated Water Resources Management IWRM is a more formally constructed approach to water governance than ESG. Longer established, and more technically focused, it should be considered less as a water paradigm, and more as a tool with which to pursue a global (international, interconnected, and integrated) paradigm of water governance. The central conceptual theme of IWRM is that water resources are finite and interdependent.[71] The Dublin Statement on Water and Sustainable Development (known as the Dublin Principles) was agreed at the International Conference on Water and the Environment in Dublin in 1992. It contains four guiding principles, which summarise and promote IWRM as a holistic approach to hydrological management, emphasising its ecological, economic and social implications. IWRM also recognises the right of all people to clean water and sanitation at an affordable price (Principle No. 4). It has been criticised for lacking specific objectives, and the question has been asked whether its emphasis on all relevant factors should remain procedural, or extend towards a more substantive agenda.[72] Nevertheless IWRM as a water paradigm has provided a common basis for water sector reform across the world, including shaping legislation in South Africa.[73] It is considered in greater detail in Chapter Three. But it is the first statement

[70] Earth Systems Governance: Conceptual Framework: <http://www.earthsystemgovernance.org/about/concept> (Last accessed 27 July 2016).

[71] International Conference on Water and the Environment: Development Issues for the 21st Century, 26-31 January 1992 Dublin, Ireland, *The Dublin Statement on Water and Sustainable Development*: Principle No. 1 – *'Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.'* Principle No. 2 – '*Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.'* Principle No. 3 – *'Women play a central part in the provision, management and safeguarding of water'*. Principle No. 4 – *'Water has an economic value in all its competing uses and should be recognised as an economic good. Within this principle it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price...' Hereinafter:* The Dublin Statement on Water and Sustainable Development.

[72] B Mitchell 'Integrated water resources management, institutional arrangements, and land use planning' (2005) 37 *Environment and Planning* 1335-1352.

[73] B van Koppen & B Shreiner 'Moving beyond integrated water resource management: developmental water management in South Africa' (2014) *International Journal of Water Resources Development* 1-16, 1-2.

of Principle No. 4 - 'Water has an economic value in all its competing uses and should be recognised as an economic good' - that connects to the next water paradigm to be introduced.

1.5.5 Water as commodity

A commodity is a marketable item produced to satisfy wants or needs.[74] In light of the fact that sufficient clean water is imperative to sustaining dignified existence, it is easy to understand why water may be considered Earth's most precious commodity.[75] Basic market economy principles of supply and demand, applied to water, provide further impetus towards a paradigm where water is treated as a commodity. On the supply side the inconvenient reality is that the volume of water on this planet remains fixed.[76] Of this volume, less than three per cent is fresh water.[77] Meanwhile, demand, particularly since the 1990s has been growing, led in large part by a significant and sustained increase in the global population: In 1987 the world's total population was five billion. By 1999 this had reached six billion. In 2011 it reached seven billion, and is estimated to reach eight billion by 2024.[78] Indeed, rising human demand for water significantly outweighs the predicted effects of greenhouse gas global warming in terms of the consequences for global water systems in the near future.[79] Such a combination of static supply and growing demand for a commodity inevitably leads to an increase in unit price (or market value).[80]

The need to meet increasing demand for this necessity called water, coupled with the promise of increased returns, has opened up huge economic opportunities for investment in water and sanitation services for myriad international financial institutions and multinational corporations.[81] Also, during the late 1980s and throughout the 1990s economic orthodoxy coalesced around the so-called Washington Consensus, which Stiglitz defines as:

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[74] "An article of commerce; something of use, advantage or profit" Collins Dictionary definition: < http://www.collinsdictionary.com/dictionary/english/commodity> (Last accessed 27 July 2016).
[75] J Chaisse & M Polo 'Globalization of Water Privatization: Ramifications of Investor-State Disputes in the 'Blue Gold' Economy' (2015) 38/1 *Boston College International & Comparative Law Review* 1-63, 2.
[76] F Franks (ed) *Water, A Comprehensive Treatise: Volume 1: The Physics and Physical Chemistry of Water* (Plenum Press, 1983) 2-3.
[77] Ibid 3.
[78] <http://www.worldometers.info/world-population/> (Last accessed 27 July 2016).
[79] CJ Vorosmarty *et al* 'Global Water Resources: Vulnerability from Climate Change and Population Growth' (2000) 289 *Science* 284-288, 284.
[80] M Blaug *Economic Theory in Retrospect* (2nd ed, Heinemann Educational Books Ltd, 1968) 42-46.
[81] See generally Water Projects & Programs, World Bank: <http://www.worldbank.org/en/topic/water/projects> (Last accessed 27 July 2015).

> 'development strategies focusing on privatization, liberalization and macro-stability (meaning mostly price stability); a set of policies predicated upon a strong faith – stronger than warranted – in unfettered markets and aimed at reducing, or even minimizing, the role of government'.[82]

Applied to water services, many such policies prioritised using privatisation contracts to facilitate and achieve much-needed investment in water and sanitation infrastructure and facilities. Consequently by 2013 ten per cent of the global population received their water from private companies.[83] This has led to the emergence of a closer association between providing access to water and operating such provision on the basis of generating profit. Indeed this is not limited to those areas of water services provided by private companies. The commercial, or private-sector mind-set that water services can, and should be profitable is also now a common feature across State-owned and provincial water providers.[84]

Such a 'privatesque' approach to water provision is sufficiently prevalent and imbedded to warrant the identification of a water-as-commodity paradigm here. Indeed, it is asserted here that this is the dominant paradigm within which assumptions are made around water governance.[85] The implications of operating water services according to this paradigm are not easy to determine, and it is important to state that such a paradigm is not automatically antithetical to other paradigms discussed. Nor is it *necessarily* in conflict with the concept of a (human) right to water. But, as will be explored later in this thesis, such a paradigmatic approach to water has raised tensions with an understanding of water as necessity; tensions first felt in some of South America's water privatization experiments. These experiments have had global ramifications for water governance, and have helped to clarify and restate the last important water paradigm to be introduced.

1.5.6 Water as commons

In December 1999 in the Bolivian city of Cochabamba, the previously State-owned water supply company *Semapa* was privatized. The privatization contract went to *Aguas del Tunari*, a joint venture with the US multinational construction company *Bechtel*. Immediately water rates were raised by 35%. Consequently many residents could not afford to pay for their water, becoming disenfranchised from what they considered their right (affordable access to sufficient

[82] JE Stiglitz 'The Post Washington Consensus Consensus' (*The Initiative for Policy Dialogue* Working Paper, 2004) 1.
[83] SL Murthy 'The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over Privatization' (2013) 31 *Berkeley Journal of International Law* 89, 109.
[84] J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20, 8.
[85] See for example The Dublin Statement on Water and Sustainable Development.

water). [86] This led to large scale, sustained public protest, between January and April 2000, organised mainly by the community coalition *Coordinadora in Defense of Water and Life*. On the 10th April 2000, less than five months after the privatization contract had been signed, the Bolivian government reversed the privatization and returned Cochabamba water to State ownership.[87]

The legacy of the so-called 'Cochabamba water war', along with similar events in Argentina, is considered in more detail in Chapter Two, particularly in relation to their influence on the 2010 General Assembly resolution on the right to water and sanitation. But it is introduced here because, with the benefit of hindsight, it was these events in Cochabamba that first located issues of water rights (articulated since Cochabamba as 'water justice'), and community-based resistance to the commodification and privatization of water, within broader struggles for global justice, including global environmental justice.[88] It is also important to note that the Cochabamba water war was influenced by non-Western, indigenous worldviews and communal ways of life that emphasised the importance of keeping access to water available for all, through an understanding of water as part of the 'commons'. The concept of commons (discussed at length in Chapter Five, and elsewhere) encompasses notions of communality, manifested through structures of community deliberation and decision-making regarding resources conceived of as collective, corporately held, or common; including water.[89] Together, resistance to an approach to water commodification that results in disenfranchisement, coupled with a restatement of water as part of the (global) commons, is introduced here as a paradigm of 'water as commons'.

1.6 Outline of thesis

The thesis follows a three level approach, moving from consideration of the research question (and relevant sub-questions) at the international level (the level of the *Covenants*), then to the national, domestic jurisdiction of South Africa (the level of the *Constitution*), before moving to consider the actual and potential role that commons and community-focused governance can play in achieving access to sufficient water for everyone (the level of the *Commons*).

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[86] W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14-36, 15

[87] Ibid 21.

[88] L Mehta *et al* 'Global environmental justice and the right to water: the case of peri-urban Cochabamba and Delhi' (2014) 54 *Geoforum* 158-166, 161.

[89] W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14-36, 16-17.

Chapter two: 'Water governance at the international level', outlines the (hard and soft) law and legal instruments relevant to identifying the nature and scope of an internationally acknowledged human right to water. The history around acceptance of the right is considered, including the important interpretative role played by the Committee on Economic, Social and Cultural Rights, as well as the effects that water reform in South America had in driving acknowledgment of the right to water at the international level. The chapter also critiques the structural and practical limitations of an international human right to water, and to a rights-based approach to water governance, before comparing the alternative/complementary/competing concept of water as a development goal. The interconnections between social, economic and cultural rights, civil and political rights, and environmental exigencies are considered. In particular, the question of sustainable access to sufficient water is framed within the challenges and limitations not just of economic resources, but also of emerging ecological capacities. Such a consideration of water in relation to social-ecological security (drawing particularly on the work of Crutzen & Stoermer,[90] Ebbesson,[91] Grear[92] and Kotze[93]) emphasises not only the existence of, and implications for an international human right to water, but also the present and future global context for any meaningful claim to such a human right.

Chapter Three: 'Water in South Africa', moves the thesis from the international level, to a single national context in order to explore both the connection between the international and national levels regarding water governance, and to chart the current shape of water access and water governance in South Africa. This begins by exploring the unique legal/historical/political factors surrounding South Africa's current water topography, as well identifying more general regional and paradigmatic changes, which together have influenced the country's current water settlement. Emerging from a historically informed study of the legal/regulatory regime for water, is a focus on the centrality of the 1996 Constitution. This central role is considered from both a

[90] P Crutzen & E Stoermer 'The "Anthropocene"' (2000) 41 *IGBP Global Change Newsletter* 17-18.
[91] J Ebbesson 'Social-Ecological Security and International Law in the Anthropocene' in J Ebbesson et al (eds) *International Law and Changing Perceptions of Security – Liber Amicorum Said Mahmoudi* (Brill, 2014) 71.
[92] A Grear 'Human rights, property and the search for 'worlds other''(2012) 3/2 *Journal of Human Rights and the Environment* 173-195; A Grear 'Human Bodies in Material Space: Lived Realities, Eco-crisis and the Search for Transformation' (2013) 4/2 *Journal of Human Rights and the Environment* 111-115.
[93] L J Kotze *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012); L J Kotze 'Arguing Global Environmental Constitutionalism' (2012) 1/1 *Transnational Environmental Law* 199-233; L J Kotze 'The Anthropocene's Global Environmental Constitutional Moment' (2015) *Yearbook of International Environmental Law* (in press).

theoretical perspective (using the work of Ackerman[94] on constitutional moments, and Barendt[95] and Ridley[96] on constitutionalism) and a more practical, nationally-specific perspective (using in particular Currie & de Waal's analysis of the Bill of Rights[97]) in order to accurately describe, then critique the legal architecture for water governance in South Africa. This supports the ensuing analysis (in Chapter Four) of the jurisprudence of the Constitutional Court.

Chapter Four: 'Socio-economic rights in the Constitutional Court', analyses decisions of the Court, and the relationship between the Court and government (including interpretation of legislation and policy), both generally, and specifically regarding economic, social and cultural rights (including the so called environmental right[98]) in the Constitution's Bill of Rights. It is argued that understanding the relationship between South Africa's highest court, and the socio-economic rights in the Constitution is crucial to identifying what potential there is for achieving access to sufficient water (one such socio-economic right) through traditional legal and regulatory means (and by implication, what are the limits of this potential?).[99] In particular this raises questions about the impact that conferring a right to water on people has on their achieving concomitant access to water (a central question in this thesis, expressed succinctly by Bond, and others, as reaching the limits of 'rights talk'[100]). It is argued that there are limitations to the Constitutional Court's ability to pursue significant social transformation, and that many of these limitations can be considered legitimate, by recourse to entrenched constitutional values (including the rule of law, and separation of powers): A position typically acknowledged as judicial restraint, but when taken to its extreme, is labelled by the author as 'judicial managerialism'.[101] But an alternative interpretation of the Court's interaction with socio-economic rights, is also postulated, emphasising the developmental importance of a dynamic, evolutionary understanding of the Court's role in relation to these rights. Rather than asking what *is* the legitimate role of the Constitutional Court? (a question that expects a static answer),

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[94] B Ackerman *We the People, Volume 1: Foundations* (Harvard University Press, 1993); B Ackerman *We the People, Volume 2* (Harvard University Press, 1998).
[95] E Barendt 'Is there a United Kingdom Constitution?' (1997) 17 *Oxford Journal of Legal Studies* 137-145.
[96] FF Ridley 'There is no British Constitution: A dangerous case of the Emperor's Clothes' (1988) *Parliamentary Affairs* 340-361.
[97] I Currie & J de Waal *The Bill of Rights Handbook* (6th ed, Juta, 2013).
[98] Section 24 Constitution of the Republic of South Africa, 1996.
[99] See generally S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010).
[100] P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal of Human Rights* 125, 125.
[101] This term was originally coined by the author in the following publication: N Cooper & D French 'The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism' in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 111.

instead the question 'what is *currently* the legitimate role of the Constitutional Court?' is asked: an idea referred to by the author as 'liminal constitutionalism'. The chapter concludes by considering the consequences of reaching the limits of 'rights talk' (particularly regarding achieving access to sufficient water), and the epistemic spaces that may open up as a result.

Chapter Five: 'Water Stories, Community organisation and 'commons thinking' ', begins by considering whether there are sufficiently similar characteristics across myriad community/communal/co-operative/commons organisational modes to warrant discussion of these within a single (albeit broad) paradigm; concluding that there is a discernible set of characteristics with which to explore water governance through commons thinking. To this end, the work of Ostrom[102] and Harvey[103] are particularly important. The history of commoning in various parts of the world is traced, in order to locate commons thinking within a rich and complex mixture of ancient traditions, indigenous knowledge systems and postmodern theory. As such, it is argued that commons thinking, applied to helping achieve access to sufficient water, is capable of reimagining water governance to effectively respond to old and new problems causing insufficient water access. Of particular note here is the emerging shift from government to governance, and consequently the growing importance of multi-level governance and grass roots organisations, both of which prioritise stakeholder participation and enfranchisement.[104]

Also, acknowledgment of so-called vernacular law, which governs the commons in more or less formal ways, presents an important opportunity to reimagine legal structures for more equitable and effective water governance. Such a reimagination is started in this chapter. It is argued that such emphasis on participation and enfranchisement supports the inclusion within this thesis, of the voices of water-poor people, and their stories. To this end the chapter considers the enfranchising potential of narrative, before reporting on, and analysing the interviews conducted, and their connection to the arguments in the current and preceding chapters.

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[102] See for example E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); E Ostrom *et al* 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 *Science* 278.

[103] D Harvey 'The Future of the Commons' (2011) *Radical History Review* 104.

[104] *See* P Jon 'Introduction: Understanding Governance' in P Jon (ed) *Debating Governance: Authority, Steering Democracy* (Oxford University Press, 2000); D M Trubek & L G Trubek 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) *University of Wisconsin Law School, Legal Studies Research Paper Series* Paper No. 1047.

In Chapter Six 'Conclusion: Achieving access to sufficient water for everyone, for ever', the central assertions of the thesis (including its originality) are summarized, before 'zooming out' again to consider the wider regional and global challenges to achieving access to sustainable, equitable and efficient access to water; reconnecting analysis at the international level with discussion of the commons. The chapter acknowledges that there are multiple dimensions to the challenge of achieving access to sufficient water, which lie outside the legal/regulatory space, and consequently (at least partially) outside the purview of this thesis. However, two such dimensions are briefly included at this point, in order to locate this research within arguably the two most important emerging areas of water- related scholarship; new water technology, and water security in the context of the Anthropocene.

1.7 Main argument and originality of thesis

As the ensuing analysis of international and national water governance will reveal and support, the central argument of this thesis is that a (human/constitutional) rights-based approach to water access, operationalized within the current, dominant, 'water-as-commodity' paradigm, will not achieve the goal of universal access to sufficient water. At least part of the solution to this failure of a rights-based approach (referred to throughout as 'rights talk') lies in commons thinking, and the adoption and advancement of a 'water-as-commons' paradigm for water governance.

This two-part (diagnosis/prognosis) argument is premised on four crucial assertions. First, notwithstanding the declarative importance of international water governance (encompassing international human rights law, and international development goals-based initiatives) people's rights claims to water, are better made at national (or even local) level. Second, the current configuration of a right to water - as an individual right, to be progressively fulfilled within the limitations of the available resources of the State – is ill-suited to achieving universal access to water. Third, the interpretation and application by the Courts, of such a right is severely limited by judicial restraint. The consequence of this is that the transformative potential of the right is further constrained. Fourth, the thoroughly different conception of water that 'commons thinking' supports, presents an important opportunity to reimagine water governance in ways that are more sustainable, more equitable, and more enfranchising than is the status quo.

Much of the originality of this thesis comes from its methodological design, which combines more traditional legal scholarship with narrative inquiry, explicitly calibrated to give voice to water-poor people, in order to reflect upon the implications of their stories, and crucially, to

learn from their praxis. If we listen carefully to these stories, whispers of vernacular law and law-like expressions begin to be heard, and these should be heeded by anyone serious about realizing the goal of access to sufficient water for everyone, forever.

2

Water governance at the international level

'On July 28th 2010 the United Nations General Assembly adopted an historic resolution recognizing the human right to safe and clean drinking water and sanitation as "essential for the enjoyment of the right to life". For those of us in the balcony of the General Assembly that day, the air was tense with suspense... Bolivian UN Ambassador Pablo Solon introduced the resolution... "Water is life," he said.

But then he laid out the tragic and growing number of people around the world dying from lack of access to clean water... every three-and-a-half seconds in the developing world, a child dies of water-borne disease. Ambassador Solon then quietly snapped his fingers three times and held his small finger up for a half second. The Generally Assembly fell silent. Moments later, it voted overwhelmingly to recognize the human right to water and sanitation. People on the floor erupted in cheers.'

Maude Barlow[105]

'A man looking at reality brings his own limitations to the world. If he has strength and energy of mind the tide pool stretches both ways, digs back to electrons and leaps space into the universe and fights out of the moment into non-conceptual time. Then ecology has a synonym which is ALL'

John Steinbeck[106]

2.1 Introduction

General Assembly Resolution number 64/292[107], witnessed by Barlow, recognizing the right to water and sanitation was adopted with 122 votes in favour, none against, and 41 abstentions. It represents for the first time, recognition of the right to clean water and sanitation at the international level, and acknowledges that both are essential for realising all human rights.

[105] M Barlow *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*. Available at: <http://documents.foodandwaterwatch.org/doc/RTW-Cdn.pdf#_1.195890220.1020496576.1429985769> (Last accessed 27 July 2016).
[106] J Steinbeck *Sea of Cortez: A leisurely journal of travel and research* (The Viking Press, 1951).
[107] United Nations General Assembly resolution 64/292 "The human right to water and sanitation", UN Doc. A/RES/64/292 (3 August 2010). Hereafter UN GA resolution 64/292.

Affirmed and supported by the corresponding Human Rights Council Resolution[108] two months later, the human rights to water and sanitation are now explicitly confirmed as being part of international law, although not legally binding on States.[109] Together these two resolutions mark the culmination of decades of efforts to acknowledge water as a human right at the international level.

This chapter begins by charting the development of a internationally acknowledged right of access to water, and by examining the relevant international legal instruments through which this right has been declared, affirmed and promulgated. Consideration is given to the nature, substance and procedural requirements of this right and ultimately to its justiciability.

The legal basis, binding obligations, and normative status of the right of access to water, are analysed, before considering the degree to which the emerging *rights*-based approach to water access connects with global (sustainable) development approaches to improving people's access to water; addressing the relationship between rights-based and development-based approaches to water governance. Finally both of these are considered in the context of global environmental constraints and exigencies, in order to better understand the interconnected challenges facing any meaningful international approach to ensuring access to sufficient water in the present and future global contexts.

2.2 History of a contested right

Since access to sufficient clean water is undoubtedly necessary for dignified life, it may be expected that a human right to water has long been acknowledged. Indeed it is most surprising, initially at least, to discover that water is not mentioned, much less explicitly protected as a human right in the Universal Declaration of Human Rights[110] or the International Covenant on Economic Social and Cultural Rights[111]. This is perhaps even more surprising given that rights to

[108] United Nations Human Rights Council Resolution A/HRC/RES/15/9 "Human Rights and Access to Safe Drinking Water and Sanitation", adopted 30 September 2010. Hereafter UN HRC Resolution 15/9. *Note* the mandate, responsibilities and functions of the Human Rights Council are outlined in GA Res. 60/251 Human Rights Council. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf> (Last accessed 27 July 2016). These include the duties to make recommendations to the UN General Assembly for the further development of international law in the field of human rights; and to make recommendations with regard to the promotion and protection of human rights (paragraph 5 (c) and (i)).

[109] Ibid. *Note* the above mandate of the Human Rights Council does not include empowerment to make legally-binding resolutions.

[110] 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.

[111] 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.

food, clothing, housing, medical care and social security, amongst other economic and social rights, *are* explicitly listed in the UDHR[112] and ICESCR.[113]

2.2.1 Conspicuous absence

There are several interpretations of the reasons for the absence of any mention of water. Perhaps particularly relevant to the absence of water from the UDHR is the era in which it was adopted.[114] The UDHR was approved by the UN General Assembly in December 1948, in the aftermath of World War II and in the wake of the United Nations' Charter, the main emphasis of which was international security (with brief mention of human rights and fundamental freedoms)[115]. As such one role of the UDHR can be understood as seeking to provide a more expansive interpretation of the UN Charter's human rights provisions. As the full horror of atrocities committed during the war began to impact on the collective psyche, including the international community, the UDHR's chief concern in declaring human rights standards, may have been to emphasise those rights most obviously violated or disregarded during the war period. Such rights include for example Articles 2 and 7 prohibiting discrimination; Article 3 regarding life, liberty and security of person; Article 4 prohibiting slavery and servitude; Article 5 prohibiting torture; and, Article 9 prohibiting arbitrary arrest, detention and exile.[116]

Therefore, while it is the case that rights to food, clothing and other social and economic rights[117], are present in the UDHR, there is at least an apparent prioritisation of civil and political rights[118] (including the right to life, and rights protecting individuals from slavery, torture, arbitrary arrest and the like) above social and economic rights. Of the 30 Articles within the UDHR, the first 20 can be more accurately categorised as civil and political, than as social and economic rights. Indeed, not only are social and economic rights outnumbered two to one, but they are also relegated to the final third of the declaration. Such an analysis of the relative balance within the UDHR of civil and political, and social and economic rights, and the consequent absence of water from explicit mention (because civil and political rights received priority over social and economic rights), may link to a second interpretation.

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[112] UDHR Article 25.
[113] ICESCR Articles 11 and 12.
[114] L Hunt *Inventing Human Rights: A History* (WW Norton & Company, 2007) 203-7.
[115] UN Charter Article 55 (c): '[The United Nations shall promote] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. Available at: < http://www.un.org/en/documents/charter/chapter9.shtml> (Last accessed 27 July 2016).
[116] UDHR, Articles 2, 3, 4, 5, 7, 9.
[117] R Gavison 'On the relationships between civil and political rights, and social and economic rights' (2003) *The globalization of human rights* 23-55, 25.
[118] Ibid 40.

Article 25 (1) of the UDHR states:

> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, *including* food clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.[119]

The use of the word 'including' at the beginning of the list of material requirements for an adequate standard of living suggests that this list is not intended to be exhaustive. Such an analysis allows the fact of the absence of water from this list to be understood in a way that does not exclude assertion of a right to water. If the list is simply indicative of the requisite conditions for an adequate standard of living (which, with reference to the preamble, must be a standard of living in keeping with dignified existence[120]) then there is scope to add other material requirements necessary for such a standard of living. Determining whether a particular condition should be considered, by implication to be part of this list then depends on whether such a condition is essential for a standard of living commensurate with dignified existence. It is precisely this interpretation that leads McCaffrey to conclude as follows:

> 'It is obvious that water, even more than food, is essential to "health and well-being"; it should therefore be taken to be included by necessary implication'.[121]

This argument, that water can (or should) be included 'by necessary implication' is supported by General Comment 15 which asserts a right to water based on the intrinsic connection between access to water and the right to food[122] as declared in Article 11 (1) of the ICESCR[123] (closely echoing the right to food in Article 25 (1) of the UDHR[124]).

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[119] UDHR Article 25 (1). *Emphasis added.*
[120] UDHR Preamble.
[121] S McCaffrey 'The Human Right to Water' in E Brown *et* al (eds) *Fresh Water and International Economic Law* (Oxford University Press, 2005) 93, 96.
[122] *See* General Comment 15, paragraphs 2, 6, 7.
[123] ICESCR Article 11(1): *'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'*
[124] UDHR Article 25 (1): *'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'*

So the historical context of the UDHR may have influenced the prioritisation of civil and political rights within the document. This in turn may help explain why those social and economic rights listed, particularly in Article 25 do not include the essential requirement of water: More attention was perhaps given to ensuring the comprehensive nature of those rights set out in the earlier articles. Alternatively it may be that including a less than exhaustive list was a deliberate technique to allow for appropriate interpretation. And it may of course be that neither of these interpretations is correct. Indeed the inclusion of both civil and political rights and social and economic rights within the same declaration, rather than separating them, as the ICCPR[125] and ICESCR subsequently did, may suggest that both groups of rights were considered equally important, and inextricably linked.[126] But whatever the case, the absence from the UDHR of such a crucial component of life as water, should not be read as a criticism of the document. The rights contained within the UDHR push far beyond those notions of individual rights (such as equality before the law, and freedom of religion, expression and participation in government) expressed in the seminal declarations that preceded it.[127] Rather the scope of the UDHR extends to declare amongst other things: equal universal suffrage;[128] the right to a nationality;[129] the right to marry;[130] and the right to work for a living wage.[131] As such it represents a progressive and expansive, if not exhaustive declaration.

Being adopted by the UN General Assembly, the legal status of the UDHR is the same as other General Assembly resolutions; it is not binding. However, as already alluded to, the UDHR significantly elaborates on the sparse reference to human rights in the UN Charter. It is now generally accepted that the UDHR constitutes authoritative (and expansive) interpretations of the human rights provisions in the UN Charter.[132] As such, the UDHR is perhaps binding on States by virtue of the binding nature of the Charter[133], rather than of the UDHR *per se.* It has

[125] International Covenant on Civil and Political Rights, GA resolution 2200A (XXI) adopted 16 December 1966, entered into force 23 March 1976. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (Last accessed 27 July 2016). *Hereafter* ICCPR.
[126] R Gavison 'On the relationships between civil and political rights, and social and economic rights' (2003) *The globalization of human rights* 23-55, 23.

[127] *See for example* The Declaration of Independence, 1776; Declaration of the Rights of Man and Citizen, 1789; UN Charter, 1945.
[128] UDHR Article 21 (3).
[129] UDHR Article 15.
[130] UDHR Article 16.
[131] UDHR Article 23 (3).
[132] H Hurst 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25/287 *Georgia Journal of International and Comparative Law* 287- 397, 319.
[133] UN Charter Article 2.

also been asserted that the UDHR should be considered as customary international law.[134] But a more realistic appraisal of its status, in light of the onerous requirements of identifiable state practice and *opinio juris sive necessitatis*,[135] is that only the civil and political rights within the UDHR have attained the status of customary international law. Since Article 25 of the UDHR, declaring the right to an adequate standard of living, clearly constitutes a social and economic right, it would be difficult to derive a justiciable human right to water from the UDHR, even if it is accepted that water is part, by implication, of the list of material requirements necessary for an adequate standard of living.

Despite any subsequent developments towards becoming customary international law, the UDHR at its inception, was never intended to be legally binding. Eleanor Roosevelt, chair of the declaration's drafting committee described the character and purpose of the UDHR as follows:

> 'It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms... to serve as a common standard of achievement for all peoples of all nations.'[136]

It is worth noting at this point that, as Higgins observes, 'the passing of binding decisions is not the only way in which law development occurs'.[137] Bearing in mind the non-binding status of General Assembly resolutions like the UDHR, Higgins' insight is particularly relevant when the impact of resolution 64/292 on the human right to water and sanitation is considered below, as well as where discussion moves away from rights-based approaches, towards development goals. But it is to the relevant legally binding treaties that attention now turns.

In contrast to the UDHR, the ICESCR and ICCPR (together referred to as the Covenants) were explicitly adopted by the UN General Assembly as legally binding treaties; open to states for accession and ratification. While the legal status of the Covenants is clearly different from that of the UDHR, all three (along with the first optional protocol to the ICCPR) together form the International Bill of Human Rights.[138] Each Covenant acts as the implementing instrument

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[134] H Hurst 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25/287 *Georgia Journal of International and Comparative Law* 287- 397, 319.

[135] North Sea Continental Shelf Cases (FRG/Denmark; FRG/Netherlands) 1969 ICJ 3, 44 (Judgment of Feb. 20).

[136] E Roosevelt, Chairman of the UN Commission on Human Rights. *Quoted in* H Hurst 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25/287 *Georgia Journal of International and Comparative Law* 287- 397, 318.

[137] R Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995) 24.

[138] H Hurst 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25/287 *Georgia Journal of International and Comparative Law* 287- 397, 318.

for civil and political rights, and for economic, social and cultural rights respectively.[139] Therefore while it is difficult to see how the UDHR can directly yield justiciable rights, this is not the case for the Covenants.

2.2.2 The International Covenant on Economic, Social and Cultural Rights, 1966

Considering the two Covenants in the International Bill of Human Rights, the ICESCR would appear to be the most natural home for a human right to water. Access to water can perhaps be expressed more easily as a social or socio-economic right, than a civil and political right (this is not to ignore the political dimensions surrounding water rights and water justice[140]). It is also a right, which if it is to be fulfilled, requires considerable action and efforts on the part of States, since more than 780 million people live without access to clean water, and 2.5 billion people do not have access to adequate sanitation.[141] The considerable size of this problem means that immediate remedies are unlikely. Consequently any treaty obligation that imposes immediate fulfilment of a human right to water would be impracticable. The concept of 'progressive realisation'[142] at the heart of the ICESCR is therefore particularly appropriate in framing a meaningful human right to water.

Articles 11 and 12 of the ICESCR both offer clear opportunities to assert that a human right to water is an essential component part, respectively, of achieving an adequate standard of living[143] and of enjoying the highest attainable standard of physical and mental health.[144] In 2002 the Committee on Economic, Social and Cultural Rights (CESCR), issued General Comment No. 15 on the right to water. This has since become a seminal statement on the existence and legality of a human right to water, and a talisman for water-rights activists and scholars. The main focus of General Comment 15 is an analysis of Articles 11 and 12, concluding that a human right to water exists in international law. Because of its relevance to this thesis, and the

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[139] R Gavison 'On the relationships between civil and political rights, and social and economic rights' (2003) *The globalization of human rights* 23-55, 46.

[140] *See* S Farhana & A Loftus (eds) *The right to water: Politics, governance and social struggles.* (Routledge, 2013); S Hellberg 'Water, life and politics: Exploring the contested case of eThekwini municipality through a governmentality lens' (2014) 56 *Geoforum* 226-236.

[141] UN Water <http://www.unwater.org/water-cooperation-2013/water-cooperation/facts-and-figures/en/> (Last accessed 27 July 2016).

[142] ICESCR Article 2: *'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' Cf.* ICCPR, Article 2: *'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.'*

[143] ICESCR Article 11.

[144] ICESCR Article 12.

importance which has been placed on it, analysis of General Comment 15 will form the basis of the ensuing discussion.

Three discreet arguments are made to justify finding legal bases for a human right to water. First in relation to Article 11, and to the list of material requirements therein, which are necessary for an adequate standard of living, the interpretation of the CESCR is clear: this list should be considered to be indicative, rather than exhaustive.[145] Essentially the same argument is made here as above in relation to Article 25 of the UDHR: Namely that using the word 'including' at the beginning of the list of material requirements for an adequate standard of living allows for the addition to this list of a human right to water, since water is undoubtedly an additional, essential requirement for an adequate standard of living.

A second argument is that a right to water is necessary in order to protect rights already (explicitly) given in Articles 11 and 12. In Article 11 adequate food, clothing and housing are all listed as requirements for an adequate standard of living. It is asserted that a right to adequate food and to adequate housing are not capable of fulfilment without a right to water also.[146] Paragraph 2 of the General Comment makes a further connection between a right to food and a right to water by including cooking in the list of necessary uses of water. The link between adequate housing and water has previously been made at length by the CESCR.[147]

Regarding Article 12: 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', the Article includes steps to be taken to achieve fulfilment of this right. These steps include provision for the reduction of infant mortality and for the healthy development of the child; and the prevention, treatment and control of epidemic, endemic, occupational and other diseases.[148] Access to safe, clean water is stated generally as a prerequisite for the pursuance of these steps towards the fulfilment of the right to health.[149] Paragraph 8 of General Comment 15 specifically addresses the requirement of water for the improvement of all aspects of environmental and industrial hygiene:

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[145] General Comment 15, paragraph 3.
[146] See General Comment 15, paragraphs 1 and 3.
[147] General Comment No. 6 (1995) on the economic, social and cultural rights of older persons. U.N. Doc. E/1996/22 at 20. Available at < http://www1.umn.edu/humanrts/gencomm/epcomm6e.htm> (Last accessed 27 July 2016). Paragraphs 5 and 32. Note the connection between adequate housing and water was also made domestically, in the South African case of *Government of the Republic of South Africa v. Grootboom & Others*, 2001 (1) SA 46 (CC), discussed at length below at 4.6.2.
[148] ICESCR Articles 12 (2) (a) and (c).
[149] General Comment 15, paragraph 3.

> 'Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.'[150]

Such unsafe and toxic water conditions also relate to the availability and accessibility of the right to adequate food (listed in Article 11).[151] Therefore, with the exception of the right to adequate clothing (in Article 11), General Comment 15 states that access to sufficient water is essential to the protection of those rights explicitly recognised in Articles 11 and 12. For this reason it is asserted that a human right to water should be acknowledged.

A third argument is that a human right to water should be recognised as existing within the ICESCR because such a right 'has been recognized in a wide range of international documents, including treaties, declarations and other standards'.[152] These international documents will be discussed in more detail below at 2.2.4. But the relevance of recognition of a right to water in such documents is that they inform the interpretation and clarification by the CESCR of provisions in the ICESCR.[153]

Together, the three arguments presented in General Comment 15 for interpreting a human right to water within the ICESCR, are compelling. But in order to assess the legal ramifications of General Comment 15, it is necessary first to consider the implementation apparatus of the ICESCR, including the status and function of the CESCR.

Part IV[154] of the ICESCR outlines the duties of States parties to report on the progress made in achieving observance of the Covenant rights. It also outlines the duties and competencies of the United Nations Economic and Social Council (ECOSOC) regarding consideration of these reports, and communication with other UN specialised agencies on matters arising from these reports, in order to contribute to the 'effective progressive implementation'[155] of the Covenant. In 1978 ECOSOC adopted a sessional working group on the implementation of the ICESCR, in order to support ECOSOC in consideration of the reports submitted by States Parties.[156] The

[150] General Comment 15, paragraph 8.
[151] Ibid. *See also* General Comment No. 12 (1999) on the right to adequate food. U.N. Doc. E/C.12/1999/5. Available at < http://www1.umn.edu/humanrts/gencomm/escgencom12.htm> (Last accessed 27 July 2016). Paragraphs 12 and 13.
[152] General Comment 15, paragraph 4.
[153] I T Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart, 2014) 40.
[154] *See* ICESCR, Articles 16-25.
[155] ICESCR, Article 22.
[156] ECOSOC Decision E/1978/10 of 3 May 1978: Composition of the Sessional working group on the implementation of the International Covenant on Economic, Social and Cultural Rights.

composition and organisation of this working group were gradually formalised, and in 1982 the group was re-named as the 'Sessional Working Group of Government Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights', which became known as the 'Group of Experts'.[157]

In 1985 this group changed its name again, to become the 'Committee on Economic, Social and Cultural Rights' (CESCR).[158] The size of the Group (now Committee) increased from 15 to 18 members, all of whom were required to be human rights experts, each serving in their individual capacities, rather than as representatives of their respective national governments.[159] The composition of members was also formally required to give due consideration to geographical distribution, as well as to the representation of different social and legal systems.[160] Nine years after the ICESCR entered into force[161] these changes brought the Committee to what remains its current structure. They also brought it towards a position of equivalence with the Human Rights Committee (HRC); the corresponding body for the ICCPR, if not total parity (discussed below at 2.2.3).[162]

The role of the CESCR has continued to mature. Its original task; to support ECOSOC in consideration of the reports submitted by States Parties, has been supplemented by a growing investigative role regarding Covenant implementation. Equally its advisory role has become more developed and more formalised, evinced by its preparation, since 1989 of General Comments[163], in the same fashion as the HRC.[164] This expanded portfolio of activities places the CESCR as 'the central "quasi-judicial" authority of the ICESCR.'[165]

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[157] ECOSOC Resolution 1982/33: Review of the composition, organization and administrative arrangements of the Sessional Working Group (of Governmental Experts) on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 27th Plenary Meeting, 6 May 1982.
[158] ECOSOC Resolution 1985/17: Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, of 28 May 1985.
[159] Ibid.
[160] Ibid.
[161] The ICESCR entered into force on 3 January 1976. *See* ICESCR, Article 27.
[162] SMA Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (World Bank, 2004) 38.
[163] General Comment No. 1 (1989) Reporting by States parties. U.N. Doc. E/1989/22. <https://www.escr-net.org/docs/i/425212> (Last accessed 27 July 2016).
[164] Preparation of General Comments by the CESCR was subsequently endorsed by UN General Assembly resolution A/Res/42/102.
[165] SMA Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (World Bank, 2004) 39.

The implications of this for determining the status of General Comment 15 (which was issued in 2002, over a decade after the CESCR had begun to adopt its more formal, neutral,[166] investigative and quasi-judicial roles), are that all CESCR General Comments, including General Comment 15 on the right to water, should be considered to be authoritative and legitimate interpretations of the ICESCR. Therefore the Committee's articulation of a human right to water; as a derivative right,[167] necessary to meet the explicit rights set out in Articles 11 and 12, should be considered to be an authoritative and legitimate one.[168] Taken as such, General Comment 15 affirms a human right to water, with corresponding obligations on States party to the Covenant. However, all CESCR General Comments stop short of being legally binding on States parties. Because the CESCR was originally established by ECOSOC, appreciation of the mandate of ECOSOC is crucial here. Established under Article 62 of the UN Charter, ECOSOC is empowered only to make *recommendations* to the General Assembly, UN members and relevant specialised agencies.[169]

But even if General Comment 15 established that a legally binding human right to water existed within the ICESCR, such a right would not require immediate fulfilment. Consequently there is no corresponding mechanism for immediate enforceability. Rather, as set out in Article 2, the relevant obligations of each State party are to 'take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...'[170] It would seem therefore that while General Comment 15 articulates an authoritative human right to water, what States are practically obliged to do is to take steps, to the maximum of their resources to progressively realise this right. No doubt, such an obligation, if taken seriously, would result in improvements to water access globally. What it would not do is to immediately, or indeed swiftly, realise this right, given the size of the task. Indeed the limitations of available resources and the acceptability of progressive realisation (as opposed to immediate realisation or realisation within in a set time frame for instance) coupled, with water scarcity, means that in some States enjoyment of a human right to water may never be achieved.

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[166] ECOSOC Resolution 1987/5 contains initiatives designed to make the work of the CESCR more judicial and less political, including inviting non-governmental organisations to make appropriate written statements towards contributing to the realisation of Covenant rights. *See* paragraph 6.

[167] *See in particular* General Comment 15, paragraphs 1 and 3, and the first and second arguments as discussed above.

[168] SMA Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (World Bank, 2004) 43.

[169] UN Charter, Article 62 (3) and (4). *See also* J Rehman *International Human Rights Law* (2nd ed, Pearson, 2010) at 39.

[170] ICESCR, Article 2 (1).

However, even within the general parameters of progressive realisation, the obligation on States parties in Article 2 (2) 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind', could be interpreted as requiring immediate, rather than progressive interpretation (based on the 'negative' quality of this obligation, rather than its 'positive' counterparts). In the same way the so-called 'core obligations' in General Comment 15 (paragraph 37) are stated as being of immediate effect. These include:

> (*a*) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
>
> (*b*) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
>
> (*c*) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
>
> (*d*) To ensure personal security is not threatened when having to physically access to water;
>
> (*e*) To ensure equitable distribution of all available water facilities and services;
>
> (*f*) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
>
> (*g*) To monitor the extent of the realization, or the non-realization, of the right to water;
>
> (*h*) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
>
> *(i)* To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.'

The basis for asserting core obligations which are to be immediately fulfilled, comes from General Comment No. 3 (1990), in which the CESCR confirms that 'States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant.'[171] However, it is difficult to see how some of these could be expected to be realised immediately. For instance, obligation *(c)*, which requires ensuring access to water facilities or services which have a sufficient number of water outlets to avoid prohibitive waiting times, is likely to require planning and construction, with both time and financial resource implications. But other stated obligations, including non-discrimination and

[171] General Comment No. 3 (1990), The nature of States parties' obligations. U.N. Doc. E/1991/23. Available at <https://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (Last accessed 27 July 2016).

monitoring the extent to which the human right to water is being realised, can more realistically be deemed appropriate for immediate implementation. With these few exceptions, it seems that the practical justicability[172] of a human right to water based on the ICESCR is limited, principally due to the provision within the Covenant, for progressive realisation. But it is also due to the non-binding status of General Comment 15, as well as to the absence within the ICESCR of facility to bring individual petitions regarding rights violations. Because of these limitations, the potential use of the ICCPR in identifying a justiciable human right to water is now considered.

2.2.3 The International Covenant on Civil and Political Rights, 1966

Unlike the ICESCR, States party to the ICCPR accept an immediate obligation to ensure that the rights recognised in the Covenant are available to everyone within the territory of the State.[173] Such an obligation is relevant to any discussion of the scope of these Covenant rights, and to interpreting States' corresponding specific obligations. Also relevant here is the particular design of the implementation mechanisms for the ICCPR, in contrast to that of the ICESCR discussed above, and the consequences of such differences for State parties.

Under Article 28 of the ICCPR the Human Rights Committee was established in 1976. The Committee is comprised of 18 human rights experts, elected by secret ballot by the States parties, to serve a four-year term.[174] Their principal functions are to conduct dialogue with the States parties, hear inter-state complaints, and to 'consider' and 'study' the mandatory national compliance reports of each State party.[175] Additionally, the Committee issues general comments (for example General Comment No. 6 on the right to life, discussed below). Under the first Optional Protocol to the Covenant, the Committee also has competence to 'receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.'[176]

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[172] While theoretically, questions relating to whether State parties are taking steps to the maximum of their available resources, in order to progressively realise the right to water, are justiciable (that is, capable of being decided by an arbiter), practically the real challenge is 'linking the expectations of individuals as rights-holders with the duties owed by others.' *See* S R Tully 'The Contribution of Human Rights to Freshwater Resource Management' (2004) *Yearbook of International Environmental Law* 101, 103.

[173] ICCPR, Article 2 (1): *'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...'*

[174] *See* ICCPR, Articles 31 and 32.

[175] *See* ICCPR, Articles 40 and 41.

[176] Article 1, Optional Protocol to the ICCPR, 1966 entry into force 23 March 1976. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> (Last accessed 27 July 2016).

In short, the implementation mechanisms for the ICCPR are considerably more robust, than their counterparts for the ICESCR. Furthermore, the effect of the first Optional Protocol (although only applying to individuals in States that are party to it) presents a direct line of justicability between individual rights-holders and their relevant State. Consequently not only do the obligations within the ICCPR require immediate fulfilment, but measures to monitor this are well developed, and there is recourse available for individuals who suffer from States' failures to meet these obligations.

Focusing again on the challenge of inferring a human right to water, the specific content of the ICCPR must be considered, in particular, Article 6. This states that:

> '[E]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[177]

Since water is essential for life, it may be asserted that the right to life stated above must include access to at least a quantum of water sufficient for maintaining existence (even if this falls short of that deemed sufficient for a dignified existence), in order that no one is arbitrarily deprived of their life. However, it must be noted first that this right to life is expressed within the ICCPR, and not the ICESCR. As such, taking a traditional view of the distinction between these two groups of rights, the right to life, along with the other rights in the ICCPR imposes only a *negative* obligation on the states party, requiring them to refrain from interfering with an individual's right (to life, in this case).[178] This is in contrast to the nature of state obligations regarding social and economic rights, as stated in the ICESCR. Here, there is a *positive* obligation on states, requiring action in order to fulfil such rights.[179] Interpreted in this way, the right to life, in relation to access to water, requires nothing more than that those states parties refrain from removing or otherwise interfering with individual's water supply in a way that would *cause* their deaths. It would not impose any obligation to provide water for individuals currently without, in order to *avoid* their deaths.

This distinction of state obligations is based on a perceived hierarchy between civil and political rights, as over social and economic rights, which in turn is based on a combination of theory and pragmatism. Liberal theories of democracy assert that civil and political rights must be robustly protected (at the national level usually by constitutional entrenchment) in order to

[177] ICCPR, Article 6.
[178] I T Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart, 2014) 49.
[179] Ibid.

ensure a functioning democratic state.[180] Such a state is then able to address social and economic challenges as they deem appropriate, and in relation to their available resources.[181] Practically, such a situation also avoids states from being obliged to meet positive rights obligations, which they are not able to afford, or indeed, that as a democratically elected executive, have chosen not to prioritise. Examples abound of the influence of such liberal thought on national constitutional settlements (and the consequent absence of social and economic rights in national constitutions, until recently[182]). But the archetype is the United States Constitution[183], throughout which the clear emphasis is on the protection of the civil rights (or liberties) of individuals from the state, and which consequently contains numerous negative obligations upon the state.[184] No social and economic rights are entrenched in the US Constitution, despite attempts in 1944 by the then President Franklin Roosevelt, to support a 'second Bill of Rights', guaranteeing a panoply of social and economic rights. While this endeavour failed, some of these rights found expression in the UDHR shortly afterwards.[185]

For the foregoing reasons then, the right to life within the ICCPR, as traditionally interpreted, does not support a human right to water. However, an alternative and more recent interpretation of states' rights obligations emphasises a 'tripartite' approach to realisation of human rights generally, regardless of whether they are classed as civil and political or social and economic. Instead, obligations to respect, protect and fulfil human rights are emphasised, each of which is relevant to all of the rights in the ICCPR and ICESCR, albeit to different degrees.[186]

Such an approach is complemented by the Human Rights Committee interpretation of the right to life in Article 6 ICCPR. Beginning with a warning that the right to life should not be interpreted narrowly,[187] it asserts that the protection of the inherent right to life 'requires that States adopt positive measures'.[188] By way of illustration of such positive measures, the comment

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[180] R Gavison 'On the relationships between civil and political rights, and social and economic rights' (2003) *The globalization of human rights* 23-55, 39.
[181] Ibid.
[182] The Constitution of the Republic of South Africa 1996 is an excellent example of a Constitution which has codified and entrenched social and economic rights alongside civil and political rights in a comprehensive Bill of Rights. This Constitution becomes the focus of attention in Chapters Three and Four of this thesis.
[183] The Constitution of the United States of America, 1787. Available at < http://billofrightsinstitute.org/founding-documents/constitution> (Last accessed 27 July 2016).
[184] Ibid. See for example the 1st, 2nd, and 3rd Amendments.
[185] Center for Economic and Social Rights: < http://www.cesr.org/section.php?id=26> (Last accessed 27 July 2016).
[186] *See* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) paragraph 4: Available at <https://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html> (Last accessed 27 July 2016).
[187] Human Rights Committee, General Comment No. 6, Article 6 (The right to life) HRI/GEN/1/Rev.9 (Vol. 1) 30 April 1982. Available at: <http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_(GC6)_en.pdf> (Last accessed 27 July 2016). *Hereinafter*, HRC General Comment 6. *See* Paragraph 1.
[188] Ibid. Paragraph 5.

goes on to implore States parties 'to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'[189] Clearly these measures, if implemented, would constitute significant positive action and investment on the part of States, despite the corresponding right being found in the ICCPR. Furthermore such problems as infant mortality, malnutrition and epidemics are all connected to inadequate and/or unsafe water.[190] This application of positive obligations to a civil and political right represents a significant shift away from the traditional diametric view of civil and political versus social and economic rights; negative versus positive obligations. It also seems to raise possibilities regarding realising a justiciable right to water through an inherent right to life.

But here again, consideration must be given to the status of General Comments, made this time by the HRC. Under Article 40 (4) of the ICCPR the HRC is empowered to 'transmit... such general comments as it may consider appropriate, to the States parties'. These comments are to be non-country specific.[191] Ghandhi clarifies the purpose of such comments, as follows:

> '[to] make the Committee's experience available for the benefit of all States Parties, so as to promote more effective implementation of the Covenant; to draw the attention of States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure; to clarify the requirements of the Covenant; and to stimulate the activities of States Parties and International Organisations in the promotion and protection of human rights...'[192]

Despite having a longer history than the General Comments made by the CESCR, and despite being mandated directly by the ICCPR from the inception of the Covenant, in contrast to the CESCR, the HRC General Comments also are not legally binding on States parties. They are however, considered as invaluable guides to the interpretation of particular Articles, and as such, contribute to the jurisprudence on civil and political rights.[193] Therefore General Comment 6 on the right to life, while authoritative, does not impose a binding positive obligation on States parties to immediately provide access to water.

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[189] Ibid.
[190] *See* World Water Assessment Programme *United Nations World Water Development Report 2: Water, a shared Responsibility* (Paris, 2006).
[191] ICCPR, Article 40 (4).
[192] P R Ghandhi *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate Publishing Co, 1998) 25.
[193] J Rehman *International Human Rights Law* (2nd ed, Pearson, 2010) 119.

Indeed, the obligation of immediate fulfilment for ICCPR rights generally seems to lead away from the conclusion that any of these Covenant rights (expansively interpreted so as to confer positive obligations on States) can be used effectively to imply a legally-binding right to water. Such a human right of access to sufficient water undoubtedly requires positive action by States towards its fulfilment. Despite the willingness of the Human Rights Committee to urge States to adopt positive measures relating to traditionally 'negative' rights, it nevertheless seems to remain more appropriate that rights which require significant positive State action (including commitments of time and financial resources) to fulfil should arise from within the ICESCR. Therefore regarding a human right to water, there seems to be more potential for this to flow from Articles 11 and 12 of the ICESCR (as discussed at 2.2.2) where consideration of progressive realisation and available resources would apply. The alternative route of connecting a human right to water with Article 6 of the ICCPR would involve conferring an obligation on States parties to provide access to sufficient water for every individual immediately; an obligation that many States would struggle to fulfil.

2.2.4 Emerging consensus and acceptance of a human right to water

Whatever the reasons may be for such conspicuous absence of a right to water from the International Bill of Human Rights,[194] and whatever the merits and limitations of deriving a human right to water from the ICESCR or the ICCPR respectively, such a right has been explicitly recognised in a range of international legal instruments (binding and non-binding) since the 1977 UN Water Conference in Mar del Plata[195]. Resolution II of that 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.'[196]

Similarly the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[197], a specialised binding legal instrument setting out an agenda to end discrimination against women, provided the following in relation to a human right to water:

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[194] The International Bill of Human Rights refers collectively to the UDHR, ICCPRs (along with its two optional protocols, and ICESCR.

[195] United Nations *Report of the United Nations Conference on Water, Mar del Plata* 1977, E/Conf.70/29 ch I. Available at < http://www.internationalwaterlaw.org/bibliography/UN/Mar_del_Plata_Report.pdf> (Last accessed 27 July 2016). *Note* this is a non-binding resolution.

[196] Ibid at 66.

> 'States parties shall take all appropriate measures to eliminate discrimination against women in rural areas... in order to ensure to such women the right... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...'

The 1989 Convention on the Rights of the Child (CRC)[198] also provides binding obligations on States parties, to combat disease and malnutrition 'through the provision of adequate nutritious foods and clean drinking water'. Therefore States parties to these Conventions have assumed international legal obligations to ensure that respectively, women in rural areas, and children, have access to water. Implementation of these obligations is monitored by the CEDAW Committee and by the Committee on the Rights of the Child, to which States parties must submit regular reports.[199] However, it must be noted that neither CEDAW nor the CRC articulates a *general* human right to water.

Throughout the 1990s and early 2000s a series of non-binding instruments reiterated a human right to water in various forms, evincing its wide-ranging acceptance, and helping to keep the right to water at the forefront of the international human rights and development agendas during this period. By way of example, Principle 4 of the 1992 Dublin Statement on Water and Sustainable Development[200] (already discussed above at 1.5.4) affirmed the importance of recognising 'the basic right of all human beings to have access to clean water and sanitation at an affordable price.'[201] The 1994 Programme of Action of the UN International Conference on Population and Development[202] declared that all individuals 'have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation. Of particular note here is that this list of the material conditions necessary for an adequate standard of living is identical to that set out in Article 11 of the ICESCR, with the addition of water and sanitation. The argument made in General Comment 15 and elsewhere that the Article 11 list is non-exhaustive is supported by this 'updated' list, which adds essential material conditions, explicitly, rather than implicitly as the CESCR has subsequently done.

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[197] UN Doc. A/34/46 (1979). Entered into force 1981. Available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro> (Last accessed 27 July 2016). Article 14 (2)(h).
[198] U.N. Doc. A/44/49 (1989). Entered into force 1990. Available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Last accessed 27 July 2016). Article 24(2)(c).
[199] *See* <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (Last accessed 27 July 2016).
[200] The Dublin Statement on Water and Sustainable Development (n 57).
[201] Ibid. Principle 4.
[202] United Nations International Conference on Population and Development, Cairo, Egypt, September 1994. Available at <http://www.un.org/popin/icpd2.htm> (Last accessed 27 July 2016).

The 2002 World Summit on Sustainable Development resolved 'to speedily increase access to basic requirements such as clean water, sanitation, energy, healthcare, food security and the protection of biodiversity.'[203] Perhaps unsurprisingly for a *sustainable* development declaration, this list connects provision of essential material requirements alongside protection of the environment. Such an example of locating the human right to water within an integrated context, which emphasises social, economic and environmental concerns simultaneously, hints at the ensuing discussion towards the end of this chapter around social-ecological security; in particular the need to frame questions of sustainable access to sufficient water within the limitations of emerging ecological capacities.

The CESCR General Comment 15 was also published in 2002. As discussed above, this authoritative interpretation of the ICESCR as including a human right to water is not legally binding on States parties, and is therefore justiciably problematic. But the importance of its substantive content, and its normative status should not be underestimated.[204]

During the same period, such activity around recognition and definition of the right to water at the international level was mirrored by equally important domestic events, which while nationally-specific, have had international ramifications in relation to achieving acknowledgment of a human right to water.

2.2.5 The Cochabamba movement

The events that catalysed the Cochabamba water war have been introduced above at 1.5.6. The legacy of these events will be considered here. But first an earlier case from Argentina, regarding similar contractual arrangements, serves as a useful point of departure for understanding the Cochabamba movement.

The case of *Compania de Aguas de Aconquija (AdA) v Argentine Republic*,[205] involved a 30-year water service contract signed in 1993 between AdA (Vivendi Universal) a French multinational water services company, and Tucuman province, Argentina.[206] The water service contract contained no provisions to ensure stability of water prices and water quality. Prices

[203] The Johannesburg Declaration on Sustainable Development, 4 September 2002. Available at <http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm> (Last accessed 27 July 2016).
[204] General Comment 15 has been cited as authority in various domestic cases, as well as in General Resolution 64/292. *See Lindiwe Mazibuko and Others v The City of Johannesburg and Others 2008; Perumatty Grama Panchayat v State of Kerala, 16 December 2003.*
[205] ICSID Case No. ARB/97/3.
[206] W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14-36.

subsequently rose, and there were two specific incidents that gave rise to allegations of poor water quality. As a result, in 1996 the Provincial government attempted to renegotiate the contract with the intention of securing reduced water prices and more acceptable water quality for its residents. The renegotiation failed, resulting in repudiation of the contract by AdA along with a claim for US$300 million in damages.

The contract stipulated that litigation was subject to the jurisdiction of the local Tucuman Court. However, the relevant French-Argentinian Bilateral Investment Treaty directed that jurisdiction lay with the International Centre for the Settlement of Investment Disputes (ICSID). This was confirmed by ICSID arbitrators, and the case was duly heard at the ICSID. AdA's claim for damages was awarded.

Despite the obvious due diligence failings of Tucuman Province regarding securing minimum safeguards during contractual negotiations, the case decision was seen as a victory for corporate capital and a reassurance to private water service providers that their interests were well protected. Considering this case in relation to the water paradigms introduced in Chapter One, this is one of the earliest examples of contemporary large-scale water privatization within a 'water as commodity' paradigm. Not only does the case exemplify the growing interest and involvement of the private sector in providing water services during the 1990s, the jurisdictional question raised in the case is also illustrative of a systemic shift in power during this time, from the State (most obviously from the sovereignty of developing States) to the Corporation; a well documented characteristic of neo-liberal globalisation.[207]

So when a similar privatization contract was signed in Cochabamba, Bolivia in 1999, and subsequently cancelled, the water service provider Aguas del Tunari also sought to enforce the contract through the ICSID, claiming between US$25 and US$100 million in damages. But unlike in the previous case, the Bolivian government withdrew from the ICSID in response to overwhelming domestic pressure, including civil unrest, which claimed two lives. As a result of withdrawal from the ICSID, local jurisdiction over the dispute was reasserted. Eventually Aguas del Tunari was forced to agree to an out of court settlement for a symbolic payment of 2 *bolivianos* (Bolivia's national currency).[208]

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[207] T Evans *The Politics of Human Rights, A Global Perspective* (2nd ed, Pluto Press, 2005) at 104; *See also* J A Scholte 'What is Globalization? The definitional issue – again' *Centre for the Study of Globalisation and Regionalisation* (2002) 109/02, 15.

[208] W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14-36, 30.

It would be a mistake to assume that this second case simply represents an isolated reversal of the State-Corporation power shift, and a return to the *status quo* of publically-owned water services. The Bolivian State (at civic and national levels) had facilitated and supported the privatization of Cochabamba water, and had defended the privatization contract throughout months of public protest: only making legislative changes to rescind the contract when local, national and international pressure threatened to topple the government.[209] Rather, the sustained and organized opposition to the Aguas del Tunari contract came primarily from a broad, grass-roots coalition, which transcended, and to a large extent marginalized, the trade unions movement as the traditional site of protest. This coalition, the *Coordinadora in Defence of Water and Life,* proved able to mobilize quickly and to sustain its protest presence for a long period of time, while articulating a coherent and extremely popular message, 'the right to water for life'; that water must be available for everyone, and that governance of water services must be such that this is fulfilled.[210] Furthermore, as this 'local' conflict around water drew popular and intellectual attention, it began to be framed within narratives of inequality and disenfranchisement, environmental (in)justice and sustainability, at both the local and the global scale.[211]

Indeed, the influence and leadership of the *Coodinadora* proved to be so strong that when control of water services was finally returned to the State-owned company Semapa, several Coodinadora representatives were appointed to its Board, charged with seeking to ensure that there would be no return to either the corruption and inefficiencies of the original Semapa, or of privatesque modes of water service delivery that 'would prioritize profitability over the needs of the population'.[212]

Returning again to the water paradigms introduced in Chapter One, the Coodinadora's mantra 'the right to water for life' clearly resonates with a water-as-necessity paradigm. But the events of Cochabamba and the strategies employed in removing and replacing Aguas del Tunari have followed the imperative that water is a necessity, and sought to realize this through a water-as-commons paradigm, which forges strong practical and epistemological links between water and the wider environment, and between the local and the global contexts. Consequently the particular call for water justice in Cochabamba, became a common call, echoing wider calls for

[209] Ibid.
[210] L Mehta *et al* 'Global environmental justice and the right to water: the case of peri-urban Cochabamba and Delhi.' (2014) 54 *Geoforum* 158-166, 161.
[211] Ibid at 159.
[212] W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14-36, 33.

global justice (including global environmental justice[213]). Indeed this connection between the events in Cochabamba and global environmental justice was symbolically cemented when the city of Cochabamba was chosen to host the World People's Conference on Climate Change in April 2010[214], three months before General Assembly resolution 64/292 was adopted. This conference attracted global attention as a showcase for the role of civil society in pursuing environmental justice. It was also seen as a response to what many saw as the failures of the COP15 climate meetings in Copenhagen the previous year.[215]

In July 2010 General Assembly resolution 64/292 on the right to water and sanitation was sponsored by Bolivia and introduced by the Pablo Solon, Bolivian Ambassador to the UN, who directly connected the proposed resolution to the legacy and lessons of the Cochabamba water war in 2000. Referencing the *Coodinadora's* rallying cry, he declared 'water is life'.[216] The corresponding Human Rights Council resolution 15/9 was also introduced by the Bolivian Ambassador.

Of course it is not claimed that the historical origins of the recognition of water rights began at Cochabamba. Indeed water rights have been recognized in various forms for millennia.[217] Water governance at the international level has long since acknowledged an interconnected relationship between water rights and broader social, economic and environmental issues, as shown in the foregoing attempt to identify a human right to water in international law. But any attempt to understand the evolution and crystallisation of a human right to water in international law must acknowledge the part that the Cochabamba movement has played in helping to focus attention and support for an *explicitly stated* general human right to water, declared at the international level. No less important a part of the legacy of Cochabamba may

[213] The term 'global environmental justice' is becoming popular. But its exact meaning is not entirely clear. Schlosberg attempts a definition as follows: 'justice demanded by global environmental justice is really threefold: equity in the distribution of environmental risk, recognition of the diversity of the participants and experiences in affected communities, and participation in the political processes which create and manage environmental policy. The existence of three different notions of justice in the movement, simultaneously, demonstrates the plausibility of a plural yet unified theory and practice of justice'. See D Schlosberg 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13/3 *Environmental Politics* 517.

[214] The conference published 'The People's Agreement'. Available at <https://pwccc.wordpress.com/support/> (Last accessed 27 July 2016).

[215] 15th United Nations Conference of the Parties, Copenhagen, December 2009. *See* J Vidal *et al* 'Low targets, goals dropped: Copenhagen ends in failure' (19 December 2009) *The Guardian*. Available at < http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal> (Last accessed 27 July 2016).

[216] M Barlow *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*. Available at: <http://documents.foodandwaterwatch.org/doc/RTW-Cdn.pdf#_1.195890220.1020496576.1429985769> (Last accessed 27 July 2016).

[217] For reference to the history of water rights on the African continent see generally R Ross *A Concise History of South Africa* (Cambridge University Press, 1999); D D Tewari 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' *Water SA* (2009) 35/5, 693-710.

be its role in galvanising 'water-as-commons' global and local movements. The ramifications of this paradigm in relation to a right to water are considered in more detail in Chapter Five.

