

Water Rights Struggles in Johannesburg and Detroit Revisited: Looking Beyond Courts at the Politics and Power of Rights-Based Legal Mobilization in a Neoliberal Global Order: A ‘Powerpack’ Analysis

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Abstract

Responding to the limits of court-based analyses and top-down position-taking in prevailing legal mobilization scholarship, this article goes beyond the courtroom to explore the value of rights-based legal mobilization from the perspective of those engaged in the campaigns to challenge racialized water disconnection in Johannesburg (2004–9) and Detroit (2014–). Against the backdrop of the ‘losing’ cases of *Mazibuko* and *Lyda*, the article finds evidence in the feedback from protagonists, of the relevance of rights-based mobilization notwithstanding the judicial defeats. The value of legal mobilization ascribed by affected communities and their allies aligns with the understanding of law as a form of political power in a dialectical relationship between structure and agency (Crawford and Andreassen 2013: 8–9). Using an expanded version of the ‘power cube’ (Gaventa 2006 and 2005), referred to here as the ‘powerpack’, the article engages in a bottom-up nuanced analysis of the multi-dimensional power of legal mobilization. In doing so, it contributes towards a deeper understanding of the transformative potential of rights-based mobilization for egalitarian socio-economic change.

Keywords: racialized water disconnection, legal mobilization, Johannesburg, Detroit

1. Introduction

On 8 October 2009, the South African Constitutional Court delivered judgment in the *Mazibuko* water rights case,¹ in which impoverished black residents from Soweto had challenged the City of Johannesburg’s disconnection of their water supply as being unconstitutional. To the shock of the applicants and many observers, particularly following two

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1 The Constitutional Court (CC) judgment is: *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (8 October 2009) (*Mazibuko* CC).

previous judgments in which the applicants won on the substantive relief claimed,² the Court ruled against the applicants on all legal grounds.³ Several years later, a similar water rights case⁴ about the disconnection of water services to impoverished black households a continent away in Detroit, *Lyda*, met the same court defeat.⁵ The disappointing judicial outcome of both cases dealing with the racialized neoliberal disconnection of water supply has led scholars to question the capacity of human rights to tackle structural inequalities. For example, Daria Roithmayr has argued that ‘in the wake of *Mazibuko*, activists who are committed to dismantling persistent racial and class inequality should weigh carefully the costs and benefits of using rights-based litigation as a strategy to advance their interests’ (Roithmayr 2010: 318).

Roithmayr’s comment helpfully surfaces two pertinent challenges that are taken forward in this article. First, is the implicit analytical question of whether focusing on a judgment alone is the optimal way of assessing rights-based campaigns. Second, is the clear need for empirical studies to understand the relevance of rights from the perspective of the people who have used legal mobilization as part of their struggles to dismantle structural disadvantage. These analytical and empirical gaps are recognized by Michael McCann, who notes that traditional legal scholarship has ‘remained court-centered, sticking close to official case law and actions of legal elites while remaining distant from grassroots movement activity’ (McCann 2006:17).

1.1 Beyond judicial decisions: understanding law as a source of political power

Regarding the first issue (the court-centred focus of evaluation), in contrast with scholars such as Gerald Rosenberg, who tends towards a more narrow focus on courts (Rosenberg 2008), Stuart Scheingold has warned that focusing on the judicial outcomes of cases has a tendency to break activism down ‘into a multiplicity of individual transactions’ and to stretch out any analysis of outcomes or value ‘to the point that it can become not only tedious but counterproductive—one step forward, two steps back’ (Scheingold 2011: 8).⁶ Thus, if your analytical frame is restricted to the impact of judicial decisions, you would have to conclude from the as yet inconclusive struggle against school segregation in the US, that the widely-celebrated case of *Brown*⁷ was a failure (Scheingold 2011: 95). Focusing on

2 The two previous judgments were from: the Johannesburg High Court - *Mazibuko and Others v City of Johannesburg and Others* (4) All SA 471 (W) (30 April 2008) (*Mazibuko* High Court); and the Supreme Court of Appeal (SCA) - *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA) (25 March 2009) (*Mazibuko* SCA). In this article, the three judgments (High Court, SCA and CC) are collectively referred to as *Mazibuko*, but the specific judgments are referred to where relevant.

3 For critique of the CC judgment in the media, see De Vos 13 October 2009, and Liebenberg 21 October 2009. For academic critique, see Langford et al 2011: 56B 21–59, Liebenberg 2010: 466–480, Williams 2010, and Quinot 2010.

4 In both *Mazibuko* and *Lyda*, the applicants pursued legal arguments based on procedural fairness, equal protection and the right to water.

5 There are four relevant *Lyda* rulings, referred to collectively as *Lyda* but specifically disaggregated where relevant: 1) *Lyda and Others v City of Detroit (In re City of Detroit)*, No 13-53846, 2014 WL 6474081 (Bankruptcy Court, Eastern District of Michigan Southern Division transcript of ruling from the bench of 29 September 2014) (*Lyda* Bankruptcy Court Initial Ruling); 2) *In re City of Detroit*, No 13-53846, 2014 WL 6474081, Supplemental Opinion Clarifying the Court’s Bench Opinion Denying Plaintiff’s Motion for a Temporary Restraining Order and Granting Defendant’s Motion to Dismiss and Opinion Denying Plaintiffs (Bankruptcy Court, Eastern District of Michigan Southern Division ruling of 19 November 2014) (*Lyda* Bankruptcy Court Supplemental Opinion); 3) *In re City of Detroit*, No 15-CV-10038, 2015 WL 5461463 (Eastern District of Michigan ruling of 16 September 2015) (*Lyda* Eastern District of Michigan); and 4) *In re City of Detroit*, 841 F.3d 684 (Sixth Circuit Court of Appeals ruling of 14 November 2016) (*Lyda* Sixth Circuit Court of Appeals). For an in-depth discussion of the *Lyda* rulings, see Mette 2019, and Murthy 2016.

6 It is worth adding that where a campaign has involved only one set of cases (yet), such as *Mazibuko* and *Lyda*, the effect of this kind of legalistic approach is to concertina, rather than stretch out, any value or outcome analysis, also to a counterproductive effect.

