

WATER JUSTICE IN SOUTH AFRICA:
NATURAL RESOURCES POLICY AT THE INTERSECTION OF HUMAN
RIGHTS, ECONOMICS, AND POLITICAL POWER

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ABSTRACT:

This paper analyzes water as a social justice issue in South Africa, a nation that has undergone tremendous political and legal transformations over the last fifteen years, but whose population nonetheless continues to suffer from severe inequities in access to freshwater resources. In light of growing water scarcity worldwide, this paper highlights that legal treatment of water resources has significant socioeconomic and distributive justice impacts, even in progressive constitutional democracies that have embraced principles of human rights and international legal norms. The paper explores historical changes in South African water law and evaluates the current political and legal status of water resources within the Constitutional system. Finally, the paper analyzes a potential Constitutional challenge to contemporary national water policy and concludes that, in this nation where socioeconomic conditions are so closely linked to water resources, exerting organized political pressure on elected officials to amend existing water laws may be a more effective strategy than litigation to achieve progressive social change.

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I. INTRODUCTION

The Republic of South Africa is a nation of extreme disparities, which are the legacy of two centuries of European colonial rule and fifty years of formal apartheid. Despite its status of moderate national wealth, inside South Africa's borders, developed and developing worlds coexist, and the brutal, racist policies of the National Party, which ruled the country until 1994, have left the inhabitants of those two worlds largely segregated by pigmentation.¹ Thus, white South Africans, who comprise just 10% of the population, predominantly live in conditions equivalent to those found in wealthy nations, while more than a third of the population subsists on less than US\$2 per day and unemployment for the black African population ranges between 30 – 60%.² The stark inequalities between blacks and whites is also reflected in municipal water services: all white suburbs account for more than 50% of residential water use, and as of 2000, only 27% of black households had running water, compared to a striking 96% of white households.³ As one commentator has stated, “[South Africa] has yet to recover from an apartheid system in which whites were afforded all the services expected in a modern society, while blacks lived in third-world conditions...”⁴

The country is combating a major backlog in basic water service provision to rural and peri-urban poor communities – over 12 million people do not have access to potable water for

¹ Karen Cavanaugh, *Emerging South Africa: Human Rights Responses in the Post-Apartheid Era*, 5 CARDOZO J. INT'L & COMP. L. 291, 293 (1997). Not surprisingly, in this nation of sharp inequalities, the richest 10% of the population is responsible for almost 50% of consumption and the poorest 10% is responsible for only 1.1%.

Andrew Allan, *A Comparison Between the Water Law Reforms in South Africa and Scotland: Can a Generic National Water Law Model Be Developed from These Examples?*, 43 NATURAL RESOURCES J. 419, n.8 (2003).

² Rena Singer, *South Africa: To Tap Votes, Politicians Promise Water with Less than a Month Before Elections, Politicians of All Hues are Pitching the Basic Infrastructure*, CHRISTIAN SCI. MONITOR, November 7, 2000; Jon Jeter, *South Africa's Driest Season*, 27 (6) MOTHER JONES 39(2002), available at http://www.motherjones.com/news/feature/2002/11/ma_145_01.html. Unemployment rates range from 32-43% for black African men and 40-58% for black African women, and two million households live in one-room dwellings, 94% of which are black African families. Barbara Schreiner et al., *Washing Away Poverty: Water, Democracy and Gendered Poverty Eradication in South Africa*, 28(3) NATURAL RESOURCES FORUM 171, 172-73 (2004).

³ *Id.* Singer, *supra* n.2.

⁴ *Id.*

drinking, eating, and bathing, and 18 million people lack adequate sanitation.⁵ Those without running water in their homes either travel to communal taps for potable water or collect water from natural sources, such as rivers, streams, dam reservoirs, boreholes, rainwater tanks, and even stagnant ponds.⁶ Water quality is thus an additional concern, as pollution levels are increasing as a result of effluent released by the growing industrial and mining sectors, fecal contamination resulting from lack of sanitation infrastructure and leaking sewers, and domesticated animals grazing too close to water sources.⁷ The democratically-elected government that took office in 1994 has made a concerted effort to extend basic water services (both drinking water and sanitation) to millions of inhabitants in poor communities,⁸ but those

⁵ Marna De Lange, *Water Law and Human Rights – Roles and Responsibilities*, 43(4) WATER SCIENCE & TECHNOLOGY 143 (2001). The total estimated population of South Africa is 45 million. Singer, *supra* n.2. See Schreiner, *supra* n.2, at 172-73 (putting forth a figure of 28% for access to potable water, which, multiplied by a population of 45 million, yields 12.5 million, and 40% for sanitation, which yields 18 million). See also Farah Khan, *Health – South Africa: High Water Fees Cited in Cholera Outbreak*, INTER PRESS SERV., October 17, 2000 (citing 12 million people still without access). Cf. DEP'T OF WATER AFFAIRS & FORESTRY, IMPLEMENTATION STATUS OF FREE BASIC WATER PROJECT, at <http://www.dwaf.gov.za/FreeBasicWater/Defaulthome.asp> (last visited January 31, 2005) (on file with Author) (indicating in table form that as of January 31, 2005, 15,309,603 persons still had not been served with free basic water) (last visited January 31, 2005) [hereinafter DWAF, IMPLEMENTATION STATUS], and Ferial Haffajee, *South Africa: Water For Everyone (What Price Water?)*, UNESCO COURIER, February 1, 1999 (indicating that over 2/3 of the population lacks access to basic sanitation). Those households without flush toilets or chemical toilets must resort to pit latrines and buckets (and outdoor locations). Barbara A. Anderson et al, *Environment, Access to Health Care, and Other Factors Affecting Infant and Child Survival Among the African and Coloured Populations of South Africa, 1989–94*, 23(4) POPULATION & ENVIRONMENT 349, 355 (2002). For a definition of peri-urban, see *infra* n.24.

⁶ As of 1998, rural residents traveled, on average, 1/3 of a mile to get water for household use. *South Africa: The Water Services Act*, INT'L MKT. INSIGHT TRADE OPPORTUNITIES INQUIRIES, September 22, 1998. Singer, *supra* n.2. See also David A. McDonald, *The Bell Tolls for Thee: Cost Recovery, Cutoffs, and the Affordability of Municipal Services in South Africa*, in COST RECOVERY AND THE CRISIS OF SERVICE DELIVERY IN SOUTH AFRICA 161, 163 (David A. McDonald & John Pape eds., Human Sciences Research Council 2002) (Table 8.1 lists categories of survey responses to the question, "Where do you get your drinking water?"). According to a survey conducted in 1994, among those who do not have access to piped, potable water, 89% did nothing to treat the water before drinking it. Anderson, *supra* n.5, at 361-62.

⁷ See De Lange, *supra* n.5, and *South Africa: The Water Services Act*, *supra* n.6.

⁸ It is worth noting that plans for water service extension mean communal taps for most black communities (with the stated objective of no tap being more than 200 meters from any household), as compared to the running water already in place in most white homes. Charles Johnson, *Privatizing Water: Political Intrigue And Free-Market Economics In South Africa*, 20(4) MULTINATIONAL MONITOR 13 (1999). However, during National Water Week 2004, the Minister of DWAF is reported as having said that the government's vision over the next ten years is to 'move people up the water ladder, from communal taps to the convenience and dignity of water in people's own yards, with each household having its own toilet and, in time, to provide hot and cold running water inside their homes.' *Saving Water, Supplying Water*, SouthAfrica.info reporter, at <http://www.southafrica.info/10years/waterweek2004.htm> (March 19, 2004) (on file with Author).

served thus far represent only a fraction of the population without access,⁹ and many of those communities that *have* received water services suffer from substandard delivery systems and lack of maintenance, as well as rising water prices and service cutoffs.¹⁰

Insufficient and inadequate infrastructure for delivering water services to poor communities is compounded by the relative scarcity of national freshwater resources. South Africa has few rivers, no mountain snow pack, and a mean annual rainfall that is substantially less than the world average.¹¹ Furthermore, due to extremely high evaporation rates, 92% of the limited rainfall returns to the atmosphere before ever reaching a river or stream, and only 60% of mean annual runoff can be utilized as a source of fresh water.¹² Seasonal variability and unpredictable periods of drought strain the country's water supply, and historical human settlement patterns around mineral deposits (rather than water sources) have led to a "geographic mismatch between water availability and water need".¹³ Thus, in most populous areas, water must be imported from other basins, and some regions are *entirely* dependent on water generated outside their boundaries.¹⁴ Meanwhile, domestic demand for water is projected to continue increasing as a function of both population growth and expected improvements in average living standards, but since the apartheid regime already directed large sums of political and financial capital toward

⁹ The figures for the number of people without access to basic water services in 1994 and in 2004 range, as do the figures for the number of people who have been served thus far. Compare De Lange, *supra* n.5 (stating that 12 million lacked access in 1994, but that by 1999, the government had successfully supplied 5 million of those persons with access), with Jay O'Keeffe, *Future Water Availability in South Africa*, 18(7) *WORLD & I* (2003) (stating that 17 million lacked access in 1994, and that by 2003, 7 million people had been served), and DWAF, IMPLEMENTATION STATUS, *supra* n.5 (indicating in table form that as of January 2005, over 15 million persons still have not been provided free basic water under the national policy of Free Basic Water instituted in 2001).

¹⁰ O'Keeffe, *supra* n.9. See generally COST RECOVERY AND THE CRISIS OF SERVICE DELIVERY IN SOUTH AFRICA (David A. McDonald & John Paper eds., 2002).

¹¹ *South Africa: The Water Services Act*, *supra* n.6. See also G. Du T. de Villiers et al, *South Africa's Water Resources and the Lesotho Highlands Water Scheme: A Partial Solution to the Country's Water Problems*, 12(1) *WATER RESOURCES DEVELOPMENT* 65, 65 (1996).

¹² O'Keeffe, *supra* n.9. See also de Villiers, *supra* n.11, at 66. In fact, in some regions evaporation rates occasionally exceed annual rainfall. *South Africa: The Water Services Act*, *supra* n.6.

¹³ O'Keeffe, *supra* n.9.

¹⁴ de Villiers, *supra* n.11, at 67.

the development of water resources to support irrigated agriculture in an arid climate, existing water supplies can only be augmented at an increasing cost.¹⁵ As of 1998, the nation was using two thirds of its water supply, which prompted the Department of Water Affairs and Forestry to state that if the water use patterns that had developed during apartheid continue unaltered, South Africa may consume all of its available water within thirty years.¹⁶ Thus, at some point in the near future, redistribution of current water allocations will be necessary to alleviate existing inequalities, making access to water resources a poignant social justice issue as well as a serious structural problem.

The organization of this paper proceeds as follows: Part II discusses the relationship between the apartheid legal regime and current natural resource inequities, while Part III describes South Africa's transition to democracy and the new government's development policy, including early commitments to redistribution and subsequent structural adjustment strategies. Part IV outlines post-apartheid transformations in water law and policy and evaluates the effects of these legal changes. Part V explores the right to water in South Africa, from both a human rights and a Constitutional perspective, and includes an analysis of South Africa's recent commitment to free basic water. Part V concludes that greater equity in access to water resources is needed, but that the most effective instrument for change may not be public litigation in the Constitutional Court,

¹⁵ *Id.* at 68. See also Roger Bate & Richard Tren, *THE COST OF FREE WATER: THE GLOBAL PROBLEM OF WATER MISALLOCATION AND THE CASE OF SOUTH AFRICA* 65-130 (Free Market Foundation, Johannesburg, 2002) (detailing the evolution of water rights and irrigation policy in South Africa).

¹⁶ Kevin Debell, *New National Water Law to Reverse Apartheid Wrong*, 10(9) *WATER ENVIRONMENT & TECHNOLOGY* 50 (1998). *But cf.* Wyndham Hartley, *Cabinet Yes to R21bn to Build New Dams*, *BUSINESS DAY* (South Africa), September 2, 2004 (noting that government had just approved a national water resources strategy that includes plans for the construction of twenty new dams in the next twenty years to meet the country's water needs), and NWRS, *infra* n.69 at 3 (emphasizing that there is "enough water to meet [the] nation's needs for the foreseeable future", if the resource is managed properly).

but rather, a politically mobilized civil society that can pressure elected officials to amend current legislation regarding the budgeting and allocation of water resources.

II. THE LEGACY OF APARTHEID

The current disparities in access to basic water services are indirectly linked to the officially discriminatory land policies inflicted on the population by the governing regime during the apartheid era,¹⁷ during which the privilege of land ownership was reserved for the 11% of the population with white skin.¹⁸ Most black citizens were prohibited from residing in urban areas and could only have legal residence in crowded ‘homelands’.¹⁹ The ruling National Party used influx control laws to prevent poor blacks from settling in cities where whites lived, and as a result, impoverished townships and villages developed haphazardly along the peripheries, supplying white-owned urban businesses with a cheap labor supply.²⁰ The government also forcibly relocated entire communities to arid rural locations with poor soil and limited water resources, both to clear out unwanted shantytowns and to make room for commercial forestry, agriculture, and National Parks on valuable land.²¹

Within this deeply segregated society, first-world and third-world economies developed independently of one another, and the national government focused its attention and resources

¹⁷ *South Africa: The Water Services Act*, *supra* n.6.

¹⁸ O’Keeffe, *supra* n.9. Discriminatory land policies trace back to the Natives Land Acts of 1913 and 1916, and the Group Areas Act No. 41 of 1950, which classified residential areas according to race and reserved 87% of the land for Afrikaners. These laws were abolished by the parliament in 1991. Cavanaugh, *supra* n1, at 292.

¹⁹ As of the 1990s, homelands constituted 13% of the land area, while black Africans constituted 74% of the total population. Anderson, *supra* n.5, at 351.

²⁰ See Jeter, *supra* n.2, and Thembi Khuzwayo, *Challenges Facing the Developing Communities in South Africa*, 14(3/4) WATER SUPPLY 20, 20 (1996), and Mark S. Kende, Economic Liberties Symposium Article, *The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 141 (2003).

²¹ See Debell, *supra* n.16, and Philip Woodhouse, *Water Rights and Rural Restructuring in South Africa: A Case Study from Eastern Transvaal*, 11(4) INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT 527, 530-31, 538 (1995).

almost universally on the former,²² which led to highly differential domestic servicing between white suburbs and black townships.²³ When the government loosened and dissolved its apartheid residential policies in the early 1990s, many inhabitants of impoverished, outlying rural settlements flocked to the cities in seek of economic opportunity, and this massive urban migration further strained the infrastructure for providing municipal services in underserved peri-urban communities.²⁴

Current discrepancies in the allocation of water can also be traced back to apartheid-era water policies, which reserved the resource for the landed white minority through convoluted riparian laws linking water rights to land ownership²⁵ and the dispensation of government subsidies that propped up white-owned, irrigated agriculture.²⁶ Under this system, most available water was used – inefficiently and virtually for free – by large-scale commercial farmers, a dominant group with “privileged access to land, water, and economic power”.²⁷ Even in cases where water resources were developed in their vicinity, small-scale users and communal areas often were not

²² Khuzwayo, *supra* n.20, at 20.

