An Analysis of Litigation Strategies for the Attainment of Water Justice in South Africa

By: Cosmo Pahlahle Mapitsa

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Supervisor: Professor Loretta Feris, Department of Public Law

I, Cosmo Pahlahle Mapitsa, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purposes of research either the whole or any portion of the contents in any manner whatsoever.

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Ditebogo le ditheto go mong waka Modimo wa Thaba Sione. Ke leboga barutiši baka go tšwa bonyenyaneng ka thekgo yeo ba mphilego yona. Go koko ke re, ke ka maitapišo a lena Tlou gore tše ka moka di gonagale. Mo ntshepetša bošego ke mo leboga bosele. Rangwane Matlhalefetše Modika ke ka boithaopo bja lena gore ke gone go fihlelela ditoro tšaka tša go tšwetša dithuto tšaka pele. Le ile go loutša mofhaka, ka loutša lemao.

Go Modike Albert Modika le Dikeledi Oniccah Mapitsa. Dikolobe le e lwele: thuto ke moloti wa tšhuwaana.

Contents:

Abstract

Jurisprudence on water justice is fractured, and this dissertation explores a range of causal factors for the way it has developed. Firstly, water justice is defined as a concept, and it is argued that the concept remains weakly theorised, with discussion on the reasons some components are better reflected in law than others. Then, the process of litigation as a means of obtaining water justice is explained within the context of other strategies for seeking justice. Finally, the development of jurisprudence is analysed using the components of water justice outlined in the study.

The research found that some components of water justice are more prominent in jurisprudence than others. Interviews with litigators explained a range of causal reasons for this, including a need for communities to have access to water in a timely manner, and a need by courts to have cases that are clear; based on sound and available evidence. Building jurisprudence requires incremental change, and litigators face a variety of priorities informing their strategies. Furthermore, while litigation plays an important role in attaining water justice, it is most effective in combination with other approaches. This study asserts that there is significant scope for a diversity of interested parties to collaborate and build integrated approaches to attaining water justice.

Chapter 1: Seeking Justice in Access to Water

1.1 Introduction

Water justice in South Africa cannot be understood without understanding the context of water scarcity. This introduction provides a background to the natural and ecological features of water in the country. Water is often the most significant determinant of how ecosystems develop, and slight variation in the quantity or quality of water can have a great impact on the nature of an ecosystem.[1] While the natural availability of water is the primary determinant of ecosystems, human beings have always planned their livelihoods around the availability of water.

Throughout history, especially since the agricultural and industrial revolutions, humans have tipped the natural balance of water systems through the 'domestication' of water, by manipulating the natural properties of water to cater for human needs. It is through various systems of water management and hydraulic engineering that ancient cities were able to develop.[2] As such, this discussion of water justice takes into account the fact that the availability of water is determined by nature but access to water is a product of water management and governance systems.

In general terms, Water Justice is defined in this dissertation as ensuring that distribution of water is equitable between human users, with at least minimal survival needs being met; ensuring that cultural values that humans attach to water and water use are taken into account and duly recognised in water management and distribution processes; and retention of healthy aquatic ecosystems through minimising human impact on water, in order to ensure fairness and equity between humans as a community of water users and other life forms.

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[1] Helen F Dallas & Nicholas Rivers-Moore 'Ecological Consequences of Global Climate Change for Freshwater Ecosystems in South Africa' (2014) 110 *South African Journal of Science* 1.
[2] Steven Mithen 'The Domestication of Water: Water Management in the Ancient World and its Prehistoric Origins in the Jordan Valley' (2010) 368 *Philosophical Transactions: Mathematical, Philosophical and Engineering Sciences* 5249.

South Africa is classified as a semi-arid country, with an average rainfall of 450mm; well below the world average of 860mm. Furthermore, distribution of rainfall is uneven across the country, with around 43% of all rain falling on only 13% of the land, resulting in relatively low stream flows in rivers.[3] Within this context of limited natural water supply, South Africa has a history of water resource allocation that focused on serving privileged urban communities, industries, and large-scale agriculture. As such democratic reform required that the allocation and distribution priorities of water be geared towards the benefit of all, especially previously marginalised sectors.[4]

In addition to receiving well below world's average rainfall and being classified as semi-arid, South Africa faces a number of water related challenges. For instance, pollution poses a significant threat to an already precarious water supply. In fact, it is said that "the biggest threat to a sustainable water supply in South Africa is not a lack of storage, but the contamination of available water resources through pollution".[5] The quality of South Africa's freshwater resources has declined due to increased pollution caused by industry, urbanisation, afforestation, mining, agriculture, and power generation.[6] Acid Mine Drainage and inadequate water infrastructure systems are examples of the factors that threaten water resources in the country.

Acid Mine Drainage (AMD) is a legacy of mining that affects surface and groundwater resources even long after mining operations cease. Indeed, acid mine drainage is a common problem among abandoned mine sites around the world. It is formed in mining environments when ore and waste materials containing sulphide minerals are exposed to water and oxygen.[7]

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[3] Marius Claassen 'How much Water do we have' in Centre for Scientific and Industrial Research (2010) *A CSIR Perspective on Water in South Africa* 4.
[4] Peter Ashton 'Water and Development: A Southern African Perspective' in Julie Trottier & Paul Slack (eds) *Managing Water Resources: Past and Present* (2004).
[5] Claassen op cit note 3.
[6] Loretta Feris & John Gibson 'Environment and Human Rights: The Right to Water in South Africa and Scotland' in Elspeth Reid & Daniel D Visser (eds) *Private Law and Human Rights: Home in Scotland and South Africa* (2014).
[7] Council for Geoscience *Mine Water Management in the Witwatersrand Gold Fields: Report to the Inter-Ministerial Committee on Acid Mine Drainage* (2010).

Considering the role that mining has played in the South African economy, especially around the Witwatersrand area, it is hardly a surprise that acid mine drainage currently poses a threat to South Africa's scarce water resources.

The risk to ecosystems and humans from AMD occurs when untreated mine water enters river systems. This risk is especially important to consider given the high concentration of gold and coal resources around key river basins, such as the Vaal. Water in these river systems becomes contaminated through acidity and heavy metals in the water as a result of a failure to pump out acid mine water.[8] Acid mine drainage is localised to mining areas such as the Witwatersrand mines in Gauteng and coal mining areas in Mpumalanga. However, in places like Limpopo it is apparent that the impacts of AMD pollution extend far beyond the communities and ecosystems surrounding mines.

The specific impact of AMD varies based on conditions such as location, geomorphology, climatic conditions, and the extent and distribution of AMD-generating deposits.[9] AMD has serious ecological impacts, and poses a big threat to water resources. It destroys aquatic life, and has a serious impact on all forms of life that depend on water.[10] Although the primary cause of AMD is historical, because there were insufficient legislative and regulatory tools to deal with the environmental impacts of mining, the regulation of mines remains fragmented even in the current context, with a result that enforcement of environmental legislation is poor.[11]

Dysfunctional wastewater treatment works also contribute to water pollution, posing a threat to the provision of water for human consumption

[8] Council for Geoscience op cit note 7.
[9] L Feris & LJ Kotze 'The Regulation of Acid Mine Drainage in South Africa: Law and Governance perspectives' (2014) 17, 5 *PLJ*.
[10] Ibid.
[11] Ibid at 2111.

and the health of aquatic systems.[12] Wastewater treatment facilities that do not function well are a reflection of the ageing wastewater infrastructure found across the country. These antiquated systems pose a threat to the provision of water and sanitation services. The widespread failure to treat wastewater properly leads to water systems being contaminated with harmful pathogens and nutrients, which, among other things, lead to eutrophication.[13]

Local government is responsible for providing water and sanitation services, but most municipalities do not have sufficient capacity to deliver water and sanitation services effectively.[14] There are only a few Water Service Authorities able to manage their water service infrastructure adequately, and as a result, there has been a deterioration in service delivery across the water and sanitation sector.[15] In many cases, the National Water Act standards relating to the treatment of water from effluent released into water resources are not met. As a result, untreated or insufficiently treated effluent enters watercourses.[16]

Water and sanitation infrastructure that previously serviced an urban minority white population, as well as the industrial and agricultural sectors, has had to make provision for both a much larger population, and a much wider geographic spread, encompassing a range of peri urban areas where service provision had previously been limited. While urbanisation has reshaped South Africa's communities, the water treatment infrastructure has not kept up with these demographic changes. In fact, the problem is now said to be so severe that it is increasingly unlikely that municipalities will be able to solve it themselves.[17]

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[12] Victor Munnik & Tally Palmer 'Domestic Wastewater Treatment: Wastewater Treatment – Tackling a Wicked Problem Through Dialogue and Action Research' (2016) March/April *The Water Wheel*.
[13] Michael Kidd *Poisoning the Right to Water in South Africa: What can the Law do?* (2011).
[14] Feris & Kotze op cit note 9 at 2114.
[15] Sarah Slabbert *Perceptions of Municipal Water and Sanitation services* (2016) 2.
[16] Kidd op cit note 13 at 11.
[17] Kidd op cit note 13 at 13.

Within this context where there is a threat to water resources due to pollution, as well as limited capacity to treat water for safe household consumption, it is apparent that there are a range of risks in the current and future provision of water services. According to Statistics South Africa, the lack of a safe and reliable water supply was considered by most households to be the biggest problem facing municipalities. Rural provinces ranked water supply as the biggest problem, compared to more urban provinces where service delivery capacity is a bit stronger.[18] Although there has been an increase in the actual number of households with access to piped water in the country,[19] eleven coma two percent (11,2%) of the population had no access to piped water in 2016. Further, up to nearly twenty five percent (25%) of the people in Limpopo and Eastern Cape had no access to piped water.[20]

The context above demonstrates that water is a scarce resource in South Africa, and access to water remains an ongoing struggle for many households. With a range of threats to the environment, including mining activities and agricultural runoff, it is unsurprising that water use can be contentious. There is a growing body of both research and jurisprudence to help guide multiple stakeholders who need to use water for divergent purposes. The section below will provide a foundation for understanding water in South African law.

1.2 Background: The Law and Access to Water in South Africa

The Constitution of South Africa, 1996 is the supreme law of the land and informs the framework within which all current water laws operate. As such, discussions of justice are informed by the human rights provided for in and guaranteed by the Constitution. In the Bill of Rights, the Constitution provides for a right to water.[21] Like all the other rights guaranteed in the

[18] Statistics South Africa *Community Survey 2016* (2016) at 56.
[19] Between 1996 and 2011, the number of households with piped water inside the dwelling nearly doubled from 3,9 million to 6,6 million. By 2016 eighty eight coma eight percent (88,8%) of households in South Africa had access to tap water in their dwellings (on-site and off-site).
[20] Statistics South Africa *General Household Survey 2016* (2018) at 36.
[21] The South African Constitution, 1996 provides in section 27(1)(b) and (2) that "everyone has the right to have access to sufficient food and water"; and that "the state must take reasonable

Constitution, the right of access to water is justiciable.[22] At the time it was incorporated in the Constitution, the right to water was not considered a universally accepted fundamental right. However, it has since gained more recognition as a fundamental right, especially in international law.

Internationally the right to water arguably formed a constituent part of other rights such as the right to health, until it was authoritatively defined as a human right in international law through General Comment No.15 issued by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2002.[23] The United Nations General Assembly Resolution of 2010 formally recognises the right to safe and clean drinking water and sanitation as a human right, and as an integral part of the realisation of all human rights.[24]

The rights contained in sections 26, 27, 28, and 29 of the South African Constitution are considered socioeconomic rights.[25] These are second generation rights that place positive obligations on government, by requiring that government act in a certain way in order to ensure that the right is fulfilled. While human rights of all kinds give rise to both negative and positive obligations, socioeconomic rights can be better described as a result of a recognition that human rights and the basic social conditions in which people live are fundamentally interconnected.[26]

In addition to its presence in section 27 of the Constitution as a socioeconomic right, the right to water is also included in section 24, which speaks to the right to an environment that is not harmful to health or well-being.[27] When dealt with in the context of this section, the right to water is

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legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

[22] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 78 (Hereafter *Certification Judgment*).

[23] Takele Soboka Bulto *The Extraterritorial Application of the Human Right to Water in Africa* (2014).

[24] United Nations Organisation General Assembly resolution 64/292, *The Human Right to Water and Sanitation*, A/RES/64/292 (03 August 2010).

[25] *Certification Judgment* para 76.

[26] Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 564.

[27] Section 24 of the Constitution provides that: 'Everyone has the right to an *environment* that is not harmful to their health or wellbeing; and to have the environment protected, for the benefit of

seen as a constituent part of the third generation or 'group rights', which are rights of the public at large rather than the rights of specific individuals. Essentially the section 24 right is also seen as a socioeconomic right devolving on communities.[28]

In general, provisions that guarantee rights to water do not in themselves guarantee that everyone will actually have water, or that such access will be equitable.[29] At best, a right to water provides the legal basis on which demands for water may be based. In fact, rights-based approaches to questions of access to water have been criticised as being particularly individualistic in nature, following from individual freedoms espoused by liberal theories. Quite often neoliberalism is criticised for using the individual as a unit of analysis of access to environmental resources. Criticism is that this system would be more likely to perpetuate inequality. This risks rendering efforts of increased access that take a rights-based approach ultimately counterproductive, due to the neoliberal commodification that stems from the approach.[30] In fact, some argue that rights-based strategies are rooted in neoliberal principles of individualism, which is what causes rights-based approaches to be ineffective at dismantling persistent inequality. A 'commons' approach often gets presented as an alternative.[31]

The Constitutional provision for human rights is an empty promise if there are no means through which those rights can be obtained or enforced. This is especially the case in South Africa, where the ability to enjoy constitutional rights is intrinsically linked to financial and social capital in a

present and future generations, through reasonable legislative and other measures that – prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. 'Environment' is defined in the National Environmental Management Act 107 of 1998 as surroundings within which humans exist and that are made up of the land, *water* and atmosphere of the earth (own emphasis). It needs to be noted that a lot of academics have argued that the section 24 environmental rights are also socioeconomic tights, eg. Humby (2016) *Infra* note 242, Murcott (2015) *Infra* note 248, and du Plessis (2011) 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279.

[28] Michael Kidd 'Environment' in Currie & de Waal (2013) op cit note 26.

[29] Anél du Plessis & Louis Kotze 'A Right to Safe Water Supplies' (2012) 8 *Quest* 42.

[30] Patrick Bond 'Water Rights, Commons and Advocacy Narratives' (2013) 29 *SAJHR* 125.

[31] Daria Roithmayr 'Lessons from *Mazibuko*: Persistent Inequality and the Commons' (2010) 3 *Constitutional Court Review* 317.

society characterised by inequality and poverty. In spite of formal guarantees of equality in the Constitution, it is clear that people living in poverty are not equally able to exercise and enjoy their rights. The practical implication is that poorer people have weaker access to fewer rights than those who are well-off. Those who are most destitute lack the resources and access to defend and assert their rights.[32] Despite this, communities that suffer from persistent inequality and threats to their wellbeing use human rights as an important basis for accessing justice.

A number of human rights-based strategies are used in the quest for water justice. These include seeking administrative remedies, advocacy by civil society organisations, protest action by communities and trade unions, and litigation. It needs to be acknowledged from the outset that these strategies are not mutually exclusive, and that they are often used either in combination with each other, or sequentially. There are various factors in each specific circumstance that inform the selection of strategies. Each of the various strategies will be briefly discussed below. However, the focus of this dissertation will be on the use of litigation as a strategy for accessing water justice. It will be argued that in spite of criticism rights-based approaches dominate water justice discussions and actions.

1.2.1. Administrative Remedies

Chapter 9 of the Constitution establishes a number of institutions that are intended to strengthen constitutional democracy. These include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality. These institutions are to carry out their mandates independently, and impartially. Their goal is to contribute to the transformation of South Africa and the attainment of social justice, which includes water justice, as will be argued in chapter 2 of this dissertation, through enhancing accountability.[33] These

[32] Laurie Nathan 'Introduction: Mind the Gap' in Kristina Bentley, Laurie Nathan & Richard Calland (eds) *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (2013) 7.
[33] C. Murray 'The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 institutions?' (2006) 9 *PELJ* 122.

institutions have both investigatory powers and certain administrative powers.

Although they do not have powers to conclusively declare government action unconstitutional or illegal, Chapter 9 institutions monitor government by requiring accountability and providing a reliable account of government record. Accountability is achieved through influence rather than enforcement. Any member of the public who has "any complaints about government services or conduct" can contact the office of the Public Protector.[34] Although it may investigate an alleged violation of or threat to a human right of its own accord, any member of the public can lodge a complaint alleging a violation of human rights.[35] Remedial action recommended by the Public Protector is binding and enforceable, and may be changed only on judicial review.[36]

Reports that are produced by Chapter 9 institutions can be used by Parliament to act on failures by government administration. Members of the public can also use reports as a basis for seeking other remedies. The powers of Chapter 9 institutions are considered 'soft' mechanisms for supporting the development of transparent democracy.[37] These mechanisms facilitate the protection of rights and attainment of justice indirectly. Administrative remedies encourage good governance, which in turn leads to the protection of constitutional democracy, including human rights.

In spite of a formal commitment to enhance democracy, South Africa has a history of attacks on Chapter 9 institutions by senior politicians.[38] Individuals working within Chapter 9 institutions who are too independent of the ruling party are subjected to various forms of pressure and

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[34] *http://www.publicprotector.org/#/style/*, accessed on 17 May 2016.
[35] *http://www.sahrc.org.za/index.php/what-we-do/lodge-complaints*, accessed on 17 May 2016.
[36] *Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 para 67.
[37] Murray op cit note 33.
[38] Tom Lodge 'Countering Public Corruption in South Africa' (2001) *Transformation* 53.

intimidation by prominent politicians.[39] Recently (at the time of writing), the office of the Public Protector was under fierce criticism by members of parliament for a number of investigations that were underway, most notably relating to the private home of the President of South Africa.[40] The fact that Parliament, a critical institution for enforcing democracy, does not always support Chapter 9 institutions in their investigation of and findings against the executive serves as one of the greatest limitations to administrative remedies as a way of enforcing rights.

1.2.2. Civic Advocacy

Civil society is often equated with democratic renewal. Civil society organisations are seen as mechanisms for promoting active citizenship in instances where there is civic apathy and political disengagement.[41] On the other hand criticism levelled against civil society organisations is that they are often funded by donors who subscribe to outdated theories of development. The underlying assumptions of liberal and modernisation theories of development are that western society has progressed along a specific path of modernisation, and developing countries are simply not as far along on the same path.[42]

While civil society organisations can be seen as vehicles for moving a country along this developmental path, others critique this framing of development. A further criticism is that as civil society organisations professionalise, they often lose their grassroots base, and may only represent a narrow, educated elite.[43] This criticism does not accurately reflect the complex landscape of civil society, which includes contestations of ideology and class. Indeed, there is tremendous diversity among

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[39] Tseliso Thipanyane 'Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and Public Protector' (2015/2016) 60 *New York Law School Law Review* 125.
[40] Phillip de Wet 'Who Protects the Public Protector?' *The Mail & Guardian* 04 August 2005, available at *http://mg.co.za/article/2015-08-04-who-protects-the-public-protector-the-public-says-public-protectorpublic-protector-says-public-protects-public-protector*, accessed on 26 June 2016.
[41] Steven L. Robins *From Revolution to Rights in South Africa: Social Movements NGOs & Popular Politics After Apartheid* (2008).
[42] Björn Hettne 'The Development of Development Theory' (1983) 26, 3 *Acta Sociologica* 247.
[43] Robins op cit note 41 at 14.

organisations working in the civic space and among members of social movements.[44]

In South Africa, civic society has and continues to play an important role as an agent through which rights can be enforced and protected. One of the biggest social movements in South Africa is the Treatment Action Campaign (TAC). The campaign was launched in the late 1990s in order to campaign for the treatment of HIV. The campaign highlighted the political side of HIV/AIDS, and the fact that it was not merely a health issue, but a human rights issue closely linked to socioeconomic rights.[45]

Civil society movements have mobilised around a range of issues, and aim to influence policy at all levels. This process of advocacy can include campaigns and discussions with policy makers. As a method to improve access to rights, it is most often based on negotiation, and is subject to the will of government and policy-makers to develop and implement specific policies. The South African experience shows that government is not easily swayed by advocacy. As a result, advocacy organisations have had to rely on litigation as a means of attaining specific outcomes. As such, litigation is often used in instances where advocacy does not ensure a sufficient protection of human rights.[46]

1.2.3. Protest Action

Although protests are an expression of the freedom of assembly, and as such an expression of a human right, actual causes of protests are a result of factors that suggest the denial of other human rights, such as poverty, service delivery failures, and exclusion from political decision-making processes.[47] Protests occur in part as a result of failures in public participation processes to respond to issues raised by communities.

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[44] Robins op cit note 41 at 15.
[45] Krista Johnson 'Rights in Post-Apartheid South Africa' (2006) 4 *Perspectives on Politics* 663.
[46] For example the Treatment Action Campaign took the government to court on a number of occasions in order to ensure provision of treatment for HIV positive mothers. Section 27 took the Department of Basic Education to court as a result of failure to deliver textbooks in Limpopo. These cases and others are not only defended by the Government, but are often appealed.
[47] Ndodana Nleya, Lisa Thompson, Chris Tapscott *et al* 'Reconsidering the Origins of Protest in South Africa: Some Lessons from Cape Town and Pietermaritzburg' (2011) 41 (1) *Africanus* 14.

Protests by communities are often targeted at local government and are characterised as 'service delivery' protests. However, protests are a characteristic feature of the relationship between local government and communities, and have more complex roots than simply poor service delivery. They are an expression of social exclusion, and the interlinking violations of socioeconomic and political rights.[48]

Nonetheless the main catalyst of protests in South Africa is around service delivery, such as inadequate housing or evictions. However, a range of other factors contribute in complex ways, including high levels of unemployment, low levels of social cohesion, poor management and leadership within municipalities, and nepotism.[49] In a nutshell, protests are said to be triggered by three main underlying issues: service delivery and transformation, representation, and governance.[50]

The extent to which protesters have their demands met as a result of mobilisation is context specific, and is shaped to a large extent by local politics.[51] Quite often protesters hand over a list of demands to political office bearers, who make promises to deal with the issues raised. Subsequent interventions are hard to track.[52] Therefore, while protest action may occasionally be effective in specific situations, it is not reliable as a method of asserting rights. It is subject to the will of government officials who may well have ignored the plight of the protesting communities in the first place.[53]

1.2.4. Litigation

Litigation is usually used either when alternative strategies have failed, or in combination with other strategies. Unlike the approaches discussed

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[48] Pieter Heydenrych & Johan Zaaiman 'Changing Local Politics in South Africa: The Power Relationship between Local Government and the People' (2013) 38, 2 *Journal for Contemporary History* 157.
[49] Ibid at 168.
[50] Ibid at 170.
[51] Chris Tapscott 'Social Mobilisation and its Efficacy – A Case Study of Social Movements in Langa' (2011) 41, 1 *Africanus* 57.
[52] Ibid at 61.
[53] Susan Booysen 'Public participation in democratic South Africa: From Popular Mobilisation to Structured Co-optation and Protest' (2009) 28 *Politeia* 1.

above, litigation is not a negotiation process seeking merely to influence government policy and practice. It is used as a strategy to deal with specific disputes. The specificity of litigation means a specific policy or action of government needs to be challenged directly, requiring a specific remedy. This makes litigation an important method either to access rights or to prevent their violation, especially as a matter of last resort.[54]

The fact that court findings and judgments are binding means that, at least theoretically, litigation is an effective way of enforcing rights. The inclusion of justiciable socioeconomic rights in the Constitution offers an opportunity for those who are deprived of their rights to use litigation to enforce them. Factors that affect the use of litigation as a strategy for asserting rights and accessing justice will be discussed in further detail in Chapters Three and Four below. The Constitutional Court's confirmation that socioeconomic rights are, at least to some extent, justiciable,[55] has reinforced litigation as a strategy for attaining water justice. This has strengthened the role of courts in the democratic project.

Unlike Chapter 9 institutions, (superior) courts have inherent jurisdiction, which gives them wide discretion to hear any matter properly brought before them. Because courts issue judgments and not recommendations, the efficiency of their judgments does not depend on the will of another branch of state, such as Parliament. While advocacy and protest action offer an opportunity for communities to claim rights from the state, the outcomes of these strategies are negotiated based on factors such as political will. In instances where advocacy and protest fail, litigation is often used.[56] There has been a lot of contestations around investigstions conducted by chapter 9 institutions and in some cases the government has formed negative views about court decisions. However there is still general acceptance of the authority of courts and respect, to a certain

[54] Raylene Keightley 'The challenges of Litigating Socio-Economic Rights in South Africa' 2011 *New Zealand Law Review* 295 at 300.
[55] Ibid.
[56] In spite of well-co-ordinated groundwork and civil mobilisation, some of the greatest successes of the Treatment Action Campaign were based on winning cases in court, for instance.

extent for court orders. Implementation of court orders will be discussed in better detail in Chapter Three.

