

**The Impact of Privatisation of Water Supply and Services on the fulfilment  
of Human Water Rights in selected Developing Countries**

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degree Mphil (Law) in the Faculty of Law, University of the Western Cape**



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## DECLARATION

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I declare that ‘The Impact of Privatisation of Water Supply and Services on the fulfilment of Human Water Rights in selected Developing Countries’ is my own work, that it has not been submitted for any degree or examination in any other tertiary institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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## Key Words

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Water, Human Rights, Right to Water, Privatisation, Liberalisation, Southern Africa, International Law, Regional Law, International Financial Institutions, Multinational Water Companies



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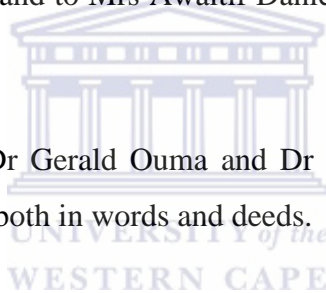
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## **ABBREVIATIONS / ACRONYMS**

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BOT	Build Operate Transfer
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CESR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CHR	Commission on Human Rights
DWAF	Department of Water Affairs and Forestry
DPLG	Department of Provincial Government and Local Government
UNECE	United Nations Economic Commission for Europe
EU	European Union
GATS	General Agreement on Trade in Services
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
ICWE	International Conference on Water and the Environment
IUCN	The World Conservation Union
LDCs	Least Developed Countries
PPP	Public Private Partnership
MDGs	Millennium Development Goals
MNC	Multinational Corporation
NWRMR	Namibian Water Resources Management Review
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
WSS	Water and Sanitation Services
WSSP	Water Services Development Plan

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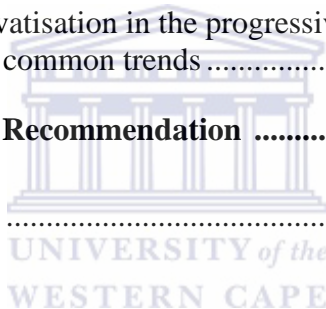
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## Chapter One

### Introduction

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#### 1.1 Background

Water is the basis of life and one of the most precious natural resources, making a critical contribution to human health and the well-being of all societies. Access to sufficient, safe and affordable water is vital for human development.. More than 2.4 million people, mostly children, die annually from water related diseases due to the absence of a safe water supply.<sup>1</sup> Despite the importance of water to the life of human beings and the environment, the right to water is not explicitly recognised in the International Bill of Human Rights.<sup>2</sup> It has been argued that access to water can be characterised as a right that is subordinate and necessary to achieve primary human rights recognised by the international human rights instruments, such as the right to life,<sup>3</sup> food<sup>4</sup> and health. Nevertheless, more recently, human rights instruments are increasingly recognising water as a human right.<sup>5</sup> The UN Committee on Economic, Social and Cultural Rights has also adopted General Comment No. 15, which discusses the right to water. According to the Committee, “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.<sup>6</sup> Notwithstanding that, there is no clearly defined and generally agreed upon and enforceable right to water.<sup>7</sup>

#### 1.2 Statement of the Problems

Securing safe and reliable water and sanitation services is one of the leading challenges hampering sustainable development. About 1.2 billion people lack access to clean drinking

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<sup>1</sup> Gleick, P. H., “the human rights to water”, (1999) 1(5) *Water Policy* 487-503.

<sup>2</sup> The International Bills of Human Rights include the UDHR, the ICCPR and CESCR. See Chapter two, pg 12-18.

<sup>3</sup> International Covenant on Civil and Political Rights (ICCPR), Art. 6.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 12.

<sup>5</sup> For a list of international declarations and resolutions which recognise the right to water (which include *inter alia*: Universal Declaration of Human Rights; Mar del Plata Declaration, UN Water Conference, 1977; Programme of Action of the International Conference on Population and Development, Cairo, 1994; Agenda 21, UN Conference on Environment and Development, 1992; Stockholm Declaration, UN Conference on the Human Environment, 1972; Rio Declaration on Environment and Development, UN Conference, 1992; Habitat Agenda, UN Habitat II Conference in Istanbul, 1996; Rome Declaration on Food security, 1996; Johannesburg Plan of Implementation of the World Summit on Sustainable Development, 2002) see, *inter alia*: [www.fian.org](http://www.fian.org); the Global Water Partnership at: [www.gwp.org](http://www.gwp.org); the World Water Council at: [www.wwc.org](http://www.wwc.org).

<sup>6</sup> Committee on Economic, Social and Cultural Rights, *The right to water: Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*, General Comment no 15 (E/C.12/2002/11).

<sup>7</sup> Amy Hardberger., “Life, Liberty, and the Pursuit of Water: Evaluating Water as a human right and duties and obligations it can creates,” (2005) 4 *NW.U.J. INT’L Hum.RJT* 331.

water and 1.2 billion people are without access to adequate sanitation.<sup>8</sup> About 80% of all diseases in developing countries are water-related, leading to an estimated 1.7 million deaths each year.<sup>9</sup>

The Dublin Principles<sup>10</sup> recognise that fresh water is an important commodity to which every human has the right to claim an essential minimum amount - the amount necessary to sustain life and meet basic sanitation needs. For human survival, the absolute minimum daily water requirement is only about 5 litres per day, whereas the daily requirement for sanitation, bathing, and cooking, as well as for assuring survival, is about 50 litres per person (equivalent to about 20 m<sup>3</sup> per year).<sup>11</sup>

In the 1980s (the International Drinking Water and Sanitation Decade), intensive efforts were made to extend access to water. Despite that, many developing countries cannot provide even the minimum daily water requirements. Peter Gleick notes that billions of people lack access to this basic requirement and close to 62 countries, which are home to more than a third of the world's population,<sup>12</sup> reported an average domestic water use that is below the 50 litre minimum.<sup>13</sup> This shows the serious problems related to the distribution and sanitation of water faced by many countries around the world. This is a situation that many believe will evolve into a full blown "water crisis" in the near future, with implications for human security in large parts of the world, particularly developing countries.<sup>14</sup>

Many of the challenges mentioned above are seen, to some extent, as an unfortunate legacy of poor public sector management of water supply and services. To meet these challenges, many countries are considering different options for managing water resources and the provision of water services. One of the options that is considered in many countries is the adoption of cost recovery policy and privatisation of water services, privatisation may take different forms; partnership between public and private institution, leasing of business rights by public sector to private enterprises, outsourcing or contracting out specific activities to

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<sup>8</sup> UN World Water Report, (2<sup>nd</sup>) presented on 22 March, 2006 during the World Water Forum in Mexico.

<sup>9</sup> WHO, *Right to Water*, p.6(2003), available at: [www.who.org](http://www.who.org) and [w.unhchr.ch/html/menu2/6/who\\_ohchr.pdf](http://w.unhchr.ch/html/menu2/6/who_ohchr.pdf). see note 1 above.

<sup>10</sup> Statement from the International Conference on Water and the Environments Dublin 1992.

<sup>11</sup> Dublin Statement (International Conference on Water and the Environments) 1992 Principle 4.

<sup>12</sup> See Gleick, P.H., "The human rights to water", (1999) 1(15) *Water Policy*. 487-503.

<sup>13</sup> Ibid.

<sup>14</sup> Gleick, P., *The privatisation of water and water systems* in P. Gleick, ed., *The World's Water: the Biennial Report on Freshwater Resources*, Island Press: Washington D.C.

private actors or even transferring the management of water services or activity from government to the private sector.<sup>15</sup>

In 1992, both the Conference on Water and the Environment in Dublin<sup>16 17</sup> and the United Nations Conference on Environment and Development in Rio de Janeiro<sup>18</sup>, emphasised that water development should involve all “stakeholders” including the private sector and non-governmental organisations.<sup>19</sup>

However, many have expressed their reservations about the privatisation of water services. The international financial institutions’ decision to promote private provision of water services has been increasingly challenged by a number of academics, including Gleick (2002),<sup>20</sup> Finger and Allouche (2002),<sup>21</sup> Budds and McGranahan (2003),<sup>22</sup> and social movements.<sup>23</sup> There has been an increasing feeling of discontent and active resistance against privatisation in developing countries and developed countries alike<sup>24</sup>. It is often argued that private provision of water services routinely increases the prices of water services while rarely expanding the service coverage to those who lack access to clean water.<sup>25</sup> It is argued that the economic benefits of privatisation have not been achieved and that the social impacts of privatisation were not thoroughly analysed, especially in relation to the impact on the poor.<sup>26</sup> The absence of regulatory mechanisms is also often raised as one of the major problems.

