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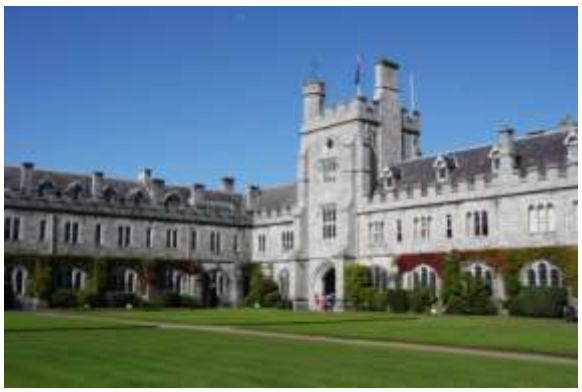

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Re-thinking the Right to Water: Enhancing Service Provider Accountability through Participatory Rights & Strategic Public Interest Litigation – South African and Irish Experiences

Sahara Nankan

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RE-THINKING THE RIGHT TO WATER:

ENHANCING SERVICE PROVIDER ACCOUNTABILITY THROUGH PARTICIPATORY RIGHTS & STRATEGIC PUBLIC INTEREST LITIGATION – SOUTH AFRICAN AND IRISH EXPERIENCES

Sahara Nankan*

Abstract:

Over the past two decades there have been significant legal and policy shifts under both international and domestic law towards the recognition of the emerging right to water and sanitation. What unites them is their underlying attempt at articulating a suitable human rights approach to the increasingly acute global water crisis and the need for enhanced administrative justice in service-provider accountability. However, in doing so the limitations of 'rights talk' have crept into the discussion leading to an often paralyzing, and unhelpfully polarising, 'public *vs* private debate' in the discourse, as well as a reductionist and one-sided policy focus on the substantive right to water in the form of availability, access and quality control with scant improvements on the ground. This has led to the significant risk that this right will become a post-political empty signifier if the challenge of increasing its effectiveness is not met in a more nuanced and holistic manner.

This paper therefore analyses the transformative legal potential that procedural rights hold for injecting meaningful content to this highly complex and politicised topic. It focuses on the lessons learned from public interest litigation failures in South Africa's water justice movement over the past decade, despite a constitutional right to water, and emphasizes the need for enhancing access to information and robust community participatory rights. It compares and contrasts this to the recent Irish experience in public advocacy opposition to austerity-backed water charges and calls for a right to water in Ireland. It warns of the dangers of superficial or static 'rights talk', a misplacement of focus on the 'public/private' dichotomy and a lack of awareness civil society advocacy might have of the importance of judicial interpretation, especially with regards to socio-economic rights which the right to water is inevitably part and parcel of. By questioning how political factors may impact upon legal objectives *in situ* such an approach seeks to contribute towards giving this right more practical meaning and relevance in the future.
Keywords: right to water, administrative justice, Ireland, South Africa, procedural rights

A. INTRODUCTION

Following the 2008 recession in Ireland, mass community mobilisation under the banner of a 'right to water' successfully opposed the austerity policy of water charges envisaged under the newly formed semi-state

* Sahara Nankan, PhD Candidate at the Irish Centre for Human Rights, National University of Ireland Galway. Email: s.nankan2@nuigalway.ie. This research was submitted as an LLM thesis for the UCC LLM in International Human Rights Law & Public Policy in September 2017, under the supervision of Dr Bjørn-Oliver Magsig, and has been lightly edited and updated to reflect recent developments up to September 2018.

company Irish Water.[2] While as it stands Ireland is a jurisdiction that does not formally recognise an explicit human right to water,[3] this example of recent domestic public advocacy has led to the government's suspension of domestic water charges and has further undermined Irish Water's reputation.[4] However, a future scenario of privatisation and further water charges is not indefinitely precluded[5] and as a result, there are now calls for a binding right that seeks to preclude private actor participation altogether.[6]

Yet it is particularly interesting that in South Africa, legal development in this area of human rights law over the past decade has raised concerning questions for the normative content and value of recognising a human right to water. South Africa is a jurisdiction that is lauded for being amongst the most progressive in the world in terms of justiciable socio-economic rights. This includes an explicit recognition of a right to water and sanitation under s.27 of the Constitution.[7] However, mass public opposition including a watershed public interest litigation case has delivered a crushing blow for water justice activists in the country.

Backed by wider advocacy networks, the *Mazibuko* case[8] was brought forward by the Phiri community of Soweto wherein the Applicants opposed a government policy of pre-paid water meters. In its seminal but heavily criticised judgment the Constitutional Court of South Africa overturned two earlier celebrated lower-court rulings and upheld the continuation of that policy notwithstanding the constitutional guarantee.

Recent Irish and earlier South African experiences have thereby both attempted to utilise procedural elements of human rights law that have predominately espoused community participatory rights and public interest litigation, the former evoking a conceptual and the latter an express right to water. Thus far, Ireland has successfully opposed water charges envisaged under a semi-state water company deriving justification from a conceptual right. South Africa however, has unsuccessfully opposed a state policy of pre-paid water meters despite an explicit Constitutional right. Yet given the irony of such contrasting outcomes, what do these illustrations tell us, if anything, about the role and potential that these strategies have in enhancing the relevance of this emerging right? Equally, what lessons does the illustrative example of South Africa provide for Ireland if calls for a legally binding right to water is to be both successful and meaningful? And in the final instances, in what way can answers contribute to how this emerging human right is to be shaped under international human rights law in the future?

For the purposes of this discussion, broadly-speaking there are two core pillars that underpin the right to water notwithstanding its process of formulation or choice of service provider modalities. The first is that of

[2] See generally, Right2Water Campaign, available at: www.right2water.ie/ (last accessed: 5 September 2018).
[3] See, O McIntyre, 'The Human Right to Water and Reform of the Irish Water Services Sector' (2014) 5(1) *Journal of Human Rights and Environment* 74.
[4] See, 'Cabinet approves legislation for water refunds and new charging regime: Households will be charged for water if they use 70% more than average' (20 September 2017), Irish Times, available at: www.irishtimes.com/news/politics/cabinet-approves-legislation-for-water-refunds-and-new-chargingregime-1.3227046 (last accessed: 5 September 2018).
[5] See, Right2Water Campaign, *The Right2Water continues and it will never end*, available at: www.right2water.ie/blog/right2water-battle-continues-and-it%E2%80%99ll-never-end (last accessed: 5 September 2018).
[6] *Ibid*.
[7] See for example, A. Nolan, 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12(1) *Journal of Constitutional Law* 61.
[8] *Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28 [hereinafter *Mazibuko*] available at: https://cer.org.za/wp-content/uploads/2010/08/Mazibuko-Constitutional-Court-judgment.pdf (last accessed: 5 September 2018).

a substantive right to water, which at the international level is interlinked with sanitation.[9] This relates to availability, accessibility and quality of water services.[9] Given the extent of the global water crisis, this has understandably been the cause of much focus.[10] The World Health Organisation as well as the United Nations Children's Fund estimate that 894 million people lack access to safe water for personal domestic use[11] and according to the UN Sustainable Development Goals, where Goal 6 is to ensure access to water and sanitation for all, at least 1.8 billion people globally use a source of drinking water that is contaminated.[12] Additionally, 2.4 billion people lack access to basic sanitation services, such as toilets or latrines.[13] A second scenario that exacerbates this is that freshwater resources are quickly diminishing as a result of anthropogenic unsustainable over-use and depletion.[14]

The second, often less noted, pillar is that of the procedural rights requirements of the right to water and sanitation.[15] Here elements are centred upon access to information, public community participation in decision-making and policy creation as well as justiciability and access to effective legal remedies.[16] An underlying approach in this paper holds that while prioritising the substantive right to water is commendable, the content of the right has placed excessive focus on access and quantity which has not led to significant improvements. Therefore, a more nuanced method is needed that also values the transformative legal potential of robust procedural rights. Specifically, emphasis needs to be placed on enhanced community participatory rights as well as the inter-linking potential of utilising strategic public litigation in a manner that builds on the participatory process, in order to provide much-needed meaning to this right.[17] Notwithstanding inevitable inherent limitations, re-orientating attention in the discourse may go further in offering greater possibilities for enhanced administrative justice in holding service providers to account, be they either state or non-state actors. It may also significantly contribute towards formulating a more meaningful normative content to the right at both the international and domestic levels, contributing significantly towards its eventual enjoyment and realisation.

In order to illustrate the value of this approach, I first outline a contextual theoretical framework which sketches the key developments of an internationally recognised legal right to water and sanitation, touching on core limitations of 'rights talk' and the unhelpful public/private debate. In doing so, given the human rights sensitive nature of water services, I also consider the calls for enhanced service provider accountability within international human rights law. I then highlight the potential for re-thinking the normative content of this right through greater focus on strengthening procedural rights, particularly public participation and strategic litigation.

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[9] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, para.12, available at: www.refworld.org/docid/4538838d11.html (last accessed: 5 September 2018) (hereinafter GC15).

[10] See on this, M. Barlow, *Blue Covenant: the Global Water Crisis and the Coming Battle for the Right to Water*, (Black Inc, Melbourne: 2007).

[11] See, World Health Organisation & United Nations Children's Fund, *Progress on Sanitation and Drinking Water* (2010) 7, available at: www.who.int/water_sanitation_health/publications/9789241563956/en/ (last accessed: 5 September 2018).

[12] See, UN, Sustainable Development Goals, Goal 6, available at: https://sustainabledevelopment.un.org/topics/waterandsanitation (last accessed: 5 September 2018).

[13] *Ibid*.

[14] Barlow, *Blue Covenant* (n.10).

[15] CESCR, GC15 (n.9), para.12.

[16] *Ibid*.

[17] This is especially so since the above-mentioned figures have remained relatively stagnant despite considerable efforts (notwithstanding some improvements) since the 1970's. See, Barlow, *Blue Covenant* (n.10).

The South African *Mazibuko* case is analysed as an example justifying the need to re-think the normative content of the right to water and place more emphasis on participatory rights. I also discuss lessons for access to effective legal remedies and strengthening strategic public interest litigation cases.

Drawing from this framework, I then critically evaluate the recent Irish experience to argue that a legal right to water, even if it were to preclude private sector participation, is insufficient to hold service providers to account. Additionally, the human rights implications of reforming the Irish water services sector has been under-explored in the literature and this paper attempts to highlight some of these lacunae.

