Spring 2008

The Trickle down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing the South African Constitutional Right to Water

Andrew L. Magaziner

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol33/iss3/4

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Trickle Down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water†

I. Introduction .............................................................................. 510
II. History of the South African Constitution and Understanding “Constitutionalism” ........................................ 512
III. The Phiri Water Rights Case ..................................................... 521
   A. South African Water Policy: A Brief Review ....................... 522
   B. The Phiri Applicants: Their Stories and Legal Claims ........ 527
IV. Interpreting the 1996 Constitutional Text: Implications for Phiri Residents ...................................................... 530
   A. Section 27 ...................................................................... 531
   B. Section 7 ...................................................................... 532
   C. Section 8 ...................................................................... 533
   D. Section 9 ...................................................................... 535
   E. Section 33 ...................................................................... 537
   F. Section 36 ...................................................................... 538
   G. Section 38 ...................................................................... 541
   H. Section 39 ...................................................................... 541
V. South African Legislation: Codifying the Constitutional Right to Water ............................................................. 543
VI. The South African Judicial System ........................................ 548
VII. International Treaties and Agreements: The Human and Legal Right to Water .............................................. 549
   A. The Human Right to Water ............................................. 550
   B. General Comment 15 ....................................................... 555
VIII. The Structure of Bill of Rights Litigation: Preliminary Procedural Issues .................................................... 561
IX. Constitutional Court Precedent and the Justiciability of Socioeconomic Claims ........................................... 561

† The author would like to thank his Articles Editor, David Ruff, for his patience, enthusiasm and invaluable advice. In addition, much is owed to Professor Elizabeth Gibson for her guidance, assistance, and encouragement throughout law school, and to his brother, Dan, for his constant support. Any errors are the author’s alone.
I. Introduction

"Everyone has the right to have access to . . . sufficient food and water . . . ."

With the above declaration, the Constitution of the Republic of South Africa distinguishes itself from most other Constitutions by virtue of its express commitment to socioeconomic justice and equality. Section 27, entitled "Health care, food, water and social security," is one of thirty-three provisions listed in Chapter 2, which enumerates the Constitution's Bill of Rights. Though the text reads simply enough, delineating the true meaning of "sufficient food and water" has revealed itself to be difficult in practice.

The right to water, and perhaps more specifically, the state's ability to restrict this right, has come under recent scrutiny in Johannesburg, South Africa. In early July of 2006, the Johannesburg High Court received an application filed by five residents of Phiri, Soweto asking the Court to declare the decisions of Johannesburg Water "to limit free basic water supply to 6 kilolitres per household per month and to unilaterally install

---

1 S. AFR. CONST. 1996 ch. 2, § 27 (emphasis added).
2 Id.
3 For a discussion of the constitutional jurisdiction of the High Court, see IAIN CURRIE & JOHAN DE WALL, THE BILL OF RIGHTS HANDBOOK 112 (5th ed. 2005) [hereinafter BILL OF RIGHTS HANDBOOK].
prepayment meters” unconstitutional.6 The five applicants sought a compulsion order to be levied upon Johannesburg Water (Pty) Ltd. to “provide a free basic water supply of 50 litres per person per day, and the option of a credit-metered supply installed at the cost of the City of Johannesburg, to the residents of Phiri, Soweto.”7 The case was heard by the High Court in December of 2007, and a decision is expected sometime after the publication of this article.

Before reaching the application before the High Court, I must first discuss the basic human and legal right to water and its constitutional assurance as provided by the South African Bill of Rights. Careful analysis of the issues central to the complaint requires a discussion of the evolution of the South African Constitution (merely a decade into its existence); an analysis of interpretive techniques for digesting what is a very liberal, and often unworkably vague, Bill of Rights; and a review of commentary regarding the fundamental nature of the right to water. With this background in place, I will focus on the Phiri water rights application itself and engage in speculative analysis concerning the constitutionality of the prepaid water meter scheme currently in operation.

The adoption of the South African Constitution nearly eleven years ago was a momentous occasion for a new democratic South Africa, but democratic constitutionalism8 is not defined by its birth, but rather, through its maturity. The members of the High Court, and similar judicial outposts throughout South Africa, sit in a position of powerful potential. The Constitution, absent interpretation and implementation, merely represents transparent promises and empty obligations. As the Phiri water rights case

---


7 Id.

8 “Without true parliamentary government it is hollow to speak of ‘a government by the people and for the people.’ Representative government is at the heart of democracy and constitutionalism. Without it is idle to speak of the constitutional protection of human rights.” Welshman Neube, Constitutionalism and Human Rights: Challenges of Democracy, in The Institutionalisation of Human Rights in Southern Africa 1, 14 (Pearson Nherere & Marina D’Engelbronner-Kolf eds., 1993).
reflects, adding substance to the text requires a careful understanding of the Constitution's history, objectives, and accompanying legal responsibilities.

The City of Johannesburg can no longer escape its constitutional duty. Both the historical provocation for the socioeconomic protection provided by the Bill of Rights and the developing international commitment to an enforceable human right to water weigh in favor of finding for the Phiri applicants. Evolving judicial precedent has reaffirmed the justiciability of socioeconomic rights in South Africa. Jeopardizing the Constitution's humanitarian impact further must remain an unacceptable proposition. The prepaid water scheme should be rendered unconstitutional.

II. History of the South African Constitution and Understanding “Constitutionalism”

"WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."

A Constitution is a people's document, "written to give effect to the will of the people and it is supposed to have decisive influence for good in their lives." The long winding road towards a South African Constitution in the mid-1990's must be considered against the historical backdrop of enslavement, disenfranchisement, and minority rule. When the Union of South

---

9 S. AFR. (Interim) CONST. 1993 pmbl. This interim Constitution was a transitional Constitution that governed South Africa while an elected Constitutional Assembly drafted the final Constitution. DION BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION 1 (rev. ed. 1995).

10 BASSON, supra note 9, at xix.

11 Id. Beginning in the 1650's, the Dutch began to colonize the southern-most tip of Africa, soon followed by the French and British. Id. By the 1830's, the British were engaged in warfare with indigenous factions, and the Afrikaners (Boers) gradually conquered and moved inland towards the North, depriving indigenous people of their land and rights along the way. Id. at xix-xx. For a general historical perspective of the events leading up to the adoption of the interim Constitution, see id. at xx-xxiv.
Africa was declared in 1910, black South Africans who lived in the Cape Colony possessed an extremely limited right to vote, a right that was completely eliminated in 1936.12 "The 1909 Constitution of the Union of South Africa [placed] . . . an omnipotent legislator . . . in the hands of an ethnic or racial minority,"13 thereby compromising the Constitution's ultimate ability to represent the people at large. "[S]urely rank[ing] as one of the greatest disasters in the constitutional history of the world,"14 the 1909 Constitution rendered Parliament free to do as it pleased, and stripped both citizens and the judiciary of the ability to challenge Parliamentary discretion.15 Compared to its British counterpart, the power of the South African Parliament was magnified because it "represented only the white minority"; black citizens, governed by the executive, had no effective control or meaningful influence on Parliament initiative.16 Human rights violations went unpunished, and the Constitution itself was subject to capricious Parliamentary amendment.17

When the National Party came to power in 1948, elected by an all-white electorate, the period of apartheid rule flowed naturally from the concentration of power in the hands of conservative Afrikaners.18 For the next four decades, any constitutional protections for the majority black population were widely disregarded. If not disregarded, many protections were unenforceable due to a judiciary rendered helpless by its

12 BASSON, supra note 9, at xx.
13 Id.
14 Id.
15 BILL OF RIGHTS HANDBOOK, supra note 3, at 3. The 1909 Constitution “was not supreme” and provided no authority under which the black majority could challenge the “sovereign Parliament.” BASSON, supra note 9, at xx. This model of “parliamentary sovereignty” originated in Great Britain and is known as the Westminster model. BILL OF RIGHTS HANDBOOK, supra note 3, at 3; BASSON, supra note 9, at xx. Unlike the British Parliament, however, the South African Parliament was not politically accountable to the disenfranchised majority of its population. BILL OF RIGHTS HANDBOOK, supra note 3, at 3.
16 BILL OF RIGHTS HANDBOOK, supra note 3, at 3. The judiciary also lacked significant judicial constraint on Parliament. Id. Courts “could only declare a [parliamentary] Act invalid if it had not been passed in accordance with the procedures for passing legislation that had been laid down in the Constitution.” Id.
17 Id. at 3-4.
18 BASSON, supra note 9, at xx.
inadequate constitutional position "as well as a general unwillingness to assist the subjects of the state against infringements by the executive authorities."\footnote{Id.}


The introduction of the 1983 Constitution only added fuel to a growing and organizing fire of displeasure. The "system of sham power-sharing between three ‘population groups’ in terms of which the whites . . . still exercised the power unhindered and the blacks were completely excluded"\footnote{BASSON, supra note 9, at xxi.} in no way triggered humanitarian improvement for the most disadvantaged South African citizens, and a state of emergency was declared as of 1986 in response to the escalating degree of violence.\footnote{Id.} The South African constitutional system, by the mid-1980s, lost any semblance of legitimacy.\footnote{Id.} It was at this breaking point, however, that the foundation for the interim Constitution began to take form.

Responding to widespread criticism, the white government and apartheid opponents began to accept the need for compromise and
an alternate course of progress. Negotiations between adversarial leaders ensued, and the path was plotted towards the interim Constitution. Secret meetings between an imprisoned Nelson Mandela and National Party government members, when coupled with the elimination of a number of apartheid statutes and the legalization of black unions, together foreshadowed the most dramatic pre-Constitution events of early 1990. One year into his presidential term, in February of 1990, new State President F. W. de Klerk released Mandela from prison, shortly after opening Parliament by lifting all legal restrictions that had previously shackled liberation movement activity. As the African National Congress ("ANC"), the Pan Africanist Congress, and the South African Communist Party enjoyed new political freedom, the ANC and the government began working toward overcoming some of the most tangible obstacles to productive negotiations—the armed struggle and the detainment of political prisoners.

Officially representing the beginning of the all-party negotiations, the Convention for a Democratic South Africa ("CODESA") convened on December 20, 1991. As described by the Constitutional Court in a 1996 judgment, "[a]n interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted." Negotiations at CODESA, however, broke down.

---


27 BASSON, supra note 9, at xxi.

28 BILL OF RIGHTS HANDBOOK, supra note 3, at 4.


30 See BILL OF RIGHTS HANDBOOK, supra note 3, at 4.

31 Id. at 5; see also BASSON, supra note 9, at xxi (describing the initiation of CODESA, the obstacles standing in the way of successful negotiation, and the drafting of the interim Constitution).


33 BILL OF RIGHTS HANDBOOK, supra note 3, at 5 (quoting Ex Parte Chairperson of
Following two years of continued discussions between the ANC and the government, formal negotiations were re-initiated as part of the Multi-Party Negotiation Process ("MPNP"). On November 18, 1993, the MPNP ratified the interim Constitution and declared "a set of binding Constitutional Principles." The interim Constitution was transitional in nature, establishing the procedures for drafting a "new" and "final" constitution. Its specific mandates, effective as of April 27, 1994, were repealed following the adoption of the 1996 Constitution. The detailed obstacles, challenges, and points of contention that arose during the negotiation process and contributed in shaping the text of the interim Constitution are beyond the scope of this Comment. The brief historical account above underscores the truly innovative and revolutionary character of the new constitutional text. For purposes of this piece, the interim Constitution most notably represented a drastic departure from a system of "parliamentary sovereignty" in favor of a "doctrine of constitutional supremacy." Whereas human rights violations had been largely ignored by the judiciary during the previous century, Chapter 3 of the interim Constitution declared a Bill of Rights and granted the courts fresh and relatively unhindered oversight authority (save a few qualitative interpretive guidelines) in safeguarding these individual rights for all South African citizens.

The Constitution, now seen as a potential pillar of security for the historically downtrodden majority, assumed a new role in the South African social order.


35 BILL OF RIGHTS HANDBOOK, supra note 3, at 5.

36 Id.

37 Id. For a complete list of the Constitutional Principles, see ROB AMATO, UNDERSTANDING THE NEW CONSTITUTION 156 (1994).

38 BILL OF RIGHTS HANDBOOK, supra note 3, at 5.

39 Id. at 2.

40 Id.
The Bill of Rights, as formulated in Chapter 3 of the interim Constitution, protected individual rights and freedoms against abusive state intrusion.\textsuperscript{41} From the most utopian perspective, the "introduction of the Bill of Rights . . . [represented] a radical break with the constitutional past in terms of which [the] very values of democracy, dignity, equality and freedom were trampled and denied, especially by an omnipotent legislature."\textsuperscript{42}

Liberation Movement members envisioned a working bill of rights long before its official adoption in 1993. Dating back to 1942, the ANC had drafted a charter of rights for South African people.\textsuperscript{43} The Freedom Charter of 1955 expanded on the basic rights and expectations ANC members demanded for an improved, equal, and democratic society.\textsuperscript{44} Though in exile, the Constitutional Committee of the ANC set out to draft its own set of constitutional principles, with the hope that these declarations would someday be woven into a new Constitutional Bill of Rights for all of South Africa.\textsuperscript{45}

Just as the exiled ANC members formulated a draft Bill of Rights, so too did the South African Government, which established the Law Commission to consider the viability of such a document.\textsuperscript{46} The Government made two important findings: (1) attempting to enforce a Bill of Rights before a new Constitution was adopted, and political equality guaranteed, was impracticable in theory; and (2) a Bill of Rights "was inconsistent with the notion of group rights as then projected by the National Party Government."\textsuperscript{47} As such, the Government recognized the need for

\textsuperscript{41} Basson, supra note 9, at xxvii.
\textsuperscript{42} Id.
\textsuperscript{43} Albie Sachs, A Bill of Rights for South Africa, in The Institutionalisation Of Human Rights in Southern Africa, supra note 8, at 23, 25.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 27. The determination to craft a justiciable Bill of Rights was not unquestioned. Id. The ANC encountered resistance from some scholars and ANC affiliated advocates that a Bill of Rights would essentially play itself out to be nothing more than a "bill of whites." Id. The ANC proceeded to draft constitutional principles, having researched and understood the important role a Bill of Rights would serve in the pursuit of freedom, though conscious of the necessary attention towards implementing and enforcing the text. Id. at 27-29.
\textsuperscript{46} Id. at 29.
\textsuperscript{47} Id.
a "non-racial Constitution" and the ANC (and other liberal movement participants) began the arduous task of working with the National Party in search of a workable draft Bill.48

The ANC and the Government, as expected, nowhere near approached universal agreement. On a broad level, the Law Commission and the ANC specifically differed with respect to who the Bill of Rights addressed and how its true utility would eventually be determined. In essence, the ANC argued that the Law Commission’s Bill of Rights was structured in overly technical terms (written with judges and lawyers in mind). The ANC, on the other hand, envisioned a Bill of Rights with greater "inner resonance," a document that represented the social and cultural expectations of the masses, priorities that the individual would never compromise, nor be asked to compromise.49 From the ANC’s perspective, the injustices stemming from the apartheid system were best addressed through socioeconomic protections written into a "‘progressive’ Bill of Rights."50 The ANC wanted all rights declared equally fundamental, justiciable, and applicable as between not only the state and its citizens, but vis-à-vis citizens themselves.51

