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Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries

STEPHEN C. McCAFFREY* AND KATE J. NEVILLE**

INTRODUCTION

As a cholera epidemic sweeps across Zimbabwe, and as climate change models predict increasing droughts across parts of sub-Saharan Africa, the urgency of the need for access to clean water in southern Africa has re-emerged in the media.¹ A right to water, internationally recognized through General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights (ESC Committee), takes on particular immediacy in light of these outbreaks; however, while the recognition of this right internationally and by some states is no doubt a positive development, the implications of its implementation are less well-defined, particularly in many developing countries, including those that have entrenched the general right into their domestic legislation.

For South Africa, the availability of clean water sources is necessary to stop the spread of virulent, water-borne diseases like cholera. Beyond crisis containment, water access is needed for human well-being and national development, and is particularly challenging in a period of increasing pressure on water resources from climate change, population growth, and urbanization. The South African government has recognized this by including the right to water in its constitution. Although post-apartheid South Africa has made striking gains in the provision of water services—national access to basic water service is reported by its Department of Environmental Affairs and Tourism to have increased to approximately ninety-five percent by 2008²—there is still significant variation in the levels of

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1. See, e.g., Editorial, *In a Time of Cholera*, MAIL AND GUARDIAN ONLINE, Jan. 23, 2009, <http://www.mg.co.za/article/2009-01-23-in-a-time-of-cholera> (last visited Apr. 20, 2009); eGov Monitor, *Heat Waves and Extreme Drought Will Increase with Climate Change*, <http://www.egovmonitor.com/node/23807> (last visited Mar. 2, 2009).

2. South Africa Department of Environmental Affairs and Tourism, State of the Environment South Africa, Goals and Indicators, Human settlements, Access to water, <http://soer.deat.gov.za/default.aspx?m=451> (last visited Mar. 23, 2009) ("In 2008 it was estimated that only 2.4 million people of the South African population

success of water provision mechanisms in the country. The constitutional recognition of a right to water provides South African communities with some recourse, through the judicial system, against the state in cases of inadequate water access. Legal avenues have been recently tested, with favorable outcomes for the plaintiffs, in Phiri, South Africa, part of the municipality of Johannesburg.³

This paper examines the potential implications of a human right to water, in part through the ruling of the Johannesburg High Court in the *Mazibuko* case. It considers the distinction between core obligations requiring immediate implementation and obligations that can be achieved progressively, and suggests that many governments with limited resources (or with political constraints that limit the potential for resource redistribution) will have great difficulty in meeting the demands of a right to water articulated as an immediately applicable core obligation without significant assistance from the international community. We contend that without the development of financial and institutional capacity to provide water services, the right to water is of only limited value. The legal requirement to provide a service is of little use if the government does not have the ability to fulfill those responsibilities, and thus an exclusive focus on human rights in legal terms (through the constitution or international human rights law) is unlikely to solve the problem of inadequate water access, particularly when framed as a right requiring immediate full compliance. Moreover, imposing an immediately applicable obligation that a country cannot fulfill puts that state in breach of international law. We suggest that the human right to water should be considered in general social terms rather than only in legal terms, and that in efforts to change governmental responsibilities, equal attention should be paid to the institutional capacity of governments in developing countries to fulfill those rights.

We argue that a human right to water has little meaning without the government's capacity to uphold that right in practice, and that an exclusive focus on legal and constitutional mechanisms for protecting human rights might be unproductive in the case of water access. To defend this position, we proceed in four sections: the first section provides background on the legal claims of a human right to water, including the reinforcement of the right by the UN Committee on Economic, Social and Cultural Rights and the distinction between core obligations and those that may be fulfilled progressively. It introduces several questions about the implementation of the right, particularly with respect to the implementation responsibilities for international and national commit-

(49.4 million) did not have access to basic water services.”).

3. In South Africa, the courts have become a forum for the pursuit of development goals, including rights to the access to water and to housing. It seems to the authors that the use of legal mechanisms for securing the means of survival and livelihood maintenance—such as water—are used as avenues of last resort for achieving these goals.

ments to water provision that are shifted to local governments. Section two critically assesses the relationship between domestic and international law, illustrating our arguments through the lens of the South African *Mazibuko* case. Section three expands the discussion of the political implications of the right to water, and suggests that public participation in designing implementation strategies for these rights might compensate for limited financial and technical resources of local governments. The final section offers a summary of our arguments as to the implementation challenges of the right to water as a core obligation and suggestions as to how public participation and procedural justice might be mechanisms through which water access could be most effectively secured in developing countries.

I. THE HUMAN RIGHT TO WATER ON THE INTERNATIONAL STAGE: GENERAL COMMENT 15

THE HUMAN RIGHT TO WATER – BACKGROUND

Given that humans must have water to live—we cannot go without it for more than a few days—it is remarkable that none of the principal human rights instruments mentions a right to water. The pattern was set by the 1948 Universal Declaration of Human Rights⁴ and was carried through into the two agreements that grew out of the Universal Declaration: the International Covenant on Civil and Political Rights (CP Covenant)⁵ and the International Covenant on Economic, Social and Cultural Rights (ESC Covenant).⁶ Whether this omission was due to a reluctance to state the obvious—that water, like air, is a precondition for enjoying all other human rights—whether water simply had not yet become a pressing issue even by the mid-1960s or whether nations were cognizant even in the mid-20th century of the enormity of the challenge of implementing a right to water, the failure of these instruments to enshrine such a right seems today to be a rather serious oversight.

GENERAL COMMENT 15

Perhaps in recognition of this omission, in 2002 the United Nations Committee on Economic, Social and Cultural Rights, which monitors implementation of the corresponding Covenant, adopted a General Comment (General Comment No.

4. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (Dec. 12, 1948).

5. G.A. Res. 2200 (XXI), ¶ 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter CP Covenant].

6. G.A. Res. 2200 (XXI), ¶ 49, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ESC Covenant]. Both the CP and ESC Covenants were agreed upon in 1966 and entered into force a decade later; the CP Covenant now has 164 parties, and the ESC Covenant has 160 parties. United Nations Treaty Collection, Status of Treaties, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en and http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

15, "The right to water . . .") finding that a right to water exists as an independent right, by necessary implication from Articles 11 (right to an adequate standard of living) and 12 (right to health) of the Covenant.⁷ Specifically, this document provides that:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic hygienic requirements.⁸

This is the first recognition by a United Nations human rights body of an independent and generally applicable human right to water.⁹ While it is no doubt an authoritative interpretation of the ESC Covenant, this finding is not binding per se on parties to the Covenant,¹⁰ nor does it "create" a previously nonexistent human right to water (indeed, as indicated above, the Committee found that the right already exists by necessary implication from other rights set forth in the Covenant). However, the General Comment does serve notice that the ESC Committee will expect the 160 parties to the Covenant¹¹ to indicate the status of their implementation of the right to water in the course of their general reports on implementation of the rights under the ESC Covenant.¹²

7. UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment No. 15* (2002), *The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. ESCOR Doc. E/C.12/2002/11 (Nov. 26, 2002) [hereinafter *General Comment 15*].

8. *Id.* ¶ 2.