Therefore, the aim of this paper is to discuss how social struggles inform the discourse, where the courts stand, and attention is also focused on forthcoming developments in this field in those jurisdictions. This is especially important given the implications the local protection of the human right to water and sanitation may have for the global protection context. This paper thereby seeks to contribute to the progressive discourse by comparing and contrasting these contemporary yet quite distinct national experiences within the framework put forth herein.

In concluding, I submit that these particular socio-legal experiences have sought to frame a comprehensive right that is inclusive rather than exclusive. I note lessons and recommendations that can be made for strengthening administrative justice in the Irish context as well as how the international human right to water and sanitation can be strengthened in a manner that supports and includes communities within their respective and differing contexts. This human right is then better viewed, both domestically and internationally, not as a static regressive right – reduced to legal-technicist questions of quantity and access – but crucially as a dynamic strategic tool that is as fluid and contextually relative as the vital resource of water itself.

B. CONCEPTUAL THEORETICAL FRAMEWORK:

THE DEVELOPMENT OF AN INTERNATIONAL HUMAN RIGHT TO WATER AND SANITATION – A NEED FOR ENHANCED ADMINISTRATIVE JUSTICE IN SERVICE PROVIDER ACCOUNTABILITY

1. The Right to Water and Sanitation under International Human Rights Law

The conceptual notion and origins of a human right to water and sanitation under international law are well-discussed in the literature.[18] Over the past decade in particular, significant legal and policy shifts have moved towards the increased recognition of this emerging right, primarily as a result of global civil society advocacy movements.[19]

In the absence of an explicit right to water and sanitation under the Universal Declaration of Human Rights, it is argued to be inferred as a derivative right necessary for the full realisation of other interdependent

[18] For a more recent detailed overview of the legal development of the right to water and sanitation under international human rights law and related issues see for example, I.T. Winkler, *The Human Right to Water: Significance Legal Status and Implications for Water Allocation* (Hart Publishing, Oxford and Portland, Oregon, United States: 2012).

[19] For an account of the social struggles to recognise water as a human right, see generally, F. Sultana and A. Loftus (eds.), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, London, United Kingdom: 2012).

rights.[20] The 2002 adoption of General Comment No.15 by the UN Committee on Economic and Social Rights[21] was the first espoused recognition by any UN human rights body of a stand-alone internationally recognisable human right to water.[22] While GC15 is non-binding in nature, it is a ground-breaking highly authoritative interpretation of the normative legal requirements that derive from the relevant provisions of the International Covenant on Economic and Social Rights.[23] State parties to the Covenant are thereby evaluated on their legal obligations relating to the relevant provisions of the Covenant.[24] GC15 states that 'the human right to water is indispensable for leading a life in human dignity. It is also a prerequisite for the realisation of other human rights.'[26] With regard to Article 11 on an adequate standard of living, GC15 '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.'[27] Interpretation is also derived from Article 12(1) on the right to the highest attainable standard of health: 'environmental hygiene as an aspect of the right to health … encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.'[25]

However Tully notes that the ICESCR 'suffers from a clear lack of immediate enforceability, with Article 2(1) merely requiring the state party to 'take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant.'[26] Yet, it is submitted here that this arguably highlights the reason why there have been numerous rapidly expanding expressions of this right emerging since the late 1970's,[27] some of which have inevitably led to reasonable calls for a stand-alone binding treaty.[28]

With regard to the International Covenant on Civil and Political Rights,[29] most significantly is Article 6 on the right to life that adds further justification for a right to water, 'since at least a minimum amount of water is indispensable to ensure survival.'[30]

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[20] Y. Danieli, E. Stamatopoulou and C.J. Diaz, *The UDHR: Fifty Years and Beyond* (Baywood Publishing Company, Amityville, New York: 1999) cited in P.H. Gleick, 'The Human Right to Water' (1998) 1(5) *Water Policy* 487, 492. Due to this lack of explicit recognition much debated has ensued in the literature as to its legal bases, scope and nature see on this, S. McCaffrey, 'The Human Right to Water' in E. Brown Weiss, L. Boissen de Chazournes and N. Bernasconi Osterwalder, *Fresh Water and International Economic Law* (OUP, Oxford 2005) 93.

[21] CESCR, GC15 (n.9). See also, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.15, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, adopted 20 January 2003, 29th Session, 1, UN Doc E/C.12/2002/11 (2003).

[22] McCaffrey, 'Human Right to Water' (n.20) 101.

[23] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (hereinafter: CESCR), available at: www.refworld.org/docid/3ae6b36c0.html (last accessed: 5 September 2018).

[24] See, M. Williams, 'Privatisation and the Human Right to Water: Challenges for the New Century' (2007) 28 *Michigan Journal of International Law* 469, 475. See further, E.B. Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 31 *Ecology Law Quarterly* 957, 972.

[25] CESCR, GC15 (n.9) para 8. There have been many arguments for other derivations such as the right to adequate housing for example, which should include sustainable access to safe drinking water, site drainage, sanitation and washing facilities, see CESCR, *General Comment No.4, Right to Adequate Housing (Article 11(1))*, UN Doc. E/1992/23 para 8(b).

[26] See S.R. Tully, 'The Contribution of Human Rights to Freshwater Resource Management' (2004) *Yearbook of International Environmental Law* 101, 103.

[27] For a concise timeline see, United Nations, *The Human Right to Water and Sanitation Milestones: Factsheet*, available at: www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf (last accessed: 5 September 2018).

[28] See, Barlow, *Blue Covenant* (n.10).

[29] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, (hereinafter: ICCPR) available at: www.refworld.org/docid/3ae6b3aa0.html (last accessed: 5 September 2018).

[30] Winkler, *Human Right to Water* (n.18) 49. See also, Office of the High Commissioner for Human Rights, *General Comment No.6: The Right to Life (Article 6)* (30 April 1982) UN Doc.A/37/40 (1982).

However the second major international break-through towards its formal recognition occurred on 28th July 2010 when the UN General Assembly majority adopted a Resolution pertaining to a universal right to water.[31] The Resolution recognises 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'[32] And whilst it is non-binding it remains equally highly authoritative. The Resolution is declaratory of global political will despite relative opposition to its adoption;[33] 41 countries, *including Ireland*, abstained. Nevertheless, it is submitted that one should be all the more cautious not to underestimate the potentially powerful implications of this Resolution. The 122 votes in favour carries with it considerable moral and aspirational weight, perhaps the first formal steps towards a future binding international right to water and sanitation.

This view is validated in part by the closely followed confirmation from the UN Human Rights Council on 28th September 2011, which provides for a legally binding obligation on nation-states to 'respect, protect and fulfil' the human rights to water and sanitation.[34] In addition, state practice is rapidly emerging that supports a right to water and sanitation, either on its own or as can be derived from other rights as touched on above. Taking the case example herein, South Africa provides one of the earliest, clearest and most progressive recognitions of this right, having encompassed it explicitly in its Constitutional Bill of Rights alongside other textually prescribed socio-economic rights.[35]

However, in part due to these developments, there remains much debate as to its normative content. More precisely this means that its nature and scope remains highly contentious. In particular, the modalities of water service provision, either between the state and non-state actor (i.e. the 'public-versus-private' debate), has until recently been intensely politicised and has dominated the often obstructively polarising discourse.[36]

Indeed, the provision of fundamental socio-economic rights goods and services,[37] such as access to safe basic water and sanitation, are increasingly being transferred from the traditional role of the State, either fully or partially, to include non-state actor participation.[38] This global trend began in the preceding decade to the

[31] UN General Assembly, *The human right to water and sanitation: resolution / adopted by the General Assembly*, 3 August 2010, A/RES/64/292, available at: www.refworld.org/docid/4cc926b02.html (last accessed: 5 September 2018).
[32] *Ibid*.
[33] See, F. Sultana and A. Loftus, 'The Right to Water: Prospects and Possibilities', in Sultana and Loftus, *Right to Water:* (n.19) 1-18.
[34] Human Rights Council Resolution A/HRC/RES/18/1, see summary UN International Decade for Action Water for Life 2005-2015, available at: www.un.org/waterforlifedecade/human_right_to_water.shtml (last accessed: 5 September 2018).
[35] See Part C of this paper *infra*.
[36] On this and critiquing the debate, see: K. Bakker's seminal article, 'The "Commons" versus the "Community": Alter-globalisation, privatisation and the human right to water in the global South' (2007) 39(3) *Antipode*.
[37] According to the United Nations, economic and social rights include but are not limited to the rights to adequate food, to adequate housing, to education, to health, to social security, to water and sanitation, and to work. In short, these rights relate to the material means that are necessary in order for individual rights-holders to attain satisfactory standards of living within an egalitarian society and the socio-cultural agency to influence such societies. The UN maintains that all rights are inter-linked, the distinction between the socio-economic rights and civil and political rights resulting from a 'deepening of cold war tensions between East and West' in the post WWII era. See United Nations, Office of the High Commissioner for Human Rights, Economic, Social and Cultural Rights, available at: www.ohchr.org/EN/Issues/ESCR/Pages/ESCRIndex.aspx (last accessed: 5 September 2018). For constructive scholarly accounts see further, A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights* (2001); M.A. Baderin and R. McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP: 2007); P. O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge: 2012).
[38] For a recent analysis of this see, K. Moyo and S. Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37(3) *Human Rights Quarterly* 619.

recognition water as a human right at the start of the 'neoliberal' era in the early 1970's.[39] The scope of non-state actor influence and power has also therefore been significantly expanding. Policy creation mechanisms and decision-making processes which mandate the establishment, operational management and realisation of these core services such as water and sanitation, are ever more likely to be dependent on the private actor participant to some degree or another.[40] Such participants primarily include but are not limited to international financial institutions (IFI); multinational corporations (MNC); domestic corporations and state-owned (or semi-state owned) companies including public-private partnerships (PPPs).

Normatively, this phenomenon has attracted much concern and criticism. These have included vexatious multi-dimensional questions related to the appropriate ethical, philosophical, political and legal domicile and role of non-traditional actors in the provision and realisation of key socio-economic goods and services of which water may be considered the most contentious due to its particular socio-environmental characteristics (See *infra* in this section).