The main purpose of the negotiations leading up to the adoption of the interim Constitution was to "ensure the ultimate goal of a liberated and democratic South Africa."52 The interim Constitution was only a first step towards this goal. The drafters envisioned a Constituent Assembly comprised of democratically elected representatives that would write and adopt a final, sturdy, and legitimate Constitution.53 Despite its deficiencies, the interim Constitution warrants applause for creating expansive constitutional jurisdiction in the courts, thereby removing Parliament from its supreme and unquestioned discretionary

---

48 Id. at 30.


51 Id. at 215.

52 Basson, supra note 9, at xxii.

53 Id.
Creation of a justiciable Bill of Rights stands as "the most important characteristic of the interim Constitution" and its greatest accomplishment.\(^5\) Though imperfect, this Chapter 3 of the interim Constitution provided a starting point for securing the fundamental rights of South African citizens. Neither the swift and complete passage of power from the state to the individual, nor the establishment of a firm right of self-determination were realistic developments at the time. It is therefore important to reiterate the goals of the interim Constitution, which, though both practically and theoretically restrained (and done so consciously), were achieved with great success. Under these guiding objectives, Mr. Justice Dion Basson, a High Court judge and co-writer of the new Constitution, asserted in 1995 that the Interim Constitution not only served its most general purpose, but was also quite successful in changing the course of South African constitutionalism:

Taking into account the important features of the interim Constitution, that is, a supreme, inflexible Constitution, a justiciable Bill of Rights, a democratic representative government and commissions and functionaries which enhance a human rights culture and secure accountability, it would appear that the interim Constitution was successful in realizing the aspirations of the people of South Africa and, in essence, creates an open and democratic society. The era of oppression and exploitation has ended. The era of constitutionalism and justice has begun.\(^6\)

The new Constitution of the Republic of South Africa, as signed by President Nelson Mandela on December 10th, 1996,\(^7\) was born in the shadow of the interim Constitution. But, unlike its predecessor, the 1996 Constitution was adopted by a democratically elected Constitutional Assembly\(^8\) and later

\(^{54}\) Id. at xxiv.

\(^{55}\) Id. at xxvii.

\(^{56}\) Basson, supra note 9, at xxx.


\(^{58}\) Bill of Rights Handbook, supra note 3, at 6.
certified by the Constitutional Court\textsuperscript{59} as being consistent with the thirty-four Constitutional Principles\textsuperscript{60} outlined during the negotiation process.

The Bill of Rights, as contained in Chapter 3 of the interim Constitution, "enshrined[d] and entrench[e][d] the fundamental human rights and freedoms of the subjects in the state which are protected against infringement."\textsuperscript{61} The Bill of Rights were justiciable promises and obligations assumed by the state, reviewable by the Constitutional Court and enforced by judicial order.\textsuperscript{62} In the 1996 Constitution, as finally adopted, the Bill of Rights finds its permanent home in Chapter 2 and stands as "one of the most progressive [Constitutional Bills of Rights] in the world."\textsuperscript{63} George Devenish, in his piece entitled "Democratic Counter Majoritarianism: Protecting Ethnic Minorities in a Liberal Democracy with Special Reference to South Africa,"\textsuperscript{64} argued demonstratively that "[t]he constitution must contain an entrenched and justiciable bill of rights that must protect civil and political rights, i.e. the first generation rights. It must also contain provisions relating to the second generation rights, i.e. socio-


\textsuperscript{60} "The [thirty-four] Constitutional Principles were a framework for the creation of a democratic state with a supreme constitution in which the fundamental rights and freedoms of all citizens [were] protected." \textit{BILL OF RIGHTS HANDBOOK, supra} note 3, at 7. As certified by the Constitutional Court in October, 1996, the new Constitution replaced the thirty-four guiding constitutional principles as the legal and social declarations with which state action must comply. See \textit{id}.

\textsuperscript{61} \textit{BASSON, supra} note 9, at 13.

\textsuperscript{62} Id.


\textsuperscript{64} George Devenish, \textit{Democratic Counter Majoritarianism: Protecting Ethnic Minorities in a Liberal Democracy with Special Reference to South Africa}, in \textit{THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA, supra} note 8, at 37, 37.
economic rights, and the third generation rights, i.e. environmental rights. The South African Bill of Rights responded to this call-to-action.

Though Chapter 2 of the 1996 Constitution textually resembles Chapter 3 of the interim Constitution in many ways, the Section 27 protections, paramount to the allegations espoused by Phiri residents in the case presently pending before the High Court, were not initially contained in Chapter 3 of the interim version. With this in mind, the relevant provisions of Chapter 2 of the 1996 Constitution, as cited by the five applicants in the Phiri water rights case, warrant specific consideration. But before turning to the specific Constitutional text, a better understanding of the Phiri water rights case is required.

III. The Phiri Water Rights Case

Phiri is a township in Soweto, bordered by Mapetla and Moraka, and established during the apartheid era in the late 1950's "as an ethnic enclave for people designated as Sothos and Tswanas by the apartheid" regime. In its early development, tens of thousands of low cost homes were constructed, though most lacked indoor plumbing or working toilets. Throughout the latter course of the 20th century, Phiri homes were gradually electrified, but a housing shortage swept the township by the 1990s, resulting in some two thousand backyard dwellings being built by the new millennium. Phiri, even by Soweto standards, is notoriously overcrowded, boasting a population density of over 180 persons

65 Id. at 38.
66 See Mubangizi, supra note 63, at 2-3. The South African Bill of Rights "contains all categories of human rights that are ordinarily included in most international human rights instruments, namely, the so-called first generation rights (which consist of the traditional civil and political rights) and the rather controversial second and third generation rights (which consist of social, economic, and cultural rights). For [this] reason, many commentators see South Africa as a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights." Id.
68 Id.
69 Id.
70 Id.
per hectare. Of specific note for the purposes of this piece, Soweto households only rarely have a separate bathroom, and there is generally an elevated degree of water loss both through outside taps and outdated standpipes.

In July of 2006, five Phiri residents filed papers in the Witwatersrand High Court "asking that the government's capped free water allowance as well as prepaid meters be declared unconstitutional." The five applicants listed the City of Johannesburg, the Johannesburg Water LTD, and the Minister of Water Affairs and Forestry as named respondents. The Phiri residents challenged a handful of decisions made by the City of Johannesburg to effectively limit the free basic water supply to six kiloliters per household per month, as well as discontinue an un-metered scheme of water distribution in favor of a controlled volume water supply system operated through pre-paid meters. Beyond declaring these practices unconstitutional, the Phiri residents, all unemployed and impoverished, seek "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." A brief historical summary of the important developments in water policy that preceded this court action will help make sense of the allegations.

A. South African Water Policy: A Brief Review

When the ANC party assumed power in 1994, it did so "under contract" with the electorate responsible for its rise to political triumph. A pillar of the ANC's commitment to the majority

---

71 Id. One hectare is the equivalent of ten thousand square meters.
72 Id. at 10-11.
74 Applicants' Notice of Mot., available at http://www.law.wits.ac.za/cals/phiri/index.htm (follow "Notice of Motion" hyperlink). The Notice of Motion was filed in the High Court of South Africa, Witwatersrand Local Division. Id.
75 Id. ¶¶ 3-4.
76 Centre for Applied Legal Studies, supra note 6, at 1.
77 Applicants' Notice of Mot., supra note 74, ¶ 8.
black and poor South African constituency, the Reconstruction and Development Programme ("RDP") was seen as a redistributive promise premised on a quest for substantial socioeconomic liberty and justice.

As outlined in the RDP, water was one of the fundamental municipal resources to be redistributed to redress historical injustice exercised against the poor and black citizenry. Improved access to sufficient, sanitary water was thus both promised and expected. However, prior to 1995, the ANC had seemingly forgotten its oath to the people, bowing to the greater forces of the international purse and prioritizing privatized investment over grass-root commitments.

The South African government adopted a policy inconsistent with the RDP's pledge to a lifeline supply of water and, by 1996, under pressure from the International Monetary Fund (IMF) and the World Bank, created the Growth, Employment and Redistribution Strategy (GEAR). GEAR represented a neo-liberal, macro-economic scheme, setting the stage for a gradual privatization of the South African water supply. "GEAR espouse[d] an official government policy of free markets and globalization, including the opening of domestic markets to foreign competition, privatization of state-owned industries, and restrictions on public spending."

GEAR thrust water delivery responsibility firmly on the shoulders of local municipalities, while the government simultaneously decreased its social spending and financial support for city council operations. Pinched on both sides, and running


81 See McKinley, supra note 78, at 2.

82 THE STRUGGLE AGAINST SILENT DISCONNECTIONS, supra note 67, at 4.

83 Francis, supra note 80, at 157.

84 THE STRUGGLE AGAINST SILENT DISCONNECTIONS, supra note 67, at 4.

85 McKinley, supra note 78, at 2.
out of internal resources, municipalities turned to the private sector to replace lost revenue. As a result, “water delivery in South Africa has become the responsibility of an international private sector in the form of the major transnational companies that control the provision of water all over the world.\textsuperscript{86} Consequentially, the price of water skyrocketed, the repercussions of which were most dearly felt by the poor and uninformed.\textsuperscript{87}

In accordance with World Bank initiative, Johannesburg and other city councils instituted cost recovery\textsuperscript{88} policies against residents faced with insurmountable water bills.\textsuperscript{89} Residents who failed to pay their utility bill had service discontinued. As a result, widespread cut-offs were implemented throughout the poorest South African communities.\textsuperscript{90} Following the terminations of utility service, evictions rose, displeasure mounted, and resistance organized.\textsuperscript{91} As the anti-privatization voice grew louder, corporate leaders began to consider alternative ways to maximize revenue, minimize water waste, and realize their neo-liberal objectives.\textsuperscript{92} The prepaid meter became a potentially viable option.

Since 2001, Johannesburg Water has been jointly operated by the French multinational Suez Lyonnaise and British Northumbrian Water.\textsuperscript{93} The City of Johannesburg also entered

\textsuperscript{86} \textit{The Struggle Against Silent Disconnections}, supra note 67, at 4.

\textsuperscript{87} Dale T. McKinley, \textit{The Struggle Against Water Privatisation in South Africa}, in \textit{Reclaiming Public Water} 181, 182-84 (2d ed. 2005) [hereinafter \textit{Struggle Against Water Privatisation}].

\textsuperscript{88} For a brief definition of cost recovery policies, with specific reference to South African utilities, see \textit{The Struggle Against Silent Disconnections}, supra note 67, at 4 n.3; see also Francis, supra note 80, at 157 (providing an overview of cost recovery policy in municipal service delivery).

\textsuperscript{89} See \textit{Struggle Against Water Privatisation}, supra note 87, at 182-84.

\textsuperscript{90} See \textit{The Struggle Against Silent Disconnections}, supra note 67, at 4.

\textsuperscript{91} “For the past three years Phiri has been a hotbed of activism in what residents call their battle for water. Dissidents have been detained and others injured during confrontations with the police over imposed household pre-paid water meters.” Groenewald, supra note 73.

\textsuperscript{92} \textit{The Struggle Against Silent Disconnections}, supra note 67, at 4-5.

into contracts with Rand Water, a parastatal water utility that provides water to Johannesburg Water.\textsuperscript{94} For these private companies, the prepaid meter system serves valuable functions. Through a front-end payment scheme, water is distributed only to paying customers, thus avoiding cumbersome debt collection, while presumably (from the state’s perspective) promoting sound and efficient water use.\textsuperscript{95} For impoverished South Africans, however, the individual right to safe and sufficient water, as promised by the Constitution, has become contingent upon an individual’s financial security and capacity to pay.\textsuperscript{96}

Through its search for a sustainable “cost recovery” scheme, Johannesburg Water introduced prepaid meters in scores across some of South Africa’s poorest townships.\textsuperscript{97} Phiri, well known for inefficient water use and water connections illegally secured by its residents to avoid regulation compliance,\textsuperscript{98} was among the targeted regions. Amos Masondo, Johannesburg’s mayor, implemented Operation Gcin’amanzi (Operation Save Water)\textsuperscript{99} in September 2003, spurring the construction of Soweto’s prepaid meter stands.\textsuperscript{100} The logistics of Operation Gcin’amanzi provide the framework for the Phiri residents’ constitutional challenge.

“The objective of Operation Gcin’amanzi is to create an efficient water supply system and achieve significant savings in

\textsuperscript{94} For a company profile of Rand Water, see Rand Water South Africa, http://www.randwater.co.za (last visited Jan. 21, 2008).

\textsuperscript{95} THE STRUGGLE AGAINST SILENT DISCONNECTIONS, supra note 67, at 3-5. Note that the “use of prepaid water in the United Kingdom was declared illegal in 1998.” Groenewald, supra note 73.

\textsuperscript{96} THE STRUGGLE AGAINST SILENT DISCONNECTIONS, supra note 67, at 5.

\textsuperscript{97} Id. at 7.

\textsuperscript{98} Id.

\textsuperscript{99} Soweto, South Africa, WATERGY CASE STUDY (Alliance to Save Energy, Washington, D.C.), at 1-2, http://www.watergy.net/resources/casestudies/soweto_southafrica.pdf [hereinafter Alliance to Save Energy]; see also Groenewald, supra note 73 (describing Operation Gcin’amanzi as a “multimillion-rand initiative to upgrade the water supply facilities in Soweto”). Project Gcin’amanzi was instituted to combat water losses in Soweto which, by 2003, amounted to seven billion liters a month. Anna Cox, STAR (South Africa), Court Battle Looms About Basic Water Supply, July 17, 2006, at 8, available at http://www.int.iol.co.za/ (search “Article Search” for “court battle looms”; then follow “Court battle looms over basic water supply” hyperlink).

\textsuperscript{100} THE STRUGGLE AGAINST SILENT DISCONNECTIONS, supra note 67, at 7.
total water supplied to the area by reducing excessive consumption and wastage." As promoted by the government and its supporters, Operation Gcin'amanzi allows residents to claim ownership of their water consumption while simultaneously realizing the government's primary goal of reducing the financial costs associated with water waste. From a poor resident's perspective, efficient cost recovery only further restricts what is already inadequate access to sanitary water. The Phiri community physically and verbally resisted the prepaid meter initiative, yet the groundwork for its implementation went largely unimpeded.

Specifically addressed in the papers filed with the High Court, Operation Gcin'amanzi allows each property to secure its first six thousand liters, per month, free of charge. Beyond this threshold volume, citizens are forced to pay consistent with their consumption. Once six thousand liters have been depleted, water use inevitably becomes contingent on disposable financial resources.

