

**NORTHWESTERN UNIVERSITY**

**LL.M THESIS**

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**IMPLEMENTATION OF THE RIGHT OF ACCESS TO SUFFICIENT  
WATER THROUGH PRIVATIZATION IN SOUTH AFRICA**

*Over 1 billion people across the world lack access to potable water and more than 2 billion are without access to sanitation. In addition, approximately 2 million deaths result from easily preventable diarrhea-related sicknesses annually.<sup>1</sup>*

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<sup>1</sup> D McDonald & G Ruiters "From Public to Private (to Public Again)" in McDonald & Ruiters (Eds) *Age of Commodity* (2005) 1

## INTRODUCTION

Water is critical to sustaining human life. Access to safe water is vital to ensuring that human beings enjoy a life of dignity. It is necessary to enjoy a healthy environment; enjoy adequate food and the right to education.<sup>2</sup> It may even impact on cultural practices. It is hard for words to convey the staggering extent of South Africa's water crisis. Almost half of South Africa's population is income poor<sup>3</sup> and it was estimated during 1997 that between 12 and 14 million people in South Africa are without access to safe water and about 20 million people are without access to adequate sanitation.<sup>4</sup>

Redressing these inequities, largely a legacy of apartheid, must be a priority for the democratic state. Although access to water was considered a priority during the democratic transition, apparent from the entrenchment of the right of access to sufficient water in the Constitution of the Republic of South Africa<sup>5</sup> it is important to explore exactly how this commitment has been practically implemented. It hardly seems appropriate, in the circumstances, for the provision of access to water to be relegated to market forces. Nevertheless, this is the trend in South Africa as well as around the world. There has been an inclination to "reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to

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2 A Kok "Water" in *South African Constitutional Law* by M Chasklason et al at 56B-1; Note further that in 1996 nearly one in four schools had no access to water within walking distance (<http://www.education.gov.za/dynamic/dynamic.aspx?pageid=329&catid=10&category=Reports>)

3 Van Koppen & N Jha "Redressing Racial Inequities through Water Law in SA" in *Liquid Relations: Contested Rights* (2005) Rutgers Univ. by Roth, Boelens & Zwarteveen (Eds) 197

4 White Paper on a National Policy for South Africa (1997), par 2.2.3 at [http://www.polity.org.za/html/govdocs/white\\_papers/water1.html#Vision](http://www.polity.org.za/html/govdocs/white_papers/water1.html#Vision) (last visited 15 April 2006)

5 Constitution of the Republic of South Africa, Act 108 of 1996

conditions generated by international and national financial markets and institutions and in an effort to attract investments from multinational enterprises whose wealth and power exceed that of many states”.<sup>6</sup>

Privatization of basic social services involves a shift of authority from the state, the traditional bearer of human rights obligations, to the private sector which impacts on the “constitutional boundaries between the state and the private sphere”.<sup>7</sup> This leads us question whether privatization enhances the ability to realize the right of access to adequate water. For the purposes of this paper a broad definition of the term “privatization” is employed. Narrowly understood, privatization means the outright divestiture of state assets. However, it may also include any other arrangement where state ownership of assets remains unchanged but decision making is transferred to a private institution.<sup>8</sup> Privatization may go even further to include the commercialization of public water services. Commercialization occurs when the state does not transfer control of the provision of water services but runs it as a

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6 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights Par 2 at [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)

7 R Malherbe “Privatisation and the Constitution: Some Exploratory Observations” *Tydskrif vir Suid Afrikaanse Reg* 2001(1) 2

8 Privatization manifests different arrangements, see note 1 above at 16-17: (1) Full divestiture in terms of which ownership is transferred but the utility is operates under supervision of an independent public regulatory body (2) Service agreement (where the state remains answerable for the functioning and maintenance of the service, but certain elements of the service are contracted out) (3) Management contract (the contractor operates and maintains the service but the state supervises the contractor and is responsible for investment (3) Lease (the plant is rented from the state and the private agency assumes the operation of the service, reporting requirements are set out in the agreement) (4) Concession, an investment linked agreement in terms of which the concessionaire takes up general responsibility for operations, maintenance and investment during the period of the contract. The concessionaire is responsible for tariff collection and customer management. Ownership of the assets are handed over to the local authority at the end of the contract (5) Build, Own, Operate and Transfer contracts (BOOT) in terms of which private operators build the service system and plants, take responsibility for the operation and maintenance but the facilities transferred to the state at the end of the contract, usually 25 years (6) Community/NGO provision which involves the handing over of some or all responsibility for water provision to the end user or a non-profit intermediary.

business operation by mechanisms such as ring fencing and full cost recovery.

To begin with, one must dispel the notion that profitability and efficiency is an inevitable consequence of privatization. Whether privatization will transform water services into an efficient operation depends on a number of factors<sup>9</sup> including: the size and scope of the operation; the financial condition of municipality; the potential for changing municipal management and operations; the size and financial resources of the provider; operational efficiencies; the service provider's experience with similar water systems and consumption patterns. Of course, the existence of competition for the provision of the service also impacts on the provider's efficiency levels and overall performance. Let us not forget however that the profitability of private actors performing public functions will not necessarily translate into a benefit for the public.

It is important to bear in mind some of the central motivations for and against privatization.<sup>10</sup> Proponents of privatization argue that governments are ill suited to provide water services in a reliable and cost effective manner. It is said that the public service lacks creativity and is intrinsically corrupt. In addition, it is claimed that the cash strapped state is unable to expand and upgrade water services independently of the private sector. Advocates of privatization argue that the private sector, with its commercial design and operating principles, must be a key constituent of water delivery strategies. By contrast, antagonists of privatization suggest that

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9 C. Arnold in "Privatization of Public Water Services: The State's Role in Ensuring Public Accountability" 32 Pepp. L. Rev 561 2004-2005 at 565, 581

10 Note 1

private companies are interested solely in ensuring profitable outcomes and are not interested in advancing the public interest. Private operators levy high rates that are prohibitive of access by the poor and they disconnect services when consumers are unable to afford to pay. Private operators also tend to cut corners to reduce costs, threatening the quality of the water and in turn generating health risks for the public. In addition, privatization may lead to the complete exclusion of some income poor population groups altogether. It is also argued that privatization generates corruption through bribes for contracts or by encouraging competitors to artificially decrease bids just to get a foot in the door.<sup>11</sup>

The first part of this paper describes the South African context and the trend to privatize water services is highlighted. Next, the legislative framework that has been put in place will briefly be explored. The third section looks at the content of the constitutional right of access to water, using international human rights law as a compass. The fourth part looks at the implementation of the right to water, considering one of the recently privatized schemes and looking at breaches of the constitutional right. The fifth part concludes with the thesis that the manner in which privatization has been implemented has put equitable access to water at risk and it threatens to exacerbate existing disparities in service provision. Because privatization is a “continuum of public and private mixes, with varying degrees of involvement and exposure to risks by the two sectors”<sup>12</sup> it is not feasible to argue that all forms of commercialization or privatization are unconstitutional. The author does propose

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11 Note 1

12 Note 1, 15

however that the legislative philosophy has been flawed at least in two key respects, by assuming that there is sufficient regulatory capacity and by the absence of any requirement for independent monitoring. Implementation has been flawed in many more respects, such as the failure to adopt a pricing strategy that favors the poor, violations of due process and the failure to provide an adequate quantity of free basic water to the poor.