A brief look at South African case law dealing with the right to water demonstrates three main trends. Firstly, the right to water is seen only as a socioeconomic right, with the focus being on whether the state is doing enough in a specific case to meet its constitutional obligations with regard to the provision of access to water. The focus has been on the quantity of water supplied, and interruptions of services (including circumstances wherein such interruption is acceptable). For instance, in *The Federation for Sustainable environment and another v The Minister of Water Affairs and Others*,[57] where water in the area was contaminated by acid mine drainage to such an extent that it was not suitable for human consumption, the applicants' case was that water supplied through water tankers (meant to provide drinking water) was insufficient.

Secondly, when litigating on the right to water, the focus tends to be on administrative justice, with the substantive right playing a minimal or no role at all. It must be clarified that this focus on administrative law can be used as a means to realise substantive outcomes. For instance, while based mostly on the constitutionality of administrative measures taken by the City of Johannesburg, arguments of applicants in the *Mazibuko* case were intended to ensure that residents who could not afford to pay for water could be provided with a minimum quantity of water. Thirdly, the right to water as a socioeconomic right is often linked to other rights such as the rights to equality, dignity, access to information, and the right to just administrative action. While links to environmental rights are often brought up, arguments seldom delve into the detail of how the two rights are connected.[58]

It is generally recognised that one of the most important goals of public interest litigation is to contribute to the achievement of lasting social

[57] (35672/12) [2012] ZAGPPHC 128 (10 July 2012).
[58] Keightley op cit note 54 at 302.

change.[59] Within the context of the right to water, the goal is to attain what can be termed water justice. Without attempting to provide an all-encompassing definition, water justice requires meeting the demands for equitable distribution of water, enjoying better cultural-political recognition of access to water,[60] and enjoying healthy aquatic ecosystems.[61] Therefore, the attainment of water justice requires a strong link between the provision of water services in terms of Section 27 of the Constitution, the protection of water resources (as part of the environment) in terms of Section 24, and due consideration of cultural values attached to water in terms of sections 9, 30 and 31 of the Constitution.

As a system that is framed around principles of equity and sustainability, the South African water management system can be seen as linking sections 24 and 27.[62] There is an attempt to strike a balance between the use of natural resources for livelihoods and protection of future generations on the one hand, and the promotion of equity, economic efficiency, and environmental sustainability on the other.[63] Nonetheless it can still be argued that there has not been a sufficient link drawn between the quantity (socioeconomic) and quality (environmental) aspects of the right to water in litigation for right to water.

It is generally accepted that the interpretation of the right to water in litigation would be broadened by incorporating other rights,[64] but there is seldom a link between the right to environment and the right to water in

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[59] Steven Budlender, Gilbert Marcus SC & Nick Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, tactics and lessons* (2014) at 7.
[60] Margreet Z. Zwarteveen & Rutgerd Boelens 'Defining, researching and struggling for water justice: some conceptual building blocks for research and action' (2014) *Water International* 39, 2 143 at 146.
[61] *http://www.waterculture.org/water-justice.html*, accessed on 28 June 2016.
[62] In its preamble, the Water Services Act 108 of 1997 acknowledges that 'all spheres of Government must strive to provide water supply services and sanitation services sufficient for subsistence and sustainable economic activity'. Chapter one of the National Water Act 36 of 1998 stipulates that sustainability and equity are central guiding principles in the protection, use, development, management and control of water resources.
[63] Ramin Pejan, Derick du Toit & Sharon Pollard 'Using Progressive Realization and Reasonableness to Evaluate Implementation Lags in the South African Water Management Reform Process' in Michael Kidd, Loretta Feris, Tumai Murombo *et al* (eds) *Water and the Law: Towards Sustainability* (2014) 305 – 328.
[64] Keightley op cit note 54 at 301 discusses that rights to equality, dignity, access to courts, and just administrative action are used to bolster enforcement of socio-economic rights.

litigation.[65] In the South African context where water is a scarce resource and environmental degradation (especially water pollution) is pervasive, the need to draw a stronger link between the right to water and the right to an environment that is not harmful in litigation practice cannot be overstated.

In South Africa, water pollution is not an isolated occurrence.[66] It is a systemic threat to freshwater resources. The question of how the right to a healthy environment and the right to access sufficient water interlink becomes critical when considering the pervasive pollution of limited resources on the one hand, and the economic pressure and need to redress past imbalances on the other.[67] This demonstrates that water justice is intrinsically linked to environmental justice. In terms of the National Environment Management Act, 107 of 1998 (NEMA), 'environment' means "the surroundings within which humans exist and that are made up of the land, water and atmosphere of the earth."[68]

In terms of NEMA, environmental justice is a principle that 'must be pursued so that adverse environmental impacts shall not be distributed in a way that unfairly discriminates against any person, particularly a vulnerable and disadvantaged person.'[69] Equity is a principle of access to environmental resources to meet basic human needs and ensure well-being, while also allowing for 'special measures…to ensure access by categories of persons disadvantaged by unfair discrimination'. One of the main objectives of the Water Services Act is to provide for the right of access to basic water supply necessary to secure sufficient water and an environment that is not harmful to human health and well-being.[70] The

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[65] Jackie Dugard & Anna Alcaro 'Let's Work Together: Environmental and Socio-economic Rights in the Courts' (2013) 29 *SAHRJ* 14.
[66] In July 2015, the Mail and Guardian newspaper reported on a story about 'sewage in Gauteng's drinking water'. The story dealt with an apparent failure in a sewage management system which resulted in water being polluted in the Vaal Dam. Available at *http://mg.co.za/article/2015-07-23-sewage-in-gautengs-drinking-water*, accessed on 23 March 2016.
[67] Mariëtte Swart & Nigel Theodore Adams 'Water services provision and the protection of water resources' in Anél du Plessis (ed) *Environmental Law and Local Government in South Africa* (2015).
[68] 107, 1998. Section 1(1)*(xi)*.
[69] Section 2(4)*(c)*.
[70] Water Services Act 108 of 1997 s 2*(a)*.

protection, use, development, conservation, and management of South Africa's water resources needs to take into account a number of factors. These include meeting the basic human needs of present and future generations, promoting equitable access, and redressing results of past discrimination.[71]

Section 24 of the Constitution provides that everyone has the right:

> *(a) to an environment that is not harmful to their health or wellbeing; and*
> (b) *to have the environment protected, for the benefit of present and future generations, through reasonable and other measures that, prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*.

Generally rights are framed as individual rights in the Constitution. However, environmental issues such as pollution often affect groups of people. Courts' broad interpretation of *locus standi* create a wide scope for representative, class and public interest litigation, which in turn creates room for the collective exercise of individual rights.[72] Water resource management in South Africa needs to conform to the Section 24 provision for the right to an environment that is not harmful to a person's health or well-being. There is a link between sustainable management of water resources and the right of access to sufficient water.[73] The National Water Act adopts the public trust doctrine, where the national government is the public trustee of water resources. The Water Service Act includes quality of water in its definition of 'Basic water supply' as "the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene".

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[71] National Water Act 36 of 1998 sec 2 *(a) – (c)*.
[72] Loretta A. Feris & Dire Tladi 'Environmental Rights' in Danie Brand & Christof Heyns (eds) *Socio-economic Rights in South Africa* (2005) 249 – 266.
[73] Pejan *et al* op cit note 63.

Lugaresi makes the important argument that the right to water should be seen in a context within which it is being discussed. In developing countries such as South Africa, the right to water is intrinsically linked to dignity, health, and even survival. In developed countries such as Italy, the right to water will concern management and cost allocation of water services.[74] In a setting where pollution is a real threat to water resources, perhaps there should be a stronger link between the right to water and the right to environment.

South African case law reflects a narrow definition of the environment; and certainly in the earlier days of constitutional litigation social justice issues were not infused in litigation on environmental issues.[75] Environmental movements have used rights not only as part of their litigation, but also as part of their organising and mobilising strategies. This is done by taking a holistic approach to ecological and social justice. It is striking, then, that although a number of environmental activist movements combine environmental and socioeconomic rights issues, litigation does not reflect this holistic approach which acknowledges interlink between the environment and access to water.[76] This raises a series of questions about litigating the right to water.

1.3 Problem Statement and Rationale

Equitable access to water is one of the most important and yet contentious aspects of social reform and justice in South Africa. While water as a topic has received a great deal of academic attention in the fields of private, environmental, and human rights law, water justice as a concept has not received quite as much attention. As discussed above, there are multiple factors that affect equitable access to water in South Africa. Through this dissertation, it is proposed that the development of the concept of water justice in academia, and the application of principles of water justice in practice, can frame discussions on access to water in a more integrated

[74] Nicola Lugaresi 'The Right to Water and its Misconceptions, Between Developed and Developing Countries' in Kidd, Feris, Murombo *et al* op cit note 61 331 – 348.
[75] Dugard & Alcaro op cit note 65.
[76] Dugard & Alcaro op cit note 65.

and holistic manner. This will in turn provide an opportunity for a comprehensive realisation of human rights.

Different interested parties approach water from different perspectives. In human rights law, water is seen as a basic need required for human wellbeing, and the focus tends to be on the provision of water as a service. From an environmental law perspective, water discussions tend to focus on the role of water in nature and ecosystems. Therefore, issues raised from this perspective deal with the protection of water as a natural resource. These fragmented approaches to water are challenged by the concept of water justice, which encompasses multiple approaches and encourages a holistic outlook as a starting point. An integrated approach to water is valuable, especially in the South African context where water problems are interelated. A hypothesis of this dissertation is that fragmented approaches lead to missed opportunities in accessing water justice.

A preliminary reading of South African case law points to litigation for the right to access to sufficient water which is heavily focused on quantity. In a number of instances courts have been asked to determine how much water can be considered sufficient for the purposes of the right. On the other hand environmentalism is seen as prioritising a concern for the environment over the needs of people, although this was somewhat challenged by the environmental justice movement. In this dissertation the concept of water justice is discussed as offering an opportunity for integrated approaches in both theory and practice, challenging the assumption that people living in poverty would be disadvantaged if the right to water included an environmental approach. First, this dissertation will contribute toward discussions of the right to water, framing the discussion around the concept of water justice. Secondly, the dissertation will focus on the role of litigation as a strategy for the attainment of water justice.

1.4 Research Questions

The main research question that informs this study is as follows.

What is the role of litigation in the attainment of water justice?

Secondary research questions are:

1. How is the concept of water justice currently articulated in South Africa?
2. To what extent do legal provisions for the right to water and the right to a healthy environment create space for the attainment of water justice?
3. What are the current approaches to litigation for the right to water and the right to environment, and why are they chosen?
4. To what extent can linking the right to water and the right to a healthy environment contribute to the attainment of water justice?

1.5 Methodology

A combination of research methods were used in conducting research for this dissertation. A desktop study wasundertaken in two interactive steps. The first step was a review of primary sources of law (both international and domestic laws) that deal with the right to water and the right to a healthy environment. Then, secondary sources discussing the right to water, the right to environment, environmental justice, and water justice were consulted. Albeit to a limited extend, comparative analysis between South African and other jurisdictions is utilised. This is especially the case where an aspect of water justice has practical or legislative examples in jurisdictions referred to. Analysis of various legal provisions focused on answering the question, “To what extent do legal provisions for the right to water and the right to a healthy environment create space for the attainment of water justice?”

Original data for the study was gathered through interviews with key informants. Using a research method often applied in the social sciences, lawyers who are involved in human rights litigation were interviewed with the purpose of seeking their views and opinions on a number of open-ended questions linked to practice in litigating the right to water. In order to conduct research with human participants, one is required to obtain ethical clearance from the University. Therefore, ethical clearance was applied for at proposal stage, and was indeed granted by the University of Cape

Town Law Faculty's Ethics Committee. Participants were informed of the fact that ethical clearance was obtained from the University, and a copy of same was handed out to each participant before the start of an interview.

A qualitative method was chosen on the basis that the purpose of the research was to understand in-depth views on the nature of water justice in South Africa, and the reasoning that shapes litigation strategies in this field. The semi-structured interview questionnaire consisted of standardised open-ended questions, which allowed a participant to answer on their own terms, while still being able to provide comparability across respondents and themes.[77] Essentially, this permitted each respondent to bring different perspectives to the same questions asked. This method was particularly applicable for this research because part of the purpose was to gain insight into the reasons for choosing specific litigation approaches.

Purposive sampling and criterion sampling were used. Purposive sampling is used in social science research when the participants in a study are 'information rich'.[78] This method is applicable to this current study, since practitioners who are involved in water rights and environmental rights have content-specific experience, and can therefore provide important information that cannot be gained from other sources. The key informants were identified on the basis of their work in human rights litigation. Attempts were made to conduct interviews with judicial officers in order to gain insight from their perspective, but, access was not granted in time for the study.

Face to face interviews were conducted in a semi-formal manner, where the interviewer opened the process, but allowed the participant to focus on the areas they thought were most important. Some interviews were conducted telephonically. All interviews were conducted personally by the author. Participant confidentiality was ensured through the use of code

[77] Tim May *Social Research: Issues, methods and Process* 3 ed (2001).
[78] David E. Gray *Doing Research in the Real World* (2014).

names, indicating the city and date where an interview took place. The research was not aiming for a statistically representative sample of practitioners involved in human rights litigation. Rather, sampling was based on the accessibility of practitioners, with the result that most respondents came from Johannesburg. A total of seven in-depth interviews were conducted. While this was less than initially anticipated, there was data saturation, with no new perspectives being introduced by the later respondents.

1.6 Structure of Dissertation

This chapter outlined the background to the question of access to water in South Africa, with a focus on the legal provisions that provide for access to water. Strategies that are used as means to ensure access to water were also discussed. Outlining the research questions and methodology, it was indicated that the dissertation aims to present water justice as a critical concept in discussions of equitable access to water. The dissertation will then assess the current use of different components of water justice as bases for litigation strategies in access to water cases.

Chapter Two will focus on a theoretical discussion of the concept of water justice. Depending on context, the concept of water justice often carries a variety of meanings. The chapter will touch on a number of current interpretations of the concept, locally and internationally, while emphasising a comprehensive nature of the term “water justice”. It will be argued in the chapter that in certain instances, certain elements of water justice find expression in the broader concept of social justice. In Chapter Three, the discussion will map the importance of litigation as a strategy within the wider context of social justice, outlining the history of rights-based litigation, and various factors that influence the use of litigation. The discussion then focusses on the use of litigation in relation to specific aspects of water justice outlined in Chapter Two.

South African access to water jurisprudence will be the focus of discussion in Chapter Four. Using discussions from the previous two chapters as

context, individual cases will be discussed looking at how specific aspects of water justice are dealt with in practice. This chapter will identify possibilities of integrated approaches to water justice in litigation strategies. The concluding chapter will sum up the discussion, and provide conclusions on the use of litigation as a strategy for attaining water justice.

Chapter 2: Defining Water Justice

When water is plentiful and there is enough to go around, water is regarded as a natural entitlement and a public good which all can access and use according to their needs. When there is scarcity of water and demand increases, however, competition becomes stronger, and particular arrangements or doctrines emerge that serve to control access.[79]

2.1. Introduction

As a natural resource, water is distributed unevenly across South Africa because of variations in rainfall, river flows, and the distribution of other water resources. The current discussion of water justice is based on an acknowledgement that access to water is not only a question of the physical accessibility of water. Discussions relating to water scarcity are mainly focused on the impact of physical scarcity, but there is a growing shift toward acknowledging other dimensions of access, such as economic and safe access. In terms these perspectives, inadequate water infrastructure is seen as a reflection, if not a cause, of the economic scarcity of water. This form of deprivation is a result of socio-political processes, which are capable of creating or exacerbating water scarcity.[80] In the previous chapter, the physical scarcity of water in South Africa was briefly discussed. The discussion of water scarcity in this dissertation will focus on the economic and socio-political scarcities of water. Water justice cannot address issues of natural water supply; rather, it looks at relationships between users of the available resources.

In the past, water laws in South Africa were designed to meet the needs and aspirations of the white population, including their domestic, agricultural and industrial needs.[81] This design was in a context of colonial and apartheid laws which excluded the majority black population of the country from various economic, social, and political spaces. Water resource allocations were

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[79] Synne Movik *Fluid Rights: Water Allocation Reform in South Africa* (2012) at 2.
[80] Justine Lacey 'Utilising diversity to Achieve Water Equity' (2008) 18, 3 *Rural Society* 244.
[81] Jan Glazewski *Environmental Law in South Africa* 8 ed (2013) 16.1.1.

based on a riparian system whereby an owner of a piece of land had full rights to water on that property. Within that context access to water in South Africa was closely linked to access to land and economic power. Therefore, the inequalities that were created by limitation of land ownership were extended extend to access to water. Black rural, and marginalised urban communities were most adversely affected by lack of access to water.[82]

According to Freyfogle, water justice arises from a requirement for flexibility that needs to be built into water resource allocation schemes in order to cater for diverse needs.[83] Discussing the evolution of water allocation schemes in the United States of America, Freyfogle highlights major approaches to allocation, from 'water rights' based, to what he calls 'water wrongs', and finally to water rights allocation by government permit. In the 'water rights' approach to allocation, water is treated as property, and ownership is based on ownership of land or captor of a stream. Since this system provides for absolute control of certain water resources at the exclusion of others, the 'water wrongs' approach developed to mitigate the negative impact of unfettered rights flowing from ownership.

Courts used principles of common law to introduce the concept of fair use in order to limit the detrimental impact of unlimited rights of ownership, such as pollution.[84] In the allocation by government permit model, ownership of certain waters vests in government, with provision for government entities to distribute limited use rights. In theory, allocation by government schemes can avoid short-sighted approaches to water use and unfairness in water allocation emanating from the land-based and capture-based allocation approaches.[85]

Societal interests play an important role in determining whether a model of water resource allocation can be considered just. Society acknowledges that water is always in use. Water flow diverted from a stream is not being used

[82] N. Gabru 'Some Comments on Water Rights in South Africa' (2005) 8, 1 *PELJ* 2/150.
[83] Eric T. Freyfogle 'Water Justice' (1986) 2 *University of Illinois Law Review* 481.
[84] Ibid at 504.
[85] Ibid at 508.

for the first time, but merely has its use changed. When left in streams, water supports fish and wildlife, dilutes and flushes pollutants, and provides aesthetic benefits.[86] As such, a water allocation system that is attuned to fairness and inclusiveness will recognise a societal need to make water equally accessible to all users based on criteria that distinguish fairly among potential users. A water system is deficient if it favours particular types of users over others, without a sound policy justification.[87] This means that water justice consists of a balance of societal requirements.

2.2. The Four Aspect Approach to Water Justice

There is no single, universal definition of 'water justice'. Water may be simple as a physical compound, but its accessibility, use, and management is contentious. As discussed in the previous chapter, water is unevenly distributed across the planet. A number of human activities and laws affect the nature of access that people and nature have to water. Justice, on the other hand, concerns notions of what it means to be fair, impartial, and unbiased. Water justice interrogates how to apply the principles and notions of justice to how water is accessed, managed, and used. However its interpretation as a concept is shaped by the divergent contexts within which it is discussed.In the South African context, water justice finds expression mainly in the broader concepts of environmental justice and social justice.

International movements for water justice arose in the 1980s, and were mainly focused on large dams and the effect that those had on marginalised communities. The effects included physical displacement, environmental destruction, and ethical questions about beneficiaries of dams. The second phase of water justice movements focused on the privatisation of public water supply, commodification of water, and the impact of newly created 'water markets' on the poor.[88] Demands for water justice emerged as a reaction to practices that were seen as unfair. As a result, water justice is often articulated as a means of reversing unfair decisions. Richard Hughes,

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[86] Freyfogle op cit note 83.
[87] Ibid at 488.
[88] Radha D'Souza 'Liberal Theory, Human Rights and Water-Justice: Back to Square One?' 2008 *Law, Social Justice & Global Development* 1.

for instance, defines water justice as an act of protesting, preventing, and remedying situations that arouse a sense of injustice. He defines injustice as a violation of fairness, equality, and dignity.[89]

Perhaps owing to the different contexts within which it is used and discussed, water justice is a dynamic concept that deals with justice as it relates to water. While it is not possible to strictly categorise different components water justice, the most prominent articulations can be categorised loosely as follows: requirements for environmental protection of a critical resource (ecological justice), access to a limited resource (distributive justice), fairness in dealing with values of water, including cultural claims (cultural justice), and guaranteed procedures and fairness in the expression and defence of all three of the above (procedural justice).[90]

2.2.1. Ecological Water Justice

The ecological component of water justice is based on the requirement to protect and preserve water cycles in their ecological functions. This stems from an acknowledgement that water is a necessary resource for all living organisms, and therefore prioritises ecological integrity.[91] The latter frames water justice around the relationship that humans have with non-human organisms. As humans, we derive our resources from the natural world, so the environmental movement has been concerned with emphasising our interconnectedness with the biosphere and the planet. The first step of the movement was to point to the ways in which human activity harms the planet.[92]

One success of the environmental movement is that politics, law, and international relations have, to various degrees and in various forms, begun to incorporate environmental elements into their operations.[93] While the environmental movement was born out of an acknowledgement that human

[89] Richard A. Hughes 'Pro-justice ethics, water scarcity, human rights' 2009 – 2010 *Journal of Law & Religion* 521.
[90] Angela Kallhoff 'Water Justice: A Multilayer Term and Its Role in Cooperation' (2014) 2 *Analysie & Kritik* 367.
[91] Ibid at 371.
[92] Brian Baxter *A theory of Ecological Justice* (2005).
[93] Ibid.

activity has an adverse impact on the biosphere, the environmental justice movement was born out of concerns that environmentalism did not take into account human inequality. As such the ecological justice aspect of water justice consists of two main focus areas. First, the acknowledgement that human usage of natural water resources often has a detrimental impact on the resource and on other living organisms that rely on the resource. This calls for a protection-based approach, to limit that harm of human impact (embodied primarily in conservationist approaches). Secondly, there is an acknowledgement that benefits of using water resources are not shared equitably within the human community, so the human impact on water resources is more detrimental to some people than to others (which is primarily embodied in the environmental justice approach).

The conservationist approach within the ecological aspect of water justice is based on a principle that ecological integrity is deserving of respect. This places the focus on justice between humans and the rest of nature, with an ideal outcome being one where a water system is left as intact as possible in order to deliver its eco-functions and support ecosystems.[94] Within this ecological aspect, distributive justice consists of the distribution of environmental risks between human and non-human users of the environment. In the eco-centric view of ecological water justice, nature is seen as vulnerable in the face of industrial power and therefore needs to be protected.[95] Other life forms have a claim to a fair share of environmental resources based on their need for survival and in order to flourish.[96] Ecological justice requires that consequences of industrial and societal use of water need to be assessed in terms of a loss of eco-functions.[97]

The perspective of ecological justice sees the law as a tool for protecting the environment in order to allow nature to enjoy a fair share of rights. Preston is critical of the effectiveness of relying on the law as a strategy of achieving ecological justice. By their nature and design, laws tilt the distribution of

[94] Kallhoff op cit note 90 at 371.
[95] Paul Martin, Sadeq Z. Bigdeli, Trevor Daya-Winterbottom *et al* (eds) *The Search for Environmental Justice* (2015) at 24.
[96] Baxter op cit note 92.
[97] Kallhoff op cit note 90 at 372.

environmental benefits in the favour of consuming users, which in turn causes burdens to be shifted more towards non-consuming users.[98] Preston advances four reasons for this assertion. Firstly, environmental laws typically prohibit or restrict the use of natural resources, and these restrictions can be lifted by regulatory authorities. Laws will restrict some forms of consumption, while enabling other forms. One such example is the licensing of water use. A second illustration is that environmental laws place the burden of proof on those who seek to preserve the environment, and not those who exploit it. Laws that allow users to apply for approval do not impose a burden on applicants to establish that the distribution applied for is just and equitable, especially towards the environment. Even within environmental impact assessment schemes, more weight is placed on quantifiable data. The exploitation of resources provides quantifiable benefits, while non-market environmental burdens are often hard if not impossible to quantify.[99]

Thirdly, by permitting applications for exploiting the environment rather than preserving it, environmental laws do not enable a holistic determination of competing claims for the distribution of benefits and burdens on the environment. Laws are structured to deal with specific applications at a given time, and lack the capacity to consider the cumulative impact of applications.[100] Finally, laws rarely require the full internalisation of environmental costs, so distributive decisions may not be accurate.[101] Although intergenerational equity is often included in statutes, nature in the present and future is often not considered in the 'community of justice'. As a result, nature receives more environmental burdens than benefits from the law. This is because the most common way of allocating environmental resources to nature involves preservation, or non-distribution, and no application can be made under the laws for a statutory approval for non-distribution.[102]

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[98] Brian J. Preston SC 'The Effective of the Law in Providing Access to Environmental Justice: an Introduction' in Martin *et al* op cit note 95.
[99] Ibid at 25.
[100] Ibid at 26.
[101] Ibid.
[102] Preston op cit note 98.

