

Law-Life: Colonialism and the Flows of the Political

by

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A dissertation submitted in fulfilment of the requirements for the degree

Magister Artium (Philosophy)

In the Department of Philosophy at the

UNIVERSITY OF PRETORIA

FACULTY OF HUMANITIES

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March 2017

DEDICATION

Forever to Cherise Botha; forever and always.

PAD and JD, for the impulse to enquiry.

PLAGIARISM DECLARATION

I declare that the dissertation, *Law-Life: Colonialism and the Flows of the Political*, which I hereby submit for the degree Magister Artium (Philosophy) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

ABSTRACT

In the Constitutional Court case of *Mazibuko and Others v The City of Johannesburg and Others CCT 39/09 [2009]*, a case dealing with the question of access to water, the presiding judge, Kate O'Regan CJ, makes the following opening remarks to the judgment: 'Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water'. My aim in this dissertation is to investigate the couplet of law-life and the *political* in the Constitutional Court case of *Mazibuko and Others v The City of Johannesburg and Others*. The case stands as an exemplar of the intersection of life and the political by virtue of its focus on socio-economic rights, specifically the right of access to water enshrined in the Constitution. The history of the case, the jurisprudence employed by the courts, and the responses and critiques to the *Mazibuko* case add to the problematics to be investigated here. What would it entail if the couplet of law-life would be brought to the concept of the *political*? It would mean interrogating how life and law is constructed by the political and not merely how the political manages and regulates life through law. If life is considered to be a matter of *bare necessities*, or mere biological life, there would not be a need to consider the question of *the political* relation to life; it could be delegated, as it has practically been, to technocratic governmental policy. Bringing *the political* to questions of *life* would reveal how the *political* implicates life in its constituting moment. In this dissertation, I will explore how *the political* could be brought to the couplet of *law-life*, focusing particularly focus on socio-economic rights, international law, colonialism, and constitution making.

KEYWORDS: Colonialism, life, law, socio-economic rights, constitution, critique, the political, water, human rights.

ACKNOWLEDGMENTS

First and foremost, I want to thank Professor Ulrike Kistner, who taught me so much more than what is written on these pages and did so much more than what is required, or even asked. It has been a long journey with, what I believe, a requisite amount of disagreements and frustrations – perhaps more for Prof of the latter and myself of the former. What Prof. Kistner taught me is how to think critically, judge cautiously, read widely and historicise properly; Prof. Kistner taught me a disposition, an approach. Thank you.

I want to thank Professor Reingard Nethersole for showing me that philosophers are also allowed to think for themselves, not just think about what others wrote. Professor Karin van Marle for guidance and support intellectually and professionally and for welcoming me into the Department of Jurisprudence for discussions, lectures and fierce debates.

I want to express my deepest gratitude to Professor Mogobe Ramose for his time and patience with a young and excitable philosopher and for setting an example of how to live a good life in a bad world.

To my mother and father, for choosing to bring me into this life during these times. But more than that, for home always being a place to go to when these times are too much to bear. Freud teaches us that our childhood enquiries from our later intellectual pursuits, and my pathologies seem suitable in this case. Thank you for the support, love and devotion.

It is difficult to thank a person that has been there since the very beginning. Since the first day I set my foot in a philosophy class, to tearing up criminology textbooks, drinking cheap wine in a makeshift room, to completing a Master's degree: thank you Cherise Botha for always being there. You are my ally, friend, and the most insightful person I know.

During a journey as long as this one, many people enter and exit one's life and all of them have an influence in one way or another. One of the more important and influential aspects of my journey thus far was my joining the Department of Philosophy, Practical and Systematic Theology at the University of South Africa. It is a great honour and privilege to be a part of this department and I have benefitted

greatly from the opportunities that this has afforded me. I owe a great amount of gratitude to Professor Rothney Tshaka, for taking a chance on a lowly philosopher and welcoming me into the department of choice.

I was lucky to have many friends and colleagues that I met and was able to benefit from in discussions and much more. To all my friends that assisted in many ways in the process of this dissertation: Melusi Mbatha, Tshepo Lephakga, Mofenyi Mataboge, Guguraj Mbatha, Molora Mabheba, Bra Steve Lebelo, Thabang Dladla, Benjamin Saggaci, Joel Modiri, Derek Hook, BB Senokoane Ziyana Lategan, Quraysha Ishmael Sooliman, Neil Eccles, Michael Cloete, Rudi van Rensburg, thank you very much

Finally, I want to specifically thank Ndumiso Dladla, with whom I discovered the real object of philosophical study: life itself.

During the research for this project I benefitted from the funding of the National Research Foundation as well as the University of Pretoria's post-graduate bursary fund.

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INTRODUCTION

[O]nly a reflection that ... thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of its concealment and, at the same time, return thought to its practical calling – (Giorgio Agamben [1995] 1998:4).

In the Constitutional Court case of *Mazibuko and Others v The City of Johannesburg and Others CCT 39/09* [2009], a case dealing with the question of access to water, the presiding judge, Kate O’Regan CJ, makes the following opening remarks to the judgment: ‘Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water’ (*Mazibuko and Others v The City of Johannesburg and Others* 2009:2). The Court takes it for granted that issues affecting life and death – such as water – have a central place in the Constitution. The preamble to the Constitution of the Republic of South Africa, Act 108 of 1996, states that one of its goals is to ‘[i]mprove the quality of life of all citizens and free the potential of each person’ (Republic of South Africa 1996). *Life* is placed as a central concern in the Constitution and brought within the frame of normative responsibilities. The Constitution *ought to* ‘improve the quality’ of life of all the citizens under its jurisdiction. One of the ways in which this improvement is enacted is through the vehicle of social economic rights and its application by the courts, something also emphasised by the Constitutional Court in the *Mazibuko* case: ‘The purpose of the constitutional entrenchment of social and economic rights was ... to achieve the realisation of the rights to the basic necessities of life’ (*Mazibuko and Others v The City of Johannesburg and Others* 2009:29).

The Constitutional Court in the *Mazibuko* case construes the ‘quality of life’ dictum contained in the Constitution as referring to the ‘basic necessities of life’. Life is reduced to its biological basis by the Court and removed from its *political* foundation and construction. The political is what constitutes unity and order and creates a normative conception of life to be unified and ordered. The political creates the conditions and coordinates for life within a collective of individuals governed by a set of rules or norms. Reducing life to its bare necessities obfuscates the political

construction of life and displaces it from a political question to, as in the case of *Mazibuko and Others v The City of Johannesburg and Others* 2009, a question of law and governance. To bring the question of the political back to life would constitute a genealogical investigation into the construction of the political and how it creates life as an issue for law and governance.

What would it mean to bring *the political* out of its concealment? What would a critique entail that could bring *the political* to questions of *life*? It would not, as Agamben ([1995] 1998) asserts, mean simply interrogating the link between life and politics, but rather interrogating how life is constructed by the political. If life is referred to as mere *bare necessities* there would not be a need to consider the question of *the political* relation to life; it could be delegated, as it has practically been, to technocratic governmental policy. Bringing *the political* to questions of *life* would reveal how the *political* implicates life in its constituting moment. Thinking the relation between life and the political within the realm of constitutionalism means also taking it out of the merely legal-technical and placing it back into the question of the how the political is constituted.

Considerable scholarship in political philosophy has been devoted to the governance of individual and collective life and its implication for governance and law. Plato (2004) conceived of an ideal republic, devoid of poets and rhetoricians that would function like a human body with its composite biological parts. The social contract theory of Thomas Hobbes ([1651] 1996) and John Locke ([1689] 1980) was built on the question of how to govern the commonwealth. David Ricardo ([1821] 2004) and Thomas Malthus found the discipline of political economy based on their anxiety about the rise of populations, while Adam Smith ([1776] 2009) also theorised wealth and how it can best be generated, and managed, by a geographically located group of individuals. Although these authors, to name a few, all theorised the management and governance of individual and collective life, the question as to how life becomes an issue for politics has received comparatively less attention.

Asking the question as to how life becomes an issue for politics would require an interrogation of the concept of *the political* as establishing order and unity. For Aristotle, this order and unity was established organically through the constitution of the Greek city states. Aristotle discusses constitutions as being the architecture of the state and identifies three primary forms of a constitution: oligarchy, democracy and tyranny. A constitution was for Aristotle the central mechanism of controlling and managing a citizenry. *The Politics* contains several chapters dedicated to ways of conducting oneself in the private and public sphere; *Book I* devotes a significant section to the management of a household in a city state. Aristotle understands the parts of the city state as essentially comprising a collective of individuals constituted around a specific normative concept of *the good life* (Aristotle 1998: Book I 1 1252a 1-3). It is this act of establishing a normative point of the good life that, for Aristotle, constitutes *the political* (Aristotle 1998: Book I 1 1252a 6-7). The political, in turn, evolves from a single household to a city state through a cumulative process: Individuals form a bond through a household, if several households come together they form a village and when several villages come together they form a city state. The most powerful grouping constitutes the normative principle of the city state as a specific definition of the *good life*. Aristotle accounts for this cumulative process through an appeal to the natural inclination of every individual to survive. Since the inclination to survive is a natural human trait, and everything in nature has a teleological end according to Aristotle, the teleological end of a human being's inclination to survive is realised in a city state (Aristotle 1998: Book I 2 11252b 1-3).¹ The constitution of a city state becomes the moment of *the political* for Aristotle since it organises and regulates the life of the citizens toward the *good life*. The citizens were regulated by a constitution that allocated positions of authority to those who could shape the ought-intentions of the citizenry toward the normative concept of *the good life* (Aristotle 1998: Book IV 1289a 15-17). The constitution of the political, through the forming of the city state, is for Aristotle a natural, and evolutionary process. It is the forming of the life of the citizen that is important in Aristotle's understanding, not the way this citizen is brought into being.

¹ 'It is evident from these considerations, then, that a city-state is among the things that exist by nature, that a human being is by nature a political animal, and that anyone who is without a city-state, not by luck but by nature, is either a poor specimen or else superhuman' (Aristotle 1998: Book I 2 11252b 1-3).

A distinction between private and political life can be discerned in Aristotle's understanding of the constitution of the political. This distinction is developed by several theorists as a way to consider the interaction between life and the political. Hannah Arendt makes a distinction between the *private* and the *public*, separating them as differing realms of *life* and the *political*, respectively. Arendt's eponymous *Human Condition* ([1958] 1998) designates the plurality between human beings that is mediated through speech and action (Arendt [1958] 1998:5, 7). It is within this plurality that Arendt locates the conceptual understanding of the *political* as distinct from *life*. The realm of the political is the *polis* where human beings relate to each other through speech and action; the polis becomes the space of the political as distinct from the social. Arendt traces the distinction between the private and the public to Aristotle. According to Arendt, Aristotle locates the life outside the realm of the political in the arena of the household and the individual. Arendt considers the intersection of life – or the realm of the social – with the political as an attempt to erase the plurality inherent in the political realm. The moment that life intersects with the political, it inscribes different terms of engagement in the realm of the political, causing the latter to turn from plurality to familiarity, from natality to mortality (Arendt [1958] 1998:9). *Life* and *the political* are thus separate and distinct terms for Arendt, and their conflation carries grave risks – epistemologically and politically. Arendt reads Aristotle's natural evolution of the human from individual to member of a city state as giving rise to a different form of life, namely political life (*bios politikos*).² Political life is determined by the activities of speech and action and not by the bare necessities of life itself, the latter of which Arendt calls 'housekeeping' issues (Arendt [1958] 1998:38).

Arendt's concept of the political as plural sees the inclusion of life in the political as an erosion of this plurality into the issue of 'the maintenance of life' (Arendt [1958] 1998:28). Life and the political are kept in mutually exclusive spheres with different

² 'According to Greek thought, the human capacity for political organization is not only different from but stands in direct opposition to that natural association whose center is the home (*oikiri*) and the family. The rise of the city-state meant that man received "besides his private life a sort of second life, his *bios politikos* ..."' (Arendt [1958] 1998:24)

forms of actions and gestures allocated to them. For Arendt, the understanding of life through the political does not arise as a primary issue; instead, the question is how the political facilitates a plurality of opinions and debate. Giorgio Agamben, in turn, reinterprets both Arendt's and Aristotle's notions of the political. In his *Homo Sacer* series, he argues that life and mortality have been central in Western political thought. In *Homo Sacer: Sovereign power and bare life*, Agamben ([1995] 1998) investigates what he considers as a contradictory relation at the heart of the political, based on the primacy of life in political thought.

Agamben starts his investigation with the distinction made by Aristotle in *The Politics*, between ζωή (*zoe*) and βίος (*bios*), 'simple living'/'the mere fact of living itself' (Agamben [1995] 1998:2) and the manner of life (Agamben [1995] 1998:1-2). ζωή is the Greek feminine noun for bare, biological life, while βίος (*bios*), is a Greek masculine noun signifying a manner of life, a qualified form of life. Agamben understands the distinction between *zoe* and *bios* much in the same way that Arendt understands the distinction between the private life of housekeeping and the political life, what Arendt designates as *bios politikos*. Agamben locates the political in the *bios*; with the divergence from Arendt in that Agamben contends life has also been part of the political in the form of an exclusive inclusion (Agamben [1995] 1998:8-9). Agamben's placement of the political within the realm of *bios* follows Aristotle's and Arendt's theorisation of the political as the space of plurality and natality, one that comes into being through joint action and speech and that establishes shared ought-intentions. Life becomes a central part of Agamben's understanding of the political as a form of life always tied to a political form of being. Contrary to Arendt's distanciation from any theoretical moves incorporating the private in the political, Agamben argues that this incorporation of bare life into political life is in fact the defining feature of the political (Agamben [1995] 1998:8).

Agamben also differs from Arendt and Aristotle, in his conceptualisation of how exactly life is related to the political. For Agamben, the distinction between *zoe* and *bios* does not completely follow Arendt's distinction between the private and the public. *Bare life* does not refer to merely biological life, but rather that form of life

that is included in the political by virtue of it being in a relation to political life – in a relation of exclusion (Agamben [1995] 1998:19). This relation of exclusion is, for Agamben, the defining characteristic of the ‘juridical’ relation that founds the political order. Bare life is encapsulated in the Roman legal figure of *homo sacer* – the sacred man/the accursed man.³ *Homo sacer* is that being whose relationship to the law can be explained by way of an exception, an *inclusive exclusion*, ‘included in the normal case precisely because it does not belong to it’ (Agamben [1995] 1998:22). Bare life is not mere biological life and can only come into appearance when there is an entrance into the political-legal sphere: *bare life* cannot be defined without being defined according to political-legal paradigms (Agamben [1995] 1998: 88). It is through the attempt by the juridical order – what for Agamben signifies the political – to include biological life that the figure of bare life comes into being. According to Agamben, the decisive fact of the modern political order is the process in which the *exclusion* – that which is outside of the rule but also makes the functioning of the rule possible – is *included* into the rule as an *inclusive exclusion*.⁴ *Homo sacer*, or *Bare Life*, becomes for Agamben the paradigm of modern politics’ emphasis on and bare biological existence, because it is this emphasis on the bare biological existence that creates the figure of *homo sacer*. There is always an excess that cannot be included in the law but only becomes realised as an excess through the law’s attempt at including it. There is always a life, a body, which is in excess of the biological life that is included in the juridical order. Bare life is what is held in excess, in suspension, as that which is created by the relation between life and the political.

Agamben subsequently completed several volumes of the *Homo Sacer* series and published the final instalment in 2014. My aim is not to give an overview of his work or discuss his specific theories and insights, but to delineate his approach to the question of life and the political. To bring the question of the political to bear on life would be to ask the question of *how* life is being constructed as political. It is not

³ ‘*Homo sacer* presents the originary figure of life taken into the sovereign ban and preserves the memory of the originary exclusion through which the political dimension was first constituted’ (Agamben [1995] 1998:83).

⁴ ‘The realm of bare life – which is originally situated at the margins of the political order – gradually begins to coincide with the political realm, and inclusion and exclusion, outside and inside, *bios* and *zoe*, right and fact, enter into a zone of indistinction’ (Agamben [1995] 1998:9).

merely a question of what constitutes a political life or what forms of life are considered political, but rather how life is *constituted* in, with, and by the *political*. In the analysis presented in this dissertation, the political is not understood as a sphere of life or a realm of plural action and speech, but as that which constitutes a normative set of principles around which human beings order and organise themselves. Such an understanding of the political would have to take into account not only particular ways of managing life, but also the formation of a particular type of life. An investigation into the intersection between life and the political would entail a historical as well as a philosophical investigation. It would have to be philosophical in the sense of investigating the conceptual foundation of the *political* and historical since these conceptual foundations are not all to be found in the present.

The focus on the Constitution allows for an engagement with a body of critical literature that, in some way or another, addresses the intersection between life and the political as it emerges in law. For *the political* to retain a critical role, it cannot be reduced to questions of bare necessities, or subsumed under the general paradigm of an *inclusive inclusion* (as per Agamben); nor can it be referred to plurality primarily (as per Arendt). The political, in the approach of this dissertation, retains a reference to the *constitution of life* as a question not only for institutions and modes of governance, but for politics. This understanding of the political would mean a genealogy and conceptual lineage different from those pursued by Arendt and Agamben.

What would this mean with regard the *Mazibuko* case and socio-economic rights? Socio-economic rights directly deal with issues of life in the form of regulated provisions for biological necessities. They could be seen to be subject to Arendt's warning of the infiltration of 'housekeeping' issues into politics; but that would miss an important aspect of the function of socio-economic rights. In dealing directly with issues of life (and death), socio-economic rights act as a form of constituted power upholding a specific conceptual-historical definition of the political. Socio-economic rights become a form of management of human life, but more importantly, they also sustain the concept of life as a counterpart of the political.

Summary of chapters

The conceptual-historical genealogy of the political and its relation to life forms the axis of this dissertation. It runs through international law, colonialism, water rights, constitution-making, and critique. The central theme, and the fields in which it becomes salient, converge, in condensed form, in the Constitutional court judgment of the *Mazibuko* case. In the first chapter I briefly present the proceedings of the *Mazibuko* case in the High Court and the Supreme Court of Appeal before turning my attention more closely to the Constitutional Court Case⁵, considering also the Water Services Act and the National Water Act in light of the mandate to actualise the right to water enshrined in section 27 of the Constitution. Following a discussion of the case and the applicable legislation, I will review the critical commentaries that emerged from various quarters after the *Mazibuko* judgement. Based on the particular approach taken to the nature of the intersection between life and politics in the judgement, two principal positions can be discerned.

The first of these positions can be termed, following Karl Klare, as *transformative constitutionalism* (Klare 1998). Klare defines transformative constitutionalism as

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. (Klare 1997:150)

Transformative constitutionalism is a critical position maintaining that the best possible way to enact the transformation needed post-1994 is through the framework established by the Constitution, and through the justiciable socio-economic rights it enshrines, in particular: socio-economic rights allow for judges and courts to engage directly with the process of transforming the material conditions of individual life within society.

⁵ All references to the *Mazibuko* case will hereafter refer to the Constitutional Court Case, unless specifically stated otherwise.

Chapter 1 features a review of several commentators on the *Mazibuko* case. One group of commentaries uphold the critical value of transformative constitutionalism in their critique of the *Mazibuko* case on the basis that the court *could have acted/decided* differently (Brand 2012; Williams 2012; Tissington 2012; Dugard 2008a, 2008b). There is a shared belief by these authors that the mechanisms put in place by the Constitution are sufficient for the social and material change proposed by the Constitution. There is also a second group of commentators who express scepticism about the ability of the Constitution to set the tracks for the changes required, thereby gesturing toward a critique moving outside of the framework set by the Constitution.

To move outside the framework set by the Constitution would, in a broader sense, open the question of the relation of life and the political beyond the legalistic and infrastructural spheres. Investigations into the commons (Bakker 2007; Bond 2010), into neo-liberalism in relation to the law (Roithmayr 2010), and into governmentality and the coterminous character of power (Veriava 2013), all open up questions on how life has been incorporated by the political, or how the social has infiltrated the political. I pursue these lines of enquiry, and attempt to extend some of the questions that emerge from the *Mazibuko* case into the genealogy of the relevant political-philosophical concepts. How are socio-economic rights configured in a colonial society? What role does international law play in relation to the Constitution? What is a constitution? What is critique?

The subsequent chapters of the dissertation will attempt to unravel some of these conceptual concerns by focusing on the construction of international law and its relationship to colonialism, differing forms of colonial rule and the ways in which they corresponded to water rights, and the relationship between constituent and constituted power. The second chapter will be dedicated to the historical development of international law and its relation to questions of life. The first theories of international law emerged from legal theories of conquest. The conquest of new territories required a law to govern these new territories. For Carl Schmitt ([1950] 2006), the process of conquest and the law it established consequently, is fundamental

to the internationalisation of the *Jus Publicum Europaeum*. Schmitt terms this new law that emerges from land appropriation, *nomos of the earth*; a legal order that establishes a new spatial division of the earth as well as to proclaim legal jurisdiction over it. For Schmitt, the idea of the *political* comes about contemporaneously with that of the appropriation, division and production of territory. The political constitutes the coordinates of life and a law that regulates and orders this life as a consequence of land appropriation. Colonialism and the appropriation of land necessitated governance and forms of rule specifically focused on human life as a combination of *zoe* and *bios*. Life was constructed as political – not by placing *zoe* and *bios* in a zone of indistinction – by collapsing *zoe* into *bios*; biological life became political life and political life became biological life. Governance and rule were based on biological life and the categorisation, differentiation and compartmentalisation of life became an obsession of international law and colonial policy.

The relationship between international law and colonialism signifies a fundamental intersection of life and the political. The staking of territory, this moment of the political, is what creates life as a question of politics. The governance of life became a central aspect of colonial laws and forms of rule post land appropriation. Mahmood Mamdani presents a historical example of this in his examination of the colonial authorities' deliberations upon 'the native question' (Mamdani [1996] 2004). Although life does not arise as a philosophical problem for Mamdani, he does show how different colonial regimes collapsed biological and political life into one central concern. The third chapter will investigate the intersection between life and the political by focusing on the history of water rights as different forms of direct and indirect rule employed by Dutch and British colonial policies structured water rights in different periods. The establishment of the Southern African legal order is historically based upon the appropriation, division, and production of land, and this includes access to water rights. Southern African colonialism is not a linear development, but an entangled history of different tactics and techniques, with different forms of water law, corresponding to different forms of *direct* and *indirect* rule. Access to water and water flows were instrumental to the colonial administration's attempts to control and regulate the movements and livelihoods of indigenous people.

The fourth and final chapter will show the consequent fault lines opening between this entangled history, and socio-economic rights enshrined in the Constitution, as these fault lines appear in the *Mazibuko* case. I will return to the preamble of the Constitution to interrogate how it engages the question of the political in its construction. I will also return to the commentators discussed in the first chapter to show the shortcomings in their identification of the political problem manifested in the *Mazibuko* case. A critique of the Constitution, I will argue, requires more than merely moving within the realm of the already possible. Critique has the potential to *invent* what is not yet possible, to blaze a trail for bringing into being that which is impossible. Critique must be able to consider that which is not yet in existence. For critique to achieve this, however, it must be able to move outside of the set of normative principles established by the Constitution, rather than within its internal limits, by which the courts and judges are urged to *make better decisions*. This is a form of critique that could bring into being that which the Constitution makes *impossible*; that which haunts the Constitution as an *impossibility*. Critique cannot merely function as a form of deliberation upon the existing conditions if it is to be a critique at the level of the political. Critique can attempt to invent that which is impossible: ‘Critique as political and ethical attitude would involve an aesthetic: an art of decisive reflective indocility, and an imagination figuring possibilities of the new’ (Kistner 2009:12). This is a task that requires a reorientation of philosophy to be a process of theory creation rather than application; a philosophy that is able to answer the questions posed by the political and historical context in which it finds itself; a philosophy that must be able to think the *creation of life* alongside, and within, *the political*.

CHAPTER 1: A CASE TO ANSWER

Introduction

The aim of this chapter is to introduce the Constitutional Court case of *Mazibuko and Others v The City of Johannesburg and Others CCT 39/09* [2009] (hereafter *Mazibuko*, the case), with the aim to discuss the events leading up to, and processes during the case in more detail. The *Mazibuko* case deals on a surface level with access to water and more specifically with section 27 of the Constitution that stipulates that ‘everyone has a right to have *access* to water.’ The *Mazibuko* case itself forms part of a series of Constitutional Court cases dealing with socio-economic rights that have been referred to as ‘second-wave’ socio-economic rights jurisprudence (Wilson & Dugard 2014:44). Accordingly, second-wave socio-economic rights jurisprudence can be considered on the basis of the changing tactics used by litigants and the courts in dealing with specific claims and contests. While the courts were initially more focused on attempting to establish a framework for the interpretation of apparently expansive socio-economic rights in a new Constitution, the litigants in these cases also acted as individual subjects under law. The courts continually used paradigms borrowed from administrative law to litigate for socio-economic rights. Since socio-economic rights do not give rise to an individual freestanding right, the Court’s decision relating to the litigation very seldom found in favour of the claimant (Wilson & Dugard 2014:44). One of the characteristics of second-wave socio-economic rights constitutional jurisprudence, on the other hand, is the role that social movements play in litigation. The *Mazibuko* case can, according to Wilson and Dugard, be grouped among second-wave jurisprudence for three main reasons: (1) the time in which the events and case took place, (2) the tactics employed by the Court in dealing with the case, and (3) the role that social movements played in the case. The *Mazibuko* case was heard in the Constitutional Court in 2009, placing the Case within the timeframe identified by Wilson and Dugard as part of the second-wave socio-economic rights cases presented to the court (Wilson & Dugard 2014:36). During the time between the so-called ‘first-wave’ and ‘second-wave’ socio-economic rights decisions, the Constitutional Court’s overall position towards socio-economic rights litigation changed considerably, and the Court applied conditions like *meaningful engagement* and *deference* more regularly. Finally, the role of ‘new’ social movements like the

Anti-Privatisation Forum (APF) and legal clinics/consultancies like the Centre for Applied Legal Studies (CALs) at the University of Witwatersrand became a semi-permanent feature of socio-economic rights litigation.