9. An earlier general comment by the ESC Committee, General Comment No. 6 (1995) on the economic, social and cultural rights of older persons, recognized, in that context, that the right to water is a human right contained in art. 11(1) of the ESC Covenant. UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment No. 6* (1995), *The Economic, Social and Cultural Rights of Older Persons*, ¶ 5, 32, U.N. Doc. E/1996/22. Following from this initial recognition, more recent United Nations action regarding the right to water includes the appointment in 2008 of Catarina de Albuquerque as an "Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation." See Press Release, IRC International Water and Sanitation Centre, Catarina de Albuquerque: Appointed as Independent Expert on Right to Water and Sanitation, <http://www.irc.nl/page/46442> (last visited May 10, 2009).

10. The ESC Committee was not created by the ESC Covenant but by a resolution adopted in 1985 by the U.N. Economic and Social Council. ESCOR Res. 1985/17 (May 28, 1985). See generally OFFICE OF THE COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet No.16 (Rev.1): The Committee on Economic, Social and Cultural Rights*, <http://www.unhchr.ch/html/menu6/2/fs16.htm> (last visited Apr. 4, 2009). Neither that resolution nor, a fortiori, the Covenant, gives the Committee the authority to adopt decisions that bind the member states. See generally Stephen C. McCaffrey, *The Human Right to Water*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 93, 94 (EDITH BROWN WEISS et al. eds., 2005) [hereinafter McCaffrey 2005].

11. See United Nations Treaty Collection, Status of Treaties, International Covenant on Economic, Social and Cultural Rights, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=en>.

12. "Under articles 16 and 17 of the Covenant, States parties undertake to submit periodic reports to the Committee—within two years of the entry into force of the Covenant for a particular State party, and thereafter once every five years—outlining the legislative, judicial, policy and other measures which they have taken to

We do not propose in this paper to re-examine the human right to water¹³ or to review generally the content of General Comment 15.¹⁴ Instead, our focus is on implementation of the right, and in particular, on the concept of “core obligations” of immediate applicability that are identified in the General Comment. To provide context for this discussion, the following paragraphs offer a brief overview of a fundamental difference between the two Covenants, relating to when their obligations become applicable, and how this is affected by the concept of “core obligations.”

Article 2 of the Civil and Political Covenant provides that parties are to “respect and ensure”¹⁵ the enjoyment of the rights it recognizes. This is an immediately applicable obligation, which follows from the fundamental nature of the obligations involved. For example, a state may not claim it will phase in the obligation not to commit extrajudicial killings in violation of Article 6 (right to life) of the CP Covenant.¹⁶ The comparable provision of the ESC Covenant, on the other hand, provides that each party “undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”¹⁷ The many qualifications within this provision make it a much softer and more attenuated obligation than its counterpart in the CP Covenant. States are to achieve ESC rights progressively, whereas they must guarantee CP rights immediately. This difference in treatment is perhaps justified, and is at least understandable, in view of the fact that many of the rights recognized in the ESC Covenant require expensive government action for their implementation, and that many of them are of a less fundamental nature than those in the CP Covenant.

This would lead one to conclude that if a right derives from one expressly recognized in the ESC Covenant, states need only take steps to implement it progressively, to the maximum of their available resources. From the perspective of many states, especially those developing countries that lack the resources to

ensure the enjoyment of the rights contained in the Covenant. States parties are also requested to provide detailed data on the degree to which the rights are implemented and areas where particular difficulties have been faced in this respect.” OFFICE OF THE COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet No.16 (Rev.1)*, *supra* note 10. The Committee poses questions to the parties on their reports and issues “concluding observations” stating the Committee’s opinion concerning the status of the parties’ implementation of the Covenant. *Id.* (indicating that the Committee meets twice a year in Geneva).

13. For treatments of the human right to water, *see, e.g.*, Peter H. Gleick, *The Human Right to Water*, 1 WATER POL’Y 487 (1998); Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1 (1992); Henri Smets, *The Right to Water as a Human Right*, 30 ENVTL. POL’Y & L. 248 (2000).

14. For an analysis of General Comment 15, *see generally* McCaffrey 2005, *supra* note 10.

15. CP Covenant, *supra* note 5, art. 2(1). The actual language provides that each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”

16. CP Covenant, *supra* note 5, art. 6.

17. ESC Covenant, *supra* note 6, art. 2(1).

meet the standard of "sufficient, safe, acceptable, physically accessible and affordable water" spelled out in General Comment 15, this would probably be seen as reasonable.¹⁸ Indeed, if they were told that the obligation to meet this standard with respect to their entire populations was one of immediate applicability they might well raise strong objections. Yet this is precisely what General Comment 15 comes very close to doing.

In 1990, the ESC Committee declared in General Comment No. 3 that it "is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [recognized in the ESC Covenant] is incumbent upon every State party."¹⁹ In General Comment No. 15, the Committee finds that there are "a number of core obligations in relation to the right to water," and, crucially, that they "are of immediate effect"²⁰ The Committee states this despite the fact that the governments that ratified the ESC Covenant only accepted an obligation to "achiev[e] progressively the full realization of the rights" it recognizes.²¹

The Committee identifies the following nine core obligations in relation to the right to water:

- (a) To ensure access to the minimum essential amount of water . . . ;
- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis . . . ;
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- (d) To ensure personal security is not threatened when having to physically access to [sic] water;
- (e) To ensure equitable distribution of all available water facilities and services;
- (f) To adopt and implement, [on the basis of a participatory and transparent process,] a national water strategy and plan of action addressing the whole population;
- (g) To monitor the extent of the realization, or the non-realization, of the right to water;
- (h) To adopt relatively low-cost targeted water programs to protect vulnerable and marginalized groups;

18. General Comment 15, *supra* note 7, ¶ 2.

19. UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *General Comment No. 3 (1990), The nature of States parties' obligations (Art. 2, par.1 [of the Covenant])*, ¶ 10, U.N. Doc. E/1991/23.

20. General Comment 15, *supra* note 7, ¶ 37.

21. ESC Covenant, *supra* note 6, art. 2(1). For a discussion of the Committee's inconsistency in describing which obligations are of immediate applicability, see McCaffrey 2005, *supra* note 10, at 109.

- (i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.²²

It bears emphasis that according to the ESC Committee, this rather long list of obligations is of immediate applicability. It would not be surprising if some parties to the Covenant objected on the grounds that: 1) they did not accept obligations of this magnitude that would be immediately applicable, and 2) they simply do not have the financial and capacity-related resources to implement the items identified as core obligations in relation to the right to water. The obligations identified in paragraphs (a) and (c) alone would be extremely difficult for many developing countries to meet in the near future, let alone immediately. The United Nations Millennium Development Goals, adopted in 2000 by all U.N. member states, call for “reduc[ing] by half the proportion of people without sustainable access to safe drinking water” by 2015,²³ not for ensuring immediate access to “the minimum essential amount of water” for all.²⁴ Having imposed these heavy obligations on state parties, the ESC Committee places at minimum a moral responsibility on wealthy nations and international financial institutions for seeing that they are fulfilled: “For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfill their core obligations”²⁵ Although the international donor community will doubtless continue to provide assistance to developing countries in the water sector to the best of its ability, in today’s economic and financial climate it seems uncertain whether the Committee’s lofty expectations can be met. This places additional pressure on States parties.

