

**INHIBITING 'PROGRESSIVE REALISATION'? THE EFFECT OF
PRIVATISATION ON THE RIGHT TO WATER IN SENEGAL AND SOUTH
AFRICA**

Submitted in partial fulfilment of the requirements for the degree of LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

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DECLARATION

I, CONTEH Sonkita, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where the works of others have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the degree of LLM (Human Rights and Democratisation in Africa).

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Date.....

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DEDICATION

This work is dedicated to the struggle for the realisation of economic, social and cultural rights in Africa.

TABLE OF CONTENTS

TITLE PAGE	i
DECLARATION	ii
ACKNOWLEDGEMENTS	iii
DEDICATION	iv
TABLE OF CONTENTS	v
LIST OF ABBREVIATIONS	vii

CHAPTER 1: GENERAL OUTLINE OF STUDY

1.1	Introduction and background	1
1.2	Literature review and overview of chapters	3

CHAPTER 2: THE RIGHT TO WATER AND THE OBLIGATION OF PROGRESSIVE REALISATION

2.1	Is there a human right to water?	5
2.2	The right to water under international human rights law	6
2.2.1	The African human rights regime	8
2.2.2	The United Nations human rights regime	10
2.3	Relationship between the right to water and other basic rights	12
2.4	The meaning of progressive realisation in the context of the right to water	13
2.5	Obligations of states in progressively realising the right to water	15
2.6	Various approaches for appraising the progressive realisation of the right to water	17

CHAPTER 3: THE POLICY OF WATER PRIVATISATION IN AFRICA

3.1	The meaning of privatisation	20
3.2	Different forms of water privatisation	21
3.3	The impetus for the privatisation of water	23
3.4	Arguments in favour of the privatisation of water	24
3.5	Arguments against the privatisation of water	25
3.6	Related concepts	26

**CHAPTER 4: THE EFFECT OF PRIVATISATION ON THE PROGRESSIVE
REALISATION OF THE RIGHT TO WATER IN SENEGAL AND SOUTH AFRICA**

4.1	The water sector in Senegal	28
4.2	The water sector in South Africa	28
4.2.1	Assessing the legal framework	29
4.2.2	The institutional framework	30
4.2.3	Private water service providers	31
4.3	Water services before privatisation	32
4.3.1	The case of Senegal	32
4.3.2	The case of South Africa	33
4.4	Water services after privatisation	34
4.4.1	Senegal	35
4.4.2	South Africa	36
4.5	The effect of privatisation on the progressive realisation of the right to water	41
CHAPTER 5: CONCLUSIONS		45
BIBLIOGRAPHY		47

LIST OF ABBREVIATIONS

BOT	build-operate-transfer
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
CRC	Convention on the Rights of the Child
DFID	Department for International Development
DRD	United Nations General Assembly Declaration on the Right to Development
F CFA	French Franc
GC	General Comment
GNUC	Greater Nelspruit Utility Company
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IMF	International Monetary Fund
NEPAD	New Partnership for Africa's Development
ONAS	Office National d' Assainissement
R	South African Rand
SDE	Sénégalaise des Eaux
SONEES	La Société Nationale d' Exploitation des Eaux du Sénégal
SONES	Société Nationale des Eaux du Sénégal
UDHR	Universal Declaration of Human Rights
UFW	unaccounted-for- water
UN	United Nations
WHO	World Health Organisation
WSA	water services authority
WSP	water services provider
WSSA	Water and Sanitation Service Africa

CHAPTER ONE

GENERAL OUTLINE OF STUDY

1.1 Introduction and background

Water, a natural resource in limited supply is fundamental to life and health, and indispensable to guaranteeing a dignified human life. Unfortunately, access to this very important public good today, is a problem confronting developing countries particularly.¹ These factors have led to the elevation of water to the level of a ‘right’.² The value of expressly acknowledging a human right to water lies in the need to encourage the international community and individual governments to increase efforts to meet the basic water needs of their peoples, to translate that right into concrete national and international policies and to focus attention on the lamentable state of water management and use world wide.³ This recognition of the right to water imposes on states the obligation to take steps to ‘achieve progressively the full realisation of this right’.⁴ Such an obligation includes ensuring that ‘water is affordable for everyone and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas’.⁵ The phrase ‘progressive realisation’ has been interpreted to mean an obligation on states “...to move as effectively and expeditiously as possible to securing its ultimate goal and should not be misinterpreted as depriving the obligation of all meaningful content”.⁶ Conrad Barbeton argues that this elucidation is practically unhelpful and proposes focusing on programme outputs and policy outcomes as more reliable measurements of ‘progressive realisation.’ An approach of this kind ‘recognizes that socio-economic rights can be fulfilled in a variety of ways’. Thus,

¹ General Comment No 15 (2002) *The right to water* (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) E/C. 12/2002/11, para 1.

² A Kok & M Langford ‘The right to water’ in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 191.

³ PH Gleick, ‘Meeting basic water needs as a human right’ Pacific Institute for Studies in Development, Environment, and Security, 2000.

⁴ Art 2(1) International Covenant on Economic Social and Cultural Rights (CESCR). See also para 17 of General Comment No 15.

⁵ n 1 above, para 25.

⁶ General Comment No. 3 (1999) *The nature of states parties’ obligations* (art 2 para 1 of the Covenant) 14/12/90, para 3.

whatever method of realisation is adopted, the 'outcome focus' compels an evaluation of results.⁷

The Committee on Economic Social and Cultural Rights (CESCR) maintains that the International Covenant on Economic Social and Cultural Rights (ICESCR) prohibits states from deliberately adopting retrogressive measures in relation to the right to water without potent justification.⁸ A violation can occur through acts of commission, that is the direct actions of states parties or other entities insufficiently regulated by states or through acts of omission including 'failure to take appropriate steps towards full realisation of everyone's right to water.'⁹

Against the preceding background, the phenomenon of privatisation has come to be a particularly important factor with respect to the progressive realisation of the right to water. Privatisation is the process of transferring property from public ownership to private ownership or transferring management of a service or activity from government to the private sector.¹⁰ There has been a rapid growth in the privatisation of essential services in many African states, based on the belief that the private sector can deliver growth and efficiency more effectively than the public sector.¹¹ This supposition has not been borne out by the available evidence. Cote d'Ivoire was the first African state to privatise its water delivery system in 1960.¹² Since then, over 18 major water contracts have been awarded by at least 14 African states including Senegal and South Africa to private concerns for the delivery of water.¹³ A host of other states are planning to or are already in the process of privatising their water delivery systems.¹⁴ The main impetus behind this spate of sometimes frenzied privatisation has been the World Bank and the International Monetary Fund (IMF) who make

⁷ 'Progressive realisation' of socio-economic rights' *ESR Review* Vol 2 No 2, 1999, available at <http://www.communitylawcentre.ac.za> (accessed 13 March 2006).

⁸ n 1 above, para 19.

⁹ n 1 above, paras 42 & 43.

¹⁰ D Chirwa 'Privatisation of water in Southern Africa: a human rights perspective' *Africa Human Rights Law Journal*, Vol 4, No 2, 2004, 218.

¹¹ D Hall and E Lobina 'Private and public interests in water and energy' *Natural Resources Forum*, 28 (2004) 268.

¹² This took the form of a concession contract to the French multinational SAUR for a period of 15 years renewable. See K Bayliss & D Hall 'Privatisation of water and energy in Africa' A report for Public Services International, 2000, 1.

¹³ K Bayliss 'Water privatisation in sub-saharan Africa: progress, problems and policy implications' Presented at the Development Studies Association Annual Conference, University of Greenwich, 9 November 2002, 3-4.

¹⁴ Some of these states include Burundi, Nigeria, Rwanda, Uganda, Zambia, Kenya Ghana and Malawi. See 13 above, 5.

the privatisation of public services or utilities an unavoidable condition for loans to African states.¹⁵ These two institutions have however quite recently come under serious pressure to ‘fundamentally rethink the use of conditionality and have initiated a series of evaluations which are expected to result in some critical conclusions.’¹⁶ This study aims to demonstrate through the two case studies of Senegal and South Africa that privatisation of water by African states can affect the process of ‘progressive realisation’ and may actually result in the violation of the right to water guaranteed under international human rights law. It investigates whether privatisation of water by African states affects the obligation of progressive realisation of the right to water. The choice of Senegal and South Africa is based on the fact that studies on the development and impact of water privatisation in both states have been carried out and further whilst Senegal is an example of ‘privatisation forced by the World Bank’¹⁷, South Africa is not. In addition, both states are parties to international human rights instruments that implicitly or explicitly guarantee the right to water.¹⁸

1.2 Literature review and overview of chapters

The study is carried out against the steady development of an impressive body of data on water. This may be because it is considered vital to the existence of humankind and thus access to the resource by a large number of the world population is problematic.¹⁹ The insistence by financial institutions such as the World Bank and IMF on the privatisation of essential services such as water by African states and the manner and consequences of such privatisation has also generated some literature.²⁰ Furthermore, a sizeable body of literature

¹⁵ K Bayliss & D Hall ‘Privatisation of water and energy in Africa’ A report for Public Services International (PSI) September 2000, 1.

¹⁶ ‘IMF and World Bank use of conditions under microscope’ 10 April 2005, available at <http://www.brettonwoodsproject.org/art.shtml?x=83004> (accessed 20 October 2006).

¹⁷ n 15 above.

¹⁸ With the exception of the Covenant on Economic, Social and Cultural Rights which South Africa has signed and not ratified, but which Senegal has ratified, both states are parties to the major human rights treaties in the United Nations and African human rights regimes. In addition, the Constitution of South Africa, 1996 explicitly guarantees the right to ‘have access to sufficient food and water.’

¹⁹ n 1, 2 and 3 above.

²⁰ ‘Public water for all: the role of public-public partnerships’ A ‘Reclaiming Public Water’ discussion paper by Transnational Institute and Corporate Europe Observatory, March 2006. See also ‘Human Rights and Privatisation’ Amnesty International, 17 March 2005 at <http://www.ai.org> (accessed 14 March 2006); D Chirwa, ‘Privatisation and Socio-economic Rights’ *Human Rights Dialogue* 2.9 (Spring 2003): Making Human Rights Work in a Globalizing World at <http://www.communitylawcentre.ac.za> (accessed 14 March 2006); D Hall & E Lobina, ‘Private and public interests in water and energy’ *Natural Resources Forum* 28 (2004) 268-277, K Bayliss, ‘Water privatisation in Africa: lessons from three cases’ Public Services International Research Unit (PSIRU), University of Greenwich May 2001.

on the concept of ‘progressive realisation’ of socio-economic rights also exists.²¹ However, the link between the privatisation of water on the one hand and the obligation of ‘progressive realisation’ has not been deliberately made and forms the sub-text of this investigation. To achieve these objectives, the paper is divided into 5 chapters, commencing with the present introductory chapter. Chapter 2 will discuss the ‘right to water’ and the obligation of progressive realisation with regard to the overall promotion and protection of economic, social and cultural rights. It will examine whether such a right actually exists under international human rights law, its nature and extent and the content of the obligation to progressively realise it. Chapter 3 will focus on the process of privatisation, its various forms and the impetus for such a process. It will also explore arguments in support of and against privatisation. Chapter 4 will analyse the impact of privatisation on the obligation to progressively realise the right to water by looking at the situation pre and post privatisation. Some concluding remarks will be made in Chapter 5.

²¹ C Barbeton ‘Progressive realisation of socio-economic rights, shifting the focus to outcomes’ *ESR Review*, Vol 2, No 2 November 1999 at <http://www.communitylawcentre.ac.za> (accessed 10 March 2006).