2.3 The content of the human right to water

In charting the development of the human right to water it is clear that there is considerable international consensus around the existence of the right, despite the fact that it lacks some of the attributes typically expected of internationally recognised human rights (including explicit enunciation in a legally binding and general convention). The absence from the International Bill of Human Rights of a legally-binding human right to water has meant that General Comment 15 has come to play a particularly important part in stating the nature and scope of this right. As McCaffrey observes, General Comment 15 'is the first recognition by a United Nations human rights body of an independent and generally applicable human right to water'.[218] In addition to its normative importance, and its role in focusing international opinion towards the issue of water as a human right, General Comment 15 provides the most authoritative and detailed commentary to-date on the substantive content of the right to water, and the corresponding standards of action and response that States Party to the ICESCR are expected to meet.[219] Consequently, since it was published in 2002, General Comment 15 has had clear potential to effect national law in respective States. Such an effect on South African water law is explored further in Chapter Three. The substantive content that General Comment 15 provides is now considered in detail, followed by the corresponding obligations of States parties.

2.3.1 Constitutive elements of the human right to water

As discussed above, the primary basis on which a human right to water is asserted in General Comment 15, is that such a right is derived from, and is required for the rights to an adequate standard of living (that is for dignified life), and to the highest attainable standard of health (Articles 11 and 12 ICESCR). Therefore the elements that constitute the human right to water must be sufficient to meet these requirements of dignified life and health.[220] Paragraph 2

[218] S McCaffrey 'The Human Right to Water' in E Brown Weiss *et al* (eds) *Fresh Water and International Economic Law* (Oxford University Press, 2005) 93, 101.

[219] *See variously* E B Bluemel 'The Implications of Formulating a Human Right to Water' (2004) 31 *Ecology Law Quarterly* 957, 972; M Langford 'Ambition That Overleaps Itself-A Response to Stephan Tully's Critique of the General Comment on the Right to Water' (2006) 24 *Netherlands Quarterly of Human Rights* 433, 448-9; M Williams 'Privatization and the Human Right to Water: Challenges for the New Century' (2007) 28 *Michigan Journal of International Law* 469, 475.

[220] *See* General Comment 15, Paragraph 11, also ICESCR, preamble and Articles 11 and 12.

describes the human right to water as entitling, 'everyone to *sufficient, safe, acceptable, physically accessible* and *affordable* water for personal and domestic uses.'[221] This identifies five elements of the right to water. These are further elaborated on in Paragraph 12 under three sub-headings of availability, quality, and accessibility:

> '(*a*) *Availability.* The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene...'

Furthermore, the quantity of water available for each person should take into account different conditions relating to health, climate, and work. But availability should correspond to World Health Organization (WHO) guidelines, which state between 20 and 40 litres per person per day (lpd).[222]

> (*b*) *Quality.* The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

Arguably the requirements around acceptability (one of the five elements identified above at paragraph 2) transcend minimal considerations around health and life, to reflect the need for water to support dignified life. A water supply of dubious colour, odour or taste, may nevertheless pose no harm to health. Here, the General Comment can be seen as pushing beyond a *de minimus* definition of adequate water, as that which sustains existence; towards a fuller definition, as that which sustains dignified life. As discussed in Chapter One, the high standard that this definition requires affirms a paradigmatic understanding of water as being necessary for *dignified* life, beyond mere existence. It is also of importance in determining States' obligations.

> (*c*) *Accessibility.* Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party.

Accessibility is further defined as relating to four overlapping dimensions. Physical accessibility requires amongst other things, that adequate water facilities 'are within safe physical reach for all

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[221] General Comment 15, Paragraph 2 (emphasis added).
[222] *See* P H Gleick 'Basic water requirements for human activities: meeting basic needs' (1996) 21/2 *Water International* 83, 88; P H Gleick "The Human Right to Water' (1998) 1 *Water Policy* 496.

sections of the population... within, or in the immediate vicinity, of each household, educational institution and workplace'[223]. Water is also required to be economically accessible for everyone, meaning that the 'direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights'.[224] Additionally, water access must be non-discriminatory; accessible to all including the most marginalised.[225] This requirement of non-discrimination extends to access to information about water issues.[226]

Requiring that water is physically *and* economically accessible is crucial to addressing some of the most pressing challenges to adequate water that people in the developing world face; particularly regarding affordability (and, often contingent to this, private sector involvement).[227] My own empirical work in Malawi and South Africa illustrates some people's experience of economically inaccessible water, including the particular sadness when improvements in physical accessibility are undone by economic constraints. The following is an extract from an interview I conducted (NC) with 'Jennifer' (J), an assistant at the *Soche Water Users' Association*, and 'Andrew' (A) a representative from the NGO *Water for People*, in Blantyre, Malawi:[228]

> NC: So what do you charge for water, how much is the water per litre or 20 litres?
>
> J: The tariff? 20 litres is 12 kwacha [£0.015][229], 40 litres is 24, and 60 litres is 36 kwacha, and that's our tariff
>
> NC: Do you ever have any problems with people not being able to pay?
>
> J: Yeah, we do have problems like when people steal the pipes.
>
> A: In terms of payment, do you have households that fail to pay the 12 kwacha? And if you have, what do you do?
>
> J: I feel like our tariff is better for everyone, 12 kwacha.
>
> NC: It's low enough, it's a small enough amount?
>
> J: Yeah, compared to other private owners, our tariffs work the same, but they have higher tariffs than us, so we feel we are giving them better.
>
> A: Do you have people that collect water from the kiosks but they don't have money?

[223] General Comment 15, Paragraph 12 (c) (i).
[224] General Comment 15, Paragraph 12 (c) (ii).
[225] General Comment 15, Paragraph 12 (c) (iii).
[226] General Comment 15, Paragraph 12 (c) (iv).
[227] P Thielbörger *The right (s) to water* (European University Institute, 2010) 3.
[228] Interview # 2. See appendices.
[229] Currency conversion at <http://www.xe.com/currencyconverter> (last accessed 27 July 2016).

J: We can't manage to - the other people, they do - run away from our kiosks and go to bore holes, there are bore holes in some regions - they pay 100 kwacha and draw out for the whole month.

NC: Sorry what do they do, they pay at the bore hole?

J: Yeah.

A: They bore holes with hand pumps, they pay once for a month, they go to that side and pay a hundred kwacha, so they can draw the whole month, go to a kiosk where they pay per fetch.

NC: The water quality, is it different?

A: Very different.

NC: What are the problems with the water from the bore hole?

J: The problem, they are not treating it.

NC: Do you actually see people in the community getting sick?

J: Yeah, they do get sick because this borehole water is from - here it's an urban area and they [*word indecipherable on Dictaphone*]. So it's easier to use the water in the ground, so they can easily contract diseases because it's not treated.

Clearly, despite the unit price for water from the Water Users' Association being less than that charged elsewhere by private providers, even this cost proves sufficiently prohibitive for some people, who instead risk their health for cheaper, untreated water. This link between inadequate water and health is particularly important to note. Not only does it affirm the rationale offered in General Comment 15 for recognising a right to water as derived from ICESCR Article 12, but the lack of (economically) accessible water also compromises the realization of other Covenant rights.[230] This supports an understanding of the right to water as both deriving from, and necessary for, fulfilling ICESCR Articles 11 and 12.

A second, brief extract relates the experience of 'Nombuso Khumalo' in Burlington on the outskirts of Durban, South Africa, whose piped water supply was forcibly disconnected due to several months of arrears. Since 1994 Nombuso had witnessed the arrival of piped water to every dwelling in her part of the settlement, including a tap installed to her wall, representing a significant improvement in her experience of access to water, until the disconnection:

'We get water from a standpipe here. I used to get it to my house, but they [Durban Municipality] sawed it off... [now] I have to make two journeys if I want two buckets [20 litres each] and there are others waiting.'[231]

[230] Contrary to General Comment 15, Paragraph 12 (c) (i).
[231] Interview # 3. See appendices.

In relation to the ICESCR and General Comment 15, Nombuso's experience can be interpreted as a regression in the realisation of her right to water, as required to be (economically) accessible. Although it is not certain whether Nombuso's access to water after disconnection would still fulfil the requirements in Paragraph 12 above, it nevertheless represents one small example of a movement in the opposite direction to the clear obligation of States parties to achieve '*progressively* the full realization of the rights' in the Covenant.[232] It would also seem contrary to the obligation of States parties in the General Comment, to 'move as expediously and effectively as possible towards the full realization of the right to water'. A forward (progressive) movement is clearly implied in both Article 2 and the General Comment. This is supported by the 'strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant'.[233] States parties' obligations are now considered in the context of the right as a whole.

2.3.2 States Parties' obligations

Part II of General Comment 15 begins as follows:

> 'The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or the contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.'[234]

Such freedoms and entitlements reflect the negative *and* positive obligations on States within a tripartite approach to human rights; to respect, protect and fulfil (as introduced above at 2.2.3). Here the freedoms defined above require States to *respect* this aspect of the right to water, imposing a mainly negative obligation on the State. If the maintenance of these freedoms requires active protection, then there would also be a positive element to the States' obligation. While the above entitlements correspond to the obligation to *fulfil*, this can be characterised as a positive obligation. Indeed this tripartite approach is explicitly adopted in the General

[232] ICESCR, Article 2 (emphasis added).
[233] General Comment 15, Paragraph 19. *See also* General Comment No. 3 The nature of states' parties obligations (1990) U.N. Doc. E/1991/23, paragraph 9. Available at: <https://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (last accessed 27 July 2016).
[234] General Comment 15, Paragraph 10.

Comment where States parties' obligations are listed respectively as, obligations to respect, obligations to protect, and obligations to fulfil.[235]

Of particular note here, not least because of the largely positive responses that they entail, are the obligations to fulfil in paragraphs 25 to 29. These include taking steps to ensure appropriate education around hygienic and sustainable water use;[236] according sufficient recognition of the human right to water 'within the national political and legal systems';[237] adopting a national water strategy; and ensuring that water is affordable for everyone.[238] This obligation of affordability requires that 'payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publically provided, are affordable for all, including socially deprived groups.'[239]

A clear imperative towards ensuring sustainable access to water is required in paragraph 28. This sets out obligations to fulfil, including the adoption of 'comprehensive and integrated strategies and programmes to ensure sufficient and safe water for present and future generations.'[240] Such obligations are explicitly connected to the Agenda 21[241] non-binding action plan for sustainable development, and the World Summit on Sustainable Development implementation plan.[242] In making these connections, General Comment 15 has located the right to water within the broader contexts of sustainable development[243] and environmental protection. Doubtless, access to sufficient water is essential for human development; as is an understanding of water as an integral part of an interconnected biosphere.[244] Therefore both of these connections are natural. They are also crucial to situating the human right to water within an integrated ecology. Both of these connections are considered in more detail below.

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[235] General Comment 15, Part III.
[236] General Comment 15, Paragraphs 26.
[237] General Comment 15, Paragraphs 26. *Note* Sufficient national recognition of the right to water should preferably be achieved by legislative means.
[238] General Comment 15, Paragraphs 26 and 27. *Note* Affordable water is to be ensured by *inter alia* appropriate technologies, pricing policies and income supplements.
[239] General Comment 15, Paragraphs 27.
[240] General Comment 15, Paragraphs 28.
[241] United Nations Conference on Environment and Development, Rio de Janerio, Brazil, 3 -14 June 1992, Agenda 21. Available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (last accessed 27 July 2016). See in particular chapters 5, 7 and 18.
[242] Plan of Implementation of the World Summit on Sustainable Development, 4 September 2002. Available at <http://www.un-documents.net/jburgpln.htm> (last accessed 27 July 2016).
[243] M Fitzmaurice *Contemporary Issues in International Environmental Law* (2009, Edward Elgar) 66: 'the true nature of [sustainable development] remains mysterious and elusive despite its wide use (or perhaps overuse).'
[244] See: The Nine Planetary Boundaries – Stockholm Resilience Centre: <http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html> (Last accessed 27 July 2016).

International obligations within General Comment 15 reiterate States parties' obligations under the ICESCR regarding international co-operation and assistance towards the full realisation of the right to water. Examples of this include the 'provision of water resources, financial and technical assistance... disaster relief and emergency assistance'.[245] So-called 'core obligations', which require immediate fulfilment, have been considered previously at 2.2.2 in relation to the exception that these obligations represent, compared to the general Covenant requirements of progressive realisation.

Part IV of the General Comment sets out actions and omissions which amount to a violation of the right to water. This identification of violations is a consequence of applying the normative content of the right, to the obligations of States parties (as paragraph 39 explains). Consequently violations can occur through acts of omission, corresponding to a failure to realise 'positive' obligations to protect and/or fulfil. Violations can also occur through acts of commission, which are contrary to the 'negative' obligation to respect. For instance, adoption of retrogressive measures incompatible with the right to water, arbitrary or unjustified disconnection, pollution or diminution of water resources may also count as violations by commission.[246] Distinction is made between violations caused by a State party's inability to act, as opposed to unwillingness. A State unwilling to take the necessary steps, to the maximum of its resources, in relation to the right to water will be in violation.

Regarding implementation at the national level, Part V of General Comment 15 requires that '[e]xisting legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements',[247] before providing detailed guidance on what a national strategy or plan of action should contain,[248] including indicators and benchmarks to assist in monitoring of the realization of the right to water.[249] Of particular note in relation to this thesis is the requirement for individuals 'to participate in decision-making processes that may affect their exercise of the right to water'[250] and to 'be given full and equal access to information'.[251]

[245] General Comment 15, Paragraphs 30-36.
[246] General Comment 15, Paragraphs 42 and 44.
[247] General Comment 15, Paragraph 46.
[248] General Comment 15, Paragraphs 47-49.
[249] General Comment 15, Paragraphs 53-54.
[250] General Comment 15, Paragraph 48.
[251] Ibid.

The emphasis on equity, inclusion, access to information, and international co-operation, along with overt connections with environmental and developmental discourses, serves to locate General Comment 15 as operating within the mode of (global) governance, as opposed to as a hierarchical, binding, discrete instrument of regulation.[252] Its authoritative, but non-binding status complements such a reading. Indeed it has been suggested that the human right to water itself can be best understood as an expression of universally accepted standards of global governance.[253] While this may detract to some extent from the bold normative claims of the human right to water (potentially diminishing its *quasi* legally binding status as a derivative right of the ICESCR) it may also address some of the difficulties which such an atypical right must confront, regarding its precise legal status under international law. It may also encourage enforcement of the right to be pursued by additional or alternative means than the traditional enforcement mechanisms which currently exist under human rights law, for which the right to water is not a good fit.[254] Certainly, approaching the right to water from the viewpoint of governance encourages wider consideration of water in relation to development,[255] and as a development goal at the international level.

2.4 The right to water at a regional level

Focusing on the geographical and geo-political region in which South Africa is located, several regional human rights instruments are relevant to a rights-based approach to achieving access to sufficient water. However, echoing the international situation, there is no single, universal, binding right to water in the African Human Rights canon. The African Charter on Human and People's Rights (ACHPR)[256]reiterates States Parties' obligations under the UN Charter and UDHR, but goes further, to state that satisfaction of economic, social and cultural rights is an essential prerequisite for the enjoyment of civil and political rights.[257]

Article 1 states that parties shall undertake to adopt legislation or other measures to give effect to the duties and freedoms enshrined in the Charter. This has been interpreted to include an obligation to protect against violations, even if the State or its agents are not the immediate

[252] L J Kotze *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012) 51-53. *See also* Chapter One 1.1 definitions.
[253] H Grimes 'Responding to the "Water Crisis": The Complementary Roles of Water Governance and the Human Right to Water' (2009) 20 2/3 *Water Law* 119.
[254] Ibid.
[255] Ibid.
[256] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986). *Hereafter* ACHPR.

[257] ACHPR, Preamble.

cause of the violation.[258] Here again the combination of negative and positive obligations is present: The State is charged *not to interfere* with Convention rights, as well as being required to *positively protect* rights through relevant and robust national law (or other measures). Failure to fulfill positive obligations can arise in two ways: Firstly where the State fails to take action to ensure respect for the relevant rights: Secondly where the State fails to protect an individual from interference by other individuals, groups or corporations.

For example, in the case of *SERAC v Nigeria*[259] the complainants brought an action against the Nigerian government regarding the violation of various economic and social rights committed by the National Nigerian Petroleum Company in partnership with Shell Petroleum Development Corporation. The African Commission found the Nigerian government guilty of violations of amongst others, the right to health and to a clean environment, due to its role in facilitating and condoning the oil corporations' operations, finding that the Nigerian State was obliged 'to protect right-holders against other subjects by legislation and provision of effective remedies'.[260]

This position echoes General Comment No.31 of the Human Rights Committee, on Article 2 of the ICCPR, which makes clear States' obligations to protect individuals 'not just against violations of Covenant rights by [state] actors, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'[261]. It should be noted however, that the Committee has not gone so far as to say that, in the absence of effective action by the State, a direct obligation is imposed on private actors to abide by Covenant rights.[262] Indeed, such a move would represent a major change to international human rights law in general. But the relevance of this to realising access to sufficient water as a human right is that the onus to respect, protect and (progressively) fulfil such a right is placed principally and explicitly on the State. Furthermore, whether water services are administered by the public sector, private

[258] 74/92. Commission Nationale des Droits de L'Homme et des Libertes v Chad, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997).
[259] 55/96, SERAC and CESR v Nigeria 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003).
[260] Ibid. Paragraph 46.
[261] General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 Mar. 2004, Hum. Rts. Comm., 80th Sess., 2187th mtg., 8, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004).
[262] P Alston 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755, 770.

companies, charities or co-operatives, States are required to do their utmost to ensure against human rights violations.[263]

Article 16(2) of the ACHPR proclaims that State parties to the Charter must take the necessary measures to protect the health of their people. Access to water is not explicitly mentioned. But following the jurisprudence of the CESCR, in their interpretation of ICESCR Article 12, it would be a compelling argument that such an obligation to protect the health and environment of its citizens would require States parties to ensure their citizens enjoy basic water and sanitation services.

Indeed, the African Commission on Human and Peoples' Rights has previously found that rights to food, housing, water, electricity and medicine can be derived from the right to health and other ACHPR rights.[264] In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehova v Zaïre*,[265] the commission held that

> 'the failure of the government to provide basic services such as safe drinking water and electricity, and the shortage of medicine constitutes a violation of Article 16.'

While a welcome and predictable interpretation, determining the human right to water as derivative, in the same way as General Comment 15, this does little for the justicability of the right. Also, it must be noted that the decisions of the African Commission on Human and Peoples' Rights are non-binding. For this reason the African Court on Human and Peoples' Rights was established, giving its first judgment in 2009. However, most of the cases heard so far have been administrative, and it remains beset by problems.

In the same way as CEDAW and CRC discussed above, the following group-specific instruments acknowledge a right to water for children and women respectively. Article 14(1) of the African Charter on the Rights and Welfare of the Child[266] provides that every child has the right 'to enjoy the best attainable state of physical, mental and spiritual health'. Article 14(2)(c) explicitly stipulates that:

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[263] Ibid.
[264] *Free Legal Assistance Group v Zaïre* ACHPR Comm No 25/89, 47/90, 56/91, 100/93 (1995) Communication 155/96, ***SERAC and CESR** v Nigeria* ACHPR Comm No 155/96, 15th Annual Activity Report.
[265] Ibid.

[266] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999: < http://www.au.int/en/treaties/african-charter-rights-and-welfare-child > (Last accessed 27 July 2016).

> State parties... shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.

Article 15 of the Protocol to the African Charter on the Rights of Women in Africa[267] states that State parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to 'provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food'.[268]

While the normative and declarative importance of these regional instruments regarding affirming access to water as a necessity (and to some extent a human right) should not be underestimated, the fact remains that at the regional level, as at the international level, a clear, binding human right to water remains elusive.

2.5 Water as a development goal

The foregoing discussion has concentrated on the nature, content and scope of the human *right* to water. Here the focus shifts to consider water in relation to development, both as a prerequisite for development, and as a specific development goal. Beneath the 'umbrella' term of water governance (defined above at 1.1) this analysis of the relationship between water and development, relates in the main, to non-binding, or soft-law instruments, in contrast to the ICESCR and ICCPR. Consequently, while law continues to play a part in understanding this area of water governance, there will be less discussion of 'hard' law. But first a definition of development is required. The UN General Assembly Resolution on the Right to Development defined development as follows:

> 'Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'.[269]

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[267] Protocol to the African Charter on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003: <http://www.achpr.org/instruments/women-protocol/> (Last accessed 27 July 2016).
[268] Ibid. Article 15.
[269] United Nations General Assembly resolution 41/128 "Declaration on the Right to Development", UN Doc. A/RES/41/128 (4 December 1986). Hereafter UN GA resolution 41/128. Preamble.

In light of this comprehensive,[270] inclusive[271] and equitable[272] definition of what development means, the Resolution goes on to declare that a right to development is:

> 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'[273]

Furthermore, 'States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.'[274]

Despite being framed as a human right, the legal status of this right to development is the same as that of Resolution 64/292 on the human right to water. Both are General Assembly resolutions, which are not legally binding on States. However, what is more important regarding the relationship between water and development is the way in which the 'right to development' (or perhaps more accurately, the impetus for development) has been pursued through non-binding, but extremely high profile development goals.

2.5.1 Water and the Millennium Development Goals

In September 2000, world leaders came together to adopt the United Nations Millennium Declaration, commiting their nations to a new global partnership for development; the Millennium Development Goals (MDGs)[275]. The MDGs are the most high profile initiative to promote development and reduce poverty internationally. Their timetable for completion was 2015, and a final report, issued in July 2015, shows huge achievements in all target areas.[276] Each of the eight goals overlaps with human rights principles and generally the MDGs share focus with the human rights agenda. However, connections or synergies with human rights are not made explicit in the MDGs; a situation now famously described by Alston as 'ships passing in the night'.[277] Consequently, analysis of the progress of the MDGs is not situated within a human

[270] 'economic, social, cultural and political process'
[271] 'the well-being of the entire population'
[272] 'fair distribution of benefits'
[273] UN GA resolution 41/128, Article 1.
[274] Ibid. Article 3.
[275] Millennium Development Goals derive from the Millennium Declaration, adopted by the UN General Assembly in 2000. Available at <http://www.un.org/millenniumgoals> (Last accessed 27 July 2016). *Hereinafter* MDGs.
[276] The Millennium Development Goals Report, 2015. Available at: <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf> (Last accessed 27 July 2016).
[277] P Alston 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755, 770.

rights framework.[278] For instance the Global Monitoring Report 2014[279] does not mention human rights, instead focusing on specific MDGs targets. Lack of reference to human rights within the MDGs framework has drawn some criticism. The failure to link congruous aims and aspirations has perhaps denied the MDGs access to the vocabulary of rights with which to strengthen their imperative for States to act, instead risking a 'technocratic input/output approach to development'.[280] But despite lacking explicit connection to human rights (and to human rights vocabulary), the MDGs were announced from their conception using the language of human dignity and equality,[281] which echoes that used in human rights instruments.[282] Also in light of their relative success, such criticisms are perhaps difficult to sustain.

Regarding water, target 7.C required global action to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation. Of note here is that this target is part of Goal number seven; 'ensuring environmental sustainability'. In contrast to much of the previous discussion around a human right to water at the international level, here access to water as a development goal has been approached from within a broader aim of environmental sustainability. Locating the challenge of access to water within this broader goal affirms the natural and necessary connections between water and wider discourses on environmental resilience and socio-ecological security (as discussed below).

Target 7. C was met in 2012, three years ahead of schedule, signaling a vast improvement in the number of people accessing improved drinking water (from 2.3 billion in 1990 to 4.2 billion in 2015),[283] and accessing improved sanitation (2.1 billion more people by 2015).[284] While the reality of these figures is that many millions of people still live without access to adequate water or sanitation facilities, it nonetheless represents considerable and sustained development, which to borrow from the human rights lexicon, could be described as an impressive global example of *progressive* realization of the right to development (and of so many of the myriad economic, social, cultural, civil and political rights that relate to the right to development, of which access to sufficient water is clearly one).

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[278] Ibid at 780.
[279] Global Monitoring Report 2014: Ending Poverty and Sharing Prosperity. Available at: <http://www.worldbank.org/en/publication/global-monitoring-report> (last accessed 27 July 2016).
[280] P Alston 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755, 784.
[281] Millennium Declaration, 2000, Part I Article 1.
[282] See for example the preamble to the UDHR.
[283] The Millennium Development Goals Report, 2015, 7.
[284] Ibid.

Such achievements should signal a note of cautious optimism regarding the potential of the newly agreed Sustainable Development Goals to help move the international community closer to eradicating poverty and to realizing at least a minimum level of development for everyone. As is discussed in Chapter Three, South Africa's response to the MDGs has been positive, as have the responses of other developing countries.[285] It seems that effective governance at the international level must not confine itself to the remit of human rights, but must also take seriously the significant potential of globally agreed, publicized and monitored development 'goals'. However, as Adelman reminds us, development discourse has been regarded with some suspicion by many in the Global South, for whom development has become a 'dirty word', synonymous with impoverishment, exploitation and pollution.[286]

2.5.2 Water and the Sustainable Development Goals

The recently adopted Global Goals for Sustainable Development (hereafter referred to as the Sustainable Development Goals, or SDGs) mark a significant new chapter in the work of the UN to eradicate poverty and champion development.[287] Though broader in their scope, and with more ambitious aims, the SDGs continue the model chosen for the Millennium Development Goals (MDGs). They avoid creating direct legal obligations in favour of a 'report card' approach to help monitor and improve the performance of the international community regarding the targets set. While this approach aims to ensure the SDGs reach at least a similar level of success as their predecessors, the emphasis on voluntary commitments rather than legal obligations raises serious questions. Practical concerns regarding how to effectively implement non-legally binding commitments join more normative questions about how the SDGs should best be conceived of as a development framework. What role should law play? Is there a sufficiently strong ethical imperative to ensure compliance? Does the 'report card' approach signal a significant shift within the international policy community towards pursuing politically ponderous but legally insubstantial ambitions? And with what consequences? Will human rights find themselves marginalised by the SDGs, or re-energised by their universal aims, and re-imagined beyond anthropocentricity by the Goals' emphasis on interconnected understandings of human and non-human life (goals 11-15). Is there a coherent conceptual framework with which to understand and critique the SDGs? If not, what will hold the focus of

[285] See MDG country reports: < http://www.undp.org/content/undp/en/home/librarypage/mdg/mdg-reports.html> (Last accessed 27 July 2016).
[286] S Adelman 'Between the Scylla of Sovereignty and the Charybdis of Human Rights: The Pitfall of Development in pursuit of Justice' (2008) 1 *Human Rights & International Legal Discourse* 17-18.
[287] United Nations Resolution A/RES/70/1 of 25 September 2015. Available at: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 27 July 2016).

States and international organisations across 17 goals, 169 associated targets and 300 indicators over 15 years of serious work? Less than a year into the allotted time span for the SDGs, the answers to such questions cannot yet be clear. But, following on from the MDGs, the international community's embrace of the SDGs also, represents a 30 year commitment to ambitious, measurable goals, which cannot be characterised as falling within the established sources of international law.[288] The MDG/SDG development agenda has not been expressed through treaty-based, or customary law. Rather, it has taken the form of 'soft' standard setting, which is becoming increasingly popular in international environmental law, and beyond.[289] This would seem to indicate a conscious shift in approach within the international community, certainly compared to the era of the Covenants, and the Right to Development. But there is also considerable synergy between the older rights-based and newer goals-based approaches to development objectives (including access to sufficient water).

Regarding water specifically, SDG goal six aims to 'ensure the availability and sustainable management of water and sanitation for all'.[290] Because of its universal aim, this goal is more easily compatible with the human right to water, articulated in GC 15, than was its precursor in the MDGs.[291] As such, it points to the potential for greater complementarity between rights-based and goals-based approaches to achieving access to sufficient water. Indeed it may be profitable to focus less on distinguishing 'hard' and 'soft' law, or rights and goals, in favour of a more pragmatic emphasis on problem solving, including through alternative standard-setting modes and compliance mechanisms (as seen in the MDGs and SDGs).[292] Seen from this perspective, whether a given approach comes from an established source of 'law' may be secondary. What matters is which approach is best suited to achieving the desired results in a given context. Such pragmatism is increasingly evident in international environmental law, and

[288] See: Statute of the International Court of Justice, Article 38: <http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II> (Last accessed 27 July 2016).

[289] J Brunnee 'The Sources of International Environmental Law: Interactional Law' (International Law Reporter, 28 May 2016) <http://ilreports.blogspot.co.uk/2016/05/brunnee-sources-of-international.html?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=Feed:+blogspot/RfRRI+(International+Law+Reporter)> (Last accessed 27 July 2016).

[290] Goal 6: Sustainable Development Goals available at: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 27 July 2016).

[291] MDG 7.C: 'to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.' The explicit aim of this target is to reduce, but not eradicate water poverty. As such, it is difficult to read this as compatible with the corresponding human rights claims that *everyone* is entitled to access to safe drinking water and basic sanitation.

[292] For monitoring and reporting obligations see generally: S Suter & A Fishman 'Lessons on Monitoring and Reporting from the MDGs and Other Major Processes' (2015) *Independent Research Forum:* <http://www.irf2015.org/sites/default/files/publications/Retreat%20%237_SD-1_Final%20Draft.pdf> (Last accessed 27 July 2016); S Kindornay & S Twigg 'Establishing a Workable Follow-up and Review Process for the Sustainable Development Goals' (2015) *Overseas Development Institute* Report: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9588.pdf> (Last accessed 27 July 2016).

also seems fitting in relation to the pursuit of essential development objectives.[293]

2.5.3 Water and Sustainable Development

As has already been illustrated by reference to the MDGs (and the place of water within the wider goal of ensuring environmental sustainability), and by the explicit connection drawn between water and protection of biodiversity in the Johannesburg Declaration on Sustainable Development,[294] it is now broadly acknowledged that access to sufficient water must be achieved in ways that are sustainable. This includes consideration of continued access for present and future generations (intergenerational equity), as well as what is necessary to protect the environment (sustainable use). This concern to ensure sustainable access to water is reiterated in General Comment 15:

> 'The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.'[295]

In short, water governance and sustainable development should go hand in hand. The term 'sustainable development' was first defined in the 1987 Brundtland Report as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[296]. But its origins in State practice date back much further, to at least 1893, when the arbitral tribunal in the *Pacific Fur Seal arbitration* incorporated elements of what would now be recognised as a sustainable development approach to natural resource use.[297] The Brundtland Report definition contains elements of equitable use, including intergenerational equity, and sustainable use; which expressed together integrates economic, social and environmental considerations. These three elements (equity, sustainable use, and integration) comprise the concept of sustainable development. Although its precise legal definition and status remains unclear, most commentators agree that sustainable development is

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[293] J Brunnee 'The Sources of International Environmental Law: Interactional Law' (International Law Reporter, 28 May 2016) <http://ilreports.blogspot.co.uk/2016/05/brunnee-sources-of-international.html?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=Feed:+blogspot/RfRRI+(International+Law+Reporter)> (Last accessed 27 July 2016). Note: A broader definition of 'law' also opens up space to consider the role of 'vernacular law' in commons approaches to water governance, as will be discussed below in Chapter Five.

[294] 'Johannesburg Declaration on Sustainable Development' UNGA A. Conf/199/20 September 2002 Annex at 18. Available at: < http://www.un-documents.net/jburgdec.htm> (Last accessed 27 July 2016).

[295] General Comment 15, Paragraph 11.

[296] 'The Brundtland Report', World Commission on Environment and Development (WCED) *Our common future* (Oxford University Press, 1987) 43.

[297] *Pacific Fur Seal* arbitration award, 15 August 1893, 1 *Moore's International Arbitration Awards* 755. *See* P Sands & J Peel *Principles of International Environmental Law* (3rd ed, Cambridge University Press, 2012) 206 and 399.

a non-binding political leitmotif, and not an enforceable norm with *jus cogens* or customary international law status.[298]

But applying these elements to the challenge of achieving access to water offers the potential to integrate equitable social and economic development in environmentally sensitive and sustainable ways. Triangulating access to water within social, economic and environmental considerations offers a distinctive approach to water governance. But the lack of clarity regarding each of the elements of sustainable development has led some to question how such distinctiveness may provide a substantive means by which to progress the reform agenda which surrounds it.[299] Without such substance, sustainable development risks becoming a hollow concept. Indeed, Fitzmaurice warns that '[t]he continuing reliance on clichéd and worn out definitions should be abandoned and the concept (or principle) of sustainable development must acquire a tangible and concrete content'.[300]

As an over-arching goal of the international community and an increasingly recognised (non-binding) principle of international law, sustainable development is likely to continue to feature in the rhetoric around transforming water governance towards greater equity and sustainability. However, as the brief consideration of the concept and application of sustainable development (above) suggests, too often aspirations towards sustainability are insufficiently developed or robust to be operationalized or fulfilled. Worst still, without a serious and sustained challenge to human behaviour, targeted at reducing consumption and 'treading more lightly', sustainable development risks being an 'ideological palliative' that helps us 'rationalize our continuing encroachments upon the planet'.[301]

Therefore a further concept is introduced below; social-ecological security. While it shares with sustainable development an emphasis on integrating economic, social and environmental considerations, it does so against an augmented awareness of the interconnections between all organisms and components in the (general or particular) ecosystem. It is to this heightened

[298] U Beyerlin & T Marauhn *International Environmental Law* (Hart, 2011) 79.
[299] N Cooper & D French "The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism" in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (2012, Martinus Nijhoff) 111 at 118.
[300] M. Fitzmaurice, *Contemporary Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2009) 108.
[301] B Richardson 'A Damp Squib: Environmental Law from a Human Evolutionary Perspective' (2011) 7/3 *Comparative Research in Law & Political Economy. Research Paper No.8/2011.* 31.

perception of access to water for people, within the boundaries of a sustainable environment, that the chapter now turns.

2.6 Effective international governance in the present and future global environmental contexts

As has become apparent from the foregoing analysis of relevant human rights and development goals, progress in realizing access to sufficient water through either or both of these approaches must proceed in ways that are sustainable and environmentally aware. Therefore it is no longer possible (if it ever was) to pursue agendas of human rights and/or human development in isolation from the realities of local, national, regional and international environmental constraints. Effective water governance at the international level must include the integration and contextualization of access to water challenges within wider ecological imperatives. Applied to the specific focus of this thesis, access to sufficient water for everyone in South Africa can only be achieved within the environmental constraints that the country faces.[302]

2.6.1 Social- ecological security and the exigencies of the Anthropocene

Social-ecological security (SES) is emerging in the literature as a concept that attempts to better articulate the multifarious challenges to the security of the human (and non-human) environment. In particular it emphasises that social and human security cannot be separated from ecological security[303]. It thus reflects a changing notion of security, towards a broader, more interconnected and contingent understanding, better placed to problematize and address the changing nature of ecological and developmental threats faced. Such threats have been defined as:

> 'an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of the Earth, or (2) threatens significantly to narrow the range of policy choices available to the international community, governments of states or to private, nongovernmental entities (persons, groups, corporations).'[304]

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[302] *See generally:* L J Kotze 'Phiri, The Plight of the Poor and Perils of Climate Change' (2010) 1/2 *Journal of Human Rights and the Environment* 135-160. *Note:* These constraints do not neatly fall into categories like 'national' and 'regional'. Rather, while the nation-state remains the principle unit of analysis within a Westphalian legal/political system, and consequently South Africa is the particular nation-state within which the issue of access to water is here scrutinised, the relevant environmental constraints that this country faces are an amalgam of local (including micro-climates), national (including net rainfall), regional (including trans-boundary water sources) and international (including climate change problems which demand global responses, regardless of whether particular states are affected).

[303] J Ebbesson 'Social-ecological security and international law in the Anthropocene' in J Ebbesson et al (eds) *International Law and Changing Perceptions of Security* (Brill, 2014) 71, 77.

[304] Ibid.

Applied to water, this means that not only must water services be 'socio-sustainable' (sustainable from the perspective of human development). They must be 'eco-socio-sustainable' if such services are to withstand the exigencies of planetary degradation.[305]

While traditionally threats to water, food, and energy security have been addressed in isolation, SES offers not only a more holistic framework for understanding and responding to these challenges, but also gains relevance when set against the backdrop of the *Anthropocene*. The Anthropocene has been unofficially proposed as a new geological epoch.[306] Formally still, the Holocene remains the present epoch, as it has for 10-12000 years. It has been characterised in the main by stable environmental conditions, which have supported the enormous growth of the human population, and the development of modern societies. But the global human imprint on the biosphere has become so significant that the Earth is moving into a critically unstable and inharmonious state.[307] It is asserted that humankind has played a central role in moving the planet towards a critically unstable state, characterised by less predictable and less harmonious Earth systems.[308] So central is this role, that humanity can be considered a discrete geological force capable of moving Earth systems outside their natural range of variability, and into a new and unstable epoch.

The effects of the Anthropocene on water are not yet fully understood. But salination, drought and heavy rainfall are all consequences of the less predictable weather patterns experienced globally. Furthermore, so crucial is fresh water for life, that pressure on water supplies adversely affects aspects of human life ranging from food security, sanitation, health and economic development.[309]

Unsurprisingly SES and the Anthropocene are becoming part of the discourse around environmental law and governance, [310] giving new impetus and urgency to principles including

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[305] Crutzen & Stoermer 'The 'Anthropocene'' (2000) 41 *IGBP Global Change Newsletter* 17-18.
[306] Ibid.
[307] W Steffen, PJ Crutzen & JR McNeill "The Anthropocene: are humans now overwhelming the great forces of nature." (2007) 36/8 *AMBIO: A Journal of the Human Environment* 614-621, 615

[308] Ibid.
[309] S Meisch 'The need for a value-reflexive governance of water in the Anthropocene' in A Bhaduri *et al* (eds) *The Global Water System in the Anthropocene* (Springer International Publishing, 2014) 427-437, 427.
[310] For a list of the more recent publications, see among others: K Rakhyun and K Bosselmann 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 *Transnational Environmental Law* 285-309; K Scott, 'International Law in the Anthropocene: Responding to the Geoengineering Challenge' (2013) 34/2 *Michigan Journal of International Law* 309-358; N Robinson 'Beyond Sustainability: Environmental Management for the Anthropocene Epoch' (2012) 12/3 *Journal of Public Affairs* 181-194; L J Kotzé 'Human Rights and the Environment in the Anthropocene' (2014) *The Anthropocene Review* 1-24; L J Kotzé 'Transboundary Environmental Governance of Biodiversity in the Anthropocene' in L J Kotzé and T Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill 2014); L

sustainable development, while offering new perspectives with which to interrogate the juristic interventions that must ultimately be better able to respond to the exigencies of the Anthropocene, now and well into the future. Consequently discussion of water governance at the international level must consider not only the existence and utility variously of a rights-based approach, and a development-based approach to water; but also the emerging environmental realities which relate to water, and the consequences for law and governance of seeking to achieve sustainable, equitable, universal access to water on an unstable planet.

2.7 Chapter summary and concluding comments

As the forgoing discussion has shown, it is not easy to find a single independent, comprehensive and legally-binding human right to water in international law. But it would be a mistake to conclude from this that there is no human right to water. Instead, the human right to water should be considered a unique right, which Thielbörger describes as:

> 'a right of its very own kind that must be seen in connection with national guarantees... and with other recognized human rights...'[311]

The human right to water can only be understood as a complex, multi-layered network of international, regional and national law, treaties, 'hard law' and 'soft law'[312]. Such an analysis is capable of affirming the continuing relevance of this right in international law; especially regarding the setting of a substantive core to the right, including codifying minimum standards and violations, as well as the independent monitoring of States' progress. Of particular importance on this point is the mandate of the UN Special Rapporteur on the Human Right to

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J Kotzé 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 33/2 *Journal of Energy and Natural Resources Law* 121-156; J Ebbesson, 'Social-Ecological Security and International Law in the Anthropocene' in J Ebbesson *et al* (eds), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Brill 2014) 71-92; A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge 2014).

[311] P Thielbörger *The right(s) to water* (European University Institute, 2010) at v.

[312] The terms 'hard law' and 'soft law' receive useful definition in the following article, although it should be noted that both terms remain inexact in their usage. Despite positivist's eschewal of soft law as a concept (on the premise that law, by definition, is binding), the principal distinction between hard law and soft law is that the former is legally binding, while the latter is not. In relation to water governance, this distinction is a useful one, since while numerous relevant sources can be identified, only some of these are binding in the strict sense. See GC Shaffer & MA Pollack 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) *Minnesota Law Review* 706-799, 712-13.

Water and Sanitation (currently held by Leo Heller).[313] The extent to which the mandate is able to effectively monitor and challenge rights violation remains to be seen.[314]

Complementing this analysis of the human right to water as atypical is the notable success of the MDGs in delivering improved access to water. Despite the MDGs being a 'non-legal' vehicle (in the sense that not only are they non-binding on States, but that they eschew even the language of human rights), they have nevertheless driven efforts to make the content of the human right to water a new reality for millions of people. Seen within a wider context of global water governance, this is an important example of a human right finding (one) expression in a non-human rights, (development goals-based) form.

There are doubtless important benefits for conceiving of access to water as a right within the framework of human rights. As Winkler reminds us, these benefits 'can all be linked to the fact that human rights are legally-binding instruments'.[315] It is for this reason that the human right to water can be described as 'reaching beyond and beneath'[316] the MDGs. But considering the challenge of access to water from the perspective of water governance at the international level, as opposed to just the perspective of (binding) international law, it must be conceded that 'soft' development approaches like the MDGs and SDGs have a significant role to play in achieving what should still be considered as the human right to water.

Also, without conflict or contradiction, such a multi-layered conception of the right to water is able to acknowledge the crucial, central role of States in embodying the right through legislative and other means (including embracing non-legislative measures) to pursue development goals. Furthermore, such a multi-layered conception of the human right to water naturally leads to consideration of the role that other layers of governance may have. Particularly relevant to this thesis is the role of grass-roots, community or 'commons' expressions of governance, that, while likely to be more 'messy' and more difficult to identify, than traditional sites of governance, are replete with potential to close some of the gaps left by the transposition of a human right to water into the national level (as explored in Chapters Four and Five). Indeed, as the history of the emergence of an international human right to water clearly shows, such sub-national, commons expressions of water governance have proved significant in achieving the high level of

[313] *See* Human Rights Council Resolution 7/22 *Human rights and the access to safe drinking water and sanitation,* adopted 28 March 2008. A/HRC/RES/7/22. Available at: <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf> (last accessed 27 July 2016).
[314] An overview of the mandate's work is available at <http://www2.ohchr.org/english/issues/water/iexpert/index.htm> (last accessed 27 July 2016).
[315] I T Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart, 2014) 214.
[316] Ibid at 215.

consensus that now exists around a meaningful human right to water, as well as in challenging inappropriate private sector involvement in water services.

The need to achieve access to sufficient water, whether pursued as a human right or a development goal, has been clarified as the need to achieve *sustainable* access. The applicability of sustainable development, and more urgently SES, have reframed the challenges of water governance at the international level; requiring eco-socio-sustainability, against the backdrop of Anthropocene exigencies. The consequences of this for water governance are manifold: Law regulates our human interactions, as well as the interactions between humans and other organisms, and non-living components in our environment. As such, law plays a crucial role in setting the standards for these interactions. Historically these standards have allowed, and even facilitated human-to-human, and human-to-non-human interactions, which have resulted in profoundly inharmonious planetary consequences. As Robinson explains, law 'is deeply implicated in the systems that have caused the end to the Holocene, and at once is central also to the reforms needed to cope with the emerging Anthropocene'.[317]

In response to this there must be a willingness to reimagine law and governance in ways which allow for more appropriate, harmonious interactions and for realising effective ways to pursue equitable, sustainable and integrated modes of living within new ecological parameters. The emergence of water governance approaches which complement and reflect the unique and multi-layered characteristics of the human right to water may be understood as manifestations of this 'new thinking'[318] that is so desperately needed if the consequences of the Anthropocene are to be mediated. Such approaches will be considered in more detail in Chapters Five and Six.

Such new thinking also impacts on the analysis within this chapter. A *legal* analysis of any particular right almost inevitably includes the identification of the legal status of that right (as well as associated considerations around compliance). Here, this would make the primary operative question 'what is the legal status of the human right to water in international law?' While asking this may have some merit, perhaps the more pertinent question to ask, in light of an understanding of the right to water as unique and multi-layered, is whether the acknowledgement of a human right to water at the international level has created, or reinforced an imperative for States to act towards its realisation. Not seeking to define the precise legal

[317] N Robinson 'Fundamental Principles of Law for the Anthropocene?' (2014) 44 *Environmental Policy and Law* 13-27, 13.
[318] A Grear 'Human Bodies in Material Space: Lived Realities, Eco-crisis and the Search for Transformation' (2013) 4/2 *Journal of Human Rights and the Environment* 111-115.

status of such an imperative leaves States able to respond to the urgent need to realise people's right to water, without the added complications of determining legally binding obligations, which are anathema to many States, and for which there remains no effective mechanism for pursuing individual rights violations at the international level.[319] Such an approach affirms the existence of a human right to water in international law, while acknowledging the significant limitations around status and enforcement.

The normative importance of such an affirmation at the international level remains: access to sufficient water continues to be emphasised as a human right necessary for dignified existence, as well as a specific international development goal. But such a shift in emphasis may allow the reality to be acknowledged that, despite their international character, '[H]uman rights and the human rights movement depend on governments and on the state system'[320] for their respect, protection and fulfilment. This inevitably leads this thesis to focus next on fulfilment of the right to water through water governance at the level of the nation-state, and to one State in particular; the Republic of South Africa.

[319] As previously discussed, there are serious conceptual and practical problems with attributing a human right to water as deriving from the Article 6 of the ICCPR in a way that requires immediate fulfilment. Consequently the individual communication mechanism for alleged rights violations, as established in the first optional protocol to the ICCPR, would not be applicable. Furthermore, while it is easier to attribute a human right to water as a derivative of Articles 11 and 12 of the ICESCR, the corresponding obligations would be largely subject to progressive realisation, making it more difficult to adjudicate on whether a particular State party's steps towards realisation of the right were insufficient to fulfil their obligation at any point in time. Also the ICESCR lacks an equivalent individual communication mechanism, which means there is no forum to consider specific rights violations under the Covenant structure. *See* M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995); J Rehman *International Human Rights Law* (2nd ed, Pearson, 2010).

[320] L Henkin, 'That "S" Word: Sovereignty, and Globalisation, and Human Rights, Et Cetera' (1999) 68 *Fordham Law Review* 1.

3

Water in South Africa

'Reconciliation means that those who have been on the underside of history must see that there is a qualitative difference between repression and freedom. And for them, freedom translates into having a supply of clean water, having electricity on tap; being able to live in a decent home and have a good job; to be able to send your children to school and to have accessible health care. I mean, what's the point of having made this transition if the quality of life of these people is not enhanced and improved? If not, the vote is useless.'

Archbishop Desmond Tutu[321]

'[M]ost proponents of a Bill of Rights in South Africa see it as an instrument designed to block rather than promote any significant social change'.

'The battle for human rights in our country has essentially been a struggle for the vote and not for a Bill of Rights.'

Justice Albie Sachs[322]

3.1 Introduction

This chapter begins by charting the current shape of access to water in South Africa. In order to put into perspective the central research question of this thesis -the degree to which a right to water can achieve access to sufficient water – it is important to understand how close the country currently is to achieving universal, sufficient access. The chapter then considers South Africa's unique legal/ political history, and how this has affected the country's current water topography, and why an explicit right of access to sufficient water[323] has been adopted. The effects on South Africa of more general, regional and paradigmatic shifts in water governance

[321] "South Africa; Tutu Says Poverty, Aids Could Destabilise Nation" (4 November 2001). Available at: <http://allafrica.com/stories/200111050100.html> (last accessed 27 July 2016).
[322] A Sachs *Protecting Human Rights in a New South Africa* (Oxford University Press, 1990) 12, 32.
[323] Note: The exact constitutional right is the right of 'access to sufficient water'. But for the sake of brevity, and where the elements of 'access' and 'sufficiency' are not important to the instant discussion, the shorthand 'right to water' is used.

are also analysed, including in particular, moves towards greater use of private and privatesque modes of water service delivery, characterised through a 'water as commodity' paradigm. The extent to which such moves create conflict with the fulfilment of a right of access to sufficient water, is specifically considered.

The legal framework for water governance in South Africa is analysed, including national water policies, and legislation, as well as the impact and influence that water governance at the international level has had and continues to have, on South African water governance. Particular focus is given to the right of access to sufficient water in the Bill of Rights in the 1996 Constitution, and to how this has been interpreted and implemented. Focus on this key Constitutional provision allows the thesis to continue to examine how effective the right to water has been, and to consider how effective it could be in securing sustainable, sufficient access to water for everyone in South Africa.[324]

3.2 Access to water in South Africa; resources, scarcity and inequality

Any discussion of water governance is framed within the reality that water in South Africa is a scarce resource.[325] Increasing demand from urban centres, for water for domestic use, jostle with demands from industry, mining and agricultural sectors.[326] These demands are made in a country that has rainfall less than the global average, falling unevenly across the country.[327] 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.[328]

[324] Although the Constitutional right of access to sufficient water does not that such access must be sustainable, it is broadly acknowledged that access to water must be achieved sustainably in order to ensure the continuing fulfillment of the right. This is clearly accepted in the 'Johannesburg Declaration on Sustainable Development' UNGA A. Conf/199/20 September 2002 Annex at 18. Available at: < http://www.un-documents.net/jburgdec.htm> (Last accessed 27 July 2016). See discussion at 2.5.3.
[325] M Kidd *Environmental Law* (2nd ed, Juta & Co. Ltd, 2011) 64.
[326] Ibid 65.
[327] Ibid 64.
[328] Department of Water Affairs and Forestry *White Paper on a National Water Policy for South Africa* (April 1997). Paragraph 14.

A brief overview of the General Household Survey (2014)[329], and the South African Human Rights Commission Report (2014)[330] gives the most recent picture of the nation's access to water for domestic use.

The percentage of households in the Eastern Cape with access to water decreased from 80.5% in 2013 to 78.5% in 2014, making it the province in which households had the poorest access to water in 2014. Access in other provinces in 2014 was as follows: KwaZulu-Natal 86.5%, Mpumalanga 87.1%; Western Cape 98.9%; Free State 95.3%; Gauteng 96.4%; Northern Cape 95.8% and North West 87.2%. Average access nationally in 2014 was 90%. An estimated 46,3% of households had access to piped water in their dwellings in 2014. A further 27% accessed water on site while 14% relied on communal taps and 2,7% relied on neighbours' taps.[331] With a total population of 52,980,000 in 2014[332] this means that 5,298,000 people lacked access to on-site or off-site piped or tap water in 2014.[333] Of those who received piped water from a municipality, almost 25% experienced interruptions to their piped water supply at least once a month[334].

It is important to acknowledge that since 1994, access to water has improved for many South Africans. In 1994 it was estimated that around one quarter of the total population (12 million people) did not have access to piped water.[335] The household survey for 1995[336] reported that 33% of African households, 72% of coloured, and 97% of both Indian and white households, had accessed to water from an on-site tap. 28% of African households in non-urban areas obtained water from a river, stream, dam or well, and 16% obtained water from a borehole.

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[329] The General Household Survey (GHS) 2015 is embargoed until the end of 2016. Consequently the GHS 2014 represents the most up-to-date statistics available from this survey. Meanwhile, 'Statistics South Africa' reports that 83.5% of the total population of South Africa have accessed to piped water. The report does not provide statistics for each province. See: <http://cs2016.statssa.gov.za> (Last accessed 27 July 2016).

[330] 'Report to access sufficient water and decent sanitation in South Africa: 2014' South African Human Rights Commission. Available at: <http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf> (Last accessed 27 July 2016).

[331] All percentages from the General Household Survey 2014 (embargoed until 27 May 2015): <http://www.statssa.gov.za/publications/P0318/P03182014.pdf> *(last accessed 16 February 2016). Hereafter GHS* 2014.

[332] GHS 2014.

[333] Author's own calculation based on figure for total population of South Africa in 2014. Note: the total population for 2016 is reported as 55.6 million people. See: <http://cs2016.statssa.gov.za> (Last accessed 27 July 2016).

[334] 24.4%. GHS 2014. 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.

[335] J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20, 6.

[336] 'Living in South Africa: Selected findings of the October Household Survey' Central Statistics. Available at: <http://www.statssa.gov.za/publications/LivingInSA/LivingInSA.pdf> (Last accessed 27 July 2016).

Among African households who had to fetch water from a source that is not on site, 17% travelled at least one kilometre to reach the source.

Since 2000, South Africa has embraced MDG target 7C: To halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation. Using 1994 as the baseline indicator, 23.4% of the population lacked sustainable access to water and sanitation at this standard. Target 7C required that this be reduced to 11.7%. By 2011/12 this had been achieved and exceeded, with 10% of the country's people lacking safe drinking water and sanitation.[337] But, despite improvements, access to sufficient water remains a daily struggle for many, and a significant stumbling block to both socio-economic development and political stability[338].

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 why some access less than is deemed sufficient[339]. Consequently the figure of 90% 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. This issue has significant bearing not only on people's general level of health and well-being[340] but also has been a key feature of the legal disputes over the constitutional provisions on the right to water[341]. Internationally sufficient water has been quantified variously between 20 and 50 cubic litres per person per day (lpd)[342]. In South Africa the ANC's Reconstruction and Development Programme (RDP)[343] set sufficient water at a minimum quota of 25 lpd, available within 200 metres of a household.[344]

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[337] Millennium Development Goals Country Report 2013: The South Africa I know, the home I understand. Statistics from page 93. Available at <http://www.statssa.gov.za/wp-content/uploads/2013/10/MDG_October-2013.pdf> (Last accessed 27 July 2016).

[338] A Russell *Bring Me My Machine Gun: The Battle for the Soul of South Africa, from Mandela to Zuma* (Perseus Books, 2009).

[339] 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).

[340] P Bond & J Dugard "Water, Human Rights and Social Conflict: South African Experiences" (2007) 1 *Law, Social Justice & Global Development Journal* (LGD). Note also that the author's fieldwork affirmed the connection between access to contaminated water and a range of health problems for residents interviewed in Winterton, Okhombe, Woodford, and Burlington. Quality of water supply is also a crucial aspect of the definition of the human right to water as detailed by General Comment 15.

[341] See discussion below of cases Manqele and Mazibuko.

[342] P H Gleick 'The Human Right to Water' (1998) 1 *Water Policy* 496.

[343] The RDP is a coherent socio-economic policy framework, the first priority of which is to begin to meet the basic needs of people - jobs, land, housing, water, electricity, telecommunications, transport, a clean and healthy environment, nutrition, health care and social welfare: 2.6.6 The RDP's short-term aim is to provide every person with adequate facilities for health. The RDP will achieve this by establishing a national water and sanitation programme which aims to provide all households with a clean, safe water supply of 20 - 30 litres per capita per day (lpd) within 200 metres, an adequate/safe sanitation facility per site, and a refuse removal system to all urban

The World Health Organisation and World Bank both recommend between 20 and 40 lpd. Peter Gleick has calculated sufficient water to be 50 lpd (see *Figure 1*).[345] These calculations were used by the South African High Court and Supreme Court of Appeal in the recent case of *City of Johannesburg v L. Mazibuko.*[346] However, it is significant to note that the Constitutional Court's judgment in the same case reduced the quota, as discussed in Chapter Four.

Figure 1

Purpose	Recommended requirement (litres per person per day)
Drinking water[a]	5
Sanitation	20
Bathing	15
Food preparation[b]	10
Total	50

As discussion in Chapter Four of the 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, 21 years after the formal end of apartheid. Fulfilment of the right of access to sufficient water therefore remains a crucial aim.

households. 2.6.7 In the medium term, the RDP aims to provide an on-site supply of 50 - 60 lpd of clean water, improved on-site sanitation, and an appropriate household refuse collection system. Water supply to nearly 100 per cent of rural households should be achieved over the medium term, and adequate sanitation facilities should be provided to at least 75 per cent of rural households. Community/household preferences and environmental sustainability will be taken into account. 2.6.8 The RDP's long-term goal is to provide every South African with accessible water and sanitation. See <http://www.anc.org.za/show.php?id=235> (Last accessed 27 July 2016).

[344] Note: Water must also be of sufficient quality, that is to say it must be clean and clear. See Water Services Act 1997, Section 1, and discussion below at 3.3.2.

[345] Peter H. Gleick, 'The Human Right to Water' (1998) 1 *Water Policy* 496.

[346] City of Johannesburg v L. Mazibuko (489/08) [2009] ZASCA 20.

[a] Minimum required to sustain life in moderate climatic conditions and average activity levels.

[b] Excluding water to grow food.

3.3 History of the development of water law in South Africa

The history of water law and the water institutional reforms discussed below cannot be divorced from the political, economic, social and environmental changes experienced in the country. Fundamental political shifts have created significant new water legislation.[347] For example, the Irrigation and Water Conservation Act 8 of 1912 followed the unification of South Africa in 1910; the Water Act 54 of 1956 followed the election of the National Party in 1948 (and the formal entrenchment of apartheid policies); and the election of the ANC in 1994 led directly to the Water Services Act of 1997, and the National Water Act 36 of 1998, amongst other transformative legislation.

The changing political economy of the country has catalysed processes of industrialisation and urbanisation at different times, including most notably during apartheid's 'heyday'[348] in the 1950s, and in the immediate aftermath of majority rule in 1994. These changes, with their consequent social and environmental implications, have shaped the ways in which water rights, and water law more generally, have developed.

The development of water law is considered below in two periods: 1652 to 1994, and 1994 to 2016. While the timespan covered by these two periods is uneven (342 years and 22 years respectively), the dividing line between them is important. The first represents the period of white, European, minority rule, while the second refers to the current chapter of majority rule. While such a stark distinction risks masking a more nuanced understanding of historical developments, it does offer a clear framework within which to chart the evolution of the law in this area, as well as providing scope to contextualise developments in water law within a broader (if necessarily inexhaustive) national narrative.

Consequently, the ensuing discussion is not intended as a comprehensive history of South Africa, nor does it seek to offer an exhaustive account of relevant movements like the ANC. Rather its purpose is to provide an historical overview of the most significant events that, directly or indirectly, have shaped the law relating to water from the beginning of established European/colonial involvement in the country (1652),[349] to the present day.

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[347] G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 107-123, 107.
[348] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 107.
[349] Before this date many European ships had landed at the Cape. But in 1652 the Dutch East India Company (Verenigde Oostindische Compagnie, hereafter VOC) established a fortified provisions station at Table Bay. Consequently, the date 1652 indicates the beginning of European involvement in South Africa. *See* S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 153-154.

For thousands of years people have inhabited the territory that is now South Africa. As long ago as c.1000BC Khoikhoi herders moved into South Africa from northern Botswana. Therefore, human relations with water resources in the country predate the arrival of Europeans by many centuries. Regulation of water prior to the colonial period reflected African customary law, which stipulated that water and land were free. [350] Chiefs regulated land tenure, but private ownership of water and land was not permitted.[351] This approach to water resources remained after the first European settlements were established, and a dual system of 'water rights' (regulating human use of water) existed until the expansion of the VOC's[352] activities in the Cape began to encroach on the native communities. This eventually resulted in the subjugation of these communities, and the imposition of European rule over water regulation, characterised by the concept of ownership over water, in contrast to indigenous approaches.[353]

3.3.1 *1652* to *1994*

Until the election of the African National Congress (ANC) in 1994 water law in South Africa evolved with little regard for water scarcity.[354] Instead, principles derived from European countries, where water supply was plentiful, were applied in a country with perennial water shortages.[355] From the period of the first Dutch colonisation of the Cape in 1652 to the Union of South Africa in 1910 the common law changed from a position of State allocation of water to what might be considered a more traditional model of 'riparian rights',[356] namely ownership and use of water being linked principally to the ownership of the land through which the water flowed. This change was brought about primarily to serve the *de facto* apartheid system of white minority domination and colonisation of resources.[357] During the 17th and 18th centuries a system of Roman-Dutch law was established in the Cape. Consequently, Roman law principles were incorporated, albeit in modified forms.[358] In Roman law, water generally was classified as *res*

[350] D D Tewari 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' (2009) 35/5 *Water SA*, 693-710, 695.
[351] Ibid.
[352] S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 304.
[353] D D Tewari 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' (2009) 35/5 *Water SA*, 693-710, 695.
[354] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Syracuse conference, Cape Town, February 2010) 1.
[355] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal*, 179-194, 183.
[356] M Kidd *Environmental Law* (2nd Ed. Juta & Co. Ltd, 2011) 64.
[357] M Meredith, Diamonds *Gold and War - The Making of South Africa* (Simon & Schuster, 2007) 525. *Note*: Although the legal machinery labelled *apartheid* was not amalgamated in to a single coherent policy until the election of the National Party in 1948, discriminatory and racially differential laws pervaded British colonial rule and independence until World War II.
[358] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal*, 179-194, 182.

publicae, indicating that it was in the public realm (although water in containers could be privately owned). More specifically, water in streams and rivers was referred to also as *res publicae*, while rain water was designated *res extra commercium,* literally meaning a non-negotiable thing; something which cannot be privately owned. Applied in the Cape, water in navigable streams remained *res publicae* (meaning that water in a stream or river could not be privately owned, but the river banks could be), while water in non-navigable streams, and spring water on land became the private property of the landowner.[359] The role of the government was understood as that of custodian of water sources (*dominus fluminis*), with corresponding rights to regulate and control the use of water in navigable streams.[360]

After around 150 years of Dutch domination, the Cape was formally ceded to Britain in 1814, and thereafter, despite setbacks, British influence increased throughout the country.[361] Initially, British policy in South Africa was to avoid direct political control of the interior.[362] But from 1870 onwards this was replaced by a contrasting, and increasingly aggressive policy of subjugation and annexation. Indeed this policy was to spread beyond the borders of South Africa, into the whole sub-continent.[363]

In this context of greater direct British influence, an alternative set of principles for water governance was adopted.[364] Premised on English law, riparian owners (those owning the river banks) were given the right to share in the water from that river. While the consequence of this juridical shift may not be immediately apparent, the adoption of a more developed form of riparian rights meant that the government's former role as custodian of water resources was greatly reduced.[365]The former principle, that water with a perennial flow was *res publica*, and consequently that riparian owners had no inherent right to the water arising on their land, was overturned. This reversal, and the consequent bolstering of riparian owners' rights is clearly asserted by Hodges CJ in *Silberbauer v Van Breda*:

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[359] Ibid at 182.
[360] C G Hall *The Origin and Development of Water Rights in South Africa* (Oxford University Press, 1939) 8.
[361] S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 179.
[362] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 21.
[363] Ibid at 22.
[364] See *Silberbauer v Van Breda* Privy Council, (1869) 6 Moo PCCNS 319 (appeal from the decision in *Silberbauer v Van Breda and the Cape Town Municipality,* 1866, 5 Searle 231), *Hough v van der Merwe* Cape Supreme Court, 27 August 1874, Buch 148, Juta.
[365] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal*, 179-194, 182.

> 'the right of the freeholder to water rising on springs from his land is undisputed and undisputable. He may use it as he pleases.'[366]

Appreciation of the confluence of these two developments is crucial to understanding how water governance in South Africa evolved in such an unequal and discriminative way. Limiting the role of government as *dominus fluminus* removed the impetus to consider water resources at a macro level, or as a common, *res publicae* good. Instead, water became understood as something to be privately governed by those who owned the land. The potential for such a mode of governance to generate inequalities is clear. But it was to be compounded by the deliberate separation of non-white South Africans from the land.

