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THE IMPACT OF LAW ON THE RIGHT TO WATER AND ADDING NORMATIVE CHANGE TO THE GLOBAL AGENDA

MICHAEL R. ULRICH*

ABSTRACT

*A resolution was passed at the United Nations Water Conference in 1977 to achieve universal access to sufficient water by 1990. This bar was lowered significantly as part of the Millennium Development Goals (MDGs). However, as the MDGs come to an end this year, even this reduced benchmark will not be reached. Water is inescapably intertwined with every other MDG, as well as the ability to exercise any human right. Consequently, the failure to achieve this goal implores an exploration of its causes. As the global community embarks on setting a new post-MDG agenda, one currently overlooked aspect is the impact that the law—in particular international law through the human rights framework—has on reaching universal access to water. The incorporation of progressive realization into human rights documents and, subsequently, national laws, has enabled governments and the international community to hide behind ambiguous demands and excuses of limited resources and democratic accountability, impeding much needed progress. The South African Constitutional Court decision in *Mazibuko & Others v. The City of Johannesburg* demonstrates how a government can utilize progressive realization to implement a discriminatory policy, while shielding itself from the responsibility of failing to provide sufficient water to its citizens. The new global agenda should strive to remove the application of progressive realization from the right to water. In doing so, it can empower citizens to hold their governments accountable and create a normative change in how water is viewed internationally. An emphasis on the law's impact will stimulate efficient development not only in terms of water, but in every facet of the global agenda moving forward.*

I. BACKGROUND

With the Millennium Development Goals' (MDGs) fifteen-year agenda scheduled to expire this year, there has been a push to set new global goals in the hopes of making continued progress

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against poverty, disease, hunger, and inequality.¹ As a result, at the RIO+20 Conference, the member states agreed to work to develop the Sustainable Development Goals, with a focus on aspirational aims that were limited in number and easy to communicate.² The Open Working Group that was created has begun to formulate areas that the post-MDG agenda will focus on, and this Article is particularly interested in those related to water. More specifically, it focuses on how the law, especially international law and the human rights framework, impacts access to water globally but has largely been absent from discussions.

One of the objectives of Millennium Development Goal 7, aimed at ensuring environmental sustainability, was to “[h]alve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.”³ Between 1990 and 2010, more than 2.1 billion people gained access to *improved* drinking water sources, exceeding the MDG target.⁴ While these advances are certainly commendable, nearly 770 million people throughout the world lack improved drinking water sources.⁵ It is also troubling that when looking at the breakdown by region, coverage reaches only fifty-six percent of the population in Oceania and sixty-three percent in sub-Saharan Africa.⁶ These disparities are perpetuated when enhancements to water access are stratified by socioeconomic status and geographical location, with the poor and rural communities significantly less likely to have gained improved access.⁷

The growth in access to improved drinking water also may overshadow the fact that the global community is not on track to meet the MDG target for sanitation, with 2.5 billion people left without access to adequate sanitation.⁸ Access to safe drinking water and

1. Jeffrey D. Sachs, *From Millennium Development Goals to Sustainable Development Goals*, 379 LANCET 2206, 2206 (2012).

2. *Id.*

3. UNITED NATIONS, WE CAN END POVERTY: MILLENNIUM DEVELOPMENT GOALS AND BEYOND 2015 FACT SHEET 1, http://www.un.org/millenniumgoals/pdf/Goal_7_fs.pdf.

4. *Id.* There is some dispute over the utility of focusing on “improved” drinking water sources. See *infra* notes 177–78 and accompanying text (describing the inability of this term to truly measure progress of sustainable access to sufficient clean water).

5. WORLD HEALTH ORGANIZATION & UNITED NATIONS CHILDREN’S FUND, PROGRESS ON SANITATION AND DRINKING-WATER: 2013 UPDATE 8 (2013) [hereinafter PROGRESS ON SANITATION & WATER], <http://www.zaragoza.es/contenidos/medioambiente/onu/625-eng-ed2013.pdf>.

6. *Water, Sanitation, and Hygiene*, UNICEF (Apr. 18, 2003), http://www.unicef.org/wash/index_statistics.html.

7. *Id.*

8. PROGRESS ON SANITATION & WATER, *supra* note 5, at 5.

proper sanitation are inextricably intertwined because a lack of access to sufficient sanitation can lead to practices that threaten a community's water supply, be it improved or not. For example, the practice of open defecation is still practiced by over 1 billion people globally.⁹ Disparities in where this practice occurs are drastic; approximately ninety percent of all open defecation occurs in rural areas, where the community is more likely to be poor and lack access to even substandard public or shared sanitation.¹⁰ While the practice has been decreasing in most regions, albeit too slow to reach global sanitation targets, it has actually been increasing since 1990 in sub-Saharan Africa.¹¹

These facts amount to an unacceptable amount of water-related mortality and morbidity worldwide, often impacting those who are most vulnerable. At the simplest level, people will die within a few days without sufficient water to drink.¹² Instead, people typically consume unclean water, which leads to numerous health problems. For example, 1.6 million people die every year from diarrheal diseases, ninety percent of which are children under the age of five and mostly in developing countries.¹³ Each year 160 million people are infected with schistosomiasis, which results in deaths in the tens of thousands.¹⁴ Meanwhile, 146 million per year are at risk of losing their eyesight from trachoma and 133 million suffer from high intensity intestinal helminths infections.¹⁵ All of these are due to a lack of safe drinking water and basic sanitation, but this is certainly not an exhaustive list of the disease burden these conditions cause around the world.

It is important to recognize the progress that has been made in water access, but it is even more critical to view these advances in the appropriate context. One of the resolutions made at the 1977 United Nations Water Conference was to provide universal access to safe water in quantities sufficient for drinking and sanitation,

9. *Id.* at 6.

10. *Id.* at 5.

11. *Id.* at 6.

12. JEFFREY D. SACHS, *COMMON WEALTH: ECONOMICS FOR A CROWDED PLANET* 115 (Penguin Books ed., 2009) [hereinafter *COMMON WEALTH*].

13. WORLD HEALTH ORG., *WATER, SANITATION, AND HEALTH 1*, http://www.who.int/water_sanitation_health/mdg1/en/ (last visited Jul. 3, 2015) [hereinafter *WATER, SANITATION, AND HEALTH*].

14. *Id.*

15. *Id.*

affording priority to those who were poor and less privileged.¹⁶ This goal of providing universal access was meant to be accomplished by 1990.¹⁷ However, nearly forty years later, although the bar was significantly lowered with the MDGs, this goal has still not been reached.

This does not detract from accomplishments in this field, but rather helps illustrate that progress in the context of something as essential as water has been relatively slow. This begs the question of why, and the answer is complex and the analysis of all relevant factors is beyond the scope of this Article. Instead, this Article focuses on one specific factor, which has hindered advancement and has been generally under analyzed: progressive realization.

Progressive realization emerged from major human rights documents as a way to set relative standards to contextualize the resource requirements that may be necessary for developing countries.¹⁸ The concept of progressive realization has since been codified in international law and various national constitutions around the world.¹⁹ The legal claim-rights that citizens hold against duty bearers are limited where progressive realization applies.²⁰ For the right to water, which is necessary for human life and the ability to exercise human rights, it seems counterintuitive to apply such a limitation.

Henry Shue categorizes the right to water as a “basic right” because it is necessary for the enjoyment of all other rights.²¹ Indeed, an attempt to enjoy another right by sacrificing the right to sufficient water would be self-defeating, as water is required for

16. INT'L ENVTL. LAW RESEARCH CTR., UNITED NATIONS WATER CONFERENCE, 1977 (RESOLUTIONS) 2 (1977) [hereinafter UN WATER CONFERENCE], <http://www.ielrc.org/content/e7701.pdf>.

17. *Id.*

18. *See infra* Part I.B (discussing the history of progressive realization).

19. *See infra* Part I.B and II.B.1 (showing that not only has progressive realization been included in numerous human rights documents that shape international law, but that it was incorporated in the South African Constitution as well).

20. Claim-rights are rights that “can be urged, pressed, or rightly demanded against other persons.” HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 14 (Princeton Univ. Press ed., 2nd ed. 1996). Claim-rights create obligations on others, which the holder of the right can demand be respected or fulfilled, because “[a] proclamation of a right is not the fulfillment of a right.” *Id.* at 15. Henry Shue describes the duties that are owed for basic rights as: (1) duties to avoid depriving; (2) duties to protection from deprivation; and (3) duties to aid the deprived. *Id.* at 52. In this Article, the duty-bearer will in most circumstances be the government, with some reference to obligations of the global community later in the Article. *See infra*, Part III.C.2 (discussing ethical and legal duties of the global community).

21. SHUE, *supra* note 20, at 25.

basic survival.²² Consequently, the focus of this Article is solely on the right to water and the hope of reaching universal access to it. As this Article will illustrate, the incorporation of progressive realization into international and local legal structures has mired advancement in universal access to water. If the global community truly hopes to make advances in water rights after 2015, it will be imperative to alter international norms by addressing the legal landscape in which water rights are currently addressed.

Part I of this Article will explore the histories of the right to water and progressive realization to demonstrate how the two have become so closely interconnected. If we hope to fully realize the right to water, it is essential to understand the evolution of the right, the challenges to achieving it, and why it has been limited for so long. In Part II, the case *Mazibuko & Others v. The City of Johannesburg*²³ will be utilized as a case study to exhibit not only how progressive realization allows governments to limit citizens' right to water, but also how these limitations affect those already disenfranchised. This analysis will proceed through two lower level court opinions before evaluating the Constitutional Court's decision to overrule them under the theory of progressive realization in the context of water rights.

Finally, Part III argues that one of the most critical steps that must be taken in setting the post-MDG agenda is the elimination of progressive realization to the right to water. Through the South African case study, it is apparent that international law can strongly influence local laws and, subsequently, have a deleterious impact on global public health—even beyond the right to water. Thus, it becomes evident that changing the legal norm of progressive realization will have a direct impact not only on water access, but also on areas such as gender equality, education, child and maternal mortality, and civil and political rights. While concerns are often raised about resource limitations and democratic accountability, a closer examination finds these excuses unpersuasive in the context of the right to water—a right integrally connected to dignity that billions lack around the world.