7 *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) was a landmark racial equality decision of the United States Supreme Court in which racially segregated public schooling was ruled unconstitutional: https://en.wikipedia.org/wiki/Brown_v._Board_of_Education (accessed 6 May 2021).

what happens in courts also tends to emphasize the importance of winning cases, thereby neglecting the potential power of ‘losing’ cases.⁸

As Scheingold notes, such a legalistic approach to the uptake of rights results in both exaggerated expectations of courts (which, for a variety of reasons related to their default conservative tendency, are often not ideally placed to advance radical change) and understated appreciation of the ‘politics of rights’, which often provides a much more optimistic perspective on the role of rights in social change (Scheingold 2011: 95). This is because, since the law embodies connotations of entitlements and obligations regarding these, ‘a declaration of rights tends to politicize needs by changing the way people think about their discontents’ (Scheingold 2011: 131). Especially in contexts of high levels of poverty and inequality, the process of converting the articulation of needs into an assertion of rights is ‘fundamentally and intensely political’ in nature and, therefore, the claiming of rights should be understood primarily as a political process rather than a legal one (Crawford and Andreassen 2013: 4–5). As such, rights are ‘contingent resources’ (Scheingold 2011: 148) of political expression and, when mobilized for change, the law is, in Richard Abel’s words, a form of *Politics by Other Means* (Abel 1995) whose evaluation requires going ‘beyond the courtroom’ (Langford 2008: 39).

1.2 The need for empirical study: understanding the value of legal mobilization from the perspective of participants

Much of the scholarship attempting to evaluate the significance of legal mobilization takes the form of theoretical stances or normative position-taking without subjecting standpoints to empirical inquiry. This approach is evident among some critics of the law from the left, with several arguing that rights are ineffective or demobilizing without seeking to examine the role of law in struggles for radical change from the perspective of the actors who claim rights as part of struggles.⁹ Even where a degree of empirical inquiry is pursued, according to McCann, such ‘entrenched normative commitments often overdetermine empirical accounts and discourage attention to the complexities, contingencies, and ironies at stake in legal mobilization’ (McCann 2006:19). However, because both the law and activism are ‘infinitely more complex, mixed, variable, and contingent than can be captured in simple position statements’ (McCann 2006:19), nuanced empirical study is required to understand legal mobilization by social actors pursuing egalitarian change.

To the extent that there are in-depth empirical studies of the politics of rights from the perspective of those engaged in legal mobilization struggles, these appear to confirm that the uptake and use of rights by individuals, social movements or actors pressing for radical change does not have significant adverse consequences for the struggles.¹⁰ But, to better understand the value of rights in contexts of structural inequality, there is clearly a need for additional empirical studies to examine the practice of the uptake of rights by actors seeking egalitarian socio-economic change, and particularly to do so using a political power analytical framework such as pursued here.

This article proceeds in four steps. In part 2, it sets out the methodology including the reasons for focusing on Johannesburg and Detroit. In part 3, the article overviews the salient features of the water rights mobilization campaigns in Johannesburg (2004–9) and Detroit (2014–). Then, responding to the potential of law as a form of political power in a dialectical relationship between structure and agency (Crawford and Andreassen 2013: 8–9), part 4 engages in a power-based analysis of the two legal mobilization campaigns. Using

⁸ That defeats in court might have positive socio-political and even legal impacts is acknowledged by many legal practitioners and increasing numbers of legal academics. See, for example, Depoorter 2013.

⁹ Relevant leftist critiques of rights include Moyn 2018, Kennedy 1986, and Gabel 1984.

¹⁰ A notable recent empirical study of US water rights mobilization, with commendable utilization of a power lens, is Kozikis and Winkler 2020. A further notable study on water rights mobilization is Clark 2017. Other empirical exceptions are Vanhala 2020, and the ground-breaking legal mobilization study of McCann 1994.

an expanded version of John Gaventa's 'power cube' to delve into the various nuanced facets of power (Gaventa 2005, 2006), part 4 finds validation from the perspective of those engaged in rights-based mobilization of the power, and therefore relevance, of rights. These insights are reflected on in part 5, the conclusion.

2. Methodology

Seeking to investigate the value of legal mobilization in contexts of structural inequality from the perspective of those who have been directly involved in rights-based campaigns, my empirical study has focused on the water rights struggles against racialised water disconnections in Johannesburg and Detroit.¹¹ This research has entailed a socio-legal analysis of multiple data sources, including existing scholarship, reports, documentaries and media. These sources have been augmented by qualitative semi-structured interviews with key activist, academic and legal informants involved in the struggles, to probe their perceptions and experiences of using water rights as part of their campaigns to challenge the water disconnections and particularly in the light of the judicial defeat of *Mazibuko* in Johannesburg and *Lyda* in Detroit.

For the *Mazibuko* analysis, my sources have been scholarship, documentaries and reports, as well as observations and interviews at the time of the litigation (and published in various articles and chapters, as identified where relevant).¹² For the *Lyda* analysis, apart from scholarship, I undertook two research visits to Detroit—in February 2019 and August 2020—to interview relevant interlocutors (as identified in a snowball process by speaking to those involved with the Detroit water struggles and experts on the issue), and I supplemented this input with remote interviews where in-person interviews were not possible. In total, I interviewed ten interlocutors (with five of whom I had follow-up interviews). This included five activists: Patricia Jones (long-time US-based water rights activist), Bruce Porter (contributor to the amicus brief on the international right to water in *Lyda*, and Director of the Social Rights Advocacy Centre, Canada), DeMeeko Williams (Chief Director, Hydrate Detroit), Maureen Taylor (State Chair, Michigan Welfare Rights Organization) and Monica Lewis Patrick (President and Chief Executive Officer of We the People of Detroit); four academics: Martha Davis (Professor of Law, Northeastern University), Noah Hall (Professor of Law, Wayne State University), Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University) and Inga Winkler (Lecturer, Institute for the Study of Human Rights, Columbia University); and one attorney: Alice Jennings (*Lyda* attorney, Edwards & Jennings PC). I received ethical clearance from the University of the Witwatersrand for the interviews, and I secured the permission of all the respondents for identifying them and for any attributed comments or quotations. Because the objective of this inquiry was to gain a better understanding of the articulation of rights as political resources, the findings have been analysed using an expanded version of the 'power cube' frame, which I have called the 'powerpack'.

2.1 Why Johannesburg and Detroit?

Despite the US being a wealthy global-North country and South Africa being a less wealthy global-South country, both countries experience high levels of racialized socio-economic inequality. Moreover, the cities of Johannesburg and Detroit share a long history and current reality of racialized residential segregation. Strikingly, in Johannesburg and Detroit the same systemic problem (the racialized disconnection of water supply) has given rise to rights-based mobilization that has gone well beyond well-publicized ('losing') litigation,

11 These two struggles against racialized water disconnections dominate the English language scholarship on water rights legal mobilization.

12 I was part of the *Mazibuko* legal team, and I have significant personal knowledge of the case and the related campaign. To maintain some analytical distance for the *Mazibuko* component of this article, I have relied on external scholarship and sources.

notwithstanding significantly different legal frameworks. Specifically, South Africa has an entrenched constitutional right to water,¹³ it has ratified the 1966 United Nations (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR), and South Africa's Constitution has an explicitly transformative mandate with wide powers for judicial oversight and interpretation (Klare 1998). In contrast, the US has not ratified the ICESCR and its courts are traditionally hostile towards comparative law and particularly to socio-economic rights (Kozikis and Winkler 2020). The similarities in socio-economic context and mobilization trajectories juxtaposed with dissimilar legal frameworks provides a compelling premise for exploring the relevance of rights-based mobilization, with the suggestion that—although engaging legal tools and norms—legal mobilization is less about law and judicial decisions, and more about politics and power.