²³ Dhesigen Naidoo & George Constantinides, *Integrated Approaches to Efficient Water Use in South Africa*, 16(1) WATER RESOURCES DEVELOPMENT 155 (2000).

²⁴ Khuzwayo, *supra* n.20, at 20. A useful definition of ‘peri-urban’ is provided by SANIPLAN dotORG, a web-based NGO that focuses on peri-urban sanitation and water supply:

The term "peri-urban" came into wide use during the 1980's in Europe. Literally, it means "around the edges or periphery of a city." This definition includes (but is not limited to) the following human settlement names from around the world: Barrio, bidonville, bustee, edge city, favela, gecikundu, informal settlement, illegal settlement, kampung, legal settlement, pueblo invisible, pueblo joven, shanty town, squatter settlement, tugurio, villa miserere, or whatever term may be used to describe persons on the peripheries or edges of the usual, acknowledged official city zones. Such settlements may be large, or they may be small. They may be longstanding, or they may be of recent origin. They may be officially recognized or they may be ignored.

<http://www.saniplan.org/defineng.htm> (last visited January 29, 2005) (on file with author).

²⁵ South Africa adopted the European model of riparian law to govern water allocation, which linked water rights to land ownership and allowed landowners the right to access water on, under, and adjacent to their property. Haffajee, *supra* n.5. For a more in-depth description of the riparian laws in place before the National Water Act of 1998 was enacted, see Allan, *supra* n.1, at 428-30.

²⁶ Such measures included drought relief and government-funded dam construction. David A. McDonald, *No Money, No Service: South Africa's Attempts to Recover Service Costs for Water and Power are Harming its Poorest Citizens*, 28(2) ALTERNATIVES JOURNAL 16 (2002). See also Haffajee, *supra* n.5.

²⁷ CLAUDIOUS CHIKOZHO, TOWARDS COMMUNITY-BASED NATURAL RESOURCES MANAGEMENT IN THE WATER SECTOR: AN ANALYSIS OF LEGISLATIVE CHANGES MADE UNDER THE SOUTH AFRICAN AND ZIMBABWEAN WATER REFORMS 1-2 (Commons South Africa Occasional Paper Series No. 6, June 2001). See also Debell, *supra* n.16.

provided access to the resource.²⁸ The democratically-elected government reformed the nation’s water laws in 1998, supplanting riparian law with a permit system that seemingly provides an instrument for reallocation of water use in the public interest through a permit review process.²⁹ However, no real redistribution has been achieved to date. As a practical matter, preexisting allocations to farming, mining, and industry are grandfathered in through the issuance of permits,³⁰ regressive pricing for large-scale consumption continues,³¹ and as of 2003, commercial agriculture was still using close to 60% of available water, while contributing to only 1.4% of the GDP and employing just 1.4% of the nation’s workforce.³²

III. DEMOCRATIC TRANSITION AND THE POLITICS OF GLOBALIZATION

In the early 1990s, South Africa formally began its transition from apartheid governance to a constitutional democracy,³³ and in the initial momentum, the nation made strong political and institutional commitments to redress past injustices and redistribute resources and power along more equitable lines. In 1990, the sitting President Frederik Willem de Klerk announced the end of apartheid and released from prison Nelson Mandela, the leader of the African National Congress (ANC), the outlawed party that had been at the forefront of decades of struggle for liberation from apartheid.³⁴ The following year, a multiracial conference approved de Klerk’s

²⁸ CHIKOZHO, *supra* n.27, at 1.

²⁹ *See id.* at 9 (analyzing National Water Act of 1998, *infra* n.66). This concession is not terribly surprising, given the scholarly prediction in 1995 that, “[T]he balance of power between the main claimants to water indicates that those who currently have most access to water are well placed to maintain the status quo, even under [the proposed and soon-to-be enacted system].” Woodhouse, *supra* n.21, at 540-41. For more on the modern permit system, see discussion, *infra* Part IV.

³⁰ *See* Wyndham Hartley, *Kasrils Taps the Space Age to Monitor SA’s Water*, BUSINESS DAY (South Africa), June 14, 2002.

³¹ McDonald, *No Money, No Service*, *supra* n.26.

³² O’Keeffe, *supra* n.9. *Cf.* Naidoo, *supra* n.23 (stating that, as of 2000, white-owned commercial agriculture uses 54% of available water resources, a slightly smaller figure).

³³ Cavanaugh, *supra* n1, at 295.

³⁴ *Id.*, at 292.

referendums for constitutional reform, and after negotiations between de Klerk and Mandela, the state enacted an interim constitution.³⁵ In 1994, the first multiracial nationwide elections were held, vaulting the ANC into power as the governing party for the first time in history.³⁶ South Africa then established a Truth and Reconciliation Commission to address the human rights abuses of the outgoing apartheid government³⁷ and a democratically-elected Constitutional Assembly, whose purpose was to draft a new, permanent constitution.³⁸ In the drafting process, the Assembly incorporated ideas from individual citizens, civil society organizations, and political parties, in what is referred to as the “largest public participation programme ever carried out in South Africa”.³⁹ The end product is an extremely progressive Constitution that embraces human rights principles and contains a comprehensive Bill of Rights which enshrines rights to basic life necessities, including housing, a clean environment, health care, social security, education, food, and most importantly for the purposes of this paper, water.⁴⁰

The African National Congress ("ANC"), Africa's oldest liberation movement, was founded in 1912 as the South African Native Congress. Its principal aim was to unite all the African people of South Africa in opposition to racial discrimination. The inaugural conference brought together African chiefs and intellectuals, many of whom had received some of their education overseas. It was largely ineffective until a group of younger members, including Oliver Tambo and Nelson Mandela, pushed the organization to take more militant positions beginning in the late 1940's. It was banned by the South African Government in 1960 after the Sharpeville massacre and many of its members went into exile. After the banning, the ANC promoted internal resistance and an armed campaign, led by its military wing, Umkhonto we Sizwe, against apartheid. After it was unbanned and its jailed members freed in 1990, the ANC quickly became South Africa's dominant political movement.

Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1491 n.112 (1996).

³⁵ Interim Constitution Act 200 of 1993, available at <http://www.info.gov.za/documents/constitution/93cons.htm>. Cavanaugh, *supra* n.1, at 292 (describing this process).

³⁶ See, e.g., Cavanaugh, *supra* n.1, at 292. These bullet points in South Africa's democratic transition gloss over the tremendous difficulties encountered during the process. For a more detailed account, see Richard A. Wilson, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 63 (Cambridge University Press 2001) (asserting that the most violent and terror-filled period in the apartheid era was from 1990-1994).

³⁷ *Id.* at 13; De Lange, *supra* n.5.

³⁸ Cavanaugh, *supra* n.1, at 295-96.

³⁹ *Id.* (quoting from the Explanatory Memorandum of the South African Constitution).

⁴⁰ Constitution Act 108 of 1996, Ch. 2, available at <http://www.info.gov.za/documents/constitution/index.htm>. De Lange, *supra* n.5 (describing both the constitution and the process of public participation). See also Cavanaugh, *supra* n.1, at 296-97. For analysis of the provision enshrining a constitutional right to water, see Part V-C.

Water policy reform was a primary focus during the period of transition, as apartheid policies had left water inequitably distributed, and access to a sanitary water supply was seen as a crucial precondition to improving standards of living among the millions of impoverished but newly enfranchised citizens.⁴¹ Thus, in 1994, the government issued a development policy paper called the Reconstruction and Development Program (RDP), which emphasized redistribution of municipal resources and the provision of basic municipal services to poor black citizens, in order to redress the historical injustice in municipal service delivery that had been put in place through racially-motivated service subsidies during apartheid.⁴² Under the RDP, water policy was to be one of *the* fundamental governmental policies aimed at redressing past imbalances.⁴³

However, the honeymoon of the transition period was short lived. In just two years, the government changed its development policy focus from socially equitable redistribution to fiscally austere neo-liberal policies aimed at macroeconomic growth supplanting the RDP in 1996 with a new national development plan called Growth, Employment and Redistribution (GEAR), which purports merely to implement the RDP but fundamentally alters the national development strategy in fact.⁴⁴ GEAR espouses an official government policy of free markets and globalization, including the opening of domestic markets to foreign competition, privatization of state-owned industries, and restrictions on public spending.⁴⁵

⁴¹ See Alison Tarmann, *South Africa's Water Policy Champions Rights of People and Ecosystem*, 28(5) POPULATION TODAY 1 (2000).

⁴² McDonald, *No Money, No Service*, *supra* n.26 (describing PARLIAMENT OF THE GOV'T OF S. AFR., WHITE PAPER ON RECONSTRUCTION AND DEVELOPMENT, Notice No. 1954 of 1994, GG vol. 353, no. 16085 (1994), at <http://www.info.gov.za/gazette/whitepaper/1994/16085.pdf> (on file with Author)). The broader development goals set out in the RDP include providing 'equal racial access to state resources' and 'ensuring the delivering of housing, water, preventive health care, and education'. Heinz Klug, *Five Years On: How Relevant is the Constitution to the New South Africa?*, 26 VERMONT L.R. 803, 818 (2002) (Symposium: The Fifth Anniversary of the South African Constitution).

⁴³ Khuzwayo, *supra* n.20, at 20.

⁴⁴ McDonald, *No Money, No Service*, *supra* n.26 (citing Growth, Employment and Redistribution: A Macroeconomic Strategy, Department of Finance, 14 June 1996, available at <http://www.info.gov.za/otherdocs/1996/gear.pdf>).

⁴⁵ See John Pilger, *Freedom Next Time*, THE GUARDIAN (London), April 11, 1998. See also De Lange, *supra* n.5.

Like many other developing countries seeking to attract foreign investment, South Africa adopted the mantra of ‘fiscal responsibility’,⁴⁶ and even at the local level, government officials embraced the policy of cost-recovery in municipal service delivery.⁴⁷ The standard justification for focusing on stringent macroeconomic policies in nations with millions of impoverished citizens who could ostensibly benefit greatly from state assistance is not just that economic growth will trickle down, but also that the government’s ability to finance structural improvements in municipal services is dependent on the health of the national economy, which is in turn dependent on the country’s ability to induce foreign investment.⁴⁸ South Africa currently relies on external assistance, and government officials have undoubtedly experienced strong pressure to create an environment conducive to luring investment from both international lending institutions and the private corporations that influence them.⁴⁹ Multinational corporate management owes no allegiance, legally or otherwise, to the welfare of South Africa’s poorest citizens, and the domestic policy choices they subtly coerce with elusive investment promises in the arena of municipal service delivery, such as privatization and cost-recovery, are rarely beneficial to the millions of citizens living in abject poverty.⁵⁰

⁴⁶ Klug, *supra* n.42, at 818.

⁴⁷ McDonald, *No Money, No Service*, *supra* n.26. See Part IV-B for a more thorough discussion of the policy of cost recovery in water service delivery.

⁴⁸ See, e.g., Allan, *supra* n.1, at 419.

⁴⁹ See JEFFREY ROTHFEDER, EVERY DROP FOR SALE: OUR DESPERATE BATTLE OVER WATER IN A WORLD ABOUT TO RUN OUT 78, 89-90 (Jeremy P. Tarcher/Putnam 2001) (noting that wealthy and politically influential supporters of institutions like the World Bank stand to gain from free market policies in the water sector and the commoditization of water, and asserting that most of the benefits from World Bank water projects flow to multinational corporations and large local industries, not to water-deprived individual citizens).

⁵⁰ See, e.g., Henry Hansmann & Renier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439-41 (2001) (preeminent corporate legal scholars discussing the global convergence of corporate law toward a standard shareholder-oriented model) (“[T]here is today a broad normative consensus that *shareholders alone are the parties to whom corporate managers should be accountable*, resulting from widespread disenchantment with a privileged role for managers, employees, or the state in corporate affairs. This is not to say that there is agreement that corporations should be run in the interests of shareholders alone--much less that the law should sanction that result. *All thoughtful people believe* that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that *the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society*. The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate

South Africa's deficit is nearly the same as that of developed countries, and international lending institutions like the International Monetary Fund (IMF) laud the country's adherence to fiscal austerity, but it is the poorest and least-advantaged citizens who disproportionately pay the price of economic restructuring.⁵¹ The country has not realized significant foreign investment, but instead has shed hundreds of thousands of jobs, primarily in sectors like agriculture and textiles, which tend to employ poor, black women.⁵² A majority of the population still lives under desperate, "nutritionally compromised" conditions, and according to some reports, economic inequalities have actually been exacerbated by trade liberalization and globalization.⁵³ As of 1998, 25% of the national budget was being deployed to make interest payments on international debt that had accrued under the apartheid regime, and critics argue that the gross economic distortions the country inherited from apartheid cannot be addressed under such fiscally austere macroeconomic policies, which come with an opportunity cost of *not* focusing on basic redistributive efforts on the ground level.⁵⁴

social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, *only* to those interests."(emphasis added). For an innovative critique of the deep-seated corporate influence over not just law and policy, but societal self-image and perceptions, see Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003). In the context of the global water sector, pet water policies such as dam construction have proven lucrative to select groups of corporations and industry but have exacerbated the impoverished conditions of powerless local residents, and the current corporate legal structure provides no solution for the devastation these water projects have wrought upon communities, families, and individuals. See, e.g., ROTHFEDER, *supra* n.49, at 79-80 (describing forced relocations brought about by World Bank-funded dam construction projects).

⁵¹ See Pilger, *supra* n.45 Black farmers are particularly disadvantaged by trade liberalization policies, as the elimination of subsidies makes it nearly impossible for them to compete with large, white-owned agribusinesses that grew fat off of historically generous State support and now hold dominant market positions and have access to bountiful water infrastructure. While small, black-owned farms now have the de jure right to operate (land ownership will not be contested), the inability to invest in water delivery infrastructure serves as an impediment to market entry. See Schreiner, *supra* n.2, at 177-78.

⁵² See *id.* at 173, and Jeter, *supra* n.2.

⁵³ Pilger, *supra* n.45. Schreiner, *supra* n.2, at 173.