22. *See id.* Likewise, “for the bearer of duties to claim to be fulfilling the duties correlative to any right in spite of not fulfilling the duties correlative to a basic right is fraudulent.” *Id.* at 32. *See also infra* notes 86–89 and accompanying text (describing what constitutes sufficient water for survival).

23. *See generally* *Mazibuko & Others v. City of Johannesburg* 2009 (4) All SA 39 (CC) (S. Afr.) [hereinafter *Mazibuko*, Constitutional Court].

II. LIKE OIL AND WATER: PROGRESSIVE REALIZATION AND THE RIGHT TO WATER

A. *Evolution of the Right to Water*

Water is so vital for life that it may seem unnecessary to devote time or energy to discussing its place in the human rights framework. In reality, this may be the only explanation, though not necessarily a logical one, as to why the right to water is largely absent from most human rights documents. Perhaps the three most widely recognized human rights instruments, the Universal Declaration of Human Rights (UDHR),²⁴ the International Covenant on Civil and Political Rights (ICCPR),²⁵ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),²⁶ all fail to explicitly mention a right to water.

There may be numerous explanations for these omissions. Perhaps Article 11 of the ICESCR, which describes the right to an adequate standard of living, is only illustrative in mentioning the rights to food, clothing, and shelter.²⁷ The same may be said for the Universal Declaration of Human Rights (UDHR), which states that the right to a standard of living adequate for one's health and well-being includes the rights to food, clothing, housing, medical care, necessary social services, and security.²⁸ Another explanation is that water was considered so essential that clarifying its necessity in addition to rights to health or to life seemed redundant.²⁹ Indeed, without sufficient water it is impossible to achieve or enjoy any of these rights.

In 1977, nearly forty years after the UDHR was passed, the United Nations Water Conference adopted an action plan to provide universal access to safe drinking water and sanitation by 1990.³⁰ Two years later, in 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was

24. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

25. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

26. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

27. See Peter H. Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 490 (1998).

28. UDHR, *supra* note 24.

29. See Gleick, *supra* note 27, at 490 ("the drafters implicitly considered water to be a fundamental resource."). See also Mathias Risse, *The Human Right to Water and Common Ownership of Earth*, 22 J. POL. PHIL. 178, 178 (2014) ("Only oxygen is needed more urgently than water at most times.").

30. See UN Water Conference, *supra* note 16.

adopted, and included women's rights to adequate living conditions.³¹ The document emphasized that "housing, sanitation, electricity and water supply, transportation and communications"³² were conditions critical to life. Similarly, the 1990 Convention on the Rights of the Child (CRC) held that states should combat disease and malnutrition by, among other things, providing adequate clean drinking water.³³

These instruments mentioning water are certainly significant, but it is worth noting that they pertain to specific populations, and also had other broad objectives.³⁴ Given that the goal of universal access to water was set in 1977, and that by the time the CRC was passed in 1990 the global community was not even remotely close to achieving its water goal, the right to water should have been important enough to be recognized outright. The fact that it was not is telling of the normative approach to water rights.

At the 1992 International Conference on Water and the Environment in Dublin, the Dublin Statement on Water and Sustainable Development emerged with four guiding principles to combat the trends of overconsumption, pollution, and rising threats from droughts and floods.³⁵ Principle No. 4 stated that "[w]ater has an economic value in all its competing uses and should be recognized as an economic good."³⁶ It recognized that there was a "basic right of all human beings to have access to clean water and sanitation at an affordable price."³⁷ This controversial principle appears to emphasize the economic importance of water as much as, if not more so than, the need for access to it.³⁸ This economic focus has influenced decades of debate over whether the commodification

31. Convention on the Elimination of All Forms of Discrimination Against Women art. 14(2)(h), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

32. *See id.*

33. Convention on the Rights of the Child art. 24(2)(c), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 52 (entered into force Sept. 2, 1990) [hereinafter CRC].

34. *See Risse, supra* note 29, at 179.

35. *See* International Conference on Water and the Environment, The Dublin Statement on Water and Sustainable Development (adopted Jan. 31, 1992), <http://www.un-documents.net/h2o-dub.htm>.

36. *Id.*

37. *Id.*

38. *See* COMMON WEALTH, *supra* note 12, at 131 (stating that while the privatization of water is a popular solution to water problems, this can actually result in private monopolies devoid of democratic constraints, which often disadvantage the poor due to a focus on maximizing profits).

and privatization of water has been harmful, or necessary, to prevent wasteful use of a finite resource.³⁹

Finally, in 2002, General Comment No. 15 on The Right to Water incorporated this universal right into articles 11 and 12 of the ICESCR.⁴⁰ Thirty-six years after the ICESCR's passage, the human rights framework considered the right to water "fundamental for life and health."⁴¹ Comment 15 also noted that the right to water is inextricably linked to other recognized rights, including an adequate standard of living, housing, food, and human dignity.⁴² The right to water also contains additional freedoms and entitlements, including the right to be free from arbitrary disconnections or contamination of water supplies, and to have a system of water supply and management that provides equal opportunity and access for all.⁴³ Still, the right to water is limited by the principle of progressive realization.⁴⁴

B. *Progressive Realization and the Two-Tiered System*

The term progressive realization is used in numerous international law documents that address human rights. Recognition of universal human rights was documented in the UDHR,⁴⁵ but state obligations to uphold them were created via international treaties, such as the ICCPR,⁴⁶ ICESCR,⁴⁷ CRC,⁴⁸ CEDAW,⁴⁹ and the International Convention on the Elimination of All Forms of Racial Dis-

39. *Id.*

40. It is worth noting that original signatories to the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are not considered signatories of the general comment, though the comment still has important normative implications. Several states have declined to accept many of the Committee's General Comments, preferring to adhere to the language in original Covenants, which fail to mention water specifically. Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 495 (2004). For example, the states participating in the Third World Water Forum decided not to follow the Committee's recommendations with regard to the right to water. *Id.*

41. Comm. on Econ. Soc. & Cultural Rights, General Comment 15, The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 1 U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15].

42. *Id.* ¶ 3.

43. *Id.* ¶ 10.

44. *Id.* ¶ 17.

45. See UDHR, *supra* note 24, at 16.

46. See generally ICCPR, *supra* note 25.

47. See generally ICESCR, *supra* note 26.

48. See generally CRC, *supra* note 33.

49. See generally CEDAW, *supra* note 31.

crimination (ICERD).⁵⁰ This Article focuses on civil and political rights, as well as economic, social, and cultural rights, due to the impact that progressive realization has on each.

Countries that signed on to the ICESCR agreed to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁵¹ In addition, the Committee on Economic, Social, and Cultural Rights aimed to clarify the concept of progressive realization by stating that it requires expeditious and effective movement toward achieving the rights described in the Covenant in terms of full use of available resources.⁵² While steps taken must be “deliberate, concrete, and targeted,” the Committee also accepts that full recognition of economic, social, and cultural rights cannot be accomplished over a short period of time. Therefore, it grants flexibility to reflect “real world” practicalities.⁵³

The ICCPR on the other hand, requires that signatories “respect and [] ensure” the rights declared by the Covenant.⁵⁴ This differs significantly from the ICESCR in that it imposes an immediate obligation upon states regarding civil and political rights. However, this variance in state obligations may stem from the notion that ICCPR rights are largely negative rights that demand that the state refrain from acts that inhibit individual liberties,⁵⁵ whereas state duties under the ICESCR are primarily viewed as positive, requiring state action to implement the rights described.⁵⁶

This distinguishing characteristic is misleading and largely unrealistic. For example, the right to liberty and security of one’s person, which is guaranteed in the ICCPR, not only prohibits the state from engaging in certain activities, but also forces the state to

50. See generally International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

51. ICESCR, *supra* note 26, art. 2(1).

52. Comm. on Econ., Soc. & Cultural Rights, General Comment 3, The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant), ¶ 9, U.N. Doc. E/1991/23, Annex III, P 10 (Dec. 14, 1990) [hereinafter General Comment 3].

53. *Id.* ¶ 2.

54. ICCPR, *supra* note 25, art. 2(1).

55. See Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 14 (1992). For example, the state cannot torture or arbitrarily imprison people. *Id.*

56. *Id.*

establish police forces, judicial systems, and maintain prisons.⁵⁷ These state activities are often time consuming and require vast resources.⁵⁸ Yet, the progressive realization principle that applies to economic, social, and political rights is supposedly in place due to the resources these rights command and the limited resources some countries have to address them.⁵⁹

The distinction between the two tiers of rights is puzzling. Ethically speaking, distinguishing between positive and negative rights only holds weight if action and omission are each assigned differentiating moral values.⁶⁰ While libertarian values may claim a significant difference, in any organized society, protection of negative rights will still compel some range of positive actions.⁶¹ In reality, the resources required to ensure any specific right will depend upon that right and the context in which it must be fulfilled, rather than its negative or positive classification.⁶²

The juxtaposition of the rights described in the ICCPR and the ICESCR, and the obligations they place on states, demonstrate that the rights are distinguishable based on more than a merely negative or positive classification. In actuality, a primary difference between them is that simply passing legislation can fulfill civil and political rights.⁶³ As a result, the supposed demand of ICESCR rights on resources has become an excuse for inaction.⁶⁴ Now, under the auspices of progressive realization, these rights have become more akin to aspirational goals than realistic benchmarks for states.⁶⁵

57. *Id.* at 14–15.

58. *Id.* at 15.

59. See Steven R. Keener & Javier Vasquez, *A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights*, 40 COLUM. HUM. RTS. L. REV. 595, 599 (2009) (discussing progressive realization in terms of the right to health and the limited resources countries have to supply goods and services related to health).