## **PART I: THE SOUTH AFRICAN CONTEXT**

The apartheid government created a system of water control based on riparian title (the holders of which were drawn mainly from the minority white population group) which gave private land owners extensive rights in relation to water resources.<sup>13</sup> In the so-called homelands (ten administrative areas consisting of no more than 13.5% of the total land), which served as the dumping ground for blacks who were surplus to the cheap labor needs of the white community, authority over water resources vested in the homeland government but implemented through traditional chiefs.<sup>14</sup> Enormous disparities developed under apartheid, for instance, almost 95% of the water used for irrigation was used by the large-scale farming community, who were almost exclusively white.<sup>15</sup> New legislation passed since the collapse of apartheid has meant that control over water is characterized by interplay between three formal systems: apartheid era laws, former homeland laws and post-apartheid legislation.<sup>16</sup> Under the

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13 S. Liebenberg “The National Water Bill-Breathing Life into the Right to Water” ESR Review Vol.1 No1 (1998) 1

14 Note 3, 195, 200

15 Note 3, 198

16 Note 3, 195-200

present dispensation, water and sanitation services (limited to potable water supply systems, domestic waste-water and sewage disposal systems) fall within the competence of local authorities.<sup>17</sup>

When the African National Congress (ANC) took power in 1994, the state faced a massive service and infrastructure backlog described a few years later by the Minister of Local Government in the following terms: “conservatively estimated that the total cumulative [infrastructure and service] backlog is about R47-53 billion, with an average annual backlog of R10,6 billion”.<sup>18</sup> It was not long before the ANC decided that the best way of dealing with the infrastructure backlog would be to resort to private capital. The Water and Sanitation Policy White Paper (1994) announced that “proposals for the private sector to provide services will be considered where these may be in the public interest and where this approach is supported by the community concerned”.<sup>19</sup>

Privatization of water services was given a boost during 1996 when the government replaced the Reconstruction and Development Program with the Growth, Employment and Redistribution policy (GEAR). GEAR rejected an expansionary fiscal strategy which “would only give a short term boost to growth” and instead focused on reducing the national deficit, encouraging investment, reducing inflation

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17 Constitution of South Africa, Schedule 4, Part B

18 White Paper on Municipal Services Partnerships, GG No. 21126 at <http://www.info.gov.za/gazette/whitepaper/2000/21126.pdf>

19 Note 1, 25

and interest rates.<sup>20</sup>

In 1997, the government published and adopted the Water Services Policy with a declared intention “to promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure development...”<sup>21</sup>

During 2000, the ANC announced its plan to introduce free basic municipal services. This promise took shape when the Minister promulgated regulations during 2001 under the authority of the Water Services Act of 1997.<sup>22</sup> The Water Services Act granted to everyone the right of access to a basic water supply and basic sanitation, defined as the “standard of water services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.” The prescribed standard is “a minimum quantity of potable water of 25 liters per person per day or 6 kilolitres per household per month” located within 200 meters of a household and “with effectiveness such that no consumer is without a supply for more than seven full days in any year”.<sup>23</sup>

However, the free basic water policy should not be seen as the panacea for the water crisis. As discussed later, the quantity of free basic water was inadequate.

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20 GEAR Policy at <http://www.polity.org.za/html/govdocs/policy/growth.html?rebookmark=1#ch2> (last visited on 21 April 2005)

21 Water Services Policy (1997) at <http://www.thewaterpage.com/wp3.htm>

22 Water Services Act No. 108 of 1997 at <http://www.info.gov.za/gazette/acts/1997/a108-97.pdf>

23 Government Gazette No. 22355 Reg. No. 509 (8 June 2001)

Furthermore privatization, pricing policies and cost recovery mechanisms limited access. In any event, several years after the free basic water policy was created there were still significant problems with the implementation of free basic water.<sup>24</sup> These implementation difficulties were created to some degree by the inability of local government to independently finance the supply of free basic water, in the absence of adequate financial support from national government.<sup>25</sup>

Then, during 2002, the state published its Draft White Paper on Water Services. In that document, the state warned consumers that the “right to a free basic water supply is not an absolute right...abuse of the right to free basic water can result in the restriction and/or disconnection of the water supply, provided fair and equitable procedures are followed and special arrangements for indigent persons are made”. At the same time, civil society organizations exposed the increase in water disconnections, with figures running into the millions, since 1994. Although these figures were disputed, DWAF conceded that the number of disconnections was high and a source of concern.<sup>26</sup>

During 2003, the state made a number of statements which confirmed its inclination to privatize water services. On 7 April 2003, the Minister confirmed that

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24 Joint submission by COSATU & SAMWU on the Draft White Paper on Water Services (2002) at <http://www.cosatu.org.za/docs/2003/warserv.htm>

25 Section 229(1) of the Constitution entitles municipalities to raise revenue via rates on property and surcharges on fees and services provided by or on behalf of the municipality as well as any other taxes or levies permitted by national government. Section 214(2) (d) of the Constitution entitles local government to an equitable division of the revenue collected nationally which takes into its need to provide basic services and perform the functions allocated to them.

26 DWAF Media Release, 6/6/03

<http://www.dwaf.gov.za/Communications/PressReleases/2003/BUDGET%20Press%20Release%20version%203.doc>

the mere fact that the state did not intend to sell off its public water services infrastructure to the private sector was no obstacle to involving the private sector in water service delivery. The Minister stated “The South African government believes that the private sector has an important role to play in service provision. However, Government will always retain responsibility for ensuring that there is adequate water services provision...The decision to use the private sector should be taken by those concerned, provided that they have adequate capacity and information to make a sound decision.”<sup>27</sup> Later that same year, the Minister of Water Affairs articulated water policy in the following terms:

“The Constitution and policy of Government do not allow people to be deprived of basic water supplies. Municipalities must restrict flow to the free basic water level rather than cut it off completely. The new White Paper on Water Services will repeat this message loudly and clearly. But we are also seeking to establish effective, democratic local government that can sustain services to our people. If those who use more than the free basic amount do not have to pay, the resulting free-for-all will be impossible to sustain and services will collapse....we insist that democratically elected local governments may consider private service provision although we require them first to consider public alternatives. We simply demand that whatever arrangement they choose gives priority to meeting the needs of the poor and to the provision of free basic services”<sup>28</sup>

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27 R. Kasrils conference statement on 7 April 2003, reported at:  
<http://www.dwaf.gov.za/Communications/PressReleases/2003/SA%20View%20on%20opportunities%20for%20private%20involvement%20in%20Water%20in%20Africa.doc>

28 R Kasrils Press Release on 6/8/2003 reported at:  
<http://www.dwaf.gov.za/communications/articles/kasrils/2003/cutoffs%20article%20website.doc>

These Ministerial statements meant no more than that privatization in its narrowest form, *viz.* transfer of ownership of water facilities and services, was not on the immediate agenda. Privatization in the form of divestiture of state assets may not have occurred<sup>29</sup> but commercialization and others forms of privatization, such as public-private partnerships, have been vigorously explored.<sup>30</sup> Later that year, the Minister defended the use of pre-paid meters in response to protestations that pre-paid water meters constituted a violation of the right of access to water.<sup>31</sup> He contended that pre-paid meters allowed consumers to monitor the amount of water used and assisted the state to supply the free basic minimum amount of water. He also stated that, since 1994, the Department of Water Affairs and Forestry (DWAF) had provided infrastructure for the supply of water to approximately 10 million rural dwellers that previously had no access while a further 6 million individuals had been supplied with water through public urban and housing programs.

Recent trends toward privatization of water services co-exist uneasily with the constitutional right of access to water which provides: “27(1) (b) Everyone has the right to have access to sufficient food and water (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.” Besides section 27(2), the duty to realize access to sufficient water is also reflected in section 7(2) of the Constitution which provides that the state is obliged to respect, protect, promote and fulfill the

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29 Note 1 at 28

30 Although only four of 284 municipalities have contracted out management of water, 5 million people are serviced through these ‘privatized’ systems (at note 1, 37)

31 Letter dated 11 November 2003, DWAF website:

[http://www.dwaf.gov.za/Communications/PressReleases/Default\\_dates.asp?year=2003](http://www.dwaf.gov.za/Communications/PressReleases/Default_dates.asp?year=2003)

rights in the Bill of Rights.<sup>32</sup> Before defining the content of the right to sufficient water, it is necessary to consider whether section 27(1) (b) applies to private actors.