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<sup>15</sup> There has been a rapid growth in the privatisation of essential services around the world based on the belief that the private sector can deliver growth and efficiency more effectively than the public sector, which has gained prominence in recent times. For literature on privatisation in developing countries see McDonald, David A & Ruiters, Greg., *Theorising Water Privatisation in Southern Africa*, in David A McDonal & Greg, Ruiters (eds.) *The Age of Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005. See Roth, G., *The private provision of public services in developing countries*. See also Bond, P., and Greig Ruiters, “Water Privatisation in SADC: The State of the Debate”, 2001, amongst others.

<sup>16</sup> Dublin Statement ( International Conference on Water and the Environment), 1992, Principle 4

<sup>17</sup> Dublin Statement in 1992 recognises water as an economic good. Principle 4 at 9 says, “Water has an economic value in all its competing uses and should be recognised as an economic good.”

<sup>18</sup> Rio Declaration on Environment and Development (1993) Principle 1 and 2.

<sup>19</sup> World Bank, *Water resources sector strategy: Strategic directions for World Bank engagement*. World Bank: Washington D.C, (2004).

<sup>20</sup> See note 14 above.

<sup>21</sup> Finger, M. & J. Allouche., *Water Privatisation: Trans-national corporations and the re-regulation of the water industry*, Spon Press: New York, 2002.

<sup>22</sup> Budds, J. & G.McGranahan, “Are the debates on water privatisation missing the point? Experiences from Africa, Asia and Latin America.” (2003) *Environment & Urbanization* 15, 2: 87-113.

<sup>23</sup> For example, Social movement in South Africa include: Coalition Against Water Privatisation.

<sup>24</sup> Kessler, T., “The pros and cons of private provision of water and electricity services”. Citizens’ Network on Essential Services. Website: [www.servicesforall.org/html/policy\\_toc.shtml](http://www.servicesforall.org/html/policy_toc.shtml). 2004.

<sup>25</sup> Petrella, R., *The water manifesto: Arguments for a world water contract*, Palgrave: New York, 2001.

<sup>26</sup> Luoma, J.R., “The water thieves”. (2004) *The Ecologist* 52-57.

### **1.3 Research Objectives**

The general objective of this research is to examine the impacts of privatisation of water supply and services on the fulfilment of human water rights, drawing on three case studies, South Africa, Namibia and Argentina to illustrate some ways in which the right to water has been implemented in their respective legislative frameworks, to assess some of the key challenges and progress that has been made in ensuring the right to water, and to examine the possible effect of privatisation in a progressive realisation of the human right to water.

#### **The specific objectives of this research are:**

- 1) to undertake an appraisal of the right to water from a human rights perspective and to determine the obligation imposed on states and non-state actors.
- 2) to assess if a human rights law approach to water would support or oppose the privatisation of water supplies and services.
- 3) to assess the existence of human rights to water in legislative and policy framework of the three selected countries and to appraise the impact of privatisations and cost-recovery policies in progressive realisation of human rights to water.

### **1.4 Rationale for Research**

The research aims at identifying such progress as has been achieved in implementing laws and policies on the human right to water in selected countries. It will specifically examine some of the implications of the constitutional right to water, enquire whether the legislative framework in these selected countries has covered the question of human water rights, and assess whether policies of privatisation of water are consistent with the selected countries' constitutional obligations relating to human rights. The research will also assess the debates that are currently being generated in the field of human rights to water and water provision.

The comparative analysis of water regulatory frameworks will be made between the following countries: Namibia, South Africa and Argentina. The aim to use these three countries as case studies stems from the fact that they are parties to the international human rights instruments that guarantee the right to water. Other reasons for the selection of these three countries include the coverage of different continents; different stages of development. Furthermore, all the selected countries have privatised water supply and services.

Finally, the concluding remarks will stress the impact of privatisation of water supply and services in the progressive realisation of the human right to water. These conclusions will highlight the dilemma entailed in the move to adopt cost recovery policies and privatisation, and prospects for human water rights, drawing on international legal instruments, international practices, comparative analysis, and case studies.

### **1.5 Theoretical Assumptions**

Water policies and legislation at all levels are shaped by various actors, including governments, interest groups, and social movements, international financial institutions such as the World Bank, the International Monetary Fund, regional banks such as African Bank and multinational water companies.

The Privatisation of water is one of the most contentious issues. The debate centres on two fundamentally opposing approaches. On one side of the debate is the idea of managing water as an economic good. According to this approach, price functions as the main mechanism that guides decisions on allocation, distribution and consumption. Those who support this view argue that the private sector will improve efficiency, increase the extension of service,<sup>27</sup> and create market competition, which increases efficiency and yields a decrease in overall costs.<sup>28</sup> Furthermore, supporters of privatisation argue that privatisation of water services decreases corruption because a privatised water services provider is separate from the government regulator and thus receives more scrutiny.<sup>29</sup> They also stress that privatisation brings in private investment and direct user charges, which will relieve governments from budget deficits.<sup>30</sup> Those advocating for the privatisation of water supply and services include international financial institutions<sup>31</sup> (the World Bank, the International Monetary Fund, and

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<sup>27</sup> See Bond, P., "An answer to marketization: decommodification and the assertion of rights to essential services, (2002) *Multinational Monitor*, July-August (14-17).

<sup>28</sup> Chirwa, D., Socio-Economic Rights and Privatisation of basic services in South Africa, A theoretical framework', *ESR Reviews, Economic and Social Rights in South Africa*, a quarterly publication by the Community Law Centre, University of the Western Cape. See Bond, P., 2002.

<sup>29</sup> Ibid.

<sup>30</sup> See McDonald, D.A. and John Pape., *The Theory of Cost Recovery; Cost Recovery and the Crisis of Services Delivery in South Africa*, Zed Press: London and HSRC Publishers, 2002.

<sup>31</sup> The term "international financial institution" refers to public funding agencies that lend money to developing countries.



regional banks like the African Bank and Asia Bank), bilateral donors, professional associations, multinational water companies and others.<sup>32</sup>

Privatisation is the process of subjecting a good or services to economic market mechanism.<sup>33</sup> The international financial institutions and most governments that support privatisation base market decisions on neoliberal theory. The neoliberal theory, as expressed by Milton Friedman,<sup>34</sup> states that an efficient market system is based on an individual rationally seeking to maximise their utility and companies maximising profit through market choice. He says that this theory is based on competition and choice.<sup>35</sup>

The most popular version of the neoliberal theory is the so-called “third way.”<sup>36</sup> The term was popularised by Anthony Giddens. According to him, third way combines “social solidarity with a dynamic economy,” which necessitates decreasing the size of the national government. This particular perspective uses the same neoliberal values and proposes that market mechanisms are a reasonable solution to developmental problems.<sup>37</sup>

The international financial institutions have followed the ideological shift away from promotion of neoliberalism and towards the third way. This is evident in their use of words. In the 1980s, the international financial institutions promoted the terms “deregulation, liberalization, and privatisation”. Since the mid-1990s, however, it is terms like “stakeholder, partnership, and participation” that have been associated with development.<sup>38</sup>

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<sup>32</sup> See “Globalization Challenge Initiative (GCI), IMF and World Bank Push Water Privatisation and Full Cost Recovery on Poor Countries”, 2001, at <http://www.citizen.org/documents/IMF-WB%20promote%20privatisation.pdf>; Halifax Initiative, World Bank Fact Sheet—Water Privatisation, at [http://www.halifaxinitiative.org/index.php/Issues\\_WB\\_BondBoycott/535](http://www.halifaxinitiative.org/index.php/Issues_WB_BondBoycott/535).

<sup>33</sup> Feigenbaum, H.B. & J.R. Henig., 1997. “Privatisation and political theory”. (1997) 50 (2) *Journal of International Affairs* 338-355.