In order to explore the above-mentioned in more detail, the discussion in this chapter will include a consideration of the more immediate period leading up to the *Mazibuko* case, as well as the legal mechanisms and legal infrastructure at work in the case. A descriptive reading of the *Mazibuko* case and the specific legal mechanisms governing its unfolding will enable us to place the events of the case in their proper context and to undertake a critical reading of the case. This chapter will include a literature review of three main themes of engagement with, and the lead up to, the *Mazibuko* case. These different approaches can be grouped around a specific approach to the rule of law in social transformation. A discussion of Karl Klare's concept of 'transformative constitutionalism' is included in order to show how this specific approach has shaped the different interpretations of the *Mazibuko* case. The basic position of transformative constitutionalism holds that the Constitution is a progressive document that needs to be interpreted in a similarly progressive way for it to bring about substantial social change. The two main approaches to the case each deal with this specific idea, either by accepting it and directing work and advocacy to develop and expand the constitutional project, or by rejecting the idea that rights discourse can bring about any substantial social transformation. A third approach attempts to problematise both the previously mentioned interpretations by bringing to the fore the specific tactics of the social movements leading up to the case. Whatever theoretical angle one takes to understand the *Mazibuko* case, one cannot avoid an engagement with the South African constitutional project. Since the case is a Constitutional Court case, it presents a possibility to critique not only the case, but with it, the constitutional project of a so-called 'new' South Africa as a whole.

The case

Water, water nowhere

Section 27 of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter 'Constitution') states that everyone has the 'right to have access to free

basic water.’ This seemingly proactive clause in the Bill of Rights is supposed to ensure that every South African citizen has an inalienable right to access a certain amount of water. The *Mazibuko* case deals directly with this specific section in the Constitution, a section that puts an active responsibility on the state. Following the implementation by the City of Johannesburg and Johannesburg Water of *Operation Gcin’amanzi*, residents of the Phiri Township in Soweto took the local government to court on the grounds of section 27.

Operation Gcin’amanzi is a campaign named by a Zulu phrase that means ‘to conserve the water’. The main goal of the campaign was to curb excessive water usage in the Johannesburg Metropolitan area. The pilot project of *Operation Gcin’amanzi* was launched in Soweto and aimed to supply the residents of Phiri township with 6000 litres of potable water per household per month, while also curbing the perceived excessive water usage levels in Soweto by way of the installation of prepaid water meters (PPM). This was attempted through the privatisation of water delivery and the consequent installation of prepaid water meters (Dugard 2008a; Naidoo 2010).

The *Mazibuko* case, decided in the Constitutional Court on 08 October 2009, saw five residents of Phiri, Soweto, take the local and national government to court to dispute the lawfulness of two of *Operation Gcin’amanzi’s* main operational tenets: (1) the city’s Free Basic Water policy that supplies 6 kilolitres of water per household per month and (2) the installation of prepaid meters to be used when the allocated water runs out. The prepaid meter works on a credit system similar to that of a prepaid phone. When the credit runs out the prepaid meter automatically cuts off the water supply. This was challenged by the residents as constituting an ‘unlawful and unreasonable discontinuation of the supply of water’ (*Mazibuko and Others v The City of Johannesburg and Others* 2009:11-12). The charges were brought in accordance with section 27 of the Constitution. The *Mazibuko* case was first heard in the South Gauteng High Court in 2007, with the original groundwork for the case starting as early as 2004. The main points of contention in the case were the City of Johannesburg and Johannesburg Water’s implementation of *Operation Gcin’amanzi*

and the constitutionality of this specific program.

When the Department of Finance of the new South African government, led by the African National Congress (ANC), the South African Communist Party (SACP), and the Congress of South African Trade Unions (COSATU) Alliance, adopted the Growth, Employment and Redistribution strategy (GEAR) in 1996, it decided to embark on neo-liberal and market friendly policies (Barchiesi 2011; Hart 2013; Veriava 2013). The new GEAR policy of merging municipalities envisaged that the City of Johannesburg would service a large population occupying a considerable space. GEAR effectively left the duty of service delivery to underprepared municipalities and one of the ways in which these municipalities dealt with this challenges is through a process of outsourcing and privatisation. The City of Johannesburg established a subsidiary company called Johannesburg Water Pty (Ltd) to deal with the delivery of water. The process of privatisation of water delivery resulted in Johannesburg Water (Pty) Ltd awarding a five-year water management contract to Suez Lyonnaise Des Eaux, a contract that was reportedly one of the biggest of its kind in the world (Bond 2010; Dugard 2008a). Suez was tasked to deliver a minimum amount of 6000 litres of potable water per household per month to the residents of Johannesburg while also curbing the excessive water loss recorded by the City of Johannesburg.

The provision of 6000 litres of potable water per household per month to be supplied by Suez through the prepaid meters was the result of the introduction by the City of Johannesburg and Johannesburg Water Pty (Ltd), of a Free Basic Water (FBW) policy in 2001. This policy was in part an attempt by the City of Johannesburg to comply with the provision for the access to water stipulated in the Constitution. Section 27 of the Constitution states that:

- (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 dependents, 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.

(3) No one may be refused emergency medical treatment.

The right of access to sufficient food and water is subject to the available resources that the government has at its disposal. The responsibility put upon the government to give effect to this right is a positive responsibility in that it forces the government to act in a certain way towards the individual citizen. It is, however, also a qualified right in that the government does need certain resources in order for it to be answerable to claims under this right. The Constitution places the right of *access to water* within the Bill of Rights; access to water therefore becomes a right contained in the highest form of law in the country. The specific dimension of this ‘access to water’ is then referred to further determination by other legal instruments and policy designs. There has been a constant attempt on the part of government, since the initiation of the constitutional project, to realise the constitutional protection of the right of access to water through the deployment of several of these legal instruments. The two central pieces of legislation regulating these attempts are the Water Services Act (WSA) 108 of 1997 and the National Water Act (NWA) 36 of 1998. The difference between the two lies in the fact that:

[The] NWA creates a comprehensive legal framework for the management of water resources, that is, rivers, streams, dams and groundwater, which is the responsibility of the national government [while] the WSA regulates water services which remain the responsibility of local government (Gowlland-Gualtieri 2007:3).

The WSA is thus the legal instrument that directly relates to ‘drinking water and sanitation services supplied by municipalities to households and other municipal water users’ (Gowlland-Gualtieri 2007:3).

According to section 3 of the WSA:

(1) Everyone has a right of access to basic water supply and basic

sanitation;

(2) Every water services institution must take reasonable measures to realise these rights;

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights;

(4) The rights mentioned in this section are subject to the limitations contained in this Act.

The WSA repeats the specifications in the Constitution and merely stipulates that a water services authority must provide measures for the realisation of these ‘access’ rights. The WSA also makes allowance, in section 9, for the Minister to determine what constitutes the ‘right of access to basic water supply.’ This was subsequently gazetted on 08 June 2001 as the ‘Regulations relating to compulsory national standards and measures to conserve water’ (South Africa. Department of Water Affairs and Forestry [DWAF] 2001). Regulation 3(b) of this document stipulates:

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 metres of a household; and

(iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

In combination, these two Acts imply that 6000 litres of potable water per household per month (25 litres of water per person per day if the household has 8 occupants) is sufficient to enable a ‘dignified human existence’ (*Mazibuko and Others v The City of Johannesburg and Others CCT 39/09 [2009]:14-15, par 28*). Following these two Acts, the national Free Basic Water policy (FBW) was announced in 2001 by the Department of Water Affairs and Forestry (DWAF) as a decision by government ‘to ensure that poor households are given a basic supply of water free of charge’ (DWAF 2002:7).

The FBW policy was not so much a new policy as merely a way to ensure that the

already existing policies are prioritised and executed (DWAF 2002; Gowlland-Gualtieri 2007). The legal framework within which the FBW policy functions is one of tariff setting. Tariff setting occurs when the local government/municipality is responsible for setting the tariffs for the delivery of a specific service, in this case water. The FBW policy also places a responsibility on the local municipality to determine what portions, or household, of their constituency are to be identified as poor and thus are considered within the auspices of *Operation Gcin'amanzi*. As already mentioned, the City of Johannesburg (COJ) privatised the delivery of water and awarded a contract to a French multinational corporation to ensure that the responsibility placed on the City by the FBW is actually met. The local municipality was given *carte blanche* in decisions over service delivery and it ended up giving *de jure* authority to a private multinational.

The FBW was yet another policy to add to South Africa's expansive legal framework and human rights-based claims to water. Socio-economic rights lawyer Jackie Dugard observes how in South Africa:

[A] justice-based human rights schema goes beyond the constitutional guarantee of access to sufficient water, to encompass a range of legislation and policies aimed at protecting substantive and procedural aspects of water-related rights (Dugard 2008a:7).

There is a direct and clear relationship between section 27 of the Constitution and the legal instruments on which the FBW policy bases its regulations. It can be argued that the FBW policy implemented by the COJ was due to a legal responsibility placed upon the City by the WSA that, in turn, was promulgated to concretely realise section 27 rights. The development of this regime of water rights – from GEAR to *Gcin'amanzi* – was thus completely in accordance with the framework established by the Constitution.

Prepaid survival

When *Operation Gcin'Amanzi* was launched in Phiri on January 2002, there was immediate resistance against its proposed 'adjustments' to service delivery. The infrastructure development for the prepaid meters started on 11 August 2003, with the

individual house connections commencing in February of the following year (Dugard 2008a:15). In opposition to the installation of the meters, the Phiri Concerned Residents Forum (PCRf) was established. The PCRf was also associated with the Anti-Privatisation Forum (APF) – a social movement that played a role in organising different struggles against privatisation in and around Gauteng. Other resident organisations affiliated to the APF were the Soweto Electricity Crisis Committee (SECC) and the Orange Farm Water Crisis Committee (OFWCC). The Coalition Against Water Privatisation (CAWP) was established in November 2003 in collaboration with the APF, to form a broader opposition against water cut-offs and the installation of prepaid meters in Gauteng and the rest of the country.

The logic behind the installation of prepaid meters in Phiri can be read in several ways. According to section 3 of the City of Johannesburg’s Water Services by-laws of 2003 (City of Johannesburg Metropolitan Municipality 2003), residents of Johannesburg have three service level options. Service level 1 provides for a communal tap and a pit latrine, service level 2 for an unmetered yard tap and sanitation not directly linked with the water system, and level 3 for a metered tap with sanitation directly linked up to the City’s sewage systems. Water is provided free on service level 1, while service levels 2 and 3 are allocated a set amount of 6 kilolitres per household per month for free. After the set amount of free water is used up, a billing system is activated. The main difference between an account-linked metered connection and a prepaid metered connection is related to the way in which this billing system works. On an account-linked metered connection, the user receives a monthly bill to be settled with the municipality; a prepaid meter requires its ‘user’ to insert money before the water flows on a pay-as-you-go basis.

The choice to install prepaid water meters is a particular element of *Operation Gcin’amanzi* that would become the object of contestation in the ensuing litigation. Prishani Naidoo (sa:4) argues that the installation of prepaid water meters has the effect of neutralising any collective action through a process of individualising issues that are common to all human existence. Prepaid water meters redirect the focus of the FBW policy from ‘poor households’ to individual bodies. There is also no longer

a burden of cost recovery on the municipality or water service provider, because payment for water must be done upfront on a unit-for-unit basis (money for water). The privatisation of water delivery and the installation of prepaid meters not only relieved the municipality of the burden of cost recovery by effectively scrapping the issue of arrears; it also facilitated the control and regulation of the poor through a series of indigence policies (Veriava & Naidoo 2013).

In direct opposition to the installation of prepaid meters and *Operation Gcin'amanzi*, the APF, in collaboration with the PCRFB, launched *Operation Vulamanzi* (open the water). Chanting the slogan 'destroy the meter, enjoy the water', residents and activists acted in collective defiance of the authorities by digging up the pipes, disconnecting the meters and reconnecting the pipes so that the water flow was open, *vulamanzi*. (McKinley 2005). The response by local government and Johannesburg Water to the protests was swift and aggressive, arresting activists and even fining one of them R25 000, or 3 years in jail, for breaking a pipe (Naidoo sa.). Johannesburg Water and its subsidiary Suez hired their own security firm, Wozani security, to protect their assets and ensure the trouble-free installation of the meters (CAWP and APF 2004:7). The shift to GEAR and a neo-liberal approach to issues of service delivery as exemplified by *Operation Gcin'amanzi* entailed a logic of discretization and control.

The success of prepaid meter installation depends on surveillance and prospective control of individual conduct. Instead of monitoring the water consumption every month retrospectively by way of sending an account, the prepaid meter allows a once-off installation, shifting the responsibility to citizens of monitoring their own water usage and buying their own tokens upfront. The installation of prepaid water meters made the communal claims to free basic water individual entitlements: if I do not put money in my meter I won't get water. Franco Barchiesi characterises this shift in the following terms:

[W]hereas the national liberation struggle represented 'the oppressed' as biopolitically homogenous due to the state's control of flows and reproduction, the democratic government could use equal market

opportunities and the image of the caring state to legitimize social exclusion and manage differential inclusion (Barchiesi 2011:84).

The act of criminalising protest action and resistance to the installation of prepaid meters not only shows the allegiance between government and private companies, but also illustrates the divide and rule tactic employed by the branches of local government and the private companies hired to install the meters. The prepaid meters were not installed throughout Johannesburg all at once, but targeted poorer areas and indigent households in historically black areas of the city (Naidoo 2010; Veriava 2013). The prepaid meters were installed for service level 2 users in traditionally black and poorer areas of the city, whereas the credit meters were installed for service level 3 users in traditionally white and affluent areas of the city.

By targeting individual activists and households, the government was able to use the struggles by residents to further entrench the logic of commodification (Naidoo sa). Although the local government made it nearly impossible for residents to sustain any type of protest, residents and members of the APF and CAWP continued to bypass prepaid meters by digging up pipes. In 2008 the residents of Phiri, with the help of the Centre for Applied Legal Studies (CALS) the Socio-Economic Rights Institute of South Africa (SERI) and the APF, took City of Johannesburg, Johannesburg Water Pty (Ltd) and The Minister for the Department of Water Affairs and Forestry to court. The move from the Constitution to the WSA to *Operation Gcin'amanzi* to the residents of Phiri came full circle.

The case was brought before the High Court and Judge Tsoka delivered his ruling on 30 April 2008. The proceedings and judgment in the High Court are summarised in the Constitutional Court judgment as follows:

The applicants argue that the policy is unreasonable. They identify the following considerations as supporting this submission: the fact that 6 kilolitres per month is allocated to both rich and poor; the fact that the amount is allocated per stand rather than per person; the fact that the 6 kilolitre free water policy was based on a misconception in that the City did not consider that it was bound to provide any free water to citizens;

that the 6 kilolitre amount is insufficient for large households and finally that the 6 kilolitre amount is inflexible (*Mazibuko and Others v The City of Johannesburg and Others* 2009:41, para 82).

The High Court held that the introduction of prepaid meters was unlawful because it halted the water supply to the residents once the free basic water allocation had been used up. This, according to the court, amounts to unlawful and unreasonable discontinuation of the water supply. The introduction of the prepaid meters was also deemed discriminatory, as the residents of Phiri did not have the option of a credit meter that was provided to the city's wealthier residents. Judge Tsoka also deemed the City of Johannesburg's Free Basic Water policy, as well as its policy on indigence, as irrational and unlawful; he recommended that the minimum amount of free basic water should be raised from 25 litres per person per day to 50 litres per person per day. The joy of the Phiri residents and water activists was, however, short-lived, as the respondents – City of Johannesburg, Johannesburg Water Pty (Ltd) and The Minister for the Department of Water Affairs and Forestry – immediately appealed to the Supreme Court of Appeal (SCA).

The SCA unanimously held that the City of Johannesburg formulated its free basic water policy under the impression that they would not be obliged to provide the minimum basic amount for free to poor areas of the city. According to the 'direct access rule', if there is legislation aiming to materialise constitutional rights, the specific law should be reviewed first, before a direct claim on constitutional rights is being made. The SCA thus held that because the WSA and National Water Standards Regulations were already in force to give effect to section 27 of the Constitution, the City of Johannesburg's failure to provide free basic water was merely a material error of law. The lawfulness of the city's FBW policy was set aside due to reasons relating to this specific interpretation of the legislation involved. The SCA unanimously held that what qualifies as sufficient water for 'dignified human existence' would be henceforth set at 42 litres of water per day, and that each resident of Phiri would receive this amount free of charge. It also proclaimed the installation of the prepaid meters as unlawful, but gave the Johannesburg Water (Pty) Ltd two years to replace the meters and/or rectify the by-laws relating to the unlawfulness of the meters.

After the decision of the SCA, the Phiri residents applied to the Constitutional Court for leave to appeal the decision of the SCA and to effectively reinstate the High Court order. The Constitutional Court handed down judgement in the case on 08 October 2009. The Constitutional Court overruled both the decisions of the High Court and the SCA. The Court, through O' Regan CJ, determined that the Free Basic Water policy and *Operation Gcin'amanzi* were not unconstitutional, and that the installation of prepaid water meters was both legal and fair. O'Regan CJ emphasised section 27(2) of the Constitution in her *ratio decidendi*, stating that it was not within the Court's power to determine how much water should be deemed as being 'sufficient'. According to s 27(2) cited above, the 'state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to have access to water. The Constitutional Court thus held that it was in no court's power to determine what amounts to sufficient water, and that, consequently, the City of Johannesburg's FBW policy was legislation drafted in order to progressively realise the right to have access to water within the state's available resources (*Mazibuko and Others v The City of Johannesburg and Others* 2009:25, par 50). With regard the prepaid meters, the Court judged, similar to the SCA, that the City of Johannesburg's own by-laws made provision for the installation of the prepaid meters and they were thus neither unlawful nor unfair. The principle of the 'direct access rule' became once again evident in the determination of O'Regan CJ: the legislative and executive authorities have already made the decision in the enforcement of the constitutional principles.

The Constitutional Court, in this specific instance, also employed a tactic known as 'constitutional deference' (McLean 2009:2). Constitutional deference refers to the decision of the Constitutional Court *not* to decide on a specific case but rather defer this decision to another branch of government. The Constitutional Court's decision in the *Mazibuko* case is exactly such a *non*-decision in that it decided that the Court did not have the authority to actually make a decision on what could be deemed sufficient water (*Mazibuko and Others v The City of Johannesburg and Others* 2009:5-6, par 9; 23-25, par 46-68). Through employing deference, the Constitutional Court decides not to decide; but in deciding not to decide, through the employment of deference, the Court still makes a decision: it decides that the decision made by the

executive/legislative branch of government was/is the correct decision. By overruling the lower courts' judgements, the Constitutional Court *de facto* confirmed the legislative's decision that 25 litres of water per person per day was the correct decision. The FBW policy was thus declared to be valid and legitimate by the Court through applying the logic of deference.

Interpretations of the case, the law, and the Constitution

Several commentators have addressed the issue of the access to water both within the *Mazibuko* case (Roithmayr 2010; Brand 2012) as well as within the broader local context of South Africa (Naidoo 2010; Bond 2010; Veriava 2013) as well as in the global context (Bakker 2007). All these political analysts share the view that the *Mazibuko* case and the activities by the state and the social movements leading up to the Constitutional Court case point to some inconsistency in the way in which the process unfolded. Most of the political analysts cited here were also critical either of the limits contained within the law itself, or the way in which the law was applied in this specific case.

I would now like to discuss these different approaches to the case and the question of water, rights and access to the commons. Before investigating the different interpretations of the case, it is, however, necessary to discuss the idea of the limits of the law as well as transformative constitutionalism. Most of the critical literature around the *Mazibuko* case focuses on the relationship between the law and social movements and either reads the 'turn' to the law by social movements as a tactical tool to promote the cause of the movement, or as a failure on the part of the movement when there is a turn to the law. A thorough engagement with the history of water right in South Africa, in particular, and constitutionalism in Africa in general, is as yet largely missing from this critical literature. I will attempt to address this perceived gap in the rest of the dissertation after supplying a review of the aforementioned critical positions.

The limits of the law

The invocation of the limits of the law when critically assessing any legal argument speaks to the analyst's concern with the possibilities of legal discourse and legal transformation. Johan van der Walt (2005) argues that legal practice should consider the court and the law as a process of democratic deliberation and not a closed discussion with the law as the final arbiter. Therein lies one of the ways in which the move towards a post-apartheid theory of law can be actualised. Van der Walt's argument corresponds in large parts to earlier debates within the Critical Legal Studies tradition in America, but more directly to a series of articles and debates on the inclusion of justiciable socio-economic rights contained mainly in sections 26 and 27 in the new Constitution (South Africa 1996). Sections 26 and 27 of the Constitution aim to protect what is most commonly referred to as second-order human rights (De Waal, Currie & Erasmus 2000:400). Second-order rights are considered positive rights because they supposedly place a responsibility on the state and government to act in a certain way to promote and protect these rights. Second-order rights are mostly actualised in legislature as socio-economic rights like housing, water and education; they are called second-order rights because they come after what is referred to as the first-order rights of freedom, equality and property. First order rights are also sometimes referred to as negative rights because they impose a restriction on the state to *not act* in a specific way. First-order rights are civil rights that prescribe to a 'negative conception of freedom', freedom from external constraints (Douzinas 2007:22), while second-order rights, on the other hand, make claims to positive aspects of freedom in that these enable individuals to have freedom from basic concerns and human necessities.

There is, however, a very direct link between these two forms of rights. The view that they are completely separate is problematic for several reasons. Pierre De Vos (1996:70) states that: 'All rights are aimed at guaranteeing each individual to live his or her life with dignity and respect.' It is with this approach that the Bill of Rights contained in the South African Constitution supposedly does not make an ideological or theoretical distinction between first and second-order rights. In the First Certification Judgement (*Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996*) of the

Constitutional Court it is clearly stated in paragraphs 77-78 that the distinction between negative and positive rights is not to be followed rigidly. The courts also affirm their ability to effectively adjudicate these socio-economic rights:

In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers (*Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996*, para. 77, quoted in Mclean 2009:119-120)

The ability of the courts to enforce these rights are, however, at best questionable as it would require the courts to make direct orders as to how the executive branch of government are to interpret the Constitution.

American legal theorist Karl Klare attempts to take up some of these questions regarding socio-economic rights and transformation in a 1998 article entitled 'Legal culture and transformative constitutionalism'. Klare sees in the new Constitution a transformative potential if the practitioners of the law actively involve themselves in the process of transformation. Since the publication of Klare's article in 1998, there have been several responses in various forms that deal explicitly with this idea of transformative constitutionalism put forth in his paper (Van der Walt 2005; Langa 2006; Liebenberg 2006; Le Roux 2007; Roux 2009, Van Marle 2009; Klare & Davis 2011). In his paper, Klare presents a reading of the Constitution as having a 'postliberal' vision (1998:151) where a postliberal vision of law is one where the 'political' aspects and issues of the law are taken into account in the judgement as opposed to the liberal interpretation and its association with a positivist legal interpretation (Klare 1998:152). The Constitution also has this postliberal quality due to its inclusion of 'progressive' socio-economic rights and 'horizontal' rights and the need for legal decisions to be also made on substantive grounds. For Klare the Constitution makes possible transformation but needs to be interpreted progressively: 'Adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice' (Klare 1998:147).

It is partly due to this postliberal vision of the Constitution that Klare argues for what he calls *transformative constitutionalism*:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' (Klare 1998:150).

Transformative constitutionalism needs to be conceived as a project of critically engaging with the Constitution in order to make it more responsive and democratic to the citizenship. As Klare argues, 'transformative constitutionalism is not a neutral concept but is ... intended to carry a positive valence, to connote a social good' (Klare 1998:150). The courts, in his view, are an arena of political change and can be used to accomplish a certain type of justice if the judges and lawyers would just engage the Constitution in a substantive and not simply in a procedural way. On this account, the Constitution in itself is thus not a bad document; it just needs the right interpreters and judges to deepen it. The fact that it still falls short of that aim is, in this view, due to a 'disconnect between the Constitution's transformative aspirations and the conservative character of South African legal culture' (1998:151).

Following Klare then, the courts and the participants in the legal process – the judges and lawyers – need to realise their position as makers of law and not only as interpreters of the law. The Constitution, according to Klare, has certain limits that are inevitable in any type of legal document. It is, however, at this *limit space* of the law that one can challenge this limit and possibly change or shift it. The employment of the legal mechanism of deference by the Constitutional Court in the case of *Mazibuko* can be read as the Court coming up against one of these limits in the law and then just deferring its decision. Constitutional deference can be defined as the decision of the Constitutional Court not to decide on a specific case, but rather *defer* this decision to another branch of government instead (McLean 2009:2). Through employing deference, the Constitutional Court thus decides not to decide. Through the employment of deference, the Constitutional Court can thus deflect from its responsibility in cases in which it is confronted by such a limit.

Danie Brand (2012:176) invokes this limit of the law directly when he discusses the Constitutional Court's decision by pointing out that the Court does not simply 'prefer not to' decide and leave it at that; the Court instead explicitly states that the decision made by the government was the correct one. In deciding not to decide, the Constitutional Court does not only retain the idea of its contingency – the potential to decide in the future; it also makes a decision in that it acknowledges that the universal right of access to sufficient water has been met in this particular situation by the local government. If the Constitutional Court should have made a decision on what constitutes sufficient water in this particular case, it would have also decided what constitutes sufficient water in all cases. When Danie Brand (2012:176) states that the Constitutional Court 'declines the invitation to attribute a particular substantive content to the right to have access to sufficient water on institutional capacity and democratic legitimacy grounds', he invokes the limit inherent in article 27(2) of the Constitution: the failure on the part of the Constitutional Court to interpret the rule in a substantial way. Brand does not aim his critique at the Constitution itself but rather at those who interpret the Constitution. Brand (2012:186-187) further argues that the mechanism of deference depoliticises issues related to poverty: The Constitutional Court proclaims that the only authority to make decisions related to 'the poor' are the specialised agents appointed to make these decisions. There is thus a 'technisation' of issues of biological life that necessarily work by way of a dichotomous logic of classification that pits poor against rich, consumers (paying) against users (non-paying). Once again, the critique is levelled at the implementation of the law rather than the law itself. Lucy Williams likewise argues that the institutions and the people who devise and control these aspects of technisation and the law are to bear the responsibility – rather than the law itself:

[T]he stubborn persistence of poverty, in both developed and developing countries, results in significant part from political and legal decisions and institutions that generate and sustain a sharply unequal distribution of wealth and resources (Williams 2012:26).