In the nearly three and a half years since the launch of Operation Gcin'amanzi, citizen experience has varied. Whereas some Phiri residents have comfortably adjusted to the six thousand free liter policy, others have had their water cut off when they used excess water beyond the free allocation and could not afford the surplus. Many have reluctantly accepted the prepaid system in order to avoid complete disconnection. The prepaid system, however, has provided nothing short of a brief respite from water

---

101 Alliance to Save Energy, supra note 99, at 1; see also The Struggle Against Silent Disconnections, supra note 67, at 8.
102 Alliance to Save Energy, supra note 99, at 1-2.
103 McKinley, supra note 78, at 3-5.
104 Id. at 5-7; see also The Struggle Against Disconnections, supra note 67, at 7 (describing the physical altercations involving protestors and Johannesburg Water's security employees).
105 The Struggle Against Silent Disconnections, supra note 67, at 7.
107 Centre for Applied Legal Studies, supra note 6, at 1.
108 Id. Prior to the implementation of the prepaid system, "[a]ll of the residents had . . . been supplied with unlimited water for which a flat-rate was levied." Id.
shortage concerns as many financially-strapped residents go without water for large chunks of a given month once their allotted free water is consumed.  

Typical of a socially divisive government policy, Operation Gcin’amanzi’s ultimate success (or failure) is framed in contrasting terms. Whereas government supporters highlight the millions of Rand saved by the dramatic decrease in dispensed water, grass-root opponents underscore the troubling humanitarian implications restricted water allocation contingent on household income necessarily provokes.

Against this backdrop, the Phiri residents have now voiced their dissent in the courtroom, anxious to secure a judicial decision condemning this allegedly unconstitutional privatization program. Whether described as a right or a privilege, access to sufficient water has constitutional ramifications, thanks to a socioeconomic promise codified in the South African Bill of Rights.  

B. The Phiri Applicants: Their Stories and Legal Claims

The five unemployed Phiri residents capture the consequences of the prepaid water scheme in a variety of ways. Considered together, the five applicants demonstrate a bleak reality which reflects the community’s larger plight. In the broadest of terms, the Phiri applicants challenge two related decisions made by the City of Johannesburg with respect to water policy: the decision to limit the free basic water supply to six kiloliters and the decision to discontinue the “uncontrolled volume water supply,” previously administered at a fixed charge, in favor of the prepaid program described above. Additional objections focus on the manner in which prepaid meters were forced upon resisting residents, the dearth of alternative options presented, and the National Standards Regulation used in determining the six kiloliter monthly

---

109 Groenewald, supra note 73.

110 Alliance to Save Energy, supra note 99, at 2. See generally Sindane, supra note 106 (describing, from the City’s perspective, the efficient, cost-effective policy implemented through Operation Gcin’amanzi).

111 See infra note 137 and accompanying text for a detailed discussion of Section 27(1) of the Constitution.

112 Applicants’ Notice of Mot., supra note 74, ¶ 1.
distribution per household. The applicants seek 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." In her founding affidavit, Lindiwe Mazibuko, the first of the five applicants, expands on the above declarations and describes the demographic characteristics of her fellow Phiri residents before the court. Ms. Mazibuko goes on to describe the legal basis for the claims, citing among others: the RDP's promise to provide a free basic water supply of 25 liters per person per day as declared in the mid-1990's; the subsequent assurance to the same end as embodied in central documents of water reform and policy known as the White Papers; and the relevant constitutional provisions central to this comment. Ms. Mazibuko also identifies unsatisfied legal obligations stemming from the following statutes: the Water Services Act ("WSA"), the National Water Act ("NWA"), the Promotion of Administrative Justice Act ("PAJA"), and the National Standards Regulations.

Lindiwe Mazibuko is the thirty-nine year old daughter of Anna Mazibuko, and one of twenty family members or boarders living

---

113 Id. ¶ 3-4, 6-7.
114 Id. ¶ 8.
115 See generally Reconstruction & Dev. Programme, supra note 79 (describing the RDP).
116 "The RDP’s short-term aim is to provide every person with adequate facilities for health. The RDP will achieve this by establishing a national water and sanitation programme which aims to provide all households with a clean, safe water supply of 20-30 litres per capita per day (lcpd) within 200 metres, an adequate/safe sanitation facility per site, and a refuse removal system to all urban households." Id. ¶ 2.6.6.
118 See discussion infra Section “Interpreting the 1996 Constitutional Text: Implications for Phiri Residents.”
121 Promotion of Administrative Justice Act 3 of 2000.
on her mother’s property. Though retired, Anna is the only source of monetary support, and as such is independently responsible for healthcare costs, utility obligations, and the day-to-day sustenance of the household. Facing an insurmountable water debt, the Mazibuko household’s water supply was disconnected and the construction of prepayment meters began. Lindiwe claims that cut-offs permeated throughout Phiri, and prepay meters were installed either unbeknownst to Phiri residents, against their will, or presented as the only available alternative to disconnection. After enduring a twelve kilometer daily trip to an available water source for as long as possible, the Mazibuko household grudgingly applied for a prepaid meter in early October of 2004.

Ms. Mazibuko’s complaint principally focuses on the free six kiloliter allocation and the practical shortcomings for a household her size. The Mazibuko household usually consumes its six free kiloliters within the first two weeks of each month and, lacking disposable income, typically endures the duration of the month on inadequate water costing them an average of fifty Rand. Were the Mazibuko household to stringently follow the guidelines promoted by Johannesburg Water, it would lack sufficient water to satisfy even the most basic needs of household members.

Other applicants detail the adverse ramifications that sparse water rights have on caring for HIV-infected family members,

---


124 Id. ¶¶ 69-75.

125 Id. ¶ 84.

126 Id. ¶¶ 78-91.

127 Id. ¶ 94.

128 Id. ¶ 101.

129 Mazibuko Founding Aff. ¶¶ 101-104, available at http://www.law.wits.ac.za/cals/phiri/index.htm (follow “Lindiwe Mazibuko (Founding Affidavit)” hyperlink). The total monthly household income was listed at 300 rand per month. Id. ¶ 73.

130 Id. ¶ 114. For instance, each person would be allotted one flush of the toilet every two days and one “body wash” every four days. Id.

131 See Munyai Aff. ¶¶ 13-17, available at http://www.law.wits.ac.za/cals/phiri/index.htm (follow “Grace Munyai” hyperlink) (describing the water needs of HIV-
ensuring safety from fires, and hosting family rituals. The applicants contend that in arriving at the six kiloliter determination, the government failed to adequately account for the typically larger Phiri household and the basic water needs of each individual in such circumstances.

On behalf of the four other applicants, and the Phiri community at large, Ms. Mazibuko’s complaint challenges the discontinuance of the flat-rate water supply, the installation of prepayment meters, and the limitation of free water to six kiloliters per household per month. These umbrella objections find credibility in the South African Constitution, and provide an opportunity to consider the human and legal right to water, the depth of the post-apartheid socioeconomic reorganization, and a progressive and evolving constitutional and litigious framework within which the High Court will operate. Before turning to the specific legislative acts in question, the relevant Bill of Rights provisions merit introduction and discussion.

IV. Interpreting the 1996 Constitutional Text: Implications for Phiri Residents

Very few nations have firmly recognized second-generation rights (which include social and economic rights like the right to water, education, and housing) in their Constitutions. South Africa is among the select few, making its Constitution one of the most progressive in the world. The constitutional provisions

infected Phiri residents).


133 See Groenewald, supra note 73. Jennifer Makoatsane describes how inadequate water disrupted her father’s funeral. Id.

134 See Mazibuko Founding Aff., supra note 123, ¶ 121. “[I]t appears that the Government assumes that there are no more than 8 members in a household in South Africa. This is certainly not the case in Phiri, where each ‘household’, including backyard shacks dependant on the supply of water to the main house, is 16 people.” Id.

135 See Mazibuko Supplementary Aff. ¶ 17, available at http://www.law.wits.ac.za/cals/phiri/index.htm (follow “Supplementary Founding Affidavit” hyperlink) (discussing the special circumstances confronting the Phiri Community).

136 See Mubangizi, supra note 63, at 2-3; supra text accompanying note 66.
described below, and the state obligations they create, either have been specifically named in filed court documents or potentially support the Phiri applicants' claims. This section focuses on some interpretive techniques that might best illuminate the downstream implications of the Bill of Rights for Phiri residents.

A. Section 27

The Phiri applicants premise their claim, first and foremost, upon the seemingly basic declaration of Section 27. That clause, titled "Health Care, Food, Water, and Social Security," reads:

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

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.\(^{137}\)

Section 27(1)(b) firmly acknowledges the right to food and water for all South African citizens. The existence of a right to food or adequate nutrition is not a novel idea. Such a right is recognized by a handful of "international human rights instruments."\(^{138}\) As written, the Section 27 rights are not direct. That is to say that people have the right to realize access to "sufficient food and water,"\(^{139}\) but these rights are conditioned upon the resources available to the state department providing the service.\(^{140}\) The degree of "sufficiency" required also remains

\(^{137}\) S. AFR. CONST. 1996 ch. 2, § 27.

\(^{138}\) FUNDAMENTAL RIGHTS IN THE CONSTITUTION: COMMENTARY AND CASES 355 (Dennis Davis, Halton Cheadle & Nicholas Haysom eds., 1997) [hereinafter FUNDAMENTAL RIGHTS]. Included among the "international human rights instruments" that have recognized the right to food are the International Covenant on Economic, Social and Cultural Rights (article 11) and Universal Declaration of Human Rights (article 25). \textit{Id.}

\(^{139}\) S. AFR. CONST. 1996 ch. 2, § 27(1).

\(^{140}\) MANDLA SELEOANE, SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTION: THEORY AND Practice 41-42 (2001); see also BILL OF RIGHTS HANDBOOK,
uncertain and will be determined by the High Court.

Even though the right to water enjoys support in several international agreements, it has not been independently identified as a human right by as many international agreements as the right to adequate nutrition and food. That said, a forged division in assessing the sufficient food and water access available to South African citizens, even if textually supported, in practice makes little sense. "Water is a vital component of nutrition so that without water the right to food is meaningless."\textsuperscript{142}

In the founding affidavit filed by Lindiwe Mazibuko,\textsuperscript{143} the five Phiri applicants ground their legal claims in the Constitutional obligations set forth in Section 27.\textsuperscript{144} Consistent with the guidelines laid out in the Constitution’s Preamble, Section 27 not only acknowledges those qualities that comprise an adequate standard of living, but also solidifies protection for basic necessities central to a healthy everyday existence.\textsuperscript{145} The South African Constitution demands that all citizens, including the Phiri applicants, have access to sufficient water.

Section 27 is the most overt source of Constitutional protection available to the Phiri residents, but it does not stand alone. The more subtle Chapter 2 (Bill of Rights) provisions considered below in many ways compliment the Section 27 state commitments. These Sections of Chapter 2 provide additional support for the water rights claims of the Phiri applicants.

\textbf{B. Section 7}

By virtue of Section 7(1), the Bill of Rights "enshrines the rights of all people in [South Africa] and affirms the democratic values of human dignity, equality and freedom."\textsuperscript{146} Section 7(2)\textsuperscript{147}

\textit{supra} note 3, at 591 ("[T]he right may not be directly infringed by retrogressive measures, while reasonable legislative and implementation measures to achieve progressive realisation of the right are required.").

\textsuperscript{141} See \textsc{Fundamental Rights}, \textit{supra} note 138, at 355-56.

\textsuperscript{142} Id. at 355.

\textsuperscript{143} Mazibuko Founding Aff., \textit{supra} note 123.

\textsuperscript{144} \textit{Id. ¶} 25-26.

\textsuperscript{145} Mubangizi, \textit{supra} note 63, at 5.

\textsuperscript{146} \textsc{S. Afr. Const.} 1996 ch. 2, § 7(1).

\textsuperscript{147} Lindiwe Mazibuko also cited Section 7(2) in her supplementary affidavit filed
obligates the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights,"148 and when read in accordance with the "guiding principles"149 set forth in 7(1), "appears to impose certain duties upon the state."150 Thus, state interference with these rights is not merely restricted, but rather the state must adopt affirmative measures to ensure the realization of the Bill of Rights.151 These positive state "duties," such as the provision of sufficient water, have, as alleged, been inadequately fulfilled. Judicial enforcement, the primary mechanism through which "enjoyment of socio-economic rights takes place,"152 is the chosen path to enjoyment, if not the only option, of the Phiri applicants.

C. Section 8

Section 8 concerns the application of the Bill of Rights. Unquestionably, the Bill of Rights, upon its adoption a decade ago, became binding on the South African government.153 Unlike the interim Constitution, the 1996 Constitution addressed, in Section 8, concerns that the Bill of Rights would not reach the discriminatory behavior of private individuals or bodies. Section 8(2) and 8(3) extend the application of the Bill of Rights horizontally, i.e. as "between one citizen or private body and another."154

Under the interim Constitution, and according to the 1996 Constitutional Court decision in Du Plessis v. De Klerk,155 the Bill

with the High Court. Mazibuko Supplementary Aff., supra note 132, ¶ 19.2.

148 S. AFR. CONST. 1996 ch. 2, § 7(2).

149 FUNDAMENTAL RIGHTS, supra note 138, at 27.

150 Id.

151 See Mubangizi, supra note 63, at 5-6. "The state may do this in several ways: through the legislature by enacting the relevant enabling legislation; and through the executive and state administration by adopting the necessary policies and making the appropriate administrative decisions." Id. at 6.

152 Id. at 6.

153 See S. AFR. CONST. 1996 ch. 2, § 8(1). For the analogous provision in the interim Constitution, see S. AFR. (Interim) CONST. ch. 3, § 7(1).


155 Du Plessis & Others v De Klerk & Another 1996 (3) SA 850 (CC) (S. Afr.).
of Rights did not apply to horizontal disputes.\textsuperscript{156} Disputes among private parties were resolved using common law principles.\textsuperscript{157} A textual amendment executed in Section 8 of the 1996 Constitution changed the status quo.\textsuperscript{158} By including the term “judiciary,” Section 8(1) directly thrust constitutional obligations upon the judiciary in reviewing private, horizontal disputes.\textsuperscript{159} Thus, the Bill of Rights gained new life. The depth of the horizontal application, however, is unknown, and will partially reveal itself through constitutional litigation, such as that before the High Court.\textsuperscript{160}

Section 8(1), by extending application of the Bill of Rights beyond the legislative and executive branches of government to the judiciary, “supports the conclusion that [C]hapter 2 applies to all law in all its applications, namely to governmental action as well as to acts of private individuals.”\textsuperscript{161} As discussed later, the water policies implemented to the detriment of so many Phiri residents are initiated through complex cooperation between private corporations and a municipal government. The definition of “organs of state” indicates that those institutions subject to constitutional scrutiny need not be identified as statutory bodies.\textsuperscript{162} In other words, the degree of the public power exerted by the institution in question is one of many factors considered in

\textsuperscript{156} Id. at 889, para. 67.

\textsuperscript{157} \textit{BILL OF RIGHTS HANDBOOK, supra} note 3, at 33.

\textsuperscript{158} “The Bill of Rights applies to all law and binds the legislature, the executive, \textit{the judiciary}, and all organs of state.” S. AFR. CONST. 1996 ch. 2, § 8(1) (emphasis added). The interim Constitution, by comparison, stated as follows: “[t]his Chapter shall bind all legislative and executive organs of state at all levels of government.” S. AFR. (Interim) CONST. ch. 3, § 7(1).