3. Residential segregation, water disconnection and water rights mobilization in Johannesburg and Detroit

Delivered to urban neighbourhoods through networked water pipes, there is an inherent link between residential segregation and water infrastructure. This reality is highly visible in South Africa where, in the persistent legacy of apartheid, almost entirely black townships and informal settlements with inadequate infrastructure are contrasted against largely white suburbs with swimming pools and plentiful water supply.¹⁴ It is also evident in much of urban US, where segregated black neighbourhoods have lagged significantly behind white neighbourhoods in receiving adequate household water and sanitation connections, and where maintenance is often lacking.¹⁵

In such contexts of racialized residential segregation, which has the effect of concentrating poverty in black areas (Massey and Denton 1998: 85), even 'neutral' water disconnections to households due to non-payment of water bills have a disproportionate impact on black households. Added to this is the widespread experience of black people in both South Africa and the US that the poor service and disconnections experienced in their communities would not occur in white residential areas (Michigan Civil Rights Commission 2017: 18). As elaborated by Stephen Gasteyer in the US context, 'where you see things falling apart [vis-à-vis water services] are predominantly minority communities' (Gasteyer cited in Walton 2016). Confronted with widespread 'falling apart' in the form of racialized water disconnections, lawyers, activists and allies in the black urban areas of both Johannesburg and Detroit have embarked on sustained legal mobilization to challenge the structurally racialized paradigm of water unaffordability and exclusion.

3.1 The Johannesburg water rights mobilization campaign (2004–9)¹⁶

In 2001, as part of a neoliberal drive to corporatize municipal services, the City of Johannesburg (City) formulated a project to limit unpaid-for water consumption in Soweto

13 Section 27(1)(b), Constitution of the Republic of South Africa, Act 108 of 1996 (SA Constitution), provides that 'everyone has the right to have access to sufficient food and water'.

14 For a historical account of apartheid's legal system of residential segregation, see Dugard 1978: 53–88 and 136–40. For a contemporary account of the impact of persistent racial segregation on infrastructure, see Budlender and Royston 2016, and South African Human Rights Commission 2014.

15 For a historical account of residential segregation in the US, see Massey and Denton 1998. For a contemporary account of the impact of persistent racial segregation on water services, see Montag 2019, Clark 2020, and Whitener 2020.

16 This section on the background of the Johannesburg water rights struggle draws from previous publications on the *Mazibuko* litigation and water rights campaign, specifically Dugard 2011: 71–2, and Dugard and Langford 2011: 42–4, at 71–2. For video background of the Phiri water rights struggle, see the *Mazibuko* Water Rights Journey available on five instalments on YouTube: <https://www.youtube.com/watch?v=bgMTecpAAdE>; <https://www.youtube.com/watch?v=dh4wB6JwTIE>; <https://www.youtube.com/watch?v=Jr5k5F5ma0A>; <https://www.youtube.com/watch?v=ti4JAF0s4Uc>; and <https://www.youtube.com/watch?v=u2XLd32Oj-4> (accessed 5 May 2021).

(a large, almost entirely black township of Johannesburg) by means of the mass installation of Prepayment Water Meters (PPMs).¹⁷ The project started with a pilot in Phiri, one of the poorest suburbs of Soweto with entrenched unemployment and poverty. Unlike the conventional water meters available throughout Johannesburg's richer suburbs, which provide water on credit with numerous procedural protections against unfair disconnections, PPMs automatically disconnect once the monthly Free Basic Water (FBW)¹⁸ supply is exhausted.¹⁹ To avoid running out of water once a PPM was installed meant having to purchase additional water on credit, which many households could not afford, leaving them without water for days on end each month.²⁰ In addition, when the PPMs were first rolled out, any household that refused to accept a PPM was left with no water supply at all, and reconnecting a household water supply unlawfully carried with it criminal sanction. Among the negative impacts of having to live with an inadequate or non-existent water supply following the PPM rollout, were unacceptable compromises to health, dignity and cultural rights as households had to make difficult decisions about whether for example to wash children before school, flush the toilet or use the water for cooking.²¹ Beyond this routine suffering, two Phiri children perished in a shack fire while their mother was on a night-shift because there was insufficient water for neighbours to extinguish the flames.²²

Determined not to accept the PPM project, community members supported by the Anti-Privatisation Campaign (APF)²³ embarked on direct resistance in the form of disrupting the installation of the PPM infrastructure. However, the direct resistance campaign was critically undermined after the City secured a wide-ranging interdict on 22 August 2003 in terms of which activists were prohibited from coming within 50 metres of any PPM operations, and private security companies were authorized to assist in managing any infringements of these terms. By the end of September 2003, 14 residents from Phiri and allied activists were charged with 'public violence', 'malicious damage to property' and 'incitement'. Almost all charges were ultimately dropped due to lack of evidence but having to defend those charged and secure bail funds consumed significant resources from the APF and sapped energy from the direct resistance campaign (Dugard 2011: 70, and Naidoo 2008:7). With direct resistance effectively foreclosed, the community turned to legal mobilization as 'another terrain of struggle' (Anti-Privatisation Forum and Coalition Against Water Privatisation 2006).²⁴

Rooted in the *Mazibuko* litigation to challenge the lawfulness of PPMs and the sufficiency of the FBW water supply, the legal mobilization campaign (2004–9²⁵) entailed extensive radio

17 The majority of Soweto households carried considerable water-related arrearages largely as a legacy of municipal services boycotts embarked on in the 1980s and 1990s as part of the anti-apartheid struggle.

18 According to the FBW policy, households receive six kilolitres of water per month for free (calculated at 25 litres per person per day for a household of eight people). As set out in the evidence as part of the *Mazibuko* case, in Phiri, with multi-dwelling households and backyard shacks living on the same property (deemed by the policy to be one 'household'), and with an average toilet flush consuming 13 litres of water, the six kilolitre monthly amount was vastly insufficient to meet even basic needs.

19 Unlike in Detroit, there are not comprehensive records of the number of PPM water disconnections in Johannesburg. This is because, with a PPM, disconnections occur automatically whenever any household's water credit or free basic amount of water runs out, hence PPM disconnections are often referred to as "silent disconnections" (Anti-Privatisation Forum and Coalition Against Water Privatisation 2006).

20 This fact was never disputed by the government in the course of the *Mazibuko* case.

21 These impacts, which were not disputed by the government, were detailed by the five *Mazibuko* applicants in their affidavits (on record).

22 Affidavit of *Mazibuko* applicant Vusumuzi Paki (on record), whose tenant's backyard shack burnt to the ground with her children in it (on record). See also Dugard 2008: 588–9.