<sup>34</sup> Friedrich August von Hayek and Milton Friedman in the mid-1970s received the Nobel Prize in Economics for advocating for the principles of neoliberal theory: see Gray, J., *Liberalism*. University of Minnesota Press: Minneapolis, 1986 see also Merquior, J.G., *Liberalism, old and new*. Twayne Publishers: Boston, 1991. This began the popularisation of neoliberal theory led by Prime Minister Margaret Thatcher and President Ronald Reagan to adopt vast neoliberal reforms within their countries in the 1980s (Feigenbaum, H.B. & J.R. Henig., *Privatisation: Trans-national corporations the regulation of the water industry*. Spon Press: New York, 1997

<sup>35</sup> Merquior, J.G., *Liberalism, old and new*. Twayne Publishers: Boston, 1991.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Macgregor, S., “Welfare, neoliberalism and new paternalism: Three ways for social policy in late capitalist societies”. (1999) 67 *Capital & Class* 91-118.



Those who oppose privatisation of water supply and services contend that water is a common good and should not be in private hands. They emphasize that water is not like any other resource, that it is the essence and need of life itself. Based on this, they argue that water should not be treated like a commodity based on market principles.<sup>39</sup> They claim that the private sector cannot apply just criteria for this basic need and that obligation to provide this vital service must therefore be left to the state. They argue that, those who are excluded from water services do not have other safe public options. The champions of this position include civil societies, unions and a number of academics.<sup>40</sup> There are numerous examples of the private provision of water services that have resulted in increased exclusion due to services disconnection when people are unable to pay increasing prices.<sup>41</sup>

Yet there are also those that espouse the view that seeks to find a middle ground between the opposing views outlined above. According to the proponents of this view, the dilemma could be solved by considering water both as an economic good and a human right.

### **1.6 Scope of the Study**

A comprehensive detailed review of the literature that is pertinent to the privatisation of water supply and services is beyond the scope of this study. The study will be limited to discussing the interface between human rights to water and the impact of privatisation of water services delivery in the realisation of human rights to water. It seeks to do that by making an assessment of international law, and examining the merits and demerits of privatisation of water supply and services drawing lessons from the case studies. Although the comparison is confined to the three selected countries for case studies, the experience of other countries and regions will be cited to reinforce some points in relevant contexts.

### **1.7 Significance of the study**

This study is important because it brings to the fore issues of the privatisation of water supply and services, highlighting both the merits and demerits from a point of view that acknowledges its urgent implications for Sub-Saharan Africa.

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<sup>39</sup> Ibid. Barlow, Maude and Tony Clarke. 2004. "Water Privatisation: the World bank's Latest Market Fantasy." *Global Policy Forum*. <http://www.globalpolicy.org/soecon/bwi-wto/wbank/2004/01waterpriv.htm> Accessed February 14, 2007. See also Louma, J. R., "The Water thieves. (2004) *The Ecologist* 52-57

<sup>40</sup> See Kessler, T., The pros and cons of private provision of water and electricity services. Citizens Network on Essential services. [www.servicesforall.org/html/policy\\_tok.shtml](http://www.servicesforall.org/html/policy_tok.shtml). [accessed 20 September 2009].

<sup>41</sup> See Bond, P.& Greg Ruiters., 2001. "Water Privatisation in SADC: The State of the Debate, Environmental Monitoring Group, Cape Town, 2001. See also chapters 4 to 7 on the impact of privatisation of water supply and services on selected countries.

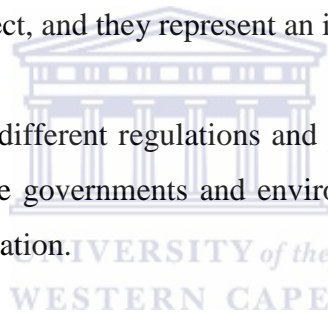
The study attempts to draw lessons from the experiences of the selected countries from different continents in order to highlight some of the potential opportunities and pitfalls presented by the privatisation of water supply and services.

The comparison between different countries as regards water legislation provides an important insight into the potential risks and benefits that are associated with the privatisation of water supply and services in the progressive realisation of the human right to water.

### **1.8 Research Methods**

This research has been based on a review and analysis of relevant literature in the field of study. Primary sources as international law instruments in the area of socio-economic rights have been relied on for the purpose of delineating the right to water. I also assessed various regional and domestic instruments, international treaties and declarations, and court cases that are relevant to the subject. A number of books and journals have appeared in the last few years on this highly debated subject, and they represent an important point of reference.

In order to explain critically the different regulations and policies of different countries, the official websites of the respective governments and environmental institutions provided me with invaluable sources of information.



### **1.9 Overview of the Chapters**

**This study is divided into eight chapters**

**Chapter One:** chapter one sets out the introduction and the problem statement, the rationale for the research, and theoretical assumptions. It highlights the scope and significant of the research and presents a chapter outline.

**Chapter Two:** chapter two examines the human water right, and assesses existing sources of the human right to water in binding and non-binding legal instruments including international, regional and local agreements. The chapter examines the role and obligation of the international community and states in the progressive realisation of the human right to water.

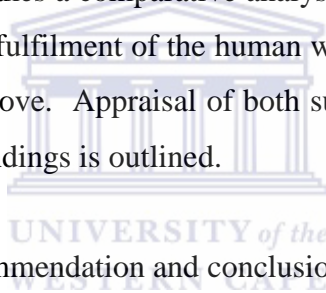
**Chapter Three:** chapter three examines privatisation, assesses the trend of privatisation of water supply and services, explores the international financial institutions' influence and involvement in the delivery of water resources (IMF, World Bank), identifies the link

between human rights and privatisation, and finally makes an appraisal of the impact of privatisation on the fulfilment of the human right to water.

**Chapters Four, Five and Six:** these chapters appraise the impact of privatisation of water supply and services in the fulfilment of the human right to water in Namibia, South Africa and Argentina respectively. The chapters review the legislative frameworks of each country to establish the existence of the human right to water and to assess if their privatisation policies are consistent with their constitutional obligation relating to social, economic and human rights. The chapters review the privatisation of water supply and services in all the selected countries, examining briefly the successes and failures in private provision of water supply and services. Finally these chapters spell out the impact of privatisation in the progressive realisation of the human right to water in all the selected countries.

**Chapter Seven:** chapter eight makes a comparative analysis of the impact of privatisation of water supply and services on the fulfilment of the human water right in the selected countries named in chapter's four to six above. Appraisal of both success and failure stories will also be made and a summary of the findings is outlined.

**Chapter Eight:** evaluation, recommendation and conclusion.



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## Chapter Two

### Appraisal of the Existence of the Human Right to Water within International Human Rights Law

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#### 2.0 Introduction

This chapter focuses on a human right to water within the existing framework of international human rights law. With the view to achieving this objective, it reviews both binding and non-binding legal instruments, international declarations, and regional and national legal instruments. Furthermore, it examines the obligation of international institutions, states, and multinational corporations in the progressive realisation of the human right to water.

#### 2.1 What is the human right to water?

Is water a “human right”<sup>42</sup> or a “human need”? This has been a major point of contention for the last few decades. Groups representing the interests of multinational water companies and international financial institutions argue that water is merely a need. On the other hand, those in favour of a social model stress the right to have access to water.

The reference to water as a human right or as an essential element of life has been stipulated in several documents dealing with the environment. However, the right to water is not explicitly recognised in any of the international instruments comprising the international Bill of Human Rights, mainly the Universal Declaration of Human Rights of 1948, the International Covenants on Civil and Political Rights, and the International Convention on Economic, Social, and Cultural Rights (ESC Covenant). Despite the absence of such explicit recognition, the UN Committee on Economic, Social and Cultural Rights, in General Comment No 15, recognises the right to water.<sup>43</sup>

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<sup>42</sup> Article 11 of the International Covenant on Economic, Social and Cultural Rights, provides that everyone has a right to an adequate standard of living for himself and his family including adequate food, clothing and housing. The "right to water" was developed in General Comment 15 on the Covenant by the Committee on Economic, Social and Cultural Rights. Such "General Comments" constitute authoritative interpretations of the provisions of the Covenant to clarify the normative contents of rights, states, parties and “other actors” obligations, violations and implementation of the rights at national level (FAO, 2003). The former United Nations Secretary-General, Kofi Annan, said that “access to safe water is a fundamental human need, and therefore, a basic human right, polluted water jeopardizes both the physical and social health of all people. It is an affront to human dignity”. Quoted in World Health Organisation, the Right to Water 6 (2003) visited at [http://www.who.int/water\\_sanitation\\_health/righttowater/en/](http://www.who.int/water_sanitation_health/righttowater/en/).

