
NOTE

WHAT PRICE FOR THE PRICELESS?: IMPLEMENTING THE JUSTICIABILITY OF THE RIGHT TO WATER

I. INTRODUCTION

Water, while possessing one universally agreed upon chemical definition, means different things to different people. Generally, one's conception of water is largely framed by the region of the world in which he or she lives. In the United States, for example, water is considered much like air: both are important in the abstract, but are so abundant that the value Americans ascribe to them is relatively low.¹ Water is present everywhere: in several rooms of every house,² in water fountains at schools, in fire hydrants lining the streets. People often take overlong showers, wash their hair every day, wash their cars on weekends, and allow faucets to run unnecessarily while washing dishes or brushing their teeth. At the end of the day, however, such uses cost Americans very little: they pay more for the Starbucks coffee³ they drink in the morning than they do for the water they consume.⁴

The reality in the developing world is markedly different. In regions where access to potable water is scarce, such as Asia,⁵ South

¹ See U.S. EPA, CLEANER WATER THROUGH CONSERVATION (1995), available at <http://www.epa.gov/OW/you/chap1.html> (listing among "normal household uses" of water in the United States: watering lawns and gardens, maintaining swimming pools, and washing cars). The comfort Americans have in water availability is manifested in many ways that individuals generally do not think about on a daily basis: taking baths and long showers, using the toilet as a trash can to flush away waste, running the dishwasher without a full load, allowing water lines and connections to leak, overwatering lawns, and rinsing down streets, sidewalks, and driveways. For a list of actions that users can take to conserve water, see CITY OF DESOTO, TX, WATER CONSERVATION TIPS, http://www.ci.desoto.tx.us/water_conservation.htm (last visited Jan. 14, 2007).

² Cf. U.S. EPA, *supra* note 1 (showing illustration of disaggregated household use indicating that, on average, 74% of household water is used in the bathroom — 41% for toilet flushing alone — and 5% of household water is used in the kitchen).

³ See *Burgers or Beans?*, ECONOMIST, Jan. 17, 2004, at 67 (noting that the average price of a Starbucks tall latte is \$2.80 — the same as that of a Big Mac); see also Associated Press, *Starbucks To Boost Coffee Prices in U.S.*, USA TODAY, Sept. 28, 2004, available at http://www.usatoday.com/money/industries/food/2004-09-28-starbucks-prices_x.htm (reporting company's plan to raise coffee prices by approximately five cents per cup).

⁴ See Am. Water Works Ass'n, Question of the Day: What Is the Cost of the Water I Use in My Home?, <http://www.drinktap.org/consumerdnn/Consumer/TestYourWaterIQ/QuestionoftheDay/tabid/188/Default.aspx> (last visited Jan. 14, 2007) (noting that a "gallon of tap water costs [the U.S. consumer] less than one penny").

⁵ See Hans van Damme, *Domestic Water Supply, Hygiene, and Sanitation*, 2020 VISION FOCUS (Int'l Food Policy Research Inst., Wash., D.C.), Oct. 2001, at Brief 3, available at

America,⁶ and much of sub-Saharan Africa,⁷ the relative cost of purchasing water is high, and water takes on a radically different level of importance. When its general importance is coupled with scarcity, water's value increases exponentially, making it more comparable to gold or diamonds than to air, with the added weight of being necessary for survival. In this sense, there are few (perhaps no) other resources of equal importance.

The impact of water's increasing scarcity has grown more pronounced in recent decades, and so too has its importance in the public consciousness. Yet while many countries have paid lip service to a right to water, both in international treaties and in the flowery language of their constitutions, most of these statements have proven aspirational at best, with little enforcement action.

As a result of this seeming complacency, there has been a push both in the international community and within developing nations to advance the right to water a step further by recognizing it as justiciable, thereby allowing citizens to seek legal recourse when their water needs go unmet.⁸ Two approaches to justiciability have predominated. The first approach, illustrated by the South African system, explicitly confers a justiciable, affirmative right of access to adequate water, a right enshrined in the country's constitution and upheld by the country's Constitutional Court. The second approach, exemplified by the Indian

<http://www.ifpri.org/2020/focus/focus09/focus09.pdf> ("Two-thirds of people without access to improved water supply . . . live in Asia.").

⁶ In terms of water resources, South America as a whole is well endowed, with only 6% of the world's population and about 30% of the world's renewable water resources. There are geographical variations, however, with semi-arid and arid areas in Argentina, Bolivia, Chile, and Peru. See GLOBAL WATER P'SHIP, OUR VISION FOR WATER IN THE 21ST CENTURY: SOUTH AMERICA 3, available at <http://www.aguabolivia.org/situacionaguaX/GWP/samersid.pdf> ("About 20% of the [South American] population [is] still living without access to water supply and more than 30% without sanitation, corresponding to 60–100 million people without access to basic services, especially [concentrated] in rural areas.").

⁷ The situation is perhaps most dire in sub-Saharan Africa. See JOHN THOMPSON ET AL., INT'L INST. FOR ENV'T & DEV., DRAWERS OF WATER II: 30 YEARS OF CHANGE IN DOMESTIC WATER USE & ENVIRONMENTAL HEALTH IN EAST AFRICA 3 (2001), available at <http://www.poptel.org.uk/iied/docs/sarl/drofwater.pdf> ("The situation is most acute in Africa, where only 62 percent of the population has access to improved water supply. The situation is worse in rural areas, where coverage is only 47 percent . . .").

⁸ Advocates have taken a similar approach in implementing a justiciable right to food. See, e.g., Comm'n on Human Rights 2002, *Right to Food*, in 2 FOR THE RECORD (Human Rights Internet & Canadian Heritage eds., 2002) (citing U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report by the Special Rapporteur on the Right to Food*, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002) (prepared by Jean Ziegler) [hereinafter *The Right to Food*]), <http://www.hri.ca/fortherecordCanada/vol2/foodchro2.htm> ("[T]here is also a clear minimum core obligation on all states to provide . . . a minimum essential level of economic, social and cultural rights, . . . regardless of the limitation of 'progressive realization' [T]hese and other obligations of states should be considered justiciable by their very nature").

legal system, derives an implied justiciable right to water from the broader “right to life.”

No legislative or jurisprudential solution can immediately solve the crisis of water scarcity. Although justiciability alone is not a panacea, it is a step in the direction of ensuring access to sufficient water. This Note argues, through the lens of South Africa’s and India’s existing jurisprudential methods, that certain forms of justiciability show more promise than others for achieving the goal of clean water for all. In particular, this Note argues that justiciability based on an explicit constitutional provision recognizing an affirmative right to water is preferable to a merely implied right to water. Developing nations seeking to achieve a justiciable right to water should follow the South African example rather than relying on the implied justiciability rights utilized in the Indian legal system. Part II provides some background regarding the (often understated) importance of water and the (often unperceived) epidemic of water scarcity in the developing world. Part III discusses both the deficiencies of the current international system governing water rights and the increasing importance of national recognition and justiciability of water rights in the developing world. Part IV provides a comparative analysis of the legal framework governing the justiciability of water rights in India and South Africa. Part V evaluates the effectiveness of the Indian model and argues that conferring justiciability in this manner has significant legal limitations and poses considerable legal risk. This Part also outlines the advantages of granting an explicit justiciable right to water as South Africa does. Finally, Part VI concludes that explicit recognition of a justiciable right to water, though not a cure-all, offers benefits better suited to both the legal and the political situations of the developing world and, in the end, offers the level of support necessary for full realization of water rights.