Two Acts in particular strengthened the connection between land ownership and water ownership. First, the Irrigation and Water Conservation Act 8 of 1912 confirmed that spring water on land, and water flowing over land, were the property of the landowner. Therefore the landowner could use the water, albeit that the water should also be available for lower-lying landowners.[367] Second, the Native Land Act 1913, stipulated that Africans (non-whites) could no longer own land outside the 'native reserves' (which made up only between eight and 13 per cent of South African territory)[368]. Consequently, this disenfranchisement from the land meant disenfranchisement from water also.

Throughout the twentieth century, despite a shift in emphasis on water supply from agriculture towards a growing industrial sector, the riparian rights paradigm remained paramount. This had inevitable consequences for uneven water distribution, something that was exacerbated by the fact that because water use and ownership was linked to land ownership, and because the white minority population owned 87% of the land[369], the majority black population was thus inevitably placed at a normative and institutional socio-economic disadvantage. Until 1994 (and the end of apartheid), white South Africans enjoyed an abundance of relatively low-cost water, indicated perhaps most cruelly by their having one of the highest per capita levels of home swimming pools and golf courses in the world.[370] The majority of government infrastructural investment

[366] Cited by De Villiers CJ in *Vermaak v Palmer* (1876) 6 Buch 25, 33.
[367] See *Le Roux v Kruger*, Cape of Good Hope Provincial Division, Judgment of 14 June 1986, 1986 (1) SA 327, Juta.
[368] S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 260.
[369] Land Reform Report: <http://www.progress.org/land16.htm> (Last accessed 27 July 2016).
[370] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Syracuse conference, Cape Town, February 2010) 10.

went into white-dominated cities and suburbs, leaving those living in the 'Bantustan' system of rural homelands with minimal supply.[371]

Racial segregation

The legal changes to water governance, discussed above, took place against an enduring backdrop of inequality and segregation along racial lines. While the now infamous apartheid system - as a single, deliberate and coherent legal, political, and religious system – did not begin until 1948,[372] perceptions of white racial superiority in South Africa have been present since the earliest encounters between Dutch settlers and Khoisan pastoralists.[373] These perceptions were given legal status, and acquired a formal structure, early in the history of the VOC's activities in the Cape. Company officials and settlers (free burghers), both white, headed the hierarchy above black categories of 'Hottentots' (Khoisan), free blacks (manumitted slaves) and slaves.[374] With some exceptions, this meant that labourers were black, while landowners and employers were white. Formal slavery continued in the Cape from 1658 to 1834, and contributed greatly to the embedding of racial hierarchy and segregation.[375]Even once slavery was abolished, it was replaced by what Terreblanche has called 'unfree labour'.[376] Despite the relative abundance of available land during the middle of the 19th century, black workers were largely excluded from land ownership, and instead, remained in similarly unequal and exploitative relationships with the white landowning employers. Consequently, when diamonds and gold were discovered in 1867 and 1868 respectively, black unfree labour was already an established economic and socio-political phenomenon, ready to meet the new surge in demand from the mines 'for cheap and docile African labour'.[377]

Even where legislation contained no explicit requirement of racial segregation, the consequences of it were to embed a racially segregated system. In the Cape, the Masters and Servants Ordinance of 1841 regulated labour contracts without reference to race.[378] But the fact that almost all masters were white and nearly all servants were black meant that even such ostensibly 'colour blind' provisions formalised and perpetuated social division along racial

[371] Id. For more detailed discussion of Bantustans see S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 261-268.
[372] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 99.
[373] Ibid at 75.
[374] Ibid.
[375] S Terreblanche *A History of Inequality in South Africa 1652-2002* (University of Natal Press, 2002) 9.
[376] Ibid.
[377] Ibid.
[378] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 78.

lines.[379] At the turn of the century several Acts were passed with overtly discriminatory provisions. Perhaps most notably, the Glen Grey Act of 1894, limited the amount of land that African (black) families could own within their own homelands, effectively forcing black workers to remain labourers for white farms. This was heralded as a necessary and desirable feature of the emerging policy of formal and practical segregation, as the then Prime Minister of the Cape Colony, Cecil John Rhodes summarised in his speech to parliament on the second reading of the Act:

> 'I do not feel that the fact of our having to live with the natives in this country is a reason for serious anxiety. In fact, I think the natives should be a source of great assistance to most of us. At any rate, if the whites retain their position as the supreme race, the day may come when we shall all be thankful that we have the natives with us in their proper position.'[380]

In 1902 a segregated location was formally established for Africans in Cape Town.[381] The School Board Act of 1905 imposed compulsory educational segregation in government schools.[382] In 1910 the Act of Union enfranchised all white adult males, but not black males. The franchise for the Cape Town municipality, established in 1839, continued to allow a small number of black voters, dependent on property requirements. However, black residents in the municipality were not permitted as parliamentary candidates, being reliant on whites for representation.[383]

While the Act of Union unified South Africa into one colonial territory, it also acted as a catalyst to expand and entrench the repression and segregation of non-whites in the country. The Dutch Reformed Church Act, 1911 excluded black people from membership; the Mines and Works Act, 1911 imposed a colour bar to protect white workers; the Defence Act, 1912 provided for a white-only citizenship force; and as mentioned above, the Natives Land Act, 1913 segregated land ownership along racial lines. At this time, according to Worden 'a cogent ideology of segregation emerged and was implemented'.[384]

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[379] Ibid.
[380] Transcription of Cecil John Rhodes' speech on the second rereading of the Glen Grey Act 1894, to the Cape House Parliament, 30 July 1894. Available at: < http://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament> (Last accessed 27 July 2016).
[381] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 79.
[382] Ibid.
[383] Ibid.
[384] Ibid at 82.

The African National Congress

Perhaps unsurprisingly, the African National Congress (ANC) was also established at this tumultuous point in the country's history. Formed in Bloemfontein on the 8th January 1912, the ANC (initially named the South African Native National Congress) was assigned the task of 'being a midwife in the process of national rebirth and regeneration'[385]. Comprising delegates from across South Africa's provinces, as well as from Bechuanaland (now Botswana), and representing a commitment to unity beyond tribal or racial lines, the ANC was to be an inherently anti-colonial political vehicle to achieve 'African freedom and liberty'.[386]

Passed the following year, the Native Land Act, 1913 quickly became a principal target of opposition by the ANC. The Act, which prevented non-whites from ownership of all land except the approximately 13% of land designated as native reserves, quickly removed the threat to white farmers that a growing rural black population had been perceived to be. Furthermore, it created a mass of cheap rural labour, as well as leading to an exodus towards urban centres. But it also represented the legalised theft of land by a white-only government, which acted as a rallying cry for the ANC. In 1916 ANC Secretary General, Solomon Plaatje, described the effects of the Native Land Act as follows:

> 'Awakening on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth.'[387]

Experienced in this way, the Act transcended the practical consequences of people being separated from the means to subsist. It symbolised the great injustice at the heart of the South African polity. The ANC mounted a campaign against the Act, culminating in a mission to the British Government in London in 1914. But despite some sympathy from individual Westminster MPs, the British Government did not intervene, and the mission was swiftly overshadowed by the onset of the First World War.[388]

While the response of the ANC to the Native Land Act was not successful, it marks the beginning of the ANC finding its place as a locus of organised political protest and popular consciousness-raising. Over the next three decades the ANC continued to publically critique and protest against segregation injustices. It also underwent fundamental changes, navigating its relationship with communism and pan-Africanism, and holding in tension opposing ambitions

[385] F Meli *A History of the ANC: South Africa Belongs to us* (James Currey Ltd, 1989) 40.
[386] Ibid.
[387] S Plaatje *Native Life in South Africa before and since the European War and the Boer Rebellion* (Cape Town, 1982) 21.
[388] F Meli *A History of the ANC: South Africa Belongs to us* (James Currey Ltd, 1989) 46.

variously to achieve integration into 'common society'[389], or to replace the state with a 'black republic'.[390] Its political influence waned in the 1930s, in part due to the rise of the Communist Party (CP) and trade unions, as alternative sites of protest. But by the time the National Party was elected in 1948, the ANC was again firmly placed to lead the opposition to the latest manifestation of racial segregation and discrimination: formal apartheid.[391]

Apartheid

By the early 1940s the segregationist project that had coalesced after the Act of Union, came under increasing pressure, as the number of Africans moving permanently to the cities grew. The relative abundance of employment opportunities in urban centres, compared to within reserves, drove this urbanisation, while simultaneously creating a new challenge for the white minority government: How to maintain racial hierarchy while allowing white demands for black urban labour to be met? The answer- apartheid - emerged as a revision of segregationist policies symbolising a revival of Afrikaner[392] nationalism[393]. Apartheid became the slogan of the National Party (NP), which narrowly won the 1948 general election, and would retain control of government until 1994. The Union of South Africa remained a dominion of the British Empire, then of the Commonwealth until 1961, when having been subjected to criticism of apartheid policies, the country withdrew from the organisation. South Africa consequently became an independent republic in the same year. This was a popular move amongst Afrikaner nationalists, whose general distrust and resentment of British influence dated back to the Anglo-Boer War (1899-1902).[394] It also proved to be the beginning of ever-greater international isolation for the new republic.[395]

Apartheid, literally meaning 'apartness'[396] or separateness, was pursued through a raft of new legislation that codified and extended racial discrimination and segregation. Crucial to apartheid

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[389] Ibid at 82.
[390] Ibid.
[391] Ibid at 119.
[392] The term *Afrikaner* is used here to describe white South Africans, typically whose first language is Afrikaans, and whose ancestry is Dutch. However, this is not a strict definition. For instance a South African with other European heritage, and for whom Afrikaans is not their mother tongue, may still identify as an Afrikaner, based on a broader socio-political identity, as reflected in Afrikaner nationalism.
[393] *Afrikaner nationalism*, like other nationalist movements, was a consciously forged political movement, complete with its own mythology, designed to unify diverse Afrikaner political positions around the policies of the National Party. See variously, J Cell *The highest stage of white supremacy: the origins of segregation in South Africa and the American South* (1982, Cambridge University Press); D O'Meara *Volkskapitalisme: class capital and ideology in the development of Afrikaner nationalism, 1934-1948* (Cambridge University Press, 1983); N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 98-106.
[394] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 121.
[395] Ibid.
[396] Chambers English Dictionary definition.

legislation was the categorisation of all South Africans according to race: White; Coloured; Asiatic (Indian); and Native (also described as Bantu, or African).[397] Every facet of society, and of social interaction began to be addressed by apartheid legislation. The Prohibition of Mixed Marriages Act, 1949, and the Immorality Act 1950 together banned all sexual contact between white South Africans and other racial groups. The Group Areas Act, 1950, and the Natives Resettlement Act, 1954, facilitated a policy of racially segregated residential areas, and allowed the en masse relocation of Indian residents from central Pretoria and Durban, and of Coloured inhabitants from central Cape Town.[398] The Reservation of Separate Amenities Act, 1953, brought compulsory segregation to bear on all public amenities from transport, to entertainment and sports facilities.[399]

In the context of this energetic imposition of institutionalised apartheid, the Water Act 54 of 1956 represents an important milestone in the history of water governance in South Africa. Replacing the Irrigation and Water Conservation Act (1912) the Water Act 1956 sought to address growing demand from mining, agriculture and industry, while introducing greater control over 'abstraction, use, supply, distribution and pollution of water'.[400] As such, the Act aimed to sustainably supply the large, thirsty (water-intensive) economic development projects, which the NP prioritised in rural areas, where their support base was located. As competition for water intensified, the English law-inspired riparian rights mode of water governance became inadequate. As explained above, and as summarised by Hodges CJ in *Silberbauer v Van Breda*, the riparian principle was that the right of the landowner to water on their land was undisputable.[401] However, this model, conceived in an agrarian context, was ill suited to multiple intensive demands on water within the same geographical area. If landowners upstream can remove water as they please, developments downstream will be affected. Therefore, the Water Act partially revived the *dominus fluminis* principle, reinstating the State as the controller of water in certain 'control areas', to be administered in the national interest.[402]

Understood as part of the apartheid project, the Water Act demonstrated a willingness to affect redistribution of water resources, but only for the purposes of facilitating economic development, the beneficiaries of which were predominantly white South Africans. The Act

[397] Population Registration Act No. 30 of 1950.
[398] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) 108.
[399] Ibid.
[400] Department for Water Affairs and Forestry, South Africa, (1986) *Management of the Water Resources of the Republic of South Africa.* Pretoria. At. 1.9.
[401] Cited by De Villiers CJ in *Vermaak v Palmer* (1876) 6 Buch 25, 33.
[402] D D Tewari 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' (2009) 35/5 *Water SA* 693-710, 701.

retained the crucial exclusionary connection between land and water, while reforming this connection in order to better achieve what was framed as the national interest, meaning the interest of the white population. Thus the Act was simultaneously reforming and conservative. It required both a reconception of proprietary interests, and the retention of the established racial hierarchy. As Goldblatt & Davies explain, the Act illustrates the pursuit of deliberately inequitable water management, skewed towards the interests of white landowners and industry chiefs.[403] Ultimately such management resulted not just in inequities of water use between racial groups, but also in inefficient and unsustainable use of water resources in a water-scarce country.[404]

The Freedom Charter, and water as a political aim

In response to the formalisation of the apartheid regime under the National Party, and as part of the political protest against it, the African National Congress (ANC) and the South African Indian Congress adopted the Freedom Charter on June 26th 1955 at a Congress of the People in Kliptown, Soweto. This was to be a galvanising moment in the so called Defiance Campaign, which aimed to raise political consciousness and embrace all democratic forces in South Africa towards liberation from apartheid.[405]

Framed as a series of aspirational statements for a post-apartheid South Africa, the Freedom Charter became the manifesto of the ANC.[406] Its claims to individual equality and dignity sit alongside calls for wealth redistribution, nationalisation of mineral resources and fair distribution of land, food, health care and education. The fusion of land and water rights, which occurred during British colonial rule, and was maintained throughout the apartheid era, can be seen to be challenged in the preamble:

> '[O]ur people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality'.[407]

Although water was not specifically mentioned in the Freedom Charter, the inseparable association of water with claims to food, health, and land among others, made equitable redistribution of water an obvious and important aim of the ANC, evidenced by the inclusion

[403] M Goldblatt & G Davies 'Water, energy and sustainable economic development in South Africa' (2002) 19/3 *Development Southern Africa* 369-387, 381.
[404] Ibid.
[405] N Worden *The Making of Modern South Africa* (3rd Ed, Blackwell Publishers, 2000) 121.
[406] The Freedom Charter, 1955. Available at: <www.anc.org.za/ancdocs/history/charter.html> (Last accessed 27 July 2016).
[407] Ibid Preamble.

of the right to sufficient water in the interim Constitution, then the 1996 Constitution[408] as well as the ANC's promise of universal free basic water, made during the 2000 municipal elections.[409]

It is beyond the scope of this chapter to analyse apartheid's disintegration in detail. Suffice it to say that from the late 1970s and early 1980s, a combination of increasing internal resistance and external (international) opposition, including economic sanctions, began to undermine the regime. By 1990 these combined pressures had become sufficient to compel the newly-elected President, F.W de Klerk to unban the ANC (as well as the Pan Africanist Congress - PAC, and the Communist Party), and to commit to a process of significant political change. Nelson Mandela was released, and almost immediately began a formal process of negotiation for transitioning to majority rule. This involved the repeal of key apartheid legislation including the Group Areas Act, previously discussed. [410] In 1991 The Convention for a Democratic South Africa (CODESA) was established to create a new constitution, producing an interim constitution in 1993, which aimed to provide:

> '...a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'[411]

3.3.2 from 1994 to the present day

The first multi-party, democratic elections were held in South Africa on the 27th April 1994, ushering in the formal beginning of the new democratic constitutional era. A government of National Unity was elected with an ANC majority, and Nelson Mandela was inaugurated as President.

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[408] Constitution of the Republic of South Africa, 1996. Approved by the Constitutional Court (CC) December 1996.Took effect on 4 February 1997. Section 27(1)(b): Health care, food, water and social security: (1) Everyone has the right to have access to - (a) health care services, including reproductive health care;(b) sufficient food and water;(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. (3) No one may be refused emergency medical treatment.

[409] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Syracuse conference, Cape Town, February 2010) at 3. The level of free basic water supply was set at 25 cubic litres per person per day (*Hereafter* lpd). This figure has since been challenged and changed several times as discussed in *Mazibuko.*

[410] N Worden *The Making of Modern South Africa* (3rd Ed, Blackwell Publishers, 2000) at 137.

[411] Postscript to the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

The practical consequences of inequitable water access, and the symbolic legacy of colonial and apartheid policies to exclude non-white South Africans from the intrinsically linked resources of land and water, meant that a thoroughly new approach to water governance was necessary. With the advent of majority rule in 1994 it was clear that such a new approach must be based on the acceptance of two fundamental factors: the extreme inequality of water distribution (pre 1994), and the overall scarcity of water in terms of the total available to the country. Crucial to the form that this new approach took, was the inclusion of a right of access to sufficient water within the new Constitution.

In order to appreciate the scope and impact of this right (and therefore the implications for its inclusion), it is necessary to consider the Constitution as a whole, as well as the role that the Courts (particularly the Constitutional Court) have played in interpreting this provision. The role of the Courts is analysed in Chapter Four. But the remainder of this chapter considers the constitutional right to water within the context of the Constitution's Bill of Rights, before discussing the relevant legislation that has been passed since 1994 in order to give effect to the right to water.

Water in the new Constitution (1996)

Chapter 2 of the Constitution is the Bill of Rights. It contains a wide array of rights loosely grouped as civil and political rights (*inter alia* equality[412], freedom[413], dignity[414]), socio-economic rights (health, food, water[415], education[416]) and group rights (cultural, religious and linguistic communities[417]). These broad groupings correspond largely to the first, second and third generation human rights as categorised by Karel Vasek.[418] The extent of the protection of socio-economic rights in the Constitution is however controversial.[419] In the process of drafting the

[412] Section 9.
[413] Sections 12, 15, 16, 21.
[414] Section 10.
[415] Section 27. This section relates to health care, food, water and social security.
[416] Section 29.
[417] Section 31.
[418] K Vasak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights', *UNESCO Courier* 30:11, Paris: United Nations Education, Scientific and Cultural Organization, November 1977.

[419] See the first and second Constitution Certification judgments in relation to the inclusion and justicability of socio-economic rights: re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC); Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26: Here it was held 'At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the [1996 Constitution] does not result in a breach of the Constitutional Principles.' [Paragraph 78].

Constitution, the African National Congress (ANC) government chose to incorporate these rights, despite the counsel of the National Party, supported by the South African Law Commission, that the Bill of Rights should stick to the traditional territory of civil and political rights. It was asserted that incorporating socio-economic rights would embroil the courts in problematic issues of resource allocation – a task that should be performed by the legislature and executive.[420] This warning of tensions regarding the separation of powers is echoed in recent case decisions discussed below. This of course is not a South African issue alone[421], but raises both comparative law instances of the difficulties of enforcing socio-economic rights as well as more theoretical difficulties with their implementation, including at the international level.[422]

The ANC government chose, however, against maintaining the historical division between first and generation rights, challenging the 'unscientific' nature of the division:

> It is difficult to divide the protection of rights in negative and positive duties... Thus the protection of the right to life, recognised as a political and civil right, requires not merely forbearance on the part of the State, but also positive action.[423]

The State is required to 'respect, protect, promote and fulfill' each of the rights in the Bill of Rights[424]. The negative duty to respect is thus joined by the positive duties to protect, promote and fulfill. Yet the socio-economic rights enshrined in the Constitution are qualified[425]: Some more than others. The right to sufficient water (alongside housing, food, health care) for instance is to be realised through reasonable legislative and other measures, within the limits of the available resources of the State, and only in a progressive (not immediate) way.[426] However, the rights of children set out in section 28 are not as qualified[427]. All rights may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[428]This corresponds largely to similar qualifications within international human rights

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[420] GE Devenish *A Commentary on the South African Bill of Rights* (1999, Lexis Nexis) at 357.
[421] M Elliott & R Thomas *Public Law* (2nd ed, Oxford University Press, 2014) 31.
[422] Consider the obligations on States in the International Covenant on Civil and Political Rights (ICCPR) in contrast to those in the ICESCR: Particularly the qualification of progressive realisation in Article 2 ICESCR that finds no equivalent in the ICCPR. Discussed in detail in chapter two.
[423] G.E Devenish *A Commentary on the South African Bill of Rights* (Lexis Nexis, 1999) 370.
[424] Section 7 of the Constitution.
[425] *See* section 36 of the Constitution: General limitation clause.
[426] *See* section 27 of the Constitution.
[427] *See* section 28(1)(c) of the Constitution. No mention is made in this section of 'available resources' or 'progressive realisation'. The only limitations on the rights in this section are therefore those generally applicable in section 36 (Limitation of Rights).
[428] section 36.

law, including broadly the proportionality test employed by the European Court of Human Rights[429].

The right to sufficient water is explicitly stated in section 27(1)(b) of the Constitution, as qualified in Section 27(2):

> (1) Everyone has the right to have access to - (a) health care services, including reproductive health care; (b) *sufficient* food and *water;*[430](c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Other Constitutional rights are related, directly or indirectly, to this right, namely the right to equality,[431] right to human dignity,[432] right to life,[433] property rights,[434] right of access to housing,[435] rights of children,[436] right to have access to courts,[437] *locus standi* provisions,[438] and the 'environmental right'.[439]

Additionally, Section 39 of the Constitution (the Constitutional interpretation clause) 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 provision means that the scope of, and discourse around, an internationally acknowledged human right to water is particularly pertinent to the domestic, constitutional position in South Africa. Discourse around the scope and status of an international human right to water has

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[429] E Ellis *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999) 121.
[430] Own emphasis
[431] Section 9: Equality includes the full and equal enjoyment of all rights and freedoms, including the right to water.
[432] Section 10: Sufficient water is essential for dignified existence. See discussion at 1.5.3.
[433] Section 11: Sufficient water is also essential for life. See discussion at 1.5.1.
[434] Section 25(8). Regarding measures to achieve land, water and related reforms in order to redress the results of past racial discrimination.
[435] Section 26: The RDP set access to sufficient water as being within 200 metres of a household.
[436] Section 28
[437] Section 34: Access to court is necessary if the right of access to sufficient water is to be practically justiciable.
[438] Section 38
[439] 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.

been considered at length in Chapter Two. The influence of international law upon Section 27 of the South African Constitution is discussed at length in Chapter Four.

Law in South Africa comes from several sources: legislation; judicial precedent; customary law and international law[440]. The Constitution of the Republic of South Africa (1996) is supreme: 'Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled'.[441] Legislation and court decisions give content to the rights within the Constitution[442]and, particularly regarding socio-economic rights and environmental law, judicial decisions provide a rich source of jurisprudence.[443]

Cumulatively, the status of the Constitution, and the scope of relevant constitutional provisions, places a clear obligation on the state to respect, protect, promote and fulfill the right of access to sufficient water. However, in order to be more accurate, this right of access to sufficient water requires a definition of both *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.[444] Sufficiency has been described as being dependent on three factors, accessibility, adequate quality and adequate quantity.[445] 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.[446]

The Water Services Act 1997

Key legislation has been promulgated in order to give effect to the right of access to sufficient water. The Water Services Act 108 of 1997 (WSA) is the principal legislative mechanism to actualize the obligations of the State. Section 3 of the WSA provides that:

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[440] A Paterson & L J Kotze (Eds), Environmental Compliance and Enforcement in South Africa: Legal Perspectives (Juta Law, 2009) 12.

[441] Section 2 of the Constitution of the Republic of South Africa, 1996. *Hereafter* the Constitution.

[442] *See* Section 39 of the Constitution

[443] Following the principle of *stare decisis* ('to stand by that which is decided'), courts are bound to abide by the prior decisions of courts of an equal or higher status. Judicial decisions are binding, and the Judiciary can declare legislation unconstitutional. However, there is a clear separation between the Judiciary and the Legislature, and the Judiciary can never legislate. The relevant jurisprudence is discussed at length in chapter four.

[444] Water Services Act 1997, Water Services Regulations, Regulation 3 (b) in GN R 509, Government Gazette of 8 June 2001. See discussion below.

[445] J Scanlon et al 'Water as a Human Right?' (2004) 51 *IUCN Environmental Policy and Law Paper* 28.

[446] 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). Hereafter 'General Comment 15'.

> 3 (1) Everyone has a right of access to basic water supply and basic sanitation; (2) Every water services institution must take reasonable measures to realize these rights; (3) Every water services authority must, in its water services development plan, provide for measures to realize these rights.[447]

The WSA aims to provide *inter alia* 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'.[448] 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'.[449] 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'.[450] 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, accessible within 200 metres.[451] This minimum quota is to be provided free of charge and is designated as Free Basic Water (FBW).[452]

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'.[453] But there are no explicit provisions within the Act on how 'access' is to be achieved.

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[447] 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,* discussed below in chapter four.

[448] WSA section 2(a).

[449] WSA sections 2(b) and 2(j).

[450] WSA section 1.

[451] 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 25lpd minimum as well as the assumption of no more than 8 people per household are considered below.

[452] This commitment to free basic water was reiterated in the Free Basic Water Programme 2001: <http://www.dwaf.gov.za/dir_ws/fbw/> (Last accessed 27 July 2016).

[453] 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 to 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 *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (Wolf Legal Publishers, 2009).

The National Water Act 1998

The National Water Act 36 of 1998 (NWA) specifically aims to address the past racial and gender discrimination endured under apartheid, in relation to water.[454] It is therefore crucial in implementing the constitutional right to water, as well as Section 24 of the Constitution's provision of a right to a healthy environment. 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, and in so doing, clearly links the environmental right (Section 24) to the right to water.[455] Section 2 states the purpose of the Act 'to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled',[456] taking into account, amongst others, the basic human needs of present and future generations, equitable water access, social and economic development, public interest, growing demand for water, ecosystems and biological diversity, as well as international obligations.[457] This echoes the Brundtland Commission's emphasis on intergenerational and intra-generational equity as intrinsic to the definition of sustainable development.[458] Section 2 can therefore be understood as articulating a vision for *sustainable*[459] use of the country's water resources.

Goldblatt and Davies argue that a comprehensive definition of sustainability must extend to include financial sustainability, which they contend has led to an emphasis on cost recoveries in the water sector.[460] Indeed, Section 2 (d) requires the water use to be 'efficient', as well as

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[454] Section 2 (c) NWA. See also N Faysee 'Challenges for fruitful participation of smallholders in large-scale water resource management organisations: Selected case studies in South Africa' (2004) 43/1 *Agrekon* 52-73.

[455] L Kotze 'Access to Water in South Africa: Constitutional Perspectives from a Developing Country' (2009) 1 *Ymparistojuridiikka*, 76.

[456] The aims of the NWA are detailed in 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.'

[457] See chapter two for more detail on relevant international obligations

[458] 'The Brundtland Report', World Commission on Environment and Development (WCED) *Our common future* (Oxford University Press, 1987) 43.

[459] See Section 2 (d) NWA.

[460] M Goldblatt & G Davies 'Water, energy and sustainable economic development in South Africa' (2002) 19/3 *Development Southern Africa* 369-387, 370.

sustainable and beneficial, in the public interest.[461] Efficiency here could certainly be interpreted to include an element of financial sustainability. Such an emphasis is seen most clearly within a paradigm of water-as-commodity (as defined in chapter one). The practical consequences of this are discussed in relation to the case of *Mazibuko* in Chapter Four. But here it is simply worth noting that if Goldblatt & Davies are correct, and if financial sustainability is pursued through water governance that requires cost recovery, then the requirement in Section 2 (b) for 'equitable water access' may be hampered by the above interpretation of Section 2 (d), where (would-be) users are unable to pay for the water they need.

The normative significance of the NWA can be seen most clearly by the Act's reframing of water as 'a natural resource that belongs to all people'.[462] This stands in stark contrast to the previous Water Act (1956), which differentiated between private and public water. The practical application of this paradigm shift is articulated in Section 3, which provides for 'public trusteeship of the nation's water resources'.[463] The clear intention of the legislature here is that water resources belong to all people. According to Pienaar & van der Schyff, reference to public trusteeship here allows the doctrine of public trust to be used:

> 'as the legal tool that encapsulates the state's fiduciary responsibility towards its people and bridges the gap between the Roman-Dutch based property concept and the notion that water as a natural resource belongs to all people'.[464]

The public trust doctrine represents a novel category in South African law, allowing property subject to the doctrine (including water in this case) to be neither private, nor State-owned. Rather the property title is vested in the State as *trustee*, with the nation (all people) as *beneficiary.*[465]Clearly such a proprietary model lends itself well to the constitutional provision that *everyone* is entitled to access to sufficient water. However, the statistics offered at the beginning of this chapter remind us that this provision is still not a reality for 'all people'. The model also represents a challenge to a traditional concept of property as the object of a

[461] See Section 2 (d) NWA.
[462] NWA Preamble.
[463] NWA Section 3.
[464] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal* 179-194, 184. Note: The theme of national public trusteeship is also echoed in international in Peter Sand's extensive work. See for example P H Sand 'The Rise of Public Trusteeship in International Environmental Law' (2013) 03 *Global Trust Working Paper Series*. Available at: < http://globaltrust.tau.ac.il/wp-content/uploads/2013/08/Peter-Sand-WPS-3-13-ISSN.pdf> (Last accessed 27 July 2016); P H Sand 'Global Environmental Change and the Nation State: Sovereignty Bounded?' in G. Winter (ed.) *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006) 519.
[465] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal* 179-194, 184.

relationship between persons and things, to which ownership is paramount.[466] As such, van der Walt argues that public trusteeship acknowledges that 'property has a public, civic or "proprietary" aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that result from it'.[467] As such the use of Public Trust in the NWA illustrates a broader trend within the new constitutional settlement, shifting from 'ownership', to 'rights in property'.[468]

Van der Walt's emphasis on interdependency and common obligations echoes more in-depth discussion in Chapter Five regarding commons forms of water governance. But it is worth noting here that despite the apparent shift from ownership, towards rights in property, that public trusteeship in the NWA suggests, the continued individualistic articulation of rights, including the Constitutional right to water, seems ill-suited to foster modes of governance that reflect people's interconnectness and interreliance, as opposed to their independence and atomisation.

The confluence of the WSA and NWA 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'[469], setting the parameters within which sufficient water can be realised. However, the Constitution makes no mention of prioritising either the right of access to sufficient water above the 'environment right' 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 differing emphases of these two Acts should not encourage incompatible agendas regarding 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[470]. The imperative of providing sufficient water to citizens now, provides

[466] J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (3rd ed, Juta, 2000) 413.
[467] AJ van der Walt 'The Public Aspect of Private Property' (2004) 19/3 *South African Public Law* 676, 707.
[468] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3/2 *Law Environment and Development Journal* 179-194, 188.
[469] L Kotze 'Access to Water in South Africa: Constitutional Perspectives from a Developing Country' (2009) 1 *Ymparistojuridiikka* 79.
[470] Ibid.

a pragmatic framework within which ecological aspects of (*inter alia*) sustainability, conservation, and biological diversity must be addressed[471].

At a more practical level, the NWA also defines types of water use,[472] sets out a hierarchy of water management institutions, and establishes that the Department of Water Affairs (DWA), formerly the Department for Water Affairs and Forestry (DWAF), is responsible for all aspects of the Act's implementation. Provision is made to establish Catchment Management Agencies (CMAs) to development strategic plans to meet the NWA objectives in each Water Management Area (WMA).[473] However, it must be noted that since beginning operations, there have been significant concerns raised about the functioning and competence of CMAs, which must be addressed if NWA objectives are to be reliably met.[474]

Together, the constitutional right of access to sufficient water and its main promulgating legislation (WSA and NWA) have framed the ANC's goal of realising access to sufficient water as an individual right. 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 lack of fulfilment of the right to water, and of socio-economic rights generally, may be pursued through litigation. The following chapter will analyse examples of such litigation in action, and the ways in which the Courts have adjudicated on these rights.

3.4 Wider factors influencing the changing shape of water governance in South Africa

As the above brief history of water governance in South Africa explains, the formal transition to majority rule began in 1990. At precisely this time, internationally, economic orthodoxy was coalescing around neo-liberal approaches to resource allocation that prioritised privatisation and reliance on market forces.[475] Broadly, such approaches are summarised by the term 'globalisation'.[476] Nowhere was this more obvious than in the significant shifts that occurred in

[471] NWA, Section 2.
[472] Section 21 NWA.
[473] <http://www.inkomaticma.co.za> (Last accessed 27 July 2016).
[474] B Schreiner & B van Koppen 'Catchment Management Agencies for poverty eradication in South Africa' (2002) 27/11-22 *Journal of the Physics and Chemistry of the Earth* 969-976.
[475] JE Stiglitz 'The Post Washington Consensus Consensus' (*The Initiative for Policy Dialogue* Working Paper, 2004) 1. See Chapter One, 1.5.5 for further discussion.
[476] JA Scholte 'What is Globalization? The definitional issue – again' (2002) 109/02 *Centre for the Study of Globalisation and Regionalisation* 15.

the water sector over the last two decades.[477] These shifts include the huge increase in the privatisation of water services, including by foreign private companies.[478] In 2015, ten per cent of consumers world-wide received water from private companies.[479] But the influences of globalisation, and of neo-liberal economic orthodoxy were not limited to the private sector. In many jurisdictions, water service provision that remained in the public sector (nationally or municipally administered) became subject to commercialisation.

3.4.1 Commercialisation

Commercialisation of a municipal service occurs when the service is delivered according to rules and principles normally reserved for private commercial markets.[480] Chief among these is the principle of commodification, whereby a resource, hitherto seen as a necessity or a public good, is recast as an asset to be allocated according to a consumer's willingness and ability to pay for it.[481]

The commercialisation of a municipal service like water (and the corresponding commodification of water) does not necessarily require that water services are provided by the private sector. What it does require is that all actors involved in the service provision operate with a private-sector (market-oriented) logic. Therefore a combination of national and provincial legislation, municipalities, private companies and public-private partnerships can all contribute to a commercialised water service. Indeed, a commercialised water service, treating water principally as a commodity, need not have any private sector involvement. But such a combination of public (national, provincial and municipal) and private actors is what can be seen emerging in South Africa from the mid 1990s.[482] From this point onwards cost-recovery became imperative for water services at Local Government level. In 1994 a DWAF water and sanitation White Paper stipulated that 'where poor communities are not able to afford basic services, government may subsidize the cost of construction and basic minimum services but

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[477] J Chaisse & M Polo 'Globalization of Water Privatization: Ramifications of Investor-State Disputes in the 'Blue Gold' Economy' (2015) 38/1 *Boston College International & Comparative Law Review* 1-63, 1.
[478] D Hall & E Lobina 'Water Privatisation in Latin America' (Public Services International Research Unit). Available at: <http://www.plataformacontralaprivatizaciondelcyii.org/xDOCUMENTOS/TPP/9c-Privatizacion-David%20holl-Water%20privatisation%20in%20Latin%20America-2002.pdf> (Last accessed 27 July 2016).
[479] Ibid.
[480] EL Lynk 'Privatisation, Joint Production and the Comparative Efficiencies of Private and Public Ownership: The UK Water Industry Case' (1993) 14/2 *Fiscal Studies* 98-116, 99. For a more detailed definition of commercialisation and commodification in relation to water services, see Chapter One at 1.5.5.
[481] Ibid.
[482] S Flynn & D M Chirwa 'The Constitutional Implications of Commercializing Water in South Africa' in D A McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (Earthscan, 2005) 59.

not the operating, maintenance or replacement costs'.[483] Such an approach would seem to be in direct conflict with the recognition of water, within the Reconstruction and Development Programme (RDP), 'as a public good whose commodification would inherently discriminate against the majority poor', which was adopted in the same year (1994).[484] Indeed it is precisely this conflict, between the concept of water as a public good, and as an economic good (or commodity) that lies at the heart of the problem of realising access to sufficient water within a water-stressed country, and a globalised, capitalist economy. Yet commercialisation of water services, and the promotion of a water-as-commodity paradigm continue to be embraced.

While it is certainly possible to commercialise water services without privatising them, private multinational companies have been involved in water service provision in South Africa (if not to as great a degree as elsewhere). For instance, in 2001 the French water management company GDF Suez was awarded a five-year contract for water services in Johannesburg. But publically owned corporations, run along commercial lines, have become the typical *modus operandi* for commercialised water services across the country.[485]

The general pervading orthodoxy that encouraged moves towards commercialisation, had a significant influence on the emerging shape of post-apartheid South Africa. As Klein describes, after the release of Nelson Mandela, the negotiations between the NP and the ANC towards a transition to majority rule, were conducted on two parallel tracks: one regarding the political settlement, the other regarding the economic transition.[486] While much of the attention focused on De Klerk and Mandela's political summits, crucial negotiations around nationalisation of mineral resources, the status of the Central Bank, debt repayments, market restructuring and general macro-economic policy, were largely conducted away from public or media scrutiny.[487]

The economic negotiations were presented as 'technical' and 'administrative', in contrast to the more explicitly normative questions around the shape of a new political settlement (including for instance whether the country should become a federation, and whether minority parties should have veto powers). The effect of this 'technocratisation' of economic concerns was to embed neo-liberal logic into the so-called administrative decisions that paved the way for how

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[483] J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20, 7 (emphasis added).
[484] D McKinley 'The struggle against water privatization in South Africa' in *Reclaiming public water: Achievements, struggles and visions from around the world* (Transnational Institute, 2005) 181-190, 181.
[485] For example Johannesburg Water Ltd. delivers water services for the City of Johannesburg. See: J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20, 8.
[486] N Klein *The Shock Doctrine: The rise of disaster capitalism* (Penguin, 2007) 199.
[487] Ibid.

resources (including water) would be governed in the new South Africa. Arguably the separation of political and economic considerations at this crucial point in the country's history has damaged the government's ability to pursue transformative policies to adequately address the legacy of vast inequality and poverty. According to Snyman, it was as if the ANC were 'given the keys to the house, but not the combination to the safe'.[488]

The impact of this on post-apartheid water governance was that key legislation drafted after 1994 reflected the imperative of commercialisation. Consequently, alongside efforts towards achieving greater redistribution and equity, moves towards full cost recovery of water services can be seen. The NWA was drafted after a wide consultation exercise, which sought international advice on the 'state of the art' for water governance. By the early 1990s there was considerable consensus from states, NGOs and water sector professionals, around the efficacy of Integrated Water Resources Management (IWRM) as an appropriate development tool, the influence of which is visible in the NWA.[489]

3.4.2 Integrated Water Resources Management

The central conceptual theme of IWRM is that water resources are finite and interdependent.[490] First articulated through the Dublin Principles, IWRM contains four guiding principles, which promote a holistic approach to hydrological management, emphasising ecological, economic and social aspects.[491] Principle No. 4 is particularly notable, as it reflects the emphasis on commercialisation of water services discussed above, while also affirming that access to water is a right:

> 'Water has an economic value in all its competing uses and should be recognised as an economic good. Within this principle it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price...'[492]

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[488] Ibid at 204.
[489] B van Koppen & B Shreiner 'Moving beyond integrated water resource management: developmental water management in South Africa' (2014) *International Journal of Water Resources Development* 1-16, 6. For an introduction to IWRM see Chapter One, 1.5.4.
[490] International Conference on Water and the Environment: Development Issues for the 21st Century, 26-31 January 1992 Dublin, Ireland, *The Dublin Statement on Water and Sustainable Development*: Principle No. 1 – *'Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.'* Principle No. 2 – '*Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.'* Principle No. 3 – *'Women play a central part in the provision, management and safeguarding of water'*. Principle No. 4 – *'Water has an economic value in all its competing uses and should be recognised as an economic good. Within this principle it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price...'*
[491] Ibid.
[492] Ibid.

The inspiration that IWRM has been to water governance in South Africa since 1994 can be summarised by the above principle. The declaration of a constitutional right to water was an important response to the colonial and apartheid legacy of inequitable access to water, while affirming the economic value of water reflected the zeitgeist of commercialisation and commodification in an increasingly globalised world. But the compatibility, or otherwise of an individual right of access to sufficient water, with the concept of water as a commodity, remains a subject of controversy (as discussed in more detail in Chapter Four).

More recently, IWRM has been criticised for lacking specific objectives, and questions have been asked as to whether its emphasis on all relevant factors should remain procedural, or extend towards a more substantive agenda,[493] and whether IWRM is sufficiently sensitive to the priorities and context of developing states.[494] Partly in response to such concerns, in 2013 the DWA issued its Second National Water Resource Strategy (NWRS2), which introduced the concept of developmental water management (DWM) as the central guiding principle for water governance, rather than IWRM. DWM, it explains:

> 'reflects and builds upon [IWRM] principles of equity, environmental sustainability and efficiency that underpin the National Water Policy and National Water Act... within the context of a developmental state'.[495]

According to van Koppen & Schreiner, one important consequence of this conceptual shift is to restore 'the vital importance of the state, unlike the tendency in IWRM to put a great deal of faith in the corporate sector and reduce state capacity and influence'.[496] More specifically, diverging from IWRM, the NWRS2 rejects water management as an end in itself. Instead, it is reinterpreted as subject to the broader developmental goals of 'equitable, redistributive and broad-based social and economic development'.[497] As such, the NWRS2 represents an opportunity to rebalance post-1994 water governance between the priorities of equity, and commercial imperatives.

The NWA requires the periodic drafting and review of a National Water Resource Strategy. The NWRS2 is the latest manifestation of this. NWRS2 is a statutory instrument with the role

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[493] B Mitchell 'Integrated water resources management, institutional arrangements, and land use planning' (2005) 37 *Environment and Planning* 1335-1352.
[494] B van Koppen & B Shreiner 'Moving beyond integrated water resource management: developmental water management in South Africa' (2014) *International Journal of Water Resources Development* 1-16, 1.
[495] Department of Water Affairs. Republic of South Africa (2013). *National water resource strategy second edition: Water for an equitable and sustainable future.* Pretoria.
[496] B van Koppen & B Shreiner 'Moving beyond integrated water resource management: developmental water management in South Africa' (2014) *International Journal of Water Resources Development* 1-16, 2.
[497] Ibid at 1.

of operationalizing the NWA. It is binding on all authorities and institutions implementing the NWA.[498] Because of this, the priorities and outstanding challenges identified in the NWRS2 are important to note, because they provide specific detail, lacking in the NWA, as well as revealing how approaches to water governance, even since 1994, have developed.

Outstanding challenges identified in the NWRS2 include achieving water conservation and demand management targets, water allocation reform to redress poverty and inequality, and the decentralisation of water resources management.[499]

The first National Water Resource Strategy in 2004 (NWRS1) details the objective of the pricing strategy (as per Section 56 NWA) as follows:

> 'The objective of the pricing strategy is to contribute to achieving equity and sustainability in water matters by promoting financial sustainability and economic efficiency in water use. One objective is to ensure that the real financial costs of managing water resources and supplying water, including the cost of capital, are recovered from users. Provisions are, however, made for a range of subsidies for water users from historically disadvantaged groups to promote equitable access to the use of water resources.'[500]

The NWRS2 is perhaps less explicit about the importance of cost recovery. Instead, it focuses primarily on the financial challenges to the water sector if it is to meet the required demands for new and refurbished infrastructure. Faced with these challenges, the NWRS2 outlines the following response:

> 'While a portion of the required investment will be provided by the public sector, the private sector will have to contribute substantially. The public sector alone will not have sufficient funds to enable full value chain financial management in the sector.'[501]

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[498] See: <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=CIwWyptzLRk%3D&tabid=91&mid=496> (Last accessed 27 July 2016).

[499] Department of Water Affairs. Republic of South Africa (2013). *National water resource strategy second edition: Water for an equitable and sustainable future.* Pretoria. Available at: <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=xwAxFxjXUlg%3d&tabid=91&mid=496> (Last accessed 27 July 2016).

[500] Department of Water Affairs & Forestry. Republic of South Africa (2004). *National water resource strategy.* Available at: <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=xgL9flb2Ru0%3d&tabid=63&mid=412> (Last accessed 27 July 2016).

[501] Department of Water Affairs. Republic of South Africa (2013). *National water resource strategy second edition: Water for an equitable and sustainable future.* Pretoria. Available at: <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=XDqqXKb3yTA%3d&tabid=91&mid=496> (Last accessed 27 July 2016).

But the NWRS2 does also acknowledge that municipalities are not recovering all of their costs from their customers, and water boards are thus not recovering all of their costs from these municipalities. Therefore the aim of cost recovery remains. But how this aim coexists with the on-going challenge to redress poverty and inequality is not clear. The following extracts from interviews conducted by the author illustrate the enduring challenge of securing access to sufficient water, when people lack the ability to pay for it:

> 'We get water from a standpipe, here. I used to get it to my house, but they [Durban Municipality] sawed it off. I don't know who supplies [the water]. I don't care, as long as we've got enough... The boys came to connect it again, but it's not worth it. So I just queue up... Sometimes no water comes through. But most of the time you get enough. But it takes a long time and I have to make two journeys if I want two buckets [20 litres each] and there are others waiting'[502]

> 'Sometimes I can't go to the standpipe so I hope I've got enough water left from yesterday. If there's not much left I cook mieles [corn] or make tea, but don't sluice the toilet until the next day. I've got to eat first.'[503]

> 'Prepaid meters are the problem. The water is on and off. If you haven't paid you don't get any. Nothing.'[504]

3.5 Chapter summary and concluding comments

The grave inequalities, segregation and ingrained discrimination that characterised white political and economic power in the country since 1652 are reflected in the ways that water has been governed. Understandably, since 1994 significant attempts have been made to begin to redress inequitable water access, including the adoption of a novel, and explicit Constitutional right to water. While notable changes in the proprietary status of water have accompanied this right to water, the right has two weaknesses in particular. First, it is qualified (to be progressively fulfilled, subject to available resources). Second, it is expressed in individual terms (each individual has a right to water). As the next chapter explores, both of these aspects of the right to water have seriously affected the extent to which the Courts have applied the right, and

[502] Interview # 3. See appendices.

[503] Interview # 4. See appendices.

[504] Interview # 5. See appendices.

therefore, the extent to which the right can help realise the transformational goal of securing access to sufficient water for everyone. Furthermore, arguably, other (potentially competing) aims for water governance (namely cost recovery, and the inclusion of the private sector) are impacting on the efficacy of the right to water as a transformational tool.

Archbishop Tutu's warning (quoted at the beginning of this chapter) reminds us that without significant advances in people's living standards, for which access to water is paramount, the seismic political transition that South Africa has undergone, will count for little. Because of this it has been imperative to scrutinise how and why water governance has been reconfigured since 1994, and to expose the factors that have influenced this reconfiguration. Affirming a constitutional right to water, and introducing new normative understandings of water in relation to the public trust doctrine, can be seen as deliberate and bold attempts to remedy past water injustices. But general acceptance of a commercialised approach to water services may represent an insidious development, which ultimately inhibits the aim of achieving equitable access to water. Indeed, the spectre of commercialisation is visible behind some of the seminal decisions of the Constitutional Court, considered in the next chapter.

Charting the history of water governance in South Africa has allowed connections to be made between general developments in the country's economic, political, social and legal spheres, and specific reconfigurations in water law and water access. In particular, economic demands, first for land, then for labour, have clearly influenced water governance (as well as other areas of law) at key historical points. Undoubtedly, the pressures of international economic sanctions (and of international capitalism generally) were also a significant catalyst for the political transition to majority rule. Furthermore, the changes to water governance post-1994 reflect the emerging international consensus around the commercialisation of the water sector. The Marxian insight that the superstructure (including a nation's political, legal and cultural institutions and norms) is determined by the demands of the economy, is useful here, in order to understand the potentially determining effect that economic exigencies have on other institutional and relational configurations.

In the preface to 'A Contribution to the Critique of Political Economy', Marx writes:

> 'In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The

> mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.'[505]

Such an analysis is applied by Saul & Bond in order to explain how 'racial capitalism'[506] (as expressed through the formal structures of apartheid) thrived in the 1960s and 70s, but disintegrated in the 1980s and '90s. Despite instances of international condemnation, particularly regarding the Sharpeville massacre in 1960, apartheid created the conditions for a decade of uninterrupted economic boom, with growth rates between six and eight per cent per annum. Mining and the mineral sector was the principal growth industry, supplying a buoyant international market. The profitability of the mineral sector was greatly assisted by the maintenance of low wages for black workers, and by the suppression of organised opposition (the ANC, Communist Party, and PAC were all banned in 1960[507]). In short, during this time 'the alliance between racism and capitalism still held'.[508] By the 1980s the importance of the mineral sector was beginning to decline. At the same time, a rapidly changing capitalist system (emerging in the form of globalisation) began to require greater skilled labour, as well as a wider consumer market. In the long term, neither of these would prove compatible with the 'super-exploitation'[509] of the black population. So the slow demise of apartheid can be attributed, at least in part, to changes in the relations of production, which globalisation has heralded.

However, we should be wary of reducing such an analysis of the development of water governance in South Africa to a simplistic view of economic determinism, which ignores the myriad other factors at play. Political aims (micro-political, through to geo-political), theological/mythological narratives, eugenics, immigration, industrialisation, and urbanisation can all be identified in the historical developments outlined above. While some of these are clearly influenced by economic demands, the connection between others of these and the economy is more tenuous. Indeed, the notion of determination, and more forcefully, of determinism, come from theological ideas of predestination, and fate that minimize the role of

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[505] K Marx (1968b) 'Preface to a contribution to the critique of political economy' in *Karl Marx & Frederick Engels: Their selected works* (New York: International Publishers, 1968), 181-185, 183.

[506] J Saul & P Bond *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana, 2014) 60.
[507] N Worden *The Making of Modern South Africa* (3rd ed, Blackwell Publishers, 2000) x.
[508] J Saul & P Bond *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana, 2014) 56.
[509] Ibid 60.

human agency.[510] In applying such notions, the very human story of this period of history (and of any other) risks being lost to an overly didactic account of the results of the demands of the economy over time. Indeed, while emphasising the close relations between economic needs and socio-political structures, Saul & Bond ultimately conclude that 'the renewed political challenge from the dominated black population would prove to be the system's real Achilles heel'.[511]

Regarding the formal transition to majority rule, and the concurrent drafting of a new Constitution, Barendt's reflections on 'constitutionalism' are pertinent. For Barendt the central insight that constitutionalism offers is that:

> 'the concentration of power in the hands of any institution of government is dangerous and that it should so far as practicable be dispersed'.[512]

While generally this restates the importance of the separation of powers, in the context of the 1996 South African Constitution this is particularly significant to appreciating the breadth of rights included therein.

By explicitly including individual rights to water, food, housing, healthcare, education and social security, amongst others, the ANC (and more broadly CODESA) were signalling that such rights would no longer be subject to government power alone (and therefore, that exclusion of people from the necessities that these rights represent, would no longer be within the purview of the government alone). Rather, elevated to constitutional rights, within a hierarchy of laws, and thereby insulated from undue government interference, realisation of these rights would be pursued by the Constitutional Court, and they would therefore enjoy a greater measure of protection than if such rights had only been expressed through legislation (characterised by Ridley as 'ordinary legislation').[513]

In this context, enshrining a right to water in the new Constitution can be seen to symbolise not just an attempt to move towards more equitable water governance, but also a faith in constitutionalism to drive social transformation. It is such a faith (and arguably the subsequent

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[510] R Williams 'Base and Superstructure in Marxist Cultural Theory' in MG Durham & DM Kellner (eds) *Media and Cultural Studies* (2nd ed, Blackwell Publishing, 2006) 131.
[511] J Saul & P Bond *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana, 2014) 60.
[512] E Barendt 'Is there a United Kingdom Constitution?' (1997) 17 *Oxford Journal of Legal Studies* 137-145, 141.
[513] FF Ridley 'There is no British Constitution: A dangerous case of the Emperor's Clothes' (1988) *Parliamentary Affairs* 340-361, 352.

loss of this faith) that is discernable in the seminal early case decisions of the Constitutional Court, considered below.

Identifying changes to the ways in which water has been governed must not be allowed to obscure the continuity that these changes have ensured, until the advent of majority rule: namely the entrenchment of profound inequities through racial hierarchy, exploitation, and segregation. But it is also important to recognise recurring themes. The return of the concept of *dominus fluminus*, in modified form, within the public trust doctrine in the NWA, has encouraged the state to (re)engage with its role as custodian of water, in part through establishing CMAs, and most recently through the NWRS2.

Moreover, where certain concepts have been resurrected for positive reasons, it raises the possibility that others could also be rediscovered and profitably applied. In particular, the Roman precept of water as *res extra commercium*, and African customary law's rejection of water as private property *could* find themselves rearticulated (and reanimated) within a water-as-commons paradigm (discussed in Chapter Five).

4

Socio-economic rights in the Constitutional Court

ZY: Because our whole jurisprudence is that quota is not the way you decide these things, we are not on minimum quotas. We are saying everybody must act reasonably and reasonableness depends on the circumstances, and the situation. We are for flexibility; we are not for mechanical determination.

NC: No, but surely the notion of reasonableness becomes more complicated when it's in relation to progressive realization, because I suggest what's reasonable one day isn't necessarily reasonable the next.

ZY: Of course it does. And that is the beauty of the test. For me that's not a problem. That is the wonder of it.

Author's interview with Justice Zak Yacoob[514]

'The Court had a historic opportunity to give meaningful, lived content to the right to water. It is to their, and our country's, discredit that they have miserably failed'

Public Statement, Coalition Against Water Privatisation[515]

4.1 Introduction

Transition to majority rule in 1994, and the concomitant creation of a new and wide-ranging Constitution, has been discussed in the previous chapter. Having stated that a right of access to sufficient water exists, and having considered why such a right is included in the Constitution, it is important to reflect on the ways that this right has been interpreted, applied and adjudicated on to-date, and what potential there may be for applying this right in the future.

[514] Interview # 6. See appendices.
[515] Available at: < http://abahlali.org/node/5876/> (Last accessed 27 July 2016).

It has already been established that the right of access to sufficient water is one component of a set of socio-economic rights, within a comprehensive Bill of Right, pertaining to civil, political, environmental, religious, economic, social and cultural aspects of life and of citizen-state interaction. It is asserted that adjudication on the right to water should not be analysed in isolation from adjudication on other Constitutional rights. Therefore, the principal purpose of this chapter is to analyse generally, how the rights within the new Constitution (focussing principally, but not exclusively, on the socio-economic rights) have been interpreted and applied by the Courts (most notably by the Constitutional Court), and what the consequences of such adjudication have been for the fulfilment of those Constitutional rights. In particular, appraising the court's interactions with a spectrum of Constitutional rights, allows for a realistic evaluation of the (potential) effectiveness of the constitutional right to water, as a tool to realise access to sufficient water for everyone in the country. But, as would be expected, the Court's adjudication on the right to water will be given specific attention.

Furthermore, the central assumption of human rights lawyers – that designating a particular claim (to life, to privacy, or to water for instance) as a *right* strengthens the weight of such a claim, and thereby improves the chances of that claim being met – is challenged in light of the Court's general approach to socio-economic rights adjudication to-date.

4.1.1 Chapter outline

The chapter begins by considering different perspectives on the legitimate interpretative and adjudicative roles of the judiciary. While South African jurisprudence has developed a distinct perspective, theory and experience from other jurisdictions is also drawn upon here, in order to provide some theoretical foundations, on top of which can be placed the ensuing critique of the Constitutional Court's judgments.

Next, within the South African context, the chapter examines the relationship between the government and the judiciary, particularly regarding the public law principle of separation of powers, and a reimagined ethos of constitutionalism. The institution of the Constitutional Court is introduced, and a small number of seminal cases relating to civil and political rights, are analysed, before undertaking a detailed examination of the most important cases heard by the Court since 1997 that concern socio-economic rights, including the right of access to sufficient water. The aim of such a case examination is to identify and reflect upon the Court's interaction with socio-economic rights in the period since the adoption of the new Constitution. In so

doing, it is argued that a more or less coherent jurisprudence can be identified (with important ramifications on attempts to build effective approaches to water governance).

The practical limitations of this jurisprudential approach are then critiqued in light of the different perspectives on the legitimate role of the judiciary (identified at 4.2), and in relation to the expansive content of the Constitution's socio-economic rights, as well as the serious and enduring need to address poverty in the country. It is argued that the Constitutional Court currently finds itself in a liminal space between an initial, strong impetus to effect substantial social transformation through the promulgation of socio-economic rights, and a more managerial role of affirming the progressive realisation of such rights only to the extent that constitutional deference, judicial restraint, and limited resources allow. The resulting critique of the legitimacy of the Court's (allegedly) changing role, offers an original contribution to the literature on socio-economic rights and the Constitutional Court in South Africa, by arguing that the Court's current role is necessarily located at the threshold between a naïve form of 'transformative constitutionalism',[516] and a more restrained, if constitutionally cogent 'judicial managerialism'.[517]

Read in such a way, the judgments of significant socio-economic rights cases can be reconsidered in ways that reveal the limits of rights-based conceptions of (water) governance, (referred to as the limits of 'rights talk') and the potential, and necessity, for new/old modes of governance to (re)emerge. This original conceptual lens is referred to as 'liminal constitutionalism'.[518]

For the sake of brevity, rights pertaining to social and economic entitlements, including the provision of basic material necessities, are referred to as 'socio-economic rights'. This conforms to the usual designation in the wider literature and practitioners' materials.[519] Within the Bill of Rights,[520] the Constitution protects the following socio-economic rights: right to a healthy environment;[521] right of access to land and security of tenure;[522] right to adequate housing and

[516] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice* 575-614, 576.
[517] N Cooper & D French 'The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism' in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 111, 131.

[518] This term was coined by the author in the draft version of the following paper, jointly authored with L J Kotze: 'Liminal Constitutionalism: Transformation, Transition, and Ambiguity in the Developmental Role of the Courts in South Africa'. To be submitted to the International Journal of Constitutional Law, Autumn 2016.
[519] See D McQuoid-Mason (ed) *Street Law South Africa: Practical Law for South Africans* (2nd Ed, Juta Law Co, 2004) 299-303.
[520] See Chapter Two of the Constitution.
[521] Section 24 of the Constitution.

protection against unlawful evictions and demolitions;[523] rights of access to healthcare services, sufficient food and water, social security, including social assistance, as well as the right not to be refused emergency medical treatment;[524] children's rights to basic nutrition, shelter, basic healthcare services and social services;[525] right to education;[526] and prisoners' rights to adequate accommodation, nutrition, reading materials and medical treatment.[527]

4.2 The legitimate role of the judiciary

While the connection between this section, and the right to water, may not be immediately obvious, the themes and theories arising from a general consideration of the legitimate role of the courts, will inform the case studies below, facilitating a more critical inquiry.

The scrutinising of government action, and the interpretation of legislation, are two crucial functions of the judiciary, which are integral to the operation of public (or constitutional) law. In executing both functions, the judiciary must determine where the legitimate limits of each function lies, and which questions that are raised are appropriate or inappropriate for judicial resolution. In making such determinations the judiciary exercises 'judicial restraint'.[528]

That judges should exercise judicial restraint is not in question. Without a measure of restraint, the judiciary's encroachment onto legislative or executive territory would become commonplace, and meaningful distinctions between the separate arms of the state would disappear. But it is the degree of restraint that should be exercised, and the reasons for this, that is the subject of recurrent contention, attracting a broad spectrum of opinion. For example, in the English case of *Huang v Secretary of State for the Home Department*[529] various models for a doctrine of judicial restraint were offered, including the acknowledgment of a margin of discretion on the part of the government (which echoes the ECtHR's use of the 'margin of appreciation'), due deference, the principle/policy distinction, and relative institutional competence (explained below). But such attempts to clarify a specific doctrine of judicial restraint have been rejected by some judges and jurists, for a variety of reasons. The eminent British judge, Lord Bingham advocated that the appropriate degree of restraint must be decided on in the context of each particular case. Moreover, this decision was part of:

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[522] Section 25.
[523] Section 26.
[524] Section 27.
[525] Section 28.
[526] Section 29.
[527] Section 35.
[528] J A King 'Institutional Approaches to Judicial Restraint' (2008) 28/3 *Oxford Journal of Legal Studies* 409-441, 410.
[529] [2007] UKHL 11 [2007] 2 AC 167.

> 'the performance of the ordinary judicial task of weighing up competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'.[530]

Rejection of a doctrinal approach, in favour of a 'case-by-case' view is not without its problems though. Without an established standard for judicial restraint, it is difficult to determine how much weight is appropriate to give to a person with 'special sources of knowledge' for instance. While Bingham may not have acknowledged the underlying set of considerations operating to determine the appropriate degree of restraint, such considerations will exist nevertheless.[531]

In contrast, *a priori* models of judicial restraint provide a degree of predictability. They also make explicit the considerations that condition judicial restraint, rather than leaving observers to guess. Traditionally two main models for judicial restraint have been used, examples of which exist across common law jurisdictions.[532] The first seeks to determine appropriate judicial restraint by recourse to the distinction between law and politics. This distinction clearly implies that law is the province of the Courts, while politics belongs to the legislature and executive. Therefore questions of *law* can legitimately be addressed by the judiciary. However, while the clarity of such a binary distinction may be attractive, it is sometimes far from simple to determine whether the instant question is a legal or a political one.[533]

Similar problems are encountered when a distinction between principle and policy is used. This model implies that principles (as defined below) fall within the purview of the Courts, while the executive decides policies. Ronald Dworkin's definition of both 'policy' and 'principle' is extremely pertinent to the central focus of this chapter, and the overarching focus of the thesis:

> 'A 'policy' [is] that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community... A 'principle' [is] a standard that is to be observed, not because it will advance an economic, political, or social situation

[530] Ibid at paragraph 16.
[531] J A King 'Institutional Approaches to Judicial Restraint' (2008) 28/3 *Oxford Journal of Legal Studies* 409-441, 412.
[532] Note: King identifies a third model, using the distinction of justicability/non-justicability. However, in the author's opinion, there is sufficient overlap between this model and to two discussed above, to warrant omitting explicit discussion of this third model, since the factors determining an issue as being non-justicable largely relate to its political/(non)legal/policy aspects. See: J A King 'Institutional Approaches to Judicial Restraint' (2008) 28/3 *Oxford Journal of Legal Studies* 409-441, 420-422.
[533] See for instance: *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) 544 (Lord Keith, dissenting).

> seemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'[534]

The socio-economic rights within the South African Constitution, and the right of access to sufficient water in particular, reflect features of both policy and principle. The Constitutional requirement for *progressive* fulfilment echoes Dworkin's reference to setting a goal to be reached through 'improvement', while the subject matter of the right to water clearly has economic, political and social features to it (as discussed in Chapter Three). But, as will be argued forcefully later in this chapter and in Chapter Five, the right to water also has a strong moral dimension, the fulfilment of which is a question of justice. Therefore it would not be a simple task to immediately define a question engaging the right to water, as either a matter of policy, or of principle. This illustrates the wider definitional problems encountered with this model.

Each model can be criticised not just for the difficulties affecting its practical application, but also for its false pretence to objectivity:

> 'a belief in the capacity of judges to deduce objective and apolitical legal answers from abstract legal rules... without recourse to policy considerations.'[535]

Such a questionable claim to objectivity in legal scholarship, is critiqued in Chapter Five, in relation to the need for more fluid and responsive forms of water governance. But limited here to discussion of the legitimate role of the judiciary, it has been observed that the pursuit of rational objectivity can create 'mechanical jurisprudence', whereby the *consequences* of judicial decisions are held as being of less importance than the decision's 'correctness'.[536] This is perhaps an apt description of the judgment in *Mazibuko and Others v City of Johannesburg* (discussed below).