<sup>43</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 15, The Right to Water*, U.N. Doc. E/C.12/2002/11 (November 26, 2002).

The following section will examine the existence of the human right to water in binding and non-binding legal instruments, international treaties, regional and national instruments in reference to the International Customs and General Principles of Law Recognised by Civilized Nations, as set out by the Article (38) of the Statute of the International Court of Justice.

## **2.2 Legally binding Instruments<sup>44</sup>**

### **2.2.1 International Instruments**

#### **2.2.1.1 UN Charter**

Article 55 of the United Nations (UN) Charter<sup>45</sup> highlights means and promotion of higher standards of living, solutions to international health and related problems, as well as universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion.<sup>46</sup> Given the situation we encounter in today's world, which is characterised by, among other things, population increase, volatile climate change and ultimate water shortages, a right to water may be a necessary avenue to uphold many of these undertakings.<sup>47</sup>

#### **2.2.1.2 The International Covenant on Civil and Political Rights (ICCPR)<sup>48</sup>**

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states:

‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’<sup>49</sup>

One may argue that a narrow interpretation of the right to life would consider intentional denial of access to sufficient water as a violation of the right to life. This is, of course, because water is essential to sustain life. Broadly speaking, however, there are disagreements

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<sup>44</sup> Frans Viljoen, 2007, defined binding as “Bind states on the basis of explicit acceptance by specific states (by becoming parties to treaties, or by implicit acceptance by the community of states (giving rise to customary international law, *Jus Cogens*, and obligation *erga omnes*)” *International Human Rights Law in Africa*.

<sup>45</sup> Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A. Res. 1991 (xviii) 17 December 1964, entered into force 31 August 1965 (557 UNTS 143); 2101 of December 1965, entered into force 12 June 1968 (638 UNTS 308), and 2847 (CCVI) of 20 December 1971, entered into force 25 September 1973 (892 UNTS 119).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> International Covenant on Civil and Political Rights, adopted 16/12/1996; GA Resolution 2200 (xx1), UN, Doc A/6316 (1996) 999 UNTS 171 (Entered into force, 23/03/1976) art. 6(1).

<sup>49</sup> *Ibid.*

on whether the right to life could imply the right to water. Some argue that “the human right to life per se...is a civil right and does not guarantee any person against death from famine or cold or lack of medical attention”.<sup>50</sup> For others, however, the right to life implies the right to fundamental conditions that are necessary to support life<sup>51</sup>. For example, the Human Rights Committee (HRC) has called for an inclusive interpretation of the right to life in a manner that requires states to take positive action to provide the “appropriate means of subsistence” necessary to support life. According to this view, the right to life includes a socioeconomic component and requires positive action by the state. In General Comment 6, the HRC states that:

*[t]he Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life,” cannot properly be understood in a restrictive manner, and the protection of this right requires that state adopt positive measures. In this point the committee considers that it would be desirable for states that are party to covenant to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.*<sup>52</sup> *This imposes on the state a positive obligation to ensure the right to life.*

There are two major advantages that arise from reading the human right to water into the right to life as recognised in the ICCPR. First, the ICCPR is binding on member states. Article 2 (1) of the ICCPR states that “[e]ach state party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.”<sup>53</sup> Second, rights recognised by the ICCPR are protected by an enforcement mechanism that includes a process of international adjudication under the First Optional Protocol. In states that have ratified the Optional Protocol, an individual can bring a complaint against the state before the HRC for violating the ICCPR.<sup>54</sup>

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<sup>50</sup> Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No 15, U.N. ESCOR Comm. On Econo., Soc. & Cultural Rights, CEDAW, CRC.

<sup>51</sup> Ibid.

<sup>52</sup> Human Rights Committee, General Comment No. 6 adopted at the Sixteenth Session (1982) on Art. 6 of ICCPR.

<sup>53</sup> ICCPR Art 12.

<sup>54</sup> Ibid.

### 2.2.1.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>55</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides more relevant rights from which the right to water can be inferred. Article 11(1) of the ICESCR provides that states should recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food.<sup>56</sup> Article 11(2) refers to the obligation of states to ensure the right of everyone to be free from hunger.<sup>57</sup> This includes the obligation of states to take measures to improve methods of production of food by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources. Arguably, the right to water can be inferred from this duty of the state. Article 12 of ICESCR provides that: “The states that are parties to the present covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken . . . to achieve the full realisation of this right shall include those necessary for. . .

- a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness”,<sup>58</sup>

Given the close relation between safe drinking water and infant mortality as well as the link between environmental and industrial hygiene, it could very well be argued that the right to water is implied in Article 12 of the ICESCR.

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<sup>55</sup> International Covenant on Economic, Social and Cultural Rights, (ICESCR) adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966).

<sup>56</sup> Ibid art.11 (1).

<sup>57</sup> Ibid, art.11 (2).

<sup>58</sup> Ibid, art 12 (1), 12 (2a-2d).



#### 2.2.1.4 The (United Nations) Committee on Economic, Social and Cultural Rights (CESCR)<sup>59</sup>

In November 2002, the ICESCR adopted General Comment No. 15 which deals with the right to water. The Committee affirmed that access to adequate amounts of clean water for personal and domestic uses is a fundamental human right of all people. The Committee noted that “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other rights.”<sup>60</sup> Member states “have a constant and continuing duty” to progressively take active steps including developing policies, strategy and actions plans in order to ensure that everyone has access to safe drinking water and sanitation facilities.<sup>61</sup> Art. 2 (2) requires that this should be taken equitably and without discrimination of any kind. The Committee emphasises and states that a party to the ICESCR has the duty to progressively realise, without discrimination, the right to water, which entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses. Realisation of the right to water should be feasible and practicable.<sup>62</sup> The Committee further elaborates that the adequacy of water should not be interpreted narrowly by a mere reference to the volume of water and technologies. Water should be treated as a social and cultural good and not primarily as an economic good. This reflects a shift from market-based policies.<sup>63</sup>

General Comment 15 gives a fairly detailed account of the contours of the right to water and offers the broadest discussion of the right by an international human rights body. Furthermore, General Comment 15 also recognises that water is essential to fulfill rights protected by the ICESCR, such as the right to food and the right to a livelihood.<sup>64</sup> The right to food is closely linked to water availability. This is evident from the fact that around seventy percent (70%) of all fresh water taken from rivers, lakes, and aquifers is put to agricultural

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<sup>59</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 1967. United Nations Economic and Social Council, Committee on Economic Social and Cultural Rights, General Comment No. 15 (2002). The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) 9<sup>th</sup> Session, Geneva, 11-29 November 2002.E/C.12/2002/11.

<sup>60</sup> See General Comment No. 15, The Right to Water (Art. 11 and 12 of the international covenant on economic, social and cultural rights) U.N. Doc. E/C. 12/2002/11, 26 November.

<sup>61</sup> for analysis, see WHO, The Right to Water, 2003, available at [http://www.who.int/water\\_sanitation-health/documents/righttowater.htm](http://www.who.int/water_sanitation_health/documents/righttowater.htm).

<sup>62</sup> General Comment 15,

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.



use.<sup>65</sup> Arguably, the right to water also encompasses having enough water to support food production.<sup>66</sup>

According to General Comment 15, the right to water entails procedural rights, including a right to information about water issues, a right to participate in decisions about water, and a right to effective remedies for violations of the right.<sup>67</sup> These procedural rights have profound implications for decision making about water resources because they require transparency and participation.<sup>68</sup>

### **2.2.1.5 Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979<sup>69</sup>**

The CEDAW obliges state parties to eliminate discrimination against women, particularly in rural areas, in order to ensure that women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”<sup>70</sup>

The right to water under CEDAW encompasses access to both clean water and sanitation. Moreover, it specifically addresses rural women, a group often vulnerable to deprivation of these rights.<sup>71</sup>

Article 14(h) of the CEDAW mentioned that there should be equality between women and men in “. . . sanitation, electricity and 'water supply'." Its purpose was not to establish a “human right to water” but to “prohibit discrimination in water supply” vis-à-vis women. From a legal viewpoint, it may not be correct to consider the mentioning of water as implying a right to water. However, it is a step forward in the direction of codifying water as a human right.

