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A political economy perspective on the right to water in South Africa

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List of Acronyms

ANC	African National Congress
CBO	Community-Based Organization
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic Social and Cultural Rights
CLC	Community Law Centre
CODESA	Convention for a Democratic South Africa
CSO	Civil Society Organization
DPLG	Department for Provincial and Local Government
DWAF	Department of Water Affairs and Forestry
EMG	Environment Monitoring Group
ES	Equitable Share
FBW	Free Basic Water
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution
HDI	Human Development Index
ICWE	International Conference on Water and the Environment
IFIs	International Financial Institutions
MIG	Municipal Infrastructure Grant
NGO	Non Governmental Organization
NP	National Party
NPM	New Public Management
PPMs	Pre-Paid Meters
RDP	Reconstruction and Development Programme
RSA	Republic of South Africa
SACOD	South African Congress of Democrats
SACPO	South African Coloured People's Organization
SAIC	South African Indian Congress
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
US	United States
WB	World Bank
WHO	World Health Organization
WSA	Water Services Authority
WSP	Water Services Provider
WSSD	World Summit on Sustainable Development
WWC	World Water Council

Abstract

Even though the provision of good quality basic services to everyone was one of the main strategies identified to address the legacies of apartheid in democratic South Africa, it seems that nowadays this sector, and in particular water services, are still characterized by many failures and tensions. Indeed, one of the major contradictions that have emerged during the last few years refers to the presence of a human rights framework, embedded in the constitutional right to water and in the Free Basic Water Policy of 2001, which is challenged by the adoption of neoliberal policies.

This work will adopt a political economy perspective to explore the tensions between content and operationalization of the right to water in South Africa. It will demonstrate that neoliberalism has led to a very narrow and exclusive realization of the right to water and that inequality levels remain very high within the country, although South Africa does have the financial resources to actually provide the same level of services to everyone. The paper will also argue that neoliberal policies within the water sector have severely affected the residents of historically poor and black areas and that the market ideology promoted by those same policies has offered a strong justification for the persistence of inequality within the country. Finally, this research will identify a serious lack of accountability as one of the major factors responsible for the failures within the realization of the right to water in South Africa.

Relevance to Development Studies

The notion of a human right to water is getting growing attention within the field of Development Studies. This Research Paper offers the opportunity to study one concrete example of operationalization of that right and therefore it helps to highlight the tensions that are most likely to emerge within such a process. Furthermore, this work contributes to investigate the effects of neoliberalism in contexts of high levels of inequality.

Keywords

Water, human rights, neoliberalism, South Africa, accountability, commodification, inequality.

Chapter 1

Introduction

1.1 Background and research problem

What a painful paradox it would be if, after decades of struggle and sacrifice, we succeeded in doing what apartheid could never do – legitimizing inequality. It would continue as before but would be regarded as natural, or, worse still, as the fault of the disadvantaged. (Sachs 1992: 103)

The provision of good quality basic services to everyone was one of the main objectives of the anti-apartheid struggle as well as one of the key strategies identified by the African National Congress (ANC) to address the legacies of the apartheid regime and to complete the process of democratization in the country (ANC 1994, Makgetla 2004: 270, Mehta 2004: 19). However, access to water in South Africa is still characterized by many failures and tensions. For instance, many households struggle to get access to water services because they cannot afford them and thus they have to rely on a basic provision of water, while others are not even guaranteed such a basic provision.

One of the major contradictions that have emerged during the last few years refers to the presence of a human rights framework, embedded in the constitutional right to water and in the Free Basic Water (FBW) policy of 2001, which is challenged by the adoption of neoliberal policies. Although the Constitution states that everyone should have access to sufficient water and the FBW policy translated such mandate into a free provision of 25 litres per person per day, it seems that since the introduction of neoliberalism in the country by the ANC (*Ibid.*), economic and financial considerations have prevailed over history. Thus, the residents of historically poor and black areas (i.e. townships) have been severely affected by neoliberal reforms in the water sector (McDonald 2002b: 20-34).

During apartheid, those residents used to access poor quality services through infrastructures for which the state did not provide maintenance (Flynn and Chirwa 2005: 65). Furthermore, townships had a 'deemed consumption' system to charge water, according to which each household paid a flat rate as if it consumed 20 kiloliters of water per month, although local authorities did not check whether people exceeded that amount (Bond and Dugard 2008: 8). In fact, such a system was not intended to benefit black residents, rather to avoid protests and the rise of political activism within townships. When at the end of the 1990s, full cost recovery was applied to water tariffs, water services became unaffordable for most of townships residents. Moreover, the government reacted to episodes of non-payment by means of strict forms of credit control, namely water cut-offs, trickle valves, Pre-Paid Meters (PPMs), collateral and collective service deprivations (Flynn and Chirwa 2005: 67-71, McDonald 2002b: 20-34).

Therefore, the research problem that I aim to address in this work refers to the tensions between content and operationalization of the right to water in South Africa.

1.2 Objectives of the research

As I said above, the overall objective of my research is to explore the tensions between content and operationalization of the right to water in South Africa from a political economy perspective. Within this framework, I will identify two specific objectives.

First, I will put the right to water into its historical context in order to understand why that was included in the Constitution of 1996. In particular, I will address the debates about the Bill of Rights for a post-apartheid South Africa within the framework of the negotiated transition to democracy. Indeed, I think it will be relevant to understand the origins of the right, as they might well have influenced its realization.

Second, I will focus on the operationalization of the right to water, to be understood as the ways in which it has been translated into policies hitherto and how it has been able to influence the performance of water utilities. For instance, I will ask whether and how do rights matter, especially for the poor. Furthermore, I will look at the extent to which a human rights-based approach to water, that sees citizens as rights holders, and a market-based approach, that sees citizens as customers, can coexist on the ground and where they fundamentally disagree, my focus being the eventual constraints to a full realization of the right to water.

Therefore, my research question will be: How is the right to water in South Africa interpreted given the neoliberal conditions under which it is to be implemented?

1.3 Methodology

Given the dimensions of South Africa and the variety of experiences with regard to water services, I addressed my research question through one case study, namely Cape Town, the provincial capital of the Western Cape. There are two main reasons which supported my choice. First, the case of Cape Town had already been studied with reference to water services delivery and neoliberal policies (McDonald and Smith 2004, Smith 2005). That helped my understanding of how water is accessed in this city. In particular, both the studies analyze the concept of corporatization of water services, as one of the main effects of neoliberalism (*Ibid.*). Second, I carried out a period of fieldwork in Cape Town, based at the Community Law Centre (CLC) of the University of the Western Cape, which has a research project on socio-economic rights. Such a period proved extremely useful in order to collect specific information about water services provision in the city.

My analysis is based on both secondary and primary data. The first refer to a series of literature reviews. For instance, I looked at the main concepts and perspectives that link water, human rights and neoliberalism; at the debates about the Constitution for a democratic South Africa; and at the most recent

studies on water services delivery in the country. While primary data refer especially to a number of interviews that I have conducted during my fieldwork in Cape Town. Due to time and resources limitations, I have been able to realize seven semi-structured interviews and one structured email interview. The respondents have been selected by means of snowballing sampling in order to get different perspectives on and different methods to advocate for the right to water. I interviewed academics, Non Governmental Organizations (NGOs) members, representatives of Civil Society Organizations (CSOs), trade unionists, activists and residents. By means of those interviews, I aimed to collect not only factual information, but also attitudes and perceptions about the realization of the right to water in South Africa.

1.4 Chapters outline

The second chapter will present a comprehensive theoretical framework on the notion of water, based on the juxtaposition of a human rights-based approach and a market-based approach to water. I will discuss the main arguments which support each perspective and I will highlight the main differences between the two approaches.

The third chapter will offer an historical perspective on the right to water in South Africa. Firstly, I will discuss the Freedom Charter of 1955, namely the document which introduced the human rights discourse in the country. Then, I will address the major debates about the Bill of Rights for a new Constitution. Finally, I will analyze the right to water as it reads in the text of 1996.

The fourth chapter will focus on the operationalization of the right to water in South Africa and it will present the major findings of my fieldwork. Thus, it will be structured around six issues which represent progress as well as failure and tensions within the process of realizing the right. For instance, these issues are the definition of the right to water; the role of local government in water services delivery; the debate on national and local responsibilities with regard to failures in water provision; the significance of having a right to water, especially for the poor; the notion of water demand management; and the conditions of residents in informal settlements with reference to access to water.

Finally, the fifth chapter will present the conclusions of my work. It will sum up the major points, provide an answer to my research question and indicate future areas for research.

Chapter 2

A theoretical framework on water

During the last two decades, water has become an highly contested issue, which is at the core of a debate between two competing views. At the extremes of such debate it is possible to identify a rights-based approach to water, which calls for the recognition of a specific human right to water and a market-based approach, which sees water as a pure economic good. It is worth to notice that both the notions of human rights and economic goods derive from liberal thinking and focus on individual agency (Seymour and Pincus 2008: 388). However, while human rights are considered to be hold by individuals by virtue of their being human, economic goods are enjoyed as a result of a preference (*Ibid.*). This chapter will deal with the human rights perspective and the economic perspective separately, in order to provide a comprehensive theoretical framework for the analysis of the South African case.

2.1 The human rights perspective

According to de Gaay Fortman (2005: 2), it is possible to distinguish between a 'downstream' or deductive perspective on human rights, where the latter are derived from international standards and then translated into national legal frameworks, thus becoming legal instruments, and an 'upstream' or inductive perspective, where people put their own perceptions about rights forward and use them as political instruments to produce social change. Both of these approaches to declaring and realizing rights apply to the case of South Africa, as I will explain in the fourth chapter. I will now look in more detail at the first approach, as I will describe the international legal framework for a right to water.

The presence of a right to water within international human rights law is highly contested, as explicit reference to such a right can be found only in two United Nations (UN) Treaties, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979¹ and the Convention on the Rights of the Child of 1989.² Thus, the right to water has usually been claimed as being implicit in other formally recognized rights, for instance the right to life and the right to health (Anand 2007). The latest development within this process is represented by the UN Committee on Economic Social and Cultural Rights (CESCR) General Comment No. 15 of 2002. Indeed, the CESCR argues for the existence of a distinct right to water on the basis of the interpretation of Article 11 (right to an adequate standard of living) and Article 12 (right to health) of the Covenant on Economic, Social and Cultural Rights of 1966 (UNCESCR 2002). The text of the Comment reads (*Ibid.*: 2):

Article 11 specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly

falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival [...] The right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12).