Although statutory approval processes may be formulated in such a way that portions of natural resources be protected, this protection does not lead to justice for non-human life.[103] Preston expresses a view that environmental statutes set no meaningful, goal-based criteria for the distribution of environmental benefits or burdens between human and non-human life forms. This is because statues cannot set meaningful environmental goals.[104] He recommends an expansion of the community of justice to include non-human nature; essentially, recognising non-human nature as a member of the community that can claim benefits of natural resources. The purpose of distributive justice between human and non-human life is to ensure that in addition to being just, it should guarantee that individuals and communities can lead flourishing lives.[105]

The environmental justice movement now points to the fault of 'traditional' environmentalism, which was characterised by a conservationist outlook. While seeking to influence policies, laws and practices in order to ensure maximum preservation of natural ecosystems, the environmental movement overlooked the inequality of distribution of environmental risks and economic benefits resulting from human activities. In essence, the environmentalist movement ignored the 'politics' of environmental exploitation. While particularly anthropocentric in nature, the environmental justice movement is now making an effort to bring the politics of social justice to the centre of discussions about environmental preservation. It is within the broader concept of social justice that access to water for human consumption is considered by the environmental justice movement. While environmentalists of a more eco-centric persuasion are critical of the environmental justice movement for a nearly exclusive focus on humans in their articulation of environment, this anthropocentricism made it possible to integrate environmental justice into bills of rights and national constitutions.[106]

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[103] Ibid.
[104] Ibid at 32.
[105] Ibid.
[106] Belinda Dodson 'Chapter 3: Searching for a Common Agenda: Ecofeminism and Environmental Justice' in David A. McDonald (ed) 2002 *Environmental Justice in South Africa* (2002).

Historically, the dominant environmental ideology in South Africa was characterised by wild-life centred conservationist approaches that appealed to an elite white minority. However, this approach perpetuated the marginalisation of the majority black population. The membership of various game protection associations, such as the Transvaal Game Protection Association and Western Districts Game Protection Association, were drawn from the social elite. The main focus of these organisations was the protection of nature, for the benefit of the privileged.[107]

In the twentieth century, a system of protecting natural areas through the establishment of national parks and game and nature reserves went hand in hand with the forceful eviction of Africans from areas marked for conservation. The preservation of nature was a priority, and Whites only policies in national parks, coupled with draconian poaching laws, meant that most people were excluded from enjoying environmental resources.[108]

In the 1990s, South African politics liberalised, which created discursive and institutional space for rethinking environmental issues. It was at this stage in South African history that a vibrant debate on the meaning, causes, and effects of environmental decay began in earnest. Environmental practices and policies were being challenged when the living spaces of black South Africans were included in definitions of ecology and environment.[109] Poor communities in urban and rural areas began to engage in campaigns and protests, citing issues ranging from nuclear power stations in their neighbourhoods to the construction of toxic waste recycling plants, and grassroots campaigns began on anti-pollution and environmental health. This is when people who were being denied socioeconomic rights began asserting claims for environmental justice.[110]

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[107] Farieda Khan 'Chapter 1: The Roots of Environmental Racism and the Rise of Environmental Justice in the 1990s' in McDonald op cit note 106.
[108] Ibid at 24.
[109] David A. MacDonald 'Introduction: What is Environmental Justice?' in MacDonald op cit note 106.
[110] Khan op cit note 107.

The development and implementation of legal rights has been a central method to access social justice. Since environmental justice exists at the intersection of environmental law and social justice, legal rights play an important role in the articulation of requirements for environmental justice.[111] Glazebrook points out that rights to the environment have been intermingled with the right to development and principles of sustainable development. While this can be seen as a positive development, there is a limit to the adequacy of protection the environment can enjoy from existing rights.[112]

Generally rights do not focus specifically on the environment, but apply only where environmental concerns coincide with development. This is used by those opposed to an independent environmental right to argue that when framed as a human right, environmental protection gives way to the right of humans to use and abuse the environment to the detriment of other species. However, Glazebrook argues that this view is based on a narrow view of human rights, since rights to environment inevitably go beyond the physical needs of humans and include spiritual, cultural and aesthetic needs and desires. To the contrary, framing environmental protection as a right draws environmental issues into the rights framework, with the outcome that environmental protection is weighed with and against other rights. In this way, the environment is not overlooked.[113]

It can be argued that currently human rights organisations often lack sufficient environmental expertise. On the other hand, environmental organisations often lack human rights expertise. An integrated approach is necessary in order to ensure the achievement of environmental protection as a human right.[114]

2.2.2. Distributive Water Justice

As briefly discussed above, distributive justice is that domain of justice that is mainly concerned with the distribution of benefits and burdens among the

[111] Martin *et al* op cit note 95.
[112] Susan Glazebrook 'Human Rights and the Environment' in Martin *et al* op cit note 95 at 86.
[113] Ibid at 88.
[114] Glazebrook op cit note 112.

affected members of a group.[115] In this specific instance however, the 'community of justice' is restricted to humans and does not include other life forms. The main concern of distributive justice is the fairness of the distribution of resources between users. The concept of distributive justice is supported by utilitarianism, which is based on the view that an individual's wellbeing needs to be seen in the context of the wellbeing of the community, or the common good of society.[116]

From a utilitarian perspective, courts have to consider interests beyond those of the parties appearing before them in assessing cases, in order to maximise the overall happiness and wellbeing of the community as a whole.[117] This is based on an acknowledgment that not all interested persons may be party to a law suit, while their interests may be affected by its outcome. Furthermore, it is not always possible to identify either discrete wrongs, or individual wrongdoers with precision. Quite often harm is inflicted on groups of people, not only specific individuals.[118] The framing of distributive water justice then involves questions of fairness in the distribution of and access to water.

Direct human water use can be categorised as domestic (water for subsistence, such as drinking, household use, and subsistence agriculture) and industrial (water for commercial agriculture, mining, and other commercial use). These distinctions are important in attempting to understand the different forms of use that must be taken into account in seeking distributive justice. Each form of water use can have different implications for wellbeing, which itself has immediate, economic, emotional, and other components. These must all be weighed together and against each other in order to reach a situation that is just.

According to Kallhoff, one important aspect of dealing with distributive justice is taking care of urgent needs. The right to water is itself fundamental in

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[115] Christopher Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009).
[116] Ibid.
[117] Ibid.
[118] Ibid.

negotiating access to water. However, regimes of basic rights are not themselves distributive schemes. A provision for the basic right of access to water does not guarantee that there will be actual access. Nonetheless, distributive justice is seen as the underlying principle that informs claims arising from basic rights. Essentially, everyone needs to be guaranteed an equitable amount and quality of water, since each person deserves an equal share of the resource in order to sustain their livelihoods.[119] The current articulation of the content of the right to water includes water that is accessible, of sufficient quality, and of a quantity required for sufficient and continuous domestic and personal use.[120]

In the 1980s, global justice movements raised objections on behalf of communities affected by large-scale damming activities. Most of the beneficiaries of water from dams were the 'modern' sector; that is, industrial farmers, industries, and the urban middle class. The Bretton Woods Institutions and developing country governments were the main targets for international justice movements against the building of dams. The former were the largest financiers of large dams, while the latter seemed to ignore the plight of the poor in approving plans for building of dams.[121] In India, for instance, large populations were displaced.

After the Cold War, structural adjustment programmes imposed by the International Monetary Fund (IMF) favoured the privatisation of water services. The global movement started to focus on, *inter alia*, the commodification of water and the impact of user-pay principles on the poor. It was during this phase that the articulation of requirements for access to water took the form of demands for recognition of a legal right to water.[122] The demand for recognition of access to water was based on a view that having such recognition within a human rights framework in international law would guarantee access to water for subsistence, especially in developing countries.[123]

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[119] Kallhoff op cit note 90 at 369.
[120] Ibid.
[121] D'Souza op cit note 88.
[122] D'Souza op cit note 88.
[123] Ibid.

In the 1970s, the international community recognised serious problems relating to water security, and there have been attempts to address the problem. Water was identified as a natural resource that needed to be guarded by the 1972 United Nations Conference on Human Environment in Stockholm. The 1977 United Nations Water Conference in Mar del Plata issued an action plan designed to address the problem of water resources.[124]

While previously forming a constituent part of other rights, such as the right to health, the right of access to water only became authoritatively defined as a human right in international law through General Comment No.15 issued by the UNCESCR in 2002,[125] subsequent to which it formed part of the the UN General Assembly 2010 Resolution 64/292.[126] The right to water in international law requires that states ensure the provision of water services, for more than mere drinking purposes. It requires that water be provided for environmental hygiene and health generally.[127] Whether water is adequate will be assessed based on availability, quality, and accessibility of such water. Party States have an obligation to ensure the progressive realisation of the right.[128]

The African Charter on Human and People's Rights (African Charter)[129] does not explicitly provide for the right to drinking water and water for sanitation.[130] Bulto argues that, as a result of this lack of explicit recognition, the right has found its way into regional jurisprudence only through innovative interpretation of the African Charter. Because there is no comprehensive protection of the right, the right to water finds itself at the bottom of socioeconomic rights that are themselves marginalised in the Charter.[131]

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[124] Rose Mary 'Right to Water: Theoretical Concerns and Practical Issues' (2006) 67, 4 *The Indian Journal of Political Science* 759.
[125] Bulto op cit note 23.
[126] United Nations General Assembly Resolution 2010 op cit note 24.
[127] Salman M.A. Salman & Siobhan McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004).
[128] Ibid.
[129] African Charter on Human and Peoples' Rights, 27 June 1981 (Came into force 21 October 1986).
[130] Takele Soboka Bulto 'The Human Right to Water in the *Corpus* and Jurisprudence of the African Human Rights System' (2011) 11 *African Human Rights Law Journal* 341.
[131] Ibid at 342

However the Principles and Guidelines of 2011 provide a more comprehensive interpretation of the right to water which includes both environmental and distributive aspects of water justice.[132]

The African Charter on the Rights and Welfare of the Child (African Children's Charter)[133] recognises the right to nutrition and safe drinking water, but only with respect to what needs to be provided for children. The provision is further limited by not regulating quality, and being silent on the quantity of water that would be adequate.[134] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[135] provides for access to clean drinking water for women without setting specific basic standards for quantity.

The right to water is read as part of other more explicitly recognised rights in the African regional context, since the African Charter does not directly protect the right to water. Rights most often interpreted to include the right to water are the right to dignity, the right to health, and the right to a healthy environment among others.[136] In spite of the African Commission's refusal to rule that reading provisions guaranteeing the aforementioned rights together meant the existence of an independent right to water under the African Charter, [137] the right to water imposes various obligations on party states.

Demands for distributive water justice internationally and regionally have culminated in the incorporation of the requirement for access to water as a basic human right. Within the South African context, a discussion of access to water has to start with the inequities that were occasioned by policies and practices of the past. Legislation such as the Natives Land Act 27 of 1913

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[132] African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011).
[133] African Charter on the Rights and Welfare of the Child, 11 July 1990 (Came into force 29 November 1999).
[134] Bulto op cit note 130 at 344.
[135] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 13 September 2000 (Came into force 25 November 2005).
[136] *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter* op cit note 132.
[137] Bulto op cit note 130.

reinforced segregation and discrimination with regards to the allocation of resources, wherein black people were deprived of land ownership and, by extension, access to water resources.[138]

Prior to 1956, the prevailing water governance system in South Africa was based on the riparian rights doctrine, which entitled owners of property that borders on a flowing water source to the use of that water. This effectively meant that water rights were determined by land ownership.[139] The Water Act 54 of 1956 consolidated the common law tradition that prevailed at the time, with the exception of a provision for increased control by the government through enabling the Minister of Water Affairs to declare Government Water Control Areas (GWCAs), and therefore regulate water use through the issuing of permits, offsetting existing property rights.

The tradition of linking water use to land ownership has persisted beyond the end of apartheid. Most available water is being used at no additional cost by large-scale commercial farmers, mines and industries who have privileged access to land and economic power. This has been a perpetuation of the distribution that existed pre-democracy.[140] Redressing the impact of many years of apartheid, together with replacing legislation that reinforced discrimination and oppression, was prominent on the agenda of the new democratic government.[141] As a result, the right of access to water is enshrined in the Constitution. Section 27 of the Constitution read together with section 26[142] are seen as the most visible provisions for socioeconomic rights in the Constitution, although it is accepted that other rights affect these socioeconomic rights.[143]

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[138] Synne Movik *Fluid Rights: Water Allocation Reform in South Africa* (2012).
[139] Ibid.
[140] Rose Francis 'Water Justice in South Africa: Natural Resource Policy at Intersection of Human Rights, Economics, and Political Power' (2005 – 2006) 18 *The Georgetown International Environmental Law Review* 149 at 152.
[141] Michael Kidd *Environmental Law* 2 ed (2011) at 72.
[142] Section 26 of the Constitution provides for the right to access to adequate housing.
[143] Jason Brickhill & Nick Ferreira 'Chapter 26: Socio-economic rights' in Currie & de Waal op cit note 26 at 565.

Water does not appear in either Schedules 4 or 5 of the Constitution, with the result that water is an exclusive national legislative competence.[144] However, local government has the authority to administer water supply and sanitation services in terms of Part B of Schedule 4 of the Constitution. The Water Services Act 108, 1997 (WSA) and the National Water Act 36, 1998 (NWA) are the two pieces of legislation that are aimed at providing for the management of water resources and providing for the realisation of the right to water as enshrined in the Constitution.[145] One of the main objects of the Water Services Act is to provide for "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being."[146]

The purpose of the National Water Act 36, 1998 on the other hand, is "to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account among other factors, meeting the basic human needs of present and future generations, promoting equitable access to water, redressing the results of past racial and gender discrimination…"[147]

According to Statistics South Africa, the lack of a safe and reliable water supply was considered the biggest problem faced by municipalities in 2016. Rural provinces ranked water supply as their biggest problem.[148] There has been a nominal increase in the actual number of households with access to piped water. Between 1996 and 2016, the number of households with piped water inside the dwelling almost doubled from 3,9 million to 7,5 million. However, the number of households with no access to piped water at all only went down marginally, moving from around 1,77 million in 1996 to 1,2 million households in 2011. More concerning is that by 2016, the number of households without access to piped water at all increased to 1,71 million. [149]

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[144] Kidd op cit note 141 at 73.
[145] Ibid at 81.
[146] Water Services Act 108 of 1997 section 2*(a)*.
[147] National Water Act 36 of 1998 section 2*(a)*, *(b)*, and *(c)*.
[148] Statistics South Africa op cit note 18 at 56.
[149] Kidd op cit note 141 at 64.

The predominantly rural provinces, such as Limpopo and Eastern Cape, have the lowest levels of access.[150]

Considering the context discussed above, it is argued that the need for distributive justice of water for domestic use in South Africa consists of three general components. The first is the provision of water services to rural villages which did not previously receive services at all. Second is that distributive water justice requires that the limited provision of water services to residents of informal settlements, where there is often no water or reticulation infrastructure, be sufficient for human sustenance.[151]

Although water services have not been privatised, there has been a commercialisation of services in the sense that government has adopted market logic in their approach to provision of services. One of the manifestations of this approach is cost-recovery, where every cent spent on the provision of water needs to be recovered from the consumers of these services. Hence the third component of distributive water justice in the South African context concerns the affordability of water for those people who have water service infrastructure.[152]

Like other socioeconomic rights in the Constitution, the right to water is qualified by references to reasonable measures, progressive realisation and resources availability. Further, the right is actually to 'access' to water, and not a right to water. Even in instances where rights are considered fully justiciable, the fact that they are subject to progressive realisation limits their practical effect, by allowing states to fulfil them over time as resources become available.[153] According to McLean, if rights are understood as political demands on social goods, it is then not strictly relevant whether they are capable of immediate or full realisation.[154]

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[150] The South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) at 38.
[151] Ibid.
[152] Bond op cit note 30.
[153] Glazebrook op cit note 112.
[154] Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009).

2.2.3. Cultural Water Justice

The relationship between culture and water is discussed a lot when dealing with the cultural value of water and water resources. Virtually all cultures have developed around water. The availability of water influenced human movements and settlement patterns. In turn, humans shaped rivers for irrigation, navigation, and flood protection. Cultural diversity is a driving force of development and the fulfilment of intellectual, emotional, moral and spiritual life. Culture and cultural diversity is shaped and sustained by interconnected realms of ecological, genetic and species diversity.[155] The cultural aspect of water justice is based on a recognition that societies and groups of people attach symbolic and practical cultural values to water. This aspect of water justice is based on the assertion that the cultural values that groups of people attach to water in general and to specific water resources need to be respected.[156]

A difficulty arises when trying to define precisely what culture is, especially to determine what factors to take into account when developing policies and practices relating to water resource management. The ideological function of culture is recognise the differences in environmental relationships between Indigenous and non-indigenous communities.[157] While there is usually little differentiation between beliefs, values, and practices in many indigenous cultures, practice is the yardstick through which a community's relationship with its environment can be assessed. The contrast between material and symbolic spheres of cultural meaning has the effect of relegating cultural interests to levels of insignificance within regional political economies. As a result, cultural interests end up marginalised in both research and practice.[158]

Internationally, theories and practices of resource management must take into account pluralistic views of resource management in order to embrace

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[155] Irene J. Klaver 'Introduction: Water and Cultural Diversity' in B.R. Johnston, L. Hiwaski, I.J. Klaver *et al Water, Cultural Diversity, and Global Environmental Change: Emerging Trends, Sustainable Futures?* (2012).
[156] Kallhoff op cit note 90 at 373.
[157] Sue Jackson 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2010) 37, 1 *Australian Geographer* 19.
[158] Jackson op cit note 157.

differences in knowledge between social groups. Meaningful political participation and space for diversity of opinions have become core principles of resource management.[159] In the United States of America, a number of Native American tribes historically have water rights reserved. These rights are preserved through the application of the riparian regime of water allocation, which is one of three regimes[160] applicable in surface water allocation in the United States.[161]

In Australia, common law recognition of native title together with social justice perspectives both served as an important cornerstone for the creation of legal resource management processes that are more inclusive of Indigenous values and interests.[162] The New Zealand and Australian governments have developed the National Water Quality Management Strategy, and regional communities' preferred values and uses were considered an essential step in its development. Culture is considered in the same way as uses such as agriculture and environment.[163] Although there is no prescribed water quality guideline for cultural values, it is required that indigenous people be fully consulted when deciding the best way to account for cultural values within their management frameworks.[164]

Even in contexts where there is recognition of the importance of cultural uses of water resources, there is often a paucity of information about this use to allow for assessments to occur fairly with other considerations. In the case of the Daly River in the Northern Territory of Australia for instance, while environmental and economic reports relating to the region had been commissioned by the government for twenty years, information about social and cultural values was so insufficient that studies were necessary and had to be undertaken during the planning process.[165] In many settler colonies such as Australia and New Zealand, indigenous rights to water resources

[159] Ibid.
[160] The other two are prior appropriation and regulated riparianism.
[161] Hope M. Babcock 'Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for us' (2006) 91 *Cornell Law Review* 1203.
[162] Jackson op cit note 157.
[163] Ibid.
[164] Ibid.
[165] Jackson op cit note 157.

have been articulated through treaties and other laws that recognise rights of indigenous communities to land and other natural resources. However, these frameworks are often outdated, and have the effect of restricting the scope of customary rights to non-economic rights of use.[166]

In some African countries such as Kenya, there is variability in the extent to which the customary laws that *de facto* govern water governance at a local level are formally recognised by law. The Kenyan Water Act, 2002 does not have recognition in customary law. The Act vests right of use of all water resources to the Minister, except where exception exists by provision of the Act or any other law. An example from the Marakwet region demonstrates that customary law does not necessarily fall in the category of 'any other law' influencing water management since there is no statute recognising it.[167]

Provisions for stakeholder participation at a local level give communities an opportunity to participate in water governance. In the case of the Marakwet community, such a provision may not suffice to allow for customary law to be taken into account. Gachenga argues that human rights-based approaches, based on the constitutional recognition of the right to water and the recognition of the rights of indigenous people, may provide a basis on which customary rights to water resources may be guarded in jurisdictions where customary law is ineffective in promoting justice.[168] This argument is unlikely to succeed in a context where legislation provides for explicit control of water resources by the state. Although a rights-based approach may be used to argue for access for indigenous people, rules determined by legislation will take interpretative precedence.

In Botswana, the Kalahari San communities battled for recognition of their rights inside the Central Kalahari Game Reserve. After years of enduring attempts by the government to force the community to move out of the reserve, the Kalahari San were granted a court order that declared the

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[166] Elizabeth Gachenga 'Customary Law Systems for Water Governance in Kenya' in Martin *et al* op cit note 95.
[167] Ibid.
[168] Ibid at 303.

government forcibly, wrongfully, and without consent deprived them of possession of settlements they had previously lawfully occupied.[169] In this case, an additional battle was fought for the community's access to water from a borehole for self-subsistence. The government's decision to close the borehole was unsuccessfully challenged in the High Court, but the Court of Appeal, the community succeeded in obtaining a ruling that entitled them to sink boreholes for domestic purposes within the reserve.[170]

In South Africa the concept of an indigenous community is a complex one. When used broadly, it refers to languages and customs of the black population.[171] The dispossession of natural resources from indigenous communities discussed in Section 2.1 above included the elimination of legally protected uses of natural resources, including water resources.[172] The removal of indigenous claims to water resources took place as part of the dispossession of black people that was propagated through various laws and practices as discussed in Section 2.2.1 above. Sections 30 and 31 of the South African Constitution are the primary provisions for the protection of culture and cultural communities.[173] These provisions are aimed at protecting ethnic, religious and linguistic minorities, and promoting cultural pluralism and tolerance.[174]

Currie and De Waal state that the use of 'community' in Section 31 is essentially an equivalent of 'minority' in international law. For a group to be considered a minority, such a group should be distinct from other groups, manifest a sense of community, and demonstrate a desire to preserve a

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[169] Alexander Ross Paterson 'The Endless Struggle of Indigenous Peoples in Protected Areas – The Bushmen's Challenge for Water Rights in the Central Kalahari Game Reserve' in Kidd, Feris, & Murombo *et al* op cit note 61.
[170] Ibid.
[171] L Feris 'A Customary Right to Fish When Fish are Sparse: Managing Conflicting Claims Between Customary Rights and Environmental Rights' (2013) 16, 5 *PELJ* 555.
[172] Ibid.
[173] Section 30 of the Constitution provides that 'Everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'. Section 31(1) provides that 'persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'
[174] Currie & de Waal op cit note 26 at 629.

collective identity. Furthermore, the group must be non-dominant, or unable to access their rights through existing political and economic power. Non-dominance is said to mean that the community finds itself at odds with the rest of society from time to time, that its culture is not the dominant culture, that its language is not the majority language, or that its religion is not the official religion of the state.[175] Except for the *Khoi* and *San* communities in South Africa, those who were historically dispossessed of resources do not fit the above description of 'cultural minority'.

Therefore, it is argued that the cultural aspect of water justice in South Africa is not underpinned or even protected by provisions of sections 30 and 31 of the Constitution. The recognition of traditional leadership in Chapter 12 of the Constitution, which focusses more on traditional authorities than the rights of cultural communities, may provide an opportunity for the development of cultural water justice in South Africa. This argument will be explored in more detail in the following chapters. A number of pieces of legislation provide for the recognition of previously disadvantaged cultural communities and the redressing of past injustices.[176] The National Water Act has the promotion of equitable access to water and redressing the result of past discrimination as factors that need to be taken into consideration when managing and controlling the nation's water resources.[177] However, there is no formal recognition of indigenous communities' rights to water resources *per se*.[178] The cultural aspect of water justice as articulated in jurisdictions such as Australia and New Zealand seems to be largely absent in the South African legal landscape. There are certainly no direct references to cultural communities in the legislation dealing with water resource management and water service provision.

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[175] Ibid.
[176] The Mineral and Petroleum Resources Development Act 28 of 2002 recognises 'the need to promote local and *rural* development and the *social upliftment of communities* affected by mining' (own emphasis), while the long title of the Restitution of Land Rights Act 22, 1994 is 'to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and Land Claims Court; and to provide for matters connected therewith.'
[177] Glazewski op cit note 81.
[178] Feris op cit note 171.