The *Mazibuko* case and the decision (not) made by the Constitutional Court impels us to ask whether the Constitution, by attempting to legislate and regulate biological human life, does not actually contribute to the legalisation on and criminalisation of

poverty? In other words: does the Constitution actively address the issue of inequality in the current South African society or does it actively promote its persistence? The juridical inscription of biological human life is simultaneously an *ex-scription* of biological human life: By attempting to legislate for what is necessary to live, the Constitution also establishes that which is necessary for life; the law determines the norm of what is sufficient for human life. The biological body that is inscribed by *Operation Gcin'amanzi* is included within the legal-political paradigm through certain apparatuses of control. In the *Mazibuko* case, these apparatuses manifest themselves not only in the privatisation of service delivery or the legislation and policy designs like the WSA and *Operation Gcin'amanzi*, but in the Constitution itself. The next series of political-legal analysts whose contributions to the debates we will be discussing shift their focus towards asking questions around the legitimacy and capability of the law to act as an impetus for large-scale social change.

Law's utility

Both Brand and Williams' critical interventions regarding the *Mazibuko* case had two main aspects in common: The focus on the biological inscription of human life in the form of socio-economic rights in the Constitution as well as the limit that this specific inscription creates. In focusing on deference as shortcoming, Brand shows his commitment to Klare's notion of 'transformative constitutionalism'. Deference is a specific tactic employed by the courts that, in this case, prevented the Constitutional Court from making a substantive decision on access to water. Brand and Williams, in separate arguments, locate their critique in the interpretation and application of the Constitution, not in the Constitution itself. Here Brand and Williams share a position close to that of Kate Tissington (2012) and Jackie Dugard (2008a, 2008b) – both members of the Socio-Economic Rights Institute (SERI), the organisation directly involved in some aspects of the litigation of the *Mazibuko* case. While Tissington and Dugard's arguments revolve around the ways in which social movements can use the law, they tout the *Mazibuko* case as an example of the benefits of adjudication as well as the transformative potential contained within the law. By the same token, they consider the Constitution as harbouring the possibility for transformation and change.

In a presentation at the University of Nottingham in 2008, Dugard makes the point that:

[U]nlike many jurisdictions where there are valid criticisms of the human rights apparatus as entrenching structural inequality, in South Africa rights are inherently transformative and are facilitated by a Constitution with much redistributive potential (Dugard 2008a:6).

Dugard argues for transformative constitutionalism since for her, the *Mazibuko* case:

[P]rovided the beginnings of an alternative model of water services, in which water can be governed by social equity for poor users and economic equity for luxury users ... [this alternative model] meets criticisms from the left, that the current water delivery paradigm is too commercially-driven, and the right, that water should be managed and priced as an economic commodity (Dugard 2008a:3-4).

Dugard's assessment of the *Mazibuko* case is premised on the High Court ruling (*Mazibuko and Others v City of Johannesburg and Others* (Centre on Housing Rights and Evictions as amicus curiae) 2008), which found in favour of the applicants. Dugard (2008b) argues in another paper in the same year that the CAWP/APF's 'turn to law' was due to fact that other avenues of resistance had closed down. The 'turn to law' is thus seen as a last resort to effect substantial change after other modes of resistance failed. Dugard's 'turn to law as last resort' argument is based on her perception of the CAWP/APF's 'ideological aversion to rights and the law' (Dugard 2008b:596). Dugard upholds the benefits of litigation in a situation in which all other forms of opposition failed, in her wish to demonstrate the possibilities contained within the law and the potential of rights-based litigation to effect substantial change. Dugard also makes a qualitative distinction between rights discourse in general and the specific rights contained in the South African Constitution, claiming the latter does, unlike the former, contain elements of transformative potential.

Kate Tissington (2012:207), likewise, points out that while the Constitutional Court case did prove disappointing in its final outcome, it nonetheless provided a tactical option for the APF during the protracted struggle against water privatisation and prepaid meters. Tissington's argument is based on a larger claim that rights-based

litigation should not be seen as a failure on the part of social movements but rather as another method of mobilisation and tactic of struggle. Acknowledging Roithmayr's (2010) argument that rights-based litigation places serious limits on tactical and strategic options for movements, Tissington nonetheless points out that although the 'turn to law' was 'taken as a last resort when political tactics and civil disobedience had been quashed ... it did provide a new basis for on-going mobilisation' (2012:207). Tissington (2012:211) calls on lawyers in this regard not to offer legal options at the expense of more radical ones. Tissington and Dugard's view presents some of the more optimistic views on the ability of rights-based litigation to assist social movements. Both of their interpretations of the *Mazibuko* case share this optimistic vision; they do not see a structural failure on the part of the law nor the Constitution. Both of them subscribe to the idea of transformative constitutionalism; in their critique of the *Mazibuko* case, they explicitly point to the limits of the law and the possibility for these limits to be (re)negotiated through a process of a constructive engagement with the law.

Another world is possible (AWP)?

Patrick Bond argues that issues around water have been excessively marred by 'rights talk', that is, a 'governance culture' adopted by activists to address issues around the access to water (Bond 2010:1). Bond further argues that 'if the objective of those promoting a rights culture is to make water primarily an eco-social rather than a commercial good, these limits will have to be transcended' (Bond 2010:2). The limits referred to here are the inherent limits in attempting to entrench issues of access to water (and perhaps issues of social justice in general) within a strictly legal discourse. For Bond, following the writers of the Critical Legal Studies (CLS) movement, one of the main problems of a rights discourse approach to issues of social justice concerns the 'domestication of the politics of need', a process by which issues related to immediate needs are politicised and turned into technical legal issues (Bond 2010:10). In this regard, Bond's argument also relates to that of Williams mentioned above, identifying the limits of law in the form of rights-discourse. But Bond's argument also corresponds to a certain strand of Marxist critique that locates rights within the neo-liberal sphere benefitting the propertied and upper classes of the society' Both of these cases – technisation of water rights as well as the Marxist-based critique – invoke the

limits of the law dealing with water rights and poverty. Bond's argument thus not only considers any rights-based discourse on access to water as overtly technical; he also considers this debate within a commercial, neo-liberal paradigm in which water features as a commodity to be distributed and traded. Instead of framing the issue of access to water as a right, it should be articulated within the framework of a strategy of the 'commons' (Bond 2010:15). For Bond, like Bakker (2007), a move towards the commons consists of a move away from an individualistic, particular idea of water rights to a more capacious idea incorporating aspects such as the environment, globalisation, and technology.

Closely related to Bond's approach is Karen Bakker's article on water resource management and the relationship between and opposition to the privatisation of water resources and anti-privatisation social movements. According to Bakker (2007:438), anti-privatisation movements around the world have taken up the campaign for a human right to water. In Bakker's (2007:439) critical perspective, these movements make 'three strategic errors'. These errors are 'conflating 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' (Bakker 2007:439). Bakker cites several theories and approaches supporting her argument that does, however, still rely on a 'limits of the law' approach. Her argument resembles that of Bond in that she expresses a fundamental doubt whether human rights can realise a fundamental right to water without approaching it from a neo-liberal perspective. Such a perspective would consider water as a commodity or material asset that needs to be distributed, without ruling out private-sector involvement to 'efficiently' see to this distribution. In the final analysis, she argues that: 'Human rights are individualistic, anthropocentric, state-centric, and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatization' (Bakker 2007:447). Rights talk, she claims, obfuscates the possibilities for alternative economies and ways of being within communities. According to both Bond and Bakker, the law has an inherent limit that cannot be overcome as it already functions within a sphere of neo-liberal market-friendly possibilities. The way in which the markedly aggressive neo-liberal GEAR could fit in seamlessly with the Constitution's

insistence on socio-economic rights is a case in point.

Daria Roithmayr (2010) also takes the same path of critique as Bond and Bakker but focuses on the *Mazibuko* case specifically. Roithmayr poses a question about the relationship between the commons approach and a commodity-based approach to the distribution of water. In her article, ‘Lessons from Mazibuko: persistent inequality and the commons’ (2010), she attempts to argue that the benefits of rights-based mobilisation after the *Mazibuko* case is limited due to the fact that cost-recovery programs and water cut-offs have been declared legal by the Constitutional Court. Following from this, she states the need for an overall shift of focus from a rights-based approach to that of an approach based on the ‘commons’. For Roithmayr, as for Bond and Bakker, rights-based litigation is not sufficient to address issues of racial and social inequality. Especially after *Mazibuko* it is clear that ‘rights based litigation has now become too closely allied with precisely those neoliberal visions of the market that make the market unlikely to dismantle inequality’ (Roithmayr 2010:320). Roithmayr also provides a critique of those social movements and activists that put all their faith in rights-based litigation in order to further their specific struggle. Going through the *Mazibuko* case, Roithmayr points out the places where the court actually reinforced conservative ideas of inequality. One example that she provides is the court’s assertion that prepaid meters are actually better suited for poor black residents because that prevents them from falling into debt (Roithmayr 2010:325; *Mazibuko and Others v The City of Johannesburg and Others* 2009:71-72, para 154).

For Roithmayr, examples like those mentioned above only affirm the fact that persistent inequality is not incompatible with human rights enshrined in section 27 of the South African Constitution. For Roithmayr, the relevance of such examples lies in the fact that the Constitutional Court demonstrably rules in favour of neo-liberal policies and ideologies governing the distribution of water resources. It shows that the project of rights-based litigation around issues of access to water is always in a position of disadvantage: Having shown its partiality toward bourgeois class interests and neo-liberal policies, litigation would not be the appropriate instrument for struggles against neo-liberal, market-responsive methods of water distribution. Issues

of access to water would be more appropriately organised around a logic of the commons, where the commons are defined as ‘a framework that emphasises common interests and networks of relationships connecting wealthy whites and poor blacks in South Africa’ (Roithmayr 2010:319). The framework of the commons would:

[R]einforce the notion that people collaboratively create neighbourhoods, cities and countries, often for reasons other than market motivation, and that no group should have unfairly-privileged access to the best that these common spaces have to offer (Roithmayr 2010:319).

All three political analysts – Bond, Bakker and Roithmayr – share a fundamental theoretical position: The turn to law by social movement activists fighting neo-liberal privatisation is a failure. They differ over some nuances in their arguments, but all three of them propose a mobilisation around the idea of the commons. Although all three of these political analysts explicitly reject taking recourse to the law, I would argue that they still invoke the ‘limits of the law’ in one way or another. They reject the turn to the law based on its partiality toward neo-liberal and bourgeois interests. They radically dispute the role of the law, positing an alternative approach based on a form of resource management and distribution that is supposedly not based on neo-liberal and market-friendly ideas of distribution. Their conceptualisation of the logic of the commons is formulated *in response* to the neo-liberal tendentiousness of the law, specifically of human rights. Theirs is a reactive thesis formulated in response to the identification of an apparent lack. This is a lack that is only identified after observing the failure of anti-privatisation movements globally (Bakker 2007), and of the *Mazibuko* case specifically (Bond 2010; Roithmayr 2010). What is missing in this conceptualisation is a historical analysis that can place the *Mazibuko* case, and the possible reactions to it, within a context different from that of another failed anti-privatisation movement or disappointing legal case. Before embarking on such historical analysis, I will investigate one more approach to the *Mazibuko* case.

For academic and erstwhile active APF member, Ahmed Veriava (2013), the APF’s invocation of the law that led to the *Mazibuko* case cannot simply be considered as either successful or unsuccessful. Although Veriava admits that: ‘An important

chapter end[ed] with the judgement of the Constitutional Court ... [But] the court case was ... just one of the final body blows that helped lay this political creature [APF] to rest.’ Furthermore, Veriava directly addresses Dugard’s argument of the CAWP/APF’s ‘turn to law’ presented above, alleging that Dugard ‘only counts positive non-judicial outcomes of the case on the mobilisations against prepaid [meters], passing over the negative effects the case had on the campaign’ and that further, ‘her argument works to sponsor a turn to law without questioning how it might itself underlie a shift in forms of political self-representation and orientation that recuperate social antagonisms’ (Veriava 2013:538). Veriava acknowledges Dugard’s claim that the case had wide-ranging social and material effects, adding that these effects include ‘not just an “economic government” of water services, but also new forms of subjection and control’ (Veriava 2013:539). So, while Dugard takes an optimistic view of the ‘turn to law’ in that ‘legal mobilisations also helped reinvigorate the flailing campaign’ (Veriava 2013:539), Veriava is cautious to point out that ‘the effects of the court case can just as well be read in the opposite direction’ (Veriava 2013:539). Veriava also points out that the APF’s relationship with legal routes and rights-based mobilisation is not merely a ‘last resort’ tactic as Dugard and Tissington would want to argue. Since the APF had a combined ‘an anti-systemic politics (which was wider than the identity “socialist”) with a grassroots politics centred on illegal reconnection’, this translated into ‘political practices that generally made recourse to the law only in escaping criminal prosecution’ (Veriava 2013:539).

Veriava also admits that the APF was forced to adopt certain pragmatic strategies in dealing with the ever-shifting nature of their relationship with the local government, the ruling ANC, as well as the shifting terrain of local struggle. Accordingly, the law was tactically invoked when it was necessary and pragmatic to do so (as in the case of bailing out activists). The use of law, or ‘turn to law’, by the APF can thus not be analysed as being a complete failure (Bond 2010; Roithmayr 2010) or being a final option after all other forms of mobilisation failed (Dugard 2008a, 2008b; Tissington 2012). Veriava makes the claim that:

[I]f it [APF] had never contemplated a constitutional challenge before then, it was because ... it never had those resources available to it. In fact, even before the PPWM [prepaid water meter] case, the SECC was in

discussions with Theunis Roux over the possibilities of litigation in the area of electricity’ (Veriava 2013:540).

Veriava’s analysis shows a much more complex relationship between the movement and the Constitution than the previously discussed authors do. Veriava’s study does, however, deploy a specific Foucaultian-Agamben lens in considering the relationship between the APF and the government; it does not focus specifically on the law as such. Veriava also fails to provide a solid historical grounding that can help explain the framing of water rights in the current South African context. However, these gaps do not constitute shortcomings as such, but rather avenues of investigation beyond the scope of a study on resistance and governmentality. Still I would want to argue that Veriava’s argument attempts to incorporate and take into account the complexities of a relationship with law in a way that the other writers do not. Where writers like Patrick Bond (2010), Daria Roithmayr (2010), and Karen Bakker (2007) would critique the turn to law by the social movements leading up to the *Mazibuko* case in one way or another, Jackie Dugard (2008a, 2008b) and Kate Tissington (2012) are much more positive about the turn to law, considering the *Mazibuko* case an example of the benefits of adjudication as well as of the transformative potential inherent in the law. Veriava (2013), in contrast, is more cautious to proclaim the ‘turn’ to law as a spontaneous or instantaneous action, or as complete failure on the part of the social movements. Instead, he refers to a co-determining relationality between the law and social movements.

Conclusion: Towards the past

The *Mazibuko* case and its background present an opportunity to engage with the jurisprudence of socio-economic rights and its relationship to its broader political environment. The *Mazibuko* case presents a clear example of the convergence of politics and the law in the post-1994 Constitutional Court jurisprudence. The aim of this chapter was to introduce some aspects of the *Mazibuko* case and its immediate historical context and show how the commentaries on the case all point to this convergence. All the commentaries discussed in this chapter do not, however, take full cognisance of the broader historical context of access to water and water rights within a colonial context like South Africa. There is also not a clear historical critique

of the Constitution and the post-apartheid project, of which the case forms an indelible part. I would like to dedicate the next two chapters to place the case within a broader philosophical-historical context related to water legislation in South Africa. This will take the form of a genealogy that does not attempt to find a beginning or an origin, but rather to understand the power relations structuring socio-economic rights, and access to water in particular, through investigating/tracing certain moments in their development.

The reason for such an investigation has its origin in my claim that the commentators discussed in this chapter all share a shortcoming with regard to their analysis of the *Mazibuko* case. This shortcoming can be described as an inability to place the *Mazibuko* case within the larger philosophical-historical genealogy, and therefore obfuscating the couplet of Law-Life in the creation of the political. This is not a claim that attempts to devalue the critical contributions of these commentators, but rather to attempt an extension of some of the insights generated by them. In order to pursue some of these routes I will use the next two chapters to analyse two aspects of the historical genealogy of the *Mazibuko* case that form an important part of the jurisprudence employed in the judgement. These aspects are the history of international law and its relationship with socio-economic rights as well as the particular history of water rights and colonialism in Southern Africa. The final chapter will be reserved for a close reading of the judgment and an engagement with the Constitution and the theoretical and empirical basis for the constitution-making process.

CHAPTER 2: A PARADOXICAL RULE

Introduction

As indicated at the end of the previous chapter, there is a lack that animates the *Mazibuko* case on the level of theory and interpretation. This lack can be tentatively named a lack of philosophical-historical contextualisation of the political. The commentators discussed in the previous chapters – under the headings, ‘The limits of the law’, ‘Law’s utility’, and ‘AWP?’ – focus on issues related to the nexus between social movements and the law, the ‘use’ by movement activists of legal routes and resources, and the lack of engagement on the idea of the ‘commons’. Although these theoretical positions contribute to our overall understanding of the case by highlighting the convergence between law and politics, they fall short of a thoroughgoing historical and political analysis. The analysts commenting on the *Mazibuko* case identify a *lack* in the current constitutional order to address the issues brought up in the case. They either see a complete failure of the law (Bond 2010; Bakker 2007; Roithmayr 2010), a possibility for the law to adjust to its limits (Tissington 2012; Dugard 2008a), or an inevitable power relation between the Constitution and social movements (Veriava 2013). It is my contention that the *Mazibuko* case requires a more scrupulous genealogical investigation, one that attempts to look for the fractures in the legal rationality presented by the court, an analysis that attempts to trace a history of the present in relation to the question of access to water and its constitutional entrenchment.

As discussed in Chapter 1, the two main claims that were brought before the successive courts by the Phiri residents and their legal teams were related to the allocated amount of free basic water as well as the instillation of prepaid meters. The identification of households to be targeted by the prepaid meters occurred by way of registering as an indigent household according to the City of Johannesburg’s Indigent Person Policy (Veriava & Naidoo 2013). This would result in debts that are in arrears to be cancelled under the provision of the acceptance of the prepaid meters. One of the immediate fault lines visible in this approach by the City of Johannesburg (COJ) is their differential treatment of wealthier white areas and poor black areas. While the

latter were issued with prepaid meters, the former were charged according to a credit meter. The explanation given by the respondents in the case, and agreed to be the Constitutional Court, was that due to the adoption of a rising block tariff structure; this model worked more efficiently by cross-subsidisation (*Mazibuko and Others v The City of Johannesburg and Others* 2009:40, par 81). Cross-subsidisation would, in turn, allow for so-called ‘historically poor’ areas to pay less for water consumption. The opting for a neo-liberal baseline (Roithmayr 2010) and the recourse to law instead of the commons (Bond 2010) are the most obvious objections to this approach by the COJ that the Constitutional Court in effect ratified with their decision. The argument in this case is that the law cannot sufficiently address issues of access and overall social justice, due to the fact that recourse to law already places these concerns into the realm of rights and entitlements to private property and access. To really give affect to any type of transformative claim or form of justice not inscribed and circumscribed by the law, one must therefore move outside of the ‘limits of law’.

I am essentially in agreement with Roithmayr and Bond’s conclusion regarding the inability of law to affect any real, material, social change. My divergence from them is based on *why* exactly the law makes this type of change in material conditions impossible. The first point of divergence relates to the genealogy of international law and colonialism and the second point of divergence relates to the specific history of water rights in Southern Africa, the latter of which I will elaborate on in the next chapter. In this chapter I will address the first point of divergence and attempt to present a historical rendering of the early formation of international law through colonialism and conquest, in what Carl Schmidt refers to as the *Nomos of the Earth*. The goal of this chapter is to place my critical reading of the *Mazibuko* case within a philosophical-historical genealogy of international law and colonialism. I will argue that *the political* as a concept emerges with land-appropriation and division and that a philosophical-historical genealogy must engage this emergence of *the political*. My aim in this chapter is thus not to rehearse the critiques discussed in the first chapter, but rather to extend them historically, legally, and philosophically into the realm of the political.

International constitutionalism

Transformative entitlements of a Human Rights state

The idea of the Constitution as a transformative framework is more often than not found in appeals to ‘justiciable’ socio-economic rights and, as discussed in the previous chapter, its inclusion into the Constitution (Klare 1998; Brand & Heyns 1998; Le Roux 2007). Danie Brand points out that socio-economic rights are among the features that make the South African Constitution of 1996 unique:

‘[Socio-economic rights] indicate that the South African Constitution differs from a traditional liberal model in that it is transformative, as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice (Brand 2005:1).

Socio-economic rights in the Constitution play both a reactive and a proactive role in ensuring its implementation. Both section 2 and section 7(2) of the Constitution place an active duty on the state to ‘progressively realise’ socio-economic rights. The existence of socio-economic rights in the Constitution enables their enforcement through:

[C]reating avenues of redress through which complaints that the state or others have failed in [its] constitutional duties can be determined and constitutional duties can be enforced ... They are translated into concrete legal entitlements that can be enforced against the state and society (Brand 2005:2).

The *Mazibuko* case is an example of the use of socio-economic rights in order to force, in this case, the state to act in accordance with section 27 of the Constitution.

The *Mazibuko* case attempts to create ‘avenues of redress’ based on the fact that ‘the state ... failed in [its] constitutional duties’ to ensure access to water. There is an internally circular movement in the working of socio-economic rights in this case as was implied in the preceding chapter. While *Operation Gcin’amanzi* was designed and implemented within the legal prescripts set up by section 27 of the Constitution, and the laws that attempt to empower this constitutional prescript on local level, it

was still necessary for the applicants to go to the courts to seek legal entitlements to section 27. While socio-economic rights do ‘create entitlements to material conditions for human welfare’ (Brand 2005:3), they rely almost exclusively on international law, specifically international human rights law, to do so. Section 39(1) of the Constitution places a responsibility on the courts to interpret the Bill of Rights in accordance with international human rights law and principles. Brand (2005:7) also points out that socio-economic rights in the Constitution are modelled on the International Covenant on Economic, Social and Cultural Rights (CESR) of 1966, itself an instrument of the United Nations (UN).

This inclusion of *transformative* socio-economic rights in the Constitution is one of the elements that makes the South African Constitution part of a global movement towards the incorporation of international human rights principles; a movement that was promulgated after 1989 with the end of the Cold War and the ‘triumph’ of human rights discourse (Douzinas 2010:93; see also Wa-Mutua 1997). The South African Constitution models itself after the international law instruments propagated by the UN and binds itself to international human rights treaties and declarations (Wa-Mutua 1997:66).⁶ Makau Wa-Mutua states that:

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions (Wa-Mutua 1997:65).

⁶ Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996, reads as follows:

‘The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

This reading by Wa-Mutua (1997) presented above resonates with Costas Douzinas's (2010:93) observation that: '[I]n the post-1989 world, rights have expanded and touch almost every part of daily existence. Democracy is presented as the exercise of a series of rights.'

The idea of an 'exercise of a series of rights' appears as a foundational part of the South African Constitution under the legal precept of 'equal protection norms' (Wa-Mutua 1997:68). Wa-Mutua is, however, sceptical about an overemphasis on equal protection norms due to its emphasis on making 'the most important feature of the post-apartheid state ... its virtually exclusive reliance on rights discourse as the engine of change' (Wa-Mutua 1997:68). The specific reliance on rights discourse is problematic exactly because it does not actively address the socio-economic inequalities brought about by apartheid and colonialism and it favours those who are already propertied (Wa-Mutua 1997:68, 89; Ramose 2012:26). It is a form of legal reasoning that is comparable to libertarian philosophies of the market and the unencumbered human subject that enter into their competitive fray. Consequently, the Constitution protects the status quo of apartheid and colonialism as much as it offers legal entitlements to those still affected by its legacy: '[T]he double-edged nature of rights language has already become evident in South Africa: the new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo' (Wa-Mutua 1997:68).

Wa-Mutua (1997) enables us to consider the inclusion of socio-economic rights in the Constitution not as merely a triumph for constitutional transformation, but rather as a historically contingent emergence that forms part of a bigger socio-political movement driven by international human rights law. The inclusion of socio-economic rights and a justiciable Bill of Rights in the Constitution can be read as an attempt at forging a human rights state and a 'transformative' Constitution. A Constitution that is in accordance with the prevailing human rights triumphalism of liberal concepts of constitutionalism that is built 'on the twin pillars of limited *government* and individual fundamental freedoms/rights' (Shivji 1991:39). Socio-economic rights in their proactive and reactive formulations both limit governmental power – through section

2 and section 7(2) in the Constitution – and ensure individual freedom and rights through the granting of legal entitlements. Socio-economic rights also pose as a vehicle for transformation on the basis that they act as a mechanism with which to undo differential access to resources based on race. This is one of the reasons given for the inclusion of socio-economic rights in the Constitution, namely that: ‘Since access to water in South Africa has largely been conditional upon land ownership and wealth (and race), the majority of South Africans have struggled to secure the right to water’ (Kok & Langford 2005:191). The right to water included in the Constitution attempts to act as a remedy to undo/repair a historical and political wrong by offering a legal remedy. The problem of such an approach – to address historical issues primarily through legal means – is that it does not necessarily engage with the possible causes of the problem but merely their possible remedies. Such an approach also runs the risk of dehistoricising political claims to land and resources and reframing them merely to questions of rights and entitlements. This is Wa-Mutua’s warning, as socio-economic rights in this instance turn claims dealing with the political into legal claims. These legal claims are, in turn, enclosed by what is considered possible within the current constitutional framework. The framework itself is never put to the test.

New jurisdictions of the old

In the *Mazibuko* case as in most other socio-economic rights cases, it is a non-governmental organisation (NGO) or social movement that takes on the government on the basis of accountability to the Constitution.⁷ This is the overall line of questioning and critique pursued by the commentators discussed in Chapter 1: The im/possibility of considering law as a useful approach in attempting to enact transformation or material change within a society. The point made by Wa-Mutua (1997) is that South Africa’s over-reliance on international law principles of human rights to address specifically political and historical problems is extremely limited. International conventions and treaties of human rights already regulate the change or transformation that is at all possible within the frame of the constitutional mandate.