Furthermore, the Comment provides a detailed description of the crucial elements of that right, namely availability, quality and accessibility, and it specifies that such characteristics apply to water for personal and domestic uses (UNCESCR 2002: 4).³ Availability refers to the fact that water must be sufficient and continuous to allow people to use it for the purposes mentioned above (i.e. personal and domestic uses). Quality means that water resources should comply with the standards imposed by the World Health Organization (WHO), in order not to be harmful to human health.⁴ While accessibility is composed of four dimensions, namely physical accessibility, economic accessibility (i.e. affordability), non-discrimination (especially towards the most vulnerable or marginalized groups within the society) and information accessibility. The Comment identifies also the obligations of states in terms of respecting, protecting and fulfilling the right to water (*Ibid.*: 7). To respect means not to interfere with the enjoyment of the right by the citizens. To protect is slightly different, as it demands the state to prevent third parties from interfering with the enjoyment of the right by citizens. While to fulfill refers to the obligations to facilitate (taking positive measures to assist the realization of the right), to promote (in terms of education and awareness campaigns) and to provide (directly, to those who cannot realize their right just with their own means). Finally, as the right to water falls within the category of socio-economic rights,⁵ the general obligation toward a progressive realization within available resources applies.

Now, one of the major shortcomings of the UNCESCR Comment is that it does not constitute a binding document, therefore at the present moment it is not possible to turn to UN mechanisms to enforce it. Furthermore, Bleisch (2006) argues that although there is a clear human rights dimension within access to water, still it is questionable whether the right to water is understood as a moral human right.⁶ She also notices that there are some dimensions of the right which need further clarification, for instance what is the minimum amount to which everyone should be entitled as a human being and who has the obligation to deliver the right (*Ibid.*: 4).

To claim a human right to water was clearly influenced by the emergence of a human rights-based approach to development in the mid 1990s. Such an approach, which actually has several formulations both in theory and in practice, has tried to apply the language of human rights to the discourse on development with very debated results among practitioners (Cornwall and Nyamu-Musembi 2004). Although it was inspired by the notion of a right to development, as that was formulated in the UN Declaration of 1986,⁷ the current approach lacks any reference to human rights within a global dimension as well as it does not take into consideration the issue of power relations between 'developed' and 'developing' countries. Therefore, it is questionable whether it would be able to produce social change in terms of increased social justice.⁸

A major issue of concern that the human rights-based approach has raised is to what extent referring to human rights can contribute to development and make a difference in the living conditions of poor people. De Gaay Fortman (2006: 34) for instance insists on the difference between 'declared' (i.e. theoretical) and 'acquired' (i.e. source of concrete entitlements) rights to state that the main problem concerning human rights is the difficulty in implementing them, especially when they happen to be socio-economic rights in developing countries. On the other side, however, he argues that human rights are not just subjective rights, but they can act as general principles of justice thus challenging power in contexts of explicit violation (which is different from non implementation). Therefore, he seems to re-affirm the opportunity to frame the request for social goods, like water, in the language of human rights.

A fundamental notion to take into consideration within this framework, as it is responsible for transforming claimed rights into concrete entitlements is that of accountability. This concept is composed of two dimensions, namely answerability, which is the right to make claims and obtain responses from those in power, and enforceability, to be understood as all the mechanisms for delivering accountability and sanctioning non-responsiveness (Newell and Wheeler 2006: 13). The current debates on accountability refer to a shift in the understanding of such notion from being associated with good governance and state responsiveness to enhancing the role of citizens in monitoring the enforcement of rights not only on the part of the state, but also on that of corporations (Gaventa 2002: 1,10).

Newell and Wheeler (2006) identify a complex relation between rights, resources (natural and for livelihood) and accountability. First, human rights are an important means of asking accountability, especially in situations of non implementation of rights. In fact, 'rights talk', because of its legitimacy and moral weight, has the potential to challenge the way in which resources are distributed (*Ibid.*: 6). Second, many conflicts in development today derive from a fundamental tension between a human rights-based approach to development, as I mentioned above, and a market-based approach to access and entitlement to resources. The latter phenomenon takes place in particular with regard to water, oil and indigenous knowledge (*Ibid.*: 14). Thus, Newell and Wheeler argue for the emergence of a 'political economy of rights', which looks into questions of access, distribution and production of resources (*Ibid.*: 9). Finally, conflicts over resources are able to manifest the relations of power that underpin institutions and affect accountability. Now, although the realization of rights depends on systems of accountability, Newell and Wheeler (2006) argue that the latter has the characteristics of an on-going process. The case of South Africa is particularly relevant in this regard, as several strategies and mechanisms to demand accountability are in place, but it is still questionable whether the right to water has been implemented to the utmost of its capacity and to what extent it has benefited the poor (Mehta 2006).

According to Gaventa (2002: 2), the notions of inclusive rights, participation and accountability would thus constitute the basis for a new rights-based approach to development, which in turn would question the meaning of citizenship. The politics of rights, resources and accountability

involves in fact the risk of both greater exclusion and inclusion. In the words of Newell and Wheeler (2006: 30),

When we use a resource lens to understand struggles for rights and accountability, the importance of daily struggles against material deprivations comes to the fore. This highlights the role that the lack of access to resources can play in denying substantive citizenship and unraveling shared imaginings of political community.

Furthermore, one of the main contemporary debates about citizenship refers to the presence of a neoliberal definition of such notion according to which the duties of individuals have to come prior to their rights (Kabeer 2005: 16-18). This implies a shift from a universal provision of socio-economic rights to a residual role for the state, which intervenes only to support those who cannot meet their basic needs through the market (*Ibid.*: 17).

An interesting reflection on the notions of accountability and citizenship in South Africa is that presented by Tapscott (2007). Investigating why a large proportion of the country's population does not participate effectively in the political process, thus remaining poor and marginalized, the author argues that, among many other explaining factors, there is a fundamental misinterpretation regarding the notions of citizenship and identity in post apartheid South Africa. Tapscott affirms in fact that when the democratic government decided to apply a liberal democratic model of citizenship, it assumed a degree of commonality between individuals, which did not correspond to the reality on the ground, as that had been affected by apartheid (*Ibid.*: 88-89). The importance of linking the rights of citizenship to the political and historical contexts in which citizens live as well as that of acknowledging the differences in their awareness and capacity to claim rights is reaffirmed by Gaventa (2002: 5), who argues that:

Those with the resources, power and knowledge to shape definitions of rights and how they are put into practice are able to turn rights discourses and entitlements to their advantage (*Ibid.*: 5-6).

After having framed the human rights perspective on water in terms of international standards, rights-based approaches to development, politics of accountability and notions of citizenship, I will now turn to the market-based approach to water. In the next paragraph I will present the main features of such approach and I will point out where it does differentiate from the human rights-based approach.

2.2 The economic perspective

The emergence of a consensus regarding the idea that water does constitute an economic good goes back to the International Conference on Water and the Environment (ICWE) which was held in Dublin in 1992 (Mehta 2004: 3). Actually, the final declaration of such conference has been considered quite controversial (*Ibid.*: 4), as it seems to adopt both a human rights and an economic perspective on water. Indeed, one of its passages reads (ICWE 1992):

Water has an economic value in all its competing uses and should be recognized as an economic good. Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to a wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.

The economic perspective on water is supported by several arguments. First, this perspective refers to the issue of scarcity of water resources to state that since water, and especially drinking water, is a scarce resource, it has to be regulated through price mechanisms which would better reflect its value and which would balance demand and supply (Dryzek 2005: 121-142). Second, pricing water is justified by the high costs associated with providing water to users. The water industry faces huge costs due to the building of infrastructure and their maintenance as well as to the processes of abstraction and purification of the resource (Vandenhoe and Wielders 2008: 403). Third, the analysis of water-related problems in many developing countries supports the idea that establishing a too low price for water leads to the lack of revenues to expand the network of public services and to a serious waste of resources, which is deemed able to compromise the possibility of satisfying next generations' basic needs (Segerfeldt 2005: 43-58). Thus, attributing a right price to water may be seen as both a financial instrument to recover costs and generate revenues and a demand management instrument that deals with environmental concerns.

Now, according to Vandenhoe and Wielders (2008: 404), such an approach to water is not incompatible with the objective of providing everyone with affordable, safe and sufficient access to the resource as long as water services comply with the principles of essential service and universal service obligations. Essential service is a category which defines those services that are objectively deemed indispensable to life and as such it derives from the concept of public health. While universal service obligation is a notion that has been introduced in order to secure the provision of services of general interest within a context of liberalization.

The ongoing reforms in the water sector which have been informed by the discourse that treats water as an economic good have also been influenced by the emergence of neoliberalism as the major agenda within global economics and politics (Sangameswaran 2009: 229). For the purpose of this work, I will define neoliberalism as a system of governance where the market prevails over the state. Furthermore, acknowledging the complexity of such a phenomenon which has reached the status of orthodoxy in economic and political thinking, I will refer to Sangameswaran (*Ibid.*) to state that neoliberalism comprises elements of policy, ideology and governmentality.

It is possible to distinguish two specific contributions of neoliberalism to the reforms of water sector. First, neoliberalism has pushed for a stronger application of cost-recovery mechanisms (*Ibid.*: 230). Such a decision is justified in terms of efficiency concerns, meaning how resources have to be employed in order to obtain the desired results. While fiscal discipline in general represents one of the policy instruments constituting the 'Washington

Consensus',⁹ in the case of water sector the failures experienced in many developing countries have served as a strong argument to support the shift of costs from the public sector to the consumers of services. Those failures refer to the inability on the part of governments to raise revenues from public services, episodes of corruption and consequent withdrawal from the objective of universal access to water services (Mehta 2004: 5). Furthermore, access to water in those contexts has been depicted as a *de facto* unequal market system where the poor have to rely on private vendors who sell water to them at a very high price, while people from the middle-class with a connection to the formal network may benefit from government subsidies (Segerfeldt 2005: 49).

Second, neoliberalism has emphasized the benefits of private sector participation within water services delivery, whose corollary would actually be to envisage a new role for the public sector (Sangameswaran 2009: 230). Private sector participation has been promoted on the basis of at least two arguments (Prasad 2006: 672). First, the private sector is deemed more efficient because of its attention towards cost-recovery. Second, it is expected to bring more investment within the water sector, thus funding the extension of formal connections and alleviating the budget deficit of governments. Private sector participation in the water sector is generally referred to as privatization, however it can take two distinct forms. On the one side, it has been proposed as divestiture, meaning the complete transfer of ownership over assets from the public to the private sector. On the other side, it has been shaped in a number of contracts between the private and the public sector, where the ownership tends to remain public, while the management becomes responsibility of the private firm. Even though this is essentially a management contract, this latter model of privatization is usually known as public-private partnerships and it has received growing attention during the last few years, because it sounds more palatable and therefore allows interests to coalesce on terminology if not on substance. It also seems able to offer more flexible solutions without the degree of ideology associated with the idea of privatization (*Ibid.*: 687). As a consequence of private sector participation in the delivery of water services, the public sector is expected to perform the role of regulatory body, as is discussed by the regulatory capitalism model.