CHAPTER TWO

THE RIGHT TO WATER AND THE OBLIGATION OF PROGRESSIVE REALISATION

2.1 Is there a human right to water?

Over a billion people in the developing world do not have access to safe drinking water.²² An estimated 14 000 to 30 000 people (mostly the young and the elderly) die every day from water-related diseases, and at any given time around half of the people in the developing world suffer from disease caused by drinking contaminated water or feeding on contaminated food.²³ On average, women and children travel 10 to 15 kilometres, spending eight or more hours per day collecting water and carrying up to 15 litres per trip.²⁴ Water is essential for survival as it constitutes an important element of the human diet and there is no adequate substitute for it.²⁵ Lack of sufficient and safe water is disastrous for humankind as the facts above show. These facts make grim reading and have reinvigorated the debate about the status of water and about access to this all important public good, in a bid to offer effective solutions to these problems. To help deal with these issues it has been argued that access to water should be seen as a fundamental human right, in fact more fundamental than some of the traditional rights such as the right to work, to form and join trade unions and to rest and leisure.²⁶ Some of the arguments for this 'human rights' approach to water have been to the effect that it will help focus attention on the current deplorable state of access to water and encourage the international community and individual governments to renew their efforts to meet the water needs of their peoples.²⁷ Much as this argument is appealing, it should be pointed out that it does not necessarily mean that by putting the human rights cloak on a claim this will ensure that the claim is actually guaranteed. It could only amount to an empty proclamation, a rhetorical flourish, if the implications of such a

²² Amanda Cahill 'The human right to water-a right of unique status: the legal status and normative content of the right to water' *The International Journal of Human Rights* Vol 9, No 3, 390.

²³ Peter H Gleick 'The human right to water' *Water Policy* 1, 1998, 488.

²⁴ (UNIFEM 2004, I) as quoted in George Kent *Freedom from want, the human right to adequate food*, (2005) 187.

²⁵ n 22 above, 189.

²⁶ n 23 above, 491.

²⁷ n 3 above, 6. See also 22 above.

declaration are not pursued.²⁸ Hopefully, ‘by making water a human right, it cannot be taken away from the people.’²⁹ What then is the juridical basis for a right to water?

2.2 The right to water under international human rights law

A number of scholars have argued that access to basic water requirement is a fundamental human right expressly and impliedly supported by international law.³⁰ Whilst the implied (derivative, inherent or tangential) argument appears to be more popular and stronger than the express theory³¹ it has not checked further innovative approaches to the right to water, such as Amanda Cahill’s ‘unique status’ argument, which sees the right as being ‘somewhere between a derivative (implied) right and an independent (express) right.’³²

In support of the ‘express right’ argument, Peter H Gleick maintains that recent international agreements and state practice offer evidence of the transition toward an explicit right to water.³³ He points to a series of international environmental or water conferences beginning in the 1970s which have tackled the issue of access to basic resource needs and rights to water and reasons that while the statements and conclusions from these sources, are not legal documents with the same status as the covenants, they do offer strong evidence of international intent informing the views of states.³⁴ He further draws support from the United Nations General Assembly Declaration on the Right to Development (DRD) 1986,³⁵ and argues that in interpreting article 8 of the DRD, the United Nations explicitly includes water as a basic resource when it states that persistent conditions of underdevelopment in which millions of humans are ‘denied access to such essentials as food, water, clothing, housing and medicine in adequate measure’ represent a clear

²⁸ Kent (n 24 above) 189.

²⁹ Scanlon *et al*, as quoted in 22 above.

³⁰ n 22 above, 489 -494.

³¹ Bas de Gaay Fortman, ‘Safe water, an enquiry into water entitlements and human rights’ in JW de Visser & C Mbazira (eds) *Water delivery: public or private?* (2006) 5. See also Gleick (n 23 above) and Kent (n 24 above).

³² n 20 above, 390-391.

³³ n 23 above, 493.

³⁴ n 33 above.

³⁵ Article 8 provides that ‘states should undertake at the national level, all necessary measures for the realisation of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources’

and flagrant ‘mass violation of human rights.’³⁶ Further support for an explicit recognition of the right to water continued with the adoption of the Convention on the Rights of the Child (CRC).³⁷

A derivative right is a right deriving from other related or dependent rights.³⁸ The implied (derivative) argument asks the question whether a set of claims that have not been explicitly recognized in legally binding documents, might nonetheless be seen as inherent, tangential or implied rights.³⁹ It maintains that water is a basic human right. Even though the International Bill of Human Rights⁴⁰ does not specifically spell out a direct right to water, it can be argued that such a right could derive from other rights such as the right to life, the right to an adequate standard of living and the right to health.⁴¹

The ‘unique status’ argument builds on this apparent confusion about the status of water as an independent, self standing right or an implied (derivative) right. It maintains that despite the explicit wording in both the CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴² water is related to *inter alia* the rights to health, food, housing, education and the right to life.⁴³ This ill-defined status is confusing especially in relation to the scope and core content of the right. Because of this, it can be argued that the right exists in international human rights law with a ‘unique status’, somewhere between that of a derivative right and an independent right.⁴⁴

Does it matter whether the right to water is a self-standing, independent right or a derivative right related to or dependent upon other rights? For Cahill, this ill-defined status causes confusion as to the scope and core content of the right to water, thus raising problems concerning its

³⁶ n 23 above, 494.

³⁷ n 36 above. The Convention on the Rights of the Child was adopted by the United Nations General Assembly in resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

³⁸ n 22 above, 391.

³⁹ Fortman (n 31 above) 4.

⁴⁰ The International Bill of Human Rights refers to the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 and the International Covenant on Civil and Political Rights (ICCPR) 1966.

⁴¹ Elisabeth Türk and Markus Krajewski ‘The right to water and trade in services: assessing the impact of GATS negotiations on water regulations’ Paper presented at the CAT+E conference, *Moving forward from Cancún* Berlin 30-31 October 2003, 2.

⁴² Adopted by the United Nations General Assembly in resolution 34/180 of December 1979, it entered into force on 3 September 1981.

⁴³ n 38 above.

⁴⁴ n 43 above.

justiciability and implementation.⁴⁵ Much as her argument raises serious concerns does it still hold content in the light of General Comment No. 15 (GC 15)?⁴⁶ For the purposes of the present analysis, we shall first establish the legal basis for a right to water and attention will now be focused on both the African and the UN human rights regimes. This exercise may also lend credence to some of the theories discussed above.

2.2.1 The African human rights regime

The African Charter on Human and Peoples' Rights (African Charter)⁴⁷ -the principal regional human rights instrument does not contain an express provision on the right to water.⁴⁸ Nevertheless, the African Charter enjoins state parties to 'take the necessary measures to protect the health of their people...'.⁴⁹ Anton Kok and Malcolm Langford argue that the obligation to protect the health of the individual as stipulated in the African Charter implies that a state party must ensure that its subjects enjoy basic water and sanitation services.⁵⁰ This argument is clearly derivative in nature. It however finds support in the decisions of the African Commission on Human and Peoples' Rights (African Commission), the body responsible for the promotion and protection of human and peoples' rights under the African Charter and the interpretation of its provisions.⁵¹ In *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* the African Commission held,⁵²

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) *reads into the Charter* (emphasis mine) a right to shelter or housing which the Nigerian government has apparently violated.

The African Commission also accepted the argument that the right to food is implicit in the African Charter, in such provisions as the right to life, the right to health and the right to

⁴⁵ n 43 above.

⁴⁶ n 1 above.

⁴⁷ Adopted by the Organisation of African Unity (OAU) in June 1981, it entered into force in October 1986. This human rights treaty is binding on all state parties. Senegal and South Africa ratified it on 13 August 1982 and 9 July 1996 respectively.

⁴⁸ n 2 above, 196.

⁴⁹ See article 16(2) of the African Charter.

⁵⁰ n 48 above.

⁵¹ See article 45 of the African Charter.

⁵² *Social & Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (2001) 71, para 60.

economic, social and cultural development.⁵³ Furthermore, in *Free Legal Assistance Group and Others v. Zaire*,⁵⁴ the African Commission held that the failure of the government to provide basic services like safe drinking water and medicine among others constitutes a violation of the right to health. It is apparent from the above, that the African Commission has applied the implied (derivative) method of interpretation to some of the provisions of the African Charter to make up for some of the omissions in the instrument. Thus, from the jurisprudence of the African Commission, one can say that access to water has been recognized at least as a subset of the right to health guaranteed in article 16 of the African Charter.

Still within the context of the African human rights regime, two relatively recent human rights instruments have expressly addressed the issue of water. Article 14(1) of the African Charter on the Rights and Welfare of the Child (the African Children's Charter)⁵⁵ provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. Article 14(2)(c) obliges states parties to pursue the full implementation of this right and to take measures to ensure the provision of adequate nutrition and *safe drinking water* (my emphasis).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women)⁵⁶ stipulates in article 15 that state parties must ensure that women have the right to nutritious and adequate food and should in this regard take appropriate measures to provide them [women] with *access to clean drinking water*, sources of domestic fuel, land and the means of producing nutritious food (emphasis added).

It is interesting to note that under the African Children's Charter, the provision of safe drinking water constitutes one of the measures necessary to ensure full implementation of the right to health, whereas under the Protocol on the Rights of Women, access to clean drinking water is a measure necessary to realise the right to nutritious and adequate food.

What is clear from this analysis is that the right to water within the African human rights regime, though not a self-standing independent right generates obligations for states parties in fulfilling

⁵³ n 52 above, para 64-65.

⁵⁴ *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (2000) para 47.

⁵⁵ Adopted in July 1990, it entered into force in November 1999.

⁵⁶ Adopted in July 2003, it entered into force in November 2005.

either the right to health or food.⁵⁷ Thus, one may say that the combined effect of the jurisprudence of the African Commission as discussed above and the water provisions of the African Children's Charter and the Protocol on the Rights of Women recognizes some form of a right to water.

2.2.2 The United Nations (UN) human rights regime

The International Bill of Human Rights does not contain an express provision on water.⁵⁸ Cahill notes that it is possible that if the framers of the International Bill of Human Rights had realised that water was to be such a scarce resource in the future they would have explicitly codified the right within these instruments.⁵⁹ Commenting on article 25(1) of the Universal Declaration of Human Rights (UDHR),⁶⁰ Gleick reasons that the framers considered water to be implicitly included as one of the 'component elements' - as fundamental as air.⁶¹ He further argues that the Declaration contains rights that must be considered less fundamental than a right to water, such as the right to work, rest and leisure and to form and join trade unions and that this supports the conclusion that article 25 was intended to implicitly support the right to a basic water requirement.⁶²

It has also been argued that the International Covenant on Civil and Political Rights (ICCPR)⁶³ implicitly provides for a right to water under article 6(1), the right to life.⁶⁴ The right to life implies the right to the fundamental conditions necessary to support life.⁶⁵ In General Comment 6 (GC 6) the Human Rights Committee (HRC), states that the right to life should be broadly

⁵⁷ The link between water and the right to health was emphasized by the African Commission at a seminar held in Pretoria from 3-17 September 2004. A statement from the seminar on social, economic and cultural rights in the Africa, published in the African Human Rights Law Journal, Vol. 5, No .1, 2005, 182, listed 'access to basic shelter, housing and sanitation and adequate supply of safe and potable water' as a component of the right to health in article 16 of the African Charter.

⁵⁸ n 22 above.

⁵⁹ n 58 above.

⁶⁰ Adopted and proclaimed by the UN General Assembly in resolution 217 A (III) of 10 December 1948. Article 25 provides in part that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care...'.
⁶¹ n 26 above.

⁶² n 61 above.

⁶³ Adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966, it entered into force on 23 March 1976.