23 The APF was formed in Johannesburg in 2000 as an umbrella network of local organizations opposed to the corporatization of municipal services by the City of Johannesburg and the threatened privatization of such services more generally. It disbanded in 2010, having been influential in ensuring that water services in particular were not privatized in South Africa (McKinley 2012).

24 For an analysis of the turn to legal mobilization, see Dugard 2011 and 2008.

25 The broad campaign ended after the judicial defeat in the Constitutional Court on 9 October 2009. Critically, key actors in the struggle do not ascribe the demise of the campaign to the judicial defeat. Rather, there was a coincidental collapse of the APF around the same time, due to extraneous organizational and leadership problems (SAHA no date).

and television coverage, newspaper articles, academic publications, press conferences and the like. Apart from domestic law, the *Mazibuko* case made significant use of international law including UN Committee on Economic, Social and Cultural Rights' General Comment 15 on the right to water, particularly its references regarding the sufficiency of water for a dignified healthy living (UN Committee on Economic, Social and Cultural Rights 2002: para 12(a)).

3.2 The Detroit water rights mobilization campaign (2014–)²⁶

After decades of deindustrialization, white flight and systemic disinvestment—while still having to pay for the expanse of Detroit's water and sewer system to surrounding white suburbs and, struggling with diminishing federal and state funding²⁷ exacerbated by the recession of 2008 to 2010—by 2013, Detroit's annual revenue became inadequate to meet its annual expenditure (Recchie et al. 2019: 78). Engulfed in debt, Detroit was 'on the verge of economic collapse' (Atuahene 2020: 123 citing Boyle 2001: 114).²⁸ Responding to the crisis, in March 2013, Michigan's then (Republican Party) governor, Rick Snyder, appointed Kevyn Orr as Detroit's Emergency Manager, thereby subjecting Detroit's largely black residents²⁹ to unelected governance.³⁰ With the support of Governor Snyder, and against the wishes of Detroit's city government, in July 2014, Orr filed for bankruptcy, asserting that Detroit was \$18 billion in debt. In December 2014, the US Bankruptcy Court ruled Detroit eligible (Recchie et al. 2019: 79–80).

Among the casualties of Detroit's bankruptcy (the largest municipal bankruptcy in US history), was the disconnection by the Detroit Water and Sewerage Department (DWSD) of water to tens of thousands of households with arrears of over \$150 on their water bills,³¹ regardless of their personal or financial circumstances. Thus, between 2014 and 2018, more than 100,000 household accounts in Detroit (a city of roughly 673,000 people) were disconnected (Horan 2018), with 44,000 households being disconnected in 2014 alone (Montag 2019: 28). Yet, despite businesses owing a third of the stated DWSD debt (amounting to hundreds of thousands of dollars³²), the DWSD did not initially disconnect water to commercial enterprises (Murthy 2016: 160).

Apart from the considerable health, privacy and dignity-related violations for households without water, in Detroit there are also additional threats in relation to family life. Without a household water supply, children can be removed by social services, and families can lose their home if it is declared uninhabitable (Montag 2019: 28–9). Moreover, as in Johannesburg, in Detroit residents can face criminal charges for reconnecting their water supply without authorization from the utility (Montag 2019: 29). The spate of water disconnections to poor black households over the spring and summer of 2014 not only led to the *Lyda* litigation,³³ but also to mass community and civil society organization which, interestingly for a country that has not recognized socio-economic rights or the right to water, was very much framed

26 Detroit's water disconnections and legal mobilization resistance are ongoing. See, for example, the website of We the People of Detroit: <https://www.wethepeopleofdetroit.com> (accessed 6 May 2021).

27 Federal funding to states and cities, as well as state funding to cities, has decreased by about 80 per cent since its peak in 1979 (Atuahene 2020: 132).

28 See also Bomey and Gallagher 2013.

29 In 2020, Detroit's centre city (the area excluding the surrounding overwhelmingly white suburbs) was 83 per cent black (Whitener 2020: 3).

30 'We the People of Detroit underscore that, due to emergency managers being imposed in the majority black cities of Allen Park, Benton Harbor, Escorse, Flint, Hamtramck, Lincoln Park, Pontiac and Detroit, in recent years the majority of Michigan's black population have lived under emergency management' – *We the People of Detroit* 2016. Condemning the disenfranchisement of Michigan's black urban voters, Jesse Jackson referred to emergency management as a form of 'plantation-ocracy' – cited in Lawrence 2013.

31 As the city's financial crisis unfolded, domestic water prices skyrocketed beyond the reach of many of Detroit's poorer (black) households, such that, between 2007 and 2017, water prices rose 120 per cent (Greene 2017).

32 At the time the disconnections were initiated by DWSD in April 2014, a golf company had an outstanding water bill of \$437,714 and the state of Michigan owed \$70,246 (Murthy 2016: 169).

33 According to Alice Jennings, the attorney in the *Lyda* case, 'we were determined this couldn't happen on our watch' – interview, Detroit (11 February 2019).

as a right to water issue. Indeed, a central demand of the resulting mobilization to counter the disconnections and to render water affordable was a call for the recognition of the right to water, which was very evident on the banners at the numerous protests and community gatherings to distribute free water (Chapman 2014, Klinefelter 2014, and Hicks 2014).

The campaigns also leveraged international human rights experts and mechanisms. As part of their rights-based mobilization, during 2014, civil society organizations in Detroit engaged the UN Special Rapporteurs on extreme poverty and human rights (then, Philip Alston), the human right to safe drinking water and sanitation (then, Catarina de Albuquerque), and adequate housing as a component of the right to an adequate standard of living and the right to non-discrimination in this context (then, Leilani Farha) to support their efforts. On 25 June 2014, the three Special Rapporteurs issued a statement expressing their concern about the legality of the disconnections, observing: 'Disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human rights' (UN OHCHR 2014b). In October 2014, having been invited by civil society organizations to directly assess the scale and impact of the disconnections in Detroit, De Albuquerque and Farha visited Detroit. In their joint statement, De Albuquerque and Farha reiterated the human rights violations, including the right to life, and highlighted the disproportionate effects of the disconnections on vulnerable people and low-income African Americans, stressing that 40.7 per cent of Detroit's population lives below the poverty level and '99 percent of the poor are African American' (UN OHCHR 2014a).

4. Legal mobilization in Johannesburg and Detroit: a 'powerpack' analysis

Exploring whether human rights are a 'useful or dangerous discourse' for social actors seeking progressive change, Cristy Clark concludes that the 'question of whether radical social movements ought to risk engaging with human rights discourse', 'partly comes down to an assessment of whether they have the power to create genuine change through this kind of engagement' (Clark 2017: 246). Calling attention to the potential of law as a form of power in the dialectical relationship between structure and agency, Gordon Crawford and Bård Andresassen hold rights, as a prism of legalized dynamic contestation, to be more powerful than traditional forms of political action such as voting (Crawford and Andreassen 2013: 8–9). Elaborating on why rights carry such transformative potential, Frances Zemans explains that the mantle of legality of law 'confers power on those who use it' and makes users 'participants in governance' (Zemans 1983: 695–6).