Therefore, Goldman (2007: 794) argues that after Dublin and under the influence of the World Bank (WB) and its transnational policy networks,¹⁰ a new global consensus on water has emerged during the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002. On that occasion water privatization was presented as the best solution for alleviating poverty and water related problems in developing countries and it was recommended that those countries did explore such a possibility of reform with the help of northern consultants.

A critique that has been moved towards the economic perspective on water, especially in its neoliberal form, refers to the fact that focusing on the management of natural resources in developing countries with the aim of reforming it has opened the way to many possibilities of profit making on the part of northern firms. Such a critique has been formulated in several ways by different authors. For the purpose of this work it is sufficient to recall the notion of 'accumulation by dispossession' proposed by Harvey (2005) and that

of 'green neoliberalism' suggested by Goldman (2007). Both of them insist on the exploitation of under-capitalized resources in poor countries to the benefit of small élites instead of the entire population.

Another critical perspective on the reforms of water sector according to economic principles and neoliberalism is that proposed by McDonald and Ruiters (2005). Actually, these authors offer a theorization of water reforms in Southern Africa which is centered around the marxist notion of commodification. Since I will draw on the work of McDonald and Ruiters in my analysis of the South African case, I will now briefly discuss their argument as well as the major concepts that they employ. According to these authors, water in Southern Africa is currently under pressure to be commodified, a process which (McDonald and Ruiters 2005: 21)

Entails the transformation of relationships, formerly untouched by commerce, into commercial relationships. Under capitalism, many goods and services which previously had no market value or were self-provided within households have been brought into the market fold and mass production. New commodities are created with the expansion of markets to new geographic areas and new sectors[...].

The commodification of water is thus a complex phenomenon which risks excluding more people from access to water and which manifests itself in three specific forms, namely privatization, commercialization and corporatization. For what concerns privatization, I will add to what I mentioned above that McDonald and Ruiters use the term in a very broad sense, to identify all the situations where non-state actors are involved in water services delivery and interests other from that of the public emerge (*Ibid.*: 14-15). Therefore, such a definition applies when either private companies or other types of organizations like Community-Based Organizations (CBOs) play the role of services providers. Commercialization refers to the adoption of business principles in the management of water services (*Ibid.*: 17). Thus, it has to be associated with the implementation of cost-recovery, profit maximization and cost-benefit analysis also on the part of public services providers. Finally, corporatization means that, though remaining public, water services are entrusted to separate business units within the local level of government, allowing financial and managerial ringfencing (*Ibid.*). As a result, financial and managerial decisions regarding water services are taken separately from those concerning other public functions.

In conclusion, after having presented both the human rights perspective and the economic perspective on water, I will highlight the main differences between them. First, as argued by Vandenhoe and Wielders (2008: 422), the issue of affordability reveals a certain disagreement between the two approaches. While the human rights-based approach does not take into much consideration the aspect of costs allocation, the market-based approach is centered on it and therefore it argues for a minimal role of the state within the provision of water services.

Second, the logics underlying the two discourses on water are opposite. According to the human rights discourse, everyone should be protected in accessing water because of his or her status as a human being, hence the issue of human dignity. On the other side, the economic discourse sees the

relationship between the individual and water as one always mediated by the market, even though the latter tends to favor people with economic means.

Chapter 3

The constitutional right to water in South Africa: an historical perspective

The case of South Africa offers an interesting opportunity to see whether and to what extent the two perspectives on water that I have presented in the previous chapter, namely the human rights-based approach and the market-based approach, can coexist on the ground and which tensions are most likely to emerge from such a circumstance. Indeed, one of the objectives of this work is to focus on the right to water as affirmed within the Constitution of South Africa of 1996 and to look at the sometimes contradictory ways in which the right has been operationalized. Therefore, the aim of this chapter is to present and discuss the constitutional right to water and especially to put it within its historical context, namely that of the transition from apartheid to democracy and of the debates on a new Constitution for the country.

3.1 Demanding rights during apartheid: the Freedom Charter

The apartheid regime established by the National Party (NP) after the elections of 1948 was characterized by a fundamental denial of rights to the majority of South Africans in every aspect of life. As a consequence, the major opposition parties, namely the African National Congress (ANC), the South African Indian Congress (SAIC), the South African Congress of Democrats (SACOD) and the South African Coloured People's Organization (SACPO), forming the South African Congress Alliance, organized the Congress of People in 1955 with the aim to discuss those major changes which would have led to a democratic South Africa. The result of such discussions was the Freedom Charter, a document formulated in the language of human rights which aimed to represent the demands and aspirations of ordinary South African citizens (Davis 1991: 2). The requests that the Freedom Charter made in terms of people's rights can be read as direct responses to the repressive legislation of apartheid. In this sense, Davis (*Ibid.*: 9) defines the Charter as an 'indigenous' document, more than a replication of the Universal Declaration of Human Rights of 1948, introducing and adapting the human rights discourse to the specific context of South Africa.

Among the many laws which constituted the formal structure of apartheid, quite a number of them had already been passed before 1955. A short list would include the Mixed Marriages Act of 1949 and the Immorality Act of 1950, which aimed to freeze the racial groups living in South Africa; the Population Registration Act of 1950, which imposed the racial classification of the South African population; the Group Areas Act of 1950, which assigned to every racial group a specific area of the country; the Natives Consolidation Act of 1945 and the Abolition of Passes and Documents Act of 1952, whose objectives were to control and to restrict the movement of African workers; the Suppression of Communism Act of 1950, which intended to restrain the

activity of opposition movements; the Reservation of Separate Amenities Act of 1953, which applied the notion of separateness to ordinary aspects of life; the Bantu Education Act of 1953, which brought the education of Africans under the control of the state (Davis 1991: 8, Ross 1999: 116-136).

Therefore, the Freedom Charter demanded not only civil and political rights, but also some socio-economic rights, like for instance the right to own land, the right to work, the right to houses, food and healthcare (South African Congress Alliance 1955). Furthermore, the Charter suggested the nationalization of mines, banks and other monopoly industries of the country, following the socialist ideas which were popular among the Congress Alliance at that time (Ross 1999: 125).

The importance of the Freedom Charter as a founding step in the struggle for the recognition of human rights in South Africa was reaffirmed in the 1980s. In 1986 the NP, envisaging a forthcoming reform of apartheid and fearing the majority rule which was likely to follow, enquired into the opportunity to draft a Bill of Rights as a means to protect the interests of the white minority (Van der Westhuizen 1990: 174). Thus, the South African Law Commission appointed to such task introduced the notion of group rights in order to protect the individual rights and possessions of white South Africans (*Ibid.*, Sachs 1990: 6-7). In reaction to this, the ANC published its own Constitutional Guidelines in 1988, followed by a draft Bill of Rights in 1990, using the Freedom Charter as the main source for both the documents. In doing this, the ANC not only recognized the relevance of the rights claimed in 1955 within the transition to democracy, but it also clarified to the majority of South Africans that human rights could serve as an instrument of liberation (*Ibid.*: 6).

3.2 The debate on a Bill of Rights for the new Constitution of South Africa

For the purpose of this work, it is interesting to report the major debates on the Bill of Rights to be included in the new Constitution of South Africa, as they developed within the framework of the transition from apartheid to democracy.

Before entering into the specifics of the debate, it might be useful to recall the different stages within the transition itself. After the National Peace Accord Negotiation which took place from June to September 1991, the Convention for a Democratic South Africa (CODESA) was inaugurated in December 1991. Such Convention involved the participation of nineteen parties, with the aim to set the rules governing the transition as well as to draft a new Constitution for the country (De Klerk 2002). However, the works of CODESA collapsed in May 1992, on the occasion of the second plenary session (*Ibid.*, Ross 1999: 189). After the breakdown, the negotiation process took mainly the form of bilateral and private meetings between representatives of the ANC and the NP (*Ibid.*). Thus, in September 1992 the ANC and the NP signed the Record of Understanding, by means of which they agreed on the new process to discuss the formation of an interim government and the writing of an interim Constitution (De Klerk 2002). The Multy-party Negotiation

Forum started in April 1993 and it resulted in an Interim Constitution adopted in December (De Klerk 2002). In April 1994 the first democratic elections in the history of the country were held and they produced a transitional government, with the ANC as the majority party, as well as a Constitutional Assembly charged with drafting the new Constitution, a task which was accomplished by May 1996 (*Ibid.*).

Within the framework of the negotiations which preceded the Interim Constitution of 1993, it is possible to identify two major debates concerning the future Bill of Rights of the country. The first debate refers mainly to the content of the Bill, while the second affects its form and scope for application. I will now look at each of them separately, as they will help to get a better insight into the origins and implication of a right to water within the country.

The debate on the content of a Bill of Rights for a democratic South Africa refers to the inclusion of socio-economic rights in the basic law of the country. It is possible to notice two opposing perspectives on the role of socio-economic rights within the post apartheid Constitution. On the one side, the ANC interpreted socio-economic rights as a specific means to address the legacies of apartheid, especially in terms of poverty and inequality (Omar 1991: 3-4, Sachs 1990: 7-12). While on the other side, the NP opposed to such a view on the basis of the debatable enforceability of socio-economic rights on the part of courts and of the lack of state resources to implement them (Davis 2001: 195, Gabru 2005: 2). The ANC thus insisted for the realization of a mixed economy, characterized by a strong intervention of the state, and for the explicit recognition of the principle of affirmative action¹¹ in order to secure equal access to resources to the majority of South Africans (Sachs 1992: 98-103). The main theoretical arguments underlying the ANC's position were the notion of indivisibility of rights and that of substantive equality (Sachs 1990: 7-9). Both of these arguments state that social and economic deprivations have the effect of inhibiting human dignity and the freedom to actively participate in democratic institutions (Liebenberg 2001: 408). In the words of Mr Nelson Mandela, President of the ANC, at the party's Bill of Rights Conference in 1991 (Gabru 2005: 2),

We must address the issue of poverty, want, deprivation and inequality in accordance with international standard, which recognizes the indivisibility of human rights. A simple vote, without food, shelter and health care is to use first generation's rights as a smokescreen to obscure the deep underlying forces which dehumanize people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched[...].