Constitutional obligations may be extended to private actors under the Constitution, which specifically makes provision for the horizontal application of the Bill of Rights. Certain duties, such as the prohibition against unfair discrimination, are explicitly applicable to private actors while the application of other rights must be considered in light of section 8(2). Section 8(2) provides that the Bill of Rights binds a natural or a juristic person if it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. This section may be interpreted in two different ways. The first approach would consider each right and determine whether it is capable and suitable for extension to private actors while the second methodology would require a consideration of the textual construction of each right.<sup>33</sup> It has been contended that the former interpretation of section 8(2) is the proper approach because the latter methodology is too formalistic.<sup>34</sup> However, it has also been suggested that the nature of the duty to progressively realize the rights in section 27(1) (b) is too burdensome to impose positive obligations on private actors and those rights should therefore not be horizontally applied.<sup>35</sup> Clearly, section 27 applies horizontally because it imposes negative duties on all persons to refrain from impairing the right. The Constitutional Court has affirmed that, at a minimum, there is a negative duty on the state and all other entities and persons to desist from

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32 Section 7(2)

33 Some rights are expressly horizontal in application (e.g. section 9(4) which provides that no person may unfairly discriminate against anyone) others make no reference to application.

34 D Davis & H Cheadle “Application of the 1996 Constitution in the Private Sphere” 13 S. Afr. J on Hum. Rts. at 57

35 *Id* at 60

impairing entrenched constitutional rights.<sup>36</sup>

It may also be argued that section 239<sup>37</sup> read with section 7(2) of the Constitution, permits horizontal application of socio-economic rights vis-à-vis private actors when they exercise a power or function in terms of the Constitution or when they exercise a public power or perform a public function in terms of any legislation. The broad language of section 239 suggests that it calls for horizontal application of the Bill of Rights<sup>38</sup> where private actors execute functions allocated to the state under the Constitution however the fact that horizontal application is specifically addressed in section 8 seems to indicate the contrary. Nevertheless, if section 239 is relevant, then the “doctrine of state action”<sup>39</sup> would provide a useful guide to its interpretation.<sup>40</sup> In addition, sections 26 and 27 of the Promotion of Equality and Prevention of Discrimination Act of 2000<sup>41</sup> imposes a duty on all persons, natural and juristic, to promote equality and refrain from unfair discrimination. Equality, in section 1, is defined broadly and extends to the full enjoyment of all rights and freedoms under the Constitution.

Of course, whether section 27(1) (b) applies horizontally or not, the legal

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36 Government of RSA v Grootboom 2001 1 SA 46 (CC) at par 34

37 Section 239 relates to “organs or state”, which includes functionaries and institutions performing functions under the Constitution or which perform public functions in terms of legislation.

38 Ellman S “A Constitutional Confluence: American State Action Law and the Application of South Africa’s Socio-Economic Rights” 24

39 In the United States, the state action doctrine prescribes that where private actors execute traditionally public functions then courts may treat them as public actors. The factors that may be relevant are whether a “private actor is performing a public function; whether the state has compelled or encouraged the action; and whether the state is intertwined with the private actor.” See note 38 at 65

40 Note 38; See further D Chirwa “Non-State Actors Responsibility for Socio-Economic Rights: The Nature of their Obligations under the South African Constitution” in ESR Review Vol. 3 No. 3

41 <http://www.polity.org.za/html/govdocs/legislation/2000/act4.pdf>

framework for privatization schemes must still be consistent with the Constitution, because the Constitution is the supreme law and all law or conduct inconsistent with it is invalid.<sup>42</sup>

## **PART II: LEGISLATIVE FRAMEWORK**

Following the entrenchment of GEAR, the state set about creating a legislative framework for private actors to participate in water services and developing a regulatory framework for private actors. As will be seen from the provisions of the various statutes, Parliament is well aware of the risks privatization poses to the realization of the right to water.

The Water Services Act, passed in 1997, was distinctive in a number of different ways. It did not just entitle everyone to a free basic water supply and basic sanitation but it also required all water services institutions, including private suppliers, to take reasonable measures to realize those entitlements.<sup>43</sup> It prohibited limitation or discontinuation of water services if that would result in individuals being denied access to basic water services for non-payment provided that those individuals prove, to the satisfaction of the water services authority, that they are unable to pay. The Act contemplates the creation of national norms for tariffs and the development of water services development plans. Every water services institution, including private providers, must comply with the prescribed national norms. Regulations passed

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<sup>42</sup> Section 2 of the Constitution

<sup>43</sup> Section 3(2) of the Water Services Act, 1997

under the Water Services Act<sup>44</sup> require contracts between municipalities and with external service providers to stipulate the method of payment by the municipality to the service provider. Interestingly, it requires payments to the service provider to take into account “the requirement for a reasonable rate of return on any investment”.

The National Water Act No. 36 of 1998<sup>45</sup> represented a significant break from the previous water management system. The primary objective of the Act, referenced throughout the text, is to redress the racial and gender inequities of the past.<sup>46</sup> The Water Act, 1956 and its system of riparian rights was discarded in favor of a licensing system that allows for the reallocation of water from high volume users to poor water users.<sup>47</sup> The National Water Act also recognized the state as the public trustee of all water resources and it empowered the Minister to ensure that water is protected, used and controlled in a sustainable and equitable manner for the benefit of all persons.<sup>48</sup> On the other hand, it is necessary to acknowledge that there are problems with the National Water Act which adversely impact on the right to water. Firstly, due to a drafting omission, the Act failed to provide for small scale but market oriented productive water uses by the poor.<sup>49</sup> This is likely to be a temporary problem. It also granted lawful status to all existing water usage if it was considered legal in the two years before the promulgation of the Act, thereby entrenching former inequities.<sup>50</sup> Lastly, the National Water Act defined basic water needs only in terms of domestic

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44 Government Gazette No. 23636, Notice No. 980 (19/07/2002), section 12(b)

45 <http://www.polity.org.za/html/govdocs/legislation/1998/index.html>

46 Note 3 at 203

47 Note 3 at 204

48 National Water Act, section 3(1)

49 Note 3 at 206

50 National Water Act, section 33

usage.<sup>51</sup>

Legislation facilitating privatization was then developed for the local government sector. The Local Government: Municipal Systems Act 2000 (the Systems Act) empowered local municipalities to enter into service delivery agreements with external service providers and delegate to them responsibility for operational planning, management and provision of the municipal service.<sup>52</sup> The municipality was also granted authority to assign to the private operator responsibility for customer management and service fee collection. However, before deciding to use an external service provider, the Act sets out onerous procedures to be followed and requires internal service provision to first be assessed.<sup>53</sup> In addition, before the appointment of an external service provider, the Systems Act requires a competitive bidding process.<sup>54</sup>

The Systems Act acknowledges that privatization may impact on the constitutional right of access to water in a number of ways. Most importantly, it provides that when a municipality enters into an agreement with an external service provider, the municipality remains responsible to provide the service to the local

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51 National Water Act, section 16, read with the title to Part 3

52 Section 1 defined “basic municipal services” as “services necessary to ensure an acceptable and reasonable quality of life...”. Although it does not expressly include water, it is quite apparent that the definition covers access to water services.

53 In relation to internal service provision, section 78(1) of the Municipal Systems Act requires certain factors to be considered such as the direct and indirect costs and benefits associated with the project, the capacity and resources to provide the service as well as the impact it may have on development. In relation to external service provision, in addition to the many of the factors already mentioned, there are other factors to be considered such as the expected effect on the environment and human health and safety.