2.2.4 Procedural Water Justice

Procedural justice may be the most established of the four aspects of water justice. It is based on a principle that none of the other three aspects of water justice can be attained without a guarantee of fairness in participatory processes.[179] The most prevalent theoretical constructions around justice in democracy contain variations of liberal ideals with emphasis, to varying degrees, on universalism. Basically, the starting point is that justice should include individual freedom, the greatest happiness for the greatest number of people, and a reliance on fair procedure as a way of guaranteeing justice through decisions made based on transparent, ethical principles.[180] In this instance procedural environmental and water rights enjoy greater support than the substantive goals of the rights, in part due to their compatibility with civil and political rights.[181]

With its roots in principles of natural justice, procedural justice requires access to information, freedom of expression, just administrative action, and access to courts. In an open and democratic society the government needs to be accountable to the public for its decisions. In order to do so, actions and decisions of the government need to be informed by rational considerations, which should be transparent and open for scrutiny and debate.[182] Access to information ensures that the public is able to participate meaningfully in decision making processes. The participation component of procedural justice is based on an understanding that representative democracy by itself is not sufficient to ensure justice, and that ongoing participation is required to create an opportunity for individuals (or groups) to express their views and influence the behaviour of those who are empowered to make decisions. Participation itself encompasses a complex spectrum of activities including political participation and participation in administrative decision-making.[183] While it does not guarantee that an outcome will be favourable, participation

[179] Kallhoff op cit note 90 at 374.
[180] Zwarteveen & Boelens op cit note 60 at 146.
[181] Glazebrook op cit note 112.
[182] Currie & De Waal op cit note 26 at 692.
[183] Giulia Parola *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (2013) at 23.

can legitimise decision-making procedures of the state and improve the quality of decision-making.[184]

The Constitution has a number of procedural guarantees that entitle a broad range of people to participate in decision-making. These include sections 32, 33, 34 and 38 of the Constitution.[185] Acts such as the Promotion of Access to Information Act 2, 2000 and the Promotion of Administrative Justice Act 3, 2000 are aimed at reinforcing the rights guaranteed in the Constitution. Provisions for access to information have the potential to profoundly affect access to justice for marginalised communities, especially by allowing for critical information to be used in litigation in order to hold the government to account.[186]

In addition to legislation that is aimed at enabling the fulfilment of procedural rights, provisions in environmental legislation with regard to standing are generous.[187] However, in South Africa's context of material inequality a prominence of focus on procedural fairness may result in substantive injustice being insufficiently addressed. One of the outcomes of strictly procedural approaches to water management is that the question of justice is narrowed, and often reduced to a question of anemic procedural fairness, efficiency and legitimacy.[188] The outcome is that micro-decisions that affect water justice are neglected, and consequences of individual situations are ignored in favour of broader considerations that may themselves be too crude to correct injustices as experienced in local contexts.[189]

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[184] Ibid at 24.
[185] Section 32 guarantees everyone the right of access to information held by the state, and information held by another person that is required for exercise or protection of any rights. Section 33 provides for the right to just administrative action; section 34 provides for access to courts; and section 38 provides for standing in matters that concern rights in the Bill of Rights.
[186] Nomthandazo Ntlama 'The Effectiveness of the Promotion of Access to Information Act 2 of 2000 for the Protection of Socio-Economic Rights' (2003) 2 *Stell LR* 273.
[187] Lisa Chamberlain 'Standing in the Water Tribunal: Access to Justice Down the Plughole' (2014) 30 *SAJHR* 543.
[188] Danie Brand, Stephan De Beer, Isolde De Villiers *et al* 'Poverty as Injustice' (2013) 17 *Law Democracy & Development* 273.
[189] John G. Tisdell 'Equity and Social Justice in Water Doctrines' (2003) 16, 4 *Social Justice Research* 401.

The potential loopholes in an exclusively procedural focus in exercising substantive rights does not reduce the indispensable role of procedural rights in the enforcement of substantive rights.[190] Procedural rights may not necessarily guarantee that a substantive right will be attained, but they do empower rights holders to demand things from a duty bearer.[191] While procedural justice can be criticised for its potential to reduce substantive justice issues, the findings of this study also indicate that enforcement of procedural justice itself is not without problems. Access to information is request driven, with no absolute right to access. This has the effect that efficiency of access to information is dependent upon the body that holds the information.[192] In the following chapters, there will be discussion around the difficulties in enforcing even the simplest of procedural rights.

2.3 Conclusion

Water justice is a dynamic and complex concept, and there is no single universally accepted definition. Located generally within discussions of social justice, the main concern of water justice is fairness in the distribution of and access to water in various forms. Based on an acknowledgement that societal needs and priorities change and vary over time and place, flexibility is a requirement of any water management and allocation system that seeks to be just.

In South Africa access to water is based on water rights, which flowed from capture-based systems. In the riparian system, the owner of a piece of land has rights to the surface water on and adjacent to their property. Those who own land also have better access to water resources, and they can use the resources as they please according to common law. However, this ownership has become restricted by rules of fair use as a result social interests. Like almost all aspects of life, water resource management schemes in South Africa remain influenced by systems that were shaped by discriminatory

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[190] Loretta Feris 'Constitutional Environmental Rights: An Under-utilised Resource' (2008) 24 *SAJHR* 29.
[191] Lisa Chamberlain 'Assessing Enabling Rights: Striking Similarities in Troubling Implementation of the Rights to Protest and Access to Information in South Africa' (2016) 16 *African Human Rights Law Journal* 365.
[192] Ntlama op cit note 186.

laws. Developments such as vesting certain water resources in the state and requiring the state to provide water services to people were informed by discriminatory laws.

Flexibility is required to ensure that water allocation and management schemes are just and respond to societal needs. These societal requirements can be understood through the four aspects of water justice. These are ecological concerns (ecological justice), distributive requirements (distributive justice), cultural considerations (cultural justice), and fairness of process and procedure in decision making (procedural justice). The discussion in this chapter focused on the principles underlying each aspect of justice, including how these principles are expressed in different contexts.

Based on environmental concerns arising from the impact of human activity on the environment, the ecological aspect of water justice in South Africa originated in conservation efforts, which later encompassed principles of environmental justice. Distributive justice is located within socioeconomic transformation discussions, originating from efforts to address the material deprivation experienced by the majority in South Africa. The cultural aspect of water justice in South Africa seems to be underdeveloped in academia and practice. Finally, procedural justice was discussed with a focus on its relationship with the other aspects of water justice, and its role in supporting their fulfilment.

In the following chapter, the focus will shift to a discussion of the evolution and role of litigation as a strategy for enforcing rights in South Africa. It will include the role of key players in the development of litigation strategies, and the factors that contribute to their use. The discussion in the chapter will create a context for understanding the methods that are used in litigation, including reasons for specific approaches, and the nature of cases that are litigated. This will in turn be the focus of Chapter Four, where specific cases are analysed for the way in which the four aspects of water justice are articulated in practice.

Chapter 3: Asserting Water Justice: The Role of Litigation in Enforcing the Four Aspects of Water Justice

3.1 Introduction

The four aspects of water justice discussed in the previous chapter provide a picture of discussions around what startegies to attain water justice should look like in practice. There are a number of approaches that communities and individuals can adopt in seeking justice. These include administrative remedies, advocacy, protest action, and litigation. These various methods were discussed in Chapter One. In this chapter, the discussion will focus on the use of litigation as a strategy in attaining water justice. Starting with the role of litigation as a way of promoting social change in general, the argument moves to litigation relating to specific aspects of water justice.

As discussed in Chapter Two, water justice is embedded in various provisions of South African law, including the guaranteed rights in the Constitution. As such, water justice in South Africa requires the fulfilment of rights in different ways. Relying on principles of equity, social justice, good governance, transparency and legality, water justice requires the fulfilment of the right to have access to sufficient water, the right to an environment that is not harmful to health and wellbeing, and the right to just administrative action.

This chapter will examine the role of litigation as a method used by communities in attempt to access rights to water and achieve water justice. The nature and history of organisations involved in public interest litigation is briefly discussed in order to illustrate the context within which the four aspects of water justice are expressed. While there is an acknowledgement in theory that the achievement of the ecological aspect of water justice requires, to various extents, the fulfilment of conservation goals and environmental justice goals, there is no consensus on how this ought to look in practice. This fragmentation reflects the lack of traction

found by a comprehensive concept of ecological water justice in the South African context.

This chapter argues that poverty, inequality and governance failures in the provision of services to communities have contributed to the dominance of the distributive aspect in articulations of water justice. In initial stages of the research there was a hypothesis that financial constraints and judicial deference were important factors influencing what was seen as an over-reliance on procedure in litigating substantive justice, and that a reliance on procedural litigation resulted in the narrowing of substantive claims in litigation. The view was that this could discourage comprehensive articulations of water justice. However, the research revealed a more nuanced picture. In fact, the role of procedural litigation as a strategy for seeking substantive justice should not be understated. Financial constraints and judicial deference are just some of the factors that affect the use of litigation as a strategy, and attaining procedural remedies is as difficult, complex, and controversial as attaining substantive remedies.

3.2 Civil Society and the Assertion of Water Justice

Social movements, defined broadly as politically and/or socially directed collectives, are focused on changing elements of the social, political or economic systems within which they are located.[193] Since the mid-1970s, South Africa has been characterised by mass civic activity. Until the 1990s, the broader civic movement was focused on fighting for liberation, freedom and overthrowing of the apartheid state. The government's clampdown on political activity was aggressive at that time. Arrests and unlawful detentions were a commonplace. One of the resultant features was the emergence of litigating organisations such as Lawyers for Human Rights and the Legal Resource Centre, whose main purpose was to act as representatives of detainees in political trials. By nature, relationships

[193] Richard Ballard, Adam Habib, Imraan Valodia *et al* (eds) *Voices of Protest: Social Movements in Post-Apartheid South Africa* (2006).

between the government and human rights organisations were confrontational.[194]

The transition to democracy resulted in a more collaborative relationship between the state and civic organisations, facilitated by the democratic government's attempts to create an enabling political environment.[195] Former staff members of human rights organisations left those organisations in order to join government and contribute toward the democratic transition from within.[196] Long-standing relationships between former colleagues and acquaintances who shared similar values and views about the future of the country resulted in cordial relationships between non-governmental organisations and government. However, unlike many other transitional societies where collaborative relations lasted for decades, new tensions emerged quickly in South Africa.[197]

Some struggles can be traced back to the earliest period of South Africa's democracy, but most coincide with the second democratic elections. In addition to the trade union movement's opposition to the government's policy on trade liberalisation, there were two other areas of prominent mass struggle. First were the struggles brought on by government's inability to make adequate progress in the fulfilment of socioeconomic rights for the majority of the population. This issue was taken up by civic movements, and the struggle was characterised by a range of advocacy and protest actions.[198] Secondly there were struggles aimed at resisting the enforcement of government policies at local level, where legitimate governance was still taking root.[199]

Organisations often come into to respond to a need for work on specific issues. Some organisations key to the attainment of water justice in South

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[194] David Cote & Jacob Van Garderen 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest' (2011) 27 *SAJHR* 167.
[195] Ballard *et al* op cit note 193.
[196] Cote & Van Garderen op cit note 194.
[197] Ballard *et al* op cit note 193.
[198] Ibid.
[199] Ibid.

Africa will be outlined below. Once they are formed, they employ a range of strategies to attain results for their cause. Various strategies will be discussed along with the activities of the organisations highlighted. Many Community Based Organisations were established in the latter part of the 1990s and into the 2000s. These included the Homeless People's Federation (which was part of the Homeless People's Alliance), the Treatment Action Campaign, the Anti-Privatisation Forum, the Soweto Electricity Crisis Committee Concerned Citizens Forum, the Anti-Eviction Campaign, the Landless People's Movement, and the Coalition for South Africans for the Basic Income Grant, and the Education Rights Project.[200] These organisations have been fundamental in helping South Africans access their rights in a range of ways, which will be outlined below.

Social Movements

The Treatment Action Campaign (TAC) is often cited as an example of the power of civil society in influencing government policy. This is mostly for the role that the movement played through campaigning, protest action, and litigation to ensure access to affordable treatment for people living with HIV.[201] The key strategy for the TAC was campaigning and increasing public awareness around issues related to availability, affordability, and use of HIV treatments. The TAC's relationship with government over time has been both co-operative and confrontational.[202]

The Durban Based Concerned Citizen Forum (CCF) was launched in 2001 with the main aim of resisting evictions and water and electricity disconnections resulting from the government's economic policies.[203] The CCF did not have specific rules on the strategies and tactics they employed, and were flexible. Their activities included protest action, community mobilisation, and campaigning.[204] The Western Cape Anti-

[200] Ballard *et al* op cit note 193.
[201] Steven Friedman & Shauna Mottiar 'Seeking the High Ground: The Treatment Action Campaign and the Politics of Morality' in Ballard *et al* op cit note 193.
[202] Ibid at 27.
[203] Peter Dwyer 'The Concerned Citizens Forum: A Fight within a Fight' in Ballard *et al* (eds) op cit note 193.
[204] Ibid.

Eviction Campaign was formed in the same year as the CCF, also aimed at resisting evictions and water disconnections. Like the CCF, the campaign was locally based with no rules on strategies and tactics to be employed. The campaign embarked on mass reconnections of services for those who were disconnected, and creating informal settlements and new neighbourhoods around state-constructed developments. These organisations simultaneously engaged with state institutions, and led protest action. Some of their activities were against by-laws, so activists were arrested and harassed by the police.[205]

The Coalition Against Water Privatisation was formed in 2003, and it used a rights discourse to challenge to the state's cost recovery of water service provision.[206] While the Coalition Against Water Privatisation focused on ensuring that water services were affordable and not privatised, its remit expanded in 2002 when the Steel Valley Crisis Committee was in reaction to Iscor's pollution of groundwater in Vanderbjilpark. The main purpose of the Committee was to mobilise the community and coordinate efforts to engage the polluting company, the government, and courts to deal with the pollution. Protests did not have the desired outcome, and the movement collapsed.[207]

Based on the general characteristics of social movements discussed, movements are usually localised and have narrow areas of interest. Social movements develop in response to specific and often localised issues. The interests of movements seldom evolve to incorporate views outside their specific contexts. When it comes to water justice, only certain aspects will concern specific social movements. While movements often apply various strategies to meet their objectives, they are more likely to maintain a narrow focus than integrate their issues of concern.

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[205] Sophie Oldfield & Kristian Stokke 'Building Unity in Diversity: Social Movement Activism in the Western Cape Anti-Eviction Campaign' in Ballard *et al* op cit note 193.
[206] Jacklyn Cock 'Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa' in Ballard *et al* op cit note 193.
[207] Ibid at 221.

3.3 Litigating Water Justice

3.3.1 Development of Litigation as a Strategy for Enforcing Human Rights

In the early days of democracy, there was a reluctance on the part of public interest NGOs to litigate against government. This was as a result of cordial relationships and shared goals between government and NGOs, as discussed in 3.2 *supra*. Earlier constitutional litigation was focused on asserting political rights (such as the revocation of the death penalty[208]), increased struggles for socioeconomic rights contributed to community based organisations adopting a more confrontational stance in their interactions with government. NGOs aimed at providing legal services started to become more specialised in order to retain funding that was shrinking. In order to attract donor funding, NGOs had to demonstrate specialist abilities. While this led to a decrease in general legal assistance, areas such as HIV/AIDS, housing, refugee and migrants rights, and gender enjoyed increasingly dedicated attention.[209]

A lot of litigation assistance given to civil society is for people being harassed and arrested by the police for their involvement in community based movements.[210] Most of these concerned ensuring that the arrested persons were granted bail and were not being subjected to unlawful treatment by the authorities.[211] This dissertation is concerned with the aspects of litigations where the demands of communities are brought to court in their own right; that is, where litigation is used as a strategy for articulating the demands of civil society and communities, and as a means of attaining justice. From this perspective, there are two underlying factors that influence the usage of litigation as a strategy.

Demands by civic organisations and communities (such as for water services) are based on needs of communities that are not being met. As discussed above, civic discontent with the government became more

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[208] The *S v Makwanyane and Another* 1995 (3) SA 391 (CC) case was the first politically important and controversial case that led to the abolishment of capital punishment in South Africa.
[209] Cote & Van Garderen op cit note 194.
[210] Ibid.
[211] Ibid.

prominent following the increasing adoption of neo-liberal policies. The effect was a restriction of access to services such as housing and water. While there are provisions for the fulfilment of certain human rights in the Constitution, the lived experience for many remained deprivation.

Additionally, as discussed above, most CBOs developed in response to discontent over specific issues, and remained locally focused. While TAC was successful in launching itself as a national movement, organisations dealing with issues such as housing and water were not able to launch themselves nationally. As a result, litigation tends to approach water at local, issue-specific level.

3.3.2 Approaches to Public Interest Litigation

Debates on the role of litigation to bring about social change focus on the manner and the extent to which litigation and jurisprudence contribute to social change. The generally held view is that courts are able to bring about social change through their decisions. Constitutional rights and the jurisprudence of them provide authoritative statements on public policy goals.[212] Debates on how to assess public interest litigation in South Africa is said to consist of two main approaches.

There is the materialist approach, which sees the purpose of public interest litigation as achieving concrete outcomes for a particular group. These outcomes are achieved when a court is persuaded to give a favourable judgment. Therefore, when choosing a strategy, obtaining a favourable judgment is the predominant consideration.[213] Considering that South African courts are known to be reluctant to decide anything beyond the issues placed before them.[214] Essentially judicial minimalism has the effect that broader claims are narrowed in favour of crafting only very specific and winnable points of law.

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[212] Stuart Wilson 'Litigating Housing Rights in Johannesburg's Inner City 2004-2008' (2011) 27 *SAJHR* 127.
[213] SERI *Public Interest Legal Services in South Africa: Project Report* (2015) at 13.
[214] Wilson op cit note 212.

One public interest litigating attorney who was interviewed in this study indicated that courts do not like cases that are brought to them with general claims; it is necessary to narrow claims down to winnable points of law.

> *Courts don't like it. If you* [are] *going to go to the court with ten issues, and if you can only prove two, they will only take the two. And the idea with court is that they want narrow issues, they want clean cut arguments, they want a clean cut proposed solution from you. They don't want cases like that, that will only come up with this argument, because you also need to legally substantiate all of the arguments that you make. And you know, some might require an interdict, some might require a declaratory* [order]. *So you might even come up with a strategy that says there are fifteen issues to deal with, but I'm going to bring seven cases and I'm going to narrow each court case to different issues… certainly I'm a big fan of doing things that way.*[215]

When courts decide on cases that are framed in narrow terms, the applicability of principles that inform these decisions are also narrowed. So, the applicability of a single case to people in similar circumstances as litigants who win a case, and the potential of a decision to alter state policy and practice remains limited.[216] Specific litigation strategies and the reasons for choosing these strategies will be discussed in more detail in the following chapter.

A legal mobilisation approach focuses on factors beyond a specific case. This approach takes into account the symbolic and political effects of legal interventions.[217] The articulations of rights in court judgments are then used as a foundation for more wide ranging social struggles. The acknowledgement of rights in judgments indicate that claims have achieved at least a partial recognition, and therefore require follow up by other political action.[218] These include advocacy, and grassroots mobilisation of people affected by an injustice. The value of litigation in this

[215] HRLJHB4_161208 Interview.
[216] Wilson op cit note 212.
[217] SERI op cit note 213 at 13.
[218] Wilson op cit note 212.

approach is not in a single case, but through medium-to-long term litigation, where continuous and interactive engagement with the legal system to allow litigants to shape processes, norms and institutions in a way that facilitates access to rights.[219] However, this approach requires technical, financial, and organisational resources not only to give communities legal representation, but also to empower communities with the ability to make informed decisions about engaging with the litigation process.

For litigation to be a viable strategy to attain social justice (and water justice in particular), courts must be willing to hear a broad range of rights claims, society should have a sophisticated legal consciousness, grassroots organisations should have sufficient resources, and the judiciary should be sympathetic to social justice.[220] If used strategically and in combination with other approaches, public interest litigation is capable of shifting entrenched institutional power.[221] The efficacy of public interest litigation to bring about social change needs to be considered in the context of the risks and feasibility of other strategies available.[222]

Human rights attorneys who participated in the study confirmed the view that human rights litigation is only one method to attain social change. Indeed, human rights can be used in a number of different ways to achieve change, including advocacy, legislative changes, empowerment, education, and litigation. All these methods need to be used together in order to effect change.[223] The participant acknowledged that law cannot be the answer to all problems of injustice. Politicians, as legislators and the executive of government, can have a greater impact on social change. Decisions relating to the amounts of tax collected, and programmes to be funded by the fiscus rest in the hands of politicians.[224]

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[219] Wilson op cit note 212 at 130.
[220] Ibid.
[221] SERI op cit note 213 at 12.
[222] Ibid at 13.
[223] HRLJHB4_161208 interview.
[224] HRLJHB5_161219 Interview.

A discussion of litigation as a strategy for transformation in general, and for water justice in particular, requires a recognition that litigation is not the only strategy to be applied. Organisations involved in litigation for different aspects of water justice use a variety of methods, including advocacy, research, public education, scrutinising legislation, policy analysis and media campaigns.[225] When assessing the role of public interest litigation, it is not sufficient to look exclusively at the outcome of court cases. Views held by litigators on the most valuable aspects of their job emerged as informative. The outcomes of individual cases were not the most important point of assessment for participants.

A number of litigators indicated that the biggest satisfaction in their job did not come from winning major, precedence-setting cases.

> *It's gonna [sic] sound strange, but one of* [the highlights of my career] *is a case we lost. It was, she had lost in the High Court, and she had lost in the Supreme Court of Appeal. We got to the Constitutional Court and we lost again. But she turned to us and said that she had been treated with utmost disrespect throughout. And the way the Constitutional Court treated her, even though it didn't ultimately give her the relief she had sought, to her that meant a recognition of her humanity. And something about that, even when we don't win, there is something about the system that can recognise a person, and give them dignity and a voice. And that for me is quite something… So it's never quite the victories in the big way you would want them. It's a constant, continuous struggle and you think you have won,* [but] *it's the first hurdle. It's six more years before you… life is too complicated and law can't fix it all.*[226]

Assessing impact of public interest litigation is not an easy and simple process. Some of the factors to be considered include receiving a positive outcome for a client (either individual or group), influencing changes to law and policy, encouraging institutional change, creating and contributing to symbolic and discursive changes, contributing to the expansion of the

[225] SERI op cit note 213 at 47.
[226] HRLJHB5_161219 interview.

democratic space, and strengthening the public interest law sector. It is important to note that strategic litigation's key role is to challenge injustice, and it therefore cannot always 'deliver' justice.[227] Overall, the value of public interest litigation is not based on assessing the number of cases that have a positive legal outcome for a claimant of rights. Instead, it is important to consider how work in the totality of a specific field affects the dynamics or public consciousness on a particular issue.[228]

3.3.3 Obstacles in Litigating Water Justice

It is possible to differentiate between strategic litigation and clinical litigation in public interest litigation, but the differentiation is theoretical. While strategic litigation aims for an impact beyond the immediate parties to a case, to change policy or law, or to influence the behaviour of the state or private institutions; clinical litigation is focused on the needs of a specificclient in a particular case.[229] Litigators are often engaged simultaneously in clinical and strategic work. In fact, most high impact work emanates from extensive clinical work. Clinical work precedes strategic work in new areas of the law for practitioners and presiding officers to become familiar with issues at play.[230] Running smaller daily cases does not only help to identify trends and systemic challenges, but also builds jurisprudence around an issue. Judgements on daily clinical cases build the foundation for strategic, high impact litigation. As discussed above, some public interest litigators believe that they add great value to communities through clinical work.

Apart from winning cases, there are numerous obstacles to translating these victories into social change. The State is often not willing or able to fulfil its legal obligations. Government can be unresponsive and obstinate even when facing litigation. In cases where there is no sustained mobilisation court rulings may be poorly implemented, diminishing their

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[227] Catherine Corey Barber 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations' (2012) 16, 3 *The International Journal of Human Rights* 411.
[228] SERI op cit note 213 at 54.
[229] SERI op cit note 213 at 48.
[230] Barber op cit note 227.

effect to social change as a result.[231] Some departments have an unwillingness or inability to comply fully with court orders in cases where a judgment has not gone in their favour.[232] One organisation active in public interest litigations illustrates the challenges in changing government practice.

> *The increased degree of hostility by government towards public interest litigation means an increased risk of non-compliance or, potentially even worse, 'malicious compliance'- [wherein government departments] deliberately comply with court orders to the minimum extent possible and in a manner that prevents the true purpose of a court order being achieved.*[233]

Another rising backlash against litigation as a strategy for social change relates to the increased use of public interest litigation strategies by organisations opposed to social change.[234] Examples of such litigation include the trade union Solidarity's litigation against affirmative action policies and practices, and Agri South Africa's challenge of the Mineral and Petroleum Resources Development Act, which affects a land owner's rights to minerals by making the state the custodian of all minerals in the country.[235] A detailed discussion of both how litigation is used by organisations opposing social change and the public sector's response to litigation for social change is beyond the scope of this dissertation. However, an awareness of these issues is important for the upcoming discussion on how litigation has been used to fulfil certain aspects of water justice.

3.3.4 Litigation of the Four Aspects of Water Justice

(a) Ecological Water Justice

As discussed in Section 2.2.1 of Chapter Two above, the ecological aspect of water justice has two main components; water conservation within broad environmental conservation, and the equity of burdens and benefits

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[231] Siri Gloppen 'Litigation as a Strategy to Hold Goovernments Accountable for Implementing the Right to Health' (2008) 10, 2 *Health and Human Rights* 21.
[232] SERI op cit note 213 at 35.
[233] Budlender, Marcus SC & Ferreira op cit note 59 at 22.
[234] Ibid.
[235] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

where water resources are used. The former is informed by an acknowledgement that the preservation of environment for its own sake is a legitimate goal, and the latter concentrates on the unequal burden suffered as consequence of environmental degradation.