⁶⁴ n 61 above.

⁶⁵ n 23 above, 492.

interpreted to include threats to health and actions to reduce infant mortality and increase life expectancy especially in adopting measures to eliminate malnutrition and epidemics.⁶⁶

This generous interpretation has been criticized on the ground that the right to life *per se* is a civil right and does not guarantee any person against death from famine or cold or the lack of medicine.⁶⁷ However, a narrow interpretation of the right can arguably result in the right to life provision being rendered vacuous. Article 6(1) of ICCPR does not only give protection against any active taking of life it also imposes a duty on states to ensure access to the means of survival, i.e. food, water and other basic needs.⁶⁸ If water is needed to sustain life then it follows that the right to water is an element of the right to life.⁶⁹

The Committee on Economic, Social and Cultural Rights (CESCR)⁷⁰ has declared that ‘water is indispensable for leading a life in human dignity’ and thus is ‘a prerequisite for the realisation of other human rights’.⁷¹ In the absence of an express provision, the Committee has read into article 11(1) of the ICESCR, the right to water:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.⁷²

Evidently, the Committee opted for the derivative approach, connecting the right to water primarily to the right to adequate standard of living in article 11 of the ICESCR.⁷³

This reliance by the Committee on the word ‘including’ has been criticized on the basis that article 11 offers no interpretive space for ‘new’ rights *vis-à-vis* its use of the word ‘including’ in

⁶⁶ UN Human Rights Committee, General Comment No. 6 30/04/82 (sixteenth session, 1982) *the right to life (Art. 6)*, para 5.

⁶⁷ Y Dinstein, ‘The right to life physical integrity and liberty’ in L Henkin (ed) *The international bill of rights- The Covenant on Civil and Political Rights*, (1981) as quoted in 22 above, 397.

⁶⁸ n 22 above, 397.

⁶⁹ n 65 above.

⁷⁰ This Committee oversees the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

⁷¹ n 1 above, para 1.

⁷² n 1 above, para 3.

⁷³ n 31 above, 5.

the formulation.⁷⁴ To read otherwise would result in a seemingly endless list of rights that could be added to article 11, for example, ‘postal delivery’ and ‘access to the internet’.⁷⁵ This criticism has been countered by the argument that water is so fundamental to survival that it cannot be comparable or reducible to postal delivery and internet access.⁷⁶ Besides, the argument continues, this interpretive step is bolstered by the existence of many international instruments that have recognized an independent right to water.⁷⁷

In contrast to the International Bill of Human Rights, two relatively recent Conventions adopted by the UN contain express provisions on the right to water. CEDAW⁷⁸ provides in article 14(2)(h) that states parties shall take appropriate measures to eliminate discrimination against women in rural areas and shall ensure to such women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and *water supply*, transportation and communications (emphasis mine). Article 24(2)(c) of the CRC⁷⁹ obliges state parties to recognize the right of the child to the enjoyment of the highest attainable standard of health and urges state parties to combat malnutrition and diseases ‘through the provision of adequate nutritious foods and *clean drinking-water*’(emphasis mine).

It appears that the UN human rights system is no different from the African human rights system in so far as water is concerned. The major human rights instruments do not contain provisions on water. This means that the supervisory bodies are left to interpret existing provisions generously in order to make room for a right to water. The derivative approach seems to provide a firm juridical basis for a right to water. Even where later binding human rights instruments specifically mention water, it is within the context of other rights, usually the right to health or the right to an adequate standard of living.

2.3 Relationship between the right to water and other basic rights

⁷⁴ S Tully ‘A human right to access water? A critique of General Comment No.15’ (2005) *Netherlands Quarterly of Human Rights*, Vol 23, No 1, 37.

⁷⁵ n 74 above.

⁷⁶ Malcolm Langford ‘Ambition that overleaps itself? A response to Stephen Tully’s critique of the General Comment on the right to water’ (2006) *Netherlands Quarterly of Human Rights*, Vol 24/3, 437.

⁷⁷ n 76 above.

⁷⁸ n 42 above.

⁷⁹ n 37 above.

The CESCR has connected the right to water to several other rights in the International Bill of Human Rights. In paragraph 3 of GC 15, it reaffirmed its recognition of water as a human right contained in article 11 of ICESCR.⁸⁰ It further asserted that the right to water is also ‘inextricably related to the right to the highest attainable standard of health, and the rights to adequate housing and adequate food.’ In addition, the Committee maintained that the right should also be seen in conjunction with other rights in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

It is generally accepted that the right to water is directly related to and a prerequisite for the realisation of other rights.⁸¹ This relationship however needs to be investigated and the parameters of each established in order to define the scope and core content of the right to water and to ensure effective implementation of the right.⁸²

2.4 The meaning of progressive realisation in the context of the right to water

Article 2(1) of the ICESCR enjoins state parties to ‘take steps...with a view to achieving progressively the full realisation of the rights recognized in the present Covenant...’. The CESCR has interpreted this article as ‘a necessary flexibility device’ which imposes ‘an obligation to move as expeditiously and effectively as possible’ towards realizing the rights in the ICESCR.⁸³ This interpretation stems from the recognition that full implementation of all economic, social and cultural rights cannot be achieved within a short period.⁸⁴ The Committee has however failed to specify how ‘expeditious and effective’ progressive implementation should be,⁸⁵ but has remarked that there is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited.⁸⁶ This principle of non-retrogression has been criticized as ‘an extremely crude and unsatisfactory yardstick for measuring compliance with progressive achievement of the Covenant.’⁸⁷ It has been argued that it creates an incentive for

⁸⁰ The Committee had earlier on, in General Comment No.6 (1995) on the economic, social and cultural rights of older persons affirmed that water is a human right within art 11 of ICESCR.

⁸¹ For more detail see Cahill, 22 above, 394-399; Gleick, 23 above, 488-489; Kent, 24 above, 187-190.

⁸² n 22 above, 394.

⁸³ n 6 above, para 9. According to Pierre de Vos ‘The right to housing’ in Danie Brand & Christof Heys (eds) *Socio-economic rights in South Africa* (2005) 100, ‘the Constitutional Court [of South Africa] endorsed this understanding of progressive realisation’ in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

⁸⁴ n 6 above, para 9-10.

⁸⁵ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: assessing the economic deficits* (2004) 52.

⁸⁶ n 1 above, para 19.

⁸⁷ n 85 above.

state parties not to implement the ICESCR to their highest ability or to try out various strategies for implementation of the rights lest they are held to an unsuccessful programme. In effect, the argument continued, the principle of non-retrogression creates a legal duty of not moving backwards rather than the positive one of moving forward which progressive realisation implies.⁸⁸ This argument rather overplays the significance of the principle of non-retrogression within the obligation of progressive realisation and diverts attention from the goal oriented nature of the obligation, which is to ‘move as expeditiously and effectively as possible’ towards realizing the right to water or any other ICESCR right.⁸⁹ The progressive nature of article 2(1) of the ICESCR in a sense differentiates the nature of its obligation from that in article 2 of the ICCPR. The latter embodies ‘an immediate obligation to respect and ensure all of the relevant rights.’⁹⁰ Paragraph 8 of the Maastricht Guidelines nevertheless noted that:

The fact that the full realisation of most economic, social and cultural rights can only be achieved progressively... does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realisation of the rights in question.⁹¹

This dual nature of the obligation of progressive realisation was previously recognized in the Limburg Principles of 1988.⁹² Paragraph 16 maintained that all state parties ‘have an obligation to begin immediately to take steps towards full realisation’ of the rights in the ICESCR. This is reinforced by paragraph 22 which stipulated that ‘some obligations under the Covenant require immediate implementation in full’ by state parties. Thus, while the ICESCR provides for progressive realisation, it also imposes on state parties various obligations which are of immediate effect. The immediate obligations of state parties in relation to the right to water include the obligation to guarantee that the right will be exercised without discrimination and the

⁸⁸ n 85 above.

⁸⁹ n 84 above.

⁹⁰ n 84 above.

⁹¹ The Maastricht Guidelines on violations of economic, social and cultural rights was adopted in 1997 by a group of experts at the invitation of the International Commission of Jurists, the Urban Morgan Institute on Human Rights and the Centre for Human Rights of the Faculty of Law of Maastricht University. The guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies.

⁹² The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights was adopted in 1986 by a group of experts at the invitation of the International Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights, University of Cincinnati.

obligation to take deliberate, concrete and targeted steps towards the full realisation of the right to water.⁹³

2.5 Obligations of states in progressively realising the right to water

Like other rights, the right to water imposes three different types of obligations on state parties. These are the obligations to respect, protect and fulfil.⁹⁴ The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to water. To this end states must not engage in practices that deny or limit equal access to adequate water, capriciously interfere with arrangements for water allocation or illegally reduce or pollute water through waste from state-owned facilities.⁹⁵

The obligation to protect requires state parties to prevent third parties from interfering with the enjoyment of the right to water.⁹⁶ Third parties include individuals, groups and corporations. States parties must adopt ‘necessary and effective legislative and other measures’ to restrict third parties from, for instance denying equal access to adequate water and from polluting or unfairly extracting from water resources.⁹⁷ In situations where third parties operate or control water services, state parties must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water, by establishing an effective regulatory system to prevent abuse.⁹⁸

The obligation to fulfil can be carved up into the obligations to facilitate, promote and provide.⁹⁹ The obligation to facilitate compels a state to take positive measures to aid individuals and communities to enjoy the right to water. The obligation to promote requires a state to take steps to ensure there is suitable education on hygienic use of water, the protection of water resources and methods of minimizing water wastage. The obligation to provide requires a state to provide the right [to water] when individuals or a group are unable-for reasons beyond their control- to realise the right themselves. The obligation to fulfil requires the adoption of measures such as, a national water strategy and plan of action, ensuring that water is affordable for everyone and

⁹³ n 1 above, para 17.

⁹⁴ n 1 above, para 20.

⁹⁵ n 1 above, para 21.

⁹⁶ n 1 above, para 23.

⁹⁷ n 91 above.

⁹⁸ n 1 above, para 24.

⁹⁹ n 1 above, para 25.

facilitating improved and sustainable access to water especially in rural and deprived urban areas.¹⁰⁰ To ensure affordability of water, states must adopt measures which may include low-cost techniques and technologies, and appropriate pricing policies such as free or low-cost water and income supplements. Furthermore, payment for water services must be based on the principle of equity and whether publicly or privately provided, must be affordable for all.¹⁰¹

In GC 3, the CESCR explained that there is ‘a minimum core obligation’ on states parties to guarantee the satisfaction of, at the very least, minimum essential levels of each of the rights in the ICESCR.¹⁰² This position echoed paragraph 25 of the Limburg Principles which provided that state parties are required, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.¹⁰³ The minimum core obligation of the ICESCR has been interpreted as requiring that each right should be realised to the extent that it provides for the basic needs of every member of society.¹⁰⁴ In GC 15, the Committee identified a number of core obligations in relation to the right to water which it said are of ‘immediate effect’ and which states parties must satisfy.¹⁰⁵ A state party cannot justify non-compliance with these non-derogable core obligations.¹⁰⁶ Failure by a state party to take the necessary and feasible steps, in good faith, towards the realisation of the right to water amounts to a violation of the right.¹⁰⁷ These violations may occur through direct actions of the state party or other entities insufficiently regulated by the state party.¹⁰⁸ They may also occur through the failure of a state party to take appropriate steps towards realizing the right to water.¹⁰⁹ Some examples of violations include arbitrary or unjustified disconnection or exclusion from water services, discriminatory or unaffordable increases in the price of water, the failure to effectively regulate and control water services providers, failure to ensure that the minimum essential level of the right is enjoyed by everyone and failure to take its international legal obligation into account when entering into

¹⁰⁰ n 1 above, para 26.