54 Section 83

community.<sup>55</sup> The Act specifically obliges the municipality to regulate the provider, monitor and assess the implementation of the service agreement, monitor the performance of the provider and control the setting or adjustment of tariffs by the provider. The municipality must “generally exercise its authority to ensure uninterrupted service in the best interests of the community”.<sup>56</sup>

Although the Systems Act requires the municipality to take community views into consideration before deciding to use an external service provider, it is not legally constrained by those views. The Act compels the municipality to communicate the contents of the proposed agreement to the community and to consult with it on the agreement. Notably, the Systems Act provides that municipalities may, through service delivery agreements, “assign responsibility to the service provider for developing and implementing detailed service delivery plans within the framework of the municipality’s integrated development plan”.<sup>57</sup> However, this does not require the service provider to adopt the entire integrated development plan of the municipality. The scope of the service provider’s developmental obligations remains a matter for negotiation and agreement.

### **PART III: CONTENT OF THE RIGHT**

Before exploring the content of the constitutional right of access to sufficient water, it is necessary to consider whether privatization *per se* is unconstitutional.

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55 Section 81(1)

56 Municipal Systems Act, section 81

57 Municipal Systems Act, section 81(2)(a)

Several types of constitutional restraints on privatization may exist. A national constitution may prescribe a particular economic system that precludes privatization<sup>58</sup>. Secondly, particular constitutional provisions might limit the use of privatization as a policy option.<sup>59</sup> Thirdly, a constitution may envisage a society that necessitates a strong and interventionist public sector.<sup>60</sup> Finally, there could be procedural hurdles that constrain and inhibit the ability to implement privatization schemes. This may include the decentralization of power between federal and local levels or specific procedures which must be first followed before privatization.

It has been suggested that the Constitutional Court implicitly accepted that the private sector may be involved with the delivery of public services. In *Government of the Republic of South Africa v Grootboom and others*<sup>61</sup> the Court stated that it was not merely the state that was responsible for the provision of houses.<sup>62</sup> However, this statement must not be taken out of context; the Court was not considering a challenge to privatization. A recent study considered whether the Constitution imposes constitutional restraints on privatization as a policy option.<sup>63</sup> The study explores various constitutional provisions but finds only a remote suggestion of the economic system contemplated by the constitutional framers through their use, in the preamble, of the term ‘social justice’. The study concluded that the constitutional text provided only a tenuous foundation for the proposition that privatization was precluded as a

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58 Note 7 at 3

59 C Gillette & P. Stephan III, “Constitutional Limits on Privatization” 46 Am. J. Comp. L. Supp 481 998, point out at 500 that in the United States states are sometimes required to provide particular functions but they note that “this does not confer a monopoly on the state for the production of that service or function”.

60 Note7, 3-4

61 *Government of RSA v Grootboom* 2001 1 SA 46 (CC)

62 Par 35

63 Note 7

policy option.<sup>64</sup> It has therefore been claimed that the Constitution takes a non-rigid approach to economic policy and permits the state to develop and implement its policy as it deems fit.

Scholars who argue that privatization is not precluded by the constitutional text place emphasis on the fact that the realization of human rights norms are not premised on any particular type of economic system. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, formulated by international experts, suggest that state parties are granted a “margin of discretion” in selecting the means to implement the rights in the ICESCR.<sup>65</sup> The UN Committee on Economic, Social & Cultural Rights (Committee on ESCR) in its General Comments accepts that the right of access to water may be implemented by private actors. In paragraph 8 of General Comment 3<sup>66</sup> the Committee on ESCR stated that:

“...the undertaking to take steps ... by all appropriate means including particularly the adoption of legislative measures neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system...

In this regard, the Committee reaffirms that the rights recognized in the

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64 Note 7 at 19

65 UN Document E/CN 4/1987/17 at Par 71

[http://www.hrca.org.au/RBABetaVer1\\_0/archives/Limburg%20Principles.pdf](http://www.hrca.org.au/RBABetaVer1_0/archives/Limburg%20Principles.pdf)

66 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

Covenant are susceptible of realization within the context of a wide variety of economic and political systems...Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified..."

It is often claimed that privatization has a "redistributive thrust" that is in harmony with the rationale for socio-economic rights. Privatization can be a valuable tool for black economic empowerment and the promotion of popular capitalism through employee share purchasing schemes.<sup>67</sup> It is frequently argued that privatization facilitates the achievement of socio-economic rights because of its potential to enhance operational efficiency, economic growth and development.<sup>68</sup> Of course, these arguments are premised on the capacity of private corporations to generate resources and to distribute those resources equitably thereby eradicating poverty.<sup>69</sup>

It may be true that the Constitution does not explicitly prescribe economic policy, but surely this is not the end of the debate. Privatization creates accountability difficulties that are hard to reconcile with democratic norms enshrined in the Constitution.<sup>70</sup> Democracy contemplates, at the very least, accountability to the electorate and compliance with the rule of law.<sup>71</sup> Contracting out of a conventionally public function "creates significant accountability problems because the private

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67 D. Chirwa "Privatization of Water in Southern Africa" in *Afr Hum Rts L J* 2004 (4) 226

68 *Id* 225

69 McBeth A *Privatising Human Rights: What happens to the State's Human Rights Duties When Services are Privatised?* 5 *Melb. J. Int'l Law* 134 2004 at 143

70 Section 1 of the Constitution defines the nation as a "sovereign democratic state".

71 J Freeman "Annual Regulation of Business Focus: Privatization" 52 *Admin. L. Rev.* 813 (2000) 814,815

provider is one step further removed from direct accountability to the electorate.”<sup>72</sup> Removing social services from the hands of political actors and placing them at mercy of the market undermines democratic norms and erodes the ability of the public to lobby their elected representatives in respect of social services.

There are of course other arguments that privatization *per se* impairs the realization of the right to water.<sup>73</sup> Firstly, the assumption that the private sector is able to positively influence economic growth and efficiency is unsubstantiated and inconsistent.<sup>74</sup> Even when enhanced economic performance has occurred after privatization, it is often not possible to identify privatization as the reason for the improvement.<sup>75</sup> It is important to note that economic growth does not automatically translate into greater access to services for those who cannot afford services.<sup>76</sup> It cannot be denied that profit driven corporations do not exist for the purposes of achieving substantive equality but are guided by the acquisition of profit. They are bound above all by their fiduciary duty to generate profit for shareholders.<sup>77</sup> The principal interest in social equity for a corporation is good public relations.<sup>78</sup> In light

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<sup>72</sup> *Id* at 824; see also J Freeman “The Contracting State” 28 Fla. St. U. L. Rev 155 2000-2001 at 198-201

<sup>73</sup> Note 67, 226-230

<sup>74</sup> D. Stevenson “Privatization of Welfare Services: Delegation by Commercial Contract” 45 Ariz. L. Rev 93 2003. Stevenson argues that civil servants and profit seekers alike seek “rents” or “inefficient payments for their time, talents or labor”. Civil servants receive rents in the form of “fringe benefits, pleasant working conditions, congenial associates, undemanding work loads, security against dismissal” while rents of contractors are often in monetary form. Rents in a corporation, being more difficult to identify than those of public sector employees, gives the illusion of savings. Stevenson demonstrates how privatized welfare contracts: (i) based on a pay per case fee to the private entity results in unnecessary reconsideration of the same file (ii) based on flat fee arrangements result in cursory reviews and dumping of files (iii) with incentives for private operators to reduce costs result in welfare recipients being driven away.

<sup>75</sup> Note 67, 227

<sup>76</sup> *Id*

<sup>77</sup> Note 74, Stevenson refers to an argument that shareholder primacy may be diminished by creating a fiduciary duty between the corporations and the community they serve.

<sup>78</sup> Note 9 at 597

of the limited scope of these fiduciary duties, it is arguable that the state should acquire shareholder interest in the private operator to ensure its accountability. To presage a further argument it is plausible that privatization will be unconstitutional in the absence of economic incentives to progressively realize the right to water.<sup>79</sup> However, purely for the purposes of further analysis, it will be assumed that privatization is not *per se* unconstitutional.