II. WATER USE AND SCARCITY IN THE DEVELOPING WORLD

Water is vital to human survival in a number of ways, including basic hydration and food production. Although water abounds in the world’s oceans and lakes, only a small portion is fit for human consumption, and still less is available to a significant portion of the world’s population.⁹ The World Health Organization (WHO) estimates that over one billion people — more than one-sixth of the

⁹ See *Priceless*, *ECONOMIST*, July 19, 2003, at 3, 3 (noting that “97% of the world’s water is seawater” and that of the remaining 3%, only one-third is available for drinking).

world's population — do not have access to even a basic water supply.¹⁰

Several factors have combined to create this scarcity, the world's ongoing population boom¹¹ and the population's concentration in developing countries¹² being only the most obvious:

Another cause of water scarcity is the increasingly common practice of over-pumping aquifers, rivers, and lakes for drinking, agricultural, and industrial use

A further cause . . . , and one that is a primary source of international conflict, involves a change in the distribution of water within an international river basin.

. . . [O]ther basic and more obvious causes of water scarcity include climatic and environmental conditions, such as aridity (a permanent shortage of water caused by a dry climate), desiccation (a drying-up of the landscape, particularly the soil, resulting from activities such as deforestation and over-grazing), and drought.¹³

This water shortage is felt most strongly in developing countries, where it creates a host of other problems that serve to worsen already

¹⁰ See WORLD HEALTH ORG. & U.N. CHILDREN'S FUND, GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 REPORT 1 (2000), available at http://www.who.int/water_sanitation_health/monitoring/jmp2000.pdf [hereinafter GLOBAL WATER SUPPLY] ("At the beginning of 2000 one-sixth (1.1 billion) of the world's population was without access to improved water supply The majority of these people live in Asia and Africa, where fewer than one-half of all Asians have access to improved sanitation and two out of five Africans lack improved water supply. Moreover, rural services still lag far behind urban services.")

¹¹ See U.N. WORLD WATER ASSESSMENT PROGRAMME, WATER FOR PEOPLE, WATER FOR LIFE 10 (2003), available at <http://unesdoc.unesco.org/images/0012/001295/129556e.pdf> ("Critical challenges lie ahead in coping with progressive water shortages and water pollution. By the middle of this century, at worst 7 billion people in sixty countries will be water-scarce, at best 2 billion people in forty-eight countries."); GLOBAL WATER SUPPLY, *supra* note 10, 1 ("The water supply and sanitation sector will face enormous challenges over the coming decades. The urban populations of Africa, Asia, and Latin America and the Caribbean are expected to increase dramatically. The African urban population is expected to more than double over the next 25 years"); Press Release, Sandra Postel, Worldwatch Inst., Drought Foreshadows Larger Water Threat (Aug. 26, 1999), available at <http://www.worldwatch.org/node/1658> ("[P]opulations continue to grow fastest in some of the world's most water-short regions. The number of people living in water-stressed countries is projected to climb from 470 million to 3 billion by 2025.")

¹² See Statement of African Ministerial Conference on Water (AMCOW) at the World Summit on Sustainable Development in Johannesburg, South Africa 2 (August 2002), available at http://www.africanwater.org/Documents/amcow_abuja_wssd_statement.pdf ("Over 400 million people are expected to be living in at least 17 water-scarce African countries by the year 2010."). Global freshwater consumption is outpacing population growth, rising at more than twice the speed of the population. See DEP'T FOR INT'L DEV., ADDRESSING THE WATER CRISIS 11 (2001), available at <http://www.dfid.gov.uk/pubs/files/tspwater.pdf> (ascribing the faster pace to "population growth (particularly in developing countries) and [to] rising demand per person due to such causes as irrigation development, industrialisation and necessary use by individuals as incomes rise").

¹³ Christopher L. Kukk & David A. Deese, *At the Water's Edge: Regional Conflict and Cooperation over Fresh Water*, 1 UCLA J. INT'L L. & FOREIGN AFF. 21, 29–30 (1996).

poor economic conditions. Water has several important nonconsumptive purposes beyond basic hydration, such as use in farming, without which many people in the developing world would lack both adequate nutrition and hope for improved economic development.¹⁴ Within largely agrarian societies, such as those in the Asia-Pacific region¹⁵ and much of sub-Saharan Africa,¹⁶ the importance of growing crops or raising livestock in a manner that yields even meager profits can be key in obtaining access to medical care, education, electricity, and heating.

Moreover, although the issue is often dwarfed by the more immediate and widely recognized dangers of insufficient drinking water, the lack of *clean* water for cooking and maintaining personal hygiene is critical.¹⁷ In many parts of the developing world, the only available water is so unhygienic as to lead to frequent serious illness,¹⁸ such as

¹⁴ See Garry Emmons, *WATER Ltd.*, HBS ALUMNI BULL., Sept. 2005, available at <http://www.alumni.hbs.edu/bulletin/2005/september/water.html> ("Agriculture will need ever-greater amounts of water to feed growing populations, even as burgeoning cities — with their greater wealth and political clout — typically draw off more water for their residents, industries, and power plants."); U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination*, ¶ 42, U.N. Doc.E/CN.4/2003/5 (Mar. 12, 2003) (prepared by Miloon Kothari) [hereinafter *Report of the Special Rapporteur*] ("Inadequate water in rural areas leads to a vicious circle of lower agricultural yields for subsistence and income generation, deepening poverty.")

¹⁵ See, e.g., V.V.N. MURTY & K. TAKEUCHI, *LAND AND WATER DEVELOPMENT FOR AGRICULTURE IN THE ASIA PACIFIC REGION* 1–2 (1996) ("[In the Asia-Pacific region,] [a]griculture shared the biggest sector of the economy, producing basic food and fibre for the domestic market as well as exporting various commodities.")

¹⁶ See Food & Agric. Org. of the U.N., *Needed by African Farmers: Simple Water Pumps* (Jan. 30, 2001), <http://www.fao.org/News/2001/010103-e.html> ("In sub-Saharan Africa, only 4 percent of arable land is irrigated, severely constraining agricultural productivity in a region where an estimated one third of the population is chronically undernourished. By comparison, 37 percent of arable land is irrigated in Asia, 24 percent in Northern Africa and 15 percent in Latin America.")