⁷ The collection of essays edited by Langford, Cousins, Dugard & Madlingozi (2014) provide a good critical overview on the history of socio-economic rights jurisprudence in the South African Constitution.

As is exemplified in the *Mazibuko* case, the failure of the executive branch of government to deliver on these constitutional mandates results in a series of court cases and constitutional challenges by legal aid and resource centres. The goal of these court challenges is to hold government accountable to the principles of human rights enshrined in the Constitution. The level to which the Constitution lives up to international law norms is thus challenged from within the country itself and not by other signatories to the UN Declaration of Human Rights. There is thus a process of the domestication of international law into what Luis Eslava and Sundhya Pahuja refer to as ‘new jurisdictions’ of international law (Eslava & Pahuja 2013:218). These new jurisdictions constitute a way to see international law as not only functioning in courtrooms at The Hague and at airports, but in institutions like NGOs and legal aid clinics that become instruments of, and conduits for, international law, most often acting in the form of human rights watchdogs (Darian-Smith 2013:263). Socio-economic rights and the politics of demand and desire that develop around the (lack of) implementation create a situation where state responsibility is transformed into NGO dependency. Socio-economic rights as a set of transformative ‘concessions’ are predicated on a putative lack, along with a proposed ‘solution’ to remedy it. The issues, or lack thereof, addressed by socio-economic rights – mostly access to resources and health – are in a country like South Africa, inherently political and historical issues. What these new jurisdictions of international law do, especially in the case of socio-economic rights, is exactly to assist in the moving of these expressly political concerns into the realm of social-legal litigation, a realm that is almost wholly sponsored by international funders and donors.

The proactive and reactive roles played by socio-economic rights are to ensure the continued implementation and realisation of these international law instruments. The NGO sector and socio-economic rights litigation act to ensure the implementation of this international human rights law. The reconstitution of expressly historical and political concerns into an arena of social legal litigation ensures the creation of a ‘new jurisdiction’ of international law, from the town hall community meeting where the rights of the Constitution are recited to NGO offices and university think tanks to, finally, the court. The almost exclusive reliance on the Constitution for remedying past injustices through law is then also a reliance on international law principles and

instruments to ensure the ‘transformation’ of the society. In the case of socio-economic rights and the *Mazibuko* case, this translates into an attempt to address a historical and political problem – access to water by a majority of the population – within the confines of human rights and international law, here *localised* in the form of the Constitution and section 27.

Socio-economic rights deal with issues relating to the access to resources sustaining human life that includes water, housing and health, to name but a few. In a settler-colonial territory like South Africa, access to these resources is a contestation not merely of a legal nature, but rather a historical-political one. Socio-economic rights in the South African Constitution signify entitlements to land and access to its resources, land and resources that were appropriated through colonial expansion. A legal edifice that developed simultaneously with the expansion of the European empire across the globe aided this colonial expansion. The link between socio-economic rights in the Constitution and international law also needs to be considered within the reading of international law as ‘the formal mechanism and institutional frame through which many colonial governments oppressed and controlled indigenous peoples’ (Darian-Smith 2013:254). The historical-political claim contained within the *Mazibuko* case is a claim that is, in no small part, related to the history of colonialism that constructed the South African society in a very particular way. The *Mazibuko* case – as most cases dealing with socio-economic rights – addresses a history that cannot merely be delimited to ‘a culture of non-payment’ brought about by the resistance against apartheid’ as suggested by the Constitutional Court (*Mazibuko and Others v The City of Johannesburg and Others* 2009:86, para 166); nor can we merely read it within the confines of the Constitution or international law. It is necessary, instead, to discuss the role that law plays in social formation with specific focus on the formation of international law and colonialism in Southern Africa. Considering this perspective on international law⁸ allows us to pose both a historical and political question in relation to the colonial and imperial nature of international law and also to show an inherent contradiction/paradox in its functioning: The creation of international law implicated

⁸ The view of international law is most often associated with approaches that can be loosely classified as either Third World Approaches to International Law (TWAIL) or postcolonial legal theory. Wa-Mutua (1997), Rajagopal (2003), Eslava and Pahuja (2013), and Darian-Smith (2013), can be roughly placed into this grouping.

these historical and political consequences. This will further allow us to place the *Mazibuko* case within the realm of the political instead of the social-juridical.

Global thinking

International(isation) of law / The nomos of the earth

The claims and entitlements related to socio-economic rights, as a localised form of international human rights, are secondary to the historical question of land appropriation and colonialism. The contestations around socio-economic rights have to be understood within both the relationship between socio-economic rights international law but also within international law's inherent relationship to colonialism land appropriation. Balakrishnan Rajagopal (2003:174) attempts to think through this relationship between human rights, land appropriation and colonialism, by questioning the accepted human rights historiography and discourse.

According to this specific historiography referred to by Rajagopal, international law and human rights are a set of universal rights bestowed on all by the nature of their birth. In this formulation, human rights act a protector against the state's encroachment on individual freedoms and entitlements. This forms part of what Marie-Bénédicte Dembour refers to as the 'natural school' of human rights:

For the great majority of them, human rights law embodies the human rights concept: the law exists in direct continuation with the transcendental existence of human rights ... most natural scholars regard the development of international human rights law in the last half-century as undeniable progress. For natural scholars, societies where human rights, by and large, are respected either already exist or can be created (Dembour 2010:5).

This historiography of human rights law also presents its origin as universal and as part of nature itself (Dembour 2015:6). It is a historiography that is also populated by scholastic philosophers' writings on divine law as well as the social contract theorists' conceptualisation of a set of individual and universal natural rights existing independently from the commonwealth (Douzinas 2007:19-26). Wa-Mutua (2002)

characterises this historiography as a ‘grand narrative’ that can be defined as consisting of the compound metaphor of *savages, victims, and saviours* (Wa-Mutua 2002). Consequently, human rights act as a saviour of citizens, the victims, under a savage state. Human rights are thus presented as a *deus ex machina* that at once turns citizens into victims, the state into a savage and the international human rights community into saviours (Wa-Mutua 2002:10-12). This is also the teleological human rights narrative that sees the post-Cold War era as a triumph for the ‘grand narrative’ (Wa-Mutua 2002:10) of international human rights law worldwide.

Echoing Wa-Mutua’s argument, Rajagopal considers the historiography of international human rights one that:

[I]s the result of benevolent responses by Euro-American States to the atrocities committed during the Second World War, through the framing of principles (such as Nuremberg principles), treaties and other legal documents (such as the International Bill of Rights and the various Conventions relating to human rights) and institutions (such as the United Nations Commission on Human Rights and its various bodies, the European Commission and Court on Human Rights, etc.) (Rajagopal 2003:174).

The only role that ‘Third World’ countries play in this network of treaties, conventions and international institutions, is that of a testing ground for international human rights movements and watchdogs.

One of the consequences, and perhaps aims, of this accepted historiography referenced by Rajagopal is that it frees any international human rights discourse and history from the history of colonialism (Rajagopal 2003:175). This attempt to dislocate international law from its colonial routes is based on the ‘idea that the “new” international law of human rights had decisively transcended the “old” international law of sovereignty which had been tainted by, among others, colonialism’, the reality is, however, that ‘far from being untainted by colonialism, human-rights discourse retains many elements which are directly descended from colonial ideology and practices’ (Rajagopal 2003:176).

The immediate question that emerges from this discussion is how, as Rajagopal claims, international human rights law re-inscribes elements of colonialism in its current practice and form? The answer to this, I believe, has to be sought in the relationship between law and ‘land appropriation’, in the creation of what is most commonly understood as the ‘modern world’ through an internationalisation of European law.

For Carl Schmitt, in his *The Nomos of the Earth in the international law of Jus Publicum Europaeum*, what is most commonly understood as international law is actually the internationalisation of a specific European legal genealogy through the process of land appropriation and division: ‘the basic event in the history of European international law [is] the land-appropriation of a new world’ (Schmitt [1950] 2006:83). European law was systemised and internationalised through a process of land appropriation. A new international world order and orientation was established in the course of the euphemistically so-called ‘Age of Discovery’. Schmitt explains that:

[F]rom the 16 to the 20th century, European international law considered Christian [read European] nations to be the creators and representatives of an order applicable to the whole earth. The term ‘European’ meant the normal status that set the standard for the non-European part of the earth. *Civilization* was synonymous with *European* civilization. In this sense, Europe was still the center of the earth. With the appearance of the ‘New World’, Europe became the Old World (Schmitt [1950] 2006:86).

It was during the colonial conquests – the Age of Discovery – that international law came into being as an extension of the *Jus Gentium Europaeum* to the rest of the globe through a series of land appropriations and divisions.

For Schmitt, the relationship between law as order and orientation, not merely rules and regulation, is based on a ‘terrestrial fundament’ of land appropriation ‘in which all law is rooted’ (Schmitt [1950] 2006:47). It is this ‘terrestrial fundament’ of land appropriations that Schmitt associates with the eponymous *nomos* of the earth:

Nomos comes from *nemein* – a [Greek] word that means both ‘to divide’ and ‘to pasture’. Thus, *nomos* is the immediate form in which the political and social order of a people [become] spatially visible ... the land-appropriation as well as the concrete order contained in it and following from it ... *Nomos* is the *measure* by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process (Schmitt [1950] 2006:70).

Schmitt’s understanding of *nomos* moves the concept of international law away from a purely legalistic interpretation and reroutes it as a political and historical problem related to the ordering and orientation of a society.

The relevance of Schmitt’s use of *nomos* is the fact that it ties all ideas of law and legality to a spatial orientation and to land: ‘Every ontological judgement derives from the land’ (Schmitt [1950] 2006:45). For Schmitt, any and all forms of law, politics and social order, come from a land appropriation that founds a new legal order and constitutes its possibilities. Schmitt ([1950] 2006:42) points out that: ‘In mythical language, the *earth* became known as the mother of law ... Law is bound to the earth and related to the earth’ and that ‘[i]n every case, land-appropriation, both internally and externally, is the primary legal title that underlies all subsequent law’ (Schmitt [1950] 2006:46). What directly follows from any land-appropriation is a process of division and distribution of the land that in turn also creates the conditions for the distinction between private and public law. Schmitt ([1950] 2006:47) points out that: ‘Land-appropriation thus is the archetype of a constitutive legal process externally (*vis-à-vis* other peoples) and internally (for the ordering of land and property within a country)’, emphasising the fact that ‘[n]ot only logically, but also historically, land appropriation precedes the order that follows from it’ (Schmitt [1950] 2006:48). International human rights law is logically and historically based on the original land appropriation of the territories outside of Europe and the ordering and orientation of these territories in the image of Europe; the creation of an identifiably European *nomos of the earth*. It was with the voyages of discovery and conquest that the ‘contours of the earth emerged as a real globe ... apprehensible as fact and measurable as space’ (Schmitt [1950] 2006:86); international law became the organiser of a new spatial order.

Vitoria's law

Land division after appropriation was an attempt by international law to establish a new spatial ordering based on a new '*global linear thinking*' (Schmitt [1950] 2006:87). This global linear thinking, in turn, emerged after the initial voyages of conquest during and after 1492 and brought into being a new concept of the globe as well as of geography:

No sooner had the first maps and globes been produced, and the first scientific concept of the true form of our planet and of the New World in the West been established, than the first global lines of division and distribution were drawn (Schmitt [1950] 2006:87-88).

These so-called *rayas* and *amity lines* divided the globe into geographical spaces and provided the form of ordering and orientating of the land appropriations of the 'New World'.

The voyages of conquest undertaken by European powers during the 15th century necessitated the geographical drawing of a global map and the consequent division of this map. The land appropriation during these voyages led to the consequent division of these new territories and the new concept of the globe. Pope Alexander VI gave the first intimation of a global line in his *Inter caetera divinae* that was published on 4 May 1493 and effectively divided the global map from the North Pole to the South Pole and assigned Spanish or Portuguese dominion over them (Schmitt [1950] 2006:88-89). Following Pope Alexander VI's dissection, there followed 3 processes of division: *rayas*, *amity lines*, and the split between the Western and Eastern Hemispheres. *Rayas* was a divisional line that 'presupposed that Christian peoples and princes had the right to be granted missionary mandate by the pope, on the basis of which they could pursue their missionary activities and, in due course, occupy non-Christian territories' (Schmitt [1950] 2006:91).

The work of 'primitive legal scholars' such as Francisco de Vitoria and Hugo de Grotius is populated by an attempt to legally theorise and justify this division and

global linear thinking.⁹ Anthony Anghie has argued that De Vitoria's *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*, two texts credited with being considered amongst the founding texts of international law, deal almost exclusively with colonialism and the extension and application of European public law to these territories (Anghie 2004:4). Anghie's main point on making these observations is that:

[I]nternational law, such as it existed in Vitoria's time, did not precede and thereby effortlessly resolve the problem of Spanish-Indian relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians (Anghie 2004:15).

Vitoria theorised a version of international law that was able to justify colonial expansion through a replacement of the dominant position of scholastic and medieval law with a strong secular law. During the Middle Ages (5th to 15th century), and more specifically the scholastic thought of St Thomas Aquinas, the concept of law was one where God handed down the rule through the eternal law. Aquinas' hierarchy of laws as laid out in his "Summa Theologica" – questions 91-97 – states that the eternal law is the highest form of law, in that all law is derived from eternal law; the eternal law that is designed by God (Aquinas [1485] 1948; Ward 1998:13). Natural law simply signifies a rational being's participation in eternal law. The relationship between *universal Law*, in the form of eternal and natural law, and *particular law*, human law, is one-sided: the *universal* frames, and completely regulates, the *particular*.

Vitoria's argument is, following from the above, that the Church and the Emperor, who gains his power from the relationship with Church and God, cannot claim universal jurisdiction for their rule since divine law is determined by belief in a specific divinity.¹⁰ For Vitoria, there is no overarching divine law that binds all under

⁹ See David Kennedy (1986), for a discussion and analysis of De Vitoria, Grotius, Francisco Suárez, and Alberico Gentili. He refers to the work by these authors as 'primitive legal scholarship' based on the display of 'a distinctive lexicon with its own textual characteristics and assumptions' (Kennedy 1986:3).

¹⁰ 'Now, in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or if there were, it would be void of effect, inasmuch as law presupposes jurisdiction. If, then, the Emperor had no jurisdiction over the world before the law, the law could not bind someone who was not previously subject to it' (De Vitoria quoted in Anghie 2004:19)

the authority of the Emperor but rather different forms of sovereignty determined by the limits of jurisdiction. The key to Vitoria's theory is his assertion that the Amerindians had a system of rules and reason that, although different from that of the Spanish, is based on rational decision-making regulated by a sovereign (Anghie 2004:20).¹¹ The *jus gentium* is used by Vitoria to refer to the type of law that is based on the human capacity of reason and rationality and binds all people and all nations together. The *jus gentium* was '[w]hat natural reason established among all nations' (Vitoria in Anghie 2004:20). Vitoria in essence replaces the 'universal system of divine law administered by the Pope [with] the universal natural law system of *jus gentium* whose rules may be ascertained by the use of reason' (Anghie 2004:20). What Vitoria in effect achieves with his theorisation *jus gentium* is not only a secularisation of the law of the human faculty of reason but also a globalisation of European law, Schmitt's *Jus Publicum Europaeum*.

The extension of the capacity to reason, determined by their own cultural norms and values, to the Amerindians by Vitoria brought a particular form of inter-European public law into force in the 'New World'. During the time in which Vitoria developed his theories, the powerful nations in Europe were Portugal and Spain and it were in effect the laws of these nations that served the form of an ideal universal law. Although the capacity to reason and rationalise is extended to the Amerindians by Vitoria, the ideal form of reason and rationality to be striven for was still a Spanish (European) one. The extension of the human faculty of rationality to the Amerindians then also required them to use this rationality to adopt a universal (read Spanish-European) form of law and order which, in turn, is based on the legal norms of the dominant sovereign power. It is for this reason that Enrique Dussel states his understanding of Vitoria's contributions as:

[T]he 'father' of judicial Modernity in the question of the European expansion, in the justification of the colonial world of the *world-system*, and therefore I will judge him, from this new perspective as the founder of

¹¹ '[The indigenous population of the Americas] are governed by a political system which has its own coherence, and possess the reason necessary, not only to create institutions, but to determine moral questions which are 'self-evident' to others' (Anghie 2004:20)

the *ius gentium europaeum* (as C. Schmitt understands it) (Dussel [2007] 2011:208).

Not only does Vitoria assist in establishing a Eurocentric form of global rationality through the reframing of the *jus gentium* as *Jus Publicum Europaeum* but he also established a justification for colonial expansion through the mercantilist argument of the right to *hospitality and reciprocity*.

The political-economic implication of Vitoria's insistence of equality between the Spanish and the Amerindians, based on a shared human faculty of rationality, is that Spanish incursions into the 'New World' are justified through the idea of reciprocity and hospitality (Anghie 2004:21). Vitoria's phrasing of this practical right is as follows:

If there are any things among the barbarians which are held in common both by their own people and by strangers (*hospitibus*), it is not lawful for the barbarians to prohibit the Spaniards from sharing and enjoying (*communicationem et participationem*) them (Vitoria's *De Indis, III*, quoted in Dussel [2007] 2011:209).

This universal law referred to by Vitoria had the practical implication, given the political relations at the time, of justifying Spanish incursion of raiding into the country. Furthermore, Vitoria asserted that in such a case where this right of hospitality and reciprocity, as established by the *jus gentium*, is not observed, 'the Spaniards may defend themselves, and do everything needful for their own safety ... and exercise other rights of war' (Vitoria's *De Indis, III*, quoted in Dussel [2007] 2011:210). Dussel observes that Vitoria's position related to international law is basically one of mercantilism where the encroaching sovereign has a legal right, backed by military power, to all that is available in the indigenous territory. Vitoria then not only justifies the Spanish presence in the Amerindian territories but also assists in establishing the *Jus Publicum Europaeum* as an international binding European law.

With Vitoria's theories and Spain's conquest of the Amerindian territory, the expansion of European power across the globe and the consequent globalisation was confirmed. Vitoria as a theorist of a *nomos of the earth* opens the path for several theorists to follow but perhaps more importantly inscribes a legal architecture with which to divide the globe. While Vitoria's theory is historically located in the wake of Pope Alexander VI's *Inter caetera divinae* and the drawing of the first global lines in the form of *rayas*, this was soon to be reinscribed at the Treaty of Cateau-Cambrésis and the establishment of *amity lines*.

Lawfare and the paradox of conquest

The Treaty of Cateau-Cambrésis in 1559 first gave rise to the concept of amity lines that 17th century jurors interpreted as a 'truce' between two nations. Amity lines effectively determined 'that treaties, peace and friendship applied only to Europe, to the Old World, to the area on [the European] side of the line' (Schmitt [1950] 2006:92). The amity lines 'ran along the equator or the Tropic of Cancer in the south, along a degree of longitude drawn in the Atlantic Ocean through the Canary Islands or the Azores in the west, or a combination of both' (Schmitt [1950] 2006:93) and it was the distinction of this geographical division that determined the 'New' and 'Old' world. Consequently, [t]his freedom meant that the line set aside an area where force could be used freely and ruthlessly' and that '[e]verything that occurred "beyond the line" [from the perspective of Europe] remained outside the legal, moral, and political values recognized on this side of the line (Schmitt [1950] 2006:94). The significance of these lines of division is that global linear thinking divided the globe into the 'Old' world and the 'New', with the 'Old' being associated with Europe's law and order, and the 'New' associated with the colonies, and lawlessness.

The division of the globe and global-linear thinking establishes, through inter-European treaties and decrees that are internationalised, a division between a lawless space and a space of law and order, the distinction being the applicability of European law. With the drawing of these divisions, conquest of the colonies became a legalised activity recognised through treaties and declarations between European nations. This division immediately creates a situation whereby everything that is not considered

European law is lawless. There is thus a process by which a specific, localised, form of European law becomes globalised through the application of this law through violence. The series of land appropriations through conquest was justified through a legal and political division of the globe post-1492. This is what Yves Winter also refers to, following Machiavelli, as the ‘paradox of conquest’, the fact that conquest does not only involve the ‘violent overthrow of an existing order but also the imposition of a new and stable order, it contains two contradictory elements: a vector of disruption and a vector of order’ (Winter 2011). The assertion that everything ‘beyond the line’ was lawless is based wholly on the establishment of the ‘Old’ world as a paragon for law, order and civilisation, and the globalisation of these into the ‘New’ world. It was this process of bringing law, the ‘vector of order’, to the colonies that also saw to the destruction, ‘the vector of disruption’, of all form of life that was not based on European conceptions of law, order and civilisation.

The mandate of expansion endowed upon themselves by the European powers gave rise to a logic of disruption and order, or rather destruction and reordering. Land appropriation and a consequent land division according to the precepts and conditions of European law and order saw to the globalisation of European order and orientation. The effort to conquer also had as its goal the transposition of the metropole to the colony, or the transformation of the colony into the metropole (Mudimbe 1988:44). This process of cultural, economic, and social reordering and reorientation requires law as a vector of order to create new signs and forms of law that can facilitate this transformation and create the institutions necessary for its protection; it also requires law as a ‘vector of disruption’ to effect the initial appropriation of land and disrupt, and erase, all forms of law and order that are not European and Christian in the ‘New’ world. The paradox of conquest is based on the use and implementation of a legal order that creates a series of signs and symbols in the attempt to erase and/or hide the violent process of its own conquest and establishment.

The conquest of the ‘New’ World was not merely related to the ‘empirical fact of military defeat and subjugation, but to a *legal* and *moral* claim, to a legal *title to rule*’

(Winter 2011).¹² The formation of the global linear thinking referenced by Schmitt is a form of establishing a world order through international law that divides the world into conqueror and conquered, appropriator and appropriated. In this regard, one can consider the history of colonialism and conquest as, amongst others, entailing a history of internationalising European law through appropriation and division.

This *nomos of the earth* is Schmitt's interpretation of the construction of the modern world order, or of modernity, that comes into being with the establishment of *global linear thinking*. Schmitt also allows us to consider the formation of the modern world order through a process of what Giorgio Agamben has termed an 'exclusive inclusion'. Accordingly, this is the relation of exception, 'the extreme form of relation by which something is included solely through its exclusion' (Agamben [1995] 1998:18), and also that, which 'expresses the originary formal structure of the juridical relation' (Agamben [1995] 1998:19). The division of the globe into the 'New' and 'Old' World, lawless and lawful, has the consequence of suspending all those peoples and spaces 'beyond the line' inhabiting the 'New' in a relationship of inclusive exclusion to the 'Old' world. European land appropriation and division during the voyages of conquests required a space that could be considered as a *terra nullius* in order for this continued appropriation to take place through mainly legally justified means.¹³ The emergence of global linear thinking excludes all those 'beyond the line' as not belonging to the law and order of Europe but includes them in the construction of law and order as a negative condition, they are thus 'included in the normal case precisely because [they do] not belong to it' (Agamben [1995] 1998:22). The 'New' World is created by the internationalisation of European law and kept in this suspended condition as the necessary exclusion that legitimises the existence of an international law.

¹² This specific conception of conquest is one that was popularised by Hugo De Grotius – a Dutch legal scholar whose writings would also have an influence in the VOC's implementation of water rights – in 1625 (Winter 2011).

¹³ See Pheko (1990) for a discussion of the concept of *terra nullius*. John Mckenzie's travelogue written as part of Sir Henry Warren's trek up from the Cape towards the then Bechuanaland protectorate reports the Tswana people's classification of English's use of written decrees and courts as 'lawfare'. (Mackenzie 1887:77-78; Comaroff 2001:306). Comaroff (2001:306) further describes lawfare as the effort by colonial and conquering powers to, through the use of law and other legal instruments, 'conquer and control indigenous peoples.' In the lexicon employed throughout this chapter, lawfare is the way in which land is appropriated (conquered) and then divided, ordered and orientated (controlled).

Conclusion: The historical present

The contemporary critiques of international law by Rajagopal (20013) and Wa-Mutua (1997; 2002) also regard this distinction and relationship of exclusive inclusion still actively functioning. Rajagopal's observation that international law cannot shed its colonial origins is a reference to this above-mentioned history of international law as well as its current functioning in Third World countries. Darian-Smith also points out how, in its present form, international law continues to perpetuate the 'asymmetrical power relations between Europeans and non-Europeans, "first" and "third" worlds' (Darian-Smith 2013:260) and that the creation of 'new jurisdictions' of international law through socio-economic rights strengthens, and entrenches an already strong international legal orthodoxy that 'provided the justification for domination and exploitation based on racial, ethnic, or religious inferiority' (Darian-Smith 2013:254). For the purposes of this specific study, however, it is necessary to consider in closer historical detail the exact functioning of this international law in Southern Africa, specifically on issues related to water law and the administrations of natural resources.

The history of South Africa is, not unlike other settler colonies, one that is intertwined with the history of conquest and colonisation. This history is a *spatial* history in that it is a history of appropriation and division, a division not only of the globe but also of the particular territories into a microcosm of this global division. In the *Mazibuko* case, this division is exemplified in the spatial division of South Africa into townships and suburbs, or affluent white areas and poor black areas. The installation of prepaid meters in the latter and credit meters in the former are part of a history that includes 'the legacy of apartheid urbanisation policy' (*Mazibuko and Others v The City of Johannesburg and Others* 2009:44, para 88). The specific historical, political and social, conditions related to Afrikaner nationalism have been extensively covered and for purposes of our argument it needs not be reconstructed here;¹⁴ it is specifically the urbanisation of black workers and the economic implications this held for white farmers and white urban workers that is of great importance to the *Mazibuko* case's

¹⁴ See for example the work done by Dunbar Moodie (1980) and Dan O'Meara (1983) dealing with the topic of Afrikaner Nationalism.

history of the present (cf. Beinart 2001:144; Terreblanche 2002:300; Thompson, L 2006:182).

Phiri is part of Soweto – South Western Townships – an area that was controlled and regulated by the Group Areas Act of 1950, a piece of legislation that prescribed specific urban zones for specific races to live in.¹⁵ The National Party attempted to create a new socio-economic situation with apartheid and insulate the so-called white nation. The mechanism used in this case was also predominantly the violence of law. The establishment of urban areas such as Soweto as a state policy revolved around creating isolated pockets of affluence and middle-class existence mostly reserved for whites. The reference to the white areas of affluence and poor black communities in the *Mazibuko* case thus very directly invokes this specific historical genealogy of geographical ordering and control.