60. See Shue, *supra* note 20, at 37.

61. *Id.* at 37–39, 45–46 (“[E]ven someone who denied that individuals or organizations have duties to supply commodities to people who are helpless to obtain them for themselves, might grant that the government ought to execute the society’s duty of protecting people from having their ability to maintain their own survival destroyed by the actions of others.”).

62. See *id.* at 39.

63. See Dennis & Stewart, *supra* note 40, at 482 (quoting Eleanor Roosevelt).

64. See Keener & Vasquez, *supra* note 59, at 599.

65. See Audrey R. Chapman, *A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 38–39 (1996).

C. Muddied Waters in the Human Rights Framework

Despite the attempt at clarification, the demands of the progressive realization framework are often considered vague and ambiguous. The framework fails to specify what steps would be reasonable or feasible. Nor is it clear what the maximum use of available resources entails. Another issue with progressive realization in the ICESCR is that each state has “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”⁶⁶ Therefore, despite the application of progressive realization to economic, social, and cultural rights, “a State party cannot, under any circumstances whatsoever, justify non-compliance with the core obligations which are non-derogable.”⁶⁷

The core obligations, which include health facilities, food, shelter, water, and medicine,⁶⁸ appear to present a tension of contradictory duties, given both the strict minimum requirements and progressive realization’s reliance on relativity and context. For example, the Committee explains that failure to meet the core minimum, for example, if a significant number of individuals are deprived of necessary foods, would create a *prima facie* case of a state failing to meet its responsibilities under the Covenant.⁶⁹ However, although this commitment to provide minimum levels of certain core rights is described as central to the justification of the Covenant, the Committee again qualifies state requirements by emphasizing the actions of the state must be viewed in the context of their available resources.⁷⁰ Therefore, failing to meet the minimum levels “required” for these most basic rights can be defended by states that assert that “every effort has been made to use all resources that are at its disposition to satisfy, as a matter of priority, those minimum obligations.”⁷¹ These core obligations, which supposedly establish a floor for state action, in reality take us no further than the pre-existing progressive realization standard that was already present.

66. General Comment 3, *supra* note 52, ¶ 10.

67. Comm. on Econ., Soc. & Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 47, U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14].

68. Keener & Vasquez, *supra* note 59, at 605.

69. See General Comment 3, *supra* note 52, ¶ 10.

70. See *id.*

71. *Id.*

This recognition of certain rights that demand minimum levels of fulfillment help illustrate the problems of progressive realization. If a government is given years to provide only a basic minimum to its citizens, the lack of certain essential and necessary rights can lead to significant harm and, in many circumstances, death.⁷² Water certainly qualifies, as one of these rights, given the necessity of drinking water for survival and the extreme levels of mortality and morbidity caused by lack of access to clean water. Still, despite required minimum core obligations, the denial of adequate water could easily fall under the parameters of limited resources for numerous developing countries around the world. On the other hand, a denial of such a right due to other factors, such as discrimination, would constitute a violation even under the theory of progressive realization.

This type of judgment is problematic because progressive realization is so inexact that even this type of monitoring becomes extremely difficult.⁷³ An inability to properly gauge the supposed advances of a state to meet its responsibilities can also convert certain rights into idealized goals that may never be reached. As a result, clear standards must be set not only to ascertain whether a right is being progressively realized through concrete steps, but to determine whether the maximum available resources have been utilized as well.⁷⁴ Consequently, criteria must be set for each individual right in each country to ensure that efforts can be accurately considered in light of a country's available resources.⁷⁵ This method of developing global standards for proper appraisal around the world requires extensive time and effort, draining resources without guarantee of an accurate assessment.⁷⁶

Determining progressive realization relative to resource availability and usage is not the only challenge presented with this framework of human rights evaluation. To do so requires looking at a country's past and present states of fulfillment, and estimating future development toward full realization.⁷⁷ This all must be done without a clear definition of what moving expeditiously and

72. See COMMON WEALTH, *supra* note 12, at 115 (discussing that without water a person can die within days, and without readily accessible clean water sources, complications arise with food consumption and pervasive disease, claiming the lives of millions each year).

73. See Chapman, *supra* note 65, at 23.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.* at 33.

effectively entails.⁷⁸ This process makes for an extremely difficult and time-consuming approach to something as essential as water. For a right so indispensable, it is worth asking if this is the best methodology. After all, “[t]he monitoring of human rights is not an academic exercise; it is intended to be a means of reducing the human suffering that results from serious violations of international standards.”⁷⁹

Progressive realization works under an unrealistic assumption that all states will take their obligations seriously and actually strive for full implementation.⁸⁰ Even if this were the case, the need for sufficient water cannot wait decades, or even years, to be satisfied. With the ambiguity that progressive realization presents, it should come as no surprise that there is no coordinated water management authority or agency for water under the United Nations system.⁸¹ In fact, the ICESCR did not establish any oversight body, as exist under most other treaties, nor did it create an individual complaints mechanism or interstate complaints mechanism.⁸² Instead, oversight is left to the Economic and Social Council,⁸³ which can read the reports it receives and bring matters to the attention of the other sections of the United Nations or other specialized agencies; pass the reports along to the Commission on Human Rights for their study and recommendation; or submit recommendations to the General Assembly on progress made in these areas.⁸⁴

When it comes to receiving adequate water, this hardly seems sufficient. The application of progressive realization to the right to water fails to appreciate the importance of ensuring this right immediately. It lacks the precision to place tangible obligations on states, and it does not contain the specificity needed for proper monitoring and enforcement. The failures of the application of progressive realization to the right to water can be proven by observing its resulting policies and their impact upon those most in need.

78. *See id.* at 32.

79. *Id.* at 37.

80. *See id.* at 38.

81. *See* Common Wealth, *supra* note 12, at 135.

82. *See* Dennis & Stewart, *supra* note 40, at 477.

83. *See id.*

84. *See id.* at 477 n.101.

III. CASE STUDY ON THE EFFECTS OF PROGRESSIVE REALIZATION

General Comment 15 of The Right to Water states that water is fundamental for life and health, indispensable for human dignity, and a prerequisite to the realization of other human rights, as it is necessary for survival.⁸⁵ Therefore, the human right to water entitles everyone to sufficient, safe, physically accessible, and affordable water⁸⁶—for consumption, cooking, and personal and domestic hygiene uses.⁸⁷ The right to water also contains negative rights, such as the freedom from interference and arbitrary disconnections, and positive rights, such as the right to have a water system provided and managed in such a way that all citizens are given equal access to it.⁸⁸ Therefore, the right is subject to progressive realization.⁸⁹

The problems explained earlier in this Article relating to progressive realization and the importance of water to life and all other human rights, create an uncomfortable relationship, as the vagaries of this standard are certain to be a contributing factor in the deaths of many.⁹⁰ An example of how progressive realization can limit the right to water can be found in South Africa, which has one of the world's most progressive constitutions, and recognizes positive rights including the right to water.⁹¹ While the South African Constitution and the ICESCR are entirely different documents, South Africa's Constitution and its courts are influenced by international law.⁹² For example, Section 27 of the South African Constitution states that rights such as food, water, and social security are to be progressively realized within available resources by rea-

85. General Comment 15, *supra* note 41, ¶ 1. The right to water is considered inextricably linked to the right to the highest attainable standard of health and the rights to adequate housing and adequate food. *Id.* ¶ 3.

86. *Id.* ¶ 2.

87. *Id.*

88. *Id.* ¶ 10.

89. *Id.* ¶ 17. The right to water is also discussed in terms of core obligations, but as stated earlier, this adds very little to State obligations in terms of progressive realization, given that countries can claim limited resources. *Id.*

90. See COMMON WEALTH, *supra* note 12, at 121 (stating a lack of clean water causes the spread of infectious diseases that results in the death of millions of children each year).

91. Jackie Dugard, *Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy*, 42 REV. RADICAL POL. ECON. 175, 179 (2010).

92. See *id.* at 179 n.13 (explaining that the Constitutional Court stated that in the context of interpreting the Bill of Rights, non-binding and binding international law is relevant).

sonable measures.⁹³ Consequently, although General Comment 15 states that the quantity of water available for each person should correspond to World Health Organization (WHO) guidelines,⁹⁴ South Africa was justified in establishing its own standard.

A. *Background on Water in Johannesburg*

The WHO has found that the absolute minimum amount of water needed for survival is twenty-five liters per person per day.⁹⁵ At this quantity, consumption needs are typically met, but hygiene may be compromised.⁹⁶ Intervention in this area should be a high priority, as such low levels of water carry with them high levels of health concerns.⁹⁷ A more appropriate minimum that would meet the basic needs of consumption, sanitation, bathing, and food preparation, would be fifty liters per person per day.⁹⁸ Even this amount is still less than half of the optimal level of water access.⁹⁹

Despite this scientifically-based international guidance, South Africa implemented a water program that provided free water in the amount of 6,000 liters of free water per household per month; for any amount used above the 6,000 liter threshold, prepayment water meters, which were placed only in certain poorer, historically black, sections of Johannesburg, would automatically disconnect until money was paid to access more water.¹⁰⁰ It is worth noting that while the prepayment meters were only placed in certain low-income areas, the free 6,000 liter allotment of water was provided to all citizens regardless of wealth.¹⁰¹ By quantifying the amount of free water by household per month instead of person per day, South Africa's initiative was inherently discriminatory against large, multi-unit homes that are common in poor urban areas of South Africa.¹⁰²

93. S. AFR. CONST. 1996, § 27; *see also* Mazibuko, Constitutional Court, *supra* note 23, ¶ 50 (interpreting Section 27 of the Constitution to require the state to take "reasonable legislative and others measures progressively" to realize the achievement of the rights described).

94. *See* General Comment 15, *supra* note 41, ¶ 12(a).

95. *See* Mazibuko & Others v. The City of Johannesburg 2008 (4) All SA 471 (HC) at ¶ 46 (S. Afr.) [hereinafter Mazibuko, High Court].