⁵⁴ Pilger, *supra* n.45. Pilger puts forth some examples of plausible ground-level redistributive efforts, including micro-financing and government loans to community cooperatives, both of which could cut out middlemen and banks and spur industrial development in impoverished communities. *Id.* On an optimistic note, such concepts may yet materialize, as advocates of more sustainable local economic development strategies predict a sea change, pointing to the growing official disillusionment with structural adjustment policies that have not borne their anticipated fruit. See PATRICK BOND, LOCAL ECONOMIC DEVELOPMENT DEBATES IN SOUTH AFRICA (Municipal

Thus, despite a transition to democracy and the extension of the franchise to all citizens, relatively little has changed on the ground, in terms of meaningful improvements in the lives of the country's poorest citizens. Poverty remains widespread and squatter settlements commonplace, and in many regions, there is still limited infrastructure and little or no access to water for household needs and sanitation.⁵⁵ 'Grotesque' power imbalances and sharp distributions in wealth still exist: 5% of the population controls 80% of the country's wealth. Now the dividing line is more along class than race, but as one writer has put it, "economic apartheid has replaced legal apartheid with exactly the same consequences for exactly the same people...."⁵⁶ A South African economist has stated even more poignantly that, "[i]n the hearts and minds of every black South African, nothing will ever compare to apartheid, [b]ut there is a very real frustration now that we have only exchanged the savagery of apartheid for the savagery of an untethered free market."⁵⁷

Some commentators suggest that the disjunction between early institutional commitments to social equity and the subsequent mushrooming of neo-liberal orthodoxy in South African political culture reflects an ideological shift to the right in the 1990s.⁵⁸ The leverage that

Services Project Occasional Papers Series No. 6, February 2002), at http://www.queensu.ca/msp/pages/Project_Publications/Series/PapersNo6.pdf (quoting an address given by President Thabo Mvuyelwa Mbeki at a conference in San Francisco in May 2000).

⁵⁵ Pilger, *supra* n.45; see also Klug, *supra* n.42, at 803.

⁵⁶ *Id.* The country has implemented aggressive affirmative action programs and there are many black faces in the governing and corporate elite. However, the vast majority of the population is black, extremely poor, and referred to as the 'underclass'. See Melanie Samson, *Dumping on Women*, 11(1) PSI'S FOCUS ON THE PUBLIC SERVICES 19, 19-22 (2004), available at http://www.queensu.ca/msp/pages/Project_Publications/Journals/Samson.htm, and Pilger, *supra* n.45.

⁵⁷ Jeter, *supra* n2 (quoting Guy Mhone, an economist at Wits University).

⁵⁸ *Id.* Another consideration is that the *relatively* peaceful transition from an oppressive apartheid government to a constitutional democracy, in which the ruling National Party essentially negotiated itself out of power, necessarily entailed some compromises in the structure of the electoral and governing processes. The successful proliferation of free market ideology among the governing elite may be the fruit of these structural compromises. In other words, while charismatic and even well-intentioned leaders may be at the helm, the power brokers of the transition period, and those who benefited from their leadership, have not vanished into the proverbial thin air. Rather, these interests may continue to exert substantial influence over the governing process, and progressive-minded officials likely do not have carte blanche to enact policies favored by their impoverished constituents. [author's suppositions]

corporate coffers wield over politicians may be one of the explanatory factors in this shift, especially since influential corporate leadership had been pressing to open up the market to the global economy long before apartheid officially collapsed.⁵⁹ Critics of the ANC accuse the party of a willingness to accept power at any price after decades of political repression,⁶⁰ and they impugn party leaders for focusing on reconciliation with the powerbrokers of the apartheid regime and cozying up to big business interests in order to gain entry into the multinational corporate elite.⁶¹ One critic goes a step further to note that the prevailing political rhetoric, which placed an emphasis on the reallocation of land, water, and other natural resources to the people, was merely expedient during the decades of struggle for liberation and the early years of democratic transition.⁶² Expediency aside, the language of redistribution, sprinkled throughout early water policy and legislation, has thus far not translated into significant, substantive changes for the majority of South Africa's poorest citizens. comeback

IV. TRANSFORMATIONS IN WATER LAW AND POLICY

The newly elected democratic government identified a critical need to expand water access to the masses in order to improve the socioeconomic conditions of the population, and in recognition that existing water laws were incapable of permitting such change, passed a series of statutes that radically restructured the underlying legal framework for access to water in South Africa.⁶³ The Water Services Act of 1997 (WSA)⁶⁴ codified the Constitutional right to access basic water supply and sanitation, mandating the construction of sufficient pipes to bring piped

⁵⁹ Pilger, *supra* n.45.

⁶⁰ *See, e.g., id.* See also n34 (outlining the history of the ANC).

⁶¹ *Id.*

⁶² *See id.*

⁶³ *See, e.g., O'Keeffe, supra* n.9.

⁶⁴ Water Services Act 108 of 1997, GG vol. 390, no. 18522, of 19 December 1997, available at <http://www.info.gov.za/gazette/acts/1997/a108-97.pdf> [hereinafter WSA].

water within 200 meters of every household.⁶⁵ The National Water Act of 1998 (NWA),⁶⁶ widely considered to be one of the world’s most progressive water policies on paper, is the “principle legal instrument relating to water resources”⁶⁷ and has fundamentally transformed the nature of water management.⁶⁸ The recently adopted National Water Resources Strategy (NWRS)⁶⁹ is a legally binding document, required by the NWA,⁷⁰ which concretizes the policies, theories, and standards articulated by the NWA and the Water Services Act.⁷¹

Among these various instruments, the NWA in particular serves as the engine for legal change. The Purpose of the Act reflects the human rights principles embedded in the Constitution, including “meeting the basic human needs of present and future generations,” “promoting equitable access to water,” and “redressing the results of past discrimination.”⁷² The Act disconnects water rights from land ownership by replacing riparian rights with an administrative permit system, to be overseen by the reorganized Department of Water Affairs and Forestry (DWAF) the national agency responsible for formulating and implementing water policy.⁷³ The Act recognizes a single national water right, called the Reserve, which is designed to satisfy the Constitutional mandate to protect basic human needs and the environment by setting aside enough water to sustain functioning ecosystems and to provide each person with

⁶⁵ *South Africa: The Water Services Act*, *supra* n.6. Tarmann, *supra* n.41.

⁶⁶ National Water Act 36 of 1998, GG vol. 398, no. 19182, of 26 August 1998, available at <http://www.info.gov.za/gazette/acts/1998/a36-98.pdf> [hereinafter NWA].

⁶⁷ NWRS, *infra* n.69, at 7.

⁶⁸ Haffajee, *supra* n.5. De Lange, *supra* n.5.

⁶⁹ Department of Water Affairs and Forestry, National Water Resources Strategy, First Edition, September 2004, available at <http://www.dwaf.gov.za/Documents/Policies/NWRS/Default.htm> [hereinafter NWRS].

⁷⁰ NWA, *supra* n.66, at ch. 2, pt. 1 (“National water resource strategy”).

⁷¹ *Id.* at 8-9. NWA, *supra* n.66, at ch. 2, pt. 1, §§ 6(1)(a)(i) – (ii). See also Hartley, *Cabinet Yes to R21bn*, *supra* n.16 (announcing government’s approval of the NWRS); *A Strategy For Water*, INSIGHT (South Africa), September 30, 2003; Neil Ford, *Water: Africa's Lifeblood*, AFRICAN BUSINESS, November 1, 2002.

⁷² De Lange, *supra* n.5; CHIKOZHO, *supra* n.27, at 8 (citing Ch. 1, §§ 2 (b), (c)); and NWA, *supra* n.66, at ch. 1, § 2(a).

⁷³ See O’Keeffe, *supra* n.9. See also the DWAF’s departmental website, at <http://www.dwaf.gov.za/About.asp>.

sufficient water for drinking, food preparation, and personal hygiene,⁷⁴ which has subsequently been quantified as a minimum of 25 liters of water per day.⁷⁵ It also abolishes private ownership in water, thereby erasing the previous division between private and public waters, and bequeathing ownership of water on the nation, to be held in custody by the State.⁷⁶ The Act recognizes the unity of the hydrological cycle, abandoning the antiquated legal distinction between surface and ground waters and including all “water resources” within its scope, including wetlands and estuaries.⁷⁷

The NWA was widely supported by the ANC’s poor, black African constituency and opposed by business interests, white farmers, and the outgoing National Party,⁷⁸ but it nonetheless contains a series of compromises, which in turn reflect aforementioned tensions between the divergent goals of equitable redistribution and fiscal austerity. The new legislation sets an enabling framework for water to contribute to poverty eradication and redress historical imbalances,⁷⁹ but it simultaneously creates loopholes that allow the status quo to prevail, and it facilitates the implementation of neo-liberal financial policies that undermine its explicit social justice aspirations.⁸⁰

⁷⁴ NWA, *supra* n.66, at ch. 3, pt. 3 (“The Reserve”).

⁷⁵ See Debell, *supra* n.16. See also O’Keeffe, *supra* n.9. See also DEP’T OF WATER AFFAIRS & FORESTRY, STRATEGIC FRAMEWORK FOR WATER SERVICES, Annexure 3 (2003), available at <http://www.dwaf.gov.za/Documents/Policies/Strategic%20Framework%20approved.pdf> (on file with Author) (definition of “basic water supply facility”).

⁷⁶ NWA, *supra* n.66, at ch.1, §3(1) (“As the public trustee of the nation’s water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.”); De Lange, *supra* n.5.

⁷⁷ See NWA, *supra* n.66, at § 1(1)(xxvii). See also De Lange, *supra* n.5; Allan, *supra* n.1, at 419.

⁷⁸ See Haffajee, *supra* n.5.

⁷⁹ Schreiner, *supra* n.2, at 174.

⁸⁰ See NWA, *supra* n.66, at Preamble and § 3 (Purpose of Act) (laying out explicit social justice aspirations of the Act). See also 1997 WHITE PAPER, *infra* n.96, at Preamble, Introduction, Summary of Policy Approaches, and § 2 (“The New South African Context”).

The statute creates a compulsory licensing system, which is a tool specifically designed to reform inequitable water allocations.⁸¹ In essence, all water uses beyond those encompassed by the Reserve must apply for permits, and water use permits are temporary and subject to review, readjustment, and revocation, depending on the reasonableness of the use.⁸² The statute provides guidance for reviewing permit applications: where applications for a new water use compete with existing uses, the basis for decision making will be “beneficial use in the public interest”.⁸³ Further, the Act creates a hierarchy of water uses: the first priority is to allocate water to the Reserve, followed by sufficient water to honor international agreements and make inter-basin transfers in the national interest, and lastly, remaining water may be distributed by permit, both to those municipal uses exceeding the minimum quantity necessary to meet the population’s basic human requirements, and to economic uses, such as water for industry, mining, and agriculture.⁸⁴ Proposed water allocations require an opportunity for public comment, and objectors to preliminary allocation decisions may appeal to a special water tribunal.⁸⁵

Despite this laudable framework for the equitable redistribution of water usage, the NWA effectively grandfathers in riparian allocations, as it simply requires existing large-scale water consumers to register their uses.⁸⁶ These preexisting uses are subject to review, and, in theory, if the decision maker chooses to reallocate water, the State will not be required to pay compensation for reductions in water access, as under the new law, all water uses beyond the

⁸¹ NWA, *supra* n.66, at ch.4, pt. 8 (“Compulsory licences for water use in respect of specific resource”); Schreiner, *supra* n.2, at 172.

⁸² See CHIKOZHO, *supra* n.27, at 9.

⁸³ Bate, *supra* n.15, at 238.

⁸⁴ De Lange, *supra* n.5.

⁸⁵ NWRS, *supra* n.69, at ch.3, pt. 2.

⁸⁶ NWA, *supra* n.66, at ch. 4, pt. 3 (“Existing lawful water uses”) (“This Part permits the continuation under certain conditions of an existing water use derived from a law repealed by this Act. An existing lawful water use, with any conditions attached, is recognised but may continue only to the extent that it is not limited, prohibited or terminated by this Act. No licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued it becomes the source of authority for the water use. If a licence is not granted the use is no longer permissible.”). See also Hartley, *Kasrils Taps the Space Age*, *supra* n.30.

Reserve are usufruct and temporal, not personal property.⁸⁷ However, if, in this permit process, a water use is depleted to such an extent that the economic viability of the water user’s enterprise is “severely affected”, the reduction will be compensable as a taking.⁸⁸

As stated above, one of the chief purposes of the NWA is to provide the general population with sufficient access to water to satisfy basic human needs. The Purpose of the Act lists eleven factors that must be taken into account in managing the resource, the first two of which are:

- (a) meeting the *basic human needs* of present and future generations
- (b) promoting *equitable access* to water⁸⁹

However, despite this unequivocal statutory mandate to expand access, structural flaws in the Act itself hinder actual improvements in water access. First, the Act delegates management to the local level, while failing to simultaneously guarantee sufficient funding for the provision of water or for infrastructural maintenance and improvements – necessary preconditions to water service delivery.⁹⁰ Second, the Act embraces a policy of cost-recovery that, as implemented, continues to deny the most impoverished South African citizens their Constitutional right to

⁸⁷ See Schreiner, *supra* n.2, at 177.

⁸⁸ De Lange, *supra* n.5.

⁸⁹ NWA, *supra* n.66, at ch. 1, §§ 2(a)-(b) (emphasis added). In its entirety, the Purpose of the Act states:
The purpose of this Act is to 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,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

Id.

⁹⁰ Haffajee, *supra* n.5. See also NWA, *supra* n.66, at ch. 5, pt. 2, §§ 61-62.

access a basic quantity of clean water.⁹¹ Lastly, the Act paves the way for privatization of the water services sector, and in South Africa’s geopolitical context, this trend threatens to reinforce apartheid-era patterns of water service provision.⁹²

A. Decentralized Management and Funding Shortages

The NWA decentralizes water management by establishing a system of newly-created Catchment Management Agencies (CMAs), which are formed to manage water according to the natural boundaries of river basins (catchments).⁹³ CMAs, in conjunction with the local water service authorities established under the WSA,⁹⁴ jointly decentralize the South African water sector. Under this new system, the local water service providers do not have unchecked discretion, as DWAF is empowered to promulgate norms and standards relating to the provision of water services, which standards must consider “the need for everyone to have a reasonable quality of life” and “the need for equitable access to water services.”⁹⁵

⁹¹ See NWA, *supra* n.66, at ch.5, pt.1, §§ 56-60.

⁹² There is no explicit discussion of private investment in water services in the NWA, except a minor reference in §116(c)(iii). However, subsequent policy documents *have* explicitly embraced privatization. See discussion on privatization, *infra* Part IV-C.

⁹³ NWA, *supra* n.66, at ch.7 (“Catchment management agencies”); Caroline Kihato & Tobias Schmitz, ENHANCING POLICY IMPLEMENTATION: LESSONS FROM THE WATER SECTOR, 39-40 (Center for Policy Studies, Johannesburg, 2002). See also CHIKOZHO, *supra* n.27, at 2. The Act doesn’t leave CMAs *entirely* to their own devices, as it requires the deployment of some minimum quantity of the national budget toward the operation of CMAs, but it does not specify how much:

- (2) A catchment management agency must be funded by
 - (a) money appropriated by Parliament;
 - (b) water use charges; and
 - (c) money obtained from any other lawful source for the purpose of exercising its powers and carrying out its duties in terms of this Act.

NWA, *supra* n.66, at ch. 7, pt. 3, § 84(2).