The situation with respect to the right to water that we have reviewed thus far may be summarized as follows: (a) a human right to water, which is not expressly mentioned in any of the basic human rights instruments, is found by the ESC Committee to exist by implication from rights expressly mentioned in the Covenant; and (b) the most basic aspects of the right—so-called core obligations—are made immediately obligatory upon States parties to the ESC Covenant. From the perspective of the government of a State party, especially a developing country government, an obligation that was not expressly accepted is not only

22. General Comment 15, *supra* note 7, ¶ 37(a)-(i).

23. United Nations Millennium Declaration, G. A. Res. 55/2, ¶ 19, U.N. Doc A/RES/55/2 (Sep. 8, 2000). The Millennium Development Goals (MDGs) are available at <http://www.un.org/millenniumgoals/>. This United Nations website states that all 191 member states of the U.N. have pledged to meet the goals by the year 2015. Millennium Development Goals, Background, <http://www.un.org/millenniumgoals/bkgd.shtml> (last accessed May 10, 2009).

24. General Comment 15, *supra* note 7, ¶ 37(a).

25. General Comment 15, *supra* note 7, ¶ 38.

found to exist by a body that was not created by the Covenant²⁶ but is found by that body to be applicable immediately in its most important—and probably most costly—respects. When viewed through the prism of the importance of water, both to human life and as a precondition to the enjoyment of the other rights reflected in the ESC Covenant, the Committee's action makes abundant sense. But without affirmative acceptance, or buy-in, by governments, it may reasonably be wondered how effective implementation is likely to be. Moreover, the focus thus far has been only on the national governments themselves (and in reality, perhaps only on heads of state or heads of government and foreign ministries). There is no requirement that a national government consult with subsidiary political units, let alone local governments, before entering into treaty obligations such as the ESC Covenant. Indeed, the law of treaties precludes a state from invoking its internal law as a justification for its failure to perform its duties under a treaty.²⁷ And yet it is precisely the local governments that will in many cases bear the burden of implementing these weighty obligations. The burdens of requiring municipal governments to implement obligations accepted on the national level are well illustrated by the *Mazibuko* case, to which we now turn.

II. THE *MAZIBUKO* CASE IN SOUTH AFRICA

Lindiwe Mazibuko was a resident of Phiri, one of the poorest suburbs of the township of Soweto, South Africa.²⁸ Together with four other residents of Phiri, she brought an application to the Johannesburg High Court in 2006 against the Minister of Water Affairs and Forestry of South Africa, the City of Johannesburg (the City), and Johannesburg Water (Proprietary) Limited (Johannesburg Water), a water service provider wholly owned by the City of Johannesburg.²⁹ The plaintiffs—or “applicants,” as they are styled in South African civil law cases—challenged the following actions and decisions of the first two defendants (“respondents”): the disconnection of their unlimited water supply, for which they had paid a fixed, or flat, rate; the installation and continued use of prepayment water meters; and the decision to limit the amount of free water to twenty-five liters per person per day, or six kiloliters per household³⁰ per month.

26. See General Comment 15, *supra* note 7.

27. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339.

28. “Phiri is one of the townships forming the larger area of Soweto that falls within the area of the City of Johannesburg.” *Lindiwe Mazibuko & Others v. The City of Johannesburg & Others* 2008 High Court of South Africa (Witwatersrand Local Division) Case No. 06/13865 ¶ 3 (S. Afr.) [hereinafter *Mazibuko*]. Further information on the *Mazibuko* case, including the full opinion, the amicus brief of the Centre on Housing Rights and Evictions (COHRE) and analysis of the judgment, is available on the website of COHRE, www.cohre.org/watersa. A report on the case is available on the website of IRIN, maintained by the U.N. Office for the Coordination of Humanitarian Affairs, <http://www.irinnews.org/Report.aspx?ReportId=78076>.

29. *Mazibuko*, *supra* note 28.

30. According to the court, “the average household in Phiri consists of about 16 persons” *Id.* ¶ 166.

The plaintiffs also sought declarations by the court that a national regulation setting a minimum water supply at twenty-five liters per person per day, or six kiloliters per household per month, is unconstitutional and invalid and that the applicants and other residents of Phiri who are similarly situated are entitled to fifty liters of water per person per day and must be given an option to have a metered supply installed at the cost of the City.³¹ The three respondents opposed the application.

As suggested by the plaintiffs' claim, the lawsuit resulted from a decision by the City and Johannesburg Water to convert Phiri's water service from a flat rate system to one involving water meters.³² These meters supply the allocation of water mentioned above free of charge, but cut off the supply thereafter "unless the consumer uses prepaid tags to obtain further water credits."³³ Thus, when a monthly free allocation has been consumed, additional water could be obtained only by paying in advance.³⁴ Many consumers in Phiri had been in arrears under the flat rate system. The City introduced the meters "as a credit control measure The benefit that was dangled was that the accumulated arrears would be written off,"³⁵ but the court noted that residents had been advised that "anyone who did not opt for prepayment meters would be without water."³⁶

Ms. Mazibuko opted not to have a prepayment meter installed; the City responded by cutting off her water supply.³⁷ In the words of Johannesburg High Court Judge Moroa Tsoka, "for a period of seven months she had no water. She resorted to obtaining water from a water reservoir in Chiawelo, a 3 km walk from Phiri. This source of water was then closed for her. As she had no alternative, she succumbed to the installation of a prepayment meter."³⁸ The court went on to note the likelihood that "a number of other households also had no other option but to accept the prepayment meters," and that it was undisputed that "the residents of Phiri are not only poor but are also uneducated . . . [and] not aware of their legal rights"³⁹

The plaintiffs challenged the prepayment water meters on the ground, *inter alia*, that Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water of June 8, 2001 (the National Standard Regulations), adopted by the Minister of Water Affairs and Forestry, is unconstitutional.⁴⁰ Regulation 3(b) defines "basic water supply service" as

31. *Id.* ¶ 11.

32. *Id.* ¶¶ 3, 9.

33. *Id.* ¶ 84.

34. *Id.* ¶ 3.

35. *Id.* ¶ 19.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* ¶¶ 2, 7 & 25.

follows:

The minimum standard for basic water supply service 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.⁴¹

Section 27 of the Constitution of South Africa provides in part as follows:

(27) Health care, food, water and social security

- (1) Everyone has the right to have access to . . .
 - (b) sufficient food and water; . . .
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights⁴²

Section 27(2) incorporates essentially the same standard as found in Article 2 of the ESC Covenant, namely, that the rights in question be realized progressively, within the limits of the state's available resources—a standard that seems on its face to contradict the notion of “core obligations” contained in General Comment 15.

The court noted that section 39(1)(b) of the Constitution requires that courts consider international law in interpreting the Bill of Rights (Chapter 2 of the Constitution, sections 7-39), and that according to section 233, “a reasonable interpretation of any legislation which is consistent with international law must be preferred.”⁴³ The court quoted the following passage from a South African judicial decision:

International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this.⁴⁴

It was, according to the court, “therefore imperative and instructive to consider

41. *Id.* ¶ 26.