Using a power lens to understand the full value of rights as political resources, Crawford and Andreassen provide a useful overview of the fourfold typology of power that is frequently used in power-oriented analyses of legal mobilization (Crawford and Andreassen 2013: 7). In this typology, negative (or coercive) power—referred to as power-over³⁴—is differentiated from positive power, which in the relevant literature typically has three configurations: power-to, power-within and power-with, all relating to the concept and practice of power as emancipation in the sense that these forms of power enhance the capacity of less powerful and more marginal groups who are generally at the receiving end of coercive power (Crawford and Andreassen 2013: 5–7). Sometimes referred to, following John Gaventa, as the 'power cube',³⁵ I use the term powerpack to denote the contingent

34 Negative power (power-over) is the kind of status quo power - whether economic, social or political - that is associated with the exercise of power by the state or dominant economic or socio-political interests.

35 The power cube analysis was developed in the early 2000s by Gaventa and other colleagues in the Power, Participation and Social Change team at the Institute of Development Studies (IDS), Sussex University. Building on the work of Steven Lukes, who identified three dimensions within which power operates - visible, hidden and invisible (Lukes 1974) - the Power Cube integrates Lukes' three dimensions with an analysis of the three spaces in which power is exercised - closed, invited and claimed/created - and the three levels of power - global, national and local (Gaventa 2006 and 2005).

components of positive power across all dimensions, spaces and levels, as catalysed by agents pushing for progressive change in any given context.

According to Amy Allen, power-to denotes 'the ability of an individual actor to attain an end or a series of ends' (Allen 1998: 34 following Connolly 1983: 86–7). Understood as the capacity to act or to exercise agency, power-to is the most direct form of positive power and is often used reactively to resist power-over. It also aligns with more conventional legalistic approaches to legal mobilization, especially those that focus on individual cases.

Since 'one of the primary obstacles to social change is the acquiescence of the oppressed' (in some discourses described as 'false consciousness'), one of the commonly acknowledged values of rights is their potential to conscientize and activate 'a quiescent citizenry', regardless of whether their invocation 'works' in any specific intervention (Scheingold 2011: 131–2). This facet of the power of rights is referred to as power-within. It describes a process in which people begin to recognize they have rights,³⁶ 'stop sublimating their grievances and begin to seek redress' (Scheingold 2011: 136), and gain 'voice'. Sabrina Kozikis and Inga Winkler highlight that power-within often provides the basis for any iteration of 'power with' and 'power to' (Kozikis and Winkler 2020: 470). As explained by Duncan Green 'unless people first develop a sense of self-confidence and a belief in their own rights (power within), efforts to ... organize (power with) and demand a say (power to) may not bear fruit' (Green 2016: 33).

Power-with describes 'the ability of a collectivity to act together for the attainment of a common or shared end or series of ends' (Allen 1998: 35). That collective action strengthens struggle was recognized by Amílcar Cabral, for whom the only way to amplify the ability to struggle, is by building unity (Cabral 1979). This is because the power that any individual may wield through individual action (whether legal or other) 'is immeasurably amplified through organization and collective action' (Zemans 1983: 696). What makes rights such useful instruments of collective action, is their universality. Thus, as collective resources that assist with alliance-building and solidarity networks, rights can be powerful vehicles for political organization.

Analysing the feedback from protagonists in Johannesburg and Detroit, it is clear from my research that the power-to, power-within and power-with elements of the powerpack have featured prominently in engagements regarding the value of rights. Values accorded to the use of rights as part of the struggles for water justice (understood by the campaigns to primarily relate to issues of universal access and affordability) are set out below, filtered through the powerpack lens.

4.1 Power-to

In both Johannesburg and Detroit, having rights-based legal frameworks provided community members and activists with the ability to act to challenge the water disconnections, including the right to protest and to pursue the *Mazibuko* and *Lyda* legal challenges. Regarding the litigation, while encompassing several rights and legal grounds—notably the rights to equal protection and procedural fairness—both cases also invoked the right to water, regardless that this right is not explicitly recognized in the US.³⁷ Although both cases ultimately lost in court, this is not to suggest that the broader legal mobilization was devoid of power. As explored below, certainly from the perspective of affected communities, activists and lawyers, there has been considerable value in these water rights campaigns, which have empowered rather than disempowered struggles for water justice. Emerging from interviews with people involved with the legal mobilization campaigns, it is clear that

³⁶ Often (and certainly as played out in Detroit, where there is no directly enforceable right to water), it is less important what actual rights are entrenched in any applicable law—what matters most is the belief of having rights (whether related to natural justice or black letter law).

³⁷ In *Lyda* the right to water, including the international right to water, was emphasized by the amicus curiae, the International Network for Economic, Social and Cultural Rights (ESCR-net).

much of the value of legal mobilization is derived from the power-within and power-with configurations of the powerpack.

4.2 Power-within

4.2.1 Johannesburg

Because the Johannesburg struggle against water disconnections had already been ‘activated’ through direct resistance (for which some components, for example mass meetings, were enabled by a rights-based legal framework recognizing the right to gather etc.) before the turn to legal mobilization, the power-within dimension of the relevance of rights is less evident than in the Detroit struggle. Nonetheless, for APF co-founder, Dale McKinley, after the defeat of direct resistance, legal mobilization provided Phiri community members and allied activists with ‘something to organise around ... recognition after having been fucked over by the police’ (author interview with McKinley cited in [Dugard 2011: 75](#)). Perhaps most evocatively, when phoned by me from the steps of the Constitutional Court following *Mazibuko*’s crushing judicial defeat, the response of one of the applicants, Grace Munyai, was: ‘I’m so sorry for you’, followed by a short pause, and: ‘but do you know I’m going to be on TV tonight’. Munyai’s response speaks to her muted concern for the judgment itself, as well as the relevance for her of the voice that legal mobilization had provided to her and other members of the Phiri community where formal politics had failed them (author telephone conversation with Munyai, cited in [Dugard and Langford 2011: 58](#)).

4.2.2 Detroit

Describing why the use of the right to water was critical to the struggles for water justice, community activist, DeMeeko Williams, explained that his organization, Hydrate Detroit, uses rights to ‘advocate and educate’.³⁸ More explicitly grounding her explanation of the value of rights in a power-within understanding, for Maureen Taylor—whose organization, the Michigan Welfare Rights Organization (MWRO), is ‘dedicated to uprooting poverty’—rights are ‘extremely important’. The MWRO distributes copies of the Universal Declaration of Human Rights (UDHR) to conscientize people and to ‘open people’s minds’.³⁹

4.3 Power-with

4.3.1 Johannesburg

Strikingly, the legal mobilization around resistance to PPMs created new alliances between the APF and Public Interest Litigation and rights-based organizations such as the Centre for Applied Legal Studies (CALS) and the Freedom of Expression Institute (FXI) ([Dugard 2011: 72](#)). In addition, it solidified the formation of a new APF affiliate social movement, the Coalition Against Water Privatisation (CAWP) ([Dugard and Langford 2011: 57–9](#)). The new alliances and solidarity afforded by the legal mobilization, ‘became the centre of mobilisation and reinvigorated the struggle’ (author interview with McKinley, cited in [Dugard 2011: 75](#)).