Responding to the problems associated with a wholesale rejection of a doctrinal approach to judicial restraint, as well to practical and normative weaknesses of more formalist models, detailed above, an 'institutional approach' to judicial restraint has been advocated. This approach asks questions about relative institutional competence: Essentially, which institution is the best among the available alternatives for resolving a given problem?[537] Posing such a

[534] R Dworkin *Taking Rights Seriously* (Harvard University Press, 1978) at 22.
[535] J A King 'Institutional Approaches to Judicial Restraint' (2008) *Oxford Journal of Legal Studies* 28/3, 409-441, 414.
[536] R Pound 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605-623.
[537] J A King 'Institutional Approaches to Judicial Restraint' (2008) 28/3 *Oxford Journal of Legal Studies* 409-441, 423.

question opens up what Lester & Pannick call a 'discretionary area of judgment'.[538] Arguably, within this area, judicial restraint can be exercised in more responsive ways than doctrinal prescription may allow for, without reverting to an entirely case-by-case approach.

Mureinik has identified three key features of this institutional approach, which together might help plot the boundary of such a discretionary area of judgment.[539] First, a 'culture of justification'[540] should encourage judges to take an expansive view of what is reviewable and justiciable. Second, significant weight should be given to views of other decision-makers. Third - acknowledging judicial concerns about trespassing beyond the limits of their institutional role - the degree of restraint shown by the judiciary should be explained with reference to relevant principles, in order to make explicit when and why restraint is required.[541]

As will become apparent from the forthcoming case discussion, issues of judicial restraint (or judicial deference) in the South African context, continue to be raised in relation to separation of powers, to the distinction between law and politics, policy and principle. But an institutional approach to judicial restraint offers a useful perspective from which decisions can be more effectively analysed. The idea of 'liminal constitutionalism' (briefly introduced at 4.1, and elaborated on below) reflects some of the themes of an institutional approach to judicial restraint, tailored to the specific constitutional and judicial circumstances of South Africa. But first of all the Constitutional Court must be introduced, and the environment in which it operates must be explained.

4.3 Establishing a new constitutional ethos in South Africa

After the efforts of CODESA and the agreement of an interim Constitution, the final Constitution of the Republic of South Africa was adopted on the 10th December 1996. The signing event was carefully orchestrated to communicate that the 'Rainbow Nation' was deliberately leaving behind its troubled past, and embracing a new and better future. Standing in Sharpeville, Gauteng, at the site where, in 1960, police shot and killed 69 peaceful protestors, former President Mandela inaugurated this new constitutional chapter with the following words:

> 'Today we cross a critical threshold. Let us now, drawing from the unity, which we have forged, together grasp the opportunities and realise the vision enshrined in the Constitution. Let us give

[538] A Lester & D Pannick (eds) *Human Rights: Law and Practice* (2nd Ed.Lexis-Nexis, 2004).
[539] D Dyzenhaus 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal of Human Rights* 11-37.
[540] Ibid.
[541] J A King 'Institutional Approaches to Judicial Restraint' (2008) 28/3 *Oxford Journal of Legal Studies* 409-441, 423-424.

practical recognition to the injustices of the past, by building a future based on equality and social justice...'[542]

A commitment to the transformational role that the new Constitution should play is clearly apparent in Mandela's exhortation. It is also reflected in the Preamble to the Constitution itself, which recognizes the need to:

'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [to] [L]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [and to] [I]mprove the quality of life of all citizens and free the potential of each person.'[543]

Such faith in the transformative ethos of the Constitution - as the site where poverty and extreme inequality should be confronted - is firmly rooted in the notion of 'transformative constitutionalism', which in South Africa has a distinct human rights dimension to it.[544] Indeed, it is essential to appreciate the importance ascribed to the Constitution, and to the Constitutional Court, within the collective psyche of the nation. Particularly in the early years of the democratic era, the Constitution and Court's commitment to meaningful and significant socio-economic transformation was perceived to be central to the success of the new South Africa:

'The new constitution obliges us to strive to improve the quality of life of the people. In this sense our national consensus recognises that there is nothing else that can justify the existence of government but to redress the centuries of unspeakable privations, by striving to eliminate poverty, illiteracy, homelessness and disease...'[545]

Put simply, the Constitution (with its accompanying Court) was heralded as integral to eradicating poverty and to reforming the experiences of the majority of the country's disenfranchised population.[546] Central to this transformed vision would be access to water and

[542] Speech delivered by the former President Mandela at the signing of the Constitution of the Republic of South Africa, 10 December 1996. Available at: <http://www.anc.org.za/show.php?id=3502> (Last accessed 27 July 2016).
[543] Preamble to the Constitution of the Republic of South Africa, 1996. Approved by the Constitutional Court (CC) December 1996, took effect on 4 February 1997.
[544] *See* E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice* 575-614, 576; K Klare 'Legal Culture and Transformative Constitutionalism' 1998 14 *SAJHR* 146-188, 153.
[545] Address by the former President Mandela to the Constitutional Assembly on the occasion of the adoption of the Constitution of the Republic of South Africa, Cape Town, 8 May 1996.
[546] See generally: P Bond *Unsustainable South Africa: Environment, Development and Social Protes*t (University of Natal Press, 2002); Fuo O 'Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser' (2014) *Stell LR* 187-189; Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-164. In South Africa, government considers the following as basic needs: sufficient water, basic sanitation, refuse removal in denser settlements,

sanitation, to health care and to housing, as evidenced by the judgments of the Constitutional Court considered below.

4.4 Role and structure of the Constitutional Court

The Constitutional Court is South Africa's highest court for constitutional matters. It became operative in 1994, under the Interim Constitution.[547] The Court's jurisdiction is limited to constitutional matters, including decisions that relate to constitutional matters. In respect of all other matters, the Supreme Court of Appeal is the highest court, and is able to hear and decide appeals on any High Court decision.[548]

The court structure is established in Chapter Eight of the 1996 Constitution, which states that all courts in the country are 'independent, and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.[549] Judicial independence is crucial to the legitimacy and impartiality of any court system, including that of a country's Constitutional Court. It has been described by Chief Justice Larmer of the Supreme Court of Canada, as 'the lifeblood of constitutionalism in democratic societies.'[550]To ensure such independence, Section 165 (3) states that 'no person or organ of the state may interfere with the functioning of the courts'[551], and Section 165 (4) requires organs of the state to assist and ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts, through legislative and other means.[552]

The Constitutional Court is comprised of the Chief Justice of South Africa, the Deputy Chief Justice, and nine other judges.[553] The President makes judicial appointments, from a shortlist of candidates. Candidates are recommended by the Judicial Service Commission, which ensures that they are sufficiently competent and appropriate for judicial office, and that the Judiciary reflects the country's gender and racial composition.[554] Judges are usually appointed to serve

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environmental health, basic energy, healthcare, housing, food and clothing. See DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 17.

[547] See <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> (Last accessed 27 July 2016).
[548] See <http://www.constitutionalcourt.org.za/site/thecourt/role.htm> (Last accessed 27 July 2016).
[549] Section 165 of the Constitution.
[550] *Beauregard v Canada* [1986] 2 SCR 56 at 70.
[551] Section 165 (3) of the Constitution.
[552] Section 165 (4) of the Constitution.
[553] Section 167 (1) of the Constitution.
[554] The Judicial Service Commission is provided for by Section 178 of the Constitution. Note that this process of judicial appointments represents a significant improvement in terms of transparency than was the case before 1994. Previously the President would appoint based on undisclosed criteria.

twelve-year terms.[555] Matters before the Constitutional Court must be heard by at least eight judges.[556]

Section 167 (3) explains the role of the Court.[557] Furthermore, Section 167 (4) confirms the Court's exclusive jurisdiction regarding the powers and constitutional status of the branches of government.[558] Regarding the role of the Court specifically in relation to the Constitution's Bill of Rights, Section 39 (2) requires that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This obligation is equally applicable to the Constitutional Court. Indeed, such is the importance of this obligation that the Constitutional Court has held itself to be 'under a general duty to develop the common law when it deviates from the objectives of the country's Bill of Rights'.[559]

4.4.1 Content and scope of the Bill of Rights

As discussed in the previous chapter (at 3.3.2), Chapter Two of the Constitution, the Bill of Rights, contains a host of rights that encompass civil, political, economic, social, and cultural areas of life and activity. The State is obliged to 'respect, protect, promote and fulfill' each of the rights in the Bill of Rights[560], which requires variously negative and positive duties. The rights are to be realised progressively, within the available resources of the State.[561] Yet socio-economic rights (including the right of access to sufficient water, housing, food, health care, amongst others) are qualified,[562] albeit that the rights of children are less so.[563] All rights may be limited

[555] M S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' *Transnational Law & Contemporary Problems* (2014) 23/35, 34-49, at 37.
[556] Section 167 (2) of the Constitution.

[557]Section 167 (3) of the Constitution: Sub-s (3) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2012.The Constitutional Court (a) is the highest court of the Republic; (b) may decide— (i) constitutional matters; and (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and (c) makes the final decision whether a matter is within its jurisdiction.

[558] Section 167 (4) of the Constitution: 'Only the Constitutional Court may— (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121; (c) decide applications envisaged in section 80 or 122; (d) decide on the constitutionality of any amendment to the Constitution; (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or (f) certify a provincial constitution in terms of section 144.'

[559] *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22.
[560] Section 7 of the Constitution.
[561] *See* section 27 of the Constitution.
[562] *See* section 36 of the Constitution: General limitation clause.

only in terms of the law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[564] International law must be taken into account and foreign law may be taken into account when interpreting the Bill of Rights[565]. So the interpretation and realisation of the rights contained within the Bill of Rights is a significant aspect of the Constitutional Court's role.

4.4.2 A new parliamentary model

One of the biggest changes to the constitutional landscape of South Africa after 1994 was the shift from Parliamentary Sovereignty to the supremacy of the (interim, then the new) Constitution. To this end, Section 2 of the 1996 Constitution affirms the Constitution as the highest law in the country, binding upon everyone.[566] As well as the inclusion of a comprehensive Bill of Rights, the 1996 Constitution provides for a new parliamentary model. Replacing the previous tricameral parliament, sanctioned under the 1983 Constitution,[567] a bicameral model was adopted, consisting of a National Assembly, and Council of Provinces. This provides that provincial interests are represented alongside national ones, and that both chambers share legislative powers.[568] Furthermore, this model provides for some separation of powers (though to a lesser extent than in other bicameral parliaments, including the United States Congress for instance).[569]

Within this bicameral model, the ANC has remained the dominant party since first gaining power in 1994, retaining between 62.1% and 69.7% of seats in the National Assembly, over five election terms.[570] The relevance of this to discussion of the role and structure of the Constitutional Court is twofold. First, the Constitution provides that constitutional amendments may be made with the support of two thirds of parliament. Therefore, the unrivalled dominance of one party could create the conditions necessary for significant amendments to be made at the behest of only that party. Second, many commentators have expressed concern for

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[563] *See* section 28(1)(c) of the Constitution. No mention is made in this section of 'available resources' or 'progressive realisation'. The only limitations on the rights in this section are therefore those generally applicable in section 36 (Limitation of Rights).
[564] section 36.
[565] *See* section 39 (b) and (c) of the Constitution respectively.
[566] Section 2 of the Constitution.
[567] See Part IV, Republic of South Africa Constitution Act, 1983: <https://en.wikisource.org/wiki/Republic_of_South_Africa_Constitution_Act,_1983> (Last accessed 27 July 2016).
[568] H Botha 'Comparative Constitutional Law in the Classroom: A South African Perspective' (2009) 28 *Penn State International Law Review* 531, 535-536.
[569] *See generally* B Ackerman 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633-725.
[570] <http://www.electionresources.org/za/provinces.php?election=2009&province=ZA> (Last accessed 27 July 2016).

the fragility of South Africa's democracy, in the face of ANC dominance and intransigence.[571] It is therefore important to consider how the ANC-dominated executive and parliament have related to the Constitutional Court.

4.5 The relationship between the Executive, the Legislature, and the Constitutional Court

Because the ANC has remained in power since 1994, consistently commanding a large majority in Parliament, it is the relationship between the government (the executive, under the leadership of the President), and the Constitutional Court, that is of particular interest here. While opposition parties within Parliament have been instrumental in directing the Court's attention towards instances of government conduct, the ability of parties other than the ANC to shape legislation is limited, due to the clear majority that the ANC government holds.

Since the Constitutional Court began to operate in 1994, there have been four Presidents: Nelson Mandela, Thabo Mbeki, Kgaleme Motlanthe, and Jacob Zuma. Motlanthe's brief presidency (from September 2008 to May 2009) was occasioned by Mbeki's resignation. Once the ANC won the 2009 general election, Zuma replaced Motlanthe as the country's President, having already won presidency of the ANC party. The following section is therefore split in to three subsections, in order to allow consideration of the Constitutional Court's relationship with the government under each of the Presidents (excluding Motlanthe).

4.5.1 Mandela

From its inception the Constitutional Court sought to confirm its role as an independent arbiter of the Constitution, insulated from the demands of the public and government. The first case heard by the Court is instructive in this regard. *S v Makwanyane* 1995[572] considered the sentence of execution for convicted murderers.[573] The case required the Court to decide whether capital punishment was consistent with the right to life, and the right to human dignity, entrenched in the Bill of Rights.[574]

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[571] [571] M S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' (2014) 23/35 *Transnational Law & Contemporary Problems*, 34-49, 38; S Choudhry "He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2010) *2 Constitutional Court Review* 2.

[572] *S v Makwanyane* 1995 (3) SA 391 (CC).

[573] Capital Punishment was provided for in Section 77 (1) (a) of the Criminal Procedure Act 1977 (Act 51 of 1977).

[574] Sections 9 and 10 of the Interim Constitution 1993. Available at: <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (Last accessed 27 July 2016). *Note*: Both rights appear in the Bill of Rights of the 1996 Constitution (Section 10, human dignity; Section 11 right to life). But the case of S v Makwanyane predates the coming in to force of the 1996 Constitution.

The position of the State regarding this question was complex. Capital punishment had not been settled during the constitutional negotiations, although the then President Mandela and other senior ANC figures were in favour of abolishing it.[575] The South African government's counsel in the case, George Bizos, conceded that the death penalty should be deemed unconstitutional.[576] However, the State's interest in the case was represented not by Bizos, but by the Attorney General of the Witswatersrand (subsequently this office would be renamed as the Director of Public Prosecutions), who argued, independently, to retain the option of capital punishment for certain situations:

> 'The death sentence meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do. It has a greater deterrent effect than life imprisonment; it ensures that the worst murderers will not endanger the lives of prisoners and warders who would be at risk if the "worst of the murderers" were to be imprisoned and not executed; and it also meets the need for retribution which is demanded by society as a response to the high level of crime. In the circumstances presently prevailing in the country, it is therefore a necessary component of the criminal justice system.'[577]

Furthermore, the Attorney General asserted that because the issue of capital punishment had not been addressed in the interim Constitution, this implied that the issue should be decided on by Parliament (and by implication, not by the Court). It was widely agreed that the Attorney General's position closely reflected the majority public opinion in the country.[578] Chaskalson P, speaking for all eleven sitting judges, acknowledged this. However, he asserted the proper role of the Court as follows:

> 'The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.'[579]

Chaskalson P argued that in light of the recent substitution of Parliamentary Sovereignty in favour of Constitutional supremacy, to hold that public opinion should be allowed to determine the question of the legality of the death penalty would represent a de facto return to Parliamentary Sovereignty, where the protection of people's rights is left once again to a

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Therefore it is the same rights, located in the interim constitution of 1993 that are referred to in the judgment of the Constitutional Court.

[575] T Roux *The Politics of Principle: The First South African Constitutional Court* (CUP, 2013) 239.

[576] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 11.

[577] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 112.

[578] M Zlotnick 'The Death Penalty and Public Opinion - S v. Makwanyane and Another' (1996)12/1 *South African Journal on Human Rights*, 70-79, 72.

[579] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 87.

mandate from the public.[580] He then concluded that the death penalty was unconstitutional, and to be outlawed accordingly.

> '[T]he death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable [...]. I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment'[581]

Section 277(1)(a) of the Criminal Procedure Act 51 of 1977, which provided for the death penalty, was ruled to be invalid, along with any similar provisions in force in South Africa. The court also forbade the government from executing any prisoners already sentenced to death, requiring them to remain in custody until new sentences were imposed.[582]

In his concurring judgment, Ackerman J emphasised the Court's commitment to the principle of constitutionalism as a bulwark against arbitrary decisions or populist sentiment:

> 'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.'[583]

The fact that by this point in time the ANC was largely in favour of the abolition of capital punishment suggests that the Constitutional Court's judgment here was politically safe to the extent that despite running contrary to public opinion, it was in keeping with the (informal) position of the ruling party. As such, the case does not represent a direct confrontation with government. But given the unpopularity of the Court's decision (at the time of the case almost 75% of South Africans supported the retention of the death penalty[584]) and the Court's strong

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[580] M Zlotnick 'The Death Penalty and Public Opinion - S v. Makwanyane and Another' (1996)12/1 *South African Journal on Human Rights*, 70-79, 73.
[581] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 95.
[582] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 151.
[583] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 156.
[584] M du Plessis 'Between Apology and Utopia – The Constitutional Court and Public Opinion' (2002) 18/1 *South African Journal on Human Rights*, 5-6.

insistence on the guiding principle of constitutionalism, it did set a precedent for its own independence, as well as for a progressive approach to constitutional interpretation:[585] attributes that have proved to be less politically palatable in subsequent judgments. The case is also noteworthy for its thoughtful consideration of universal values and the principle of *Ubuntu*, which are returned to in Chapter Six.

For Roux, *Makwanyan*e also evinces a keen self-awareness of the Court's need to navigate between public popularity (including respect for the general moral zeitgeist), and its requirement to coexist with government (in order to ensure its own longevity). As such, the judgment can be seen to constitute a 'largely successful exercise in judicial politics'.[586] The Court's alleged willingness to strike such a balance (however unconsciously) will be returned to in relation to some of the socio-economic rights cases considered below.

4.5.2 Mbeki

A second notable case regarding the Constitutional Court's relationship with government and Parliament is *Minister of Home Affairs v. Fourie* 2005.[587] The case raised the question of whether the common law definition of marriage – as between one man and one woman[588] – was constitutional. It was argued that this definition violated the rights respectively, to equality, dignity, and privacy,[589] to the extent that it prevented same-sex couples from being able to marry, and to enjoy the same benefits and status as heterosexual couples. Following the principle established in *Makwanyane* (that the operative question must be whether the Constitution has been violated in relation to the instant case, not whether public opinion would be offended), the Court was satisfied that the common law definition of marriage was incompatible with the express provisions for equality in the Constitution. Section 9, subsections (2) and (3) are particularly relevant here, defining the right and its corresponding obligations upon the State as follows:

> (2) 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,

[585] See generally M Zlotnick 'The Death Penalty and Public Opinion - S v. Makwanyane and Another' (1996)12/1 *South African Journal on Human Rights*, 70-79.
[586] T Roux *The Politics of Principle: The First South African Constitutional Court* (CUP, 2013) 246.
[587] *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC).

[588] Id. at paragraph 3: As articulated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61.

[589] Sections 9, 10, and 14 of the Constitution.

> or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[590]

Here, the ground of sexual orientation is explicitly included in subsection (3) regarding protection from unfair discrimination by the State. The Court's conclusion thus far is unsurprising. Summarising the constitutionally appropriate application of equality to the issue of marriage, Sachs J stated that:

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.[591]

However, it is what the Court ordered to be done in response to its conclusion that is noteworthy about this case in relation to the current discussion. Therefore it is the Court's so-called 'remedial jurisprudence'[592] that is now considered. In particular, it is the varying approaches to the relative importance of Separation of Powers, reflected in the minority and majority judgments in *Fourie* that are most pertinent to the socio-economic rights cases discussed below, which are to be reflected on in preparation for a thoroughly contextualised analysis of the Court's adjudication on the right to water.

As in the case of *Makwanyane*, here the Court's decision regarding the unconstitutionality of the relevant legislation was unpopular among the public in general, which included an organised and vocal opposition to same-sex marriage.[593] However, this time the ANC was ambivalent at best, on the issue of marriage equality. Indeed, shortly before the *Fourie*

[590] Section 9 (2) and (3) of the Constitution.
[591] *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC). Paragraph 60.
[592] T Roux *The Politics of Principle: The First South African Constitutional Court* (CUP, 2013) 375.
[593] N Barker 'Ambiguous symbolisms: recognising customary marriage and same-sex marriage in South Africa' (2011) 7/4 *International Journal of Law in Context*, 447.

judgment, the then Deputy President, Jacob Zuma amongst other senior ANC members, had expressed opposition to same sex marriage.[594]

Rather than striking down the unconstitutional section of the relevant legislation (here Section 30(1) of the Marriage Act 1961[595]), as was the approach in *Makwanyane*, the order of the Constitutional Court included that:

> '[t]he common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples... The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.'[596]

Furthermore,

> '[I]f Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.'[597]

Clearly the Constitutional Court was aware of the risks involved in choosing this remedial action, and deferring to Parliament, in favour of the more direct approach in *Makwanyane*:

> 'Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice.'

In pre-empting Parliament's possible failure to act, by directing the rephrasing of the relevant section of the Marriage Act after 12 months, the Court could be fairly certain that neither of the above eventualities would arise. However, it is worth considering in more detail the Court's sensitivity to the second consequence listed above, namely that the claimants' remedy must

[594] T Roux *The Politics of Principle: The First South African Constitutional Court* (2013, CUP) 377.
[595] Act 25 of 1961.
[596] *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC). Paragraph 162.
[597] Ibid. Paragraph 161.

bring about *practical* change. That this represents the most basic requirement of transformative constitutionalism is clear: Applying the provisions of the Constitution 'in action' must lead to positive, substantive change.[598] But the Court's concern that the transformative aspect of its judgment may be lost in the face of parliamentary inaction is something that will be reflected on in more depth below, particularly in relation to the dissonant reality for many, of having a constitutional right to water, and simultaneously not having access to sufficient water. Sachs J's concerns, quoted above, clearly indicate that the Court is not ignorant of the deeply troubling nature of such disconnection between what could be described as 'rights as declared, and right as lived'.

Notwithstanding this, the approach in *Fourie* (to allow Parliament to correct the defect identified in the relevant Act, in a way of its choosing), was variously defended as compatible with the doctrine of Separation of Powers, and criticised by the minority judgment as unduly deferent. Despite the difference of opinion, the majority judgment could be understood as reflecting an 'institutional approach' to judicial restraint: the Court taking an expansive view of what is reviewable and justiciable, while affording significant weight to the views of Parliament as the other decision-maker, and doing so explicitly. It could also be interpreted in light of the distinction between principle and policy: Ensuring that the principle of marriage equality (characterised as a matter of justice or fairness) is protected, while deferring to the legislature regarding questions of policy (see discussion at 4.2).

The term 'separation of powers' or 'trias politica' was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, in the 18th century, and first expressed in his book *The Spirit of the Laws*.[599] The doctrine provides that the political power of the State is divided into legislative, executive and judicial branches, which must be separate and act independently. The aim of this is to prevent the concentration of power and thereby, to promote liberty and accountability.[600] In the context of the South African state, the three arms of the State are defined as Parliament (legislature), President and Executive, and the Judiciary. The scope and remit of each is detailed in chapters Four, Five, and Eight respectively of the 1996 Constitution. Section 44 asserts that the passing and amending of legislation is within the purview of Parliament.

[598] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice* 575-614, 575.
[599] A M Cohler (Ed) *Montesquieu: The Spirit of the Laws (Cambridge Texts in the History of Political Thought)* (CUP, 1989) 21.
[600] Ibid.

Sachs J, giving judgment for the majority in *Fourie*, sought to respect and maintain this separation of powers between the role of the Court, as interpreter of the Constitution, and Parliament as the author of legislation, by preserving Parliament's legislative role regarding the issue of marriage:

> 'This judgment serves to vindicate the rights of the applicants by declaring the manner in which the law at present fails to meet their equality claims. At the same time, it is my view that it would best serve those equality claims by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter. In this respect it is necessary to bear in mind that there are different ways in which the legislature could legitimately deal with the gap that exists in the law.'[601]

In so-doing, according to Roux, the Court's order communicated to Parliament, and to the public 'we are confident that when the people's representatives reflect upon this matter in Parliament, armed with the guidance we have given them, they will arrive at the position required by constitutional principle'.[602] But such confidence in, and deference towards Parliament's legislative role was not held unanimously. By contrast, Justice O'Regan explains:

> 'The doctrine of Separation of Powers is an important one in our Constitution but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.'[603]

Rather, for O'Regan, the principal issue is whether the Constitution has been violated. If the Court has satisfied itself that this is the case, then it is duty-bound to remedy the violation. Consideration of Separation of Powers is subordinate to this duty, not because the Court has concluded such, but because the Constitution requires it:

> 'It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty.'[604]

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[601] *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC). Paragraph 139.
[602] T Roux *The Politics of Principle: The First South African Constitutional Court* (CUP, 2013) 258.
[603] *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC). Paragraph 170.
[604] Ibid at paragraph 171.

Despite O'Regan's dissent, the Court's order stopped short of providing immediate relief for the applicants. But the following year, Parliament enacted the Civil Union Act 2006[605] 'to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership'.[606]This allowed for same-sex marriages, since no distinction is made in the Act between same-sex and heterosexual couples. Again, for Roux, this is illustrative of the Constitutional Court's self-awareness regarding the potential consequences of their decisions upon the continued independence of the Court itself. Following O'Regan's argument, the Court clearly had the *constitutional* power to amend the Marriage Act. But did it have the *institutional* power?[607] *Viz.* Was the Court sufficiently confident in its own position, in the face of government hostility and unpopularity in the public perception, to act to the exclusion of Parliament? If Roux's analysis is correct, the answer to this would be 'no'. Also, ten years after *Makwanyane,* this case was heard within a different political/constitutional climate. The country was under different Presidential leadership (albeit it that the government has remained ANC), and President Mbeki's relationship with the courts was strained.[608] Arguably, by 2005 the 'honeymoon' period of South Africa's new democracy had waned, and the transformative work of the Court was becoming correspondingly less strident (albeit perhaps no less effective in the *Fourie* case, in light of Parliament's positive legislative response).

4.5.3 Zuma

Tensions between the government and Constitutional Court since Mbeki's resignation in 2008 have deepened. When President Jacob Zuma took power in 2009, there was concern that he would actively try to limit the Constitutional Court's influence.[609] On several occasions before and after taking office, Zuma and other senior ANC officials expressed concern with what they considered to be the Court's 'judicial politicking'[610] in opposition to the government. Straining credibility, the ANC Deputy Minister of Correctional Services, Ngoako Ramthlodi, in 2011, accused the Judiciary and civil society of:

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[605] Act 17 of 2006.
[606] Ibid Section 2 (a).
[607] T Roux *The Politics of Principle: The First South African Constitutional Court* (CUP, 2013) 376.
[608] 'Mbeki Challenges Court Ruling to Defend Reputation' *AFP* 23 September 2008. Available at: <http://www.worldipcomgroup.com/newsafp/africa/080923084418.6lnqsxcy.html> (Last accessed 27 July 2016).
[609] M S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' (2014) 23/35 *Transnational Law & Contemporary Problems* 34-49, 35.
[610] C Hartman et al 'Sustainable Governance in the BRICS; Country Report South Africa 2 (2013). Available at: <http://sgi-network.org/brics/pdf/Country%20Report%20South%20Africa.pdf> (Last accessed 27 July 2016).

> 'sustained and relentless efforts to immigrate *[sic]* the little power left with the executive and the legislature... to curtail efforts and initiatives aimed at inducing fundamental changes'.[611]

It is worth noting that Zuma has had personal battles with the courts and national prosecutors in recent years (he was acquitted in 2006 of raping a female domestic worker,[612] then investigated for corruption in 2007 – the charges were subsequently dropped, but this decision has recently been appealed[613]), although whether these experiences have influenced his professional view of the courts is not certain. His comments in 2012 that 'we don't want to review the Constitutional Court, we want to review its powers'[614] seem incongruent with the Court's institutional independence, as enshrined in the Constitution, and discussed above. Nevertheless, in the same year, following several court decisions against the government on issues of executive power,[615] the ANC's Department of Justice issued a 'Discussion Document on the Transformation of the Judicial System'.[616] The following extract from this document is instructive. It summarizes the government's appraisal of the current role of the Constitutional Court, while betraying its annoyance with some of the Court's decisions:

> 'Over the past few years, many in the Judiciary have shown a profound understanding of constitutional imperatives and set out to defend the basic law of the land. This includes many judgments, particularly by the Constitutional Court, that have reflected progressive interpretation of the Constitution and social rights in particular. Government continues to respect and implement the courts' decisions unconditionally. Notwithstanding these achievements, in an evolving polity, the issue of appropriate balance among the three centres – the Judiciary, the Executive and Parliament – is one that will continually be contested.
>
> There have been some instances where certain court decisions are perceived not to fully advance the transformative purpose of the Constitution. There is therefore a need for open and

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[611] 'Double Speak about Judicial Reform in South Africa Raises Alarm Bells', *ISS Africa* 23 March 2012. Available at: <http://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells> (Last accessed 27 July 2016).

[612] 'Zuma found not guilty', *Mail & Guardian* 8 May 2006. Available at <http://mg.co.za/article/2006-05-08-zuma-found-not-guilty> (Last accessed 27 July 2016).

[613] 'Prosecutors drop Jacob Zuma corruption charges', The Guardian 6 April 2009. Available at: <http://www.theguardian.com/world/2009/apr/06/zuma-corruption-charges-dropped> (Last accessed 27 July 2016). See also: < http://ewn.co.za/2016/05/23/NPA-to-appeal-ruling-that-charges-against-Zuma-be-reinstated> (Last accessed 27 July 2016).

[614] 'Double Speak about Judicial Reform in South Africa Raises Alarm Bells', *ISS Africa* 23 March 2012. Available at <http://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells> (Last accessed 27 July 2016).

[615] See *Langa v. Hlophe* 2009 (4) SA 382 (SCA); *Glenister v. President of South Africa II* 2011 (3) SA 347 (CC); *Justice Alliance of South Africa v. President of the Republic of South Africa* 2011 (5) SA 388 (CC); *Democratic Alliance v. Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA).

[616] Available at < http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf > (Last accessed 27 July 2016).

> constructive debate on the decisions of the courts and how they seek to advance the vision of a non-racial, non–sexist and prosperous democratic society.[617]

The 'transformative purpose of the Constitution', mentioned above is defined in the same document as including:

> (a) The entrenchment and realization of democratic values enshrined in the Constitution.
>
> (b) Eradicating poverty and underdevelopment, within the context of a thriving and growing first economy, and the successful transformation of the second economy.
>
> (c) Providing adequate safety and security measures for all people in South Africa to be and feel safe.
>
> (d) Building a strong and democratic state that truly serves the interests of all people and promotes social justice
>
> (e) Contributing to the achievement of the African renaissance and a better world.[618]

As will be apparent in the analysis of socio-economic rights cases below, some criticism of the Court's failure to fully advance an agenda of transformation is justified. But, levelled by government, such criticism has been interpreted as 'code for the ANC seeking more compliant courts'.[619]

Most recently, in March 2016, the Constitutional Court decided that Zuma had acted unconstitutionally when using public money to pay for non-essential upgrades to his private residence; ordering him to repay the money.[620] This decision may serve to deepen any personal animosity the incumbent President has towards the Court. But it would be erroneous to conclude that the Constitutional Court is showing signs of capitulation in the face of government pressure. Indeed, Chief Justice Mogoeng Mogoeng took the opportunity in this most recent case to remind Zuma, without compromise, of the President's grave responsibility:

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[617] Ibid at 10 (3.3.3 – 3.3.4).
[618] Ibid at 4 (2.3.3).
[619] M S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' (2014) 23/35 *Transnational Law & Contemporary Problems* 34-49, 40.
[620] 'Jacob Zuma breached constitution over home upgrades, South African court rules', *The Guardian* 31 March 2016. Available at: <http://www.theguardian.com/world/2016/mar/31/jacob-zuma-ordered-repay-upgrades-nkandla-home-south-african-state-funds> (Last accessed 27 July 2016).

> 'The president is the head of state, his is the calling to the highest office in the land... The nation pins its hopes on him to steer the country in the right direction.'[621]

While it remains the case that the relationship between the government, the ANC-dominated Parliament, and the courts is delicate at best, and that under Zuma's presidency, a truly independent judiciary is felt as 'a thorn in its side',[622] it is also clear that the courts (and the Constitutional Court in particular) continue to function as a site of government accountability, and a champion of the Constitution. Explanations of case decisions, based on considerations of deference to Separation of Powers, judicial activism, and even the Court's own existential concerns, will continue to be developed and applied to the discussion of socio-economic rights cases below.

Notwithstanding the ensuing discussion of whether the Constitutional Court has acted in a sufficiently transformative way in certain cases (including most relevantly for the purpose of the present study, regarding interpretation of the right of access to sufficient water), it is clear that the Court has embraced its role as arbiter and protector of the Constitution with diligence. In light of this record of institutional independence, and in particular, being mindful of the Court's willingness to hold government to the standards that the Constitution imposes, attention now turns to the judgments of the Constitutional Court that specifically relate to socio-economic rights (including the right of access to sufficient water), in order to refocus on the central problematic of this thesis: the extent to which a right to water can achieve access to sufficient water for everyone.

4.6 Case decisions on socio-economic matters: an illusive (transformative) narrative?

The Constitution's Bill of Rights imposes significant positive duties on government: to protect; promote; and fulfil the rights therein (as well as the negative duty to respect). Since the protection, promotion and fulfilment of economic and social rights potentially places onerous, and costly obligations on government (to provide housing, healthcare or water for instance), the interpretation and application of such rights (here labelled socio-economic rights) are particularly likely to affect the relationship between the Constitutional Court (as the interpreting power) and the government and Parliament (as the branches of the State charged variously with fulfilling the rights at issue, and with passing legislation, and agreeing budgets to enable such).

[621] Ibid.
[622] M S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' (2014) 23/35 *Transnational Law & Contemporary Problems* 34-49, 38.

Given the high potential for adjudication of socio-economic rights to create tensions with the government and legislature, the foregoing general discussion of the relationship between the courts and the other branches of the State has provided the context within which to interrogate key socio-economic rights cases. Of particular importance will be how these court decisions take into account the corresponding obligations of the State. To omit the preceding discussion would risk scrutinizing the court's judgments on socio-economic rights in isolation from the political and constitutional context in which decisions have to be made. It would also ignore the insightful shift from greater to lesser direct legislative intervention, evidenced in *Makwanyane*, then *Fourie.*

It is also important to clarify that while the inclusion of socio-economic rights in the 1996 Constitution was a subject of some controversy (see discussion at 3.3.2), the question of whether these rights are justiciable was directly addressed during the certification proceedings before the Constitutional Court:

> '[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'[623]

Therefore, further discussion regarding whether these rights should be justiciable will not be pursued here, although it should be noted that globally, the role of socio-economic rights remains highly contentious. Rather, attention will focus on how particular socio-economic rights have been adjudicated on by the Constitutional Court, and to what ends.

4.6.1 *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997)[624]

The first case for consideration here immediately reminds us that while the Bill of Rights contains a broad range of socio-economic rights, these rights are qualified, and are to be realised progressively, within the available resources of the State (see 3.3.2 and 4.3.1). This case

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[623] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at paragraph 78.

[624] *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

was the first to raise the scope of Section 27 (1) - (3), access to healthcare, and to emergency medical treatment,[625] before the Constitutional Court. The appellant was a 41 year old, unemployed man who suffered from diabetes, ischaemic heart disease, cerebrovascular disease and chronic renal failure. The appellant began undergoing dialysis treatments in a public hospital. However, due to the high demand, lack of equipment and the patient not qualifying for continuous treatment, his dialysis was stopped. The appellant consequently began the same treatment in a private hospital, but quickly became unable to finance this himself.

He appealed to the Constitutional Court under Section 27(3) *in casu* that he was refused emergency medical treatment, as well as regarding Section 11; the right to life. Counsel for the appellant compared the appellant's situation to the case of *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another*[626] before the Supreme Court of India. In this case, the right to life in the Indian Constitution was interpreted as including a positive duty on the State 'to extend medical existence for preserving human life'. Therefore it was held that by refusing treatment, the patient was denied the right to life. [627] However, before the Constitutional Court, Chaskalson P noted the differences between the Constitutions of South Africa and India, adding that the expansive, positive interpretation of the right to life in the Indian context was warranted because of the relative lack of separate economic and social rights, compared to those in the South African Bill of Rights:

> 'In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27.'[628]

Furthermore, the Constitutional Court stated that on the instant facts the appellant did not require *emergency* treatment. He was suffering from chronic disease and required dialysis two or three times a week, therefore the Court held that this case did not fall within section 27(3), but better related to section 27(1) and (2), under the right of access to health care services. These sections entitle everyone to have access to health care services provided by the state 'within its available resources'.

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[625] Section 27 (3) of the Constitution: 'No one may be refused emergency medical treatment'.

[626] (1996) AIR SC 2426.
[627] Ibid at 2429.

[628] *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) (CCT32/97) [1997] ZACC 17, at paragraph 19.

The Court's reasoning here confirmed that the obligations upon the State, which Section 27 (1) and (2) entail, do not require *immediate* fulfilment, and that the resources currently available will therefore dictate the degree to which the appellant is entitled to these rights at the present time. The stark reality was that '[a]t present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public.'[629]

Furthermore, by acknowledging that the available resources in relation to such rights cannot but shape the extent to which the rights can be made manifest at any one point in time, the Court reaffirmed that decisions about the allocation of such scarce resources should remain with the politicians and policy makers, and not with the courts:

> 'The provincial administration which is responsible for health services in KwaZulu- Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.'[630]

This represents an early indication of the Constitutional Court's sensibilities around the Separation of Powers, as later articulated by Sachs J in *Fourie* (discussed above). Here, the correct interpretation of Section 27 (1) and (2) did not require a co-option of executive (policy-making) power by the Court. Consequently the Court concluded that the state had not breached any of its constitutional duties and therefore the appellant was not entitled to relief.

However, despite this decision, which the Court acknowledged was a tragedy for the appellant, Chaskalson P reiterated the Constitutional Court's commitment to social transformation, albeit mindful of the limitations facing this task, which the instant case cruelly illustrated:

> 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be

[629] Ibid at paragraph 24.
[630] Ibid at paragraph 29.

> human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'[631]

This case therefore affirms the Constitutional Court's transformative impetus, while acknowledging that without sufficient resources, the prospects for meaningful transformation are severely constrained. Such a tension will become a familiar one as subsequent cases are considered. Moreover, this decision reinforced the constitutionally orthodox separation of roles between the courts and the executive, whereby decisions about the size and share of resources remain within the remit of the executive. Not to ignore the personal human consequences of these constitutional questions, the appellant, Thiagraj Soobramoney died from renal failure a few days after the Court's decision.[632]

4.6.2 *Government of the Republic of South Africa v. Grootboom (2000)*[633]

This is undoubtedly the most famous and celebrated decision of the Constitutional Court to-date. Any attempt to identify a distinct jurisprudential approach to the Court's socio-economic rights decisions must acknowledge the guiding role that the concept of *reasonableness* has played since this seminal case. Yet, as will be argued, there is a troubling disconnection between the prominence given to the Court's reasoning and decision in *Grootboom*, and the remedial consequences for the parties involved, which must draw into question the transformative limits of this and other socio-economic rights decisions.

Mrs Grootboom and others (the respondents), living in an informal settlement in appalling conditions, without water, sewerage or refuse removal services,[634] decided to illegally occupy a plot of land due to be the site of a new low-cost housing development. In due course the respondents were evicted: their shacks were bulldozed, and their possessions lost in the process. The respondents were rendered homeless as a result of the eviction, and applied to the High Court 'for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation'.[635] The appellants (the Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council, and Oostenberg Muncipality) were ordered to provide the respondents

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[631] Ibid at paragraph 8.
[632] 'The High Cost of Living' *The Mail & Guardian* 5 December 1997. Available at < http://mg.co.za/article/1997-12-05-the-high-cost-of-living> (Last accessed 27 July 2016).
[633] [2000] ZACC 19; 2001 (1) SA 46 (CC).
[634] *Government of the Republic of South Africa v. Grootboom & Others*, 2001 (1) SA 46 (CC). Paragraph 7.
[635] Ibid paragraph 4.

with at least a minimum standard of shelter, which included 'tents, portable latrines and a regular supply of water (albeit transported)'.[636] The appellants challenged the correctness of this order. The case was subsequently heard in the Constitutional Court. Consequently, the majority of the legal argument in *Grootboom* relates to interpreting the scope and application of the respondents' constitutional right to housing, and the corresponding State obligations that this requires.

The Court accepted that the respondents had *no* right to claim shelter immediately, since the stated nature of the right to housing obliged the State to 'act positively and proactively within its available resources to ameliorate the plight of indigent people living in deplorable conditions,'[637] but it did not require the *immediate* fulfilment of the respondents' rights. The Court was critical of the government's approach to housing policy since 1994, which they inferred was overly focussed on commercial concerns, including prioritising the 'normalisation of the market for housing in townships':[638]

> 'The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development in the Act. In other words there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.'[639]

As a result of the State's failure to enact housing policy to the standards required by the Constitution, the Court set aside the order of the High Court, and issued an order to create and implement a housing programme that included provision of relief for those people who had not yet been provided with accommodation.[640] A more detailed analysis of the Court's reasoning, as it relates to socio-economic rights more generally, is undertaken below.

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[636] Ibid.
[637] M Mogoeng 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *Singapore Academy of Law Journal* 1-16, 12.
[638] J Saul & P Bond *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana, 2014) 191.
[639] Ibid paragraph 52.
[640] M Mogoeng 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *Singapore Academy of Law Journal* 1-16, 12.

Yacoob J, who provided the lead judgment, emphasised the need to understand all socio-economic rights as being interconnected, and embedded within the nation's social and historical context.[641] Consequently, he identified apartheid as the underlying cause of Mrs Grootboom's plight:

> 'Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.'[642]

While this was undoubtedly the case in general historical terms (echoing the author's account of apartheid's legacy, set out in the previous chapter), the immediate issue before the Constitutional Court was rather more specific, namely the scope of Section 26 of the Constitution; the right to housing:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.[643]

It is appropriate to quote Yacoob J at length here regarding the correct interpretation of socio-economic rights, since, as will be become apparent, his interpretation has become an influential schema, followed in subsequent cases:

> 'Like all the other rights in Chapter 2 of the Constitution (which contains the Bill of Rights), section 26 must be construed in its context. The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote

[641] Ibid paragraphs 24 & 25.
[642] Ibid paragraph 6.
[643] Section 26 Constitution of the Republic of South Africa, No. 108 of 1996. Additionally, Section 28 (1) (c) was relevant to the particular rights of the children who had been living in the informal settlement: 'Every child has the right to basic nutrition, shelter, basic health care services and social service'. Note: The third subsection referred to above was not directly relevant to the case, as Mrs Grootboom's eviction had been lawfully executed.

> access to adequate housing and has three key elements. The state is obliged: (a) to take *reasonable* legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right... The third subsection provides protection against arbitrary evictions.
>
> Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context."[644]

Particularly notable here is the State's obligation to take reasonable measures, within the confines of the resources available to it, to improve the degree to which the relevant right is realised. It is undoubtedly the case that, in practice it may be difficult to identify exactly what resources are available at any one point in time, and it may be complicated to effectively monitor the progressive realisation of particular rights (ensuring that the degree to which respective rights are fulfilled does not plateau or regress). Therefore elements (b) and (c) may represent considerable practical challenges. But both elements can be recognised as epistemologically objective: 'Available resources' is a quantifiable concept, in theory at least, while 'progressive realisation' describes a trajectory directed towards on-going improvement, which is also theoretically capable of measurement, despite complexity regarding what metrics to use. In contrast, the State's obligation to take *reasonable* (legislative and other) measures eschews the objective attributes of elements (b) and (c). What constitutes *reasonable* measures requires subjective consideration. This is not to say that element (a) should be dismissed as an arbitrary standard. Rather, Yacoob's approach above prescribes that what counts as reasonable measures will depend on two contexts; the textual, and the social/historical. But the objective/subjective distinction here does suggest that it is reasonableness that is the principal concept with which the Constitutional Court interrogated the scope of the right to housing in the instant case, and would apply in subsequent socio-economic decisions. Yacoob J defined reasonableness as follows:

> '[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted or whether public money would have been better spent. The question would be whether the measures that have been adopted are

[644] *Government of the Republic of South Africa v. Grootboom & Others*, 2001 (1) SA 46 (CC). Paragraphs 21 & 22. *Emphasis added.*

> reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.'[645]

Given that the right to water is the central focus of this thesis, a more detailed consideration of reasonableness as a legal principle is undertaken specifically in relation to the case of *Mazibuko* below. But it is important to note here that what is prescient to the application of reasonableness as per Yacoob's definition, is that it allows for the accommodation of a legitimate diversity of views within the 'limits of reason'.[646] Explained in light of an institutional approach to judicial restraint, significant weight is afforded to these views, and consequently the Court's restraint will be in evidence unless such views (and the actions stemming from them) are outside the scope of what is reasonable.[647]

In the case of *Grootboom*, the State's failure to provide for situations akin to those that Mrs Grootboom and others found themselves in was deemed *un*reasonable. In other words, the Court held that the State had not fulfilled its obligation to take reasonable legislative and other measures to progressively realise the respondents' rights. What the Court did not do, however, was to stipulate what such reasonable measures would have been. This represents the fundamental distinction between a 'minimum core' (sometimes referred to as a minimum quota) approach to realising socio-economic rights, and the approach of reasonableness, which the Constitutional Court pioneered in *Grootboom*, and has favoured ever since. As the author's interview with Justice Yacoob illustrates (a portion of which is quoted at the beginning of this chapter), the Court believed that adoption of a jurisprudence of reasonableness provides greater flexibility - allowing for a greater permissible range of policy decisions, than would the 'mechanical determination'[648] of minimum quotas. Moreover, this faith in the benefits of reasonableness, according to Yacoob J, has remained steady. Speaking to me shortly after retiring from the bench in January 2013 Justice Yacoob said 'I think that all the judgments of

[645] Grootboom (CC). Paragraph 41.
[646] C Hoexter 'The future of judicial review in South African administrative law' (2000) *South African Law Journal* 484, 509.
[647] Constructed in this way, the reasonableness 'test' echoes the English Public Law concept of 'Wednesbury unreasonableness', whereby a decision is deemed to be Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it. From the Grootboom judgment it would seem that the test for declaring an action 'unreasonable' in the South African jurisdiction is less stringent than that in England and Wales. i.e it is more likely that the actions of a public authority in South Africa will be deemed unreasonable, than that the actions of an English public body would be deemed Wednesbury unreasonable. But nevertheless, the reasonableness 'test' in South Africa still provides considerable scope to the public body. See: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.
[648] Interview # 6. See appendices.

our court while I was there have been consistent'.[649] Certainly, the Court's adoption of reasonableness is central to the *Mazibuko* judgment on the right to water, discussed below.

It is important to note that whatever the perceived benefits of applying a 'reasonableness approach' to socio-economic rights cases, this represents a divergence from the approach developed by the United Nations General Committee on Economic Social and Cultural Rights (CESCR), whose task it is to interpret the obligations of State-parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee, and Covenant are discussed in more detail in Chapter Two. But in relation to the right to housing, raised in *Grootboom*, the ICESCR is directly relevant. Article 11.1 provides that:

> 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'[650]

At the time of the *Grootboom* judgment, the Republic of South Africa was a signatory to the ICESCR, but had not yet ratified it. Ratification subsequently took place in January 2015.[651] Despite this, Section 39 of the Constitution obliges courts to consider international law (whether or not it is binding upon the South African State) when interpreting the Bill of Rights, an obligation elaborated on by Chaskalson P in *Makwanyane*:

> 'public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].'[652]

[649] Ibid.
[650] Article 11.1 ICESCR. Emphasis added.
[651] See < https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (Last accessed 27 July 2016).
[652] ***S** v Makwanyane* 1995 (3) SA 391 (CC). Paragraph 35.

Therefore the approach taken by the CESCR to interpreting State-parties' obligations regarding the right to housing in the Covenant was important to consider. The CESCR's approach is summarised below as follows:

> 'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre.'[653]

The CESCR's explicit adoption of minimum core obligations would seem an appropriate approach for the Constitutional Court to follow. Yet this is rejected for three reasons in the instant case, which Yacoob J makes clear. First, the CESCR's conclusion was based on 'extensive experience' that allowed for an accurate determination of what a minimum core should be. The Constitutional Court, according to Yacoob J lacked comparable information, and could therefore not determine such a minimum core.[654] Second, it was stated that the 'right to housing', set out in the ICESCR differs from the 'right of access to housing' in Section 26 of the Constitution. Yacoob J contested that determination of a minimum core in the more nuanced context of the Constitutional right 'presents difficult questions':[655]

> 'This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.'[656]

[653] *Government of the Republic of South Africa v. Grootboom & Others*, 2001 (1) SA 46 (CC). Paragraph 29.
[654] *Government of the Republic of South Africa v. Grootboom & Others*, 2001 (1) SA 46 (CC). Paragraph 32.
[655] Ibid at paragraph 33.
[656] Ibid.

Third, the diversity of needs in relation to individuals' right of access to housing seems to undermine any claim that there is one (single) minimum core[657], leading the Court away from the adoption of such an approach, and towards the more flexible concept of reasonableness.

While the *Grootboom* judgment has been broadly celebrated, it has also been criticised. Some commentators have interpreted the Court's eschewal of a minimum quota approach as fatal to fulfilling its own transformative role, as mandated by the Constitution. Shortly after the judgment, Bilchitz pertinently criticised Yacoob J's claim that the diversity of needs regarding housing disqualifies a 'minimum core' approach:

> 'The fact that some need access to land, some need land and houses and others need financial assistance, is not relevant to the determination of the minimum core. Each is entitled to the same level of provision; the differential needs people have will determine in what way the government is required by the Constitution, if at all, to assist them.'[658]

Bilchitz contests that it would be perfectly workable to set a minimum core that provides clarity regarding the particular obligations of the State towards each individual:

> Let us specify the minimum core obligation imposed by s 26 as requiring the government to provide each person in South Africa with shelter that protects him or her from the elements. It then becomes clear that those who have such shelter have no basis upon which to claim it from the government. Those who have land but no shelter, could claim building materials for instance. Those with neither land nor shelter, could claim both. But the general obligation of the state does not vary.'[659]

Certainly the rejection of a minimum core approach largely on the basis that it 'presents difficult questions', raises its own questions about how thoroughly this approach was considered before the concept of reasonableness was preferred. As Bilchitz's example above illustrates, adopting a minimum core approach to the issue before the Court in *Grootboom* was possible, but it would also have conferred a significant obligation upon the State (albeit ameliorated within the constraints of progressive realisation and available resources). Living without land or shelter, Mrs Grootboom's community could have claimed that *their* right of access to housing required the provision by the government of both of these. But instead, limiting itself to the question of whether the government's housing policy was reasonable, the Court avoided imposing any direct or specific obligations upon the State, other than to revise its housing

[657] Ibid.
[658] D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 489.
[659] Ibid.

programme. Indeed, it is the issue of State obligations that may best help explain the adoption of a jurisprudence of reasonableness in preference to that of a minimum core. Mindful of the finite resources available to the State, and deferent to the policy-making and legislation-creating roles of the executive and legislature respectively, it seems that the Court chose to remain firmly within its remit, as dictated by the Separation of Powers, while fulfilling its own 'minimum core' obligation towards the Bill of Rights. Directing government to devise and implement a new housing programme that included measures to provide relief for those lacking accommodation, can be seen as requiring the least encroachment on government's discretion, while promoting the 'spirit, purport and objects of the Bill of Rights'.[660]

If such an analysis is correct, the jurisprudence of reasonableness can be understood as containing within it a high degree of judicial deference. Whether this deference is due to constitutional sensibilities or realpolitik is harder to say. This is not to deny any transformative role for the Court. That socio-economic rights are justiciable at all, represents a degree of transformative potential for the Courts, not available in other jurisdictions. But it is plausible to assert that determining a minimum core for the right of access to housing, in this case, would have led to greater positive transformation for the respondents, than was the case here. Echoing Mr Soobramoney's experience, once again the expansive rights in the Constitution failed to benefit the vulnerable litigants involved. In response to the Court's order to revise its housing programme, the government embarked on a significant new housing project for poor residents in the Western Cape.[661] But Mrs Grootboom remained destitute, despite the Court's judgment in her favour. She died 'homeless and penniless'[662]. Her obituary is a poignant reminder of both the enduring need to effectively secure socio-economic rights, and the potential that exists for dislocation between the work of the courts to this end, and the reality for indigent people:

> 'Irene Grootboom was the woman whose name became known around the world for enforcing the state's obligation to respect socio-economic rights... Grootboom's death, and the fact that she died homeless, shows how the legal system and civil society failed her. I am sorry that we didn't do enough following up after the judgment was given in her favour. We should have done more'.[663]

[660] Section 39 (2) of the Constitution.
[661] M Mogoeng 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *Singapore Academy of Law Journal* 1-16, 12.
[662] 'Grootboom dies homeless and penniless' *The Mail & Guardian* 8 August 2008: <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (Last accessed 27 July 2016).
[663] Ibid.

In response to this, Saul & Bond's frustration around the limitations of the *Grootboom* judgment are reflective of many for whom the approach of reasonableness represents an overly inhibited, managerial, and deferent judicial role:

> 'The Court did not have the courage and self-mandate to prescribe the policies and practices that *would* be considered of minimal acceptability'.[664]

While the strength of feeling here is not misplaced, given the gravity of the situation for those experiencing homelessness, this criticism does betray a lack of understanding of (or perhaps lack of concern with) the fundamental separation of powers at the heart of the South African polity. It is tempting to conclude that transformative constitutionalism would be achieved more deeply and more quickly by more activistic and prescriptive socio-economic rights decisions. But any gains made may risk being undermined by the loss of constitutional integrity, and adherence to the foundations of constitutionalism – the rule of law and the separation of powers - that such judgments would inevitably entail.[665]

Whatever the merits of the *Grootboom* judgment, its application of reasonableness, and the Court's sensitivity towards separation of powers and illegitimate encroachment into the realms of policy-making are themes that recur in the subsequent cases discussed below.

4.6.3 *Manqele v Durban Transitional Metropolitan Council* (2002)[666], and *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002)[667]

Before proceeding to the next Constitutional Court case to be considered, it is worth considering the juridical problems caused for lower courts, by the eschewal of a minimum core for socio-economic rights, in favour of a jurisprudence of reasonableness. Mention of the following two cases is important to this end, but also because both cases relate to the issue of access to water, and the right of access to sufficient water in Section 27 of the Constitution.

Manqele

Here, the applicant, an unemployed mother with seven dependent children was a tenant in an apartment owned by the local municipality. The applicant failed to pay for her water services

[664] J Saul & P Bond *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana, 2014) at 191.
[665] M Elliott & R Thomas *Public Law* (2nd ed, Oxford University Press, 2014) 33.
[666] (6) SA 423 (D&CLD) (Manqele).
[667] JOL 9513 (W) (Bon Vista).

and so supply to the apartment was disconnected. The applicant petitioned the High Court for a declaratory order that the disconnection was unlawful and a direction to the respondent (the municipality) to reinstate and maintain basic water services. She based her petition on her right to basic water supply as per Section 3 of the WSA (discussed above in Chapter Three). Her legal council chose not to rely on the applicant's constitutional right of access to sufficient water.[668]

The respondents claimed that at that time there was no quantum applied to the constitutional right (reiterated in Section 3 of the WSA), which was capable of being enforced. The term 'sufficient water' used in the Constitution had not been quantified. Similarly the municipality's obligation to provide a 'basic water supply', defined in Section 1 of the WSA as 'the prescribed minimum standard of water supply services' had, according to the Court, not been effectively prescribed. The Court held that prescription had to be by regulation and no regulations existed at that time as to the extent and manner with which a basic water supply should be realised[669].

Furthermore, the respondents argued that, in the absence of a prescribed quantum for basic water supply, they had adopted a policy of providing residents with the first six kilolitres of water per month free. The applicant had far exceeded this amount, which resulted in her water supply being disconnected.

The applicant's counsel argued that the WSA must be read in conjunction with the Constitution and that therefore the right to a basic supply of water must be read as incorporating at least the amount of water that would meet the Constitutional requirement.[670] But the court disagreed:

> In the absence of regulations defining the extent of the right of access to a basic water supply, I have no guidance from the Legislature or Executive to enable me to interpret the content of the right embodied in s 3 of the Act. The interpretation that the applicant wishes me to place upon s 3 of the Act, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, requires me to pronounce upon and enforce upon the respondent the quantity of water that the applicant is entitled to have access to, the quality of such water and acceptable parameters for 'access' to such basic water supply. These are policy matters, which fall outside the purview of my role and function, and are inextricably linked to

[668] The applicant's decision not to rely on the Constitutional right to water may have been a significant factor in the failure of her application. In *Bon Vista* and *Mazibuko* reliance was put on the Constitutional right of access to sufficient water, and in both cases the courts provided greater assistance. Even though the Constitutional Court's decision refused to uphold the appellants' appeal in the last instance, the constitutional right was itself affirmed.
[669] Regulation GN R 509 of 8 June 2001 has since been promulgated.

[670] Paragraph 427A

> the availability of resources. Given the fact that the prescribed minimum basic water supply has not yet been promulgated, notwithstanding the commencement of the Water Services Act... it would seem that such resources are not yet available on the scale required to give national content to s 3 of the Act.[671]

Therefore, the conclusion of the Court was that the right upon which the applicant relied was incomplete and could not be enforced. The Court also remarked on the fact that the applicant had not limited her family's water use to the six kilolitres per month provided for free by the municipality and had therefore had to pay for the additional water used. This, in the Court's view, seemed to justify the disconnection and discontinuation of water services. The application was dismissed and judgment delivered in favour of the respondents.

No discussion was entered into regarding the sufficiency (or otherwise) of 6 kilolitres per household per month. Rather, the willingness to accept the appropriateness of a particular volume of water seemed at odds with the court's explicit reasoning that quantification of water supply is a matter of policy and outside the court's purview.

While scant attention was paid to the capacity of the service provider, the case sent a clear signal that the Court was adamant about maintaining separation of powers, and not straying into policy matters. This clear positioning of the courts in their traditional and constitutionally restrained place is perhaps justified (especially since no minimum core for access to sufficient water had yet been decided). But it also illustrates the limitations of the Court's role in realising the protection, promotion and fulfilment of socio-economic rights.

Bon Vista Mansions

The applicants in *Bon Vista* were residents of an apartment block in Johannesburg. Their water supply was disconnected following non-payment for water services. An order was sought from the High Court by the applicants to direct the respondent (the local municipality) to restore their water supply. The Court granted the order. In setting out the reasons for its decision the court analysed the right of access to sufficient water, affirming the interpretative value of international law regarding the role of the State regarding socio-economic rights, with reference to the ICESCR and its associated General Comments. In particular the State 'must refrain from action which would serve to deprive individuals of their rights',[672] and 'that a violation of the duty

[671] Paragraph 427C-F
[672] *Bon Vista*. Paragraph 16.

to respect a right arises when the state, through legislative or administrative conduct, deprives people of the access they enjoy to socio-economic rights'.[673]

Because the applicants already had existing access to water services, it was held that the respondent's disconnection amounted to a breach of the State's Constitutional duty to respect the right of access to water.[674] The applicants made an urgent interim application to the High Court in order to have water supply restored for themselves and other residents, pending the final decision on an application for similar relief that had already been lodged. The Court granted the urgent application to have water supply restored for themselves and other residents, directing the respondents (the local municipality) to restore the water supply. The respondents contended that the applicant did not have the requisite *locus standi* to bring the application. But the Court found that, given the urgent nature of the interim application (made in order to ensure access to water for several residents for several days) the applicant was not required to follow the usual formalities. The Court reiterated that water services were a 'basic and essential service'[675]and emphasised the serious consequences to residents' health if the service was discontinued.

The Court's attention then turned to analysing the right of access to sufficient water. The landmark judgement of Chaskalson P in *Makwanyane*[676], which affirmed the interpretative value of international law in the adjudication of socio-economic rights, was particularly persuasive in the Court's thinking here.

> 'International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language similar to that which has been used in international instruments... It assists in understanding the nature of the duties on the state...'[677]

The nature of the duties arising on states from the ICESCR, and from its associated General Comments are twofold. First, the State (or State body, including a municipality such as the respondent in this case) must refrain from actions that would deprive individuals of their rights.[678] Second, the State has a duty to respect rights and will be said to have violated that duty if people are deprived access to socio-economic rights that they have hitherto enjoyed.[679] This applied here to a discontinuation of water services that residents had accessed up until this

[673] *Bon Vista*. Paragraph 19.
[674] *Bon Vista*. Paragraph 20.
[675] Paragraph 10
[676] *S v Makwanyane 1995 (3) SA 391 (CC) (at paragraph 35).*
[677]Bon Vista, paragraph 15
[678] Bon Vista, paragraph 16
[679] Bon Vista, paragraph 19

point. Consequently, the decision of the municipality to disconnect water supply was judged to be in violation of its Constitutional duty to respect the right of access to sufficient water.[680]

The question then arose as to whether the municipality was justified in their breach. Accepting that the WSA formed the relevant statutory framework, the Court looked to section 4(3)[681] of the WSA to establish the circumstances under which water services can be limited or discontinued. The Court described section 4(3) as a deliberately demanding set of circumstances because of the potentially serious human and health consequences of terminating water services.[682] The respondents were not able to justify their reasons for disconnection in line with the requirements of section 4(3) and the applicants had shown at least a *prima facie* right to continued access to water.

In light of the State's obligation to 'respect, protect, promote and fulfill' each of the rights in the Bill of Rights, *Bon Vista* demonstrates the court's willingness to enforce respect for a socio-economic right at its current level of realization. By not allowing the applicants to suffer a discontinuation of water services that they had had access to, their right of access to sufficient water was maintained. Likewise, the right was afforded protection by the Court's purposive application of the relevant legislation. The application of international law here shows its authoritative importance in domestic judicial reasoning as well as adding substance to the scope of the right to water and the associated duties of the State. But this was a constrained judgment in many ways. Again, failure to articulate a minimum core to the right to water limited the ability of the Court to promote *progressive* realisation of the right, in a transformative way.

[680] Bon Vista, paragraph 20
[681] WSA Section 4(3): Procedures for the limitation or discontinuation of water services must:
(a) be fair and equitable
(b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless -
(i) other consumers would be prejudiced;
(ii) there is an emergency situation; or
(iii) the consumer has interfered with a limited or discontinued service; and
(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.
[682] *Bon Vista*. Paragraph 28.

4.6.5 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (2002)[683]

Despite the prominence given to the case of *Grootboom* as 'a positive precedent for the judicial enforcement of economic and social rights'[684], arguably it is *Treatment Action Campaign (TAC)* that represents the most transformative judgment to-date by the Constitutional Court on socio-economic rights.