¹⁷ See MARIANNE KJELLEN & GORDON MCGRANAHAN, *COMPREHENSIVE ASSESSMENT OF THE FRESHWATER RESOURCES OF THE WORLD* 7 (1997), available at <http://www.sei.se/dload/1997/CAOTFROTW.pdf> ("In arguing for the importance of water, it is common to oversimplify its role, and overemphasise the significance of contaminated drinking water."). It is easier, in many ways, to understand lack of water's direct link to dying of thirst than its connection to waterborne diseases. Instead of poor hygiene being readily associated with a dearth of clean water, the problem tends to be viewed as having multiple causes and multiple solutions. For example, fecal-oral diseases, properly associated with a lack of clean water, are more readily associated with poor sanitation, which itself is thought to be a cause of the lack of clean water. Another way clean-water scarcity is sometimes viewed is as the *presence* of industrial pollution. The different possible characterizations of the problem can lead many to forget that, at its heart, it is *primarily* a water supply issue.

¹⁸ See *GLOBAL WATER SUPPLY*, *supra* note 10, at 3 box 1.4 ("Water-washed disease occurs when there is a lack of sufficient quantities of water for washing and personal hygiene. When there is not enough water, people cannot keep their hands, bodies and domestic environments clean and hygienic. Without enough water, skin and eye infections (including trachoma) are easily spread, as are the faecal-oral diseases.")

diarrheal diseases.¹⁹ The crisis affects hundreds of millions of people,²⁰ its impact felt most heavily by women and children.²¹

III. THE INTERNATIONAL CONTEXT, ITS DEFICIENCIES, AND THE NEED FOR NATIONAL JUSTICIABILITY

Advocates in the international community continue to push for protection of water rights.²² These proponents argue that the general “right” to water inherent in all individuals requires governments both to provide access to water and to protect that access from such predatory influences as pollution and market forces. The key to government enforcement is the justiciability of the right to water: the ability of the courts, once the right is recognized, to enforce and adjudicate it.²³ Thus, justiciability enables individuals to seek remedies and hold their

¹⁹ Children are particularly susceptible to this strain of disease. See Am. Red Cross, Integrated Management of Childhood Illness: IMCI Target Conditions, <http://www.redcross.org/services/intl/imci/damm.asp> (last visited Jan. 14, 2007) (“A lack of clean water leaves children vulnerable to a wide variety of waterborne infections which cause diarrhea. Many of the world’s children drink, bathe in, and play in unsafe water. Once a child contracts diarrhea, the lack of potable water contributes to dehydration . . . , sometimes leading to death.”); GLOBAL WATER SUPPLY, *supra* note 10, at 2 box 1.2 (“Approximately 4 billion cases of diarrhoea each year cause 2.2 million deaths, mostly among children under the age of five. This is equivalent to one child dying every 15 seconds, or 20 jumbo jets crashing every day. These deaths represent approximately 15% of all child deaths under the age of five in developing countries. Water, sanitation, and hygiene interventions reduce diarrhoeal disease on average by between one-quarter and one-third.”) (internal parenthetical numeration omitted).

²⁰ See PACIFIC INST., WATER FACT SHEET, http://www.pacinst.org/reports/water_fact_sheet (last visited Jan. 14, 2007) (“Lack of clean drinking water leads to nearly 250 million cases of water-related disease each year and between 5 and 10 million deaths.”)

²¹ See *Report of the Special Rapporteur*, *supra* note 14, at ¶ 15 (“The consequences of having inadequate housing or essential civic services such as water and sanitation are particularly devastating for women, with consequent impacts on their health, personal status, safety, well-being, and the education of their children.”); Annette Pruss et al., *Estimating the Burden of Disease from Water, Sanitation and Hygiene at a Global Level*, 110 ENV’T’L HEALTH PERSP. 537, 540–41 (2002) (“90% of this disease burden from poor water sanitation occurs in children younger than 5 years.”); DEP’T FOR INT’L DEV., *supra* note 12, at 23 (“[F]etching a family’s basic water requirement can be both time consuming . . . and physically exhausting, a burden that falls disproportionately on women and children.”).

²² Organizations pushing for recognition of the right to water include Amnesty International, the U.N. Committee on Economic, Social, and Cultural Rights, and the World Health Organization. See, e.g., Public Statement, Amnesty Int’l, Human Right to Water (Mar. 24, 2003), available at <http://web.amnesty.org/library/index/engIOR100022003?open&of=eng-398>; WORLD HEALTH ORG., THE RIGHT TO WATER, (2003), available at http://www.who.int/water_sanitation_health/rtwrev.pdf.

²³ See Rebecca J. Cook, *Advancing Safe Motherhood Through Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 114 (Isfahan Merali & Valerie Oosterveld eds., 2001).

governments accountable if the right is violated.²⁴ Proponents also argue that justiciability is key in holding governments accountable for not meeting their obligations under international law, which increasingly recognizes access to water as a fundamental human right.²⁵

The initial groundwork for this movement was laid in the international sphere. The most significant human rights document to date is the United Nations's Universal Declaration of Human Rights.²⁶ Drafted over fifty years ago, it began as a nonbinding document²⁷ but eventually grew to have some normative force. Although the fundamental rights and freedoms it recognizes do not explicitly include a right to water,²⁸ the Universal Declaration does contain clauses that provide some measure of justification for such a right. Article 22, for example, states that "[e]veryone, as a member of society[,] . . . is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."²⁹ Article 25(1)

²⁴ See Asian Legal Res. Ctr., *Reports of the Special Rapporteur on the Right to Food*, ARTICLE 2 INT'L COVENANT ON CIV. AND POL. RIGHTS, Apr. 2003 16, 22, available at <http://www.article2.org/pdf/v02no2.pdf> (arguing that accountability requires justiciability).

²⁵ See Anil Naidoo & Adam Davidson-Harden, *Water as a Strategic International Resource 1–2* (Nov. 18, 2006) (unpublished manuscript), available at http://www.cancun2003.org/download_en/Naidoo_Davidson-Harden_conflict_water_version_final_ingles.doc. Professors Naidoo and Davidson-Harden explain:

Overall, economic, social and cultural rights (under which the right to water resides) have less weight in the UN and international legal system than do political or civil rights. They are generally viewed as non-justiciable rights as opposed to political and civil rights which are viewed as justiciable. . . . Putting the right to water beyond the reach of courts is arbitrary and violates the principle that human rights must be indivisible and interdependent. . . . The UN must address this paradox because the right to water and other economic, social and cultural rights are not being enforced as a result of limited national legal frameworks that exist for this right as well as the non-justiciable nature of the right.

Id.; see also Alternative World Water Forum, *For the Implementation of the Human Right to Water* (Mar. 18, 2005) (unpublished manuscript), available at http://www.fame2005.org/IMG/doc/FAME2005-DOC1_HUMAN_RIGHT-2.doc. The Forum authors argue:

Putting the justiciability of the right to water into practice at the national, continental and international level represents the ultimate goal of the mobilisation around this plan of action that we hope to achieve. We will really be able to say that the right to water has been effectively implemented once individuals are able to assert the application of this right before the courts of their countries or before continental or international jurisdictions that will be authorised to issue compulsory verdicts.

Id. at 3.

²⁶ G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration], available at <http://www.un.org/Overview/rights.html>.

²⁷ See Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT'L ECON. L. 553, 560 (2006).