Although the Constitution itself provides no explicit guide as to how to conceptualize the term “access” to “sufficient” water in section 27(1) (b), the Constitution permits reference to international law for the purpose of interpreting the Bill of Rights.<sup>80</sup> International human rights treaties do not readily recognize the right of access to water, aside from a few noticeable exceptions.<sup>81</sup> The ICESCR itself only recognizes the right to water indirectly by recognition of the rights to food and an adequate standard of living. The Committee on ESCR, interpreting the articles 11 (the right to adequate food) and article 12 (the right to an adequate standard of living, including adequate food, clothing and housing) affirmed in General Comment No. 15 of 2002 (hereafter GC15) that this includes the right of access to a supply of safe and adequate water.<sup>82</sup> Although South Africa signed the ICESCR, it has not yet ratified the treaty. Nonetheless GC 15 provides important interpretive guidance on the content of the right of access to water and the duty of the state to take reasonable and

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79 Note 69, 148-153

80 Section 39(2)

81 The Convention to Eliminate Discrimination against Women (CEDAW) recognizes the right of rural women to a water supply and the Convention on the Rights of the Child recognizes the right of children to clean drinking water.

82 UN Committee on Economic, Social and Cultural Rights: General Comment (2002) No. 15 (GC15)  
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a5458d1d1bbd713fc1256cc400389e94?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a5458d1d1bbd713fc1256cc400389e94?Opendocument)

other legislative measures with its available resources to progressively realize the right.

*Accessibility and Sufficiency of Water*

Accessibility of water, according to the Committee on ESCR entails four elements. Firstly, water must be physically accessible and be within safe physical reach of each household, educational institution and workplace. Secondly, water must be economically accessible and be provided at rates that are affordable to all. Thirdly, access to water must be provided on a non-discriminatory basis. Fourthly, provision must be made for sharing of information about water issues.

Sufficient water, according to the Committee on ESCR, requires that the quantity of water be adequate and safe for personal and domestic uses. What is sufficient must be determined by reference to what is necessary to “prevent death from dehydration, reduce the risk of water related disease and provide for consumption, cooking, personal and domestic hygienic requirements”.<sup>83</sup> The adequacy of the quantity of water necessary for any individual will vary according to the different circumstances but should be consistent with the guidelines issued by the World Health Organization.<sup>84</sup> This aspect is discussed in greater detail later. It should be noted however that the Committee on ESCR, by defining a sufficient quantity of water only by reference to personal and domestic usage (although agricultural usage may be

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83 GC 15 par 2

84 GC 15 par 12(a)

more important for rural dwellers) exhibited a western or urban bias.<sup>85</sup>

*Duty to respect, promote and fulfil the right*

As mentioned earlier, the state is obliged to respect, promote and fulfil the right of access to sufficient water. The Committee on ESCR states that the obligation to *respect* the right obliges the state to desist from, directly or indirectly, obstructing the enjoyment of the right of access to water. The Committee suggests that states are required to *protect* the right by preventing third parties, including corporations, from interfering with the right.<sup>86</sup> The Committee has declared that “where water services ...are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”<sup>87</sup>

The obligation to *fulfil* requires the state to facilitate, promote and provide the right to adequate water. Facilitation of the right implies that the state must take positive steps to help individuals and communities to enjoy the right and it must provide adequate water when individuals or groups are unable, for reasons beyond their control, to realize the right by themselves. The state is obligated to take whatever measures are necessary to realize the right. This includes the use of suitable low-cost techniques and technologies, appropriate pricing policies and income supplements. Pricing of water services must be “based on the principle of equity,

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85 Note 2 at 56B-11

86 GC 15 par 23

87 GC 15 par 24

ensuring that the services whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.”<sup>88</sup>

### *Reasonable Privatization Program*

Section 27 obliges the state to take reasonable legislative and other measures to achieve the right to adequate water. Accordingly, if the state decides to transfer responsibility for the provision of water services to the private sector it must do so under a reasonable privatization scheme. The reasonableness standard, in the context of section 26 and 27, was addressed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom and others*,<sup>89</sup> *Soobramoney v Minister of Health, Kwa-Zulu Natal*,<sup>90</sup> *Minister of Health v Treatment Act Campaign*<sup>91</sup> and *Rail Commuters Action Group v Transnet*.<sup>92</sup>

In those cases, the Court rejected the approach taken by the Committee on ESCR that every socio-economic right has a minimum core which is immediately enforceable because the Constitution did not expect what was not affordable. The real question was therefore whether the state had taken reasonable legislative and other measures to realize the right and the achievement of the minimum core are an

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88 GC 15 para 27

89 2001(1) SA 46 (CC)

90 1998 (1) SA 765 (CC)

91 2002(5) SA 721 (CC)

92 Case No: CCT56/03 (at [http://concourt.law.wits.ac.za/courtrecords.php?case\\_id=12840](http://concourt.law.wits.ac.za/courtrecords.php?case_id=12840))

indication of whether the legislative and other policies are reasonable. Although this denies individuals an immediate claim to relief from the state, the Court will apply high level of scrutiny in relation to what constitutes reasonable legislative and other measures. The Court has demonstrated its willingness to assess reasonableness in the light of principles such as comprehensiveness, transparency, effective implementation and short term provision for those in urgent need. In *Grootboom* the Court also stated that a reasonable program must “clearly allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available”.<sup>93</sup> No less important is the Court’s statement in the *Rail Commuters* case where it evaluated reasonableness in the context of the nature of the duty, the social and economic context in which it arises, the extent of the threat to fundamental rights and a consideration of the intensity of the harm that may result.

#### *Affordability of Water Services*

Reasonableness must take affordability into account, a fundamentally important issue because access is ordinarily determined by reference to an individual’s ability to pay for water services. In a society in which 65% of the population is income poor, the state may be obliged to subsidize the cost of water services for the poor. The pricing policy must not be discriminatory and must not exclude those in desperate need. This has been recognized in the present legislative framework in a number of different ways: provision of free basic water, the potential for the establishment of water tariffs that take into account the socio-economic status of users and the

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93 Par 39

retention of public control over tariffs where provision of services is privatized.<sup>94</sup>

The implementation of these legislative mandates will be discussed separately.

### *Duty to Monitor and Regulate*

A reasonable framework for privatization schemes must make provision for independent monitoring of private operators because monitoring by the private operator will be guided by self-interest and is therefore likely to result in distortion. Monitoring by the state would be equally inappropriate. Contracting out of services would not have occurred in the first place had the state not been inclined to privatize them. Furthermore, states might shield service providers to avoid political embarrassment or they might do so to avoid having to provide the service itself. The Committee on ESCR specifically recommends that monitoring of private service providers be independent.<sup>95</sup> Independent monitoring is indispensable for transparency and accountability. It is also vital to mediate the quality and quantity of services as well as the price.<sup>96</sup> The independent monitoring agency should have the authority and capacity to assess public opinion on service provision, receive and appraise complaints, recommend solutions to the local municipality or the service provider and scrutinize the corrective action.

Regulations<sup>97</sup> under the Water Services Act require only that the service contract

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94 Local Government: Municipal Systems Act, section 74 read with section 81(3)

95 GC 15 at par 24

96 P. Bond, D. McDonald & G. Ruiters "Water Privatisation in Southern Africa: The State of the Debate" ESR Review Vol. 4 No. 4 (2003) at 4

97 Government Gazette 23636 Reg. No 980 (19 July 2002)

make provision for the manner in which the water services authority will monitor the performance of the external service provider. There is no mandatory requirement that there be independent monitoring. It is therefore plausible that the absence of provision for independent monitoring could form the foundation of a constitutional challenge to privatization schemes.