⁹⁴ WSA, *supra* n.64, at ch. III, §§ 11 – 21. The WSA defines “water services authority” as “any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993) responsible for ensuring access to water services.” *Id.* at ch. I, § 1(xx)

⁹⁵ WSA, *supra* n.64, at §§ 9, 10. The DWAF did in fact promulgate compulsory national standards relating to tariffs, with which every water service institution is required to comply in its pricing scheme. DEP’T OF WATER AFFAIRS & FORESTRY, NORMS AND STANDARDS IN RESPECT OF TARIFFS FOR WATER SERVICES IN TERMS OF SECTION 10 (1) OF THE WATER SERVICES ACT (ACT NO. 108 OF 1997) (2001), *available at* [http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC10\(1\)REGS-11%20JUNE%202001.doc](http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC10(1)REGS-11%20JUNE%202001.doc) (on file with Author).

Devolved water management authority appears to be a remedy tailored specifically to counteract South Africa's experience with natural resource management under apartheid governance, as it is purportedly designed to avoid the pitfalls of autocratic centralized control over a local resource and to promote widespread local participation in the decision-making process.⁹⁶ However, achieving equitable participation in local resource management is complicated by the "skewed structure of South African society," which is in large part a byproduct of apartheid.⁹⁷ The National Party strategically entrenched the power of traditional leaders, in order to control decision making in rural areas, and traditional law evolved under apartheid to prevent ordinary citizens from participating in development issues.⁹⁸ These customs continue to inhibit full participation. Thus, for example, in some rural areas, women are prohibited from expressing their views in the presence of a chief.⁹⁹ In South Africa's male-dominated society, calls for full participation challenge gender norms in the household and in the community – women are responsible for family chores (such as fetching water on a daily basis) as well as gainful employment (where possible), and those women who do have enough free time

⁹⁶ See DEP'T OF WATER AFFAIRS & FORESTRY, WHITE PAPER ON A NATIONAL WATER POLICY FOR SOUTH AFRICA, §§ 7.1, 7.1.3 (1997), at <http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf> (on file with Author) [hereinafter 1997 WHITE PAPER]; see also *South Africa: The Water Services Act*, *supra* n.6. See generally Bate, *supra* n.15 (documenting at length the problems associated with apartheid-era centralized control over water resources).

⁹⁷ Schreiner, *supra* n.2, at 174. As some scholars have observed,

“[T]he fact that the establishment of [devolved authority to new, local institutions] did not occur simultaneously with reform of entitlements to water has meant that catchment management is still concerned predominantly with ‘green’ rather than ‘brown’ environmental issues. As a result, concern with the role and participation of poorer communities in these institutions persists, and the only real participation from poorer communities appears to be in those areas in which access to the resource has been enhanced or was a historical fact...[P]lacing catchment management before water reform raises interesting questions about participation: to what extent are there incentives for those who have no access to water to participate in institutions that are to manage the resource? ...[W]ithout a real stake in decision-making (...through direct entitlements to water), the turnout for public meetings on water resource management may remain restricted to those who have historically enjoyed access to the resource.”

Kihato, *supra* n.93, at 56, 59.

⁹⁸ Khuzwayo, *supra* n.20, at 21.

⁹⁹ Schreiner, *supra* n.2, at 176.

to attend catchment forums tend to observe passively.¹⁰⁰ Thus, the mere presence of women at such forums is not an indication of their involvement in decision-making processes.¹⁰¹

Poor, black communities were historically excluded from local water management, and this puts them at a strategic disadvantage in terms of the capacity to make informed decisions.¹⁰² Overcoming this gap in information and experience requires training (“the process of transferring specific functional skills and knowledge to bring a person to an agreed standard of proficiency”) as well as capacity-building (strengthening the institutional ability to undertake tasks, mobilizing communities, and creating community-wide awareness).¹⁰³ The objectives driving concerted efforts to train and build capacity are both to expand participatory local decision making as well as to enable communities to take ownership of water schemes, under the theory that this is the best way to guarantee their ongoing success.¹⁰⁴ Training members of impoverished South African communities in the relevant aspects of water management¹⁰⁵ is a formidable task, because of widespread illiteracy, language barriers,¹⁰⁶ and a limited familiarity with technology.¹⁰⁷ Certainly, progressive steps have been taken to overcome obstacles to

¹⁰⁰ *Id.* at 174. *See also* 1997 WHITE PAPER, *supra* n.96, at § 7.3.3 (“Women are the traditional custodians of natural resources in the rural areas, and they are also the people who suffer most from degradation of water and other natural resources. In the rural areas women spend long hours fetching water for their families, and are the custodians of family health.”).

¹⁰¹ Schreiner, *supra* n.2, at 174.

¹⁰² *See id.*

¹⁰³ G. Schoeman & P. Pybus, *The Role of Communication in the Delivery of Water Services to Communities*, 2(4) WATER SCIENCE & TECHNOLOGY: WATER SUPPLY 225, 231 (2002).

¹⁰⁴ *See* Schoeman, *supra* n.103, at 233.

¹⁰⁵ Such relevant aspects of water management include, but are not limited to, mechanics, operations, and maintenance. *Id.* at 233.

¹⁰⁶ The South African constitution formally recognizes 11 official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. S. AFR. CONST. ch. 1, § 6(1), *available at* <http://www.info.gov.za/documents/constitution/1996/96cons1.htm>. However, this list is not exclusive of all languages spoken within the country. *See id.* at § 6(5) (making provision for other languages spoken in the country, including Koi, Nama, San, sign language, German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, Arabic, Hebrew and Sanskrit).

¹⁰⁷ Schreiner, *supra* n.2, at 176; Schoeman, *supra* n.103, at 232. The lack of familiarity with technology is partially attributable to apartheid policy that deliberately denied black citizens access to education in math and science, but it is exacerbated by ongoing economic disparities. Tarmann, *supra* n.41. As Schreiner poignantly notes, a ‘digital

participation, such as the creation of “forum champions” – individuals strategically selected and trained to administer forums, resolve conflict, and communicate with the other members of the community – and the coordination of water management schemes with other community-based local economic development initiatives.¹⁰⁸ However, these measures neither eliminate nor fully compensate for the numerous economic and cultural obstacles to substantive participation by a truly representative slice of local populations. This is troubling, because enhanced democratic local control is provided as one of the primary justifications for delegation of responsibility to local institutions.¹⁰⁹

Meanwhile, the national government has steadily decreased its funding to local governments (funding was reduced by 85% during the period 1991-98 and an additional 55% from 1997-2000) and simultaneously burdened those same localities with the responsibility to provide water to their residents.¹¹⁰ Thus, whatever the intentions behind decentralized management, it may not amount to much more than an artful legislative copout by the national government, because so many communities have neither the capacity to manage water democratically nor the finances to supply it affordably. Delegation does, however, facilitate the more neoliberal aspects of the government’s agenda, including cost recovery and privatization.

divide’ separates those with access to the latest communications technology from those who don’t even have electricity. Schreiner, *supra* n.2, at 174.

¹⁰⁸ Schreiner, *supra* n.2, at 175; Schoeman, *supra* n.103, at 233.

¹⁰⁹ See NWA, *supra* n.66, at Preamble (“Recognising the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate”). In fact, one scholar notes that “[e]mpowerment’ and ‘community participation’ are buzz words[] that end up becoming hollow clichés as they sometimes completely miss the point...Rural communities [are] being used as pawns in the new political game...It is doubtful whether rural communities really understand the extent to which they are being used.” Khuzwayo, *supra* n.20, at 20.

¹¹⁰ McDonald, *No Money, No Service*, *supra* n.26 (also asserting that at the local level, a grossly disproportionate amount of human resources, capital infrastructure, and financial resources continue flow to and benefit wealthier communities, not the impoverished settlements). *But cf.* Part V-C-2 (outlining the potential increases in national funding to local governments post-2000 through the local government equitable share).

B. Cost Recovery

Post-apartheid South Africa inherited a legacy of historically subsidized water provision, and from the outset, the new government embraced the principle of cost recovery in the water sector.¹¹¹ This policy attaches a price tag to water usage,¹¹² which is designed to reflect the true societal cost of consuming a finite resource *and* finance the cost of managing and delivering the resource to end users.¹¹³ Cost recovery stems from the conception of water as an economic resource,¹¹⁴ which view is promoted by the World Bank and reflects the underlying principle that “water should be made available to people only if the company providing it can recover its costs plus a profit...and those who can't pay are not to get services.”¹¹⁵ Proponents of cost recovery in service provision place a premium on economic efficiency,¹¹⁶ although the language in South Africa’s policy documents and legislation on the topic of cost recovery in the water sector never ceases to emphasize the importance of countervailing equity considerations.¹¹⁷ Large, licensed

¹¹¹ See David A. McDonald, *The Theory and Practice of Cost Recovery*, in COST RECOVERY AND THE CRISIS OF SERVICE DELIVERY IN SOUTH AFRICA 17, 20-22 (David A. McDonald & John Pape eds., Human Sciences Research Council 2002).

¹¹² 1997 WHITE PAPER, *supra* n.96, at § 6.5.3 (“To achieve the objectives of water management...all significant water resource use will be charged for, regardless of where it occurs...The only exception will be in respect of the Reserve for basic human needs.”).

¹¹³ NWA, *supra* n.66, at ch.5, pt.1 (“Water use charges are to be used to fund the direct and related costs of water resource management, development and use, and may also be used to achieve an equitable and efficient allocation of water. In addition, they may also be used to ensure compliance with prescribed standards and water management practices according to the *user pays* and *polluter pays* principles. Water use charges will be used as a means of encouraging reduction in waste, and provision is made for incentives for effective and efficient water use.”).

¹¹⁴ 1997 WHITE PAPER, *supra* n.96, at § 6.5 (“What is at issue is the way water is valued as an *economic resource*, the costs incurred to make the resource available to users and the methods used to cover those costs. In pursuit of the objectives of water management, it is widely agreed that *the setting of the appropriate price for a natural resource such as water* can be an effective mechanism to achieve its efficient and productive use.”) (emphasis added).

¹¹⁵ Heidi Vogt, *Environmental Justice in South Africa: Water Sanitation, Privatization, and the Legacy of Apartheid*, 246 DOLLARS & SENSE 8 (March 1, 2003).

¹¹⁶ See, e.g., 1997 WHITE PAPER, *supra* n.96, at § 6.5.

¹¹⁷ See 1997 WHITE PAPER, *supra* n.96, at § 6.5.2 (“It is important that the introduction of realistic pricing for water does not further penalize disadvantaged communities who were already penalised during the apartheid era. White communities were given a strong economic advantage under apartheid through access to cheap water, while economic development in black communities was restricted by a variety of factors, one of which was lack of access to affordable water. In the interests of equity and social justice, this aspect will have to be considered in the question of water pricing. The price to be levied for water reserved to meet basic needs must merit particular attention.”). See also NWRS, *supra* n.69, at ch.3, p t. 4, §3.4.1.1 (“The objective of the pricing strategy is to contribute to achieving equity and sustainability in water matters by promoting financial sustainability and

water uses are governed by the NWA, which establishes a pricing framework and liability for nonpayment and makes provision for water use restrictions and cutoffs as a remedy.¹¹⁸ The water pricing for domestic use, on the other hand, is governed by the WSA, which articulates a duty on the part of a water service authority to provide consumers in its jurisdiction with affordable access to water services, and a duty on the part of consumers to pay reasonable charges for their water use.¹¹⁹

Insufficient access to potable water was a widespread problem before the ANC came into power, but to the extent that water was available, it was provided for free or at a highly-subsidized price.¹²⁰ When the government introduced cost recovery, the price of water increased dramatically, and the connection fees and volumetric charges proved too expensive for struggling, low-income households who had previously accessed water from communal taps.¹²¹ As a result, many individuals were forced to resort to collecting water from streams, canals, and stagnant puddles:

[Metolina Mthembu, a 70-year-old resident of Mbabe village in the KwaZulu-Natal province, is] glad the new government installed a tap outside her home two years ago. But now the water costs money, she notes, and people here are poor. “There are no jobs. We must choose between food and water, so we buy food and pray that the water does not make us ill. It is a bad gamble. Many, many of us have grown sick from the water.”¹²²

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.”)

¹¹⁸ NWA, *supra* n.66, at ch.5, pt.1 (“*Non payment of water use charges will attract penalties, including the possible restriction or suspension of water supply from a waterwork or of an authorisation to use water.*”) (emphasis added); *id.* at §§ 57(4), 59(2), and 59(3)(b).

¹¹⁹ WSA, *supra* n.64, at ch. III, §§ 11(1), 11(2)(d) (qualifying that such charges must be set in accordance with “any prescribed norms and standards for tariffs for water services”).

¹²⁰ Jeter, *supra* n.2; McDonald, *No Money, No Service*, *supra* n.26.

¹²¹ Jeter, *supra* n.2; Jonathan Katzenellenbogen, *Water Shortage Will Reach Crisis Levels Globally By 2025*, BUSINESS DAY (South Africa), August 19, 2002.

¹²² Jeter, *supra* n.2.

Charges for water service delivery have led to substantial debt among low-income families, which according to one national survey, averaged US\$290 by 2001.¹²³ Another case study found payments in arrears that ranged from US\$500 to US\$1500,¹²⁴ and a third found households with debt as high as US\$3800, when combined with payments in arrears for electricity service provision.¹²⁵ Service providers are required to make arrangements with struggling households to help them manage their payments,¹²⁶ but experience has demonstrated that many of these payment arrangements are structured such that the families will remain perpetually in debt.¹²⁷ Providers are also required to establish a policy for indigents,¹²⁸ but in many regions, this policy is either nonexistent or insufficient. For example, in one locality, the measuring stick of a household's indigent status is its water consumption, not its ability to pay, so if the household consumes more than 20 kiloliters per month, it will not be eligible for indigent assistance.¹²⁹ Ratepayers who are unable to make their payments risk having their houses taken from them and sold, and tenants of local public housing risk eviction.¹³⁰ Thus, for those living on the margins of South African society, the stakes of consuming more water than one can afford are very high.

¹²³ The survey was conducted in July 2001 by the Human Sciences Research Council, with a sample size of 2430 respondents. McDonald, *The Bell Tolls for Thee*, *supra* n.6, at 168. The debt figure provided was R\$2,274, which the author converted to US dollars at the interbank rate on January 15, 2001, courtesy of Oanda.com, available at <http://www.oanda.com/convert/classic>.

¹²⁴ Hamedat Deedat, *Viva Prepaids, Viva! Assessing New Technology for Cost Recovery in the Rural Northern Cape*, in *COST RECOVERY AND THE CRISIS OF SERVICE DELIVERY IN SOUTH AFRICA* 143, 154 (David A. McDonald & John Pape eds., Human Rights Research Council 2002). The range of debt figures provided was R\$4000 – R\$12,000, which the author converted to US dollars at the interbank rate on January 15, 2001, courtesy of Oanda.com, available at <http://www.oanda.com/convert/classic>.

¹²⁵ McDonald, *The Bell Tolls for Thee*, *supra* n.6, at 168. The debt figure provided was R\$30,000, which the author converted to US dollars at the interbank rate on January 15, 2001, courtesy of Oanda.com, available at <http://www.oanda.com/convert/classic>.

¹²⁶ See STRATEGIC FRAMEWORK, *supra* n.75, at § 4.5.8 (bullet paragraph entitled “Compassion”).