\textsuperscript{159} \textit{BILL OF RIGHTS HANDBOOK, supra} note 3, at 34.

\textsuperscript{160} For a discussion regarding competing notions of horizontal application, see \textit{FUNDAMENTAL RIGHTS, supra} note 138, at 43.

\textsuperscript{161} Id. at 44.

\textsuperscript{162} See S. AFR. CONST. 1996 ch. 14, § 239. Three categories of conduct point toward classification as an “organ of state”: (1) “[c]onduct of any department of state or administration in the national, provincial or local spheres of government”; (2) “[c]onduct of any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution”; and (3) “[c]onduct of any functionary or institution exercising a public power or performing a public function in terms of any legislation.” \textit{BILL OF RIGHTS HANDBOOK, supra} note 3, at 47
determining the constitutional breath of their activity. Respondent Johannesburg Water (PTY) LTD, for instance, most likely falls under the broad definition of “state organ,” subjecting it to Constitutional obligations like the provision of sufficient water.

**D. Section 9**

On a more abstract level, the Section 9 equality protection provision captures the essence of the Phiri resident action. Section 9, titled “Equality,” reads in part as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, . . . ethnic or social origin, colour, . . . age, disability, . . . culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Simply put, the water allocation system in place has negatively impacted black, impoverished residents in a disproportionate and potentially unconstitutional manner. An equality guarantee along the lines of Section 9, with fiscal considerations temporarily put aside, presumably ensures that one citizen will not realize an entrenched right at the cost of another being denied the same protection. From a formal perspective, equality demands “sameness of treatment: the law must treat individuals in like circumstances alike.”

---

163 FUNDAMENTAL RIGHTS, supra note 138, at 44.
165 FUNDAMENTAL RIGHTS, supra note 138, at 61.
166 BILL OF RIGHTS HANDBOOK, supra note 3, at 232.
Formally speaking, the Johannesburg water policy, as later discussed in detail, speaks to all South African citizens in the same tone, whether white or black, wealthy or poor. However, from a substantive perspective, the “equality of outcome” is compromised by an approach rooted in formal equality. Because the pursuit of mere formal equality fails to adequately account for disparities along social and economic lines—a harsh reality in post-apartheid South Africa—analyzing state behavior through a substantive lens allows the reviewing judicial body to better evaluate whether the “Constitution’s commitment to equality is being upheld.” Phiri residents have a strong case structured in terms of disparate treatment.

The Constitutional Court detailed the analytical progression for unpacking an equal protection claim in its 1998 decision, *Harksen v. Lane NO* After determining whether the law or conduct differentiates between people or categories, and considering any rational connection to a legitimate government purpose, the Court will gauge whether or not the differentiation “amounts to unfair discrimination.” During this second inquiry, the Court will ask the following questions:

(i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If

---

167 *Id.* at 233. See also Nadine Strossen, *Translating a Bill of Rights’ Paper Guarantees into Meaningful Human Rights Protections, in Interpreting a Bill of Rights* 50, 61 (Johan Kruger & Brian Currin eds., 1994) (discussing, prior to passage of the 1996 Constitution, how best to add meaning to the equality clause).


169 *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) at 323-25, paras 51-54 (S. Afr.).

170 *Id.* at 324-25, para. 54; *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC) at 10, para. 20 (S. Afr.).
on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).¹⁷¹

Finally, "[i]f the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause ([§] 33 of the interim Constitution)."¹⁷²

Under this approach, the Constitutional Court (and lower courts like the High Court) will have an opportunity to assess the implementation of Operation Gcin’amanzi and determine whether the Phiri allegations encompass a Section 9 violation. Water policies must reflect relevant water laws, and must do so under the guise of equal protection.

E. Section 33

Section 33 is one of the two Constitutional provisions, alongside Section 27,¹⁷³ specifically mentioned¹⁷⁴ in the founding affidavit filed by Lindiwe Mazibuko on behalf of the other four applicants.¹⁷⁵ Section 33 reads, in full:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in

¹⁷¹ Harksen, 1998 (1) SA at 324-25, para. 54; Satchwell, 2002 (6) SA at 10, para. 20.

¹⁷² Harksen, 1998 (1) SA at 325, para. 54; Satchwell, 2002 (6) SA at 10, para. 20.

¹⁷³ S. AFR. CONST. 1996 ch. 2, § 27(1).

¹⁷⁴ Mazibuko Founding Aff., supra note 123, ¶ 26 ("The Constitution also provides in section 33(1) that every person has the right to administrative action that is lawful, reasonable and procedurally fair.").

¹⁷⁵ See id. ¶ 2.
subsections (1) and (2); and

(c) promote an efficient administration.176

Applicant Mazibuko's explicit reference to Section 33 underscores the provision's pivotal role in formulating the constitutional claims of the Phiri residents. Section 33 was drafted in direct response to the runaway administrative power of the apartheid era that largely went unconstrained by an unenthusiastic judiciary.177 Irrespective of whether an administrative action is considered "reasonable," Section 33 encourages the Court to initiate a balancing inquiry by weighing the "substantive justification" promoted by the administration in question against the alleged misconduct.178 By seeking review from the High Court, the Phiri residents have proclaimed the administrative activity179 of Johannesburg Water LTD, as well as the City of Johannesburg and the Minister of Water Affairs and Forestry, unconstitutional.180

F. Section 36

Section 36, the "limitation clause," establishes the boundaries placed on generally applicable fundamental rights, and the justifications that warrant intrusion on, or restriction of, the basic rights guaranteed by the Bill of Rights.181 Section 36 ties in the language of Section 1 to outline the limits of individual prerogative. In full, it reads as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including—

176 S. AFR. CONST. 1996 ch. 2, § 33.
177 BILL OF RIGHTS HANDBOOK, supra note 3, at 642.
178 FUNDAMENTAL RIGHTS, supra note 138, at 163.
179 See generally BILL OF RIGHTS HANDBOOK, supra note 3, at 645 ("[A]dministrative action is conduct of an administrative nature performed by public authorities and the conduct of private persons and entities when they exercise public powers or perform public functions.").
180 See id. ("[A]n allegation that a particular exercise of public power is reviewable amounts to an allegation that it is unconstitutional . . . ").
181 Id. at 163.
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.¹⁸²

Understanding and testing the limitation clause is properly viewed as a separate step in the litigation process, distinct from determining whether or not a right has been infringed by the respondent.¹⁸³ Determining the legitimacy, reasonableness, or justification for the infringement prompts the court to consider the impact the conduct or law has on the affected society.¹⁸⁴

If the High Court were to side with the Phiri applicants, at least with respect to the constitutional claims, and declare a Bill of Rights infringement, the limitation clause would bear its teeth. The inescapable Section 36 inquiry would test whether the infringement is reasonable and justifiable. In other words, the Constitutional Court, upon appeal, presumably would not allow an entrenched right to be undermined simply because the intrusion made fiscal sense, or was adopted with the general welfare in mind.¹⁸⁵ By requiring that the limitation be justifiable, the Constitution places a heavy burden on the intruding actor to prove a compellingly important impetus behind the questionable behavior.¹⁸⁶

"Any restriction on a right must be reasonable and must be proportional in that the impact or extent of the restriction must match the importance of the aim served by the limitation of the right."¹⁸⁷ The conduct or law in question must serve a constitutionally appropriate purpose, and the infringement that

¹⁸² S. AFR. CONST. 1996 ch. 2, § 36.
¹⁸³ BILL OF RIGHTS HANDBOOK, supra note 3, at 166.
¹⁸⁴ Id. at 167.
¹⁸⁵ Id. at 164.
¹⁸⁶ Id.
¹⁸⁷ Constitutional Court of South Africa, supra note 154 (follow "The limitation clause" hyperlink).
results from its implementation must be proportional to the benefits it seeks to create.\(^\text{188}\) In *S v. Bhulwana*,\(^\text{189}\) a 1996 decision, the Constitutional Court expressly detailed the Section 36 analysis:

In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.\(^\text{190}\)

The scope of the limitation clause is defined on a case-by-case basis. The more important the fundamental right being infringed upon, the more justification the infringers must demonstrate.\(^\text{191}\) Likewise, the purpose compelling the infringement must be central to the pursuit of constitutional democracy\(^\text{192}\) and generally regarded, by reasonable citizens, as abundantly important.\(^\text{193}\) The nature of the infringed-upon right, and the degree of its contribution towards attaining a "democracy based on human dignity, equality and freedom," will affect how the limitation exerted on the right is conceptualized.\(^\text{194}\)

As discussed below in greater detail, the causal connection between the water policies and their benefits may prove unstable, undermining the requisite close attachment between the law (or conduct) and its purpose demanded by the standards of reasonableness and justifiability.\(^\text{195}\) Lack of a "rational connection" between the declared purpose and the underlying institutional action weighs in favor of a rights infringement being deemed unjustifiable.\(^\text{196}\) The Court will also consider whether the desired benefit could be achieved through less intrusive means.\(^\text{197}\)

The limitation clause inquiry, if reached by the High Court,
will focus primarily on the financial justification that lurks behind the potentially unconstitutional water distribution scheme. The judiciary will determine whether the financial justification is a compelling enough reason\textsuperscript{198} for this infringement upon the fundamental right to sufficient water. The court’s inquiry will likely focus on the water distribution scheme’s proportionality.

G. Section 38

Section 38 addresses standing before the court and, in part, reads as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest; . . .

(c) anyone acting as a member of, or in the interest of, a group or class of persons; [and]

(d) anyone acting in the public interest . . . \textsuperscript{199}

The Phiri applicants appear to have legitimate standing under Section 38(a) to be heard before the High Court. Section 38 represents a far broader approach to standing than that recognized under the common law prior to the adoption of the 1996 Constitution.\textsuperscript{200} Though perhaps largely inconsequential for our present inquiry, it is important to note that Section 38 has reduced restrictive standing requirements (though not completely\textsuperscript{201}) to promote the “[e]ffective enforcement of the Bill of Rights.”\textsuperscript{202}

H. Section 39

More than any other provision contained in the Bill of Rights, Section 39, at least analytically, should guide the course of judicial review. The interpretation clause reads:

\textsuperscript{198} BILL OF RIGHTS HANDBOOK, supra note 3, at 179.

\textsuperscript{199} S. AFR. CONST. 1996 ch. 2, § 38.

\textsuperscript{200} BILL OF RIGHTS HANDBOOK, supra note 3, at 80.

\textsuperscript{201} For a more expansive discussion on the sustained standing limitations under the new Constitution, see id. at 82-91.

\textsuperscript{202} Id. at 80.
(1) When interpreting the Bill of Rights, a court, tribunal or forum—
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.203

As described below, extensive social and political commentary has focused on the evolution of socioeconomic norms recognized by international bodies and implemented by state governments. The Constitutional Court has emphasized the role both foreign and international law play in interpreting the South African Bill of Rights204 and encourages consideration of even those international human rights agreements to which South Africa is not a signatory.205 As a result, how and whether the right to water has been legally declared in foreign jurisdictions may influence the High Court’s analysis of Operation Gcin’amanzi.206 Similarly, particularly strong evidence demonstrating an absolute, albeit theoretical human right to water as recognized in international circles may provoke a more sympathetic judicial inquiry into the humanitarian effects of prepaid meters.

204 See generally S v Makwanyane 1995 (3) SA 391 (CC) (S. Afr.) (discussing the framework created by international agreements, customary law, and tribunal decisions in which the Bill of Rights can be understood). For an overview of the importance of foreign and international law in South African constitutional interpretation, see BILL OF RIGHTS HANDBOOK, supra note 3, at 159-61.
205 BILL OF RIGHTS HANDBOOK, supra note 3, at 160.
206 See id. at 160 (describing the role comparative human rights jurisprudence can play during the development of indigenous jurisprudence); see also Groenewald, supra note 73 (discussing how prepaid meters have been outlawed in United Kingdom).
As South Africa continues to emerge from the apartheid shadow, well-publicized decisions, such as this one, will reveal the Constitution's success on an international stage. It is reasonable to assume that the impact of the subsequent impression forged by South African courts with respect to the socioeconomic protection of the historically oppressed is not beyond the judiciary's comprehension.

V. South African Legislation: Codifying the Constitutional Right to Water

"Some, For All, Forever"207

As alluded to earlier, a handful of important legislative acts paved the way for contemporary South African water policy. Breaking down this national legislation reveals a facially progressive and human rights-oriented legal regime constructed to secure improved basic water access for the public.208 In practice, however, improvements in access to water remain largely unrealized for the poorest South Africans,209 Phiri residents among them. A more comprehensive review of the legislation summarized below is beyond the scope of this comment, but a passing understanding of these important provisions helps illustrate the water guidelines in effect today.

Water was a critical component of the post-apartheid strategy aimed at achieving social and environmental retribution.210 The Water Services Act and the National Water Act, cumulatively, identified three principal objectives: (1) to “redress the inequalities and racial and gender discrimination of the past;” (2) to “link

207 "Some, for all, forever" is a somewhat ironic part of the policy framework of the Department of Water Affairs and Forestry. H. M. MacKay, Inst. for Water Quality Studies, Dep't of Water Affairs & Forestry, Toward a Classification System for Water Resources in South Africa (1998), http://www.dwaf.gov.za/Dir_IWQS/waterlaw/class/wisa.html. Perhaps “some, for all . . . who can pay, forever” would be more appropriate.

208 See Francis, supra note 80, at 161.

209 Id.

water management to economic development and poverty eradication; and" (3) to "ensure the preservation of ecological resource base for future generations."\(^{211}\)

The National Water Act of 1998 ("NWA")\(^{212}\) abolished private ownership of water,\(^{213}\) positioned the government to serve as the "public trustee of water,"\(^{214}\) and "establish[ed] a compulsory licensing system with the potential to redistribute water supply more equitably among the populace."\(^{215}\) The Minister of Water Affairs and Forestry, a named respondent in the Phiri rights application, serves as the "public trustee" of South African’s water resources.\(^{216}\) "The Minister is ultimately responsible for ensuring that water is protected, used, developed, conserved, managed, and controlled in a sustainable and equitable manner for the benefit of all persons and in accordance with the constitutional mandate."\(^{217}\) The NWA also established the basic human need ("BHNJR") standard, set at twenty-five liters per person per day, and required that this minimum standard be met before water could be allocated for uses beyond sustaining individual health.\(^{218}\)

The newly elected ANC party found great support for this legislation from its poor, black constituency, but, as Rose Francis argues, failed to radically alter the status quo.\(^{219}\) Francis identifies three of the NWA’s pivotal shortcomings. First, the NWA transfers water allocation responsibility to local municipal actors, but neglects to secure sufficient financial support necessary to develop sound infrastructure vital to efficient water distribution.\(^{220}\)

\(^{211}\) Id.


\(^{213}\) Francis, supra note 80, at 161.


\(^{215}\) Francis, supra note 80, at 161; see also id. at 162 (describing the listed "Purposes of the Act").