The formation of Soweto, however, can be traced to an earlier occupation of land in the area. Soweto already started to form around 1934-1935 with the establishment of Pimville and Orlando respectively. It would just continue growing with the influx of workers from outside the city into the urban areas. In 1944, James Sofazonke Mpanza led a group of individuals onto municipal land on the outskirts of the then Johannesburg and established *Masakeng* – the place of sacks. The majority of the residents of *Masakeng* were employed on the Rand in some or other capacity for the mines (Bonner 1995:121). The National Party (NP) government attempted to deal with *Masakeng* and other such potential settlements through once again employing the violence of law in the form of the Bantu Authorities Act No. 68 of 1951 and the Bantu Laws Amendment Act No. 54 of 1952. These were just two pieces of legislation used by the NP government to entrench spatial division and to ensure that the most economically developed and agriculturally arable land was to be in the possession of the white, NP voting, minority.

¹⁵ This law followed closely the findings of the 1948 Fagan Commission Report (officially named the Native Laws Commission) that warned explicitly about the economic dangers for the white population as a result of unregulated black urbanisation (Suzman & Web 1948).

The history of the *Mazibuko* case in the present and the events surrounding it have to be understood within this history of spatial division and uneven resource allocation. More specifically, the case itself must be placed within a political and historical genealogy of water rights in the country. The Water Services Act 108 of 1997 and the National Water Act 36 of 1998 were promulgated in accordance with section 27 of the Constitution to enable the ‘access of water’ and was followed in 2001 by the Free Basic Water Implementation Strategy. These pieces of legislation were aimed to move towards a more equitable allocation of water resources and were thus a direct attempt to undo the legislation and legal ordering of the apartheid past. As important it is to realise this immediate historical context into which the *Mazibuko* case fits, it is just as important to realise that the history of the *Mazibuko* case is not limited to the arbitrary cut-off point of 1948, or the beginning of apartheid. This arbitrary cut-off point is exactly where the judgment of the court, as well as the commentators discussed in Chapter 1, *lack* a philosophical-historical contextualisation of the political.

CHAPTER 3: LIQUID CAPITALISM, FLUID IMPERIALISM

Introduction

The previous chapter located the *Mazibuko* case within a broader historical perspective, showing how the early formation of international law corresponded with colonialism and the land appropriation and division of the world by European powers. This process, encapsulated in Schmitt's term *Nomos of the Earth*, includes the division of the globe into the 'Old' and 'New' worlds and the claims by European powers to the ownership of the 'New' world. Schmitt's primary contention is that control over land is a fundamental element of any political formation and society. In Schmitt's etymological understanding, *nomos* entails three possible analyses and applications: '[T]he first meaning of *nemein* is *nehmen* [to take or to appropriate] ... The second meaning of *nemein* is *teilen* [to divide or distribute] ... The third meaning of *nemein* is *weiden* [pasturage]' (Schmitt 2006:326-327). There is a threefold process to *nomos* that includes appropriation, distribution and production. These three stages of the formation of any society encompass the gambit of regulatory and disciplinary processes and structures contained within any social formation: legal, economic, policing, cultural. These particular structures and processes – which have also found their correlates in the division of academic disciplines – all serve as markers for the appropriation and division of land and emanate from the political origin of a social formation, its *nomos*. It is Schmitt's contention that:

[I]n every stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, or social theory are these elementary questions: *Where and how was it appropriated? Where and how was it divided? Where and how was it produced?*' (Schmitt [1950] 2006:327-328).

Schmitt's three questions can assist to unravel the formation of the political and the social context relevant to the *Mazibuko* case. For Schmitt, to pose a question related to the political is to pose a question related to land appropriation, division, and (re)production. To place the *Mazibuko* case within the realm of the political would

require a historical understanding of the society in which the case *emerges* as a contestation.

The context from which the *Mazibuko* case *emerges* is one that is shaped by a colonial historical past. To describe and analyse this process of appropriation, division, and production, requires not only a historical understanding of colonialism but also an understanding of the history of water rights in Southern Africa. Since the *Mazibuko* case is framed by its historical past, the routes of the case must be disentangled to uncover the fault line(s) not only of the regulation and distribution of water, but more importantly the way the post-apartheid state constitutes itself. The *Mazibuko* case, and water rights more generally, are to be considered not merely as an individual and isolated incident but an integral part of the construction of the post-apartheid state. The inability of the court to make a decision that would amount to a radical transformation of the conditions of the applicants – conditions engendered by the history of colonialism – is not so much a fault of the specific court and the specific judges but rather represents a fault line in the post-apartheid state itself: the continued existence of a bifurcated state. This bifurcated state pervades the history of both colonialism and water rights in Southern Africa and contributes to creating systems of rule and governance.

Colonialisms and civil society

Land appropriation in the case of Southern Africa was a process rather than a singular event. It is therefore appropriate to refer to *land appropriations* rather than land appropriation, *colonialisms* instead of a singular colonialism. This is not to undermine the singularity of the colonial project/vision with regard to expansion and entrenchment of racist social structures but rather to allow for historical particularities and complexities to surface when considering the changing faces/phases of colonialism in Southern Africa. Different regimes of colonial rule also applied different legal and administrative technologies in order to establish and maintain their rule. It is important to understand these different technologies and their workings in order to better place the *Mazibuko* case within its historical and political genealogy.

In his book *Citizen and subject: contemporary Africa and the legacy of late colonialism*, Mahmood Mamdani considers the question of colonialism and colonialisms accounting for the formation of the colonial state:

The colonial state was in every instance a historical formation. Yet its structure everywhere came to share certain fundamental features. This was so because everywhere the organization and reorganization of the colonial state was a response to a central and overriding dilemma: the native question. Briefly put, how can a tiny and foreign minority rule over an indigenous majority? (Mamdani [1996] 2004:16).¹⁶

For Mamdani the native question was the key to analysing the formation of the colonial state, for the native question ‘was a dilemma that confronted every colonial power and a riddle that preoccupied the best of its minds’ (Mamdani [1996] 2004:1). The native question was integral to the formation of the state during colonialism, and to the promulgation of its policies and laws. According to Mamdani, the formation of the state during colonialism in Southern Africa can be understood through the formation of a colonial civil society and, contemporaneously, a bifurcated state (Mamdani [1996] 2004:13-21). I will discuss Mamdani’s formulation of the bifurcated state and different forms of colonial rule in detail in the following section, but first the question of Mamdani’s understanding of the concept of civil society needs to be considered.

Mamdani considers civil society as a political concept that finds one of its most enduring articulations in modern social theory in the work of GFW Hegel (Mamdani [1996] 2004:14). Mamdani relies largely on Hegel’s initial conceptualisation of civil society, one that rested on two interrelated movements or events: the separation of the market from politics and the centralisation of violence in the state through the social contract. Regarding the former, Mamdani ([1996] 2004:14) argues that ‘the spread of commodity relations diminished the weight of extra-economic coercion’ and in this process established the market, or economics, as a realm different from that of politics. The market has its own internal logic and mechanisms of control and coercion. Since the market established its own processes and ‘[w]ith an end to extra-

¹⁶ Originally published by Princeton University Press.

economic coercion, force ceased to be a direct arbiter in day-to-day life. Contractual relations among free and autonomous individuals were henceforth regulated by civil law' (Mamdani [1996] 2004:14). Mamdani points out that civil society, according to Hegel, is 'a meeting ground of contradictory interests ... the first explosive, the second integrative; the first in the arena of the market, the second of public opinion' (Mamdani [1996] 2004:14). Mamdani continues to trace this genealogy through Marx and Gramsci and their formulations of the concept of civil society two contradictory interests and their different formations.

While Marx conceives of civil society as 'the ensemble of relations embedded in the market', Gramsci considers civil society as 'not the market but public opinion and culture' (Mamdani [1996] 2004:14-15). For Mamdani, Gramsci establishes civil society as a relation between the state, economy and society, with its actors such as writers, activists, and 'organic intellectuals'. According to Mamdani, Gramsci's notion of civil society 'as public opinion and culture has been formulated simultaneously as analytical construct and programmatic agenda in Jürgen Habermas's work on the public sphere' (Mamdani [1996] 2004:15). Mamdani's references to Hegel, Marx, Gramsci, and Habermas amount to the claim that civil society has always been differentiated, as is the case with Habermas' public sphere, along societal fault lines: race, gender, class. More specifically, Mamdani contends that: 'The exclusion that defined the specificity of civil society under colonial rule was that of race' (Mamdani [1996] 2004:15). Mamdani relies for his critique of this conception of civil society – one which is not all that clear in his combination of different theorists – on a chapter by Geoff Eley entitled 'Nations, publics and political cultures: placing Habermas in the nineteenth century' (Eley 1993). Mamdani draws upon a genealogy of civil society here that acts more as a straw man than a thoroughly examined and philosophically formulated concept of civil society. His critique of civil society revolves around Habermas's formulation of civil society and the public sphere. He thus assumes that the genealogy of civil society traced by him – from Hegel to Marx to Gramsci – finds its final and full articulation in the work of Habermas.

Mamdani's theorisation of civil society has some shortcomings the analysis of which I will not undertake here for two reasons. Firstly, an explication of the concept of civil society would not contribute substantially to the main argument of this thesis. Secondly, I agree with Mamdani's point that:

[I]t is not possible to understand the nature of colonial power simply by focusing on the partial and exclusionary character of civil society. It requires, rather, coming to grips with the specific nature of power through which the population of subjects excluded from civil society was actually ruled (Mamdani [1996] 2004:15).

The point that civil society, however defined, is exclusionary and racialised under colonialism is not in itself a novel claim. The value of Mamdani's enquiry lies exactly in his analysis of 'the specific nature of power' that managed this exclusion and racialisation. It is for this reason that I will not employ the concept 'civil society', or its correlate 'political society' in this chapter. I will instead refer to the 'civic sphere' to indicate that space in which law, economy and the government, interact with those individuals constituted as citizens.

Rule/s

Direct rule

The bifurcated colonial state in Southern Africa created for those whom it governed a dual subjectivity. The colonial state was divided and double-faced: on the one hand, 'the state that governed a racially defined citizenry, was bounded by the rule of law and an associated regime of rights' (Mamdani [1996] 2004:19); while on the other hand, 'the state that ruled over subjects was a regime of extra-economic coercion and administratively driven justice' (Mamdani [1996] 2004:19). The colonial state produced a dual subjectivity in the *citizen* and the *subject*. The forms of rule that produced these subjectivities were diverse and Mamdani makes a distinction between two forms of governance that applied to the creation and management of these subjectivities: 'direct and indirect rule' (Mamdani [1997] 2004:16). These two forms of rule correspond to the different forms of colonial rule employed respectively by the Dutch and the British. Direct and indirect rule also correspond to the construction of the colonial societies and their governance by the Dutch and the

British. These complimentary, yet different, forms of governance – direct and indirect rule – also structured the modes of division and production related to the regulation, distribution, and use of water sources.

The colonial state formed during the Dutch control of the Cape was largely premised on slave labour (Magubane 1983:21-22; Schoeman 2012; 2013). Its civic sphere was likewise formed around the question of slavery, the early settlers’ answer to the ‘native question’. The fact that the colonial state in the Cape Colony was based on direct rule, and that it was formed around the institution of slavery, may be linked to its legal strategies. The Cape Colony was initially settled and ruled through the legal edifice of Roman-Dutch law.¹⁷ Robert Ross notes how:

The Roman-Dutch law of the Republic of the Netherlands, as selected and amended to first suit the requirements of an eastern trading empire and then of the port and colony of the Cape, was used to settle disputes and to maintain public order and the rights of property (Ross [1993] 1994:155).¹⁸

Some of the amendments and selections observed by Ross ([1993] 1994:156) included the *de facto* control of the legal formation of the Cape Colony, placed in the hands of a select few individuals; a civic and legal sphere formed around access to the courts and legal officials of the colony. The early form of rule and governance at the Cape can be termed a form of ‘centralised despotism’ and was a clear expression of a method of direct rule.

Direct rule is the form of colonial governance associated with early Dutch settler colonialism at the Cape of Good Hope. Mamdani notes that:

In the context of a settler capitalism [direct rule] involved a comprehensive sway of market institutions: the appropriation of land, the destruction of communal autonomy, and the defeat and the dispersion of tribal populations. In practice, direct rule meant the reintegration and

¹⁷ Roman-Dutch law is still used widely today in South African private and public law.

¹⁸ Wesleyan University Press in New England first published Ross’ text, but WITS University Press reproduced it a year later..

domination of natives in the institutional context of semiservile and semicapitalist agrarian relations (Mamdani [1996] 2004:17).

In the case of the Cape, this form of settler colonial capitalism was initially exemplified and represented by the Vereenigde Oost-Indische Compagnie (Dutch East India Company, henceforth the VOC). The VOC was a mercantilist company¹⁹ trading in the newly established colonies and was particularly interested in opening up a trade route from Europe to the Indian subcontinent. The VOC's journey to the Cape of Good Hope, under Jan Van Riebeeck's command, was undertaken in order to set up a refreshment station on the southern tip of Africa to facilitate trade between Europe and the Indian subcontinent.

Van Riebeeck and the Dutch settlers who arrived on the southern tip of Africa in 1652 were under the jurisdiction of the VOC. Realising that there was a shortage of labour and arable land at the VOC station, the *Heeren XVII* – translated as the 17 Lords of the company, or directors in modern parlance – granted Van Riebeeck permission to settle several *vrijburghers* – free citizens, or privateers – on the eastern part of Table Mountain (Guelke 1976:27). Guelke and Shell (1992:806) state that Van Riebeeck was convinced of a model of European agriculture of 'intensive farming, combining crops and livestock in a clearly proscribed area.' Van Riebeeck's model was premised on the apportionment of small patches of land and it required intensive labour. Van Riebeeck wrote to the *Heeren XVII* asking for slave labour to assist in setting up the provision station, along with fortifications (Guelke & Shell 1992:806). Following this intervention by Van Riebeeck, land was apportioned further into the interior adjacent to the water sources of the Eerste Rivier and Liesbeeck Rivier. The land surveyed and

¹⁹ 'During the mercantilist period (1500-1880) the economic orthodoxy among the emerging nation states of Europe was that a specific country could only become rich if it could ensure a large inflow of gold (through plunder or trade), and if it had better trade routes and more ships for colonial exploitation than its rival. The mercantilist mentality ... justified military conflict, plunder, and exploitation as methods of enrichment' (Terreblanche 2002:154); 'Mercantilist policies include the use of state power to build up industry, to obtain and to increase the surplus of exports over imports, and to accumulate stocks of precious metals. These stocks of precious metals, which could readily be turned into money, were believed to be important for national power ... Mercantilist economics, unlike ancient or medieval economics, was centred on the nation state, which was viewed as being in a competitive struggle with other nations' (Backhouse 2002:58).

proportioned for the *vrijburghers* by the VOC was arable land for varied farming, with access to almost unlimited water resources.²⁰ The *vrijburghers* were allocated 29-acre plots of land, a number of slaves, and were settled on this newly-apportioned land close to the Eerste Rivier and Liesbeeck Rivier.

This initial appropriation and division by the VOC and the settlement of the *vrijburghers* was one of the main catalysts for the war of resistance waged by the Khoikhoi. The land Van Riebeeck initially divided between the *vrijburghers* was a popular grazing spot for Khoikhoi pastoralists during certain times of the year. The system of transhumant pastoralism practiced by the Khoikhoi was based on mobility and the availability of water and rainfall (Guelke & Shell 1992:805). The VOC managed to forcefully assert its claim to the land inhabited and utilised by the Khoikhoi, against the latter's resistance. After the first war of resistance, Autshumao of the Goringkaikona was sent to Robben Island as a political prisoner and brought back in April 1660 to assist in peace negotiations (Terreblanche 2002:154). Although the Khoikhoi did not accept the just-ness of the land seizure, they were left with no option but to request permission from the settlers to access this land. Van Riebeeck's journal entry on the war and its aftermath is telling in this regard:

On being asked why they wished to come back to the Cape now and make peace, they had replied that the Cape was their birthplace and their own country with an abundance of fresh water, that their hearts continually hankered after it (Van Riebeeck quoted in Guelke & Shell 1992: 807).

Having seized the water sources and arable land that had formed the subsistence base of the Khoikhoi, Van Riebeeck issued a series of *plakkaten*²¹ to regulate and control the use of water. Initially the *plakkaten* were to regulate the allocation of water

²⁰ After Van Riebeeck left the Cape, Simon van der Stel was the commander ordered by the *Heeren XVII* to set forth expanding the existing Dutch settlement. The establishment of Stellenbosch was due to Van der Stel claiming ownership of another rich water source, namely the *Eerste Rivier*, and giving free-hold properties to newly arrived settlers (Guelke 1976).

²¹ A *plakkaten* is a decree or ordinance issued by 'the local Council of Policy, which was a governing body with legislative power, [and] could promulgate specific ordinances or decrees, known as *plakkaten*' (Groenewald 2007:61). *Plakkaten* were first attributed to Emperor Charles V of the Netherlands who started the tradition of pasting ordinances on public notice boards. The word *plakkaten* comes from the Dutch word for 'paste', *plak* (Goudsmit 2004:156).

upstream from the company gardens, the main water source for the VOC at the time. On 16 December 1661 Van Riebeeck, however, issued a *plakkaat* ordering a stop to all irrigation activities, so as to be able to channel the water to the corn mill of the VOC (Tewari 2009:696). With this intervention, the VOC claimed *dominium* over all the water resources available in the area, and henceforth proceeded to grant special entitlements for the use of the water resources for irrigation. Van Riebeeck allocated freehold land to certain *vrijburghers* close to water resources to encourage farming and agriculture; in a subsequent move, he issued a law prohibiting these *vrijburghers* to exercise their *riparian* use of the water resources.²² Van Riebeeck thus in effect seized control of the water resources for the VOC by way of seizing land from indigenous people.

Regarding water rights, the Roman Dutch law drew a distinction between private and public water; private water was designated for personal use, while the definition of public water included the possibility of communal usage. The legal principle at work here is *res omnium communes* – water belongs to all as a public resource. The VOC, however, took control of the water resources in the Cape in two phases, thus effectively changing the legal principle over a period of time. In the first phase, from 1655, a series of *plakkaten* was issued by Van Riebeeck to control water use in the Cape; the second phase was the declaration, in 1761, of *dominus fluminis*, meaning the exercise of *dominium* over water resources by a ruling body – the VOC – through issuing entitlements to water access (Tewari 2009:695). It is important to note that *dominus fluminis* does not indicate ownership of the water sources as such, but rather a *de facto* control of these resources through the ability to regulate the distribution and use of these resources. This form of state control over water resources persisted relatively unchanged until the 19th century – until colonial governance passed from the Dutch to the British administration. The dispossession of land during Dutch colonial rule was largely based on the powers to seize the water sources and the land on which this water runs. Access to water during this time was treated as a form of entitlement granted by the VOC to its employees. At the same time, access to water

²² Riparian rights refer to the use of a right that an owner of a specific piece of property has to use the water sources on that property in such a way that it does not subtract from the necessary usage of users downstream (Tewari 2009:701; Getzler 2004:1-3)

was denied to indigenous people of the area whose land had been alienated from them, thus severely curtailing their livelihoods. The indigenous population could only access water through an entitlement of use granted by a colonial land and slave owner. Legislated access to water resources was re-routed and re-divided by the VOC, the *de facto* state of the Cape Colony at that time.

The annexation of riparian lands and water resources was one of the factors that contributed to the first war of resistance; the annexation gave the VOC power over the livelihoods and existence of the indigenous transhumance pastoralists of the region. The form of appropriation and division favoured by Van Riebeeck and the VOC enabled the acquisition and establishment of private property by a growing group of white settler-colonial agriculturalists relying on black slave labour (Legassick 1974:258). The mandate of the VOC revolved round the establishment of a refreshment station as well as a trading outpost, stipulating *settlement* – through appropriation and division of land – in the territory occupied. The colonial state formed during the VOC control of the Cape was bifurcated between those who had direct access to the court and its legal technologies – the employees of the VOC and certain *vrijburghers* – and those who were subject to the law by the fact of being excluded from it – slaves and the indigenous people. The series of *plakkaten* issued by the VOC to regulate and legislate everything from slave labour to access to water resources put the company in a position of power over the Cape Colony and its inhabitants.

Indirect rule

The legal armature constructed by the VOC using mainly *plakkaten* changed substantially toward the end of the 18th century. During the Napoleonic wars in Europe the British annexed the Cape after the Battle of Muizenburg in order to secure the interests of the British East India Company after France attacked the Netherlands. The Colony changed hands once more to the Dutch in 1803, before the British finally took control in 1814 as a result of the Anglo-Dutch Treaty of the same year – a treaty that ceded colonies, owned by the Dutch prior to the outbreak of the Napoleonic wars, to the British (Terreblanche 2002:179). The regime changes in the Cape Colony

meant that Roman Dutch law was never completely replaced by the British common law system. The colonial regime changes resulted in what can be termed a process of legal miscegenation over the next 150 years (Tewari 2009:697). The main difference between the two legal and colonial regimes consisted of socio-political approaches and structures. The VOC had a strong mercantilist approach based on a process of elite class formation through access to privileged networks. Access to resources such as water and arable land in the colony were determined by the VOC through the granting of legal entitlements to the few who could access the legal system. The British in their turn were committed in their governance methods to a legal system of common law as well as an economic and political system of industrialism, characterised by the championing ‘of the alleged merits of economic liberalism, self-regulating markets, atomistic individualism, and the sanctity of property rights’ (Terreblanche 2002:180). The British also developed a form of *indirect rule* that differed from that of *direct rule* preferred by the VOC; this change in the preference of colonial rule also changed the form in which water provision and access to resources were managed and controlled.

The main and defining difference between the colonial and legal regimes of the Dutch and the British was their approach to the ‘native question’. In each case, this question arises with different points of reference and different specificities. In the case of British colonialism in Southern Africa, it was a tactic of indirect rule, implemented specifically in the Natal colony. While direct rule indicated ‘unmediated – centralized – despotism’ (Mamdani [1996] 2004:17), indirect rule signified a ‘mediated – decentralized – despotism’ (Mamdani [1996] 2004:17). Under indirect rule, ‘land remained a communal – “customary” – possession’ (Mamdani [1996] 2004:17) and ‘[t]he market was restricted to the products of labor, only marginally incorporating land or labor itself’ (Mamdani [1996] 2004:17). Indirect rule ‘signified a rural tribal authority. It was about incorporating natives into a state-enforced customary order’ (Mamdani [1996] 2004:18). In short, the main difference between direct and indirect rule is that direct rule seeks to incorporate both native and settler into one legal and civic sphere, while indirect rule creates the fissure between *citizen* and *subject* by formalising a bifurcated legal system: a modern European one for settlers and an imposed customary one for natives. The method of indirect rule was favoured by the

British and implemented as policy after the British annexation of the colony of Natal in 1843 (Mamdani [1996] 2004:62).

In the 2012 W.E.B. Du Bois lectures entitled *Define and rule: native as political identity*, Mamdani defines indirect rule as a ‘new form of colonial governmentality [that] was born in the mid-nineteenth-century crises of colonialism’ (Mamdani 2012:6). Mamdani recognises Sir Henry Maine as one of the leading theorists responding to anti-colonial uprisings in several of the English colonies between 1857 and 1865. Maine’s response to a failing form of colonial rule was the creation of the concept of the ‘native’, or a ‘theory of nativism:

[I]f the settler was modern, the native was not; if history defined the settler, geography defined the native; if legislation and sanction defined modern political society, habitual observance defined that of the native (Mamdani 2012:6).

Maine introduced not only the concept of ‘native’ but with it also the idea of difference and the management of this difference – ‘the holy cow of the modern study of society, just as it is central to modern statecraft’ (Mamdani 2012:3).

The articulation of indirect rule became official policy of the British in Southern Africa with the annexation of Basutoland in 1871. The adoption of indirect rule in Southern Africa was simultaneous with its implementation, albeit in different varieties, across the British colonies. When the British initially took control of the Cape, they were confronted by a legal and social system that was unified under the VOC command. The British inherited a direct rule system built on and around slavery and high yield agriculture. The indigenous population at the Cape at that time consisted of the Khoikhoi and San as well as slaves imported from the East (Mamdani 2004:65). The indigenous population would, however, change with the British conquest of the Xhosa-speaking inhabitants of the Eastern Cape and the consequent incorporation of these newly conquered British subjects into the colonial legal architecture. The conquest and incorporation of the Xhosa-speaking polities and people into a colonial legal and administrative fold was as a result of a century-long war of conquest and resistance. These wars are referred to in South African

historiography as the ‘Kaffir Wars’, from the first war (1779) close to the Fish River to the ninth war in the Transkei against Gcaleka and Ngqika (1878) (Mamdani [1996] 2004:66). Indirect rule was established in the course of the series of land appropriations and divisions during this time, as will be shown below.

While the British inherited a system of direct rule from the VOC, they applied the same principles in the course of the annexation of both the Xhosa-speaking polities, as well as the land of the Thembu polity west of the Great Kei in 1847 (Mamdani [1996] 2004:66). The governor of the Cape Colony, Sir George Grey, authorised this annexation of lands and immediately settled hundreds of white farmers in the area of the Great Kei, now renamed British Kaffraria. Situated between the newly apportioned farms were several native reserves that posed a challenge for governance as well as law and order; this challenge was neutralised by eroding the authority of indigenous rulers and transferring all tasks of legal and administrative order to local white magistrates (Mamdani [1996] 2004:66). The ‘appropriation of land, destruction of communal autonomy, and establishment of the “freedom” of the individual to become a wage worker’ (Mamdani [1996] 2004:66), formed the preconditions for the establishment of a settler colonial society governed by indirect rule.