¹²⁷ See Mthetho Xali, “*They are Killing us Alive*” *A Case Study of the Impact of Cost Recovery on Service Provision in Makhaza Section, Khayelitsha*, in *COST RECOVERY AND THE CRISIS OF SERVICE DELIVERY IN SOUTH AFRICA* 101, 113 (David A. McDonald & John Pape eds., Human Rights Research Council 2002).

¹²⁸ See STRATEGIC FRAMEWORK, *supra* n.75, at § 4.5.8 (bullet paragraph entitled “Compassion”).

¹²⁹ *Id.* at 106.

¹³⁰ *Id.* at 101. A 2001 survey and report conducted jointly by an NGO and a government agency indicated that 2 million people had been evicted from their homes for failure to pay for their water and electricity bills. Anthony

Surprisingly, a debate actually exists among academics and government officials as to the reason behind widespread nonpayment for water service delivery. Some policymakers claim this phenomenon is a residual effect of a “culture of nonpayment” that developed during the liberation movement’s boycotts of the apartheid regime.¹³¹ This argument ultimately pins culpability on impoverished citizens for their inability to pay for cleanwater and turns a blind eye to both the current economic realities among poor communities and the underlying politico-legal structure. Ample evidence put forth by NGOs and university researchers demonstrates that many families, especially in rural areas with staggering levels of unemployment, are simply *unable* to cope with the financial burden of paying water bills.¹³² The disturbing implication of the existence of this debate is that officials who subscribe to the “culture of nonpayment” theory feel justified in limiting or denying access to water based on ability to pay.¹³³

Water service cutoffs are the most common response to a household or a community’s inability to pay, and since cost recovery was introduced in 1996, more than 10 million people have had their water disconnected, with a disputed 700,000 persons cut off from water supply in

Stoppard, *Economy – South Africa: Water, Electric Cutoffs Affect 10 Million*, INTER PRESS SERVICE, March 21, 2002.

¹³¹ McDonald, *No Money, No Service*, *supra* n.26, at 16.

“Many government officials and business executives also argue that a *national habit* dating back to the apartheid era--when entire communities boycotted white rule by refusing to pay rent and utilities--is responsible for many of the cutoffs. ‘You will find in South Africa there exists a culture of nonpayment,’ says Jacob Maroga, managing director of distribution for ESKOM, the electric utility that the state is preparing to sell. ‘There are people who have very legitimate reasons for not paying their bills, but there are many more who grew accustomed through our liberation movement to simply not paying a bill. That’s not the kind of attitude that’s constructive to building a modern, productive economy.’”

Jeter, *supra* n.2.

¹³² Jeter, *supra* n.2; Xali, *supra* n.127, at 106, 113; McDonald, *No Money, No Service*, *supra* n.26.

Most low-income households keep careful records of their service bills, know exactly how much they owe and are deeply concerned about how they are going to pay their current bills and arrears. ‘People take their payments seriously, they have statements on file going back several years. This is not the behavior of someone who does not care about paying for their services,’ explains Municipal Services Project co-director, David McDonald.

Stoppard, *supra* n.130.

¹³³ This is evidenced by municipalities that are rather insensitively advising residents to ‘use less water’ as a solution to their financial woes. Xali, *supra* n.127, at 112.

2001 alone.¹³⁴ Many local governments have also begun installing prepaid meters, which are purportedly designed to help households monitor their water use and avoid incurring debt, but more importantly, they eliminate the problems associated with issuing and collecting bills from poor residents by ensuring that people pay for water before they use it.¹³⁵

Potable water is necessary for drinking and also for cooking, since cheap staple foods like pap, mealie-meal, and samp require lengthy boiling to make them edible for human consumption.¹³⁶ Desperate people whose water supply is cut off are put in the undignified position of asking their neighbors for water or even stealing it, to the detriment of the social fabric of low-income communities.¹³⁷ Demonstrations and riots have ensued in protest to service cutoffs,¹³⁸ and some communities have even organized teams of bootleg plumbers to reconnect water supplies.¹³⁹ In some localities, water service providers have resorted to tearing up service delivery infrastructure, which is counterproductive to the national government's aspirations to expand access, and armed guards are deployed to fend off protestors while water service is disconnected.¹⁴⁰

¹³⁴ Ginger Thompson, *Water Tap Often Shut to South Africa Poor*, N.Y. TIMES, May 29, 2003 (Section A, Column 3); Vogt, *supra* n.115. The 2003 Strategic Framework for Water Services provides that water service providers have the right to disconnect water services that are provided to domestic water consumers, but only as a last resort, after the service provider has followed all the necessary procedures, including compassion, communication, fair process, warning, and restrictions (as opposed to disconnections) in the first instance. See STRATEGIC FRAMEWORK, *supra* n.75, at § 4.5.8.

¹³⁵ Xali, *supra* n.127, at 112; Vogt, *supra* n.115.

¹³⁶ Xali, *supra* n.127, at 107.

¹³⁷ Deedat, *supra* n.124, at 150 (quotes from community members on the problem of water theft and community conflicts over water).

¹³⁸ See, e.g., Sizwe samaYende, *South Africa: Violence Erupts After Water Supplies Cut in Volksrust*, AFR. EYE NEWS SERV., April 20, 1999 (discussing the reaction of citizens in a township located in Mpumalanga to service cutoffs, which came about after the water system's meter-reading was temporarily privatized and the citizens disputed the size of their bills and refused to pay them).

¹³⁹ Thompson, *supra* n.134. The "struggle plumber" is the new hero for neighborhoods who are "fighting for access in the face of multinational corporations' increasing control of water supply". They dismantle prepaid meters and "[hack] into company pipe lines in the name of the right to water." Vogt, *supra* n.115. As Professor Dean Rivkin noted with some irony, struggle plumbers may have achieved more justice in South Africa than all the preceding legal water reformations combined. Professor Dean Rivkin, Class Discussion in Environmental Justice and Community Lawyering at Harvard Law School (Dec. 3, 2004).

¹⁴⁰ McDonald, *No Money, No Service*, *supra* n.26.

Law-abiding households cut off from potable water supplies are forced to turn to natural sources for their drinking, cleaning, and bathing, and these sources are often polluted and unsanitary. In 2000-01, a massive cholera outbreak swept the nation, infecting more than 100,000 people and killing over 200, and this epidemic was directly linked to cost recovery policy and water service cutoffs,¹⁴¹ as the following passage illustrates:

The afternoon's end brings a rural rush hour of women walking down the dirt road that winds through this village. Many of them barefoot and dressed in rags, the mothers and grandmothers come pushing wheelbarrows or carrying big buckets to fetch water for their families. But the road quickly becomes a divide between the haves and have-nots. Those with pennies to spend stand in line on one side and buy their water from a metered tap. The larger group scoops water from a giant, littered mud puddle across the way. Sewage seeps in from leaky pipes nearby. Some of the women said that cholera had stricken their families. Workers at a mobile clinic have reported high rates of diarrhea among children here.¹⁴²

Numerous commentators assert that cost recovery policy thus far has operated at a net economic loss: the administration of the policy – performing service cutoffs and meter installations and hiring collections agencies and lawyers – incurs more expenses than it manages to squeeze out of low-income people, and the cost of coping with water-borne illnesses, in terms of direct medical expenses and lost economic production, has exceeded the estimated total cost of providing water infrastructure to every person in the country.¹⁴³ These figures do not account for the intangible cost of lost human life, and an estimated 43,000 persons die each year from diarrheal causes, mostly poor black children under the age of five.¹⁴⁴

Service cutoffs and the impacts of cost recovery are concentrated among historically disadvantaged citizens. During the decades of apartheid, labor flowing from these selfsame

¹⁴¹ *Id.*

'No one doubts our government's good intentions,' says David Hemson, research director of the government-funded Human Sciences Research Council (HSRC). 'But in the name of development, in the name of progress and modernization, we have exposed our most vulnerable populations to this very colonial disease, a disease that is by definition a by-product of backwardness. *What does that say about policies like cost recovery?*'

Jeter, *supra* n.2 (emphasis added).

¹⁴² Thompson, *supra* n.134.

¹⁴³ Xali, *supra* n.127, at 113, 116; McDonald, *No Money, No Service*, *supra* n.26; Khan, *supra* n5 ; Jeter, *supra* n.2.

¹⁴⁴ McDonald, *No Money, No Service*, *supra* n.26.

communities subsidized infrastructure to deliver water to white suburbs and white-owned industries, and as a result, service levels in wealthy and industrial areas now equal or surpass North American standards.¹⁴⁵ Thus, the imposition of cost recovery policy, combined with decentralized management of water resources and service distribution, seems patently unjust for impoverished localities that must simultaneously address poverty and water scarcity, all while financing the construction of water infrastructure to deliver water services without a sizeable industrial or suburban tax base.¹⁴⁶

C. Privatization

Equity aside, decentralization and cost recovery lay the groundwork for privatization of the water service sector. Local governments are trying to turn water services into profitable ventures in order to attract private investors,¹⁴⁷ and this fits squarely within the national policy position. As discussed in Part III, international lenders like the IMF and the World Bank have encouraged the South African government to adopt conservative fiscal measures such as cost recovery (making the dispensation of public services like water pay for itself through fees) and privatization (relinquishing state-owned water operations to private companies). This pressure has been tremendously influential, as is evidenced by the most recent national articulation of water policy: “While privatisation is an emotional and very much political issue in South Africa, the private sector has played and will continue to play an important role in water services. The challenges facing us are simply too big to be addressed by government alone.”¹⁴⁸ Private sector

¹⁴⁵ *See id.*

¹⁴⁶ *See, e.g.,* V.J. Bath, *The How, Why and What of Managing Water Supply During the Period of South Africa's Political Rebirth*, 14(1) WATER SUPPLY 101, 106 (1996) (predicting the difficulty of financing water services and water supply in districts that do not contain large water consumers to help foot the bill of district-wide service delivery).

¹⁴⁷ Jeter, *supra* n.2; Thompson, *supra* n.134.

¹⁴⁸ *See* STRATEGIC FRAMEWORK, *supra* n.75, at 19, § 3.4.7 (quoting Minister Kasrils, address to the African Investment Forum, April 2003).

involvement in local water service constitutes one of the ten “key principles informing the institutional vision” laid out by the 2003 Strategic Framework for Water Services, which is the most recent national policy document for the water services sector.¹⁴⁹

Proponents of privatization argue that private companies have greater capacity to efficiently deliver water, and they note that state-run water services have failed to bring clean water and sanitation to millions of people in the preceding decades, and that, as a factual matter, international donors and lenders require some element of privatization as a precondition for funding.¹⁵⁰ Pro-privatization interests are clearly winning the battle, as they have the support of both national and local policymakers. Since 1999, several local governments have entered long-term water service contracts with international conglomerates, including Nelspruit, Johannesburg, and Cape Town.¹⁵¹

Critics of privatization express concern that private companies’ single-minded attention to the bottom line will lead to anti-labor measures, such as layoffs, wage cuts, union-busting activities, and cutting corners on health and safety measures.¹⁵² They also point out that

¹⁴⁹ Id. at §§ 1.3, 3.1.

¹⁵⁰ Ford, *supra* n.71; Vogt, *supra* n.115.

¹⁵¹ *South Africa: First Water Services Privatization Contract Awarded*, BBC WORLDWIDE MONITORING, Friday, January 29, 1999 (text of report by the South African news agency SAPA); Johnson, *supra* n.8; Dumisane Lubisi, *South Africa: Nelspruit’s Privatised Water Deal Signed*, AFR. EYE NEWS SERV., April 21, 1999; Thompson, *supra* n.134; Wyndham Hartley, *Project Will Secure Cape Town’s Future Water Supply*, BUSINESS DAY (South Africa), September 27, 2004.

¹⁵² It is important to keep in mind that those individuals constituting the labor class, who are detrimentally affected by anti-worker measures, are also the members of impoverished communities in need of water service extension. See Johnson, *supra* n.8. Labor unions have been the most vocal and organized opponents of privatization. See, e.g., Kihato, *supra* n.93 (discussing the framework agreement struck between the government and the Congress of South African Trade Unions, called the Framework of the Restructuring of Municipal Service Provision). In the face of onslaughts against service delivery, the municipal workers’ union (SAMWU) held a workshop that was designed to focus on restructuring public service delivery as an alternative to privatization. From the perspectives of environmental justice and community advocacy, as well as public relations, this was an interesting effort to channel participants’ energy toward proactive, positive, and creative efforts, rather than reactive, combative, and negative strategies like litigation. At this workshop, participants engaged in role play to come up with creative methods for restructuring the public work force to make it more effective and thereby protect it from being eliminated and outsourced or privatized altogether. John Pape, *Public Sector Alternative: SAMWU’s Efforts*, 25(4) SOUTH AFRICAN LABOUR BULLETIN 45 (2001). Unions are also concerned with the gendered implications of privatization. For example, the municipal workers’ union and an NGO called the Municipal Services Project jointly conducted the

privatization is limited as an option to those regions of the country with a sufficiently wealthy water consumer base to attract private investment, and that rural areas are not well situated to leverage such funds.¹⁵³ There is additional concern that even within a given region, a private service provider may have an incentive to focus on providing water to wealthier areas, where marginal returns are higher, at the expense of building the infrastructure necessary to extend access to poorer communities.¹⁵⁴ This phenomenon, combined with the long-term nature of contracts entered thus far, may serve to reinforce apartheid-era service delivery, since many townships and peri-urban areas still have not been incorporated into the wealthy, white-washed cities they enfold and therefore risk exclusion from the benefits of privatization.¹⁵⁵ In fact, opponents of privatization marshal the vivid language of historical oppression in their critiques,¹⁵⁶ and it is noted that “[t]he issue of access to services has become an explosive new cause in the same urban townships and rural squatter camps that were principal battlegrounds for the fight against apartheid.”¹⁵⁷

V. ANALYZING THE RIGHT TO WATER

A. *Water as a Human Right*

Opponents of cost recovery and privatization define the provision of water as a quintessentially public service, and from this presumption flows the conviction that water should be provided by a democratic government in accordance with the public interest, rather than by a

Gender and Local Government Restructuring Research and Capacity Building Project, the results of which supported previous international research findings. The study indicated that structural adjustment and privatization negatively affect workers, and specifically negatively affect female workers more than male workers due to gendered divisions of labor in the workplace. Samson, *supra* n.56.

¹⁵³ Kihato, *supra* n.93.

¹⁵⁴ Johnson, *supra* n.8.

¹⁵⁵ Lubisi, *supra* n.151 .

¹⁵⁶ “‘Privatization is a new kind of apartheid,’ said Richard Makolo, leader of the Crisis Water Committee, which was formed to resist the privatization effort in a township called Orange Farm, 25 miles south of Johannesburg. ‘Apartheid separated whites from blacks. Privatization separates the rich from the poor.’” Thompson, *supra* n.134.