\(^{217}\) Id.

\(^{218}\) Pejan, supra note 214, at 1203.

\(^{219}\) Francis, supra note 80, at 164.

\(^{220}\) Id. at 165.
Second, by embracing a cost-recovery scheme, the NWA effectively perpetuates a government policy seemingly unconcerned with (or indifferent to) the plight of the poorest South Africans. And finally, the NWA opened the door for a privatized water services sector as local governments struggled to meet the organizational and fiscal demands of utility distribution and turned to private investment for answers.

Any exercise of water resource strategy must comply with the founding principles around which the NWA was drafted. In other words, implemented water distribution policies must realize the objectives set forth by the Act, including the following: "(a) meeting the basic human needs of present and future generations; (b) promoting equitable access to water; (c) redressing the results of past racial and gender discrimination; [and] (d) promoting the efficient, sustainable, and beneficial use of water in the public interest . . . ." The NWA gives meaning to the water access rights promoted by the Water Services Act (passed one year earlier) by creating a national water reserve meant to satisfy basic individual water needs. The water reserve provides water essential to sustaining adequate health, such as water for drinking, cooking, and maintaining personal hygiene. Policies such as prepaid meters not only restrict equitable access to sufficient water resources, but seemingly do so along lines of race and poverty. The ideally uncompromised commitment of South Africa's evolving democratic regulatory regime to ensure improved public health must be re-examined in light of this development.

The Water Services Act of 1997 ("WSA") recognizes the cooperative call to action the Constitution demanded with respect to water service circulation by assigning roles and responsibilities to various government departments. It created government

---

221 See id. at 170. For further discussion on the consequences of the cost recovery scheme, see id. at 170-78.
222 Id. at 165.
225 Stein, supra note 216, at 2182.
227 Pejan, supra note 214, at 1204-05.
positions responsible for "ensur[ing] efficient, affordable, economical and sustainable access to water services." More importantly, the WSA, in Section 4(3), specifically provides that no person should be "denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services." The Phiri application questions whether the respondents have complied with this mandate.

Article 3 of the WSA states that "everyone has a right of access to basic water supply and basic sanitation" and requires that reasonable measures be taken by water service organizations to realize this minimum obligation. Fulfillment of this mandate placed on water service organizations was questioned by a South African court in *Mangele v. Durban Transitional Metropolitan Council*. *Mangele* addressed both Article 3 and Article 4(3) of the WSA. In *Mangele*, the applicant was given six free kiloliters of water per month by the Durban Transitional Metropolitan Council (DTMC). But, upon failing to pay for excess water used, the applicant was served with written notice and eventually had the water service disconnected. The applicant argued that the WSA prohibited the DTMC from disconnecting her basic water service while she was unable to pay, citing Section 4(3).

The Court refused to address policy issues presented before it and, noting the applicant's prior tampering with the water mechanism, determined that the disconnection was exercised in accordance with the WSA. However, Salman M. A. Salman and

228 *Id.* at 1205.
233 *Id.* at 426.
234 *Id.*; SALMAN ET AL., *supra* note 230 at 80-81 & n.298.
236 *Id.* at 427, 429-30.
Siobhan McInerney-Lankford, in their book "The Human Right to Water," note that had the challenge been framed in constitutional terms, rather than challenging conformity with the WSA, the court may have reached an alternative decision.\textsuperscript{237} The High Court now has the opportunity to consider the constitutional fallout that poverty-provoked disconnection creates.

South Africa's adoption of the Free Basic Water Policy ("FBW") in 2001 appeared to signal a firm commitment to guaranteeing a "minimum basic quantity of potable water" for all citizens.\textsuperscript{238} Rose Francis traces this pledge back to Section 27 of the Constitution and the WSA's initial delineation of government responsibility to achieve equitable access on a nationwide level.\textsuperscript{239} The FBW, however, has been criticized for three principal reasons: (1) underestimating the requisite minimum quantity relative to international norms, (2) defining its policy on a per-household basis rather than on individual terms, and (3) instituting the cost-recovery system whereby citizens must pay for water upon passing the free threshold volume.\textsuperscript{240} The Phiri applicants address each of these complaints.

The High Court will analyze the Phiri applicants' claims within the above framework. In defining the substance reflected in Section 27(1)(b) of the South African Constitution, the court must necessarily determine the justiciability of this socioeconomic right in light of national regulatory law, customary and international declarations, and an evolving notion of constitutionalism. The Constitutional Court has heard a number of landmark cases since its inception that will presumably help structure the High Court's analysis in this area. But, before considering the developing constitutional law and interpretive techniques implicit in unwinding the Bill of Rights, a brief synopsis of the organization of the court system, the international commentary on the legal and human right to sufficient water, and the justiciability of socioeconomic claims is useful.

\begin{footnotes}
\item[237] See SALMAN ET AL., supra note 230, at 81 & n.298.
\item[238] Francis, supra note 80, at 177.
\item[239] Id. at 178-79.
\item[240] Id. at 180-82.
\end{footnotes}
VI. The South African Judicial System

The Phiri application was filed in the High Court of South Africa, Witwatersrand Local Division. The High Court’s jurisdiction over this matter is granted by Section 166 of the 1996 Constitution in accordance with Item 16 of Schedule 6. The hierarchy of South African courts is traced back to the creation of the Union in 1910.241 At that time, judicial authority was reserved in two different branches, split between the Supreme Court of South Africa, which had both appellate and local divisions, and a handful of lower courts. The Constitutional Court, as created by the interim Constitution, stands as the final and conclusive reviewing judicial body for all constitutional issues.242 The Constitutional Court and the Appellate Division were the two appellate courts; the former handled all constitutional issues, and the latter received all non-constitutional cases.243 Parties heard in the Constitutional Court could not appeal to the Appellate Division, and vice versa.

Though all courts operating prior to the enactment of the 1996 Constitution remained in existence upon the adoption of the new Constitution, Section 166 set forth a new judicial hierarchy. The courts include “(a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts . . . .”244 Item 16 of Schedule 6 explains that the old Appellate Division became the Supreme Court of Appeal.245 Both the Constitutional Court and the Supreme Court of Appeal (SCA) have Republic-wide jurisdiction, and both exercise appellate authority.246 Whereas the Constitutional Court hears strictly constitutional appeals, the SCA may hear appeals that raise both constitutional and non-constitutional issues.247 The Constitutional Court must also confirm any High Court and SCA

241 BILL OF RIGHTS HANDBOOK, supra note 3, at 99.
242 Id.
243 Id.
244 S. AFR. CONST. 1996 ch. 8, § 166.
245 S. AFR. CONST. 1996 sched. 6, item 16.
246 BILL OF RIGHTS HANDBOOK, supra note 3, at 102.
247 Id.
decisions that "declare Acts of Parliament, provincial legislation and conduct of the President invalid," and may in certain situations serve as a court of initial review for some constitutional matters.\textsuperscript{248}

The High Courts created by the 1996 Constitution replaced the local divisions of the Supreme Court as defined prior to 1996; they function as superior courts and possess limited jurisdiction.\textsuperscript{249} They hear a variety of constitutional cases, and, in fact, "may decide any constitutional matter except matters within the exclusive jurisdiction of the Constitutional Court."\textsuperscript{250} Thus, the High Court can render conduct or legislation unconstitutional unilaterally, or in the alternative, seek confirmation from the Constitutional Court in a few select circumstances.\textsuperscript{251} Should the Witwatersrand High Court directly apply the Constitution with no consideration for the common law, any appeal may directly be brought to the Constitutional Court.\textsuperscript{252} The Constitutional Court, however, will not typically "exercise its jurisdiction to develop the common law in constitutional matters without the matter having first been dealt with by the Supreme Court of Appeal."\textsuperscript{253}

\section*{VII. International Treaties and Agreements: The Human and Legal Right to Water}

Consistent with Section 39(1) of the Constitution, the High Court should consider international standards when interpreting the relevant Bill of Rights provisions.\textsuperscript{254} South African citizens represent a mere cross-section of impoverished people around the globe who continue to struggle for sufficient water access. The international community has responded in various ways, with staggered success, in declaring the legal and human right to water. How human rights treaties have addressed the right to water will

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. at 112.
\item Id.
\item Id. at 129.
\item Id. For a summary of the path of appeals from High Court decisions under the 1996 Constitution, see generally id. at 130.
\end{enumerate}
\end{footnotesize}
help shape the South African constitutional understanding.

Only one-hundredth of one percent of all earth’s water is available for human consumption in a fresh, drinkable form. An estimated 1.7 billion people have inadequate drinking water, almost half of whom tolerate chronic shortages. The Phiri residents reflect a common scenario for poor, urban-dwelling individuals in many countries, forced to purchase water from vendors or prepaid meters while wealthy citizens, perhaps living only a few miles away, receive municipal distribution at far lower costs. The most natural consequence of an inadequate potable water supply is the deterioration of community health. Disease and conflict, both directly tied to water scarcity, will continue to undermine development in countries facing the gravest water shortages. As a result, the international community has begun to speak in terms of a human right to water in the last half century, doing so with increased tenacity within the last decade.

A. The Human Right to Water

Undeniably, water is essential to human survival. It is a pillar of nourishment, hygiene, sanitation and agricultural production. Though the human right to water has not been satisfactorily defined by international law to this point, water is considered a vital component in securing other internationally protected rights, such as the right to health and life. Alternatively, the right to water has been interpreted to fall within


256 Id.

257 See id. at 2.


260 Id.

261 Erik B. Bluemel, The Implications of Formulating a Human Right to Water, 31 Ecology L.Q. 957, 957 (2004); see also Alvarez, supra note 259, at 72 (listing the human rights treaties and agreements that do not specifically mention the right to water).
the right to food, defined in Article 25 of the Universal Declaration of Human Rights. Article 25 states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . . .” Textually, this proclamation is not exhaustive, and one could identify other fundamental rights pivotal to obtaining an adequate standard of living. Though the Declaration is not binding per se, the most “fundamental provisions [of the General Assembly resolution] are generally thought either to have passed into customary international law, or to constitute an authoritative interpretation of relevant U.N. Charter provisions, or both.”

Two 1966 covenants provide the foundation for the evolving debate over whether there is a human right to water. Both the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”) contain “provisions from which the right to water can be inferred.” Unfortunately, even if the state parties to the ICESCR were to affirmatively establish a right to water (rather than merely infer one), their realization of this right would need only be “achieved progressively,” thus allowing state actors more wiggle room to effectuate this legal obligation on a timeline unlikely to trigger immediate results. Therefore, even a facially strong commitment is potentially undermined by the ICESCR’s tolerance for piecemeal progress. For this reason, proponents of economic, social and cultural rights have criticized


263 Alvarez, supra note 259, at 73.


267 Alvarez, supra note 259, at 73. The right to water can be inferred from Article 11 and Article 12 of ICESCR. Id. at 73-74.

268 SALMAN ET AL., supra note 230, at 28 (describing the differences in enforceability between ICESCR and ICCPR); McCaffrey, supra note 264, at 8-9.
ICESCR for inadequately providing oversight and implementation procedures essential to implementing the textual commitment.\textsuperscript{269}

ICCPR, on the other hand, "imposes an immediate obligation 'to respect and to ensure' the rights it proclaims."\textsuperscript{270} Also, its expansive interpretation of the inherent human right to life provided in Article 6 encompasses a firm recognition of the right to water.\textsuperscript{271} Before turning to the ICCPR in depth, and then considering more recent protocols expanding on the ICESCR, inferences flowing from the ICESCR as originally passed warrant further elaboration.

ICESCR is the instrument under which the United Nations Committee on Economic, Cultural and Social Rights of the United Nations Economic and Social Council ("ECOSOC") operates.\textsuperscript{272} In recognizing a handful of other fundamental rights, such as the right to adequate housing and food, the right to develop, the right to gain a living by work, and the right to enjoy cultural practices, ICESCR has been interpreted to encompass the subordinate right to water.\textsuperscript{273} Commentators, however, have questioned whether ICESCR "merely set[s] forth hortatory goals" or "real rights,"\textsuperscript{274} also noting that ICESCR rights (including the right to water if inferred) stand on unequal legal footing with human rights instruments.\textsuperscript{275} As a result, enforcing conformance with ICESCR declared rights lacks the backing of the law. In fact, it has been said that the "rights" provided by the ICESCR are "more in the
nature of goals than of presently existing entitlements."\(^{276}\)

South Africa signed the ICESCR on October 3, 1994,\(^{277}\) and ratified the agreement on December 10, 1998.\(^{278}\) As such, South African laws should properly align with the ICESCR agenda.\(^{279}\) Should the Phiri water rights application succeed, perhaps South African law will in turn adapt to more accurately encompass the principles captured by the ICESCR.

The ICCPR created the Human Rights Committee ("HRC") to monitor compliance with the rights it created.\(^{280}\) Thus, state signatories have a forum to voice complaints, and also remain subject to citizen criticism. The HRC fields reports from State Parties, reaches decisions regarding alleged human rights grievances, and produces an annual report of its activities to the General Assembly.\(^{281}\)

Article 6 of the ICCPR declares: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."\(^{282}\) Though this language has not, over the last forty years, been considered to capture an enforceable right to water,\(^{283}\) a broader interpretation of Article 6 rights has been embraced by members of the Human Rights Commission in more contemporary times.\(^{284}\) Under this understanding, the right to life entails the right to appropriate means of subsistence, which in turn requires the right to clean, safe drinking water.\(^{285}\)

\(^{276}\) McCaffrey, supra note 264, at 12; see also SALMAN ET AL., supra note 230, at 28-29 ("This is because the rights provided for in the ICESCR are often perceived as 'goals' or 'objectives' rather than 'true individual rights.'").

\(^{277}\) Seleane, supra note 140, at 40.


\(^{279}\) Seleane, supra note 140, at 40.

\(^{280}\) Dennis & Stewart, supra note 269, at 477.

\(^{281}\) SALMAN ET AL., supra note 230, at 32-33.

\(^{282}\) ICCPR, supra note 266, at 53.

\(^{283}\) See generally McCaffrey, supra note 264, at 9 (describing the historical reluctance of signing nations to recognize an enforceable right to water by virtue of the ICCPR alone).

\(^{284}\) Id. at 10.

\(^{285}\) Id. at 10-11.
Unlike the ICESCR, which protects "second generation rights," the ICCPR protects "first generation rights" (traditionally considered those rights associated with democracy, such as the right to life, privacy, equality, assembly and freedom of expression) and is considered protective of "liberty-oriented rights." As mentioned above, perhaps the most important distinction between the ICESCR and the ICCPR lies with each instrument's respective implementation mechanisms. Whereas "Article 2 of the ICESCR obliges each State Party to take steps to the maximum of its available resources to achieve progressively the full realization of the rights under the ICESCR," Article 2 of the ICCPR demands affirmative and immediate obligations on State Parties subject to ICCPR jurisdiction.

By the new millennium, the human right to water was at best inferred, and at worst, downright unenforceable. Neither the ICESCR nor the ICCPR, the two strongest proclamations of international human rights, explicitly referenced the right to water, and the Universal Declaration of Human Rights was no different.