Given the extremely high rate of illiteracy in South Africa and the technical expertise that would be required to assess compliance with the water services contract, it is submitted that monitoring not be delegated to community boards. The high rate of poverty also suggests that voluntary citizen boards<sup>98</sup> which rely on membership fees to employ organizers, lawyers, lobbyists, economists and others staff are inappropriate. It is recommended that the monitoring function be performed by an independent municipal services ombudsman with appropriate public funding, technical expertise and investigative powers, an arrangement which has already been mooted in the White Paper on Municipal Services Partnerships.<sup>99</sup>

It is hard to envisage an unregulated but reasonable privatization program. The Committee on ESCR suggests that, where water services are privately operated, states are obliged to establish an effective regulatory system which must include independent monitoring, genuine public participation and imposition of penalties for non-compliance. Regulation is crucial to ensure the appropriate quality, accessibility and sufficiency of water. It is also essential to ensure the progressive realization of

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98 S Flynn & D. Chirwa "Constitutional Implications of Commercializing Water in South Africa" in *Age of Commodity* (note 1) 65

99 Note 18 at par 6

the right of access to water. These obligations to regulate arise simply because constitutional duties cannot be delegated by the state to the private sector. There is a compelling argument that the state remains liable for regulatory failure, regardless of the form of legislation or contract, such liability arising from its failure to exercise due diligence in its regulation of the private service provider.<sup>100</sup>

Of course, the state must devote sufficient financial and human resources to effectively regulate the private service operator. In addition, it is suggested that the state be statutorily obliged to assess its regulatory capacity before the actual decision to contract out services is taken. The evaluation should be comprehensive and involve community participation as well as independent expertise. Regrettably, the Systems Act presently makes no provision for a prior evaluation of the regulatory framework or the regulatory capacity of the state.

It is submitted that effective regulation should make provision for the state to impose statutory penalties on private providers in the event of their non-compliance with governing legislation or the service contract itself. It is unreasonable for the state to rely on contractual remedies to ensure protection of the lives and health of the public. At present, there is no provision for statutory penalties to be imposed by the state.

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100 D. Mullan & A. Ceddia "Impact on Public Law of Privatization, DeRegulation, Outsourcing, and Downsizing: A Canadian Perspective" 10 *Ind. J. Global Legal Stud* 199 2003 at 224, 225, 235, 236; See further note 69 at 149

*Redress for the Public from Private Operators*

On 13 August 2003, the UN Economic and Social Council adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>101</sup> The Norms clarified that business enterprises may be the bearers of human rights obligations. They recognized the duty of transnational corporations to respect national sovereignty, ensure non-discriminatory conduct and contain duties in relation to the environment and labor.

It must be noted however that the Norms limit the obligations of transnational corporations to promote, fulfill and respect human rights, in international and national law, to the “respective spheres of activity and influence” of corporations.<sup>102</sup> In relation to consumers, the Norms provide that:

“Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and ... ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.”

The Norms also require businesses to provide adequate reparation to those who

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101 UN Document E/CN.4/Sub.2/2003/12/Rev. 2 at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument)

102 See Part A: General Obligations

are adversely affected by their activities. The Norms may yet play a significant role in ensuring responsibility, where provision of basic services has been privatized.<sup>103</sup>

Naturally, the common law principles of tort are applicable to private operators if they negligently or intentionally cause harm to the public. This may result, for example, from the supply of a poor quality of water which generates health risks. Such action is, by its very nature, limited to redressing the harm already caused to the public. Whether private operators will be responsible to the public on any other basis will depend on the horizontal application of section 27(1) of the Constitution and on the nature of the legislative or contractual framework of the privatization scheme.

Section 13 of the Regulation 980 published under the Water Services Act requires external service providers to prepare and publish a consumer charter, in consultation with the public, which sets out consumers' rights to redress. However, consumer charters are unlikely to take the form of contract, and will therefore not generate contractual remedies for the public. Contracts create binding obligations between the parties to the contract and when contracts confer benefits upon third parties those benefits are enforceable only upon the acceptance of the benefit by the third parties.<sup>104</sup> There are therefore sound policy arguments to create a statutory right of action for the public so that they are effectively able to enforce the water services contract themselves.

Although the creation of a statutory right of redress against the private operator is

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103 T Sihaka "Privatisation of basic services, democracy and human rights" ESR Review Vol. 4 No. 4, 4

104 This common law contract, is known in South Africa, as *stipulatio alteri*.

necessary, statutory rights for the public (who may be unable to understand or enforce their rights) are no substitute for a strong regulatory framework.<sup>105</sup>

### *Period of the Contract*

The period of the contract, for the implementation of the privatization scheme, should be short. This is necessary to allow for competitive efficiency, a key rationale for the contract. Moreover, short term contracts permit the state to cancel or renew the contract in response to critiques by the independent monitoring agency or the public. The length of the contract is inversely proportionate to the degree of public control over the service provider. It is therefore conceivable that lengthy contracts, such as 30-year concessions, which are currently permissible,<sup>106</sup> may be subjected to legal challenge on the basis that they violate democratic norms.<sup>107</sup> Shorter contracts “foster competition and accountability because private service providers know their contract will expire soon”.<sup>108</sup>

### *Progressive Realization of the Right*

The state bears a duty to progressively realize the right of access to sufficient water subject to its available resources, it must take steps to make certain that social and economic rights are “made accessible not only to a large number of people but to

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105 Note 100, 240-243

106 Contracts between local authorities and private water services providers may not exceed 30 years (see section 9 of Regulation 980 GG No. 23636 of 19 July 2002)

107 Naturally the counter argument will be that shorter contracts will bring lower capital investments.

108 Note 74 at 129

a wider range of people as time progresses”.<sup>109</sup> A private water service provider cannot be relied upon by itself to progressively extend access to the poor. Indigent communities do not enlarge the paying customer base of the private provider are therefore likely to be neglected. Accordingly, the state is obliged to provide economic incentives for the private operator to extend its service and progressively realize the right of access to water.<sup>110</sup> In the absence of such incentives or a state subsidy<sup>111</sup> the provision of parallel services by the public sector may become unavoidable. Parallel service provision has potential drawbacks. It might inhibit cross-subsidization of services and it could also result in discriminatory service provision, where the rich gain access to efficient privatized services and the poor have access only to lower quality public services.<sup>112</sup>

Article 2(1) of the ICESCR requires state parties to take all necessary steps to the maximum of its available resources to achieve the right. In order for a state party to be able to attribute its failure to meet its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposition to satisfy, as a matter of priority, those minimum obligations. However, section 27(2) of the Constitution does not refer to the maximum of available resources but talks only of “available resources”. What does this mean in the context of privatization? Firstly, the nature of resources should be

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109 Grootboom, note 89, at par 45

110 Note 69 at 148

111 Chirwa, note 67, argues that the removal of state subsidies may constitute a violation of the right to adequate water.

112 Note 103 at 3

defined. Scholars<sup>113</sup> argue that resources include human resources, technological resources, information resources as well as material and financial resources.<sup>114</sup>

The formulation of the constitutional right appears to relate only to resources of the state. Indeed, public expenditure was typically conceptualized as the sole major resource which could be tapped to realize human rights.<sup>115</sup> It is now generally accepted that available resources are not limited to the resources of the state but includes private resources as well as international resources.<sup>116</sup> The Limburg Principles define available resources as those “within a state and those available from the international community through international co-operation and assistance.”<sup>117</sup> Although the typical private service contract envisages the payment of a service fee to the private provider and contemplates the cost of monitoring and regulation, the state may seek to reduce its budgetary allocation and rely on private resources for the expansion of services. We must therefore ask whether such a reduction of spending is vulnerable to constitutional challenge.