The annexation by Sir George Grey was the first step in the establishment of indirect rule as official government policy (Mamdani [1996] 2004:70). The second phase was the settlement of white farms in the area of British Kaffraria. Although the official policy of the Cape Parliament was that there was a single system of law for both native and settlers, it soon emerged that indigenous authorities and legal practices were still in place (Mamdani [1996] 2004:66-67). The second phase of the establishment of indirect rule was thus a *de jure* acceptance of direct rule with a *de facto* practice of what would become indirect rule: ‘[O]fficial claims to a single legal order were belied by an informal tolerance of tribal law in peasant enclaves in the Cape proper’ (Mamdani [1996] 2004:70). The third and final phase was of the official adoption of indirect rule that directly followed the annexation of Basutoland in 1871. The direct consequence of this annexation was the official establishment of a dual legal system, one for citizens and one for subjects. This official adaptation of a dual

legal system completes the shift from direct rule, associated with Dutch colonialism in the Cape, to indirect rule as official British colonial policy in Southern Africa.

Mamdani argues that one of the reasons why the British opted to have a dual legal system was to effect more control over the African polities. The British governors opted to control tribal authorities by allowing them to remain autonomous under a system of indirect rule rather than integrating them under one legal order (Mamdani [1996] 2004:67). Another factor in the elaboration of indirect rule at this time was the discovery of diamonds and gold and the subsequent intensification of industrial mining. The type of labour needed by industrialists for large-scale mining and the type of labour needed by settler farmers for small-scale farming differed, and so did the social and political conditions of these forms of labour:

For whereas white farmers called for the breaking up of tribes to release labor that could be absorbed and controlled on settler farms, the mines required the retention of tribal reserves from which labor would be released when required and to which it could be returned when not needed (Mamdani [1996] 2004:68),

These differences in forms of rule also had an effect on the regulation of access to land and natural resources such as water. Since Van Riebeeck's first annexation of arable land to white settler farmers in the Cape and the establishment of industrial operations following the discovery of diamonds and gold, the access to, and routing of, water has been a fundamental concern of the colonial administration in Southern Africa. The access to water has been used in different ways to further the interest of the colonial regimes in Southern Africa. The VOC issued *plakkaten* and regulated water to serve the interests of the VOC at the Cape and strengthened its agricultural practices. The VOC followed a *dominus fluminis* principle that was in accordance with the mercantilist stance of the VOC as well as their approach of direct rule. The VOC's approach was to rule its colonial territory, and manage the resources of this territory, according to one, single-system of law approach. With the British this principle would, however, prove insufficient for the large-scale agricultural farming and, later, industrial mining operations that they required. Access to water and water

rights also changed along with the implementation of indirect rule. Water rights became more explicitly tied to property rights during the period of British indirect rule, with individual owners being able to determine use rights. The change from direct to indirect rule was not an immediate one and was brought about through a series of annexations and legal developments. This same gradual process also pertained to the change in the approach to water rights from the principle of *dominus fluminis* to that of the *riparian principle*. The differences in these two principles are also a feature of the differences in the overall form of rule and legal tradition used by the Dutch and the British. Both the Roman Dutch law and English Common Law had differences in their approaches to the question of access to water and land in Southern Africa.

Changing routes

Dominus fluminis and the riparian principle

The differing approaches between the Dutch and British colonial policies were largely based on the differing philosophical underpinnings of their legal systems. The difference between the two colonial governments' approaches to water law can also be found in the different legal systems and the understanding of resource management. The main difference between Roman-Dutch Law and English Common Law is that Roman-Dutch Law is principle based and proceeds by way of an application of these principles while English law is grounded in common law and proceeds mainly on the basis of precedents (*stare decisis*). In the Common law system, the law-giving force decides on cases driven by precedents and a writ system. With the establishment of the Supreme Court of the Cape Colony in 1828, and the consequent rise in the number of English and Scottish jurors, the British Common law system became the main legal-colonial paradigm (Kidd 2009:88). This new legal dispensation started to challenge the *dominus fluminis* principle through judgements and writs. The Supreme Court imputed to itself the sole authority to decide on water-related cases, leaving the local magistrates with very little power to decide water-related issues and disputes (Thompson, H 2006:36). Decisions related to water rights were to be dealt with by granting individual rights to users and owners (Tewari 2009:697). At the time, there were still a large number of settler subsistence farmers

and the development of water and irrigation infrastructure was largely based on individual initiatives. Two events were consequential for the law and practice of water rights regulation. The first was Sir John Craddock's proclamation, in 1813, which gave European settlers land tenure based on a quit-rent model (De Kiewiet 1941:40; Tewari 2009:701). This proclamation contributed to the adoption of a *riparian principle* of water rights in the Cape Colony:

The ownership of riparian land gave automatic access to water that flowed from the adjoining land. A riparian owner was given the right to use all the water of a public stream provided that it was used in a 'reasonable' manner ... the British system put a lot of trust in the hands of individuals and incentivised them to make a transition to the riparian system of water rights (Tewari 2009:701).

The second important event in the change of water access regulation towards the riparian principle was the court case of *Retief v Louw* in 1856. The legal decisions related to water access during this time were no doubt influenced by, and influenced, the mode of rule and governance adopted by Grey following the conquest of the Xhosa-speaking polities. The case dealt with the rights of water users on adjacent farms and those further downstream; a downstream user was litigating against an upstream user for unreasonable water use. The downstream user was deprived of drinking water and water for basic sustenance irrigation (Kidd 2009:88; Tewari 2009:697). In his *ratio decidendi*, presiding officer Judge Bell dismissed the *dominus fluminis* principle, opting rather for a doctrine of riparian rights adopted from the Anglo-American legal tradition (Kidd 2009:88; Tewari 2009:697). The two legal principles involved – the *riparian* and the *dominus fluminis* principle – had sown confusion in water rights until the 1876 case of *Hough v Van der Merwe* in which the *riparian* principle of water rights was unequivocally adopted (Thompson, H 2006:38; Kidd 2009:88-89; Tewari 2009:698). In the *Hough v Van der Merwe* case, the Supreme Court granted riparian owners the use-rights to public rivers and streams, thereby dissolving the *dominus fluminis* principle established by the Dutch. These cases entrenched the distinction between private and public water resources, as well as the distinction between ordinary and extraordinary use. Water running through a riparian property could henceforth be used provided that such use did not negatively

affect the downstream user (Kidd 2009:88). These legal decisions reversed the Roman-Dutch principle of water as *res communis omnium* and turned water into a closed commons regulated by individual rights tied to land ownership (Movik 2011:20). This legal change in water regulation signals the implementation of a British-colonial system of indirect rule as a form of governance distinct from that of the Dutch.

The change in the approach to water rights closely followed, or resembled, a change in settler agricultural production: from subsistence farming in the 17th and 18th centuries to larger-scale industrial operations in the 19th and 20th centuries. The initially dominant model of subsistence farming changed with the expansion of the settler population inland, along with the contestations surrounding the exploitation of mineral and other resources. Two separate, though not completely unrelated, events contributing to the changing production techniques were the legal abolition of slavery in the Cape and the discovery of precious metals in the north of the country. The British abolition of the slave trade in 1834 brought political and economic destabilisation to the *vrijburghers* and other settlers at the Cape – now referred to as Afrikaners (see Moodie 1980). Some Afrikaners responded by embarking on the large-scale move inland known as the ‘Groot Trek’ from around 1835. This inland move informs the establishment of the so-called Boer Republics, the two most influential of these being the Zuid-Afrikaanse Republiek (ZAR) established in 1852 and the Orange Free State established in 1854. Diamonds were initially discovered on land adjacent to the both the Orange Free State and the ZAR, which was swiftly annexed by the British. The discovery of diamonds gave impetus to industrialisation and a greater influx of international capital (Legassick 1974:260). While the early Dutch and British water laws served a smaller subsistence farming settler population, the discovery of diamonds in Kimberley in 1867 rapidly changed the economic and social organisation of the settlers and required more industrialised farming methods (Terreblanche 2002:9, 228). This discovery impelled water laws to include agricultural and mining interests (Tewari 2009:700). This could be one of the reasons why the doctrine of water rights through *prior appropriation*, a more appropriate model for dry and arid regions, was not applied in the Cape Colony; where irrigators would prefer the prior appropriation due to the high level of certainty it offered the

bearer of the rights, it would not have allowed for the easy and swift entrance of industry into Southern Africa after the discovery of diamonds (Movik 2011:21).

With the later British riparian law, water use became tied up with land ownership. Access to water was wholly determined by access to land adjacent to the water resource. With the discovery of diamonds, a young colonialist from England and future Prime Minister of the Cape Colony, Cecil John Rhodes, established De Beers Consolidated – with the assistance of Rothschild money – to effectively take ownership and control of the land and resources needed to mine diamonds (Legassick 1974:260). For the purpose of mining, the riparian principle was ideal, since mining requires access to large amounts of water resources.²³

Apart from water resources and land, diamond mining also required a very large workforce that would be able to effectively work on the mines 24 hours a day (Webster 1983:9). In response to the need for a large labour force, as well as the pressure on Britain to consolidate its colonies during the ‘scramble for Africa’, British Colonial Secretary Lord Carnarvon proposed a ‘federation of South African colonies and republics under British sovereignty’ (Terreblanche 2002:242). This was mainly motivated by the British aim to control as much African labour as possible to make the mines as profitable as possible. Lord Carnarvon’s proposal was realised in the annexation of the ZAR in 1877. It was clear by now that the mining companies’ need for a numerous and growing labour force was envisaged to be met through a system of extra-economic coercion at a stage when slavery had been abolished. The riparian principle by now entailed precepts of indirect rule and smaller-scale African farmers were forced into migrant labour, since land ownership and individual rights to water to sustain farming had become severely curtailed. At the same time (1870s), the British sought to suppress resistance against their expansion of the frontier of the Eastern Cape as well as Natal. Another costly battle in the southern colony was imponderable for the British – not least because of the recession experienced in Britain during the 1870s (Terreblanche 2002:243). This was one of the reasons why

²³ See Getzler (2004) for an exploration of the relationship between the riparian principle and industrialization.

the British ceded their annexation and in 1881 signed the Pretoria Convention with the two Boer Republics.

The Pretoria Convention ensured that the Boer Republics would regain their self-government after the British annexation, but would still be subject to suzerainty. The British did, however, effectively pursue one of the prime goals of the 1877 annexation: cheap, forced, African labour. In terms of Article 21 of the Pretoria Convention of 1881 (Kruger, Pretorius & Joubert 1881), a commission was established to investigate African land tenure. The commission's recommendation included a provision stipulating that Africans may *purchase* land freely if the transfer of that land was registered in the name of a Native Location Commission. This meant that indigenous people *were allowed to* purchase the land that they already owned and occupied, but the Native Location Commission would hold the ownership of the land centrally. This dispensation debarred Africans living on and working the land from generating an income off the land to pay the taxes and levies imposed, thus forcing them to seek employment on the mines. Those who did purchase the land had no right of access to riparian water on the land because they were not the legal owners; they still had to apply for entitlements to the Native Location Commission. The implementation of these legal provisions effectively entrenched a dual legal system with decentralised colonial control over the indigenous population. The riparian principle at this stage contributed to alienating the indigenous population from general free access to water resources.

The discovery of gold in the Witwatersrand area in 1886, six years after the signing of the Pretoria Convention, provided a strong impetus for the British to consolidate their different interests in the Southern African colony. Just after the discovery of gold on the Reef, there was a steady influx of approximately 125 million pounds of foreign capital into the colony through companies like Consolidated Gold Fields and the steering body of the Chamber of Mines (Legassick 1974:260). British colonial policies contributed to ensure a labour influx for the mining sector as the adoption of indirect rule had effectively created large labour reserves out of areas inhabited by indigenous people. There was, however, a competing interest from the side of the

Boers in the ZAR and Orange Free State, as they, too, clamoured for cheap African labour – to work on the Boer farms and industry.

At the end of the ‘long 19th century’, British imperialism and a growing Afrikaner nationalism acted to annex and occupy most of the arable land left in possession of indigenous people. Drawing on the previous experiences of colonial Cape governors, and on the history of native administration in the 19th century more generally, three major legal mechanisms were promulgated to entrench land dispossession and force economically active persons into servile labour. These legal mechanisms were the *Glen Grey Act* No. 25 of 1894, the *Pass Laws Act* No. 31 of 1896, and the *Native Land Act* No. 27 of 1913 (Webster 1983:9). Of these three acts, the Glen Grey Act and the Native Land Act had the most direct impact on the history of water rights and legislation.

When the *Glen Grey Act* No. 25 of 1894 was passed, Cecil John Rhodes declared its stated goal as one of removing ‘[n]atives from that life of sloth and laziness, teaching them the *dignity of labour*’ (Rhodes quoted in Webster 1984:10). This Act in effect established the first official influx-control policies, and the first ‘homeland’, by turning the Glen Grey area into a labour reserve, while creating a disenfranchised class, forced to work on the mines in order to pay the taxes imposed by the newly-enforced tax laws. This disenfranchised labouring class was allocated taxable freehold in the labour reserves identified by the Glen Grey Act, thus ruling out land ownership and property close to industry (De Kiewiet 1941:142).²⁴ The overall shift to an industrial economy entailed the tendency for natural resources like water to be employed for the development and the expansion of industry as the riparian principle favoured the interest of the land-owning and industry-owning British and Afrikaner magnates. With water use and access to water being tied to land ownership, indigenous people were excluded from access to water resources unless landowners granted individual entitlements.

²⁴ It is worth mentioning here that the *Glen Grey Act* No. 25 of 1894 is considered by early liberal historiography of South Africa, as in the case of De Kiewiet, an act of British patronage aimed to assist the indigenous conquered people of the colony. The reason for the reference to De Kiewiet here is the detailed information contained in his text on the economic and political implications of the Glen Grey Act.

The expansion of British imperialism from the Cape Colony northward into the interior went hand in hand with the adoption of the riparian principle of water rights on a larger scale.²⁵ This expansion attained geopolitical effect with the unification of the British and Boer colonies after the signing of the South African Act of 1909 (Beinart 2001:79). The South African Act was a result of a convention between the British colonies (Cape and Natal Colony) and the Boer Republics (Orange Free State and ZAR), with the Constitution of the new Union the result of an agreement reached between the British and the Boer Republics in May 1909 (Thompson, L 2006:146). The Union of South Africa was declared on 31 May 1910 as a unitary state under parliamentary sovereignty (Thompson, L 2006:146). The first important piece of legislation related to water, adopted by the new Union's parliament, was the *Irrigation and Conservation of Waters Act* No. 8 of 1912 (Kidd 2009:89). This Act confirmed the riparian doctrine as the guiding principle of water rights in the newly formed Union, thus confirming the convergence of access to water and access to land. The *Native Land Act* No. 27 of 1913 was signed into law, a year after the *Irrigation and Conservation of Waters Act* was promulgated. The Native Land Act made it impossible for Africans to purchase land outside of the allocated reserves and other designated areas, echoing and confirming section 21 of the Pretoria Convention (Terreblanche 2002:12; Thompson, L 2006:159). This piece of legislation also assisted in tightening the management of the migrant labour compounds, or *kampongs*, installed by the Chamber of Mines and administered on a basis of indirect rule through local Commissioners of Native Affairs (Terreblanche 2002:12; Movik 2012:79).

Along with the *Glen Grey Act*, the *Native Land Act* effectively dispossessed indigenous people from the land and turned a large number of economically active black South African men into migrant labourers; and it turned those not employed in white-owned agriculture and industry into 'surplus people'. These two legal documents did not only make African land ownership effectively illegal; along with the riparian principle, they also alienated African landholders from any water sources if not mediated by a white landowner. This made any type of independent subsistence

²⁵ The *Volksraad* governments in the Boer republics also adopted the British riparian water principle in the republics (Kidd 2009:89).

farming and production by peasants practically impossible, since access to water resources would be dependent on the entitlements given by the landowner.²⁶ The principle of indirect rule thus went hand in glove with the riparian principle. The riparian principle largely served private property reserved for whites, and the development of industry, in the newly-formed South Africa; but it would run into its own *limits* due to social and political changes brought about by the apartheid government of the National Party (NP).

Differing rule

In returning to the question of indirect rule more specifically and to his 2013 Du Bois lectures, Mamdani's aim is to understand 'indirect rule as a form of what Michel Foucault called "governmentality"' (Mamdani 2012:43). Mamdani bases this statement on the fact, stated earlier, that indirect rule 'was about the understanding and management of difference' (Mamdani 2012:43). Although there is much to be made of this initial statement and short rationalisation, it is unfortunately left as a mere idea and not developed in much detail in the remainder of Mamdani's lectures focusing as they do, on the differential constructions of native and settler identity through the policy and philosophy of 'nativism' and 'indirect rule'. Considering indirect rule as a form of governmentality can, however, allow us to understand the relationship between indirect rule and the riparian principle discussed above, as well as the National Party's (NP) choice of legal principles related to the regulation and management of water. The need to extend the conceptual framework of indirect rule emerges in considering the series of political technologies employed by the colonial government(s) to regulate access to natural resources and to 'manage' populations in the process. To understand this exigency, we would need to first consider what Michel Foucault understood as governmentality with a view to make it intersect with Mamdani's 's concept of indirect rule.

²⁶ This argument can be corroborated when considering that Africans were banned from using tractors in 1936; in 1954 there were also heavy restrictions placed on irrigation (Movik 2011:79). Notwithstanding these restrictions, there was a considerable amount of sharecropping and small-hold farming going on especially in the Transvaal region during this time. See Van Onselen (1997) for a social history of this period.

Michel Foucault ([1978] 2007) develops the concept of governmentality for the first time in his 1978 lecture on *Security, territory, population*.²⁷ This lecture is part of a series of lectures Foucault presented at the *Collège de France* to accord with his appointment to the professorial chair of Philosophy and History at the same institution. These *Collège de France* lectures would coincide with the publication of the first volume of Foucault's *History of sexuality* ([1976] 1978). Taken as a whole, these lectures and the publication constitute the most systematic development of the concepts of biopolitics, biopower, and governmentality, respectively. Regarding governmentality, Foucault puts forth a preliminary definition in his February-1978 lecture. According to Foucault, governmentality can be defined as the:

[E]nsemble formed by institutions, procedures, analysis and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument (Foucault [1978] 2007:108).

Foucault further adds that governmentality refers to a specific type of power 'which has led to the development of a series of specific governmental apparatuses (*appareils*) on the one hand, [and on the other] to the development of a series of knowledges (*savoirs*)' (Foucault [1978] 2007:108). Governmentality must be understood as a set of apparatuses of governmental control that replace the state of justice with a process that Foucault identifies as the 'governmentalization of the state' (Foucault [1978] 2007:109).

The governmentalization of the state corresponds to a shift in power that can be understood as 'the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death' (Foucault [1976] 1978:138). The governmental apparatuses of control develop in accordance with the need to regulate the biological capacities of human life and become a 'state of population' (Foucault [1976] 1978:138). The replacement of the state of justice with that of the governmentalization of the state is related to the changing nature of power and its corollaries. Where power was initially associated with sovereign power – 'the right to

²⁷ For the translation of Foucault's *Collège de France* lectures I rely on the collection and translation by Graham Burchell.

decide life or death’ (Foucault [1976] 1978:135) – the modern incarnation of this power is dubbed by Foucault as biopower – ‘a power that exerts a positive influence on life, that endeavours to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations’ (Foucault [1976] 1978:137). Biopower becomes a form of power that aims at the disciplining and normalisation of the individual: ‘[T]he set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power’ (Foucault [1978] 2007:1). Biopower is aimed not so much at the species, but at the individual. It is a power aimed at the body not to extinguish the body but rather to regulate its development and its definition.

Foucault shows how forms of power in political modernity do not necessarily rely on classical juridical notions of power. According to Agamben, in Foucault’s work there is a:

[D]ecisive abandonment of the traditional approach to the problem of power, which is based on juridico-institutional model ... in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects’ very bodies and forms of life’ (Agamben [1995] 1998:5).

Agamben further notes that Foucault shows the interrelation between *political techniques* and *technologies of the self*, integrating ‘techniques of subjective individualization with procedures of objective totalization,’ (Agamben [1995] 1998:5). Foucault’s analysis presents us with a way to analyse the working of power through considering both its institutional mechanisms and the way in which it permeates individual bodies.

The link between biopower and governmentality comes into play in the *Mazibuko* case in several instances. While direct rule and indirect rule can help us understand the tactics and technologies employed by different colonial regimes in South Africa, they need to be supplemented by considering the workings of resource management and access to resources during apartheid more specifically. While I do agree in principle with Mamdani’s statement that ‘indirect rule [can be considered] as a form of what Michel Foucault called “governmentality”’ (Mamdani 2012:43), I would want

to add the consideration that this emerges only after indirect rule has run up against its own limits. While indirect rule is always concerned with biopolitical management – as all colonial regimes are – it does not develop the technologies of power Foucault associates with governmentality until the 1930s and 1940s. One of the catalysts of the new technologies of power is the growing native urban population and the National Party government’s attempt to control and regulate the movement of this new urban population in every aspect. A new form of power was required that would combine the precepts of direct and indirect rule into a form of governmentality that could manage the biological necessities and movements of the individual. This was initially achieved through influx-control measures such as the pass laws and the settlement of ‘native urban areas’, or what is commonly known today as ‘townships’.

When the National Party won the election in 1948, it did so, based on a strategy that promised to manage a growing black urbanisation and secure white economic participation. The National Party proposed apartheid as a form of rule that could control this growing black urban population and allay the fears of white property owners. This was specifically acute in Johannesburg and the rapid formation of Soweto (cf. Bonner & Segal 1998). It was clear that a new strategy was required to deal with black urbanisation as the previous strategies and policies were clearly inadequate. The perceived danger of urbanisation was already established in a report issued by the Stallard Commission in 1922.²⁸ In the report, it warns of the dangers of ‘miscegenation’ between white and black urban dwellers and proposed an urban policy that held that:

The Native should only be allowed to enter urban areas, which are essentially the white man’s creation, when he is willing to enter and to minister to the needs of the white man, and should depart when he ceases so to minister (quoted in Mamdani [1996] 2004:93).

The commission also proposed the establishment of a Native Affairs Department (NAD) that could oversee and regulate a segregated urban residential area (Mamdani [1996] 2004:93) The Stallard Commission’s proposals were formalised with the

²⁸ The Stallard Commission drew its inspiration and mandate from the Native Reserve Location Act No. 40 of 1902.

Native Urban Areas Act No. 20 of 1923 and again confirmed with the *Bantu Authorities Act* No. 68 of 1951 by the apartheid government of the National Party.

The 1948 election manifesto of the National Party was based on a report produced by the Sauer Commission in 1947 that uncannily resembled the Stallard Commission's report (Mamdani [1996] 2004:99). The Sauer Commission report proposed a pass law system that would control African urbanisation with the goal to reverse it completely, in effect establishing a colonial urban area and a native reserve area(s). Although the National Party used this as an election strategy, its shortcomings soon became apparent, motivating the implementation of a number of recommendations of the more liberal Fagan Commission Report released in the same year as the Sauer Commission report (Mamdani [1996] 2004:99). The National Party's strategy was to establish reserves, or 'homelands', where native authority was to be administered through a form of autonomous customary law amended by the National Party government in the *Bantu Laws Amendment Act* No.54 of 1952 and overseen by a Native Authority established by the *Bantu Authorities Act* No. 68 of 1951 (Mamdani [1996] 2004:101). Along with the native reserves, the apartheid government also established segregated urban areas overseen by the Native Affairs Department (NAD). Henceforth customary law would pertain to rural 'natives', and civil law would pertain to urban 'settlers' while Africans on labour contracts residing in urban areas were to be segregated and administered and managed by the NAD.

This strategy and election manifesto of the National Party government set out to control a native urban population that doubled between 1939 and 1952 (Mamdani [1996] 2004:97). Although the National Party adopted several techniques and legal routes that were established much earlier by the policy of British indirect rule, a strict adherence to the riparian principle became out-dated for the social and economic needs of the apartheid government. The *Water and Services Act* No. 54 of 1952 was signed into law, replacing the earlier *Irrigation and Conservation of Waters Act* No. 8 of 1912 (Kidd 2009:90). The *Water Act* No. 54 of 1956 placed final control of water resource allocation with the state – thus confirming the *dominus fluminis* principle once again – but did not completely overturn the riparian principle. As a result, the

riparian principle was retained in respect of current landowners and thus to the explicit exclusion of the majority indigenous population. By having executive authority on water use, the state was able to control and divert water to areas declared ‘Government Water Control Areas’, that is, areas deemed to be in ‘national’ and ‘public’ interest (Tewari 2009:701; Movik 2011:21). Thus, a distinction was made in the *Water and Services Act* No. 54 of 1952 between public and private water, with access to private water staying in the hands of riparian owners, and control of public water in the hands of the state. This meant that areas on the outskirts of Johannesburg, such as Soweto, could be supplied with water without water resources being tied to a freehold or private property.²⁹

Up until the *Water and Services Act* No. 54 of 1952, the political technologies employed to regulate access to water were almost exclusively legal mechanisms. The *Glen Grey Act* No. 25 of 1894, the *Pass Laws Act* No. 31 of 1896 and the *Native Land Act* No. 27 of 1912, were all political technologies used with the explicit aim of controlling and directing the modes and relations of production and distribution, the residence and flows of persons, goods, services and money. Combined with the growing need for labour in industry and on farms, these legal mechanisms effectively closed off the possibility of survival outside of the formalised colonial economy. Through the imposition of legal strictures and taxes, independent subsistence and peasant farming was thwarted and communal living displaced. However, the establishment of townships on the periphery of colonial urban centres presented new challenges to the legal order, rendering legalistic regulations and sanctions insufficient in ‘managing’ differentially defined populations. The newly constructed native urban areas south-west of Johannesburg were brought within the ambit of municipal governance through the establishment of the NAD as well as through the extension of municipal services and infrastructure.

The circumstances that gave rise to the adoption of the *Water and Services Act* No. 54 of 1952 and the establishment of large-scale municipal infrastructure can be partly

²⁹ The fact that Johannesburg is not built around a large water source made the necessity to regulate and reroute water resources vital for the development of the city and its surroundings (Turton, Schultz, Buckle, Kgomongoe, Malungani, & Drackner 2006).

found in the formation of Soweto and the Masakeng movement.³⁰ The National Party's election manifesto was largely based on a promise to its white electorate to control the influx of urban natives and to protect the interest of a white working class. When the National Party came into power in 1948:

[T]hey cleared black freehold townships and other areas of black settlement in the inner city and peri-urban areas; and they established tighter control over the municipal locations which they intended to be the sole place of residence of urban Africans (Bonner & Segal 1998:28).

