WATER RIGHTS, COMMONS AND ADVOCACY NARRATIVES

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ABSTRACT

Can a rights-based agenda potentially challenge the dominant market narrative with respect to water access, and in the process, also address climate change reparations, adaptation and mitigation? Learning from the case of water in the most advanced court challenge to neo-liberal state power that has yet been adjudicated, in Johannesburg in 2009, it is just as likely that rights-talk will be co-opted by neo-liberalism. If that happens more systematically within the climate justice struggle, at a time activism intensifies and court cases emerge more frequently, momentum towards a genuine breakthrough against corporate control of global environmental governance (amplified now under the rubric of the ‘Green Economy’) could well be distracted, halted or even reversed. The classical problems associated with rights-based narratives – their basis in liberal individualism and disconnection from broader socio-economic and ecological processes – may continue to be crippling, as witnessed in the example of South African water policy, law and activism. The specific case involves a Paris-based water privatisation company (Suez) whose policies in Johannesburg led five Sowetans to sue the city to increase water supply and cease imposing pre-payment meters. The same ideological debates – how to fuse neo-liberal imperatives with rights rhetoric – took centre stage during the June 2012 Rio+20 Earth Summit. There, the dominant trend towards market determinations of nature required a stronger countervailing ‘decommodification’ narrative than ‘rights talk’ can offer. The question posed here, is whether using human rights considerations will make contestation of ‘neo-liberalised nature’ any easier, and the answer arrived at is negative, based on the evidence from Johannesburg. Instead, ‘commoning’ is the alternative narrative, ie arriving at the commons through and beyond rights.

Keywords: water, human rights, South Africa, Constitution, commons

I INTRODUCTION

How are human rights articulated within water advocacy movements, and what lessons – especially from South Africa – can be drawn from subsequent efforts to introduce rights into climate advocacy? Is rights language a strong countervailing force to the market’s commercialising tendencies when it comes to water or climate policy? Or is it co-optable within neo-liberal environmentalism, thus requiring a different political framing?

This article reviews the limits to a typical ‘rights-talk’ legalistic counterstrategy favoured by liberal non-governmental organisations (NGOs). This rhetoric is usually contrasted with neo-liberal ‘Green Economy’ narratives that aim to price environmental services. The latter narratives dominated the Rio+20 Summit in June 2012 and are set to continue to affect socio-environmental policy in coming years. Along with ‘Payment for
Ecosystem Services’, carbon trading and geo-engineering, one of the most disputed aspects of ‘neo-liberalised nature’ is water privatisation. The main framing device against privatisation adopted by a vast set of social movements and allied NGOs across the world since the late 1990s, is making the ‘right to water’ a central demand. In the pages below, I consider the case of water, drawing on detailed experiences with rights narratives and market pressures in Johannesburg, South Africa (which, coincidentally, hosted Rio+10 in 2002), and then consider how these lessons apply to the emerging Climate Justice movement’s narratives.

In the process, I must ask what kind of analyses, strategies, tactics and demands worked best under circumstances of intensifying global struggle for socio-environmental justice? Specifically, this article asks, how appropriate is it for influential strategists to emphasise rights talk as a means of countering corporate-neo-liberal pressure, such as in the field of water? The global debate trails by a few years the same concerns about the efficacy of water rights invoked both by the state and by social activists in post-apartheid South Africa. The simple question is whether by invoking the right to water and attempting to define it in the context of neo-liberal municipal management, does a generic commitment to rights trump the market? Or instead, does rights-talk work within neo-liberalism?

The critical requirement of the neo-liberal project when applied in micro-developmental settings is the imposition of market logic. What that means in the case of retail water and sanitation is to achieve 100 per cent cost-recovery on every drop sold, and where there are subsidies (and especially cross-subsidies), to remove these because they represent inefficiencies, and deterreents to market investments. Such a logic can be readily applied not only by a private supplier seeking a cost+markup to achieve a typically desired rate of 30 per cent on investment in the water sector, but also by municipalities whose water departments are increasingly run as independent cost-centres. It is in this sense that the drive to privatise water can occur within a municipality, even with full public ownership. The point is that the logic of the market – the neo-liberal opposition to subsidisations and other price distortions – is the opposite of the logic of society and environment. The question is whether the rights discourse offers a sufficient basis for framing opposition to market logic.

To illustrate the conflict, Durban provides the best data to judge the efficacy of using pricing measures as a mechanism of achieving basic water rights at the same time as demand management (conservation) while still operating within the 100 per cent cost-recovery logic. Research conducted at the University of KwaZulu-Natal (UKZN) by Chris Buckley and former city official Reg Bailey showed that water ‘price elasticity’ – the negative impact of a price increase on consumption – for the city’s highest-income third of the population is 0.10. A doubling of the real (after-inflation) water price from 1997 to 2004 generated less than a ten per cent reduction in use. (What was proposed by Johannesburg for high-volume users was not a 100 per cent real increase, but a meagre three per cent rise – ten per cent in nominal terms...
but inflation was seven per cent.) Durban research revealed that instead, the impact of higher prices is mainly felt by low-income people, who recorded a much larger 0.55 price elasticity. ¹

Likewise, international studies suggest that while levels of water consumption may dip following large price increases, patterns of use generally reassert themselves fairly quickly in all but the lowest income groups. Ironically, as the ‘right to water’ was fulfilled through an official commitment to Free Basic Water, as explored below, the result of price changes at higher blocks in Durban and Johannesburg was further water deprivation for the poor alongside increasing consumption in the wealthier suburbs, which is in turn creating demand for more bulk water supply projects – including another extremely expensive Lesotho Highlands Water Project dam – which will then have to be paid for by all consumers, and which will have major environmental impacts.