4.3.2 Detroit

Detailing the alliance-building function of legal mobilization, for *Lyda* attorney, Alice Jennings, the importance of rights relates to the alliances that have developed across community organizations.⁴⁰ These organizations include the Detroit Water Brigade, Hydrate Detroit, Michigan Welfare Rights Organization, People’s Water Board Coalition, Unitarian Universalist Service Committee (UUSC) and We the People of Detroit.

38 Interview with DeMeeko Williams (Chief Director, Hydrate Detroit), Detroit, 12 February 2019.

39 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

40 Interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC), Detroit, 11 February 2019.

For Taylor, the right to water provided a ‘clear rallying point around which to create partnerships and coalitions’ between community organizations, welfare organizations etc.⁴¹ Academic ally, Peter Hammer, too, stressed the importance of human rights as an overarching value system that signifies and consolidates ‘broader struggles’.⁴² For Hammer, the right to water was ‘tremendously important for movement-building’ across communities, community organisations and human rights organisations’.⁴³ Similarly, academic Martha Davis explained that having an international right to water provided something concrete to organize around and to garner ‘international solidarity’—‘without these cohesive frameworks and content, organisation would have been harder, more nebulous’.⁴⁴ For Monica Lewis Patrick, President and Chief Executive Officer of We the People of Detroit, human rights provide a ‘connection between people from all around the world – a network of support and solidarity’.⁴⁵

Expanding on the significance of the support theme, several respondents mentioned the solidarity-related significance of the visit by UN Special Rapporteurs Catarina de Albuquerque and Leilani Farha, and Lewis Patrick spoke about what a ‘big deal’ the UN convening was, and how much it galvanized solidarity.⁴⁶ Hammer spoke about their visit being ‘an extraordinary moment’.⁴⁷ Similarly, for Taylor, it was ‘big when Catarina and Leilani came to Detroit’; international human rights ‘bind us across nations’.⁴⁸ Hammer, too, spoke about the importance of the UN Special Rapporteurs’ interventions as a moment of solidarity.⁴⁹

Taking the connecting role of rights even further, academic ally, Noah Hall highlights that from the perspectives of the affected communities and their supporters, the water rights’ struggles in Detroit and Flint are very connected. Hall observed: ‘it’s largely the same people and the same forms of mobilization so, in a way, Flint is a positive outcome of *Lyda*’.⁵⁰

4.4 A New dimension to the powerpack: ‘power-from’

As important as the typical configurations (power-to, power-within and power-with) of the powerpack are in analysing the value of legal mobilization, and as prominently they feature in engagements with protagonists, it appears from these engagements that the three configurations do not capture the full extent of the power of legal mobilization. I suggest that including a fourth dimension, power-from, would contribute towards a more comprehensive understanding of the power of rights. If power-to, power-within and power-with are ‘foundational’ (Kozikis and Winkler 2020: 470) because they provide a platform for activation, action and amplification, then power-from is metamorphic. Applied to rights, this describes the latent potential of rights-based mobilization as a fluid, shape-shifting

41 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

42 Interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), Detroit, 11 February 2019.

43 Follow-up Zoom interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), 27 August 2020.

44 Skype interview with Martha Davis (Professor of Law, Northeastern University), 8 February 2019.

45 Interview with Monica Lewis Patrick (President and Chief Executive Officer of We the People of Detroit), Detroit, 11 February 2019.

46 Interview with Monica Lewis Patrick (President and Chief Executive Officer of We the People of Detroit), Detroit, 11 February 2019.

47 Interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), Detroit, 11 February 2019.

48 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

49 Follow-up Zoom interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), 27 August 2020.

50 Telephone interview with Noah Hall (Professor of Law, Wayne State University), 3 September 2020. Hall’s reference to Flint relates to the legal mobilization campaign, including judicial victories, around the contamination of Flint’s water supply from 2014 onwards (Flint is just over 100 kilometres from Detroit). See, for example, https://en.wikipedia.org/wiki/Flint_water_crisis; <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know>; and <https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis?t=1618474879635>. Date accessed 19 May 2022.

process for exposing domination, reframing exclusion, providing a 'general moral discourse' for alternative ways of being (McCann 1994: 281), and ultimately for advancing change.

Wendy Brown captures the essence and potential power of what I am calling power-from, in terms of the paradox that rights encapsulate. Although speaking specifically about gender-related rights, Brown's adroit analysis is equally compelling regarding socio-economic rights. For Brown, the paradox—and the latent power—behind rights is that: rights that 'entail some specification of our suffering, injury or inequality lock us into the identity defined by our subordination, and rights that eschew this specificity not only sustain the invisibility of our subordination but potentially even advance it' (Brown 2000: 232). Yet, where rights highlight subordination, the language of rights affirms the untenability and injustice of exclusion in the present and articulates the conditions and contours of inclusion and justice in the future. By presenting a vision of equality and inclusion, rights expose the injustice of ongoing inequality and exclusion and provide a framework for challenging such injustices. In other words, part of the power of rights—the power-from—is their emancipatory potential not only as instruments or even as static ends, but as articulating what equality and freedom might look like and, through their instantiation, providing a way of reframing the debate and resisting hegemonic power, as well as a universally applicable vision for change (Nelson and Dorsey 2008: 169).

In the (power-from applicable) logic of Jacques Rancière, rights act to expose the dynamics of domination and question the existing order by providing a counter-veiling narrative to the dominant ones (Rancière 1998: 30). Similarly, in his later work, Michel Foucault recognized that human rights can be useful in liberation processes because they can be used to counter status quo power (of whatever kind and wherever it exists) (Eleveld 2015: 86–8 referring to Foucault 2000: 449–53). Moreover, through catalysing new ways of thinking about and articulating issues, rights provide a basis for imagining different constellations, opportunities and futures—above all, for Foucault, rights can 'enhance the possibility of living, thinking and acting differently' (Foucault 1997: 158 cited in Eleveld 2015: 88). By so doing, rights-claiming constructs a shared space for creativity, and the power of legal mobilization then 'rests in its capacity to serve as a vehicle for imagination', expressing the pleasure in, hope for, and necessity of, shared freedom (Hoover 2019: 256). In this way, rights 'open up the desires that motivate our claims beyond injury or vulnerability by focusing on the freedom that makes the expression of desires possible', thereby sustaining potentially disruptive political action in which, in Bonnie Honig's terms, 'the basic terms of political life and the identity of the community are renegotiated' (Honig 2003 cited in Hoover 2019: 256). Thus, in their inherently relational character, claiming rights first and foremost contests traditional relationships, with significant potential to transform power differentials (Zivi 2012).