Yet, given the historically traditional approach of the state-centric nature of international human rights law,[41] a major underlying issue of the debate has been whether or not private sector participation in water services is both wholly justifiable and legitimate. Essentially, international law remains state-centric because states ratify treaties and have had, until relatively recently, an unparalleled role in providing such goods and services.[42]

Subsequently, the emergence of 'market environmentalism'[43] has occurred which is 'the creation of private property rights for resources previously governed by common pool resources.'[44] It broadly utilises the principle of scarcity, wherein proponents argue that because water is an ever-diminishing resource only if it is priced at full economic cost can it be allocated as a high value good. The management of water by private companies who are accountable to customers and shareholders will ensure maximum accountability which is considered more effective (and direct) when contrasted with often floundering political accountability.[45]

On the other hand, opponents primarily base their arguments on the assertion that water is not simply a resource-commodity like any other good or service, it is essential for all life due to its localised and non-substitutable nature. Furthermore, it also entails multiple (often sacred/spiritual) connotations for different

[39] F.G. Isa, '*Globalisation, Privatisation and Human Rights'*, in F.G. Isa and K.D. Feyter (eds), *Privatisation and Human Rights in the Age of Globalisation*, (Intersentia, Antwerp-Oxford: 2005). As she summarises, 'it is clear that liberalisation, privatisation and deregulation spawned by neoliberal globalisation are aimed at reducing the role of the state in economic and social systems. As a result, sectors previously covered by the public sector are left in the hands of the market' at 13.

[40] Gaining momentum in the 1990s international financial institutions promoted multinational water companies as a panacea to the global water crisis, proclaiming greater efficiency, management skills and technology to water services, see Moyo and Liebenberg, *Privitization of Water Services* (n.38) 693.

[41] A. McBeth, 'Privatising Human Rights: What Happens to the State's Human Right's Duties when Services are Privatised?' (2004) 133 *Melbourne Journal of International Law* 134.

[42] *Ibid*, 134-135.

[43] Also known as 'neoliberalising nature', see Bakker, 'Commons versus the Community' (n.36) 20.

[44] *Ibid*. See further on the particular interest in the literature on the impact of neoliberalism on water as a specific resource: K. Bakker, *An Uncooperative Commodity: Privatising Water in England and Wales* (OUP, Oxford: 2004); K. Bakker, *Privatising Water: Governance Failure and the World's Urban Water Crisis* (Cornell University Press: 2010); M. Finger and J. Allouche, *Water Privatisation: Transnational Corporations and the Reregulation of the Water Industry* (Spon Press, London: 2002); P. Bond, 'Water Commodification and Decommodification Narratives: Pricing and Policy Debates from Johannesburg to Kyoto to Cancun and Back' (2004) 15(7) *Capitalism, Nature, Socialism*.

[45] P. Rodgers et al, 'Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency and Sustainability' (2002) 4(1) *Water Policy* 1.

communities depending on its relative context.[46] Therefore they have called for water to be given recognition as a human right, which places an onus upon states to provide water to all and often these calls preclude private sector involvement altogether.[47]

Critique has therefore focused on three aspects of non-state actor participation:

1) 'Privatisation' of municipal utilities,
2) Growth of the bottled water industry, and
3) Trading of water as a commodity.[48]

It is argued that free market policies including full cost recovery and private sector participation (PSP) do not necessarily improve efficiency or governance.[49] Commodification also often serves to price it out of reach for the poor.[50] Hence it is often argued that PSP is even incompatible with a right to water and sanitation.[54]

Interestingly however, within the recent emergence of this right at the international level there exists perhaps a more significant paradoxical phenomenon. Civil society water justice movements, who are the most likely of advocates, as well as many private for-profit actors, who are the most unlikely of advocates, are now both *equally recognising* this emerging right. For example, following the General Assembly 2010 Resolution, Global Water Intelligence heralded the breakthrough as a 'massive defeat for global water justice movement' because the right 'remained fundamentally compatible with private sector participation and contained no obligation on utilities to provide subsidies to poor communities.'[51] On 29th June 2010, the UN Special Rapporteur on Safe Drinking Water and Sanitation also published a contentious report where she stated that under international human rights law there 'are no prescriptive modes of service provision.'[56] Unsurprisingly concerns from a human rights perspective are raised as to 'whether this opened the floodgates to further commercialisation within the water sector.'[52] As Sultana and Loftus have argued: 'such concerns are real since rights discourse do not necessarily preclude marketization, privatization or dispossession. This in turn underscores the need to rearticulate debates with political questions around democracy, justice and equity.'[53]

Concerns have also been driven by 'soft law' factors such as the 1992 *Dublin Principles* which frame water as an 'economic good.'[54] While these principles are non-binding in nature, their influence has arguably

[46] See for example J. Linton, 'The Human Right to What? Water, Rights, Humans and the Relation of Things', in Sultana and Loftus, *Right to Water* (n.19) 45. Linton proposes to broaden the idea of a right to water and to approach it from a relational perspective where it is possible to call for rights 'that involve the collective identity of human being (species being) and water as a process rather than quantity', in which 'identities of humanity and water are collective, processual and interrelated' at 45-46.

[47] P. Bond, *Unsustainable South Africa: Environment, Development and Social Protest* (Merlin Press, London: 2002).

[48] Sultana and Loftus, *Right to Water* (n.19) 2-3.

[49] E. Gutierrez *et al.*, *New Rules, New Roles: Does PSP benefit the poor? – Synthesis Report* (Wateraid and Tearfund, London: 2003).

[50] *Ibid*. See also, E. Harvey, *'The Commodification of Water in Soweto and its Implications for Social Justice*' (2007) Thesis submitted for doctor of philosophy, Sociology Department, School of Social Sciences, University of the Witwatersrand, Johannesburg, South Africa.

[51] Global Water Intelligence, 'The Human Right to a National Water Plan' (2010) available at: www.globalwaterintel.com/insight/human-right-national-water-plan.html (last accessed: 5 September 2018). The World Bank and other bodies such as the World Water Council have also officially accepted the right.

[52] Sultana and Loftus, *Right to Water* (n.19) 2.

[53] *Ibid*.

[54] The Dublin Statement on Water and Sustainable Development, 31 January 1992. Adopted at the International Conference on Water and the Environment in Dublin, Ireland, available at: www.un-documents.net/h2o-dub.htm (last accessed: 5 September 2018).

encouraged further private sector involvement where market factors such as full cost recovery are propagated. As Sultana and Loftus further contend, this has led to increased marginalisation and exclusion of vulnerable groups and communities. Furthermore, these trends have resulted in a situation where 'those who can afford have it readily, those who can't left without affordable or accessible water sources.'[55] From this perspective, corporate interests are thereby the most unlikely yet most vocal supporters of the right as a means for greater expansion of business opportunities, in this case 'the struggle to achieve fair access to water is in danger of producing its own nemesis.'[56] Sultana and Loftus cite important issues such as the politics of water governance, equality and water justice which may be affected if this right is to be driven by individualisation and a liberal capitalistic approach which is negligent and dismissive of the socio-economic injustices caused by power asymmetries.[57]

Therefore, despite the considerable degree of consensus and the 'moral weight' of the right to water, Sultana and Loftus submit that the right 'risks becoming an empty signifier a shallow post-political consensus that actually does little to effect real change in water governance.'[58] Herein, 'rights discourse may subvert water equity if efficiency and full-cost recovery are prioritised.'[59] This emerging right may thus 'obfuscate as much as it clarifies sometimes furthering the very agendas water activists seek to counter.'[60]

In light of this argument, the right to water and sanitation 'says little as to *how* and *who* will be providing it.'[67] Clark goes on to argue that organisations have 'sought to reduce the content of the right to water to the question of *access*' (emphasis added).[61] In other words, there is no guarantee of fair implementation, accountability or that co-optation is prevented.

Indeed, it is submitted here that these concerns necessarily raise the issue of legitimacy and accountability – particularly in the absence of binding international legal obligations on non-state actors.[62] There remains a continued search, domestically and internationally, as how best to hold non-state actors accountable for acts or omissions which may impede the progressive realisation of this right, and possibly, incur upon them direct human rights duties and obligations. In this vein, Moyo and Liebenberg account for a 'range of non-binding state-initiated mechanisms both within and without the UN system that have since been attempted to impose human rights obligations on non-state actors.'[63]

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[55] *Ibid*.
[56] *Ibid*, 3. See also, C. de Alburquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, 29 June 2010, available at: https://www2.ohchr.org/english/issues/water/iexpert/docs/A-HRC-15-31-AEV.pdf (last accessed: 5 September 2018).
[57] Sultana and Loftus, Right to Water (n.19) 3-13.
[58] *Ibid*, 4.
[59] *Ibid*.
[60] *Ibid*.
[61] C. Clark, 'The Centrality of Community Participation to the Realisation of the Right to Water: The Illustrative Case of South Africa', in Sultana and Loftus, *Right to Water* (n.19) 179.
[62] See P. Alston, *'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accomodate Non-state Actors*?', in P. Alston (ed.), *Non-state Actors and Human Rights* (OUP, Oxford: 2005), 3-36.
[63] Moyo and Liebenberg, *Privitization of Water Services* (n.38) 708. Key initiatives outlined, which lie beyond the scope of this paper include: the 2008 Report adopted by the Human Rights Council, *UN Protect, Respect, Remedy: A Framework for Business and Human Rights* (UN Framework); 2011 UN Guiding Principles to operationalise this Framework; Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises (OECD Guidelines; International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; UN Norms on Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (Norms on TNCs) and the UN's Global Compact.