¹⁰¹ n 1 above, para 27.

¹⁰² n 6 above, para 10.

¹⁰³ n 92 above.

¹⁰⁴ n 85 above, 22.

¹⁰⁵ n 1 above, para 37. These obligations include, ensuring access to the minimum essential amount of water, sufficient and safe for personal and domestic uses to prevent diseases; ensuring the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; ensuring physical access to water facilities or services that provide sufficient safe and regular water; ensuring equitable distribution of all available water facilities and services; and adopting relatively low-cost water programmes to protect vulnerable and marginalized groups.

¹⁰⁶ n 1 above, para 40.

¹⁰⁷ n 106 above.

¹⁰⁸ n 1 above, para 42.

¹⁰⁹ n 1 above, para 43.

agreements with other states or international organisations.¹¹⁰ In progressively realizing the right to water, it is important to note that state parties have a margin of discretion in determining which measures are most appropriate to fulfil their obligations. However, they must ensure that whatever steps they take do not interfere with the enjoyment of other human rights.¹¹¹

2.6 Various approaches for appraising the progressive realisation of the right to water

Conrad Barbeton argues that one way of approaching progressive realisation is to focus on the ‘input side of the equation.’¹¹² According to this approach, states parties must progressively increase the amount of resources allocated to programmes that contribute towards realizing socio-economic rights.¹¹³ This means that a state party should increase its spending each year in order to provide access to water for everyone. To do this, a state party may have to cut expenditure in other areas continuously or to endlessly increase taxation. This approach to progressive realisation does not seem to be financially or economically viable and is based on the assumption that progressively increasing inputs raises output.¹¹⁴

Another approach, which Barbeton seems to favour, is to focus on programme outputs and policy outcomes.¹¹⁵ Rather than focus on how much money is spent on the water programme for instance, the real questions should be how many people have access to adequate water supply and how many do not. This approach requires state parties to be transparent about their actions in fulfilling the right to water and to formulate policies that prioritise specific outcomes.¹¹⁶ The output or outcomes approach also requires states parties to monitor and measure the actual performance of programmes.

A further potentially fruitful approach may be to focus on identifying violations enumerated in the ICESCR.¹¹⁷ The Limburg Principles made an early start in identifying the issue of violations of economic, social and cultural rights. The proposal for an optional protocol to the ICESCR, it is

¹¹⁰ n 1 above, para 44.

¹¹¹ n 1 above, para 45.

¹¹² n 21 above, 3.

¹¹³ n 112 above.

¹¹⁴ n 113 above.

¹¹⁵ n 21 above, 4.

¹¹⁶ n 1115 above.

¹¹⁷ V Dankwa, C Flinterman & S Leckie, ‘Commentary on the Maastricht Guidelines on violations of economic, social and cultural rights’ *SIM Special* 20, 14.

argued, is based on the same premise.¹¹⁸ The violations approach involves identifying and rectifying violations of the right to water and requires input from states parties, non-governmental organisations and human rights monitoring bodies.¹¹⁹ It would be assuming too much to posit that a singular approach is sufficient to tackle the very complex and fluid task of realizing socio-economic rights, which to a large extent depend on the ebb and flow of economic and political conditions.¹²⁰ As GC 3 noted, ‘progressive realisation’ is a ‘necessary flexibility device, reflecting the realities of the real world and the difficulties involved in realizing economic, social and cultural rights.’ It follows from the preceding analysis that the obligation to progressively realise the right to water is just not amenable to a single approach.

¹¹⁸ n 117 above.

¹¹⁹ n 118, above.

¹²⁰ n 85 above.

CHAPTER THREE

THE POLICY OF WATER PRIVATISATION IN AFRICA

Over the last two decades, privatisation has become commonplace across Africa.¹²¹ Since the 1980s, it has been promoted as the panacea for all that was wrong with the economies of developing countries.¹²² In post colonial Africa, state enterprise was one of the instruments governments used to fulfil a range of duties such as establishing new industries, providing employment and controlling the prices of basic consumer goods.¹²³ One of such basic consumer good was water. In many [African] countries, water has been historically considered as a ‘free’ resource of unlimited supply that is managed by the state.¹²⁴ Users did not pay for the true costs of supplying water and often paid only for a proportion of the cost of transferring, treating and disposing of water, i.e. its use was heavily subsidized.¹²⁵ This it has been argued, led to the over extension and consequent poor performance of water-managing state enterprises.¹²⁶

Key supporters of the policy of privatisation in Africa generally, have been the World Bank and its private-sector arm, the International Finance Corporation and the International Monetary Fund. Privatisation has been a central component of donor-funded aid programmes since the late 1980s and has featured prominently in the conditionality arrangements that the World Bank and IMF establish with developing country governments.¹²⁷ The World Bank is the largest lender for infrastructure projects in the developing world and its support for privatisation in the water sector has had considerable influence on the policies of borrowing countries and other development banks and donor agencies.¹²⁸ It should be pointed out though that the pressure to privatise water delivery is no longer solely exerted by the World Bank and the IMF. Multinational corporations, multilateral institutions such as the European Union and the World Trade Organisation, and donor

¹²¹ John Craig ‘Privatisation and indigenous ownership: evidence from Africa’ Centre on Regulation and Competition, Working Paper No. 13, 2002, 2.

¹²² K Bayliss ‘Privatisation and poverty: the distributional impact of utility privatisation’ *Annals of Public and Cooperative Economics*, 73:4 2002, 605.

¹²³ n 121 above.

¹²⁴ Julia Brown ‘Water service subsidies and the poor: A case study of Greater Nelspruit utility Company, Mbombela Municipality, South Africa’ Centre on Regulation and Competition, Paper No. 112, 2005, 2.

¹²⁵ n 124 above.

¹²⁶ Paul Cook & Yuichiro Uchida ‘Privatisation and economic growth in developing countries’ Centre on Regulation and Competition, Paper No. 7, 2001, 3.

¹²⁷ n 122 above.

¹²⁸ Jennifer Davies ‘Private-sector participation in the water and sanitation sector’ *Annual Reviews*, 2005, 154.

agencies such as Britain's Department for International Development (DFID), Germany's GTZ and the United States USAID have become key supporters of this policy.¹²⁹ Support for the privatisation of water has also been voiced by the African Ministerial Conference on Water held in Nigeria in 2002 and the International Fresh-Water Conference held in Bonn in 2001.¹³⁰ The New Partnership for Africa's Development (NEPAD) has also given privatisation a fresh push.¹³¹

3.1 The meaning of privatisation

The term privatisation is bedevilled with ambiguity, but its many meanings have not attracted any serious controversy.¹³² Broadly defined, it is a process which entails the reduction of the role of the government in asset ownership and service delivery and an increase in the role of the private sector in these areas.¹³³ It has also been defined as the 'shifting of activities from the state to private sectors as well as the shifting of production from public to private hands'.¹³⁴ Privatisation has also been conceived as constituting measures that are aimed to strengthen the private sector of the economy.¹³⁵ In a narrow sense, privatisation has been viewed as the transfer of productive assets from the state sector to the private sector¹³⁶ or as implying a permanent transfer of control, whether as a consequence of a transfer of ownership right from a public agency to one or more private parties or, for example, of a capital increase to which the public-sector shareholder has waived its right to subscribe.¹³⁷

Three levels of privatisation have been identified, namely, privatisation of a public enterprise, privatisation of a sector and privatisation of an entire economy.¹³⁸ Though each is separate and distinct, these three tiers are by no means mutually exclusive. It is evident from the above that, privatisation, in the broad or narrow sense, involves the transfer of property from public

¹²⁹ n 10 above, 219.

¹³⁰ n 129 above.

¹³¹ n 129 above.

¹³² n 10 above, 218.

¹³³ DJ Gayle & JN Goodrich 'Exploring the implications of privatisation and deregulation' in DJ Gayle & JN Goodrich (eds) *Privatisation and deregulation in global perspective* (1990) 1- 3 as quoted in 10 above.

¹³⁴ Rosario Faraci 'The replacement of the political control in the Italian privatised state-owned enterprises: Privatisation methods and corporate governance mechanisms' Lowrys May College & Graduate School of Business, 1997, 4.

¹³⁵ n 121 above, 3.

¹³⁶ David Parker & Colin Kirkpatrick 'Privatisation in developing countries: a review of the evidence and the policy lessons' Centre on Regulation and Competition, Working Paper No. 55, 2003, 1.

¹³⁷ Pierre Guislain, *The privatisation challenge: A strategic, legal and institutional analysis of international experience* (1997) 10.

¹³⁸ n 137 above, 10-11.

ownership to private ownership and or the shifting of management of a public service or activity from government to the private sector.

3.2 Different forms of water privatisation

The categorization of water privatisation depends on the extent to which responsibility for capital investment and the burden of commercial risks are shifted from the public to the private sector.¹³⁹ A number of forms of water privatisation have been identified, but these are not necessarily exhaustive.

Privatisation of water may occur through a service contract on a fee-for service basis.¹⁴⁰ This involves the outsourcing of individual tasks such as billing and collections, well drilling and water quality testing. This does not confer any investment responsibility or revenue risk on the private venture.¹⁴¹ Ownership of assets and responsibility for capital investment and commercial risk remains with the public sector.¹⁴²

Privatisation of water may also be carried out in the form of a management contract. Management contracts transfer responsibility for managing a utility to a private operator often for 3 to 5 years.¹⁴³ This is a more comprehensive form of contracting out, involving most or all of an agency's operations.¹⁴⁴ It confers operational decision on the private entity. A management contract may pay a private operator a fixed fee for performing managerial tasks or offer greater incentives for efficiency by defining performance targets and basing the fee in part on their fulfilment.¹⁴⁵ Likewise, ownership of assets and responsibility for capital investment and commercial risk remain with the state enterprise.¹⁴⁶

¹³⁹ n 128 above, 148.

¹⁴⁰ n 139 above.

¹⁴¹ n 139 above.

¹⁴² n 139 above.

¹⁴³ *Approaches to private participation in water services: a toolkit*, Public-Private Infrastructure Advisory Facility & The World Bank (2006) 7.

¹⁴⁴ n 143 above.

¹⁴⁵ n 137 above.

¹⁴⁶ n 133 above.

Another form of water privatisation occurs via a lease agreement.¹⁴⁷ In this case, the private firm assumes full responsibility for the operation and maintenance of a given set of water infrastructure, such as a distribution network or treatment plant, for a specified period of time, usually 10 to 15 years.¹⁴⁸ Generally the firm also agrees to accept at least part of the revenue risk associated with the daily operations of the system. Responsibility for major capital investment still remains with the public sector.¹⁴⁹

In addition, privatisation of water may take the form of a concession. This term is often used interchangeably with 'licence' though they may have specific and different meanings. Concession often refers to a contract that grants an operating licence.¹⁵⁰ Where this happens, the private firm assumes not only responsibility for the operation and maintenance of assets but also for financing and managing investment.¹⁵¹ As a result, the duration of a concession is typically much longer than a lease because the private firm must have the opportunity to recover its investment.¹⁵² Asset ownership remains in public hands and it becomes imperative to establish contractual standards to ensure that when infrastructure is transferred to the public sector at the end of the concession it is in good condition.¹⁵³

Water privatisation also takes the form of build-operate-transfer (BOT) agreements.¹⁵⁴ This is a contract by which a private operator agrees to build, finance, operate and maintain a facility or system (such as a water treatment plant) for a specified period of time, and then transfer the facility or system to the party that awarded the contract, typically the state.¹⁵⁵ Unlike leases and concessions, BOT contracts are usually limited to a single facility such as a reservoir or waste water treatment plant. Investment burden remains with the private firm, but after a demonstration period of successful operation by the private firm, government may assume ownership and management of the facility or assume ownership but lease the facility back to the firm or simply regulate the privately owned and operated facility.¹⁵⁶

¹⁴⁷ Colin Kirkpatrick & David Parker 'Regulation and the privatisation of water services in developing countries: assessing the impact of the General Agreement on Trade in Services (GATS)' Centre on Regulation and Competition, Paper No. 67, 2004, 8.