In *Soobramoney* it was argued that section 27(1) (a)<sup>118</sup> read with section 27(2) of the Constitution, entitled Soobramoney to expensive but potentially life saving dialysis treatment at a state hospital. It was common cause that there were

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113 S. Leckie “Another Step Towards Indivisibility : Identifying Key Features of Violations of Economic, Social and Cultural Rights” 20 Hum. Rts Q. 107 (1998); C Scott & P Alston “Adjudicating Constitutional Priorities” (2000) 16 SA J. on Hum Rts 206 at 252-254; D Moellendorf “Reasoning about Resources: Soobramoney & the Future of Socio-Economic Rights Claims” (1998) 14 SA J. on Hum Rts 330-332; P De Vos “Pious Wishes or Directly Enforceable Human Rights?” 13 S. Afr J. on Hum Rts 988 (1997) 97, 98

114 R. Robertson “Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ Realizing Economic, Social and Cultural Rights” in 16 Hum Rts Q 694 (1994) 694-702

115 S Leckie, note 113 *supra* at 107

116 R. Robertson, note 114 *supra* at 698-699

117 Limburg Principles par 24-26.

118 This section entitles everyone to basic health care services subject to the state’s available resources

insufficient funds in the existing budgetary allocation to treat him, together with others who were similarly placed. The Court would not entertain the argument that additional funds must be redirected from elsewhere in the national budget and focused on the principled employment of the existing budgetary allocation.<sup>119</sup> This narrow approach has justifiably been critiqued. There is no persuasive reason why available resources should be interpreted in this restrictive manner given that revenue may be generated through other means such as loans or progressive taxation.<sup>120</sup> Regrettably, it is unlikely the courts will accept that a reduction of public spending on water services (in anticipation of funding by the private sector) is an impairment of the right of access to water.

#### **PART IV: IMPLEMENTATION OF THE RIGHT TO WATER**

To place the constitutional right of access to sufficient water in its proper context, it is appropriate to consider at least one concrete example. The example selected is one of the largest concession agreements of its kind in the country.

##### *Bewater Concession*

The post-apartheid demarcation of Nelspruit had increased the population under the Nelspruit local authority from 24 000 to 230 000.<sup>121</sup> Many of the newly integrated areas were populated by indigent black communities that had been severely

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119 C Scott & P Alston *Adjudicating Constitutional Priorities* (2000) 16 SA J. on Hum Rts 206 at 239

120 M. Pieterse "Beyond the Welfare State" *Stellenbosch Law Review* 2003 (1) 13

121 L. Smith, A Gillett, S Mottiar & F. White "Public Money, Private Failure: Testing the Limits of Market Based Solutions for Water Delivery in Nelspruit" in *Age of Commodity* (note 1 above) at 131

neglected by the apartheid government and infrastructure in these areas was therefore in a pitiful state. The Nelspruit local authority faced declining revenue shares from national government and an increase in demand for services. In 1999, in desperation, the local authority concluded an agreement with a multi-national company, Biwater, to provide water and sanitation services and to collect tariffs.<sup>122</sup> These services would be provided through the Greater Nelspruit Utility Company (GNUC), a partnership that was created between Biwater and a black economic empowerment consortium, Sivukile Investments. The agreed period of the concession, which assumed the form of a “build, own, operate and transfer” contract, was 30 years.<sup>123</sup> The extreme length of the contract was motivated by the large capital investment expected of the private operator.<sup>124</sup> The local authority assumed that its retention of the power to veto tariff increases by the GNUC would grant it sufficient power to protect the public.

There were three principal motivations for entering into the concession; firstly, there were great expectations for increased capital in infrastructural investment,<sup>125</sup> then there was the assumption that the concession would inject greater operational efficiency and finally there was a belief that the GNUC would demonstrate greater

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122 It is worthwhile to note the comments of the Biwater chairperson, A White: “BOOT contracts are not good for the client,...They are, however, superb for the contractor. The contractor gets four sources of profit: construction, financial engineering, equity dividend and management contract.” White stated that contractors must ensure that (a) there is a guarantee of payment by the state (b) protection against inflation, devaluation and foreign exchange fluctuation (c) guaranteed return on investment (d) automatic tariff increase formula see <http://altavoz.nodo50.org/biwater2.html#ENT6> (last visited April 17 2006)

123 Note 121 at 130

124 Note 121 at 135

125 The Department of Local Government reported that “it would cost approximately R350 million to upgrade existing services in the town to an acceptable level and to provide new and reliable services ....With an actual annual budget of R20 million, the council was unable to provide the necessary services as well as to ensure that other services are maintained to a satisfactory level. ....more than 50% of the population living in the greater Nelspruit area do not receive basic water or sanitation services. (<http://www.dplg.gov.za/Documents/Publications/linkingled/linkingledcasestudies/nelspruit/nelspruitnewapproach.htm>)

effectiveness in tackling the politically charged issue of non-payment.<sup>126</sup>

During the first few years, the concession recorded significant capital investment in infrastructure<sup>127</sup> and a large increase in the number of new connections.<sup>128</sup> However, these successes have been eclipsed by the problems. The local authority lacked the capacity or will to effectively monitor the provider. It neglected the Compliance Monitoring Unit that had been created and monitoring virtually collapsed for a significant period.<sup>129</sup> Furthermore, the private operator failed to tackle the problem of non-payment of water bills, as expected. Non-payment continued for several reasons. Firstly, there were considerable protests and grievances relating to the quality of the service, particularly the unreasonably high water bills and the introduction of strict debt recovery measures. Payment of water bills was of course also hindered by unemployment and high levels of poverty.<sup>130</sup> Tension flared up because of rate increases, the exact amount of which is unclear.<sup>131</sup> The increases had been introduced in response to the national free basic water policy. The tensions have resulted in the operations of GNUC being hindered by the residents. As at January 2002, the GNUC was 17 million rand in debt.<sup>132</sup> Non-payment has led to a decline in

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126 Smith, Gillet, Mottiar & White Public Money, Private Failure note 121 *supra* at 134-140

127 Ironically, the vast majority of the funds came from the public purse. *Ibid*

128 *Ibid*

129 *Ibid*

130 *Ibid*

131 The exact amount of the rate increases is unclear. There have been vastly different accounts of the increases. Allegations were initially made that the rates increased by as much as 400%, although it now seems that they increased by 10% in 2000 and 2001. The confusion appears to have arisen from the inclusion of arrears on the water bills. See Mail and Guardian : Water Privatisation a Total Debacle by G. Daniels at [http://www.mg.co.za/articledirect.aspx?articleid=155825&area=%2farchives\\_online\\_edition%2f](http://www.mg.co.za/articledirect.aspx?articleid=155825&area=%2farchives_online_edition%2f) (last visited 25 April 2006)

132 *Ibid*

investor confidence and a suspension of capital investment.<sup>133</sup> GNUC now focuses its attention on the functioning and maintenance of existing infrastructure and has no plans to invest further until the business turns around.<sup>134</sup> The progressive realization of the right of access to water has been stalled by the suspension of investment.

### *Breaches of the Right*

Privatization and the corporatization of water services have generated a number of different violations of the constitutional right of access to sufficient water. Some of these are discussed below.

Firstly, many water service providers are reported to have coerced consumers into using trickle valves, prepaid meters and other limitation devices. These devices have the effect of disconnecting consumers when they can no longer afford services, preventing the continuous supply of water for personal and domestic uses. The devices affect the accessibility of water, which according to the Committee on ESCR, should be both sufficient and continuous for personal and domestic uses.<sup>135</sup> Significantly, trickle valves have been outlawed in the United Kingdom.<sup>136</sup>

Service disconnections constitute impermissible limitations on the constitutional

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133 *Ibid*

134 *Ibid*

135 According to the Committee on ESCR availability requires a water supply that is sufficient and continuous for personal and domestic uses (GC 15 at par 12(a))

136 The United Kingdom Water Services Act (1999)

right of access to sufficient water<sup>137</sup> because they limit the continuous supply of water when there are less restrictive means to achieve the objective, such as debt recovery.<sup>138</sup> In the main, the increase in the number of disconnections has resulted from the vigorous application of full cost recovery measures by both public and private suppliers. It should be noted that disconnections are easier to implement when supply of services are privatized because private operators are less susceptible than government to pressure from the public.