However in doing so, as Bakker has pointed out, there has been a disproportionate focus on dualisms and substantive rights only, predominately accessibility, affordability, quantity and financial sustainability.[64] It is submitted that there is a need for recognition that many misconceptions arise when advocates evoke a right to water and sanitation that solely focuses upon opposing 'privatisation.'[65]

The first is that from a pragmatic perspective examples of 'purely' non-state actor service provision are still in the minority. In the majority of cases, as alluded to above, hybrid models comprising of both state and non-state actor service provision is preferred.[66] Further, Castree for example notes from his case analyses that different types of processes are often grouped under the 'nebulous banner of neoliberalism' i.e. privatisation, marketization, deregulation, re-regulation, commercialisation, corporatisation all of which take differentiated economic forms.[67] Bakker further contends that there are three strategic errors in anti-privatisation campaigns, namely a conflation of human rights and property rights; failing to distinguish between different types of property rights and service delivery models and thereby failing to foreclose the possibility of increasing private sector involvement in water supply.[68] She provides a valuable clarification of the different forms of resource management and their respective typologies as well as the different delivery models of state, market and community.[69]

Secondly, states remain the primary legal duty-bearers under international law, even where non-state actors are involved. As the Special Rapporteur affirms, 'the state cannot exempt itself from its human rights obligations by involving non-state actors – the state remains the primary duty-bearer for the realisation of human rights.'[70] For example, the 2008 UN framework for application of human rights standards to non-state actors sets out differentiated but complementary responsibilities, underscored by the tripartite principles of the primary State duty to protect, the corporate responsibility to respect human rights as well as to provide access to remedies.[71] Given the abovementioned structural realities, inadequate state-actor accountability in this field also prevails. It is put forth here that this is with regard to the difficulties in both vertical and horizontal justiciable recognition of socio-economic rights generally,[72] and not primarily because a right to water remains politically contested.

As outlined above, another layer of complexity in this field is a type of 'elite capture' of the right, which does not on its own preclude privatisation. This is exacerbated by the excessive focus placed on duty-bearers which has centred the debate on reductionist issues of substantive rights rather than on legal rights-holders and how they, as individuals and as communities, may participate with full agency in shaping the normative content of this emerging right. Indeed, emerging counter-trends such the 'commons', water as a 'public trust' and 'alter-globalisation' movements point to this problem (see section 2 *infra*). Renewed aims therefore

[64] Bakker, 'Commons versus the Community' (n.36) 28-29.
[65] *Ibid*.
[66] UN Special Rapporteur (n.56) 4-13.
[67] N. Castree, 'The Epistemology of Particulars: Human Geography, Case Studies and "Context"' (2005) 36(5) *Geoforum* 541.
[68] Bakker, 'Commons versus the Community' (n.36) 28.
[69] *Ibid*, 32 and 34.
[70] UN Special Rapporteur (n.56) 18.
[71] UN High Commissioner for Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises,* U.N. ESCOR, Commission on Human Rights, Resolution 2005/69, 1(a), UN Doc. XVII, E/CN.4/2005/L.10/Add.17 (2005). As highlighted, there remains a strong current of critique and a quest to bring in non-state actors as duty-bearers under international law.
[72] See for example Nolan, 'Holding Non-state Actors to Account' (n.7).

include broader issues such as greater accountability including transparency, monitoring and regulation, as well as the sanctity of water to both human societies and the natural environment.[73]

2. Re-Thinking Normative Content Through Strengthening Procedural Elements of Community Participatory Rights and Strategic Public Interest Litigation

It is evident that more forward-looking questions as to how and why certain modalities are followed, their outcomes and impacts on local communities are now occurring within a growing recognition of the disabling dualism of the public/private binary. There is a shift of focus towards 'public stewardship,' water as a 'commons' and 'alternatives for provision' that are community-interest orientated.[74] In part, this means that there is a need to equally recognise that the political and legal frontlines of this debate are shifting towards re-articulation of priorities and principles, equitable distribution and deep democracy.[75] In the formulation and struggle for this precision within human rights discourse, in what way then, can we re-think a right that effectuates useful progress for vulnerable communities where 'vulnerable' is understood as being contextually relative? For example, this may be poorer and rural communities in South Africa that lack access adequate water and sanitation provision, and those who are disconnected as a result of the inability to pay tariff increases (*infra* Part C). It may also be communities in developed countries such as Ireland, which may be affected by regressive measures taken under an austerity panacea and increased divesture in water services[76] (*infra* Part D).

From the perspective of the commons, water contains non-substitutable unique qualities[84] – it is a flow resource that is indispensable to life (indeed it is second only to oxygen in terms of immediate survival needs), and is in fact life itself – human beings are essentially water bodies made up of more than 70% of this element. Water is also indispensable for ecosystem health; therefore it is 'tightly bound to communities and ecosystems through the hydrological cycle' necessitating as Shiva has argued, 'collective management of water resources.'[77] Bakker has further outlined three core arguments within this framework: 1) water supply which is subject to multiple market and state failures, without community involvement will not manage water wisely; 2) water has important cultural and spiritual dimensions closely articulated with place-based practices, as such provision cannot be left to private companies or to the state; and 3) water is a local flow resource whose use and health are most deeply impacted at a community level. Therefore, protection of ecological and public health will only occur if communities are mobilised and enabled to govern their own resources. Conservation is also more incentivised through an environmental, collectivist ethic of solidarity, which encourages users from engaging in wasteful behaviour.[86] Through this lens, the 'real water crisis' (emphasis added) is then in fact a '*socially produced* scarcity, in which a short term logic of economic growth'

[73] V. Shiva, *Earth Democracy* (Zed Books, London: 2005).
[74] *Ibid*.
[75] Sultana and Loftus, *Right to Water* (n.19) 7.
[76] See C. de Alburquerque, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, (11 July 2013), UN Doc. A/HRC/24/44 available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-44_en.pdf (last accessed: 5 September 2018). See also, McIntyre, 'Human Right to Water' (n.3). As McIntyre points out, 'the link between fiscal austerity and states' commitments to ESCR was recognised recently by civil society organisations in the Vienna+20 CSO Declaration, adopted 26 June 2013 which acknowledges, at 6, para.19, that 'deep and farreaching austerity measures in many parts of the world … coupled with long-standing financial regulation failures in the North, have deepened economic inequalities within and between countries, with inter-generational impacts on the realisation of the human right to decent work, adequate standard of living for all, social protection, food, housing, *water*, health and education among others' [emphasis added] 74-75.
[77] See, V. Shiva, *Water Wars* (South End Press, London: 2002).

has in so doing 'converted abundance into scarcity.'[78] Thus for example, in response to the *Dublin Principles*, the *P7 Declaration 2000* outlined principles of water democracy, decentralised, community-based democratic water management, where water conservation is politically, socially, economically, culturally inspired rather than economically motivated.[79]

Bakker has therefore concluded that genuine community alternatives must contain two elements. The first is the reformation rather than abolishment state governance' whilst secondly and simultaneously 'fostering and sharing alternative local models of resource management.'[80] Moreover, 'no one model can be anticipated or imposed,' rather they 'build on local resource management and community norms.'[81] Indeed, Clark notes that water has been collectively managed by many societies throughout history.[82] For example, in Roman law: *aqua profluens* (flowing water) was classified as *res communes* (belonging to everyone, equity, society wide ownership etc.)[92] It also continues in many systems of indigenous water rights today, where participation is fostered in community water governance processes – for example in the Chilean Andes.[83] Reality, according to Clark, undermines the contention put forth by Garrett Hardin's (1968) *'The Tragedy of the Commons'* where she rebuts his view that the commons will inevitably entail decentivisation and depletion by arguing that he 'fails to take into account the historical success of community management' where many cases are subject to 'well-defined rules of access and use.'[84] According to the UN Development Programme for example, 'customary law often involves strict controls on water use with water rights structured to balance claims based on inheritance, social need and sustainability, institutional cooperation is common.'[95] In order to support her hypothesis, she refers to various case examples such as a large-scale study on irrigation systems where it was shown that 'participatory community management is the superior institutional framework in terms of ensuring both efficient and equitable water allocations.'[85] She cites similar findings in rural water supply projects, forest management, where community involvement that increases local ownership results in greater willingness to contribute to and concern for resource preservation.[86] Osmani further illustrates how cooperation at the community level often outperforms alternative models such as central governance management or market control in terms of both efficiency and equity.[87]

Community participation cannot however occur in a legal vacuum. An interlinking procedural element from a human rights praxis perspective is that of public interest litigation (PIL). Therefore, it is submitted that maximising community participatory rights in this way can be utilised to effectively articulate strategic public interest advocacy and litigation in order to enhance administrative justice to better hold service providers to account for violations of the right to water and sanitation.

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[78] *Ibid*.
[79] *Ibid*, 31-33.
[80] *Ibid*, 33-38.
[81] *Ibid*.
[82] Clark, 'Centrality of Community Participation' (n.61) 180.
[83] *Ibid*. See also, R. Boelens and H.D. Vos, 'Water Law and Indigenous Rights in the Andes' (2006) 29(4) *Cultural Survival Quarterly* 18.
[84] Clark, 'Centrality of Community Participation' (n.61) 181-182. See also, United Nations Development Programme, *Human Development Report – Beyond Scarcity: Power, Poverty and the Global Water Crisis*, (UNDP, New York: 2006) 16-17.
[85] *Ibid*.
[86] S. Osmani, *'Participatory Governance: An Overview of Issues and Evidence*', in United Nations Department of Economic and Social Affairs (UNDESA) (ed), *Participatory Governance and the Millennium Development Goals* (MDGs), (United Nations, New York: 2008) 15-18.
[87] *Ibid*.

In short, PIL is the use of the judicial court system through adversarial litigation which seeks to advance the cause of a minority or disadvantaged groups or individuals, or which raises issues of broad public concern.[88] In other words, it strategically employs the law to effect social change. As outlined by Surya, PIL has 'a vital role in the civil justice system in that it could achieve those objectives which could hardly be achieved through conventional private litigation.'[89] It therefore, 'offers a ladder to justice to disadvantaged sections of society, provides an avenue to enforce diffused or collective rights, and enables civil society to not only spread awareness about human rights but also allows them to participate in government decision-making.'[101] Crucially, it also contributes to 'good governance by keeping the government accountable.'[102] This is especially the case in light of structural asymmetries in this field, as outlined above; not all rights-holders have equal access to their rights, nor the capacity or resources to challenge abuses of such rights before their judicial systems.

Therefore, it is plainly evident that PIL contains inherent limitations that advocacy networks ought to be aware of. To highlight this, the next section of this paper will analyse the *Mazibuko* case as an example of the need for prioritising procedural rights of participation and effective litigation strategies within the right to water and sanitation. In summary, this section has attempted to put forward a contextual theoretical framework for re-thinking the normative content of the right to water and sanitation. Within this conceptual understanding, what lessons and possibilities does the South African example then hold? And in turn what possibilities can be drawn for a more meaningful content if Ireland were to recognise such a right in the future?