¹⁴⁸ n 137 above.

¹⁴⁹ n 142 above.

¹⁵⁰ n 137 above, 243.

¹⁵¹ n 142 above.

¹⁵² n 137 above.

¹⁵³ n 142 above.

¹⁵⁴ n 133 above.

¹⁵⁵ n 137 above, 335.

¹⁵⁶ n 137 above.

A further form of water privatisation is divestiture. It involves the sale by the state of some or all of the equity in a state owned water facility to a private firm.¹⁵⁷ Assets, along with responsibility for their operation are transferred to the private firm.¹⁵⁸ Here, the state is limited to a regulatory function. It should be pointed out that the form that privatisation takes in a particular locality depends on the priorities of the public sector, for example, new investment or efficiency gains, as well as the degree of risk both parties are willing to transfer to the private sector.¹⁵⁹

3.3 The impetus for the privatisation of water

It has been put forward that reforms in the water services sector in Africa have been ‘strongly influenced by neo-liberal views’.¹⁶⁰ It has been however argued that whilst the impulse for privatisation in Europe might have been driven by liberalization of markets and budgetary constraints experienced by governments, Southern African countries, for instance, embarked on privatisation initiatives as a key part of the policy, conditionality on which the approval of aid or loans depended.¹⁶¹ Speaking in a broader context, it has been asserted that privatisation has become increasingly elevated in terms of the significance attached to it by the World Bank.¹⁶² That it has featured prominently in the conditionality arrangements that the World Bank and the IMF establish with developing countries and is often a condition for the release of aid funds and debt relief.¹⁶³

There is no denying the role of the World Bank and IMF in the privatisation process in Africa because the policy has been a central component of donor-funded aid programmes since the late 1980s when the World Bank itself expressed dissatisfaction with government efforts at public sector reform.¹⁶⁴ The question then is why the emphasis on privatisation after over 20 years of post-independence, state management of water resources? The answer may lie in the fact that in spite [or because] of state control, more than one billion people in the developing world lack

¹⁵⁷ n 137 above.

¹⁵⁸ n 142 above.

¹⁵⁹ n 128 above, 151.

¹⁶⁰ n 124 above.

¹⁶¹ n 10 above, 219.

¹⁶² n 122 above.

¹⁶³ n 12 above.

¹⁶⁴ n 122 above, 604.

access to clean water, whilst over 12 million die each year from drinking contaminated water,¹⁶⁵ and that there is thus an urgent need to reverse this situation.

3.4 Arguments in favour of the privatisation of water

A key argument in favour of water privatisation has been the potential of privatisation to enhance operational efficiency, economic growth and development of the water sector.¹⁶⁶ In developing countries, public water utilities often have unaccounted-for water (UFW)¹⁶⁷ rates of 40% or more, are considerably overstaffed, recover only about a third of their costs of service provision and do not provide services to a substantial proportion of households within their service area.¹⁶⁸ Political considerations prevent public utilities from charging cost-recovering tariffs thereby leaving them to struggle to maintain existing infrastructure, which is further overstretched by an expanding customer base.¹⁶⁹ Privatisation is intended to improve the performance of public enterprises by focusing attention on financial performance and removing the enterprise from state control.¹⁷⁰ For this reason, privation is prescribed as a remedy.

Another argument that favours privatisation of water is the inability of public utilities to raise capital for investment.¹⁷¹ The public sector it is argued has limited capital and its investment options are undermined by short term political expediency.¹⁷² Increased capital investment is needed to manage population growth and urbanization.¹⁷³ Of particular importance is the escalating cost of raw water source development and transmission. Nearby water lower-cost raw water sources have already been developed and there is the need to draw fresh water supplies from ever greater distance.¹⁷⁴ The immense capital investment need necessitates the involvement of private firms in the water sector.

¹⁶⁵ Colin Kirkpatrick et al 'State versus private sector provision of water services in Africa: A statistical, DEA and stochastic cost frontier analysis' Centre on Regulation and Competition, Paper No. 70, 2004, 3.

¹⁶⁶ n 10 above, 224.

¹⁶⁷ Unaccounted-for-water (UFW) refers to the difference between the volume of water supplied to a network by a water firm or agency and the volume of water used by its customers. UFW comprises physical losses through leaking pipes and administrative losses through illegal connections, meter tampering and other activities.

¹⁶⁸ n 128 above.

¹⁶⁹ n 168 above.

¹⁷⁰ n 122 above, 610.

¹⁷¹ n 10 above, 224.

¹⁷² n 161 above.

¹⁷³ n 128 above, 156.

¹⁷⁴ n 164 above.

Privatisation of water is expected to provide fiscal benefits.¹⁷⁵ It is argued that privatisation raises revenue for the government in the form of proceeds from the sale and removes the burden on governments to finance investments in the water sector.¹⁷⁶ This should allow governments to spend more on services or service foreign debts.¹⁷⁷ It has also been argued that privatisation of water brings to an end the financially-draining practice of state subsidy to state enterprises.¹⁷⁸ Governments bail out poorly run businesses with money that could be used for other, more beneficial activities, when economically it may be better to let the business fold up.¹⁷⁹ Finally, it has been posited that privatisation of water can make a considerable dent in poverty where it is tied to the release of aid funds.¹⁸⁰ In an assessment of the counterfactual, the supply of aid from the World Bank is considered to be a major benefit of privatisation.¹⁸¹

3.5 Arguments against the privatisation of water

Privatisation of water is perceived by some as government's abdication of its obligation to provide services that are essential to life and health.¹⁸² The acknowledgement of water as a basic human right is often cited as evidence that a state should retain responsibility for water services.¹⁸³ Privatisation of water has also been opposed on the basis that in most cases, the primary incentive to privatise is the need to meet conditions for aid and debt relief.¹⁸⁴ As a result of its connection to aid disbursement, privatisation is often rushed, with more attention focused on securing the deal rather than on the interests of the end users.¹⁸⁵

Opponents of privatisation contend that there is little practical evidence to show that privatisation does in fact result in increased efficiency, economic growth and development.¹⁸⁶ Studies on the impact of privatisation on economic growth in developing countries conclude in the negative.¹⁸⁷ It has been further argued that there is no unequivocal evidence that the private sector does

¹⁷⁵ n 122 above, 608.

¹⁷⁶ n 128 above.

¹⁷⁷ n 10 above, 226.

¹⁷⁸ Sunita Kikeri et al, *Privatisation: The lessons of experience* (1994) 29.

¹⁷⁹ n 178 above.

¹⁸⁰ n 122 above, 611.

¹⁸¹ n 122 above.

¹⁸² n 128 above, 152.

¹⁸³ n 182 above.

¹⁸⁴ n 122 above, 606.

¹⁸⁵ n 184 above.

¹⁸⁶ n 10 above, 227.

¹⁸⁷ n 175 above; also n 122 above, 607.

perform better than the public sector.¹⁸⁸ While private ownership may bring better management skills and better incentives, this is by no means inevitable.¹⁸⁹ Private firms with no experience in water infrastructure development are unlikely to bring better management than state enterprises. It has also been argued that the implementation of cost recovery measures and removal of subsidies, which accompany privatisation, may constitute a denial of human rights, especially those of the poor.¹⁹⁰ State intervention in the form of subsidies and other measures is critical to increasing or sustaining access by poor communities to water.

Lastly, private firms are interested in profit and not social objectives.¹⁹¹ To maximize profit, private firms become selective about the type of investment that they undertake.¹⁹² Investment in water supply infrastructure in a developing country is not the most attractive proposition for the private sector because it requires extensive up-front investment and takes years to recoup cost, let alone make a profit.¹⁹³ This has led to private firms acquiring interest only in the aspects of service delivery that make quick profits.¹⁹⁴

Whichever side of the debate one supports, the ultimate determinant of the viability of privatisation as a better economic policy to supplant state-owned enterprises will be concrete evidence of more efficient and effective service delivery by the private sector. The impression one gets at the moment is that in Africa at least, privatisation of water does not seem to be living up to expectations.

3.6 Related concepts: Deregulation, Liberalisation, Commodification and Corporatisation

‘Deregulation’ implies the reduction or elimination of specific governmental rules and regulations that apply to private business, including removal of regulations that prevented the private sector from competing with a nationalized monopoly.¹⁹⁵ ‘Liberalisation’ is closely related to deregulation. It involves measures aimed at opening up the market for competition.¹⁹⁶ Such

¹⁸⁸ n 116 above, 610.

¹⁸⁹ n 186 above.

¹⁹⁰ n 10 above, 228.

¹⁹¹ n 122 above, 612.

¹⁹² n 122 above, 612.

¹⁹³ n 192 above.

¹⁹⁴ n 192 above.

¹⁹⁵ n 10 above, 221.

¹⁹⁶ n 195 above.

measures may include removal of subsidies, removal or reduction of tariffs and introduction of cost recovery measures.¹⁹⁷

‘Commodification’ consists in the application of an approach that accords to water the status of an article of trade and to the water services sector the corresponding status as a productive commodity sector.¹⁹⁸ ‘Corporatisation’ is a method of institutional reform that incorporates many principles inherent in privatisation, such as performance-based management and full cost recovery.¹⁹⁹ The principal objective of corporatising a public service is to let it function as a business.²⁰⁰

¹⁹⁷ n 195 above.

¹⁹⁸ Kobus Muller & Frederick M Uys ‘*Amanzi ayimpilo* (water is life!): Regulatory governance of the water sector in South Africa’ Centre on Regulation and Competition, Paper No. 77, 2004, 25.

¹⁹⁹ n 195 above.

²⁰⁰ n 195 above.

CHAPTER FOUR

THE EFFECT OF PRIVATISATION ON THE PROGRESSIVE REALISATION OF THE RIGHT TO WATER IN SENEGAL AND SOUTH AFRICA

4.1 The water sector in Senegal

In March 1995, Senegal's National Assembly passed an act to govern the institutional reform of the urban water supply sector.²⁰¹ This was in accordance with several structural adjustment credit agreements with the World Bank in the 1980s, which aimed to liberalise trade and to rationalise public sector management including public enterprises and the civil service.²⁰² The law dissolved the national water company, La Société Nationale d' Exploitation des Eaux du Sénégal (SONEES) and authorised the creation of three key institutions: an asset-holding company, Société Nationale des Eaux du Sénégal (SONES), the Office National d' Assainissement (ONAS), a national office for urban sanitation, and a new water operating company, Sénégalaise des Eaux (SDE) which was destined for privatisation.²⁰³ SONES as the state asset-holding company was authorised to manage the water sector through a 30 year concession contract signed with the state.²⁰⁴ A 10 year lease contract was then executed between the state, SONES and SDE with a parallel performance contract between SONES and SDE, which listed a number of performance obligations of SDE.²⁰⁵ Following a competitive bidding process involving only French companies, Société d'Aménagement Urbain et Rural (SAUR) was declared the winner and became the majority shareholder of SDE, with 57.84 per cent.²⁰⁶ In April 1996 (the effective date of the lease contract), SDE took up management of urban water services in Senegal.

4.2 The water sector in South Africa

²⁰¹ Clarissa Brocklehurst & Jan G Janssens, *Innovative contracts, sound relationships: urban water sector reform in Senegal* (2004) 13.