²⁸ See *id.*

²⁹ Universal Declaration, *supra* note 26, art. 22.

states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family.”³⁰

A. The Insufficiency of Current International Efforts

Although the Universal Declaration arguably contains provisions that lay the groundwork for a human right to water, the absence of explicit acknowledgement of that right has hampered the efforts of human rights proponents. The most promising expansion on the Universal Declaration is the International Covenant on Economic, Social, and Cultural Rights³¹ (ICESCR), a multilateral treaty adopted by the U.N. General Assembly and in force since 1976. In particular, the ICESCR recognizes the right to an “adequate standard of living”³² and the right to the “enjoyment of the highest attainable standard of physical and mental health.”³³ In 2002, the U.N. Committee on Economic, Social, and Cultural Rights adopted General Comment 15 to the ICESCR,³⁴ which declared the right to water an essential cornerstone for realizing other human rights.³⁵

Yet although the ICESCR and General Comment 15 represent major steps forward in acknowledging a human right to water, neither is a binding document. Countries that chose to ratify the ICESCR did not bind themselves to immediately implementing its provisions. In fact, signatories are obligated to take steps only “to the maximum of [their] available resources” to achieve realization of the rights enumerated by the ICESCR.³⁶ The document provides no explicit enforcement mechanism or provision guaranteeing community control of the scarce water resources at issue.³⁷

³⁰ *Id.* art. 25(1).

³¹ *Opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], available at <http://www.ohchr.org/english/law/cescr.htm>.

³² *Id.* art. 11(1).

³³ *Id.* art. 12(1); see also Sheldon Leader, *Human Rights, Risks, and New Strategies for Global Investment*, 9 J. INT’L ECON. L. 657, 698 (2006) (“The Covenant provides that all states shall take steps to achieve the full realization of this right, including steps necessary for ‘the improvement of all aspects of environmental and industrial hygiene’ and the ‘prevention, treatment and control of epidemic, endemic, occupational and other diseases.’” (quoting ICESCR, *supra* note 31, art. 12(2)(b)–(c))).

³⁴ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15, U.N. Doc. E/C. 12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15], available at <http://www.unhcr.ch/html/menu2/6/gc15.doc>.

³⁵ See *id.* ¶ 3 (“The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”).

³⁶ *Id.* ¶ 17.

³⁷ See *id.*

*B. The Obstacle of Economic and Social Rights
as "Second Class" Rights*

Although they do not necessarily comprise an effective mechanism for protecting economic and social rights, the ICESCR and General Comment 15 are part of (and have further encouraged) a somewhat revolutionary movement, as proponents of stronger socioeconomic rights have begun to argue in favor of elevating economic and social rights to the same level as political rights by making them justiciable. Traditionally, international human rights law has branded economic and social rights "second-class," nonjusticiable rights, in contrast to political and civil rights.³⁸ Supporters of the traditional view frequently argue that such rights are too vague,³⁹ making it difficult to set a bright line for violations. Some scholars also argue that courts lack both the democratic legitimacy to intervene in decisions of social policy and the ability to fully understand and adjudicate the complex issues involved.⁴⁰ As a result, many governments, scholars, and international organizations have rejected the possibility that victims could invoke these "second-class" rights in the courts, given the impracticability of adjudicating rights both amorphous and expensive to implement.⁴¹

³⁸ Naidoo & Davidson-Harden, *supra* note 25, at 14. The authors note:

Under international human rights law (as well as in terms of its application at the national level), civil and political rights have, in many respects, received more attention, legal codification and judicial interpretation, and have been instilled in public consciousness to a far greater degree, than economic, social and cultural rights. It is therefore sometimes wrongly presumed that only civil and political rights (right to a fair trial, right to equality of treatment, right to life, right to vote, right to be free from discrimination, etc.) can be subject to violation, measures of redress and international legal scrutiny. Economic, social and cultural rights are often viewed as effectively "second-class rights" — unenforceable, non-justiciable, only to be fulfilled "progressively" over time.

Id. (quoting U.N. Office of High Comm'r for Human Rights, Comm. on Econ., Soc. and Cultural Rights, Fact Sheet No. 16 (Rev. 1), available at <http://www.unhchr.ch/html/menu6/2/fs16.htm>).

³⁹ See Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113, 122 (1999); E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, in 9 NETH. YEARBOOK OF INT'L L. 69, 83 (T.M.C. Asser Inst. ed., 1979) (describing social rights as aspirational and vague).

⁴⁰ See Ronald J. Krotoszynski, Jr., "I'd Like to Teach the World to Sing (In Perfect Harmony)": *International Judicial Dialogue and the Muses — Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1322–23 (2006) ("In a democratic society, why should judges have the final say when judges lack the democratic mandate enjoyed by executive and legislative branch officials?"); Abner J. Mikva, *Why Judges Should Not Be Advicegivers*, 50 STAN. L. REV. 1825, 1826–28 (1998) (arguing that judges lack both the legitimacy and capacity to serve the democratic process as "advicegivers").

⁴¹ See *The Right to Food*, *supra* note 8, ¶ 38. The Commission outlines the traditional arguments for nonjusticiability of the right to food and, by extension, of economic and social rights generally:

[F]irstly, the right to food was imprecise; secondly, the right to food was subject to the limit of progressive realization; thirdly, the right to food required resources to be provided and involve[d] political issues which a judicial or quasi-judicial body is not able to deal with.

Despite this historical hierarchy, economic and social rights have been the beneficiaries of a worldwide elevation of status: as populations grow and economic and social disparities become more pronounced, the urgency of these disparities gains wider recognition on the international stage. Arguments against the practicality of enforcing a justiciable right to water have been challenged in both scholarly debate and, perhaps more importantly, in the courts themselves. A South African Constitutional Court justice has predicted that “21st-century jurisprudence will focus increasingly on socio-economic rights.”⁴²

C. *The Importance of a Justiciable Right to Water*

Justiciability of water rights would play a pivotal role in protecting individuals, particularly the poor and underrepresented, from both the vagaries of the capitalist system and a lack of governmental prioritization. An actual right to water would involve the right of access to, at a minimum, the quantity of water necessary for survival. This right can be approached in one of two ways.⁴³ First, there is the negative rights approach, which prohibits governments and other parties from infringing on one’s right to water through acts such as pollution or diversion of water supplies. This approach includes both “respecting” (for example, governments not polluting) and “protecting” (for example, governments not allowing third parties to pollute) the right. The

Id. The report also observes the significance of the distinction between positive and negative rights:

The main argument for a difference of nature between human rights was that civil and political rights were effectively “negative obligations”, which means that the State must simply refrain from taking actions that stop people from exercising their civil and political rights. This is seen as inexpensive in terms of resources, as it simply implies that the State should not do something. Economic, social and cultural rights, on the other hand, were viewed as “positive obligations” as they require the State to take positive action to improve the living conditions of people. In this case, positive actions must be taken by Governments, which implies the need for resources. For that reason, even when economic, social and cultural rights are laid down in national constitutions, these rights are often considered as “directives” or “guidelines” for Governments, rather than as individual rights that are enforceable in courts. This is because, it is suggested, the judiciary should not have power either to adjudicate the right to food, nor to control policies and resources that are the responsibility of the executive branch of Government.