To track the prospects of the rights and commons framing, I first consider some crucial background contextual information about South Africa, including the challenge of water/sanitation delivery, followed by consideration of the specific problems associated with Africa’s richest city (Johannesburg), particularly its most politicised neighbourhood (Soweto). The article then addresses thorny technical issues that have arisen in the course of transforming rights discourse into justiciable service delivery. The limits of liberal capitalist democracy as the basis for social services provision in poor neighbourhoods – under circumstances of extreme inequality and fiscal pressures – became evident in 2009, when Soweto activists promoting water rights were defeated in the courts. Their potential move ‘out of the box’ of the liberal rights narrative, towards a ‘commons’ approach to water, is explored in the Conclusion, where the next terrain of crucial socio-environmental struggle is being joined: the climate.

II IS SOUTH AFRICA RIGHTING WATER WRONGS, OR MERELY REVISITING RETAIL RIGHTS?

Since the United Nations (UN) Declaration of Human Rights, the idea that all individuals have certain basic human rights, or entitlements to political, social, or economic goods (such as food, water, etc) has become a key framework for politics and political discourse. In appealing to human rights, groups and individuals attempt to legitimise their cause, and to accuse their opponents of ‘denial of rights’. As water is essential to human life, social conflict surrounding water is now framed in terms of the ‘human right’ to water. In this ‘culture of rights’, social groups use ‘rights talk’ as a blanket justification for the provision of water; in some cases, however, even popularly

¹ R Bailey & C Buckley ‘Modelling Domestic Water Tariffs’ presentation to UKZN CSS (7 November 2005).
elected governments dispute their exact responsibilities for water provision and management.

During apartheid, water was a relatively low-cost luxury for white South Africans, with per capita enjoyment of home swimming pools at amongst the world’s highest levels. In contrast, black South Africans largely suffered vulnerability in urban townships and in the segregated ‘Bantustan’ system of rural homelands, which supplied male migrant workers to the white-owned mines, factories and plantations. These rural homelands had weak or non-existent water and irrigation infrastructures, as the apartheid government directed investment to the white-dominated cities and suburbs, and also in much more limited volumes to black urban townships.

After 1994, racial apartheid ended, but South Africa immediately confronted international trends endorsing municipal cost-recovery, commercialisation (in which state agencies converted water into a commodity that must be purchased at the cost of production), and even the prospect of long-term municipal water management contracts roughly equivalent to privatisation. At the same time, across the world, commercialisation of water was being introduced so as to address classic problems associated with state control: inefficiencies, excessive administrative centralisation, lack of competition, unaccounted-for-consumption, weak billing and political interference. Across a broad spectrum, the commercialisation options have included private outsourcing and the management or partial/full ownership of the service. At least seven institutional steps that can be taken towards privatisation: short-term service contracts, short/medium-term management contracts, medium/long-term leases (affermages), long-term concessions, long-term Build (Own) Operate Transfer contracts, full permanent divestiture, and an additional category of community provision which also exists in some settings. Aside from French and British water corporations, the most aggressive promoters of these strategies are a few giant aid agencies, especially USAID, the British Department for International Development, and the World Bank. As a result of pressure to commercialise, water was soon priced beyond the reach of many poor South African households, resulting in an estimated 1.5-million people disconnected each year due to inability to pay by 2003.3

The Constitution of the Republic of South Africa, 1996 however, included socio-economic clauses meant to do away with the injustices of apartheid, including, ‘Everyone has the right to have access to sufficient food and water’ and ‘Everyone has the right to an environment that is not harmful to their health or well-being’.4 The Water Services Act 108 of 1997 put these sentiments into law as ‘the main object’: ‘the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being’.5 Grassroots water activists seized on these guarantees to clean water and their discourses soon invoked rights

4 Constitution s 27(1)(b).
5 Section 2(a).
talk. They insisted upon a social entitlement to an acceptable supply of clean water, amounting to at least 50 litres supplied per person per day, delivered via a metering system based on credit, not ‘pre-payment’.

The surge in confidence for the rights narrative left their critics bemoaning a new ‘culture of entitlement’ in which the government was expected to solve all social ills. As Lungile Madywabe of the (pro-market) Helen Suzman Foundation put it:

> Cynics fear that a culture of entitlement is growing. But the left finds such statements insulting and dehumanising, and argues that it is crass to suggest that people are unwilling to pay for services when unemployment exceeds 40 per cent … A turning point in the African National Congress government’s thinking came in 1995, when Nelson Mandela returned from Europe and spoke in favour of privatisation.6

The commercialisation of water was viewed with great enthusiasm by the new South African government. In South Africa, the shift to a market-based system of water access has been protested in various ways, including informal/illegal reconnections to official water supplies, destruction of prepayment meters, and even a constitutional challenge over water services in Soweto. While such protests confront powerful commercial interests, they attempt to shift policy from market-based approaches to those more conducive to ‘social justice’. Nevertheless, this article draws on the 2008 to 2009 courtroom dramas to argue that a rights discourse has significant limitations so long as it remains primarily focused on the social domain.