In the past, organisations such as the Endangered Wildlife Trust (EWT) and Wildlife and Environment Society of Southern Africa (WESSA) were criticised for focusing on preserving biodiversity without incorporating social issues into their strategies.[236] While remaining focused on preservation, these organisations have developed programmes that involve communities in conservation efforts. WESSA implements conservation initiatives and training. The EWT increases awareness about the environment and plays a role in ensuring efficient implementation of conservation legislation. Therefore, while community involvement has increased, biodiversity and nature conservation remain the key objectives for these organisations.

NGOs that focus on the environmental justice aspect of water tend to have an anthropocentric focus. As discussed above, litigating NGOs provide services based on demand. Litigation will have a specific and localised focus, owing to the nature of civic movements discussed above, but the fact that water justice is articulated through a human rights lens is important. The right to an environment that is not harmful, as contained in Section 24, is seen as anthropocentric. Environmental protection aims to preserve the earth for a variety of reasons, and an environmental justice approach demonstrates that human interests can be central to these efforts.[237]

Human rights NGOs commonly see the environment as inextricably linked to poverty and inequality. NGOs concerned with localised environmental degradation, or the State's inadequate response to the management of water pollution and the provision of water services, are demonstrating an

[236] Cock op cit note 206.
[237] Feris op cit note 190.

environmental justice outlook, in their concern about equitability of environmental burdens and benefits. NGOs benefit from an environmental rights approach that incorporates human rights and socioeconomic rights, and acknowledges that this integration is essential to attain environmental goals.[238] This awareness is reflected in the work of public interest litigators.

One respondent indicated that in the past, environmental work focused on the right to an environment that is not harmful in general and the protection of environment itself. Now, their work has started to move to what they described as environmental justice instead of just environmental rights.

> *I would say that in the past* [environmental litigation] *has been kind of focus to a right to environment not harmful in general [sic] and has also been quite focused on protection of the environment in and of itself. But I think since we have sort of been moving* [our work] *in a slightly different direction, maybe you can call it environmental justice as opposed to just environmental rights. And in that way we are more focused on communities as opposed to, you know, protecting a river for the purpose of protecting a river. We think more about if the river is polluted what will be the impact on surrounding* [human] *communities. We come at it from that perspective.*[239]

In South African litigation, the ecological aspect of water justice is predominantly expressed through the environmental justice perspective. This is a result of a variety of factors. There has not been much collaboration between organisations concerned with conservation and those concerned with environmental justice. Community-based environmental justice organisations focus on environmental issues only in as far as the impact is immediate and obvious to residents, so conservation by itself does not feature prominently in these movements. Conservation, which highlights the need for equitable sharing of the environment between human and non-human life, remains the

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[238] Rachel Wynberg & David Fig 'Realising Environmental Rights: Civic Action, Leverage, and Litigation' in Malcolm Langford, Ben Cousins, Jackie Dugard *et al* (eds) *Socio-economic Right in South Africa: Symbols or Substance?* (2014).
[239] HRLJHB2_161205 Interview.

preoccupation of niche environmentalist organisations. Although these organisations have been expanding the involvement of local communities in conservation programmes, there are few wider, collaborative relationships between organisations concerned with conservation and those concerned with environmental justice.

Participants in the study acknowledged that the conservation movement and environmental justice movement are working in silos. The differences in focus were seen as the consequence of specialisation and requirements of clients. A participant whose environmental work is focused on environmental justice put it as follows:

> *Other people have one approach, the moment you say environment, they think fauna and flora. They think green… whereas the clients that we have represented, particularly in the mining host communities, their understanding of environment involves what the definition of environment entails: land, water, air. So when they take steps to challenge a mining company, their concerns are mainly to do with contamination of the air they breathe, the water they drink, appropriation of their land without adequate consultation or even compensation… But it is true that there are those environmental groups that protect biodiversity, and the like. I don't think that the two are mutually exclusive. It's just an issue of expertise and specialisation. As Judge Sachs said in the Fuel Retailer case, the right is complex and under litigated…*[240]

The right to environment is predominantly litigated on procedural and administrative law grounds; this is important for how ecological water justice is articulated. There are few cases where environmental rights are fully used and clearly interpreted.[241] The use of procedural and administrative law as a means of attaining water justice will be discussed in further detail in Section 3.3.4 below. The consequence of a focus on procedure is that even after 20 years of a constitutional right to environment, the right itself is still an enigma.[242] Finally, while costs are a well acknowledged impediment to the use of litigation as a means of

[240] HRLJHB1_161121 Interview.
[241] Feris op cit note 190.
[242] Tracy Humby 'The right to development-in-environment and its ecological and developmental thresholds' (2016) 32, 2 *South African Journal on Human Rights* 219.

asserting justice, litigating environmental rights on substantive grounds requires extensive and often expensive scientific evidence to make a case.

Large corporations that are often responsible for pollution and environmental degradation can afford scientists required to collate evidence on pollution, while this is hardly an option for community based organisations and litigating NGOs with their limited budgets. The risk of channelling limited financial resources toward scientific studies is high when there is no certainty that the results of studies will provide information that can be used as evidence to win substantive cases. One participant spoke of an instance where they had funding, though limited, to conduct an air quality assessment study. In the end, it was determined that the results of the study were not useful for the case.[243]

Another respondent was of the view that the limited resources of public interest organisations is an issue that is bigger than a question of financial muscle. Inequality fundamentally shapes the relationship between mining companies and communities, impacting not only on which rights communities can access, but how these rights are understood and articulated. This makes a procedural articulation of substantive rights the only viable way of asserting justice.[244]

Ecological water justice is fragmented as a result of the factors outlined above. The professional distance between conservationist organisations and NGOs dealing with human rights mean that the component parts of ecological water justice are often not considered together. Conservationists' goals are framed as in conflict with progressive development goals of poverty reduction.[245] Given the difficulty of bringing environmental rights to court, communities often enter into negotiations with polluting companies. This is a less expensive and time consuming option, but comes with no guarantees that future pollution will be prevented. Perhaps more importantly, negotiated settlements do not

[243] HRLJHB2_161205 Interview.
[244] HRLJHB1_161121 Interview.
[245] Du Plessis op cit note 27.

create legal precedence that other communities in similar situations may rely on in the future. It contributes to the dearth environmental cases that have been brought to court. As a result, the substantive right to environment has not become sufficiently developed in jurisprudence. In practice, then, the jurisprudence fails to build a substantive precedence upon which future cases may build.

Even authors who accept that case law reflects a narrow definition of the environment argue that environmental rights are not sufficiently infused with other socioeconomic rights.[246] More information is needed to litigate environmental rights than other socioeconomic rights. The costs related to bringing a case to court and the procedural nature of environmental legislation have a great impact on the kind of jurisprudence that gets created around environmental rights.

High costs of litigation create a barrier of access for poor communities. There might be provisions for litigious remedies in law, but due to the interconnected nature of rights, people who lack access to socioeconomic or environmental rights often also lack access to legal resources. Even if resources are found to litigate, claimants have to endure hazardous conditions until after litigation is successful.[247] The finalisation of environmental cases is notorious for taking a lot time.[248] A litigating attorney who participated in the study confirmed this view:

> *Anyone who is working in this space knows that the jurisprudence is underdeveloped, and we need to push further. But environmental cases are complex and they are resource intensive and I think that in and of itself, it's nothing to do necessarily with the Constitution, but rather it requires some scientific expertise. The cases tend to be lengthy. And so kind of pushing the agenda through the courts can be difficult. And*

[246] Dugard & Alcaro op cit note 65.
[247] Greg Ruiters 'Race, Place, and Environmental Rights: A radical Critique of Environmental Justice Discourse' in McDonald op cit note 106 at 118.
[248] Melanie Murcott 'The Role of Environmental Justice in Socio-economic Rights Litigation' (2015) 132 *SALJ* 875.

> *I think the lack of jurisprudence on the right probably reflects that.*[249]

An analysis of the efficiency of litigation as a strategy for attaining the ecological aspect of water justice needs to take into account that environmental rights are complex, spreading into many sectors. This is compounded by a debate on the extent to which our legal system enables an integrated approach to rights.[250] The lack of cooperation between organisations concerned with conservation and NGOs dealing with the impact of environmental degradation on human development results in a number of lost opportunities. There is little, if any, exchange of expertise, or identification of common interests that may lead to a more integrated approach. As a result, the ecological aspect of water justice remains fragmented, and environmental conservation and human development are too often treated as conflicting when articulating rights.

(b) Distributive Water Justice

The distributive aspect of water justice concerns the fairness of systems that determine access to water for human use, such as domestic consumption, but also industrial and agricultural purposes. The National Water Act changed the underlying water allocation system in South Africa by abolishing ownership of water by persons and placing all of the nation's water in the trusteeship of the national government.[251] Equity in access to water and access to the benefits derived from water through allocation reform is central to the Act. However, little has been achieved in reallocation, since the biggest users of water remain white commercial farmers.

Access to water for productive purposes mirrors inequalities of South African society.[252] Water allocation reform is aimed at providing access to

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[249] HRLJHB2_161205 Interview.
[250] Wynberg & Fig op cit note 238.
[251] Jan Glazewski and Cheri Young 2016 'Water Law and the Environment' in Glazewski op cit note 81.
[252] Barbara Schreiner 'Viewpoint – Why Has the South African National Water Act Been so Difficult to Implement?'(2013) 6, 2 *Water Alternatives* 239.

water for subsistence farming or sustaining basic livelihoods, and to create space for the development of commercial farming among previously disadvantaged communities. However, there has been little success in practice. There are hardly any links between land reform, agricultural support, and water resource allocation. In fact, many redistributed farms have failed from a lack of access to water for production purposes.[253]

The Water Services Act aims to ensure the fulfilment of the rights of access to basic water supply, and provide a regulatory framework for local authorities to supply water in their respective areas.[254] Challenges and backlogs in the provision of water were outlined in detail in the introductory chapter of this dissertation. When there is a disjuncture between the constitutional promise and actual needs of communities,[255] the Constitutional Court has been criticised for giving too much deference to the executive branch of the state and failing to take a more activist stance.[256]

There are a number of factors that affect the use of litigation as a strategy of asserting the distributive aspect of water justice. The section 27 right to water contains a requirement that the state must take reasonable measures to ensure the progressive realisation of the right water. While this section provides for a substantive right of access to sufficient water, the main test in litigation becomes that of reasonableness. The key criticism of the reasonableness review as a standard is that focusing on process and the reasonableness of government actions overshadows and downplays the importance of developing the substance of the normative content and the obligations imposed by socioeconomic rights.[257]

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[253] Karen Nortje, Nikki Funke & Willem de Lange 2014 'How do we improve synchronisation between land and water reform?' (2014) *The Water Wheel* 36.
[254] Glazewski & Young op cit note 251.
[255] Keightley op cit note 54 at 305.
[256] Ibid at 299.
[257] Geo Quinot & Sandra Liebenberg 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 3 *Stell LR* 639.

The justiciability of socioeconomic rights has the purpose of ensuring that substantive rights can be asserted through litigation, but the important role that administrative justice plays cannot be downplayed. Reasonableness offers a model that promotes other key constitutional objectives.[258] Reasonableness in administrative law will be discussed in the section on procedural water justice below. In spite of the importance of reasonableness in the constitutional system, a focus on reasonableness means that urgent needs of communities may be overlooked in favour of strict adherence to procedure. The Constitutional Court has been criticised for being conservative, and ignoring the plight of the poor when reviewing the right to access to water in the *Mazibuko* case.[259]

The concept of progressive realisation creates flexibility when it comes to the enforcement of socioeconomic rights. It is based on an acknowledgment that socioeconomic rights cannot be fulfilled immediately, and that there is a need to ensure that the state takes steps to ensure achievement of goals of the Constitution, especially that basic needs of all in society are met.[260] The concept of progressive realisation has had varied application by the courts. In *Modderklip,* progressive realisation was interpreted to require inclusive and fair participation in planning processes, and that measures should be sufficiently flexible to adapt to changing situations.[261]

In *Mazibuko*, the court held that the revision of policies over time was sufficient to meet the requirements of progressive realisation. The evolution of the policy in this case was as a result of extensive consultation that occurred, and also in reaction to challenges to the policy.[262] This interpretation of progressive realisation does not allow for an assessment

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[258] Quinot & Liebenberg op cit note 257.
[259] Ed Couzens 'Avoiding *Mazibuko*: Water Security and Constitutional Rights in Southern African Case Law' (2015) 18, 4 *PELJ* 1162.
[260] Lillian Chenwi 'Unpacking "progressive realisation", its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) *De Jure* 742.
[261] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) para 49.
[262] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 67, 78.

of the extent to which the provision of services in question increased. Indeed, while regular review may improve policy, this does not necessarily mean it will result in rights being enjoyed.[263]

Progressive realisation is seen as an internal limitation to the right of access to water. Courts emphasise that the constitutional text itself gives recognition to the fact that socioeconomic rights are not immediately achievable or deliverable.[264] Another consequence of the application of the progressive realisation requirement is that socioeconomic rights jurisprudence becomes analogous to an administrative law model. Courts apply administrative law to construct a framework within which the state's positive obligations can be assessed.[265] The Court's assessment of state compliance to the requirement of taking reasonable measures to achieve progressive realisation is evaluated on administrative law concepts of rationality, reasonableness and procedural fairness.

The *Mazibuko* case was the first case to be taken to the Constitutional Court on the basis of the section 27 right to access to water. The Court's approach has been criticised for a number of reasons, including that the court ignored the contextual evidence of urgent needs, and favoured a superficial assessment of state policy.[266] The court described its role as a secondary one. The risk of a court that sees itself as playing merely a secondary role in ensuring the fulfilment of socioeconomic rights is that the court will render itself unable to ensure a truly democratic form of socioeconomic development as a matter of routine.[267] The Court's interpretative approach in this case prevented it from fully taking the basis of the complaints before it into account.[268]

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[263] Chenwi op cit note 260.
[264] Keightley op cit note 54 at 306.
[265] Stuart Wilson & Jackie Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011) 3 *Stell LR* 664.
[266] Ibid.
[267] Ibid at 671.
[268] Wilson & Dugard op cit note 265.

As discussed above, litigation of socioeconomic rights is often very localised, and based on the specific experiences of affected communities. Litigation is often used in conjunction with other methods of asserting rights, such as protest aimed at resisting the imposition of measures that threaten the enjoyment of a right.[269] There are a number of cases[270] in which courts have been called upon to determine the content of socioeconomic rights in specific circumstances. This is often the case when a specific action, such as cutting off electricity, is impugned. In these instances, litigation is the primary, if not only strategy of asserting rights. Often clinical cases are brought on an urgent basis with respect to disconnections and evictions. These cases are mostly from urban centres where organisations dealing with human rights litigation have a presence.[271] The main purpose of running these cases is to obtain the best outcome for a client in the most cost effective manner.

There are increasing instances of failure by government to implement court orders in cases where applicants are successful. This failure is seen by some as an example that litigation is an inappropriate strategy of asserting socioeconomic rights.[272] Since litigation is framed around human rights, this supposed 'failure' of litigation is seen as a failure of the rights discourse to guide socioeconomic development.[273] Success in court often requires specificity and simplicity in a case, and therefore a narrowing down of broad and interconnected issues. As such the current system discourages the consideration of other aspects of water justice in a case, and encourages abandoning of arguments not central to a case. During

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[269] Jackie Dugard 'Current Developments: Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 24 593. Residents of Phiri initially adopted the direct protest method, prior to adopting a 'legal mobilisation' approach. The latter entails articulating demands in official fora as an assertion of rights.

[270] Clinical cases are those that are initially thought to affect only the client who seeks assistance. These are 'run of the mill' cases. For instance, the case of *Leon Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) started out as a clinical case, with no campaigning or mobilising element to it. However, the value of the precedence it set for public interest litigation on municipal service disconnections cannot be ignored.

[271] Organisations such as LRC, SERI and CALS mostly deal with clinical cases. Combination of strategies take place only in cases where there have been long struggles with local government, for instance.

[272] Malcolm Langford 'Civil Society and Socio-Economic Rights' in Langford *et al* (eds) op cit note 238.

[273] Ibid.

interviews for this study, the need to specialise was pointed out as an important factor for practitioners. Those who dealt predominantly with one aspect of water justice were reluctant to discuss the other of water justice in detail, as they did not see themselves as specialists in that field. However, it needs to be pointed out that on the same thread participants pointed out the importance of collaboration with other practitioners in different fields, in order to ensure the achievement of water justice.

(c) Cultural Water Justice

As discussed in Chapter Two above, the cultural aspect of water justice is based on a need to respect relationships and values that different cultural groups have with and attach to water. In countries such as the USA, New Zealand, and Australia, indigenous communities are recognised especially in questions of distribution of and access to natural resources such as land and water. In the South African context, customary law gained formal recognition in the democratic dispensation, especially through provisions of sections 39(2) and 211 of the Constitution.[274] In spite of this recognition, as well as other areas of law where customary law has played a prominent role since its formal recognition[275], the history of statutory law being imposed on cultural communities has continued to have an effect. This means that some aspects of customary law have been denied, and continue to be denied in instances where it remains incongruous in a context dominated by European norms.[276]

The current recognition of cultural communities in South African law does not create an environment that encourages the attainment of the cultural aspect of water justice. The difficulty of defining the concept of 'indigenous community' in South Africa was indicated above. In other

[274] Section 39(2) of the Constitution provides that 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Section 211 provides for recognition of traditional leadership and customary law.
[275] For instance, the recognition of customary law has had tremendous impact to South African family law. Customary law has influenced the general body of our law, while it becomes continually developed through jurisprudence.
[276] Nica Siegel 'Thinking the Boundaries of Customary Law in South Africa' (2015) 31 *SAJHR* 357.

territories, indigenous communities are the primary beneficiaries of cultural water justice. Without a clearly identified community, there has been little articulation of the cultural aspect of water justice in South Africa. While concepts such as 'native' were used as a basis of exclusion and restriction of access to resources in the past, the ability to use similar concepts in restitution and promotion of equity in the current democratic space are more contentious.

In Section 2.2.3 of Chapter Two, it was argued that the constitutional protection of language and culture in Section 30 and cultural, religious and linguistic communities in Section 31 do not offer an opportunity for the attainment of the cultural aspects of water justice in South Africa. Jurisprudence invoking or mentioning these sections relate to topics such as whether foetuses are included in the constitutional right to life afforded to 'everyone',[277] the retention of corporal punishment as a means of discipline in schools (as a 'vital' part of the Christian faith as practiced by some),[278] the validity of a customary marriage in an instance where one of the requirements of a custom are not complied with,[279] excommunication of a member from a religious community,[280] whether a litigant has a right to require that civil proceedings be conducted in a specific language,[281] and whether interests based on a sense of belonging to a place where one lives rooted in a particular history is recognised within the rights of cultural communities.[282]

The existing gap in the recognition of 'indigenous communities' does not mean that there is no space for the fulfilment of the cultural aspect of water justice in South Africa. A number of pieces of legislation create a basis for seeking the attainment of cultural water justice in a localised form. For instance, the Traditional Leadership and Governance Framework Act[283]

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[277] *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).
[278] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[279] *Mabuza v Mbatha* 2003 (4) SA 218 (C).
[280] *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W).
[281] *ABSA Bank Ltd v Ferreira NO and Others* 2016 (2) SA 258 (ECP).
[282] *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC).
[283] 41 of 2003.

provides for a recognition of a traditional community if such community is subject to a system of traditional leadership in terms of that community's custom, and observes a system of customary law.[284]

In addition to customary roles, the national or provincial government give traditional leaders roles in land administration, health, economic development, environment, and the management of natural resources.[285] Traditional councils can influence water service provision by participating in policy and legislation development at a local level, facilitating the involvement of the traditional community in the integrated development plan of a municipality, and by participating in development programmes of municipalities and of the provincial and national spheres of government.[286]

NEMA includes 'physical, chemical, aesthetic and cultural properties and conditions of [natural environment: air, land and water] that influence human health and well-being' in the definition of "environment".[287] It is therefore submitted that cultural values that communities attach to water are 'cultural properties' for the purposes of the Act. The National Heritage Resources Act 25 of 1999 is aimed at the promotion of good management of cultural resources, and enabling communities to nurture and conserve their legacy so that it may be bequeathed to future generations.[288] However, the Act does not cover natural resources as part of heritage. Therefore, there seems to be a limit on the ability of a cultural community to claim conservation of specific water resources on the basis that they are part of their heritage.

The biggest factor affecting the cultural aspect of water justice may be the legal framework of water governance. Unlike the previous riparian model, the National Water Act makes the national government trustee of the country's water resources. The Minister is responsible for the management of water resources on behalf of national government. However, provision

[284] Section 2 (1) *(a)* - *(b)*.
[285] Sections 19 and 20.
[286] Section 4 (1) *(d)*, *(f)* and *(g)*.
[287] Section 1(1) *(xi)* and *(iv)*.
[288] Preamble.

is made for the establishment of Catchment Management Agencies through which water will be managed at a catchment level, subsequent to the assignment and delegation of such authority by the minister.[289] One of the biggest failures in the implementation of the NWA is as a result of the failure to establish functional Catchment Management Agencies (CMAs).[290] One of the consequences of this failure is that traditional communities lose out on the potential of influencing the management of water resources through engagement with CMAs.

Local conflicts around governance persist within traditional communities, and views of traditional leaders on specific issues do not necessarily represent the collective view of a community. For instance, the Minerals and Petroleum Resources Development Act acknowledges the inclusion of traditional communities in local mining activities, mostly through continued royalty payments, black economic empowerment, mine-community partnerships, and social labour plans.

Through the mechanisms above, traditional leaders have become mediators of mineral-led development and mining deals[291], and instead of increasing the involvement of rural communities in mining economies, chiefs have become more powerful. As a result there has been less transparency and accountability, heightened inequality, deepened poverty and increased tensions between local communities and traditional leadership.[292] In rural communities under traditional leadership, such as the Bakgatla-ba-Kgafela traditional authority community[293] and the Kgobudi Traditional Community[294], the focus of local movements is on ensuring that monetary benefits of mining activities are equitably shared or

[289] Glazewski & Young op cit note 251.
[290] Ramin Pejan & Jonathan Cogger 'The Application of Assignment and Delegation within the Context of the National Water Act: The Implications for Catchment Management Agencies' (2013) 130 *SALJ* 125.
[291] Sonwabile Mwana 'Chief's Justice? : Mining, Accountability and the Law in the Bakgatla-ba-Kgafela Traditional Authority Area'(2014) 49 *SA Crime Quarterly* 21.
[292] Ibid.
[293] Ibid.
[294] Facts in *Platreef Resources (PTY) Limited v Kgobudi Traditional Community* 2013 JDR 0062 (GNP) relate to the community's contestation of authority of a traditional leader, and therefore validity of agreements entered into by the traditional leader with a mining company.

used for the community's benefit. As a result environmental concerns such as water contamination tend to not play an important role in community politics.

Urban based litigation organisations such as Lawyers for Human Rights, Legal Resource Centre, and Centre for Applied Legal Studies have started to provide legal assistance to rural communities. Since representation is done on a case by case basis, most of the cases tend to deal with evictions from farm land, land restitution, and the protection of natural heritage from commercial activities that may be destructive. However, cases such as those affecting the Carolina and Blyvooruitzitcht rural communities were directly related to water and access thereto. Even in cases where rural communities are involved, there is seldom a common view between communities and traditional leaders. Cultural values seldom play a role in the articulation of rights by rural communities, so the cultural aspect of water justice in South Africa is virtually non-existent.

(d) Procedural Water Justice

Approaches that consider substantive contents of rights are important in determining duties that specific rights impose on state functionaries and other actors. In order for a right to be fully enjoyed, there needs to be clarity on what the right entails, and how it can be protected. In Section 1.2.4 of the introductory chapter, it was asserted that litigation for water justice draws heavily on administrative justice, with a consequence that substantive water justice questions play a minimal role in litigation strategies. An underlying argument is that a reliance on administrative law for fulfilment of substantive justice limits substantive remedies by encouraging reviews on narrow grounds.

However, procedural law plays an important role in ensuring fairness (at least *prima facie*) and predictability in democratic processes. As discussed in Chapter Two, the South African Constitution provides for procedural safeguards in order to ensure the accessibility and enjoyment of rights. Promotion of access to information and administrative justice are basic

necessities for ensuring that the ecological, distributive, and cultural aspects of water justice are attained. There is a view that courts tend to have a preference for procedural remedies that promote political solutions when dealing with environmental and socioeconomic rights.[295]

Procedure also plays an important role in supporting participatory democracy and contributing to rights enforcement processes through procedural remedies. The latter offer alternative mechanisms of enforcing rights outside of direct litigation. When properly developed, procedure can give communities an important enforcement tool.[296] As discussed in Chapter Two, the expansion of *locus standi* that was brought about by section 38 of the Constitution has transformed the justiciability of rights, especially of socioeconomic rights. While section 38 of the Constitution provides for broad *locus standi* on human rights issues, section 32 of NEMA[297] provides for similar standing for environmental cases. However, our courts' interpretation of laws of standing in environmental rights issues have been criticised for a failure to interpret the provisions of NEMA correctly.[298]

Civic society movements and litigating NGOs use procedural rights to attain maximum outcomes for clients and communities. Methods include insisting on the implementation of meaningful engagement with communities when government and private entities develop plans that may affect the wellbeing of communities, assisting communities in accessing information relating to mining activities in their environment, and making procedural arguments during litigation for substantive rights.

