

South Africa and the Human Right to Water

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- When implemented in the law, gives each citizen a legal standard for what they may expect from their *government*
- Technical, science-based standards a means to a rights-enhancing end rather than an end to themselves
- **Exerts moral suasion (but not legal requirements) on all actors**

This is what our core international human rights legal instruments say about the environment:

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- Governments have a corresponding duty to respect, protect, and fulfill these rights.
- **Governments must achieve these rights *progressively*, according to their means.**

Rights TO Nature

- A (necessary?) precursor to Rights *OF* Nature or of an Earth-based legal system
 - Recognition of dependence
 - If not always *interdependence*
- South Africa has many of the puzzle pieces
 - Not yet put together well

Globally....

- According to the World Health Organization,
 - unsafe water and inadequate sanitation one of the four leading causes of death
 - 15% of childhood deaths
 - More total deaths than measles, malaria, and AIDS combined
 - App. 1 billion people lack access to a basic supply of clean water

Human Right to Water

28 July 2010: UN General Assembly votes to declare a human right to water:

“The right to safe and clean drinking water and sanitation [is] a human right that is essential for the full enjoyment of life and all human rights.”

South Africa Constitution Bill of Rights (1996)

- **§ 24 Environment:** Everyone has the right
- **(a)** to an environment that is not harmful to their health or well-being; and
- **(b)** to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

South Africa Constitution Bill of Rights

§27 Health care, food, water and social security.-

(1) Everyone has the right to have access to –

- (a) health care services, including reproductive health care
- **(b) sufficient food and water;** and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

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

Right to Water

- Post-apartheid, in 1994,
 - >10 million South Africans had no access to safe, clean water;
 - >20 million lacked basic sanitation

Water: The Resource Problem

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- Seasonal variability
- Droughts exacerbated by climate change
- **Apartheid: Human settlements around mineral deposits or in distant former “homelands”**
 - **mismatch water source to population densities**

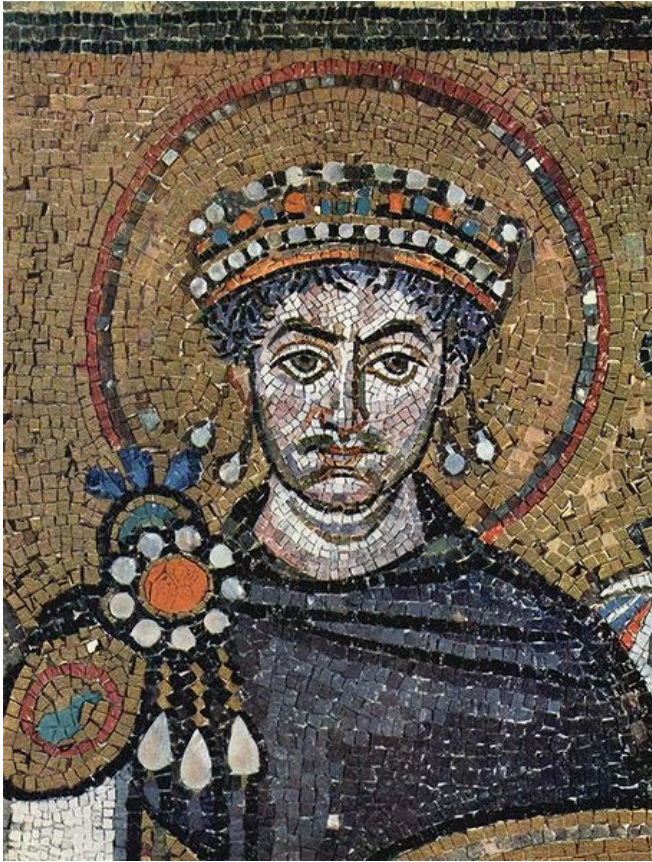
Structural Adjustment

- International Financial Institutions provide continued loans contingent on reforms:
 - Fiscal austerity
 - Reduced spending on public projects and services
 - Free markets and globalization: Access to domestic markets by foreign interests
 - Privatization of state owned businesses

How will South Africa fulfill its citizens' right to water?

- **Principle 1: Water provision will be governed by the Public Trust Doctrine**

The Emperor Justinian (482-565 A.D.)



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- These resources must remain for public's beneficial use;
- These resources must be stewarded sustainably by those in power.

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- Principle 2: Water Provision will be governed by fair and equitable access, with special attention to the needs of the most indigent

How will South Africa fulfill its citizens' right to water?

- **Principle 3: Water will be allocated both to fulfill basic human needs, as well as basic environmental requirements**
 - “The national Government is committed to carry out its public trust obligations in a way which:
 - guarantees access to sufficient water for basic domestic needs;
 - makes sure that the requirements of the environment are met; (1997 White Paper)
 - **Fulfill public trust by maintaining a *reserve* that fulfills human needs and protects aquatic ecosystems (1998 National Water Act)**

The Reserve...

- “After providing for the basic needs of citizens, the only other water that is provided as a right, is the Environmental Reserve—to protect the ecosystems that underpin our water resources, now and into the future.”

The Reserve...

- “[t]he quantity, quality and reliability of water required to maintain the ecological functions on which humans depend shall be reserved so that the human use of water does not individually or cumulatively compromise the long term sustainability of aquatic and associated ecosystems.”

The Reserve...

- “[i]t is the duty of national Government, as part of its public trust function. . .to assess the needs of the Environmental Reserve and to make sure that this amount of water, of an appropriate quality, is set aside.”

The Reserve...

- “[w]here the needs of the Environmental Reserve cannot be met because of existing developments, provision must be made for active intervention to protect the water resources.”