The case concerned the provision of an anti-retroviral drug, nevirapine, which prevents mother-to-child transmission of the HIV virus during pregnancy and birth. It is estimated that almost seven million people living in South Africa have HIV, representing a prevalence rate amongst adults of 19% of the population.[685] Given these high figures, the issue of HIV and its treatment has been an important challenge for the country for many years, despite the fact that at the time of the *TAC* case, then President Mbeki's notorious 'Aids denialism' sought to repress the use of HIV/Aids medication.[686]

Several pharmaceutical companies offered nevirapine to the South African government free of charge for a five-year period. But the government confined the drug's use to pilot sites, denying most mothers access to the drug. TAC, a coalition of civil society, medical practitioners, activists and others, challenged this decision, arguing that it violated Section 27 of the Constitution, the right of access to healthcare services, for those mothers not supplied with the drug. Additionally, the Institute for Democracy in South Africa, and the Community Law Centre acted as *amicus curiae.* As discussed above regarding the scope of Section 27 in *Soobramoney*, the right of access to healthcare services does not require immediate or unconditional fulfilment:

> Section 27 (1) Everyone has the right to have access to - (a) health care services, including reproductive health care; (b) sufficient food and water; (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
>
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

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[683] (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)
[684] S Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Journal of Human Rights*, 232.
[685] Statistics from UNAIDS <http://www.unaids.org/en/regionscountries/countries/southafrica> (Last accessed 27 July 2016).
[686] 'Mbeki AIDS denial cost 300,000 deaths' *The Guardian* 26 November 2008. Available at: <http://www.theguardian.com/world/2008/nov/26/aids-south-africa> (Last accessed 27 July 2016).

(3) No-one may be refused emergency medical treatment.

Following the Constitutional Court's approach in *Grootboom*, the High Court in *TAC* asked whether the government had taken reasonable measures, within its available resources, to progressively realise the right. The High Court concluded that the government had not acted reasonably in this regard:

> 'More specifically the finding was that the government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available in the public sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV.'[687]

The government was consequently ordered by the High Court to make nevirapine available in public health centres across the country. The government appealed this order before the Constitutional Court. The Court referred to both *Soobramoney* and *Grootboom* in its analysis of the State's obligations as being grounded in a social and historical context.[688] It also analysed amicis' argument that Section 27(1) established an individual positive right, and has a minimum core to which everyone is entitled.[689] But, following *Grootboom* again, the Court decided that Section 27(1) and (2) must be read together in order to determine an individual's rights and corresponding State obligations:

> 'A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.'[690]

The minimum core approach was therefore explicitly rejected for a second time. The Court then proceeded to describe the issue before it as follows:

> 'The question in the present case is not therefore whether socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that the measures adopted by the government to provide access to healthcare services for HIV-positive mothers and their new-born babies falls short of its obligations under the Constitution.'[691]

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[687] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15. Paragraph 2.
[688] Ibid Paragraph 24.
[689] Ibid Paragraphs 26-39.
[690] Ibid Paragraph 35.
[691] Ibid Paragraph 25.

Satisfied that answering this question was within the Court's purview, and eschewing a minimum core approach to doing so, the Court applied its jurisprudence of reasonableness to the government's policy. The government cited four reasons for restricting the use of nevirapine to test sites. First, it was concerned that, despite being able to provide the drug itself, it may not be able to provide all users with a 'comprehensive package'[692] including additional information, counselling, and materials: Nevirapine is usually effective when provided at birth, but a child can also contract HIV when breast-fed. Therefore the government submitted that they would need to provide mothers with appropriate formulae milk as a substitute. Second, some mothers and/or children may show resistance to the drug in the future. Third, the government raised concern about the safety of the medicine (although medical trials show that only prolonged administration of the drug can lead to side effects). The fourth concern was the lack of appropriately trained staff and budgetary constraints.[693]

Rejecting each of these reasons in turn, the Court concluded that:

> 'the policy of confining nevirapine to research and training sites fails to address the needs of mothers and their new-born children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to healthcare services required by those who do not have access to the sites.'[694]

The government's policy was therefore deemed unreasonable, since in light of *Grootboom*, in order to be reasonable:

> 'measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.'[695]

The Court held that the government's policy excluded those who could reasonably be including within the programme. The government was ordered to make nevirapine available nationwide in hospitals and clinics, and to take reasonable measures to increase the reach of counselling and testing services across the public health sector.[696]

The consequences of this decision have been positive and far-reaching in the fight against the HIV/Aids pandemic. Following the judgment, nevirapine was swiftly made available in public

[692] Ibid Paragraph 51.
[693] Ibid Paragraphs 51-54.
[694] Ibid Paragraph 67.
[695] Ibid Paragraph 68.
[696] Ibid Paragraph 135.

health centres. In 2015 more than two and a half million people were using anti-retrovirals – more than in any other country.[697]

The implications of the *TAC* judgment are also significant for appraising the Constitutional Court's willingness and ability to give transformative effect to socio-economic rights. Perhaps more clearly than was the case in *Grootboom*, the Court's consistent application of a reasonableness test for government policy, generated a thorough reconsideration of the particular policy in question, which quickly improved many more people's experience of their right to healthcare services. Yet this transformative success was achieved without defining a minimum core for Section 27, which according to the Court's own constitutional sensibilities, would inevitably have transgressed beyond the Court's remit of review and interpretation, towards policy-creation.

But despite retaining such a position of constitutional deference, the Court's order in *TAC* was both specific and prescriptive in its requirements. Arguably to prescribe such a fundamental expansion of antiretroviral therapies across the country, complete with counselling and additional services, represents the imposition of a *de facto* policy upon government by the Court. Here, in the author's opinion, the Constitutional Court succeeded in balancing the competing requirements of constitutionalism: for transformative action, and appropriate deference to the executive. Thus the order can be read as drawing the outer contours of a new and reasonable policy, while leaving government free to decide its interior topography. The final clauses of the Court's order are pertinent here:

> 'the orders made... do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it.'[698]

The next case to be considered is the most directly relevant to the focus of this thesis. As such, the following analysis concentrates not only on the Constitutional Court's interpretation of socio-economic rights, and specifically the right of access to sufficient water, but also on the interpretation provided by the High Court, and the Supreme Court of Appeal. Together, the judgments in this case reveal the scope and limitations of using the right of access to sufficient water to achieve the goal that this thesis sets out to examine: how to realise access to sufficient water for everyone in South Africa.

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[697] M Mogoeng 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *Singapore Academy of Law Journal* 1-16, 11.

[698] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15. Paragraph 135.

4.6.6 *Mazibuko and Others v City of Johannesburg and Others* (2010)[699]

The context for consideration of the right of access to water in South Africa has been discussed at length in Chapter Three. The Constitutional Court, in *Mazibuko's* opening paragraphs provides an apposite summary of this context:

> Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps ... despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.[700]

Mazibuko was first heard in the Witswaterand High Court and was brought by a group of residents from the Phiri area of Soweto, near Johannesburg.[701] It challenged the legality of installing pre-payment water meters 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 (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'[702].

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 of access 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

[699] (3) BCLR 239 (CC).
[700] *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC), par 2.
[701] Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights & Evictions as amicus curiae) [2008] JOL 21829 (W). Hereafter Mazibuko (W).
[702] Mazibuko and others v City of Johannesburg and others [2009] JOL 24351 (CC). Hereafter Mazibuko (CC). Paragraph 166.

and personal hygiene than those using pit latrines.[703] 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'.[704]

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.[705] Applying the General Comment, the court's view was that '[T]he State is under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis'.[706]

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[707]. The state is obliged to respect, protect and fulfil the right to water.[708]

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 result[709]). 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 respondent could provide this

[703] 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.
[704] Mazibuko, (W) Paragraph 5
[705] Ibid at 106.
[706] Mazibuko, (W) Paragraph 36.
[707] 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.
[708] Mazibuko, (W) Paragraph 37.
[709] Mazibuko, (W) 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).

increased amount 'without restraining its capacity on water and its financial resources'[710]the High Court decided wholly in the applicants' favour.

The City of Johannesburg and Johannesburg Water appealed to the South African Supreme Court of Appeal in February 2009.[711] 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, and the City of Johannesburg and Johannesburg Water were directed to formulate a revised water policy accordingly.[712]

Mazibuko in the High Court and Supreme Court of Appeal was heralded as an important milestone in socio-economic jurisprudence in South Africa[713]. 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 judgment[714]) 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.[715] The potential implications of *Mazibuko* for people living in similar situations to the Phiri residents were significant. Both decisions demonstrated 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 population, in a 'water-stressed' country[716].

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 of 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.

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[710] Mazibuko, (W) Paragraph 181.
[711] City of Johannesburg & others v Mazibuko & others (Centre on Housing Rights & Evictions as amicus curiae) [2009] JOL 23337 (SCA). Hereafter Mazibuko (SCA).
[712] 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.
[713] L J van Rensberg 'The Right of Access to Adequate Water: Discussion of Mazibuko v The City of Johannesburg Case No 13865/06' (2008) 3 *Stellenbosch Law Review*, 434.

[714] See generally Mazibuko (W).
[715] Mazibuko (W). Paragraph 1.
[716] M Kidd *Environmental Law* (Juta & Co. Ltd, 2008) 64.

The Constitutional Court held that the City of Johannesburg's Free Basic Water policy was not in conflict with Section 27 of the Constitution or Section 11 of the Water Services Act[717] 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.[718] This was particularly so since the City of Johannesburg had continually amended its Free Basic Water Policy during the course of the litigation.[719] Consequently the applicants' appeal was dismissed, and the installation of prepaid water meters in Phiri was affirmed as compatible with Section 27 of the Constitution.[720]

Crucial to an understanding of this judgment is the guiding role that *reasonableness* has played in the Constitutional Court's jurisprudence since *Grootboom*, discussed above at length above. Although *Grootboom* related specifically to the constitutional right to adequate housing,[721] the standard established in this case, and followed in *TAC*, required that government action in relation to socio-economic entitlements generally, must be reasonable.

The principle of reasonableness was applied to the Constitutional Court's judgment in *Mazibuko* as follows: First, the nature of the right of access to sufficient water was accepted as being one of progressive realization. Second, the actions of the respondents (namely the City of Johannesburg, and Johannesburg Water) in constantly reviewing their Free Basic Water Policy, and by providing on occasion for additional free water allowance as well as relief from other municipal charges, together represent reasonable actions in relation to the constitutional right to water, notwithstanding the respondents' continuing obligation towards progressive realization.[722] The clear implication here is that while the actions and policy of the respondents were deemed reasonable at the time of the judgment, they must not be allowed to solidify in to an established

[717] Water 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.

[718] Mazibuko (CC). Paragraph 163.
[719] Mazibuko (CC). Paragraph 163.
[720] Mazibuko (CC). Paragraph 169.
[721] Section 26 Constitution of the Republic of South Africa, No. 108 of 1996.
[722] Mazibuko (CC). Paragraph 168.

standard. Rather, the impetus of progressive realization must engender continual revision.[723]

This application of reasonableness directly contrasts with the alternative approach to adjudicating on socio-economic rights, followed by the lower courts in *Mazibuk*o: namely establishing a minimum core obligation for the state to fulfil. Establishing the minimum quantum of water to be deemed sufficient, by reference to international standards and domestic, context-specific evidence[724]would seem an appropriate approach to interpreting the constitutional right to water. So it is important to note the reasons that the Constitutional Court raised to vindicate their continued, deliberate and explicit rejection of a minimum core approach, in favour of reasonableness.

First, a constitutional defense can be made for the Court's approach here. It 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.[725] Arguably such a 'restrained and focused role for the Courts'[726] may help achieve 'appropriate constitutional balance'[727] by avoiding direct incursion into budgetary and policy priorities:

> 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.[728]

Second, the argument is made that quantifying a minimum core requirement here would detract from the duty imposed on government to continually review its policies to ensure the progressive realization of the right.[729] Indeed, a situation could be envisaged where a defined minimum quantum of water may impede rights holders from receiving more than this quantum in keeping with the provider's capacity to supply. In order to avoid this, the Court reiterates that it is for government to set the target it wishes to achieve, and for the Courts to submit such a

[723] Mazibuko (CC). Paragraph 163.
[724] Mazibuko (W). Paragraphs 128 and 172.
[725] 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.
[726] Minister of Health and Others v Treatment Action Campaign and Others [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (hereafter *Treatment Action Campaign No. 2*). Paragraph 38.
[727] Treatment Action Campaign No. 2. Paragraph 38.
[728] Mazibuko (CC). Paragraph 161.
[729] Mazibuko (CC). Paragraph 67.

target to the standard of reasonableness.[730]

It is plausible to suggest that defining a (static) minimum core content to the right to water may have negative practical consequences in the future. Regarding this, the decisions of the High Court and Supreme Court of Appeal, to quantify the content of the right, without clarifying how a minimum core content relates to progressive realization, was unfortunate.[731] But it seems less plausible that a minimum core approach is necessarily incompatible with reasonable, progressive realization. Indeed there seems to be scope here to explore a mutually reinforcing model for these two principles, whereby a provisional minimum core is established, based on current capacity, but coupled with the requirement to continually pursue a fuller realisation of the right, to the extent that available resources allow. Such a hybrid approach would presumably require the periodic redefinition of the minimum core to reflect the progress made in realizing the right to date. Indeed, the degree of complementarity or antagonism between a reasonableness approach to socio-economic rights and a minimum core approach has been considered at length elsewhere, and remains contested.[732]

Third, it is asserted that a jurisprudence of reasonableness encourages a continuous contestation for the content of socio-economic rights, enabling 'citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation':[733] Citizens and the courts combining in a dynamic, collaborative endeavour to negotiate what content the right (to water, in this case) should have at any one point in time. Indeed, the product of such litigation, according to O'Regan J, is to foster 'a form of participative democracy'.[734] The clear implication here is that if the Court instead set an ultimate standard for such rights, the accountability of government would be affected, and citizens' role in the democratic process would be diminished. To this end the Constitutional Court maintained that litigation regarding the positive obligations of socio-economic rights was an important element of government accountability, concomitant with the founding provisions of the Constitution, 'to ensure accountability, responsiveness and openness'.[735] Such litigation also complements the right of access to the courts in Section 34 of the Constitution, which Lindiwe Mazibuko and others were entitled to as litigants:

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[730] Mazibuko (CC). Paragraph 70.
[731] Mazibuko (CC). Paragraph 68.
[732] D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484-501.
[733] Mazibuko (CC). Paragraph 71.
[734] Mazibuko (CC). Paragraph 160.
[735] Section 1 (d) Constitution of the Republic of South Africa, No. 108 of 1996.

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.[736]

Reading Sections 1 and 34 together, the requirements of accountability, responsiveness and openness, and that of a *fair* public hearing, reflect much of the content ascribed by Bernstein to the value of *fairness* ('accountability, representation, and responsibility, as well as distributive justice'[737]). When considered in the light of these standards, the Constitutional Court's judgment in *Mazibuko* has clearly facilitated government accountability by requiring 'a detailed accounting from government'.[738] Furthermore, it has supported the representation of the applicants, by allowing their appeal, and clarified the responsibility of the City of Johannesburg, and Johannesburg Water respectively. However, whether the judgment also achieved distributive justice remains contentious.

A personal insight

In 2014, I interviewed Justice Yacoob, who provided the lead judgment in *Grootboom*, and in so doing, first articulated the Constitutional Court's jurisprudence of reasonableness. Justice Yacoob was not on the bench that heard *Mazibuko*. I asked him what he thought of the judgment, and of the Court's continued rejection of a minimum core approach, in favour of reasonableness. His thoughts, although shared after retiring from the Constitutional Court, are insightful, particularly in as much as they suggest that the Court's judgment, though disappointing for many, represents the extent of what could be expected from an appropriately deferent (or restrained) court within the confines of a constitutional democracy:

> ZY: I didn't sit in *Mazibuko* because I was sick, but people invited me to talk at a conference on *Mazibuko* thinking that because I didn't sit in it I would be against it. And I must tell you, I'm completely for *Mazibuko* and I'm quite happy now that I'm not a judge I can write an article saying why *Mazibuko* is right, and why all those people who are against *Mazibuko* are quite wrong... I think that all the judgments of our court while I was there have been consistent with *Grootboom*, and I think in broad terms that *Mazibuko* would be the case that many people knew, is a bad example because it is really invidious in all the circumstances relating to water to say how many kilos people should have.

[736] Section 34 Constitution of the Republic of South Africa, No. 108 of 1996.

[737] B Steven 'Globalization and the Requirements of 'Good' Environmental Governance' (2005) 4 (3/4) *Perspectives on Global Development and Technology* 645-679, 652.

[738] Mazibuko (CC). Paragraph 163.

> NC: Invidious in what way, because it risks the court overstepping the mark into policy, or what?
>
> ZY: Invidious because we are not in a minimum quota then beyond the reasonableness test and the only issue was whether the water being supplied in all the circumstances at that time was reasonable. Not whether a certain amount was reasonable. And that we can't determine, and I think that the answer to that question should have been all the circumstances taken into account, everything, that the water supplied at that time could not be said to be unreasonable.[739]

Much work has been done to quantify the minimum quantum of water required for daily life in various conditions.[740] So it is not entirely clear why Yacoob J considered such quantification as automatically negative, other than for the reasons identified early: namely that such an establishment of a minimum core would involve encroachment by the Court on the purview of government. Furthermore, quantifying what counts as 'sufficient water' may possibly risk losing the 'progressive realisation' aspect of the right. But it is asserted here that this is not an inevitable consequence of adopting a minimum core. Indeed, designating the core as being the *minimum* required, arguably provides impetus to move forward from this point. To this end, as mentioned earlier, it would seem sensible to periodically 'ratchet up' such a minimum core, in order to promote progressive realisation, and to ensure that the progress that has been achieved is not lost.

The reasons set forth by the Constitutional Court in *Mazibuko* can be summarized as delivering a constitutionally deferent, pragmatic, and conditional judgment that the actions of the water service providers regarding the claimant's right to water had been reasonable. Scholarly disagreement persists around the judgment,[741] and its potential consequences for effective water governance are considered below at 4.7. The explicit restatement of reasonableness as the appropriate approach to socio-economic rights litigation is perhaps understandable in a country with limited resources and manifold social and economic problems. Nevertheless, it emphasizes the tension at the heart of the justiciability of socio-economic rights, visible in each of the preceding cases: the pragmatism of progressive

[739] Interview # 6. See appendices.
[740] See generally PH Gleick 'The Human Right to Water' (1998) 1 *Water Policy*.
[741] See variously L J Kotze 'Phiri, the plight of the poor and the perils of climate change: time to rethink environmental and socio-economic rights in South Africa?' (2010) 1/2 *Journal of Human Rights and the Environment* 135-160; J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20; L Jansen van Rensburg 'The Right of Access to Adequate Water [Discussion of Mazibuko v the City of Johannesburg Case no 13865/06]' (2008) 3 *Stellenbosch Law Review* 415-435; P Bond and J Dugard 'The Case of Johannesburg Water: What Really Happened at the Pre-paid 'Parish Pump'' (2008) 12(1) *Law Democracy and Development* 1-28.

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.

4.7 Critique

Throughout the preceding case analysis various conceptual lenses have been hinted at, through which the Court's jurisprudence may be better understood. These lenses have been described as 'judicial managerialism', 'judicial deference', and 'transformative constitutionalism'. The purpose of this section is to reflect upon the critical value of these lenses, in order to reach some instructive conclusions regarding the appropriate role that the Constitutional Court could play in helping to achieve the goal of access to sufficient water, by adjudicating on the right of access to sufficient water.

4.7.1 'Judicial Managerialism' or (legitimate) judicial restraint?

The exasperation behind the public statement issued by the Coalition Against Water Privatisation, in response to the final *Mazibuko* judgment (quoted at the beginning of this chapter) is palpable. For the vulnerable litigants, their *amicus curiae,* activists and campaigners in academia, and in broader civil society, the Court's decision to affirm as reasonable, the installation of prepayment meters, and to reject calls to define a minimum core for 'sufficient water', represented the most constrained example of the judiciary's deference to the executive as the sole appropriate decision maker on resource allocation. Indeed, considered in light of the theory on institutional approaches to judicial restraint, it appears that the judiciary afforded themselves an extremely small discretionary area of judgment. In activist circles it has also come to symbolise the abject failure of the Court to grasp the transformative potential of the Bill of Rights, and to take concrete steps towards its realisation, instead lapsing into conservative inertia and mechanical jurisprudence. As activist and academic Jackie Dugard notes, *Mazibuko* was about more than securing the right of access to sufficient water for the people of Phiri:

> '[T]he case has always represented a challenge to the degradation of the progressive potential of the Freedom Charter,[742] the RDP,[743] and the human rights framework, by local government technocrats who have come to dominate South African hydro-politics'.[744]

[742] See discussion in Chapter Three at 3.3.1.
[743] See discussion in Chapter Three at 3.2.

As such, it was hoped that the Constitutional Court would champion this challenge, and support a new and progressive chapter for water justice. Because of this weight of expectation, the actual judgment was inevitably a grave disappointment. But, without denying this, it is important to review the *Mazibuko* decision in light of the previous decisions of *Soobramoney, Grootboom* and *TAC*, in order to reflect on the degree of consistency that exists across the Court's judgments. While this does not reduce the impetus for greater meaningful realisation of the right to water than *Mazibuko* delivered, arguably it does push us to consider other avenues for sustainable, equitable water delivery.

As Justice Yacoob was keen to emphasise, arguably the Constitutional Court's approach to socio-economic rights, has been consistent; developing and applying a test of reasonableness with which to determine the constitutional legitimacy of State (in)action. Moreover, since *Grootboom*, if government action has been deemed *un*reasonable, the Court's remedial jurisprudence has also been consistent; broadly stipulating the necessary requirements to satisfy the State's obligation to take reasonable legislative and other measures regarding the particular right at issue, without being overly-prescriptive regarding the minutiae of such requirements.

Contrasting the Court's orders in *Makwanyane* and in *Fourie* respectively, it can be clearly seen that, after an initially direct intervention, the Court chose to restrain itself from direct legislative involvement, deferring instead to the government (and Parliament). Similarly, while the orders in *Grootboom* and *TAC* directed government policy and activity towards particular ends, in both instances government retained the policy-making role. Indeed, had the Court's decision in *Mazibuko* been otherwise, and the supplier's actions had been found to be unreasonable, it is highly likely that a similarly 'light touch' order would have followed (eschewing the approach of the High Court and Supreme Court of Appeal to set a particular quantum for sufficient water).

Nevertheless, despite claims of consistency, the *Mazibuko* judgment can be seen to demonstrate a managerial (or technocratic) approach to socio-economic rights adjudication, at odds with the tenor in previous cases. The fact that Johannesburg Water's ability to increase water supply was not scrutinised, nor was sufficient consideration given to issues of environmental sustainability, suggests that the Court's conclusion that the State's actions were reasonable was reached without a sufficiently deep appraisal of all the relevant factors. To return to Yacoob J's schema, outlined in *Grootboom*, determination of the reasonableness or otherwise of the measures taken by the State must be made with regards to the requirements

[744] J Dugard 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1-20, 15.

for progressive realisation within available resources. While much was made of the progressive (i.e. progressing) quality of the water supplier's policy (being periodically reappraised), too little attention was paid to establishing what constituted available resources in this context. While available water resources are clearly relevant to such an appraisal, there would also be likely consequences in relation to financial and infrastructural resources. On this point, it is important to provide some perspective to the 'available resources' qualification encountered regarding each of the socio-economic rights discussed.

Recent figures remind us that public finances in South Africa are consistently dwarfed by the scale and cost of poverty and inequality in the country. 40% of the population is categorised as destitute. Welfare recipients outnumber taxpayers by three to one, and with a Gini coefficient[745] of 0.7%, South Africa has recently surpassed Brazil as the most unequal emerging State.[746] The immediate implications of this are that the resources available to the State with which to realise significant improvements in people's access to water are limited. Here, Roux's sceptical reading of *Makwanyane* and *Fourie*, discussed above, offers an insightful perspective from which to consider the ultimate *Mazibuko* judgment: Ever mindful of the perceived need to maintain an appropriate balance in its relationship with government, the Constitutional Court not only refrained from setting or affirming a minimum core for the right to water, but also avoided imposing a multidimensional test for reasonableness (one which seriously investigated the relevant social, economic and environmental factors), for fear of imposing (overly) significant obligations upon the State. If such an appraisal is at all accurate, it is not to say that the Court's judgment here was reached consciously, for existential reasons, much less Machiavellian ones. Rather, the high degree of deference shown towards government, and the consequently managerial approach to adjudicating on the right to water evident in this judgment, together suggest a systemic/institutional limitation to the transformative ability of the Courts: interpreting rights in their current, qualified form, against a backdrop of finite resources and seemingly infinite needs.

4.7.2 Transformative Constitutionalism

At the risk of repeating the discussion at the beginning of this chapter, the dawn of the democratic era, and the adoption of a new Constitution and Constitutional Court, provisioned with an expansive and justicable Bill of Rights, signalled a new era of constitutionalism in the

[745] The Gini coefficient represents the income distribution of a nation's residents, and is the most commonly used measure of inequality. See <http://data.worldbank.org/indicator/SI.POV.GINI> (Last accessed 27 July 2016).
[746] C Hartman et al 'Sustainable Governance in the BRICS; Country Report South Africa 2 (2013). Available at: <http://sgi-network.org/brics/pdf/Country%20Report%20South%20Africa.pdf> (last accessed 27 July 2016).

country, and more specifically, an era of social and economic transformation following the recent political changes. Building on the argument above regarding the consistency of the Court's approach to socio-economic rights, a shallow appraisal of the Court's work over the last two decades may suggest that the Court has gradually retreated from its initial activist role, towards a more constrained, managerial approach. Such an analysis, it is argued, focuses too much on the outcomes of the various seminal cases considered above, rather than on the Court's careful crafting of a consistent and distinctive jurisprudence. Doubtless at first glance the decision in *Grootboom*, ordering the government to build houses for the poor, or, in *TAC,* requiring antiretroviral drugs to be made available to all who need them, indicate a strong commitment to pursuing positive socio-economic transformation through rights interpretation. Equally it is not surprising that in contrast, *Mazibuko's* failure to secure access to sufficient water for many, has been dismissed as being constrained at best. But even at such a superficial analytical level, there remains a transformative aura around the Court, discernable both in certain decisions, and in its very structure. Christiansen reminds us of the latent transformative energy in the Court's generous *locus standi* provisions, outlined in Section 38 of the Constitution:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

Extending beyond the usual classes of persons with immediate remediable harm, such broad standing facilitates greater access to the court system than is the case in most jurisdictions.[747] Similarly, inclusion of socio-economic rights that are justiciable, provides the Court with tools with which to affect transformation, and so distinguishes the Court's role and potential from that of similar courts in other countries.[748]

[747] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice*, 575-614, 582.
[748] Ibid 585. Cf. US Supreme Court.

4.7.3 'Liminal Constitutionalism'

In anthropology, a liminal space is an intermediate stage between two, more fixed states, for instance the space between life and death.[749] Liminal constitutionalism, it is suggested, is a useful idea to describe the role the Constitutional Court has adopted in relation to socio-economic rights adjudication. It applies the concept of liminality to the changing role of the Court: variously pushed and pulled by demands towards driving substantive transformation through expansive interpretations, and towards more constrained, managerial and deferential adjudication. These demands, which are described in the preceding discussion, are labelled 'Transformative Constitutionalism' and 'Judicial Managerialism'.

Applied in this context, the author suggests that the Constitutional Court's jurisprudence can be understood by reference to such a liminal space, between an expansive and a constrained application of socio-economic rights. Furthermore, it is asserted that this liminal space must necessarily be an intermediate one, before collapsing back towards one or other of the fixed states outlined above. Despite initial enthusiasm for a more overtly transformative Court, and despite evidence that the Court remains more transformative (or at least more capable of affecting transformation) than its foreign counterparts, it is difficult to imagine how this could be maintained in the long term, if the doctrine of *trias politica* is to be respected. Therefore, recourse to a more constitutionally appropriate degree of judicial restraint (which detractors may call 'managerialism') would seem to be likely. Adopting an institutional approach to judicial restraint may have encouraged judges to take an expansive view of what is reviewable and justiciable, within a 'discretionary area of judgment' less inhibited by doctrinal prescription, than would more formalist approaches. But in the particular context of South Africa, this 'discretionary area', or 'space' should not be seen as being fixed. Rather, the degree of discretion that the judiciary afford themselves (and consequently the degree of restraint shown) is better understood as representing a temporary, flexible, or liminal space. Plotted on top of the preceding case discussions, the concept of liminal constitutionalism reveals how the Constitutional Court has generally adopted a constitutionally appropriate (although often disappointing) degree of judicial restraint since its inception, despite the fact that the transformative activism shown by the Court has changed (and arguably diminished).

It can be claimed that what constitutes appropriate judicial restraint may change as the country's political and judicial systems evolve, and as people's material conditions slowly improve. But,

[749] D Oistein-Endsjo 'To lock up Eleusis: A question of liminal space' (2000) 47/4 *International Review of the History of Religions* 351-386, 354.

perhaps more radically, in relation to the issue of access to sufficient water, it is asserted that discussion of transformative versus managerial roles, or minimum core versus reasonableness, continues to take place within the dominant paradigm, that prioritises water as a commodity. Therefore it may be that in relation to the overarching question of how to achieve access to sufficient water for everyone, even a more transformative judicial reading of the right to water than was in evidence in *Mazibuko,* may have limited benefit in securing significant improvements. This raises the question of how else constitutional rights can be fulfilled in order to promote substantive transformation (an essential aim, given the continuing and profound challenges of poverty experienced by many). In short, how else can socio-economic rights (and particularly the right to water) be pursued and championed, other than through the Courts?

The utility of conceptualising the Constitutional Court as being in a liminal space is that it invites a more authentic, self-critical evaluation of the Court's role (both actually, and aspirationally), including the current/potential consequences of this role for constitutionalism. This in turn leads to a consideration and critical re-evaluation of modes of water governance lying outside the current configuration of individual rights claims (made within a water-as-commodity paradigm), and that therefore do not necessarily rely on the courts to act as the guarantors of distributive justice. In short, liminal constitutionalism leads us to acknowledge that discourse on access to water may have reached the limits of 'rights talk'. What lies beyond is less familiar terrain.

4.8 Reaching the limits of 'rights talk"[750]

The plight of the Phiri residents, in the aftermath of the *Mazibuko* judgment, reflects the enduring reality of water poverty for people across the country, despite their right to water. In Durban, where the author's empirical work has focused, this work reflects the same problems as in Phiri, namely that the poorest people must routinely navigate daily existence with insufficient water. Paying for more water than the amount currently provided for free is rarely an option for people in this position. Therefore the absence of a minimum core for water that accurately reflects people's most basic needs, condemns many to perpetual water poverty. It is against this grim reality that the *Mazibuko* judgment appears as such a profound failure for transformative constitutionalism. While the interpretative approach of the Court can be acknowledged for its consistency with preceding judgments, and its scrupulous adherence to

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

separation of powers sensibilities, it nevertheless represents an impotent constitutional and judicial response to such a crucial and basic need. The profundity of this failure inevitably raises the question of whether the transformative potential of socio-economic rights within their present interpretive framework, have reached their limits.

The social repercussions of insufficient water for the residents of Phiri (as well as for others in similar situations) are obvious, although it may be difficult for those of us untouched by poverty to fully empathise with people in such dire conditions. Average households contain more than 16 residents, most of whom are dependent on State pensions and/or child support grants. As a community they were described by the High Court as 'poor, uneducated, unemployed and... ravaged by HIV/AIDS'.[751] Insufficient water, regularly experienced, has multiple detrimental consequences for (amongst other things), health, education, gender equality, child safety, and domestic violence, as well as (perhaps most fundamentally) human dignity.[752]

But there are doubtless economic and environmental consequences too. It is anticipated that the impact of climate change on communities like Phiri will be serious, since the existing socio-economic deprivations undermine the material and physical resilience necessary to effectively adapt. As the United Nations Intergovernmental Panel on Climate Change, Adaptation and Vulnerability working group explains:

> 'Poor communities are especially vulnerable, in particular those concentrated in high-risk areas. They tend to have more limited adaptive capacities and are more dependent on climate sensitive resources, such as local water and food supplies.'[753]

In this context, any scope for economic development is seriously limited by high unemployment, low rates of training and education and a dearth of all but the most peripheral entrepreneurial opportunities.

Emphasising the social, economic and environmental consequences for people living with insufficient water reflects the established 'Trinitarian' model of sustainable development. This model (requiring consideration of social, economic and environmental factors) is central to the IWRM/ developmental water management (DWM) approach to water allocation, discussed in Chapter Three (at 3.4), and evident in the Second National Water Resource Strategy

[751] Mazibuko (W). Paragraph 5.
[752] See generally: J Martinez-Alier *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Edward Elgar, 2002).
[753] C Vogel & P Reid 'Vulnerability, Adaptive Capacity, Coping and Adaptation: a Conceptual Framework' in R E Schulze (Ed) *Climate Change and Water Resources in Southern Africa: Studies on Scenarios, Impacts, Vulnerabilities and Adaptation, WRC Report no 1430/1/05* (Water Research Commission, 2005) 351-358.

(NWRS2). The model is also 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 before 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 climate change, or 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 so-called 'environmental right' (particularly sustainable development) in Section 24 of the Constitution[754]. Despite environmental protection and sustainability featuring heavily in the legislation, these considerations appeared neither in the obiter or ratio of the *Mazibuko* judgments.

The absence of environmental considerations is common to rights-talk in general, since individuals' rights claims are contested largely in isolation from the realities of resource scarcity. Such an atomised approach to rights adjudication emphasises the very practical limitations of an anthropocentric human rights narrative. Yet given the exigencies of water scarcity in South Africa, and more generally the Anthropocene challenges mentioned earlier in Chapter Two, it seems essential that the focus of water governance must be eco-socially sustainable. Stewart and Horsten's critique of the absence of environmental considerations in *Mazibuko* leads them to ask how and where water is used (60% agriculture, 15% industry etc), and the justification for such use in the face of the dual realities of water scarcity and insufficient water access for many[755]. Such questions, if raised in the context of litigation are likely to transgress the legitimate purview of the Courts. But when asked outside this forum, they can aid the imperative of keeping social, economic and environmental aspects of water access interconnected.

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[754] 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.

[755] L Stewart & D Horsten 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *South African Publiekreg/Public Law* 486, 503.

A second critique is that adjudication of rights claims can remove their public, political dimensions, 'domesticating issues of poverty' and casting them as private, or familial matters[756]. 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 legal form to moral claims. In so doing the moral claim is diluted, turning it into a technical legal problem and bureaucratizing away the imperative to meet the claim on which the right is founded[757]. 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 that the State can restrict rights if it is doing so reasonably[758]. Similarly the Constitution provides for the progressive realization of socio-economic rights, but only within available resources. Lack of available resources is therefore a (legally) legitimate reason for unfulfilled rights, despite the size and nature of available resources remaining undisclosed. So, expressing the claim of access to water in legal form (as a right) creates practical difficulties, and allows for inchoate application. But there is also a normative dissonance between the moral claim and the narrative of a human right to water, particularly when interpreted in light of water commodification and privatization. As Karen Bakker explains:

> 'Human rights are individualistic, anthropocentric, state-centric, and compatible with private sector provision of water supply... Moreover, 'rights talk' offers us an unimaginative language for thinking about new community economies...occluding possibilities for collective action beyond corporatist models of service provision'.[759]

Such a critique need 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 pursuit of the right has had

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[756] D Brand 'The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa' in A J van der Walt (ed) *Theories of Social and Economic Justice* (African Sun Media, 2005) 17, 35.
[757] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Syracuse Conference, Cape Town, February 2010) 12.

[758] Constitution of the Republic of South Africa: Section 36.
[759] K Bakker 'The 'Commons' Versus the 'Commodity': Alter-globalization, Anti-privatisation and the Human Right to Water in the Global South' (2007) 39(3) *Antipode* 441, 447.

positive substantive and normative effects and has underpinned significant legal victories.[760] But Pieterse[761] and Bond[762] assert that human rights generally, and Constitutional rights specifically in South Africa, concentrate on consciousness-raising and recognition of individual's rights to necessities, rather than focusing on redistribution, reparation, and environmental exigencies. Their potential for social transformation is therefore limited. More stridently, Brand asserts that 'the law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation'.[763] The importance of contestation is explored further in Chapter Five.

Countering these limitations are a growing cacophony of voices advocating for a paradigm shift, away from individualized rights, towards the 'commons', and a culture of sharing, which is becoming known as 'commoning', towards which attention will shortly turn.

Critiqued in this way, the Constitutional Court's decision in *Mazibuko* illustrates the limitations of using rights (including principally the right of access to sufficient water) to achieve sustainable access to sufficient water for the most vulnerable. Unsurprisingly therefore, the strategy of campaigners, civil society and those affected by water poverty, is changing in response. Reliance on litigation and an overly-optimistic conception of the developmental role of the Courts, is being challenged, and replaced. Instead a shift towards advocating for greater grass-roots, community action, is emerging, aimed not at challenging the legality of inchoately experienced rights, but at reconfiguration at the community level, to address the underlying problem of water poverty more effectively than does the status quo.[764]

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

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

[762] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Syracuse conference, Cape Town, February 2010).

[763] D Brand 'The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa' in A J van der Walt (ed) *Theories of Social and Economic Justice* (African Sun Media, 2005) 17, 35.

[764] See: Socio-Economic Rights Institute of South Africa website <http://www.seri-sa.org> (Last accessed 27 July 2016).

4.9 Chapter summary and concluding comments

Charting the role of the Constitutional Court and its interpretation of socio-economic rights in the context of contemporary South Africa (including an expansive Bill of Rights, an intransigent ANC government, manifold social and economic problems, and limited resources) has been an essential step towards understanding the limitations surrounding using the right to water to help realise the goal of access to sufficient for everyone.

While analysis of the Court's approach to socio-economic rights has variously emphasised its jurisprudential consistency on the one hand, and its retreat from transformative constitutionalism, towards more managerial decisions, on the other, the enduring material realities of insufficient access to healthcare, shelter, and water, amongst other necessities, nevertheless leads to the conclusion that a 'top-down' transformative role for the Courts should not be overly relied upon. For example, sixteen years after the *Grootboom* decision, many South Africans still do not have access to adequate housing.

It is perhaps unfair to excessively criticise the Constitutional Court for not presiding over greater positive transformation than it has, despite the surfeit of socio-economic rights at its disposal. Indeed, the Court's current Chief Justice Mogoeng Mogoeng adds some much-needed perspective as to the scale of the task:

> 'By any standards, 20 years is too short a period to gauge the effectiveness of the mechanisms designed to undo at least 300 years of racial subjugation and economic disempowerment. A lot of good has been done. There has [sic] been quite a number of teething and unanticipated problems. But there has also been several self-inflicted and progress-inhibiting impediments. We need a radical paradigm shift in our approach to this.'[765]

The final line here also hints at the limitations inherent within the current judicial approach to socio-economic rights (however expansively they are framed, and no matter how transformative their outcomes might be at times). Arguably such limitations stem from an overly individualistic conception of rights. Conceived as such, any constitutional right is inchoate and can raise hope beyond what can realistically be achieved. Moreover, despite judicial differences between the lower and higher courts in *Mazibuko*, the final judgment – representing what is ultimately a constrained expression of a moral claim – signifies the inevitable limitation of achieving development through law. What actually occurred is that the Constitutional Court filtered the moral claim through a legal lens, which invariably diminished the significance of the overriding

[765] M Mogoeng 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *Singapore Academy of Law Journal*, 1-16, 16.

goal to be reached. Perhaps in a democratic society, and a capitalist economy, this is as much as can be expected from a judicial forum.[766] Any more is pure utopia. But this need not be the end of the tale. There are other approaches, such as an emphasis upon collective rights and commons allocation, which might equally provide an alternative, and perhaps more effective, means to achieve transformative goals, even if they currently stray beyond the confines of what is considered generally appropriate. Moreover, such approaches also emphasise the significance, nay the necessity, of moving away from the traditional and sterile dichotomies in development discourse – public v. private, market v. State-controlled, commodification v. human right, international v. municipal - that have so far informed the dominant discourses on water governance at the international and national (South African) levels and towards more pluralist interpretations of the interlinkages between law, development and politics. Although such interpretations may be less easy to categorise and rationalise from a formal, legal perspective, they are as much part of the social reality as are the keynote constitutional judgments considered above.

Here, the notion of liminality may be of use once again, in helping to conceptualise the epistemic shifts hinted at thus far. Rather than just denoting a temporary jurisprudential location in the self-image of the Constitutional Court (between more transformative and more constrained judgments), liminal constitutionalism can also describe the threshold between understanding the *court*s as the principal guardian of socio-economic rights, and emerging 'new/old'[767] modes of water governance that are becoming increasingly important sites for contesting sustainable and equitable solutions. Serendipitously, the physical properties of water, as flowing, fluid, and resisting stasis, would seem to encourage consideration of similarly fluid modes of governance. It is towards some of these, that our attention now turns.

[766] One should also not diminish the crucial role for a court in balancing not just the claims before it, but also the wider agendas on both sides of the issue to determine the wider public interest. For instance, as the *amicus curiae* in *Mazibuko* was part of an anti-privatisation forum, the rights-claims brought on behalf of the Phiri residents could not realistically be separated from the interests of those representing them. This may, in turn, diminish the moral claim underlying the substantive right. How far a court would, either expressly or implicitly, consider such matters must remain conjecture but arguably is a fundamental role of a judicial body in a democratic society.

[767] D Bollier & BH Weston 'Reimagining ecological governance through human rights and a rediscovery of the Commons' in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 251.

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Water stories, community organisation and 'commons' thinking

'And all those who had believed were together and had all things in common; and they began selling their property and possessions and were sharing them with all, as anyone might have need.'

Acts 2:44-45[768]

'The first step towards reimaging a world gone terribly wrong would be to stop the annihilation of those who have a different imagination – an imagination that is outside capitalism as well as communism. An imagination which has an altogether different understanding of what constitutes happiness and fulfilment. To gain this philosophical space, it is necessary to concede some physical space for the survival of those who may look like the keepers of our past, but who may really be the guides to our future'

Arundhati Roy[769]

'With deregulation, privatisation, free trade, what we're seeing is yet another enclosure and, if you like, private taking of the commons. One of the things I find very interesting in our current debates is this concept of who creates wealth. That wealth is only created when it's owned privately. What would you call clean water, fresh air, a safe environment? Are they not a form of wealth? And why does it only become wealth when some entity puts a fence around it and declares it private property? Well, you know, that's not wealth creation. That's wealth usurpation.'

Elaine Bernard[770]

[768] The Bible, New International Version, Acts chapter 2, verses 44-45.
[769] A Roy 'The Trickledown Revolution' *Outlook,* 20 September 2010. Available at: <http://www.outlookindia.com/article/the-trickledown-revolution/267040 >. (Last accessed 27 July 2016).
[770] E Bernard *The Corporation* 2003.

5.1 Introduction

The previous chapters have outlined a rights-based approach to access to water, and have concluded that this approach, in its current configuration, is unlikely to be successful in achieving access to sufficient water for everyone in the country.

This chapter will first use an empirical study to provide supporting evidence for the claim that 20 years of a constitutional right to water have made inadequate impact on the ground for the many people still living in water poverty (the statistical data in support of this has already been outlined in Chapter Three). It is hypothesised that the current, primary legal solution to the problem of water poverty (a *right* of access to sufficient water), framed within a water-as-commodity paradigm, is inadequate, because of the inadequacy of the theory behind the law: namely that conferral of a qualified, individual right will affect significant positive change. Therefore, it is suggested that the paradigm upon which the current legal solution is based needs to be reconsidered. This is supported by the perceived failure of the right to water to effectively facilitate access to sufficient water for everyone in the country – as evinced in the Constitutional Court's judgment in *Mazibuko*.

This chapter then looks to current practice to see whether any viable alternatives arise from within the empirical study undertaken. It identifies practices that reflect 'commons' approaches to water access, which it is suggested may help to redesign and reinvigorate water governance in South Africa. The chapter examines the potential that commons approaches represent as an alternative (or as an adjunct) to the present, dominant mode of water governance in South Africa (as discussed in Chapters Three and Four), seeking to understand these practices through an alternative legal paradigm, referred to as 'water-as-commons'.

Structured in this way, the chapter contains two distinct sections; one is comprised of research (interview findings), the other analysis. But rather than present these sections in separate chapters, they have remained together as a reminder that 'the medium is the message': that including the voices of water poor people within analysis of the right to water is an integral part of reimagining water governance (this methodological insight is explained and applied more fully below at 5.2.2). Here, commons approaches to water governance are scrutinised using a combination of theoretical, historical and empirical enquiry. Central to the use of empirical data is the connection between people's experiences of living with insufficient water, and commons approaches that are arising in response to these experiences.

The limits of a right of access to water within a water-as-commodity paradigm

Throughout the thesis so far, mention has been made of the various ways in which water, and access to water can be conceived. Particular emphasis has been given to conceptions of water as being a public good (held on trust and administered by the State), or a commodity (the economic value of which is prioritised). As detailed in Chapter Two, and Chapters Three and Four respectively, the commodification of water (treating water primarily as an economic good) in recent years has been encouraged and embraced internationally (with varied success), as well as in South Africa. This has had a considerable effect on water governance in South Africa, generating legislation and strategic priorities that advocate full cost recovery, and influencing judicial decisions on the reasonableness of water policies. Throughout the thesis a terminology of paradigms is used in order to describe the various conceptions of water that are considered. Conceiving of water primarily as a commodity is referred to as a 'water-as-commodity paradigm'.

The previous chapter concluded that a constitutional right to water, as it is currently expressed, (requiring reasonable measures to be taken towards its progressive fulfilment, contingent upon available resources) could not ensure that everyone experiences access to sufficient water with which to meet their basic needs. Viewed from *within* a water-as-commodity paradigm, one response to this perceived failure may be to reappraise the current expression of the right to water. This could include debating the advantages of a minimum core approach to the right to water versus a reasonableness approach (as developed and favoured by the Constitutional Court). Another response may be to pursue greater clarity and transparency around the issue of available resources, and to identify opportunities within the current political structures to advocate for greater prioritisation of socio-economic rights. More radically, the sacrosanct status of Separation of Powers, (as attested to by the Court's consistently deferential stance towards government and parliament), could be further critiqued, perhaps emphasising an instrumentalist approach to transformative constitutionalism, less sensitive to trespassing on policy decisions, in the pursuit of securing significant material improvements. And there are, no doubt, other ways to respond to, and improve on, the inchoate right of access to sufficient water in its present form, within a water-as-commodity paradigm.

Some of the above critiques have been elaborated on in Chapter Four, while others lie outside the remit of this thesis. But each of them shares some common attributes, the identification of

which is crucial to introducing the purpose of *this* chapter. First, the right of access to sufficient water, in its current form, pertains to individuals: 'Everyone has the right of access to... sufficient food and water'.[771] As such, the right is not conferred collectively on groups (families, communities etc.). Rather, each person has her/his own right. Second, the right is one of '*access* to sufficient water', as opposed to '*ownership* of sufficient water' or a 'right to water'.[772] This complements the designation of water in the National Water Act, as being under 'public trusteeship', administered by the State, for the benefit of the nation (see discussion at 3.3.2). This also limits potential encroachment upon individuals' property rights under the Constitution[773] (which will be critiqued at length below, in relation to access to water). Third, despite the emphasis on individuals' rights of access to water within the Constitution and legislation, simultaneous reference to water as an economic good, and to the need to achieve 'efficient use' of water, has perpetuated and reinforced commercial approaches to water service provision, which emphasise cost-recovery.[774] Such an approach was clearly acknowledged in *Mazibuko*, and was accepted without criticism by the Constitutional Court (see above at 4.7).

Together, these attributes support a reading of the current right of access to sufficient water as existing within a water-as-commodity paradigm (as introduced in Chapter One, and applied in the South African context in Chapter Three at 3.4). In short, the right to water is individualistic; it is compatible with private property rights; and it is interpreted in light of *a priori* assumptions about the commerciality of water services. Therefore, further debate around judicial deference, government priorities, or the reasonableness of 'reasonableness' (!), however beneficial, is likely to take place within the same paradigm, asserting (more or less consciously) the same attributes of the right to water identified above.

However, the conclusions drawn in the previous chapter, about the limits of rights talk, provide the impetus for this thesis to open up new space in which to reimagine water governance, and the role and efficacy of a right to water. It is therefore the principal purpose of this chapter to attempt such a reimagination, and to propose a paradigm shift: from water-as-commodity, towards water-as-commons.

[771] Section 27 (1) (b) of the Constitution.
[772] In the South African Constitution, the water-related right is the 'right of access to sufficient water'. However, for brevity, on occasion, this right is referred to as the 'right to water'.
[773] See Section 25 of the Constitution.
[774] See discussion at 3.4.

Exploring and experiencing the consequences of a paradigm shift

The chapter begins by reflecting on the experiences of some of the many people living in water-poverty in South Africa (regularly experiencing insufficient access to water, with myriad negative consequences). This applies the practice of 'narrative inquiry' (see above at 1.3.1 and below at 5.2.1).[775] Embracing narrative (the telling of a story) as both a method and a phenomenon of study, narrative inquiry 'involves the reconstruction of a person's experience in relationship both to the other and to a social milieu':[776] By deliberately including within this thesis the voices and stories of water-poor people, the shortcomings of the current right to water can be exposed not just as causing legal or political problems, but also social problems, personally and communally experienced. As will be seen, these experiences create multiple histories that attest to some material improvements, as well as to continuing disenfranchisement and discrimination, suggesting some unsettling continuities with the country's troubled past.

Moreover, the application of narrative inquiry[777] here - actively listening to the experiences of water-poor people, and their responses to water-poverty – reveals ideas, attitudes and actions that can inform and inspire attempts to reimagine water governance in more equitable and sustainable ways. To this end the chapter considers the enfranchising potential of narrative, before analysing the interviews conducted, and their connection to the arguments in the current and preceding chapters.

As will become apparent, it is argued that across myriad community/communal/co-operative/commons organisational modes attested to in the empirical work conducted by the author, as well as by other researchers, there are some sufficiently discernable shared characteristics, which warrant discussion of these modes within a single (albeit broad) paradigm: commons approaches to water governance, or 'water-as-commons'. Commons theories are introduced, and the history of 'commoning' in various parts of the world is traced, in order to locate 'commons thinking' within a rich and complex mixture of ancient traditions, indigenous knowledge systems and postmodern theory. It is asserted that commons thinking, applied to the task of helping achieve access to sufficient water, is capable of reimagining water governance to effectively respond to key problems associated with insufficient water access. Of particular note here is the emerging conceptual shift from government to governance, and consequently the growing importance of multi-level governance and grass roots organisations, both of which

[775] S Pinnegar & J G Daynes 'Locating Narrative Inquiry Historically: Thematics in the Turn to Narrative' in D J Clandinin (ed) *Handbook of Narrative Inquiry: Mapping a Methodology* (Sage Publications, 2007) 3.
[776] Ibid at 5.
[777] Ibid at 3.

prioritise stakeholder participation and enfranchisement.[778] This shift is analysed in more detail below.

Although serious criticisms of commons thinking exist in the literature, and are acknowledged and explored here, this chapter's consideration of the potential of the commons to help reimagine water governance is unapologetically optimistic in parts. This optimism (and the conscious suspension of negative preconceptions associated with non-hierarchical, grass-roots modes of governance, which it entails) is crucial to creating fresh epistemic space within which ideas can emerge and play, uninhibited by the confines of the dominant paradigm. Within such a space, the erstwhile inviolate phenomena of private property, commodification,[779] and human rights are deconstructed and reconsidered in relation to how best to meet the challenge of securing access to sufficient water for everyone.

This interrogation of commons thinking will prepare the way to argue that the current state of water governance in South Africa should be reviewed in order to better facilitate and encourage the growth of community-specific bottom-up water solutions.

5.2 Story-telling: Listening to people's lived experiences

So far in this thesis most of the research underpinning my writing has come from sources that are traditionally accepted and expected in legal scholarship, including books, journal articles, case reports, legislation, and treaties. While the sources used have been chosen for their specific relevance to the subject of the thesis, it is perceived that they also meet a more general standard, which warrants their inclusion, namely that of offering 'methodologically validated knowledge about society'[780] (or at least that part of society being scrutinised). There is an assumption that such scholarly resources are accepted because they pursue and/or reflect 'truth'.[781]

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[778] *See* P Jon 'Introduction: Understanding Governance' in P Jon (ed) *Debating Governance: Authority, Steering Democracy* (Oxford University Press, 2000); D M Trubek & L G Trubek 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) *University of Wisconsin Law School, Legal Studies Research Paper Series* Paper No. 1047.

[779] Here the term 'commodification' refers to the transformation of anything (goods, services, people etc.) into commodities or objects of trade. See: A Appadurai 'Introduction: commodities and the politics of value' in A Appadurai (ed.) *The Social Life of Things: Commodities in a Cultural Perspective* (Cambridge University Press, 1983) 3.

[780] R Usher 'Telling a Story about Research and Research as Story-telling: Postmodern Approaches to Social Research' in G McKenzie et al (eds.) *Understanding Social Research: Perspectives on Methodology and Practice* (Falmer Press, 1997) 27.

[781] Ibid.

By contrast, we tend to think of 'story-telling' differently. We synonymise stories with fiction, rhetoric, and even hyperbole, which mark story telling out as an altogether less serious endeavour than scholarship.[782] Indeed, for a long time, story-telling (narrative form, or 'narrativity', as it is referred to in sociological literature) has been deliberately avoided in legal scholarship; scorned by scholars as being 'forever a bastard discipline':[783] particularistic, idiosyncratic and imprecise. More recently however, narrative form has begun to be embraced, as a means of incorporating subjective and specific accounts of social life, within consciously *socio*-legal work. In such a context, the criticisms of particularism, idiosyncrasy, and imprecision are beginning to be celebrated as providing 'a promising vehicle for introducing legal decision-makers to a more complex, ambiguous legal subject'.[784] This has been driven, in large part, by the emerging challenges within social-scientific scholarship, to claims of 'truth', and 'pretence to objectivity' (as mentioned above in relation to formalist approaches to judicial restraint).[785] These challenges are themselves symptomatic of a 'postmodern turn' within wider society, described by Best & Kellnor as:

> 'a turn away from modern discourses of truth, certainty, universality, essence, and system, and a rejection of grand historical narratives of liberation and revolution'.[786]

This section offers a brief reconsideration of the role of legal research through stories, asserting that narrative inquiry is necessary in order to understand law in action, and therefore, in the context of this thesis, essential for appreciating the manifold challenges facing people seeking to secure access to sufficient water. Although commonplace in sociology, and notwithstanding the work of scholars including Ewick & Sillbey, and Abrams, this method remains underused in legal research.[787] Having deliberately adopted such a method here, a brief justification for it is provided. It is argued that including people's stories alongside 'legal' materials is necessary in order to more fully understand the potential that commons approaches have to positively shape water governance. Furthermore, it is asserted that the traditional 'legal' materials identified above are themselves examples of telling stories. Some of the decentring consequences of this assertion are considered below.

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[782] Ibid.
[783] P Ewick & S S Silbey 'Subversive stories and hegemonic tales: Toward a sociology of narrative' (1995) *Law and Society Review* 197-226, 198.
[784] K Abrams 'Unity, Narrative and Law' in A Sarat & S S Silbey (eds.) *Studies in Law, Politics and Society* (JAI Press, 1993) 30.
[785] P Ewick & S S Silbey 'Subversive stories and hegemonic tales: Toward a sociology of narrative' (1995) *Law and Society Review* 197-226, 198.
[786] S Best & D Kellnor *The Postmodern Turn* (The Guildford Press, 1998) 7.
[787] See: K Abrams 'Hearing the Call of Stories' *California Law Review* (1991) 79; P Ewick & S S Silbey 'Subversive stories and hegemonic tales: Toward a sociology of narrative' (1995) *Law and Society Review* 197-226. Also see generally K Plummer *Telling Sexual Stories* (Taylor & Francis, 2004).

5.2.1 Enacting a methodology of narrative inquiry

The general methodology and method that my empirical work follows is detailed in Chapter One (1.3). Here, some deeper reflections are offered around the particular importance of narrative inquiry in the specific context of this thesis and its focus.

In March 2000, shortly before the Millennium Development Goals were agreed, the World Bank published a significant report on people's experiences of living in poverty, entitled 'Voices of the Poor: Can anyone hear us?'[788] It was compiled from 60,000 interviews in 60 countries, offering important context for the forthcoming MDGs. In so doing, the report brought narrative inquiry to the forefront of development studies. Voices of the Poor also gave essential insight into the nature of poverty, concluding that poverty is much more than lack of income. Poverty was also identified with people's experience of under-representation in their political institutions, and of being denied a 'voice' with which to influence the key decisions that affect their lives.

Voices of the water-poor

Inspired by the report's methodology, as well as by its conclusions around the disenfranchising effects of poverty, the interviews I conducted with members of water poor communities, have sought to emulate it (on a much-reduced scale), by recording personal accounts of people's experiences of accessing (in)sufficient water, and the implications of this. Also, in the process of interviewing, I sought to acknowledge the (modest) enfranchising potential of narrative itself. The very act of listening to people's accounts of the challenges they face in accessing water can communicate affirmation to the story-teller: that their experiences matter; that they have been noticed; and that, in some small way at least, they have a 'voice'. As Spanbauer lyrically reminds us:

> 'The only thing that keeps us from floating off with the wind is our stories. They give us a name and put us in a place, allow us to keep on touching.'[789]

Such sentiments are affirmed in my own experience of interviewing people, most of whom have been extremely eager to tell their stories, to share their names, and to open their homes.

Throughout the thesis, as people's experiences are represented in quotations from their own stories, it is important to be mindful that any process of representation is complex. Here some

[788] 'Voices of the Poor: Can anyone hear us?' 14 March 2000: See <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20013937~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (Last accessed 27 July 2016).

[789] T Spanbauer *The Man Who Fell in Love with the Moon* (Grove Press, 1992) 190.

of the recent scholarship on narrative methodologies and postmodern approaches to social research is relevant. Critiquing the modernist assumption that meaning can be discovered by dispassionate observation and experimentation, postmodern approaches to social science suggest that there is a first step that must precede such empirical work. This first step 'requires a shifting of the way the world is seen and the construction of a new world to investigate'.[790] In light of this, my attempts to capture and represent people's stories can be seen as a mode of intervention, which changes the way the world (here, the phenomenon of living without access to sufficient water) is understood, and opens up new spaces to investigate.[791] Not only can this insight break open the epistemological closures that are assumed in traditional legal research (for instance a justiciable right of access to sufficient water, granted within certain constraints is expected to result in effective provision of sufficient water), it also decentres epistemology as *the* pivot of research, requiring that fresh ontological enquiry must precede it.[792]

Applying these insights to the foregoing research into water governance at the international and domestic levels, including the Constitutional Court's jurisprudence, we are reminded that epistemological research traditions (that delineate knowledge from thought and experience) are never independent of the socio-cultural context in which they are practised. Rather, they are inevitably coded by 'the structures, conceptuality and conventions of language, embodied in discourses and texts'.[793] Even though the sources that have been used to analyse water governance thus far are familiar to (legal) epistemological research, they cannot escape socio-cultural contextualisation. Neither can they avoid relying upon the meaning-constituting system that language is. Therefore, even the most positivist/empiricist sources used can be understood as stories, which cannot be separated from their subjectivity, history or socio-cultural location, or from the coding of the language in which they are represented. The same holds for the ensuing discussion of the commons, and the reflections on people's lived experiences of access to (in)sufficient water.

Some of the experiences shared below affirm that there have been improvements in access to water, particularly since 1994. But most of the people interviewed also document that

[790] R Usher 'Telling a Story about Research and Research as Story-telling: Postmodern Approaches to Social Research' in G McKenzie et al (eds.) *Understanding Social Research: Perspectives on Methodology and Practice* (Falmer Press, 1997) 31.
[791] DJ Clandinin & J Rosiek 'Mapping a Landscape of Narrative Inquiry' in D J Clandinin (ed) *Handbook of Narrative Inquiry: Mapping a Methodology* (Sage Publications, 2007) 35.

[792] R Usher 'Telling a Story about Research and Research as Story-telling: Postmodern Approaches to Social Research' in G McKenzie et al (eds.) *Understanding Social Research: Perspectives on Methodology and Practice* (Falmer Press, 1997) 31.
[793] Ibid.

challenges remain. Many of the stories shared remain focused on the problems of accessing sufficient water. While others tell us how their experiences of water-poverty have led them to develop responses that (to differing degrees) reflect the salient features of commons thinking.

5.2.2 'The Medium is the Message': the importance of narrative inquiry for commons thinking

In 1964 the philosopher and communication theorist Marshal McLuhan coined the phrase 'the medium is the message'.[794] McLuhan's insight - that the medium through which a message is communicated, influences the message itself – is pertinent to the inclusion here of the experiences of water-poor people, in a discourse around alternative modes of water governance. Without this, the content of the 'message' - that more appropriate approaches to water are possible - risks being undermined by the medium used (by an enquiry undertaken at a great distance - geographically, empathetically and experientially - using legal and other scholarly materials, the privileged status of which results in an over-emphasis on the efficacy of legal mechanisms, without sufficient appreciation of their lived consequences).

In contrast, *this* enquiry has deliberately sought to embed the legal analysis of the right to water within the social context that makes it meaningful: the experiences of those living without sufficient water. Therefore, it is hoped that as the role of community organisation and commons thinking are analysed, the medium – discourse that includes people's experience of, and response to, water poverty – will positively influence, ground, and sensitise the message (or conclusions that are reached).

Furthermore, such is the importance placed on the need for commons approaches to spring from the priorities and capacities of the communities themselves, (as evidenced below) that it is difficult to imagine how any serious enquiry into the potential of the commons to affect modes of governance could be undertaken in isolation from the relevant lived experience of communities. Inclusion (in some shape or form) of people's experience within the fabric of commons responses seems vital to the methodological integrity of commons thinking. Therefore, throughout the thesis, but particularly in this chapter, the emphases placed on the stories of water-poor people, and on commons modes of water governance, do not represent two separate foci: Rather, they are intertwined.

[794] M McLuhan *Understanding Media: The Extensions of Man* (McGraw-Hill, 1964) 8.

5.3 Stories from water-poor people – glimpses of the commons

This section considers some stories of people's experiences of life where access to sufficient water is problematic. These stories have been collected over a number of years, and from a variety of places in rural and peri-urban KwaZulu-Natal (in South Africa) and from rural and peri-urban locations around the city of Blantyre in Malawi. Most of the stories come from interviews that I have conducted, but some recent empirical work conducted by Sophie Hellberg is also used in relation to the development of water governance approaches across eThekwini municipality.[795]

In most of the communities in South Africa that I visited, English was not the primary spoken language, although certain interviewees spoke fluent English. Consequently some interviews were conducted through an interpreter, and so the extracts used to recount people's stories, where interpretation was necessary, are not verbatim. Rather, the interpreter has rendered interviewees' words spoken in isiZulu, into English. Where extracts from dialogues are reproduced, the name of each speaker is indicated using their initials. As the interviewer, my initials (NC) appear where necessary for clarity. Although often interviewee's names are anonymised in empirical research, here the decision was made to refer to participants by the names they chose to give (either their full names, first name only, or nickname). The first reason for this is that there is an extremely rare chance of participants' identities being discovered and recognised by readers, given the relatively isolated location of participants' communities, as well as the academic audience at which this research is directed. The second is that referring to participants by name seems appropriate given one of the stated aims of the empirical work within the thesis: to allow people to tell their own personal stories.

5.3.1 A recap of the content of the right to water

Since most of the interviews below were conducted in South Africa, where a right of access to sufficient water is constitutionally enshrined, the question of what is sufficient water is particularly relevant in analysing people's experiences of access to water in relation to their constitutional right. As detailed in Chapters Three and Four, what constitutes 'sufficient water' is contentious. But, as discussion of the relevance of an internationally acknowledged right to water (in Chapter Two) reminds us, considerable effort has been taken to define a minimum core requirement for the right to water, which is at least indicative of what constitutes sufficient water, in the South African context. Indeed, the Constitution of South Africa requires courts to

[795] See Chapter One at 1.3.1 for more detail on how interviewees were approached, including information provided, clarification of expectations, informed consent, and data protection.

consider international law.[796] This was in evidence in the case of *Mazibuko* discussed in Chapter Four, and particularly visible in the High Court and Supreme Court of Appeal judgments.