Meaningful engagement has become a requirement for proving reasonableness of government policy in socioeconomic rights cases, and

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[295] Brian Ray 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 *SAJHR* 107.
[296] Ibid.
[297] Section 32(1) of NEMA makes provisions that mirror those of section 38 of the Constitution with regard to standing in environmental matters.
[298] M Kidd 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) 13, 5 *PELJ* 27.

it also functions as a remedy in cases where there was insufficient engagement prior to litigation. The value of meaningful engagement lies at the intersection between substantive rights and administrative law. In these cases, the concept of meaningful engagement has the potential of being incorporated with normative content.[299]

The importance of engagement for its own sake, and as a key way to pick up potential points of litigation, is highlighted by a participant who was asked about the infusion of procedural law in environmental litigation.

> *You know, you can't always litigate. So we were, through these stakeholder engagements, we were beginning to get what litigation would give us. We were beginning to get access to government departments sitting with us, hearing from us what our concerns were and our now clients, and committing to doing something. So, when I left, that stakeholder engagement forum was meeting regularly and committing to doing something. But whether or not that was successful, I'm not sure. But with all engagements, your rights to litigate are always reserved*.[300]

The procedural aspect of water justice transcends the other aspects, and in spite of conceptual differentiation can often not be separated from substantive human rights.

3.4 Conclusion

Litigation is used by public interest organisations in a number of ways. The most prominent use of litigation is as a matter of last resort, after a combination of other strategies such as engagement, petitioning, campaigning, and protests have failed. Perhaps the most important contextual factor affecting the use of litigation is the socio-political context within which the strategy is applied. The change in role of public interest litigation organisations, from being concerned with political rights and having relatively large sponsorships, to focusing on social or developmental issues and having to contend with reduced funding, affects

[299] Shanelle Van Der Berg 'Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law with Substance?' (2013) 29 *SAJHR* 376.
[300] HRLJHB1_161121 Interview.

litigation as a strategy in a number of ways. Yet generally speaking, the performance of organisations is measured primarily by how they perform in specific cases. This success in turn has an impact on the ability of an organisation to raise funds.

In South African legal practice the ecological aspect of water justice is fractured. Organisations involved in environmental conservation and those working on environmental justice hardly cooperate. Conservation interests are broadly represented by environmentalist organisations that are generally still treating social inequality as a peripheral issue. Human rights organisations, on the other hand, represent communities whose views on environmental concerns relate to their specific and immediate circumstances, with little attention paid to broader conservation concconerns. As a result, even in instances where litigation is used to assert environmental rights, the concept is not presented in a comprehensive manner.

Community based organisations rely on public interest organisations to litigate around the promises of social development and equality. Due to conflicts at local level relating to access to water, the distributive aspect of water justice is the most prominent, while the cultural aspect is virtually absent in South African legal theory and practice. There have been efforts to acknowledge the role played by customary law and cultural communities, but factors such as the abolition of the riparian system of water governance have meant that land redistribution and the recognition of customary law have had virtually no impact on the cultural aspect of water justice. In principle there is room for communities under traditional leadership to participate in water management as stakeholders. However, the failure to establish functioning Catchment Management Agencies on the one hand, and conflicts of legitimacy between communities and traditional leaders on the other hand, have rendered stakeholder participation impossible.

The procedural aspect of water justice is the most commonly used despite criticism that it narrows down substantive rights, and that it limits the development of normative content on human rights. Principles of administrative and procedural fairness form a basis for most reviews of government actions and decisions. Factors that affect the use of procedural remedies include the prescription of specific procedures by legislation, and the relative ease of proving a procedural case. Given the context around different approaches to litigation in this chapter, the next chapter will analyse the use of litigation with a focus on specific cases.

Chapter 4: Courting Water Justice

4.1. Introduction

In Chapter Three the use of litigation as a strategy for asserting rights was discussed. When it became apparent that promises of constitutional democracy were not being fulfilled for a majority of the population in South Africa, the collaborative relationships that existed between many NGOs and government shifted to become more confrontational. Basic services for marginalised people were being rolled out at a snail's pace, and government practice did not prove inclusive. Dissatisfaction in communities grew, resulting in an increasing use of litigation as a strategy for accessing constitutional rights.

The previous chapter focused on external factors that affect the use of litigation as a strategy. This chapter will focus on jurisprudence around each of the four aspects of water justice. A number of prominent cases that define water justice jurisprudence will be discussed. Insight drawn from interviews with litigation specialists will be used in the analysis of factors that shape the nature of the jurisprudential development on water justice. The subsidiary research question underpinning the discussion in this chapter is: what are the current approaches to litigation for the right to water, and why are they chosen?

The discussion in Chapter Two focused on the way in which the four aspects of water justice are articulated within the South African legal context, which is underpinned by the constitutional framework. It was indictaed that water justice litigation is primarily articulated through the human rights discourse. The section below will go into detail by looking at cases dealing with the right to access to sufficient water as provided for in the Constitution and in legislation. The chapter will then discuss prominent environmental rights cases. Firstly, factors that dominate contestation in environmental cases will be outlined, and then judicial interpretation of environmental rights as demonstrated in case law will be examined. It will be argued that the complexity that is inherent in the litigation of

environmental law discourages the development of substantive environmental rights jurisprudence. Finally existing jurisprudence around each of the four aspects of water justice will be discussed.

4.2. South African Jurisprudence and Water Justice

4.2.1 Water from the Tap: Service Delivery Provision Jurisprudence and Water Justice

In South Africa's democratic reform, the provision of basic services was an urgent societal need. Chapter Two outlined the reasons why distributive justice is the most common starting point for theorising just service provision. As one participant concurred, when answering a question of what water justice means and what it should include, a definition of water justice in South Africa needs to start with considerations of daily access to clean drinkable water. According to this participant, the number of people who do not have actual access to water means questions of access take priority over questions related to other aspects of water justice.[301]

Poor urban and rural communities have inadequate and often no water services, as highlighted in Chapter One. This explains why access to water services often dominates the South African water justice discourse. What follows is a discussion of a number of cases concerning the question of access to water. South African jurisprudence on the right to water consists of cases dealing with specific issues which include the disconnection of water services due to non-payment, questions of whether a minimum regulated amount constitutes 'sufficient' water for purposes of the right (and whether installation of pre-paid meters is lawful), and what would constitute sufficient water in a situation where normal reticulation systems do not provide access to water. The dearth of jurisprudence dealing with access to water for productive purposes under the NWA means that this issue will not be explored in detail in this study.

[301] HRLJHB2_161205 Interview.

(a) Termination of Water Services

There are a number of cases that deal with the provision of water services and the relationship between water service providers and water users. This discussion will focus on cases where the question of water service provision has been framed around human rights (as opposed to common law remedies such as *mandamus van spolie* for instance). Some of the cases brought to court earlier in the constitutional era where the right to water was dealt with include the *Manqele*[302] and *Bon Vista Mansions*[303] cases. These cases invoked not only the constitutional right to water, but also dealt with various provisions of the WSA.

In *Manqele*, an unemployed mother of four had water supply to her municipality-owned flat disconnected as a result of her inability to pay for municipal services. Relying on the right to water as provided for in Section 3 of the WSA, the applicant sought a declaratory order against the municipality (the respondent in the case) stating: [that] the discontinuation of basic water services to her flat was unlawful and invalid because the by-laws in terms of which the disconnection was effected were contrary to provisions of WSA, that procedures of disconnection did not comply with provisions of section 4 of WSA, and that the result of the disconnection was that she and her dependents were denied access to basic water services as a result of their inability to pay.[304]

When the *Manqele* case came before court, there were no regulations that prescribed minimum standards for water supply services necessary for the reliable supply of sufficient quantity and quality for households to support life and personal hygiene. *In casu* the court was of the view that there was no prescription of a minimum standard of water supply service that would meet the definition of 'basic water supply' as defined in the WSA.[305] The court went on to reject the applicant's argument that the constitutional right of access to sufficient water means the WSA must be read to incorporate,

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[302] *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D) (Hereafter *Manqele*).
[303] *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (Hereafter *Bon Vista*).
[304] *Manqele* at 424 G-I.
[305] *Manqele* at 426F.

at the very least, access to a specified amount of water that would meet the constitutional requirement.[306] The Court found that without regulations, there was no guidance with regard to the quantitative content of the right to water.

Interpretation of the right to water in this case was narrow and legalistic. While the applicant relied on the Water Services Act to enforce their rights, this should not necessarily have the effect of overshadowing the constitutional basis of the right. While a litigant cannot directly rely on a constitutional right in an instance where an Act is enacted to give effect to that right,[307] relying on a right provided for in a statute does not remove the constitutional basis of the right. The court's narrow interpretation *in casu* potentially falls fowl of principles laid down in section 39(2) of the Constitution.

The case would have been more complex had the court been asked to "pronounce upon and enforce upon the respondent the quantity of water that the applicant is entitled to have access to."[308] However, having accepted the fact that the WSA is indeed intended to fulfil the constitutional right to water, a contextual interpretation taking into account other human rights contained in the Constitution and promoting the values of the Constitution would seem to be apposite. A more appropriate interpretation of the issues would have made it apparent that the court did not need to determine the quantity to which the applicant was entitled, but rather the court was required to decide whether cutting off someone's water supply altogether accorded with the right to water in WSA, which is a right that stems from the Constitution.

Progressive realisation is a restriction on a person's ability to claim a right immediately, but disconnection deals with an infringement on a right that was already realised. The facts of the *Manqele* case exhibit the persistent

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[306] *Manqele* at 427A – C.
[307] Confirmed in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) per Ngcobo J para 436.
[308] *Manqele* at 427D.

inequality of access to water services, underscoring that women in South Africa are often the worst affected by poverty and inequality. The personal circumstances of litigants often shape socioeconomic rights litigation, but insufficient attention is paid to the gendered dimensions of access.

Nearly a year after the Durban and Coast Local Division of the High Court (as it then was) heard the *Manqele* case, the Witwatersrand Local Division (as it then was) heard an urgent case on the disconnection of water supply to a block of flats. In the *Bon Vista Mansions* case, the urgent application for reconnection of water services was granted. While the decision may have been based on the specific arguments applicants placed before the court, one of the differences between the *Manqele* and the *Bon Vista Mansions cases* is the court's clear acknowledgement in the latter case of the constitutional context within which the issues were located.

The court's view in *Bon Vista Mansions* was that issues that involve the basic and essential service of water provision and sanitation are inherently urgent. This in itself demonstrates a progressive view of the need to protect rights enshrined in the Constitution.[309] The court in this case not only took the constitutional right in section 27(1)(a) as a point of departure, but also dealt with duties of the state in terms of section 7 of the Constitution.[310] The court was of the view that the issues not decided at that stage of the case did not concern the duty of the municipal council to fulfil the right of access to water (which the court noted places a positive duty on municipal council), but the duty placed on the council to respect the right to access to water.[311] The court went on to hold that since the applicants in the case had existing access to water prior to the disconnection, the act of disconnecting the supply was *prima facie* breach of a constitutional duty to respect the right of access to water. Following the constitutional two-stage approach of adjudicating limitation of rights, the court held that the onus falls on the Council to justify the breach.[312]

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[309] *Bon Vista* para 10.
[310] Section 7(2) of the Constitution provides that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.
[311] *Bon Vista* para 13.
[312] Ibid para 20.

The case of *Joseph*[313] does not concern termination of water services, but is relevant for the insight it offers on how the Constitutional Court approaches the termination of municipal services. Briefly, the case in the Constitutional Court was an appeal against a judgment of the South Gauteng High Court (as it then was).[314] The applicants were residents of a block of flats to which the respondents supplied electricity services. The respondents disconnected electricity supply to the building due to non-payment of services by the owner of the building, subsequent to which the applicants brought an urgent application to the High Court in which they sought in part for immediate reconnection of electricity. The High Court dismissed the urgent application with costs.

In the second part of the application, applicants sought to have the court declare that the disconnection of electricity by the respondents was unlawful for failing to follow proper process; that is, giving the occupants an opportunity to make representations and taking their personal circumstances into account prior to disconnection, in compliance with requirements of just administrative action.[315] Applicants argued that administrative justice required the respondents to comply with procedural fairness prior to disconnecting electricity to their building, and also that the right to housing as provided for in Section 26 of the Constitution required that personal circumstances must be taken into account prior to taking measures that might adversely affect that right.[316]

As a secondary argument, applicants contended that access to electricity is an integral part of the right to housing in the circumstances of the case. The High Court rejected this submission, stating that:

> *There is no absolute right of access to electricity let alone a right to an uninterrupted supply of electricity where the municipal provider has not been paid and where the consumers are not indigent persons. This is to be contrasted*

[313] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).
[314] *Darries and Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ) (Hereafter *Darries*)
[315] Ibid para 3.
[316] *Darries* para 5.

> *with the right of access to sufficient water – which itself is guaranteed as a fundamental right in s 27(1)(b) of the Constitution. There is no similar provision in relation to electricity. In terms of the Water Services Act, disconnection is not permitted as this would endanger the health of the residents, and if they are unable to pay for the service. In the present matter, there is no statutory protection against disconnection as in the Water Service Act, nor are the present applicants persons who are indigent and who qualify for assistance in terms of the relevant by-laws.*[317] [Footnote omitted. Own emphasis]

The decision of the court in this case was overturned on appeal, but the reasoning of the court demonstrates some of the difficulties that courts have when having to adjudicate substantive socioeconomic rights. In this case, the court conflated a question of whether a specific right exists in specific circumstances, with that of whether the right was violated. Whether a right to electricity exists as part of the right to housing has nothing to do with whether the municipality was paid for providing such services. The court's reasoning seems to imply that had a right to electricity existed as part of the right to housing, interruption of electricity supply would not constitute infringement without a statutory provision to that effect. In other words, in order to be an infringement of a right, an act needs to be specifically prohibited by statute. With respect, this is clearly not our law, and is certainly not in accordance with the promotion of the spirit of the bill of rights.

After the High Court dismissed the application on the basis that there was no contractual relationship between the City and the occupants of Ennerdale Mansions, the applicants approached the Constitutional Court. The appellants sought for reconnection of electricity supply and an order declaring that they were entitled to procedural fairness.[318] From the outset, the Constitutional Court was of the view that the High Court misconstrued the issue by starting its enquiry with the city's Credit Control By-Laws instead of dealing with it as a PAJA enquiry.

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[317] Ibid para 39 – 40.
[318] *Joseph* para 1.

The High Court failed to take into account the role of PAJA in circumstances where people had no contractual relationships with a public service provider.[319] The Constitutional Court held that the relationship between a municipality and citizens is based on the constitutional and legislative public responsibility that a municipality has towards people in its jurisdiction, beyond that of contract.[320] Viewing the issue from a broader constitutional relationship perspective, the court focused on obligations that a municipality has. Rights and obligations based in public law arise as a result of various legislative and constitutional provisions that place obligations on local government to provide basic services.[321]

Having adopted an approach that took into account the responsibilities that local government has in terms of the Constitution and legislation, the court went on to hold that administrative justice within the democratic context requires that Section 3(1) of PAJA be interpreted purposefully, and that it include legal entitlements that are based on constitutional and statutory obligations of government.[322] The Constitutional Court found that a failure to follow proper procedures in terminating electricity services was unlawful, and that electricity by-laws that provide that electricity can be disconnected without notice are unconstitutional.

The cases discussed above demonstrate a combination of progress and setbacks in the application of human rights focused interpretative approaches to law. The restrictive interpretative approaches in *Darries* and *Manqele* allowed for disconnections of essential services. On the other hand, interpretative approaches adopted by the High Court in *Bon Vista Mansions* and the Constitutional Court in *Joseph* placed human rights at the centre of purposive interpretation. Emphasis was placed on constitutional responsibilities, rather than powers of organs of state.

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[319] Ibid para 22.
[320] Ibid para 25.
[321] Ibid para 40.
[322] Ibid para 43.

(b) Quantifying 'Sufficient' Water: the *Mazibuko* Case.

The *Mazibuko*[323] case is so far the most prominent case in South African water justice jurisprudence. In addition to being the first case to be brought to the Constitutional Court for specific adjudication on the Section 27 right to water, it has received considerable attention from local and international scholars. Prepaid water meters were installed in the Phiri township of Soweto by the Johannesburg Water company in 2004. A number of residents launched an application in the High Court challenging both the lawfulness and constitutionality of the installation of prepaid water meters, and calling into question the sufficiency of the Free Basic Water allocation.[324] The applicants also challenged the Regulations Relating to Compulsory National Standards and Measures to Conserve Water, and sought a declaratory order that each resident was entitled to 50 litres of water per person per day.[325] The role of the Centre on Housing Rights and Evictions as *amicus curiae* in this case is important. The High Court noted that the NGO was admitted in the proceedings 'to address the legal right to water in the context of international and comparative law.'[326]

In the Constitutional Court, the main issues to be decided on were whether the City's policy to supply six kilolitres of free water per month to every accountholder in the city was in conflict with Section 27 of the Constitution or Section 11 of the WSA, and whether the installation of pre-paid meters in Phiri was lawful.[327] The court held that when coupled with section 27(2), Section 27(1)(b) would not require state to provide every person with sufficient water. The right rather requires the state to take reasonable legislative and other measures to progressively realise the achievement of the right to sufficient water within available resources.[328]

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[323] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (Three judgments relating to this case are discussed in this paper. Abbreviations HC and SCA will be used to indicate when judgment of the High Court or Supreme Court of Appeal respectively. Mere reference to *Mazibuko* will be referring to the Constitutional Court case/judgment).
[324] Patrick Bond & Jackie Dugard 'The Case of Johannesburg Water: What Really Happened at the pre-paid 'Parish Pump' (2008) 12, 1 *Law, Democracy & Development* 1.
[325] *Mazibuko* (HC) para 11.
[326] Ibid para 13.
[327] *Mazibuko* para 5.
[328] Ibid para 50.

The Constitutional Court held that the applicants' argument that the court should determine the content of the right in Section 27(1)(b) as amounting to 50 litres per person per day is similar to the minimum core argument that was advanced in earlier cases and rejected by the Court.[329] The court also indicated that what a right requires depends on the situation, and therefore causing the fixing of a quantified standard would be counter-productive to a dynamic analysis of context. The concept of reasonableness places context at the centre of the enquiry and allows for an assessment of context in determining whether a government programme is reasonable.[330] This means the Constitutional Court overturned both the High Court and Supreme Court of Appeal judgments.

The High Court and SCA had found that the City's Free Basic Water policy was based on a misinterpretation of its constitutional obligations. The City had held a view that it had no obligation to provide a specific amount of free basic water.Findings of the court of first instance and court *a quo* were overturned by the Constitutional Court on this issue. The Court held that the City was not under any obligation to provide a particular amount of free water to citizens per month, but that it was required to take reasonable measures to realise the achievement of the right for access to water.[331] This was a departure from the High Court's view that the City's obligation to provide access to water included both physical and economic access.[332] On the question of the lawfulness of installing pre-paid water meters, the court of last resort held that the City's by-laws can be interpreted in a way that authorises the installation of pre-paid meters. On whether the pre-paid meters were installed through an unlawful process, the court held that the City Council was exercising executive powers which were not subject to review in terms of PAJA.[333]

The applicants' argument that the court should determine the content of the right to water by quantifying the amount that would be sufficient for dignified

[329] Ibid para 50 – 56.
[330] Ibid para 60.
[331] Ibid para 85.
[332] *Mazibuko* (HC) para 41.
[333] *Mazibuko* para 131.

life was taken by the court to be similar to an argument for a minimum core. The court held that the argument ought to fail for the same reasons that it failed in the *Grootboom* and *Treatment Action Campaign* cases.[334] The striking dissimilarity between the abovementioned cases and the *Mazibuko* case is that the state had already set a minimum standard with regard to water, through regulation 3(b). Therefore the court's judgment can be criticised because the minimum was set by the executive arm of the state, and the court's adjudication should have focused on whether it is reasonable to require an organ of state to provide more than the minimum in instances where such organ of state does not argue that it has insufficient resources to do so.

On the question of determining a minimum amount of water that is required for dignified human life, both the High Court and the SCA were persuaded by the arguments on international law. A participant in the study notes that considering the Constitutional Court's stance in the *Grootboom* and *TAC* cases, arguments requiring a focus on international law were less likely to succeed in this case.[335] Some of the criticisms of the *Mazibuko* judgment relate to the court's apparent inability to appreciate the actual socioeconomic conditions of the applicants in the case. According to Kidd, the court's judgment was flawed because there was no sufficient consideration of the fact that residents in Phiri were among the poorest and their inability to pay for the extra water consumed would mean that many of them would spend a significant part of the month without water.[336]

As discussed in the previous chapters, in the South African context the inaccessibility of water services is closely linked to poverty. Dugard and Maohlakoana[337] discuss the gender-based inequities of poverty, and how they affect access to basic services. Expressing views that are similar to those discussed by the participant above, they argue that

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[334] Ibid para 52 – 56.
[335] HRLJHB3_161205 interview.
[336] Kidd, M. 2011 *Environmental Law* 2 ed cited in Couzens op cit note 259. It is important to note that this criticism by Kidd does not seem to appear in the latest edition of the work cited.
[337] Jackie Dugard & Nthabiseng Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25 *SAJHR* 546.

> *In South Africa… women bear the brunt of water and energy services-related problems. Insufficient access to resources such as water and electricity increase women's vulnerability to sexual exploitation and gender violence in the home. For this reason it can be said that both poverty and basic services have a gender.*[338]

Roithmayr points out that while the court's opinion focused on whether the installation of pre-payment of water meters in Phiri was based on an acceptance of the City's cost recovery policy by the court, there was no interrogation of the context of historical poor bill payment by the community of Phiri.[339]

The court's rejection of the minimum core principle, and its emphasis on the need to defer decision making in assessing the rights of access for those who cannot afford water are some of the reasons that Liebenberg provides for questioning rights-based litigation's ability to advance the cause of dismantling inequality.[340] Liebenberg argues that the court's approach to the facts of the case failed to give independent significance of the Section 27(1)(b) right to water. Instead, it focussed on the reasonableness requirement of section 27(2).[341] Liebenberg criticises the reliance on reasonableness as the predominant means of assessing the content of a right, suggesting that it illustrated a disappearance of the Constitutional Court's willingness to scrutinise government action.

> *But whatever the Court's willingness to scrutinise government had been in TAC appears (at least for the moment) to have disappeared in Mazibuko. In the latter case, the Court seemed to recant or reinterpret the earlier TAC language as relatively limited to extending pre-existing government policy, ostensibly because the government had already committed to rolling the drugs out for the entire population. Finding the notion of defining a minimum core of*

[338] Ibid at 548.
[339] Roithmayr op cit note 31.
[340] Ibid at 321 – 323.
[341] Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010).