¹⁵⁷ *Id.*

profit-seeking entity, private or public, that arguably responds to market imperatives rather than community imperatives.¹⁵⁸ As one scholar reflects,

For with the acceptance of water as a commodity comes the dilemma of what to do with the idea of water as a basic human right. In other words, if we are willing to use monetary value as our sole guiding principle for water extraction, treatment and distribution, on what grounds do we make moral decisions about how much water is enough and who is consuming too much? Just because someone can afford to pay the cost of filling their swimming pool or washing their cars every day, should they have the right to do so when others are struggling to survive with no water at all?¹⁵⁹

The global debate on whether water is an economic resource or a public good that eludes commodification is a longstanding one and exceeds the scope of this paper.¹⁶⁰ However, to the extent that there is an emphasis on the public interest in water provision and inherent rights of access in South Africa, this stems from a conception of water as a human right. It is useful to explore the right to water from a human rights perspective, because, structural adjustment policies notwithstanding, the South African Constitution incorporates human rights principles in its Bill of Rights, and these principles infuse all subsequent national water laws and policies.¹⁶¹

International human rights are individual rights that are enforceable against State governments, as compared to abstract morals or standards that carry no legal weight. For the purposes of this discussion, human rights are limited to “genuine rights under international law, where States have a duty to protect and promote those rights for an individual.”¹⁶² Within this rubric, the South African Constitutional provision on water reflects human rights principles,

¹⁵⁸ Johnson, *supra* n.8. CHIKOZHO, *supra* n.27, at 6 (“[O]ne has to bear in mind that water is a basic human need and therefore, its allocation has to be carried out taking into consideration some social imperatives. The need for emphasizing the user pays principle and cost recovery has to be delicately balanced with the users’ ability to pay lest others will be deprived of this basic need.”)

¹⁵⁹ McDonald, *No Money, No Service*, *supra* n.26.

¹⁶⁰ In fact, this debate was a central topic at the International Conference on Water and the Environment in Dublin in 1992, which resulted in guiding principle #4: “Water has an economic value in all its competing uses and should be recognized as an economic good.” The Dublin Statement on Water and Sustainable Development, *at* <http://www.wmo.ch/web/homs/documents/english/icwedece.html>. Despite the adoption of this principle in the Dublin conference, the classification of water as a commodity is far from settled practice. *See, e.g.*, ROTHFEDER, *supra* n.49, at 77-97 (chapter analyzing the international political debates of the last fifteen years over whether water is best characterized as a legal right or a non-guaranteed need).

¹⁶¹ De Lange, *supra* n.5.

¹⁶² Peter H. Gleick, *The Human Right to Water*, 1 WATER POLICY 487, 488 (1998) (on file with author).

because it places a duty on the South African government to protect and promote the right to water for all individuals.¹⁶³ In fact, scholars advocating the international recognition of a human right to water point to Section 27 of the South African Constitution to lend support for their argument.¹⁶⁴

The two major sources of international law are treaties (conventions or covenants, in the parlance of international legalese) and customary international law, which develops over time in recognition of widely-agreed-upon morals and norms of conduct.¹⁶⁵ Among the various binding agreements and sources of customary law, there is no explicit human right to water,¹⁶⁶ but several international legal scholars argue persuasively that a right to water can be inferred from the basic instruments of international human rights law.¹⁶⁷ These scholars find support for an inferred right to water from the following explicit human rights:

¹⁶³ S. AFR. CONST. ch. 2, § 27, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>. But compare Ron C. Slye, *Economic and Social Rights – South Africa – Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights*, 97 AM. J. INT’L L. 669, 678-79 (2003) (asserting that the socioeconomic rights in the South African Constitution depart from international human rights, as envisioned by the ICESCR committee, in that those rights enumerated in the Bill of Rights are *group* rights, not *individual* rights: the state’s positive obligations apply to groups, and there are no individual entitlements to specific resources) with Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20(2) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 284, 296-97 (2004), available at <http://wwwserver.law.wits.ac.za/sajhr/2004/wesson.pdf> (observing that a recent decision by the South African Constitutional Court appears to extend individual rights to members of a particular group, but only with respect to a resource that has limited cost implications and requires no necessary expertise to administer, and speculating that with respect to matters with ‘far-reaching financial implications’ or that ‘involve significant expertise’, the Court will recognize only the more generalized group right to reasonable governmental plan, policy, or program).

¹⁶⁴ Both Peter Gleick and Ignacio Alvarez refer to § 27(1)(b) of the South African constitution as evidence of “State practice” treating water as a human right. Gleick, *supra* n.162, at 493; Ignacio J. Alvarez, *The Right to Water as a Human Right*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 76 (Romina Picolotti & Jorge D. Taillant eds., 2003). State practice is an important element of the process in which customary international law develops over time. See Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 72, 72 (Henry J. Steiner & Philip Alston eds., 2nd ed., 2000).

¹⁶⁵ See, e.g., Malanczuk, *supra* n.164, at 72-78.

¹⁶⁶ The one exception is the United Nations Convention on the Rights of the Child. See Alvarez, *supra* n.164, at 74-75. In fact, there is even a longstanding debate concerning the existence of an explicit human right to a healthy environment, of which water is only a component, albeit a crucial one. See, e.g., Timothy J. Schorn, *Drinkable Water and Breathable Air: A Livable Environment as a Human Right*, 4 GREAT PLAINS NAT. RESOURCES J. 121, 122 137-39 (2000) (citing W. PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION (1976)).

¹⁶⁷ Gleick, *supra* n.162; Alvarez, *supra* n.164, at 71; Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1 (1992). But cf. ROTHFEDER, *supra* n.49, at 78 (observing

- The inherent right to *life*, including rights to an appropriate means of subsistence and the right to a decent standard of living [found in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)]¹⁶⁸
- The right to *health* [found in Article 12 of the ICESCR]¹⁶⁹
- The right to *food* [found in Article 11 of the ICESCR]¹⁷⁰

Water is a precondition to these rights, because survival, an adequate standard of living, good health, and potentially, sufficient food, all depend on a minimum amount of clean water to prevent dehydration, reduce the risk of water-borne diseases, and provide for cooking, hygiene, and sanitation.¹⁷¹

The lingering question remains, though, that if water is inextricably linked to other cherished and legally protected rights, why was it not included in human rights documents? Peter Gleick's answer is that, at its genesis, the field of international human rights focused on recognizing and protecting libertarian individual rights to freedom from violence and oppression by the State. He observes that the field evolved over time to encompass the recognition and protection of standards and morals associated with general human wellbeing, and subsequent treaties reflected this progression.¹⁷² However, he contends that at the time of their drafting in the 1950s and 60s, the framers of these relatively 'modern' treaties did not foresee that water scarcity and water access would be problematic on such a global scale, but instead considered water to be a

that at recent global environmental summits, which are dominated by wealthy power players, the current consensus is that water is *not* a right, only a need). The political conclusions drawn at these summits, however, do not necessarily eviscerate scholarly conclusions to the contrary.

¹⁶⁸ Gleick, *supra* n.162, at 492, and Alvarez, *supra* n.164, at 73-74.

¹⁶⁹ Gleick, *supra* n.162, at 492, and Alvarez, *supra* n.164, at 73.

¹⁷⁰ Gleick, *supra* n.162, at 492, and Alvarez, *supra* n.164, at 73. Alvarez contends that water is necessary to realize a right to food, but acknowledges that water's status with respect to food is not totally clear. *Id.* at 76. Gleick, on the other hand, does not think that water can be inferred from the right to food, because food can be imported. Gleick, *supra* n.162, at 491.

¹⁷¹ See Gleick, *supra* n.162, at 491.

¹⁷² Gleick, *supra* n.162, at 488.

resource as fundamental and plentiful as air.¹⁷³ Thus, in his view, the omission of an explicit right to clean water in basic international human rights documents is attributable to a lack of foresight, rather than an intentional exclusion.¹⁷⁴

Establishing a human right to water will not, in and of itself, guarantee the ultimate satisfaction of worldwide water needs.¹⁷⁵ Rather, the value of acknowledging a human right to water in international jurisprudence is that such recognition will encourage both the international community and domestic governments to a) translate that right into specific legal obligations and responsibilities [which South Africa has already done], b) *renew* their efforts to meet the basic water needs of their populations [which South Africa is in the process of doing], and c) *financially prioritize* meeting basic water requirements over other investment and management decisions [which South Africa only recently claims to be doing].¹⁷⁶

B. South Africa's Free Basic Water Policy

In 2001, South Africa formally adopted a policy of Free Basic Water (FBW), which aims to provide each household with 6,000 liters of clean water every month free of charge – the minimum quantity of water identified by the government as necessary for survival.¹⁷⁷

Purportedly, the FBW policy was announced shortly after the Minister of Water Affairs, Ronnie

¹⁷³ This makes more sense when considered in light of the fact that the world's population is exploding, while the world water supply has remained fixed for the last 3 million years. Thus, water scarcity is increasing (water scarcity being defined as the amount of water available relative to the number of human beings vying for access to the resource), and a global water crisis is more widely recognized in 2005 than it was fifty years ago. *See, e.g., Alvarez, supra* n.164, at 71.

¹⁷⁴ Gleick, *supra* n.162, at 490, 501. As he rather passionately asserts, "To assume the contrary would mean that there is no right to the single most important resource necessary to satisfy the human rights more explicitly guaranteed by the world's primary human rights declarations and covenants." *Id.* at 493.

¹⁷⁵ As Gleick points out, a human right to food unequivocally exists, and yet nearly a billion people in the world remain undernourished. *Id.* at 489.

¹⁷⁶ Gleick, *supra* n.162, at 489. *Cf. ROTHFEDER, supra* n49, at 78 ("The question of right versus need isn't a tiny semantic distinction or an intellectual argument with little significance in real life. The day-to-day living conditions endured by millions of people – and for some, their survival – as well as the growing gap between water haves and haven-nots, are directly tied to the outcome of the debate over whether water is a right or a need. Moreover, global water management policies...are being crafted and funded based on its conclusions.").

¹⁷⁷ *Saving Water, supra* n.8.

Kasrils, observed a woman in the Eastern Cape collecting water from a dirty stream despite water pipes having recently been installed in her village by DWAF, and upon inquiry, learned that she was not using piped water because she couldn't afford it.¹⁷⁸ This incident happened to coincide with the cholera epidemic, and immediately preceding the 2000 nationwide local government elections, the ANC President Thabo Mbeki announced the adoption of Free Basic Water.¹⁷⁹ The policy was welcomed by politicians and impoverished citizens, while technocrats have argued that it is not logistically feasible, cost-effective, or sustainable, and critics have scathingly referred to it as “politically expedient” and “hastily conceptualised”.¹⁸⁰

To the contrary, however, FBW can trace its lineage back through regulation and statute, all the way to Section 27 of the Constitution, which provides that:

- (1) Everyone has the right to have access to -
 - a. health care services, including reproductive health care;
 - b. sufficient food and *water*; and
 - c. social security, including, if they are unable to support themselves and their dependants, 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.¹⁸¹

The Water Services Act (WSA) of 1997 includes a provision that effectuates this Constitutional requirement by outlining the right of access to basic water supply,¹⁸² and regulations issued by DWAF in June 2001 implement this provision of the WSA by

¹⁷⁸ Kihato, *supra* n.93, at 29.

¹⁷⁹ *Mbeki Promises Free Water, Electricity to South Africa's Poor*, AGENCE FRANCE-PRESSE, October 8, 2000.

¹⁸⁰ Kihato, *supra* n.93, at 29.

¹⁸¹ S. AFR. CONST. ch. 2, § 27.

¹⁸² Specifically, Section 3 of the WSA provides:

Right of access to basic water supply and basic sanitation

- (1) Everyone has a right of access to basic water supply and basic sanitation.
- (2) Every water services institution must take reasonable measures to realise these rights.
- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
- (4) The rights mentioned in this section are subject to the limitations contained in this Act.

WSA, *supra* n.64, at § 3.

defining a minimum standard for basic water supply service.¹⁸³ A predecessor to FBW, called the lifeline tariff, was envisioned in the 1997 White Paper on National Water Policy, which was to provide the “Reserve for basic human need” free of charge.¹⁸⁴ While the lifeline tariff was apparently never realized, it demonstrates that policymakers were conscious of their Constitutional obligation to provide water access and that they contemplated free or highly subsidized service provision as a potential solution. A version of this solution was not adopted as national policy until 2001, a year after President Mbeki made his groundbreaking announcement, but the 2003 Strategic Framework for Water Services formally recognizes the policy of FBW, which all local water service authorities are legally obliged to implement.¹⁸⁵ Thus, irrespective of its

¹⁸³ The regulation provides that:

Basic water supply

3. The minimum standard for basic water supply services is –
 - (a) the provision of appropriate education in respect of effective water use; and
 - (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month -
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

DEP'T OF WATER AFFAIRS & FORESTRY, REGULATIONS RELATING TO COMPULSORY NATIONAL STANDARDS AND MEASURES TO CONSERVE WATER §3 (2001), *available at* <http://www.dwaf.gov.za/Documents/Notices/Water%20Services%20Act/SEC9DREG-20%20April%202001.doc> (on file with Author).

¹⁸⁴ 1997 WHITE PAPER, *supra* n.96, at § 6.5.3. The 1997 White Paper initiated the fundamental overhaul of water resource policies that took place under National Water Act of 1998. STRATEGIC FRAMEWORK, *supra* n.75, at § 1.2.

¹⁸⁵ *See id.* at § 4.4.1. Lest the unfamiliar reader be confused by repeated references to policies and strategies, the Strategic Framework document provides some help in navigating through this semantic quagmire: “Policies establish the vision, overall goals and approach, *legislation* creates the enabling environment and *strategies* set out the detail of how the policies will be implemented in order to achieve the vision and goals.” *Id.* at § 1.4 (emphasis in original).

pre-election expediency, FBW is rooted in political and legal history, and it is now firmly entrenched in the governance of domestic water services.¹⁸⁶

FBW requires that water service authorities provide the minimum quantity of water for free, which has led to its characterization as a daring policy that “emerged in opposition to international policy trends.”¹⁸⁷ However, it is unambiguous that any water consumed over and above the minimum quantity necessary for survival (as defined by the government) must be paid for, in support of cost-recovery principles:

The adoption of the free basic water policy has not negated [the “user pays”] principle. On the contrary, the free basic water policy strengthens the principle in that it *clearly requires consumption in excess of the basic water supply service to be paid for* while enabling free access by the poor to a basic water supply service necessary to sustain life.¹⁸⁸

One of the strongest critiques of FBW is that the quantity defined by the government as the minimum quantity necessary for survival is insufficient. The government’s policy advocates 25-33 liters/person/day, depending on the size of the household, whereas the UN and the World Health Organization both recommend a minimum of 50 liters/person/day to ensure a healthy life.¹⁸⁹ Critics therefore assert that FBW is actually regressive in its implementation, because an insufficient minimum quantity provided for free, combined with payment at cost for any water

¹⁸⁶ As of July 2001, the majority of local governments had implemented the national government’s official policy of FBW. *South Africa: Programme for 6,000 Litres of Free Water per Family Begins 1 July*, BBC MONITORING, July 2, 2001.