The objective of those promoting water rights should be to make water primarily an eco-social, rather than a commercial, good. Including eco-systemic processes in discussions of water rights potentially links consumption processes (including over-consumption by firms and wealthy households) to environmental sustainability. However, the lawyers developing strategy in the seminal case I consider below decided to maintain only the narrowest perspective of household water usage, since to link with other issues would have complicated the simple requests for relief. Hence, given the lawyers’ defeat, once I interrogate the limits to rights discourse in the South African context, the most fruitful strategic approach may be to move beyond the ‘rights’ of consumption to reinstate a notion of ‘the commons’, which includes the broader hydropolitical systems in which water extraction, production, distribution, financing, consumption and disposal occurs.

### III Water Rights and Water Denial in Soweto and Johannesburg

One of the critical disputes in Johannesburg during the period 2001 to 2009 was interpretation of the African National Congress’s (ANC) promise of a universal free basic water service. In the 2000 municipal election campaign, the ruling party’s statement had been clear: ‘The ANC-led local government will provide all residents with a free basic amount of water, electricity and

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other municipal services so as to help the poor. Those who use more than the basic amounts, will pay for the extra they use.’

There is an extensive record regarding the way the right to water was distorted in Johannesburg. Initially, in 2001 Johannesburg Water officials reinterpreted the ‘right to water’ mandate regressively by adopting a relatively steep-rising tariff curve. In this fee structure, all households received 6,000 litres per month for free, but were then faced with a much higher second block (ie the curve was convex-up), in contrast to a concave-up curve starting with a larger lifeline block, which would have better served the interests of lower-income residents. The dramatic increase in their per-unit charges in the second block meant that for many poor people, there was no meaningful difference to their average monthly bills even after the first free 6kl. Moreover, the marginal tariff for industrial/commercial users of water, while higher than residential, actually declined after large-volume consumption was reached.

In early 2008, changes to Johannesburg Water pricing policy meant that although there was a higher Free Basic Water allotment, of 10kl/month, the 2000 promise of free basic water would be kept only for the small proportion of the population declared ‘indigent’, instead of on a universal basis to ‘all’ residents. Facing the lawsuit by Soweto residents and their high-profile lawyers, and following the departure of the French water company that set the original prices in 2006, there was scope for a slightly more redistributive and conservationist pricing system, and the 2008/09 water price increases included very slight above-inflation rises for higher blocks of consumption.

What ideology informed Johannesburg officials’ orientation to water pricing? Even though the municipal officials insisted that they were meeting the basic rights obligations in the Constitution and prevailing water law, the top-down neo-liberal approach to meters and consultation conformed to the city’s overall strategy of decentralisation and geographical differentiation of service provision according to ability to pay. The World Bank reported on its:

local economic development methodology developed for the City of Johannesburg in 1999. The latter sought to conceptualize an optimal role for a fiscally decentralized City in the form of a regulator that would seek to alleviate poverty by applying a two-pronged strategy. The first prong would focus on reducing ‘income-poverty’ through job creation by creating an enabling business environment for private sector investment and economic growth in Johannesburg. The second prong would address non-income poverty reduction by directly tracking the effects of local government expenditures on service delivery to poor households in the city. The ‘enabling business environment’ kept prices low for business but high for the poor, notwithstanding the ‘second prong’. Moreover, the Bank encouraged the commercialisation of the municipal water company, which led to one of the world’s largest management contracts, won by the French firm Suez for the period 2001 to 2006. As the world’s second largest water company, Suez came

For more background on South Africa’s water conditions discussed below, see, P Bond Unsustainable South Africa (2002); and P Bond Talk Left Walk Right (2006).

to South Africa just before the end of apartheid, picking up three small water concessions in Eastern Cape towns during the early 1990s. The firm won the bid for a five-year trial contract to manage Johannesburg Water, in part by taking the city’s councillors on a junket to Argentina the year before, where the ‘success story’ of Buenos Aires was unveiled.

The Suez contract in Buenos Aires would fail when the Argentine government disallowed Suez’s substantial hard-currency profit repatriation in the midst of the 2002 economic crisis. Yet in adapting to the challenge posed by social movement rights activists, Suez came to realise that it could ‘strongly’ endorse water and sanitation as a ‘fundamental right’, so as to acquire more business opportunities:

through its partnerships with local authorities, by working in the southern hemisphere to provide an additional 11.8 million people with access to drinking water [and] an additional 5.7 million people with access to sanitation.9

The reality, however, was that when confronted with a great many poor people, Suez resorted to water self-disconnections and regressive pricing policies, as Soweto residents soon experienced.

In South Africa, Suez inherited a dysfunctional retail water system, especially in Johannesburg’s vast shack settlements, which are home to nearly a third of the city’s 3.2-million residents. There, according to city surveys at the time Suez entered, 65 per cent of the population use communal standpipes and 20 per cent receive small amounts of water from tankers (the other 15 per cent have outdoor yard taps). For sanitation, 52 per cent have dug pit latrines themselves, 45 per cent rely on chemical toilets, two per cent have communal flush toilets and one per cent use ablution blocks. These conditions are particularly hostile to vulnerable people: they breed opportunistic infections at a time when Johannesburg’s HIV rate has soared above 25 per cent, and in the last decade cholera and diarrhoea epidemics have killed many tens of thousands of people, especially children.