C. SOUTH AFRICA – THE *MAZIBUKO* JUDGMENT AND THE RIGHT TO WATER AND SANITATION, AN EMPTY SIGNIFIER?

1. The Right to Water and Sanitation under South African Legal and Policy Framework: Experiences and Lessons from the Mazibuko Public Interest Litigation Case

It must be emphasised from the onset that an analysis of the South African case in this context is not new.[90] The Constitutional Court's ruling nearly a decade ago has attracted much attention in the discourse due to its particular implications for what has otherwise been thought of as a leading domestic example of 'good practice' regarding an explicit right to water and sanitation.[91] Clark for example maintains that it 'highlights the risk that the right to water will largely be hollow if its content is reduced to access and fails to incorporate community participation.'[92] Similarly, Bond proffers that the case provides 'the basis for rethinking both rights and commons so that both the ecological and community control factors are foregrounded, alongside contestation of the deeper logic of capital accumulation that explains the drive for commodification within which activists campaign for water rights.'[93] Dunchin also points out that it is thus far 'the most recent

[88] The PILSNI Project: Advancing human rights and equality through public interest litigation, available at: www.pilsni.org/about-public-interest-litigation (last accessed: 5 September 2018).
[89] D. Surya, *'Public Interest Litigation in India: A Critical Review'* (2009) 1 *Civil Justice Quarterly* 19.
[90] See for example, Clark, 'Centrality of Community Participation' (n.61). See also, P. Bond, *'The Right to the City and the Eco-social Commoning of Water – Discursive and Political Lessons from South Africa'*, in Sultana and Loftus, *Right to Water* (n.19) 190.
[91] Sultana and Loftus have also cautioned that 'good practice' is the new dialogue that needs to be taken with a pinch of salt. This means increased awareness of the problems of implementing plans and policies. See, Sultana and Loftus, *ibid*.
[92] Clark, 'Centrality of Community Participation' (n.61) 175.
[93] Bond, *Unsustainable South Africa* (n.47) 191.

precedent in South Africa's closely watched economic and social rights jurisprudence following in the wake of such decisions as *Soobramoney* (1998), *Grootboom* (2001), *Treatment Action Campaign* (*TAC*) (2002), *Modderklip* (2005) and *Olivia Road* (2008).' [94] He also points to how it sheds 'critical light on the debate over whether economic and social rights have minimum legal content or a "minimum core" as posited by the UN Committee on Economic, Social and Cultural Rights in its 1990 General Comment No.3 on the Nature of States Parties' Obligations.'[95] Thirdly, it provides a 'useful case study of both the potential and limits of strategic public interest litigation and the justiciability and enforcement of economic and social rights in the national sphere.'[109]

Unlike the Irish context (*infra* Part D), the South African Constitution[96] enshrines a broad range of justiciable socio-economic rights under its extensive Bill of Rights.[97] Given the historical injustices suffered under Apartheid rule, Section 7.1 firmly states that these rights form the 'cornerstone of democracy.' Section 7.2 further provides that the state is obliged to 'respect, promote, protect and fulfil' the rights contained therein. However, Section 7.3 does subject these rights to a limitation clause contained under Section 36, 'in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'[98] Section 27 provides for the right to healthcare, food, *water* and social security (emphasis added). Section 27.2 further obliges the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.' In terms of justiciability of socio-economic rights, the Constitutional Court has also been viewed as an example of good practice and has played a role in international human rights law articulation.[99] Therefore, an analysis of this seminal court ruling is both valuable and useful in terms of re-evaluating priorities and principles of an international human right's approach to water and sanitation. It may also act as a guiding reminder of the importance of including robust procedural rights in other jurisdictions, such as Ireland, where communities are increasingly calling for a right to water to be explicitly recognised within their respective legal systems.

Turing to the substantive matter of the case itself, it centred upon two legal issues:[100] 1) the installation of pre-paid water meters by the local municipality in the Phiri informal settlement of the district of Soweto in Johannesburg, and 2) the adequacy of the government's free basic water allocation policy of 25 litres per person per day. Clark observes that this was the Court's 'first opportunity to define the scope of the right under Section 27.'[101] Indeed, Bond goes further and maintains that this 'was the most important test so far of possibly the world's most advanced water rights Constitutional clause.'[102] The group of local residents

[94] P. Dunchin, 'A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case', (13 January 2010), EJIL Talk, *European Journal of International Law*, available at: www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/ (last accessed: 5 September 2018).
[95] *Ibid*.
[96] *Constitution of the Republic of South Africa*, 10 December 1996, available at: www.refworld.org/docid/3ae6b5de4.html (last accessed: 5 September 2018).
[97] *Ibid* Chapter 2, Bill of Rights. See further, Nolan, 'Holding Non-state Actors to Account' (n.7).
[98] In limiting these rights the following (non-exhaustive) relevant factors are to be taken into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.
[99] For example, the incorporation of 'reasonable' into the text of Article 8(4) of the Optional Protocol to the ICESCR is a direct reference to the more limited form of judicial review adopted by the South African Constitutional Court in its seminal socio-economic rights case, *Grootboom*. Reasonableness was favoured by the working group and thus incorporated into the text of OP. See Clark generally (n.61).
[100] Clark, 'Centrality of Community Participation' (n.61) 176.
[101] *Ibid*.
[102] Bond, *Unsustainable South Africa* (n.47) 190.

backed by wider public interest advocacy networks had previously succeeded in their objections to both of these policy measures in two lower-court rulings. Applicants argued for interpretation of clear content which focused on minimum quantities, the recognition of need for affordability as well as, significantly, participatory elements that included 'the need for procedural justice and community participation in the development and implementation of water policies.'[103]

The Applicants argued that the City's policy of delivering water on a pre-payment basis (Operation *Gcin'amanzi* – conserve water) in certain low-income poverty-stricken areas was unconstitutional and discriminatory, based on Section 27 as well as certain anti-discriminatory provisions under the *Water Services Act 1997* and Johannesburg by-laws.[104] In terms of quantity, the Soweto applicants argued for 50 litres p/p/d whereas the City insisted on its policy floor of 25 litres. Section 1 of the *Water Services Act* operationalises Section 27.1(b). Basic water supply is defined therein as 'the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water of households, including informal households, to support life and personal hygiene.'[105]

Yet despite these strong constitutional and legislative guarantees, the majority judgment delivered by Justice O'Regan instead 'reflected a narrow interpretation'[106] of the law. Clark puts forth that it 'not only accepted the dominance of market-based solutions but also minimised the role of community participation.'[107] This in turn, 'threatens to make the right to water effectively meaningless for poor and marginalized communities in South Africa and potentially elsewhere.'[108]

(a) Public Participation and Administrative Justice Claim

The Applicants claimed that they had 'insufficient opportunity to participate in policy development and were not adequately consulted about its implementation.'[123]

Section 33 of the Constitution provides for *'Just administrative action'*[109] as follows:

> Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> National legislation must be enacted to give effect to these rights, and must— (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> Imposes a duty on the state to give effect to the rights in subsections (1) and (2); and to promote an efficient administrative action.

[103] Clark, 'Centrality of Community Participation' (n.61) 176.
[104] See *Water Services Act* No 108 of 1997.
[105] *Ibid* Section 1.
[106] Clark, 'Centrality of Community Participation' (n.61) 191.
[107] *Ibid*.
[108] *Ibid*.
[109] See, South African Constitution (n.96) section 33.

All actions that affect the public must be preceded by public participation and this has been given legislative effect in the *Promotion of Administrative Justice Act 2000*.[110] Section 4(1) provides that: 'any administrative action (that) materially and adversely affects the rights of the public must be proceeded by a public inquiry or a notice and comment procedure. It is only permissible to depart if it is reasonable and justifiable in the circumstances.' Further, the *Municipal Systems Act 2000* Section 4(2)(e) requires: 'local councils to consult with communities about the level, quality, range and impact of municipal services and the available options for service delivery.'[111]

However, the Court went on to dismiss these administrative and procedural justice arguments. The Court's rationale was that the decision to impose pre-paid meters resulted in an *executive* as opposed to an administrative action decision and was therefore exempt from meeting compliance requirements under PAJA. Liebenberg has criticised this interpretation as being an 'overly broad construction of the executive powers of a municipal council.'[112] The implication unjustly reduces the 'scope for public participation in decisions which affect enjoyment of constitutionally guaranteed socio-economic rights.'[113] The installation of pre-paid meters is a 'policy formulation in a narrow rather than broad sense' and therefore 'constitutes exercise of administrative rather than executive power.'[114] Clark maintains that this interpretation makes sense given that 'the purpose of Section 33 and PAJA is to make government action more transparent and accountable.'[115] In its classification therefore, Court 'is effectively drawing a curtain around significant areas of public policy.'[116]

(b) Separation of Decision-Making Processes and Implementation

The Court's reasoning also distinguished between the decision to introduce pre-paid meters and the process of implementation itself.[117] Implementation was held to be 'procedurally fair as community workers were employed to explain the process to the community' and public meetings were held thereto. But Clark notes that this finding contrasts with the earlier High Court ruling which described the consultative process as a 'publicity drive' for a policy decision that was already a *fait accompli*, finding the approach to be misleading, intimidatory and presumptive.[118] In effect, the Constitutional Court's legal separation allowed it 'to consider the community participatory role without examining their power (or lack thereof) to affect the outcome of the process.'[119] Clark's critique aptly draws on Arnstein's '*A Ladder of Citizen Participation,*' where she identifies eight levels of participation ranging from non-participation, tokenism and actual citizen power: here, 'there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.'[120] It is submitted here that not only is such a process tokenistic (whilst conceding that access to information is a valid procedural element in itself), merely being informed in a "consultation setting" of a *fait accompli* as was the City's approach, is not participatory in any

[110] *Promotion of Administrative Justice Act 2000* (hereinafter PAJA).
[111] *Municipal Systems Act 2000.*
[112] S. Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta Academic, Cape Town: 2010), Postscript. See further, Clark, 'Centrality of Community Participation' (n.61) 177.
[113] *Ibid*.
[114] *Ibid.*
[115] Clark, 'Centrality of Community Participation' (n.61) 177.
[116] *Ibid*.
[117] *Ibid*.
[118] *Ibid*. See, *S v Mazibuko* (A1246/2006) (2008) 2AGPHC 106 (18 April 2008) available at: www.saflii.org/za/cases/ZAGPHC/2008/106.html (last accessed: 5 September 2018).
[119] *Ibid*.
[120] S.R. Arnstein, *'A Ladder of Citizen Participation*' (1969) 35(4) *Journal of the American Planning Association* 216.

sense at all. The approach is static, regressive, removes the crucial analyses of power asymmetries and seriously undermines the integrity of the term.