The debate on the form and scope for application of the Bill of Rights may look misleading at first sight. Indeed, it implies a switch in the positions of the ANC and the NP. While on the one side the ANC argued for a minimalist Bill of Rights to be implemented during the transition period, on the other side the NP proposed a rather comprehensive Bill, even though limited to civil and political freedoms (Davis 2001: 207, Spitz and Chaskalson 2000: 258). The reasons for such a circumstance may be described as mainly strategic (*Ibid.*). In fact, the ANC was very confident in the results of the elections scheduled for 1994, thus it decided to leave to the forthcoming Constitutional Assembly, where it thought to represent the majority, the charge of drafting a Bill of

Rights which properly reflected its vision (Spitz and Chaskalson 2000: 258). Furthermore, the ANC feared that a conservative judiciary, which still represented the interests of apartheid, would have deprived a Bill containing socio-economic rights of its potential for social transformation (Davis 2001: 211). Accordingly, the NP intended to prevent the effects of majoritarianism within the Constitutional Assembly, trying to gain as much as possible while it still had power to negotiate (Spitz and Chaskalson 2000: 258).

In the end, the Technical Committee responsible for drafting the Interim Constitution favored the NP's perspective and it produced quite a comprehensive Bill of Rights, even though the latter did not include an extensive list of socio-economic rights. According to the definitions provided by the Committee itself, the interim Bill of Rights came to include those basic rights and freedoms which were deemed necessary to ensure the functioning of democracy during the transition and those rights and freedoms 'aimed at achieving the overall security and well-being of all during the transition' (*Ibid.*: 264). The category comprising the rights and freedoms 'conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction' (*Ibid.*) was left to discussion within the Constitutional Assembly. The NP won also with reference to the scope for application of the Bill of Rights, as vertical application was largely preferred to the horizontal one (Davis 2001: 207-208).¹²

Now, the final Constitution approved in 1996 does not differ too much from the Interim Constitution. However, the final Bill of Rights does contain a broad list of socio-economic rights and a provision regarding horizontal application (RSA 2009). Notwithstanding this, Savage (2001: 185-186) argues that the final Constitution is quite clearly a product of political compromise, as the ANC had to make several concessions to the opposition parties in order to pass the final clauses. Such a reading of the events may help to understand why socio-economic rights and in particular the right to water were formulated in the way they actually read within the Constitution, as I will discuss in more detail in the next paragraph.

3.3 The right to water in the Constitution of 1996

The presence of a formal right to water within the basic law of a country is still very limited across the globe. Apart from South Africa, the list of those countries which have enclosed the right to water within their Constitution would include the Democratic Republic of Congo, Ethiopia, Gambia, Kenya, Uganda, Zambia, Ecuador, Uruguay, the states of Massachusetts and Pennsylvania in the United States and Belgium (WWC 2009). Section 27 of the Constitution of South Africa reads as follows (RSA 2009: 21-22):

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 realization of each of these rights [...].

I will now discuss some issues that will help to interpret the reach of the constitutional right to water as that was formulated in 1996.

First, according to many commentators (Gabru 2005, Liebenberg 2001, Magaziner 2008), the formulation of Section 27 clearly excludes the hypothesis that socio-economic rights could be seen as goods on demand from the state. The expression 'right to have access to' qualifies the right to water as an indirect right. That means that the state does not have the obligation to provide water to everyone, rather it must create those enabling conditions which would help citizens to access services on their own. Direct provision of water on the part of the state has to take place only when citizens do not have sufficient means to satisfy their basic needs.¹³

Second, it is noticeable that the Constitution lacks to define what constitutes 'sufficient' water in terms of quantity and quality. This turns extremely problematic when it comes to operationalize the right or to decide on eventual violations of that, as it leaves a high degree of discretion to policy makers and the judiciary (Gabru 2005: 12, Magaziner 2008: 518). In 2001, the Department of Water Affairs and Forestry (DWAF) issued the Compulsory National Standards and Measures to Conserve Water Regulations, which contained a definition of 'basic water supply' in terms of 25 litres per person per day within 200 meters of an household (DWAF 2001: 4). As I will discuss in more detail in the next chapter, such a provision corresponds to the WHO minimum standard to survive in the short term (WHO 2003: 13). Ever since, that definition has been used as an equivalent to the notion of sufficient water, however a ruling by the Constitutional Court could impose a different interpretation of Section 27.

Third, a direct consequence of the lack of a clear definition of sufficient water within the Constitutional text is that a 'reasonableness approach' to the right to water comes to prevail over a 'minimum core obligations approach' (Magaziner 2008: 561, 579). While the latter approach refers to the duty on the part of the state to satisfy minimum essential levels of the right, the former one leaves the state free to realize the right by means of those that it considers 'reasonable measures'. Again, such a circumstance leaves a high degree of flexibility to policy makers, whose decisions however might be challenged in courts.

Finally, as I mentioned in the previous chapter, the main limitation to the realization of the right to water derives from the notion of progressive realization within available resources, which in fact appears in Section 27 (RSA 2009: 22). Nevertheless, such a notion has been interpreted as claiming for rapid and effective steps on the part of states as well as for a budget allocation that prioritizes the realization of the right (Kok 2005: 277-278).

Now, two institutions have been entrusted with the task of watching over the right to water, namely the judiciary and the South African Human Rights Commission. For the purpose of this work, I will focus on the activity of the former. South African jurisprudence on socio-economic rights has not been so progressive hitherto, as it rarely accepted the claims made by poor residents for improvement in the enforcement of those rights (Magaziner 2008: 561-566). Such a trend has recently been confirmed by the judgment of the Constitutional Court in the *Mazibuko* case, as that was released early in

October. Indeed, even though the previous sentences within the *Mazibuko* case, namely that of the High Court and that of the Supreme Court of Appeal, had raised many expectations in terms of a broader interpretation of the right to water, to the benefit of poor citizens of South Africa, the Constitutional Court has rejected the requests of the applicants who were actually townships' residents.

Since I will discuss the *Mazibuko* case in more detail in the next chapter, I will now just provide some background information about it. The case, also referred to as Phiri water campaign, officially began in 2006, when five residents of Phiri, a township within the area of Soweto in Johannesburg, were heard in the South Gauteng High Court against the city of Johannesburg, the water service provider Johannesburg Water¹⁴ and the DWAF. The applicants challenged the forced installation of Pre-Paid Meters (PPMs)¹⁵ in their houses, which they considered both unconstitutional and unlawful, and the quantity of Free Basic Water (FBW) received (i.e. 25 litres per capita daily), which they deemed not sufficient to meet their basic needs (Khalfan and Conteh 2008: 12-13, *Mazibuko* 2008: 4). Therefore, the Phiri residents asked for conventional meters and a quantity of 50 l pcd free of charge. According to Magaziner (2008: 518-522), the applicants based their claims on a number of Constitutional clauses. Apart from Section 27 (the right to water) and Section 33 (administrative action),¹⁶ which were specifically mentioned in the affidavit presented by the residents, it is important to mention Section 9 (equality), as the installation of PPMs concerned just the area of Phiri, one of the poorest townships of Johannesburg, and not the wealthy and historically white suburbs of the city.

A discussion of the contributions of the *Mazibuko* case to the realization of the right to water in South Africa will follow in the next chapter, together with the analysis of other crucial issues that will help to understand successes and failures of such a process.

Chapter 4

The operationalization of the right to water in South Africa: policies and tensions

The aim of this chapter is to provide an analysis of the process of operationalization of the right to water in South Africa. Thus, it is structured around six crucial issues that will highlight progresses, failures and tensions inherent in such a process. The issues are the (re)definition of the right to water; the role of local government in water services delivery; the debate on national and local responsibilities with regard to failures in water provision; the significance of having a constitutional right to water, especially for the poor; the notion of water demand management; and the conditions of informal residents with reference to access to water services. Since most of the analysis is based on the findings of my fieldwork in Cape Town, I will make explicit reference to my case study throughout the entire chapter.

4.1 A process of continuous redefinition

The operationalization of a right will inevitably depend on the definition provided for it. I will argue that the right to water in South Africa has gone through a process of continuous (re)definition which was influenced by specific political and economic circumstances. The striking aspect of this process is that in the end it has brought to a very narrow and exclusive understanding of the right as well as to a very limited operationalization of it. It is possible to identify three main phases within this framework.

The first phase corresponds with the adoption of the macroeconomic strategies contained in the Reconstruction and Development Programme (RDP), the political manifesto which the ANC presented at the elections of 1994. This document was focused on redistribution of assets and equal access to basic services, with the aim to solve the dualism that had characterized apartheid (Makgetla 2004: 270). The second phase began in 2001, when the Department of Water Affairs and Forestry (DWAF) issued the Free Basic Water (FBW) policy, which not only provided a definition of the quantity deemed sufficient to give effect to the right to water, but it also stated that such a quantity should have been provided free of charge to every household within the country (Mehta 2004: 19). For instance, the Compulsory National Standards and Measures to Conserve Water Regulations, by means of which the policy was implemented, defined the basic water supply as 25 litres per capita daily within 200 meters of an household (DWAF 2001: 4). Finally, the third and current phase started when South African municipalities decided to adopt their own indigent policies as a way to deliver the FBW. This phase is actually characterized by a great variety of experiences at the local level.

Thus, even though it could be said that the FBW policy represents the only concrete attempt to realize the right to water in South Africa, I think it is worth to look at it as part of a process which started already with the RDP and

which recently evolved into the indigent policy. I will now analyze each of these phases in more detail.