Writing about law being a 'continuous part of social practice', Scheingold explains that instead of an accomplished fact the law is rather, on the one hand, an 'authoritatively articulated' goal of public policy and, on the other, a political resource of 'unknown value in the hands of those who want to alter the course of public policy' (Scheingold 2011: 6–7). 'Such an understanding of the law as knowledge and linguistic practice', according to McCann, 'calls attention to law's power as a constitutive convention of social life' (McCann 2006: 21 citing Brigham 1996). Viewed from a power-from perspective, the politics of rights involves the restaging of political moments as an expression of power that can be used to 'subvert the existing order' (Hoover 2019: 259). As such, through exposing domination, reframing struggles and articulating counter-power egalitarian visions, legal mobilization is capable of influencing discourse and shifting power relations—both likely precursors to social change. The metamorphic power-from facet features distinctly in responses from those involved in the Johannesburg and Detroit water rights campaigns.

4.4.1 Johannesburg

Much of the power-from component in the Johannesburg water rights struggle emerges from the highly transformative (but ultimately overturned) High Court judgment, in which Judge Tsoka reframed the PPM water disconnection logic as a racist and unlawful response to racialized poverty. Considering the common cause fact that people living in white suburbs continued to enjoy procedural protections prior to any contemplated disconnection of their water supply whereas, with the installation of PPMs and their automatic disconnection mechanism, the black residents of Phiri were no longer afforded this right, Judge Tsoka commented:

The underlying basis for the introduction of the prepayment meters seems to me, to be credit control. If this is true, I am unable to understand why this credit control mechanism is only suitable in the historically poor black areas and not the historically rich white areas. Bad payers cannot be described in terms of colour or geographical areas. There may be as many bad customers in the historically rich white areas as there are in the historically poor black areas. Bad debt is a human problem not a racial problem (*Mazibuko* High Court para. 154).

In addition, based on the testimonies of the four women applicants (and going beyond the applicants' pleadings)⁵¹, Judge Tsoka found PPMS to constitute unfair discrimination based on gender, providing fertile ground for a more intersectional approach to disadvantage in legal mobilization:

South Africa is a patriarchal society. Many domestic chores are performed by women. Many households in poor black areas are headed by women. Phiri Township is no exception. It is understandable therefore that the first applicant travelled 3 kilometres to access water on behalf of her household. In this context it seems to me that prepayment meters discriminate against women unfairly because of their sex. Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful (*Mazibuko* High Court para. 159).

Writing about the 'historic and ground-breaking' *Mazibuko* High Court judgment (delivered by Judge Tsoka), which was subsequently overruled by the Constitutional Court but left its transformative mark in terms of its reframing of the problem as being about the need to validate intersectional dignity and equality rather than neoliberal credit control, McKinley has commented:

The judgment ranks as one of post-apartheid South Africa's most important legal victories for poor communities and all those who have been struggling against unilateral and profit-driven neo-liberal basic service policies ... Judge Tsoka ... went beyond the legal points, recognizing the racial, class, administrative and gender-based discrimination underlying the City of Johannesburg's water policy. The judge explicitly rejected the arguments for restricting the water usage of poor communities (*McKinley* 2008).

And commenting (in 2008) about the possibility that the High Court judgment could be overturned, McKinley explained that any potential judicial loss would 'not detract from the political and social significance' of the case and legal mobilization:

51 Centred around the racial discrimination of installing PPMs in black communities but not in white communities that also had water-related arrearages, the applicants' legal papers did not focus on gender (despite four out of the five applicants being women). Judge Tsoka nonetheless advanced a gender analysis in his judgment, on the basis of the descriptions by the four women applicants of how the burden of making do with less water or having to find alternative water sources fell on their shoulders.

It is a case which does not only have applicability to South Africa but which, by its very character, enjoins the attention and direct interest of billions of poor people around the world who are suffering under neo-liberally inspired water policies, alongside the governments that are implementing such policies and their corporate allies who seek to turn water into nothing less than another profit-making stock market option. The CAWP and its allies are confident ... that water provision will now no longer be delivered in a discriminatory, patronising and inhumane manner (McKinley 2008).

Further power-from evidence was highlighted in a newspaper article of 19 July 2009 entitled 'Masondo Next to be Axed?' in which journalist Matuma Letsoalo suggested that then City of Johannesburg mayor, Amos Masondo, might be sanctioned by the ANC following accusations from the regional ANC leadership that Masondo 'undermin[es] the region when taking important decisions', specifically 'for failing to inform the regional leadership of his decision to challenge a Johannesburg High Court ruling on pre-paid water meters' (Letsoalo 2009).⁵² More generally, for McKinley, the Phiri water rights struggle served to focus a critical light on the adverse affects on the poor of the South African government's 'neo-liberal (water) policy onslaught', and 'opened the door' to viewing this against the country's constitutional frameworks (McKinley 2008).

As remarkable testimony to the shifting of power relations in response to the legal mobilization, the City of Johannesburg ended up providing the residents of Phiri (and Johannesburg more broadly) approximately the same remedies they had litigated over, despite the Constitutional Court defeat. The City raised the amount of FBW it provided to the poorest households in Johannesburg to 50 litres per person per day (the precise amount the applicants had argued for in *Mazibuko*) and redesigned the PPMs so they would not completely disconnect the water supply when credit runs out, and instead provide a continuous trickle of water until further credit is loaded or the FBW amount is refreshed the following month (Dugard and Langford 2011: 58).

4.4.2 Detroit

For Hammer, reframing the water unaffordability issue in Detroit as a right to water issue was 'so important in re-energising the movement and providing fresh momentum' for communities and community organizations trying to address socio-economic exclusion.⁵³ In the words of Jennings, 'the right to water has given us the sense of humanity to continue the fight';⁵⁴ 'Sometimes a victory is in the fight ... you need to put the issues out there and fight and fight and fight, and put the issues out there, and eventually they will be taken up ... in Detroit, the fight goes on'.⁵⁵ Similarly, according to long-time socio-economic rights activist, Bruce Porter:

What do you do when you have a legal system that marginalizes socio-economic rights? Like the amicus in *Lyda*, you need to introduce rights such as the right to water by whatever means, to plant the seed that there is an international human rights system ... The Detroit water rights campaign was completely energising – it's a long-term struggle, but you have to keep on planting the seeds, making the arguments, and established human rights frameworks including the ICESCR are sources of these seeds.⁵⁶

⁵² That Mayor Masondo was not recalled does not diminish the clear political significance accorded to the legal mobilization.