96. *See* WORLD HEALTH ORG., THE RIGHT TO WATER 13 (2003) [hereinafter WHO, RIGHT TO WATER], http://www.who.int/water_sanitation_health/en/righttowater.pdf.

97. *See id.*

98. *See* Gleick, *supra* note 27, at 496.

99. *See id.*

100. *See* Dugard, *supra* note 91, at 176.

101. Mazibuko, Constitutional Court, *supra* note 23, ¶ 79.

102. Dugard, *supra* note 91, at 184–85.

Research has shown that the average household size in Phiri, a poor subsection of the Soweto area of Johannesburg where prepaid meters were placed, was thirteen people.¹⁰³ As a result, in a thirty-day month, each person in an average household in Phiri would be allotted less than 15.4 liters of water per day, falling well below the adequate minimum requirements set by the WHO just for consumption. Because thirteen people per household was simply the average, not the maximum family size, it is clear that many of South Africa's poor received far less than the minimums set by the WHO for basic water needs. Unsurprisingly, the free allocation of water often ran dry well before the end of the month, and few, if any, were able to afford additional water.¹⁰⁴

The impetus for this policy was the goal of reducing water waste and improving payment rates.¹⁰⁵ Although the previous water plan required a flat rate fee for 20,000 liters of water per household per month, actual consumption in Soweto was closer to 67,000 liters.¹⁰⁶ Johannesburg Water estimated that nearly seventy-five percent of the water going into Soweto was unaccounted for, making it a perfect location to test the new prepaid meter water plan.¹⁰⁷ However, this calculation of water usage without revenue failed to factor in the water lost to leakage, which was a significant problem due to the steel pipes laid in Soweto in the 1940s and 1950s without corrosion protection.¹⁰⁸

The 6,000-liter plan was later amended, although only after suits were filed and a case had already commenced, in order to allow account-holders who registered as indigent to receive an additional 4,000 liters of water per household, per month.¹⁰⁹ Additionally, due to problems faced in emergency fire situations, the city eventually allowed each household with a prepaid meter that registered as indigent an emergency allotment of 4,000 liters of water per

103. *Id.* at 189. One of the parties of the Mazibuko case had twenty people living on one water stand, dropping the amount of water per person per day to approximately ten liters per person per day in a thirty-day month. *See* Mazibuko, Constitutional Court, *supra* note 23, ¶ 4.

104. Dugard, *supra* note 91, at 176. "The limitation or discontinuation results in the applicants not having access to water for about two weeks prior to the release of the next available free six kilolitres per household per month." Mazibuko, High Court, *supra* note 95, ¶ 84.

105. *See* Mazibuko, Constitutional Court, *supra* note 23, ¶ 13.

106. *See id.* ¶ 11.

107. *See id.* ¶ 12.

108. *See id.* ¶ 11.

109. *See id.* ¶ 81.

year.¹¹⁰ Though the details of the amendments will be discussed in more detail below, in the average household of thirteen, this would still only increase the per person per day total to just over 25.6 liters in a thirty-day month, an amount just above the basic minimum amount of water needed for daily consumption. Furthermore, with administrative barriers of registration and the social stigma associated with registering as indigent, it should come as no surprise that at the time the answering affidavits were lodged, only 118,000 households had registered, although at least 500,000 households were eligible.¹¹¹ In response to the dire water situation, a lawsuit was filed challenging the prepaid meter policy, and the ensuing case was heard by the High Court of South Africa (High Court), the Supreme Court of Appeal (Court of Appeal), and finally the Constitutional Court.

B. *Mazibuko & Others v. The City of Johannesburg*

1. The High Court of South Africa

In the case of *Mazibuko & Others v. The City of Johannesburg*,¹¹² the concept of progressive realization and the right to water collided. In that case, five residents of separate households in Phiri, a historically poor black subsection of Johannesburg, brought a lawsuit asserting that the water policy violated Section 27 of the Constitution, which stated that everyone has the right to have access to sufficient water.¹¹³ The Constitution makes clear that the right is not unbounded, and the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”¹¹⁴ Thus, the issue was whether the prepaid meter policy violated the right to water or fit within the progressive realization framework that the Constitution incorporates.

The case was first heard by the High Court of South Africa, which found that the policy was discriminatory, irrational, and unreasonable.¹¹⁵ To help make its determination, the court looked to international law for guidance, as required by section

110. *See id.*

111. *See id.* “People are reluctant to register as indigent for fear of social stigma.” *Mazibuko*, High Court, *supra* note 95, ¶ 146.

112. *Mazibuko*, Constitutional Court, *supra* note 23.

113. *See* S. AFR. CONST., 1996, § 27(1)(b).

114. *Id.* § 27(2).

115. *Mazibuko*, High Court, *supra* note 95, ¶ 26.

39(1)(b) of the Constitution.¹¹⁶ The court also considered WHO guidelines, which stated that twenty-five liters per person per day would sustain life in the short term, but ultimately felt that this amount was insufficient for residents.¹¹⁷ After hearing expert evidence, the court held that the City was obliged to provide fifty liters of water per person per day.¹¹⁸ The court also found that the City had no reasonable argument that they actually lacked the capability and resources to provide more than the current policy provided.¹¹⁹

The High Court believed the prepaid meters had no basis in law and were unconstitutional,¹²⁰ and that much of the policy and corresponding amendments were nothing more than a veiled attempt to discriminatorily coerce historically poor black areas into accepting the prepaid meters.¹²¹ The evidence the City submitted to suggest that proper notice and explanation were given of the change in policy was in the form of affidavits mainly from employees and councilors of the City.¹²² The court felt that the notice provided was misleading, had a tone of intimidation and presumptiveness, and, in reality, was a subtle attempt to persuade residents to accept the prepaid meters.¹²³ For residents to partake in the benefits of the amendments, including the 4,000 additional liters per month and an emergency 4,000 liters per year, they had to not only register as indigent, but also accept prepaid meters.¹²⁴ To incentivize registration and increase the amount of prepaid meters, the City offered to write off accrued debt; however, such debt would be reinstated if anyone was found to have interfered with prepaid meter installation or tampered with the meter.¹²⁵

The court was extremely troubled by the water policy because it did not provide notice and an opportunity to be heard for those

116. See *id.* ¶ 31. The court specifically relies on Articles 11 and 12 of the ICESCR, General Comment No. 15, and the CRC. See *id.* ¶¶ 35–38.

117. See *id.* ¶¶ 46, 169.

118. See *id.* ¶ 183.

119. See *id.* ¶ 181.

120. See *id.* ¶ 82.

121. See *id.* ¶¶ 149, 154.

122. See *id.* ¶ 107.

123. See *id.* ¶¶ 109–10. The court found the terms of notices to convey the prepaid meter system as “a *fait accompli*.” *Id.* ¶ 122.

124. See *id.* ¶ 140.

125. See *id.* ¶ 141. While the court offers social stigma as a cause for the lack of households registering as indigent, it is likely that the coercion into accepting prepaid meters may have had a large influence in preventing higher registration numbers as well. See *id.* ¶ 146. In the end, the court found that the amendments did little to improve the situations for those in Phiri. See *id.* ¶ 148.

with prepaid water meters, who may have been able to show that understandable financial hardships were the reason they were unable to pay for more than the free allotment of water.¹²⁶ The City's explanation as to why historically poor black areas were not granted the same privileges as historically wealthier white areas was that the prepaid metered communities would not be able to afford additional water and, thus, the City was helping to prevent them from going into debt.¹²⁷ The court found this justification discriminatory, patronizing, and reminiscent of the historical justifications for apartheid.¹²⁸ Rejecting the notion that "bad payers" were isolated in the same geographic region, the court struck down the prepaid meter system and demanded that the City legitimately offer to all residents the option of a standard meter at the City's expense.¹²⁹

2. The South African Supreme Court of Appeal

The Supreme Court of Appeal agreed with the High Court that the City could indeed provide sufficient free water to those who were unable to afford it and also rejected the City's argument that it was not obliged to provide any free water.¹³⁰ Looking to international law, the court also found General Comment 15 particularly persuasive in its definition of accessibility, which requires water to be affordable and accessible to all, including the most vulnerable.¹³¹ Ultimately, the Court of Appeal was influenced by different expert evidence and held that the City was constitutionally obligated to ensure that residents received forty-two liters of water per person per day.¹³²

Another distinction between the two lower court opinions is that while the Court of Appeal also found the use of prepaid meters to be unlawful, it decided to suspend the declaration for two years to allow the City an opportunity to make necessary changes to legalize

126. *See id.* ¶ 93.

127. *See id.* ¶ 153.

128. *See id.*

129. *Id.* ¶¶ 154–55, 183.

130. *See Mazibuko & Others v. The City of Johannesburg 2009 (3) All SA 202 (SCA) ¶¶ 27, 30 (S. Afr.)* [hereinafter *Mazibuko, Court of Appeal*].

131. *See id.* ¶ 28.

132. *See id.* ¶ 24. The High Court utilized the calculations of P.H. Gleick, whereas the Court of Appeal used those from I.H. Palmer, with the primary difference being that Palmer believed that only fifteen liters of water were required for sanitation, whereas Gleick believed that twenty liters were required, as well as some minor differences in amounts each considered necessary for personal washing, cooking, and house cleaning. *Id.*

their use.¹³³ The court felt that since the unlawfulness was merely influenced by an error of law, it would be inappropriate to command the removal of prepaid meters that were already installed.¹³⁴ Another interesting point was the court's emphasis on its role in constructing the City's water policy. While the Court of Appeal felt it was within its right to find a basic minimum ensured by the right to water, it stopped short of making determinations on how to best distribute this amount of water to citizens. Instead, the court left it to the City to fairly and equitably reformulate its discontinuation policy, such that it provided reasonable notice and an opportunity to be heard for people who could prove that they could not afford to pay but should not be denied water access.¹³⁵

The court noted that it would be irresponsible to usurp the function of the City and specify exactly how the new policy should be designed.¹³⁶ The court also referenced the difficulty it faced in deciding how to disperse limited resources and the roles that each of the democratic branches play in establishing sound policy. Finally, the court also felt well within its authority to interpret Constitutional responsibilities, delineating what amounts to a minimum core obligation, but it did not believe it was within its power to rewrite the law and specify how each citizen would receive that amount.