42. S. AFR. CONST. 1996, § 27(1)(b), (2), available at <http://www.info.gov.za/documents/constitution/1996/index.htm>.

43. *Mazibuko*, *supra* note 28, ¶ 31.

44. *Id.* ¶ 32 (quoting *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2006 (6) BCLR 625 (W) (S. Afr.)).

the international law regarding the right to have access to water.”⁴⁵ Although South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights, the South African Constitutional Court found in a 1995 decision that section 39(1) applies even if the instrument in question is not technically binding on South Africa.⁴⁶ Consequently, the court referred to General Comment 15, discussed in the preceding section. Judge Tsoka found that according to the General Comment, one of the aspects of the right to water is accessibility, meaning that “the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population.”⁴⁷ Thus, “the State is under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis.”⁴⁸

Earlier in the opinion the court had noted that until 2001 all of the residents of Johannesburg, except the residents of Phiri, had been entitled to an unlimited supply of water on credit. While Phiri residents also were entitled to an unlimited water supply, they had to pay a flat rate for it.⁴⁹ This inequality continued under the new system. Judge Tsoka declared:

The Constitution guarantees equality. It is therefore inexplicable why some residents of the City are entitled to water on credit plus free allocation of 25 litres per person per day or 6 kilolitres per household per month yet the people of Phiri, such as the applicants, are denied water on credit. In spite of the fact that they are poor, they are expected to pay [for] water before usage. Their counterparts, who are affluent and mainly in rich and white areas, irrespective of how much water they use, are entitled to water on credit. The differentiation, in my view, contravenes the right to equality.⁵⁰

The court also found that the City’s water policy discriminates against women because “[m]any domestic chores are performed by women,” and the prepayment meter policy may, if water is cut off, force women to travel long distances in search of water, as was the case with Ms. Mazibuko.⁵¹ As General Comment 15 explains, an obligation under the ESC Covenant that is without doubt immediately applicable is the obligation not to discriminate in the implementation of the rights reflected in the Covenant.⁵² Judge Tsoka eloquently described the conse-

45. *Id.* ¶ 34.

46. *State v. Makwanyane & Another*, 1995 (6) BCLR 665 (CC) at 5 (S. Afr.) (the Constitutional Court’s first case, which abolished the death penalty).

47. *Mazibuko*, *supra* note 28, ¶ 36.

48. *Id.*

49. *Id.* ¶ 3.

50. *Id.* ¶ 151. The court went on: “To argue, as the respondents do, that the applicants will not be able to afford water on credit and therefore it is “good” for applicants to go on prepayment meters is patronising. That patronization sustained apartheid . . .” *Id.* ¶ 153.

51. *See id.* ¶ 159.

52. General Comment 15, *supra* note 7, ¶¶ 1, 13. The obligation not to discriminate is based on Article 2(2) of the ESC Covenant, which provides in part: “The States Parties . . . undertake to guarantee that the rights

quences of this form of discrimination: "To deny the applicants the right to water is to deny them the right to lead [a] dignified human existence, to live a South African dream: To live in a democratic, open, caring, responsive and equal society that affirms the values of human dignity, equality and freedom."⁵³

Plaintiffs also challenged defendants' determination that twenty-five liters per person per day, or six kiloliters per household per month, constituted sufficient basic water.⁵⁴ The amicus⁵⁵ argued that international law requires defendants to provide plaintiffs with the core minimum water supply and that the core minimum requirement has become part of South African constitutional jurisprudence.⁵⁶ The court quoted from General Comment 15's discussion of "a number of core obligations in relation to the right to water . . . which are of immediate effect."⁵⁷ It also referred to a decision of the Constitutional Court in which the Court stated as follows:

[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under s 26(2),⁵⁸ and not as a self-standing right conferred on everyone under s 26(1).

[35] A purposive reading of ss 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis.⁵⁹

Thus, the Constitutional Court interpreted the concept of "minimum core" rights, or obligations, as "possibly being relevant to reasonableness under s[§] 26(2)," that is, whether the government was taking "reasonable legislative and other measures," within the limits of its available resources to achieve the progressive realization of the right in question, as required by paragraph 2 of both sections 26 and 27, as well as by Article 2(1) of the ESC Covenant.⁶⁰ Judge Tsoka found that the Constitutional Court's interpretation of the concept of minimum

enunciated in the present Covenant will be exercised without discrimination of any kind . . ." ESC Covenant, *supra* note 6, art. 2(2).

53. *Mazibuko*, *supra* note 28, ¶ 160.

54. *Id.* ¶ 9.

55. The amicus *curiae* was the Centre on Housing Rights and Evictions (COHRE). *Id.* ¶ 13.

56. *Id.* ¶ 127.

57. *Id.* ¶ 128. These obligations are quoted in section I above.

58. *Id.* ¶ 132; S. AFR. CONST. 1996, § 26, 27, available at <http://www.info.gov.za/documents/constitution/1996/index.htm>. Section 26 concerns the right to housing, which was involved in that case. Section 26(2) is worded identically to Section 27(2), quoted above, except that it refers to "right" in the singular.

59. *Mazibuko*, *supra* note 28, ¶ 132 (quoting *Minister of Health and Others v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) ¶¶ 34, 35 (S. Afr.)).

60. *Id.* ¶¶ 98, 132.

core obligations did not constitute a rejection of that concept:

[133] Again, I do not understand the Constitutional Court to be rejecting the core minimum as part of our law. In any event all the attempts to determine the core minimum within the context of this case boils down to one thing: an attempt to determine the basic water supply, within the State's maximum available resources in compliance with the provisions of section 27 of the Constitution.⁶¹

In *Mazibuko*, defendants contended that they had taken reasonable measures to move progressively beyond an allocation of twenty-five liters per person per day.⁶² These measures took the form of the Special Cases Policy and other policies growing out of it, designed to afford special treatment to indigent and other disadvantaged classes of individuals. However, Judge Tsoka found these policies unfair and inflexible, and said that their "underlying objective . . . is to encourage the installation of prepayment meters."⁶³ He therefore concluded that these policies were "both irrational and unreasonable."⁶⁴

Plaintiffs sought an order from the court that each of them was entitled to fifty liters of water per person per day.⁶⁵ The court considered affidavits of experts indicating that the amount of free water provided by defendants was insufficient to meet at least some basic needs. One of these experts expressed the opinion that fifty liters per person per day was "appropriate in Phiri to maintain the health of residents" and provided detailed reasons for that conclusion.⁶⁶ The court concluded that twenty-five liters per person per day "is woefully insufficient," especially because of the prevalence of HIV/AIDS in Phiri.⁶⁷

The court noted that the maximum free amount of water set by defendants at six kiloliters per household per month was based on a household of eight persons each using twenty-five liters per day,⁶⁸ but, in fact, it was undisputed that the average number of persons per household was a minimum of sixteen. The court also stated that "it takes 10-12 litres to flush a toilet in waterborne sanitation areas," and that "the residents of Phiri Township are mainly poor, uneducated, elderly, sickly and ravaged by HIV/AIDS."⁶⁹ The court found that "[i]n these circumstances, it is obvious that the 25 litres per person per day is insufficient for the residents of Phiri."⁷⁰

61. *Id.* ¶ 133.

62. *Id.* ¶ 137.

63. *See id.* ¶ 149.