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<sup>65</sup> Gleick, P. H., “the human rights to water”, *The Ecologist* (March) 52-57.

<sup>66</sup> General Comment 15, 6-7.

<sup>67</sup> Ibid, 12.

<sup>68</sup> these rights would imply that if a government wishes to privatise water resources, it must satisfy certain procedural obligations, including a right to public participation, comment, and information, See Sanches-Moreno & Higgins, at 1781.

<sup>69</sup> UN Convention on the Elimination of All Forms of Discrimination Against Women, Committee On Elimination of Discrimination Against Women [CEDAW/C/ERI/CO/# ( Feb. 3, 2006).

<sup>70</sup> Ibid Art. 14 (2) (h).

<sup>71</sup> Ibid.

CEDAW urges state parties to pay special attention to ensuring access to clean water.<sup>72</sup> In a concluding comment for Burkina Faso, the CEDAW Committee recommended that “the access of women to primary health services and drinking water be facilitated.”<sup>73</sup>

#### **2.2.1.6 The Convention on the Rights of the Child (CRC) of 1989**<sup>74</sup>

Article 24 of the CRC provides that a child has the right to enjoy the highest attainable standards of health in order to “combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water.”<sup>75</sup>

A more explicit reference to the right to water comes from Article 24-2(c) of the CRC, which clearly mentions “clean drinking water.” The CRC also emphasises the obligation of states in combating contagious diseases and malnutrition among children. It should be noted that this stipulation was aimed at protecting children, especially in poor countries, from diseases caused by a lack of clean drinking water.

The CRC’s treaty monitoring body, the Committee on the Rights of the Child (CRC committee) has frequently mentioned the right to water, framing it both in the context of health and adequate standards of living. The treaty text refers to the state obligation to ensure “provision of adequate nutritious foods and clean drinking water”.<sup>76</sup> The CRC Committee, in its General Comment 7, places access to water under states’ obligations in order to improve early childhood health and reduce infant mortality.<sup>77</sup>

The right to water, as understood by the CRC Committee, clearly encompasses sanitation and safe drinking water.<sup>78</sup> The CRC Committee conceives of state obligations as including a

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<sup>72</sup>Ibid.

<sup>73</sup> See CEDAW Comm., Concluding Comments of CEDAW: Burkina Faso, 276, U.N. Doc. A/55/39 (Aug. 17 2000).

<sup>74</sup> The Convention on the Rights of the Child (CRC) of 1989. Adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1990.

<sup>75</sup> CRC, Art 24.

<sup>76</sup> CRC, Art 23, art. 24, 2 (c).

<sup>77</sup> CRC Committee., General Comment 7: Implementing Child Rights in Early Childhood, 27, U.N. Doc.CRC/C/GC/7 (2005) (hereinafter CRC General Comment 7).

<sup>78</sup> CRC Concluding Observations Azerbaijan, CRC Concluding Observations Belize; CRC Concluding observations Peru 90, 59.

positive duty to act, and thus has recommended expenditure of money and material resources to ensure access to water and sanitation.<sup>79</sup>

## **2.3 Non-Binding legal Instruments**

### **2.3.1 The Universal Declaration of Human rights (UDHR)<sup>80</sup>**

UDHR was adopted by the General Assembly of the UN in 1948. The Declaration notes in Article 25 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 and necessary social services.....”<sup>81</sup>

Peter Gleick, in his analysis of Article 25, argues that the term “including” shows that the elements listed were not meant to be all inclusive, but merely representative or indicative of the “component elements of an adequate standard of living”.<sup>82</sup> This argument is supported by the fact that not just water but also air does not appear in Article 25. Gleick further argues that “[l]ogic suggest that the framers of the UDHR considered water to be implicitly included as one of the component elements as fundamental as air.”<sup>83</sup>

### **2.3.2 The Stockholm Declaration**

The Stockholm Declaration<sup>84</sup>, which was adopted following the UN Conference on the Human Environment in 1972, states that “the natural resources of earth including air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefits of present and future generations through careful planning or management, as appropriate.”

This declaration includes principles for the protection of the environment. Principle 2 recognises the fundamental right to "an environment of quality that permits a life of dignity

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<sup>79</sup> SEE CRC General Comment 7, 94; CRC Concluding Observations Ghana, 93, 49-50.

<sup>80</sup> Universal Declaration of Human Rights 1948, adopted by the United Nations General Assembly on 10 December 1948.

<sup>81</sup> UDHR .Art. 25.

<sup>82</sup> Gleick, P., The human right to water, (1998) (1) *Water Policy* 487-503.

<sup>83</sup> Ibid.

<sup>84</sup> Stockholm Declaration (United Nation Conference on the Human Environment, 1972).

and well being" and that "natural resources of the earth including . . . Water . . . must be safeguarded for the benefit of present and future generations."<sup>85</sup>

Such a declaration cannot be considered legally binding. While water is mentioned here as a natural resource that should be safeguarded and a “human right” that must be protected, it could be considered as a “soft law” and a prelude to becoming customary law.

### **2.3.3 UN Water Conference, held at Mar del Plata Action Plan. Argentina<sup>86</sup>**

The Action Plan of the UN Water Conference, which was held in Mar del Plata in 1977, was the first UN Water Conference. The primary outcome of that conference was the launching of the international drinking water supply and sanitation decade (1980-1990) under the slogan “water and sanitation for all”. The conference declared that "all people have the right to drinking water in quantities and of quality equal to their basic needs".<sup>87</sup>

This Action Plan states that drinking water is a human right for all people in quantities and quality equal to their basic needs<sup>88</sup>. However, this is a declaration that does not have a binding force. It could be considered “soft law” on its way to becoming customary law, binding to all states, provided that the conditions of international customary law are met. However, it must be noted that it provides clear recognition of water as a human right. Yet even if it is binding, it creates a legal obligation on states only with reference to “drinking water.”<sup>89</sup>

### **2.3.4 Dublin Statement (International Conference on Water and the Environment, 1992)<sup>90</sup>**

Principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: “...it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price.”<sup>91</sup>

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<sup>85</sup> Ibid, Principle 2: “ The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefits of present and future generations through careful planning or management, as appropriate”.

<sup>86</sup> UN Water Conference, Mar del Plata, Argentina, 1977.

<sup>87</sup> Ibid.

<sup>88</sup> Preamble, United Nations, 1977. Report of the United Nations Water Conference, Mar Del Plata. March 14-25, 1977. No E77 11 A 12, United Nations Publication, New York.

<sup>89</sup> Peter H. Gleick, Basic Water Requirements for Human Activities: Meeting Basic Needs (1996) 21 *WATER INT'L* 83.

<sup>90</sup> International Conference on Water and Environment (ICWE) in Dublin, Ireland, 1992, Dublin Statement.

### **2.3.5 Rio Declaration on Environment and Development (1992)<sup>92</sup>**

Principle 1 of the Rio Declaration on Environment and Development (1992) states that human beings are the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature. Principle 2 states that a right to development must be fulfilled so as to equitably meet both developmental and environmental needs of present and future generations.<sup>93</sup>

### **2.3.6 Agenda 21<sup>94</sup>**

Agenda 21, the blueprint of sustainable development, is most probably the primary non-binding international instrument dealing with the environment. Chapter 18 on fresh water notes that a right to water entails three elements: access, quality, and quantity. It is concerned not only with “making certain that adequate supplies of water of good quality are maintained for the entire population of this planet”<sup>95</sup> but also ensuring that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs.”<sup>96</sup>

### **2.3.7 Declaration of Amsterdam, 1992<sup>97</sup>**

The declaration of Amsterdam states that all members of the present and future generations have the fundamental right to a sustainable livelihood including the availability of water in sufficient quantity and quality.<sup>98</sup> Each individual human being, collectivity and entity which has an interest in a water resource has the right to effectively participate in decision making processes concerning activities that may in any way affect water resources.

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<sup>91</sup> Principle 4 of Dublin Statement.

<sup>92</sup> The Rio Declaration on Environment and Development (1992).

<sup>93</sup> Ibid, principle 2.

<sup>94</sup> Report of the United Nations Conference on Environment and Development (1992), Agenda 21.