The apartheid government's new policy had an immediate effect on areas like Orlando and the newly established Moroka, both of which had massive overpopulation and no system of municipal services such as water or electricity. By 1954 the National Party government started with its 'site-and-service' program (Bonner & Segal 1998:29). Consequently, all families residing in Moroka and Orlando 'were required to move to sites measuring 12 metres by 22 metres and serviced by a bucket latrine on every plot, with a water outlet every 500 metres' (Bonner & Seal 1998:29). After two years, several townships were established on this model, with Phiri Township being settled in 1957.

A growing native urban population combined with the need to control and regulate movement and access to resources necessitated a situation where basic services had to be made available to these new urban residents. Commenting on the establishment of municipal infrastructure like water pipes and electricity, Antina von Schnitzler notes that: 'Historically, municipal services, and the relationship between state and citizen they construct, were linked to the rise of "population" as an administrative category of governance' (Von Schnitzler 2008:908). Von Schnitzler argues that the development of municipal services must be understood with regard to rising population numbers and the need to control and regulate this population. Infrastructure as an administrative category of governance would, like all forms of governance in the colonies, be skewed towards the biopolitical needs of the white colonial population. Instead of being merely a form of governance, infrastructure in the colonies also became a form of control and management of the native population. It became one

³⁰ This was discussed in Chapter 2 under 'The historical present'.

way of addressing the ‘native question’ in the 21st century. The development of infrastructure in the colonial territories is for Von Schnitzler also an example of a relationship of extraction:

[I]nfrastructure became both a means to extract resources and a form of biopolitics constituting colonial territories as unified, governable spaces ... infrastructure in the colonies was primarily linked to the process of extraction and a biopolitics closely bound up with the project of colonial domination (Von Schnitzler 2008:908-909).

Von Schnitzler’s observation above can be supported by considering the importance for the apartheid government of having an influx of cheap labour close to the urban areas. It was also the case in which almost all the inhabitants of this newly formed township were employed on the Rand (Bonner 1995:121). This was as a result of the growing industrial development of not only the goldmines but also large industries such as the Electricity Supply Commission (ESKOM) and the Iron and Steel Corporation of South Africa (ISCOR).³¹

In 1956, Sir Ernest Oppenheimer – one of the most well-established gold mining magnates in the world at that time as head of Anglo-American Corporation – arranged for a loan to the Johannesburg City Council (JCC) of R6 million to develop Soweto (Bonner & Segal 1998:29). The link between the creation of the township of Soweto and the need of the mining industry to keep a steady influx of cheap labour is clearly discernible in this act by Oppenheimer and the Johannesburg Mining Houses. In the same year, 1956, a growing awareness of the need for updated water management strategies saw the establishment of the Department of Water Affairs to replace the Department of Irrigation (Tempelhoff 2004:82). That the establishment of the new Department of Water Affairs specifically focused on the management of water consumption indicates the changing needs related to the control and management of water resources.

The extension of basic services through infrastructural development can ‘be seen as the material embodiment of the apartheid state’s varying strategies for governing the

³¹These industries also required a much closer control of water supply and consumption by the government and the Rand Water Board bought-in water supply projects, such as the Vaal Dam, with the Department of Irrigation (Tempelhoff 2004:82).

townships (Von Schnitzler 2008:909).³² The same infrastructure became for most residents, however, one of a limited range of possibilities of engaging with, and getting access to, the state. The political and historical question of access to basic resources was moved to the realm of biopolitical governmentality under the guise of infrastructure development and maintenance. The strategy by the National Party was thus one that combined previous legal principles and legislation in order to ‘manage’ a growing urban population. For this task, neither a clear form of direct rule nor a clear form of indirect rule would be sufficient; at stake were not merely differential access to the law and the civic sphere, but differentially structured biopolitical interventions. The combination of legal mechanisms with technologies such as urban planning and infrastructure development enabled the National Party government to adopt a hybrid form of rule that, although clearly distinguishable on its own grounds, construct its edifice from the archives of colonial rule in Southern Africa. The management of populations followed the distinction between citizen and subject highlighted by Mamdani, with its earliest formulations in the policy of indirect rule and the colonial ideologemes of ‘nativism’.

Conclusion

The different forms of colonial rule and techniques changed significantly throughout the history of Southern Africa. From the Dutch, to the British, to the apartheid government, the ‘native question’ was dealt with differently by these variant colonial powers. Although there is a correlation and uniformity in the practice of colonialism itself, its particularities at times differ considerably. The argument of this chapter is that the use and regulation of water resources has been a key occurrence of colonialism in South Africa. I attempted to place contestations of the *Mazibuko* case – differential access to water and municipal infrastructure technology – within this historical genealogy to try and understand better what the fault lines are that emerge in the case. While the previous chapter attempted to understand the *Mazibuko* case within the development of international law and colonialism, this chapter attempted to trace this development specifically within Southern Africa. The fault line that is the

³²The development of prepaid infrastructure is considered by some authors as a way of handling the poor by ‘remote control’ (Harvey 2005; Macdonald and Ruiters 2005) through controlling township residents’ water and electricity use.

subject of this chapter as well as the previous one emerges from the political contestation around the appropriation, division, and production of the region that is presently called South Africa.

In Schmitt's ([1950] 2006) understanding, it is the land appropriation, division, and production that establish *the political* as a concept that can function on its own. Following from the second chapter, the current chapter attempted to understand the South African *political* situation through understanding its routes and roots of appropriation, division and production. South Africa, like most colonial territories, was created, as it exists today through a gradual process of effective occupation and conquest by a series of colonial powers. Through the process of appropriation, and the attempt to interrogate the 'native question', the different colonial regimes established a legacy of a bifurcated state system that differentiates between the 'citizen' and the 'subject'. This division between citizen and subject and the construction of a bifurcated state are clearly discernible in the history of colonial rule and laws regulating access to water resources. My focus in this chapter was specifically on the relationship between different forms of colonial rule and concurrent tactics employed to regulate water use and access. Mamdani's ([1996] 2004) categorisation of different forms of colonial rule as corresponding to tactics of direct and indirect rule assisted in understanding and theorising the different tactics of regulating and accessing water resources. What becomes clear through this reading is the systematic construction of a bifurcated state that is able to differentially manage the population as 'citizens' and subjects'.

My argument is that these lines of division of a bifurcated state are still visible in the *Mazibuko* case and the circumstances surrounding it. As mentioned in the introduction, the *Mazibuko* case cannot be theorised as an exceptional moment or isolated incident but rather stands as an example of the bifurcated nature of the post-apartheid constitutional order. The claims made by the applicants in the *Mazibuko* case – the constitutionality of the Free Basic Water policy (FBW) as well as the prepaid meters (PPM) – became impossible for the court to accede to. Acceding to the claims of the applicants would in effect have meant acknowledging an inherent fault

in the construction of the Constitution. The installation of the PPM could only have proceeded on the basis of some form of legitimate authority. In the case of Phiri this was the *Water Services Act* No. 108 of 1997 (WSA) a legal instrument giving expression to section 27 of the Constitution – as well as the Free Basic Water Policy.³³ The *Water Services Act* No. 108 of 1997, in particular, is a ‘regulatory control’ put in place to give realisation to the access to water promised in section 27 of the Constitution. What the court is faced with is a situation in which finding in favour of the applicants would mean, in effect, acknowledging a fundamental shortcoming in the Constitution itself, its over reliance on, in Wa-Mutua’s words, ‘equal protection norms’³⁴ to undo a historical process. Socio-economic rights are included in the Constitution to alleviate an inherently political question – a problem of appropriation, division, and production – through an international legal paradigm that has its history in the appropriation of the ‘New’ World. If the Constitution would attempt to substantively deal with the question of the *political* – that is of land appropriation, division, and production – then it would inevitably come into conflict with itself and the ways in which it conceives of the South African society.

³³ Both of these policies are discussed in-depth in Chapter 1 under the heading of ‘Water, water, nowhere’.

³⁴ See the section entitled ‘International constitutionalism’, in Chapter 2, for a discussion of this critique by Wa-Mutua.

CHAPTER 4: AN IMPOSSIBLE QUESTION

Introduction

The decision made by the Constitutional Court in the case of *Mazibuko and Others v The City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28, through O'Regan CJ, confirmed unequivocally that the issues brought before the court are not in conflict with the Constitution itself. O'Regan's judgment in the *Mazibuko* case stays loyal to the letter of the Constitution as well as the jurisprudence developed by it. Her discussion and application of questions of constitutional subsidiarity, deference, reasonableness and fairness, are within the bounds prescribed and set by the Constitution. O'Regan's judgment did not evoke dissent by any other judge; the opinion was thus a unanimous one. The decision by the court meant that the residents of Phiri, the applicants, would not see any change in their immediate conditions. They would still be allocated six kilolitres per household per month through a prepayment meter that 'temporarily suspends'³⁵ the water flow when the allocated amount has run out. The failure of the *Mazibuko* case to bring about any change in the conditions of the applicants cannot, however, be wholly understood within the interpretative framework provided by the Constitution.

In the first chapter I identified the problem presented by the *Mazibuko* case as a problem of a legal, political, and historical, nature that needs to be considered according to these legal, political, and historical, precepts. My attempt in the second and third chapter was to bring to the fore some of the considerations from a larger legal, political, and historical, framework. The second chapter discusses the roots and routes of international law and their relationship to colonialism and conquest. My aim in the second chapter was to present a narrative of human rights and international law that differ from the accepted and much touted 'grand narrative' of human rights. The third chapter dealt with the specific history of this international law in its localised, Southern African variant. The chapter focuses on the different technologies of rule and power in different colonial regimes, as well as on specific legislative and administrative regulations of access to water and natural resources. The point of these

³⁵ See section on 'Constituted history' in this chapter for a discussion on discontinuation vs. temporary suspension.

two chapters is to show how the structuring of access to water has a direct bearing on processes of land appropriation and division *constituting* South African society. Water rights regulating access and use have long been a permanent part of daily life in South Africa.

What emerges from the discussion in these chapters is an example of the way in which the political constructs life as a question for politics. The constitution of the political through land appropriation and division also constructed the question of *life* as a variant of ‘the native question’. The question of how to manage and control life in the colony was answered, in part, by employing different forms of water management that corresponded to different forms of colonial rule. In this chapter, I want to bring together the insights of the previous two chapters by discussing the *ratio decidendi* of the case and how some of the points raised in the previous two chapters’ argument on international law, water rights, and colonialism, appear in the judgement. I also discuss the paradox of constitutional authority that lies at the foundation of any constitution-making project by way of a close reading of the first line of the preamble to the Constitution. Turning back to the discussions of the commentators of the case in the first chapter, I try to show how the critical position adopted by the majority of the commentators discussed functions within the realm of an already existing *potentiality*. It is a critical position that focuses on the *constituted* power of the Constitution – the court, government departments and other functions of the state – and how this can bring about incremental changes in the shared ought-intentions of ‘the people’. This position of critique fails to consider the larger political history that the Constitution forms part of and consequently is unable to bring into being anything other than what is contained as a possibility within the Constitution.

Judging a judgement

Constituted history

I have thus concluded that neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri as a result of Operation Gcin'amanzi constitute a breach of section 27 of the Constitution' (O'Regan CJ in *Mazibuko and Others v The City of Johannesburg and Others* 2009:87, paragraph 169).

In the *Mazibuko* judgement, the court brings the idea of historical justice and redress to the fore in several instances. This focus is specifically observable in the sections dealing with the background of the case and the material conditions of the applicants (*Mazibuko and Others v The City of Johannesburg and Others* 2009:2-9). In the second paragraph, O'Regan CJ states that '[a]lthough rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa' (*Mazibuko and Others v The City of Johannesburg and Others* 2009:2). After listing some of the gains made since the adoption of the Constitution in 1996 – with reference to the fact that the number of people who do not have access to water has dropped from 12 million to 8.2 million – the court acknowledges that despite these gains, 'deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden' (*Mazibuko and Others v The City of Johannesburg and Others* 2009:2). This sentiment is echoed again eight paragraphs later when the court states that:

Apartheid urban planning did not permit black people to live in the same urban areas as white people. Soweto was developed in accordance with this appalling racist policy. It is home to approximately a million people. Phiri, where the applicants live, is one of the oldest areas in Soweto. Most of the houses in Phiri are brick yet generally the people who live in Phiri are poor. (*Mazibuko and Others v The City of Johannesburg and Others* 2009:6)

The court acknowledges that the living conditions of the applicants are largely the result of historical processes. There is, however, a clear focus on apartheid as a

catalyst of this inequality. In the judgement, there are several instances where apartheid and its legacy are identified as a contributor to the conditions in which the applicants find themselves. The judgement mentions apartheid in eight instances (*Mazibuko and Others v The City of Johannesburg and Others* 2009: 6; 44; 77; 79; 82; 86), each time as a factor contributing to the material conditions in which the applicants find themselves. The court clearly recognises that the conditions of the applicants in the *Mazibuko* case are due to the immediate past of apartheid and its geographical and urban planning legacies. It would follow that the conditions that brought this case to the Constitutional Court are of a piece with this same history.

The Constitutional Court does not only acknowledge this history but also recognises that it resulted in a level of inequality that must be redressed. This is emphasised in the second paragraph of the judgement: ‘The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor’ (*Mazibuko and Others v The City of Johannesburg and Others* 2009:2). Apartheid becomes the point of reference for the court in dealing with the issues before them. The court refers to the past in order to pose inequality as a problem to be addressed by the Constitution. But the reliance on the past to motivate current decision-making also becomes evident in the argument to rationalise differential water access:

The City conceded that, given the deep inequality that exists in South Africa as a result of apartheid policies, any differential treatment of townships or suburbs may have a differential, and arguably adverse impact on the ground of race, and thus constitute indirect discrimination on that ground. On the other hand, given the deep inequality that exists, the City noted, different treatment might often be necessary or desirable (*Mazibuko and Others v The City of Johannesburg and Others* 2009:79-80).

This argument is further adduced by the court to justify the legality of installing prepaid water meters (PPM), and the limits to consumption thus imposed. Accordingly, the use of PPM by the City of Johannesburg is not considered unfair discrimination, as it is designed to curb excessive water usage, and to correct the

infrastructural woes of apartheid era city planning. The court therefore variously references the apartheid past to justify decisions related to differential water access and consumption limits. The past becomes central to the development of a Constitutional jurisprudence related to section 27. However, this past is limited by the terms of reference to apartheid; its purview is not extended to include the preceding routes of land appropriation, division, and production that form part of the basis of apartheid.

Concerning the issue of a limit to water usage and the automatic disconnection of the water flow, the court presents us with two relevant interpretations: one novel conceptual definition of ‘disconnection’, and a second related to the theory of socio-economic rights litigation. One of the arguments brought before the court by the applicants relates to the constitutionality of the disconnection of water flow upon expiry of the credit on the prepaid meter (*Mazibuko and Others v The City of Johannesburg and Others* 2009:58). The argument was based on the fact that the prepaid meters discontinues the water flow automatically and must therefore be deemed illegal. In response to this argument, the court points out that the regulations and by-laws dealing with disconnection are applicable only to credit meters and not to prepaid meters. Furthermore, it was pointed out that the court considers the definition of ‘disconnection’ in relation to ‘temporary suspension’ as follows:

The ordinary meaning of ‘discontinuation’ is that something is made to cease to exist. The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation (*Mazibuko and Others v The City of Johannesburg and Others* 2009:63).

This distinction made by the court is important for two reasons: firstly, it presents a normative definition of the word ‘discontinuation’, extending it retrospectively to all the legislation in which it appears; and secondly this definition by the court allows ‘temporary suspensions’ in the case of prepaid meters.

The significance of this distinction made by the court is highlighted in paragraph 121 (*Mazibuko and Others v The City of Johannesburg and Others* 2009:63-64) confirming that the suspension of water services does not constitute the denial of access to water resources. Accordingly, the limit to water usage is not considered to constitute a ‘disconnection’ if the flow of water recommences in the next month, or when new water is purchased. This distinction is also significant when considering the *telos* of socio-economic rights litigation prescribed by the court. In the judgement, O’Regan CJ articulates a theory of socio-economic litigation that problematises the idea of the South African Constitution as merely a conduit of international human rights law. This problematisation has to do with the argument of the court concerning a basic core of socio-economic rights. The condition of a basic minimum standard, or basic core, is one that is determined by the United Nations Committee on Economic, Social, and Cultural Rights (1966).³⁶ However, the court has rejected the basic core argument on two occasions. O’Regan CJ cites the cases of the *Grootboom* and *Treatment Action Campaign (TAC)* here.³⁷ In the *Mazibuko* case, the court argues that the refusal of a basic minimum core in the South African situation is ‘essentially twofold. The first reason arises from the text of the Constitution and the second from an understanding of the proper role of courts in our constitutional democracy’ (*Mazibuko and Others v The City of Johannesburg and Others* 2009:28-29).

With regard to the text of the Constitution, there is a reference to the co-determination of section 27(1) and 27(2), leading to the interpretation that everyone has the right to access to water *within* the state’s available resources. Again, making reference to the apartheid past of South Africa, the court explains:

³⁶ ‘[The United Nations Covenant on Economic, Social and Cultural Rights] is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant.’ (International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), 21 UN GAOR Supp. (No 16), 1966, U.N. Doc A/6316 as quoted in *Mazibuko and Others v The City of Johannesburg and Others* 2009:26)

³⁷ *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15 and the *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19.

At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights. (*Mazibuko and Others v The City of Johannesburg and Others* 2009:29).

This statement by the court is not a rejection of international law as such but rather an acceptance of its role in the architecture and content of the Constitution's position on socio-economic rights. The Constitution includes socio-economic rights in order to *allow* the government and the citizens to engage on questions such as access. This stipulation by the court paves the way for its disclaimer in the *Mazibuko* judgement: it is not the court's role to determine what content a socio-economic right should entail (*Mazibuko and Others v The City of Johannesburg and Others* 2009:30)

The refusal by the court to decide on a basic core is discussed in the first chapter of this dissertation as *constitutional deference*. But beyond that, it indicates a particular theoretical understanding of transformation and normative standards. Towards the end of the judgment this understanding is articulated:

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy (*Mazibuko and Others v The City of Johannesburg and Others* 2009:83).

O'Regan understands the role of the Constitution as one that upholds the democratic institutions of the state through testing them against their normative constitutional framework. The Constitution sets out what is considered legal and possible and, as was pointed out in the first chapter of this dissertation, this also includes the legislation and by-laws that regulate *Operation Gcin'amanzi*. In the case of *Mazibuko*, the court cannot make a decision that falls outside of the framework that the Constitution sets for democratic participation.

What emerges at this stage is a clear understanding of the Constitution's role in upholding *constituted* power and in upholding the *constitution* of the state. In this sense, the court becomes the guardian of a *constituted legal and political order*. It aims to make sure that eruptions and contestations remain *temporary* disagreements and not a *discontinuation* of the constitutional order. The view articulated by the court is that socio-economic rights form part of an *internal* critique of the Constitution. It forms part of a transformative endeavour, such as it has been conceptualised in Karl Klare's (1998) idea of transformative constitutionalism as discussed in the first chapter, which does not question the normative foundations of the Constitution. There is thus an assumption that the normativity proposed by the Constitution is a sufficient condition for the transformation that the Constitution consequently proposes. The *Mazibuko* case, and the decision made by the Constitutional Court, indicate an inability to substantively deal with the issues brought before it. In deciding to employ the principle of *deference*, the court effectively declares the conditions leading up to the *Mazibuko* case as being legitimate and constitutional. The court does recognise a historical responsibility to change the conditions of the applicants; but still, in not making a decision to change them, the court tacitly acknowledges its normality. The repeated reference by the court to apartheid as a historical marker may be one way to account for this inability. However, the fault lines opening up in the case extend beyond the historical injustices of apartheid; limiting the historical picture to apartheid will inevitably lead to a limited understanding of these fault lines. The inability of the court to reach a decision that could change the material conditions of the applicants also figures in the theoretical approach taken by the court with regard to socio-economic rights litigation. This theoretical approach by the court can be better

understood if we consider the constitution-making project and the establishment of the normativity defended by the court.

From ‘we’ to ‘our’

Any constitution, by its definition, creates a normative framework for legislation and regulation from which to construct an apparatus of control and to regulate action. One of the influential lineages of this idea of a constitution dates back to as early as Aristotle.³⁸ This basic definition of a constitution holds true even for the more advanced and modern forms of written constitutions today: a constitution is in its definition a way of organising a normative state of affairs; of organising the *polis*. It is the organisation of the routes of production and distribution after land appropriation, in Schmitt’s ([1950] 2006) terms, that establishes the new political order. A constitution becomes a guardian of the normative conditions brought about by appropriation, division, and production of land. In this case a constitution as legal and normative document comes about at the same time as construction of the political. A constitution is not merely laws, ‘it involves the entire normative framework of state life in general, the basic law in the sense of a closed unity, and of the “law of laws.”’ (Schmitt [1928] 2008:63). The ‘absolute form of constitutionalism’ implies that the constitution is ‘a *fundamental legal regulation*. In other words, it can signify a unified, closed *system* of higher and ultimate *norms* (constitution equals norm of norms)’ (Schmitt [1928] 2008:63). Although the political cannot be reduced to a constitution, the latter does give a constituted form to the political moment of the appropriation, division, and production of land. This moment of the political also contains a vector of disruption and a vector of order since the appropriation of land creates a new legal order through a destruction of that which precedes it. The realm of what is possible within a constitution is always circumscribed by what is constructed as potentially possible through the establishment of a new normative framework. A constitution is also the main form of governing life within a political territory. The

³⁸ *Politics* Book III deals mostly with the constitutions of city states as the organisation of citizens in a territory, ‘Moreover, a constitution is itself a certain organization of the inhabitants of a city-state. But since a city-state is a composite, one that is a whole and, like any other whole, constituted out of many parts, it is clear that we must first inquire into citizens. For a city-state is some sort of multitude of citizens’ (Aristotle 1998: 65, Book III 1 1274b 36-41).

South African Constitution aims to '[i]mprove the quality of life of all citizens' and also to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' (Republic of South Africa 1996). This sentiment is also clear in the *Mazibuko* case and the continual reference to the past of the country as a condition for the improvement of the lives of the applicants in the present.

The acknowledgment of past injustices and the attempt to address and correct these injustices is one of the hallmarks of the South African Constitution. In the preamble to the Constitution we read that, 'We, the people of South Africa, /Recognise the injustices of our past.' These opening lines of the Constitution proclaim both a 'people' and a 'history'. The personal pronoun 'we' is a first person plural pronoun indicating a collective, qualified in this case as a collective understanding by virtue of the verb 'recognise', followed by the abstract noun 'injustices'. The abstract noun is further qualified by the definite article 'the', indicating that these 'injustices' are determinate. It is not merely all or any 'injustices' but rather 'the injustices' defined by the Constitution. The first-person plural 'we' is linked with 'the injustices' through the activity of recognition that places the 'we' and the 'injustices' in a causal relationship. The 'we' moves from first-person plural to a first-person plural dependent possessive pronoun, 'our', within this one sentence. The possessive pronoun has the linguistic function of qualifying the definite article. In the case of the above-mentioned preamble, the possessive determiner 'our past' also qualifies the preceding definite article and its accompanying noun 'the injustices'. An example of rephrasing this sentence would look something to the effect of 'We the people of South Africa, recognise the injustices of *the* past' or 'We the people of South Africa, recognise [~~the~~] injustices of our past.' The possessive determiner 'our past' and the definitive form of 'the injustices' become causally connected since the act of recognition becomes the function that transforms the first-person plural subject 'we' to a first-person plural dependent possessive 'our'. The nominative plural 'the people of South Africa', in turn, qualifies the first-person pronoun 'we' and determines the *shared intentions* of the personal pronoun 'we' as being that of 'the people of South Africa.' The 'we' is thus also 'the people of South Africa', constructed simultaneously by the constitutional document.

The act of recognition of determinate ‘injustices’ becomes the necessary condition to form the ‘we’ of South Africa, and the attendant dependent possessive pronoun. A close reading of the *Mazibuko* judgement reveals the circumscription of injustices, as well as repeated references to apartheid as a historical contributing factor for the material conditions of the applicants. In contrast to the frequency – eight times, to be precise – of the instances in which apartheid is mentioned in the judgment, and adduced as argumentative proof or background information, the term ‘colonialism’ does not appear once in the text. There seems to be, using the court’s phraseology, a *discontinuation* between apartheid and the history that precedes it. As I argued in the third chapter of this dissertation, the water regulations and laws promulgated and applied during the apartheid period, did not appear *ex nihilo* but had its basis in the history of the different forms of colonial rule in Southern Africa. Water management and access control had long been central to colonial rule in its attempts to deal with the ‘native question’. The circumscription of ‘the injustices’, referring to ‘apartheid’ does not take this history into account. This circumscription, moreover, removes the concerns of the case from its *political* trajectory – that is its relation to land appropriation, division, and production – and places it within the limited normative framework established by the Constitution itself. By not taking the history of colonialism prior to apartheid into account in the circumscription of past injustices, the whole history of the development of the bifurcated state and differential regimes of water gets occluded from what is considered as ‘past injustices’.

The normative role of the Constitution is to safeguard the construction of the ‘we’ by presenting rules, what the ‘we’ *ought* to do, that corresponds to the *constitution* of this normativity. In discussing this role of a constitution, Hans Lindahl refers to these legal orders as constituting ‘authoritative collective action (ACA)’ (Lindahl 2015:166). Accordingly, legal orders such as constitutions are ACA that correlate and coordinate collective action towards a ‘normative point of joint action’ also ‘involv[ing] second-level authorities that monitor participant agency with a view to realizing the (transformable) normative point of joint action’ (Lindahl 2015:166). Lindahl argues that an ACA can be considered a legal order since the aim of both ACA and a legal order is to regulate *shared intentions* around a normative point of

action.³⁹ The Constitutional Court acts as an example of Lindahl's 'second-level' authorities in that it monitors how the 'we' of South Africa collectively *ought* to act. This 'we' includes the institutions and governmental apparatuses such as courts, governmental departments and other statutory bodies that are established by the Constitution. In the court's approach to socio-economic rights litigation as process of participatory democracy, the court expresses a position akin to that of Lindahl's definition of an ACA as monitoring 'participant agency with a view to realizing the (transformable) normative point of joint action' (Lindahl 2015:166). In this sense, the 'notion of legal power is proper to constituted power' (Lindahl 2015:167). Lindahl defines constituted power in its broad sense as the 'actualization of a practical possibility under ACA' and in the narrow sense as 'the enactment of legal norms by second-level official authorized to monitor ACA' (Lindahl 2015:167). Constituted power is circumscribed by the possibilities contained within the Constitution as ACA. The role of the Constitutional Court is to protect the normativity of the Constitution by prescribing and monitoring *ought*-actions as shared intentions of the 'we' through the enactment of constituted power.