Disconnections or limitations of water services without due process are unconstitutional. The Constitution guarantees to everyone the right to administrative action that is lawful, reasonable and procedurally fair.<sup>139</sup> It is arguable that disconnections or limitations of water services, whether by a public or a private service provider, constitutes administrative action for the purposes of the Constitution and the Promotion of Administrative Justice Act of 2000.<sup>140</sup> These due process protections are echoed in Water Services Act<sup>141</sup> which provides for fair and equitable procedures before any limitation or disconnection of services and which requires reasonable notice of intention to limit or discontinue water services. Subject to certain exceptions, the Water Services Act also provides for an opportunity to make

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137 Section 36(1) of the Constitution provides that “The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including (a) the nature of the right (b) the importance of the purpose of the limitation (c) the nature and extent of the limitation (d) the relation between the limitation and its purpose (e) the less restrictive means to achieve the purpose.

138 Note 67 at 68

139 Section 33 of the RSA Constitution

140 Section 3 of the Promotion of Administrative Justice Act requires administrative action that materially affects the rights or legitimate expectations of any person to give adequate notice of the proposed action, the right to request written reasons and a ‘reasonable opportunity’ to make representations.

141 Water Services Act section 4(3)

representations before any discontinuation or limitation of water supply. Use of devices to limit water supply violate due process norms because they limited existing access to water without the opportunity to make prior representations.

The aforementioned due process norms were considered by the High Court in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*.<sup>142</sup> The Court found that the act of disconnecting an existing water supply by the Council was *prima facie* in breach of the constitutional right of access to water and placed the onus on the Council to justify the breach. The Court expressed doubt that a standard notice, which did not advise consumers of the right to make representations complied with due process norms in section 4(3) of the Water Services Act. Although not currently required, it may well be that due process requires that the person whose rights are to be affected to be personally informed of the impending action.<sup>143</sup>

The limitation of free basic water to 25 liters per person per day (or 6 kiloliters per household per month) denies some the right of access to water because it fails to take into account the fact that many townships have multiple households on a single site<sup>144</sup> and it is premised on an incorrect assumption that there are 8 persons per household.<sup>145</sup> Indeed, there appears to be sufficient evidence indicating that 25 liters per person per day is inadequate to provide for basic personal and food hygiene

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142 [2002] JOL 9513 (W)

143 Note 1 at 69

144 Note 24

145 Id

needs.<sup>146</sup> Although the World Health Organization has not clearly articulated its position on the basic minimum supply of water necessary for every person, UNESCO declared that every person requires between 20 and 50 liters of safe per day for their basic needs.<sup>147</sup> However, the fact that the Constitutional Court has eschewed the minimum core approach may mean that the quantity of the free basic water supply is beyond challenge.

Access has also been limited by pricing policies. Although the free water policy has alleviated the problem somewhat, it has been inconsistently implemented<sup>148</sup> and the basic minimum supply is insufficient for basic needs. Furthermore, because water charges rise steeply after the first free block of water this acts as a constraint on access by the poor whose access is inevitably limited to the free basic amount.<sup>149</sup> The trend toward implementation of full cost recovery (which includes the initial cost of the infrastructure, maintenance and service costs) unfairly impacts on the poor because of higher infrastructure costs for areas disadvantaged by apartheid.<sup>150</sup>

The use of full cost recovery mechanisms in respect of indigent communities is suspect. In the first instance, the Constitution permits the introduction of water related reform measures to redress the results of past racial discrimination.

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146 A Kok in “Privatisation and the Right of Access to Water” in *Privatisation and Human Rights in the Age of Globalization* by K de Feyter & F Gomez (Eds) (2005) notes, at page 273, that the final version of Comment 15 (issued by the Committee on ESCR) suggests that between 20 and 50 liters is adequate for personal and hygienic purposes, 20 liters being the absolute minimum for states with resource constraints.

147 [http://www.unesco.org/water/wwap/facts\\_figures/basic\\_needs.shtml](http://www.unesco.org/water/wwap/facts_figures/basic_needs.shtml)

148 In some areas of South Africa, free basic water is supplied only where there is formal infrastructure and in other areas free basic water is only supplied after a payment of costly connection fees (Note 98 at 72).

149 Id

150 Note 98 at 65

Furthermore, the Constitutional Court has already rejected arguments that differential pricing policies necessarily constitute unfair discrimination. The Constitutional Court has already endorsed the political branches social transformation efforts.<sup>151</sup> In *City Council of Pretoria v Walker*<sup>152</sup> the Court rejected a challenge by residents of a formerly white residential area who argued that the application of consumption based tariffs for their area and a lower flat rate in formerly black townships constituted unfair discrimination. The Constitutional Court found that the temporary measures were rationally connected to the legitimate purpose of achieving parity in municipal service provision.<sup>153</sup> Although the statutory framework permits the state to adopt pricing strategies that would favor the poor, the potential of these mechanisms has remained unexplored.<sup>154</sup>

## **PART V: CONCLUSION**

The South African state has clearly demonstrated its preference for private sector involvement in water service delivery. This has been demonstrated by its macro-economic perspective as well as by the legislative framework it has put in place since 1994.

The state is fully aware that water services cannot simply be left to the whims of

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151 Section 25(8) of the RSA Constitution

152 1998 (2) SA 363 (CC)

153 T. Roux "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court" in *Democratization and the Judiciary* at 93

154 Provisions of the Water Services Act have not been implemented include those that empower the Minister to prescribe national standards relating to water services and to differentiate between users and areas on the basis of socio-economic factors (the standards must take into account the need for everyone to have a reasonable quality of life and the need for everyone to have equitable access to water services).

market forces and that “the character of the state’s human rights obligations in relation to social service provision cannot be transferred entirely from the state to the private operator, even where the service provision itself is transferred, nor can those obligations be duplicated in their entirety”.<sup>155</sup> Despite this awareness, there are a number of flaws in the legislative framework as well as in the implementation of private sector involvement in water service delivery. There has been an unwarranted assumption that sufficient regulatory capacity exists to regulate private actors. Moreover, absolutely no provision has been made for independent monitoring of private providers. Implementation has been scarred by the use of full cost recovery mechanisms and the absence of a pricing strategy that favors access by the poor. This has had a disproportionate impact on the poor. Access by the poor has also been limited by violations of due process norms and the inadequate quantity of free basic water. Finally, the state has endorsed the use of lengthy concession contracts which arguably violate constitutionally entrenched democratic norms.

Privatization does not relieve the state of its constitutional duties, if anything, these obligations become more onerous. The state is required, among other things, to ensure that the enabling legislation and policy framework is reasonable. The state must develop a strong regulatory framework and build its capacity to regulate the private provider. The state must choose an appropriate form of privatization and make certain that the contractual terms are reasonable. Finally, the state must subsidize access by the poor and it may be obliged to provide incentives for the expansion of services to them. In addition, the state may be constitutionally obliged

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155 Note 69 at 149

to actually provide parallel services to the poor.

The realistic costs of due process rights,<sup>156</sup> monitoring<sup>157</sup> and regulation, which costs are inescapable, must be properly considered before privatization is embarked on. All things considered, it is not hard to understand why it has been said that the “profit seeking nature of private corporations may be inherently irreconcilable with the goals and implementation requirements of social service programs.”<sup>158</sup>

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156 Note 74 at 103, 123

157 Monitoring costs may be substantial, they must be estimated and added into the equation (see Featherstun D et al “State and Local Privatisation” 30 Pub. Cont. L. J. 644 2000-2001 at 649)

158 Note 74 at 111