> *obligation to be too intrusive, the Court retreated behind principles of reasonableness and progressive realisability to a more deferential stance, and refrained from giving substantive content to affirmative socio-economic rights.*[342]

The *Mazibuko* judgment is a conservative judgment that saw the right of access to sufficient water 'de-prioritised' by the Constitutional Court.[343] Being the first case on the right to water to be brought to the Constitutional Court, the role of *Mazibuko* in the development of jurisprudence on the right to water in particular, and socioeconomic rights in general cannot be underestimated. While the applicants were unsuccessful in obtaining the remedies they sought, the judgment has been used as precedence in a number of subsequent cases, such as the *Carolina* case discussed below. Even in *Mazibuko,* the court accepted that the City's continued review of their by-laws and basic water policies may well have been spurred by the litigation *in casu*.[344]

(c) 'Sufficient' Water in Times of Emergency, or a Missed Opportunity for Water Justice Jurisprudence: The *Carolina* Case[345]

This case was brought through an urgent application to the High Court. The case came about as a result of the interruption of water service supply to residential areas around the town of Carolina in Mpumalanga. The local water supply was contaminated by mining activity, so potable water was provided through water tanks. This provision of water services proved to be insufficient and the supply of water was unreliable. Applicants were seeking an order that would declare a failure of some of the respondents to provide access to reliable potable water for more than seven full days to be unlawful, directing some of the respondents to provide temporary potable water in line with regulations relating to national standards, and directing

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[342] Roithmayr op cit note 31 at 323.
[343] Couzens op cit note 259.
[344] *Mazibuko* para 96.
[345] *The Federation for Sustainable Environment and Another v The Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 428 (hereafter *Carolina* case). There were four judgments delivered in this case, that of the 10 July 2012, 26 July 2012, 03 August 2012, and 09 September 2014. The date of the judgment in question will be indicated each time it refers.

some of the respondents to engage with the community on steps being taken to ensure a restoration of water supply in the area.[346]

The applicants' case was that the failure to provide an effective and reliable supply of potable water to the residents of Carolina constituted an infringement of their right of access to water in terms of Section 27 of the Constitution. Based on the fact that the failure to provide water services through water supply infrastructure was a result of contaminated of water, the applicants in this case also demanded that respondents put measures in place to mitigate and prevent water pollution in the future. Such measures needed to be made in consultation with residents and other affected parties.[347] The court proceeded to discuss judgments that indicate the importance of acknowledging the impact of the legacy of apartheid on the deprivation of rights that people still experienced, and indicated that it is within this context that the issues in this case needed to be viewed.[348]

Water pollution played an important role in the events that led to this case, but there was no reference to the right to an environment that is not harmful during litigation, which would include the prevention and mitigation of pollution. As a result, environmental rights are not considered part of the context within which the issues in the case were to be viewed. The applicants' written submissions indicate that the interruption that occurred as a result of a contamination of water supply through acid mine drainage resulted not only in the death of fish in the dam that supplied the town, but also caused the water to be unsafe for human consumption. It further caused a need for the provision of emergency water supply and development of a reasonable plan for the restoration a safe water supply.[349] In making a case for urgency, applicants submitted that access to safe drinking water was inherently urgent because it is a basic human need that, if the fulfilment of which had to wait, the matter would threaten health, well-being and even lives of human beings.[350]

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[346] *Carolina* (10/07/2012) para 3 – 4.
[347] Ibid para 6 – 7.
[348] Ibid para 9.
[349] *Carolina* (Applicants' heads of argument, 12 June 2012) para 2, 5 – 6.
[350] *Carolina* (Applicants' heads of argument, 12 June 2012) para 14.

Applicants in the case relied on Section 27 of the Constitution, the Constitutional Court's judgments in *Mazibuko* and *Grootboom*, and the Water Services Act and Regulations. The applicants made a case that the respondents were compelled to provide a certain amount of potable water, to take measures to restore safe water supply through the existing infrastructure, and to ensure that there was meaningful engagement while doing so. There was no mention of the constitutional right to environment and how it applied to the facts of the case. This was a lost opportunity for substantive articulation and application of the right to environment as provided for in Section 24 of the Constitution. The significance of the lost opportunity is apparent in the court's later judgment in the case.

> *Both district municipality and local municipality are obliged to respect the rights of the communities in their area, that are enshrined in the Bill of Rights. The right in issue in casu is enshrined in s27(1)(b) of the Constitution. The particular section does not only guarantee being provided with basic water, but it is much profound. It deals with health as well (27(1)(b). <u>This section also places, in my view, an obligation on all spheres of governance to ensure a healthy environment to the communities</u>*.[351] [Footnote omitted. Own emphasis].

Fulfilment of the right to water places a number of obligations on the state. Additionally, realisation of the right has wide ranging implications for the dignity, health and environmental wellbeing of citizens. However, the right to a healthy environment in the South African context does not need to be implied in the right to water in Section 27 of the Constitution, since it is explicitly provided for in Section 24. Environmental legislation passed in fulfilment of Section 24 needs to be read, interpreted, and applied wherever relevant.

Water resource protection and management were not directly at issue in this case. The conflation of technical terms by the courts do not assist in obtaining clarity on the obligations that various government spheres and

[351] *Carolina* (26/07/12) para 13.

agencies have in order to ensure the fulfilment of constitutional obligations. In an application for appeal in the same case, some of the respondents contended that since there were no people dying as a result of consumption of polluted water in the area, the water must be of sufficient quality for human consumption.[352] This attitude by government leadership demonstrates, among other things, a failure to comprehend the nature of the obligations and duties they have emanating from constitutional human rights. Fortunately the court was not persuaded by the argument *in casu*.

Litigation of the *Carolina* case can be criticised for not bringing in an obvious environmental component. The context within which the case was tried helps explain why this approach was chosen by litigators. A majority of pollution-related litigation is channelled through the water tribunal, which links to applications for mining.[353] Challenges with pollution are on-going, and occur mostly through catchment management agencies and their ability to do their work, whereas in this case the community required an urgent application focussed on immediate access to water.

4.2.2 Environmental Rights Jurisprudence and Water Justice

Environmental law jurisprudence in post-apartheid South Africa is based on the provisions of Section 24 of the Constitution. As discussed in the previous chapters, ecological justice is a key aspect of water justice. Environmental protection takes place in a context where mining and industrial pollution not only adversely affect conservation, but also form an important economic activity. The legal framework acknowledges the delicate balance of encouraging economic development on one hand, and conserving the environment on the other. The wording of the provision for the right to an environment that is not harmful makes it apparent that there is a potential for conflict between environmental conservation and sustainable development.[354]

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[352] *Carolina* (26/07/2012) para 23.
[353] HRLJHB4_161208 Interview.
[354] LJ Kotze 'The Constitutional Court's Contribution to Sustainable Development in South Africa' (2003) 6, 2 *PELJ* 1.

The environmental right is itself generally underused in litigation.[355] But there is also little litigation invoking the relationship between the right to water and the protection of water resources contained in the right to environment. Environmental rights jurisprudence is developed by litigation, which concretises legislative provisions through interpretation. Adjudication of the right to environment will provide guidance to the executive and legislative authorities when facilitating sustainable development and protecting the environment.[356] This adjudication can also play a role in attaining of water justice, considering the significance of ecological justice relating to water pollution and use in South Africa.

The two subsections below are brief discussions of environmental law jurisprudence. In subsection (a), a number of cases dealing with environmental pollution are discussed, and in subsection (b) the discussion will focus on general environmental rights jurisprudence to highlight the outlook of South African courts on environmental issues. This will not be a discussion of every environmental case, but those with particular importance and relevance for the development of water justice jurisprudence.

(a) Water Pollution Jurisprudence

A majority of reported cases of environmental pollution in South Africa focus on air pollution, with only a handful dealing with water pollution. The case of *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*[357] demonstrates the potential for conflict between environmental, developmental, and administrative rights.[358] The case was an appeal from the High Court on the question of whether interested parties are entitled to raise environmental objections and be heard by the official designated to grant (or refuse) mining licences.[359]

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[355] Feris op cit note 190.
[356] Kotze op cit note 354.
[357] 1999 (2) SA 709 (SCA) (Hereafter *Save the Vaal Environment*)
[358] Gerrit Ferreira, Willemien du Plessis & Kobus van der Walt 'A licence to Mine, Audi Alteram Partem and NEMA: *The Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (SA) 709 (SCA)' (1997) 4 *SAJELP* 243.
[359] *Save the Vaal Environment* at 713G-H.

While considering an application for a mining licence, the Director of Mineral Development *in casu* indicated that he was neither obliged nor prepared to hear opposition by respondents, an unincorporated association of members who owned property near a part of the Vaal River that would be affected by the mining activity subsequent to the licence being granted.[360] The Court held that the *audi alteram partem* rule applies when an application for a mining licence is made to the Director in terms of Section 9 of the Minerals Act.[361]

The *Save the Vaal Environment* case deals with the natural justice principle of *audi alteram partem*, but the constitutional protection of procedural justice and environmental rights provides for broader rights and standing than was present in the common law principles of natural justice.[362] The case of *Petro Props (Pty) Ltd v Barlow and Another*[363] dealt with an application for an interdict against activities of a group of residents opposed to the construction of a petrol station on private property that had an environmentally sensitive wetland. The court held that the facts of the case required an adjudication of the balance between the rights of property ownership on one hand, and freedom of expression on the other.[364]

Concluding that a campaign undertaken by the respondents did not constitute an unlawful infringement on the applicant's rights, the court found against the application for interdict.[365] The court's acknowledgment of freedom of expression in environmental protection efforts is very important. Enforcing court orders is one of the major challenges to using litigation as a strategy to asserting rights, the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others*[366] provides an example of a situation where a company and its directors were held to be in

[360] Ibid at 714B-E.
[361] 50 of 1951.
[362] Ferreira *et al* op cit note 358 at 249.
[363] 2006 (5) SA 160 (W) (Hereafter *Petro Props*).
[364] *Petro Props* at 180C.
[365] Ibid at 190C.
[366] 2006 (5) SA 333 (W).

contempt of court for a failure to comply with a court order seeking to enforce compliance with directives issued in terms of the NWA.

(b) Adjudicating the Conflict of Environmental Rights and Socioeconomic Rights

The constitutional court cases of *Kyalami Ridge*[367]and *Fuel Ret*ailers *Association*[368] dealt with what is often described as a conflict between environmental protection and socioeconomic rights. In the former, the balance between environmental and other socioeconomic rights was seen as a conflict, while the majority judgment in the latter case articulated the balancing required through the principle of integration, which is the core of sustainable development.[369]

The *Kyalami Ridge* case was the first case where the Constitutional Court was asked to consider the rights provided for in Section 24 of the Constitution. While it is not strictly related to water, it offers insight into how the Constitutional Court views and interprets the right to an environment that is not harmful. Residents (under the auspices of the Kyalami Ridge Environmental Association) did not rely only on section 24 when they obtained an interdict against the Minister of Public Works and a contractor against the establishment of a temporary settlement on land owned by the state where a prison was located. The establishment of the settlement was a decision taken by various government entities to house people from Alexandra township who were rendered homeless after heavy rains and floods.Arguments made by the Kyalami Ridge residents were that the decision taken by the government to establish the settlement infringed their constitutional right to just administrative action and to certain environmental rights.[370]

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[367] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (*Mukhwevho Intervening*) 2001 (3) SA 1151 (CC) (Hereafter *Kyalami Ridge*).
[368] *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) (Hereafter *Fuel Retailers Association*).
[369] Tumai Murombo 'From Crude Environmentalism to Sustainable Development: *Fuel Retailers*' (2008) 125 *SALJ* 488.
[370] *Kyalami Ridge* para 24.

In the Constitutional Court, the Kyalami residents contended that the establishment of the transit camp would damage the environment.[371] The court held that provisions of section 2 of NEMA that applicants relied on were "directed to the formulation of environmental policies by relevant organs of state, and the drafting and adopting of their environmental implementation and management plans, rather than to controlling the manner in which organs of state use their property."[372]

The court's interpretation of section 2, which places the environmental implementation and management plans at the forefront of NEMA, has been criticised for restricting the purpose of the Act to only one of the aims of NEMA.[373] Therefore, the court's conclusion that the principles in section 2(1) are not directed at controlling how organs of state use their property may be based on an erroneous reading of the section. The section provides in part that "the principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment" (emphasis added). The qualifier in the section seems to be that which 'may significantly affect the environment'.

The court goes on to acknowledge that a report presented by the respondents in evidence, although based on hypotheses according to the court, raises concerns that there are possibilities of soil erosion, air pollution, water pollution , and damage to flora and fauna. However, the court held that since principles set out in section 2 of NEMA apply only to activities that 'may significantly affect the environment', the respondents had to show that the proposed development would be of that character. Based on this approach, the court proceeds as follows (emphasis added)

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[371] For this contention, they relied on provisions of section 24 of the Constitution, section 2(4)*(g)* and *(k)* of the National Environmental Act, 107 of 1998, and the Environment Conservation Act 73 of 1989.

[372] *Kyalami Ridge* para 69.

[373] Michael Kidd 'The Constitutional Court's Dilution of NEMA: *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*' (2001) 8 *SAJELP* 119.

> *There was…no suggestion that if the work is carried out in the manner described… it will "significantly affect the environment". In the circumstances the Kyalami residents have not shown as a probability that the establishment of the camp at Leeuwkop will have a significant effect on the environment. It follows that even if the development has to be carried out in accordance with principles recorded in section 2 of the Management Act, it has not been shown that the provisions of this Act were infringed by the government's decision to locate the camp at Leeuwkop.*[374]

By requiring that those who seek to have section 2(1) of NEMA applied to show that an activity 'will' significantly affect the environment, the court is placing a higher probative requirement than that provided for by the Act. Since the Act's provision is for those actions that 'may' significantly affect the environment, it should not be necessary for someone who relies on these principles to have to show that an action by government 'will' significantly affect the environment. One participant who litigates environmental cases echoed the view that it is difficult to obtain certainty of exact impact of activities on the environment, especially if such impact is from activities yet to be conducted.

> *I think in law* [proving impact] *is very difficult. Because I think you would have to pre-empt what the government should have done, and again that would be a fight of experts. The problem in South African law is that if you bring an expert to court, the opposition is allowed to bring their own expert, and the two or three or four are put before the judge who must then make up his* [her] *mind. Whereas in other countries they just agree on one expert and that expert's report is considered the expert report. So, when you have five or four experts fighting over the same thing you are likely to be in litigation for the next five or six years. And Judges don't know what to do with that type of information. Environmental law, water law litigation is very new in this country. So, a lot of the provisions in environmental legislation haven't been tested yet. So, people are still finding their feet with it*.[375]

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[374] *Kyalami Ridge* para 76.
[375] HRLJHB4_161208 Interview.

In addition to the financial burden of obtaining expert reports, the requirement by courts that it needs to be proven that an activity will have an impact renders provisions of section 2(1) of NEMA toothless.[376] Since it sets a precedence, this approach will make reliance on the substantive right to environment much more difficult and expensive, especially for litigants who are represented by Non-Profit Organisations that rely on limited donor funding. While environmental concerns in *Kyalami Ridge* were raised instrumentally, with the bigger goal of protecting property values and a peaceful environment, it provides important insight into how courts, and the Constitutional Court in particular, deal with environmental rights questions.

The court's judgment in *Kyalami Ridge* has been criticised for presenting housing and environment as conflicting rights. Environmental rights were seen toapply to the richer property owners, while housing rights were seen as relevant to the poorer victims of floods. However, as pointed out by Feris, this case presented an opportunity for the court to assess the State's duties imposed by the constitutional right to environment, especially with regard to sustainable development.[377] It is unfortunate that the 'bifurcated' approach to rights is not displayed only in defence of properties for the privileged, but also seems to be prevalent in cases where environmental justice movements are litigating on environmental issues.[378] Far from being unaffected by environmental concerns relating to atmospheric pollution, noise, and congested transport, the poor are even more susceptible to environmental degradation including water pollution, lack of sanitation, overcrowding, and long commuting distance from work, which are all livelihood threatening environmental concerns. It is the poor who are therefore most vulnerable to environmental degradation.[379] It is not correct to view environmental concerns as a preserve of the privileged.

Dugard and Alcaro state that courts may have a level of discomfort in adjudicating rights in an integrated manner, with a knock-on effect that

[376] Kidd op cit note 373.
[377] Feris op cit note 190 at 42.
[378] Dugard & Alcaro op cit note 65.
[379] Feris op cit note 190 at 43.

litigators are influenced by the courts' approach to environmental rights. As a result there may be a deliberate narrowing of claims by litigators in order to bring to court traditional 'winnable points of law'. [380] This view was echoed by a participant who litigates environmental cases. The participant states that courts do not like to adjudicate broad cases that deal with a multitude of issues. Instead, they prefer narrow issues presented through "clean cut arguments" and a "clean cut proposed solution."[381]

The participant indicated that since the same set of facts may require different legal remedies, sometimes practitioners bring a series of cases with each one focusing on a specific relief sought.

> *And certainly I'm a big fan of doing things that way. I will bring smaller cases that are clean, that have no disputes of fact, that I can get decided quickly, that I can win rather than bring one big case with 15 issues that will drag out for 10 years and still get only one form of relief because I haven't proved the others well enough. I'm a big believer in doing cases in categories, or in themes that are clean cut, very low burden of proof, because it's about the money as well… The risk is never to be sloppy in bringing too much information…* [Courts] *want you to have thought through if you can find a solution with the shortest, straightest line, and that's exactly how courts operate. So the throwing everything in, doesn't work*.[382]

The Constitutional Court's approach to adjudicating the apparent conflict between socioeconomic and environmental considerations was brought to the fore in *Fuel Retailers Association*. In *casu* the Constitutional Court considered the concept of sustainable development, viewing it as a balance between the promotion of economic and social development on the one hand and protection of the environment on the other.[383] According to the court, sustainable development provides a framework for reconciling

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[380] Dugard & Alcaro op cit note 65 at 26.
[381] HRLJHB4_161208 Interview.
[382] HRLJHB4_161208 Interview.
[383] *Fuel Retailers Association* para 44 the Court states that 'Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environment base.'

socioeconomic development and environmental protection.[384] The anthropocentric nature of the concept of sustainable development is acknowledged by the court when it is stated that "one of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management – 'batho pele'".[385] The court went on to hold that environmental authorities have an obligation to consider socioeconomic factors as an integral part of their environmental responsibility.[386]

The *Fuel Retailers Association* case was seen by many as a victory for environmental rights. In addition to consisting of requirements for balancing human needs for socioeconomic development and environmental protection, the concept of sustainable development is seen as a means to achieve the aim of equitability.[387] Perceptions that South African environmental laws and environmental impact assessment regulations are overly informed by an environmentalist paradigm which negates the idea of sustainable development were dispelled by the *Fuel Retailers Association* case.[388]

4.3. Water Justice in South African Jurisprudence

A court case will seldom deal only with one specific aspect of water justice to the exclusion of others. However, there is a scarcity of integrated approaches to water justice when litigation is used as a strategy. The contextual factors that affect the use of litigation in general, and approaches taken in such litigation were outlined in Chapter Three above. In the current chapter, specific cases dealing with aspects of water justice were discussed. The discussion below will provide conclusions focusing on the different aspects of water justice in case law.

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[384] Ibid para 57.
[385] Ibid para 60.
[386] Ibid para 62.
[387] Loretta Feris 'Sustainable Development in Practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province'* (2008) 1 *Constitutional Court Review* 235.
[388] Murombo op cit note 369.

4.3.1 Ecological Water Justice

Around eleven years ago, Kidd noted that there was an increase in the number of environmental cases brought to thecourt. At that time, Kidd expressed a view that judicial adjudication of environmental law was "chequered".[389] He discusses a number of cases showing, albeit in general terms, that there is at best a varied understanding and application of environmental law principles on the part of the judiciary. The cases discussed by Kidd mostly deal with questions of standing in environmental litigation. Participant litigators in this research shared a view that there is still a lack of in-depth understanding of environmental law in the South African legal system.[390] As stated in the methodology section, a request for interviews with members of the judiciary were not accepted, so their perspective is not represented on this matter, and it could be a subject of future study.

Kidd accepts that the manner in which courts deal with environmental cases is influenced in no small measure by arguments counsel place before courts.[391] For the purposes of water justice, and ecological water justice in particular, the nature of the legal provisions themselves (in this case articulated as human rights), play an important role in forming understandings of water justice, and influencing the manner in which counsel formulates arguments for court.

The anthropocentric nature of environmental rights in South Africa skews ecological justice in favour of social concerns. The Constitutional Court confirmed in *Fuel Retailers* that sustainable development is central to South African environmental law. As discussed in Chapter Two above, sustainable development principles encourage ecological conservation, and may seem to have the potential to promote ecological water justice. However, sustainable development does not seek to halt development that may be

[389] M. Kidd 'Greening the Judiciary' (2006) 3 *PER* 1.
[390] While not numerically representative, the fact that all participants interviewed for this study expressed a view that environmental law does not enjoy high judicial understanding suggests that this issue is still seen as relevant to the nature of environmental jurisprudence in South Africa.
[391] Kidd op cit note 389 at 8.

detrimental to the environment, but rather seeks merely to ensure that development does not 'unnecessarily' damage life supporting systems.[392] It is apparent that although sustainable development begins with conservation of the environment, it ultimately provides for the determination of circumstances under which environmental degradation can be deemed necessary. The principle of 'Batho-Pele' which is central to sustainable development places human interests above all other life forms. This already prejudices other life forms, which overrides the distributive element of ecological water justice.

The observation by Feris around ten years ago that there was a dearth of cases dealing with environmental rights as a result of the under-utilisation of section 24[393] still seems to apply. In spite of the Constitutional Court's *Fuel Retailers* case laying a solid foundation for further development of environmental rights jurisprudence, there has been no robust development of jurisprudence that takes advantage of the full potential of the right to environment.[394] Participants in the research indicated that some of the factors that influence the litigation of environmental rights include the fact that litigating rights within the environmental law framework is time consuming and resource intensive.

In order to build a case on substantive environmental rights, expert reports are often required, which become points of contention, because each party brings their own expert in terms of our adversarial legal system. There is also poor enforcement of existing environmental law provisions and court orders, which makes it less likely that even with success in substantive matters there will be improved enforcement.[395] Two participants highlighted that most substantive environmental issues are dealt with out of court. This is important, because most contestations and resolutions may not be reflected in case law.

[392] Murombo op cit note 369 at 494.
[393] Feris op cit note 190.
[394] Humby op cit note 242.
[395] HRLJHB2_161205 Interview.

4.3.2 Distributive Water Justice

It was argued earlier that the distributive aspect of water justice is the most prominently articulated of the four aspects of water justice. The slow pace at which services are provided to poor communities, coupled with the increasingly confrontational relationships between government and local communities, has contributed to the prominence of the distributive aspect of water justice. When asked to provide a definition of water justice, practitioners who participated in the research for this dissertation discussed almost exclusively the provision of water services, especially the need to ensure that there is easy and reliable access to water services. Academic discussions of the right to water are also predominantly located within socioeconomic rights discussions.

As discussed in Chapter Two, the distributive aspect of water justice consists of justice in distribution of access to water for both domestic consumption and for economic purposes. The cases discussed above focused on access to water for personal and domestic purposes. Although not reflected in litigation and case law, it is generally accepted that there has been little change in the patterns of access to water for agricultural and other economic uses, with the biggest users remaining the previous riparian owners.[396] The *Carolina* case discussed above is an indication of another important factor in the analysis of distributive water justice litigation. As discussed, the issues in Carolina arose as a result of water contamination, which is an ecological water justice issue. However, the case is categorised as a distributive justice case because that was the approach adopted in the litigation of that case.

4.3.3 Cultural Water Justice

The vacuum that exists in South African law with regard to the cultural aspect of water justice was discussed in the previous two chapters, and can be seen in the dearth of jurisprudence dealing specifically with the rights of cultural communities to water resources. As argued above, there is space, albeit limited, for certain aspects of cultural water justice to be explored. The

[396] Schreiner op cit note 252.

recognition of traditional leadership in the Constitution creates an opportunity for the development of cultural water justice in instances where it is appropriate. Land redistribution is perhaps the most prominent government programme where focus is on the redistribution of resources targeted at cultural and traditional communities.

There are a number of instances where cultural communities under traditional leadership use litigation as a strategy, although not directly related to water justice or access to water. In *Dukuduku Community*[397] for instance, the Dukuduku community applied for a review and the setting aside of the Regional Land Claims Commissioner's decision to dismiss the Dukuduku community's claim in terms of the Restitution of Rights in Land Act 22, 1994. The community was successful, as it was held that the Commissioner's decision was unreasonable in that she took irrelevant factors into consideration and failed to take into account relevant facts at her disposal.[398] The constitutional court case of *Bengwenyama Minerals*[399] was an application by a community previously deprived of formal title to their land, and they subsequently won it back through a land claim. *In casu,* the Department of Mineral Resources granted prospecting rights to the first respondent, while ignoring the applicant's application to be granted the preferent right to prospecting rights to which it was entitled in terms of the MPRDA. It was held that the Department failed to execute its duties of consulting with the community, and ought to have afforded the community an opportunity to make representations.[400]

In *Bareki,*[401] a traditional community used litigation as a way of getting a mining company to take reasonable steps to rectify the pollution and/or degradation of the environment in the surrounding mining area. The government was the owner of the land in question, and also had the

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[397] *Dukuduku Community v Regional Land Claims Commissioner, Kwazulu-Natal, and Another* 2006 (3) SA 508 (LCC) (Hereafter *Dukuduku Community*).
[398] *Dukuduku Community* at 514C – E.
[399] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) (Hereafter *Bengwenyama*).
[400] *Bengwenyama* at 142D – F.
[401] *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T).

responsibility of taking reasonable measures to rectify the environmental pollution and/or degradation. The court held that section 28(1) and (2) of NEMA did not have retrospective effect, with a result that the requirements of the abovementioned provisions did not apply to pollution causing activities that occurred prior to when NEMA came into effect.

This means that polluters cannot be held responsible for damage caused by pollution prior to the promulgation of NEMA, which poses a major problem, since most of the pollution in South Africa is historical.[402] The court in this case has been criticised for not attempting to sufficiently investigate the content and implications of the constitutional right to environment.[403] It is fortunate that the Constitutional Court's view is closer to an acknowledgement of the continuing nature of pollution. In *Fuel Retailers Association,* the court stated that "environmental concerns do not commence and end once the proposed development is approved. It is a continuing concern. The environmental legislation imposes a continuing, and thus evolving, obligation to ensure the sustainability of the environment and to ensure the sustainability of the development and to protect the environment."[404]

There is a dearth of cases brought by traditional communities dealing specifically with water justice related issues. Further research is required for in depth understanding of reasons and causes of this scarcity of cases. The fact that there is a recognition of traditional authorities and communities in the Constitution, yet this has not led to the development of cultural water justice contributes to the general trend of rural communities continuing to be deprived of access and benefits of basic human rights.