But instead of expanding water access in these underserved areas, Suez initiated massive water disconnections. In early 2002, just before community resistance became an effective countervailing force, Johannesburg officials were disconnecting more than 20,000 households per month from power and water, contradicting the claim on the Department of Water Affairs and Forestry’s website that Johannesburg offers 100 per cent of its residents Free Basic Water. For municipal bureaucrats and Suez, disconnecting low-income

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9 Also in 2002 the Lesotho government prosecutors charged Suez subsidiary Dumez with bribing Masupha Sole, the manager of the Lesotho Highlands Water Authority (which supplies Johannesburg with water). Sole allegedly received US$20,000 at a Paris meeting in 1991 to engineer a contract renegotiation providing Dumez with additional profits in excess of US$1-million, at the expense of Johannesburg water consumers. On those grounds, the South African Municipal Workers Union (SAMWU) asked Johannesburg officials to bar Suez from tendering for the water management contract, but this request was refused.

people and maintaining low water/sanitation standards was a strategy, quite simply, to save money.

Suez began its management of Johannesburg’s water by installing 6,500 pit latrines, a pilot ‘shallow sanitation’ system and thousands more pre-payment water meters in poor areas, including Soweto. Pit latrines require no water. The shallow sewage system was only attempted sporadically due to consumer dissatisfaction. With this system, maintenance costs are transferred to so-called ‘condominium’ residential users, where a very small water flush and slight gravity mean that the pipes must be manually unclogged every three months (or more frequently) by the residents (typically women) themselves. The water-borne system breaks down, thus, not by accident – but by design, so as to save the city water.

As for the payment system, unlike conventional meters in wealthy suburbs, which provide due warning of future disconnection (and an opportunity to make representation), pre-payment meter disconnection occurs automatically and without warning following the exhaustion of the 6,000 litre free water supply. If the disconnection occurs during the night or over a weekend when water credit vendors are closed, the household has to go without water until the shops are open again, and if the household does not have money for additional water, it must borrow either money or water from neighbours in order to survive. The Mazibuko plaintiffs argued that the pre-payment water meter represented not only a threat to dignity and health, but also a direct risk to life in the event of a fire. Dangers from inadequate water resulting from self-disconnecting pre-payment meters were starkly illustrated when two children died in a shack fire in 2002, which in turn catalysed the lawsuit by five Sowetans (four of whom were women) that became known as Mazibuko v Johannesburg Water, or the ‘Phiri’ case after the area of Soweto where the plaintiffs resided.

One central problem was that Johannesburg managers were reluctant to offer a rising block tariff so as to redistribute water from rich to poor. If designed properly such systems penalise luxury consumption and promote conservation. In 1996, this potential was demonstrated in the Hermanus municipality, which raised prices on high consumption through a steep block tariff. Within four months, per capita peak demand for bulk water was reduced by one-third, while revenues increased by one-fifth.11 In Johannesburg, in contrast, the block tariff adopted in 2001 was highly convex so that the additional marginal price increases for wealthier, high-volume users were negligible.

The block tariff system applied in Johannesburg reflected Suez’s logical opposition to water conservation, for its self-interest is selling more water to those people who could pay for it. The increasingly expensive water Suez supplied to Johannesburg was piped hundreds of miles across the Lesotho

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mountains in Africa’s largest cross-catchment water transfer, which caused a five-fold increase in water prices, from US$0.30 to US$1.30/kl during the late 1990s. As Johannesburg water customers became liable for Lesotho dam loan repayments, they faced an average 69 per cent increase in the nominal cost of water supply from 1996 to 1999, with high-volume users paying a much lower increase. By the time the city’s commercialisation strategy was established in 1999, Johannesburg’s water prices had become more regressive than even during the apartheid era (i.e., with a flatter slope in the block tariff).

In sum, rights advocates argued, the underlying problem was that across South Africa, the self-interest of powerful municipal constituents—large businesses, farms and rich ratepayers—was to keep water prices relatively low, which in turn required limiting provision in low-income neighbourhoods. In this context, rights advocates accused the city of adopting the following strategies: (1) imposition of water prices that soar after a very small, free amount of roughly two toilet flushes per person/day for member households, so that the next block of consumption becomes unaffordable; (2) disconnection of people too poor to pay for any water beyond the 6kl allocation; (3) offering Free Basic Water on the basis of a household as a unit (rather than the ANC’s 1994 Reconstruction and Development Programme (RDP) recommendation of 50 litres per person per day), which penalised larger families and those who have backyard shackdwellers or tenants who also drew upon the per-household supply; (4) provision of low-quality water and sanitation technology to tens of thousands of poor households, with the objective of reducing consumption (the technology includes pre-payment water meters, chemical toilets, Ventilated Improved Pit Latrines, and ‘shallow sewage’ systems featuring smaller pipes and lower gradients, no cistern for flushing, and manual unclogging of faeces when pipes periodically clog); and (5) provision of differential technology according to geography, race and class, such that water-saving hardware was only imposed on people in townships and informal settlements and not in wealthier and whiter suburbs.

In March 2008, the water rights activists complained about three new Johannesburg Council innovations: (1) use of an inaccurate register of indigency, one that recorded only a small proportion of the city’s poor and thus excluded a large number of low-income people from free water allocations; (2) a new system of ‘means testing’, even though gaining indigency status initially entailed an invasive process of surveillance; and (3) termination of the policy of universal free water services for all, even though termination directly contradicted the Constitution, the RDP and the ANC municipal election promise that ‘all residents’ would receive free services.