64. *Id.* ¶ 150.

65. *Id.* ¶ 167.

66. *Id.* ¶ 171 (quoting affidavit of Peter H. Gleick, President, Pacific Institute for Studies in Development, Environment and Security. Gleick is also relied upon in General Comment 15, *supra* note 7, at 5).

67. *See id.* ¶ 179.

68. *Id.* ¶ 168.

69. *Id.* ¶ 169.

70. *Id.*

This led the court to consider the question "whether the respondents have the resources to afford increasing the 25 litres per person per day to 50 litres per person per day."⁷¹ The court concluded that:

[t]he various policies adopted by the respondents such as the Special Cases Policy . . . all point to one direction: the ability of the respondents to provide more water than 25 litres per person per day It appears that the respondents are able to provide 50 litres per person per day without restraining [their] capacity on water and [their] financial resources.⁷²

The court therefore ruled in relevant part that the defendant's decision to limit free basic water to twenty-five liters per person per day or six kiloliters per household per month was invalid; that the "forced installation" of the prepayment water meter system "without the choice of all available water supply option[s]," and the prepayment water system itself, were "unconstitutional and unlawful"; and that the defendants must "provide each applicant and other similarly placed residents of Phiri Township with . . . free basic water supply of 50 litres per person per day and . . . the option of a metered supply installed at the cost of the City of Johannesburg."⁷³

This decision illustrates the possible consequences of a top-down system of decision-making in water supply management. These consequences could ensue even where the decisions are made with the best of intentions.⁷⁴ The South African Constitution is widely regarded as a model instrument, in part because it incorporates internationally recognized human rights as articulated in the basic human rights instruments. It was far-sighted in providing that everyone has the right to access sufficient water, well before the right had been expressly recognized by international human rights institutions. As noted earlier, however, unlike certain civil and political rights, which may be implemented by simple governmental abstention (e.g., from extrajudicial killing), many economic and social rights require affirmative governmental action for their implementation. This would ordinarily be the case for the right to water. Moreover, these positive obligations often need local adjustment and flexibility to be appropriate for specific neighborhoods' socio-economic conditions. A participatory process may be the key to the effective implementation of these rights. In the *Mazibuko* case, however, the residents of Phiri were not consulted or otherwise allowed to participate in the decision-making process that led the city to adopt the policy of installing prepayment water meters. Considering that the residents were effec-

71. *Id.* ¶ 180.

72. *Id.* ¶ 181.

73. *Id.* ¶ 183.

74. The authors take no position on the motivations of the City in *Mazibuko*. Some question whether the government was acting with "best intentions," as they consider the prepayment meters a punitive credit control measure on the poor and do not see the meters as a responsible water management decision.

tively given no choice about the prepayment meters, that the amount of free water was based on a household of half the actual minimum size, and that the residents' only alternative was to be without water, it is surprising that there were not mass protests. The absence of such public resistance supports the court's finding that the Phiri residents were unaware of their rights or how to go about vindicating them.

Does this mean that it is wrong, or at least inappropriate, to adopt high standards at the national or international level when those standards must be implemented locally, where conditions may vary widely? That is not our argument. High standards for improving basic living conditions and human rights should be encouraged and promoted. However, our view is that such standards should be set in the form of goals, which can be achieved through flexible means depending on the circumstances and needs of the affected polity, as revealed in a participatory process. Indeed, the formula contained in Article 2(1) of the ESC Covenant, which is carried over into paragraph 2 of sections 26 and 27 of the South African Constitution, would seem the most appropriate approach, especially if implemented through broad citizen participation. As we have seen, this formula calls for progressive realization of the rights in question, bringing to bear the maximum of a state's available resources with the economic and technical assistance of the international community in the case of the Covenant.

The international framing of a right to water has domestic implications, as the jurisprudence set internationally (international law) can be referred to and considered in the interpretation of national constitutional frameworks, as was seen in the case of South Africa. However, the implications of a constitutional right to water need further investigation.

III. WHERE THE RUBBER MEETS THE ROAD: IMPLEMENTATION CAPACITY FOR WATER PROVISION

In this section, we argue that in the absence of public participation in designing implementation strategies, the lack of government institutional capacity to finance and deliver public goods might undermine the right to water. However, institutional capacity is not a fixed quantity; governments may be able to increase their capacity to fulfill water rights by incorporating communities into the process of implementing international and constitutional rights. Moreover, it may be possible that even governments with contentious community relations can increase their institutional capacity to deliver on their duties by developing more collaborative relationships with community leaders. Overtures of securing equality, inclusion in decision-making, and extension of resource distributional rights to those communities could act as mechanisms to overcome capacity barriers, thereby allowing for stronger constitutional commitments to water, even in the presence of financial and technical constraints. This, of course, would require the government to act in good faith and to engage seriously with communities rather

than just make token gestures of concern and inclusion.⁷⁵ Environmental justice is implicated in the right to water, and the discourse of justice could be used constructively as a tool to engage communities more effectively and to develop positive governance capacity through partnerships and public participation.

We examine this claim in two sections. First, despite the court's comment that the municipality has the capacity to provide increased amounts of water, free of charge, to those unable to afford water in Phiri, we assess the barriers to water provision that the court may not have included in its ruling. The trade-offs between different positive constitutional rights are considered in light of the *Grootboom* decision, a housing case in the Western Cape province of South Africa, particularly with respect to competing demands for government resources for providing public goods.⁷⁶ We acknowledge that, in the current environment of antagonism between the municipality and the disadvantaged complainants, it may be difficult for the government to balance its political and fiscal constraints to redistribute funds to provide additional free water, as cross-subsidies from wealthier communities may not be politically expedient or viable.⁷⁷

Second, we then hypothesize that this relationship could be altered if institutional channels of public participation are opened and an exercise in community consultation is undertaken. We suggest that capacity is dynamic and can be developed through strategic political action that exchanges autonomy and responsibility, where some level of local autonomy is offered to communities as a trade-off for decreased governmental responsibility for providing the water itself. Constitutional commitments to and international obligations regarding water as a human right present challenges to resource-scarce governments, but institutionalized forms of public participation offer us a way past the barriers. The role of public access to information and decision-making processes in environmental issues has been recognized in the European context through the Aarhus Convention in 1998;⁷⁸ this type of agreement and an explicit public role in governance should be incorporated into the design of systems for the implementation of the constitutional right to water. Engaging with communities on a platform of justice

75. There are indications that the City of Johannesburg has not engaged seriously with its poor communities, and has demonstrated little desire to move towards soliciting more meaningful participation (Jackie Dugard, Senior Researcher, Centre for Applied Legal Studies, University of the Witwatersrand, pers. comm.)

76. See *Government of the Republic of South Africa and Others v. Grootboom & Others*, 2000 (11) BCLR 1169 (CC) at 1; see also Joan Fitzpatrick & 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. 659, 669 (2003), available at <http://www.jstor.org/stable/pdfplus/3109853.pdf>.

77. One progressive approach considers cross-subsidies from wealthy to poor consumers to be a constitutional mandate. See, e.g., *City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC) at 4 (S. Afr.). However, cross-subsidies may not be viable in all situations, which, as previously noted, makes the immediately applicable obligation of states to implement the core obligation of the human right to water a problematic requirement.

78. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 447, available at <http://www.unece.org/env/pp/>.

and equity could be an effective channel through which to develop greater capacity to provide water and, even further, to develop more resilient and responsive governance.

COMPETING PRIORITIES – MULTIPLE RIGHTS, MULTIPLE DUTIES

Under South Africa's constitution, water is not the only public good that has been entrenched as a right. The *Mazibuko* decision makes reference to another South African case—*South Africa v. Grootboom*, decided in 2000⁷⁹—in which the court upheld residents' right of access to affordable housing.⁸⁰ The *Mazibuko* court referred in particular to the following observation by the Constitutional Court in *Grootboom*: “the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as [previously] construed [by the Court].”⁸¹ Thus, individuals have the right to seek judicial enforcement of the South African government's obligation to take reasonable steps to implement a multiplicity of socio-economic rights. Were citizens to demand immediate action on the right to water, as contemplated by General Comment 15, and even progressive action on the full range of other rights, municipalities might find themselves stretched beyond their current abilities to deliver these goods.⁸²

The question of a right to water, therefore, becomes more than a question of abstract justice—it becomes a capacity and implementation issue. First, although the court in the *Mazibuko* case found the municipality to have the capacity to provide additional water to the community, this is a question that must be considered beyond the scope of this single case. Our interest in constitutional and international rights to water extends beyond Phiri and the municipality of Johannesburg and has broader social resonance. Consequently, it is critical to evaluate the implications of financial constraints, water supply limitations, and competing demands for government funds on the responsibility of the state to provide water to its citizens as a basic right. South Africa—a middle-income

79. See *Grootboom & Others*; Fitzpatrick & Slye, *supra* note 76, at 670-71.

80. *Mazibuko*, *supra* note 28, ¶¶ 129-31.

81. Fitzpatrick & Slye, *supra* note 76, at 670-71.

82. This concern about limited resources is a general one that must be considered for each case, across municipalities. Wealthier municipalities, like the City of Johannesburg, might have numerous options for financing public goods, but poorer municipalities might not have these same options. A joint project of the Centre for Applied Legal Studies, the Centre on Housing Rights and Evictions, and the Norwegian Centre for Human Rights found that financial and human resource capacity varied across South African municipalities, and in some cases, political will, not just resources, might be the constraining factor for implementing rights. See generally Kate Tissington et al., Centre for Applied Legal Studies et al., *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (Oct. 2008), available at http://web.wits.ac.za/NR/rdonlyres/14D413A0-9CA8-40A7-9428-4B7545548C05/0/WaterServicesReport_web_Nov08.pdf.

country, described as a “huge engine of growth”⁸³—is one of the wealthier countries of Sub-Saharan Africa and may have the capacity to allocate additional resources to water provision. However, it is difficult to imagine less-developed countries having similar capabilities; many currently lack the financial resources to secure water treatment and delivery to all of their poorest communities. Indeed, an in-depth study has concluded that “many regions, like sub-Saharan Africa, will fail to meet the water targets” set forth in the Millennium Development Goals adopted in 2000 by 189 member states of the United Nations.⁸⁴ This projected failure is especially significant since the water target falls short of ensuring access by all, aiming instead to “[h]alve, by 2015, the proportion of people without sustainable access to safe drinking water.”⁸⁵ Second, even in a South African context, it is debatable whether every municipality has the capacity to provide adequate water to its citizens immediately, given the other social goods requirements that are also its responsibility under the constitution. Although it was found by the court that the city had the resources to provide additional water to the residents of Phiri, the *Mazibuko* ruling included no discussion of competing demands for government resources and so may not have fully captured the capacity constraints facing the government. Moreover, although the decision was specifically for Soweto, Johannesburg, it could have legal implications for other municipalities (especially if it is ultimately upheld by the Constitutional Court) because of its interpretation of the right to water.

Asit Biswas, the founder and president of the Third World Centre for Water Management in Mexico, and a former senior scientific advisor to the Executive Director of the United Nations Environment Programme, articulates this concern of insufficient capacity, suggesting that some countries are hesitant to recognize water as a right because they:

are worried that human rights to water may mean free provision of clean water and proper wastewater management for everyone, which they simply cannot afford. Since this simply cannot be achieved within the foreseeable future, these countries prefer not to recognize this concept until their responsibilities and accountabilities are clarified, as well as those of the consumers.⁸⁶

In general, the recognition of a right does not create the capacity to deliver on that right, and the practical implications of embedding a right to water in a country's constitution should be considered in this context just as they should be in finding that certain aspects of state obligations to guarantee the human right to

83. Mallory Saleson, *Africa Now—Building a Better Future in Africa's Middle Income Countries*, WORLD BANK, Oct. 31, 2007, <http://go.worldbank.org/I353NN7TY0>.

84. PETER H. GLEICK, *THE WORLD'S WATER 2008–2009* 62 (2009).

85. United Nations Development Programme, Millennium Development Goals, Goal 7, Target 7c, <http://www.undp.org/mdg/goal7.shtml> (last visited May 12, 2009).

86. Asit K. Biswas, *Water as a Human Right in the MENA Region: Challenges and Opportunities*, 23 INT'L J. WATER RESOURCES DEV. 209, 215 (2007).

water are immediately applicable. In light of this, we suggest that the root causes of the lack of capacity must be considered. Capacity is a dynamic characteristic of a government that reflects not only its financial and technical resources, but also its ability to harness resources beyond its direct control. These resources include the perception of the government as an effective and responsible public agent, as well as political will, and support from influential constituencies. As a result, government capacity can be extended through negotiation and active development of new mechanisms of governance: we argue that one option for strategic development of increased capacity is through local community engagement and empowerment in water provision systems.

BUILDING CAPACITY: PROCEDURAL JUSTICE AND COMMUNITY PARTICIPATION IN WATER PROVISION

The clarification of an international right to water points to specific interpretations of the requirements for rights enforcement: under the ESC Covenant, rights are required to be implemented progressively, as the capacity is developed to do so. In contrast, the CP Covenant rights—which protect liberties but require less action for positive provision of services than ESC rights—must be implemented immediately, as discussed in section I. As a result, viewing the right to water as a civil and political right—as part of the right to life⁸⁷—imposes far more immediate burdens on the state. However, in either case, the question of state capacity becomes important. While the right to water has thus far been viewed as an ESC right because the development of better water access and provision can only happen progressively, the political and civil rights involved in developing those systems could be implemented immediately. Marie Soveroski, a human rights lawyer, states that “[n]o matter how strong a substantive right to a clean environment might be on paper, it would be meaningless without the procedural (and related) rights necessary to pursue respect, protection and promotion of that right.”⁸⁸ As a parallel point, from the perspective of those without sufficient water, it is meaningless to have a procedural right of access to court (as, for example, was possible for the residents of Phiri) unless it is possible for the government to implement the court’s ruling (the requirement, in this case, being for an increase in water allowances and the removal of pre-payment meters). Put another way, it is meaningless to have a court ruling reinforcing government obligations where that government does not have the capacity to follow through on the required actions. The fostering of greater government capacity—for

87. The right to life was originally considered to prohibit such state action as extrajudicial killing, not the right to water, health, and the like, but this may be changing. See McCaffrey 2005, *supra* note 10 (supporting the notion that this is changing).