(c) Contestation of the Operation of Pre-Paid Meters and a Denial of Procedural Safeguards

In terms of objections to water disconnections, the Applicants relied on Section 4(3) of the *Water Services Act* which provides that any disconnection or limitation of a water service must comply with a range of procedural safeguards, including provision of reasonable notice, and the opportunity to make representations to ensure people are not denied access to basic water services for their inability to pay.[121] The Applicants contended that when a pre-paid meter disconnects a water service for non-payment there is no notice nor any opportunity to make such representations. Families, living in poverty-stricken informal settlements with up to eight people per household (many including vulnerable groups such as children and the elderly), are forced to go without water until they are able to afford new credit or a new month's free basic water allowance becomes available.[122] Uncontested evidence pointed to the fact that most Applicants went without water for up to 15 days.[123] Despite this evidence the Court ruled the legislation to be inapplicable in these circumstances because it was 'administratively impossible for pre-paid meters system to comply with its requirements.'[141] But as Clark maintains, this would actually reinforce the Applicant's claim that they are an unlawful device,[124] precisely *because* they are irreconcilable with procedural fairness as set out in the statute.

The Court further distinguished between the terms 'suspended' and 'disconnected'[125] to dismiss the Applicant's claim that they constituted disconnections – because water was available to residents in the next month the term 'suspension' only applied. Clark sensibly argues that this finding 'disregards the very real benefits afforded by procedural safeguards.'[126] Such safeguards play a crucial role in preventing water from being disconnected in the first place. They also allow communication to ensure government service providers (in this instance) are 'not insulated from knowledge that tariffs are set at unaffordable rate for many.'

Moreover, the Court's distinction disregards the impacts on health and dignity of having to 'endure regular denial of water services due to lack of credit.' In the English case of *R v Director General of Water Services*,[127] which Clark utilises to substantiate her criticism, a similar issue was considered eleven years prior to *Mazibuko* in South Africa. Therein, Justice Harrison found the use of pre-paid meters to be illegal – it was 'common sense that meters disconnected or otherwise cut off the supply of water to the premises,' and that this impacted on vulnerable people and low-income households which carried with it a negative impact on public health.[128] Hence Clark effectively points to the 'harsh irony that the opposite conclusion could be reached eleven years later in South Africa, a country widely viewed as a leader in social rights jurisprudence.

The Constitutional Court is the final arbiter of the law in South Africa. Given its ruling, what lessons does this judgment hold for the future re-thinking of the right to water and sanitation from a procedural advocacy perspective?

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[121] See *Water Services Act* (n.104) section 4(3).
[122] Clark, 'Centrality of Community Participation' (n.61) 178.
[123] *Ibid*.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] Clark, 'Centrality of Community Participation' (n.61) 178.
[128] *Ibid*.

(d) An Empty Signifier?

Bond maintains that a costs-benefits analysis of this case requires 'full and frank debate.'[129] He points to the shortcomings in Clark's review; that whilst there is indeed needed to include the complementary right to participation, this forms but one lesson. 'Unless capable of breaking beyond the bounds of neoliberal public policy, it is one acceptable to many water privatisers and other neoliberal advocates of a smaller state.'[130] Bakker in advancing a commons view, as previously mentioned, also points out the limitations of 'rights talk' and the possibilities of co-optation. Moreover, Bond contends that putting such public policy power in the hands of very often conservative judges 'may be inappropriate.'[131] This is due to the reluctance of the Court to involve itself in the setting of prescriptive levels of water provision. Indeed, this deferential position can be clearly seen in the Irish context of socio-economic rights justiciability (*infra* Part D).

Therefore Bond aptly describes a 'huge paradox' that in exists in terms of political concerns, wherein communities are 'often forced to appeal to the very states who have failed to provide them with water.'[132] In his argument Bond proffers that the 'full set of hydropolitical connections between the social and ecological is not properly conceptualised in water rights framing' and makes the case for the politics of water rights which is better contextualised from a Marxist 'right to the city' standpoint. This point of view will not be addressed in detail as it lies beyond the scope of this paper. However, suffice to say, Bond outlines other key limitations in the *Mazibuko* case that may be useful for the purpose of this discussion. In terms of strategic litigation the case is criticised on several grounds.[133]

Firstly, it was obstructively individualist in that it remained private and familial instead of public and political. Secondly, it was also consumption-orientated (without links to production and ecology etc.). Moreover, it was framed not to resist but to legitimise neoliberalism. It was also unable to transcend society class structures – this distracted activists from potentially more serious strategies to dismantle class divisions through redistribution and/or reparations. It ultimately also proved too technicist, thus alienating the mass base and society in general. In doing so it was guilty of making mass based organisations the 'client' which in the process became 'domesticated' – for example social protests were told to stop during litigation. It then became subjected to the watering down of rights given the Constitutional clauses of progressive realisation, reasonable measures within available resources. It was also 'tempting for scholars to follow its legal alleyways,' this in turn distracted from more transformative route to politics. And given that judges are amongst the 'most conservative elites' in society it proved precarious in class-power terms. Moreover, it was reflective of 'an overall problem that even liberal-democratic capitalism will not deliver basic-needs goods to poor people.'[134] Lastly, there was a mistake as to the request for relief which was too narrow, partially based on the grounds of international evidence for minimal water quantity needs. As Danchin points out, whilst international law is persuasive, what takes precedence is the Constitutional Court's own development of its 'flexible reasonableness doctrine in an effort to forge a distinctly South African attitude to the justiciability of economic and social rights.'[135]

[129] Bond, *Unsustainable South Africa* (n.47) 191.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*, 192.
[134] *Ibid*.
[135] *Ibid*, 192-193. See also, Dunchin, 'Human Right to Water' (n.94).

However Bond appropriately highlights the comments of one of the key advocates on the case, Jackie Dugard who maintains that the 'reasonableness' test 'ignored the *realpolitik* of Soweto.'[136] According to Dugard, the Court misunderstood the Applicants as arguing for minimum core approach to the right to water. They had in fact 'pursued the *Grootboom* approach (in rejection of minimum core approach as being too inflexible), which is that rights and obligations can only be established in *context*.'[137] Applicants specifically asked the Court to evaluate the City's water policy 'in the context of a high-density urban township with waterborne sanitation and no alternative water or sanitation sources.'[138] The Court nonetheless displayed an extraordinary degree of deference in finding that this policy fell within the remit of 'reasonableness' which shows a worrying retreat from earlier-praised adjudication.

Bond states that a possible rebuttal may be that the Applicants 'did not stress strongly enough the extent to which wealthy white residents has access to plentiful, inexpensive water on credit (not pre-paid), for comparative water consumption across race and class was not a major part of the case, as the effort to win a victory meant narrowing the narrative to a relatively non-contextualised terrain.'[139]

Yet Dugard has pointed to areas where the Court was both class and race-biased in which the City's policy, viewed as 'textually permissible,' results in a 'new form of highly deferent legal interpretation.'[140] Astoundingly, the Court dismissed the unfair discrimination (based on race) ground 'because despite proven debt across City, pre-payment meters have only installed in poor black areas – the Court said that the applicants had not proven that pre-payment meters were installed in ALL black areas.' Dugard appropriately discharges this reasoning in the following terms: 'This is nonsensical and goes against all its previous equality decisions. It would mean that for example if I allege dismissal on grounds of sexual orientation (a listed ground in the Constitution) amounted to unfair discrimination, I would have to prove that my employer dismissed ALL other gay employees in the organisation.'[141] Therefore, the 'legal-technicist' arguments of Court 'were thus subtly political, in defense of the status quo.' The *Mazibuko* case also shows a disconcerting retreat from enforceable socio-economic rights.[162] What implications therefore, can this example have for a future potential Irish context?

D. IRELAND – A CASE STUDY: PUBLIC ADVOCACY AND CALLS FOR A RIGHT TO WATER AND SANITATION, AN EMERGING PROSPECT?

1. Public (Community) Advocacy and Water Charges Under the Austerity Restructuring of the Irish Water Services Sector

The civil society movement against the semi-state company Irish Water, the austerity-backed water charges and the recent calls for a recognition of a right to water and sanitation is amongst one of the biggest and most rapidly expanding public advocacy campaigns in Irish history.

[136] *Ibid*, 193. See also, J. Dugard, *'Reply'* (17 April 2010) EJIL Talk, *European Journal of International Law*.
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid*.
[140] Dugard, 'Reply' (n.136).
[141] *Ibid*.

Before assessing the legal position and possibilities from the aforementioned South African case, it is useful to briefly outline the recent attempts at restructuring the Irish water sector.[142]

Following the 2008 recession, Ireland's financial bail-out and its terms thereon was set out under the 2009 *EU/IMF Memorandum of Understanding*.[143] This agreement, *inter alia*, required the restructuring of the water services sector which also included a tabled plan for the introduction of domestic water charges (2012-2013) [144] under the auspices of fiscal austerity.