Resistance strategies and tactics developed over time. Initially, activists took what was already a popular township survival tactic—illicitly reconnecting power once it was disconnected by state officials due to non-payment (in 2001, 13 per cent of Gauteng’s connections were illegal)—and added a socialist, self-empowered ideological orientation. Within a few months of Johannesburg Water’s official commercialisation in 2000, the Anti-Privatisation Forum (APF) was formed to unite nearly two-dozen community
groups across Gauteng, sponsoring periodic mass marches of workers and residents. The network also shared information with water activists across the world, for example in Cochabamba, Bolivia, Argentina, Accra, and Detroit. And from the APF came the Coalition Against Water Privatisation (CAWP), which assisted five of Soweto’s Phiri neighbourhood activists to launch the Constitutional Court case in 2004.

Suez’s water management in Johannesburg generated not only social conflict but also strife within the council, and the company’s contract was not renewed in 2006, in spite of the desired 25-year extension option available in the original water commercialisation Business Plan. That plan had anticipated that (after-tax) profits from Johannesburg water supply would soar from R3.5-million (roughly US$300,000) in 2000/2001 to R419-million (US$50-million) in 2008/2009. One reason for Suez’s departure was that Johannesburg Water’s tactics were so hotly contested by the rights advocates, who had expected the Bill of Rights socio-economic clauses to be enacted.

In October 2009 South Africa’s Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water access to poor people. In the first case in the Johannesburg High Court, five Soweto women had successfully argued for their right to a larger supply of free municipal water and for abolishing the recently-installed pre-payment meter system. In the ruling, Johannesburg High Court Judge Moroa Tsoka ruled that the ‘prepayment water system in Phiri Township’ was ‘unconstitutional and unlawful’, and ordered the city to provide each applicant and other residents with a ‘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’.¹² Judge Tsoka accused city officials of racism for imposing credit control via prepayment ‘in the historically poor black areas and not the historically rich white areas’. He noted that meter installation apparently occurred ‘in terms of colour or geographical area’, and the community consultation process was ‘a publicity stunt’ characterised by a ‘big brother approach’.¹³ It was the first South African case to adjudicate the constitutional right of access to sufficient water¹⁴ as a matter of public (municipal) policy.

The hope from the April 2008 High Court ruling was that Tsoka had begun a new era of ecological, rational and more egalitarian water provision. However, 11 months later, the Supreme Court judgment ordered, whimsically, a decline in free water available per person from 50 litres each day to 42, if the consumer can prove household ‘indigency’. The Supreme Court also found that prepayment meters were illegal according to Johannesburg Water’s own

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¹² In the High Court: Mazibuko v City of Johannesburg 2008 (4) All SA 471 (W); in the Supreme Court of Appeals: City of Johannesburg v Mazibuko 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA); 2009 (3) All SA 201 (SCA); in the Constitutional Court: Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).


¹⁴ Constitution (note 4 above).
water policy, but that the city didn’t have to remove its illegal meters in Phiri, and instead could ‘legalise the use of prepayment meters’ by changing policies on disconnections to permit them without any administrative-justice process. On the first point, the CAWP argued that 42 litres per person per day:

falls short of what is universally accepted and recognised as the minimum amount of water needed for basic human needs and dignity. Even more problematic though, is that the Supreme Court’s order to the City to provide this amount, is conditional. The very same City that has, at every opportunity, resisted the legitimate claims and demands of poor communities for adequate amounts of free basic water, is effectively allowed carte blanche (through its own assessment of what constitutes ‘reasonableness’ and ‘through available resources’) to determine the timing, character and extent of changes to its existing ‘free water policy’.

The Centre for Applied Legal Studies (CALS), which represented the applicants throughout the High Court case and beyond, agreed, ‘The relief granted by the Court is neither appropriate nor effective … [and] fails to address the City’s constitutional obligations to progressively realise the amount of water it provides’. But neither the activists nor the lawyers were persuasive in the final test, the appeal of the Supreme Court’s judgment to the Constitutional Court, which handed down a ruling completely vindicating Johannesburg Water in October 2009. The judgment confirmed the original 25 litres per person per day plus pre-payment meters as ‘reasonable and lawful’.

The CAWP was infuriated, charging the Court with ‘a lazy legalism and wholly biased and contradictory reasoning … It is as if the thousands of pages of evidence and testimony provided by the Phiri applicants in countering the same from Johannesburg is simply ignored and/or considered irrelevant’. The CAWP was especially annoyed that the Court agreed Johannesburg had passed the ‘progressive realisation’ bar, interpreted by CAWP as allowing ‘the state to do whatever it pleases, whenever it pleases and at whatever pace pleases it’. The CAWP also disputed the Court’s definition of ‘discontinuation’:

The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.

CAWP’s reply: ‘an insult both to the poor and to the constitutional imperatives of justice and equality’.

IV THE LIMITS OF THE RIGHTS NARRATIVE

Some argue that the whole basis of rights discourse (not just judgments like the Constitutional Court’s in the Phiri case) exhibit the problems described above in part because of the rights movement’s ‘domestication’ of the politics
of need. But more can be said about the intrinsic role of rights law from this standpoint, which allows us to question the legalistic reliance upon the rights narrative for popular access to water.