Id. ¶ 37.

⁴² Albie Sachs, Justice, Constitutional Court of S. Afr., *Social and Economic Rights: Can They Be Made Justiciable?* (2000) (unpublished manuscript), available at http://www.unep.org/dpdl/symposium/Documents/Country_papers/Sachs_speech.doc.

⁴³ See Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 103 (2005) (“Whereas many Western scholars focus on individual negative rights, i.e., those that restrain government action from infringing upon individual liberties, a positivistic human rights framework acknowledges that governments must act affirmatively to fulfill the economic, social, and cultural components of human rights.” (internal citation omitted)).

second option is the positive rights approach, which involves not only “respecting” and “protecting,” but also “fulfilling.” Such an approach requires a government not only to prevent interference with access to adequate water supplies, but also to provide the basic quantity of water needed, regardless of the expense involved or the recipients’ ability to pay. This Note focuses on methods of making justiciable the positive, and more comprehensive, approach to the right to water.

In the years to come, as water becomes scarcer and governmental apathy and predatory privatization become increasingly common, justiciability of water rights will depend on their effective enforcement.⁴⁴ Key to this enforcement is the existence of domestic and international legal avenues for redress. Such avenues are already in place to protect civil and political rights; their absence with respect to economic and social rights has hampered those rights in terms of both their effective enforcement and their perceived importance.⁴⁵

Domestic justiciability serves three important functions in the realization of economic and social rights in general and water rights in particular. First, and perhaps most significantly, justiciability acts as a check against government and corporate interests that might otherwise ignore or encroach upon citizens’ water rights. This check is particularly critical as water privatization becomes more common in both the developed and developing world, leading to more widespread abuse.⁴⁶ Justiciability would, hopefully, serve as a way to deter abuses of water rights as corporate interests would fear incurring liability for water pollution or illegal water shutoffs. Furthermore, the prosecution of violators (governments, private interests, and other third parties) would allow courts to furnish victims of water rights violations with relief through such means as mandating private companies’ restoration of water services and forcing governments to enact policies that do not disregard poor, rural areas.

Second, justiciability of water rights serves as an important signal both to inhabitants of a nation and to those looking to the nation for guidance. Even justiciability that is not perfectly effective still has

⁴⁴ See Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 *FORDHAM INT’L L.J.* 1663, 1672 (2004).

⁴⁵ See *id.* at 1672–73.

⁴⁶ An alarming example of such abuse occurred in Cochabamba, Bolivia, where almost immediately after the government signed a forty-year privatization contract, the company involved raised water rates by a staggering amount — as much as 100 to 200 percent in some instances — making it virtually impossible for many living within the country to afford even a basic amount of water. See *PUBLIC CITIZEN, WATER PRIVATIZATION FIASCOS* 5 (2003), available at <http://www.citizen.org/documents/privatizationfiascos.pdf>.

significant normative force.⁴⁷ The current widespread subordination of economic and social rights to civil and political rights sends the message that the former, water rights included, cannot be adjudicated, but are considered less important.

A justiciable water right would bolster norms against prioritizing corporate profit over the human need for water. The best way to ensure that water is managed sustainably is to empower local organizations in their efforts to influence water management and to condemn industries that pollute or abuse this common resource. In much the same way that the Universal Declaration of Human Rights began as a nonbinding recommendation but transformed into an instrument of normative force, acknowledgment of a justiciable right to water could ultimately visit much needed pressure upon exploitative corporations and corrupt governments.

Third, justiciability allows national tribunals to clarify the meaning of water rights in varying contexts and to establish authoritative interpretations helpful to governments.⁴⁸ The United Nations, relevant nongovernmental organizations, and other bodies can more effectively supervise the progressive realization of this right by monitoring the number of cases brought to the courts and the remedies granted to those seeking redress.⁴⁹

Despite the benefits of justiciability, there are many challenges to the realization of well-established “rights” in the developing world, including poverty, corruption, and various forms of institutionalized discrimination. Although these challenges hardly offer waivers of responsibility, they do call into question whether simply adding another justiciable right to the generally accepted list will truly make a difference.

There are, however, examples of economic and social rights being successfully made justiciable. Both India and South Africa have created a justiciable right to water, with the latter having shown more promise in actually ensuring broad protection of that right. Most importantly, the South African model prevents courts from effectively drafting policy themselves by positioning economic and social rights within the framework of “reasonableness” instead of within an unrealistic concept of perfect realization.⁵⁰

⁴⁷ See David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 55 (2006).

⁴⁸ See Sánchez-Moreno & Higgins, *supra* note 44, at 1672.

⁴⁹ See *id.* at 1672–73.

⁵⁰ See Ran Hirschl, Reply, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 471, 486 (2005) (“None of [South Africa’s] positive rights provisions, however, imply a right to housing, healthcare, or education *per se*; instead, they merely ensure that *reasonable* state measures are taken to make further housing, healthcare, and education progressively available and accessible.” (second emphasis added)); see also *id.* at 487 (“This innovative construction

IV. PATHWAYS TO JUSTICIABILITY — A COMPARATIVE ANALYSIS

As citizens of water-strained countries seek ways to have their governments both recognize and enforce the right to water, those governments now have access to two realistic models for making water rights justiciable. The first model is embodied in India's system, in which, although many economic and social rights are not directly justiciable as per the country's constitution, courts have been granting social rights justiciability on the basis of broader constitutional rights such as the right to life.⁵¹ The second model is embodied in South Africa's system, which employs a constitution that explicitly recognizes numerous justiciable economic and social rights, including the right to water.⁵²

This Note focuses on these two countries for several reasons. First, they are unique in the degree to which they have needed⁵³ and granted⁵⁴ justiciability to water rights. Second, both nations have, in recent history, been faced with the need to develop new governmental systems and craft new judicial policy. After gaining its independence from British colonial rule, India adopted its current constitution in 1950. South Africa's post-apartheid government, established only in 1994, adopted its current constitution in 1996. In this way, both nations were faced with the same "blank slate" that currently confronts many countries in the developing world. Most significantly, both con-

of 'weak' rights requires the government to take reasonable measures, within its available resources, to achieve the progressive realization of each of these rights by establishing practicable programs of land reform, housing, education, and healthcare. It therefore strikes a balance between constitutional commitments and political and economic realities." (footnote omitted).

⁵¹ Another prominent example of the Indian model can be found in Bangladesh. The Supreme Court of Bangladesh has used the "right to life" clause in its constitution to render justiciable a wide range of environmental safeguards that include the right to clean and safe water. See Jona Razzaque, Access to Environmental Justice: Role of the Judiciary in Bangladesh 1, 2 (unpublished manuscript), available at <http://www.eng-consult.com/BEN/papers/Paper-jona.PDF>.