²⁰² n 201 above, 1.

²⁰³ n 143 above, 249.

²⁰⁴ n 201 above, 14.

²⁰⁵ n 201 above, 15; these obligations included meeting World Health Organisation (WHO) standards for water quality, maintaining and repairing all infrastructure at its own cost and installing 17 kilometres of 100mm ductile iron pipe annually.

²⁰⁶ n 201 above, 18; the other shareholders were the state and former SONEES employees, both taking 5 per cent each and private Senegalese investors who held 32.16 per cent of the shares.

4.2.1 Assessing the legal framework

The legal and institutional framework relating to water services provision in South Africa is much more complicated than in the Senegal situation. Since 1994, different pieces of legislation regarding water provision have been passed.²⁰⁷ The 1996 Constitution of South Africa guarantees the right to access sufficient food and water.²⁰⁸ Section 27(2) further obliges the state ‘to achieve the progressive realisation’ of these rights. The same constitution also creates governments at the national, provincial and local spheres which are ‘distinctive, interdependent and interrelated,’ and which must ‘cooperate with one another in mutual trust and good faith’.²⁰⁹ The constitution also makes the delivery of water and sanitation services a matter for local governments.²¹⁰

The Water Services Act 1997 sets national standards and provides a regulatory framework for water services institutions and water services intermediaries.²¹¹ It also provides for the establishment of water boards and the role of the Minister of Water Affairs in setting the requisite standards in respect of water quality and management.²¹² More importantly, the Act provides a framework for private sector participation in service delivery.²¹³

The National Water Act 1998 defines a new way of governing scarce water resources.²¹⁴ One of its basic principles is that the state is the custodian of water, a public resource to which every citizen has a right of access and the management of which must be for the benefit of society as a whole.²¹⁵ The Local Government Municipal Structures Act 1998 defines the types and structures of municipalities. Three categories of municipalities exist, namely metropolitan, local and district.²¹⁶ The Local Government Municipal Systems Act 2000 defines how local government should operate and allows for various types of partnership arrangements a municipality may enter

²⁰⁷ GS Mackintosh et al ‘Climbing South Africa’s water services ladder: safe drinking-water through regulatory governance’ Emanti Management, Stellenbosch, 7599 South Africa, 2.

²⁰⁸ The Constitution of South Africa, 1996, sec 27(1)(b).

²⁰⁹ n 208 above, sec 40(1)&41(1)(h).

²¹⁰ n 208 above, sch 4, part B.

²¹¹ Christopher Mbazira ‘Privatisation and the right of access to sufficient water in South Africa: the case of Luhkanji and Amahlati’ Paper presented at a seminar on *Water Delivery in South Africa and The Netherlands: public or private?* Utrecht University in the Netherlands 7-8 March 2005, 13.

²¹² n 198 above, 7.

²¹³ n 124 above, 12.

²¹⁴ n 198 above.

²¹⁵ n 211 above.

²¹⁶ n 198 above.

into to ensure the delivery of services such as water.²¹⁷ It also provides for the establishment of policies which would ensure the affordability of water and of other basic services for poor households where the combined income does not exceed a predetermined amount.²¹⁸ The Local Government Municipal Structures Amendment Act 2000 places the function of access to water services among others at a district level, unless a local municipality is authorised to perform this function.²¹⁹

Clearly, the 1996 Constitution guarantees everyone the right of access to water but does not lay down a detailed framework for its achievement, as is usually the case with constitutions. Subsequent acts such as the Water Services Act 1997 and the National Water Act 1998 give effect to this Constitutional provision by among others, furnishing a national framework within which this right can be progressively realised, providing for the participation and regulation of the private sector and generally ensuring a qualitative service delivery. The legislations on local government help pinpoint exactly where responsibility lies for the actual implementation of the right at the local level as well as allow for a margin of discretion in determining the type of arrangements that can ensure realisation of the right.

4.2.2 The institutional framework

The national government is the overall regulator of the water sector and it does this through the Minister of Water Affairs who has real authority to regulate and intervene in the spirit of cooperative governance.²²⁰ The provincial sphere of government is also involved in regulating water in accordance with the principles of cooperative governance and in line with its broad mandate to oversee local government.²²¹ Primary responsibility for water services provision rests with local government.²²² Section 84 of the Municipal Structures Act 1998, confers responsibility for the provision of water services on the district and metropolitan municipalities, but the Act also provides that a local municipality may be authorised by the Minister of Provincial and Local Government Affairs to undertake this responsibility.²²³ The district or authorised local municipality thus becomes the water services authority (WSA) as defined in the Water Services

²¹⁷ n 198 above.

²¹⁸ n 198 above, 8.

²¹⁹ n 198 above.

²²⁰ n 198, above, 13-14.

²²¹ n 198 above, 14.

²²² n 220 above.

²²³ n 220 above.

Act 1998.²²⁴ There can only be one WSA in any specific area. The WSA is essentially the regulator of the service and is also responsible for ensuring that services are provided effectively, efficiently, sustainably and affordably in accordance with the legal framework already mentioned.²²⁵ A WSA may itself provide water services (internal mechanism) or contract a water services provider (WSP) to do so (external mechanism).²²⁶ Where a WSA contracts a WSP (which could be a private firm) to provide water services, the former must regulate the latter in accordance with the contract which must clearly specify the allocation of roles and responsibilities between the regulator and the provider.²²⁷

4.2.3 Private water service providers

There have been several cases of water privatisation in South Africa. In the early 1990s, a subsidiary of Suez-Lyonnaise-Ondeo, known as Water and Sanitation Service Africa (WSSA) obtained three lease contracts in the impoverished Eastern Cape province: Stutterheim (1993), Queenstown (1992) and Fort Beaufort (1994) for 10, 25 and 10 years respectively.²²⁸ In 1998, the municipalities of Nelspruit and Dolphin Coast privatised their water services by granting 30 year leases to two companies, Biwater-Nuon, through its subsidiary Greater Nelspruit Utility Company (GNUC) and Saur respectively,²²⁹ and in 2000, Johannesburg City Council gave a five year management contract to Suez-Lyonnaise-Ondeo for its water services.²³⁰ It should be pointed out that South Africa in contradistinction to Senegal has not drawn on the World Bank or IMF for loans and as such these instances of water privatisation have been as a result of government policy and not of conditionalities.²³¹ This means that unlike Senegal, South Africa may opt out of any water privatisation scheme without fear of consequences from the World Bank or IMF and indeed has in at least one instance.

²²⁴ n 198 above, 3.

²²⁵ n 198 above, 15.

²²⁶ n 220 above.

²²⁷ n 224 above.

²²⁸ Greg Ruiters & Patrick Bond, 'Contradictions in municipal transformation from apartheid to democracy: the battle over local water privatisation in South Africa' Background Research Series, Municipal Services Project, 1.

²²⁹ n 15 above, 4.

²³⁰ n 228 above.

²³¹ Jessica Budds & Gordon McGranahan, 'Are the debates on water privatisation missing the point? Experiences from Africa, Asia and Latin America' *Environment & Urbanization*, Vol 15, No 2 October 2003, 106.

4.3 Water services before privatisation

4.3.1 The case of Senegal

At independence in 1960, the urban water utility was privately managed through a concession contract by the *Companie Générale des Eaux du Sénégal*, which was largely owned by *Générale des Eaux*, a private French firm.²³² In 1971, the shareholders were required to sell their shares to the state and the company was nationalized.²³³ This public utility which supplied water to the capital, Dakar, where approximately 30 per cent of the population lived was according to the World Bank plagued with problems resulting from a lack of autonomy from the government, chronic water shortages in the capital and the piecemeal development of its assets.²³⁴ In 1983 the water utility was one of the first public enterprises to be subject to a contract plan through the newly formed public utility SONEES.²³⁵ Though technically well-run, SONEES was unable to exercise control over planning for the sector, set tariffs to recover costs or settle unpaid bills with suppliers such as the state-run electricity utility.²³⁶

By 1995, only 54 per cent of the urban population had access to safe water as there were serious supply problems.²³⁷ In 1994 for example, supply deficit resulted in only 16 hours of service per day on average and this intermittent supply had a detrimental effect on quality due to infiltration of soil water into pipes during periods of negative pressure.²³⁸ Water losses from leakages and illegal connections (unaccounted-for-water) were estimated at 27 per cent of production in Dakar.²³⁹ Also the capital was primarily supplied with ground water and there were quality problems due to saline intrusion.²⁴⁰ The bulk of Dakar's poor did not have access to affordable water except through public standposts.²⁴¹ Drinking water quality in many cities was poor, with

²³² n 201 above, 2.

²³³ n 228 above.

²³⁴ n 201 above, 3.

²³⁵ Michael Kerf, 'Do state-holding companies facilitate private participation in the water sector? Evidence from Cote d'Ivoire, The Gambia, Guinea and Senegal' *The World Bank*, February 2001, 9.

²³⁶ n 235 above, 10.

²³⁷ World Bank, *Republic of Senegal water sector project- staff appraisal report*, 1995 as quoted in 201 above.

²³⁸ n 201 above, 4.

²³⁹ n 236 above.

²⁴⁰ n 238 above.

²⁴¹ n 235 above.

bacterial contamination at the end of the distribution system while chlorination was insufficient.²⁴²

4.3.2 The case of South Africa

Until 1994, policies based on white (male) supremacy and racial segregation applied in South Africa.²⁴³ Racial segregation was part of the social and economical pattern in South Africa from as early as the 17th century. In 1961, South Africa became a republic and was divided into four provinces each with an administration with certain responsibilities, and in pursuit of the goal of separate institutions for each racial and ethnic group, there was a gradual attempt to divide South Africa into various states, each entirely independent and autonomous with no political control by the central government.²⁴⁴ Four territories accepted autonomy and became independent national states and those that did not accept became self-governing territories still under the political control of the Republic of South Africa.²⁴⁵ Both national states and self-governing territories stayed economically, financially and otherwise completely dependent on the Republic of South Africa. Blacks were controlled under a separate legal and administrative system.²⁴⁶ Even though they made up three-quarters of the population, they were restricted to ownership of only 13 per cent of the country.²⁴⁷

Rights to use water were subject to the principles of South African water law, which had its roots in Roman, Dutch and English law.²⁴⁸ The water law made a distinction between public and private water. Public water was a source of water that had the potential for communal use, while private water had limited applications.²⁴⁹ Public water was vested in the state and private water (including underground water) was regarded as private property, with the owner of the land on which private water was found having full and exclusive use of that water.²⁵⁰

²⁴² n 236 above.

²⁴³ The country held its first multi-racial election in April 1994.

²⁴⁴ H Thompson et al 'Policies, legislations and organisations related to water in South Africa, with special reference to the Olifants river basin,' International Water Management Institute, Colombo, Sri Lanka, Working Paper 18 (South Africa Working Paper No 7), 2001, 10.

²⁴⁵ n 244 above.

²⁴⁶ n 244 above, 7.

²⁴⁷ n 244 above, 8.

²⁴⁸ n 244 above, 11.

²⁴⁹ n 246 above.

²⁵⁰ n 246 above.