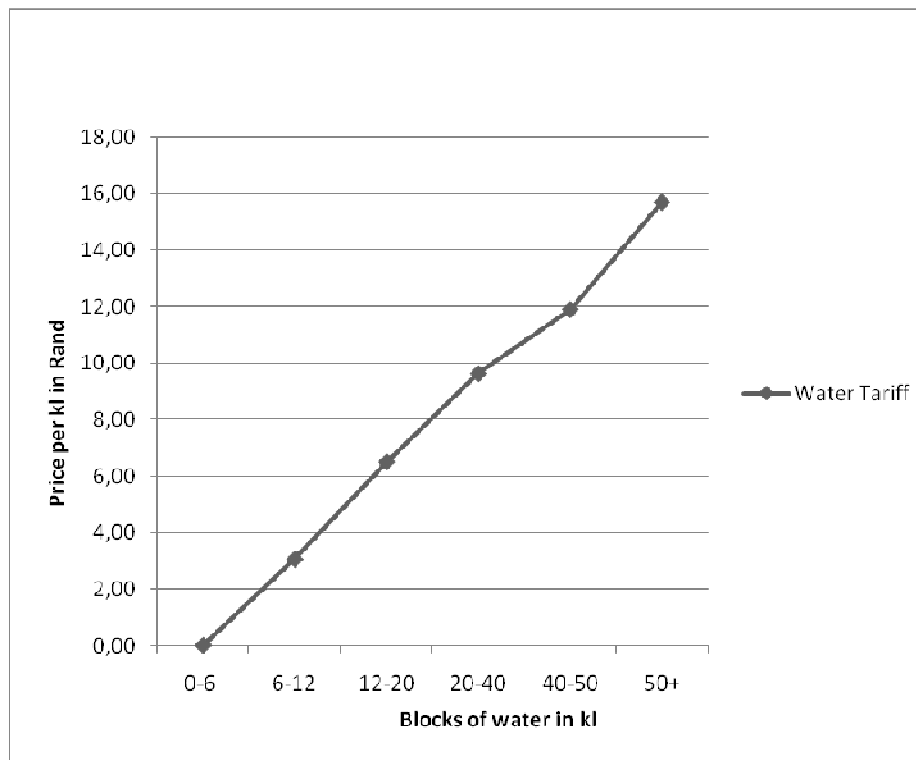
In 1994, approximately 12 million South Africans did not have access to any form of safe water supply (Muller 2007: 34). Thus, the RDP proposed a 'welfare-oriented' strategy (Mehta 2004: 19) aimed to secure access to water to all citizens within the country in three consequent steps. From a provision of 20-30 l pcd within 200 meters of the house in the short term, the ANC committed itself to supply 50-60 l pcd on-site in the medium term, in order to guarantee 'accessible water to every South African in the long run' (ANC 1994). However, the RDP was replaced by the Growth, Employment and Redistribution (GEAR) macroeconomic strategy already in 1996 and those objectives were put aside. The GEAR formally introduced neoliberalism in South Africa (Mehta 2004: 19). As a consequence, the local level of government, which is the major responsible for the provision of water services, was soon restructured according to the principles of New Public Management (NPM).¹⁷ The main idea behind such approach was that of running the public sector as if it were a business, thus giving priority to the economic aspects of public services at the expenses of their inherent social values. Nevertheless, at the end of the 1990s, the introduction of corporatization, cost-recovery and credit control measures in the management of water services had resulted in high levels of non-payment, vast amounts of municipal arrears and massive water cut-offs (McDonald 2002a: 164-173).

That was the context in which the DWAF adopted the FBW policy in 2001. Now, even though it is debatable whether that policy represented a genuine effort to realize the right to water, especially for the poor, or it was prompted by the local government elections held in 2000, it finally provided a clear interpretation of the constitutional wording 'sufficient water' (RSA 2009: 21). However, such an interpretation of the right to water, which equated the latter with a 'basic' provision of 25 l pcd, was very much shaped by neoliberalism. Indeed, the decision to provide just a minimum amount of free water to eliminate the backlogs of apartheid together with the establishment of a 'water ladder', where better services were associated with higher tariffs, clearly reflect the fiscal restraint which is typical of neoliberal policies. Furthermore, numerous issues of concern have emerged during the last few years with regard to the implementation of the FBW policy (Flynn and Chirwa 2005: 71-73, Tissington et al. 2008: 31-34).

First, the policy is unevenly implemented across the country. This can be related to two main causes. On the one hand, there is a lack of capacity (both technical and financial) at the level of municipalities, which has inhibited the process of decentralization within the country. On the other hand, there seems to be a serious failure to monitor and enforce the FBW policy on the part of the DWAF, which, according to the law, is the national regulator of the water sector. Second, it has been noticed that the FBW policy is similar to a one-size-fits-all measure, which does not take into consideration the socio-economic reality of the poor in the country (Dugard 2009: 33). Namely, this refers to the fact that the policy targets account holders (e.g. households), applying a standard of eight people per household, while in South Africa poor households are often shared between the family of the stand holder and one or more

backyard dwellers. Third, partly as a consequence of the previous point, the quantity of water deemed sufficient to carry a healthy life is highly debated. As I have already mentioned, the figure of 25 l pcd¹⁸ is considered by the WHO as the lowest level to maintain life over the short term (WHO 2003: 13). For instance, basic access to water should assure consumption, while hygiene may be compromised (*Ibid.*). Furthermore, during my fieldwork I have been confirmed that the free basic amount usually lasts only for two weeks (academic and representative of CSO, personal communication, 5 August 2009). The DWAF must actually be aware of these considerations, as it has acknowledged that the FBW should ideally be increased to 50 l pcd (Tissington et al. 2008: 32). Fourth, the FBW policy has been accompanied by a system of raising blocks tariffs, where a volume-based charge increases for higher consumptions of water, thus providing a mechanism of cross-subsidization among different types of users and discouraging waste (*Ibid.*: 42). However, it has been noticed that poor households may be penalized more than top users by sharp tariff increases after the free block (*Ibid.*: 45). For instance, the tariff for the second block of water may become unaffordable for the poor, who are then obliged to rely just on the basic amount. The data for Cape Town displayed in figure 1 show in particular how the price for the first blocks tends to rise steeply, while the increase slows down in correspondence of the fifth block, which usually funds luxury consumption.

Figure 1
Water Tariffs Structure in Cape Town 2007-2008



Source: Processing data from Matrix 2007/08¹⁹

Finally, the FBW policy does not apply to informal settlements, even though a large number of South Africans live in those sites.²⁰ Residents of informal settlements access water through a communal tap which should be located within 200 meters of their shacks. Now, even though these people do not pay for water, it is debatable whether this system is able to assure them a basic amount of water, especially given the overcrowded conditions of informal sites (informal residents, personal communication, 5 August 2009). I will address the issue of informal settlements in more detail in one of the next paragraph.

The third phase within the process of definition of the right to water is actually a further development of the second. Although the FBW policy was issued at the national level, it was a local government's responsibility to implement it. Since 2005, in order to face the challenges deriving from ensuring access to basic services in a context of severe poverty and unemployment, municipalities are allowed to build their own indigent policies as a way to deliver FBW (Tissington et al. 2008: 24).²¹ As I said above, this has led to a variety of experiences on the ground. For instance, some municipalities still provide the FBW on a universal basis, while many of them have decided to entitle to receive the free basic amount of water only those citizens who qualify as 'indigent'. Then there are municipalities which have decided to maintain the free basic amount of water for all, while increasing that of indigents.²² Even the employment of an indigent policy has raised some issues of concern.

First, the definition of 'poor' or 'indigent' may well be a matter of debate, depending on the specific circumstances of each municipality.²³ Second, during the last few years there has been a shift from a system of automatic registration of the indigent based on the value of their houses to a system where people must go through a complex process of means testing in order to apply for the policy (*Ibid.*: 37-38). The difficulty of the procedure combined with a feeling of shame associated with the act of demanding has thus resulted in a general underrepresentation of indigents within the municipal registers (*Ibid.*: 37).²⁴ Third, the policy usually targets municipal account holders, meaning that many poor tenants or informal residents are automatically excluded (*Ibid.*). Fourth, the agreement between the indigent household and the municipality often demands the installation of water management devices as a necessary condition to receive free water (*Ibid.*: 38). As I will discuss in much detail in the paragraph about the notion of water demand management, this means that the poor are strictly forced not to exceed the basic amount of services. Finally, even though another (positive) condition of the agreement is the promise of writing off the arrears that poor households have matured with the municipality, Tissington et al. (2008: 38) point to the fact that the arrears are not really written off, but rather suspended. Such a finding was confirmed during my own research, as I was told that while interests on the debt were written off, indigents continued receiving 'pink papers' which demanded them to pay the actual debt (activist, personal communication, 7 August 2009).

In order to support my argument about the effects that political and economic circumstances, and especially the rise of neoliberalism, had on the operationalization of the right to water in South Africa, I will now turn to the

analysis of local government as one of the major sites of tensions within the provision of water services.

4.2 Tensions at the local level

As I mentioned in the previous paragraph, water service delivery is one of the functions of the local level of government. Now, it is precisely at this level that it is possible to identify some important tensions with regard to the operationalization of the right to water. These refer in particular to the restructuring of municipalities according to the principles of neoliberalism, within that framework of reforms known as New Public Management (NPM). Indeed, the local government was asked to combine a human rights framework, embedded in the constitutional right to water and in the FBW policy, with a completely opposing logic as that of NPM. It is with regard to such a situation that Mehta (2006: 75) argues for a 'schizophrenic role of the state' which is at the same time enforcer and violator of socio-economic rights. I will now look in some detail at two policy tools which were introduced in South African municipalities as a result of their restructuring at the end of the 1990s, namely corporatization and credit control.

Smith (2005: 169) refers to corporatization as a 'second wave of neoliberalism' that took place in South Africa after that the first wave, namely privatization, had received a lot of criticism. Such a criticism derived especially from the fact that water privatization, not only in South Africa, but all over the world, failed to provide affordable and accessible services for the poor (*Ibid.*). As a consequence, the notion of de-regulation which was inherent in Washington Consensus,²⁵ was replaced by that of re-regulation. The market orientation of the latter is still evident from the fact that it implies an organizational restructuring of public services, with the aim to transform them into corporations. Market mechanisms within a framework of strong state regulation are in fact deemed to work better in the provision of basic services (*Ibid.*).

In particular, corporatization refers to the transfer of responsibility for services delivery to a unit or a department which, though fully owned by the state, is managerially and financially ringfenced (McDonald and Smith 2004: 1470). The main argument supporting corporatization states that a more efficient services delivery would result from focusing just on the act of delivering (the core business), leaving policy making and other minor functions to other offices (Manning 2001: 299). Furthermore, financial ringfencing allows to reveal accurately costs and surpluses of running a service, thus identifying losses and gains (McDonald and Smith 2004: 1470). However, such an approach means also that the economic aspects of a public service, for instance the degree of financial sustainability, tend to prevail over its social aspects. With regard to this, Dugard (2008: 595) argues that one of the major problems of South Africa is the absence of a national social regulation of water, aimed to secure adequate safe and affordable access to water for the poor, which balances the proliferation of municipal economic regulations.