3. The South African Constitutional Court

When the case reached the Constitutional Court, it overruled the Supreme Court of Appeal and upheld the policy, with one critical difference in constitutional interpretation. Despite the Constitutional provision providing a justiciable right to water, the Constitutional Court found that the Constitution "does not require the state upon demand to provide every person with sufficient water."¹³⁷ The state is merely required to "take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."¹³⁸ As such, it found that there was no "constitutional obligation to provide any *particular* amount of free water," an interpretation that directly contradicted both the lower court's rulings.¹³⁹

133. *See id.* ¶¶ 58, 60.

134. *See id.* ¶¶ 38, 60.

135. *See id.* ¶¶ 42-43, 54.

136. *See id.* ¶ 42.

137. Mazibuko, Constitutional Court, *supra* note 23, ¶ 50.

138. *Id.*

139. *Id.* ¶ 85.

The primary purpose of the court's decision appeared to be the relevance and importance of applying the progressive realization standard to determining the manner in which the right to water is fulfilled. Of particular importance to the court was that the other branches determine how to gradually realize the right to water. Indeed, the court felt it would be "institutionally inappropriate" for the judiciary to determine what steps must be taken to progressively realize not just the right to water, but any social or economic right.¹⁴⁰ Instead, the legislature and executive were seen as the governmental branches best able to understand social needs in the context of available resources.¹⁴¹

While the lower courts utilized international law and expert testimony to determine that the City was obligated to provide a minimum amount of water sufficient to protect human dignity, the Constitutional Court concentrated on the ICSECR and General Comment 3, which focus specifically on progressive realization.¹⁴² The court rejected the argument that there was a core minimum amount of water that it had to define, but evaluated whether the City was fulfilling its responsibility to progressively realize the right to water. As a starting point, the court held that progressive realization bars the government from taking no steps at all to realize the right to water, an undeniably low bar that the prepaid meter policy clearly passes.¹⁴³ The court also interpreted progressive realization as requiring the government to provide some provision for the most desperately needy and to avoid unreasonable limitations or exclusions, although the poor were already being provided free water.¹⁴⁴

Another duty under progressive realization is the need for the City to continually review its policies.¹⁴⁵ Yet, this too appears to be quite a low bar and this interpretation seemed to place more of the onus on poor citizens to review the policies than upon the government itself. For example, the court stated that setting a minimum standard of water provided citizens notice of what their right entailed and, therefore, placed the burden on them to hold officials accountable politically or through legal challenge if they did

140. *Id.* ¶ 61.

141. *See id.*

142. *See id.* ¶ 40. *See also* notes 47–49 and accompanying text (describing language from ICESCR and General Comment 3 that define progressive realization).

143. *See id.* ¶ 67.

144. *See id.*

145. *See id.*

not approve.¹⁴⁶ Citizens, especially those that live in historically-poor black communities that received the prepaid meters, are faced with an uphill battle, given that the minimum standard set is considered presumptively reasonable.¹⁴⁷ As evidenced by this case, if the state makes changes after litigation commences, those changes may be used as evidence of the state reviewing and updating its policies and thereby satisfying progressive realization requirements.¹⁴⁸ In the Constitutional Court's view, even if the City's policy changes have been driven by the litigation in question, "[t]he litigation will in that event have attained at least some of what it sought to achieve."¹⁴⁹

The Constitutional Court held that by putting in place a policy that provided some free amount of water, altering the policy at various points during the litigation, and maintaining a reasonable connection to the legitimate purpose of conserving water and increasing financial stability, the City fulfilled its obligation of progressive realization.¹⁵⁰ While the lower courts expressed concerns of discrimination, the Constitutional Court felt that because the historically wealthier white communities were unable to choose prepaid meters and were stuck with credit meters, there was sufficient equality.¹⁵¹ Perhaps more shocking, the court stated that even if the policy was discriminatory in practice, the City had demonstrated that the purpose behind the policy was fair and thus constitutional.¹⁵² In the end, the Constitutional Court found that this prepaid meter system not only met constitutional obligations, but also exemplified a government meeting the requirements of the progressive realization standard.¹⁵³ However, it is the progressive realization standard that may in actuality be the true problem.

IV. NO TIME LIKE THE PRESENT: INCORPORATING LAW INTO THE GLOBAL AGENDA

To continue to make substantial advances in areas of poverty, inequality, and poor health, the post-MDG agenda must begin by determining what strategies have worked in advancing and accom-

146. *See id.* ¶ 70.

147. *See id.* ¶ 76.

148. *See id.* ¶ 96.

149. *Id.*

150. *See id.* ¶¶ 150–54.

151. *See id.* ¶ 155.

152. *See id.* ¶ 150.

153. *See id.* ¶ 71.

plishing the MDGs and which have not.¹⁵⁴ For example, MDG 7 will not be completely accomplished, as over 2.5 billion individuals will still be without adequate sanitation. As a result, it is vital that we identify why this goal was not reached. One under-analyzed issue is the impact of international law, specifically the human rights framework and its application of progressive realization, to the right to water. The critical role that the law can play in this arena is clearly exemplified by the *Mazibuko* case. Moving forward, the global agenda would be best served by modifying the current human rights structure as necessary to advance evolving goals. A change in international law would not only advance water rights, but also many other areas that the MDGs sought to improve that are likely to remain among newly-set objectives.

The focus of this Article has been on the impact that progressive realization has on the right to water, not only due to the indispensability of water, but also due to the role it plays in fulfilling many other human needs. While there are important debates over the impact and scope of human rights law, resource allocation, and the role of courts in democratic states, to truly succeed in making efficient improvements on critical global objectives, the application of progressive realization to the right to water must be addressed.

A. *Accountability, International Norms, and the Expressive Power of Law*

The impact that international law and the human rights formulation have on the health and well-being of billions around the world cannot be overstated. There has been a push to emphasize and enforce a right to health globally, and with it a surge in health-related litigation.¹⁵⁵ Everything from the right to essential medicines, maternal care, and housing has come under right to health or right to life lawsuits.¹⁵⁶ Though the validity and importance of these rights is beyond the scope of this Article, these suits do suggest the strong connection between the law and health.¹⁵⁷ The law's relevance to the right to water is no different.

154. See Sachs, *supra* note 1, at 2206.

155. Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health*, 10 HEALTH & HUM. RTS. 21, 21 (2008).

156. See *id.*; see also U.N. Comm. on the Elimination of Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Comm. No. 17/2008, ¶ 1, U.N. Doc. CEDAW/C/49/D/17/2008 (Sept. 27, 2011), http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C49-D-17-2008_en.pdf.

157. See Gloppen, *supra* note 155, at 24 (describing how health rights litigation can increase government accountability in terms of both policy and implementation gaps).

One of the primary functions of the law is to empower citizens to hold their government accountable for fulfilling its legal obligations. Indeed, in *Mazibuko*, the Constitutional Court stated that “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.”¹⁵⁸ Yet, as seen in *Mazibuoko*, progressive realization affords the government the opportunity to hide behind a nebulous concept that does little to demand specific state action.¹⁵⁹ By utilizing arguments that mention limited resources, administrative burden, and democratic accountability, a government can avoid providing the services needed to satisfy certain rights. In the case of water, this can, and has, proven deadly.¹⁶⁰

The right to water differs from other rights in that the basic water needs of individuals can be quantified and specified.¹⁶¹ However, the indefinable nature of progressive realization renders these scientific facts useless and increases the difficulty in monitoring state compliance for the right to water.¹⁶² One need look no further than the discrepancies in the various court interpretations of the right to water in the *Mazibuko* case. In *Mazibuko*, the Constitutional Court was able to reject the idea of a core minimum due to progressive realization, despite expert testimony on basic needs required for human dignity, when it held that the “Constitution does not require government to be held to an impossible standard of perfection.”¹⁶³

If citizens are unable to even demand the basic minimum amount of water necessary for a dignified life, they certainly cannot hold their government responsible for failing to meet its obligation. Moreover, citizens’ ability to demand the fulfillment of their rights is weakened by the fact that the government can simply make changes to its policy once litigation has commenced, whether or not such changes actually improve conditions on the ground. Though the High Court found little improvement among the amendments made in *Mazibuko*, which it believed were more

158. *Mazibuko*, Constitutional Court, *supra* note 23, ¶ 59.

159. See Dennis & Stewart, *supra* note 40, at 490 (finding that progressive realization does not present a clear standard to provide appropriate oversight).

160. See WATER, SANITATION, AND HEALTH, *supra* note 13, at 1.

161. Lucy Williams, *The Justiciability of Water Rights: Mazibuko v. City of Johannesburg*, 18 WILLAMETTE J. INT’L L. & DISP. RESOL. 211, 250 (2010).

162. See Chapman, *supra* note 65, at 23.

163. *Mazibuko*, Constitutional Court, *supra* note 23, ¶ 161.

focused on increasing the amount of prepaid meters installed,¹⁶⁴ the Constitutional Court believed that passing amendments at all was evidence of satisfying progressive realization requirements.¹⁶⁵

Thus, progressive realization strips power away from citizens, and most heavily burdens those who are already vulnerable. Consequently, poor citizens must wait for outsiders, such as NGOs, to assist in providing water needed for survival. Although a top-down approach to achieving human rights is laudable, progressive realization prevents the achievement of a complimentary bottom-up approach that would undoubtedly increase the efficiency in which these rights are met.¹⁶⁶

In this sense, progressive realization can help to protect the status quo. In developing countries with marginalized, poor populations, especially those with troubled histories such as South Africa, this is even more concerning. As seen in *Mazibuko*, historically poor black neighborhoods were forced to use prepaid meters while historically wealthier white areas were given water on credit, an arrangement the lower courts felt was reminiscent of apartheid. This sanctioned discriminatory policy is made worse by the numerous procedural protections that the wealthier communities are afforded.¹⁶⁷ These protections include notice of being in default, an opportunity to reach an agreement with the City for payment in installations, and hand delivering or posting a final discontinuation notice.¹⁶⁸ This is certainly a stark contrast to the automatic discontinuation of water faced by houses with prepaid meters.