⁵² Other notable examples of the South African model appear in Gambia, Uganda, and Zambia. The Gambian Constitution states that "[t]he State shall endeavour to facilitate equal access to clean and safe water." GAM. CONST. art. 216(4). The Ugandan Constitution states that "[t]he State shall endeavor to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that . . . all Ugandans enjoy rights and opportunities and access to . . . clean and safe water . . ." UGANDA CONST., Nat'l Objectives and Directive Principles of State Policy XIV. The Zambian Constitution states that "the State shall endeavour to provide clean and safe water." ZAMBIA CONST. (Constitution Act 1991) art. 112(d).

⁵³ See, e.g., ENERGY AND RESOURCES INST., WATER, WATER, EVERYWHERE, NOR ANY DROP TO DRINK . . . (2000), available at <http://static.teriin.org/energy/water.htm#intro> (noting that "[s]ome 200 million Indians do not have access to safe and clean water," that "India [has] already attained the status of a water-scarce country," and that "India [is predicted to] be among the countries worst hit by water scarcity . . . in the new millennium").

⁵⁴ See Marcus Powlowski, *Making Public Health Motivated Evictions Consistent with the Right to Housing*, 9 QUINNIPIAC HEALTH L.J. 271, 300-01 (2006) (describing India and South Africa as notable exceptions to the general sentiment that second generation rights are not justiciable).

stitutions were passed against a backdrop of rich human rights law from which drafters could draw.⁵⁵ Thus, both nations drafted their constitutions at a time when they had the theoretical and international law resources to plausibly fill their blank slates with comparatively progressive principles.

A. The Implied Justiciable Right to Water: The Indian Model

India does not have an explicit justiciable right to water in its constitution. Instead, its judiciary derives the justiciability of the right to water from the broad, constitutionally recognized right to life.⁵⁶ Shortly after gaining its independence from the British, India adopted a progressive constitution that prohibited discrimination and recognized fundamental human rights.⁵⁷ The Indian Constitution divides its recognized rights into two broad categories: “Fundamental Rights,” including civil and political rights, and “Directive Principles of State Policy,” covering economic, social, and cultural rights. While rights in both categories are constitutionally recognized, only “Fundamental Rights,” including the right to life and the right to equality, are directly justiciable.⁵⁸

Though the Directive Principles of State Policy⁵⁹ are made explicitly non-justiciable by Article 37 of the Indian Constitution,⁶⁰ the Indian Supreme Court has managed to overcome this limitation to justiciability. The right to water, as a Directive Principle, merely represents a guideline for policymakers and is not, on its face, enforceable by a court of law. But by broadly interpreting the Indian Constitution’s right to life clause,⁶¹ the court has been able to render justici-

⁵⁵ For example, the Universal Declaration of Human Rights already existed at the time that each constitution was drafted.

⁵⁶ See Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. J. INT’L HUM. RTS. 331, 352 (2005).

⁵⁷ See Prakash Shah, *International Human Rights: A Perspective From India*, 21 FORDHAM INT’L L.J. 24, 31 (1997) (“India’s Constitution guarantees all human rights and fundamental freedoms as conceptualized in the Universal Declaration, and recognizes certain unalienable rights that are inherent to the concept of the dignity of man.”).

⁵⁸ See C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT’L L. & POL’Y 195, 214 (2005).

⁵⁹ The Directive Principles provide that “[t]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.” INDIA CONST. art. 38.

⁶⁰ *Id.* art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

⁶¹ *Id.* art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

able the economic and social rights it wishes to legally protect.⁶² The court's expansive view of the scope and content of the fundamental right to life has allowed it to use the right to provide justiciability for a wide range of economic and social rights,⁶³ including the right to water.⁶⁴

The synthesis and integration of fundamental rights with directive principles in the judicial process of constitutionalizing social and economic rights has given monumental latitude to the courts in their efforts to recognize and protect these rights. In defining economic and social rights vis à vis their relation to fundamental rights, the Indian Supreme Court has established a legal framework through which individuals can enforce these rights.

The Indian Supreme Court has in this way affirmed the justiciability of the right to water on many occasions. For example, in *Attakoya Thangal v. Union of India*,⁶⁵ the plaintiffs argued that the government's plan to extract ground water from their community in order to supply potable water to a neighboring community would upset the fresh water equilibrium and cause long-term harm to local water by increasing salinity.⁶⁶ The court ruled in favor of the plaintiffs and held that the constitutional right to life includes a right to water, reasoning:

[T]he administrative agency cannot be permitted to function in such a manner as to make inroads, into the fundamental right under Art. 21. The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritisation of human needs and a new value system has been recognized in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself.⁶⁷

⁶² See Marcus, *supra* note 47, at 66 (citing *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.R. 658, P 1.05) ("India provides for certain socioeconomic rights in its constitution and accepts domestic adjudication of the positive obligations these constitutional rights entail."); see also Randall Peerenboom, *Human Rights and Rule of Law: What's The Relationship?*, 36 GEO. J. INT'L L. 809, 831 (2005) ("[A]ggressively activist Indian courts have favored interpretations that foster social and economic rights, giving them an 'indirect justiciability.'").

⁶³ See Powlowski, *supra* note 54, at 300 n.149 ("Although strictly speaking socioeconomic rights are part of the directive principles and not enforceable[,] . . . the line between fundamental rights (which are enforceable) and directive principles has become blurred. . . . [M]any provisions found in the directive principles, and which were once considered formally non-justiciable, have become justiciable.").

⁶⁴ See *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516 ("The right to life guaranteed in any civilised society implies the right to water, decent environment, and the right to live with human dignity and all that goes along with it.").

⁶⁵ (1990) 1 K.L.T. 580.

⁶⁶ *Id.* at 581.

⁶⁷ *Id.* at 583. See also *A.P. Pollution Control Bd. II v. Prof. M.V. Nayudu*, (2001) 2 S.C.C. 62, 69 (holding that the right of access to drinking water is fundamental to life, thereby creating a state duty under Article 21 to provide such access to its citizens); *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647, 660 ("The constitutional and statutory provisions protect a

Water pollution has represented a prominent issue in the court's jurisprudence. In *M.C. Mehta v. Union of India*,⁶⁸ the court addressed pollution of the Ganga River by the Kanpur Municipal Corporation,⁶⁹ holding that Article 51 of the constitution requires the government to protect and improve the environment.⁷⁰ The court ordered the government both to improve the sewage system and to end the practice of throwing burnt corpses into the river.⁷¹ The court emphasized the importance of both water and air, stating that because of the "grave consequences of the pollution of water and air," protection of the natural environment was a paramount state duty under the constitution.⁷² In *Vellore Citizens' Welfare Forum v. Union of India*,⁷³ the court held that tanneries had violated citizens' rights by dumping untreated effluents into agricultural areas and local drinking water supplies.⁷⁴

Indian courts have also held the State responsible for inaction in cases of third party water pollution. In *M.C. Mehta v. State of Orissa*,⁷⁵ citizens sued the government for failing to act in the face of sewage flowing into the river, contaminating local water and causing waterborne diseases.⁷⁶ When the court learned that the government had advance notice of the water's contamination, it held that the State was obligated to immediately control the existing pollution and prevent further pollution, noting the importance of maintaining the wholesomeness of water used for human consumption.⁷⁷

B. The Explicit Justiciable Right to Water: The South African Model

South Africa currently operates under one of the most progressive constitutions in the world, one that acknowledges and makes justiciable not simply civil and political rights but social and economic rights as well.⁷⁸ In South Africa, a large range of economic and social rights

person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment."). The Court has also articulated the idea that the right to life necessitates a right to a "healthy environment," making water pollution a justiciable issue. *See, e.g.,* *Kumar v. Bihar*, (1991) 1 S.C.C. 598, 604 (holding that the right to life "includes the right to enjoyment of pollution-free water and air for full enjoyment of life").