<sup>95</sup> Ibid, Agenda 21, Para 18.2.

<sup>96</sup> Ibid. Para 18.8.

<sup>97</sup> Declaration of Amsterdam.

<sup>98</sup> Article 1, of Declaration of Amsterdam.

### **2.3.8 Millennium Declaration and Political Declaration of Johannesburg<sup>99</sup>**

Both the Millennium Declaration and the discourses that were adopted at the recent World Summit on Sustainable Development (WSSD) in 2002 in Johannesburg enhance the possibility of linking environmental health with human development goals in the global effort to eliminate poverty. The full implementation of Agenda 21, the programme for further implementation of Agenda 21, and the commitments to the Rio principles, were emphasised at the summit.

### **2.4 The Right to Water at Regional and National Level.**

This Section will examine relevant regional human rights instruments including the African Charter on Human and People's Rights<sup>100</sup> and the African Charter on the Rights and Welfare of the Child,<sup>101</sup> among others.

#### **2.4.1 Regional instruments**

##### **2.4.1.1 African Charter on Human and People's Rights (1981)<sup>102</sup>**

The African Charter on Human and People's Rights notes that "all peoples shall have the right to a general satisfactory environment favourable to their development."<sup>103</sup> Combined with the provision of Article 16 according to which states shall take the necessary measures to protect the health of their people, and that states have a duty to protect and provide safe drinking water for their citizens.

##### **2.4.1.3 The African Charter on the Rights and Welfare of the Child (1990)<sup>104</sup>**

The African Charter on the Rights and Welfare of the Child states that "every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health"<sup>105</sup> and state

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<sup>99</sup> The World Summit on Sustainable Development (WSSD) 2002, adopted Millennium Declaration and Political Declaration of Johannesburg, Agenda 21. See United Nations Millennium Declaration, G.A. Res. 55/2, 4 U.N. Doc.A/RES/55/2 (Sept. 8, 2000) at <http://www.un.org/millennium/declaration/ares552e.htm>.

<sup>100</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force OCT. 21, 1986.

<sup>101</sup> African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 91990), entered into force NOV. 29, 1999.

<sup>102</sup> Ibid.

<sup>103</sup> Art 24 of the Africa Charter on Human and people's Right, adopted June27, 1981, OAU, entered into force October 21, 1986.

<sup>104</sup> Art. 14(1) of the African Charter on the Rights and Welfare of the Child, OAU, 1990, entered into force November 29, 1999.

<sup>105</sup> Ibid.

parties are required to take measures “to ensure the provision of adequate nutrition and safe drinking water.....”<sup>106</sup>

#### **2.4.1.4 European Council of Environmental Law (ECEL) Resolution on the Right to Water (2000)<sup>107</sup>**

The Committee of Ministers of the Council of Europe, in October 2001, adopted the European Charter on Water Resources which replaced the European Water Charter of 1968. The Committee recommends to its member states to take note of the charter and apply its principle in the framework of their national policies. Paragraph 5 of the Charter proclaims the right of everyone “to a sufficient quantity of water for his or her basic needs”. The recommendation also notes that “international human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families”. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.”<sup>108</sup>

#### **2.4.1.5 The UN Economic and Social Council’s Economic Commission for Europe (ECE) Protocol<sup>109</sup>**

Adopted in October 1999, this is the first major international legal approach for the prevention, control and reduction of water-related diseases in Europe. As a Protocol on Water and Health,<sup>110</sup> the protocol specifically states in Article.6, that, “[p]arties shall pursue the aims of: a) access to drinking water for everyone; b) provision of sanitation for everyone”.<sup>111</sup> It also mentions the three central aspects of a human right to water by stating that “equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion”.<sup>112</sup>

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<sup>106</sup> Ibid. Art 14 (2) (c).

<sup>107</sup> The European Council of Environmental Law (ECEL) Resolution on the Right to Water (2000) was adopted in October, 2001.

<sup>108</sup> Ibid, Para 5.

<sup>109</sup> The UN Economic and Social Council’s Economic Commission for Europe (ECE) Protocol to the Protocol on Water and Health to the 1992 Convention on the Protection and Use of the Transboundary Watercourses and International Lakes, 18 Oct 1999, entry into force 4 August 2005.

<sup>110</sup> Ibid, art. 6.

<sup>111</sup> Ibid. art. 6 (1).

<sup>112</sup> Ibid. art. 5 (1).



#### **2.4.1.6 Protocol of San Salvador<sup>113</sup>**

Article 11 of the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights of 1988, provides that “everyone shall have the right to live in a healthy environment and to have access to basic public services”.<sup>114</sup> Although water is not mentioned explicitly, the term “basic public services” could arguably be defined to include access to water.

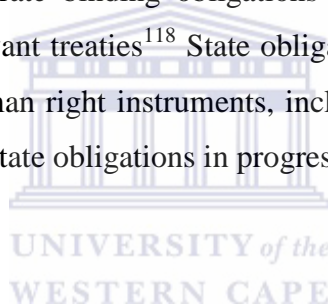
#### **2.4.2 National Instruments**

##### **2.4.2.1 The right to water guaranteed by some constitutions**

Several governments have included rights to water in their Constitution, legislation and policies. In Africa amongst the nation that have guaranteed rights to water in their constitution, include South Africa,<sup>115</sup> Uganda<sup>116</sup> and Ethiopia.<sup>117</sup>

#### **2.6 Obligations of states in progressive realisation of human right to water**

Human rights traditionally generate binding obligations on governments, particularly for states that are parties to the relevant treaties<sup>118</sup> State obligation for the human right to water can arise under a number of human right instruments, including the ICESCR, CEDAW and CRC. This section discusses the state obligations in progressive realisation of the human right to water.



At the international level, states are required to cooperate and assist each other in order to ensure the realisation of the right to water in all places and for everyone. The UN Committee on Economic, Social and Cultural Rights has noted that Articles 2, 11 and 23 of the ICCPR recognise the essential role of international cooperation and assistance and require states to take joint and separate action to achieve the full realisation of the right to water.<sup>119</sup> In doing that, however, they must refrain from polluting shared water resources such as trans-boundary rivers or lakes as well as altering significantly the natural flow or debit of

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<sup>113</sup> The Protocol of San Salvador is an additional Protocol to the American Convention on Human Rights. The San Salvador Protocol reinforces the coverage provided by the Convention in the area of economic, social and cultural rights.

<sup>114</sup> Report on the Human Rights Situation in Brazil by the inter-American Commission on Human Rights, at [http://www.cidh.oas/Countryrep/brazil-eng/chapter %202%.htm](http://www.cidh.oas/Countryrep/brazil-eng/chapter%202%.htm).

<sup>115</sup> South Africa, Constitution of 1996 (Act 108 of 1996).

<sup>116</sup> Constitution of Uganda, 1995, Art. 14.

<sup>117</sup> Ethiopian Constitution, 1998, Art. 90 (1).

<sup>118</sup> Steven R. Ratner., “Corporation and Human Rights: A Theory of Legal Responsibility”, (2001) *Yale Law Journal*, 443, 449.

<sup>119</sup> General Comment 15, Paragraph 30.



watercourses which will deprive the population of another country of their access to water.<sup>120</sup> Similarly, in General Comment 8, the Committee has noted that states must refrain from jeopardising by means of economic sanctions the “quality of food and the availability of clean drinking water”.<sup>121</sup>

States have the obligation to realise economic, social and cultural rights progressively under the ICESCR.<sup>122</sup> Similarly, the ICESCR Committee identified nine core obligations in General Comment 15 that have “immediate effect.”<sup>123</sup> These include ensuring access to a minimum amount of water for personal and domestic uses, ensuring non-discrimination in access to water, adopting water programmes designed to protect vulnerable and marginalised groups, and addressing water-borne diseases, particularly through sanitation programmes. No limitations are placed on how states must meet this obligation. However, the obligation imposed on states by the ICESCR is put at three levels: primary, secondary, and tertiary.<sup>124</sup> These include the obligations to respect and protect at the primary level and fulfil at tertiary level. General Comment 7 to the CRC places access to water under states’ obligations to ensure access to health care and nutrition in order to improve early childhood health and reduce the infant mortality level.<sup>125</sup> This obligation requires governments to ensure that the activities of their institutions and officials do not interfere with a person’s access to water.