The Reserve...

- Alas...

How will South Africa fulfill its citizens' right to water?

- **Principle 4: Reallocation of existing water rights is possible**

How will South Africa fulfill its citizens' right to water?

- **Principle 5: The right to water isn't an absolute right that everyone can claim immediately**
 - State will fulfill the right progressively, according to its available resources

How will South Africa fulfill its citizens' right to water?

- **Principle 6: Water will be limited**
 - 25 liters/person or 6000 liters/household/month within 200 meters of a house

How will South Africa fulfill its citizens' right to water?

- **Principle 7: The government will not provide unlimited *free* water**

How will South Africa fulfill its citizens' right to water?

- **Principle 8: The government may subcontract water delivery to external service providers**

Constitutional Court of South Africa



Draft White Paper on Water Services (2002)

“right to a free basic water supply is not an absolute right . . . abuse of the right to free basic water can result in the restriction and/or disconnection of the water supply, provided fair and equitable procedures are followed and special arrangements for indigent persons are made.”

Mazibuko v. City of Johannesburg (2009)



Lindiwe Mazibuko

Mazibuko v. City of Johannesburg

**Communal
tap
(standpost)
for drinking
water in
Soweto,
South Africa**









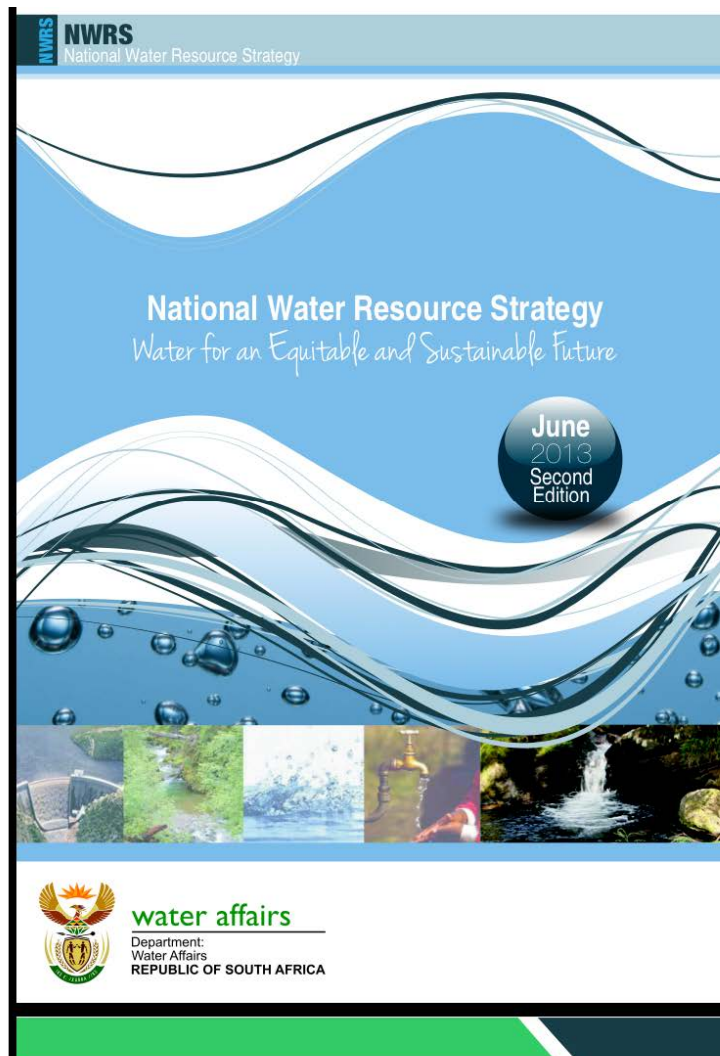
Mazibuko v. City of Johannesburg (2009)

Holding: §27(2) of the Constitution: *Progressive realisation* means “***requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources....*** It does not confer a right to claim “sufficient water” from the state immediately.”

Mazibuko v. City of Johannesburg (2009)

Conclusion:

- Won't impose a doubling of the minimum core. Defer to experts to determine this.
- Separate but unequal modes of prepaid water metering not unconstitutional.
- Shutting off water for non-payment is acceptable.
- No mention of the "reserve."
- So a "human rights" to a resource approach doesn't solve all problems...





SIP 19: Ecological Infrastructure for Water Security

An overview of a proposed Strategic Integrated Project (SIP) aimed at improving South Africa's water resources and other environmental goods and services through the conservation, protection, restoration, rehabilitation and/or maintenance of key ecological infrastructure

Final Draft for Submission to the Presidential Infrastructure Coordinating Commission

Revision 6.1, Friday 31 October 2014



Ecological Infrastructure and Human Right to Water

- **“Watershed-related ecological infrastructure can filter out water pollution, regulate stream flows, recharge aquifers, and absorb flooding. These benefits are collectively known as ‘watershed services,’ and society can't do without them.”**
- “In essence, the sound ecological infrastructure that underpins healthy watersheds does much the same work as a water treatment plant and other built water quality infrastructure, but without the expensive equipment and associated operating costs and with added benefits like protection of wildlife habitats and carbon sequestration.

Right *to* Water in South Africa →
Rights *of* Nature? Earth-based Law?

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 - **Without always following through or understanding what the law means**

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- **Legal protection of the “reserve”**
 - **Ambiguous on whether for human needs or for its own sake**
 - **Unrealized (as of yet) in practice**

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- **Citizens, bureaucrats, judges need to be socialized**
 - **Legal innovations coupled with environmental illiteracy → infelicitous results**
 - **Socialization takes time and savvy**
 - **Whanganui River example**