4.3.4 Procedural Water Justice

The procedural aspect of water justice is by its nature the most prominent aspect of water justice in litigation. Prior to litigation, procedural justice

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[402] Willemien du Plessis & Louis J Kotze 2007 'Absolving Historical Polluters from Liability through Restrictive Judicial Interpretation: Some Thoughts on *Bareki NO v Gencor Ltd*' (2007) 1 *Stell LR* 161.
[403] Ibid at 171.
[404] *Fuel Retailers Association* para 78.

manifests through public participation and fairness in administrative decision making. This includes the provision of adequate notice of the nature and purpose of proposed actions, and affording affected persons a reasonable opportunity to make representations. It is often when there is a failure to meet these requirements that adverse decisions are challenged through litigation. Procedural justice in litigation consists of access to courts, including a broadened standing as discussed above and a fair hearing.

Procedural justice issues were brought up in virtually all of the cases discussed above. In *Manqele,* the applicant averred that the respondent in that case used procedures that were not complaint with requirements of section 4(3) of the WSA.[405] In addition to a reconnection of electricity supply, the applicants in *Joseph* sought an order declaring that they were entitled to procedural fairness in the form of notice and an opportunity to make representations before electricity supply was terminated.[406] The applicants challenged the lawfulness of prepaid meters in *Mazibuko,* based on an argument that this amounted to administrative action. There it was argued that the installation itself amounted to unfair process.[407]

There are a number of cases dealing almost exclusively with procedure, even when the contentious issue arising is related to the environment. Such cases include *Escarpment Environment Protection Group*[408] and *Vaal Environmental Justice Alliance.*[409] The *Escarpment Environment Protection Group* case was based on a challenge of the Water Tribunal's ruling on *locus standi*. The respondents in the case applied to the Department of Water Affairs for water use licences for mining purposes under the National Water Act. The respondents were not directed by the DWA to publish notices to inform the public that written objections to the granting of the

[405] *Manqele* at 423H.
[406] *Joseph* at 58E – F.
[407] *Mazibuko* paras 26 & 105.
[408] *Escarpment Environment Protection Group and Another v Department of Water Affairs and Others, In Re; Escarpment Environment Protection Group and Another v Department of Water Affairs and Others, In Re; Escarpment Environment Protection Group and Another v Department of Water Affairs and Others* ZAGPPHC 505 (20 November 2013).
[409] *Company Secretary of ArcelorMittal South Africa and ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA).

licences may be lodged at a specified time. The Environment Protection Group and Wonderfontein Community Association found out about the application in any case, and submitted written objections.[410] Without deciding on the merits of objections, the Water Tribunal found that the objectors did not have the requisite standing and dismissed the appeals.[411]

After considering the constitutional and legislative scheme within which the protection of environment and environmental management should take place, and considering one of the purposes of the NWA, the court held that applications for water use licences affect the rights of others, and that a responsible authority exercising powers in terms of Section 41 of NWA performs an administrative action. Those affected by applications for water licence uses are entitled to lawful, reasonable, and procedurally fair administrative action, the court held.[412] The court then concluded that the Water Tribunal's interpretation of section 148(1)(f) of the NWA was incorrect, and that there is no rational purpose for denying the input of classes of objectors who did not necessarily meet the requirements of section 148 when narrowly interpreted.[413] The court upheld the appeal on the basis that a broader interpretation of section 148 would advance the constitutional values of open and broad participation by those affected by administrative action. On this basis, they declared that the appellants have standing to pursue their appeal to the Water Tribunal.[414]

Even though the *Vaal Environmental Justice Alliance* case was framed as an administrative law case, it emanated from ArcelorMittal declining an application for a copy of its environmental master plan in terms of the Promotion of Access to Information Act. The respondent appealed to the SCA, but the appeal was dismissed. The court asserted that a private party has a duty to disclose information required for the exercise and protection of

[410] *Escarpment Environment Protection Group* para 8.
[411] Ibid para 12.
[412] Ibid para 20.
[413] *Escarpment Environment Protection Group* paras 45 & 49.
[414] Ibid paras 59 & 71.

rights.[415] The refusal to provide information requested in terms of PAIA highlights a matter that was discussed by one participant in the study.

During interviews, litigators said that some of the biggest challenges in litigating rights on substantive grounds is the difficulty of obtaining information from government, especially in relation to mining activities.[416] At the beginning of the study, it was a hypothesis that one of the reasons for the apparent prominence of procedural approaches to human rights litigation is due to litigators holding views that procedural cases are easier to win in court and court orders granted are subsequently easier to implement. This hypothesis emanated partly from the court's apparent reluctance to grant substantive relief.

During fieldwork, litigators indicated that even relying on procedural methods and remedies is not necessarily easier or any more straightforward than approaches that would focus on developing contents of rights. One participant indicated that the reason Superior Courts judgments appear to exhibit a procedural focus on substantive rights issues is because often the issues litigated are not freshly contested. Substantive issues would have been contested in other fora, such as the Water Tribunal, prior to being taken to high court. By the time they go there, they are likely to be challenged on procedures followed in earlier tribunals.[417] Another participant indicated that environmental rights are complex to delineate. There are many processes that need to be followed prior to identified activities taking place. However, communities are often bombarded with information that they do not understand. This results in permissions being granted as if there was proper and due consultation. The participant indicated that most difficulties arise when permission has been granted, but there are internal appeal mechanisms that need to be followed.[418]

[415] *Vaal Environmental Justice Alliance* at 537.
[416] HRLJHB2_161205 Interview.
[417] HRLJHB4_161208 Interview.
[418] HRLJHB1_161121 Interview.

4.4. Conclusion

External socio-political developments have played a major role in shaping the development of the landscape within which public interest litigators work. The advent of democracy came with a reduction of the need for politically related legal services. On the other hand, the embodiment of justiciable socioeconomic rights in the Constitution, coupled with the slow progress of realising a number of socioeconomic rights, increased the need for legal services related to attaining socioeconomic rights. Government's limited capacity for service delivery increased the requirement for litigation to be used as a means of asserting socioeconomic rights.

In addition to the specific requirements of clients and communities, the likelihood of success in litigation plays an important role in informing approaches that litigators adopt. While public interest litigators base a majority of their cases on constitutionally guaranteed rights, ease of litigation is the most important consideration. Litigators seek remedies that are well recognised in law, such as interdicts and *mandamus* to vindicate human rights. While there is a will to advance and build substantive rights based jurisprudence, a number of difficulties dissuade litigators from adopting this as standard practice. The need for immediate relief by clients is an important factor in litigation strategies. Attitude of the courts towards certain lines of argument also plays an important role when litigators assess the likelihood of a successful outcome.

Procedural arguments obtain better favour with the judiciary. Jurisprudence around the disconnection of water services requires that fair process be followed in notifying affected parties of their rights. While standing in the Water Tribunal has been expanded to parties that were previously excluded by the Tribunal's interpretation of applicable legislation, judicial deference still dissuades the development of substantive arguments in cases where government and others may need to be ordered to act in specific ways beyond procedural fairness. The complexity of environmental law, coupled with the resource intensity of building substantive cases, deters the development of substantive rights approaches to environmental law. Obtaining information from government and private companies is difficult,

and the judiciary's reluctance to adjudicate integrated rights both reduces the incentive for developing cases that integrate various aspects of water justice.

Chapter 5: Towards an Integrated Approach to Water Justice

5.1. Introduction

Water justice as discussed in this dissertation arose from an observation that water resource management and water service provision are contentious issues in South Africa. In a country where rainfall is well below average and inequality is persistent, it is hardly a surprise that water reflects the elusive nature of justice in South Africa. This study explored how litigation can support the attainment of water justice. The investigation was framed around the following research questions:

The main research question was, "What is the role of litigation in the attainment of water justice?"

Subsidiary research questions were:

(a) To what extent do the provisions for the right to water and the right toa healthy environment create space for the attainment of water justice?

(b) What role does litigation currently play in the attainment of water justice?

(c) What are the current approaches to litigation for the right to water, and why are they chosen?

(d) To what extent can linking the right to water and the right to a healthy environment contribute to a more substantive rights-based approach in litigation?

An analysis of litigation strategies for achieving water justice requires a discussion of litigation as a strategy on the one hand, and a discussion of the concept of water justice on the other. From the outset, it was acknowledged that there are a number of strategies that are employed in order to assert rights and seek justice. The most common strategies include administrative remedies, advocacy, protest action, and indeed litigation. However there are legal remedies that are not rights-based but can still be used to attain certain aspects of water justice.[419] It was argued that the most prominent legal

[419] The Common law remedy of *mandament van spolie* was often used in South African case law as a way of asserting access to water through property law. The principle of the Commons has also been

articulations of water justice in South Africa are located within the human rights framing.[420]

Litigation is a strategy employed by public interest organisations in a number of ways. Usually, it is used as a matter of last resort, after a combination of other approaches such as engagement, petitioning, campaigning, and protests have failed. Often litigation is used concurrently with other strategies. The changing landscape of public interest litigation organisations has affected litigation. Organisations which were historically concerned with political rights are now refocusing on social developmental issues, and require a funding base to support their work.

In Chapter Three, the contextual changes within which litigating organisations operate were discussed in more detail. With a reduction in funding for public interest litigation occasioned by the advent of democracy, organisations that survived had to adapt to more stringent requirements in order to remain operational. Their performance in meeting targets, and the efficiency with which funds are used have become central considerations. As a result, litigating organisations have specialised with regard to the legal services they offer. They are also pushed to be efficient, which translates into measuring the success of specific cases. This influences the nature of cases that organisations litigate, and the approach they take to this litigation.

Administrative remedies used for asserting water justice are usually carried by statutory bodies such as the South African Human Rights Commission and the Public Protector. Through their powers to investigate and make binding recommendations, they can enforce rights by requiring accountability, mostly on the part of the government. They play a crucial role in supporting the democratic system through their investigations and assessment of

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presented as an alternative to a human rights approach to water justice. See Couzens (2015) op cit note 259 for a discussion of the use of *mandament van spolie* in access to water cases. See Roithmayr (2010) op cit note 31 and Bond (2013) op cit note 29 for discussions of principles of Commons as alternative to the human rights narrative.

[420] The superiority of the Constitution is perhaps the most overarching factor that makes any legal discussion of water justice purporting to take place completely outside human rights considerations meaningless.

government action. These administrative remedies are comparable to advocacy, in that they aim to persuade government to change practice.

Advocacy also plays an important role in building awareness of issues and of lobbying those in government. Public awareness is often built through civic education and campaigns. Lobbying is used as a means to influence lawmakers and policy implementers. This approach is less confrontational, and is effective when there is consensus with officials on the best approach for the attainment of rights and the fulfilment of justice. However, advocacy relies on good governance, and strong political will. Advocacy was more effective in the earlier years of democracy, when there was shared optimism and close relationships between government and civic organisations. As it became apparent that government was having difficulty ensuring access to socioeconomic amenities for the poor, relations deteriorated. Protest action and litigation as means of claiming access to socioeconomic rights became more prominent.

Protest action against the lack of access to socioeconomic amenities has been on the increase. While it is itself an expression of the democratic rights of freedom of assembly and protest, it is often used as a strategy where there is exclusion from decision making processes. Often, protest action takes place in response to specific actions or policies, especially those of local government. While it aims to put pressure on decision makers, issues raised by protesters are often either suppressed or co-opted by authorities.

There has also been an increase in litigation as a strategy for asserting rights. The use of litigation was a common strategy for anti-apartheid activists, but it was not as common in the early days of democracy. From the late 1990s, litigation has increasingly been used in cases involving socioeconomic rights. Factors that influence the use of litigation as a strategy, including the costs of litigation, the needs of clients, and the difficulties of enforcing court orders, were discussed in Chapter Three. Ultimately, these factors mean that litigation is rarely the exclusive strategy of asserting rights, when considered with other strategies, but rather forms a

critical part of a constellation of strategies. These are used in conjunction with each other, and not seen as mutually exclusive. Therefore, litigation is only a part, albeit an important part, of a number of interlinked strategies used in the quest for water justice.

Understanding of the use of litigation as a strategy in the quest for water justice requires an understanding of the concept of water justice, and its various expressions. While there are many discussions around various aspects of water justice, the concept itself does not enjoy a single, universally accepted definition. A discussion of litigation for attaining water justice needs to take into account all dimensions water justice. In this dissertation, water justice was categorised into four main aspects, namely: ecological water justice, distributive water justice, cultural water justice and procedural water justice. Water justice was discussed as a dynamic term with the prominence of each aspect understooed to be influenced by specific and localised contexts. One of the underlying arguments of this dissertation is that in spite of the specificity of context, there is a benefit in adopting a comprehensive view of water justice.

Ecological water justice is concerned with the protection of ecosystems, for a fair distribution of water resources between humans and the environment. This was discussed as one aspect of water justice in environmental laws. Academic discussions of ecological water justice are divided into two broad categories: conservationism and environmental justice. The conservationist outlook focuses on discussions relating to preserving natural resources, and minimising environmental degradation. Justice from this outlook concerns the fairness of human use of water compared to needs of ecosystems. Water pollution is then evaluated on the impact it has on broader ecosystems relying on the water resource. Environmental justice focuses on discussions of the fair distribution between humans of the burdens and benefits of environmental degradation. Activities that affect the environment are assessed on the basis of the impact they will have on human development. This varies from a direct impact on people’s health, to peoples’ ability to use natural resources. Questions of justice and fairness come in when assessing

the distribution of economic benefit of environmental exploitation against the burden of a degraded environment.

The constitutional right to a healthy environment in section 24 is anthropocentric, but contains elements of ecocentrism. In the past, there were perceptions that conservationist concerns were the preserve of the privileged, but there has been a continuous move towards an integrated outlook by those involved in conservation efforts. While it is beyond the scope of this work, organisations involved in promoting environmental conservation have started involving local communities in their activities. Litigation is not often utilised by conservationist organisations as a strategy; rather, they focus on education and campaigning. There are instances where they use litigation to attain specific outcomes, but the constitutional right to environment is still underutilised by practitioners[421], with a result that twenty years after the constitutional provision, the right itself still has a weak legal foundation.[422]

There is a tendency to bring cases that focus on procedural aspects of law in environmental litigation, which has limited the development of a substantively based approaches to the right to an environment that is not harmful. This research has revealed a range of reasons for this. One of the most important factors include that litigators take on issues that are brought to them based on requirements of clients. Many substantive environmental issues are dealt with prior to litigation, where it is not unusual to reach settlements. This makes it difficult to understand the way the substantive right is practiced through an assessment of jurisprudence.

Environmental legislation is complex, with detailed peremptory internal processes that need to be exhausted before litigation can be instituted. Most environmental cases that reach the high courts and law reports are appeals and applications for reviews of these prior processes, which tend to deal with

[421] The argument by Feris (2008 op cit note 190) that the right to an environment was being under-utilised led to a number of responses discussing the role of environmental rights in South Africa's developmental trajectory.
[422] Humby 2016 op cit note 242 deals in more detail with an argument that the right to environment is under-theorised.

procedure over substantive rights. The costs of collecting evidence and preparing it for presentation in court as well as proving liability, are high in environmental cases. These factors limit the use of litigation as a startegyn for enforcing the ecological aspect of water justice.

Distributive water justice[423] is the subject of a lively academic discussion.[424] The provision of water services is a symbol of the persistent failure of basic service provision and social injustice. It is hardly a surprise that access to water for direct human consumption is seen as the centre of any discussion of water justice in South Africa. Chapter Three indicates that the use of litigation for the distributive aspect of water justice is informed by a disjuncture between the constitutional promise and the reality of a failure to deliver basic water services. A shortcoming was highlighted on using litigation as a strategy. Government is often unable and/or unwilling to implement court orders effectively. So success in court does not always translate into the achievement of distributive water justice.

Following the *Mazibuko* case, a question of the justiciability of socioeconomic rights became a subject of academic discussions. Specifically, whether court judgments sufficiently provide for the attainment of tangible outcomes for those deprived of basic services. In the Constitutional Court's decision in *Mazibuko*, there was criticism of courts' adjudication of the right to water. In Chapter Four the *Mazibuko* case was discussed as a symbol of the courts' inability to take into account the circumstances of litigants in a case, preferring instead to focus on abstract legal concepts. Concepts such as reasonableness and progressive realisation were seen in these criticisms as removing the substance of the justiciability of the right to water.

The distributive aspect of water justice also contains questions of distribution of water resources for industrial and agricultural purposes, although these

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[423] Which deals with provision of water services and equitable share of water resources between humans, and not to be confused with distributive justice between various life forms contained within ecological water justice.

[424] The *Mazibuko* case has been a subject of a great deal of academic discussion. The right to water, often framed with specific reference to access to water services is often discussed in various works dealing with socio-economic rights and social justice.

are less central to the South African legal landscape. While the riparian system of rights to water resources has been abolished, past patterns of access to water for agricultural and industrial use persist. There is an open licence application process, but it has not successfully shifted patterns of access. This is important to understand the attainment of distributive water justice, but a detailed analysis falls beyond the scope of this dissertation.

In contrast the distributive aspect, cultural water justice receives nearly no academic attention in South Africa. Chapter Two explained how the cultural aspect of water justice arose from recognising values that cultural groups attach to water. In practice, this means cultural considerations should be deliberated with issues of water governance and distribution. The difficulty of defining the concept of culture was also highlighted.

Although there is virtually no discussion of cultural water justice, there might be room for the development of legislation and practice taking cultural considerations into account. This would require a substantial shift in norms and practices, so a detailed discussion of this aspect requires separate research. There are cases where traditional leaders were found to have *locus standi* to litigate on behalf of their communities, but standing was granted on bases of provisions and considerations other than roles of litigants as leaders of traditional communities.

The procedural aspect of water justice was discussed in Chapter Two, with its importance in attaining water justice based on the view that justice can be guaranteed by ensuring that decisions are made through processes that are open and fair. The criticism of a focus on procedural law is it reduces the substantive, broader questions of justice to lacklustre discussions of procedural fairness. [425] Litigation for the right to water focuses on the procedural and quantitative aspects of water justice. The implications of this for the attainment of water justice was one of the key motivations for this research. A focus on procedural law may perpetuate the underutilisation and unclear definition of other aspects of water justice. The research revealed

[425] See Brand *et al* op cit note 188.

two important findings with regard to procedural justice, which are discussed in Chapter Four. Provisions for procedural fairness create an important channel for monitoring the fulfilment of substantive rights. Furthermore, procedural law plays the important role of weaving a thread through which actions of authorities can be assessed, including substantive content upon which litigation can be based. This means that basing litigation on procedural law has the potential to enhance, and not impede, substantive rights-based approaches to water justice.

5.2. Is there Room for Water Justice?

The focus of this dissertation has been on the role of litigation as a strategy for attaining water justice. However, it emerged through the research that the concept of water justice itself has received little to no attention in South African academia and praxis. Subsequent to the *Mazibuko* case, some scholars sought to offer alternatives to the rights-based approaches to questions of water justice. However, within the constitutional context, rights-based approaches have a critical role in the discussion and attainment of water justice. While the topic of water has been greatly discussed within environmental and socioeconomic legal studies, in the few instances where water justice is discussed, it is seen in narrow terms, at the exclusion of important component aspects.[426]

Given the prominence of an intersectional understanding of human rights, a number of studies have sought to encourage integrated approaches to human and environmental rights theory and practice.[427] These 'integrated approaches' are seen as encompassing a combination of 'green' and 'brown' issues.[428] This includes pro-poor interpretations of the right to a healthy environment, which integrates a range of environmental justice concerns.[429] Environmental justice has the potential to strengthen the enforcement of socioeconomic rights, because because it takes into beneficiaries of

[426] For instance Francis's (op cit note 140) discussion of water justice in South Africa focuses on water service provision, to the exclusion of the other aspects of water justice.
[427] Feris 2008 (op cit note 190) notes that Constitutionally-guaranteed environmental right require integrated approaches to environmental problems, and discarding of beliefs that place conservation and human considerations outside each other.
[428] Dugard & Alcaro op cit note 65.
[429] du Plessis op cit note 27.

environmental resources, and includes substantive human development issues.Sustainable development has been included in the constitutional provisions on the right to a healthy environment, so both social and environmental considerations need to be taken into account when assessing the costs and benefits of environmental impact.

Water justice requires that cognisance be taken of each of the four aspects in this dissertation. The concept of water justice is broad enough to allow ongoing development, and in the future, more components may be added as theory deepens our understanding of the concept. The current underdevelopment and under-theorisation of the concept limit a more integrated discussion of water. While specific situations may require an in-depth focus on specific aspects, the need for a broader, integrated, and robust approach to water justice is important. Integrated approaches offer the best opportunity to assess progress towards attaining water justice.

5.3. Towards Integrated Approaches

Chapters Three and Four discuss the range of factors that affect litigation as a strategy for the attainment of water justice. Many aspects of water justice are grounded in a human-rights framework, and the development of substantive, rights-based litigation approaches is a slow process. One litigator who participated in the study indicated that it is best to view the development of litigation strategies as a combination of small steps moving progressively toward a broader desired state of affairs. When it comes to water, access to basic water services is urgent. This participant gave an example of housing, indicating that the first question is of access, sometimes using common law remedies such as spoliation. Thereafter, jurisprudence is developed along the lines of legislation preventing illegal evictions, which require court orders to be obtained prior to evictions. Jurisprudence then develops to confirm a duty on local government to provide temporary emergency accommodation in the cases of evictions or other emergencies. According to this participant, the development of water justice jurisprudence

needs to follow a similar course of progressively expanding the substantive aspects of rights.[430]

There used to be a perception that environmental concerns are elite and even in conflict with socioeconomic rights. There has been an increase in environmental activism among poor communities affected by pollution, as well as an increase of community inclusion in environmental issues. Organisations litigating human rights have units that deal with environmental cases. Participants in the research indicated that there were efforts towards developing integrated approaches to litigation. However, the complexity and resource intensiveness of environmental law cases, means that the development of jurisprudence from the higher courts dealing on substantive environmental issues is likely to remain slow. Integration continues between the environmental and socioeconomic aspects of water justice, but most organisations take an environmental justice perspective. While there are benefits to this approach as discussed in previous chapters, the ecological aspect of water justice also requires due consideration.

The benefits of an integrated approach to water justice cannot be overstated, especially in a South African context where the average rainfall is nearly half of the world's average, a majority of the population still lack access to basic water services, and the pollution of water resources continues at dangerously high rates. Only integrated approaches will allow a holistic solution the water justice in this context

5.4. Conclusion

Discussions of water in society often start with the amount of water received from rain and rivers. However, the manner in which people are able to use water for is usually determined by the social, rather than environmental context. In South Africa, access to water is a socio-political and economic issue. Reflecting the inequalities that exist in other dimensions of South Africa, access to water is inequitable. Both industry and a small, wealthy elite of citizens enjoy unhindered access to water, while poor members of society

[430] HRLJHB3_161205 Interview.

still struggle to access sufficient water. Water justice must consider fair and equitable access to water for all uses.

The concept of water justice is important for discussions of water in South Africa. However, there has been little to no focus on theorising the concept itself. While grounded in Constitutionalism, water management and distribution in South Africa still fall short of the fulfilment of the human rights guaranteed in the Constitution. A number of strategies, including litigation, are used as means to reach the constitutional promise. However, a weak theoretical foundation is impeding the development of litigation. Linking the right of access to water and an environment that is not harmful is beneficial and required for the attainment of water justice. However, discussions of integrated approaches focus on environmental justice. The role of conservationist approaches to attain healthy environments should not be overlooked. Additionally, stronger development of the cultural aspects of water justice could begin bridging some of these gaps between human and environmental development.

This research provided a more nuanced understanding of the role litigation plays in the attainment of social justice in general, and water justice in particular. There was a reluctance to use litigation against the government in the earlier days of democracy, but increased tensions between communities and government have clarified the requirement for the use of litigation. It plays an important role in fighting injustice and protecting the vulnerable. However, factors such as costs limit the accessibility of litigation for the most disadvantaged. Simultaneously, conflicts do not end with a court order. Weak enforcement of court orders poses a challenge to translating successful litigation into water justice.

There are a number of considerations that emerged from this dissertation which are relevant for further research in the field. One is that there is a need for integrated and multi-disciplinary research methods in legal research. These approaches can enrich legal scholarship. For instance, most legal research consists of analysing court decisions as reported in law reports.

While this has the benefit of continuous development of law, it cannot be denied that the role of litigation in fulfilling Constitutional rights is more nuanced than case law demonstrates. The practice of law itself is embedded in a social, political, and economic context. Research methods that go beyond case law can unearth factors that affect and are in turn affected by the development of law through jurisprudence. Further research is required to better understand the potential for a recognition of cultural water justice in South Africa within the current legislative framework. This could be an important missing link to bridge ecological and socioeconomic justice.

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