Two human rights treaties, The Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Convention on the Rights of the Child, contained precise references to a right to water. For example, Article 24 of the Convention on the Rights of the Child establishes "the right of the child to the enjoyment of the highest attainable standard of health and the right to facilities for the treatment of illness and rehabilitation." In pursuing the realization of this right, states are obligated to "combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking

286 Salman et al., supra note 230, at 22.
287 Id. at 21.
288 Id. at 29.
289 See Universal Declaration of Human Rights, supra note 262.
291 Alvarez, supra note 259, at 75.
water. By way of this textual division of food and water rights, the right to "clean drinking water" is thus independent of the right to food, marking a divergent path from past human rights interpretation that often stretched to find a subordinate right to water within the right to adequate food.

International humanitarian law has recognized a right to water in more specific terms than either the ICESCR or the ICCPR. Within this framework, a 21st century human right to water has been asserted by some scholars, though it still lacks widespread direct textual support in the most important human rights treaties.

B. General Comment 15

In light of these developments, and in search of a more unyielding commitment to developing an internationally recognized independent human right to water, ICESCR issued General Comment 15 in November, 2002. In part, General Comment 15 reads as follows: "Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights." It wasn't until 1988 that the Committee on Economic, Social, and Cultural Rights began to release "General Comments" pertaining to the ICESCR. The General Comments served the following general purpose:

The Committee endeavours, through its general comments,

---

292 Id.
293 Petrova, supra note 290, at 593-94 & n.106; see also Alvarez, supra note 259, at 75 (describing relevant provisions from the Geneva Convention).
294 Bluemel, supra note 261, at 971; see also SALMAN ET AL., supra note 230, at 53 ("General Comment No. 15 was issued by the Committee on Economic, Social and Cultural Rights at its Twenty-ninth session, held in Geneva, November 11 to 29, 2002.").
296 SALMAN ET AL., supra note 230, at 45.
to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant. Whenever necessary, the Committee may, in the light of the experience of State parties and of the conclusions which it has drawn therefrom, revise and update its general comments.297

With the implementation of the General Comment model, the ICESCR assumed traits of the "sanctional model" more historically associated with the ICCPR.298

Though the General Comments are not legally binding, per se, on State Parties to the ICESCR, their legal significance should not be understated.299 The Committee on Economic, Social and Cultural Rights adopted an increasingly quasi-judicial posture, and in light of a traditionally absent authoritative body monitoring State Parties' compliance with the ICESCR, the General Comments are considered an important tool in both asserting and enforcing declarations of human rights. Though the General Comments do not expand State Parties' obligations under the ICESCR as it was initially constructed, their greatest utility is served in clarifying and interpreting the vague provisions of an outdated treaty. "General comments are therefore critical interpretations of the provisions of, and obligations under, the ICESCR, which have a significant bearing on the enforcement of the ICESCR, and the realization and observance of the rights it contains."300

General Comment 15 addresses both the substantive and


298 SALMAN ET AL., supra note 230, at 47.

299 See id. at 49 (describing the context in which General Comments have become important in monitoring State Party action); see also Bluemel, supra note 261, at 973 (describing General Comments' role in assisting international bodies in determining whether a State has complied with the ICESCR to a sufficient degree).

300 SALMAN ET AL., supra note 230, at 53.
procedural elements of the human right to water. Substantively, General Comment 15 provides minimum guidelines for “availability, quality, and accessibility” of sanitary water; procedurally, it details the “right to information concerning water issues, the right to participate, and the right to effective remedies.”

The Phiri water applicants, presumably, have legitimate substantive and procedural complaints with water allocation in Soweto along the lines of Comment 15. In fact, Paragraph 2 of General Comment 15 speaks almost directly to the troubles of the Phiri residents in describing the egregious potentialities associated with an unrealized human right to water. Paragraph 2 in part reads:

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, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements.

Furthermore, paragraph 12, in parts (a), (b), and (c), details the substantive requirements of availability, quality and accessibility of sanitary water. The Phiri applicants describe a water reality that touches on all three prongs of General Comment 15’s substantive core.

The legal facets of General Comment 15 translate into both affirmative and negative obligations placed on both state and, at times, non-state actors. To this end, Paragraph 10 declares:

The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and

---

301 Petrova, supra note 290, at 596.
302 Id.
303 General Comment 15, supra note 295, ¶ 2.
304 See generally id, ¶ 12 (providing explicit directions on how to satisfy the General Comment’s requirements).
305 SALMAN ET AL., supra note 230, at 66.
management that provides equality of opportunity for people to enjoy the right to water.  

Erik Bluemel asserts that by "categorizing a right to water as a human right," and speaking in terms of entitlement rather than charity, General Comment 15 accelerates the achievement of basic water access, ordains fresh water a legal entitlement, and turns traditionally vulnerable social groups into empowered and influential policy activists.  

According to Paragraph 20, three specific legal obligations fall on State Parties: "obligations to respect, obligations to protect and obligations to fulfil." As these legal obligations directly relate to the Phiri water rights case, State Parties like Johannesburg Water must "refrain from interfering directly or indirectly with the enjoyment of the right to water" and, more specifically, are prohibited from denying or limiting equal access to adequate water. In addition, the South African government, under Paragraph 23, must "prevent third parties," including "individuals, groups, corporations and other entities" from "interfering in any way with the enjoyment of the right to water." Together, Paragraphs 20 and 23 address the behavior of all respondents, both public and private, in the Phiri case.  

Paragraph 24 addresses the privatization of water distribution schemes, like that operating in Soweto, by outlining the proper regulatory oversight State Parties must exercise over third parties controlling water services. In short, "States parties must prevent [third parties] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water." Moreover, prepaid meters and similar payment mechanisms must comply with Paragraph 27, which states that "[a]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are

---

306 General Comment 15, supra note 295, ¶ 10.
307 Bluemel, supra note 261, at 973.
308 General Comment 15, supra note 295, ¶ 20.
309 Id. ¶ 21.
310 Id.
311 Id. ¶ 23.
312 Id. ¶ 24.
affordable for all, including socially disadvantaged groups."\textsuperscript{313} Most notably, Paragraph 27 appears to condemn the social injustice plaguing the Phiri community by stating, in the final sentence, "[e]quity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."\textsuperscript{314}

The status of international human rights law with respect to water rights, and its corresponding influence on South African law, remains somewhat indeterminate. One scholar, however, has gone so far as to say that, though international human rights law has not created legally binding obligations on states, it has pressured some states, such as South Africa, to more comprehensively account for the human right to water by virtue of domestic legislation.\textsuperscript{315} Under this rationale, the South African Constitution not only declares an important domestic legal obligation, but directly reflects and endorses an international priority.

General Comment 15, Salman and McInerney-Lankford submit, represents "further evidence that there is an incipient right to water evolving in public international law today."\textsuperscript{316} How this maturing international regime will affect the High Court's decision remains uncertain, and may ultimately hinge on the Court's propensity towards reaching a judgment focused primarily on the constitutional issues.

It is interesting to note, however, that General Comment 15 continually emphasizes the issue of affordability,\textsuperscript{317} one of the principal components of the Phiri rights claim. The Comment appears to equate low cost water with free water, and most water experts have firmly spoken out against free water programs.\textsuperscript{318} What follows, therefore, is the natural conclusion that the High Court will focus its inquiry not on the simple privatization, necessarily, or even payment based distribution of water in Soweto in and of itself. Rather, affordability should be measured relative

\textsuperscript{313} \textit{Id}. \textsuperscript{\textsuperscript{31}}27.
\textsuperscript{314} General Comment 15, \textit{supra} note 295, \textsuperscript{\textsuperscript{31}}27.
\textsuperscript{315} Bluemel, \textit{supra} note 261, at 977.
\textsuperscript{316} SALMAN ET AL., \textit{supra} note 230, at 89.
\textsuperscript{317} \textit{Id}. at 70.
\textsuperscript{318} \textit{Id}.
to the economic conditions unique to the Phiri community, and reconsideration employed for the threshold allocation point (six kiloliters) after which payment is required.

South Africa, in the post-apartheid era, is no longer isolated from the international legal establishment. Domestic programs, like Operation Gcin’amanzi, unquestionably serve many beneficial fiscal purposes, but may at the same time compromise South Africa’s commitment to human rights norms as embodied in international law. As mentioned earlier, the South African Constitution explicitly urges the consideration of international law by courts interpreting the Bill of Rights;319 thus, it is reasonable to anticipate the High Court’s consideration of General Comment 15 and other similar international treaties.

Ironically, from the Phiri residents’ perspective, the South African Constitution at once both represents an “emerging recognition of the human right to water in [a] domestic legal context . . . ”320 and a promise regrettably unfulfilled. The South African experience to date indicates how a human rights approach to water can at times clash with a cost-efficient program aimed to limit waste.321 A human rights approach to water privatization will continue to impress international scrutiny upon multinational water companies, and secure improved protection for those low-income global citizens most substantially bearing the burden of a privatized water industry.322 At times when government appears to prioritize economic objectives ahead of fundamental human rights, the true breadth and value of a rights-based approach will be revealed. But before a human rights approach is fully achieved, access to adequate water simply can not rest primarily on the ability to pay.

---

319 See supra note 203 and accompanying text (demonstrating that Section 39(1)(b) prompts reviewing courts to consider international law when interpreting the South African Bill of Rights).
320 SALMAN ET AL., supra note 230, at 88.
321 See generally Bleumel, supra note 261, at 980 (describing the inherent tension between a human rights approach to water and implementing a financially viable water infrastructure).
322 Petrova, supra note 290, at 612.
VIII. The Structure of Bill of Rights Litigation: Preliminary Procedural Issues

Bill of Rights litigation in South African courts can be divided into distinct stages. Prior to addressing the substantive human rights concerns of the litigants involved, a reviewing court must initiate compliance with certain procedural guidelines. Before either the substantive stage or the remedial phase commence, the court must determine the breadth of the specific Bill of Rights provisions in question, how they should be interpreted, and whether any Section 36 limitations apply.

According to Iain Currie and Johan de Waal, the procedural stage is comprised of three questions: (1) "Does the Bill of Rights apply in the dispute between the parties," and if so, "how does the Bill of Rights apply . . . ?;" (2) "Is the issue to be decided justiciable?;" and (3) "Does the court have jurisdiction to grant the relief claimed?" The second inquiry is of particular importance because this question's answer directly determines whether the High Court can even contemplate the remedy sought by the Phiri applicants. Absent an affirmative response, the High Court would not have proceeded to consider the substantive law discussed above, and therefore the justiciability of socioeconomic claims is a central issue to the evolution of a developing South African constitutionalism.

IX. Constitutional Court Precedent and the Justiciability of Socioeconomic Claims

Ensuring the highest human right standards may in turn compromise a state's desired financial scheme. Judicial review, therefore, of alleged human rights violations necessarily requires "weighing the critical needs of individual citizens against the

---

323 BILL OF RIGHTS HANDBOOK, supra note 3, at 24.
324 See id. at 27-28 (describing the onus of litigants to declare the remedy requested and the respondents corresponding duty to rebut).
326 See supra note 181 and accompanying text.
327 BILL OF RIGHTS HANDBOOK, supra note 3, at 28.
328 Id.
329 Id.
legitimate budgetary constraints of the state." To say the least, members of the Witwatersrand High Court, and similarly situated judges, face the challenging task of shaping a presently immature Constitutional theory around and with a sound economic regime.

Though the South African Bill of Rights is widely regarded as one of the most progressive human rights instruments in existence today, the South African judiciary, and the Constitutional Court in particular, has been criticized for failing to realize many of the promises the Constitution purportedly makes. Some of the more unfavorable scholarly commentary takes issue with the Court's unwillingness to adopt a "minimum core approach," choosing instead to implement a reasonableness approach in exercising its constitutional jurisprudence.

The judiciary's proper role in enforcing the constitutional socioeconomic protections in question has not been fully developed. But, for prospective purposes, the Constitutional Court declared socioeconomic rights justiciable and subject to protection from government intrusion. In this context, the Constitutional Court has forged its role in enforcing socioeconomic rights, and rejected any enduring perception of non-justiciability. Richard Goldstone goes so far as to say that the "Constitutional Court has successfully enforced the constitution's provisions for social and economic rights while

331 Mubangizi, supra note 63, at 2.
333 Id. at 165. The "minimum core approach" is the popular notion that the Court should identify the minimum core of each fundamental socioeconomic right identified in the Constitution when challenged in a judicial setting. See id.
334 Id.
335 See Mubangizi, supra note 63, at 3 (noting that some commentators have suggested that the legislature and executive are better suited to enforce the fundamental rights protection outlined in the Constitution and not the judiciary).
balancing the state's interest in managing its political affairs," a truly lofty declaration that gives hope to the Phiri applicants before the High Court.

By virtue of a handful of historical decisions, the Constitutional Court has shaped the framework for Bill of Rights adjudication likely to be utilized by the High Court. On a number of occasions, the Constitutional Court has had the opportunity to consider the parameters of the socioeconomic guarantees contained in the Bill of Rights, and the corresponding duty of the state to realize these objectives. Exactly how the Constitutional Court has previously addressed both the right to housing and healthcare should guide the High Court's reasoning regarding the Phiri application.

Central to the Constitutional Court's jurisprudence in this area has been consideration for the availability of state resources. In the three major socioeconomic cases discussed below, the Constitutional Court has recognized, to varying degrees, the "utilitarian considerations" that in many ways either directly or indirectly threaten the constitutional pledge of elevated humanitarian protection.

A. Constitutional Court Precedent: Socioeconomic Rights Litigation

Were the Phiri applicants before the High Court in 1997, their prospects for victory immediately following the seminal decision handed down in Soobramoney v. Minister of Health would be bleak at best. At this early stage of socioeconomic rights

338 Goldstone, supra note 330, at 4.
339 Ramin Pejan promoted the same theory when he asserted that "the South African Constitutional Court has developed jurisprudence regarding economic and social rights applicable to the potential justiciability of the right to water." Pejan, supra note 214, at 1194-95.
340 Mubangizi, supra note 63, at 3.
341 See Lehmann, supra note 332, at 166 (noting that the Court has recognized the tension that exists between absolute protection of individual rights and inadequate disposable resources).
342 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) (S. Afr.).
343 Richard Goldstone declares this initial Constitutional Court decision regarding socioeconomic rights the "worst possible beginning [from the humanitarian
litigation, the Constitutional Court adopted a more restrictive interpretation of the new Constitution's commitment to socioeconomic equality and, therefore, claims such as those held by the Phiri applicants would have had little hope. Initial reaction to this disheartening decision provoked fears that the Court had rendered the socioeconomic rights provisions meaningless in practice.\footnote{Mark S. Kende, The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective, 6 CHAP. L. REV. 137, 145-46 (2003).}

The issue presented before the Court was "whether a public hospital unconstitutionally failed to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease, and cerebro-vascular disease."\footnote{Id. at 146.} Soobramoney, the ill patient, required dialysis once a week, but was denied priority treatment in favor of patients who could realize a short-term and full recovery.\footnote{Goldstone, supra note 330, at 5. For a more complete synopsis of the Soobramoney facts, see Soobramoney, 1998 (1) SA at 769-70, paras. 1-7.} A High Court injunction initially compelled the government to provide the dialysis treatment, but the Constitutional Court reversed.\footnote{Goldstone, supra note 330, at 5.} The right to health care, as announced in Section 27 of the Bill of Rights (the same clause containing the right to water), was evaluated for the first time in this context.