88. Marie Soveroski, *Environment Rights versus Environmental Wrongs: Forum over Substance?*, 16 REV. EUR. CMTY. & INT’L L. 261, 261 (2007).

example, through public participation and empowerment—is therefore a necessary component of the right to water. Consequently, these procedural justice aspects of governance and decision-making are tied up with the substantive rights to water.

J. Craig Jenkins and his colleagues offer a useful analysis of human rights and child hunger that is of present relevance: they raise concern about focusing on supply side solutions to hunger, rather than addressing the root causes.⁸⁹ Specifically, they express reservations about developing food programs instead of “expanding social and political rights, reducing armed conflict and militarization, and improving women’s status”—actions, they suggest, that would be more effective in combating child hunger.⁹⁰ Similarly, the fulfillment of a right to water might be best achieved through means other than simply construction by the government of standpipes and piped water systems.

The longer-term solutions advocated by Jenkins et al. are important to consider—the ability to pay for water services is in part a function of secured livelihoods, incomes, and purchasing power—but, while these are relevant considerations, they will not address the immediate needs of households desperate for water right now. In Phiri, the incidence of HIV/AIDS places demands on households for water that are not likely to be quickly resolved through programs to increase incomes and develop financial security. Both short-term and long-term solutions are needed for these families. If a government lacks resources to address short-term needs it may have an obligation to seek support from higher levels of government within the country or from international aid agencies. However, the point made by Jenkins et al. is relevant even for these short-term solutions—more effective immediate responses may be possible if the focus is shifted from government provision of water through pipes (supply side options) to collaborative systems of water delivery and payment schemes that reflect communities’ needs and abilities and engage them in decision-making processes. While the government is clearly implicated in the provision of water to vulnerable populations, the form of this provision need not be confined to technocratic or engineering solutions. More creative, participatory channels can be explored for meeting this right, in ways that might lead to more durable and equitable water access.⁹¹

89. J. Craig Jenkins, Stephen J. Scanlan & Lindsey Peterson, *Military Famine, Human Rights, and Child Hunger: A Cross-National Analysis, 1990-2000*, 51 J. CONFLICT RESOLUTION 823 (2007).

90. *Id.*

91. Private sector solutions have been offered as one strategy to provide water and sanitation services more efficiently and effectively. However these public-private partnerships have had mixed results and are perceived by many civil society groups to be problematic and exclusionary arrangements for water provision. For a discussion and review of private sector participation in the water sector, see Jennifer Davis, *Private-Sector Participation in the Water and Sanitation Sector*, 30 ANN. REV. ENV'T & RESOURCES 145 (2005); see also Soveroski, *supra* note 88. Given the troubled track record of private sector engagement, the present paper focuses on non-profit and community-based options for informing governmental decision-making processes

When the community is given the chance to have some degree of control over innovative water access systems, the government, consequently, may be held less accountable for water provision. Such a transfer of responsibility might allow for continued government involvement and support but yield communities the opportunity to develop more context-appropriate solutions to water access. Of course, this should not be taken as a suggestion that municipal governments can divest themselves of the responsibility for water provision. In South Africa, it is clear from both international law and the national constitution that the government has a duty to secure basic water access for its citizens, in an equitable manner. However, the path to this outcome—other than broad dictates that it cannot be discriminatory—is not dictated by international law or the constitution (or the courts). This opens up space for considering alternative mechanisms for developing water provision systems in local communities. These alternate mechanisms involve not only the physical and managerial systems for water provision but the processes underpinning their development—the processes through which choices are made about resource use and allocation, about payment systems and types of services, and about dispute resolution and penalties. The language used—a discourse of justice—offers a framing strategy for governments engaging in these discussions.

Part of the legal battle in the *Mazibuko* case involved not just an issue of basic water provision but a fundamental question of procedural justice. The differential water provision systems in wealthy and poor neighborhoods—which were also divided along racialized lines—were a focal point for the community and in the judicial decision. Providing wealthy households with access to credit, while establishing pre-paid water systems for the poor, creates inequity in the provision of water access. Discrimination, through differential payment schemes and water cut-off penalties, along lines of geography (and the associated racial identities based on patterns of segregation) was found to violate constitutional rights. This issue of justice, as a result, had practical implications for governance and for the development of government capacity. Political consequences of water provision decisions depend not only on distributional outcomes of the quantity of water given to households (although that was of critical importance here) but also on the perception of justice across the community. For these rights to be meaningful in South Africa, it is clear that there is a need for more than just outcome-based indicators: procedural fairness is considered to be of critical importance in water access.

Soveroski states that “[t]he right to a clean environment has been considered in the context of civil and political rights, and economic, social and cultural rights, within the framework of binding international treaties and national law, and as embodied in soft law instruments” and suggests that “environmental rights must

be understood in the framework of human rights in general.”⁹² Similarly, we suggest that the right to water must be considered in light of the broader set of human rights instruments. Along these lines, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁹³ becomes relevant. It states, in part, that “citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.”⁹⁴ It also acknowledges “in this regard that citizens may need assistance in order to exercise their rights.”⁹⁵ For example, Article 6, on public participation in decisions on specific activities, says that the public should be made aware of environmental decision-making processes and given information about how to engage in these processes.⁹⁶ Through accepting the principles of this agreement, the parties to the convention have agreed that public engagement in environmental decision-making has political and legal value; states beyond the signatories to the convention could benefit from the adoption of similar principles. Governments struggling to use top-down mechanisms to provide water services to underserved, economically vulnerable communities, could instead strengthen the channels of public participation in these processes—thereby alleviating suspicion of government bodies, increasing the political rights and perceptions of ownership of vulnerable populations, and increasing their capacity to develop effective water provision systems.

FUNDING CONSTRAINTS AND LOCAL EMPOWERMENT

The question of water access often takes the form—in popular media and civil society discourse, at least—of water as a right versus water as a commodity. Private sector involvement in water provision is hotly contested.⁹⁷ Some see such involvement as an efficient way of tapping into capital and technical expertise, thereby achieving both access and conservation goals, increasing the network of official water service provision, and increasing the quality and efficiency of that service. Others see private sector involvement as a violation of the right of people to a shared, common resource, and as further alienating poor communities by

92. Soveroski, *supra* note 88, at 261.

93. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, *available at* <http://www.unece.org/env/pp/>.

94. *Id.* pmbl.

95. *Id.*

96. *Id.* art. 6, ¶¶ 2-5. Some states have similar requirements. *See, e.g.*, Promotion of Access to Information Act of 2000 (S. Afr.), *available at* www.freedominfo.org/documents/South%20Africa%20PAIA.pdf.