In addition to directly empowering individuals to help enforce their rights, the law can also be extremely important in creating international norms that maintain a more expressive power. Though water is so essential for life, basic minimums are not being met for an astoundingly large number of people around the world. Changing international law to recognize that water is a right that must be achieved immediately, rather than progressively, can help alter the existing norm that lumps water into the same categories

164. *Mazibuko*, High Court, *supra* note 95, ¶¶ 148–49.

165. *See Mazibuko*, Constitutional Court, *supra* note 23, ¶ 78.

166. *See* Mark Heywood & John Shija, *Symposium: Global Health Governance: A Global Framework Convention on Health: Would it Help Developing Countries to Fulfill Their Duties on the Right to Health? A South African Perspective*, 38 J. L. MED. & ETHICS 640, 640 (2010) (describing the need for global governance to incorporate a bottom-up strategy).

167. *See Mazibuko*, High Court, *supra* note 95, ¶ 94.

168. *See* Dugard, *supra* note 91, at 176 n.2.

as other economic, social, and cultural rights.¹⁶⁹ In this sense, such changes to international law can be effective in several ways.

Changing the law can provide notice that water should no longer be thought of as a right that should be gradually realized, and one that can also be enforced by sanctions when violated. However, the law has the power to generate change even without penalties or direct coercion,¹⁷⁰ in part due to the moral weight carried by such law, which can indicate to people the need for a new direction and modification of existing norms.¹⁷¹ Changing international standards could also provide “social sanctions on defectors,” where countries that do not meet their water obligations would no longer be able to hide their human rights violations behind the veil of progressive realization.¹⁷² For countries like South Africa, which is often thought of as a progressive country that highlights the importance of human rights, this alone may be enough to stimulate change.¹⁷³ For the right to water, this shift in enforcement could be critical.

Ultimately, the movement toward universal access to water has unquestionably been hampered by progressive realization and its vague requirements. Compelling a specified minimum amount of water would create a two-pronged effect in motivating states to fulfill their duties.¹⁷⁴ Meanwhile, a failure to make this change could have the opposite effect, as “[a] failure to address certain obligations may also inculcate or reinforce existing beliefs about their lack of importance.”¹⁷⁵

B. *The Broad Impact of Water*

It is so imperative to address the causes of falling short on the water MDG not only because of its connection to achieving the

169. See Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996) (discussing how the law can be used as a corrective to restructure existing social norms and make a legal expression of what is appropriate behavior).

170. See Seema Shah, *Outsourcing Ethical Obligations: Should the Revised Common Rule Address the Responsibilities of Investigators and Sponsors?*, 41 J. L. MED. & ETHICS 397, 405 (2013).

171. Sunstein, *supra* note 169, at 2031.

172. *Id.* at 2029.

173. See Shah, *supra* note 170, at 406 (“shaming those who violate norms can be a powerful way to change behavior.”).

174. See Lawrence O. Gostin & Robert Archer, *The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law*, 35 J. L. MED. & ETHICS 526, 529 (2007) (“human rights norms need to be developed and refined to make clearer the international obligations owed by States.”).

175. Shah, *supra* note 170, at 405.

goals set for water specifically, but also due to water's contribution to many other global objectives. The connection between water access and MDG focus areas of poverty, hunger, education, gender equality, gender safety, child mortality, maternal health, and the global disease burden only amplifies how essential this change is for the post-MDG agenda.¹⁷⁶ Jeffrey Sachs, who was heavily involved in the MDGs and is currently working to help frame the post-MDG agenda, has even stated that providing safe and sustainable access to water and sanitation would be among his top priorities for a new global agenda.¹⁷⁷

According to Sachs, four types of investments can help a country escape from the poverty trap: boosts in productivity in agriculture, infrastructure, education, and health.¹⁷⁸ The right to water is connected to all of these. To break out of the poverty trap, the extremely poor must also be empowered to increase their economic productivity, thereby increasing their income levels and eventually their ability to save and invest.¹⁷⁹ Eradicating poverty requires employment and income, but those without sufficient or adequate water are likely to have a difficult time mustering up the health or the time to earn a living. Therefore, it should come as no surprise that the ten countries with the lowest human development indexes are water-stressed countries with extensive dry-land populations.¹⁸⁰ Yet, even in arid environments providing adequate household water is typically not a problem of availability, but rather due to the lack of proper infrastructure.¹⁸¹

There is a similarly basic connection between water and school attendance, which is directly linked not only to education goals but

176. See Thomas F. Clasen, *Household Water Treatment and the Millennium Development Goals: Keeping the Focus on Health*, 44 ENVTL. SCI. & TECH. 7357, 7357 (2010).

177. Sachs, *supra* note 1, at 2207. This should come as no surprise, given the connection between water and an ability to work, and Sachs's belief that "[o]ur generation's challenge is to help the poorest of the poor to escape the misery of extreme poverty so that they may begin their own ascent up the ladder of economic development." JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 24 (Penguin Press ed., 2005) [hereinafter *END OF POVERTY*]. Over two billion people are at the bottom of the economic ladder, or not even on its lowest rung, due in large part to a lack of basic amenities such as safe drinking water and sufficient sanitation. *Id.* at 18. As a result, safe drinking water and sanitation is one of Sachs's "Big Five" development interventions that he believes are critical to generate economic development in developing countries. *Id.* at 232–34.

178. See COMMON WEALTH, *supra* note 12, at 230–31. Intervention is required to break out of the poverty trap, as poverty is self-reinforcing, not self-correcting. *Id.* at 31.

179. See *id.* at 42.

180. See *id.* at 121. The ten countries are Niger, Sierra Leone, Mali, Burkina Faso, Guinea-Bissau, Central African Republic, Chad, Ethiopia, Burundi, and Mozambique. *Id.*

181. See *id.* at 116.

also goals of economic development.¹⁸² “Women and children bear the brunt of the socioeconomic impact from short supplies of clean drinking water,” spending up to six hours a day gathering water instead of spending time in school or working.¹⁸³ Furthermore, lack of infrastructure and water access can take a physical toll, which may leave individuals more vulnerable to violence.¹⁸⁴ As a result, lack of water can have a vast impact on child mortality, gender equality, empowering women, and education, among other global objectives. Consequently, an inability to fulfill water rights is undeniably connected to the fact that “the goal of gender equality between men and women and boys and girls has not yet been met worldwide.”¹⁸⁵

The irrefutably strong link between access to sufficient water and health is another key justification for a shift in the water rights agenda. Nearly sixty percent of infant mortality is connected to infectious diseases and most infant deaths are related to inadequate water for hygiene and sanitation.¹⁸⁶ Meanwhile, the fight against HIV/AIDS, in particular, is nearly impossible for those without water. Persons infected with HIV/AIDS need more than the average water supply due to the need for frequent bathing to avoid skin infections, extra care that must be taken in food preparation to avoid gastro-intestinal pathogens, and extra drinking water needed to prevent diarrhea-caused dehydration.¹⁸⁷

It is vital that the new global agenda recognize the link between water and so many other global objectives and, accordingly, to place universal water access at the top of its list of emerging priorities. In addition to changing international law and removing the application of progressive realization to the right to water, it is important that the goals set for water be appropriate. In the post-

182. See Sachs, *supra* note 1, at 2207 (stating that the gap in earnings between those who have a higher education and those who do not is widening sharply).

183. Jennifer Voelker, *Access to Clean Water and Sanitation Pose 21st-Century Challenge for Millions*, 292 J. AM. MED. ASS'N 318, 319 (2004).

184. See END OF POVERTY, *supra* note 177, at 241 (describing the long walks and begging for water, in addition to the actual labor of cooking, cleaning, laundry, and caring for and bathing children). “There are no compelling international statistics, comparable to health statistic, documenting the labour burdens related to inadequate water provision.” *Id.*

185. Sachs, *supra* note 1, at 2207–08.

186. See Maggie G. Montgomery & Menachem Elimelech, *Water and Sanitation in Developing Countries: Including Health in the Equation*, 41 ENVTL. SCI. & TECH. 17, 19 (2007).

187. See Williams, *supra* note 161, at 242; see also Mazibuko, High Court, *supra* note 95, ¶ 172 (stating numerous reasons why people with HIV/AIDS need more daily water than the average individual, including preventing transmission to newborns, taking medication, and laundering).

MDG agenda, it should be unacceptable, as was done by MDG 7,¹⁸⁸ to focus merely on the total number of people with “improved” water sources.

This distinction between improved and unimproved water access provides a false sense of achievement in providing universal sustainable access to sufficient amounts of quality water. Improved access does not necessarily mean the services available meet health standards.¹⁸⁹ If we truly want to measure our progress in reaching universal access to adequate and sustainable water in the future, efforts to capture advancement must focus on water quality, quantity, and access to ensure that minimum amounts of water necessary for dignified living are available and received.

C. *Justifications for Progressive Realization Do Not Hold Water*

1. Limited Resources

Progressive realization has a practical appeal, especially when considering changing international standards that require all countries, including developing countries with extremely limited resources, to immediately provide sufficient water to their citizens. Resource allocation is a difficult ethical and legal issue that every country must deal with in some manner. However, to have a realistic impact, an agenda that removes progressive realization from the right to water must contend with these obstacles. As this Article has attempted to demonstrate, water is a unique resource due to its importance to human life and the ability it offers individuals to exercise all other rights.

Although there is a complexity involved in determining how to ensure universal access to sufficient water, the ability to quantify the right to water separates it from other economic, social, and cultural rights like the right to health, education, or an adequate standard of living. Despite a debate over how to accomplish fulfilling water rights, there should be no debate as to whether each individual has an immediate right to a sufficient amount of water. For individuals to know their rights and for countries to be held accountable, it is imperative that a basic minimum amount of water be set and agreed upon globally.