Though the Court recognized that denying Mr. Soobramoney's request for dialysis would provoke an earlier death, it held that his condition did not trigger the emergency medical treatment language contained within Section 27.\footnote{S. AFR. CONST. 1996 ch. 2, § 27(3); see also supra note 137 and accompanying text.} The Court reasoned that a contrary decision would have mistakenly prioritized terminal illnesses over less threatening medical conditions, thus jeopardizing the state's ability to fund preventive healthcare programs in light of limited disposable financial resources.\footnote{Soobramoney, 1998 (1) SA at 773, para. 19.} The Court extended tremendous deference to the hospital's decision on how best to allocate medical treatment, reflecting the judiciary's perspective.\footnote{Goldstone, supra note 330, at 5.
willingness to defer to institutional commitments grounded in reasonableness.\textsuperscript{350} In noting the objectively heavy financial burden that Mr. Soobramoney’s treatment produced, at a cost of nearly 60,000 rand per year,\textsuperscript{351} the Court, though perhaps begrudgingly,\textsuperscript{352} tipped the balancing inquiry in favor of a conservative budgetary approach and against a more human rights oriented methodology.

In simple terms, Mr. Soobramoney’s sustained health, unquestionably requiring a burdensome financial commitment shouldered by the state, was sacrificed in favor of pursuing the more advanced health of others.\textsuperscript{353} The Court phrased its decision in exceedingly deferential terms, perhaps an indication of its early trepidation for asserting a judicial voice in traditionally administrative or legislative conversations.\textsuperscript{354}

Even though the Court was unwilling to instruct the government on how medical supplies were to be distributed, or how hospitals should spend their money, the Court did note that violations of the equality clause\textsuperscript{355} would trigger judicial interruption.\textsuperscript{356} In this sense, early Bill of Rights jurisprudence reflected the immediate concern for racial equality that developed naturally from the anti-apartheid movement. This somewhat shallow understanding of the scope of the new Constitution’s human rights purpose fortunately gave way to a more profound exercise in socioeconomic egalitarianism by the turn of the

\textsuperscript{350} Id. at 776, para. 29.

\textsuperscript{351} Id. at 775-76, para. 28.

\textsuperscript{352} See id. at 776-77, para. 31 (“One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. . . . But the state’s resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme.”).

\textsuperscript{353} Lehmann, supra note 332, at 167.

\textsuperscript{354} The Constitutional Court, in Soobramoney, stated that “[the] choices [made by the hospital] involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.” Soobramoney, 1998 (1) SA, at 776, para. 29.

\textsuperscript{355} See supra note 164 and accompanying text.

\textsuperscript{356} Goldstone, supra note 330, at 5.
In evaluating *Soobramoney*’s importance in terms of its precedential authority, some commentators have argued that the decision really failed to establish guidelines for future socioeconomic jurisprudence.\(^{357}\) But Karin Lehmann notes, while citing Craig Scott and Philip Alston’s analytical remarks on *Soobramoney*’s legacy, that many other scholars endorse the utilitarian decision employed by both the state and the Court in unpacking the *Soobramoney* dilemma.\(^{358}\) In this respect, the civil libertarian fears born from the sobering *Soobramoney* decision\(^{359}\) that the South African judiciary would remain unresponsive to individual rights and personal freedom infringement by the state may have, indeed, been premature.

Whereas *Soobramoney* fell short of espousing a concrete adjudicatory framework for constitutional rights, the *Government of the Republic of South Africa v. Grootboom*\(^{360}\) decision was quite progressive in this respect. *Grootboom* addressed the right to housing as guaranteed by Section 26 of the Constitution.\(^{361}\) The applicants before the Court represented hundreds of squatter-dwellers who had been displaced from their homes following a flood.\(^{362}\) Faced with intolerable living conditions,\(^{363}\) the squatters, including Mrs. Grootboom, moved onto private property, where they were eventually forcefully evicted\(^{364}\) by the private

---

\(^{357}\) See Mubangizi, *supra* note 63, at 6 & n.33.


\(^{359}\) As a side note, Mr. Soobramoney died within one hour of the Constitutional Court decision. Goldstone, *supra* note 330, at 5. When members of the media congregated at his home to record his reaction to the earlier rendered judgment, Mr. Soobramoney succumbed to a stroke. *Id.*

\(^{360}\) *Gov't of the Rep. of S. Afr. & Others v Grootboom & Others* 2001 (1) SA 46 (CC) (S. Afr.).

\(^{361}\) Lehmann, *supra* note 332, at 171.


\(^{363}\) The squatters lived in shacks and most of them lacked water and electricity. *Grootboom*, 2001 (1) SA at 55, para. 7. Sewage accumulated at alarming rates, and small shacks inadequately protected large families from the elements. *Id.*

\(^{364}\) The squatters’ temporary homes were bulldozed and their possessions destroyed in an attempt to push them off the private property. *Id.* at 55-56, para. 10.
landowner. Upon returning to their deplorable squatter settlements as a last alternative, the squatters found their old homes occupied and became officially homeless. The squatters then struggled to erect sturdy shelter on a local municipal sports field, and the local government was unreceptive to their pleas for assistance.

The Grootboom applicants filed a suit against the Cape Town provisional government, claiming that the government had failed to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to adequate housing]” guaranteed by Section 26(1). Grootboom and her fellow applicants demanded adequate temporary housing “pending implementation of the programme to provide adequate housing,” but the Court refused their request, concluding that Section 26 did not warrant immediate relief consistent with those commands. The Court did, however, declare the housing program unconstitutional. In doing so, it laid the foundation for a standard of review applicable to socioeconomic claims premised on the Constitution’s text.

The unanimous Court decision reasserted the justiciability of socioeconomic rights and went on to declare the state’s housing program unconstitutional by virtue of its unreasonableness.

365 Pejan, supra note 214, at 1196.
366 Id.
367 Grootboom, 2001 (1) SA at 56, para. 11.
368 Goldstone, supra note 330, at 6.
370 Id. at ch. 2, § 26(1).
372 See Lehmann, supra note 332, at 171; Grootboom, 2001 (1) SA at 86, para. 95 (“Neither s 26 nor s 28 entitles the respondents [who won in the High Court] to claim shelter or housing immediately upon demand.”).
373 Lehmann, supra note 332, at 171-72.
374 See Kende, supra note 344, at 143. The Court cited the First Certification Judgment, Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (S. Afr.), and explicitly stated that, although budgetary implications stem from enforcing fundamental socioeconomic rights, these implications are not a bar to realizing the justiciability of socioeconomic rights. Kende, supra note 344, at 143.
375 Lehmann, supra note 332, at 171-72.
Specifically, the negative obligation placed on South African states by Section 26 demanded that they "desist from preventing or impairing the right of access to adequate housing." The Court further emphasized the importance of socioeconomic rights, and rejected an international human rights approach that embraced the notion of a "minimum core" level of socioeconomic protection, as alluded to earlier. Instead, the court adopted a reasonableness test, asking "whether the measures taken by the state to realise the right afforded by section 26 are reasonable."

In assessing the reasonableness of the state housing program, the Court, as a preliminary matter, applauded the state's medium and long-term housing approach. However, in condemning the short-term housing strategy, the Court held that the state failed to act reasonably, and defined this measuring stick as follows:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measured aimed at achieving realisation of the right. . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

The reasonableness inquiry revealed a blind eye turned (if turned at all) towards the poorest members of society. Thus, while the Court favorably reviewed many elements of the housing scheme, the predicament of the homeless undermined the program's constitutional legitimacy. In the end, the Court shied away from impeding the government's discretion in how to effectuate the constitutional mandate, but instructed that at least

---

376 Grootboom, 2001 (1) SA at 66, para. 34.

377 For a further discussion of the importance of socioeconomic rights, in the language of the Grootboom court, see Kende, supra note 344, at 143.

378 Grootboom, 2000 (1) SA at 66, para. 33.

379 Lehmann, supra note 332, at 172.

380 Grootboom, 2001 (1) SA at 69, para. 44. For a further discussion of what "reasonable" meant in the area of housing, see Pejan, supra note 214, at 1197.

381 Kende, supra note 344, at 145 (citing Grootboom, 2001 (1) SA at 79, para. 66) ("The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide for relief for those in desperate need.").
some budgetary consideration be adequately exercised with the poorest communities in mind.

_Grootboom_ can be, and was, distinguished from _Soobramoney_ on many levels. For the purposes of this piece, the most notable distinction lies in the commitment to the more widespread public interest reflected more notably in the _Grootboom_ decision. In other words, the adverse consequences of the _Soobramoney_ decision were in many ways mirrored by important countervailing social interests that might, some would argue, have demanded the sacrifice of one for the betterment of others. In _Grootboom_, however, jeopardizing the realization of adequate shelter would have directly undermined the social initiative the housing program, in essence, sought to incorporate.\(^\text{382}\) If visualized along the lines of a broad spectrum, the water rights application falls, at best, squarely in tow with the _Grootboom_ decision or, at worst, merely on its side of the scale. A water allocation scheme that fails to adequately account for those “whose needs are the most urgent and whose ability to enjoy all rights therefore is in most peril”\(^\text{383}\) cannot be constitutionally sustained. The adverse consequences that flow from such a program directly undermine the legitimacy of the policy.

Furthermore, the _Grootboom_ Court appeared to grasp its decisive role in alleviating the socioeconomic injustice that plagued South Africa during apartheid, and unfortunately persists today. One particularly poignant paragraph of the _Grootboom_ decision practically preconceives the complaint filed by the Phiri residents. In this respect, though the underlying social issue is different, the general theme resonates through all struggling communities. The _Grootboom_ Court noted that

Unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream. . . . Self-help . . . cannot be tolerated . . .

\(^{384}\)
In *Grootboom*, the Constitutional Court successfully saw beyond the illegal activity of citizens enduring insufferable living conditions and addressed the constitutionality of the state action that provoked the prohibited behavior. A consistent application of this standard suggests that the High Court will view the claims of the Phiri residents through a similarly unrelenting, and conceivably sympathetic, lens.

Like *Soobramoney*, the third of the three landmark socioeconomic cases heard by the Constitutional Court addressed the issue of adequate healthcare. *Minister of Health v. Treatment Action Campaign* was decided in 2002, and further elaborated on the methodology the Court first announced in *Grootboom*. A “reasonableness” standard was again employed, in this instance to evaluate government provided access to HIV medicine.

The Constitutional Court assessed the government’s anti-HIV program and, more specifically, the use (or non-use) of a then-new drug called Nevirapine. Nevirapine, according to the World Health Organization, could prevent the spread of HIV/AIDS from infected pregnant mothers to their unborn fetuses or newborn babies. The government was hesitant to introduce Nevirapine into mainstream medicine and, even upon distributing the new drug, availability was restricted tremendously.

The Treatment Action Campaign (TAC), an HIV/AIDS advocacy group, brought suit challenging the constitutionality of

---

385 *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721 (CC) (S. Afr.).

386 Marcus, *supra* note 337, at 64.

387 *Id.* The horrific AIDS epidemic is well-documented. *See* Kende, *supra* note 344, at 147 (describing relevant statistics with respect to AIDS-related deaths); *see also* Treatment Action Campaign, 2002 (5) SA at 728, para. 1 (describing the HIV/AIDS pandemic as “an incomprehensible calamity”).

388 *See* Treatment Action Campaign, 2002 (5) (SA) 721 (CC), at ¶ 2 and accompanying note. *See also id.* ¶ 12 for overview of Nevirapine.

389 Kende, *supra* note 344, at 147-48; *see also* Treatment Action Campaign, 2002 (5) SA at 743-44, paras. 48-56 (detailing the policy of distribution).

390 *See* Treatment Action Campaign, 2002 (5) SA at 729, para. 4 (“The programme impose[d] restrictions on the availability of Nevirapine in the public health sector. . . . The applicants contended that these restrictions [were] unreasonable when measured against the Constitution . . . .”). For a more comprehensive account of the “[g]overnment policy on the prevention of mother-to-child transmission of HIV,” *see id.* at 741-42, paras. 40-43.
the government's limited distribution program. The program in question limited the use of the promising new drug to a handful of designated test sites and expressly forbade doctors practicing in other public health institutions from dispensing Nevirapine. As a result, Nevirapine was available at only two sites per province, a consequence of the government's own uncertainty regarding the safety and efficacy of the relatively untested drug. For practical purposes, the brunt of the restricted distribution scheme was felt by families unable to pay for private healthcare, the majority of whom lacked access to the research and training sites where Nevirapine was available. TAC demanded that the drug be readily available through the public health care system.

The Court initially reflected on both Soobramoney and Grootboom, and firmly declared the justiciability of socioeconomic rights. Briefly stated, the Court asked itself "whether the applicant ha[d] shown that the measures adopted by the government to provide access to health care service for HIV-positive mothers and their newborn babies [fell] short of its obligation under the Constitution." The Court dismissed amici

391 Pejan, supra note 214, at 1199.
392 Lehmann, supra note 332, at 174; see also Treatment Action Campaign, 2002 (5) SA at 753-54, para. 92 (summarizing the relevant evidence before the Court, recounting the specifics of the challenged program, and setting forth the corresponding analytical framework for understanding the program's constitutionality).
393 Treatment Action Campaign, 2002 (5) SA at 731-32, para. 11.
394 Id. at 731, para. 10.
395 See id. at 732-33, para. 15. The government sought to "develop and monitor its human and material resources nationwide for the delivery of a comprehensive package of testing and counseling, dispensing of Nevirapine and follow-up services to pregnant women attending at public health institutions." Id. It appears that the government was mostly driven by a concern over the escalating costs of staffing and allocation that would accompany a more immediate distribution of the drug on a more widespread scale. Id. at 732-33, 753, paras. 15, 49.
396 Id. at 733, para. 17. For a summary of the Applicants' case, see Treatment Action Campaign, 2002 (5) SA at 734-35, para. 19.
397 Goldstone, supra note 330, at 7.
399 Id. at 736, para. 25.
400 Id.
arguments that a "minimum core" approach\textsuperscript{401} was appropriate, rather demonstratively asserting that "[i]t is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."\textsuperscript{402}

With respect to its own role in enforcing the provisions of the Bill of Rights, the Court's self-proclaimed "function in respect of socio-economic rights," it was said, "is directed towards ensuring that legislative and other measures taken by the state are reasonable."\textsuperscript{403} Paragraph 28 of the \textit{Treatment Action Campaign} decision sets forth the standard of review likely applicable to the Phiri water rights application, and is perhaps most illustrative of how the High Court will process the tension between the municipal fiscal agenda and the alleged fundamental rights violations. It reads in full:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.\textsuperscript{404}

The above standard of review appears to envision a restrained role for the Courts, but as ultimately proved, the Court's decision embraced an active role in ensuring the reasonableness of any government policy. Any initial deference the City of Johannesburg enjoys should, accordingly, not prevent the High Court from finding in the applicant's favor.