¹⁸⁷ Kihato, *supra* n.93, at 57.

¹⁸⁸ STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1 (emphasis added). *See also id.* at § 4.1 (Key Principle #3) (outlining consumer responsibility to pay for services provided over and above the free basic quantity), and at Preface (“With this right [to a basic amount of water for free] comes a responsibility... to pay for services where these are provided over and above a basic service.”).

¹⁸⁹ Khan, *supra* n5 ; McDonald, *No Money, No Service*, *supra* n.26. *But cf.* Michael Kidd, *Not a Drop to Drink: Disconnection of Water Services for Nonpayment and the Right of Access to Water*, 20(1) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 119, 134 n.64 and associated text (2004), available at <http://wwwserver.law.wits.ac.za/sajhr/2004/kidd.pdf> (citing a variety of international sources, whose estimates of the necessary minimum quantity range from 20 – 50 liters). To put these quantities in perspective, an average bath requires 200 liters of water, and a toilet flush uses 10-15 liters. McDonald, *No Money, No Service*, *supra* n.26. It is also worth noting that the South African government is clearly aware that 25 liters/person/day may not be sufficient, as the 2003 Strategic Framework encourages water service authorities to increase the level of free water from 25 liters to 50 liters and indicates that, at some point in the future, the national government will consider boosting the national subsidy to make this feasible. STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1.

consumed in excess (rapid tariff hikes often kick in after the first block of free water), actually leaves some families with higher water bills than they had before the free water policy was introduced.¹⁹⁰ Another regressive aspect of the policy is its calculation on a per-household basis, rather than an individual basis, because poor households are typically larger than those in the middle class, so the free block of water must be distributed among more people.¹⁹¹ Furthermore, households with outstanding water debt are not eligible for their allocation of free water until their debt is paid off, and families' whose service has been disconnected for nonpayment forfeit their right to free basic water.¹⁹² These exceptions exclude a substantial portion of the most disadvantaged citizens in the population from free basic water, because, as noted previously, water debts can be staggering and hundreds of thousands of families have suffered water service cutoffs.

FBW forms part of the national government's water strategy, but it is distributed and paid for by local government through water service authorities.¹⁹³ The policy's financing is slated to come from two sources: 1) *cross-subsidization* among users within a supply system or within a water services area, and 2) the *equitable share*, which is a Constitutionally required portion of the annual national budget allocated to local governments.¹⁹⁴ In reality, cross-subsidization is not a viable source of funding in regions that do not contain a critical mass of local economic activity with consumers who

¹⁹⁰ McDonald, *No Money, No Service*, *supra* n.26. Some support for this may be found in the facts of *Manqe v. Durban Transitional Metropolitan Council*, a case first decided by the Durban High Court in February 2001. 2002 (6) SA 423 (D). In *Manqe*, the plaintiff had been exceeding her free basic supply of 25 liters/person/day and had been paying for the excess in the past, but once she was no longer able to pay for the excess, she was cut off entirely for nonpayment. See Kidd, *supra* n.189, at 125-26, 131.

¹⁹¹ *Id.* See also McDonald, *The Theory and Practice of Cost Recovery*, *supra* n111, at 29.

¹⁹² Vogt, *supra* n.115; Katzenellenbogen, *supra* n.121.

¹⁹³ See STRATEGIC FRAMEWORK, *supra* n.75, at § 2. See also David Jackson, *Free Water 'Lifeline' For the Needy*, BUSINESS DAY (South Africa), April 8, 2004.

¹⁹⁴ See S. AFR. CONST. ch. 13, §§ 214(1), 227(1)(a), available at <http://www.info.gov.za/documents/constitution/1996/96cons13.htm>; STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1.

are purchasing water in bulk.¹⁹⁵ Most rural municipalities fall within this category, and these are the regions most likely to need financing for additional service delivery infrastructure, in addition to the costs of operation and maintenance faced by all municipalities.¹⁹⁶ Financing of FBW is further complicated by the cash-strapped status of local governments, most of which were running at a deficit as of 2000.¹⁹⁷ Meanwhile, private companies involved in the South African water service sector are arguing that providing a minimum quantity of water for free is not economically viable, thereby realizing the fears of those in the anti-privatization camp, who argue that a private company should not be making life-or-death decisions according to the bottom line, which is arguably what is at stake in the dispensation of free basic water to extremely poor communities.¹⁹⁸

Thus, the importance of national funding in order to realize the provision of free basic water is magnified – the latest water services strategy document indicates that the government is aware of this, since it notes that the equitable share was to have been temporarily increased for the 2003-04 period specifically to help local governments implement free basic services.¹⁹⁹ As of 2003, millions of people living in shantytowns and rural areas still had not been provided with free water and reports of service cuts remained widespread among the communities most at risk of contracting water-borne diseases.²⁰⁰ By April 2004, 20 million people were still projected to receive water (read:

¹⁹⁵ Kihato, *supra* n.93, at 21.

¹⁹⁶ *See id.* at 27.

¹⁹⁷ Khan, *supra* n5.

¹⁹⁸ *See* Ford, *supra* n.71.

¹⁹⁹ STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1.

²⁰⁰ *See* Stoppard, *supra* n.130. *See also* Thompson, *supra* n.134, and Carolien van der Voorden, *Free Water in SA Remains a Dream*, 21(2) WATERLINES 27 (2002).

had not yet received free water),²⁰¹ and as of the time of this paper, according to DWAF's own figures, over 15 million people still have not been served with free basic water, and 13 million of these people are classified as "poor". This is 33% of the total population, and 45% of the 'poor' population, still not served with a minimum quantity of free water, which is particularly disturbing in light of the fact that 95% of the nation's water service authorities are reported as having implemented FBW.²⁰²

C. Constitutional Protection of the Right to Water

The South African Constitution is admired as one of the most progressive in the world, because the Bill of Rights enshrines numerous socioeconomic rights, including rights of access to land, adequate housing, social security, health care, food, and water.²⁰³ The South African Constitutional Court has ruled that these enumerated rights are justiciable, and in so doing, has departed from the historical divisions in international human rights jurisprudence between political and civil rights on the one hand, which are traditionally considered justiciable, and economic and cultural rights on the other, which have been considered presumptively nonjusticiable.²⁰⁴

The Constitution obligates the State to take legislative or other reasonable measures to progressively realize each of these rights, and while adjudication of these rights necessarily requires the courts to issue judgments that implicate the government's budgetary decisions, the Court has rejected the theory that enforcing socioeconomic rights in court overly politicizes the judiciary and interferes with the doctrine of separation of powers among the legislative,

²⁰¹ Jackson, *supra* n.193.

²⁰² These figures are from DWAF's website devoted to FBW, which is updated daily, at <http://www.dwaf.gov.za/FreeBasicWater>.

²⁰³ S. AFR. CONST. ch.2, §§ 25-27. See also Vogt, *supra* n. n.115, and Klug, *supra* n.42 .

²⁰⁴ Shadrack B. O. Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socioeconomic Rights in South Africa*, 4 BUFFALO HUMAN RIGHTS L. REV. 79, 89 (1998).

executive, and judicial branches of government.²⁰⁵ Nevertheless, the Court has carefully tailored its judgments and its analyses of socioeconomic rights to preserve the balance of power in its Constitutional review.²⁰⁶ This trend surely reflects prudential considerations by the justices about both the institutional competency and legitimacy of the judiciary – it may also indicate a measure of doubt about the utility of judicial review over the administration of budgetary resources that are being deployed to implement socioeconomic rights. As one scholar notes,

[T]o date there have been very few constitutional challenges to the basic inequalities which are part of apartheid's legacy. *Furthermore, it is not clear what a constitution can do in this regard. While a constitution may guarantee rights and ensure oversight of government decisions, it cannot address the basic problem of lack of resources.*²⁰⁷

1. A Roadmap for Litigating Socioeconomic Rights

Since 2000, the Constitutional Court has issued several monumental decisions respecting the rights to housing, health care, and social security.²⁰⁸ This court has not yet presided over a case litigating the Constitutional right to water, but a lower court ruled in 2002 that an alleged violation of the right to water is a justiciable issue, just like the rights to housing and health care

²⁰⁵ *Id.* at 81; De Lange, *supra* n.5.

²⁰⁶ *See* Wesson, *supra* n.163, at 285 (observing that the court in *Grootboom*, *infra* n.208, sought “to protect the interests of vulnerable sectors of society, while also leaving the primary responsibility for co-ordinating socio-economic programs in the hands of the state,” and that this strikes “an appropriate balance between the competing roles of the state and the judiciary”). *See also* Kende, *supra* n.20, at 149:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

Id.

²⁰⁷ Klug, *supra* n.42, at 818 (emphasis added).

²⁰⁸ Gov't of Republic of South Africa v. *Grootboom*, 2000 (11) BCLR 1169 (CC), *available at* <http://www.concourt.gov.za/files/grootboom1/grootboom1.pdf> (adjudicating the right to housing and finding that the state housing program was unconstitutional because it did not make reasonable provision for those persons most immediately in desperate need) [hereinafter *Grootboom*]; *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC), *available at* <http://www.concourt.gov.za/files/tac/tac.pdf> (adjudicating the right to health care services and holding that the right to health care is subject to the availability of resources, so the government is not required by the Constitution to provide life-saving specialty services that it cannot afford) [hereinafter *TAC*]; *Khosa v. Minister of Soc. Dev.*, 2004 (6) BCLR 569 (CC), *available at* <http://www.concourt.gov.za/files/khosa/khosa.pdf> (adjudicating the right to social security) [hereinafter *Khosa*].

that had thus far been asserted in the Constitutional Court.²⁰⁹ This raises the question of what exactly it means in practice to have a justiciable right to water protected by the Constitution. The existing socioeconomic rights cases provide some useful guidance for analyzing the contours of this right. It is well-established that the rights and duties enumerated in the Bill of Rights must be analyzed in light of the Constitution as a whole, that the substantive provisions and implementation provisions of each right must be read jointly, and that the rights must be considered within their relevant social and historical context.²¹⁰ The right to water is physically positioned amidst the cluster of socioeconomic rights in the Bill of Rights, including housing, health care, and social security, and the right to water shares an implementation provision with the rights to health care and social security, which is identically worded to the implementation provision for the right to housing.²¹¹ Furthermore, the right to water shares a social and historical context with rights to housing, health care, and social security, each of which is a crucial aspect of a humane standard of living and a necessary precondition to improving the socioeconomic circumstances of the impoverished majority. Thus, it is reasonable to extrapolate the contours of a right to water from the Constitutional Court’s holdings on these other rights, which jointly provide a roadmap for adjudication of socioeconomic rights.

The Constitution does not provide individuals with specific rights to access specific resources; instead, it places an obligation on the government to take reasonable action to achieve

²⁰⁹ *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council*, 2002 (6) SA 66 (T). See also Kidd, *supra* n.189, at 123, n.18 and associated text.

²¹⁰ See Grootboom, *supra* n.208 at ¶21-22 (analyzing the substantive and implementing provisions of the right to housing (§ 26) in tandem) (“[Each of] the...rights in Chapter 2 of the Constitution (which contains the Bill of Rights)...must be construed in its context...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.”). See also Slye, *supra* n.163, at 671-72.

²¹¹ The implementation provision for the right to health care, food, water, and social security states: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” S. AFR. CONST. ch. 2, § 27(2). The implementation provision for the right to housing states: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” S. AFR. CONST. ch. 2, § 26(2).

these generalized rights for the population.²¹² Thus, to get through the courthouse doors, a person who is deprived of access to sufficient potable water must assert that the government’s action (or inaction) is unconstitutional within the meaning of Section 27. A governmental action takes the form of a plan, policy, or program (PPP) that is designed to achieve the “progressive realisation” of Constitutional rights. The Court uses reasonableness as the measuring stick to evaluate a PPP,²¹³ and its expectations for reasonably progressive realization are bifurcated into a) measures taken to implement those rights for the general public (the general component) and b) measures taken to implement those rights for the desperately poor citizens who are most immediately in need of assistance (the indigent component).²¹⁴

For evaluating the general component of the PPP, the reasonableness test consists of three elements.²¹⁵ First, the PPP must contain substantive measures that are comprehensive, coherent, balanced, flexible, and feasible.²¹⁶ It must have a workable legal and administrative infrastructure (mere framework legislation is insufficient), and it cannot exclude large swaths of people – a PPP that excludes a “significant segment of society” is presumptively unreasonable, and in light of the overall purpose of the PPP, the state must provide relevant justifications for excluding groups of people.²¹⁷ Second, the rate of implementation must reflect “progressive realisation” – this means that in order for the government to satisfy its Constitutional obligations,

²¹² See discussion, *supra* n.163 (regarding individual rights versus group rights).

²¹³ Wesson, *supra* n.163, at 287.

²¹⁴ The state has a special obligation to attend to the needs of the very poor, who cannot afford to pay for the most basic socioeconomic rights. Slye, *supra* n.163, at 676-77.

²¹⁵ Slye, *supra* n.163, at 617 (analyzing Grootboom, *supra* n.208, at ¶¶ 21,38, and S. AFR. CONST. ch. 2, § 26(2)).

²¹⁶ Wesson, *supra* n.163, at 287 (analyzing Grootboom, *supra* n.208, at ¶¶ 40,41,43).

²¹⁷ See Slye, *supra* n.163, at 673 (analyzing Grootboom, *supra* n.208, at ¶ 78); *id.* at 672 (analyzing Grootboom at ¶¶ 42, 43); Wesson, *supra* n.163, at 288 (jointly analyzing Grootboom, *supra* n.208, TAC, *supra* n.208, and Khosa, *supra* n.208); *id.* at 295, n.56 and associated text (exploring how the court’s decision in *Khosa* sharpens the reasonableness analysis).

it must move “as expeditiously as possible” toward its goal, but it need not achieve its goal *immediately*.²¹⁸ Third, the government’s obligation is subject to the availability of resources.²¹⁹

In contrast, in order to withstand reasonableness scrutiny by the Court, the *indigent* component of the PPP must be implemented on a fast track (“with due regard to the urgency of the situations it is intended to address”),²²⁰ it must provide relief for a significant number of people, it must provide immediate relief to some of those people, though not all,²²¹ and most importantly, it must consist of measures devised, implemented, supervised, and *funded* by the State.²²² Thus, while the State’s financial obligations to implement the general component of a PPP are limited by its determination of the availability of resources, the State has much less budgetary discretion with respect to the indigent component of the PPP. The funding for the indigent component must consist of a reasonable part of the national budget for the overall PPP, and it must be given financial priority, even if doing so compromises the government’s other stated objectives that drive the general component of the PPP.²²³

If a party sues the government regarding the constitutionality of its PPP, the plaintiff will bear the burden of proving that either component of the government’s PPP is unreasonable,²²⁴ and should the plaintiff prevail, the only remedy the court can provide is an order requiring the government to devise a new PPP that *is* reasonable – the intricacies of a remedial PPP are left to the legislative branch that was found in violation of the Constitution in the first instance, but the

²¹⁸ Kende, *supra* n.20, at 144 (quoting Grootboom, *supra* n.208, at ¶ 45 (in turn citing United Nations Committee ESCR, general comment 3, 9 (1990) (comment on implementation of Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, *available at* http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)).