Land tenure in the national states and self-governing territories was different from that in the Republic of South Africa. In the Republic, land was predominantly privately owned, while most of the land in the former was held under some form of communal tenure.²⁵¹ Having different political organisations for the different groups in South Africa meant that very many organs were involved in the provision of water services and as such, water resources management became inefficient and ineffective.²⁵² The result of this type of arrangement was that by 1994 there was an inequity in water services between the different groups. Water was mostly used by the dominant (white) group which had privileged access to land and economic power. Only about 45 per cent of blacks had piped water against nearly 100 per cent for the other groups (including so-called coloureds and Indians).²⁵³

Also, as a result of apartheid, deprivation and poverty have strong racial characteristics. Blacks have twice the unemployment rate of coloureds, three times that of Indians and ten times that of whites.²⁵⁴ Blacks also comprise nearly 95 per cent of South Africa's poor, with over two-thirds living in the rural area.²⁵⁵ In those rural areas where water supplies existed, drinking-water quality was often poor with serious negative impact on primary health.²⁵⁶ Thrown into the mix, is the fact that South Africa is an arid country with less rainfall than the world average and at the threshold of 'water stress'.²⁵⁷ This immensely disturbing state of affairs necessitated a national response which came in the form of a national water policy, which advocated for the use of capital from the private sector to help organise water service provision and subsequent legislations.²⁵⁸

4.4 Water services after privatisation

This section focuses on water delivery in both Senegal and South Africa, post privatisation. It outlines the available facts and figures which will then be used as the basis for analysis later on. In the case of Senegal there has only been one instance of privatisation whilst in South Africa there has been at least six. The choices below are predicated on the fact that a reasonable time

²⁵¹ n 244 above, 16.

²⁵² n 244 above, 18.

²⁵³ Whitepaper on a National Water Policy for South Africa, Ministry of Water Affairs and Forestry, April 1997, 10.

²⁵⁴ n 253 above, 14.

²⁵⁵ n 254 above.

²⁵⁶ n 198 above, 20.

²⁵⁷ n 253 above, 13.

²⁵⁸ n 253 above, 16.

has elapsed since the respective privatisation processes and that a body of data is available on the outcome of these processes.

4.4.1 Senegal

The following have been identified as outcomes of the privatisation of urban water supply in Senegal.

Since privatisation began, the volume of water produced for use in the urban water sector has risen each year from 96.3 million cubic metres in 1997 to 114.6 million cubic metres in 2002, a 19 per cent increase.²⁵⁹

There has also been a substantial increase in the number of clients from 241 671 in 1996 to 327 501 in 2001, an increase of over 35 per cent.²⁶⁰ In the Dakar region, between 1995 and 2002, the number of private connections increased by 34 per cent and the number of public standpipes also rose by 5 per cent, from 940 in 1995 to 1424 in 2002.²⁶¹ The proportion of the population served increased from 80.3 per cent to 89.5 per cent at the end of 2002.²⁶² The increase in the number of clients has been attributed to the expansion of the water network system which increased from a length of 4319 kilometres in 1996 to 5330 kilometres in 2001, an increase of 23 per cent.²⁶³ By its contract, the private firm was required to renew 17 kilometres of 100mm network each year. It has met or exceeded this requirement each year since 1997 and by 2001 had renewed over 97 kilometres of pipeline.²⁶⁴

Average water tariffs have risen steadily since privatisation. In 1996, the average tariff faced by consumers for both water supply and sanitation including all taxes and surcharges was 380.42 F CFA/m³ and in 2002 it was 464.84 F CFA/m³, an overall increase of slightly over 22 percent.²⁶⁵ There has been a suggestion that this estimate is very conservative and that in actual fact between 1995 and 2003, the average price hike has been nearly 40 per cent.²⁶⁶ The contract with SDE required that 96 per cent of water samples meet World Health Organisation (WHO) standards for

²⁵⁹ n 201 above, 21.

²⁶⁰ n 259 above.

²⁶¹ n 259 above.

²⁶² n 201 above, 22.

²⁶³ n 262 above.

²⁶⁴ n 201 above, 34.

²⁶⁵ n 201 above, 25.

²⁶⁶ Hawa Ba, 'Water privatisation in Senegal,' *Pambazuka News*, No 7, available at <http://www.pambazuka.org/fr/category/features/34815> (accessed 10 October 2006).

bacteriological quality and 95 per cent for physio-chemical quality.²⁶⁷ As at 2001, over 97 per cent of samples meet both bacteriological and physio-chemical standards.²⁶⁸ This shows a marked improvement in the quality of water supplied.

Finally, a substantial proportion of the population of Senegal is poor, with an estimated 54 per cent of its 9.2 million people living below the poverty line in 2002.²⁶⁹ Many of the poor live in the rural areas but urban areas also have high rates of poverty: in 1995 it was estimated that 16 per cent of Dakar's population was poor.²⁷⁰ Translation of a WHO estimate on water and sanitation in 2000 showed that at the time, over one million urban dwellers were completely without water services and over 850,000 were provided water only through public standposts.²⁷¹ This problem was tackled by a government policy of 'social connection' (a policy of subsidized connections and consumption) and through the construction of standposts where there were no private connections.²⁷² The number of social connections increased from slightly below 5000 in 1996 to about 20 000 in 2001.²⁷³ As mentioned earlier, public standpipes also increased by 5 per cent. The downside however was that due to some complex eligibility requirement, many of the poor were excluded from social connections²⁷⁴ and the price of water charged to these standpipes increased by 35 per cent between 1995 and 2002.²⁷⁵

The result after privatisation can best be described as mixed. While there has been an increase in the number of persons connected, yet many more still remain unconnected because of costs. Water quality has improved but many poor people do not have access to safe water as a result of the high tariffs for public standpipes and the weak implementation of the social connection policy.

4.4.2 South Africa

The case of Fort Beaufort

²⁶⁷ n 201 above, 35.

²⁶⁸ n 267 above.

²⁶⁹ n 201 above, 36.

²⁷⁰ n 269 above.

²⁷¹ n 201 above, 36-37.

²⁷² n 201 above, 137.

²⁷³ n 201 above, 39.

²⁷⁴ n 201 above, 42.

²⁷⁵ n 201 above, 29.

In 1995, the poverty-stricken black township of Bhofolo was amalgamated with the former whites-only municipality of Fort Beaufort.²⁷⁶ There were 3,400 house connections in Fort Beaufort, mainly in the former whites-only areas.²⁷⁷ A 300 per cent increase on water service rates was announced for township residents, from R10,60 to R28 per month, to normalize charges.²⁷⁸ From river access and a few communal standpipes, in the 1950s to public taps in the 1980s, Bhofolo's water infrastructure only 'improved' to unmetered yard taps in the 1990s.²⁷⁹ By 2002, Bhofolo residents still had no indoor piped water in contrast to whites who had 'first-world' services and up to 1996 were charged on a declining block tariff for water.²⁸⁰ From 1996 to 1997, the water rate structure changed by an upward revision of 100 per cent, from R28 to R60 per month.²⁸¹ Fort Beaufort also experienced an increase in connection charges. From May 1996 there was a 100 per cent hike in water connection fees from R310 to R648 (an amount greater than a month's income for most families of Fort Beaufort).²⁸² Significantly, Fort Beaufort's tariffs at the time were higher than non-privatised towns such as Reddersburg.²⁸³

The absolute level of poverty and unemployment in Fort Beaufort meant that most households were unable to pay their bills.²⁸⁴ The arrears ran into millions, and in a bid to recover them, the municipal authority- which was under a monthly financial obligation to WSSA- simply denied electricity to those households with water debt.²⁸⁵ In December 2001 the municipal authority succeeded in having the Eastern Cape High Court cancel the contract with WSSA on the grounds that it had not been published first for comment by members of the public and that approval was never obtained from the local government Member of the Executive Council.²⁸⁶ The inability of the municipality to continue paying management fees to WSSA and a high level of dissatisfaction

²⁷⁶ Greg Ruiters 'Debt, deprivation and privatisation: The case of Fort Beaufort, Queenstown and Stutterheim' in David A McDonald & John Pape (eds) *Cost recovery and the crisis of service delivery in South Africa* (2006) 45.

²⁷⁷ n 228 above, 3.

²⁷⁸ n 276 above, 44-45.

²⁷⁹ n 276 above.

²⁸⁰ n 276 above; A declining block tariff is a payment structure that allows a consumer to pay less for more consumption.

²⁸¹ n 276 above.

²⁸² n 276 above, 46.

²⁸³ n 276 above, 47.

²⁸⁴ n 283 above.

²⁸⁵ n 283 above.

²⁸⁶ David Hall et al 'Water privatisation in Africa,' Public Services International Research Unit, University of Greenwich. Paper presented at *Municipal Services Project Conference*, Witswatersrand University, Johannesburg, May 2002, 11.

with its services among the communities played a significant role in the move to cancel the contract.²⁸⁷

Fort Beaufort is a clear example of the difficulty or impossibility of attempting to realise the right to water by private sector participation in a situation of absolute poverty. By nature, private firms function on the basis of cost recovery and profit-making, a principle which is not necessarily poverty-friendly. High water tariff and connection fees meant that residents were routinely disconnected from or could not connect to the water supply system. Comparatively lower rates in other non-privatised municipalities provided a telling contrast. The privatisation of water delivery in Fort Beaufort ended up progressively ‘derealising’ not only access to water but also access to electricity by its poor residents. Little wonder why there was a collective expression of ‘joy and relief’ when the High Court nullified the contract.²⁸⁸

The case of Stutterheim and Mlungusi

In 1997, Mlungusi (Stutterheim’s black township) residents paid a R22 flat rate for unmetered basic water supply, whilst those with metered supply (the white areas) paid a fixed amount of R16, that is R6 lesser than the poor township residents.²⁸⁹ 45 per cent of Stutterheim’s 4468 households were not paying bills regularly by 1997 and this resulted in a cut-off of water supply to 20 per cent of all black township households.²⁹⁰ A further exclusionary measure was the huge R1425 reinstatement fee to reconnect water, an amount more than twice the monthly household income of black townships.²⁹¹

In addition to the high tariffs charged for the largely unimproved services, there were complaints about the lack of consultation by WSSA with community structures, confusion over responsibility for leaks in the water system, with many customers told to do repairs themselves or to hire private plumbers and a general lack of accountability and transparency with respect to the municipal contract.²⁹²

²⁸⁷ n 286 above.

²⁸⁸ n 276 above, 55.

²⁸⁹ n 276 above, 48.

²⁹⁰ n 228 above, 4.

²⁹¹ n 276 above, 51.

²⁹² n 281above.

Here, the facts and figures reveal that post privatisation was characterised by massive disconnections of water supply, high tariff for largely unimproved services and even higher reconnection fees in a community steeped in extreme poverty. Disconnections and higher tariff translated into an interference with the enjoyment of the right to water for a large number of poor people and hence an infringement of the obligation of progressive realisation. Again, the attempt to use privatisation as a measure to realise the right to water in the midst of serious poverty has proven problematic.

The case of Queenstown

In Queenstown, the flat rate for water services was raised by 150 per cent, from R15 per month before privatisation to flat rates of R38 per month after privatisation.²⁹³ This resulted in a rapid growth of consumer debt which by 1997 had reached R26 million.²⁹⁴ In a bid to recover the arrears, the local council resorted to legal processes and when that did not work, retained for itself the right to disconnect electricity supply for the non-payment of water bills.²⁹⁵ By February 1999, 2282 electricity meters had been disconnected by the municipality for the non-payment of services and in 1998, a private armed security company, Gray Security had tendered to cut-off water services of the non-paying residents.²⁹⁶ To press the point home, in January 2000 water supply was cut to Cape College, Thabaletu School and all other schools on the opening day of classes.²⁹⁷ To deal with the issue of non-payment, the introduction of prepaid water meters is being discussed.²⁹⁸

Queenstown again shows the extreme difficulty in using privatisation as a measure to progressively realise the right to water in a community where poverty is rife. The supposed beneficiaries ended up losing even the little that they had been enjoying. Those who could not afford to pay the increased water tariff had their electricity disconnected. It is fair to say that privatisation of water set the residents of Queenstown back in more than one respect.

The case of Nelspruit

²⁹³ n 280 above.