The Committee on Economic, Social and Cultural Rights, General Comment number 15 on the right to water[797] has been discussed at length in Chapter Two. But it is worth reminding ourselves of what General Comment 15 (GC 15) states as being the necessary content of the right to water. Paragraph 2 describes the human right to water as entitling, 'everyone to *sufficient*, *safe, acceptable, physically accessible* and *affordable* water for personal and domestic uses.'[798] This provides a yardstick with which to measure how closely people's experiences of access to (in)sufficient water correspond to what has been authoritatively determined as everyone's requisite entitlement.[799] Therefore, as people's stories of water-poverty are shared, the level of access they describe, as well as the conditions surrounding access, can be analysed in relation to the broad requirements of sufficiency, accessibility and affordability, as stated in GC 15 (each of these requirements is defined and analysed in detail in Chapter Two, at 2.3).

5.3.2 Stories from rural KwaZulu-Natal

The Winterton base of Christian development charity 'Youth With A Mission' (YWAM) facilitated interviews with people in the communities of Okhombe and Woodford. YWAM undertakes community development activities in these villages and settlements, which are close to the Winterton base.

Okhombe

Okhombe is a large dispersed village at the foot of the Drakensberg Mountains, in eastern KwaZulu-Natal, three hours' drive inland from Durban. The population is around 500 people, whose primary language is isiZulu.[800] Here, Mbali Miya (MM) and Mpume (Mp) share their experiences of accessing water:[801]

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[796] Section 39 of the Constitution.
[797] Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002. Available at: < http://www.unhcr.org/49d095742.html> (Last accessed 27 July 2016). Hereinafter, General Comment 15.
[798] General Comment 15, Paragraph 2 (emphasis added).
[799] Using General Comment 15 in this way does not ignore the accepted limitations of available resources, or the general need for progressive rather than immediate fulfilment. It must also be noted that the 'right to water', as it is referred to in General Comment 15, differs from the 'right of access to sufficient water' in the South African Constitution.
[800] See census information available at < http://census2011.adrianfrith.com/place/571032> (Last accessed 27 July 2016).
[801] Interview # 7. See appendices.

NC: Where do you get your water?

MM: Wheelbarrows to fetch from a tap [standpipe]... Sometimes there is a queue it is difficult because you want water but there is a queue and you have to wait.

NC: How long does it take to get the water you need?

MM: During winter the water is very scarce in this community. You have to queue even to get a litre

NC: Have you ever not been able to get any water out of the tap?

MM: Usually that tap, the water comes, you do pumping, but sometimes we don't get any water out... Before we vote they said the municipality said they were going to supply everyone. Every house is going to have a tap. They started digging for where the pipes to go. Then after voting they just stopped [2009 general election].

NC: Is the water clean/clear? Does it taste OK?

MM: Sometimes the water that comes out is not good. These days it's smelling not good, like fish... when it rains I think mud gets pumped in or something.

NC: Have you ever got ill from the water?

MM: Yeah, everyone says they do get ill. Runny tummy. I don't know if it's the water.

Mp: Because we don't have taps we get water from the standpipe. When it rains the water from the river comes in around the standpipe and I think it makes it bad. Sometimes it just comes dirty water.

NC: Do you use it?

Mp: Yeah

NC: Do you boil it?

Mp: Yeah no not really, just put jik [bleach] in and leave it overnight and then use it in the morning. Because sometimes you want to cook and you want to make things and so you cannot wait for a long long time... You cannot boil it as it's too much, you're wasting your wood.

NC: What about the cost? Do you have to pay for the water you use?

Mp: No it's for free... as much as you can get.

Mbali and Mpume's account reveals that they regularly encounter significant problems relating to water access. Sufficiency, relating to the volume of water necessary to meet their personal and domestic needs, is one such problem when the flow from the communal standpipe they use is slow or stops. Equally, the unpleasant odour and dirty appearance of water at times, as well as the anecdotal connections made within their community between water and diarrhoea, all draw into question the acceptability and indeed the safety of the water they access. Because they fetch water using a wheelbarrow to carry 20 litre plastic buckets or drums, physical

accessibility is also a challenge. Even for able-bodied people, collecting enough water to meet the daily needs of a family in this way is tiring and time-consuming. For elderly or infirm residents such a method of collecting water is prohibitive, as 'Gremmah' (Grandma) Mbongwa explains:

> 'When it rains we collect the water from the roof. It's better than carrying it from the river [200 metres away]. The rainwater can be rusty from the roof, but we put extra Jik [bleach] in it. So it's ok. It doesn't taste nice when I make tea...
>
> If it hasn't rained, I get one of the children to go to the river for us. We still have to put Flash in the water, because the cows shit in it. If not, I get the runs.'[802]

Indeed, living on the outskirts of Okhombe, and far from a standpipe, Gremmah Mbongwa's access to water is doubly problematic. Not only is her closest source of water (other than rain water) too far away for her to carry it, the source – the river - is also not an 'improved water source'. An improved water source is one that, by the nature of its construction and when properly used, adequately protects the source from outside contamination, particularly faecal matter.[803] Therefore those in Gremmah Mbongwa's situation must rely on others to fetch water for them, and then must take steps to try to reduce the chances that this water will cause diarrhoea.

Clearly these experiences of access to water fall short of the content of the right to water, as clarified by GC 15. Measured against the requirements of GC 15, only the *affordability* of Mbali and Mpume's water regularly meets the standard set, since they are not charged for the water they access. Their account also provides an insight into the potential for people's access to water to become politicised. The election-time promise of improved water service provision should have arisen from the municipality's commitment to progressively realise the constitutional right to water, and from an appraisal that resources were available to this end. Instead, it seems that Okhombe residents were offered false hope of improvement, in return for their vote. Gremmah Mbongwa also recalls that in 1994 the municipality first started to talk about piping water to each house. This possibility resurfaced as a local election promise made by both the ANC and IFP (Inkata Freedom Party) campaigns during 2008.[804] Furrows were dug

[802] Interview # 1. See appendices.
[803] See World Health Organisation Joint Monitoring Programme for Water Supply and Sanitation: <http://www.wssinfo.org/definitions-methods/watsan-categories/> (Last accessed 27 July 2016).
[804] See the following article that corroborates IFP's water promises in Kwa-Zulu Natal during the 2008 election campaign: 'South Africa: Thirty Years Later, Still No Water in Roosboom' *All Africa* 8 August 2014. Available at: <http://allafrica.com/stories/201408110891.html> (Last accessed 27 July 2016).

in the run-up to the election, in preparation for pipes to be laid, but were abandoned once election time was over.

Woodford

35 kilometres west of Okhombe is the village of Woodford. The community here faces significant problems of material and social deprivation. It is estimated that 40% of its population of several hundred residents[805] are 'economically inactive'.[806] I interviewed three residents, Nombuso Khaba (NK), and two sisters, Vosile (V) and Elizabeth (E). They shared similar experiences to people in Okhombe, regarding the accessibility and quality of their water supply. But there was some disagreement about whether the water they accessed was a cause of illness. Also Nombuso's account of the municipality's decision to stop charging for water provides an interesting example of community organisation in relation to water services. Although it was unclear whether before this decision people were finding water access unaffordable, or whether their principal complaint was that they were being charged for an intermittent supply.

NC: Where do you get your water from?

NK: Fetching from the tap [standpipe]

NC: How much water do you use in a day?

NK: Maybe eight 20 litres [8 x 20 litre buckets] for 11 [people in the household]

NC: Have you ever been sick from the water, or do you know anyone else who has had health problems from the water?

NK: Before she [Nombuso's cousin] was having stomach problem, so when she gone to the doctor they said she got a water virus, she doesn't know if it's water or what.

NC: Do you ever have any problems with the supply?

NK: The water sometimes becomes dirty for a while before they [the municipality] clean them. Sometimes they just finish – cut off – without any notice, and sometimes its not tasting good.

NC: How many times is it cut off in a month?

NK: Maybe twice a month... It doesn't taste good because they are using chlorine.

NC: Do you have to pay for the water? Have you ever had to?

NK: No for free. Before they were paying for it, but now always for free. After a certain meeting they were having the community was complaining about paying for the water so they decided to stop paying. From there it's free.

[805] Exact census information is not available.
[806] See <https://www.legalwise.co.za/files/2514/4238/6431/Ekwaluseni_Library_Project.pdf> (Last accessed 27 July 2016).

NC: Why did the community not want to pay?

NK: It's too much. Many times it's cut off.

NC: What year was that?

NK: Think it was 2004.

NC: The meeting, was it just community members there or was the municipality there as well?

NK: They were complaining to the municipality. So it was the community with the municipality.

NC: And did the community decide not to pay, or did the municipality say you don't have to pay?

NK: Both. We said we're not going to pay. Municipality decided that they [the community] mustn't pay.[807]

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NC: How do you carry the water back from the standpipe?

V: If she's making the washing she is taking the wheelbarrow. If she doesn't want to make washing, just take the bucket.

NC: How many buckets to do the washing?

V: Four buckets [4 x 20 litres]. Once a week.

NC: What is the water like? Is it clear? Does it taste good?

E: No it is because we use chlorine. They [the municipality] put it in... It is for free there is no limit.

NC: So you've never got ill from the water?

E: Other people say they come sick, but I don't understand why, the water is clean.

NC: Have you ever been promised a water tap here in the house?

E: No.

V: No.

NC: How many people use that pump? How many families?

V: Maybe if I can count families. It's for 80 families. Two taps for 80 families.

[807] Interview # 8. See appendices.

NC: Is there a big queue?

V: Yes especially on Saturdays.

NC: Does it ever run dry?

V: Yes but it is rare. Most days we have enough water.[808]

Taken together, these narratives emphasise that there are particular challenges to access to water in Okhombe and Woodford, relating to sufficiency (the collection of a quantum of water commensurate with people's domestic needs); acceptability (the taste, odour and appearance of water); safety (although some interviewees rejected the assertion that the water caused illness); and physical accessibility (relating to the proximity of improved water sources, and the logistics of transporting the amount of water required). In these rural locations, the financial affordability of water did not seem to present a challenge, since water services, where available, were provided free of charge, and have been for some time.

Verulam

Closer towards Durban, I interviewed Sewpersadh Kanthelall (SK) who lives on a smallholding on the outskirts of the town of Verulam, in eThekwini Metropolitan Municipality, 27 kilometres from the centre of Durban.[809] Behind the smallholding, 500 metres away is a small settlement called Msunduze, with around ten block and corrugated iron houses and several rondavels (round huts made from mud, with thatched grass roofs). Mr Kanthelall told me how he and his wife struggle to afford to pay their water bill, as well as how they regularly experience intermittent supply, despite having taps and piped water to the house, and despite their location within a large metropolitan area.[810]

NC: Where does the water come from? Is there a tap?

SK: A tap, yeah. And the water comes from the Hazelmere Dam. We pay for water, a month of water... In case we don't pay, they'll cut the water off, but I pay every month. My water comes to over 700 Rand a month. You see, myself and my wife we are pensioners, I can't afford to pay 700 Rand a month, for it to be not working.

NC: [Looking at their water bill] a total of 797 Rand, that's for one month?

SK: One month, yeah.

NC: And do you always have enough water? Is the supply always there?

SK: No, sometimes the water is cut. Containers are kept in case water is cut for a day or two.

[808] Interview # 9. See appendices.

[809] eThekwini, meaning 'lagoon', is the Zulu name for Durban.

[810] eThekwini Metropolitan Municipality is the second most populous area in South Africa, after Johannesburg. This area is referred to variously as eThekwini, and as Durban.

NC: When the water is cut, do you know beforehand?

SK: No, when we open the tap, there is no water.

NC: Do you know why?

SK: No, we have to wait for the water to come in. It could be one day or two days that water doesn't come. So I've got some containers and things to cook, you must have water, without water you can do nothing. So I don't know, it might be cut off today or tomorrow.

NC: In one month, how often do you get the water cut off?

SK: About four times in a month.

NC: So maybe about once a week?

SK: Yeah.

NC: What about the quality of the water, is it fine?

SK: Yeah, it's fine.

NC: And the amount that you spend on the water, do you get any free water?

SK: No, you have to pay for water. In the back [in Msunduze] most of the people get free water, we are paying for them, because when those people come to [*word indecipherable on Dictaphone*] business is our business.

NC: I'm really interested in how you get cut off and whether the government gives you notice.

SK: No, you just open the tap and there is no water.

NC: And the 700 rand a month, does that feel like a lot?

SK: Yeah, it's big money. I'm earning 1410 Rand a month, I pay 700 Rand for water. What about my lights, what about insurance, what about food?

NC: So you and your wife-

SK: She pays for power, I pay for water... If the water is cut the government don't help us. The water that comes, comes. You've got to pay for it, whether you've got water or no water. You've got to pay your account, if you don't pay your account [made a hand gesture of turning off a tap].[811]

Conducted in November 2015, this interview took place during South Africa's second consecutive year of drought. The previous month was also the hottest October in recorded history.[812] No doubt some of the interruptions to Mr Kanthelall's water supply are a result of the low water table in the nearby dam, caused by the drought conditions, which compounded underlying infrastructural problems with pumps and pipes.[813] Long-term climate predictions

[811] Interview # 10. See appendices.
[812] 'Records tumble as drought goes on' *The Mail & Guardian* 20 to 26 November 2015, 11.
[813] Ibid.

show that there will be even less water in the future, as the country's interior becomes hotter by between three and five degrees centigrade by 2050.[814]

Mr Kanthelall also shared how the amount they have to pay for water each month is a source of anxiety for them, especially as they get older. Consequently, despite the ever-increasing problem of water-scarcity, their measures to conserve water (including flushing the toilet only sporadically) are driven primarily by financial concerns. Although still able to pay for the water they use, such financial concerns, along with intermittent supply, are straining their experience of regularly accessing sufficient water (as defined by GC 15, regarding accessibility and affordability). However, Mr Kanthelall was quick to acknowledge that the standard of living that he and his wife enjoy, is considerably better than that of many residents in neighbouring Msunduze, whose relationship with water is more problematic still.

Msunduze

In Msunduze water is accessed from standpipes that have been erected in clearings between dwellings. This provision is similar to that in Okhombe and Woodford, described above. But here each standpipe serves a single household, and water must be paid for. To facilitate this, standpipes are connected to meters. In November 2015, Ndwendwe local municipality was in the process of replacing existing meters with prepayment meters, of the type used by Phiri residents and at issue in the case of *Mazibuko* (see above at 4.5.6). I was invited in to the home of Thandeka (T) and her family of five children, partner and grandfather, to discuss their experiences of access to water. The meter attached to the standpipe Thandeka used was still one that produced a monthly bill, but we spoke about what they anticipated the consequences of changing to a prepayment meter might be.

> NC: Do you get a certain amount of water every day that is free and then you pay after that?
> T: 8 litres free.
> NC: 8 litres a day? For the whole house?
> T: 64(?) litres a day is free for the whole house. For everybody, it's not counted as individual.
> NC: How many people live here?
> T: Eight.
> NC: How many houses use this standpipe?
> T: Just this one at the moment.
> NC: So each of the houses here will have their own meters and their own taps?
> T: Yes, we don't share meters.

[814] Ibid.

NC: Do you ever find there's no water even if you've paid? Does the water supply get cut?

T: If the bill is high they will cut the water.

NC How do you get it on again?

T: We go pay.

NC: Do you have to pay all of it or just some?

T: They want it all.

NC: What happens if you can't pay?

T: It's difficult, you don't have the water, you have to pay then you get the water.

NC: Does anyone get water from other places, like rainwater?

T: No, we don't have rain heavy around here.

NC: The quality of the water, it's fine? It's good quality water?

T: Yeah.

NC: Do you ever find that you've run out of water?

T: No.

NC: Do you know of anybody in this area who doesn't have enough water?

T: Yeah, there is a few where they don't have enough water.

NC: And that's because they can't afford to buy it?

T: They can't afford to buy it.

NC: [Looking at the standpipe] If that broke who would fix it?

T: It is a municipality, but when it broke a couple of weeks ago, months ago, we just had to do it.

NC: You did it yourself?

T: Yeah, we just had to do it and the neighbourhood helped. We just put a new pipe, I think the pipe is a little bit old now, sometimes it bursts. The government will only kind of be involved with what's happening in the meter. So whatever pipe that's broke here, they wouldn't be involved, but they'd be involved if the water maybe burst out of the meter, and we call them and they will come and fix it, but they will also take their own time.

NC: But the pipe is your own responsibility and you have to maintain that yourself?

T: Yeah.

NC: That must have cost quite a lot of money.

T: Yeah, it did.

NC: When the meter changes to a prepayment meter like the electric-

T: They're already changing, I don't know how they'll do it, because ____.

NC: Do you think that will be a good thing or a bad thing?

T: Bad thing... I think it's because of financial-wise. A lot [of people] are not working, they just stay here, in the guardian of the grandpa, and he's the only one who supports the family.

NC: The only income is from the grandpa?

T: Which is for 8 people. It's quite a lot, and also regarding water and electricity.

NC: Do you know how much money it would cost each month to have the water that you need on a prepayment?

T: It's different. I think most of the time it's 800 [Rand] a month.

NC: And that's for the 8 of you?

T: Yeah... It is for 8 people, they live here and use water.

NC: With the 800 a month, if you have to spend that, will you still have enough for food or electricity or school?

T: No, we don't have enough. If you have to go and pay 800 for water you can struggle to pay for food.

NC: How do you pay for the electricity is that prepayment?

T: Yeah.

NC: How much is the electricity?

T: 10 Rand will last a day.

NC: Do you go and buy that every day?

T: No, you have to buy maybe 100 Rand. And when it's finished on the meter you buy another.

NC: Where do you buy it from?

T: Verulam, in the town.

NC: So you have to go all the way there to buy the electricity and then come back?

T: Yes.

NC: Can you walk?

T: No. Taxi. [Verulam is 23 kilometres away]

NC: Do you think that will be the same with the water prepayment, when that comes in, will you have to go to the same place to buy the water prepayment?

T: Yeah, it's exactly the same.

NC: How much does it cost in the taxi?

T: 12 Rand each way.[815]

In contrast to the experiences of people in more rural locations like Woodford and Okhombe, Thandeka's story reflects very different challenges facing her family's efforts to access sufficient water. The proximity and physical accessibility of their water source is generally unproblematic (when not in need of repair), and the water quality is good. But, recounting the contemporary experiences of neighbours, and anticipating the possible consequences of having to use prepayment meters, clearly it is the affordability of water and the consequent denial of access to water, when it cannot be paid for that is the most difficult challenge. Furthermore, once

[815] Interview # 11. See appendices.

prepayment meters are widely installed, if Msunduze residents are actually required to travel to the nearest town in order to prepay their water accounts, the additional financial and logistical burden that this would entail may compound the relative *in*accessibility of sufficient water for people in Thandeka's situation, despite their physical proximity to clean, piped water.

It is not claimed that these stories of people's experiences of access to water in specific rural and peri-urban locations can automatically be generalised across a municipality, or across the nation as a whole. Such qualitative interviews, particularly when conducted on a relatively small scale, are intrinsically ill-suited to producing broad empirically supported generalisations.[816]

But, returning briefly to the statistics considered in Chapter Three regarding people's level of access to water in the country, the stories shared above do provide some context to the bald figures (from the General Household Survey 2014) that 86.5% of people living in KwaZulu-Natal, and 90% nationally, have access to water for domestic use (see 3.2). Undoubtedly such statistics fail to acknowledge that varying *degrees* of access to water exist. They are also unable to appreciate the lived consequences variously of inadequate, intermittent, remote, contaminated, and unaffordable water supply for those interviewed, and for people living in similar material conditions. The statistics on access to water do provide a general picture, which confirms that access to water remains problematic for many people. The stories of water-poor people shared here, simply add humanity and nuance to what are already established and generalized observations, and in so doing, these stories anthropomorphize statistical subjects into people with a voice. While it is methodologically prudent to acknowledge the dangers of generalizing from specific cases, this must not lead us to marginalize people's experiences of access to (in)sufficient water, particularly if our aim is to identify opportunities for new modes of water governance, that may (already) be conceived in response to such experiences.

5.3.3 Stories from Durban

In February 2010 and November 2015 I conducted a series of interviews with water-poor residents in the city of Durban. On both occasions staff from YWAM Durban assisted me. Durban is a city synonymous with beaches, and home to Africa's largest port. Water is central to the city's image and identity. But access to water for many of its poorest residents is a constant struggle, compounded by moves to commercialize water resources, and to pursue full cost recovery. The result is that access to water has emerged as a dividing line between those who can successfully navigate a water-as-commodity paradigm, and those who cannot; instead

[816] K F Punch *Introduction to Social Research: Quantitative and Qualitative Approaches* (3rd ed, Sage Publications, 2014) 122.

experiencing dislocation from the dominant norm and exclusion from what their Constitution states is their right.[817] As illustrated below, not only can this dividing line be seen between richer and poorer areas of the city, but even within the same community. Also, amongst my empirical work in South Africa, it is here that examples of commons thinking in action can be glimpsed most clearly, in relation to community organisation for water governance.

Burlington

Burlington is a large settlement on the outskirts of Durban, 20 kilometres inland (south-west) from the beachfront.[818] Part of eThekwini Metropolitan Municipality, it is comprised of a combination of permanent dwellings and informal housing.[819] By 2010 the municipality had provided piped water to a number of homes here. But the cost of water from this source quickly proved prohibitive for many residents. Those who became indebted eventually had their pipes disconnected (see 2.3.1). I first visited Burlington in February 2010. I saw and heard how some members of the community, many of whom had had their water supply disconnected, had organised themselves into those who were able to collect water from the standpipe (both those physically able and those who had time) and those who could not. Those not able to use the standpipe (including older residents) were receiving a small amount of money from their younger neighbours in order to ensure that their water bills were paid and that they could continue to enjoy water piped to their homes; while able bodied residents relied again on the standpipe. Community leaders met to decide whom to prioritise in this system, and to monitor how it worked.[820]

Here, the community's collective response to the specific problem of accessing water after disconnection, evinces a corporate, or commons approach towards water access, rather than an individualistic one. In this community, at that point in time, accessing sufficient water has been framed as a communal endeavour, achievement of which requires a variety of responses from people, dependent on their needs and abilities. This is explored further below at 5.4.

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[817] Constitution of the Republic of South Africa, Section 27.

[818] See <http://www.durban.gov.za/City_Services/engineering%20unit/Surveying_Land_Information/Documents/ETHEKWINI%20WARD%20MAP%20NEW%20BOUNDARIES.pdf> (Last accessed 27 July 2016).

[819] For definitions and clarification of informal housing/informal settlement see <http://www.thehda.co.za/uploads/files/HDA_Informal_settlements_status_South_Africa.pdf> (Last accessed 27 July 2016).

[820] N Cooper & D French 'The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism' in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 111, 136.

More recently, in November 2015, I revisited this community, to find that access to sufficient water remained a daily challenge for many. But once again this problem has led several households to develop innovative responses (although not all of which reflect commons thinking). Standpipes remain the primary means of accessing water for many in this community. These are fed by long pipes, dug into shallow troughs, or running along the surface of the ground. A number of residents living near these pipes have plumbed into them in order to connect a water supply directly to their homes, as one resident, Sanele (S) explains:

> NC: Where do you get your water?
> S: This tap here, but before we applied [installed] it we used to take it from that neighbour [next door].
> NC: When did you get that one?
> S: A few months back.
> NC: Who is responsible for it, who put in, was it the municipality?
> S: Yeah, we'll go in to apply for it and then they put the meter in and connect the pipe from the meter to the tap.
> NC: So the municipality puts the meter in and then you have to do the pipe yourself?
> S: Yeah.
> NC: Have you ever had a problem with not having enough water?
> S: No, I'm okay so far.[821]

However, in making these individual connections, water pressure for the communal standpipe is reduced. Those residents who continue to rely on water from the standpipe experience periods where little or no water is accessible. Living directly across the road from Sanele, three sisters, Helen (H), Thembeka (T) and Phindile (P), explained how disruptive this low water pressure can be:

> '[It is] a struggle because the water can't come out because and all of these people are like taking water in to their house and no water is coming out the standpipe'. [822]

The stark contrast between the stories of these two households is a poignant reminder of how, even on the same street, people's relative wealth or poverty dictates their experience of access to water. Sanele's household could afford to undertake a self-connection, and to pay their water bill, while Helen and her sisters could not. Not only does this mean that Sanele enjoys a water tap in her home, but the fact that she now has such a tap actually impairs other people's access

[821] Interview # 12. See appendices.
[822] Interview # 13. See appendices.

to water from the standpipe. Moreover, unlike in Msunduze, each standpipe in Burlington must serve scores of families. Demand for water from the standpipe, combined with low pressure, and intermittent flow, results in long queues at busy periods:

> NC: How many buckets for a day do you use?
> H: Six.
> NC: And that's for how many people?
> H: Eleven.
> NC: How many houses does the standpipe serve?
> T: [laughing] Uncountable right now.
> NC: Right, a lot? Like more than 10?
> T: [laughs again] More than two hundreds!
> NC: More than 200 for one standpipe? So when you go to get water, how long does it take you to queue up?
> T: It just depends, like when you come...
> H: She also says because even if you are there in the line, because there's just a very small amount that comes out of the pipe, it actually takes long time, because people have done it themselves, taken it in to their own houses.[823]

Acknowledging that for many South Africans piped water (predominantly accessed from a standpipe) is not a reliable source, the government launched the 'adopt a river' initiative in 2010.[824] This combines education to reduce river pollution with training and equipment to clean and maintain rivers for use as sources of water for communities living close to them. Burlington is one such area, and in 2013 sixty residents volunteered to clean and maintain their local river. Every week volunteers, including Thembeka, continue to maintain their section of the river in order to create a safe alternative to using standpipes for those still living without water connected to their homes, as my interpreter, Sbo (S) explained:

> S: Ok there is a river down there and that river, they actually try as much as they can to clean it. The thing is, those guys put waste in there; they also put chemicals and stuff to fertilize everything. These guys (community) even put fish inside the water just to make it more to see if there is enough to be alive.
> NC: Oh, so you put fish in to see if the fish are healthy?

[823] Interview # 13. See appendices.
[824] <http://www.wrc.org.za/news/pages/adopt-a-riverlaunchesinlimpopoandkwazulu-natal.aspx> (last accessed 27 July 2016).

S: Yes. But also these guys also clean the pipes and the grasses around the area so that to make the water clean. They are just volunteering for themselves to be healthy, have good water.[825]

Both of these stories from Burlington show that in the midst of poverty and hardship, and faced with a regression in their level of access to water (for those having experienced forcible disconnection), some residents in Burlington chose to engage with the problem of water poverty from the perspective of shared needs, rather than focusing on their individual rights, and what can be described as commons approaches to water governance are beginning to take root in this community.

Elsewhere in eThekwini

Recent research undertaken elsewhere in eThekwini Municipality suggests that water-poor residents are adopting an approach to water allocation that emphasises a responsibility to each other, which is in contrast to the individualistic paradigm reinforced by an unreconstructed notion of a right to water[826]. eThekwini Municipality is considered a leader in sustainable water services. Initiatives to reduce water wastage and improve water quality have been pioneered by the municipality, with considerable success.[827] Between 1999 and 2009 water was brought to over a million people who previously lacked it[828]. Such an approach, driven in large part by municipal and state strategic goals, has been assisted in no small part by the prevailing mind-set of residents, who fuse a strong ethic of individual responsibility for water use, with an understanding of water as a common resource.[829]

On a larger scale, the Durban Group for Climate Justice,[830] formed in 2004, has proved to be an important practical and intellectual focal point for community organisation and action, including in relation to water allocation issues. But perhaps more importantly, this civil-society movement has galvanised disparate single issues around a coherent aim of climate justice[831]. Echoing previous discussion of the indivisibility of human security from ecological security, and of social, from economic, from environmental sustainability, the Durban Group for Climate Justice has successfully directed public energy and community involvement around the

[825] Interview # 14. See appendices.
[826] S Hellberg 'Water life and politics: Exploring the contested case of eThekwini municipality through a governmentality lense' (2014) 56 *Geoforum* 226, 230.
[827] In 2014 eThekwini Municipality won the Stockholm Industry Water Award. See <http://www.siwi.org/prizes/stockholmindustrywateraward/winners/2014-2/> (Last accessed 27 July 2016).
[828] Ibid.
[829] S Hellberg 'Water life and politics: Exploring the contested case of eThekwini municipality through a governmentality lense' (2014) 56 *Geoforum* 226, 230.
[830] <http://www.durbanclimatejustice.org> (Last accessed 27 July 2015).
[831] P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal of Human Rights* 125, 140.

coherent but multi-dimensional goal of pursuing climate justice at every appropriate scale: Promoting a truly common endeavour.[832]

From the example in Woodford, of concerted community resistance to paying for substandard water services, to spontaneous community organisation in Burlington in the face of disconnections, and partnerships with local government towards ensuring a clean source of river water, each of these stories contains an appreciation of water as a shared resource, accessible to everyone. But they also reflect a strong social conscience and community cohesion which may prove capable of overcoming the perceived weaknesses famously identified in Garrett Hardin's pessimistic treatise 'The Tragedy of the Commons', discussed in detail below.[833] But, from the empirical work I have undertaken, it is in Malawi that the clearest examples of commoning are found.

5.3.4 Stories from Malawi

The geographical and jurisdictional focus of this thesis remains South Africa. But there are some notable comparisons between the socio-economic rights in the Malawian Constitution, and those in South Africa, and particularly between the perceived failures of such rights to achieve access to sufficient water for people in both countries. As a result of this, the lacuna left by inchoate socio-economic rights realization in Malawi has begun to be filled by innovative approaches to water governance (amongst other things), which exemplify community organization and commons thinking in action. Reflecting on these Malawian examples allows inspiration to be drawn for greater use of commons approaches to water governance in South Africa. To this end some appreciation of the legal and material situation in Malawi regarding access to water is necessary, although a thorough study of comparative law in Malawi and South Africa is not attempted here.[834]

Malawi's history since British colonial rule, then under the one-party authoritarian government of Hastings Banda, has left a legacy of 'widespread, deep and severe' poverty.[835] Economic marginalization, which perpetuates the conditions of poverty, is particularly relevant to the task

[832] Climate justice is a popular activistic trope, but suffers from insufficient substantive analysis. Towards a rectification of this see U Baxi 'Towards a climate change justice theory?' (2016) 7/1 *Journal of Human Rights and the Environment,* 7-31.
[833] G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243-8.
[834] See J Ellis 'General Principles and Comparative Law' (2011) 22/4 *European Journal of International Law* 949-971.
[835] S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5/12 *International Journal of Constitutional Law* 258-293, 261.

of achieving access to water.[836] According to the International Monetary Fund (IMF) Poverty Strategy Paper for Malawi,[837] the water sector faces challenges including: degradation of water resources; limited access to potable water; inadequate promotion of hygiene and sanitation; inadequate water reservoirs; inadequate capacity of contractors and consultants. Consequently, water services are identified as a 'key priority area' for poverty reduction.[838]

In Malawi 57% of the population live below the national poverty line.[839] The WHO/UNICEF Joint Monitoring Programme Report[840] estimates that 96% of people in urban areas and 89% in rural areas have access to safe water (designated as either water piped on to premises, or water from other improved source). But these statistics have been criticized as considerably inflated.[841] Water For People–Malawi, a water NGO based in Malawi's second city, Blantyre, estimates that only 38% of people living in the 21 low-income peri-urban areas of the city have access to water that meets government standards. In the rural district of Chikhwawa only 42% have access to safe drinking water. Access to sanitation in these areas is estimated to be 22% in peri-urban Blantyre, and 8% in Chikhwawa using improved sanitation facilities.[842] WaterAid estimate that with a total population of 15 million people, two million lack safe access to water, and 10 million are without access to adequate sanitation.[843]

The Republic of Malawi Constitution[844] and the Constitution of the Republic of South Africa[845] share a common transformative aim. Both countries emerged, almost simultaneously, from authoritarian and anti-democratic rule, with a clear desire to transform themselves towards the upholding of constitutional values including human dignity, human rights, the achievement of equality, constitutional supremacy, and the rule of law.[846] [847]

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[836] Ibid.
[837] International Monetary Fund (IMF) Malawi Poverty Reduction Strategy Paper 2012: <http://www.imf.org/external/pubs/ft/scr/2012/cr12222.pdf> (Last accessed 27 July 2016).
[838] Ibid 17.
[839] United Nations Development Programme country information. Available at: <http://www.mw.undp.org/content/malawi/en/home/countryinfo/> (Last accessed 27 July 2016).
[840] World Health Organisation/ United Nations Children's Emergency Fund (WHO/UNICEF) Joint Monitoring Programme (JMP) for water supply and sanitation, 2015: Available at <http://www.wssinfo.org/documents/?tx_displaycontroller%5Btype%5D=country_files> (Last accessed 27 July 2016).
[841] Water for People, Country Report, Malawi. Available at <https://www.waterforpeople.org/where-we-work/malawi> (Last accessed 27 July 2016).
[842] Ibid.
[843] WaterAid website. Available at <http://www.wateraid.org/where-we-work/page/malawi> (Last accessed 27 July 2016).
[844] Republic of Malawi (Constitution) Act No. 20 of 1994, hereinafter the Constitution of Malawi, or the Malawian Constitution.
[845] Constitution of the Republic of South Africa, No. 108 of 1996, hereinafter the Constitution of South African, or the South African Constitution.
[846] Section 1 of the South African Constitution.

Chapter IV of the Malawian Constitution includes socio-economic rights to education,[848] to pursue a livelihood,[849] and to fair labour practices,[850] and a right to development[851] (rarely included in national constitutions[852]), alongside civil and political rights to privacy,[853] to freedom of conscience,[854] freedom of expression,[855] and freedom of assembly,[856] amongst others.

There is no explicit right of access to sufficient water (or other right to water) in the Constitution of Malawi. However, consideration of the content and obligations associated with the right to development clearly allows a right to water to be implied. Section 30 reads as follows:

> (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right. (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities. (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.[857]

The right to development appears in the Constitution as a justiciable right, as opposed to being listed only as a principle of national policy.[858] Consequently, subsections (2), (3), and (4), refer to State obligations which are capable of being enforced by the Courts. Second, enjoyment of the aspects of the right to development, set out in subsection (1), are contingent upon access to basic resources. This is acknowledged in subsection (2), which provides a list of such basic resources. It is necessary to interpret this list as being indicative, rather than exhaustive, since a lack of access to water (not listed) would impede the right holder's ability to enjoy the right to development as least as much as would a lack of access to the requirements explicitly listed. A similar interpretative argument is now well accepted regarding the absence of an explicit right of

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[847] See Chapters III and IV of the Malawian Constitution.
[848] Section 25 of the Malawian Constitution.
[849] Ibid. Section 29.
[850] Ibid. Section 31.
[851] Ibid. Section 30.
[852] The right to development reflects the United Nations Declaration on the Right to Development, GA 41/128 (Dec. 4, 1986). For further discussion on the potential of the right to development to achieve social change internationally, see S Marks 'The Human Right to Development: Between Rhetoric and Reality' (2013) 17 *Harvard Human Rights Journal* 137.
[853] Section 21 of the Malawian Constitution.
[854] Ibid. Section 33.
[855] Ibid. Section 35.
[856] Ibid. Section 38.
[857] Ibid. Section 30.
[858] See Sections 13 & 14 of the Malawian Constitution.

access to water from the Universal Declaration of Human Rights (UDHR), and the ICESCR, as discussed in Chapter Two.

Section 211 (1) of the Malawian Constitution obliges the State to abide by international agreements once ratified by Parliament, although international provisions must be incorporated through an Act of Parliament before they become part of national law. Rights contained in international agreements not yet incorporated, cannot be directly enforced in domestic courts. While several international treaties relevant to the right to water remain unincorporated, the Universal Declaration of Human Rights is now accepted as part of domestic law.[859]

In 2014 I spent some time with the NGO *Water for People*, in Blantyre, Malawi, interviewing staff as well as residents in some of the communities where Water for People works. Country director, Kate Harawa, summarized the effect on the Malawian government of their international commitments as follows:

> 'They have committed themselves to certain international agreements in terms of water, so the Malawi government is obligated to provide that 27 litres of water per person per capita for the people of the low income areas. But it doesn't always meet that obligation.'[860]

In contrast to South Africa, in Malawi it is principally the paucity of litigation on socio-economic rights, that limits the effectiveness of the country's socio-economic rights to contribute to a 'transformative, pro-poor jurisprudence.'[861] Since the entry into force of the 1994 Constitution, litigation on civil and political rights has dominated. Where social and economic rights have received judicial consideration, they have been limited to the areas of employment and education, and related to 'non-poor' litigants.[862] One reason for this is that very few poor people are in a position to pursue cases. Because the legal system is driven by litigation, the Courts do not investigate cases on their own initiative, and so the opportunity for pro-poor jurisprudence is limited by the absence of relevant litigation.

The barriers facing the advancement of pro-poor litigation have been broadly categorized as practical barriers, and formal barriers.[863] Practical barriers to litigation in Malawi include a lack information on, and understanding of, individual rights. Also language has been identified as a barrier, since the official language of the Courts is English, while the overwhelming majority of

[859] See the case of *Chihana v. Republic.* Criminal Appeal No. 9 of 1992 (MSCA).
[860] Interview # 15. See appendices.
[861] S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5/12 *International Journal of Constitutional Law* 258-293, 269.
[862] Ibid.
[863] SF Moore *Law as Process: An Anthropological Approach* (2nd Ed, Routledge & Kegan Paul, 1983).

evidence given in courts is presented in local languages.[864] Without an adequate grasp of spoken and written English, and without access to representation (expanded on below), it is extremely difficult to navigate the rules of procedure in order to begin a case, much less to progress it.[865] Where cases are progressed in local languages, the need for translation slows the process, further straining the Court system and increasing litigation costs.[866]

In contrast to South Africa, *Locus standi* requirements are strict, and there is no provision for public interest litigation. Potential litigants must show that they have a direct interest in the case, reducing the ability of NGOs and other organizations to litigate on behalf of others. This effectively prevents test cases, whose transformative potential may be greater than those of individuals.[867] Also, in contrast to other developing-country jurisdictions, Court formality and legal bureaucracy remain strict and complex, which further reinforces the practical requirement for legal representation, but without steps to make this affordable, for instance, through court-funded investigation.[868] As a result many people's experiences of insufficient access to basic resources[869] are interpreted only as the acute or chronic symptoms of poverty, but not also as actionable violations of constitutional rights.

Even where litigation is pursued, it is not guaranteed to be pro-poor. One case decision (among the few available) illustrates the reluctance of the Courts to harness the transformative potential of Constitutional rights, even when faced with the opportunity to do so. In *Mchima Tea and Tung Estates Co. Ltd v. Concerned Persons*,[870] the plaintiff company owned a tea plantation on land that had originally been acquired under racially discriminatory land laws, when Malawi was a British protectorate. In the early 1990s people from surrounding villages, driven by land shortages, occupied parts of the plantation. The plaintiff sued for the eviction of these squatters, and was successful, despite the defendants' argument that they had title to the land, based on pre-colonial ancestral title. What is important about this decision is the failure of the High Court to consider whether customary land law surrounding ancestral title could affect the plaintiff's ownership rights. In other post-Colonial jurisdictions, similar situations have led to the acknowledgment that colonial titles to land did not extinguish traditional, customary titles.

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[864] S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5/12 *International Journal of Constitutional Law* 258-293, 274.
[865] Ibid.
[866] Ibid.
[867] Ibid 276.
[868] See B M Wilson 'Claiming Individual Rights Through a Constitutional Court: The Example of Gays in Costa Rica' (2007) 5/2 *International Journal of Constitutional Law* 242.
[869] See Section 30, Malawian Constitution.
[870] Civil Cause 1665 of 1994 (HCM).

As Brennan J stated in the Australian case of Mabo v. Queensland [No. 2]:[871]

> 'It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.'

Reticence to pursue a similar line of argument, and thereby, to consider the transformative possibilities latent within the right to property,[872] and the right to development,[873] amongst others, in the Malawian Constitution has limited the efficacy of such rights as transformative, or development vehicles. The reasons for such a constrained decision may have included an understandable desire not to be seen to give legal legitimacy to 'land-grabbing'. But a lack of willingness to probe the economic inequalities that have given rise to the present uneven distribution of basic resources (like land and water) represents a clear limitation on the effectiveness of rights talk in delivering transformative responses to poverty. Arguably here too, a judicially managerial approach to the application of Constitutional rights can be identified.[874]

Faced with the dual reality that many Malawians are water poor, and that socio-economic rights currently have limited ability to effect substantial change, some communities have been galvanized to create innovative grassroots responses to governance of their water supply, with impressive consequences.

Blantyre - Water Users' Associations

In Malawi, the NGO *Water For People* has been working for over a decade with local communities on the outskirts of Blantyre, to support and develop community-owned Water Users Associations (WUAs), in order for people to gain sustainable access to clean, affordable water. Water is purified and pumped from a municipal plant to multiple standpipes (called water points) in each community. Access to water at each water point is controlled by the local WUA. The purpose and scope of this initiative is explained in the following extract from an interview I conducted with Andrew (A), a representative from *Water for People*:

> A: We train the communities to maintain their own laws without having support from somewhere but the community within should know how to manage their water points if they break down: Management training.

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[871] 175 CLR 1 (1992).
[872] Section 28 (2) Malawian Constitution: 'No person shall be arbitrarily deprived of their property'.
[873] Section 30 (3) Malawian Constitution: 'The State will take measures to introduce reforms aimed at eradicating social injustices and inequalities'.
[874] N Cooper & D French 'The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism' in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 111, 131.

NC: So when you say manage, do you include repair or any sort of infrastructure or is it just management of who gets the water?

A: Both repair and management of the actual borehole and also how they can contribute funds.

NC: So communities actually give money towards the management of the borehole?

A: Yes, they give to water point committee, and the water point committee keeps that money to buy spares in case there is a need for repair.

NC: And what about access to the water? Is that regulated by the management committee as well, sorry, the water point committee, so if one person wanted to get a certain amount of water, does that have to go through the committee?

A: At the moment, all the households will have access to that water point, and access to the water point if they pay enough of the tariff, they don't pay per use, they pay a monthly tariff so the water point committee goes around to collect that monthly tariff. For the people that don't have that tariff, an agreement is met, so they can pay in the future. It's a community based management so they understand which people have problems and when they can pay, but they agree the amount to be paid per household no matter how much quantity they draw from the water point.[875]

Reflecting on the successes and challenges of one such WUA, in Nkolokott, a peri-urban district of Blantyre, Pastor Elias Nowa (WUA Executive chairperson) said the following:

'In the first place, the kiosks that were there, were being run by the small committees. But the problem was that the people who were selling water by then were using the money for themselves. They were not giving the money to the committee. As a result there was a bill to Blantyre water board of 1.6 million to pay. Then later on Blantyre water board came in partnership with Blantyre city council and water for people, their first goal, which is to form the associations like ours.

Now we are functioning very well because of the number of success stories that we have. We have managed to build a water tank at __ previously that location had problems with water,

[875] Interview # 16. See appendices.

there was problems with water supply, but since we built the water tank, the people are okay now, they can be provided with water every time.

There are some private water sellers within the community. They are not allowed to sell water but they do it on their own. The problem is they sell that water cheaper than from us. Illegal connections. That's one of the challenges. There are a number of them, but regardless of those challenges we operate nicely. And maybe to add, one of the success stories is previously people experienced water point diseases like cholera, but this time around our people are drinking treated water.'[876]

Andrew's explanation clearly emphasises that management of water resources in the communities where Water for People partners, is community based. Embedding the governance of water resources within the very communities being served allows those administrating the water point to hear, evaluate and respond to both the needs of community members, and to their ability to contribute. Such bespoke administration is illustrated further in the following dialogue with Francis, one of the WUA administrators:

NC: Do you ever have any problems whereby a family, a household, can't afford to buy water? So they may come to a seller and say I need the water but I don't have the cash. What do you do about that?

F: Our water is sold at a cheaper price than those who are privy to other sellers, so we try to convince them to at least give something.

NC: So you would take less than the usual amount if you needed to? If somebody came to you and said I don't have twelve, but I have five, would you accept that?

F: No, we don't accept that.

NC: So presumably you feel confident that the twelve is the right price, that everyone can afford it?

F: Yes.

NC: But in cases where households don't have 12 kwacha, what would you do?

[876] Interview # 17. See appendices.

F: It could be a widow, could be an old lady, very old lady. We always get our people to at least work somewhere in order to get something for the water. We have chiefs in our committees, so we always encourage them to go home and communicate with their people.

NC: If a family said we couldn't afford it, then the chief would ask them why?

F: Yes.[877]

As Pastor Nowa recounts, such a governance structure is facilitating affordable, access to sufficient safe water, thereby meeting the requirements of GC 15 for those community members. Furthermore it represents a degree of collaboration between local government (municipality), NGO and community members in order to design, implement, and maintain a sustainable and equitable model of water governance on a local scale.

5.3.5 Summary

The foregoing stories recount an array of problems facing people's regular access to sufficient water. These problems can be broadly categorised into two sets: those afflicting rural communities, and urban communities respectively. Problems in rural areas tend to include poor water quality (visibly dirty and/or contaminated water, linked to ill health), as well as issues of proximity and the transportation of water. Urban water access problems revolve most obviously around the affordability of accessing a sufficient quantity of water from improved sources, as well as intermittent issues of supply.

In places these stories also reveal instances of commons thinking in relation to water access. Summarised here, four distinct examples of commons thinking are discernable, representing an increasingly well formed (and formalised) application of commons approaches to water governance.

The first, and most subtle example is from Nombuso Khaba's account (interview #8) of how her municipality changed its policy on charging for water in response to community protest. This suggests a change in mind-set among that community of water users, and a shift in the dynamic driving their own interpretation of their right to water; from being a right conferred upon passive subjects, to one that is there to be claimed, grasped and inhabited by active and

[877] Interview # 18. See appendices.

engaged citizens. Whether such contestation will herald any deeper direct community involvement with water services remains to be seen.

The second example comes from Burlington, and from the response of residents to forcible water disconnections. The decision of people to pool resources, prioritise the most vulnerable, and to work together to deliver water where it was most needed represents an inspiring example of organic, self-organising, and temporary action that clearly reflects a commons ethos, even if its organisational structures are minimal and relatively informal. Also of note is the absence of local government or NGO involvement. Rather, this response to water-poverty was generated by the community, for the community.

Staying in Burlington, the third distinct example of commons thinking in action comes from the adopt-a-river initiative, recounted by Thembeka and Sbo (interviews #13 and 14). While this reflects a similar approach to water access as the previous examples (demonstrating active involvement in grasping their right to water), it also represents a degree of collaboration between community residents and local government, assisted by a relatively formal structure requiring initial training and the provision of equipment. Here the capacity of the community to take a commons approach to their water resource has been enhanced by this collaboration. But in contrast to the final example, this collaboration has been temporary, and residents have quickly been left solely responsible for the on-going implementation of this initiative. Perhaps it is more accurate then, to characterise the involvement of local government as acting as a catalyst for the community's own efforts, rather than in any fuller collaboration.

The fourth, and clearest example of commons thinking in action comes from the WUAs around Blantyre in Malawi. As Andrew, Francis, and Pastor Elias recount (interviews #16-18), the creation and maintenance of WUAs by community members has been achieved in partnership with the NGO Water for People, and in communication with local government. Crucially start-up costs, including infrastructure and training have been provided by Water for People, and although established WUAs are responsible for their own administration (including the paying off of accrued arrears), they remain closely accountable to the NGO as part of a stable long-term collaboration, committed to ensuring community managed water governance.

Each of these examples has led to some demonstrable gains in people's experience of a right of access to sufficient water. But some gains are more modest than others. For Nombuso's community, the affordability of water is now one less obstacle to accessing sufficient water

(although it is unclear how much of an obstacle it ever was). For Burlington residents plunged into crisis, their self-organised efforts offered protection to those most at risk of water poverty. Longer term, adopt-a-river has provided an alternative (and perhaps more sustainable) source from which to access sufficient water. But the scheme's longevity must be questioned in relation to the lack of on-going support and the considerable 'buy-in' required from residents. Only in Blantyre does the work of the various WUAs represent significant and sustained improvements in the realisation of the (human and/or constitutional) right to water. Perhaps the correlation between the most well developed governance structures and the greatest practical gains should not come as a surprise? Certainly such anecdotal evidence as to the success of this form of commons approach should be noted in any consideration of how commons modes could be expanded (this is briefly addressed at 5.6).

Following all of these stories, the next section charts the history of the commons as a mode (or broad collection of modes) of thinking and action, before theorising on the importance of the commons for contemporary water governance. After having glimpsed some more or less established examples of commons thinking in action in relation to water governance, it is important to ground these examples within a broader and deeper tradition of the commons, in order to better understand the (positive and negative) potential that commons approaches to water governance may have in helping to realise access to sufficient water for everyone in South Africa.

5.4 The commons in theory and in practice

The commons is a new way to express a very old idea, that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good of all[878]. In short, the commons means 'what we share', so unsurprisingly it has been expressed as encompassing a host of assets from clean air, to languages, music, wildlife, judicial systems, the internet, and fresh water, amongst many more.[879] 'Commons thinking' can be defined as any ideas for the enjoyment of such assets that promote sharing and encourage equitable and sustainable use. Since the impetus of commons thinking is that commons assets are for everyone to enjoy, where the commons are finite (natural resources for instance), use must necessarily be equitable if everyone is to benefit from them now, and sustainable if

[878] <http://www.onthecommons.org/> (Last accessed 27 July 2016).
[879] J Walljasper *All that we share: A field guide to the Commons* (The New Press, 2010) 2.

everyone will continue to benefit from them into the future.[880]

As the Biblical quotation at the beginning of this chapter attests to, commons thinking need not be limited to intangible assets and natural resources, but at times has also been applied to 'all things', including personally-owned property and possessions.[881] Indeed, the rejection of claims to private property in this Biblical story illustrates the dichotomy at the heart of much of the scholarship and activism around the commons: that commons thinking and praxis sit in confrontation to the concept of private property. The validity or otherwise of this perception, as well as the antagonism that it generates will be analysed in more detail below.

5.4.1 Historical and contemporary examples of commoning

The following is not intended to provide a comprehensive history of commoning. Rather its purpose is to support the assertion that commons approaches to resource governance have existed for a long time, and have taken many diverse forms, and that in light of the long and rich tradition of commoning, a serious appraisal of the contemporary potential of commons thinking, applied to water governance, is warranted.[882]

Since pre-history reciprocal altruism and collective action have been essential features of the development of agriculture and pastoralism, and consequently, essential to sustaining the human species. In the territory of South Africa, around AD 3000 hunter-gatherers acquired livestock, and consequently transitioned from hunting to herding duties that necessitated sustained co-operation between community members, in the incessant search for grazing land and water. Between AD 300 and 1000 crop cultivators moved in to the Transvaal, Kwa-Zulu Natal and the Eastern Cape, and by the end of the Late Iron Age (circa. AD 1000) livestock and agriculture were important subsistence activities. They also began to form the basis of trading networks that extended northwards to modern day Zimbabwe. It is important to note that these Iron Age communities were far from egalitarian. They displayed strict gender divisions of labour, and 'a highly patriarchal system of social organisation and authority.'[883] As such, these early communities would be problematic archetypes of commons thinking in action. However, within these communities, the approach taken to governing land and water is instructive, offering a 'proto-commons' insight into how indigenous peoples have effectively blended

[880] Ibid.
[881] See The Bible, New International Version, Acts chapter 2, verses 44-45.
[882] Although the author accepts that there is not an inevitable connection between the longevity of an idea, and its utility. For an amusing take on this insight, see T Minchin 'White wine in the sun'. Available at: <https://www.youtube.com/watch?v=-0s68-GLGWY> (Last accessed 27 July 2016).
[883] R Ross *A Concise History of South Africa* (Cambridge University Press, 1999) 12-15.

cultural norms with ecological imperatives. As discussed in Chapter Three (3.3) African customary law forbade private ownership of land or water, instead placing these resources (both of which are essential to cattle-grazing and agriculture) under the control of the chief for the benefit of the community, in order to avoid the potentially fatal consequences of exhausting them.[884] Governance decisions around land and water were made at the level (or scale) of the community, rather than at the level of an individual or a single family. Decisions made at this scale were generally able to fulfil the dual requirements of meeting the community's immediate subsistence needs, *and* of sustaining land and water resources into the future.[885] Indeed, as the archaeological evidence of wide-ranging trading networks shows, not only were material subsistence needs met, surplus was also generated, with which to exchange.[886]

There are numerous historical examples across the world where communities have regulated resources in order to avoid their depletion, while maintaining adequate living standards. Indeed some authors describe the standard of living in communities where resources have been managed on a sustained yield basis, as 'generally affluent'.[887] The Acholi tribe in modern day Uganda enforced a system of closed seasons, whereby hunting was restricted and regulated in order to ensure the on-going availability of game.[888]

In Europe there is a long history of managing some grazing lands and forests as common property resources, some of which remain.[889] Conditions for grazing were set between users, for example that only grazing during daylight hours was permitted. Where overgrazing became a threat, 'stinting' was imposed, where common users were assigned quotas of animals they could graze.[890] In England, King John's signing of the Magna Carta in 1215, and the Charter of the Forest, signed by Henry III in 1217 contain a range of legal rights to commoning.[891]

One historical example of commoning in relation to water resources comes from the Spanish system of cooperative irrigation known as *huerta*.[892] Dating back to the 15th Century, and

[884] D D Tewari 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' (2009) 35/5 *Water SA* 693-710, 695.
[885] S V Ciriacy-Wantrup & R C Bishop ' "Common Property" as a Concept in Natural Resources Policy' (1975) 15 *Natural Resources Journal* 713-727, 717.
[886] N Worden *The Making of Modern South Africa* (3rd Ed, Blackwell Publishers, 2000) 8.
[887] S V Ciriacy-Wantrup & R C Bishop ' "Common Property" as a Concept in Natural Resources Policy' (1975) 15 *Natural Resources Journal* 713-727, 718.
[888] Ibid 717.
[889] See the 'Foundation for Common Land' <http://www.foundationforcommonland.org.uk/rights-of-common> (Last accessed 27 July 2016).
[890] Ibid 718.
[891] These include rights to grazing, hunting and foraging in order to earn a living from forests. See P Linebaugh *The Magna Carta Manifesto: Liberty and Commons for All* (University of California Press, 2008).
[892] D Wall *The Commons in History: Culture, Conflict and Ecology* (MIT Press, 2014) 35.

beginning in the arid areas around Valencia, *huerta* regulated the use of irrigation canals to provide sufficient water to support agriculture in the region. Each *huerta* determined their own rules regarding water quotas. They also agreed systems for monitoring and punishments for users who infringed the community's rules. Each *huerta* was overseen by a *syndic*, who was elected from within the *huerta*, and served a two or three-year term. This system of water commoning has influenced similar approaches to water regulation in the Philippines, and in California, and remains in use in some areas of rural Spain and Portugal.[893]

Each of these examples asserts that people can, and do operate cooperatively, sacrificing immediate individual gain for the sake of collective interests regarding the governance of resources, where there is a social framework to facilitate such a commons approach.[894] While it is also true that humans have the propensity to act selfishly - as utility-maximising individuals – the above examples affirm that such propensities are not inevitable, and that other ways of living are imaginable and achievable. Indeed Roy's insight (quoted at the beginning of this chapter) is pertinent here. Where the current paradigm is failing (in this case failing to ensure access to sufficient water for everyone), it is wise to heed those whose imagination (and experience) is outside it.[895]

Vernacular law, social norms, and legal theory

The above historical examples of commons thinking in action also illustrate the importance of having a governance structure to establish rules and responsibilities, and to regulate people's behaviour (to greater or lesser degrees). Specifically in relation to commons modes of resource allocation, such regulation has recently been termed 'vernacular law'[896] in order, simultaneously, to affirm its philosophical connection to law (as defining rules, practices and norms of behaviour), and to distinguish it from 'State law' (which describes law that is officially sanctioned - emanating from the 'proper' law-making institutions, and abiding by formal constitutive procedures[897]). But broadly defining law in this way, and identifying 'law-like' systems and structures, has a longer tradition. Llewellyn distinguishes between (proper) law and that which

[893] Ibid 35-6.
[894] D Bollier & BH Weston "Reimagining ecological governance through human rights and a rediscovery of the Commons" in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 255.
[895] A Roy 'The Trickledown Revolution' *Outlook,* 20 September 2010. Available at: <http://www.outlookindia.com/article/the-trickledown-revolution/267040 >. (Last accessed 27 July 2016).
[896] D Bollier & BH Weston 'Green Governance: Ecological Survival, Human Rights, and the Law of the Commons' (Cambridge University Press, 2013) 104.
[897] Ibid.

performs 'law-jobs', but that does not qualify as law.[898] Fuller describes 'law' that has *not* been created by official sanction (i.e. 'vernacular law', using Bollier & Weston's typology), but that nevertheless has 'found direct expression in the conduct of men toward one another', as 'customary law'[899] (distinct from customary international law, as a source of international law, but similarly reflecting acknowledgement via attitude and action). Such customary law can be seen in action in for example trade unions, clubs, churches and universities, wherever 'miniature legal systems'[900] are concerned with member's duties and entitlements. Indeed, Fuller argues that not only is customary law ubiquitous, but that understanding it is imperative to an understanding of ordinary law (State law).[901]

Customary law provides us with a 'language of interaction', which projects some degree of predictability upon otherwise random social interaction and conduct. Understood in this way it is apparent that customary law fulfils a similar function to State law: regulating expectations about behaviour.[902]Moreover, the behavioural expectations that are regulated are not neutral. Rather, the behaviour that is to be expected is that which is deemed acceptable. In other words customary law does not just provide predictability to erstwhile random interactions. It also 'facilitates interaction on a level more profitable for all concerned'.[903] Seen in this way, Fuller's claim that ordinary law can only be understood by an appreciation of customary law becomes compelling. It reconnects the purpose of the 'law' with its imperative, and in so doing, reminds us of the good reasons why such an imperative exists. Where this connection has been severed, the imperatives of ordinary law, for instance the crime of murder, can become divorced from its interactional origins, wherein refraining from murder was accepted not just as being predictable, but profitable (generally!) for all concerned.

Applied in the context of commons approaches to water resource allocation, reconnecting the (State/ordinary and vernacular/customary) law on access to water, to its interactional origins generates a powerful moral claim. At the level of State law, as discussed at length in Chapter Four, the currently configured individual right of access to sufficient water, is prone to being interpreted in isolation from the complex socio-economic and environmental contexts that make access to water a moral claim. Therefore, re-engaging with the social, economic and environmental factors that generated the right is essential to its appropriate interpretation and

[898] K N Llewellyn 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49/8 *The Yale Law Journal* 1355-1400.
[899] L Fuller 'Human interaction and the law' (1969) 14/1 *The American Journal of Jurisprudence* 1-36, 1.
[900] Ibid.
[901] Ibid 20.
[902] Ibid.
[903] Ibid 21.

application.

Regarding vernacular law, which regulates the behaviour of those engaged in commons modes of water governance, maintaining a clear bond between the rules governing the actions of a WUA in Blantyre for instance, and the profitability or desirability of the interactions that these rules facilitate, must help to retain the *moral* character of such commons endeavours. This could protect the application of such 'law-like' rules from the same tendency towards technocratisation, as evidenced by the interpretation, in *Mazibuko*, of the right to water in State law. Returning briefly to interview #18 above, Francis' acknowledgement that they will always work with people to understand their situation, and to find a solution to their needs, is one small illustration of the connection that currently exists between the vernacular law of a WUA and its interactional origins: to secure 'water for everyone, forever'.[904] The importance of characterising access to sufficient water as a moral claim is elucidated on below at 5.5.

Practically too, the concept of vernacular law (or perhaps more accurately, the acknowledgement of vernacular law in action) is important in evaluating the appropriate role of commons approaches to water governance. The 'State law' on access to sufficient water is simple enough to identify. Yet a central claim of this thesis is that this law is inadequate to the task of ensuring access to sufficient water for everyone. But because of its status as 'State law', despite its perceived inadequacies, it is supported by a formal legal structure of promulgation and enforcement. In contrast, what can be described as the vernacular law relevant to commons approaches to water governance in Durban or Blantyre for instance, lacks comparable formality or enforceability. Such a lack should not be dismissed lightly. But neither should the relative absence of formality or enforceability lead to premature conclusions about the (un)suitability of commons approaches. Here again the challenge may be to rethink, or reimagine the assumptions inherent within the dominant paradigm. The water users associations around Blantyre operate within a readily identifiable and agreed framework of regulation, although, crucial to the success of these initiatives, there is sufficient flexibility to promote maximal enfranchisement and community involvement. Returning to the residents of Burlington, whose efforts to respond positively and collectively to their experiences of water poverty have led them to engage in various collaborative projects: they are operating without a formal set of externally imposed rules and sanctions. Instances of informal arrangements are also sparse. But rather than excluding such projects from the picture of water governance in that area, their efforts can be identified and affirmed as examples of 'self-organised governance' springing from bottom-up

[904] This is the motto of the NGO Water for People, adopted by the WUAs that it partners with around Blantyre, Malawi. See < https://www.waterforpeople.org> (Last accessed 27 July 2016).

responses to a complex system of water governance.[905] Such a description is in sharp contrast to the archetypal top-down 'command-and-control' regulation, so familiar in State law.[906] This contrast illustrates a wider shift from government to governance, explained below.

Government to governance

The steady emergence of new regulatory modes is challenging the State's historically central (indeed, virtually exclusive) role in regulation. Such new modes of regulation prioritise 'processes through which collective goals are defined and pursued in which the state (or government) is not necessarily the only or most important actor.'[907] The consequence of this is that regulation is changing, from centralised, top-down government, to more disaggregated, non-centralised and less hierarchical regulatory forms.[908]

The shrinking role and importance of government, as a result of the steady move from 'government to governance'[909] is well documented.[910] Kotze & Fuo explain this shift in light of the forces of globalisation, and by eight manifestations of globalisation in particular:

> 'significant advances in communication technology and social media that are connecting the world; by modes of travel that enable global connectivity; by systems of free trade; by the creation of regional and international superstructures of governance such as the European Union; by the rise of epistemic networks and non-governmental organizations as well as non-state, but law-like, rules; by the emergence of treaty regimes and international norm producing functional non-state organisations such as the World Bank that enable inter-state cooperation in

[905] It is clear that the system of water governance is complex. Beginning with the Constitutional right of access to sufficient water, the system of water governance is then influenced by relevant legislation, national water policy, and metropolitan and local municipal policies. But the complexity continues, since, as evidenced, these layers of legislation and policy do not result in access to sufficient water for everyone. Therefore more layers of (less formal) governance are created, encompassing various (sometimes competing, sometimes overlapping) regimes of communal and/or personal water provision (taps to individual dwellings versus communal standpipes), voluntary initiatives, informal neighbourhood subsidies etc.

[906] The terms 'self-organised governance' and 'command and control regulation' are taken from D Bollier & BH Weston 'Green Governance: Ecological Survival, Human Rights, and the Law of the Commons' (Cambridge University Press, 2013) 81.

[907] M Betsill Michelle & H Bulkeley 'Cities and the Multilevel Governance of Global Climate Change' (2006) 12 *Global Governance* 141-159, 144.

[908] See generally, L J Kotzé *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012).