Now, with reference to the case of Cape Town, I will mention two specific issues of concern that have emerged from the fieldwork that I have

conducted. First, water services are inherently linked to the housing delivery process (representative of CSO, personal communication, 24 July 2009). This is especially true for residents in informal settlements, who wait to be allocated to new government housing projects and who meanwhile cannot climb the water ladder, meaning that they cannot get access to better quality services. Thus, it becomes relevant to ask to what extent it is useful to deal with these demands for social services separately, as proposed by corporatization. Second, such a reform seems likely to create a climate of tensions and division instead of one of cooperation towards the common well-being. That sometimes may result in an unclear allocation of responsibilities as well as performing of public functions at the expenses of citizens, a situation which could be aggravated by the outsourcing of certain tasks to private companies (trade unionist, personal communication, 4 August 2009).

Besides corporatization, municipalities have to apply a series of credit control measures to help them reduce fiscal deficits deriving from water services. The range of possible options includes water cut-offs, trickle valves, pre-paid meters (PPMs), water management devices, collateral service deprivations and collective service deprivations (Flynn and Chirwa 2005: 67-71). I will now look in some detail at those measures which have been the most debated, namely water cut-offs, PPMs and water management devices. Water cut-offs, after having being employed extensively at the end of the 1990s,²⁶ have been abandoned, at least at the level of national political discourse, as they represent a too manifest threat to the right to water. Furthermore, where disconnections are still performed, like in Cape Town, they do not affect the provision of FBW (Matrix 2007/08). PPMs as well are very contested, as their functioning may result in a form of automatic disconnection from water provision (Tissington et al. 2008: 54). These devices represent one of the major issues discussed in the *Mazibuko* case. However, the Constitutional Court has found the installation of PPMs in the township of Phiri lawful, arguing that what these meters may determine 'is better understood as a temporary suspension in supply, not a discontinuation' (*Mazibuko* 2009: 63). Water management devices are actually a further development of PPMs, as they set a daily limit to the consumption of water and cut off the provision as soon as that limit has been reached (Tissington et al.: 55). Nevertheless, the city of Cape Town, where these devices have been introduced in 2008, firmly states that they are not PPMs, since users do not have to pay water in advance with them and they can actually get an extra amount above the FBW on credit (academic and representative of CSO, personal communication, 5 August 2009). The problem is that the latter is not a viable option for the majority of the poor in Cape Town, as they do not have the money to pay for it. Under such circumstances, it appears highly probable that the municipality has consciously decided to include the new devices within the framework of water demand management to avoid political debate about and public resistance to an issue, that of credit control measures, which has already raised many concerns all over the country.

In conclusion, one of the major contradictions which have emerged at the level of local government with reference to the realization of the right to water is that a technical approach has been privileged in order to solve problems which are inherently political. However, this means that those problems are

going to persist in the future until a proper political solution has been found. The next paragraph will partly address this issue, by presenting the debate about the degree of responsibility of the national and local level of government for the failures within the operationalization of the right to water.

4.3 The debate about national and local responsibilities

Even though the crisis of water services delivery was harsher at the end of the 1990s, namely before the implementation of the FBW policy, when people were experiencing massive cut-offs as a result of non-payment (McDonald 2002a: 162), still there is widespread dissatisfaction with the poor level of services provided in the country and such a feeling clearly emerged from the sometimes violent protests that took place earlier this year (Letsoalo and Mataboge 2009: 14-15).

An interesting issue of debate is whether the main responsibilities for these failures fall within the municipalities or within the national government. According to Muller (2007), the former Director General of DWAF, poor water services delivery in South Africa derives from the fact that following decentralization a political approach has prevailed over a technical one in the management of water. He uses the expression 'parish pump politics' to refer to 'the way in which local power and social relations impact on water-supply systems' (*Ibid.*: 40). Therefore, the author argues that the availability of financial resources at the local level has created opportunities for rent seeking, rather than increasing the well-being of the poor. Furthermore, in a comment on the *Mazibuko* case, Muller defended the validity of the FBW policy, thus implicitly referring practical inefficiencies in the course of its implementation to the behavior of municipalities (Muller 2009: 19).

On the other side of the debate, there are authors (Bond and Dugard 2008, Dugard 2008, Tissington et al. 2008) who, though acknowledging that the bulk of the problems with water services takes place at the local level, still argue that those same problems are the result of decisions taken at the national level. For instance, the reform of municipalities according to the principles of NPM was issued by the national government. Thus, municipalities were nominated both Water Services Authority (WSA) and Water Services Provider (WSP), but this shift in responsibility came with the withdrawal of national subsidies and the prohibition of running budget deficits (Dugard 2008: 602). Moreover, as I mentioned above, Tissington et al. (2008: 15-16) argue for a serious lack of regulation on the part of DWAF, which apart from issuing the FBW policy never intervened to enforce it or to check the implementation aspects left to every single municipality. Such a circumstance has led to a situation of uneven application of the policy, which was very well depicted by the words of two of my interviewees (academics, personal communication, 10 August 2009):

While some municipalities are trying their best to provide FBW and provide water in a pro-poor way, others are wholly focused on recovering costs and have a profound anti-poor attitude, probably due to frustrations felt in terms of financial and technical constraints and pressure to implement pro-poor strategies without the necessary support.

The respondents pointed to the need for more financial and technical assistance from the national government, if municipalities have to secure access to water to their citizens. Now, the issue of funding is extremely relevant, as it is very much related to the pressure towards the commercialization of water services. It also allows a better understanding of the process of prioritization among different political objectives. For instance, even though services delivery has always been a priority of the ANC at the discourse level, in practice such objective has not received sufficient resources to be properly achieved. Tissington et al. (2008: 57-59) highlight that the financial instruments allocated to this sector, namely the Municipal Infrastructure Grant (MIG) and the Equitable Share (ES),²⁷ have proved not to be sufficient to meet the needs of the poor. However, South Africa is not a poor country. Indeed, it is ranked among middle income countries with a GDP of 283 billion US Dollars (UNDP 2009), though characterized by a very high level of inequality.²⁸ Therefore, even though the issue of capacity at the local level cannot be overlooked, the lack of a strong political will could be referred to as the major responsibility on the part of the national government for the failures within the operationalization of the right to water.

Now, the next paragraph will reflect on the significance of having a right to water entrenched in the Constitution, with particular regard to the effects that it is likely to have on the lives of the poor.

4.4 Do rights matter? Successes and failures of the *Mazibuko* case

The case of South Africa clearly demonstrates that rights do not always translate into concrete entitlements to satisfy particular needs (de Gaay Fortman 2006: 34). In fact, even though the FBW policy represents an attempt in this sense, I have tried to highlight its major shortcomings. Moreover, such a policy excludes the poorest of the poor, namely the residents of informal settlements, whose access to water is thus seriously threatened. However, it is important to ask what is the significance of having a constitutional right to water and to what extent it may make a difference for the living conditions of poor people (Mehta 2006: 70).

Now, the presence of a legal framework represents a very useful instrument within the process of realizing rights. As the Constitution imposes on the state the negative duty to respect the right to water and the positive right to promote, protect and fulfill it (Flynn and Chirwa 2005: 61), citizens have the opportunity to challenge the policies and to get the government accountable. In particular, litigation in courts becomes a concrete possibility besides other forms of social action. In South Africa, the very first campaign aimed to advocate the respect and promotion of the right to water took place between 1996 and 2000 when the hypothesis of privatization of water services delivery was getting real and municipalities were implementing cost-recovery in a very strict way (Dugard 2008: 601). That led to the creation of several social movements, like the Anti-Privatization Forum, the Anti Eviction Campaign or the Coalition Against Water Privatization, which employed different methods of social action. Currently, it seems that such methods have been joined by

litigations held in courts with the aim to achieve more effective results. Indeed, the debate on the right to water is at the present moment dominated by the *Mazibuko* case. Therefore, it is worth to look at it in some detail in order to highlight its contributions as well as its limits. Since I have already introduced the background of the case in the previous chapter, I will now focus on the three judgments which were released in its regards.

The South Gauteng High Court's decision published in 2008 was actually quite progressive compared to South African jurisprudence on socio-economic rights (Khalfan and Conteh 2008: 12-15). In fact, the court approved all the requests made by the applicants, namely the Phiri residents, supporting its decision with some interesting arguments. First, the judge declared the installation of PPMs in Phiri both unconstitutional and unlawful on the basis, among other issues, of the violation of the right of equality. The judgment referred to the evidence of racial discrimination, as PPMs were installed only in traditionally poor black areas of Johannesburg (*Mazibuko* 2008: 58-60). Second, the judge declared the FBW amount, namely 25 l pcd, insufficient to meet the basic needs of Phiri residents. Besides the fact that the average size of Phiri households was proved to be of 16 members, the judgment stated that 25 l pcd represents the very minimum amount which municipalities are required to provide, but also to increase in order to fulfill the right to water (*Ibid.*: 17-18). Furthermore, the judge took a minimum core obligations approach, as he ordered the city of Johannesburg and the water services provider to supply to each applicant and similar residents in Phiri a quantity of 50 l pcd free of charge (*Ibid.*: 72). As I explained in the previous chapter, such an approach has the effect of enhancing the positive duties of the state with regard to the realization of socio-economic rights.

The Supreme Court of Appeal's judgment was however more cautious (Dugard and Liebenberg 2009: 11-17). First, the judge stated that 42 l pcd would constitute a sufficient amount of water in terms of Section 27 of the Constitution (*City of Johannesburg* 2009: 2). Thus, he ordered the city of Johannesburg to reformulate its FBW policy in order to provide such amount to all the registered indigents (*Ibid.*). Second, the judge declared the installation of PPMs as unlawful on the basis that it did not comply with the city's Water Services By-Laws (*Ibid.*: 27-33). As a consequence, the judgment suspended the order of unlawfulness for a period of two years to allow the city to legalize the use of PPMs (*Ibid.*: 34-35).