²⁹⁴ n 276 above, 49.

²⁹⁵ n 276 above, 52.

²⁹⁶ n 295 above.

²⁹⁷ n 295 above.

²⁹⁸ n 276 above, 54.

Since its inception, there has been continuous criticism of the operation of the concession by political and community groups as well as trade unions.²⁹⁹ Before privatisation, the residents of Nelspruit were paying a flat rate of R70 per month, but after Biwater took over the water supply, the monthly rate shot up to between R400 and R500.³⁰⁰ This resulted in a dramatic decline in the payment for services. The non-payment of bills has been met with cut-offs and legal action.³⁰¹ The company also did not extend services and water infrastructure as it promised: it still stands at only one tap for ten households.³⁰² Projects to provide water to peri-urban areas were put on hold until payment for service picked up while the company maintained that there was no point in pumping in money if it was not sure of cost recovery.³⁰³

The case of Nelspruit exemplifies the true character of privatisation as merely a cost recovery and profit-oriented mechanism. The dramatic increase in tariff followed by disconnections for non-payment of water bills and the position of Bi-water not to extend services to peri-urban areas (where the majority of poor people reside) if there is no prospect of cost recovery captures the true essence of privatisation as a mechanism suitable only for those who can pay. Access to water is supposed to be enjoyed by all not just by those who can afford it. Progressive realisation includes taking steps to ensure that those who cannot afford to pay nonetheless enjoy the right to water.

The case of Dolphin Coast

The Dolphin Coast concession was controversial from the outset because it was signed six weeks after the national government and local authorities signed a framework agreement with trade unions stipulating that 'public sector provision is the preferred option and privatisation is only a last resort after all other avenues have been exhausted'.³⁰⁴ Over a year into the contract, a research study of the concession warned that it faced difficulties of further enlargement of the

²⁹⁹ n 286 above, 14.

³⁰⁰ n 299 above.

³⁰¹ n 299 above.

³⁰² n 299 above.

³⁰³ n 299 above.

³⁰⁴ n 286 above, 16.

municipal area and of possible opposition to the higher charges it makes for water provision to the poor.³⁰⁵

In 2001, the company hit financial problems and a renegotiation of the concession contract resulted in a 15 per cent increase in the price of water to restore profitability.³⁰⁶

The case of Johannesburg

Much cannot be said of the Johannesburg water and sanitation utility as its management was only relatively recently turned over to Suez-Lyonnaise Ondeo. This move, part of a wholesale reform plan, was precipitated by the very serious financial difficulties of the city which struggled to maintain delivery of existing services and could not expand its services to previously marginalized communities.³⁰⁷ The water and sanitation utility was the largest of the three utilities under the reform program and had a health cash flow.³⁰⁸ Public opposition to private sector participation led the municipal authority to opt for a management contract rather than a concession contract.³⁰⁹

On the whole, the state of affairs in Senegal post privatisation appears more favourable than those in South Africa and more inclined towards progressively realising the right to water. This is not to say that it is the ideal and as will be shown later, in many respects it infringes the obligation of progressive realisation. The post privatisation scene in South Africa has been chaotic with flagrant violations of the obligation of progressive realisation in the form of mass disconnections and deliberate refusal to extend water services to needy but poorer communities.

4.5 The effect of privatisation on progressive realisation of the right to water

Assessing the impact of privatisation on the progressive realisation of the right to water in Senegal and South Africa is bound to face difficulties. This is because the term ‘progressive realisation’ has not been sufficiently defined by the CESCR and the principle of non-

³⁰⁵ David Hemson & Herbert Batidzirai, ‘Public private partnership and the poor: A case study of the Dolphin Coast water concession, Kwazulu-Natal, South Africa’ WEDC, Loughborough University, quoted in 286 above.

³⁰⁶ n 286 above, 17.

³⁰⁷ Clarissa Brocklehurst (ed), *New designs for water and sanitation transactions: Making private sector participation work for the poor* (2002) 33.

³⁰⁸ n 307 above.

³⁰⁹ n 307 above.

retrogression has been declared an unsatisfactory yardstick by which to measure progressive realisation.³¹⁰

However, one can still undertake an analysis of the facts above based on the identified obligations inherent in the idea of progressive realisation. Using Conrad Baberton's output approach, a reasonable interpretation of the facts and figures post privatisation can be made.

One of the immediate obligations of progressive realisation is that a state must ensure that the right to water will be realised without discrimination. Where a measure to ensure the realisation of this right has the effect of benefiting only a particular group because of their economic, social or other status and excluding others, this obligation is violated. Privatisation in both the Senegal and South African cases has tended to infringe this obligation. In the case of Senegal, reform of the water sector has been limited to urban areas. The reason for this according to one writer was that the billing and collecting of water rates were considered more likely to be effective in an urban environment where users would be more financially solvent, but where also the means of coercion would be more effective in the case of the non-payment of bills.³¹¹ Thus, while residents in urban areas benefited from better services, those in rural areas (the majority of the population) were left out in the cold. The implication of this is that the state deliberately adopted a policy which resulted in the exclusion of a significant portion of its population from benefiting from improved water services on the basis of their economic, social or other status.

In South Africa, especially with regards to Stutterheim, WSSA has been accused of classic cherry-picking as it failed to serve 80 per cent of the regions township residents.³¹² These township residents almost exclusively comprise poor black people most of whom are unemployed or if employed, whose average combined monthly household income does not exceed R600. Here, as in the case of Senegal, financial motivations led to individuals within the same state being treated differently on the basis of their economic or social status.

Progressive realisation also includes the obligations to respect and protect. The obligation to respect demands that a state must refrain from interfering with the exercise of the right to water, by for instance refraining from actions that deny or limit equal access to water by all and the obligation to protect demands that a state must prevent third parties like corporations from

³¹⁰ n 85 above.

³¹¹ n 266 above.

³¹² n 228 above, 8.

interfering or compromising equal access to water. An example of the interference, denial or limitation of equal access to water in both the obligations to respect and protect would be the cutting off of water supply for whatever reason and making reconnection difficult by inflating reconnection charges. In the case of Senegal, there have not been any reports of the widespread disconnection of water services for the non-payment of bills or for other reasons. However, it has been asserted that before privatisation, a semi-institutional practice had been established in the poor areas of towns, whereby local populations without domestic water supply could receive free water from public fountains or standpipes.³¹³ Privatisation did away with this allowance and the poor now have to buy water from these standpipes, which is much more expensive than domestic connections. The result of this change has been recourse to alternative sources of water such as rivers, which are unsuitable for drinking or for use in food preparation. A causal link between the outbreak of cholera in recent years in Senegal and this limitation of access to water has been suggested.³¹⁴

South Africa is replete with instances of mass cut-offs of water to black townships, notwithstanding the absolute levels of poverty in those townships. The case of Stutterheim readily comes to mind. This practice was replicated in both Queenstown and Fort Beaufort, which began by cutting electricity when water bills were not paid on time. In these cases, the municipal authorities were responsible for these cut-offs. They also made reconnection difficult if not impossible. In Queenstown for example, the reinstatement fee was R1425, more than twice the average monthly household income of black townships. Nelspruit also suffered the outright disconnection of water services by GNUC for the non-payment of bills. These actions could be seen as denying, interfering or limiting the exercise of the right to water.

The obligation to progressively realise the right to water also requires states to ensure the enjoyment of the right to water to persons and groups who by themselves are unable to realise it as well as the adoption of pricing policies such as free or low-cost water and income supplement. This obligation clearly requires states to provide free water to individuals who are poor and cannot afford to pay for it and to provide low-cost water to those whose economic situation is only slightly better. The adoption in Senegal of a policy of social connection as well as increasing the number of standpipes could be seen as complying with the obligation to ensure the right to those who are unable to realise it. However, this is undermined by the fact that due to

³¹³ n 266 above.

³¹⁴ n 266 above.

complex eligibility requirements, many of the poor people could not benefit from the policy. In addition, the prohibitive cost of obtaining water from public standpipes also counteracts the availability of these standpipes. In South Africa, those groups (black township residents) that could not realise the right to water by themselves have been largely ignored and in fact have borne the brunt of the massive cut-offs of water supply. In 2001, because of the desperate water situation and the resulting cholera outbreak, the national government promised to and did provide 25 litres of free water per day to all households.³¹⁵ This could be seen as a measure of compliance but it had to be precipitated by a cholera epidemic.

Has privatisation then violated the obligation to progressively realise the right to water in Senegal and South Africa? There cannot be a straightforward answer to this question as in some respects elements of privatisation (as it has been carried out) have tended to violate the obligation while other aspects of it have tended to fulfil the obligation. In Senegal, the limitation of privatisation to the urban areas can be judged a violation of the non-discrimination obligation. In the same vein, the refusal to extend water services to poorer areas in South Africa violates this obligation. On the other hand, the social connection policy (with all its imperfections) in Senegal complies with the 'fulfil' (provide) component of the obligation. The introduction of free basic water in South Africa can also be seen as complying with this obligation. It could be argued that privatisation *per se* is not objectionable but that the manner in which it has been carried out in our case studies leaves much to be desired. The counter-point to this argument would be that however well its implementation, the key characteristics of privatisation, cost-recovery and profitability make it a poverty-unfriendly policy and hence unsuitable for African states where the vast majority of people are absolutely poor. That still leaves the question of how to deal with the huge water deficit in Africa unanswered. If not privatisation, what else?

³¹⁵ *The right to water*, 5th Economic & Social Rights Report Series, 2002/2003 Financial Year, South African Human Rights Commission, 21 June, 2004, xiii available at <http://www.communitylawcentre.ac.za> (accessed 31 October 2006).

CHAPTER FIVE

CONCLUSIONS

There is no doubt that there is a huge water problem in Africa, bordering on an emergency and that confronting it necessitates the use of, among others, a human rights approach. Traditional human rights instruments which apparently had not bothered to specifically address the issue of water are being interpreted expansively to make room for such a right. Newer human rights instruments and recent constitutions of an increasing number of states are carving out a place for a right to water. Being one of those rights that are subject to progressive realisation, the challenge is how to determine whether a given measure violates the obligations inherent in progressively realizing the right to water. Definitional problems already beset the term with the principle of non-retrogression already under immense criticism.

The introduction of the policy of privatisation in the water sector with all its implications for cost recovery and profitability in many African states, especially when viewed against the backdrop of absolute poverty and the lack of basic services especially in the rural areas brings on newer challenges to progressively realizing the right to water. What clearly comes out is that the African situation as exemplified by the case studies is unique and may not be completely amenable to privatisation as a measure to progressively realise the right to water. The lack of water infrastructure and the high levels of poverty combine to make an investment in water delivery both fairly expensive and very risky for a private business, whose aim is to maximise profitability with minimum input. The situation in Africa certainly begs for more innovative approaches to realising the right to water in a sustainable manner. While an outright treatment of water as a social good would have serious, negative long term implications for progressive realisation, the perception of water as a purely economic good is equally defective. The former perception held sway before the wave of privatisation and saw states heavily subsidising water delivery and the latter was ushered in by privatisation which emphasised cost recovery and profitability. An absolute reliance on one method has not seemed to work, but both approaches certainly have elements in them worthy of consideration. It might not be unreasonable to suggest an approach based on a 'mix and match' of the two. While privatisation may not be desirable for the poor, it really would be unfair to subsidise those who can afford to pay for water delivery.

Progress in bringing water to the over one billion people in the developing world without access has been very slow, with the result that millions continue to die each year from drinking unsafe water. Progressive realisation in practical terms is continuously reducing this number until every individual's water needs are met. This implies that there is an urgent need for an innovative approach to ensure the fulfilment of this obligation.

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