For example, Marius Pieterse argues that:

the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo … the social construction of phenomena such as ‘rights’ and ‘the state’ legitimize a collective experience of alienation (or suppression of a desire for connectedness) while simultaneously denying the fact of that experience. 21

He provides a delightful illustration of this alienation – one that may well be felt by Phiri residents – in asking us to conceive of:

the South African socioeconomic rights narrative as a dialogue between society (as embodying the social and economic status quo) and certain of its members (a social movement, interest group, or individual seeking to assert herself against the collective of the status quo) over the satisfaction of a particular socioeconomic need. Behold, accordingly, the following three-act drama:

ACT 1: On the Streets
Member/Citizen: I am hungry.
State/Society: (Silence) …
Member/Citizen: I want food!
State/Society: (Dismissive) You can’t have any.
Member/Citizen: Why?
State/Society: You have no right to food.
Member/Citizen: (After some reflection) I want the right to food!
State/Society: That would be impossible. It will threaten the legitimacy of the constitutional order if we grant rights to social goods. Rights may only impose negative obligations upon us. We cannot trust courts to enforce a right to food due to their limited capacity, their lack of technical expertise, the separation of powers, the counter-majoritarian dilemma, the polycentric consequences of enforcing a positive right, blah blah blah …
Member/Citizen: (Louder) I want the right to food!!
State/Society: (After some reflection) All right, if you insist. It is hereby declared that everyone has the right to have access to sufficient food and water and that the State must adopt reasonable measures, within its available resources, to progressively realize this right.
Member/Citizen: Yeah! I win, I win!
State/Society: Of course you do.

ACT 2: In Court
Member/Citizen: I want food, your honor.
State/Society (Defendant): That would be impossible, your honor. We simply do not have the resources to feed her. There are many others who compete for the same social good and we cannot favor them above her. If you order us to feed her you are infringing the separation of powers by dictating to us what our priorities should be. We have the democratic mandate to determine the pace of socioeconomic upliftment, and currently our priorities lie elsewhere.
Member/Citizen: (Triumphantly) But I have the right to food!

State/Society (Court): Member/Citizen is right. It is hereby declared that the State has acted unreasonably by not taking adequately flexible and inclusive measures to ensure that everyone has access to sufficient food.

Member/Citizen: Yeah! I win, I win.

Everyone: Of course you do.

ACT 3: Back on the Streets

Member/Citizen: I am hungry.

State/Society: (Silence) …

Member/Citizen: I want food!

State/Society: We have already given you what you wanted. You have won, remember? Now please go away. There is nothing more that we can do.

Member/Citizen: But I am hungry!

State/Society: Shut up.

(Member/Citizen mutely attempts to swallow the judgment in her favor.)

In a more thoughtful way than ‘shut up’, a former Black Consciousness movement revolutionary leader, Mamphela Ramphele (a managing director at the World Bank during the early 2000s and later a wealthy venture capitalist), argued forcefully against the rights-based strategy, for it soon becomes a classic culture of entitlement:

The whole approach of the post-apartheid government was to deliver free housing, free this, free the other. This has created expectations on the part of citizens, a passive expectation that government will solve problems. It has led to a ‘disengaged citizenry’ coupled with a style of leadership in the previous administration that neither accommodated nor welcomed criticism. Thus when people’s expectations are not met, they revert to the anti-apartheid mode of protest which is destroy, don’t pay, trash. We are yet to grasp the role of citizens as owners of democracy.

The same week, deputy police minister, Fikile Mbalula, alleged:

We have just established recently that in actual fact, there is an element of criminality perpetrated by aboTsotsi [bandits] within our communities who have other intentions not related to service delivery, but use service delivery protests as a tool to commit their intended crime.

Ramphele and Mbalula were amongst many who criticised activists demanding water rights. Yet the activists refused to disengage, and instead continued to protest vigorously, at one of the world’s highest per capita rates. Police recorded an average of more than 800 protests annually that they termed ‘dissatisfaction with service delivery’ from 2009 to 2012. That rate reflected a steady 40 to 45 per cent dissatisfaction level identified in polls undertaken by the Human Sciences Research Council (HSRC) from 2003 to 2011. Moreover, the strategy of refusing to pay for water and electricity

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23 Cited in P Green ‘100 Days, 11 Issues’ Mail & Guardian (17 August 2009).
24 F Mbalula ‘Speech Delivered at the Nelson Mandela Bay Crime Prevention Summit by the Deputy Minister: Police’ (13 August 2009).
proved to be effective in pushing the state to make concessions such as the 2000 ANC Free Basic Water promise and the 2008 expansion of the free water allocation in Johannesburg, Durban and a few other cities.

But the state’s overall objective has been to define rights-based protest (and indeed all service delivery protest, along with individual solutions such as informal water or electricity reconnection following disconnections) as illegitimate, and instead to channel the radical language of grassroots activists towards the courts. According to Danie Brand, ‘The law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation’. Brand specifically accuses courts of ‘domesticating issues of poverty and need’ so that they become depoliticised, ‘cast as private or familial issues rather than public or political’.27

V FROM RIGHTS TO COMMONS, FROM WATER TO CLIMATE

Karen Bakker notes a variety of problems associated with a narrative of human rights applied to water:

The adoption of human rights discourse by private companies indicates its limitations as an anti-privatization strategy. Human rights are individualistic, anthropocentric, state-centric, and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatization. Moreover, ‘rights talk’ offers us an unimaginative language for thinking about new community economies, not least because pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.28

Based on the experiences in the Johannesburg water conflicts, the most logical route through and beyond the limitations intrinsically imposed by rights-based strategies is not to defend the Right to Water at Rio+20. The alternative is to explore and shift advocacy efforts towards a ‘commons’ strategy and indeed an entire culture of sharing, of ‘ubuntu’ that cuts against the grain of individualised liberties and their potential cooptation within a Green Economy regime. According to the ‘onthecommons’ website:

The commons is a new way to express a very old idea—that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good and all. The commons are the things that we inherit and create jointly, and that will (hopefully) last for generations to come. The commons consists of gifts of nature such as air, oceans and wildlife as well as shared social creations such as libraries, public spaces, scientific research and creative works.29

29 See <http://onthecommons.org/content.php?id=1467>. 
For Michael Hardt:

On the one hand, the common refers to the earth and all of its ecosystems, including the atmosphere, the oceans and rivers, and the forests, as well as all the forms of life that interact with them. The common, on the other hand, also refers to the products of human labor and creativity that we share, such as ideas, knowledges, images, codes, affects, social relationships, and the like.  