[909] See for a detailed discussion of the various aspects related to this emerging expression, R Bellamy and A Palumbo (eds) *From Government to Governance* (Ashgate, 2010).

[910] The difference between "government" and "governance" lies nestled in the globalisation paradigm, where government refers to the orthodox, traditional and hierarchical notion of formal Westphalian state-centred governance, while governance means the direct opposite, i.e., informal, flexible, hybrid and multi-level governance, or "an emerging political strategy for states to redefine [their] role in society." P Jon 'Introduction: Understanding Governance' in P Jon (ed) *Debating Governance: Authority, Steering and Democracy* (Oxford University press, Oxford, 2000) 2.

> specific areas; the steady growth of economically dominant and politically influential multinational corporations that function in an intermeshed transnational setting; and by the emergence of global regulatory problems such as climate change that require multi-stakeholder solutions and that are affecting everyone everywhere with scant regard to physical borders or to the sanctity of state sovereignty.'[911]

Doubtless, there are also other bottom-up factors affecting the government-to-governance shift. Catalysed by unequal power relations, animated by a redistributive ethos, and evident across an array of subaltern cosmopolitan politics, these factors together form what Santos describes as 'counter-hegemonic globalization'.[912]

In the context of this thesis, the term 'governance' is deliberately used to denote flexible, informal and multi-level regulation, which are potentially more appropriate attributes for effective regulatory strategies, and more complementary to commons thinking than is traditional, hierarchical regulation.[913]

5.4.2 Critiquing the commons

Commons thinking seems well placed to critique the limitations and failures of existing 'State/Market'[914] institutions, and in so doing, to create space to imagine, and to implement new forms of provisioning. Given its necessity as a prerequisite for life, water is increasingly being understood as one such form of wealth for which commons thinking seems appropriate.[915] To quote Bollier and Weston:

> '[T]he Commons is not an ideological agenda or an impractical, utopian vision. It is a useful new/old framework and vocabulary for building a new societal vision and for imagining constructive alternatives to the neoliberal economics and policies that now enclose (commodify

[911] L J Kotzé & OFuo 'Bridging the public-private regulatory divide: South African mines and the right of access to water' (2016) 34/3 *Journal of Energy and Natural Resources Law* 285-312, 292. Also, for a general discussion on the impact of globalization on environmental governance, see L J Kotzé *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012).

[912] See chapters 5 and 9: B Santos *Towards a new legal common sense* (Butterworths, 2002).

[913] *See variously* R Bellamy & A Palumbo (eds) *From government to governance* (Ashgate, 2010), P Jon 'Introduction: Understanding governance' in P Jon (ed) *Debating Governance: Authority, Steering and Democracy* (OUP, 2000).

[914] D Bollier & BH Weston 'Reimagining ecological governance through human rights and a rediscovery of the Commons' in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 251. Here the term State/Market, used by Bollier & Weston indicates the close relationship between the institutions of state and market, which reflects a shared commitment to a neoliberal political and economic agenda.

[915] <http://www.ourwatercommons.org > (Last accessed 27 July 2016).

and privatise) shared resources...'[916]

It is also becoming acknowledged that understandings of water that are limited to discourses of water rights and water commodification, perpetuate an unsustainable and unhelpful 'bifurcation between nature and culture',[917] which must be creatively reimagined.

In contrast to individualised consumption within a rights-based paradigm, a commons strategy emphasises shared consumption. This echoes the emphasis on interconnectivity within IWRM, and within South Africa's Second National Water Resource Strategy (see Chapter Three). But unlike IWRM, a commons approach would avoid emphasising individual water rights, in favour of communal needs. 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.

Institutions and modes of organisation based around the concept of the commons have positively contributed to natural resource management since 'economic pre-history'[918]and commons ideas and praxis are resurging. Faced with the increased commodification of resources, services and areas of life previously managed as public or social goods and the disenfranchising consequences for those excluded as a result, commoning is emerging as a radical alternative to the dominant contemporary paradigm.

The tragedy of the Commons?

Written nearly five decades ago, Garrett Hardin's seminal treaties, 'The Tragedy of the Commons'[919] has proved to be extraordinarily influential in dissuading social scientists from serious appraisal of the potential of commons thinking.[920] Based on Malthusian predictions of population growth, Hardin asserts that 'the inherent logic of the commons remorselessly generates tragedy.'[921] Using the illustration of a common pasture, Hardin explains that it is everyone's propensity to graze as many cattle as possible on this common resource in order to

[916] D Bollier & BH Weston "Reimagining ecological governance through human rights and a rediscovery of the Commons" in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 252.
[917] A Neimanis 'Alongside the right to water, a posthumanist feminist imaginary' (2014) 5/1 *Journal of Human Rights and the Environment* 5, 5.
[918] S.V Ciriacy-Wantrup & Richard C. Bishop, 'Common Property as a Concept in Natural Resources Policy' (1975) 15 *Natural Resources Journal* 713.
[919] G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243.
[920] D Feeny *et al* 'The Tragedy of the Commons Twenty-Two years later' (1990) 18/1 *Human Ecology* 1-18, 2.
[921] G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1244.

'maximise his gain'.[922] In so doing, each herdsman will continue to add to his or her own stock of cattle, judging that adding each new head of cattle will benefit that herdsman alone (since when the cattle are sold, the proceeds go to each individual herdsman). Meanwhile, the negative effect of one more head of cattle grazing on the commons is shared among all of the herdsmen.[923] The consequence is the eventual ruination of the common pasture, as a result of overgrazing, without any effective incentive to avoid this.

In reaching his conclusion that 'freedom in a commons brings ruin to all',[924] various assumptions are made about the (lack of) relationships and regulations between the herdsmen. As the above historical example from European common lands illustrates, the imposition of 'stinting' in order to avoid overgrazing was one regulatory tool that was widely used to avoid overgrazing.

Leaving assumptions about practicalities aside momentarily, Hardin makes a more serious, and more troubling assumption about people's inescapable drive towards individual utility maximisation. But despite Hardin's warnings that the rational actions of private individuals to maximize their gain would inevitably lead towards a degeneration of commonly held resources, recent work on commons strategies challenge this. Instead, David Harvey questions the paradigmatic lens through which Hardin's common pasture is glimpsed:

> 'The real problem here, it seems to me, is not the commons *per se*. It is the failure of individualized private property rights to fulfil our common interests in the way they are supposed to do.'[925]

In other words, Hardin's common pasture, if more effectively governed regarding the rights and responsibility of users, is perfectly capable of avoiding his pessimistic predictions. But while Bollier and Weston remind us that regarding resource allocation, human attributes of cooperation and self-sacrifice do exist, they accept that these attributes are joined by self-interest.[926] Therefore it is important not to ignore Hardin's warnings altogether. The central problematic of the commons is described as follows by pioneering commons scholar Elinor Ostrom:

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[922] Ibid.
[923] Ibid.
[924] Ibid.
[925] D Harvey 'The Future of the Commons' (2011) *Radical History Review* 104.
[926] D Bollier & BH Weston 'Reimagining ecological governance through human rights and a rediscovery of the Commons' in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 255.

> 'How a group of principals who are in an interdependent situation can organize and govern themselves to obtain continuing joint benefits when all face temptation to free-ride, shirk or otherwise act opportunistically.'[927]

The above examples, from Burlington in particular, illustrate this tension between cooperation and self-interest, which any endorsement of commons approaches must acknowledge. In that community, the challenge of securing access to sufficient water is being met variously by those prioritising sustainable access for the community at large, and by those whose independent actions to pipe water to their own homes leaves their neighbours without.

Perhaps such examples of commoning, or commons thinking, are too ephemeral to formally categorize or concretize. Indeed, as noted previously, the community's attitudes and response in Burlington have very little rigid structure with which to ensure that future challenges will be met using the same commons approach (although it must be noted that there have been moves towards identifying specific members as decision makers). But this lack of rigid structure should not lead us to conclude that commons approaches lack resilience, nor that they will necessarily be temporary. Rather, it is precisely the relative lack of formalised structure which may allow such commons approaches to withstand changing environments and challenges. Ostrom's insights are particularly pertinent here, as she explains that traditionally, advocates of state resource allocation and advocates of privatisation have both relied on the assumed superiority of top-down institutional design. Institutional change, it is assumed, (including that required to give effect to the right to water) must come from outside the community and be imposed on those individuals affected[928]. This assumption rests in turn on a further assumption, that there is a dichotomous choice to make between these two top-down modes: State *or* private control must be the correct route. The benefit of commons approaches, manifest in more or less fluid form, is that they are well placed to fill the gaps between competing regulatory approaches, which almost inevitably appear while the question of (water) resource allocation is being inadequately addressed through the complex, overlapping, sometimes competing paradigms of rights, development and commodification. Ostrom's vision here is to see the creation of a 'rich mixture of 'private-like' and 'public-like' institutions defying classification in a sterile dichotomy'[929]. Such a definition is not out of place in describing the various commons approaches observed above. Indeed 'adopt a river' initiatives, pioneered in eThekwini, provide

[927] E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990) 42.
[928] Ibid 14.
[929] Ibid.

useful examples of precisely such a classification-defying hybrid: A mixture of public resources catalysing community action.

Romanticizing community control of resources must be avoided, not least because inequitable power relations can exist at small as well as large scale. Therefore there is potential for any institutional design and praxis to discriminate and disenfranchise. Also, it must be acknowledged that commons endeavours face myriad challenges around resourcing and sustainability, as well as the ever-present possibility that people will default to opportunistic (in)action. Burlington's adopt-a-river initiative, described above, began with sixty volunteers. In November 2015 there were only ten.

While we must be mindful of these problems, commons ideas are on the rise[930]. This is driven, in part by the failures of litigation on the right to water, and of 'rights-talk' more generally, to incorporate environmental protection, and even to deliver resources to all individuals effectively. Indeed, what the Constitutional Court has identified as a crucial function of litigation on social and economic rights[931] – to provide crucibles within which new socio-economic settlements are created and recreated – is also a function that may be ascribed to the commons. Indeed, the commons may contain a degree of potential for positive change, which the Court's jurisprudence of reasonableness has so far failed to deliver:

> 'In a commons, ordinary people can deliberate with each other and have their concerns heard... to formulate and ratify the rules that will affect their everyday lives.'[932]

Commons strategies, 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. Commons solutions, whether long-lasting or temporary, have the potential to give form to the erstwhile unheard voices of the water poor and to respond appropriately through innovative and inclusive social/institutional arrangements.

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[930] P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal of Human Rights* 125, 138.
[931] Mazibuko (CC). Paragraph 71.
[932] D Bollier & BH Weston 'Reimagining ecological governance through human rights and a rediscovery of the Commons' in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 254.

5.4.3 Property and the right to water

The various stories shared above testify (in the main) to the fact that neither a human right to water (expressed in its current form) nor a constitutional right of access to sufficient water can be relied on to provide equitable and sustainable water allocation for everyone: To this end the right to water (expressed in international human rights law, and constitutionally, in South Africa) remains useful but limited. Where these stories also recount, or even hint at, examples of communal, grass-roots responses to water poverty, it is possible to identify and to affirm commons thinking in action, governed by vernacular law.

Together, the limitations of rights-talk, and the green shoots of commons examples should lead us to consider alternative approaches to water governance that are embedded more firmly in the context of their community (while probably being less formally constituted). To this end, and inspired by the motif of 'reimagination', attention now turns to the relationship between access to sufficient water and the concept of property. Although perhaps not immediately apparent, (a particular conception of) property is crucial to understanding and critiquing access to water in a water-as-commodity paradigm. Indeed, people's experience of water-poverty must lead us to imagine new conceptualizations of property that are more sensitized to the needs of those people currently economically excluded from the 'right' to participate in the market for water sufficiently to meet their needs, and who instead, have to rely on a favourable interpretation of the constitutional right to sufficient water.

Bromley & Cernea amongst others identify four property paradigms: state property, private property, open-access, and common property[933]. Throughout this discussion, mention of 'commons', 'commons approaches', 'commons thinking', and 'commoning' all refer to the fourth paradigm; common property. As defined above, this paradigm embodies the idea that some resources belong to everyone, and that these common or community resources must be actively protected and managed for the good of all[934]. However, applied to particular resources in real-life situations, common property does not mean 'everyone's property'[935]. It must be distinguished from an open access or 'non-property' paradigm, where no institutional arrangements exist regarding a particular resource. Instead, a common property paradigm confers ownership and management rights over a resource upon a 'corporate group', whose

[933] D Bromley & M Cernea, 'The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies' (1989) 57 *World Bank Publications*.
[934] <http://www.onthecommons.org/> (Last accessed 27 July 2016).
[935] A Ainslie 'When 'community' is not enough: managing common property natural resources in rural South Africa' (1999) 16/3 *Development Southern Africa* 375.

membership and boundaries are defined. Arguably, without these features of exclusion and distinction, the concept of property has no meaning in any paradigm.[936]

In South Africa the current property regime regarding water resources combines the State property and private property paradigms to the extent that the State remains heavily involved in water infrastructure and delivery. But its involvement is increasingly directed by a 'private sector' rationale of commercialisation, central to which is the requirement that the costs of water services are recovered from users, and preferably, profit is generated beyond this (see Chapter Three).[937] Therefore, since the impetus for this hybrid State/private property regime is commercialisation, it can be understood as functionally comparable to Macpherson's concept of industrial revolution private property.[938] Consequently, the ensuing discussion of a paradigm shift involves the current dominant paradigm of individualised ownership and consumption (albeit it with State involvement), within which the preceding discussion of 'rights-talk' is situated, and a commons or common property paradigm. When directed specifically to water governance, these paradigms have been articulated as 'water-as-commodity', and 'water-as-commons'. The former views water as a commodity like any other essential good, responsive to customers and shareholders and capable of generating profit[939]. The commons, in contrast, emphasises the characteristics of water that make for a difficult fit within the private property paradigm. Not only is water essential for human life and for the health of all ecosystems; it has no substitute; it is inextricably linked with the hydrological cycle, which is itself connected with the particular geography of countries, regions and communities. Furthermore, water has important cultural and spiritual dimensions, which are also connected to the geographical location of particular communities (see Chapter One for more detail on this). For each of these reasons, it is asserted that collective management of water by communities is not only

[936] S V Ciriacy-Wantrup & Richard C. Bishop 'Common Property as a Concept in Natural Resources Policy' (1975) 15 *Natural Resources Journal* 713, 715.
[937] S Flynn & D Mzikenge Chirwa 'The Constitutional Implications of Commercialising Water in South Africa' in D McDonald and G Ruiters (eds), *The Age of Commodity, Water Privatisation in Southern Africa* (Earthscan, 2005) 59.
[938] C B Macpherson 'Capitalism and the Changing Concept of Property', in Kamenka and Neale (eds), *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975), 104-124.
[939] This commercialised view of water is explicitly stated in The Ministerial Declaration of The Hague on Water Security in the twenty-first century: 'Valuing water: to manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and to move towards pricing water services to reflect the cost of their provision':
<http://www.worldwatercouncil.org/fileadmin/world_water_council/documents/world_water_forum_2/The_Hague_Declaration.pdf> (Last accessed 27 July 2016).

appropriate, but necessary, if sustainable, appropriate resource management is to be achieved.[940] Therefore the potential of a common property paradigm in relation to water must be seriously considered.

5.5 Interrogating the inviolate: Property, commodification, and Human Rights

Together the preceding examination of the commons as a theoretical and practical approach to natural resource governance, combined with some examples of commons thinking in action (in relation to water governance in particular) provides the impetus to launch the central claim of this thesis: Commons approaches to water governance have the potential to create more sustainable and more equitable access to sufficient water for those currently experiencing water poverty, than does the present rights-based approach.

While it is my conviction that this is the case, such a claim inevitably challenges certain assumptions, which are intrinsic to modern democratic, capitalist cosmology. Chief among these is the right to property (and the connected concept of 'property'), as well as the relationship between human rights and property.[941] Having sought to fracture the water-as-commodity paradigm, and to find epistemic space beyond the limits of rights talk, it is important now to return to the central tenets of that paradigm, and to critique them in light of the commons.

It is well accepted that there is affinity between rights and property. Grear reminds us that 'the very idea of 'subjective right' first emerged from the central idea of *dominium* over property'.[942] But anything other than a superficial analysis of the connection between a right of access to sufficient water, and a right to property, reveals a complex set of interlinkages, conceptually and practically, internationally, and nationally. We may begin with the difficulty faced in realizing the right of access to sufficient water in light of the dominant concept of property that is implicit within the international human rights jurisprudence. Taking the Universal Declaration of Human Rights as a starting point, there is a great tension created for the realization of the social agenda within the human rights canon. On the one hand, there are explicit rights to participate

[940] K Bakker 'The 'Commons' Versus the 'Commodity': Alter-globalization, Anti-privatisation and the Human Right to Water in the Global South' (2007) 39/3 *Antipode* 441.

[941] Regarding the primacy of private property, Adelman asserts that there are 'only two fundamental rights in the dominant discourse: protection of private property and the right to consume'. See S Adelman 'Between the Scylla of Sovereignty and the Charybdis of Human Rights' (2008) 17 *Human Rights & International Legal Discourse* 17, 21.

[942] A Grear 'Human rights, property and the search for 'worlds other'' (2012) 3/2 *Journal of Human Rights and the Environment* 173-195, 181.

in the social and scientific advances in one's society, and from this a line of rights flow, creating rights to the necessary elements of human well-being and dignity, for example, the right to healthcare, to housing, to education, and (implicitly) to water (see Chapter Two at 2.2.1). These form what could be described as a list soft of rights, because there is another, shorter list of hard rights in the human rights canon: the right to own property, including intellectual property.[943]

This ownership right is much stronger than the soft rights, because it links to the question of the acceptability of different forms of discrimination. Whereas the canon of human rights law has accepted that discrimination on the grounds of race, gender, and increasingly age, is illegitimate, *economic* discrimination is seen as acceptable. Perhaps at the very edges of economic exclusion, where there is an appeal to justice in the need to respond to catastrophic natural disasters that plunge individuals into immediate and extraordinary poverty, claims are made that require a redistribution of economic resources for the well-being of individuals. But in the normal daily run of poverty, economic discrimination is perfectly acceptable. Indeed, it is a necessary part of our international free market. Our democratic rights that are seen in the international (human rights) community as the pinnacle of human social achievement, require the ability to discriminate between individuals because of economic difference, and to enjoy the fruits of that discrimination. I might have a right to housing or to health care, but it is seen as an acceptable realization of that right to enable me to participate in a market and not to be excluded for reasons of my race, gender or age for instance. But it is perfectly acceptable, in positivist human rights thinking, for an individual to be told you cannot have this health care or accommodation because you cannot afford it. This is due to a number of things we have forgotten about the conceptualization of property.

First, 'property' is not a synonym for 'things'. Colloquially, property is about things. Property is a label, at one level, for different commodities; 'property' relates colloquially to the things that are valued in particular societies over time. So, land is a recurring 'thing' of property. In agrarian, artisan and industrialized societies, different commodities take on different cultural and economic importance and value. Today, for example, we speak about 'the information age',[944] and different forms of information are commodified and become part of the owned world. Indeed, with the developments in modern biotechnology, even parts of human beings,

[943] N J Cooper, A Swan, & D Townend 'A Confluence of New Technology and the Right to Water: Experience and Potential from South Africa's Constitution and Commons' (2014) 16/2 *Ethics and Information Technology* 119-134.
[944] M Castells *The Rise of the Network Society: The Information Age: Economy, Society, and Culture, Volume 1* (Wiley & Sons, 2011) 8.

animals and plants, have become independent commodities and part of this owned world.[945]

However, property is not only the 'thing'. Property is not really the thing at all. Property is a description of the relationship of people regarding the 'thing'. When I say that I have property in something, I am referring to a system of rights regarding my relationship to other people in relation to that thing. Essentially I say to others, 'this is mine'. As Beyleveld & Brownsword have noted, this is a particular sort of claim. I only have to assert the provenance of my claim - that I purchased or made the thing - for the property to 'bind the world'; the claim to property is to a strong, broad and binding right.[946] Indeed, upon noticing an object we naturally think 'to whom does that belong?' We do not pause, in today's society, to ask whether a thing is owned because we see it as part of the realm of commodities. We do not pause to think about the *nature* of the property that is or could be claimed. Our only real pause is in thinking how far the net is cast over commodities. Concern may be voiced regarding the commodification of something hitherto regarded as existing outside the realm of property claims, like clean air, or DNA perhaps.[947] This however, does not mean that we cannot, or should not, also question how far a property right extends in other respects.

Second, 'property' is a changing and changeable notion. Macpherson[948] reminds us that the current paradigm within which we construct the concept of 'property' is not the only available paradigm that we have used or that we could use. The current paradigm of property, derived from the industrial revolution, revolves largely around private property. Fundamental to the way in which property is conceptualized within this paradigm are three attributes: First, property is easily transferable between individuals; second, property ownership is detached from social duties and is seen as part of a citizen's rights; third, property rights are enforced by the machinery of the State, as part of the rule of law.[949] We can develop a complex layering of rights-holdings over particular items of property (usually, the complexity is proportional to the perceived economic value of the commodity), but these are essentially created through the exchanged parts of the single exclusive right to the property. However, this is not the only way

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[945] Ibid.

[946] D Beyleveld & R Brownsword *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001) 171-194.

[947] Although locating such things as being outside or beyond the realm of commodification reflects the Roman law concept of *res publicae*, as well as African customary principles prohibiting private ownership of land and water, it may also be a relatively new phenomenon; for instance invoking Keynesian notions of social goods, encompassing perhaps education, health care and elemental resources like water. See A L Mark *Economics for the Common Good: Two Centuries of Social Economic Thought in the Humanistic Tradition,* (Routledge, 1999) 16.

[948] C B Macpherson 'Capitalism and the Changing Concept of Property' in Kamenka & Neale (eds) *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975) 104-124.

[949] Ibid 112.

in which we have held property. Macpherson illustrates the existence, and the potential for existence, of alternative property paradigms, by considering the feudal system of property that preceded private, industrial revolution property. In the feudal system, property rights were much more attached to the individual and the individual's social duties. Property rights were not citizenship rights, but were bestowed by the monarch and within the social hierarchy.[950] Because of this framework, property was not as easily transferable. Perhaps most significantly, property was not as exclusive. Within this system, and for social welfare purposes, common ownership (i.e. community rather than exclusively individual ownership) was important. Common land became a way of ensuring social security for some members of the community; collective access to the benefits of property was as important within the system as private or exclusive enjoyment.

Doubtless there are some similarities between this description and the fundamental facets of commons thinking, as discussed above. But this is not to advocate feudal society over modern industrial society. Macpherson simply reminds us that the way that we conceptualize property today is not necessarily the *only* way to do so. This resonates with Reich's idea of 'new property', which affirms the paradigmatic nature of property: the changeable nature of property in response to different socio-economic conditions. We moved from feudal to private property due to the changing needs of industrialization and market capitalism. Over a shorter span of time, and within one jurisdiction, a similarly symbiotic relationship between the needs of the economy and the scope and content of the law (on access to water) has been traced (in Chapter Three). The question today might be "do the new socio-economic needs of our society require a change in the conceptualization of property?" However, in seeking a more interconnected and less anthropocentric perspective, such a question must also ask how property might be reconceptualised in order to respond to the ecological imperatives facing us all. This relates to the third observation about 'property'.

Third, 'property' is a moral issue. Morality is about the appropriateness of different actions of individuals towards other individuals.[951] It is about being able to make a convincing justification for making particular choices that influence other people. Modern societies tend perhaps, to limit the scope of morality, claiming that it relates to particular sorts of choices rather than others, for example, sexual morality rather than morality in international commodities trading or hedge fund management. However, morality is simply about justifying human choices and

[950] Ibid.
[951] Collins Dictionary definition: <http://www.collinsdictionary.com/dictionary/english/morality> (Last accessed 27 July 2016).

actions. Property is the relationship between individual human beings, about things. It is about the claims that individuals make to bind each other about things. This makes 'property' a moral issue, because the act of claiming the particular relationship to things against other individuals is a human action and therefore subject to morality.

When I say, 'this is mine', I am making an appeal to a particular sort of relationship to that property that I intend all other people to be bound by. I have to be able to justify that claim in terms of its morality. Generally, the underlying social response is to assume that ownership and property claims are *necessarily* moral, but this is questionable. When my property claims have implications on others' well-being, then the requirement to be able to make the moral argument for that claim-making is imperative. If I fill my swimming pool, or water my garden[952] a few kilometres away from my neighbour, who cannot afford to buy credit for the prepayment meter in order to access water for her family to wash and cook in, I have to be able to justify denying her some of my water 'because it is mine'. Indeed, 'because it is mine', or 'because I bought it', or, implicitly, 'because I deserve it and you do not' are hard moral claims to justify in the face of my neighbour's need. Indeed, the requirement to question the morality of claims to property is inherent in all acts of property-claiming. In this way, maintaining a simple private, industrial revolution property claim over access to water, or the means of supplying water, is a moral issue, requiring robust justifications and open to legitimate critique and creative alternatives.[953] Water scarcity affects over 20% of the world's population (those without access to sufficient potable water to meet daily needs) and the problem has increased in many regions, while a private property paradigm for water continues to be promulgated[954].

The demand that property-claiming be subject to rigorous moral justification is not to place an unequal, or intolerable burden upon particular governments, municipalities, companies, or individuals. Because the concept of property is one that binds the world, it is universal and systemic. The requirement to make property a moral issue challenges *all* property ownership since morality is not selective. This leads to the question of how best to conceive of property in a morally sensitized way. It also raises the question of whether human rights might have a role

[952] According to this article half of the water used for domestic purposes in Gauteng is used to fill swimming pools and to water gardens. Mrs Mazibuko and her co-applicants also reside in Gauteng: 'Records tumble as drought goes on' *The Mail & Guardian* 20-26 November 2015, 11.

[953] This is not to ignore the measures in place in South Africa to ameliorate water poverty, including the Free Basic Water policy of 25 litres per person per day. However, as several of the interviews with water poor people testify, this policy is not able to ensure that everyone has access to sufficient water (even when sufficiency is limited to volume as in this illustration).

[954] K Bakker 'The 'Commons' Versus the 'Commodity': Alter-globalization, Anti-privatisation and the Human Right to Water in the Global South' (2007) 39/3 *Antipode* 430.

in such a reconceptualization of property. While the liberal vision of human rights - as individually focused, and increasingly technical and positivistic – is compatible with an industrial revolution private property paradigm, there is another vision of human rights, that resists legal domestication, and so retains some potential to act as a site and catalyst of critique, which can still disrupt positive human rights law itself. Grear describes this potential as:

> 'energy which reaches [...] beyond the 'now' of law towards the 'not yet' of justice as law's endlessly elusive horizon'.[955]

Viewed in this way there is no contradiction in asserting the inadequacies of rights talk, and specifically of the right of access to sufficient water, while heeding the clarion call to affirm a right to water as a prophetic, emancipatory (and unambiguously moral) claim.

In response to such a call, commons ideas do not deny individual rights. Rather, it is a shift in emphasis from individual rights (conferred in isolation from realities of scarcity and imperatives of sustainability, and susceptible to legal domestication), towards greater contextualisation and contestation of those rights claims.[956] The themes of interconnectivity and interdependence within IWRM are echoed here. But unlike IWRM a commons strategy avoids emphasising individual (legal) water rights, in favour of communal needs (this does not detract from the continuing articulation of a right to water for everyone, as a moral claim, framed variously in individual and communal terms).

In the South African context, there is potential to give effect to a reconceived notion of property in relation to water. Not only does the National Water Act apply the doctrine of public trusteeship to water, in a way that eschews private or State-ownership (rather the property title is vested in the State as *trustee*, with the nation - all people - as *beneficiary*[957]), but, as van der Walt argues, such a deliberately novel designation acknowledges that 'property has a public, civic or "proprietary" aspect to it that transcends individual economic interests and that involves interdependency and common obligations'.[958] (See discussion at Chapter Three at 3.3.2).

Furthermore, the right to property in Section 25 of the Constitution makes specific provision for 'legislative and other measures to achieve land, *water* and related reform, in order to redress

[955] A Grear 'Human rights, property and the search for 'worlds other'' (2012) 3/2 *Journal of Human Rights and the Environment* 173-195, 178.
[956] M B Dembour 'What Are Human Rights? Four Schools of Thought' (2010) 32/1 *Human Rights Quarterly*, 6-9.
[957] G J Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' *Law Environment and Development Journal* (2007) 3/2, 179-194, 184.
[958] AJ van der Walt 'The Public Aspect of Private Property' (2004) 19/3 *South African Public Law* 676, 707.

the results of past racial discrimination',[959] paving the way, in theory at least, for a fundamental reimagination of water governance in South Africa.

Such a 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. If innovatively applied to water allocation, a commons strategy may be able to transcend 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.

5.6 Challenges and solutions

Clearly the foregoing critique of the failures of the right to water and the attempts at reimagining water governance raises many challenges. Inevitably, questions are raised as to the best shape and scope of a right to water (as well as justifying why such a right should even exist), and around the Court's legitimate interpretation of the right to water, requiring that theories of constitutionalism, separation of powers, and judicial restraint must be carefully re-examined. Zooming out to the international level, questions must be asked about the contingent articulation of liberal human rights, and the ways in which they are expressed as being congruent with a globalised capitalist economy. Furthermore, introducing and identifying commons thinking in action, regarding water governance at the local level, uncovers layers of 'law' or law-like interactions that must also be analysed and theorised; as social norms are agreed (sometimes rediscovered), monitored and enforced within structures containing vastly different degrees of formality. The purpose of asking each of these questions (as well as the many others that this thesis has generated) is to answer how law can best help achieve the goal of access to sufficient water for everyone. This section simply acknowledges that the scale of that goal is considerable, and points to three practical 'next steps' towards solutions.

First, regarding the constitutional right of access to sufficient water, greater scrutiny should be afforded to what resources are available in fulfilment of the right. While the apportioning of resources is undoubtedly a political question, a new legal requirement to publish what resources have been made available in pursuit of which socio-economic rights, along with explanations, could encourage their quicker, progressive realisation. Regarding national water policy,

[959] Section 25 (8) Constitution of the Republic of South Africa 1996. (Emphasis added).

commitment to full cost recovery for water services should be removed. While this would undoubtedly impact upon the State's available resources, it would also, crucially, allow the right to water to be pursued from outside a water-as-commodity paradigm, which is essential if indigent communities are to experience significant improvements in their access to water. To this end the public trusteeship of water should be re-emphasised, including within the operation and priorities of State-owned water companies. The relatively minor involvement of foreign direct investment in the South African water sector means that such a shift could be undertaken without the degree of acrimony witnessed in parts of South America.

Second, judicial interpretation of the right of access to sufficient water should adopt a more pragmatic and flexible approach, resisting the urge towards automatic restraint, which risks manifesting itself in a managerialism that masquerades as deference. The Constitutional Court's jurisprudence of reasonableness should not be used to avoid adopting tangible minimum standards (core obligations) for socio-economic rights, when the substance of the particular right makes it 'reasonable' to do so. Regarding the right of access to sufficient water, such a minimum core should be decided, and then regularly reviewed in line with the continued obligation of progressive fulfilment. Moreover, the quantum decided for such a minimum core must accurately reflect both the needs of the (human) water users, and the capacities of their environment. This would require moving towards a more contextualised definition of sufficient water, which will almost certainly involve the adoption of maximum quotas for water use (whether these are imposed by prohibitive law or by prohibitive taxation is another matter).

Third, serious research (echoing that conducted by Ostrom[960] and others in various sectors, but particular to South Africa and to water governance) should be undertaken to identify where the optimum balance lies between community self-organisation and collaboration in partnership with government or NGOs. As the experience of the WUAs in Malawi suggests, achieving this balance is essential in order to effectively deliver sustainable and equitable water services over the long term, in communities where access to water is problematic. Such research must be creative enough to consider atypical modes of water governance, while being sensitive to the potential and actual weaknesses within commons thinking (and action).

Doubtless each of these 'solutions' would generate their own challenges, not least regarding the need for new law and legal regulation, new interpretative approaches, and new ways to affirm,

[960] See for example E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); E Ostrom *et al* 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 *Science* 278.

encourage and support existing forms of vernacular law, with the potential to positively contribute to the overarching goal of access to water for everyone.

5.7 Chapter summary and concluding comments

Most ambitiously within this thesis, this chapter has sought to connect the legal shortcomings of the constitutional right of access to sufficient water to the reality of living with insufficient water for many in the country. A further connection has then been made between the ways in which water poor people experience the dominant mode of water governance, and the potential (sometimes latent, sometimes manifest) to rethink water governance in more enfranchising, more equitable and more sustainable ways. Crucial to this post-water-as-commodity imaginary endeavour is a fresh appraisal of the role of community organisation and commons thinking, based on empirical observation and theoretical analysis. But in order even to begin such a creative reappraisal, space must be found where ideas and examples that fall outside the dominant paradigm, are allowed room to flourish or to wilt, without presupposition. Doubtless the purity of such a cerebral space is not possible to attain in reality. Our conditioning, prejudices and preferences cannot be entirely kept away from the subject of our analysis. But even being mindful of this can help alert us to the importance of acknowledging our (un)conscious biases, and of compensating for them where we can. To this end, Peter Rollins' notion of 'suspended spaces' (or 'uncolonised spaces') is a useful conceptual schema, and helps justify the decidedly optimistic appraisal of the potential contained within some people's stories.[961]

Similarly some of the post-modern insights into the interrogatory importance of the 'other', as well as on the necessary suspicion of epistemological closures, have guided the approach of this chapter, including its conclusions. Sensitive to the eschewal of meta-narratives implicit in the postmodern turn, and reflecting on the lived experience of commoning discussed above, I do not wish to suggest that commons modes of water governance should necessarily be looked to as a replacement for more familiar 'top down' models (typified by State/Corporate water service) in *all* circumstances. Neither do I argue that framing questions of water use as issues to be addressed communally, necessarily removes the need to conceive of access to water *also* as a personal, individual issue, to which a 'right of access to sufficient water' may provide an appropriate legal concept and justiciable tool. To deny a place altogether for individuals' claims of a right to water would be to ignore the progress that has been made in improving people's

[961] P Rollins *How (Not) to Speak of God* (SPCK, 2006) 97.

access to water globally. As part of this endeavour, the articulation and (at least partial) recognition of a right to water continues to focus rhetoric and galvanise action (see Chapter Two).

Denial of an individual right to water in order to emphasise the interconnected, shared, contextualised and communal aspects of water use, would also betray an ideological commitment to the commons as *the* best approach to water governance, which simply echoes the 'free market' claim that it is commercialisation that is *the* only effective mode of resource allocation. Therefore I am not proposing a revolutionary replacement of *all* current water services with commons modes of water governance. While I maintain that commons thinking promotes a contingent and grounded vision of water use, which is essential for sustainable, equitable water governance, this assertion does not reject the possibility that other modes of governance can also (perhaps even more effectively) contribute to realising the same goal.[962] Indeed, commons thinking must not be allowed to follow the totalising route that modernism encourages, and which has helped to deeply embed the commercialisation of natural resources as the dominant paradigm. As Usher reminds us, one consequence of accepting that knowledge is relative to discourses, and is therefore always partial and perspectival, is that claims to atheoretical and value-neutral 'truth', even derived from observation, are fantasy.[963] Moreover, such fantasies are pernicious because they prompt the enclosure and restriction of spaces that incubate and encourage perpetual contestation. Instead, the existence of such spaces for contestation becomes even more important when faced with 'the almost unthinkably complex, inter-related and interactive, global system'.[964]

Here, epistemic spaces can signify and remind us of the 'ungraspable'[965] nature of this system, and therefore also, the futility of any claims to mastery of it. Epistemic spaces are important then, not just to encourage contestation, but also humility. Not humility as acquiescence, but as the catalyst for active and on-going contestation: reminding us that since a perfect system is ungraspable, the task must continue. But while a single, certain solution will always remain illusive, we must remember that the *problem* can be clearly described: many people continue

[962] For a more optimistic appraisal of the role of privatisation/commercialisation of water services, see for example J Budds & G McGranahan 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America.' (2003) 15/2 *Environment and Urbanization* 87-114; L Mehta 'Unpacking rights and wrongs: do human rights make a difference? The case of water rights in India and South Africa' (2005) Working Paper 260 *Institute of Development Studies*.
[963] R Usher 'Telling a Story about Research and Research as Story-telling: Postmodern Approaches to Social Research' in G McKenzie et al (eds.) *Understanding Social Research: Perspectives on Methodology and Practice* (Falmer Press, 1997) 31.
[964] Ibid 30.
[965] Ibid.

to live without access to sufficient water, while 'holding' a right to water that was supposed to eradicate this unacceptable status quo. Therefore, where commons approaches to water resources can be used to achieve improvements in people's access to water, they should be pursued with gusto.

Learning from some of the practical examples of commoning, considered above, the application of commons thinking to the water resources of any given community will require some degree of organisation and administration. While stories from Blantyre and Burlington provide examples with more or less formal governance structures, both examples also illustrate multilevel governance in action. In both locations, across two different jurisdictions, constitutional, national and municipal water law and policy remain unaffected by the operation of commons approaches to water allocation at the grass roots. Obligations imposed by legislation are unchanged by commons thinking, and, in South Africa, the right of access to sufficient water remains operative (albeit within the various constraints of qualification and interpretation) for each individual in the community. Therefore, commons approaches can be promoted without the need to advocate for the outright replacement of the current system of water governance.

It is to be expected that such interaction between municipal and community governance will be reflected, at least to some extent, in municipal governance frameworks. In South Africa, this is one of the purposes of creating CMAs (discussed above). In Blantyre, Malawi, municipal government regularly communicates with the WUAs, briefing them of changes to water pumping and purification capacities, and helping them to ensure dependable water provision.

On another practical note, several of the commons examples discussed above actually involved collaboration with the State (local or municipal government) to greater or lesser degrees. These examples are interesting first because they remind us that in pursuing the goal of access to sufficient water for all, the resources of the State, though limited, are important nonetheless. Second, though these examples reflect commons thinking, they are not entirely commons projects, because of their involvement with, and reliance upon State resources. Not only should this caution against hubristic claims about the mastery of the commons, it also requires acknowledgement of a third mode of water governance, distinct from State allocation (within a water-as-commodity paradigm), and water-as-commons, which can be expressed as a hybrid of community and State action.

It may even be more accurate (despite my aesthetic sensibilities) to add a fourth 'C' to the title of this thesis, and to acknowledge the role of 'collaboration', or the collaborative efforts of communities in partnership with local government towards more effective water governance. Indeed, such collaboration was what Ostrom has referred to as 'private-like' and 'public-like' institutions that defy classification in a sterile dichotomy. Whether such hybrids represent a water governance paradigm that is distinct from both water-as-commodity, and water–as-commons, is not clear. But mindful not to claim the mastery of any one paradigm, perhaps such ambiguity is fitting.

6

Conclusion: Achieving access to sufficient water for everyone, forever

> 'We will talk quite directly about it, because water is quite a fascinating thing... My own feeling is that there must be entitlements- the amount of water that any family however rich can use. My problem is that unless you have a maximum, you're not going to solve the problem... You can't say as long as you're prepared to pay more and more and more, you can have as much water as you like. Mad.'
>
> Author's interview with Justice Zak Yacoob[966]

6.1 Introduction

Throughout this thesis the central problematic has remained 'how to achieve access to sufficient water for everyone in South Africa'. This has been engaged with from the perspectives of international law (and more broadly, water governance at the international level); South African Constitutional law (and more specifically, socio-economic rights jurisprudence); and community organisation (combining commons approaches to water governance in theory and practice).

That this problematic is timely and important is only too evident from the fact that so many South Africans still live without access to sufficient water, and that water resources are under increasing pressure from a fusion of adverse climate change, inadequate governance, and increasing demand. The focus of this study has been on *legal* responses to the challenge of achieving access to sufficient water, with much attention given to how water, and access to water, are regulated using legal tools and legal concepts, including legislation, case decisions, and the language of (legal) rights. But throughout this legal enquiry effort has been made to include the

[966] Interview # 6. See appendices.

experiences of people for whom access to sufficient water is problematic, and whose lives are adversely affected by insufficient water and its myriad consequences. People in such situations are described as 'water poor'. The voices of some of these water poor people, and the stories they tell, have been afforded a privileged position within the thesis, in deliberate subordination of the model of much mainstream scholarship, which (consciously or otherwise) excludes the experiences of people on the 'wrong side' of the economic/legal/political/ consensus.[967]

In brief, the main conclusions of this thesis are threefold: First that the tentative consensus around a human right to water in international law is useful in directing attention and catalysing action towards improving people's access to water. The right to water, as a trope, raises awareness of the profound global challenge of delivering sustainable access to sufficient water for the 650 million people worldwide, who currently live without it, including the 900 children a day who die from diarrhoeal disease caused by unsafe water.[968] Moreover, it informs national law regarding the content of a domestic right to water, including concomitant State obligations, and it helps to direct development priorities including the Sustainable Development Goals.[969] But it falls short of being an effective tool for ensuring access to sufficient water for everyone. This is necessarily so, in the absence of an effective international regulatory framework for violations and compliance regarding socio-economic rights, and the continued primacy of states as the main context within which individuals' rights are conferred and experienced.

Second, the right of access to sufficient water in the South African Constitution is not capable of ensuring access to sufficient water for everyone in the country (this is referred to as the limits, or limitations of rights talk). As it is currently configured and interpreted, the right is individualistic, compatible with private property rights, and interpreted in light of *a priori* assumptions about the commerciality of water services. Furthermore, it is subject to progressive realisation within the available resources of the State. Together, these conditions and attributes position the right to water (and water governance more generally in South Africa) within a water-as-commodity paradigm. One consequence of this regarding the task of achieving sufficient water for everyone, is that in creating such a conditional *legal* right, the underlying moral claim to sufficient water is diluted, and the right of access to sufficient water is transformed into a technical legal problem[970] This allows for experiences of access to *in*sufficient

[967] R Banakar & M Travers (eds) *Theory and method in socio-legal research.* (Hart, 2005) 12.
[968] See: <http://www.wateraid.org/what-we-do/the-crisis/statistics> (Last accessed 27 July 2016).
[969] For an example of how the international human right to water has focused pressure for the inclusion of a goal of universal water access within the recently-agreed Sustainable Development Goals, see <http://www.right2water.eu/news/human-right-water-and-sanitation-must-be-sdgs> (Last accessed 27 July 2016).
[970] P Bond 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the

water to be deemed legally legitimate, thereby allowing the continuation of water poverty, and restricting space for political contestation.[971]

Third, commons approaches to resource allocation (commons thinking in action) are well placed to step in to the gap left by the limitations of rights talk. Commons thinking promotes a contingent and grounded vision of water use, which is essential for sustainable, equitable water governance. Furthermore the emphasis within commons thinking on community priorities can encourage decisions on water governance to be mediated by communities, and made at the lowest appropriate level. This has the potential to help achieve access to sufficient water for everyone, by restating it as a moral claim, and aiding its fulfilment in more sensitised and appropriate ways. These attributes of commons thinking, applied to water governance, represent a distinct alternative paradigm: water-as-commons. It is argued that access to sufficient water for everyone in South Africa could be more closely realised by reconceiving water governance within a water-as-commons paradigm (albeit manifest in different shapes and sizes, including being variously combined with State actors and /or NGOs), than by the continued pursuit of commercialised water services, and an (over)reliance on top-down approaches to water governance, including a constitutional right of access to water.

By combining the substance of these conclusions with the ways in which they have been reached, it is asserted that an original and meaningful contribution to the state of the art on water governance in South Africa has been offered here (with some scope for application beyond the South African context). These conclusions are considered in more detail below as the thesis structure is reviewed. The chapter finishes with some reflections on the limitations of the thesis, and some thoughts on directions for future research.

6.1.1 Structure

Entitled 'Covenants, Constitution, and Commons', the thesis has sought to engage with the question of how to achieve access to sufficient water for everyone in South Africa from the perspective of law (broadly defined to include 'soft law'[972], governance, and 'vernacular law', alongside more traditional 'hard law'[973]), by adopting a three-level approach, moving from consideration of how access to sufficient water may be pursued through international law, and

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commons?' (Syracuse Conference, Cape Town, February 2010) 12.

[971] D Brand 'The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa' in A J van der Walt (ed) *Theories of Social and Economic Justice* (African Sun Media, 2005) 17, 35.
[972] G C Shaffer & M A Pollack 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) *Minnesota Law Review* 706-799, 712-13.
[973] Ibid.

at the international level; to national (including constitutional) law and policy in South Africa; and finally to the level of community organisation and the vernacular law of the commons.

The pertinence of each level of enquiry to the overarching problematic of the thesis is now reviewed, beginning with water governance at the international level. This is the level of the Covenants (ICESCR and ICCPR), but also of other relevant international (including regional) treaties, UN General Assembly resolutions, and internationally agreed development goals, amongst other things. Central to my enquiry at this level was the question: 'How is the goal of achieving access to sufficient water understood, facilitated, and implemented at the level of international law?'[974]

In order to answer this, Chapter Two focused on identifying the nature and scope of an internationally acknowledged human right to water, including outlining the law and legal instruments relevant to water governance at the international level. The chapter examined and critiqued the structural and practical limitations of an international human right to water, and to a rights-based approach to water governance, before introducing an alternative/complementary conception of water as a development goal. Connections between social, economic and cultural rights, civil and political rights, and environmental exigencies began to be made in this chapter, in order to frame the question of sustainable access to sufficient water within the challenges and limitations not just of economic resources, but also of social and cultural needs, and of emerging ecological capacities. The conclusions reached in Chapter Two, around the conceptual and material limitations on the ability of an international human right to water to address the challenge of access to sufficient water for everyone, propelled the thesis towards the next level of enquiry: national water governance in South Africa.

As the statistics above attest to, access to sufficient water remains a serious challenge for people in numerous countries across the world. Therefore, any one of these countries could have been chosen as the focus of enquiry on national, or State-bound approaches to water governance. But, as detailed in Chapter One, South Africa was chosen for a number of reasons, including most notably the novel inclusion of a right of access to sufficient water within the country's new Constitution. This, combined with the significant and persistent problems of water access facing many citizens, and my own familiarity with, and affection for, the country, meant that South

[974] For the purpose of this question 'international law' is understood to encompass not only the authorities as set out in the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355, Article 38 (1) (a)-(c)), but also the relevant United Nations General Assembly Resolutions, despite not being binding on member states, and other 'soft law', or non-legally binding instruments including for instance the 1992 Rio Declaration on Environment and Development. *See* A Boyle 'Soft law in international law-making' in M Evans (ed) *International Law* (4th ed, Oxford, 2014) 118, 119-120.

Africa was an ideal context to continue to interrogate the role and potential of law in helping to achieve universal access to sufficient water.

Three research questions were particularly relevant to analysing water governance in South Africa: How is the right of access to sufficient water understood, facilitated, and implemented in South Africa? What impact does relevant international law have on South Africa's regulatory framework for access to water? To what extent can the current international and domestic regulatory frameworks achieve access to sufficient water for everyone in South Africa? These questions have been addressed across Chapters Three and Four.

Chapter Three begins with an exploration of the country's unique social, legal, and political history, in order to use this as a lens through which past and present water governance can be critiqued. This has required a detailed study of the operation of the 1996 Constitution, as well as of legislation and policy pertaining to water governance. Deliberately descriptive in parts, in order to lay the foundation for the ensuing evaluation of the effectiveness of the right of access to water, this chapter also offers a critical reading of the interaction between law and the economy, and the determining dynamics of capitalist imperatives upon governance, including water governance. Study of the Constitution also reveals the formal connection between international law and domestic law. Some of the normative consequences of water governance at the international level, on South African jurisprudence are reflected on in Chapter Four. So the principal purpose of Chapter Three has been to identify the law and legal instruments that relate to, and impact upon, the right of access to sufficient water in South Africa, as well as beginning to consider the relevance of international law for South African water governance.

Chapter Four places the right of access to sufficient water within the general context of those socio-economic rights within the Bill of Rights, as created by the 1996 Constitution. It is argued that in order to understand the scope, application, and transformative potential of the right of access to sufficient water, consideration must be given to the ways in which all socio-economic rights have been interpreted and adjudicated upon by the courts, and most notably by the Constitutional Court. Furthermore, it is asserted that the interpretation of socio-economic rights depends, in part at least on the perceived relationship between the judiciary and the other branches of the State. Consequently, Chapter Four analyses seminal decisions of the Constitutional Court including those specifically regarding socio-economic rights, in order to identify a more-or-less coherent jurisprudence, and in so doing, to address the extent to which

the constitutional right to water (informed by the international human right to water) helps achieve access to sufficient water for everyone in South Africa.

Chapter Four concludes that there are limitations to the Constitutional Court's ability to pursue significant social transformation through adjudication on socio-economic rights, and that many of these limitations can be considered legitimate, by recourse to entrenched constitutional values (a position labelled 'judicial restraint', which taken to its extreme, becomes 'judicial managerialism'[975]). But an alternative interpretation of the Court's interaction with socio-economic rights is also postulated, emphasising the developmental importance of a dynamic, evolutionary understanding of the Court's role in relation to these rights. Rather than asking what *is* the legitimate role of the Constitutional Court? (a question that expects a static answer), instead the question 'what is *currently* the legitimate role of the Constitutional Court?' is asked: an idea expressed as 'liminal constitutionalism'. The usefulness of this concept is considered. But it is ultimately concluded that affecting significant transformation through adjudication of the right of access to sufficient water (as it is currently configured) has reached its limits. Reaching the limits of 'rights talk' (particularly regarding achieving access to sufficient water) once again propels the thesis, in Chapter Five, to the next regulatory level upon which the task of achieving access to sufficient water for everyone is considered: the commons.

Here the central research question has been 'what role can commons/community organisations play in creating effective water governance[976] to help achieve access to water for everyone?' In order to address this, Chapter Five begins with a detailed analysis of the stories of several people for whom access to *in*sufficient water is a regular problem. Measured against the most authoritative international standard for sufficient water, these people's stories reveal the various ways in which water access can be so problematic, as well as the consequences of lives lived without sufficient water. From this narrative inquiry flows an attempt to reconceive water governance from outside the structural and conceptual closures of the dominant paradigm (identified above as water-as-commodity) and consequently, to explore the potential for new/old

[975] This term was originally coined by the author in the following publication: N Cooper & D French 'The Right to Water in South Africa: Constitutional Managerialism and a Call for Pluralism' in E Blanco & J Razzaque (eds) *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff, 2012) 111.

[976] Here the term 'governance' is deliberately used in contrast to the traditional, hierarchical notion of regulation referred to in the previous two sub-questions. Instead governance, which emphasises flexible, informal and multi-level regulation, is proffered as potentially a more appropriate regulatory strategy, more complementary to commons thinking. *See* above at 5.4.1. Also see variously R Bellamy & A Palumbo (eds) *From government to governance* (Ashgate, 2010), P Jon "Introduction: Understanding governance" in P Jon (ed) *Debating Governance: Authority, Steering and Democracy* (OUP, 2000). These definitions and themes have been considered further in Chapter Five.

modes of governance that have the capacity to be more sustainable, more equitable, and better suited to the communities hit hardest by water poverty.

Blending contemporary perspectives on vernacular law and multi-level governance with postmodern theories on stories and subjectivity, and empirical observation and reflection, a fresh contribution is made to the debate on how best to achieve access to sufficient water for everyone in South Africa.

6.1.2 Reconnecting the local, the national, and the global

The three-level design that this thesis follows has been useful in order to provide structure, and to direct focus towards international, national, and community approaches to water governance, in turn. But it must be noted that these levels of governance do not occupy cleanly separated strata. Rather, each level interacts with, and responds to, the others. Chapters One and Two show how the impetus to adopt an international human right to water, was driven, at least in part, by national governmental failures, and by grass-roots activism. Chapters Three and Four evidence the influence of relevant international law on national water governance in South Africa, and as argued in Chapters Four and Five, recent developments of commons approaches to water governance in South Africa and Malawi have been driven by the limitations of top-down national law and policy.

While much attention has been given to commons thinking in action, within local communities, it is important to remember that the commons is also a global movement. There are many historical and contemporary examples of geographically bound commons approaches, applied across the world: to water; agriculture; libraries; and grocery shopping, amongst many others. But also, empowered in large part by the internet, *global* commons have developed exponentially, and can be seen in relation to open access scholarship; open source software; alternative currencies; music; and data sharing.[977] Indeed, the prevalence of commons approaches, alongside their resilience to economic shocks (due to the fact that many commons modes are more or less separate from State/market logic and control) has even led at least one country to formally consider transitioning towards greater use of commons approaches.[978] Similarly, South Africa's launch of Catchment Management Agencies (CMAs) to improve locally-specific water governance,[979] is an example of adapting governance structures in order to

[977] See for example Open Knowledge International <https://okfn.org/> (Last accessed 27 July 2016).
[978] In 2014 the Ecuadorian Government commissioned a strategic research initiative by Free Libre Open Knowledge (FLOK). Available at: <http://en.wiki.floksociety.org/w/Research_Plan> (Last accessed 27 July 2016).
[979] <http://www.inkomaticma.co.za> (last accessed 27 July 2016).

attempt to incorporate grassroots organisation and knowledge: 'empowering stakeholders to engage in consensual and adaptive decision making across the [...] catchment.'[980]

6.2 A note on originality

Reviewing the prevalence of empirical research in legal studies, Epstein and King have noted that although much legal scholarship makes use of empirical information – that is quantitative data or qualitative information – far too little attention has been paid 'to the key lessons of the revolution in empirical analysis that has been taking place over the last century in other disciplines'.[981] In particular there remains a conspicuous absence of work that focuses on the methodology of empirical analysis in law. The result of this, they claim, is that 'readers learn considerably less accurate information about the empirical world than the studies' stridently stated'.[982]

Sensitive to this general weakness in legal research, and influenced by social scientific skepticism around epistemological mastery, I have deliberately sought to adopt a methodological design that is at once explicit, and is also able to combine legal scholarship with narrative inquiry in order to tell a story that is grounded in the empirical world. To the degree to which I have succeeded in this endeavour, I believe that this makes a positive contribution to genuinely socio-legal research.[983]

Moreover, the conceptual lens through which the jurisprudence of the Constitutional Court has been analyzed in Chapter Four, represents an original attempt to break open the binary model that frames 'judicial managerialism' and 'transformative constitutionalism' as competing interpretations of the 'correct' or most appropriate approach of the Court. Instead of such a binary tension, the concept of 'liminal constitutionalism' has sought to rephrase questions around the optimum approach of the Constitutional Court, as contingent, temporary and fluid: What is optimum at one point in time will not necessarily be so at another time. This encourages continual contestation of the Court's role, which has the potential to lead to consideration of modes of water governance outside the current configuration of individual rights claims, whenever and wherever appropriate (see 4.6.3).

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[980] See Inkomati CMA 'Mission Statement': <http://www.inkomaticma.co.za> (last accessed 27 June 2016).
[981] L Epstein & G King 'Empirical Research and the Goals of Legal Scholarship: A Response' (2002) 69 *University of Chicago Law Review* 1-209, 1.
[982] Ibid 2.
[983] R Banakar & M Travers (eds) Theory and Method in Socio-Legal Research (Hart Publishing, 2005) xi.

Finally, analysis of the relationship between property and the right of access to sufficient water, pertinently contributes to the literature on human rights and property rights. Grear has described water as 'the ultimate frontier issue between rights and property paradigms'[984] and although this nexus has already received some critical theoretical attention, the emphasis on the experience of water-poor people in this thesis adds practical dimensions to the theoretical debate, applying the theory within the South African legal system, and illustrating people's 'felt injustice'[985] by giving voice to their stories, and by learning from their responses. In so doing, this thesis makes a timely contribution to scholarship around the evolutionary direction of socio-economic rights in South Africa, and across the global South, (where the inclusion of socio-economic rights within national Constitutions is becoming more popular[986]) and on the potential for commons thinking to be used in pursuit of better (water) governance.

6.3 Pre/Post modern hints towards hydro-socio-eco responsibility

The Commons has been described as 'a useful new/old framework and vocabulary for building a new societal vision.'[987] Unsurprisingly then, commons thinking finds echoes of itself in ancient traditions, as well as in contemporary culture. Similarly the 1996 Constitution of the Republic of South Africa attempts to integrate old wisdom with the contemporary language of rights, and a fresh commitment to dignity (while clearly renouncing the legacies of discrimination and apartheid). One such ancient tradition, which is particularly relevant to any discussion of rights and resource governance in South Africa, is *Ubuntu.*

6.3.1 *Ubuntu,* rights and commons

In the case of ***S** v **Makwanyane*** (considered in Chapter Four in relation to judicial deference), in *obiter*, Langa J called for:

> 'a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *Ubuntu.*'[988]

[984] A Grear 'Human rights, property and the search for 'worlds other'' (2012) 3/2 *Journal of Human Rights and the Environment* 173-195, 191
[985] Ibid at 178.
[986] For a recent example of such inclusion see the 1993 Constitution of Zimbabwe. Available at: < https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf> (Last accessed 27 July 2016).
[987] D Bollier & BH Weston 'Reimagining ecological governance through human rights and a rediscovery of the Commons' in A Grear & E Grant (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 251, 252.

[988] ***S** v **Makwanyane*** 1995 (3) SA 391 (CC). Paragraph 223. Note this was originally quoted from Chaskalson P's judgment in National Unity and Reconcilliation.

Although referred to in *Makwanyane* in the context of capital punishment, Ubuntu can also claim much broader significance, particularly to the conceptualisation of people's rights and responsibilities. Ubuntu has been described as a world-view prevalent in African societies, which predates colonial involvement on the continent, and as a metaphor for group solidarity in response to the challenges of survival and of scarce resources.[989] It is well summarised by the phrase *'Motho ke motho ka batho babang'*, 'a person is only a person because of other people'.[990] As such it implicitly emphasises personhood, humanity, and humaneness.[991]

Langa J describes it as being relevant to contemporary South African jurisprudence because of its emphasis on the interdependence of community members, and therefore the importance of 'communality':[992]

> It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.'[993]

Applied more specifically to the focus of this thesis, and to the right of access to sufficient water, Ubuntu seems to offer an important vantage point from which to review both the constitutional right to water, and the commons approaches to water governance identified in the previous chapter. The right to water, in its current configuration is contingent upon available resources, and subject to progressive, not immediate fulfilment. But Ubuntu raises a further important limitation that any one person's enjoyment of their right must not be at the expense of others' mutual enjoyment.

In light of this, Justice Yacoob's comments on imposing maximum quotas for water use (quoted at the beginning of this chapter) supports this emphasis on mutual responsibility and mutual enjoyment, and hint at the need for a significant transformation of water governance if truly sustainable, equitable access to sufficient water for everyone is to be achieved. Ubuntu offers a rationale by which the right to access water, that any one individual or family has, can be scrutinised (and if necessary, limited) by the context of the needs and resources within their

[989] L Mbigi & J Maree *Ubuntu: The Spirit of African Transformation Management* (Sigma Press, 1995) 1-7.
[990] Ibid.
[991] Y Makgoro 'Ubuntu and the law in South Africa' (1997) 1/1 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 2.
[992] ***S v Makwanyane*** 1995 (3) SA 391 (CC). Paragraph 224.
[993] Ibid.

community. To use so much water that your neighbour's access to water is in jeopardy, would be to disregard Ubuntu.

Within the context of a community where water poverty exists, such an application of Ubuntu to water access and the right to water may contribute to the agreement of shared social norms and vernacular law around which commons approaches to water governance could be regulated. Indeed, the willingness of residents in Burlington to pool finances in order to maintain piped water to older people's homes, implicitly accepts that there is a maximum quantum of water beyond which one individual's water use will impede another's. If those contributing to elderly neighbours' water bills, decided instead to use that money to buy more water for themselves, their neighbour's access to water would be impinged upon. Whether there should be a maximum quota for water use in (State) law is a different question. The Constitutional Court's rejection of a minimum core approach to socio-economic rights may suggest that there may also be resistance to imposing maximums. But Yacoob's comments certainly reinforce the argument made in Chapter Five, that a claim to (however much) water must be understood as a moral claim, and not simply as a value-neutral market activity:

> 'You can't say as long as you're prepared to pay more and more and more, you can have as much water as you like. Mad.'[994]

Ubuntu can be used to affirm an individual's right of access to sufficient water, because Ubuntu affirms the dignity of all people, and sufficient water is necessary for dignified existence. While simultaneously, Ubuntu reminds us that it is everyone's responsibility to ensure that we *all* enjoy that right. Applied to the foregoing analysis of the limits of rights talk, and of commons responses to the challenge of water poverty, the individual 'rights' element of Ubuntu, is protected (albeit incompletely) through legislation, policy, and the work of the courts. While in service of the 'responsibilities' aspect of Ubuntu, commons thinking (perhaps particularly in conjunction with municipal or NGO facilitation) provides a framework within which people's co-responsibility (the responsibility that each member of a community owes to everyone else) can be productively expressed. To summarise, attempts to reimagine the application of the right of access to sufficient water more fully, and in more sustainable and equitable ways, would benefit from meditating on Ubuntu's central insights around the interdependency of everyone, and the consequent interconnection between people's rights and their responsibilities.

[994] Interview # 6. See appendices.

6.3.2 Revisiting water governance in the Anthropocene's dark light

As well as Ubuntu's *pre*-modern wisdom, more recent insights from legal scholarship, sociological and cultural thought, must also be considered if serious suggestions on the future shape of water governance are to be proffered. These insights have been catalysed by environmental exigencies that are connected to the geological phenomenon of the Anthropocene.

The Anthropocene was introduced in Chapter Two (see 2.5.1), and its potential impact on water governance was briefly noted. The Anthropocene is a proposed new geological epoch, defined by the claim that humanity has become a geological agent in much the same way as volcanoes and meteors, capable of influencing the Earth and its systems. Regardless of its current unconfirmed geological status, the Anthropocene has caught the attention of scholars across social and natural scientific disciplines, literature and the arts, and is becoming a popular lens through which to consider past, present and future global environmental change, and its impact at every level of society.[995]

The physical effects of the Anthropocene on water are not yet fully understood, although driven by climate change, and by excessive human interference with water systems, less predictable weather patterns (causing drought and heavy rainfall), pollution and salination are all beginning to adversely affect water supplies. This is causing manifold consequences for human and non-human life, including food security, sanitation, health and economic development, ecosystems degradation and species extinction.[996]

While such emerging realities compel any efforts to reappraise the design and praxis of water governance towards more eco-sensitive directions, it is the social and cultural consequences of the Anthropocene that are just as important for the focus of this thesis, and its conclusions. As Robinson reminds us, debate around determining the existence of the Anthropocene 'is a scientific one, not a socio-economic or cultural determination, yet its greatest implications may lie in the realm of the social sciences'.[997] Accordingly, the Anthropocene has already generated a trans-disciplinary platform upon which to bridge the prevailing divide between the 'social world' of philosophy, anthropology, sociology, politics, law and economics, and the 'material world' of

[995] The Anthropocene 'is not just a new way to look at the past; it [also] strongly affects the future'. See L Robin & W Steffen 'History for the Anthropocene' (2007) 5/5 *History Compass* 1694-1719, 1699.
[996] S Meisch 'The need for a value-reflexive governance of water in the Anthropocene' in A Bhaduri *et al* (eds) *The Global Water System in the Anthropocene* (Springer International Publishing, 2014) 427-437, 427.
[997] N Robinson, 'Fundamental Principles of Law for the Anthropocene?' (2014) 44 Environmental Policy and Law 13-27, 13.

engineering and natural science.[998] In so doing, old separations are collapsing, alongside old assumptions about the Earth's stability and resilience.