⁶⁸ (1988) 1 S.C.C. 471.

⁶⁹ *See id.* at 488-89.

⁷⁰ *Id.* at 491.

⁷¹ *Id.* at 490-91.

⁷² *Id.*

⁷³ (1996) 5 S.C.C. 647.

⁷⁴ *Id.* at 650.

⁷⁵ A.I.R. 1992 Ori. 225.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See* Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 433, 461 (2005) (reviewing RAN HIRSCHL, *TOWARDS*

have been recognized in both the constitution and the bill of rights. The latter, which is incorporated in the 1996 constitution, explicitly provides that every person in South Africa has the right of access to sufficient food and water, subject to the government's practical ability to provide it.⁷⁹ The constitution also recognizes rights of access to housing, food, health care, social security, education, and a healthy environment.⁸⁰ Significantly, the constitution requires that the State *respect, protect, and fulfill* all the rights in the bill of rights, including socio-economic ones.⁸¹

South African courts have affirmed the justiciability and legal enforcement of economic and social rights. In the landmark case *South Africa v. Grootboom*,⁸² the Constitutional Court addressed the justiciability of social and economic rights in the context of forced eviction and the right to housing.⁸³ The Court referred to Section 26 of the South African Constitution, which states that everyone has the right to have access to adequate housing and that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.⁸⁴ The Court explained:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the State "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.⁸⁵

JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) ("[T]he South African Constitution is regarded as one of the most progressive and far-reaching in explicitly including not only negative liberties but also positive rights.")

⁷⁹ See Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT'L ENVTL. L. REV. 149, 186–87 (2005).

⁸⁰ S. AFR. CONST. §§ 24, 26–27, 29 (1996). Section 27 states:

- (1) Everyone has the right to have access to —
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Id. § 27.

⁸¹ *Id.* § 7, ¶ 2.

⁸² 2000 (11) BCLR 1169 (CC) (S. Afr.).

⁸³ See *id.* ¶¶ 3, 19–24.

⁸⁴ *Id.* ¶ 41.

⁸⁵ *Id.* ¶ 20 (footnote omitted).

Through this ruling, the Constitutional Court affirmed that victims of economic and social rights violations can turn to the courts for appropriate legal relief.

In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*,⁸⁶ a division of the South African High Court found that the disconnection of a water supply was a justiciable issue and represented a prima facie breach of the State's constitutional duty to respect the right of access to water.⁸⁷ The plaintiffs, residents of a block of flats in Hillbrow, Johannesburg, had their municipal water supply disconnected by the defendants for nonpayment and sought to have their access restored.⁸⁸ After three days of unsuccessful attempts to convince the manager of the premises to restore service, the residents petitioned for relief from the courts on the grounds that their inability to pay the water fees made the shutoff unlawful.⁸⁹

The court held that Section 27(1)(a) of the constitution mandated that everyone had the right of access to water and that the Local Council, as an organ of the State, had the responsibility, as detailed in Section 27(2) of the constitution, to take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.⁹⁰ The court further held that disconnection procedures must be fair and equitable, and should in no circumstance result in a person's being denied access to basic water services for nonpayment where the person proves, to the satisfaction of the water services authority, that he or she is unable to pay for the basic services.⁹¹ As such, the court ordered the defendants to reinstate the water supply to the residences.⁹²

V. AN EVALUATION OF BOTH MODELS

This Part compares the Indian and South African models of water justiciability with an eye toward the needs and circumstances of nations in the developing world. While both approaches have benefits and drawbacks, there are certain advantages to the South African model that make it superior for countries in the developing world hoping to establish a realistic, effective, and practical method of water-rights justiciability.

Though there seem to be many benefits to the Indian model of justiciability, including giving governments the flexibility of not explicitly

⁸⁶ 2002 (6) BCLR 625 (W) (S. Afr.).

⁸⁷ See *id.* ¶ 20.

⁸⁸ *Id.* ¶¶ 1-2.

⁸⁹ See *id.*

⁹⁰ *Id.* ¶¶ 11-12.

⁹¹ *Id.* ¶ 27.

⁹² *Id.* ¶ 34.

obligating themselves to provide access to water, there are also drawbacks. First, deriving a justiciable right to water from the broad right to life greatly limits the extent of justiciability. Just as the right to life has traditionally been considered a negative right,⁹³ placing upon the State the responsibility of not taking a citizen's life, so the right of access to water, under the Indian model, seems limited to protecting the citizen from interference with access to water. What is needed in the current global crisis, however, is a positive, affirmative entitlement to water.

There are many who argue that the limitations characteristic of the Indian model are beneficial and that only the negative aspects of economic and social rights should be legally justiciable.⁹⁴ Negative rights require that States simply refrain from taking actions that interfere with the exercise of those rights.⁹⁵ Such a system, requiring merely that the State *not* do something, is comparatively inexpensive in terms of resources.⁹⁶ In contrast, full recognition of economic, social and cultural rights, as under the South African model, creates "positive obligations" that require the State to take proactive steps to improve the living conditions of its people.⁹⁷

Because the preexisting broad right from which the right to water is derived is a negative one, many judiciaries will focus on the obligations to respect and protect rather than on the positive obligation to fulfill. This tendency, manifested in recent Indian water right jurisprudence, protects the right to clean drinking water most readily when water sources are polluted by industry. The right to water has been cited as an integral part of the guarantee of the right to a clean environment.⁹⁸ For example, in *D.D. Vyas v. Ghaziabad Development Au-*

⁹³ See Christopher J. Roederer, *Another Case in Lochner's Legacy, the Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order Is a "Sham," "Nullity," and "Cruel Deception,"* 54 *DRAKE L. REV.* 321, 332 n.55 (2006) ("[T]he rights to life and liberty are considered negative rights or liberties, not positive rights.")

⁹⁴ See, e.g., Richard B. Stewart, *Federalism and Rights*, 19 *GA. L. REV.* 917, 943 n.91 (1985) (acknowledging the argument that "only negative rights are judicially valid and . . . 'positive rights' . . . (or 'welfare rights') lack justiciable criteria").

⁹⁵ See Michael A. Santoro, *Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 *N.C. J. INT'L L. & COM. REG.* 923, 940 (2006) ("Unlike negative rights that require the duty holder simply to forbear from interfering with the right holder, positive rights (such as the right to health care) require someone to act for, or provide something to, the right holder.")