The difference in the two discourses is not merely that water is demanded as an individualised consumption norm in one (rights) and is ‘shared’ in the other (commons). Other contrasts between the political cultures of rights and of commons are explicitly analysed by Bakker, who insists rights advocates suffer a ‘widespread failure to adequately distinguish between different elements of neoliberal reform processes, an analytical sloppiness that diminishes our ability to correctly characterize the aims and trajectories of neoliberal projects of resource management reform’.  

The rebuttal from Johannesburg activists is that rights discourses – even as purely rhetorical demands for a constitutional entitlement, used to empower ordinary people – can serve as a step towards the commons narrative.

This debate has recurred over centuries of social resistance to commodification and ‘enclosure’). Today, Bakker suggests, the water sector includes ‘alterglobalization’ movements engaged in the construction of alternative community economies and cultures of water, centred on concepts such as the commons and ‘water democracies’. A crucial missing element in the rights discourses is environmental, Bakker insists: ‘The biophysical properties of resources, together with local governance frameworks, strongly influence the types of neoliberal reforms which are likely to be introduced’. Bakker is concerned that ‘in failing to exercise sufficient analytical precision in analyzing processes of “neo-liberalising nature”, we are likely to misinterpret the reasons for, and incorrectly characterize the pathway of specific neoliberal reforms’.  

This insight, in turn, should generate concern about climate activist narratives, in part because within the Climate Justice movement there is a tendency to draw upon rights-related narratives, especially for generational rights, or ‘Greenhouse Development Rights’. Where did Climate Justice begin, and do the dangers of rights talk apply? A conference in The Hague sponsored by the New York group CorpWatch in 2000 was the first known event based on the term Climate Justice. Four years later, the Durban Group for Climate Justice was launched, and for many years remained an important strategic listserve for those opposed to the neo-liberal strategy

31 Bakker (note 28 above) 436.
32 Ibid.
33 P Bond Politics of Climate Justice (2012).
34 See J Karliner ‘Climate Justice Summit Provides Alternative Vision’ CorpWatch <http://www.corpwatch.org/article.php?id=977; and see http://www.corpwatch.org/article.php?id=1048> for the first definition I have seen, dating to late 1999.
of carbon trading. The sometimes inchoate advocacy movement known as Climate Justice Now! (CJN!) began in 2007, and played a role in grassroots environmental advocacy as well as global-scale UN climate summits.

The highest-profile of these, with 100,000 protesters demanding a strong agreement from negotiators, was in Copenhagen in 2009; contesting mainstream environmentalists, Danes and other Europeans formed a Climate Justice Alliance whose ‘Reclaiming Power’ protest was severely repressed by Copenhagen police.

Shortly after the Copenhagen summit’s well-recognised failure, the Bolivian government led by Evo Morales and his then UN ambassador, Pablo Solon, hosted a 2010 conference in Cochabamba, attended by 35,000 activists, including 10,000 from outside the country. This was important partly because of attempts to incorporate within Climate Justice politics a commitment to carbon markets and offset payments, especially through the Reducing Emissions from Deforestation and Forest Degradation (REDD) programme. The Cochabamba conference adopted several demands that were anathema to mainstream climate politics, and that borrowed the language of rights:

• 50 per cent reduction of greenhouse gas emissions by 2017;
• acknowledging the climate debt owed by developed countries;
• full respect for human rights and the inherent rights of indigenous people;
• universal declaration of rights of Mother Earth to ensure harmony with nature;
• establishment of an International Court of Climate Justice;
• rejection of carbon markets and commodification of nature and forests through the REDD programme;
• promotion of measures that change the consumption patterns of developed countries;
• end of intellectual property rights for technologies useful for mitigating climate change; and
• payment of six per cent of developed countries’ GDP to addressing climate change.

REDD proved amongst the most important wedge issues within the Climate Justice community, for late in 2010, sharp controversies emerged over forest preservation as major US environmental foundations attempted to resurrect market strategies. Nevertheless, from the realisation that ‘neo-liberalised
nature’ was the new global-governance approach for environmental (and social) management, there emerged, in direct response, a new Climate Justice philosophy and ideology, principles, strategies and tactics. The question still to be answered is whether transcending rights talk in favour of commoning is the appropriate route forward for climate activism; at least with respect to linkage of issues through a commons perspective, there are enormous potentials, as Edgardo Lander explained in his review of the Cochabamba:

Struggles for environmental or climate justice have managed to bring together most of the most important issues/struggles of the last decades (justice/equality, war/militarization, free trade, food sovereignty, agribusiness, peasants’ rights, struggles against patriarchy, defense of indigenous peoples’ rights, migration, the critique of the dominant Eurocentric/colonial patterns of knowledge, as well as struggles for democracy, etc, etc). All these issues were debated on Cochabamba and, to some degree, present in the Cochabamba Peoples’ Agreement.  