Finally, the Constitutional Court's decision published last October rejected all the requests made by the applicants, namely the Phiri residents, suggesting a rather conservative interpretation of the right to water. The judge stated that the FBW policy implemented by the City of Johannesburg had to be considered reasonable and therefore not in conflict with Section 27 of the Constitution (*Mazibuko* 2009: 38-51). Among the various arguments which supported her decision, the judge insisted on the fact that the city had proved that its FBW policy was not inflexible, rather it had been revisited several times to favor the indigents (*Ibid.*: 46-49). With regard to the issue of PPMs, the judgment declared that their installation was lawful (*Ibid.*: 52-82). Now, it dealt especially with definitions in order to reach such a conclusion. For instance, the judge agreed with the respondents when she affirmed that the city's Water

Services By-Laws, when referring to a 'metered full pressure water connection', implied both credit and pre-paid meters (*Mazibuko* 2009: 53-58). Moreover, as I mentioned in a previous paragraph, the judge argued that PPMs do not result in an unauthorized discontinuation of water supply, rather in a 'temporary suspension' (*Ibid.*: 58-65). The concern about unfair discrimination was also set aside on the basis that although the installation of PPMs affected a vulnerable group, its purpose (i.e. eradicating water losses) was laudable and its effects were not disadvantageous to Phiri residents (*Ibid.*: 78-82). Finally, the judge both introduced and concluded her decision with some reflections on the role of courts in determining the content of socio-economic rights (*Ibid.*: 23-34, 82-85). There, she argued that socio-economic rights are not totally positive, as they depend on the criteria of reasonableness and progressive realization. For instance, to properly interpret the right to water, Sub-Sections 27(1) and 27(2) of the Constitution must be read together.²⁹ Thus, while the judgment of the High Court seemed to break with the tradition of South African jurisprudence on socio-economic rights, that of the Constitutional Court fits perfectly in such tradition. As a consequence, the reasonableness approach is still strongly recommended instead of the minimum core obligations approach.³⁰

Now, such a conclusion of the *Mazibuko* case could actually question to what extent human rights can be employed in order to promote socio-economic transformations as well as to what extent the socio-economic rights of the poor are secured by the Constitution and hence courts (Bond and Dugard 2008: 2-3). According to Mehta (2006: 63-64), there are two main reasons why the poor may not enjoy second generation rights. On the one side, that could depend on 'sins of omission', which the author refers to as circumstances like the lack of resources or capacity that cannot be easily overcome (*Ibid.*). On the other side, the government could be responsible for 'sins of commission', meaning voluntary decisions that go against the realization of the rights of the poor (*Ibid.*). What is important to notice however is that the notions of 'sins of omission' and 'sins of commission' are linked to each other and therefore they do generate tensions. For instance, the credit control measures that I have analyzed before could well fall within the category of 'sins of commission', nevertheless they could also be deemed and are actually justified as a consequence of the lack of resources at the local level.

I will now look at another important concept that may conflict with the realization of the right to water, especially for the poor, namely that of water demand management.

4.5 A new concept: water demand management

During the past few years, the debate on water both in South Africa and at the international level has been shaped by the emergence of a new concept, namely that of water demand management. This concept introduces some environmental concerns in the context of water services delivery, arguing that water scarcity may be better faced through interventions on the demand side instead of the supply side.

Now, the issue of water scarcity in South Africa is highly debated. The Constitutional Court introduced its judgment in the *Mazibuko* case

acknowledging that access to water in the country remains characterized by deep inequality, but it also affirmed that South African climate is largely arid and therefore it requires a 'careful management' of the country's scarce resources (*Mazibuko* 2009: 2-3). The interviews that I have conducted during my fieldwork confirm that opinions diverge on this topic. For instance, one of my respondents said that Cape Town is going to run out of water in the next ten years (NGO member, personal communication, 22 July 2009), while others interviewees appeared more skeptical about it, pointing out the unequal distribution of resources and questioning why, if water scarcity is such a high priority, local authorities do not employ a comprehensive set of measures to deal with it (academic and representative of CSO, personal communication, 5 August 2009; trade unionist, personal communication, 4 August 2009).

Nevertheless, it seems that the notion of environment is understood as something objective and a-political, so that environmental concerns are taken into consideration even when they possibly conflict with social justice concerns (Tissington et al. 2008: 65-66). Thus, I will now look into two aspects of water demand management which appear particularly problematic with reference to the right to water.

First, the practice of water demand management has proved to be unequal and discriminatory towards the poor, who in South Africa are still for the most part black (*Mazibuko* 2008: 58-60).³¹ Indeed, municipalities tend to install devices aimed at limiting the amount of water consumed only in poor areas, while residents of wealthy areas are allowed to use and eventually waste all the water which they can pay for (Dugard 2008: 604-605, *Mazibuko* 2008: 58-60, Rudin 2008: 11). This happened in Phiri when the city of Johannesburg began to install PPMs in Soweto in 2004 within the framework of Operation Gcin'amanzi (Dugard 2008: 605), as well as in Cape Town, where the introduction of the new devices as part of the city's indigent policy has started more recently (academic and representative of CSO, personal communication, 5 August 2009). Even an organization which supports the idea of water demand management, like the Environment Monitoring Group (EMG), complains about the ways in which that has been implemented, questioning the different approach adopted with different income groups (NGO member, personal communication, 22 July 2009).

The argument presented by municipalities to support their policies with regard to water demand management says that water management devices are installed in poor areas because those areas are affected by the greatest loss of water both physically and financially (*Mazibuko* 2009: 78; NGO member, personal communication, 22 July 2009). However, such an argument does not take into consideration the historical reasons that would explain the current situation. For instance, water leaks and burst pipes which often take place in former townships are the result of the lack of investments in operation and maintenance during the apartheid regime (Dugard and Liebenberg 2009: 11, Flynn and Chirwa 2005: 65). Such a perspective could also question the origin of the debts accumulated by poor residents after the introduction of a user-pay system (academic and representative of CSO, personal communication, 5 August 2009). Furthermore, the idea that water demand management has hitherto been employed as a way to punish the poor and to encourage them

not to exceed the FBW amount, rather than as an instrument to promote the conservation of water resources, could be supported by the analysis of water tariff structures. As I already said with reference to Cape Town, the raising blocks tariff system does not refrain top users from consuming as much water as they can afford.

The second aspect of water demand management which could conflict with the right to water refers to the fact that such a policy has facilitated a process of individualization of the problems faced by poor residents when accessing the resource (activist, personal communication, 7 August 2009). Municipalities demand in fact that poor residents adjust their behavior, in order to reduce their consumption of water, by means of their indigent policies. Since such request is in the form of an individual agreement between the household and the municipality, it has determined two series of consequences (*Ibid.*). On the one side, it is possible to notice a decrease in the level of social mobilization around the issue of water services in comparison with the situation of the early 2000s.³² That could be explained by the fact that while in the past poor residents shared a common threat of being cut-off, what prevails today is a feeling of individual responsibility to deal with the conditions imposed by the municipality. On the other side, poor households are forced to employ the most extreme remedies to conserve water, sometimes even to the detriment of human dignity (academic and representative of CSO, personal communication, 5 August 2009). For instance, as the water demand management devices installed in Cape Town do not allow residents to monitor how much water has been consumed, the latter may even rely on less water than the basic amount for fear to incur debts with the municipality (*Ibid.*). As a result, a fundamental need like access to water is constantly perceived as a struggle and it may also produce conflicts within the household (activist, personal communication, 7 August 2009).

Even though I have always focused on the effects that current water policies may have on the poor, the next paragraph will look in more detail at the extent to which the right to water has been operationalized with regard to the poorest of the poor, namely the residents of informal settlements.

4.6 Do residents in informal settlements enjoy their right to water?

The category of residents of informal settlements refers to those citizens who have settled in any area of the country without asking permission to the competent municipality.³³ For the most part they are internal migrants, who were displaced to the so-called 'homelands' during the apartheid regime, but then moved from there in search of job and better opportunities (Ross 1999). The housing backlog and the lack of housing subsidies are among the main factors which force those people to live in shack settlements (Richards et al. 2007: 375). In Cape Town, for instance, 15,6% of households live in informal dwellings, about the 70% of which are inhabited by people coming from the Eastern Cape province (representative of CSO, personal communication, 24 July 2009; Statistics South Africa 2008). Richards et al. (2007) describe those areas as characterized by poverty, unemployment, lack of infrastructure,

overcrowding, health risks and high crime rates. Thus, they represent a serious challenge for municipalities which, though lacking the resources, have to provide them with basic services like housing, water, electricity and health care.

For what concerns access to water, municipalities have agreed that informal settlements should receive at least a basic amount of water to meet the minimum requirements of residents in terms of health and dignity. However, as local councils do not want to make investments in temporary settlements,³⁴ they do not install meters, but they put a certain number of standpipes according to their estimates of how many people live in a specific area (Tissington et al. 2008: 27-29). As a result, informal settlements do not qualify for the FBW policy, rather they receive water for free, although they have to share access, as municipalities assume that in those conditions households will not be able to carry more than 6 kl of water per month (*Ibid.*). The official policy in Cape Town is to provide 1 communal tap for every 25 households (Matrix 2007/08), nevertheless it is always very difficult to determine how many people live within a household in those areas. For instance, visiting an informal site within the former township of Khayelitsha in Cape Town revealed that about three hundred people rely on just one tap. The interviews that I have carried out with some of those residents have then highlighted several issues of concern (informal residents, personal communication, 5 August 2009).

First, people have to wait in a queue for hours before filling their buckets, especially during the weekend, so that it may look more convenient to walk a long distance to reach another tap. Second, sometimes it happens that a family goes to one of the formal houses nearby and asks for water, but then depending on the mood of residents there, it can be asked to pay for the service. Third, hygienic conditions in the area and especially where the tap is located are described as really unhealthy. This depends in particular on the fact that there are no sanitation systems or a proper refuse collection. Finally, failures in the tap have occurred in the past, leaving people without water for almost two months and forcing them to look for other sources. Furthermore, it seems that informal residents are stuck with such a basic provision of water services and cannot climb the water ladder, because improvements depend on the housing delivery process, which in turn happens to be very slow and problematic (Tissington et al. 2008: 28).³⁵

Therefore, even though the case of informal residents could be used to demonstrate to what extent the realization of socio-economic rights depends on the availability of resources, it also reinforces one of the argument that I have already stated. Namely, how narrow and exclusive is the definition of the right to water in South Africa today. Indeed, although the Constitution affirms that all South Africans should be entitled to such a right, in practice the most marginalized groups within the society are still excluded from it and treated in a different way.

Chapter 5

Conclusion

The aim of this work was to explore the tensions between content and operationalization of the right to water in South Africa. In order to reach that objective, I first presented the current debate about the notion of water, since it is reflected in the case of South Africa. At one extreme of the debate it is possible to identify a human rights-based approach to water, which claims for the recognition of a specific right to water within international human rights law. While at the other extreme it is possible to recognize a market-based approach to water, which was influenced by neoliberalism and which argues for the recognition of water as an economic good. Secondly, I took an historical perspective to investigate the origins of the South African right to water, as they refer to the debates about the new Constitution for the country. Such a right was in fact included in the constitutional text of 1996. Thus, an analysis of Section 27 of the Constitution (i.e. the right to water) was offered as an important instrument to better understand the attempts to operationalize the right. Finally, I discussed the realization of the right to water in the country, in order to highlight the major successes and failures which characterize such a process. The chapter was structured around six interrelated issues which constitute the major findings of my period of fieldwork in Cape Town.