97. For arguments on both sides and discussions of the debates over public and private sector water provision, *see, e.g.*, Violeta Petrova, Note, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 BROOK. J. INT'L L. 577 (2006); Jessica Budds & Gordon McGranahan, *Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America*, 15 ENV'T & URBANIZATION 15, 87(2003).

depriving those without means of the ability to pay for necessary water resources. However, the pricing of water (its commodification) is not synonymous with privatization of services, and is conceptually compatible with its status as a human right.⁹⁸ The discussion of the merits and costs of privatization are beyond the scope of this paper, but an important element to consider in the assessment of capacity is the issue of water pricing. The question of payment for water services—and the impact of this on the right to water—is considered in the South African constitutional right, where governments are, in general, allowed to require payment for water services but are not permitted to deny basic water access to those without the ability to pay. The court's ruling that the government must provide fifty liters of water per person per day free of charge, instead of the initial level of twenty-five liters per person per day, has significant cost implications. The increase of treated water that is required by the government—without payment, as these are very poor households—imposes a financial or political burden on the government. States with limited finances and few funds in reserve may have to reallocate resources from other sectors in order to meet these demands.

The availability of funds to meet these water provision demands is constrained by access to capital, the political mandate to redistribute wealth, and the political choices and preferences of the government itself. Funding for free water provision can be obtained through cross-subsidization, either from within the water sector, where payments from wealthier consumers can be used to finance water provision to the poor, or from other sectors, where tax revenues can be redirected into the water sector to provide basic services. Governments have control over their spending decisions, and—especially where a wealthy segment of the population does exist—can obtain some level of control over the redistribution of resources in society to achieve basic social welfare. However, this autonomy in spending decisions is limited in some cases: the support of powerful constituents may be needed to maintain power, and some cross-subsidies are not politically popular (thus leading to a trade-off between social justice and stability of government, where governments may lose popular support from influential interest groups). Additionally, there may be municipalities where there are low revenues in many sectors, and thus, even with cross-subsidies, there may be limited funding available for governments to reallocate to the water sector.

The World Water Council, in a report on the right to water, states:

Traditionally, people, particularly the poor, have not been included in assessing their own needs, although they frequently represent a large proportion of the urban population. This has often led to the construction of facilities that they do not need, do not use properly, do not care for and to which they are not ready to

98. See Karen Bakker, *The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South*, 39 *ANTIPODE* 430 (2007).

contribute. However, if communities are involved in making decisions around the levels and costs of services, and given the opportunity to improve their situation, they will be willing to participate in construction, with perhaps the local authority providing material and guidance that they cannot provide for themselves. Following this process, there is more chance that people will be willing and able to pay for the services they are benefiting from.⁹⁹

These constraints of political will, public support, and resource access can be negotiated and altered. Odeh Al Jayyousi suggests that good governance for water resources involves democratic participation in decision-making.¹⁰⁰ He outlines four principles for this: public accountability; effective oversight; competence and effectiveness in management and operation of water systems; and transparency in decision-making. Al Jayyousi also recognizes that the specific configuration of good governance for water management will depend on the local context and broader governance framework.¹⁰¹ Participation of those affected by the provision or denial of rights, and of those responsible for implementing the activities needed to uphold those rights, should be included in the design of systems to fulfill the rights.

IV. GENERAL CONCLUSIONS

In countries where governments have limited financial and technical capacity, upholding a human right to water presents a significant challenge.¹⁰² In this paper, we asserted that in such cases, legal mechanisms for securing water access may be problematic. Although the courts can play a role in providing incentives to governments to follow through on their commitments and offer channels of recourse to citizens in cases of discriminatory practices, the provision of water services is unlikely to be improved through judicial decisions alone. We used the *Mazibuko* case in South Africa to trace out the implications of a ruling on the human right to water, drawing particular attention to the distinction between progressive implementation and core obligations. We offered an assessment of the role of community empowerment in facilitating the government's response to water provision responsibilities and suggested that legal rights alone are not sufficient for protecting human rights in areas that require positive government action, such as water provision. In cases where governments have sufficient resources—as perhaps was the case in Johannesburg, where the court ruled that the provision of additional water would not overburden the defendants—legal

99. CÉLINE DUBREUIL, *THE RIGHT TO WATER: FROM CONCEPT TO IMPLEMENTATION* 30 (2006).

100. Odeh Al Jayyousi, *Water as a Human Right: Towards Civil Society Globalization*, 23 *WATER RESOURCES DEV.* 329 (2007).

101. *Id.* at 336.

102. Even in highly developed economies there is resistance to recognizing the human right to water. For example, California water utilities are reportedly opposed to the proposed Human Right to Water Bill, A.B. 1242, 2009 Leg., 10 Reg. Sess. (Cal. 2009) (Personal Communication, Patricia Jones (May 12 2009)).

mechanisms might be sufficient for protecting these rights. However, in many cases, these demands will put pressure on governments that have little ability to meet these requirements. While a human right to water is part of international law, and has been incorporated in some national constitutions, additional measures beyond legal avenues are needed for securing these rights.

In light of these conclusions, a focus on justice might be the most effective political strategy for securing better water access and for developing effective conflict resolution mechanisms. Communities involved in the planning stages and the development of water provision systems—particularly when they have access to information about the multiplicity of demands on water resources—may be better equipped to resolve issues of competing water demands than communities with perceived rights but little access to decision-making processes. Malcolm Langford sets out six practical consequences of establishing a right to water, one of which is that “citizens and communities need to be assisted to participate effectively in the decision-making process in the water and sanitation sector, particularly in discussions over water reform, and to ensure that any privatization processes are open and transparent.”¹⁰³ A cautionary note should, however, be sounded: community-based solutions are not necessarily equitable and efficient.¹⁰⁴ Nevertheless, greater public participation allows for the possibility of opening up the system to include perspectives from those most affected by the decisions and systems and the opportunity for those individuals to buy into the solutions.

Beyond a moral claim to concepts of equality, the language of justice has practical implications for governments struggling to meet constitutional or international legal commitments. Additionally, this argument can be extended to the international sphere, as high-level leaders negotiate treaties that have implementation implications for lower-level authorities and for communities who are excluded from the negotiation processes. By focusing on process as well as outcomes, by soliciting input from and devolving some authority to communities, and by engaging local partners in service provision strategies and the design of systems for the implementation of rights, governments may trade some autonomy for a reduced implementation burden and a greater capacity to follow through on their commitments.

For a government facing a series of demanding duties, this could be a strategy that would enable the fulfillment of its responsibilities without the overextension

103. Malcolm Langford, *The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?*, 21 INT’L J. WATER RESOURCES DEV. 273, 280 (2005).

104. For a discussion of some of the literature on the mixed outcomes of community-based management, see Sara Singleton, *Co-operation or Capture? The Paradox of Co-management and Community Participation in Natural Resource Management and Environmental Policy-Making*, 9 ENVTL. POL. 1 (2000). She notes, for instance, that “in situations where communities are highly unequal or fractured along lines of caste, gender, age, or ethnicity, establishing or strengthening formal village authority is not likely to facilitate more equitable internal distribution.” *Id.* at 2.

of its capacities. Local participation might increase compliance with regulations and acceptance of arrangements for water provision (or other requirements under international law) and might reduce demands on government for services. Negotiation is essential in this arrangement, as governments will still have funding responsibilities, but communities—with more access to information—may be more likely to recognize the funding constraints at hand, and adjust their water supply systems accordingly. Equitable systems are not necessarily identical systems: communities may be willing to adopt locally-specific solutions for water delivery and payment, as long as there is a shared perception of justice—which is more likely if they participate in the process. Genuine community participation in decision-making processes might be a route through which these arrangements could be designed and implemented.