### **2.6.1 The Obligation to respect**

The obligation to respect<sup>126</sup> requires states to refrain from interfering directly or indirectly with the enjoyment of the right to water. This requires the governments to ensure that the activities of their institutions and officials do not interfere with a person’s access to water. For example, a public company may pollute a drinking water source or an individual, a municipality or a local authority may unfairly disconnect the water supply of a community. In such cases, it is the state’s duty to adopt necessary laws and regulations to prevent these

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<sup>120</sup> UN Convention on the Law of Non-Navigational Uses of Watercourses, 1997, Art 5, 7 and 10.

<sup>121</sup> UN Committee on Economic Social and Cultural Rights, General Comment 8 on the relationship between economic sanctions and respect for economic and social rights. E/C. 12/1997/8, CESCE 1997. Para. 3

<sup>122</sup> ICESCR, art. 2(1); General Comment 15. The Covenant provides (in Article 2) that all state that are party is obliged to ‘..take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adaptation of legislative measures’,

<sup>123</sup> General Comment 15.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> General Comment 15.

interferences and to render possible a judicial remedy in case of a violation of the right to water. States' duty to respect also means that they must ensure maintenance of all existing access to water.<sup>127</sup>

### **2.6.2 The Obligation to protect<sup>128</sup>**

The obligation to protect relates to the duty of the states to prevent third parties from interfering with the enjoyment of the right to water. Third parties include individuals, government departments, municipalities and corporations. Hence states have an obligation to protect the access to water of the persons under their jurisdiction.

The duty to protect requires states to prevent third parties from interfering in any way with the enjoyment of the right to water.<sup>129</sup> Interference by third parties may include pollution of water sources, denial of access to water, unreasonable increase of prices for water services by private services providers or compromising of equal, affordable and physical access to sufficient, safe and acceptable water. States have therefore a duty to take necessary legislative and other measures to restrain interference.<sup>130</sup>

The duty of the state to protect by regulating third party activities becomes even more important in areas where water distribution services are handled by private undertakers.<sup>131</sup> If private entrepreneurs are not carefully regulated, they will tend to neglect the basic water requirements of the most disadvantaged parts of the population as the latter may be unable to pay for the services even when these are provided at a very low cost. Therefore governments or public authorities must take measures to ensure that the sufficiency, safety, affordability and accessibility of water are maintained by private operators.<sup>132</sup>

### **2.6.3 The Obligation to promote**

The obligation to promote requires a state to take steps to ensure that there is suitable education on the hygienic use of water, the protection of water resources and methods of minimising water wastage. The obligation to provide requires a state to provide the right [to

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<sup>127</sup> *ibid.*

<sup>128</sup> General Comment 15, 7; see also general WHO, 25 Questions and Answers on Health and Human Rights 17 (2002).

<sup>129</sup> *Ibid.*, General Comment 15, Paragraph 23. The CESCR, recognising that this right is relevant in private relations, has stated that party states must "Prevent third parties" including individuals, corporations and other entities and agents acting under their authority from interfering in any way with the enjoyment of the right to water. GC, 14.para. 23.

<sup>130</sup> *Ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> WHO (2002) stated that a state must be aware of its roles and responsibilities in working with non-state parties in order to ensure that vulnerable populations have access to the services they need.

water] when individuals or a community are unable to realise the right themselves for reasons beyond their control. This may be the case for rural communities who do not have access to piped water in or close to their homes. In such a situation, it is the duty of the public authorities to progressively extend safe water distribution towards these areas.<sup>133</sup>

#### **2.6. 4 The obligation to fulfil**

The obligation to fulfil<sup>134</sup> is an obligation for a more positive action to facilitate and provide access to adequate water for those who do not have it. This requires governments to take active steps to ensure that everyone can enjoy the right to water.

General Comment 15 imposes upon states three obligations: to facilitate access to water, to promote the right to water, and to provide water. The obligation to facilitate compels a state to take positive measures to aid individuals and communities to enjoy the right to water. In order to do so, states may, for instance, have to adopt appropriate pricing policies such as free or low-cost water for poorer communities. They must also make necessary legislative and administrative rules adapted to the social, economic and political realities of the country and aimed to facilitate people's access to water.<sup>135</sup>

The duty to provide may be the continuity in access to water. The right to water in a sufficient quantity and quality can be compromised by discontinued access to water. Authorities must therefore take all precautions for an equal and continued access to water. The obligation to provide is a key element of the right to water concerning public institutions such as school and hospitals.<sup>136</sup>

State parties must ensure that water is affordable and adopt measures including the use of a range of appropriate low-cost techniques and technologies, appropriate pricing such as free or low-cost water, and income supplements. Any payment for water services has to be based on the principles of equity, ensuring that these services, whether privately or publicly provided,

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<sup>133</sup> See General Comment No. 9 (1998), Para. 4, and Principle 10 of the Rio Declaration on Environment and Development.

<sup>134</sup> GC No 15 ( "States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services").

<sup>135</sup> The ICESCR, recognising that this right is relevant in private relations, has stated that States Parties must 'prevent third parties'.

<sup>136</sup> WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation: "Meeting the MDG drinking water and sanitation target: a mid-term assessment of progress", 2004. p6.

are affordable for those disproportionately burdened with water expenses compared to richer households.<sup>137</sup>

## **2.7 International obligation in the realisation of the human right to water**

Part 111 of the General Comment No. 15 outlines the international obligations concerning the right to water; this right includes positive<sup>138</sup> and negative<sup>139</sup> obligations, similarly the General comment No. 15 also stresses the fundamental importance of ensuring access to adequate sanitation and States parties obligation to progressively extend safe sanitation services particularly to rural and deprived urban areas, taking also into account rural and urban areas.<sup>140</sup>

In relation to the privatisation of water supply and services, states are advised to avoid infringing on the enjoyment of the right to water by other states and prevent their own citizens and domestic companies from taking such actions. If a company based in one country violates the rights to water in another country, the government of the first country has a legal duty to intervene and prevent future abuses. Furthermore, if resources are available, states should take actions to “facilitate” the right to water in other countries (for instance by providing water resources, technical or financial aid). The ICESCR Committee see these obligations as extending to trade matters and to such state activities as are conducted within membership of international financial institutions such as the World Bank.<sup>141</sup>

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## **2.8 Obligation of Non-State Actors such as Non-Governmental Organisation (NGO) and Corporate obligation in progressive realisation of the human right to water**

In General Comment 15 acknowledges the potential impacts that the policies and actions of actors such as UN agencies, International financial institution (including World Bank and IMF) and international NGO or humanitarian organisations can have upon the right to water of individuals and communities. The impact could either be positive or negative, The

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<sup>137</sup> GC15, 26 & 27.

<sup>138</sup> Positive obligations of State that are parties to Conventions – for instance, to ensure that the right is given due attention in international agreements, or the special responsibility of the economically well developed States parties to provide aid and international assistance to poorer states parties. Part iii General Comment no. 15.

<sup>139</sup> Negative obligations such as refraining at all times from imposing embargoes or similar measures that prevent the supply of water, as well as goods and services essential for securing the right to water. Part iii, GC No1 15.

<sup>140</sup> General Comment No. 15.

<sup>141</sup> General Comment 15 notes that states should respect the right to water when entering into international agreements, and it specifically states that trade liberalisation agreements “should not curtail or inhibit” a country’s capacity to ensure realisation of the right to water, id. 35. It also requests that party states take measures to ensure that the right to water is “taken into account” by the international financial institutions of which those states are members, including the lending policies and credit agreements of the International Monetary Fund and the World Bank. Id.36.

Committee emphasises the important role that they can play in protection, realisation and promotion of the right to water.<sup>142</sup> Furthermore, the General Comment outlines the obligations of non-state actors, this include amongst other things, the obligation to co-operate with States parties in relation to the implementation of the right to water and incorporation of human rights law and principles into both policies, structural adjustment programmes or development projects, likewise, the committee emphasised the need to give priorities to the most vulnerable or marginalized groups of the population in the provision of aid and the distribution and management of supply and services.<sup>143</sup>

In General Comment 9, the Committee recommends that international financial institutions, notably the IMF, the World Bank, and the African Development Bank, should take into account the rights to water in their lending policies, credit agreements, structural adjustment programmes and other development projects.