Additionally, McIntyre notes that it was 'quite clear that Irish water-related infrastructure and services urgently' required 'considerable improvement' by means of capital investment.[166] A 2011 Environmental Protection Agency report[145] indeed does outline the need for investment in order to 'meet the water quality requirements'[146] under the European Union's *Water Framework Directive* (2015).[147] Conaghan has pointed out that at the time government costs of providing water services reached €1.2billion in 2010, operational costs €715million and capital costs €500million.[148] McIntyre also notes that there was an affirmative commitment to 'transition to a non-exchequer based funding model by the start of 2014.'[149] At the time, public health risks included contamination by cryptosporidium and the system was (and still is despite the recent transition to Irish Water *infra*) considered 'wasteful, with average water leakage levels estimated at 41%.' Hence, a *Programme for Government* was implemented which included the pledge to install water meters within a charging system. This was preconditioned by the establishment of a new State utility company Irish Water. It was established as a semi-state utility which means it maintained (until recently) the statutory mandate of installing water meters, billing 'customers' including operational functions such as sourcing investments and other private finance.[150]

Irish Water was planned to take over management of 34 local water service authorities.[151] However, given unexpected mass public opposition to water charges, this processual transition has been mired by setbacks and controversy.[152] The company is incorporated under the *Water Services Act 2013* and centralises 31 local authorities (water and wastewater services) under this one semi-state service provider.[153] In terms of regulatory structures in place, it falls within the regulatory and monitoring oversight of the Environmental Protection Agency. Its economic regulation is overseen by the Commission for Energy Regulation (CER), which is mandated with 'protecting the interests of the customer, while approving an appropriate funding

[142] See, McIntyre, 'Human Right to Water' (n.3).
[143] EU/IMF Programme of Financial Support for Ireland (16 December 2009) at 26, available at: www.imf.org/external/np/loi/2010/irl/120310.pdf (last accessed: 5 September 2018).
[144] See, D. Conoghan, 'Water Policy, Water Regulation and Water Rights: Part I' (2012) 19(1) *Irish Planning and Environmnetal Law Journal* 3.
[145] Environmental Protection Agency, *Water Quality in Ireland 2007-2008: Key Indicators of the Aquatic Environment* (24 February 2011), available at: www.epa.ie/pubs/reports/water/waterqua/Water%20Quality%20in%20Ireland%202007%20-%202008%20%20Key%20Indicators%20of%20the%20Aquatic%20Environment.pdf (last accessed: 5 September 2018).
[146] *Ibid*, 88.
[147] Directive 2000/60/EC establishing a framework for Community action in the field of water policy (2000) OJ L327/1.
[148] Conoghan (n.144) 5-7.
[149] McIntyre, 'Human Right to Water' (n.3) 88.
[150] PwC, Irish Water: *Phase 1 Report* (Jan 2012),as cited in McIntyre, 'Human Right to Water' (n.3) 88.
[151] *Ibid*.
[152] For a recent example see the issue of refunds following the suspension of water charges, F. O'Toole, 'Spend my Water Charges on Reversing Austerity' (25 July 2017) *Irish Times*, available at: www.irishtimes.com/opinion/fintan-o-toole-spend-my-water-charges-on-reversing-austerity-1.3165475 (last accessed: 5 September 2018).
[153] See further, Irish Water, available at: www.water.ie/about-us/our-company/ (last accessed: 5 September 2018).

requirement sufficient to enable the utility to deliver the required services to specified standards in an efficient manner.'[177] It was also to regulate the setting of tariffs.

The MOU itself however does not require privatisation. However, this should not of course be construed as meaning that privatisation is implausible. Nevertheless, *The Water Services Act 2007* (as amended) further provides for 'three levels of safeguards to ensure democratic control over the sector,' set out as follows:[154]

> Section 27: The Minister may only transfer functions to private operator if democratic accountability for the function is ensured. McIntyre[179] points out that there 'does not appear to be any equivalent for state-owned company.' Of course this raises concerns of a possible accountability deficit when it comes to holding the state actor to account.
>
> Section 31(2): water services authority cannot contract with private operators where this would involve the transfer of the authority's assets or infrastructure to that private sector.
>
> Section 40(7): a water service provider authority which contracts services out to the private sector will continue to be responsible for the compliance of those services with the requirements of this Act.

McIntyre concedes that there is 'likelihood of private entities acquiring some form of interest' given that one of the purposes of the company's establishment was that 'borrowing capacity is higher than other models allowing the entity to become self-funding sooner.'[155] Further, 'privatisation of the water utility might become attractive in the future.'[181] From a human rights perspective, taking account of financial bail-outs and the austerity panacea to economic instability, many issues arise as to the precise implications and possible regressive measures that may result from such policies. These are further exacerbated by the particularly human rights sensitive nature and aforementioned socio-environmental (and cultural) characteristics of water and what this resource means to communities. Indeed, the UN Special Rapporteur's report on 11th July 2013 addresses the links between fiscal austerity and states' commitments to socio-economic rights realisation.[156] She discusses the precarious risks posed to these rights during financial crises. Whilst non-binding, *The Vienna+20 CSO Declaration* (25-26 June 2013) also highlights this important issue, providing for guiding principles and the reaffirms the primacy of human rights as well as the urgent need to ensure legal accountability for human rights abuses. With possibly significant resonance to the Irish context, it acknowledges that:

> Deep and far-reaching austerity measures in many parts of the world … coupled with longstanding financial regulation failures in the North, have deepened economic inequalities between countries, with inter-generational impacts on the realisation of the human rights to decent work, an adequate standard of living for all, social protection, food, housing, *water*, health and education, amongst others (emphasis added).[157]

[154] McIntyre, 'Human Right to Water' (n.3) 90.
[155] *Ibid*.
[156] de Alburquerue, *Report of Special Rapporteur* (n.76).
[157] See, Vienna+20 Declaration, Vienna (26 June 2013), available at: https://viennaplus20.files.wordpress.com/2013/04/vienna20-cso-declaration-final.pdf (last accessed: 5 September 2018).

Since 2013, there have been rallying calls for a legally recognised Irish right to water and sanitation in the wake of the suspension of water charges which occurred as a direct result of social protests and mass political advocacy networks (nearly 100,000 people protested the water charges during the course of 2014).[158] It is therefore clear that these concerns are supported by a large percentage of the Irish population. However, it is submitted that solely opposing charges is insufficient even precluding PSP; without robust procedural rights elements of community participation in the decision-making and management of this resource including open legal avenues for advancing strategic public interest litigation (if need be), a right to water risks becoming an empty signifier in a shallow post-political consensus. Indeed, much can be learnt from the position of the South African *Mazibuko* case as outlined above as well as the Irish judicial position with regard to socio-economic rights adjudication.

2. The Irish Legal framework: Defining a Right to Water and Sanitation? Challenges and Possibilities for Meaningful Content

Currently, there is no constitutional or legislative explicit right to water and sanitation in Ireland.[159] The government has however ratified the ICESCR which, as outlined in Part B, is the core international legal instrument for deriving a right to water and sanitation, (notwithstanding some objections). It is submitted that as a foundational measure, it would serve advocacy networks to push for the government to commit to its intention and sign up to the Covenant's Optional Protocol which provides for an individual complaints mechanism procedure in order to bring claims of human rights violations against state parties.

Importantly, as mentioned at the start of this paper, Ireland did not support the UNGA Resolution recognising an international human right to water and sanitation. However, it is submitted that given the recent public opposition to water charges, this arguably highlights a gulf or disconnect that exists between classes within Irish society wrought by recession which has impacted the middle to lower-income brackets including the most vulnerable. Further, there is a growing disjuncture between the general public and political representatives who continue to carry the weight of EU/IMF austerity on their shoulders, despite such social struggles to the contrary. The official reasoning as McIntyre points out was 'related to cost implications'[186] – however nebulous the objection may be. Nevertheless, given such rapid attitudinal changes in this post-recession decade, Ireland may well recognise such a right despite its abstention to the Resolution over seven years ago. However, Nolan has outlined the limitations of socio-economic rights adjudication in Ireland (in the context of holding non-state actors to account, although there is also overlap regarding the state actor).[160] It is arguable that a possible right to water and sanitation may run into similar challenges if it is not articulated in more meaningful ways, such as from the perspective of the commons as outlined herein.

Suffice to say, the Irish Constitution provides for socio-economic rights-related provisions of both a justiciable and non-justiciable nature.[161] The most prominent is Article 42 on the right to primary education. As alluded to under Article 40.3.1, many socio-economic rights are accorded constitutional status through unenumerated recognition. This provision states that: 'the State guarantees under its laws to respect, and,

[158] For a further example see, C. McCormack, 'Water Charges Protest Draws Massive Crowd to the Streets' (12 October 2014) Irish Independent, available at: www.independent.ie/irish-news/politics/water-charges-protestdraws-massive-crowd-to-the-streets-30656878.html (last accessed: 5 September 2018).

[159] McIntyre, 'Human Right to Water' (n.3) also appropriately points out that it is 'highly unlikely' that EU Charter or any EU water related and environmental Directives provide a justiciable basis for this developing right, at 93.

[160] See, Nolan, 'Holding Non-state Actors to Account' (n.7).

[161] See P. O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (2012); Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document* (2005).

as far as practicable by its laws to defend and *vindicate* the personal rights of the citizen' (emphasis added). It is 'clear that this provision imposes a duty on the State to take *positive action* in appropriate circumstances.'[162] Article 40.3.2 further provides that: 'the State shall' in particular by its laws protect at best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.' In her case analyses, Nolan points out that under some circumstances the Irish courts have broadened the obligation of the state to defend and vindicate these rights in the context of actors other than organs of the state. In *Ryan v Attorney General* (the seminal case regarding unenumerated rights) it was held that personal rights are not exhausted by life, person, good name and property rights' expressly enumerated in Article 40.3.2. This was later confirmed by Supreme Court.[163] Nolan however highlights a 'general reluctance in recent years to recognise and give effect to such rights' due to the implications adjudication of socio-economic rights is perceived to have on the separation of powers doctrine (classical constitutional liberal theory approach) and the court's involvement in distributive justice.[164] As a result, the Supreme Court has refused to recognised new unenumerated socioeconomic rights. She points out that it has gone so far as to question the existence of economic and social rights previously identified by other courts.

A possible right to water and sanitation may therefore theoretically take several forms in Irish law. It may be constitutionally guaranteed through further judicial interpretation of unenumerated rights under Article 40.3 although this is highly unlikely given its recent restrictive approach towards recognizing other socio-economic rights. There may also be a referendum which explicitly recognises this right, however this will require a much longer-term public advocacy campaign. Also perhaps the recent emergence of this right under international human rights law might itself play a role in interpretation and application of Constitutional protections. It may also be legislatively provided for under statute(s). Yet, whatever legal avenue may be employed, the precise scope, normative content and justiciability of such a right would need to be rethought of in light of the aforementioned conceptual framework and the *Mazibuko* case example. Indeed, even where international and regional human rights regimes have not (as yet) recognised a binding right to water and sanitation, such as the European Union, they have 'long given ready support to key aspects of any such right, particularly the procedural aspects which serve to facilitate the meaningful and effective participation of affected individuals and communities in the making of administration decisions potentially affecting their water services. For example, the UN Economic Commission for Europe's (UNECE) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention)[165] provides the rights of the public (individuals and their associations) with regard to the environment, access to environmental information, public participation in decision-making and access to justice. It may theoretically be utilised in advocacy strategies in the context of formulating a right to water and sanitation that places community before market and state. Or perhaps a distinct "Aarhus-type" of instrument can be pushed in terms of water and sanitation at the regional level utilising a broader eco-social approach.