VI CONCLUSION

Does the eco-social critique of the limited effect of rights apply to South African water-rights activists and does it explain the constraints associated with their human rights discourse? At the same time, does it offer lessons for Climate Justice activism, as to avoiding similar limitations? Perhaps most importantly, in order to make their case for more water without prepayment meters, the Soweto activists and their lawyers focused only upon the consumption needs of low-income residents. Hence several other processes were downplayed: the source of a large amount of Johannesburg’s water in the Lesotho dams; the manner in which Rand Water—the catchment management agency between the dams and Johannesburg—processed and distributed the water; the financing of the bulk system through the World Bank and other creditors; the extremely high consumption norms of Johannesburg’s wealthier residents and large corporations; and the disposal of water through the system’s sanitation grid into a water table and groundwater beset by ecological crises.

In other words, linkage of issues was lost by virtue of the narrow human-centric channelling that legalistic rights talk compels of water activists. This is not to say that by adding natural rights, the human rights case would be strengthened, of course. The potential to invoke a ‘water reserve’ (ie letting a river flow all the way to the ocean) within national legislation (for example the National Water Act) does not necessarily assist poor people in gaining access to water, without first challenging the extreme abuse of water by corporations (Eskom is the most wasteful given its use of cooling water for coal-fired power plants), golf courses, timber plantations and wealthy households with swimming pools and English gardens.

Adding environmental factors is only the first step to ‘commoning’ water. Much more important is establishing a base amongst water consumers for a

different way of arranging water distribution and disposal. For if done without adequate foresight, Bakker warns:

appeals to the commons run the risk of romanticizing community control. Much activism in favour of collective, community-based forms of water supply management tends to romanticize communities as coherent, relatively equitable social structures, despite the fact that inequitable power relations and resource allocation exist within communities.  

The challenge, thus, is to introduce a strong culture of water commons as an ideology, so that public consciousness and daily life are suffused with the vision of equitable access ensured through collective action in a context of ecological limits. That will serve as an antidote to the ‘neo-liberal populism’ that may well emerge to re-commodify commons processes. For example, faddish techniques of micro-financing and ‘self-help’ entrepreneurial ideologies drawing on a ‘culture of social entrepreneurship’ are now applied to public goods such as water and health care. In the name of the ‘right to credit’ based on breathing the life of finance into ‘dead capital’, there has been enormous damage done to a commons of social trust. This is true even in the case of Muhammad Yunus’ Grameen Bank, given that micro-credit is now increasingly held responsible for thousands of small-farmer suicides in South Asia and other manifestations of market/society failure. One of the most influential micro-entrepreneur advocates, Hernando de Soto, rests his vision of property rights upon the collateralisation of land, shacks, livestock and other goods informally owned by poor people (but currently dead capital), all the better to invoke micro-finance and in turn an often mythical successful rise to market-based wealth generation. Such capture of commons processes at local level should be contrasted with the changes required at the national scale, and potentially globally once the balance of power improves, to fundamentally redirect our inherited patterns of extraction, production, distribution, transport, financing, consumption and disposal.

Even greater challenges can be found along similar lines when it comes to climate change, a problem that amplifies the need for radical change in all the inherited systems that have proven so destructive. This is true especially as absolute water scarcity emerges, for countries like South Africa – and metropolitan areas such as Johannesburg – will become sites of conflict thanks to climate change, paralleling rural Darfur, Sudan, where sustained drought catalysed a ferocious war over land and water access. This kind of disaster brings us, finally, to recall that in 2009 in Addis Ababa, Ethiopia, the African Union demanded wealthy industrialised countries pay reparations for damage done by climate change under the rubric of ‘climate debt’. Numerous other forms of ecological debt could be calculated and paid for by over-consumers in the Global North, given that the perspective required to move

42 Bakker (note 28 above).  
in this direction is to understand the web of life connecting North and South as a great commons. 44

In the water sector, activist awareness of the ecological aspects of water as commons is growing especially because of climate change. The Johannesburg region is crucial because it is the most intensive site for (non-smelting) electricity usage in South Africa, its water tables are being ruined through Acid Mine Drainage, its main resource (gold) is nearly exhausted, and its manufacturing base is uncompetitive with imports from East Asia. As a financial and services centre it has thrived, but the sustainability of such activity is limited given the country’s vast problems with current account balances, foreign debt and an unstable currency. Moreover, it is a city with vast reservoirs of conscientised activists in civil society, whose honeymoon with the South African state after apartheid was very short indeed.

What was and is necessary, for exploration in Johannesburg after Phiri, or in Durban after COP17, or anywhere influenced by the 2012 Rio+20 Summit, as well as in all the future sites of struggle over water and environmental services across the world, are new ideas and strategies that can transcend consumption-based rights demands. As a first step, we need more coherent critiques of the full range of practices that undermine our ability to perceive and respect water and other aspects of nature as a commons. These strategies may emerge through fusions of community, environmental and labour in the alliance-formation that necessarily occurs during eco-social justice struggles, as rights-talk meets its limits, and as the commons appears as a new frontier.

44 ‘Rich Countries Owe Poor a Huge Environmental Debt’ Guardian (18 January 2008); also see K Sharife & P Bond ‘Payment for Ecosystem Services versus Ecological Reparations: the “Green Economy”, Litigation and a Redistributive Eco-Debt Grant’ in this Special Issue.