Formally, the Holocene Epoch denotes the relatively stable period of the past 10 000 - 12 000 years that has been characterised by extraordinarily good living conditions enabling the development of modern societies in a world of seven billion people.[999] Every piece of documented human thought and experience, in literature, philosophy, history, religious texts, and laws, has been written during this epoch,[1000] and therefore, has arisen from within this context of relative stability. As climate change challenges this stability, and Earth systems reach the limits of sustainability, many of the assumptions implicit within human thought (and within the operative logic of human institutions) about the constancy and permanence of the natural world, are being challenged. In turn, this is challenging the very ways in which humanity can behave within the world. This is generating radical reappraisals of how we live (and where we live, and even why we live), which are beginning to affect individual and societal values regarding trade, travel, consumption, architecture, politics, religion, and much more. As Klein succinctly puts it 'this changes everything'.[1001]

The Anthropocene is also pervading *legal* discourse, particularly at the intersection of environmental law and human rights. This is offering new perspectives for lawyers to consider the role of law in mediating the human-environment interface.[1002] Because of the importance that law plays in regulating human-to-human behaviour, as well as human's interactions with the non-human world, it is essential that the Anthropocene's interrogative light be brought to bear here. Law 'is deeply implicated in the systems that have caused the end to the Holocene, and at

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[998] O Uhrqvist & E Lövbrand 'Seeing and Knowing the Earth as a System: Tracing the History of the Earth System Science Partnership'. Available at <http://www.earthsystemgovernance.org/ac2009/papers/AC2009-0107.pdf> (Last accessed 27 July 2016).

[999] The Holocene started approximately 12 000 years ago and was characterized by stable and temperate climatic and environmental conditions which have (mostly) allowed human development to flourish. See E Swyngedouw 'Whose Environment? The End of Nature, Climate Change and the Process of Post-Politicization' (2011) XIV *Ambiente & Sociedade Campinas* 69; J Rockström *et al* 'A Safe Operating Space for Humanity' (2009) 461 *Nature* 472-475.

[1000] Y N Harari *Sapiens: A Brief History of Human Kind* (Harvill Secker, 2014) viii.

[1001] N Klein *This Changes Everything: Capitalism vs. the Climate* (Simon & Schuster, 2014).

[1002] See generally: N Robinson 'Beyond Sustainability: Environmental Management for the Anthropocene Epoch' (2012) 12/3 *Journal of Public Affairs* 181-194; L J Kotzé, 'Human Rights and the Environment in the Anthropocene' (2014) *The Anthropocene Review* 1-24; J Ebbesson, 'Social-Ecological Security and International Law in the Anthropocene' in Jonas Ebbesson *et al* (eds), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Brill, 2014) 71-92; A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2014); K Rakhyun & K Bosselmann 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 *Transnational Environmental Law* 285-309; K Scott 'International Law in the Anthropocene: Responding to the Geoengineering Challenge' (2013) 34/2 *Michigan Journal of International Law* 309-358.

once is central also to the reforms needed to cope with the emerging Anthropocene'.[1003] Applying this realisation to water governance - and in particular to the question of how law can help to achieve access to sufficient water for everyone - should lead us to a deep reappraisal of what the role of law (here relating to water governance) should be. This reappraisal must be uninhibited by the assumptions of the dominant (water-as-commodity) paradigm. Instead, it must break open the prohibitive epistemological closures in the law, and expose legal discourse to new/old modes of understanding and action, which are more finely calibrated to mediating the profound social and environmental challenges facing socio-eco-responsible water governance.

On a more modest scale, this is precisely the impetus behind my efforts to blend people's stories of insufficient water with commons thinking, and in so doing, to illustrate how atypical (non-paradigmatic) approaches to law can be (and are being) applied in order to open up new perspectives, and new approaches (in this instance for water governance). In short, acknowledgment of the exigencies of the Anthropocene could be the catalyst needed for a vivid reimagination of, then a thorough implementation of, modes of water governance that better realise sustainable, equitable water access for all. But even such 'new thinking'[1004] must not be allowed to ossify, and so become closed to the perpetual need for contestation (see 5.6).

6.4 Limitations of this thesis, and future research directions

This thesis has limited itself to an enquiry around legal approaches (albeit broadly defined) to achieving the goal of access to water for everyone in South Africa. For this reason there are a number of limitations to the thesis that should be noted. First, the positive potential of non-legal approaches, including technological innovations, and improved water management for instance, have not been considered in detail. Such approaches, which seek to improve the available supply and/or quality of water, are already playing important roles in helping to realise access to sufficient water for many people. Indeed, some productive research on combining water-

[1003] N Robinson, 'Fundamental Principles of Law for the Anthropocene?' (2014) 44 *Environmental Policy and Law* 13-27, 13.

[1004] A Grear 'Human Bodies in Material Space: Lived Realities, Eco-crisis and the Search for Transformation' (2013) 4/2 *Journal of Human Rights and the Environment* 111-115.

monitoring technologies with commons approaches to water governance, is being pursued by the author, outside this thesis.[1005]

Second, the particular focus on South Africa has allowed for an in-depth analysis of water governance in one jurisdiction, and has produced country-specific conclusions. While undoubtedly there are some similarities between South Africa and neighbouring countries, both regarding the problems facing people's access to water, and regarding the status, inspiration and application of socio-economic rights, any wholesale application of the conclusions of this thesis to questions of water governance in other countries, should be avoided. The inclusion of an explicit right of access to sufficient water in the South African Constitution, coupled with the prescribed relationship between international law and domestic law in the country, and the distinctive jurisprudence on socio-economic rights that the Constitutional Court has developed, all emphasise the fact that aspects of water governance in South Africa are unique. But, mindful of this, the empirical work in this thesis, conducted in Malawi, suggests that commons thinking may have a role to play in water governance wherever water poverty and community organisations exist (while conclusions around the limits of rights talk may have less general application in certain other jurisdictions).

Third, methodologically, the use of semi-structured interviews in water-poor communities risked reflecting a very narrow, and selective section of experience. This was mitigated somewhat by using a variety of rural and urban locations, and in so doing, identifying some issues common to similar locations. Also, the data collected has been triangulated by considerable additional evidence from other sources. So although selective, it is 'real' (as well as being at odds with positivist legal theory, that would anticipate that conferral of a right to water should solve people's problems of water access[1006]). But the fact remains that by targeting communities where access to sufficient water is problematic, the interview data used in this thesis recounts problems of water access across nearly all participants, despite the fact that in the country as a whole, access to sufficient water is not (particularly) problematic for the majority of people. Therefore it is important to be clear that a study of how access to sufficient water might best be achieved through legal means, will be most directly relevant to the minority of people in South Africa who are water poor. However, framing the (human) right to water as a moral claim (see 5.5), compounded by the emerging social and ecological realities of the

[1005] *See* N J Cooper, A Swan, & D Townend 'A Confluence of New Technology and the Right to Water: Experience and Potential from South Africa's Constitution and Commons' (2014) 16/2 *Ethics and Information Technology* 119-134; A Swan & N J Cooper 'Innovative funding methods for rural communities and their water pumps' (2013) 1/2 *Water Resources and Rural Development* 17-26.

[1006] M Freeman *Human Rights: An Interdisciplinary Approach* (2nd ed, Polity, 2011) 11.

Anthropocene, the question of how to achieve sustainable, equitable access to water *should* also be an operative question for everyone. It has already been noted that these interviews are not intended to be the basis of generalised assumptions. Rather, they illustrate and emphasise aspects of what is already acknowledged as being the general inadequacies around access to water in the country. Moreover, they turn attention towards the grass roots, from where innovative responses to water poverty are emerging.

For various reasons a more in-depth ethnographic study in the communities visited, was not feasible, although hopefully this is something to pursue in the future. To be able to observe and reflect upon people's daily interaction with water and in relation to water over a longer period of time, would have allowed for greater understanding variously of the complexities and the mundaneness of navigating life with insufficient water. Also, conducting longer (and multiple) interviews could have led to deeper insights, which would more easily transcend the surface level of giving information.[1007] Such richer quality interviews would have allowed for more conversational analysis of the interactional character of the interviews, and of identification and mediation of the power dynamics present in any interview, but only implicitly discernable in our relatively short and structured interactions.[1008]

From the perspective of constitutional theory, the decisions of the Constitutional Court regarding socio-economic rights, will continue to be watched with interest, particularly to see whether the proposed conceptual schema of Liminal Constitutionalism can continue to provide useful analysis. I do not envisage that the Constitutional Court will return to the (perceived) expansive judgments made in the early days of the Court's existence. But the considerable problems of poverty and disenfranchisement that many in the country continue to face, may compel the Court not to settle into managerialism, but to continue, temporarily at least, to pursue some degree of transformational activity.

6.5 Concluding thoughts

The right of access to sufficient water in South Africa is widely heralded as an exemplar of the incorporation of socio-economic rights in domestic constitutional law. This is undoubtedly true, but only up to a point. Shaped in part by consensus around an international human right to water, as well as by the desire to remedy the profound inequities of apartheid, the right to water

[1007] P Drew, G Raymond & D Weinberg *Talk and Interaction in Social Research Methods* (Sage Publications, 2006) 28-29.
[1008] Ibid.

(placed in the context of the Bill of Rights) simultaneously provides an overarching *moral* framework (through the elaboration of relevant human rights norms), while remaining decidedly remote from the experience of many people. At the international level, although the human right to water has the conceptual potential to reach across boundaries, the extent to which this has meaningfully occurred remains contentious. In contrast, domestic law is often considered as a more effective means of giving effect to developmental priorities, particularly in a context such as South Africa, where constitutional rights arguably better represent on-the-ground social and economic needs than in other countries. But the interpretation and application of the domestic, constitutional right of access to sufficient water in South Africa, has been constrained and inchoate, illustrating the practical and conceptual limits that 'rights talk' is facing. The formalism of law – be that international law or domestic constitutional law – can never ultimately reflect how the law is perceived and operationalised at the grass-roots level. International and constitutional provisions have an important symbolic and catalytic role, but one should hesitate before forming the view that such codification will *per se* engender full and complete normative implementation. Clearly, they will not, as the constrained jurisprudence of the Constitutional Court, and the experiences of water-poor people, bear testament to.

But the story does not end there. Driven in part at least, by the failures of the right to water (at the international and national levels) to translate into access to sufficient water for everyone, water-poor communities are beginning to experiment with, and embrace bottom-up commons approaches to water allocation (and water governance in its broadest sense), governed by more or less identifiable social norms and vernacular law. The shape, scope and longevity of these commons exemplars are far from uniform, and the optimum degree of collaboration between communities, municipal government and NGOs is also unclear. But their very existence suggests that new thinking is being applied to water governance, and with some positive results. This should elicit hope, but not surprise:

'Ex Africa semper aliquid novi'[1009]

[1009] Pliny the Elder, Historia Naturalis bk. 8, sect. 42: In S Ratcliffe *Oxford Essential Quotations* (3rd ed, Oxford University Press, 2015).

Table of Cases

Mazibuko and Others v City of Johannesburg and Others 2010 (3) BCLR 239 (CC).

Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15.

Minister of Home Affairs v. Fourie [2005] ZACC 19; 2006 (1) SA 524 (CC).

North Sea Continental Shelf Cases (FRG/Denmark; FRG/Netherlands) 1969 ICJ 3, 44 (Judgment of Feb. 20).

Pacific Fur Seal arbitration award: Between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals, 15 August 1893, 1 Moore's International Arbitration Awards 755.

Perumatty Grama Panchayat v State of Kerala 2004 (1) KLT 731.

Residents of Bon Vista Mansions v Southern Metropolitan Local Council [2002] JOL 9513 (W).

S v Makwanyane 1995 (3) SA 391 (CC).

SERAC and CESR v Nigeria ACHPR Comm No 155/96, 15th Annual Activity Report.

Silberbauer v Van Breda Privy Council, (1869) 6 Moo PCCNS 319

Silberbauer v Van Breda and the Cape Town Municipality, 1866, 5 Searle 231

Hough v van der Merwe Cape Supreme Court, 27 August 1874, Buch 148, Juta.

Soobramoney v Minister of Health (Kwazulu-Natal) (1997) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12).

Vermaak v Palmer (1876) 6 Buch 25, 33.

55/96, SERAC and CESR v Nigeria 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003).

74/92. Commission Nationale des Droits de L'Homme et des Libertes v Chad, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997).

France

Declaration of the Right of Man and the Citizen, 26 August 1789.

Republic of Malawi

Republic of Malawi (Constitution) Act No. 20 of 1994, Republic of South Africa Constitution Act, 1983.

Republic of South Africa

Act of Union 1910.

Criminal Procedure Act 1977. Act No. 51 of 1977.

Constitution of the Republic of South Africa, 1993 (Interim Constitution). Act No. 200 of 1993.

Constitution of the Republic of South Africa, 1996. Act No. 108 of 1996.

Defence Act 1912.

Dutch Reformed Church Act 1911.

Glen Grey Act of 1894.

Group Areas Act 1950.

Irrigation and Water Conservation Act 8 of 1912

Immorality Act 1950.

Mines and Works Act 1911.

National Water Act No. 36 of 1998.

Native Land Act 1913.

Natives Resettlement Act 1954.

Prohibition of Mixed Marriages Act 1949.

Reservation of Separate Amenities Act 1953.

School Board Act of 1905.

Water Act 54 of 1956.

Water Services Act 1997. Act No. 108 of 1997.

Department for Water Affairs and Forestry, South Africa, (1986) *Management of the Water Resources of the Republic of South Africa.* Pretoria. At. 1.9.

Department of Water Affairs and Forestry White Paper on a National Water Policy for South Africa (April 1997).

DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 17.

Masters and Servants Ordinance of 1841

United States of America

United States Declaration of Independence, 1776.

United States of America: Constitution 17 September 1787.

ACC/ISGWR, International Conference on Water and the Environment: Development Issues for the 21st Century, 'The Dublin Statement on Water and Sustainable Development' (January 1992).

African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

African Charter on the Rights and Welfare of the Child (Adopted 1990, entered into force Nov. 29, 1999) OAU Doc. CAB/LEG/24.9/49.

Protocol to the African Charter on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.

United Nations Documents

Convention on the Elimination of All Forms of Discrimination against Women UN Doc. A/34/46 (1979). Entered into force 1981.

Convention on the Rights of the Child U.N. Doc. A/44/49 (1989). Entered into force 1990.

ECOSOC Decision 'Composition of the Sessional working group on the implementation of the International Covenant on Economic, Social and Cultural Rights' (3 May 1978) E/1978/10

ECOSOC Resolution 'Review of the composition, organization and administrative arrangements of the Sessional Working Group (of Governmental Experts) on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 27th Plenary Meeting' (6 May 1982) 1982/33.

ECOSOC Resolution 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (28 May 1985) 1985/17.

Optional Protocol to the International Covenant on Civil and Political Rights, (adopted 1966 entry into force 23 March 1976) UNTS 999.

UNCESCR 'General Comment No. 1' in 'Reporting by States parties.' (1989) U.N. Doc. E/1989/22.

UNCESCR 'General Comment No. 3' in 'The nature of States parties' obligations.' (1990) U.N. Doc. E/1991/23.

UNCESCR 'General Comment No. 6' in 'The economic, social and cultural rights of older persons.' (1995) U.N. Doc. E/1996/22 at 20.

UNCESCR 'General Comment No. 12' in 'The right to adequate food' (1999) U.N. Doc. E/C.12/1999/5.

UNCESCR 'General Comment 15' in 'The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights' (26 November 2002) U.N. DOC. E/C.12/2002/11.

United Nations, 'Charter of the United Nations' 1945 1 UNTS XVI.

UN GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992) (Agenda 21).

United Nations Declaration on the Right to Development, GA 41/128 (Dec. 4, 1986).
United Nations General Assembly 'Declaration on the Right to Development' 41/128 (4 December 1986) UN Doc. A/RES/41/128.

United Nations General Assembly 'International Covenant on Civil and Political Rights' 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976).

United Nations General Assembly 'International Covenant on Economic, Social and Cultural Rights' G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, (adopted 16 Dec 1966, entered into force 3 Jan. 1976) U.N. Doc. A/6316.

United Nations General Assembly 'The human right to water and sanitation' 64/292 (3 August 2010) UN Doc. A/RES/64/292.

United Nations General Assembly, 'Universal Declaration of Human Rights' G.A. Res. 217A (III), 3 U.N. GAOR (Resolutions, part 1) at 71 (adopted 10 Dec. 1948) U.N. Doc. A/810.

United Nations Human Rights Council Resolution A/HRC/RES/15/9 "Human Rights and Access to Safe Drinking Water and Sanitation", adopted 30 September 2010.

United Nations International Conference on Population and Development, Cairo, Egypt (September 1994) A/CONF.171/13.

United Nations, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997) HR/P/PT/12.

United Nations Millennium Declaration UNGA Res 55/2 (18 September 2000)

United Nations Resolution A/RES/70/1 of 25 September 2015.

United Nations, Plan of Implementation of the World Summit on Sustainable Development (4 September 2002) A/CONF.199/20.

United Nations, 'Report of the United Nations Conference on Water, Mar del Plata' (1977) E/Conf.70/29 ch I.

United Nations, Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.

United Nations, World Summit on Sustainable Development, 'The Johannesburg Declaration on Sustainable Development' (4 September 2002) A/CONF.199/20.

UN Human Rights Committee 'General Comment No. 6' in 'The right to life' (April 1982) HRI/GEN/1/Rev.9 (Vol. 1).

UN Human Rights Committee 'General Comment No. 31' 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' (29 Mar. 2004) Hum. Rts. Comm., 80th Sess., 2187th mtg., 8, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004).

Vasak K, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' (November 1977) *UNESCO Courier* 30:11, Paris: United Nations Education, Scientific and Cultural Organization.

World Water Assessment Programme *United Nations World Water Development Report 2: Water, a Shared Responsibility* (2006, Paris) UN-WATER/WWAP/2006/3.

Bibliography

Books

Abrams K, 'Unity, Narrative and Law' in A Sarat & S S Silbey (eds.) *Studies in Law, Politics and Society* (JAI Press, 1993).

Ackerman B, *The New Separation of Powers* (Harvard Law Review 2000).

Ackerman B, *We the People, Volume 1: Foundations* (Harvard University Press 1993).

Ackerman B, *We the People, Volume 2* (Harvard University Press 1998).

Appadurai A, *The Social Life of Things: Commodities in a Cultural Perspective* (Cambridge University Press 1983).

Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).

Bauer MW and Gaskell G (eds), *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (Sage Publications 2000).

Bellamy R and Palumbo A (eds) *From government to governance* (Ashgate 2010).

Best S, & Kellnor D, *The Postmodern Turn* (The Guildford Press, 1998).

Beyerlin U, & Marauhn T, *International Environmental Law* (Hart, 2011).

Beyleveld D and Brownsword R, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2001).

Blaug M, *Economic Theory in Retrospect* (2nd ed, Heinemann Educational Books Ltd 1968).

Bollier D and Weston BH, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press 2013).

Bollier D and Weston BH, Grear A and Grant E (eds) *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015).

Bond P *Unsustainable South Africa: Environment, Development and Social Protes*t (University of Natal Press, Pietermaritzburg 2002).

Boyle A, Evans M (ed) *International Law* (4th ed, Oxford 2014).

Brand D, van der Walt AJ (ed), *Theories of Social and Economic Justice* (African Sun Media 2005).

Bromley D and Cernea M, *The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies (*World Bank Publications, 1989).

Bryman A, *Social Research Methods* (4th ed, Oxford University Press 2012).

Castells M, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture, Volume 1* (Wiley & Sons 2011).

Cell J, *The highest stage of white supremacy: the origins of segregation in South Africa and the American South* (Cambridge University Press 1982).

Cohler A M (ed), *Montesquieu: The Spirit of the Laws (Cambridge Texts in the History of Political Thought)* (CUP 1989).

Cooper N J and French D, Blanco E and Razzaque J (eds), *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Martinus Nijhoff 2012).

Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995).

Currie I & de Waal J, *The Bill of Rights Handbook* (6th ed, Juta, 2013).

Denzin NK and Lincoln YS, *Handbook of Qualitative Research* (Thousand Oaks, California 2005).
Devenish GE, *A Commentary on the South African Bill of Rights* (Lexis Nexis 1999).

Dexter LA, *Elite and Specialized Interviewing* (ECPR Press Classics 2006).

Dobinson I and Johns F, McConville M and Chui W (eds), *Research Methods for Law* (Edinburgh University Press 2007).

Drew P, Raymond G and Weinberg D *Talk and Interaction in Social Research Methods* (Sage Publications 2006).

Du Plessis A, *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (Wolf Legal Publishers 2009).

Dworkin R, *Taking Rights Seriously* (Harvard University Press, 1978).

Ebbesson J, Ebbesson J et al (eds) *International Law and Changing Perceptions of Security – Liber Amicorum Said Mahmoudi* (Brill 2014).

Elliott M, & Thomas R, *Public Law* (2nd ed, Oxford University Press, 2014).

Ellis E, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

Evans T, *The Politics of Human Rights, A Global Perspective* (2nd ed, Pluto Press 2005).

Farhana S and Loftus A (eds) *The right to water: Politics, governance and social struggles.* (Routledge 2013).

Fitzmaurice M, *Contemporary Issues in International Environmental Law* (Edward Elgar 2009).

Flynn S and Chirwa DM, McDonald DA and Ruiters G (eds) *The Age of Commodity: Water Privatization in Southern Africa* (Earthscan 2005).

Franks F (ed) *Water, A Comprehensive Treatise: Volume 1: The Physics and Physical Chemistry of Water* (Plenum Press 1983).

Freeman M, *Human Rights: An Interdisciplinary Approach* (2nd ed, Polity, 2011).

Gillham B, *Case Study Research Methods* (Continuum 2000).

Ghandhi PR, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate Publishing Co 1998).

Guba EG and Lincoln YS, *Handbook of qualitative research* (Thousand Oaks, California 2005).

Hall C G, *The Origin and Development of Water Rights in South Africa* (Oxford University Press 1939).

Harari Y N, *Sapiens: A Brief History of Human Kind* (Harvill Secker, 2014).

Hegel GWF, *Phenomenology of Spirit* (Clarendon Press 1977).

Higgins R, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

The Holy Bible containing the Old and New Testaments [Authorised King James Version]. (London: Collins Bible undated).

The Holy Bible containing the Old and New Testaments [New International Version] (Biblica 2011).

Hunt L, *Inventing Human Rights: A History* (WW Norton & Company 2007).

Jon P (ed) *Debating Governance: Authority, Steering and Democracy* (OUP 2000).

Kidd M *Environmental Law* (, Juta & Co. Ltd 2008).

Klein N, *The Shock Doctrine: The rise of disaster capitalism* (Penguin 2007).

Klein N, *This Changes Everything* (Simon & Schuster 2014).

Kotzé L J, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012).

Kotzé L J, Marauhn T (eds), *Transboundary Governance of Biodiversity* (Brill 2014).

Kunene M, *The Ancestors & the Sacred Mountain* (Heinemann Educational 1982).

Lawrence DH, *Pansies: Poems by DH Lawrence* (Fedonia Books 2002).

Lester A, & Pannick D, (eds) *Human Rights: Law and Practice* (2nd Ed.Lexis-Nexis, 2004).

Liebenberg S, *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010).

Linebaugh P, *The Magna Carta Manifesto: Liberty and Commons for All* (University of California Press 2008).

Macauley D, *Elemental Philosophy: Earth, Air, Fire and Water as Environmental Ideas* (State University New York 2010).

Macpherson, C. B. (1975), Kamenka and Neale, (eds), *Feudalism, Capitalism and Beyond* (London: Edward Arnold 1975).

Mark AL, *Economics for the Common Good: Two Centuries of Social Economic Thought in the Humanistic Tradition,* (Routledge 1999).

Martinez-Alier J, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Edward Elgar 2002).

Maisel R and Persell CH, *How Sampling Works* (Sage 1996).

Marx K, *Karl Marx & Frederick Engels: Their selected works* (New York: International Publishers 1968).

Mbigi L and Maree J, *Ubuntu: The Spirit of African Transformation Management* (Sigma Press 1995).

McCaffrey S, Brown E *et* al (eds), *Fresh Water and International Economic Law* (Oxford University Press 2005).

McCoubray H and White N, *Jurisprudence* (3rd ed, Blackstone Press 1999).
McLuhan M, *Understanding Media: The Extensions of Man* (McGraw-Hill 1964).

McQuoid-Mason D (ed) *Street Law South Africa: Practical Law for South Africans* (2nd ed, Juta Law Co 2004).

Meisch S, Bhaduri A *et al* (eds) *The Global Water System in the Anthropocene* (Springer International Publishing 2014).

Meli F, *A History of the ANC: South Africa Belongs to us* (James Currey Ltd. 1989).

Meredit M, *Diamonds Gold and War - The Making of South Africa* (Simon & Schuster 2007).

Moore SF, *Law as Process: An Anthropological Approach* (2nd Ed, Routledge & Kegan Paul 1983).

O'Meara D, *Volkskapitalisme: class capital and ideology in the development of Afrikaner nationalism, 1934-1948* (Cambridge University Press 1983).

Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

Paterson A and Kotze L J (Eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta Law 2009).

Pinnegar S and Daynes J G, Clandinin D J (ed), *Handbook of Narrative Inquiry: Mapping a Methodology* (Sage Publications 2007).

Philippopoulos-Mihalopoulos A, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge 2014).

Plaatje S, *Native Life in South Africa before and since the European War and the Boer Rebellion* (Cape Town 1982).

Plummer K, *Telling Sexual Stories* (Taylor & Francis 2004).

Punch K F, *Introduction to Social Research: Quantitative and Qualitative Approaches* (3rd Ed, Sage Publications, 2014).

The Qur'an. Translated by Tarif Khalidi. (Viking, 2008).

Ratcliffe S, *Oxford Essential Quotations* (3rd ed, Oxford University Press 2015).

Rehman J, *International Human Rights Law* (2nd ed, Pearson 2010).

Rollins P, *How (Not) to Speak of God* (SPCK, 2006).

Ross R, *A Concise History of South Africa* (Cambridge University Press 1999).

Roux T, *The Politics of Principle: The First South African Constitutional Court* (CUP 2013).

Russell A, *Bring Me My Machine Gun: The Battle for the Soul of South Africa, from Mandela to Zuma* (Perseus Books 2009).

Sachs A *Protecting Human Rights in a New South Africa* (Oxford University Press 1990).

Salman SMA and McInerney-Lankford S, *The Human Right to Water: Legal and Policy Dimensions* (World Bank 2004).

Sands P & Peel J, *Principles of International Environmental Law* (3rd ed, Cambridge University Press 2012).

Santos B, *Towards a new legal common sense* (Butterworths, 2002).

Sarantakos S *Social Research* (Palgrave MacMillan 2013).

Saul J and Bond P, *South Africa, The Present as History, from Mrs Ples to Mandela & Marikana* (Jacana 2014).

Spanbauer T, *The Man Who Fell in Love with the Moon* (Grove Press 1992).

Steinbeck J, *Sea of Cortez: A leisurely journal of travel and research* (The Viking Press 1951).

Terreblanche S, *A History of Inequality in South Africa 1652-2002* (University of Natal Press 2002).

Thielbörger P, *The right(s) to water* (European University Institute 2010).

Usher R, McKenzie G et al (eds.), *Understanding Social Research: Perspectives on Methodology and Practice* (Falmer Press 1997).

Vogel C and Reid P, Schulze RE (ed), *Climate Change and Water Resources in Southern Africa: Studies on Scenarios, Impacts, Vulnerabilities and Adaptation, WRC Report no 1430/1/05* (Water Research Commission 2005).

Wall D, *The Commons in History: Culture, Conflict and Ecology* (MIT Press 2014).

Walljasper J, *All that we share: A field guide to the Commons* (The New Press 2010).

Williams R, Durham MG and Kellner DM, (Eds) *Media and Cultural Studies* (2nd Ed, Blackwell Publishing 2006).

Winkler IT, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart 2014).

Worden N, *The Making of Modern South Africa* (3rd Ed, Blackwell Publishers, 2000).

The World Commission on Environment and Development (WCED), *Our common future* (Oxford University Press 1987).

Journal Articles

Abrams K, 'Hearing the Call of Stories' (1991) *California Law Review* 1052.

Adelman S, 'Between the Scylla of Sovereignty and the Charybdis of Human Rights: The Pitfall of Development in pursuit of Justice' (2008) *Human Rights & International Legal Discourse* 17.

Ainslie A, 'When 'community' is not enough: managing common property natural resources in rural South Africa' (1999) 16(3) *Development Southern Africa* 375.

Anderies J M *et al*, 'The Topology of Non-linear Global Carbon Dynamics: From Tipping Points to Planetary Boundaries' (2012) *Center for the Study of Institutional Diversity* Working Paper Series #CSID-2012-009.

Andrews D *et al,* 'Dehydration: Evaluation and Management in Older Adults' (1995) 274(19) *JAMA* 1552.

Alston P, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27 *Hum.Rts.Q.* 755.

Assies W, 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14.

Backeberg G R, 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 107.

Bakker K, 'The 'Commons' Versus the 'Commodity': Alter-globalization, Anti-privatisation and the Human Right to Water in the Global South' (2007) 39(3) *Antipode* 441.

Barendt E, 'Is there a United Kingdom Constitution?' (1997) 17 *O.J.L.S* 137.

Barker N, 'Ambiguous symbolisms: recognising customary marriage and same-sex marriage in South Africa' (2011) 7(4) *Int. J.L.C.* 447.

Baxi U, 'Towards a climate change justice theory?' (2016) 7/1 *Journal of Human Rights and the Environment* 7.

Bilchitz D, 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *SALJ* 489.

Bluemel E B, 'The Implications of Formulating a Human Right to Water' (2004) 31 *Ecology L.Q.* 957.

Bond P and Dugard J, 'The Case of Johannesburg Water: What Really Happened at the Pre-paid 'Parish Pump'' (2008) 12(1) *Law Democracy and Development* 1.

Bond P and Dugard J, 'Water, Human Rights and Social Conflict: South African Experiences' (2007) 1 *Law, Social Justice & Global Development Journal* (LGD).

Bond P, 'South Africa's rights culture of water consumption: Breaking out of the liberal box and into the commons?' (Paper presentation at Syracuse conference, Cape Town, February 2010) at 1.

Bond P, 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal of Human Rights* 125.

Botha H, 'Comparative Constitutional Law in the Classroom: A South African Perspective' (2009) 28 *Penn State International Law Review* 531.

Budds J, & McGranahan, G 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America.' (2003) 15/2 *Environment and Urbanization* 87.

Chaisse J and Polo M, 'Globalization of Water Privatization: Ramifications of Investor-State Disputes in the 'Blue Gold' Economy' (2015) 38(1) *Boston College International & Comparative Law Review* 1.

Christiansen E, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice* 575.

Choudhry S, ''He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2010) *2 Constitutional Court Review* 2.

Ciriacy-Wantrup S V and Bishop R C ' "Common Property" as a Concept in Natural Resources Policy' (1975) 15 *Nat.Resources J.* 713.

Cooper N J, Swan A, and Townend D, 'A Confluence of New Technology and the Right to Water: Experience and Potential from South Africa's Constitution and Commons' (2014) 16(2) *Ethics and Information Technology* 119.

Crutzen & Stoermer 'The 'Anthropocene'' (2000) 41 *IGBP Global Change Newsletter* 17.
Dembour M, 'What are human rights? Four Schools of Thought' (2010) 32(1) *Hum.Rts.Q.* 1.

Dugard J, 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) *Review of Radical Political Economics* 1.

Du Plessis M, 'Between Apology and Utopia – The Constitutional Court and Public Opinion' (2002) 18(1) *SAJHR* 5.

Dyzenhaus D, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) *South African Journal of Human Rights* 14.

Ellis J, 'General Principles and Comparative Law' (2011) 22(4) *EJIL* 949.

Epstein L and King G, 'Empirical Research and the Goals of Legal Scholarship: A Response' (2002) 69 *U.Chi.L.Rev.* 1.

Ewick P, & Silbey S S, 'Subversive stories and hegemonic tales: Toward a sociology of narrative' *Law and Society Review* (1995) 197.

Faysee N, 'Challenges for fruitful participation of smallholders in large-scale water resource management organisations: Selected case studies in South Africa' (2004) 43(1) *Agrekon* 52.

D Feeny *et al* 'The Tragedy of the Commons Twenty-Two years later' (1990) 18/1 *Human Ecology* 1

Fuo O, 'Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser' (2014) *Stell LR* 187.

Gabor M R, 'Types of Non-Probability Sampling used in Marketing Research: 'Snowball Sampling'' (2007) 2(1) *Managing and Marketing.*

Gavison R, 'On the relationships between civil and political rights, and social and economic rights' (2003) *The globalization of human rights* 23.

Gleick P H, 'Basic water requirements for human activities: meeting basic needs' (1996) 21(2) *Water International* 83.

Gleick P H, 'The Human Right to Water' (1998) 1 *Water Policy* 496.

Gloppen S and Kanyongolo F E, 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5(12) *ICON* 258.

Goldblatt M and Davies G, 'Water, energy and sustainable economic development in South Africa' (2002) 19(3) *Development Southern Africa* 369.

Grear A, 'Human Bodies in Material Space: Lived Realities, Eco-crisis and the Search for Transformation' (2013) 4(2) *JHRE* 111.

Grear A, 'Human rights, property and the search for 'worlds other'' (2012) 3(2) *JHRE* 173.

Grimes H, 'Responding to the 'Water Crisis': The Complementary Roles of Water Governance and the Human Right to Water' (2009) 20 2(3) *W.L.* 119.

Hardin G, 'The tragedy of the commons' (1968) 162 *Science* 1243.

Harvey D, 'The Future of the Commons' (2011) 109 *Radical History Review* 104.

Hellberg S, 'Water, life and politics: Exploring the contested case of eThekwini municipality through a governmentality lens' (2014) 56 *Geoforum* 226.

Hendriksen A *et al,* 'Participatory decision making for sanitation improvements in unplanned urban settlements in East Africa' (2012) 21/1 *Journal of Environment and Development* 98.

Henkin, 'That "S" Word: Sovereignty, and Globalisation, and Human Rights, Et Cetera', (1999) 68 *Fordham L.Rev.* 1.

Hoexter C, 'The future of judicial review in South African administrative law' (2000) *SALJ* 484.

Hurst H, 'The Status of the Universal Declaration of Human Rights in National and International Law"(1995) 25(287) *Ga.J.Int'l.& Comp.L.* 287.

Jansen van Rensburg L, 'The Right of Access to Adequate Water [Discussion of Mazibuko v the City of Johannesburg Case no 13865/06]' (2008) 3 *Stellenbosch L.Rev.* 415.

Kende M S, 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' (2014) 23(35) *Transnational Law & Contemporary Problems* 34.

King J A, 'Institutional Approaches to Judicial Restraint' (2008) *Oxford Journal of Legal Studies* 28/3, 409.

Klare K, 'Legal Culture and Transformative Constitutionalism' 1998 14 *SAJHR* 146.

Kotzé L J, 'Access to Water in South Africa: Constitutional Perspectives from a Developing Country' (2009) 1 *Ymparistojuridiikka* 76.

Kotzé L J, 'Phiri, the plight of the poor and the perils of climate change: time to rethink environmental and socio-economic rights in South Africa?' (2010) 1(2) *JHRE* 135.

Kotzé L J, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *TEL* 199.

Kotzé L J, 'Human Rights and the Environment in the Anthropocene' (2014) *The Anthropocene Review* 1.

Kotzé L J, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 33(2) *J.Energy Nat.Resources & Envtl L.* 121.

Kotzé L J, 'The Anthropocene's Global Environmental Constitutional Moment' (2015) *Yb.Int'l Env.L.*

Kotzé L J, & Fuo O, 'Bridging the public-private regulatory divide: South African mines and the right of access to water' (2016) 34/3 *Journal of Energy and Natural Resources Law* 285.

Langford M, 'Ambition That Overleaps Itself-A Response to Stephan Tully's Critique of the General Comment on the Right to Water.' (2006) 24 *NQHR* 433.

Liebenberg S, 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *SAJHR* 232.

Lynk E, 'Privatisation, Joint Production and the Comparative Efficiencies of Private and Public Ownership: The UK Water Industry Case' (1993) 14(2) *Fiscal Studies* 99.

Makgoro Y 'Ubuntu and the law in South Africa' (1997) 1(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2.

Marks S 'The Human Right to Development: Between Rhetoric and Reality' (2013) 17 *Harv.Hum.Rts.J.* 137.

Mehta L, 'Unpacking rights and wrongs: do human rights make a difference? The case of water rights in India and South Africa' (2005) Working Paper 260 *Institute of Development Studies*.

Mehta L *et al* 'Global environmental justice and the right to water: the case of peri-urban Cochabamba and Delhi' (2014) 54 *Geoforum* 158.

Michelle M B and Bulkeley H 'Cities and the Multilevel Governance of Global Climate Change' 2006 12 *Global Governance* 141.

Mitchell B, 'Integrated water resources management, institutional arrangements, and land use planning' (2005) 37 *Environment and Planning* 1335.

Mogoeng M, 'Twenty years of the South African Constitution: Origins, Aspirations and Delivery' (2015) 27 *S.Ac.L.J.* 1.

Molden D, 'Planetary Boundaries: The Devil is in the Detail' (2009) *Nature Reports Climate Change* 119.

Murthy S L, 'The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over Privatization' (2013) 31 *Berk J Intl L* 89.

Neimanis A, 'Alongside the right to water, a posthumanist feminist imaginary' (2014) 5(1) *JHRE* 5.

Oistein-Endsjo, D 'To lock up Eleusis: A question of liminal space' (2000) 47(4) *International Review of the History of Religions* 351.

Ostrom E, *et al* 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 *Science* 278.

Pienaar G J and van der Schyff E, 'The Reform of Water Rights in South Africa' (2007) 3(2) *Law Environment and Development Journal* 179.

Pieterse M, 'Eating Socio-economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Hum.Rts.Q.* 796.

Pound R, 'Mechanical Jurisprudence' (1908) *Columbia Law Review* 8, 605.

Rakhyun K and Bosselmann K, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 TEL.

Richardson B, 'A Damp Squib: Environmental Law from a Human Evolutionary Perspective' (2011) 7/3 *Comparative Research in Law & Political Economy. Research Paper No.8/2011.* 31.

Ridley FF, 'There is no British Constitution: A dangerous case of the Emperor's Clothes' (1988) *Parliamentary Affairs* 340.

Robin L and Steffen W 'History for the Anthropocene' (2007) 5(5) *History Compass* 1694.

Robinson N, 'Beyond Sustainability: Environmental Management for the Anthropocene Epoch' (2012) 12(3) Journal of Public Affairs 181.

Robinson N, 'Fundamental Principles of Law for the Anthropocene?' (2014) 44 E.P.& L. 13.
Rockström J *et al,* 'A Safe Operating Space for Humanity' (2009) 461 Nature 472.

Roosevelt E, Chairman of the UN Commission on Human Rights. *Quoted in* H Hurst 'The Status of the Universal Declaration of Human Rights in National and International Law"'(1995) 25(287) *Ga.J.Int'l.& Comp.L.* 287.

Scanlon J et al, Cassar A and Nemes N, 'Water as a Human Right?' (2004) *IUCN Environmental Policy and Law Paper* 51.

Schlosberg D, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13/3 *Environmental Politics* 517.

Scholte J A, 'What is Globalization? The definitional issue – again' (2002) 109(2) *Centre for the Study of Globalisation and Regionalisation* 15.

Scott K, 'International Law in the Anthropocene: Responding to the Geoengineering Challenge' (2013) 34(2) Mich.J.Int'l L. 309.

Shaffer G C and Pollack M A, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) *Minn.L.Rev.* 706.

Slaughter A M and Ratner S R, 'The Method is the Message' (1999) 93(2) *AJIL* 410.

Steffen W, Crutzen P J, McNeill J R, 'The Anthropocene: are humans now overwhelming the great forces of nature' (2007) 36(8) *AMBIO: A Journal of the Human Environment* 614.

Steven B, 'Globalization and the Requirements of 'Good' Environmental Governance' (2005) 4(3) *Perspectives on Global Development and Technology* 645.

Stewart L and Horsten D 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *South African Publiekreg/Public Law* 486.

Stiglitz J E, 'The Post Washington Consensus Consensus' (2004) *The Initiative for Policy Dialogue* 1.

Swyngedouw E, 'Whose Environment? The End of Nature, Climate Change and the Process of Post-Politicization' (2011) XIV Ambiente & Sociedade Campinas 69.

Tewari D D, 'A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present' (2009) 35(5) *Water SA* 693.

Trubek D M and Trubek L G 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) *University of Wisconsin Law School, Legal Studies Research Paper Series* Paper No. 1047.

Tucker R W, 'Hans Kelsen Principles of International Law' (1966) 438 in SR Ratner & AM Slaughter 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *AJIL* 291.

Tully S R, 'The Contribution of Human Rights to Freshwater Resource Management' (2004) *Yb.Int'l Env.L.* 101.

Van der Walt AJ, 'The Public Aspect of Private Property' (2004) 19(3) *South African Public Law* 676.

Van Koppen B and Shreiner B, 'Moving beyond integrated water resource management: developmental water management in South Africa' (2014) *International Journal of Water Resources Development* 1.

Van Rensberg L J, 'The Right of Access to Adequate Water: Discussion of Mazibuko v The City of Johannesburg Case No 13865/06' (2008) 3 *Stell LR* at 434.

Vorosmarty C J *et al* 'Global Water Resources: Vulnerability from Climate Change and Population Growth' (2000) 289 *Science* 284.

Williams M, 'Privatization and the Human Right to Water: Challenges for the New Century' (2007) 28 *Mich.J.Int'l L.* 469.

Wilson B M, 'Claiming Individual Rights Through a Constitutional Court: The Example of Gays in Costa Rica' (2007) 5(2) *ICON* 242.

Zlotnick M, 'The Death Penalty and Public Opinion - S v. Makwanyane and Another' (1996) 12(1) *SAJHR* 70.

Websites

Albuquerque C and Roaf V, 'On the Right Track: Good Practices in realising the rights to water and sanitation*'* (2012) <http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf > (accessed Last accessed 27 July 2016).

Amosu A, 'South Africa; Tutu Says Poverty, Aids Could Destabilise Nation' (*All Africa* 2001). <http://allafrica.com/stories/200111050100.html> (Last accessed 27 July 2016).

Andersson B, 'eThekwini Water & Sanitation, serving the Durban metropolitan area in South Africa, has been named the 2014 winner of the Stockholm Industry Water Award, for its transformative and inclusive approach to providing water and sanitation services.' (*Stockholm International Water Institute* 2014) <http://www.siwi.org/prizes/industry-award/2014-2/> (Last accessed 27 July 2016).

Boseley S, 'Mbeki AIDS denial cost 300,000 deaths' (*The Guardian* 2008): <http://www.theguardian.com/world/2008/nov/26/aids-south-africa> (Last accessed 27 July 2016).

Cele H, 'Adopt-a-River launches in Limpopo and KwaZulu-Natal' (*South African Water Research Commission,* 2010): <http://www.wrc.org.za/news/pages/adopt-a-riverlaunchesinlimpopoandkwazulu-natal.aspx> (Last accessed 27 July 2016).

Center for Economic and Social Rights 'United States' (*Center for Economic and Social Rights,* 2016): < http://www.cesr.org/section.php?id=26> (Last accessed 27 July 2016).

Collins Dictionary definition: <http://www.collinsdictionary.com/dictionary/english/morality> (Last accessed 27 July 2016).

Collins Dictionary definition: <http://www.collinsdictionary.com/dictionary/english/commodity> (Last accessed 27 July 2016).

Constitutional Court Of South Africa, 'History of The Court' (*Constitutional Court of South Africa* 2016): <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> Last accessed 27 July 2016).

Constitutional Court Of South Africa, 'The Court's position in the justice system' (*Constitutional Court of South Africa* 2016): <http://www.constitutionalcourt.org.za/site/thecourt/role.htm> (Last accessed 27 July 2016).

Department of Water Affairs & Forestry. Republic of South Africa 'National water resource strategy' (*South African Water Research Commission* 2004): <http://www.wrc.org.za/knowledge%20hub%20documents/other/nwra%20sept04.pdf> (last accessed 27 July 2016).

Department of Water Affairs, Republic of South Africa 'National water resource strategy second edition: Water for an equitable and sustainable future: (*South African Water Research Commission* 2013) <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=xwAxFxjXUlg%3d&tabid=91&mid=496> (Last accessed 27 July 2016).

Durban Group for Climate Justice: < https://www.tni.org/en/profile/durban-group-for-climate-justice>. (Last accessed 27 July 2016).

Earth Systems Governance: Conceptual Framework: <http://www.earthsystemgovernance.org/about/concept> (Last accessed 27 July 2016).

Election Resources on the Internet, 'April 22, 2009 General Election Results - Republic of South Africa Totals: National Assembly' (*Election Resources* 2009): <http://www.electionresources.org/za/provinces.php?election=2009&province=ZA> (Last accessed 27 July 2016).

Elgot J, 'Jacob Zuma breached constitution over home upgrades, South African court rules' (*The Guardian* 31 March 2016): <http://www.theguardian.com/world/2016/mar/31/jacob-zuma-ordered-repay-upgrades-nkandla-home-south-african-state-funds> (Last accessed 27 July 2016).

ESCE-Net 'The Government of South Africa ratifies the ICESCR' (*ESCR-Net* 2015): <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (Last accessed 27 July 2016).

eThekwini Ward Map: <http://www.durban.gov.za/City_Services/engineering%20unit/Surveying_Land_Information/Documents/ETHEKWINI%20WARD%20MAP%20NEW%20BOUNDARIES.pdf> (Last accessed 27 July 2016).

Europa 'Commission says yes to first successful European Citizens' Initiative' (*Europa,* 19 March 2014): <http://europa.eu/rapid/press-release_IP-14-277_en.htm> (Last accessed 27 July 2016).

Foundation for Common Land, 'Rights of Common' (*Foundation for Common Land,* 2015): <http://www.foundationforcommonland.org.uk/rights-of-common> (Last accessed 27 July 2016).

Free Libre Open Knowledge (FLOK), 'Research Plan' (*Flok Society,* 26 June 2014):<http://en.wiki.floksociety.org/w/Research_Plan> (Last accessed 27 July 2016).

The Freedom Charter, 1955: < http://www.sahistory.org.za/article/congress-people-and-freedom-charter> (Last accessed 27 July 2016).

Hall D and Lobina E, 'Water Privatisation in Latin America' (*Public Services International Research Unit* 2002): <http://www.plataformacontralaprivatizaciondelcyii.org/xDOCUMENTOS/TPP/9c-Privatizacion-David%20holl-Water%20privatisation%20in%20Latin%20America-2002.pdf> (Last accessed 27 July 2016).

Hartman C et al, 'Sustainable Governance in the BRICS; Country Report South Africa 2 (*Sustainable Governance Indicators,* 2013): <http://sgi-network.org/brics/pdf/Country%20Report%20South%20Africa.pdf> (Last accessed 27 July 2016).

Inkomati CMA, 'Mission Statement' (*Inkomati-Usuthu,* 2012): <http://www.inkomaticma.co.za> (Last accessed 27 July 2016).

International Monetary Fund (IMF), 'Malawi Poverty Reduction Strategy Paper' (*International Monetary Fund* 2012): <http://www.imf.org/external/pubs/ft/scr/2012/cr12222.pdf> (Last accessed 27 July 2016).

J Brunnee 'The Sources of International Environmental Law: Interactional Law' (International Law Reporter, 28 May 2016) <http://ilreports.blogspot.co.uk/2016/05/brunnee-sources-of-international.html?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=Feed:+blogspot/RfRRI+(International+Law+Reporter)> (Last accessed 27 July 2016).

Joubert P 'Grootboom dies homeless and penniless' (*The Mail & Guardian* 2008): <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (Last accessed 27 July 2016).

S Kindornay & S Twigg 'Establishing a Workable Follow-up and Review Process for the Sustainable Development Goals' (2015) *Overseas Development Institute* Report: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9588.pdf> (Last accessed 27 July 2016).

Kings S, 'Records tumble as drought goes on' (*The Mail & Guardian* 2015): <http://mg.co.za/article/2015-11-19-records-tumble-as-drouguht-goes-on> (Last accessed 27 July 2016).

Mabaso P and Mulla Z, 'South Africa: Thirty Years Later, Still No Water in Roosboom' (*All Africa* 2014): <http://allafrica.com/stories/201408110891.html> (Last accessed 27 July 2016).

Mandela, N, 'Address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the new constitution' transcript' (*South African History Online,* 8 May 1996): <http://www.sahistory.org.za/topic/address-president-nelson-mandela-constitutional-assembly-occasion-adoption-new-constitution> (Last accessed 27 July 2016).

M Barlow, Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation: < http://canadians.org/content/report-our-right-water-people's-guide-implementing-united-nations'-recognition-right-water > (Last accessed 27 July 2016).

'Mbeki Challenges Court Ruling to Defend Reputation' *AFP* 23 September 2008: < http://www.news24.com/SouthAfrica/Politics/Timeline-Zuma-court-decision-20090108> (Last accessed 27 July 2016).

Millennium Development Goals country reports: <http://www.undp.org/content/undp/en/home/librarypage/mdg/mdg-reports.html> (Last accessed 27 July 2016).

Ministerial Declaration of The Hague on Water Security in the twenty-first century: <http://www.worldwatercouncil.org/fileadmin/world_water_council/documents/world_water_forum_2/The_Hague_Declaration.pdf > (Last accessed 27 July 2016).

The Nine Planetary Boundaries – Stockholm Resilience Centre: <http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html> (Last accessed 27 July 2016).

On the Commons: <http://www.onthecommons.org> (last accessed 27 July 2016).

Our Water Commons, (*Our Water Commons,* 2016*)*: <http://www.ourwatercommons.org > (Last accessed 27 July 2016).

Peters B 'Investing in community-driven development: The case of the Woodford Library' (*Legal Wise* 2014): <https://www.legalwise.co.za/files/2514/4238/6431/Ekwaluseni_Library_Project.pdf> (Last accessed 27 July 2016).

'Phiri Water Case: Constitutional Court Fails the Poor & the Constitution' (8 October 2009): <http://abahlali.org/node/5876/> (Last accessed 27 July 2016).

Rhodes, C J, 'Transcription of Cecil John Rhodes' speech on the second rereading of the Glen Grey Act 1894, to the Cape House Parliament, 30 July 1894' (*South African History Online* 1894): <http://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament> (Last accessed 27 July 2016).

Right2Water, 'Human Right to Water and Sanitation must be in SDGs!' (*Right2Water* 2014): <http://www.right2water.eu/news/human-right-water-and-sanitation-must-be-sdgs> (Last accessed 27 July 2016).

Roy A, 'The Trickledown Revolution' (*Outlook,* 20 September 2010): <http://www.outlookindia.com/article/the-trickledown-revolution/267040 > (Last accessed 27 July 2016).

Sapa-APF, 'Zuma found not guilty' (*Mail & Guardian* 8 May 2006): <http://mg.co.za/article/2006-05-08-zuma-found-not-guilty> (Last accessed 27 July 2016).

Speech delivered by the former President Mandela at the signing of the Constitution of the Republic of South Africa, 10 December 1996: < http://www.sahistory.org.za/archive/speech-president-nelson-mandela-signing-constitution-sharpeville-10-december-1996> (Last accessed 27 July 2016).

Statistics South Africa, 'General Household Survey 2013' (*Statistics South Africa,* 27 May 2015): <http://www.statssa.gov.za/publications/P0318/P03182014.pdf> (Last accessed 27 July 2016).

Statute of the International Court of Justice, Article 38: <http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II> (Last accessed 27 July 2016).

Sustainable Development Goals: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 27 July 2016).

Sustainable Development Knowledge Platform 'Open Working Group proposal for Sustainable Development Goals' (*Sustainable Development Knowledge Platform,* 2016): <https://sustainabledevelopment.un.org/focussdgs.html> (Last accessed 27 July 2016).

S Suter & A Fishman 'Lessons on Monitoring and Reporting from the MDGs and Other Major Processes' (2015) *Independent Research Forum:* <http://www.irf2015.org/sites/default/files/publications/Retreat%20%237_SD-1_Final%20Draft.pdf> (Last accessed 27 July 2016).

Tamukamoyo H, 'Double Speak about Judicial Reform in South Africa Raises Alarm Bells', (*ISS Africa,* 23 March 2012): <http://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells> (Last accessed 27 July 2016).

The Department of Justice and Constitutional Development, 'Discussion Document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (*The DOJ & CD* February 2012): < http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf > (Last accessed 27 July 2016).

'The High Cost of Living' (*The Mail & Guardian,* 5 December 1997): < http://mg.co.za/article/1997-12-05-the-high-cost-of-living> (Last accessed 27 July 2016).

The Housing Development Agency, 'South Africa: Informal Settlements Status' (*The Housing Development Agency*, 2012): <http://www.thehda.co.za/uploads/files/HDA_Informal_settlements_status_South_Africa.pdf> (Last accessed 27 July 2016).

The World Bank, 'Global Monitoring Report 2014: Ending Poverty and Sharing Prosperity' (*The World Bank,* 2014): <http://www.worldbank.org/en/publication/global-monitoring-report> (Last accessed 27 July 2016).

The World Bank 'GINI index (World Bank estimate)' (*The World Bank,* 2016): <http://data.worldbank.org/indicator/SI.POV.GINI> (Last accessed 27 July 2016).

The World Bank, 'Projects & Programs' (*The World Bank,* 2016*)*: <http://www.worldbank.org/en/topic/water/projects> (Last accessed 27 July 2016).

Tran M, 'Prosecutors drop Jacob Zuma corruption charges' (*The Guardian,* 6 April 2009): <http://www.theguardian.com/world/2009/apr/06/zuma-corruption-charges-dropped> (Last accessed 27 July 2016).

UDHR, Articles 2, 3, 4, 5, 7, 9. Available at: < http://www.un.org/en/universal-declaration-human-rights/index.html /> (last accessed Last accessed 27 July 2016).

Uhrqvist O and Lövbrand E, 'Seeing and Knowing the Earth as a System – Tracing the History of the Earth System Science Partnership' (*Earth System Governance,* 2009): <http://www.earthsystemgovernance.org/ac2009/papers/AC2009-0107.pdf > (Last accessed 27 July 2016).

UNAIDS 'HIV and AIDS estimates' (*UNAIDS*, 2015): <http://www.unaids.org/en/regionscountries/countries/southafrica> (Last accessed 27 July 2016).

United Nations Development Programme, 'About Malawi' (*United Nations Development Programme*, 2015): <http://www.mw.undp.org/content/malawi/en/home/countryinfo/> (Last accessed 27 July 2016).

United Nations General Assembly Resolution A/RES/70/1 of 25 September 2015. Available at: <https://sustainabledevelopment.un.org/?menu=1300> (Last accessed 12 July 2016).

UN Millennium Project, 'Goals, targets and indicators' (*UN Millennium Project,* 2006): <http://www.unmillenniumproject.org/goals/gti.htm#goal7> (Last accessed 27 July 2016).

UN Water, 'Facts and Figures' (*UN Water,* 2013): <http://www.unwater.org/water-cooperation-2013/water-cooperation/facts-and-figures/en/> (Last accessed 27 July 2016).

Vidal J *et al* 'Low targets, goals dropped: Copenhagen ends in failure' (*The Guardian,* 19 December 2009): < http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal> (Last accessed 27 July 2016).

'Voices of the Poor: Can anyone hear us?' (*The World Bank,* 14 March 2000): <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20013937~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (Last accessed 27 July 2016).

Water for People: < https://www.waterforpeople.org> (Last accessed 27 July 2016).

Water for People, 'Malawi' (*Water for People* 2015*)*: <https://www.waterforpeople.org/where-we-work/malawi> (Last accessed 27 July 2016).

WaterAid, 'Malawi' (*WaterAid* 2016): <http://www.wateraid.org/where-we-work/page/malawi> (Last accessed 27 July 2016).

WaterAid, 'Statistics' (*WaterAid* 2016): <http://www.wateraid.org/what-we-do/the-crisis/statistics> (Last accessed 27 July 2016).

World Health Organization, Health Topics: Sanitation: <http://www.who.int/topics/sanitation/en/> (Last accessed 27 July 2016).

World Health Organisation Joint Monitoring Programme for Water Supply and Sanitation, 'Documents' (*WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation,* 2015): <http://www.wssinfo.org/documents/?tx_displaycontroller%5Btype%5D=country_files> (Last accessed 27 July 2016).

World Health Organisation Joint Monitoring Programme for Water Supply and Sanitation, 'Improved and unimproved water sources and sanitation facilities' (*WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation,* 2015): <http://www.wssinfo.org/definitions-methods/watsan-categories/> (Last accessed 27 July 2016).

World People's Conference on Climate Change and the Rights of Mother Earth 'The People's Agreement' (*PWCCC,* 22 April 2010): <https://pwccc.wordpress.com/support/> (Last accessed 27 July 2016).

XE 'Currency Conversion' (*XE*, 2016): <http://www.xe.com/currencyconverter> (Last accessed 27 July 2016).

Youth With A Mission (YWAM) <http://www.ywam.org> (Last accessed 27 July 2016).

Zimbabwe Constitution (1993) <https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf> (Last accessed 27 July 2016).

Appendices

List of Interviews

Complete interview transcripts are available on request. Interviews are listed below in the order that they appear in the thesis:

1 Author's interview with 'Gremmah' Mbongwa.
Okhombe, Kwa-Zulu Natal. April 2010.

2 Author's interview with Jennifer (Soche Water Users' Association) and Andrew (Water for People).
Soche, near Blantyre, Malawi. April 2014.

3 Author's interview with Nombuso Khumalo.
Burlington, Kwa-Zulu Natal. April 2010.

4 Author's interview with Siyabonga Mbhele.
Burlington, Kwa-Zulu Natal. February 2010.

5 Author's interview with Sanele.
Burlington, Kwa-Zulu Natal. November 2015.

6 Author's interview with Justice Zak Yacoobs.
University of Kwa-Zulu Natal. April 2014.

7 Author's interview with Mbali Miya and Mpume.
Okhombe, Kwa-Zulu Natal. April 2010.

8 Author's interview with Nombuso Khaba.
Woodford, Kwa-Zulu Natal. February 2010.

9 Author's interview with Vosile and Elizabeth.
Woodford, Kwa-Zulu Natal. February 2010.

10 Author's interview with Sewpersadh Kanthelall.
Verulam, Kwa-Zulu Natal. November 2015.

11 Author's interview with Thandeka.
Msunduze, Kwa-Zulu Natal. November 2015.

12 Author's interview with Sanele.
Burlington, Kwa-Zulu Natal. November 2015.

13 Author's interview with Helen, Thembeka and Phindile.
Burlington, Kwa-Zulu Natal. November 2015.

14 Author's interview with Sbo.
Burlington, Kwa-Zulu Natal. November 2015.

15 Author's interview with Kate Harawa (Water for People).
Blantyre, Malawi. April 2014.

16 Author's interview with Andrew (Water for People).
Blantyre, Malawi. April 2014.

17 Author's interview with Pastor Elias Nowa (WUA Executive Chairperson).
Nkolokott, near Blantyre, Malawi. April 2014.

18 Author's interview with Francis (WUA Administrator).
Nkolokott, near Blantyre, Malawi. April 2014.

Model information letter

This letter is for use with township residents who have been approached as potential interviewees. The letter will be offered to participants in English and Afrikaans. The same content will appear in both versions.

Access to sufficient water in South Africa.

Dear sir/ madam,

You are invited to take part in a research project; *'Access to sufficient water in South Africa'*. Before you decide whether to take part it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part.

The aim of this research is to help us understand how water is accessed for domestic purposes (drinking, washing, cooking) by township residents and people living in informal settlements in South Africa. We want to ask questions about whether you have a water supply close to your home; whether the supply works well; whether the water is expensive; whether you have ever not had enough water to meet your needs and how that affected you or your family.

The aim of asking all these questions is to try to work out how access to sufficient water can best be protected for everyone in South Africa.

You have been asked to take part in this research because you have links with Youth With A Mission, South Africa and because you have been involved in the (...) project in (...) township. I used to work for Youth With A Mission myself and would really appreciate your help in my research.

Taking part is entirely voluntary. If you would prefer not to take part this will not affect you in any way. If you do decide to take part you will be given this information sheet to keep. You can change your mind at any time. You do not have to give a reason.

In order to make interviews easier I would like to record them using a Dictaphone. Once I have finished all my interviews, I will write up what we talked about and will then destroy the recording. If you would like to take part in an interview, but don't want to be recorded, you can say so and your interview will not be recorded.

If you do take part in this research, we will arrange a time and place for the interview. Interviews will take place in the area that you live, so you will not need to travel. It is expected that the interview will not take longer than 30 minutes. You do not need to bring anything with you or prepare anything. But if you have water bills, it may be helpful to have a look at these to remind you about the price you pay for water.

I will ask you general questions about your experience accessing water. These will cover the following:

- How close are you to your water supply?
- Does it work (all the time, some of the time, does it get shut off?)
- Do you get all the water you need?
- How expensive is it? (can you afford to buy all the water you need or do you buy less than you need? Do you pay for water at all?)

I will listen to what you say and I might ask you for more details or to explain something I don't understand. I will also ask you whether you live in the township or in an attached informal settlement.

If you do not know answers to the questions that is fine. If you need a little while to think, that too is OK. In the interview, if you find that answering any of the questions is upsetting, you are welcome to take your time, to pause the interview, or to stop it completely. Any recording will be destroyed if you wish.

You will not receive any payment or reward for taking part in this research. Whilst there are no immediate benefits for you taking part in the project, it is hoped that this work will contribute to a better understanding of day-to-day challenges regarding water and may help to shape improvements in the future.

All the information that we collect about you during the course of the research will be kept strictly confidential. If you give your name and agree for it to be used to identify your responses, your name may be used in this thesis, and in future related publications. If you do not wish to be identified in any reports or publications that come from this research, your contribution will remain anonymous.

This research will form part of a Doctoral Research Thesis. It may also be used in journal articles, books and other published material. However, it is not possible to provide participants with copies of any such publications.

This research project has been approved by the School of Law, Research Ethics Committee at the University of Sheffield, England.

You can contact us for further information using the following details:

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Thank you for taking the time to read this.

Nathan Cooper

Framework for semi-structured interviews in water-poor communities (interview schedule)

The following questions, grouped A – E formed the framework for interviews. Questions were modified, rephrased or not used, depending on each situation. For instance some respondents who expressed satisfaction with the quality of water they used were not asked whether their health had been adversely affected by poor quality water.

A How do you access water (for domestic use)? Eg. Standpipe, tap at home, shared tap, bucket?

Who provides the water? Local authority/ private company/ charity?

B Questions based on the definition of sufficient water in General Comment 15 CESCR regarding availability, quality and accessibility (physical, economic, non-discriminatory and information accessibility).

How much water do you use in a day/week? For how many people?

What does it taste/ look/ smell like?

Is your water source very close? If not, who collects it and how?

Do you get an amount of water free? How much do you pay per unit? How much do you spend a week on water? How much do you earn in a week?

C If residents/communities have experienced insufficient water (as defined by GC15)

How do you make your concerns/complaints known?

Is there involvement from your local MP/ council/ NGO/ advocacy group?

Are people involved in direct action? Informal reconnection? Activist network?

D Has your experience of access to sufficient water changed in recent years? What aspects of section B?

E What is the wider impact on your life of problems with access to sufficient water?

Health issues? Time/money diverted from...? Education/work-related issues?