Before I provide a proper answer to my research question, I would like to focus on three issues that emerged from my work and that I consider particularly interesting.

The first issue refers to the definition of the right to water and its effects on the implementation of the latter. While the constitutional text qualifies the right as sufficient water for everyone, thus promoting a reasonableness approach to its realization, the policy framework of South Africa seems to be based on a minimum core obligations approach. However, the policy tools identified by the ANC to put into practice the right to water might be seen as part of a single process of redefinition of such a right, which in the end brought to a narrow and exclusive understanding of it as well as to a limited operationalization. The process of redefinition began with the Reconstruction and Development Programme (RDP) of 1994, which, though recommending a provision of 25 litres per capita daily in the short term, already envisaged a provision of 50-60 l pcd on site in the medium term. Nevertheless, the RDP was not implemented and the second policy tool, namely the Free Basic Water (FBW) policy of 2001, equated the notion of sufficient water to 25 l pcd within 200 meters of a household. Finally, the indigent policies built by South African municipalities since 2005 tend to provide the FBW only to registered indigents, who usually under-represent the number of households which cannot afford water services.

The second issue refers to the political and economic circumstances which influenced the process of redefinition of the right to water. In the course of my work, I tried to demonstrate that such a process was severely affected by the rise of neoliberalism in South Africa. Indeed, as neoliberal policies were

applied to basic services, like water, they did not take into consideration the history of apartheid and its legacies. Therefore, those policies ended up punishing the residents of historically poor and black areas, whose conditions, both general and in relation to water services, are the direct result of apartheid legislation. Actually, the market ideology promoted by neoliberalism provided a strong justification for the persistence of inequalities within the provision of water.

The third issue is a reflection on the state of the debate about water within South African civil society. While at the end of the 1990s the introduction of neoliberal policies in the water sector had been faced by the emergence of a series of groups of concerned citizens, who tried to resist the ongoing reforms, the situation nowadays seems to be characterized, as I already said, by a process of individualization of the problems related to access to water. Even though people might turn to courts, as illustrated by the *Mazibuko* case, or protests against poor services delivery might still erupt, I would point to the absence of a coherent project able to bring the issue of water services at the core of the national political debate and to suggest valid alternatives to the current policies. Such an absence would however inhibit a shift, led by civil society, towards a more progressive and inclusive definition and operationalization of the right to water.

The research question which drove this paper was: How is the right to water in South Africa interpreted given the neoliberal conditions under which it is to be implemented? I will answer this question by saying that neoliberalism did shape both the content and operationalization of the right to water in South Africa to such an extent that the latter was not interpreted according to the specific circumstances in which citizens live. In particular, because of neoliberal pressures for fiscal restraint, such a right was equated with a basic amount of water, which though guaranteeing survival, would not allow for socio-economic advancement of the majority of the population. Furthermore, there is still a minority of South African citizens, namely those living in informal settlements, who do not even enjoy the basic provision of water services.

A strong evidence supporting the argument that South Africa has failed to realize inclusive rights for its people and thus to effectively improve the living conditions of the majority of them comes from the Human Development Index (HDI) statistics. These figures show a negative trend for South Africa, whose HDI has almost constantly decreased since 1990 (UNDP 2009). This year, the HDI for the country is 0,683, a value which gives South Africa a rank of 129th out of 182 countries for which data are available (*Ibid.*). It is worth to notice that such an indicator offers a more complete picture of the development of the country than the GDP per capita, which in South Africa corresponds to almost 6000 US Dollars. The latter would in fact hide the high level of inequality that still persist in the country and that current policies have failed to address and ameliorate.

One of the major factor which could explain such a situation seems to be a failure within the process of accountability. Although South Africa does have a legal and policy framework which could be seen as deriving from a human rights-based approach to development, there is a wide gap between that

framework and the reality on the ground, meaning that a serious realization of the rights promised by the ANC is still lacking.

Therefore, an interesting area for future research could be a deeper investigation into the actors involved in trying to get the government accountable for the implementation of the right to water and into the mechanisms that have been employed in order to reach such objective.

Notes

¹ Article 14 of the CEDAW reads (UNGA 1979):

State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas [...] and, in particular, shall ensure to such women the right to [...] enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply [...].

² Article 24 of the Convention on the Rights of the Child reads (UNGA 1989):

State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health [...] and, in particular, shall take appropriate measures [...] to combat disease and malnutrition [...] through the provision of adequate nutritious foods and clean drinking-water [...].

³ These include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene (UNCESCR 2002).

⁴ WHO standards for drinking water can be found in the publication *Guidelines on Drinking Water*, available at http://www.who.int/water_sanitation_health/dwq/guidelines/en/index.html (accessed 10 November 2009).

⁵ Economic, social and cultural rights, known as 'freedoms to', represent the so-called second generation of human rights, formally recognized in the UN Covenant on Economic, Social and Cultural Rights of 1966. Actually, their status as human rights is highly debated, as they need the investment of many resources on the part of states in order to be secured (Uvin 2004: 38).

⁶ The main difference between legal and moral human rights is represented by the fact that while the former depend on an official declaration by governments, the latter do not depend on any governmental body and indeed persist even in case of disrespect by the institutions (Bleisch 2006: 4).

⁷ The right to development is defined as follows (UNGA 1986):

An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

⁸ Though acknowledging that the concept of social justice is highly debated within the fields of sociology, philosophy and political science, for the purpose of this work I will define it simply as distributive justice, meaning a fair allocation of scarce goods among individuals within a society (Marshall 1998: 333).

⁹ The expression 'Washington Consensus' was coined by Williamson to refer to a set of policy instruments that were agreed upon within the International Financial Institutions (IFIs) and the United States (US) government agencies since the late 1970s, in order to promote the establishment of a free market regime at the international level (Williamson 1990).

¹⁰ This expression refers to business and development actors whose activities in the water sector are under the influence of the WB (Goldman 2007: 790-793).

¹¹ The concept of affirmative action refers to the adoption of policies, especially those regulating access to education, employment or land, with the aim to redress past forms of discrimination and thus to guarantee equal opportunities to all the members of society (Omar 1991: 4, Sachs 1992: 98-103).

¹² While the notion of vertical application of a Bill of Rights means that the Bill will regulate only the relationships between the individual and the state, the notion of

horizontal application implies that also the relationships among individuals can be ruled by such Bill (Omar 1991: 6).

¹³ This is a concrete example of the notion of residual state that I have introduced in the previous chapter.

¹⁴ As a result of full corporatization, the water service provider in Johannesburg is a publicly-owned corporation, Johannesburg Water.

¹⁵ PPMs are devices containing automatic shut-off valves that interrupt the provision of water as soon as the credit runs out (Flynn and Chirwa 2005: 70).

¹⁶ Section 33 of the Constitution of South Africa states that 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair' (RSA 2009: 25). The applicants made explicit reference to such a clause because, according to them, the functioning of PPMs would violate it.

¹⁷ NPM can be defined as a broad set of reforms aimed to apply the principles of neoliberalism to the functioning of the public sector. In particular, such reforms promote more managerialism and technicism and demand a shift in the role of the local government from being a direct provider of public services to facilitating the participation of private and civil society actors within those functions (Manning 2001, Swyngedouw 2005).

¹⁸ Such a figure was derived from the so-called 'eThekweni model', a project carried out by Durban Metropolitan Council in 1997 in order to provide water to informal settlements within the city. After having calculated the amount of water that an individual could physically carry and afford (i.e. 7 l pcd), the municipality decided to provide every shack in informal settlements with a 200 l drums of water free of charge, as that happened to be cheaper than administering the collection of money from those sites (Bond and Dugard 2008: 12).

¹⁹ These data derive from a matrix which was built in 2007 and 2008 during the fieldwork which preceded the publication of the report by Tissington et al. (2008) *Water Services Faultlines*. I received a copy of this unpublished material from the Community Law Centre in Cape Town, during my own period of fieldwork. From now onwards I will refer to it as Matrix 2007/08.

²⁰ Cape Town statistics report a number of informal dwellings serviced by the city equal to 108.899 out of an estimated total number of households of 904.000 (City of Cape Town 2009).

²¹ In 2005, the Department for Provincial and Local Government (DPLG) published the Framework for a Municipal Indigent Policy, followed by the Guidelines for the Implementation of the National Indigent Policy by Municipalities (Tissington et al. 2008: 24).

²² Cape Town falls within this category. Thus, registered indigents receive 6 kl of free water (per month per household), plus 4,2 kl of free water for basic sanitation, plus a grant of 30 Rands (Matrix 2007/08).

²³ In Cape Town, the poverty line that qualifies indigents is set at R1700 per month per household (Matrix 2007/08).

²⁴ In Cape Town, people can apply for the indigent policy if they meet at least one of the following criteria: either owning a property whose value does not exceed R199.000 or earning an income of R1700 or less per month per household. While the first criterion determines an automatic qualification as indigent, the second one needs evidence on the part of residents. In 2008, only three thousand households were officially registered as indigent with the municipality, even though the statistics estimated a number of households living below the poverty line close to three hundred thousand (City of Cape Town 2009, Matrix 2007/08).

²⁵ For a definition of this expression, I refer to note 9.

²⁶ The figures about water cut-offs are contested, however McDonald (2002a: 162) estimates that about ten million of South Africans have experienced a water cut-off due to non payment.

²⁷ While the MIG is a conditional grant aimed to address the services backlogs of the country, the ES is an unconditional grant usually employed to finance the provision of FBW (Tissington et al. 2008: 18).

²⁸ The GDP per capita is 5914 US Dollars, while the Gini Index for the period 1992-2007 has been 57.8 (UNDP 2009).

²⁹ For a reading of the text of Section 27, I refer to section 3.3.

³⁰ For a discussion of these concepts, I refer to section 3.3.

³¹ According to the 2001 Census, in Cape Town the number of black households with a total annual income between R0 and R4800 was approximately 85 thousand, that of coloured households 28 thousand, that of indians households 75 hundred and that of white households 10 thousand (Statistics South Africa 2001).

³² Although, as I already mentioned, at the time of my fieldwork a number of protests about poor service delivery took place all over the country.

³³ According to the 2007 Community Survey, 14,4% of South African households live in informal dwellings (the total estimated number of households being around 12 million) (Statistics South Africa 2008).

³⁴ It is worth to notice that, according to my interviews, people can live in informal settlements for very long periods (informal residents, personal communication, 5 August 2009).

³⁵ Tissington et al. (2008: 28-29) report that 'public sector investment within informal settlements is restricted as a result of the illegal status of settlements' and that the objective to eliminate informal settlements by 2014 has been highly debated at the national, provincial and local level.

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