Applying this standard of review, the Court in \textit{Treatment Action Campaign} unanimously condemned the government's

\begin{footnotes}
\footnote{See \textit{id.} at 737-40, paras. 26-36 (discussing \textit{Grootboom} and previous decisions involving the "minimum core" approach).}
\footnote{\textit{Id.} at 739-40, para. 35.}
\footnote{\textit{Id.} at 740, para. 36.}
\footnote{\textit{Treatment Action Campaign}, 2002 (5) SA at 740, para. 38.}
\end{footnotes}
restrictive program and unequivocally attached fixed obligations upon the state to provide the drug free of charge, in addition to counseling and testing. The decision ultimately rested in notions of equality: some mothers could not be denied while others received the treatment with relative ease.

Speaking more broadly to the socioeconomic guarantees contained in the Constitution and, one could argue, envisioning a water rights claim such as that before the High Court today, the Court stated: "[t]hese are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them." The scope of these emerging doctrinal words will dictate the constitutionality of the prepaid water program. A reasonableness inquiry consistent with Treatment Action Campaign demands remedial judicial action issued against the named respondents in the Phiri water rights application.

A favorable outcome in the Phiri case may be forestalled by one large discrepancy between the facts presented in Treatment Action Campaign and those described in the Phiri application. Namely, the government in Treatment Action Campaign freely acknowledged that more widespread distribution of Nevirapine was plausible, from a resource allocation standpoint, and the Court concluded that the costs associated with improved counseling and testing were negligible. Conversely, the government has installed prepaid water meters and implemented Operation Gcin’amanzi in an effort to better utilize the government’s resources, not out of preference, but out of purported need. In light of the water shortage facing South Africa generally, and the statistics highlighting waste and misuse in communities like Soweto, the High Court may find the costs associated with imposing a stricter, and far more demanding, notion of the constitutional right to water untenable. Ultimately, how the High Court evaluates the water resources available to the state and the costs incurred in meeting the Phiri applicants’ demands will, for

405 See id. at 754, para. 95.
406 Goldstone, supra note 330, at 5.
407 Treatment Action Campaign, 2002 (5) SA at 754, para. 94.
408 Lehmann, supra note 332, at 175-76.
better or worse, determine the scope of judicial review.

The *Treatment Action Campaign* decision can be both applauded and questioned. In many respects, the decision highlights the judiciary’s role in enforcing the often unworkably vague provisions of the Bill of Rights. Merely a decade into their evolution, socioeconomic rights are unquestionably justiciable. The Constitutional Court, and lower courts alike, serve an invaluable role in protecting the right to healthcare, housing and, going forward, the right to water. But immediate victories, such as those obtained in *Grootboom* and *Treatment Action Campaign*, in practice could eventually prove reflective of a more troubling legal doctrine. Though the modern Court has made great strides in effectuating the socioeconomic rights provided in Sections 26 and 27, a more conservative interpretation of the Paragraph 38 language contained in the *Treatment Action Campaign* decision could eventually threaten what presently appears to be developing humanitarian-based methodology.

From one perspective, the High Court is “ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences” for the Phiri community. Following this line of reasoning, the High Court’s reasonableness inquiry necessarily will be “restrained and focused,” intent on “[not] rearranging budgets.” Under this approach, the court may cautiously evaluate the activity of the City of Johannesburg and Johannesburg Water in a different light as compared to the *Treatment Action Campaign* case.

Another reason to believe the court may treat the Phiri case differently is that the AIDS pandemic at the center of the *Treatment Action Campaign* controversy was the subject of intense international attention. Though the water shortage in South Africa has garnered media interest, the adoption by the Court of a somewhat more restrictive understanding of the state obligation in this area is likely not to create a similar uproar.

---

409 See supra notes 401-402 and accompanying text.


411 Id.

412 See Lehmann, supra note 332, at 176 (describing how the government and HIV positive pregnant women had coinciding interests, thus provoking the eventual *Treatment Action Campaign* decision). The government’s umbrella interest in pursuing a sound fiscal agenda may not align as well with the Phiri residents’ interest in acquiring...
Regrettably, the cost of a more lenient reasonableness standard, at least in terms of minimum government constitutional compliance, will be incurred by the politically voiceless.

B. The "Reasonableness" Standard and the Implications for the Right to Water

Grootboom and Treatment Action Campaign provide the adjudicatory blueprint for a Constitutional challenge, such as the Phiri water rights application, to state sponsored water policy. Both cases were, and still are, considered landmark victories for the socioeconomically deprived citizens of South Africa. But insulated triumphs have not shielded the Constitutional Court from theoretical criticism. Karin Lehmann argues that the "court's undue and excessive deference to the legislature and executive," as manifested by the "criteria used by the court to decide whether executive action is unconstitutional" and "the form of relief granted by the court when a particular action is declared unconstitutional," are two focal points of scholarly contention.413

The Court digests government policy and, shedding a subjective understanding of state and municipal practice in favor of a more objective perspective, the Court evaluates the government policy in question using a reasonableness test.414 As discussed earlier, the ICESCR underscored the progressive realization approach towards achieving socioeconomic rights improvement415 and the Constitutional Court has seemingly endorsed this methodology.416 By invoking the "reasonable" test,417 the Court does not necessarily force the government's hand; on the contrary, it assesses the government's strategy relative to its more free water.

413 Id. at 177.

414 Pejan, supra note 214, at 1201; see also Lehmann, supra note 332, at 177 ("[T]he court will adjudge a particular policy or program constitutional if it is rational, reasonable, and made in good faith.").

415 See supra note 268 and accompanying text.

416 See generally Pejan, supra note 214, at 1201-02 (discussing the Court's doctrinal consistency with international law).

417 See Lehmann, supra note 332, at 177-78 ("Following Grootboom and Treatment Action Campaign, it is clear that the essence of the judicial inquiry in most cases will be whether the particular policy or program is reasonable.").
constitutinal obligation. As such, the Court has demonstrated a willingness to denounce government programs as unconstitutional, but has yet to recognize "an immediate right to obtain the socio-economic good in question." Progressive realization, therefore, envisions future government compliance consistent with the Court's guiding principles.

The fervor of corrective action, however, is unfortunately emasculated by the type of deference the judiciary extends to the government. Trusting that the government will devise a reasonable policy going forward may prove to indicate a shallow understanding for the degree of the socioeconomic injustice. With respect to water distribution in poor communities like Soweto, even assuming a sympathetic High Court that renders current policy unreasonable, deferring responsibility to a government long since invested in the privatization of the water industry naively ignores the immediate needs of the most deprived Phiri residents. Bleak prospects, such as those held in households like Lindiwe Mazibuko's, practically beg the Court to adopt the supervisory posture scholars criticize the Court for shying away from.

Beyond the remedial shortcomings afflicting the South African judiciary, the reasonableness doctrine, itself, is not without its problems. By adopting a reasonableness standard, the Treatment Action Campaign Court expressly disavowed an alternatively proposed "minimum core" approach. Had the Court asserted minimum core obligations, the corresponding state duty would be far more demanding. The reasonableness criterion provides a more flexible, and perhaps unstable, contemporary understanding of South African socioeconomic rights. The level of vagueness necessitates a disclaimer of uncertainty in anticipating the

418 Pejan, supra note 214, at 1201.
419 Lehmann, supra note 332, at 178.
420 Mazibuko's living conditions are described in her Founding Affidavit. Mazibuko Founding Aff., supra note 123, ¶¶ 67-77.
421 See Lehmann, supra note 332, at 178. But see Pejan, supra note 214, at 1201-02 (describing the "necessary discretion" the reasonableness test affords the government, consistent with the international human rights approach to implementing socioeconomic rights).
423 See Pejan, supra note 214, at 1202 ("The notion of minimum core obligations imposes a much stricter duty on the State.").
direction of future constitutional decisions, such as that before the High Court. What remains clear, however, is that the Court failed to define the scope of socioeconomic rights in a concrete manner.\textsuperscript{424}

The "minimum core" versus "reasonableness" debate will continue as the Constitution progressively evolves. The reasonableness standard is amorphous and less tangible. Critics contend that the reasonableness test, at best, modestly responds to an era of discrimination and inhumane governmental action directly responsible for socioeconomic inequality today. Had the Court implemented a minimum core approach, "the golden opportunity to 'fast-track' constitutional transformation . . . [by setting] clear benchmarks for the legislature and executive, benchmarks that prioritize the welfare of the poorest in South Africa" would have been opportunistically grasped.\textsuperscript{425} The course of fundamental rights reform under a minimum core approach, such critics contend, would be both more immediate and significant for the South African citizens in dire need of redevelopment in this area.

Regardless of one's placement on the theoretical spectrum, whether aligned with the minimum core supporters\textsuperscript{426} or "reasonableness" advocates, how one evaluates the right to water poses a novel challenge distinct, in some ways, from the socioeconomic challenges the Court has heard in the past. In the starkest terms, establishing the parameters of the constitutional right to water requires drawing a line separating adequacy from inadequacy. In other words, whether the government is acting reasonably hinges on a simple determination: either the municipal scheme provides adequate water to everyone, or it does not. The notion of "adequacy," much like the term "reasonable," is arbitrary in nature. But anything short of adequacy, once defined, is therefore inadequate and consequentially unconstitutional.

Dr. Peter Henry Gleick, an internationally renowned water

\textsuperscript{424} Lehmann, supra note 332, at 178.

\textsuperscript{425} Id. at 181. By comparison, the "reasonable measures" standard is difficult to apply and produces only vague constitutional obligations. Id. (describing an argument made by South African human rights scholar Sandra Liebenberg).

\textsuperscript{426} But see id. at 182 (critiquing the minimum core approach).
specialist and environmental scientist, filed an affidavit supporting the Phiri water rights application. Dr. Gleick initially highlights the implicit reference to an "adequate water standard" as embodied in the Universal Declaration of Human Rights and the ICESCR, and goes on to discuss the explicit recognition of the right to water in a number of international human rights treaties, as described earlier. Most notably, Dr. Gleick's testimony weaves the reasonableness standard together with Phiri circumstances.

What is truly adequate (or "sufficient" as Dr. Gleick puts it) will vary between communities. Dr. Gleick argues that the six kiloliters per household per month provided at no expense—or essentially an average of twenty-five liters per person per day based on a household of eight people—is insufficient to meet the basic needs of households containing more than eight people and far below internationally recognized standards. To sustain adequate levels of water access, a government program must meet the Basic Water Requirement for human needs. According to Dr. Gleick, with due consideration extended for "cleaning, hygiene, drinking, cooking, and basic sanitation," a program that allocates less than fifty liters per person per day inadequately meets this standard. But must the government meet the basic requirements central to this adequate standard in order to act reasonably?

With respect to the Phiri community in particular, the maturing notion of constitutionalism dictates that what is reasonable is necessarily adequate as well. The Court has confirmed its aversion to minimum core standards. Though at first glance Dr. Gleick's proposal seems to embody a minimum core approach, in essence, his reasoning supports a case-by-case determination with regards to each respective slice of society. What is reasonable and

428 Id. ¶ 9.
429 See Petrova, supra note 290, at 593.
430 Gleick Aff., supra note 427, ¶ 17.
431 Id. ¶ 18; see also Peter H. Gleick, Basic Water Requirements for Human Activities: Meeting Basic Needs, WATER INTERNATIONAL, June 1996, at 83, 90 ("[Fifty] liters per person per day of clean water should now be considered a fundamental human right.").
adequate for a wealthy household of four may be different from a household of twenty, comprised of unemployed adults and infant children. Dr. Gleick’s method is sound in this respect.

Phiri, and similar poor urban areas filled with overpopulated households and plagued by high unemployment, require higher domestic water usage to meet basic needs. Phrased differently, poor communities that are predictably the most densely populated in South Africa suffer from high unemployment rates that leave more individuals in domestic housing over the course of a day. As a result, basing average water consumption rates on households of eight fails to account for the most disadvantaged and hard-pressed familial units. Dr. Gleick points out that the six kiloliter amount, for a household of eight, is even insufficient to satisfy the basic water needs recognized by normative international theory, underscoring the disparity between South African water rights and standards acknowledged around the globe. The High Court should consider the extraordinary conditions unique to Soweto, such as the hot and dry climate, the obstacles to healthy sanitation in overpopulated areas, and the dearth of fresh water sources near metropolitan regions.

The temptation to feed the need for socioeconomic reform places heavy burdens on the South African judiciary seeking to delineate the terms of the Bill of Rights. The Constitutional Court’s prior reluctance to declare minimum core obligations may, in the end, allow the High Court to evaluate the Phiri rights application through an isolated medium with focused contemplation for only the Phiri complaint, as opposed to the broader undertaking of defining the full scope of Sections 26 and 27. Progressive realization, therefore, is feasible on a smaller, more manageable scale. In fact, a narrow holding by the High Court, a foreseeable conclusion, may leave the broader constitutional issue for appellate review, or perhaps, postpone its resolution for another day.

432 Gleick Aff., supra note 427, ¶ 20.
433 Id. ¶ 21.
434 See id. ¶¶ 22.1-22.4 (describing why Soweto households demand a higher water distribution standard to meet the basic water requirements of everyday life).
X. Conclusion

Post-apartheid South Africa has made tremendous strides in pursuing not only democratic ideals, but also in promoting socioeconomic progress for all South Africans. The Constitution was internationally revered for its express commitment to socioeconomic justice, but the text alone provides very little assurance absent judicial cooperation in enforcing Constitutional obligations upon various state actors. The right to water continues to evolve, both as a human and legal entitlement. South Africa was one of the first nations to explicitly reserve the right to water for its citizens, and the Constitutional Court has since declared similar socioeconomic rights justiciable before a court of law. Defining the right to water, just as the right to healthcare and housing before it, will come by way of judicial review.

In light of a maturing international and customary law in this area, and a supportive framework of Constitutional Court precedent, the High Court has an opportunity to lead South African socioeconomic jurisprudence into an age of innovative equality. The Phiri water rights application, admittedly, does not reflect the water access situation for all South Africans. Undoubtedly, prepaid meters, privatized utilities, and Operation Gcin’amanzi have had some beneficial effect for the City of Johannesburg. But, the Phiri rights application is not about pursuing what is best for the majority. Rather, the plight of the Phiri residents demonstrates the stubborn resolve with which a new South Africa must effectuate a once promising, though yet to be realized guarantee of socioeconomic rights for everyone.

It is incumbent upon the legislature and the executive to not lose sight of the most disadvantaged citizens. It is for the judiciary, however, to see purported compliance for what it truly is, and if necessary, to guide policy reform in an effective manner and away from feeble assertions of socioeconomic equality. The presently skeletal legal and human right to water guaranteed by the Bill of Rights, if it is to become a reality, must find a stabilizing source of reaffirmation through judicial denunciation of an unconstitutional, unreasonable, and inadequate municipal water program.

ANDREW L. MAGAZINER