²¹⁹ Slye, *supra* n.163, at 671.

²²⁰ Wesson, *supra* n.163, at 288.

²²¹ *Id.* (analyzing Grootboom, *supra* n.208, at ¶ 68). *See also* Slye, *supra* n.163, at 678 (also analyzing Grootboom at ¶68).

²²² *See* Slye, *supra* n.163, at 673 (analyzing Grootboom, *supra* n.208, at ¶ 96).

²²³ *See* Wesson, *supra* n.163, at 288 (analyzing Grootboom, *supra* n.208, at ¶ 66). *See also* Kende, *supra* n.20, at 145 (also analyzing Grootboom at ¶ 66).

²²⁴ Slye, *supra* n.163, at 680.

Court may provide some specific recommendations as guidance.²²⁵ An arduous burden of proof and a lack of specific relief surely will depress the incentive for individual citizens to litigate.²²⁶ However, the lower courts have demonstrated a willingness to construe standing requirements liberally in water rights cases, so the Constitutional Court does remain open as a venue for parties to bring public impact litigation.²²⁷

2. *The Viability of Litigating the Right to Water*

The South African government appears to be mindful of its Constitutional obligation to provide access to water. From the inception of water's legal transformation, the various policy documents, statutes, and regulations acknowledge the Constitutional mandate and the need to meet the population's most basic water requirements. The ongoing inequities in water access and widespread water service cutoffs highlight the government's failure to fulfill its Constitutional obligation, but they do not necessarily demonstrate a Constitutional *violation*, within the rubric of socioeconomic Constitutional claims brought before the Constitutional Court.

The most immediately Constitutionally suspect program is that of cost-recovery, which drives service cutoffs. However, Professor Michael Kidd of University of Kwazulu-Natal Faculty of Law has recently analyzed the constitutionality of water service cutoffs and concluded

²²⁵ *Id.* (analyzing TAC, *supra* n.208).

²²⁶

This combination of rights and remedies ultimately provides only a limited incentive for poor communities to use litigation as a means for enforcing socioeconomic rights, since the remedy will be, at best, an order that the state replace an unreasonable policy with a reasonable one. Such an order may well fail to provide any immediate or tangible benefit to poor individuals.

Id. at 679.

²²⁷ See Highveldridge, *supra* n.209. Advocates of judicial restraint would shutter at this statement. See, e.g., Kende, *supra* n.20 (arguing that “historical original intent” in South Africa is that in the long run, the elected branches, not the courts, should be the “primary engines of social transformation.”).

that, while service cutoffs are a prima facie limitation on the Constitutional right to water,²²⁸ water service providers can justify this limitation, because a significant source of funding in the water service sector comes from cross-subsidization, and thus,

[T]hose who fail to pay their accounts are compromising the water services provider's ability to provide basic services to other users. Limitation of water use is therefore not just a manner of debt collection (and if this were the only reason for discontinuing a water supply it would be unlikely to meet the requirements of the limitations clause) but part of the exercise of balancing water access rights between all the users of the resource.²²⁹

As Professor Kidd clearly recognizes, any Constitutional analysis of government water programs will involve a detailed examination of financial considerations, especially since the Bill of Rights, as interpreted by the justices of the Constitutional Court, requires sufficient funding of at least the indigent component of a program. Therefore, it is worth exploring the funding structure of the government's water programs in more detail.

Each province is entitled under the Constitution to an equitable share of the National Revenue Fund, which is comprised of the money received by the national government.²³⁰ The national parliament distributes this fund among the provincial and local governments and municipalities via the annual Division of Revenue Act.²³¹ However, the national government does not have unlimited discretion in its budgetary allocations. Before passing this legislation, the parliament must consult with provincial and local governments and a national agency called the Financial and Fiscal Commission.²³² Furthermore, the Constitution provides some guidance

²²⁸ Kidd, *supra* n189, at 121.

²²⁹ *Id.* at 133. However, he goes on to note that completely disconnecting service so as to deny an indigent person of his or her free basic minimum quantity would violate the Constitution, and in addition, to the extent that the current quantification of free basic water – set at 25 liters/person/day – is insufficient to meet basic human needs, this may also violate section 27. *Id.* at 132, n.57 and associated text.

²³⁰ S. AFR. CONST. ch. 13, § 213.

²³¹ § 214; *see also, e.g.*, Division of Revenue Act 5 of 2004, GG vol. 465, no. 26222, of 31 March 2004, *available at* <http://www.info.gov.za/gazette/acts/2004/a5-04.pdf>. It was the Division of Revenue Act 5 of 2002 that created the impetus to ultimately phase DWAF out of direct water service provision and financing and transfer operation and financing of water service schemes to local governments. *See* STRATEGIC FRAMEWORK, *supra* n.75, at § 1.2 (discussing Division of Revenue Act 5 of 2002, GG vol. 441, no. 23290, of 28 March 2002, *available at* <http://www.info.gov.za/gazette/acts/2002/a5-02.pdf>); *see also* NWRS, *supra* n.69, at ch. 3, § 3.9.4.1.

²³² S. AFR. CONST. ch. 13, § 214(2).

in this determination, mandating that legislation quantifying the equitable share take into account, among other things:

- the general obligation “to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them”²³³
- the localities’ fiscal capacity, development needs, and income disparities²³⁴

Thus, the Constitution bequeaths each local government with the right to receive sufficient funding assistance from the national government “to enable it to provide basic services and perform the functions allocated to it.”²³⁵

The NWA does not provide much guidance for the funding of local water service provision.²³⁶ It merely states that the Minister of DWAF *may* provide financial assistance in the form of grants, loans, or subsidies appropriated by Parliament and designed to further the purposes of the Act, and that in so doing, the Minister must consider the needs for equity and redressing the results of past discrimination.²³⁷ Likewise, the WSA *permits* but does not *require* the Minister to provide financial assistance (grants, loans, or subsidies) to water service institutions.²³⁸

Consumer water tariffs (water use charges) served as the primary source of funding for water service provision up until 2000, when the local government elections implemented the ‘final phase in the local government transformation process’.²³⁹ Post-2000, the local government

²³³ S. AFR. CONST. ch. 13, § 214(2)(d).

²³⁴ S. AFR. CONST. ch. 13, § 214(2)(e)-(g).

²³⁵ S. AFR. CONST. ch. 13, § 227(2)(a).

²³⁶ The National Water Resources Strategy lays out the financial implications of implementing the provisions of the NWA, and describes two principal sources of funding for the DWAF – a Water Trading Account (revenue from water use charges) and allocations from the government’s Exchequer Account (funding from the national parliament). The NWRS anticipates phasing the former account out in 2005-2006 “following the transfer of water services schemes to local governments.” NWRS, *supra* n.69, at ch. 3, §§ 3.9.1, 3.9.4, 3.9.4.1.

²³⁷ NWA, *supra* n.66, at ch. 5, § 61. This provision also lists other necessary considerations: transparency, purpose of the financial assistance, financial position of the recipient, and need for water resource protection. *Id.*

²³⁸ WSA, *supra* n.64, at ch. IX, §§ 64(1)(a) – (c). The WSA diverges from the NWA in that it explicitly permits funding not just from parliamentary appropriation, but also from nongovernmental organizations and other governments and governmental institutions. *Id.* at § 64(1)(b)-(c).

²³⁹ STRATEGIC FRAMEWORK, *supra* n.75, at §§ 1.2, 4.4.1.

equitable share serves as a significant source of funding for basic water services.²⁴⁰ The Strategic Framework commits the national government to continue providing financial support to local governments' efforts to extend access to a basic water supply, and it lays out three sources of national funding: the local government equitable share (the annual, unconditional grant, which the local government has ultimate discretion to distribute among its various functions as it sees fit), municipal infrastructure grants (conditional capital grants earmarked for building water supply facilities), and capacity-building grants (presumably designed to help local governments increase citizen participation in the management and operation of water services).²⁴¹

An interesting confluence of events occurred in South Africa at the turn of the millennium, and the manner in which the legislative and executive branches of the government have responded to these events may not be coincidental, but rather, evidence that leaders in the public (water) sector are aware of possible Constitutional suits and laying the groundwork to successfully defend against them. In 2000, the Constitutional Court issued its most sweeping and formative judgment on socioeconomic rights to date in *Government of Republic of South Africa v. Grootboom*, in which it held the government in violation of the Constitution for its failure to provide immediate housing for the most desperate and needy citizens.²⁴² That same year, a massive cholera epidemic swept the populace and came to a head politically with the President's announcement of a Free Basic Water policy.²⁴³ Lastly, nationwide local government

²⁴⁰ *Id.* See also Kidd, *supra* n.189, at 133 n.61 (“The ‘equitable share’ of national revenue to municipalities, required by [section] 214 of the Constitution and the Division of Revenue Act 5 of 2002, covers operating transfers to municipalities to be used primarily for the provision of basic level of services to the poor/indigent. The proportion of nationally raised revenue which goes to local government should be equitable, based on the functions it has to fulfill and the amount of revenue it is able to generate on its own.”).

²⁴¹ *Id.* at § 4.1.

²⁴² *Grootboom*, *supra* n.208.

²⁴³ See n.179 and associated text.

elections concluded the final phase in the local government transformation process that decentralized many functions and responsibilities, including water services, to the local level.²⁴⁴

FBW appears to be designed to satisfy the ‘indigent component’ requirement of the government’s overarching long-term plan to extend water services to every member of the population. For reasons discussed in Part IV-B, cross-subsidization at the local level cannot sufficiently finance service extension and provision of free water, especially in rural regions, where poverty is greatest, water is scarce, and infrastructure is the least-developed. Thus, even with the adoption of FBW, the national government would still be vulnerable to Constitutional attack, if it did not make a concerted effort to support local governments’ efforts financially.

Two years after FBW was formally adopted, the government explicitly laid out sources of financing, in addition to cost-recovery, in its 2003 policy document, the Strategic Framework for Water Services. This document emphasizes for the first time the national government’s commitment to funding the nationwide effort to eliminate the backlog in basic water services and improve the level of service provision over time, and it articulates the specific sources of funding available.²⁴⁵ Furthermore, it indicates that national funding through the equitable share was to have been increased for the period 2003-04, specifically to help local governments implement free basic services.²⁴⁶ The Strategic Framework makes only a passing reference to the Constitutional Court’s *Grootboom* decision, namely, that *Grootboom* requires it to provide water services and to have a special program or pay special attention to those in dire need.²⁴⁷

Interestingly, though, its predecessor, the Draft Water Services White Paper, discussed the

²⁴⁴ See n.239 and associated text.

²⁴⁵ STRATEGIC FRAMEWORK, *supra* n.75. For greater description, see n.245 and associated text. It is worth noting, however, that this is only the first time the government *articulated its legal responsibility* to fund water service extension. Several years before this document was issued, the national government had already spent hundreds of millions of dollars to bring water services to over 3.5 million people. Singer, *supra* n.2.

²⁴⁶ STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1.

²⁴⁷ *Id.* at § 7.3.1, n.12.

financial and programmatic implications of the *Grootboom* decision on water services much more extensively:

The recent “Grootboom” Constitutional Court judgement implied that where a municipality has failed to progressively plan and implement strategies for addressing the needs of its consumers, and where a municipality does not have the financial resources to address these needs through a strategy of progressive realisation, it is the responsibility of provincial government, in the first instance, *and thereafter national government to support, strengthen and regulate*, to ensure the provision of basic services to those persons in dire need. All three spheres thus have a real responsibility and obligation to see to the realisation of basic rights to water supply and sanitation and must exercise their roles in a manner that indeed provides for the progressive realisation of those rights.²⁴⁸

This draft White Paper was ultimately supplanted by the Strategic Framework and carries no legal weight or policy influence. It is not entirely clear why the DWAF chose to downplay the level to which the *Grootboom* decision was driving the formulation and articulation of national water policy in its final policy document. Nevertheless, the government’s actions since *Grootboom* (adopting an indigent component to its overall water services program and making explicit commitments to fund this program in its most recent policy documents) will most likely satisfy the kind of inquiry the Constitutional Court is likely to engage in when presiding in the first instance over a water rights case that facially challenges the government’s water programs.²⁴⁹

VI. CONCLUSION

In 2001, a scholar of South African water rights stated rather poignantly that, “here has been a formal governmental commitment to human rights principles in the constitution and

²⁴⁸ DEP’T OF WATER AFFAIRS & FORESTRY, DRAFT WHITE PAPER ON WATER SERVICES 14 (2002) (on file with Author).

²⁴⁹ This article does not explore the viability of challenging the local governments’ policy of cost-recovery, *as applied*. An as-applied challenge could potentially target a specific class of water service cutoffs, in which water service institutions have cut off water service altogether – *including* the free basic minimum quantity – to those households that cannot afford to pay for water consumption that exceeded the free basic minimum allotment. As a precondition to such a challenge, it would be necessary to demonstrate conclusively that the free basic minimum, as currently quantified, is not sufficient to meet the households’ survival needs. For more on this, see nn.228, 229, and associated text.

ensuing legislation, rules, and regulations. However, for human rights principles to be realized in fact, there must also be a commitment of financial resources and cooperation among federal and local officials...²⁵⁰ Four years later, the national government has legally proclaimed a commitment of financial resources to extend water access to the population, and it has intimated that provision of *at least* a minimum of free basic water to all its citizens is within the country's financial capacity.²⁵¹ Time will tell whether these commitments on paper translate into faster water service extension and better water service delivery, and thereby a safer, more humane life for the millions of citizens still collecting water from unclean sources for their basic survival needs. In light of the government's most recent programs and policies, it is not clear how effective a suit in the Constitutional Court would be at improving water access and water equity. It has been noted that, in South Africa, "[l]itigation and judicial activism, however progressive, can only play a limited contributory role to social transformation."²⁵² In other words, to the extent that the current pace and quality of extending and providing water services is unsatisfactory, the next big push for more equity in water access, and collateral improvements in the life conditions of South Africa's most impoverished citizens, may need to come from civil society in an organized effort to give existing water laws more redistributive bite. This is a simultaneously over-simplistic and overwhelming conclusion, but a historically recurrent one nevertheless. A former minister of the Department of Water Affairs once described water as the foundation of democracy and social stability in South Africa.²⁵³ If it is ever possible to mobilize the population around a salient political issue and effectively pressure elected officials to change the course of democratic governance, surely access to water can serve as motivation.

²⁵⁰ De Lange, *supra* n.5.

²⁵¹ STRATEGIC FRAMEWORK, *supra* n.75, at § 4.4.1 ("The cost associated with providing free basic water to poor households is not large for a country of our economic size and strength.")

²⁵² Gutto, *supra* n.204, at 99.

²⁵³ Debell, *supra* n.16.