[162] See further, G. Whyte, *Social Inclusion and the Legal System—Public Interest Law in Ireland* (2002) 19.
[163] *Ryan v Attorney General* (1965) IR 294, at 312-313 and 344. Other unenumerated rights include: various rights of child, right to bodily integrity, the right not to have health endangered by state, the right to work and to earn a livelihood.
[164] Nolan, 'Holding Non-state Actors to Account' (n.7) 5. She notes the stark contrast between two cases within a nine years of each other and the different tests applied by the Courts in determining the extent of the state's constitutional obligation in relation to the right to education of children with special needs. See, *O'Donoghue v Minister for Health* (1992) 2 IR 20 and *O'Carolan v Minister for Education* (2005) IEHC 296.
[165] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998), available at: www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (last accessed: 5 September 2018).

Bakker has also put forward the *public-public* partnership (PPP) as 'potentially powerful actually existing alternatives.'[166] Herein in public water supply utilities with expertise and resources (typically large cities in the global North) are partnered with those in the South, as well as smaller urban centres in North also, whilst acknowledging the 'political pitfalls,' i.e. to be 'promoted for less profitable communities allowing more private sector contracts to cherry pick profitable communities.'[167] It is submitted that this type of PPP could also apply to communities and cities that are vulnerable to the discontents of regressive austerity measures.

Bakker further suggests that 'institutional support from multilateral agencies may be forthcoming'[199] in this sense. For example, she cites the UN Secretary General's Advisory Board on Water and Sanitation which requested that the UN support:

> … the creation of an international association of public water operators – encouraged by the UN Commission on Sustainable Development's official acknowledgement of the importance of public-public partnerships and by specific campaigns by public utilities – notably Porto Alegre – governments in Argentina, Bolivia, Brazil, Indonesia, Holland, Honduras, France, *South Africa* and Sweden have initiated public-public partnerships, at times also entailing radical restructuring of management-worker relationships within water supply utilities[168] (emphasis added).

Bond maintains that a 'crucial challenge for water rights advocacy is to transcend narrow juristic narratives' that tend to be 'individualistic, anthropocentric, state-centric, and compatible with private actor provision of water supply.'[169] In the current Irish campaign for a legal recognition however, a mere call for right to water that precludes private actor participation would still face the same wall regarding state service provision. If it is to have genuine meaning the debate could heed the lessons of other domestic cases such as South Africa, interpret normative instruments in a manner that prioritises participatory rights, as well as utilise the approaches of alter-globalisation movements such as the commons and thereby re-orientate focus towards the central role of procedural rights in the right to water and sanitation.

E. CONCLUSIONS AND RECOMMENDATIONS: PRIORITISING COMMUNITY PARTICIPATORY RIGHTS & STRATEGIC PUBLIC INTEREST LITIGATION

The abovementioned South African and Irish experiences, whilst different in their own respective contexts, point to a very similar aim which is the desire to give the right to water and sanitation some critical meaning for communities beyond the narrow confines of legal technical (and purely economic) terms such as access, quantity and financial sustainability.

In terms of learning from the *Mazibuko* case several comments and recommendations can be made. First, ensuring procedural detailed safeguards to any right to water remains essential, there is great potential for this to be progressively advanced in a country such as Ireland for reasons outlined in the previous section. Second, public participatory rights should be taken seriously from the onset of any public policy initiative as well as in the ongoing management and review of such water policies, and incorporated in robust, clear and consistent legal terms. However, this is not to say that community participation is without its own inherent

[166] Bakker, 'Commons versus the Community' (n.36**Error! Bookmark not defined.**) 33.
[167] *Ibid*, 34.
[168] *Ibid*, 35.
[169] Bond, *Unsustainable South Africa* (n.47) 190.

limitations, which any jurisdiction would do well to be aware of when formulating or re-(thinking) such a legal and/or conceptual notion. Bakker for example remains correctly cautious not to romanticise community control.[170] She points out that much activism tends to see such forms of water supply management 'as coherent, equitable social structures, despite the fact that inequitable power relations and resource allocation exists within communities.'[171]

Indeed, there are many limitations to such resource management which can be overcome if approached in proactive ways. Communities are not historically egalitarian. For example, the gender asymmetries that remain for now still highly socially entrenched in patriarchal systems are acutely visible in socio-economic rights. In the context of water for example, in the global South, women and girls are the primary water-bearers and are often the most vulnerable groups affected by rights violations. Financial crisis and fiscal austerity may exacerbate gender asymmetries more acutely. It rings true that, 'research has demonstrated how cooperative management institutions for water common-pool resources can function effectively to avoid depletion.'[172] However it also rings true that 'other research points to the limitations of some of these collective action approaches in water.'[173] In other words as Bakker succinctly puts it the 'commons can be exclusive and regressive as well as inclusive and progressive.'[174] Indeed as she concedes, 'the role of the state in encouraging redistributive models of resource management, progressive social relations and redistribution is more ambivalent than those making calls for returns to the commons would perhaps admit.'[175] It is submitted that domestic, regional as well as international articulations will need to refine their focus on these terms if a right to water and sanitation is to have concrete positive effect in the future (especially if considerations for a binding international treaty are to be taken seriously).

On the public interest litigation front, there are significant hurdles that both the South African and a potentially Irish context will need to overcome in order to effectuate administrative and procedural justice. Clark proffers that the *Mazibuko* case is worth highlighting because 'despite the unfavourable result, the applicants and the social movement that sponsored it did not regret their decision to litigate.'[176] The value of advocacy is thereby 'grounded in a much broader campaign against neoliberal policies to the delivery of basic social services.'[177] Langford has noted that 'any critique of litigation as a vehicle for social change is only sustainable if there are viable alternatives or if litigation makes the situation worse in the absence of alternatives.'[178]

Dugard further elaborates on the potential for strategic public interest litigation in the area of socio-economic rights such as water and sanitation:

> rights can be useful to the left regardless of the ultimate outcome of litigation *per se*. Advocating a pragmatic approach to rights, I suggest that in contemporary South Africa, with its extreme socio-

[170] Bakker, 'Commons vs Commodity' (n.36) 34.
[171] *Ibid*.
[172] *Ibid.*
[173] *Ibid*.
[174] *Ibid*. See further on this, J. McCarthy, 'Commons as Counter-hegemonic Projects' (2004) 35(3) *Capitalism, Nature, Socialism* 9.
[175] *Ibid*.
[176] Clark, 'Centrality of Community Participation' (n.61) 181.
[177] *Ibid*.
[178] *Ibid*. See, M. Langford, 'The Justiciability of Social Rights: From Practice to Theory', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, New York: 2008) at 42.

> economic and racial inequalities, while in the normal course of events the law does indeed serve the interest of the elites, rights-based legal mobilisation can have a predominately positive impact on social movements representing disempowered groups, including the poor … If strategically used … may in certain circs offer the left an additional tactic in a broader political struggle. In some instances the additional tactic may be a last resort, but it remains a useful one.[179]

As highlighted in this paper, leading scholars and practitioners remain equally cautious of "rights talk" whilst suggesting that a focus on property rights may prove more fruitful in the long term. It is submitted that the *Mazibuko* case does reflect some of these concerns raised in this paper. Any human right to water and sanitation and the discourse in this field generally ought to engage a more nuanced and critical reflective praxis especially countries that have the opportunity to articulate such a right anew, such as in the Irish legal system. Yet Bakker emphasises an important distinction that these jurisdictions ought to equally take heed of. It remains a central task to defend and extend a right to water although on its own it is not entirely satisfactory.[180] It may be viewed as a useful tactic whereby 'those without access legitimise their struggles not only for water but also for dignity.'[181] Hence in an aspirational manner the right to water 'can be a valuable tool, because it compels powerful to consider redistributive politics embedded in their water use practices. In other words human rights are not a solution but rather a *strategy* for creating the context in which claims for social and environmental justice can be pursued' (emphasis added).[182] She makes an important argument which is perhaps worth quoting in full here:

> A broad interpretation of human rights may be a useful conceptual antidote to what some term as the elite capture of the benefits of development. This arises because of a central conundrum underpinning the debate over the human right to water: while governments often recognize that unserved communities have legitimate claims to social services, they are frequently unable to provide those services and so deal with their claims on the basis of political expediency. In order to collectively apply informal pressure on governments to meet demands, these marginalized population seek to define themselves as communities with a clear identity … the social or consumption rights these groups demand are distinct from human rights which focus on individual right characteristics of Western liberal-rights frameworks. (Recent debates over social citizenship make a similar point).[183]

In the final instance, human rights mobilisation in this field can enhance solidarity. Yet as Bakker appropriately puts forth:

> But what kind of solidarity and with whom? ... The most progressive politics, will seek new expressions of eco-social (socio-natural) justice that move us away from anthropocentric, individualist notions of human rights. A recent and suggestive example is the case of Bolivia, where politicians have been at the vanguard of the international movement in support of the human right to water, while simultaneously promoting environmental rights (notably the *Ley de Derechos de la Madre Tierra* and the revised *Ley del Agua*). The Bolivian case suggests that the irony of the growing

[179] Dugard, 'Reply' (n.136).
[180] Bakker, 'Commons versus the Community' (n.36) 36.
[181] *Ibid*, 37.
[182] *Ibid*, 38.
[183] *Ibid*.

> international consensus on the human right to water is that it may lead eventually to give rise to the conditions for its transcendence.[184]

From a socio-legal perspective, the right to water and sanitation as it currently stands is at crucial juncture where the inter-section of law, policy and advocacy is particularly acute in terms of its potential to shape the content and future direction of what this right will mean in practice. This has significant implications with regard to holding key providers of water services accountable for *prima facie* violations of this emerging right. Therefore, this paper has attempted to explore both the theoretical and practical implications of the key elements of public community participation and strategic public interest litigation within this highly topical field of human rights law. It has been argued in this paper that both of these national experiences offer interesting ways of re-thinking a more nuanced normative content for the human right to water and sanitation in the future.

[184] *Ibid*.