The WHO has already provided tiers of water requirements; yet, they range from twenty-five liters per person per day, which

188. See Clasen, *supra* note 176, at 7359 (finding the improved versus unimproved standards lacking in terms of measuring true progress).

189. Montgomery & Elimelech, *supra* note 186, at 18.

includes serious health concerns, to fifty liters per person per day.¹⁹⁰ With the premise being that failure to reach the basic minimum would constitute a human rights violation, the WHO must determine a specific amount of water per person that countries may not fall short of.¹⁹¹ The WHO should gather water experts and country representatives to come to an agreement on a specific minimum amount of water that will be mandated globally. Because “[t]he WHO gains its moral authority through science,” its determination must be backed by sound evidence using a transparent and collaborative process.¹⁹² Once this amount is agreed upon, it will be easier to determine when limited resources is the true reason that a country is unable to accomplish its duties in the context of water rights.

Further demonstrating the problem of resource limitation, the *Mazibuko* case shows why progressive realization can be utilized regardless of whether resources are actually limited. Despite what the Constitutional Court has said about the objective and purpose of the water policy, the policy was passed in response to a financial crisis, which the City of Johannesburg wanted to address by privatizing water services and reducing the water used by poor citizens who could not afford to pay for it.¹⁹³ The Constitutional Court gave little attention to the uncontested fact that the City *did* have the resources necessary to provide all of its citizens with a sufficient amount of water.¹⁹⁴ In the opinion of the High Court, the City

190. WHO, RIGHT TO WATER, *supra* note 96.

191. See Paula Braveman & Sofia Gruskin, *Poverty, Equity, Human Rights and Health*, 81 BULL. WORLD HEALTH ORG. 539, 541 (2003) (stating the importance of setting and enforcing standards for major health determinants, such as clean water and sanitation). This value can also be demonstrated in relation to the South African use of a reasonableness standard, which does very little to empower citizens to hold their government accountable for failing to reach known human rights standards. See Heywood & Shija, *supra* note 166, at 642 (discussing the importance of setting standards against which citizens are able to measure their governments). It is also important to note that although the World Health Organization (WHO) is suggested as the coordinator for determining the specific water amount required, they are by no means the only option. The United Nations or other organizations with global reach could serve as the coordination center, but the relevant point is global collaboration to ensure the acceptance of the water amount that is ultimately set.

192. See Lawrence O. Gostin, *International Infectious Disease Law: Revision of the World Health Organization's International Health Regulations*, 291 J. AM. MED. ASS'N 2623, 2626 (2004) (discussing the importance of fairness, objectivity, and transparency in good governance, and how evidence-based decision making would grant the WHO respect for basing decisions on the best available science).

193. See Dugard, *supra* note 91, at 183.

194. See *Mazibuko*, High Court, *supra* note 95, ¶ 181 (“It is uncontested that the respondents have the financial resources to increase the amount of water required by the

could provide fifty liters of water per person per day “without restraining its capacity on water and its financial resources.”¹⁹⁵

The City also claimed that the policy was implemented to cut down on water waste. However, wealthier residents were still able to access as much water as they liked for pools, gardens, ponds, and baths—without any pressure to conserve.¹⁹⁶ In fact, the head of Johannesburg Water’s management company admitted that it would be foolish to reduce the company’s revenue stream by encouraging water conservation among affluent households that paid their water bills.¹⁹⁷ Meanwhile, the City conceded that the worst debtors were government and institutional bodies, though there was no plan to impose prepayment water meters on them.¹⁹⁸ These facts belie the notion that a limited amount of resources was truly the primary motivation behind the water policy.

The Constitutional Court references the fact that a rising tariff payment structure discourages an extreme and unnecessary use of water, while forcing wealthier residents to cross-subsidize the water use of the poor who would use less water.¹⁹⁹ Yet, the Court fails to mention in its opinion that commercial enterprises and institutions were excluded from the rising block tariff arrangement and were charged at a flat rate based on consumption, in spite of the fact that commercial agriculture and industry account for seventy-eight percent of water consumed in South Africa.²⁰⁰ As a result, a more accurate description would be that residential users are subsidizing water consumption by businesses, regardless of their size or location.²⁰¹

A true look at the evidence suggests that the driving force behind the change in water policy was economics, not resource limitations.²⁰² Through the application of progressive realization, this type of slight-of-hand justification for discriminatory policies can be upheld. Conversely, the argument can be made that having a clearly-defined, minimum standard would cause an overall reduction in the resources involved in fulfilling the right to water. Pro-

applicants per person per day.”); Mazibuko, Court of Appeal, *supra* note 130, ¶ 27 (“not the City’s case that it is unable to provide the residents of Phiri with sufficient water.”).

195. Mazibuko, High Court, *supra* note 95, ¶ 181.

196. See Dugard, *supra* note 91, at 186.

197. See *id.* at 184.

198. See *id.* at 188.

199. See Mazibuko, Constitutional Court, *supra* note 23, ¶ 80.

200. See Williams, *supra* note 161, at 245.

201. See *id.*

202. See Dugard, *supra* note 91, at 184.

gressive realization complicates the methodological requirements of formulating, monitoring, and evaluating whether a government is complying with its duties.²⁰³ By demanding specific criteria for every given context, standards would be different not only for every country, but could also vary greatly for areas within countries as well.²⁰⁴ The ambiguous demands of progressive realization also encourage complex litigation. Litigation would be less necessary against a clearly defined water amount and the suits that did follow would be more efficient in examining governmental performance against a specific barometer. Including those needed to conduct litigation, the amount of resources demanded by progressive realization's application to water is far from limited.²⁰⁵

Rather than looking at resources in such a narrow scope, a nation that commits resources to providing sufficient water to its people is likely to receive a substantial return on investment. People with adequate water are more likely to help stimulate economic development, both through their personal productivity and their increased purchasing power.²⁰⁶ Moreover, it is likely to be cheaper to contribute funds to provide water than it would be to treat the countless diseases and ailments that stem from a lack of clean drinking water and proper sanitation.²⁰⁷ In reality, "[i]mproving global access to clean drinking water and safe sanitation is one of the least expensive and most effective means to improve public health and save lives."²⁰⁸

203. See Chapman, *supra* note 65, at 31.

204. See *id.*

205. See Mazibuko, Constitutional Court, *supra* note 23, ¶ 165 ("It is true that litigation of this sort is expensive and requires great expertise.").

206. See COMMON WEALTH, *supra* note 12, at 121 (discussing the connection between the least developed countries with the poorest citizens and the fact that they are found in regions with the lowest average water availability per person). "[A]ll ten of the countries ranked as having the lowest human development are water-stressed countries with extensive dryland populations." *Id.*

207. See Braveman & Gruskin, *supra* note 191, at 542 (stating that an assessment should be made to determine which services are most essential to the health and livelihood of the poor and disadvantaged and then given priority over other provisions). In terms of economics, estimates have suggested that the cost to society for just direct medical expenses and lost work time related to water-related diseases far outweigh the cost of implementing new infrastructure needs for all major urban water sectors. See Gleick, *supra* note 27, at 499. Meanwhile, eighty percent of the underserved could be reached for only thirty percent of the costs for providing the highest level of service to all and 35,000 rural residents could be provided basic sanitation services for the same cost of providing 100 urban people with a centralized sewage system. *Id.*

208. Montgomery & Elimelech, *supra* note 186, at 17.

2. Communal Approach

Despite these facts, there may still be governments that are unable to afford the resources necessary to provide each of their citizens with adequate water. For those governments, the global community has an ethical and—with the removal of progressive realization—legal obligation to ensure universal water access.²⁰⁹ When the resources required for providing water are compared to the full scope of available global resources, the excuse of limited resources becomes less persuasive.²¹⁰ Of course, it is important that countries make every effort to fulfill their duty to provide sufficient water; in addition, their efforts should be honest, transparent, and fair.²¹¹ However, in light of uncontrollable constraints that can arise due to geography, climate change, and other factors, this is not always possible.²¹²

To ensure that it is truly due to lack of resources that citizens are prevented from receiving adequate water, a two-pronged global response is required. Prong One would require the global community to provide the resources necessary to achieve the right to water. Within the MDGs, there has been a call for states to provide international assistance and develop a global partnership to encourage development in the least developed countries.²¹³ In response, the eight leading industrialized nations (G-8) committed

209. See Gostin & Archer, *supra* note 174, at 527 (“States have a responsibility to help, derived from international law, political commitments, ethical values, and national interest.”).

210. See Heywood & Shija, *supra* note 166, at 645 (“the reality is that resources for health are not that scarce if they are measured against the overall availability of resources in the globe.”).

211. See generally Lawrence O. Gostin, *What Duties Do Poor Countries Have for the Health of Their Own People?*, 40 HASTINGS CTR. REP. 9–10 (2010) (discussing state obligations to provide adequate health resources within their capacity and through processes that are honest, transparent, accountable, fair, and that include civic deliberation).

212. See COMMON WEALTH, *supra* note 12, at 124–30 (describing water stresses of certain countries due to population growth, political cleavage, and extreme climate conditions). “For dozens of countries, much or all of the nation’s water supply originates in other countries.” *Id.* at 124. The interstate connectedness of water makes it a communal problem that calls for a communal answer. Indeed, if global solutions are not genuinely pursued, the water crisis is likely to lead to an increase in global conflict. In addition to the health, poverty, education, and equality benefits that will undoubtedly emerge from a change in international water norms, there will also be a reduction in international violence related to water. “One of the most important interventions—ensuring predictable and adequate access to water for human use and agriculture—is frequently overlooked in conflict avoidance and peacemaking.” *Id.* at 130.