⁵³ Follow-up Zoom Interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), 27 August 2020.

⁵⁴ Interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC, Detroit), Detroit, 11 February 2019.

⁵⁵ Follow-up telephone interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC, Detroit), 3 September 2020.

⁵⁶ Telephone interview with Bruce Porter (contributor to the amicus brief on the international right to water in *Lyda*, and Director of the Social Rights Advocacy Centre, Canada), 4 September 2020.

In Hammer's view, the inclusion of the international right to water in the *Lyda* amicus brief led to the important finding of fact by the court that water disconnection led to 'irreparable harm' (*Lyda* Bankruptcy Court Supplemental Opinion para. 21), which was critical in recasting the water disconnection problem as a human crisis.⁵⁷ Evidently, part of the power-from effect of the legal mobilization in Detroit comes from reframing the communities in Detroit as 'citizens and political actors' rather than 'only consumers of water' (Jepson 2020: 85).

Highlighting the reframing role the right to water played, Taylor stressed the importance of legal mobilization in providing a counter-narrative to the prevailing paradigm of 'blaming poor people for hardships', 'denying structural problems' and trivializing their suffering.⁵⁸ For Taylor and the MWRO, the value of human rights lies in portraying 'another way and another vision'—so that 'people are not always just looking up through a small aperture like a frog in a well'. In Taylor's words, 'living in Detroit is like living in a bubble of lies and madness with nothing to hold onto'—people often feel like they are 'being stifled by not being heard',⁵⁹ whereas, human rights, including the right to water, 'offer a better vision and hope—a good model, showing that the rest of the world lives like human beings'.⁶⁰

Emphasizing the metamorphic role of rights-based mobilization, Clark notes that, in the context of hostility towards socioeconomic rights and with the US having abstained from voting on the 2010 UN General Assembly resolution on the right to water, the 'strategic decision' by Detroit social movements 'to employ the language of the human right to water is noteworthy' and can be seen as a radical strategy that challenges rather than reinforces the (neoliberal) status quo (Clark 2020: 183). 'Even more significantly', according to Clark, the water justice movements and campaigns in Detroit have been 'a catalyst for increased political activism across the board' (Clark 2020: 184). For example, Jennings has used the legal lessons from *Lyda* to mount subsequent cases in the Michigan surrounds about water disconnections.⁶¹ And for Murthy, the *Lyda* litigation, although formally a judicial defeat, 'has helped to initiate discussions about the status of the right to water and the role of legislatures in protecting affordable access to water as a basic human need'—'[p]olicy-makers at the local, state, and national level have since taken steps towards ensuring access to water for drinking, sanitation, and hygiene' (Murthy 2016: 219). As a result of the case and the ongoing legal mobilization campaign, in Jennings's words, 'Detroit has become the ground zero for water rights in the US'.⁶² For example, in 2015, Democratic State Government Representatives in Michigan proposed new legislation on water quality and affordability, as well as regulating disconnections (Murthy 2016: 260). And there is draft national legislation on the affordability of water being championed by US Representative from Michigan, Rashida Tlaib.⁶³ As summed up by Hammer: all things considered, 'the *Lyda* campaign did pretty well by changing the frame for viewing water disconnections as a human rights issue' and, as a result, there is now 'the Detroiters Bill of Rights, which proposes key amendments to the City Charter, including a right to water, and that has the backing of two progressive councilwomen, Raquel Castañeda-López and Mary Sheffield'.⁶⁴

57 Follow-up Zoom interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), 27 August 2020.

58 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

59 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

60 Interview with Maureen Taylor (State Chair, MWRO), Detroit, 11 February 2019.

61 Follow-up telephone interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC, Detroit), 3 September 2020.

62 Interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC, Detroit), Detroit, 11 February 2019.

63 Interview with Alice Jennings (*Lyda* attorney, Edwards & Jennings PC, Detroit), Detroit, 11 February 2019.

64 Follow-up Zoom interview with Peter Hammer (Director of Damon J Keith Center for Civil Rights, and Professor of Law at Wayne State University), 27 August 2020.

5. Conclusion

The global neoliberal economic order has proven particularly resistant to egalitarian socio-economic transformation. This is perhaps especially the case regarding the traditional politics exercise of voting (which in many countries appears to favour elites), but also regarding revolutionary overthrow (which, broadly, has not occurred in recent history despite increasing inequality across and within countries). The failure to reform the global order should not, however, be taken (as implied by Moyn 2018) as evidence that human rights are not actively at work as part of struggles for egalitarian change, or that they have failed as an emancipatory framework.⁶⁵

Responding to two identified gaps in legal mobilization scholarship (the need to focus on the politics of rights beyond the courtroom, and to do so from a bottom-up empirical perspective), this article contributes towards a deeper understanding of the usefulness of rights for radical agendas. Using a power lens to explore the relevance of rights to those mobilizing the law as part of egalitarian struggle, the case studies on Johannesburg and Detroit demonstrate that—although the activists and allies were not successful in court—from the perspective of those directly involved in rights-based campaigns, rights have held significant value. Judging from the struggles for water justice in Johannesburg and Detroit, when the analytical lens is widened beyond the courtroom, legal mobilization resonates with multi-dimensional and metamorphic (power-from) power that constitutes a cogent form of politics with considerable radical promise.

It is of course important to question the limits of human rights discourse and to deliberate the risks of human rights tactics. But it is equally important not to overstate the limits and risks to radical change of the uptake of human rights. As the case studies of Johannesburg and Detroit reveal, ‘rights-based activism can yield practical benefits and counter-hegemonic possibilities, including the articulation of more radical conceptions of the right to water’ (Clark 2017: 231). Albeit limited in scale and temporality, the Johannesburg and Detroit water struggles indicate that—even if human rights claims are not able to immediately dismantle entrenched inequality—rather than being an empty ‘depoliticising signifier’ (Sultana and Loftus 2012: 2), over the long-term, rights-based mobilization can politicize campaigns, ignite movements and catalyse struggles for structural change.

Biographical details

Jackie Dugard has published widely on the role of law in social change, most recently: Dugard, J. and Sánchez, A. 2021. Bringing Gender and Class into the Frame: An Intersectional Analysis of the Decoloniality-As-Race Critique of the Use of Law for Social Change. *Stellenbosch Law Review* 1: 24–46. She was the first Director of the Gender Equity Office (GEO) at the University of the Witwatersrand (2014–16), and the co-founder and first Executive Director of the Socio-Economic Rights Institute of South Africa (SERI) (2010–12).

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⁶⁵ Compared with more traditional forms of political expression such as voting, legal mobilisation has, arguably, been more successful at advancing alternative visions and shifting power relations.

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Conflict of Interest

I was part of the *Mazibuko* litigation team and peripherally involved in the *Lyda* amicus intervention but, in this article, I do not rely on my own analysis of the cases themselves.

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