⁹⁶ See Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need To Graft, Best Not To Prune*, 3 *U. PA. J. CONST. L.* 750, 760 (2001) (discussing libertarians' concern that broad declarations of positive rights would force states to implement expensive programs in order to meet judicially created standards).

⁹⁷ See Santoro, *supra* note 95, at 940.

⁹⁸ See James R. May, *Constituting Fundamental Environmental Rights in National Constitutions Worldwide*, 23 *PACE ENVTL. L. REV.* 113, 125 (2006) (citing Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 *COLUM. J.*

thority,⁹⁹ the court held that “[i]f anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse[] for removing the pollution of water or air which may be detrimental to the quality of life.”¹⁰⁰

Although some might applaud the aforementioned cases as illustrative of the effectiveness of the Indian approach to justiciable water rights, it is important to note one common characteristic among them — these cases involve protection of negative rights only. Whether ruling against diversion of needed water resources by the government or pollution of needed drinking water by mining companies, all of the cases discussed above are limited to the negative right of freedom from interference. The cases do not make any mention of the positive right to water or any governmental obligation to fulfill such a right. While such a passive approach may seem attractive to the extent it protects governments from expending resources for water provision, such passivity is actually harmful overall in the face of the existing water crisis. A real impact on global suffering — one that alleviates the lack of water needed for drinking, hygiene and development — requires positive action. The treatment of the right to water as merely another derivative negative right is a comparatively ineffective approach and encourages government complacency.

Some might argue that, under a system that attaches the right to water to the negative right to life, judges are not necessarily constrained by the right to life’s negative nature — a creative judiciary would be free to stretch the right to encompass both a negative and a positive right to water. But this claim highlights a second drawback to the legal approach used in India: even judges who wish to create a de facto positive right to water may be reluctant to make broad affirmative entitlements for fear of paving the way to claims of other entitlements — justiciable rights to food, shelter, medicine, and the like.¹⁰¹ Such an approach might seem viable in countries like India, but poorer nations (such as those in sub-Saharan Africa) are ill prepared to afford such commitments; realizing this, judges might be hesitant to recognize water rights for fear that other, impractical rights would follow.

ENVTL. L. 131, 167–70 (2001)) (describing India as “perhaps the first country to interpret a constitutional right to life as including a fundamental right to a healthy environment”).

⁹⁹ A.I.R. 1993 All. 57.

¹⁰⁰ *Id.*

¹⁰¹ See Charles Taylor, *What’s Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 179–81 (A. Ryan ed., 1979) (cautioning that positive rights can create a jurisprudential slippery slope); cf. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 60 (1996) (arguing that courts are generally reluctant to offer “high-level principles” because they lack “democratic pedigree”).

Another disadvantage of the Indian approach is the potentially undemocratic nature of judicial or quasi-judicial involvement in determining which economic and social rights should be legally enforceable. Such creatively expansive jurisprudence risks allowing courts to usurp the policy prerogatives of legislatures by ordering governments to spend specific amounts on health or education or to implement specific types of policies.¹⁰² Though having constitutionally enumerated economic and social rights allows judges the legal framework to involve themselves in policy formation, the enumeration serves as a limitation on the *types* of issues in which they can intervene and creates an exclusionary effect that can protect governments from activist courts. Under the Indian framework, for example, the High Court of Rajasthan has held that negligence in restraining the number of stray animals in urban areas created a public nuisance in violation of Article 21.¹⁰³ The court reasoned that stray animals on the road interfere with transportation, pollute the city, and therefore endanger the health of people in the area.¹⁰⁴ In another illustrative example, the Supreme Court of India reasoned that pollution from cars poses a health risk to people and that the State is legally required to ensure emission standards are implemented and maintained.¹⁰⁵ Such reasoning, already employing a dangerously expansive view toward negative rights, runs the risk of even further eroding judicial self-restraint to the point of creating justiciable, positive rights from the bench.

In contrast to the Indian system, there are several benefits to using the South African method of constitutionally conferring justiciability on water rights claims. First, the enumeration in the constitution of the right to water allows a judiciary to insist that the State dedicate resources to water provision without fear of inadvertently creating further financial costs in the future. For countries in the developing world seeking to create a justiciable right to water, there is a benefit to being obligated only to what was concretely agreed upon before the judiciary became involved. While an enumerated obligation might

¹⁰² Professor Peerenboom explains this problem further:

Arguments about how activist the judiciary should be and the proper method and principles of constitutional interpretation cannot be settled by appealing to the requirements of a thin rule of law alone and will turn in part on one's belief about judicial competence. For instance, attempts by activist judiciaries to address social inequities by interpreting economic rights provisions broadly have led to complaints that rule of law is being undermined in India and the Philippines. While such disputes also occur in the context of interpreting broad clauses regarding civil and political rights, they often give rise to additional concerns about judicial competence in that they involve resource allocation decisions arguably best left to the legislative and executive branches.

Peerenboom, *supra* note 62, at 843.

¹⁰³ See *Phophaliya v. Rajasthan*, A.I.R. 1998 Raj. 96.

¹⁰⁴ *Id.* at 97.

¹⁰⁵ See *Mahindra v. Madhya Pradesh*, (1996) 6 S.C.C. 129.

seem imposing, it also provides comforting limitations on the State's responsibility. Poorer developing nations, for which the water crisis is most severe, would then be able to mete out limited resources in the area of water rights without having to worry about making similar expenditures in other areas.

The South African legal formulation of this right is particularly helpful in this endeavor in that it requires the State to take *reasonable* legislative and other measures, and takes under consideration the notion of available resources.¹⁰⁶ This approach allows the State the latitude to implement these rights "progressively" without being required to stretch beyond their available resources. While the measure of "reasonableness" is not an exact science, and courts may not necessarily be perfect in their evaluations thereof, the measure at least allows for a safety valve in the face of otherwise expensive entitlements. The key to the South African model is that, while the courts do not decide the rights that should be legally protected, they retain the power to review the "reasonableness" of policies implementing such protections. Thus, enumerated rights are preferable to broader interpretations in that they ensure that a State can be held accountable for violations without falling prey to widely varying judicial interpretations of the State's obligations. Affirmative entitlements keep power in the hands of legislators and policy makers.

VI. CONCLUSION

Although the present day seems rife with ever increasing social and economic disparities, it is in many ways a time of hope, as national and international legal systems begin to protect the rights of those most in need. The movement toward recognizing and making justiciable economic and social rights in general, and the right to water in particular, is a beacon of light in the otherwise dark days of severe water scarcity. That said, developing countries, which are most in need of a justiciable right to water, are also the countries for which such a right poses the greatest challenges — and the greatest risks. While both the Indian and South African models hold promise for the developing world, the South African approach would likely be the more helpful, allowing the State to focus its resources on the right to water without fearing the judicial unpredictability to which the Indian approach gives rise.

¹⁰⁶ See *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) at 777 (S. Afr.) ("The state has to manage its limited resources in order to address all [its citizens'] claims [for access to housing, food and water, employment opportunities, and social security]. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.")