213. See Gostin & Archer, *supra* note 174, at 529.

to providing multilateral assistance by mobilizing capital and expertise and freeing up resources for developing countries.²¹⁴

To assist with this process, an international health organization like the WHO could provide crucial assistance and legitimacy.²¹⁵ Wealthier nations could funnel resources into the WHO, which would then be able to utilize its staff and expertise to create a streamlined process.²¹⁶ While an international response is certainly no easy feat, by focusing on providing a specific and previously agreed-upon amount of water, the global response would be no more complicated than current international relief efforts that are lauded worldwide.

The WHO would also be the logical candidate to assist with Prong Two of the response—investigating the legitimacy of a country's claim that resource limitation is the sole cause of insufficient water. “[I]f duties to avoid depriving people of their last means of subsistence are to be taken seriously, some provision must be made for enforcing this duty on behalf of humanity upon those who would not otherwise fulfill it.”²¹⁷ The burden of proof would fall on the country in need,²¹⁸ and the WHO already has resources in place that are required for international surveillance.²¹⁹ It may also be able to provide necessary expertise to evaluate countries' inabilities to provide each of their citizens with adequate water. For example, in many cases, it is not the lack of water supply that is the culprit, but improperly maintained water systems.²²⁰

By eliminating progressive realization and changing the global norm for water rights, it is possible that many investigative aspects of the international human rights response would become superfluous. For example, if an appeal were made for failing to provide

214. *See id.*

215. As previously stated, the WHO is used as an example, but is certainly not the only option. What is key is that a central organization coordinate the effort of fulfilling the right to water, both in terms of supplying a sufficient amount of aid when necessary and providing oversight and monitoring. But what is not debatable is the urgent need for an international body to handle the right to water. COMMON WEALTH, *supra* note 12, at 136.

216. *See* Gostin, *supra* note 192, at 2626.

217. SHUE, *supra* note 20, at 56.

218. *See* Dennis & Stewart, *supra* note 40, at 492. This would be a welcome change from the progressive realization standard, which, as seen in *Mazibuko*, can place the burden on the citizenry to engage in costly and complex lawsuits in the hopes of ensuring their right to water.

219. *See* Gostin, *supra* note 192, at 2625.

220. *See* Voelker, *supra* note 183, at 319 (discussing how Ethiopia has 600 rural water-supply systems, thirty percent of which do not work due to improper maintenance, and that in Niger, thirty-five percent of hand pumps are not functional and thirty-two percent of small piped water systems function poorly).

sufficient water and a subsequent investigation led to a finding that the request was not legitimate, the country in question would be globally known as a human rights violator and a thief. The combination of the potential for public shaming and the threat of an investigation into a claim for assistance should provide enough incentive for countries to avoid seeking unwarranted handouts.

Most of the OECD countries have fallen significantly short of their pledge to donate 0.7% of their Gross National Income per annum, and providing universal access to sufficient water seems like a logical place to start investing more resources.²²¹ In fact, one estimate suggests that it would cost 0.03% of the “rich-world” national income to meet global targets for water and sanitation.²²² The main problem in providing adequate water universally “is not the absence of reasonable and low-cost solutions, but the difficulty of implementing global cooperation to put those solutions in place.”²²³ If human rights are to be seen as important and universal, the right to water, arguably the most basic and essential right, should be given top priority in the new global agenda.

3. Democratic Accountability

Another argument against changing international law to prevent progressive realization from applying to water rights is supported by the theory of democratic accountability, and the notion that legislatures and executives of sovereign nations should be left to determine how best to distribute their resources. In *Mazibuko*, the Constitutional Court rejected advocacy for a core minimum and stated that to ensure democratic accountability, the legislative and executive branches of government must determine how best to utilize resources.²²⁴ Eliminating the application of progressive realization to the right to water and setting a global standard amount of water that all people are entitled to would certainly run contrary to this position. But it is unclear that such a shift in international law would indeed reduce democratic values in governance.

As discussed earlier, it is difficult for individuals to even exercise civil and political rights or participate in democracy if they lack

221. See Gostin & Archer, *supra* note 174, at 527.

222. COMMON WEALTH, *supra* note 12, at 131.

223. *Id.* at 12.

224. See *Mazibuko*, Constitutional Court, *supra* note 23, ¶ 61; see also Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673, 691–92 (2007) (“We rejected the claim that people should have individual rights justiciable through the courts according to the minimum core argument.”).

sufficient water to maintain minimum standards of health.²²⁵ To maximize democratic values, it should be every country's goal to maximize the ability of all individuals to participate in the democratic process.²²⁶ If the poor do not have the ability to participate due to health concerns that inevitably flow from inadequate water, it can hardly be argued that the legislative and executive branches truly represent the community.

For a right as fundamental as water, it is unfair to leave the poor to battle the power and influence of the rest. "[O]ne of the chief purposes of morality in general, and certainly of conceptions of rights, and of basic rights above all, is indeed to provide some minimal protection against utter helplessness to those too weak to protect themselves."²²⁷ In reality, a judiciary that defers to other branches of government—which may only be accountable to the healthy, wealthy, and wise—creates a dangerously circuitous democracy where the rights and well-being of the most vulnerable fall at the bottom of the government's list of priorities, or are excluded from the list altogether.

The powerful influences of corporations, lobbying, and self-interest suggest that the "trite assumption that the political branches reflect the will of the people is anachronistic."²²⁸ Meanwhile, progressive realization creates a default of deferral, where the judiciary places the burden of proof on the citizens.²²⁹ For the right to water, as in *Mazibuko*, this typically means the poor are saddled with the duty to ensure their own rights when they are already less likely to litigate, and less likely to win.²³⁰ The judiciary's role in a democracy is to interpret the laws, uphold justice, and ensure governmental accountability. However, progressive realization

225. See SHUE, *supra* note 20, at 20 ("basic rights need to be established securely before other rights can be secured.").

226. See Williams, *supra* note 161, at 249 ("conception of democracy includes, at a minimum, the aspiration that society will make available to all members of the community the basic social and economic resources they need to participate meaningfully in political and social decision making.").

227. SHUE, *supra* note 20, at 18.

228. Williams, *supra* note 161, at 249.

229. See Peter Danchin, *A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case*, BLOG EUR. J. INT'L L. (Jan. 13, 2010), <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/> (discussing a shift of judicial inquiry that focuses less on progressive realization and places the burden of proof on the state to show the steps it has taken to realize a right).

230. See Gloppen, *supra* note 155, at 24 (finding that a reliance on litigation to enforce rights is problematic for the poor because they are less likely to bring suits and typically the "haves" tend to win in court).

effectively removes this role by creating a vague standard that the other branches should have little trouble satisfying. Only if a government takes no steps to realize the right to water, or perhaps establishes some policy that is even more egregious than the one found in *Mazibuko*, can it be found to have violated obligations of progressive realization.²³¹ This hardly appears to comply with principles of democratic accountability.

It is unclear how anyone can be said to enjoy any rights allegedly protected by society if they do not have those most basic necessities required for good health.²³² A clear standard should increase democratic participation as well as ease the ability of the people to hold their government accountable.²³³ Likewise, the role of the judiciary becomes more relevant in enforcing individual rights. *Mazibuko* demonstrates that progressive realization allows states to reject core minimum requirements,²³⁴ despite the fact that an evaluation of reasonableness should implicitly necessitate some minimum amount of water that the government does or does not meet.²³⁵ Moreover, *Mazibuko* reveals how progressive realization can enable a court to come to the contradictory conclusion that democratic accountability prevents it from directing policy, while simultaneously permitting water to be handled by a private company that is not accountable to voters.²³⁶

South Africa's hiding behind democratic accountability allowed its poor citizens to be categorically denied a basic minimum level of water. Eliminating progressive realization in the context of water does not prevent governments from encouraging their democratic branches to make resource allocation decisions. Relying on litigation to enforce water rights can make it more difficult to predict if and when water policies may need to be changed. A clearly delineated amount of water that must be delivered to all can simplify long-term planning and priority setting for water in the con-

231. See Danchin, *supra* note 229.

232. See SHUE, *supra* note 20, at 24.

233. See Heywood & Shija, *supra* note 166, at 642.

234. It has been stated that previous South African cases did not reject the minimum core argument, rather they found the minimum core raised questions of prioritization instead of establishing quantitative norms. See Sachs, *supra* note 224, at 691–92. Yet, the notion that the minimum core created justiciable individual rights was rejected. See *id.* at 692. The South African Constitutional Court found the minimum core argument was unnecessary “as a foundation, the lever, or the platform, to introduce justiciability.” *Id.* at 698.

235. Danchin, *supra* note 229.

236. See COMMON WEALTH, *supra* note 12, at 131 (describing how privatization of water can create a private monopoly not even constrained by the need to win the next election).

text of other policies.²³⁷ It is neither democratically abhorrent, nor impractical, to expect the judiciary—in coordination with the other branches—to maintain and ensure both the availability of a basic minimum amount of water required for a dignified life and the chance to participate in a representative society.²³⁸

V. CONCLUSION

As the global community embarks on setting a new agenda to tackle the extremely pressing issues faced by the world's most vulnerable, it is clear that the right to water, and the impact that the law has on that right, should take top priority. Despite its undeniable connection to every aspect of life, universal access to sufficient water has proved elusive. Recognition of the role the law has had on this sluggish progress would have an unquestionably far-reaching impact on poverty, inequality, and disease, among other critical areas. The water needs of an individual are not a nebulous, idealistic concept, or an unattainable state of mind. They are a scientifically calculable measurement, only made imprecise by the application of progressive realization.

As such, the first step in achieving universal access must be to remove progressive realization from the right to water in international law, and begin to alter the global norm that this indispensable right can be fulfilled gradually. The *Mazibuko* case demonstrates how discrimination can be cloaked behind the veil of progressive realization, and can result in the disenfranchised being categorically denied a minimum amount of water necessary for a dignified life. If the goal of universal access set in 1977 is ever to be reached, the power of international law and the human rights framework must be acknowledged and addressed. When it comes to water, progressive realization must no longer provide a shield to obligations that are owed to all.

237. See Gloppen, *supra* note 155, at 24.

238. See SHUE, *supra* note 20, at 25 (stating that it is not impractical to expect management of the essentials of life).