The *practical possibilities* that are available to the Constitutional Court, but perhaps more fundamentally, the application brought to the Constitutional Court by Phiri residents is already circumscribed by the normativity that the Constitution, as an ACA upholds. Participatory action in the shared intentionality established by the normativity of the Constitution 'manifests itself as reproducing the extant legal order, such that there is a continuity linking together past, present, and future as the temporal modes of the group agent' (Lindahl 2015:167). The *discontinuation* between the history of apartheid and colonialism in the *Mazibuko* judgement presents 'the injustices of our past' as circumscribed apartheid. The court links the past of apartheid with the present of the case in order to arrive at a judgment that extends the normativity of the Constitution into the future. The shared intentionality of the 'group agent' is channelled towards a future whose possibilities are circumscribed by a

³⁹'Monitoring includes decisions in the face of conflict among the participant agents about the course that their joint action ought to take. Legal orders also typically involve second-level authorities who uphold joint action: they take the appropriate steps to ensure that participant agents comply with joint action and its normative point, bringing sanctions to bear on non-compliers' (Lindahl 2015:166).

determinate past. Could the court have made a different decision? Could it have extended its understanding of the present to the patterns of colonial rule during the 18th and 19th centuries? To do so would have meant a change in the normative foundations of the Constitution; it would have meant a decision *impossible* within the realm of possibilities circumscribed by *the political* aspect of the Constitution. If the normativity of the Constitution is to be challenged, if the *political foundations* of its *constitution* are to be challenged, a change to its normative structure is what is required. This change can only be achieved from a position that attempts to establish a new normativity and *shared intentionality*; an impossible question to pose to a Constitutional Court whose role it is to monitor *ought* actions, or *shared intentionality* of the group agent. Before returning to this *impossible* question, it is necessary to ask the prior – both in the sense of priority and coming before – question of how the current *constitution* of normativity came about.

Impossible constitutionality

Normativity and sovereignty

The questioning of foundations is neither foundationalist nor anti-foundationalist. Nor does it pass up opportunities to put into question or even to exceed the possibility or the ultimate necessity of questioning, of the questioning form of thought, interrogating without assurance or prejudice the very history of the question and of its philosophical authority (Derrida 1990:931).

The normative framework of the Constitution must be understood as having two moments, or two interrelated events, the constitution of the political and the construction of the Constitution as a legal and political document. The constitution of the political was discussed in Chapter 2 of this dissertation as being the founding of a *nomos* based on the appropriation, division, and production of land, and I investigated this on the basis of different technologies of water management in colonial Southern Africa. The *political* is thus constituted in Southern Africa through the appropriation of land and the establishment of a colonial legal and social order. This *constitution*

extends historically beyond apartheid presented in the Constitution in circumlocutionary terms of ‘injustices of the past’; moreover, as I will argue below, it encompasses the current normativity regulated by the Constitution and the court.

The Constitution needs to be discussed further, with respect to two interrelated aspects: its conceptual/theoretical aspect and its historical/empirical aspect. Regarding the conceptual/theoretical aspect of the Constitution, I will return to the personal pronoun ‘we’ for a moment. The first word of the Constitution is ‘we’, indicating a collective that is defined by the clauses that follow. The ‘we’ also functions in the role as *constituting* the new Constitution as well as *the people* that become subject to it. This ‘we’ further ‘provides a preliminary determination of the normative point of ACA and of those who are or could become participant agents in it’ (Lindahl 2015:167). The invocation of the ‘we’ as the first word of the Constitution is what *constitutes* not only the normativity of the Constitution but also the shared intentionality of ‘the people’:

[The constituent act] that gives rise to a new legal order retrojects the emergence of this order into the past, such that the emergent legal order is deemed to be the implication of an origin that has already come to pass ... an act originates a collective by representing its origin (Lindahl 2015:168).

The co-constitution of both *the people* and the Constitution that they bring into being – by the personal pronoun ‘we’ – is a paradox not only of representation but also of constituent power (Lindahl 2015:168). This paradox means that the ‘we’ of the Constitution never really exist until it is proclaimed into existence by the Constitution.

This paradox relates to the question of how constituent power functions and to what extent individuals, or the ‘we’, can actualise and exercise this power. The ‘we’ of the Constitution is constructed historically at the same time as the Constitution. The Constitution is dependent on the ‘we’ for its legitimacy and its ability to regulate the shared ought-intentions of the ‘we’. The constituted power inherent in the Constitution is, in this regard, co-determined by the constituent power of the ‘we’. This constituent power of the ‘we’ is not able to bring about a new normativity since

its potentiality is determined retrospectively through the exercise of constituted power. The circumscription of ‘the injustices of the past’ through the *discontinuity* asserted in relation to the history of apartheid and colonialism constructs this ‘we’ within the *political possibilities* already present. The Constitution did attempt to change a normative state of affairs, but it aimed to do so within the realm of constituted power. The adoption of the new Constitution in South Africa came after a shift in political power and representative structures. There was a reorganisation of political power in South Africa that required, and was also predicated upon, a change in the organisation of the normative shared ought-intentions of the agent group from an exclusivist racial one to an inclusive multicultural one. In this process of changing the normative structure through constituted power, it was also necessary to create a new ‘we’ and a new set of collective intentions. The Constitution creates a new state and a new people; it *constitutes* this new state and new people. This act of co-constituting both a state and a people is what can be termed the ‘paradox of constitutionalism’.⁴⁰

This paradox at the heart of constitution-making does, however, not mean that the act of constitution-making itself is irrelevant for theoretical interrogation. Loughlin and Walker remind us that:

Although aspects of this strategy [the paradox of constitutionalism] can be traced to the foundations of all modern constitutions, we should also recognize that the historic circumstances of the founding do not necessarily exhaust the significance of the event (Loughlin & Walker 2007:3).

The paradox still gives rise to a Constitution, as ACA, that brings about a normative state of affairs and regulates shared ought-intentions. This is the case with the South African constitution-making moment as well: the lack of theoretical and conceptual clarity does not render its construction void. The process of South African constitution-making gives us a clear example of how constituted power is used to

⁴⁰ ‘Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that government ultimately is generated from the “consent of the people” and that, to be sustained and effective, such power must be divided, constrained and exercised through distinctive institutional forms’ (Loughlin & Walker 2007:1).

bring about a change in the normative foundations of the Constitution without changing its *political constitution*.

The much-praised ‘democratic moment’ of 1994 did not come about as a result of the establishment of a new normativity through constituent power, but through a process of changing the normative shared intention through constituted power. The drafting of the Constitution was a process that took close to 6 years from the first official negotiations to the signing of the final document. A Transitional Executive Council sanctioned by the Multi Party Negotiations (MPN) in 1993 drafted the South African Constitution initially.⁴¹ This committee was to draw up an interim constitution that would establish the state architecture while a constituent assembly (consisting of the National Assembly and the National Council of Provinces, both houses of Parliament) would draft the final Constitution. The Interim Constitution was drafted according to a legal process stipulated in the 1983 Constitution (Republic of South Africa 1983) and was legally adopted in Parliament (Botha 2010:67). The Interim Constitution contained 34 constitutional principles compliance that were a condition for the acceptance of the final Constitution.⁴² The establishment of an interim constitution (an interim constitution; but the Interim Constitution) entailed the establishment of a decision-making body acting as the author and legitimiser of a ‘new constitution’. The adoption of the Interim Constitution in November 1993 encapsulated a negotiated settlement between the ANC and the NP that saw the establishment of a power-sharing platform and a ‘government of national unity’.

These negotiations and the resulting Interim Constitution can be criticised on a number of grounds. One of these criticisms relates to the question of representation of the parties to the negotiations. When the time came for the negotiations and the decision on the content of the constitutional mandate, the majority of people were not consulted as to the validity or agenda of these negotiations. The ANC made the

⁴¹ The *Transitional Executive Council Act* of 1993 No. 51 of 1993 made the establishment of this committee possible.

⁴² William Beinart (2001:291) comments that ‘[t]he historic compromise of 1994 found its form in the Interim Constitution that provided for a parliament based on a non-racial universal suffrage; it would also act as a Constituent Assembly in order to finalize the Constitution in two years.’

decision to negotiate with the NP government officially at a policy conference in 1991 (Ramose 2012:26). Since it was an ANC conference, the right to vote on the matter was reserved for members of the ANC. The ANC was not officially elected as a negotiating party; neither was it fully representative of the majority of the South African people. While the white voters democratically elected the NP into government in 1989, the NP only retrospectively sought a mandate to engage in the negotiations in the form of the 1992 referendum to its support base (Ramose 2012:26; Giliomee 2016:267-276).⁴³ The NP referendum of 1992 was phrased thus: ‘*Steun u die voortsetting van die hervormingsproses wat die Staatspresident op 2 Februarie 1990 begin het en wat op ‘n nuwe grondwet deur onderhandelings gerig is?*’ (Quoted in Gilliomee 2016:271).⁴⁴ The question posed by the NP to its electorate was thus not with regard to the content or architecture that the Constitution would take, but rather, whether negotiations should proceed.

Taking into consideration that neither the ANC nor the NP, who were the main negotiators for the new Constitution, had mass-based support for the content of the final Constitution, the process can be described by what Patrick Bond has called an *elite transition* (2000). Considering some of the events that preceded the negotiations, this claim by Bond can be justified.⁴⁵ Prior to the official negotiations, both the ANC and the NP adopted positions regarding the content and architecture that the Constitution should take. These decisions were also taken at policy conferences that did not include the mandate of the people they claimed to represent. In 1989, two

⁴³ Herman Giliomee, in an exchange with FW de Klerk’s chief of staff Dave Steward, makes the argument that the NP itself never had the mandate from its white voting base to agree to the final Constitution (Giliomee 2016:267-276). In one of Steward’s responses to Giliomee’s claim that the NP conceded to more than was necessary during the negotiations, Steward lists the different concessions made by each party, showing how most of the concessions made by the NP were ‘cosmetic’. He concludes this listing with the statement ‘According to any method of objective measuring, it was the ANC – and not the government – that made the most serious concessions’ (Giliomee 2016:281) (Own translation).

⁴⁴ ‘Do you support the continuation of the reform process which the state president initiated on 2 February 2016 and which will lead to a new constitution based on negotiations?’ (Own translation).

⁴⁵ Several political theorists and historians have documented discussions relating to the negotiations and signing of the interim and final Constitution in 1993 and 1996 respectively (cf. Nolutshungu 1991; Sparks 2003, 2009; Klein 2008; Esterhuyse 2012; Terreblanche 2012). Several of these texts tell the story of backroom dealings between business leaders, the NP and the ANC on trout farms, British country estates, and finally in a big spectacle for the world to see at the Kempton Park Convention Centre.

years before the first official negotiations, the ANC drafted its Constitutional guidelines for a democratic South Africa that included a bill of rights as one of their proposals.⁴⁶ In 1990, the constitutional committee of the ANC submitted a discussion document on a possible bill of rights to the relevant members and branches of leadership. This was followed in 1992 by a draft version of a bill of rights submitted by the ANC. When the ANC thus entered into the first negotiations, it came prepared for a Constitution (Nolutshungu 1991:97; Wa-Mutua 1997:78).

Although there were debates in the 70s and 80s among Marxist-inspired intellectuals about the specificities of a national democratic revolution and a seizure of state power,⁴⁷ by the 1990s it was all but clear that the ANC was moving towards an approach more akin to liberal constitutionalism. The NP, likewise, adopted a position on constitutionalism in the beginning of the 1990s. Where the ANC's vision was based on ideas of constitutionalism inherited from the Anglo-Saxon tradition that included protection of individual rights and majoritarian rule, the NP adopted the consociational model developed by Dutch legal theorist Arend Lijphart (1969) arguing for the protection of minority rights.⁴⁸ For Lijphart, majoritarian rule is incompatible with plural societies; due to the array of ethnic and class differences in such societies, he argues, any type of political antagonism takes the form of group mobilisation and to guard against this a power-sharing platform must be enacted (Lijphart 1969; Habib 2012: 38-40).

⁴⁷ The 1986 edition of the journal *Transformation* vol. 1, captures this debate, with contributions by Jeremy Cronin (1986), Peter Hudson (1986), and Neville Alexander (1986).

⁴⁸ Minority rights was one of the main points of contestation regarding a Bill of Rights. The ANC was initially opposed to the idea but accepted it as part of the negotiations. The Pan Africanist Congress (PAC), Azanian Peoples Organisation (AZAPO), and other Black Consciousness and Pan Africanism structures and movements, however, vehemently refused this constitutional proviso and it ultimately led to their withdrawal from the negotiations. The PAC opposed the inclusion of a Bill of Rights exactly on the grounds that it would constitutionally ensure the continuation of benefits received by the white population under apartheid and colonial rule. The position of Pan-Africanist and Black Consciousness affiliated movements and intellectuals emphasised the historical nature of the South African problem as one of land dispossession instead of purely population registration and political rights.

Both the NP and the ANC held certain notions of constitutionalism when they entered into the negotiations, each presenting and protecting their own interests. Although there were differences between the ANC and NP's final vision, both agreed that parliamentary sovereignty should be dissolved into constitutional supremacy and the Constitution should act as both the sovereign law and the basic law of the state, with a justiciable Bill of Rights. The Constitution was thus promulgated on the basis of a change in normativity based on constituted power negotiated in an *elite transition*. These two aspects related to the coming-into-existence of the Constitution – the theoretical and historical – and can be seen to account for the lack of material changes for the majority of subjects that were constitutionally attaining citizenship. The circumscription of the 'we' and the normativity established by the Constitution has empirical and historical foundations within the *political* genealogy of land appropriation, division, and production. This normativity can, in turn, not produce the necessary ought intentions to go against its own *political constitution*.

The impossible question

If all participation in the constitution-making process is an engagement with its normative ought-intentions, then all possibilities are already circumscribed by the Constitution as acts of constituted power, or participatory democracy. The institutions that are supposed to enact this power – the courts, the different governmental divisions and departments – are the actualisation of the Constitution's constituted power. The Constitution is able to protect its normativity through the establishment and regulation of these different organs of its constituted power. A challenge to the normativity of the Constitution, using any of these institutions, actually has the inverse effect of strengthening the constituted power of the Constitution, and the normativity it upholds. Furthermore, since the Constitution was established by a change in normativity through constituted power, there is an inevitable continuity between the present form of normativity and that of the past. The lack of constituent power – or rather the masking of constituted power as constituent power – in the construction of the new Constitution means that this continuity is one that will be strengthened by the continual claim to the Constitution to actualise its constituted power through institutions such as its courts.

This brings me back to the main line of argument made by commentators on the *Mazibuko* case discussed in the first chapter. I classified the majority of these critical positions as forming part of what Karl Klare (1998) termed ‘transformative constitutionalism’.⁴⁹ Without restating the argument, suffice it to say that Klare holds that the Constitution is a framework that must be collectively interpreted and developed by the courts, legal practitioners, civil society and individuals in the country. Transformative constitutionalism proposes that those who are already part of the discourse of the legal profession change their perspective from positivist to a post-liberal position, the latter being perceived as the correct approach to transform social conditions through the Constitution. Considering the historical and political genealogy sketched in the second and third chapters of this dissertation, my claim is that such an internal critique fails to sufficiently consider extra-Constitutional factors in the assessment of the Constitution. A critique that moves from within the normativity established by the Constitution fails to consider the impossibility inherent in the critique. What emerges clearly from the discussion of the *Mazibuko* judgment above is that the claims brought before the court by the applicants *cannot* be met by the courts, and by extension, neither by the Constitution.

The inability of the Constitution to deal with the claims brought before it in the *Mazibuko* case relates to the political normativity that it is designed to uphold and regulate. This normativity of the Constitution is, in turn, one that has its foundations in the appropriation, division and production of South Africa as a colonial territory. The changing of this normativity during the negotiations and the signing of the new Constitution was effected through constituted power, and was based on the legal authority of the 1983 Constitution. The Constitution Act 110 of 1983 was itself based on the Constitution Act 32 of 1963, and only differed from the latter significantly in the respect of including a Tricameral parliament (Marais 1993:255).⁵⁰ The

⁴⁹ See section in Chapter 1 entitled ‘Limits of the law’ for the discussion of these specific theoretical approaches.

⁵⁰ Motsoko Pheko ([1990] 1992:34-36) argues that the 1961 Republican Constitution has to be read together with the Westminster Statute of 1931, the latter that granted ‘dominion’ status to South Africa and repealed the application of the Colonial Laws Validity Act of 1865 in the colony. While the Westminster Statute was hailed by, amongst others, General Hertzog as an assurance of South Africa’s freedom and sovereignty, it was clearly only a cosmetic device. There was still a governor general in the Union that was a direct representative of the

characterisation of the 1996 Constitution as a ‘new’ Constitution can be upheld only if we understand ‘new’ to mean appearing chronologically ‘after’ the previous one. The Constitution is in fact not new, as it does not *invent* anything different from what was already possible; it does not invent a new constituted power. What it contained as its possibilities and its potentialities, are already confined by an already existing constituted power.

The continuity between the current Constitution and Constitutions preceding it is not merely a chronological continuity. It is also a continuity in the sense that there is no clear *discontinuation* of past forms of political normativity. The *constitution of the political* discussed in the second and third chapters of this dissertation are not changed by a constituent power; on the contrary, they are modified through a process of constituted power. The latter process can only modify normativity; but it cannot establish a new form of normativity. Lindahl’s observations regarding the way constituted power changes the normativity established by an ACA could be seen to correspond to considerations of the *possibility of invention* and *critique*. Changing the normativity through constituted power would mean that what is actualised is defined and circumscribed by what is possible (Lindahl 2015:169). What is possible is, in turn, defined by the normativity established by the Constitution and upheld by its different arms of constituted power. The paradox of constitutionalism can also be understood from the side of constituted power, as the *impossibility of invention*.

The impossibility of invention is the paradox that nothing that can be invented is actually pure invention. Invention, Alexis Nouss argues, ‘is an event; the words themselves indicate as much. It’s a matter of finding, of bringing out, of making what is not yet here come to be. Inventing, if it is possible, is not inventing’ (Nouss in

British Monarchy until 1961. The 1961 Constitution was not the supreme law of the country and rather acted as an administrative and political document (Devenish 2012:7). The 1961 Constitution also claimed its independence unilaterally from the Crown while the executive power to make decisions still lay with the British Crown (Pheko 1992:35; Devenish 2012: 8). The Afrikaner Republicanism that culminated in the 1961 Constitution was a rebellion against the Crown with a clear its political goal of attempting to claim independence in governing the South African state, hence its administrative nature.

Derrida 2007:450).⁵¹ For Nouss, invention is circumscribed by what already exists as potential. What can be actualised is always contained by what is possible so that invention, as being the creation of the impossible or not-yet-possible, can never exist as a potentiality. If the capacity to invention exists as potentiality then what is brought to the fore is not invention as such, it is not something new. For Nouss an invention must signal an event, it must bring about something new for it to be an invention (Nouss in Derrida 2007:450). The impossibility of the invention as potentiality means that merely actualising what is considered to be potentially possible does not constitute an event that invents something new. For an invention to bring about something new it must move outside of the realm of what is potentially possible; an invention must by definition, always be impossible. Invention, the event that inaugurates the new, is always a question of the impossible.

Invention is, however not only an impossibility. Invention has the potential to bring about that which is considered not (yet) possible: ‘What was not possible becomes possible. In other words, the only invention possible is the invention of the impossible’ (Nouss in Derrida 2007:451). Invention as a concept always has to do with the making possible the impossible. The paradox of invention is not merely that nothing can be invented which is possible, but that which can be invented is always impossible. This ability to identify what is not possible is mostly something that happens retroactively, after the event. Whether or not the event can be considered a new invention, is seldom possible to understand within the sphere of possibility in which the event occurs. The question of the impossible exists simultaneously with that which is possible and the actualisation of the one automatically means the disavowal of the other. If a possibility is actualised, that which was impossible is not actualised. Conversely, if something new is invented, the impossible is made possible and it no longer is impossible.

The potential of possibilities contained within the normative framework of the Constitution makes the invention of new normativity an impossible task. This is, however, an impossibility that haunts the Constitution. Nouss states that:

⁵¹ The text of Alexis Nouss from which I draw these insights was presented at a colloquium in collaboration with Jacques Derrida. His text appears as *Paroles sans voix*.

Even when something comes to pass as possible, when an event occurs as possible, the fact that it will have been impossible, that the possible invention will have been impossible, this impossibility continues to haunt the possibility (Nous in Derrida 2007:452).

What impossibility haunts the Constitution? What is impossible within the normativity established by the Constitution? If we consider the *Mazibuko* case, the impossible is what the applicants brought before the Constitutional Court: A request to change the material conditions of their existence. This is an impossible request for the Constitution to attend to because it exactly brings to the fore the impossibility that haunts the Constitution. This is the impossibility of a new normativity and shared intention that signifies a discontinuation from what has been constituted. The constitution of a new political moment would also mean the discontinuation of the current political normativity built on the initial appropriation, division, and production, of land. The Constitutional Court is unable to make a decision that would change the material conditions of the applicants because such a decision would need to take into account the political and historical genealogy of the case; a task that is impossible within the circumscribed history set out by the Constitution.

Considering this impossibility also allows us to understand why the Constitutional Court came to the decision that it did: it could not have decided otherwise. That which is possible circumscribes the possibilities of the Court's decision. Deciding differently would mean to make a decision that is not possible; it would mean making an impossible decision. This impossibility that haunts the Constitution also appears as a spectre in the transformative constitutionalist critiques discussed in the first chapter of this dissertation. While the court can only act as a form of constituted power, critique can be otherwise. Critique can exist outside of the circumscribed sphere of the possible and bring into being that which is considered not yet possible. Critique can invent that which is not possible; but for this to happen, critique must also be invention. Critique as invention is not a novel concept. If we consider the Greek etymology and meaning of the word 'critique', we find that it is linked with the idea of creation and invention. Κριτική τέχνη (Kritike tekhnē) was the term assigned to

the critique and translates as ‘critical art or critical technique’. κρητικη can be translated as the ability to judge or the ability to make a decision between several possibilities pertaining to a specific situation and τεχνη as the ability to create or produce something. While today we can speak of a critique of some object, for the Greeks the idea of κρητικη was tied with that of τεχνη (Heidegger 2011:222; Delpont 2012:42). Critique has as its condition the task of producing or creating, not merely destructing.

If critique consists of these the two elements, *judgement* and *creation*, then the activity of critique proceeds according to these two elements. To be able to create something one must know what is already in existence; to invent the impossible one must know what is already possible. Judgment is the element of critique that enables the identification and analysis of potential possibilities while creation is the element that brings into being a new, previously impossible, possibility. A critique of the Constitution would then also be a critique not only of the possibilities that it offers, but also of the impossibility that haunts the Constitution. A critique of the Constitution, if this critique is also to function as an invention, must thus be able to move outside of the circumscribed possibilities already contained within the Constitution to bring about that which is considered impossible.

A question?

Invention as an event that brings about the new would allow us to consider the normativity of the Constitution and the process of its coming into existence as merely a self-fulfilled prophecy: We cannot expect of the Constitution, or constitutionalism, to invent anything new since invention is itself a paradox. The paradox of the Constitution and the paradox of invention would make it impossible for any constitutional process to come to being *ex nihilo*. Alternatively, if any new constitutional order would come into being it would do so not as an invention but rather as an actualisation of an already existing potentiality. A new normativity brought about by constituent power would be considered an impossibility. This condition of impossibility within the Constitution is exactly what produces it as a document opposed to the de-bifurcation of the state and its water laws.

The opposition from the Constitution to this type of change or de-bifurcation is the only possibility available within its realm of potentialities. To be able to decide otherwise would be to go against the normativity established by the Constitution and would mean that the Constitutional Court would have to act differently than a branch of constituted power. This is an impossible question to pose to the courts, as it is not within their potentiality of possibilities to actualise. A question of the impossible is a question of invention, something that the courts as a form of constituted power cannot actualise. A case cannot be the event that brings about something new; the court can never actualise the impossible. Karl Klare and the critique discussed in the first chapter as transformative constitutionalism poses this same impossible question to the Constitution. Transformative constitutionalism expects of the Constitution to become that which it is not within its possibilities to actualise. There is a lack of imagination in the position of transformative constitutionalism that confines its critical outlook to that which is possible. Transformative constitutionalism as a critique does not aim to invent something new; it does not attempt to bring into the realm of the possible that which is impossible. The lack of imagination pertaining to transformative constitutionalism as a critique is also an inability to place the Constitution within its larger political genealogy. The absence of the question of land appropriation, division and production, from the critical positions discussed in the first chapter misconstrues the political problem of the Constitution.

The inability to place the Constitution within a larger historical genealogy and to interrogate the political foundations of the normativity the Constitution upholds also has the effect of strengthening this same normativity. By requesting the courts and other legal practitioners to interpret the Constitution differently, one is asking for a change in the normative structure. This is a change that is to be brought about by the forms of constituted power established by the Constitution, the same forms of constituted power that must effect the monitoring of the normative shared ought-intentions. A critique that fails to see the impossibility that haunts the Constitution fails to see the necessity to bring this impossibility into the realm of the possible. There is a looming question, as to whether critique can function as that which inaugurates the event that brings the not-yet-possible into the realm of possibility. This could be the space for critique if critique is understood not as merely *judgement*,

but also as creation. But still, would such a critique be possible? A critique that is able to invent what is not there? Critique as an invention could be a form of engagement that would allow us to consider that which is not-yet-possible; it could allow us to invent the impossible.

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