Does a corporate body have any obligation in the realisation of the human right to water? The UN Global Compact provides an example of norms which encompass a right to water. While none of the ten core principles of the Global Compact state that companies should comply with international human rights norms, which encompass a right to water, at least one large water company refers to the Global Compact in its corporate code of conduct, suggesting some awareness of the Compact in such business.<sup>144</sup>

The Norms on the responsibilities of Transnational Corporations and other business entities with regards to Human Rights, which was approved by the UN's Sub Commission on the Promotion and Protection of Human Rights in 2003 (the UN Draft Norms), offer a revolutionary approach as this seems to provide, at a first glance, greater potential for realising the human right to water.<sup>145</sup> The draft implies the intent to create binding, obligatory human rights obligations for transnational corporations and other business enterprises. The

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<sup>142</sup> General Comment 9, part VI

<sup>143</sup> Ibid.

<sup>144</sup> See General U.N. Global Compact .available at [http://www.unglobalcompact.org/docs/about\\_the/2.0](http://www.unglobalcompact.org/docs/about_the/2.0).

<sup>145</sup> See General ECOSOC, Sub-Committee on the Promotion and Protection Of Human Rights, Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights, Commentary on the Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E./CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003); David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational corporations and Other Business Enterprises with Regard to Human Rights", (2003) *American .Journal of .International Law* 97: .901.

UN Draft Norms offer the promise of holding private companies responsible for human rights violations.

Any of the above-mentioned obligations could be implicated in water privatisation arrangements.<sup>146</sup> For instance, if a state reassigns or contracts water rights traditionally enjoyed by individuals to a private company, and the private company fail to deliver the water supply and services, or disconnect water supply, this contract might constitute a prohibited interference in access to water, thereby violating the duty to respect the right to water.<sup>147</sup> Privatisation arrangements may also affect the duty of the state to protect the right to water since that duty covers states' obligations to protect rights from violations by third parties, such as private corporations.<sup>148</sup> The fundamental meaning of state obligation to protect is that states retain some human rights obligation regardless of privatisation arrangements.<sup>149</sup> General Comment 15 explicitly addresses states' obligations under circumstances where water supply and services are supplied or controlled by third parties. States must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses, an effective regulatory system must be established, in conformity with covenant and general comment, which includes independent monitoring, genuine public participation, and imposition of penalties for non-compliance.<sup>150</sup>

## **2.9 Concluding remarks**

This chapter critically examined the existence of the human right to water in binding and non-binding instruments. The extensive literature search revealed that access to safe drinking water is recognised by the international community as an essential element of life. However, the discussion also reveals that this right has not been clearly defined in international law and has not been expressly recognised as a fundamental human right. A right to water is rather interpreted as an implicit component of existing fundamental human rights although it is expressly included in non-binding international instruments.

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<sup>146</sup> More details on privatisation of water services will be provided in chapter three.

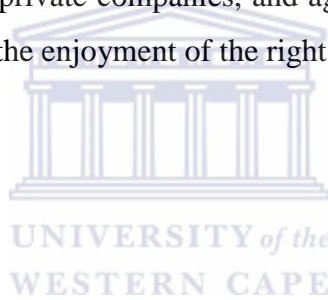
<sup>147</sup> See General Comment 15.

<sup>148</sup> Ibid.

<sup>149</sup> ECOSOC< sub-Commission on the Promotion and Protection of Human Rights, Report of the High Commissioner: Liberalization of Trade in Services and Human Rights, 50, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002 [ hereinafter UNHCHR Liberalization of Trade in Services and Human Rights] (“In human rights terms the need to regulate...is in fact a duty to regulate; the obligation on State to ‘fulfill’ human rights requires States to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realisation of such rights”).

<sup>150</sup> General Comment 15. Paras 30-36.

A key issue on the rights to water was addressed by General Comment 15 of the UN Committee on Economic, Social and Cultural Rights. The Committee stated that there is a human right to water embedded in article 11 of the Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee also emphasises the interdependence between the human right to food in article 11 and the right to life and human dignity enshrined in the International Bill of Human Rights. This recognition of the right to water by the ICESCR Committee is an important step in the right direction. Nevertheless, many questions and practical matters remain unresolved. The status, scope, and content of the right to water have not been fully detailed. Clarifying and further developing the theoretical understanding of the right to water can help both states and the international community to assess options for progressively realising the right to water. However, states are obliged as we have seen above to respect, protect, promote and fulfil this right. They have an obligation to prevent organs of state, individuals, “third parties” private companies, and agents of state under their authority from interfering in any way with the enjoyment of the right to water.<sup>151</sup>



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<sup>151</sup> GC 15, para 23.



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## Chapter Three

### An appraisal of the impact of private provision of water supply and service delivery on the fulfilment of the human water right

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#### 3.0 Introduction

The privatisation is an idea that is gaining strength in Africa and the rest of the world, but it remains controversial. As indicated previously, the debate centres on two fundamentally opposing approaches.<sup>152</sup> On one side of the spectrum is the idea of managing water as an economic good using market-like or market friendly instruments, where prices function as the main mechanism that guides decision on allocation, distribution and consumption. On the other side of the spectrum is the view that considers water as a common good and consequently holds that water should not be left in the hands of the private sector. Water is the essence of life itself and should not be treated as a commodity based on market principles.<sup>153</sup>

This chapter reviews the discussion on the privatisation of water supply and services. It briefly examines privatisation, the trend of privatisation of water supply and services, and processes and methods related to privatisation. It examines links between the human right to water and privatisation. It explores the impact of private provision of water supply and service delivery on the fulfilment of human water rights.

#### 3.1 What is privatisation?

The term privatisation<sup>154</sup> - is a term that is used to convey a variety of ideas, it has been defined to mean 'denationalisation', that is, transferring of the ownership of public enterprise to private hands, it has also been defined as a process which entails a reduction in the role of the government in assets ownership and service delivery and an increase in the role of the private sector in these areas.<sup>155</sup> Privatisation may take different forms: partnership between public and private institution, leasing of business rights by public sector to private

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<sup>152</sup> The term approach as used in this study is interpreted to mean the theory as well as its application in practice.

<sup>153</sup> See chapter one above, page 1

<sup>154</sup> The on-line Oxford English Dictionary defines it as "The policy or process of making private as opposed to public", available at <http://dictionary.oed.com>. The Concise Oxford Dictionary (1995, 9<sup>th</sup> edn.) defines the word 'privatize' as follows "make private, esp. assign ( a business etc). to private as distinct from state control or ownership.

<sup>155</sup> DJ Gayle and JN Goodric., " Exploring the implications of privatisation and deregulations", in DJ Gyale and JN Goodric (eds.) (1990) (1) *Privatisation and deregulation in global persepective* 3.



enterprises, outsourcing or contracting out specific activities to private actors, and management or employment given to private sector.<sup>156</sup>

### 3.2 The trend to privatisation of water supply and services

Private water supplies exist in all developing countries in the form of water vendors at street level. Prior to 1990, there was little privatisation of piped water services in developing countries. Between 1985 and 1990, few contracts existed for water and sewerage projects around the world, with a cumulative capital expenditure in private water services totalling less than US\$1bn.<sup>157</sup> However, during the 1990s, there was an increased interest in water privatisation, which was largely stimulated by donor agency pressures. In 1997, the total figure for private investment had risen to US\$25bn.<sup>158</sup> By the end of 2000, at least 93 countries had privatised some of their piped services.<sup>159</sup>

By the late 1990s, international aid for water and sanitation had fallen slightly compared to aid in the mid 1990s while aid for irrigation, drainage, and hydropower had declined substantially.<sup>160</sup> The World Panel on Financing Water Infrastructure has described the peaks and drops of private investment and bank lending in water and sanitation as part of the general decline in financial crises since the mid 1990s.<sup>161</sup> However, other factors accounting for the decline in water investment have to do with risks that are specific to the water sector.<sup>162</sup>

Due to a widespread perception of public mismanagement of urban water supply and sanitation systems (WSS), there has been a substantial increase in formal private sector participation in recent years. A World Bank database lists 97 different cases where private sector firms have taken on a major role in water supply and services provision in Africa, Asia

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<sup>156</sup> Bond, P., McDonald, D.A and Ruiters, G. "Water Privatisation in SADC: The State of the Debate " No 4, ESR Review pp. 10-13.

<sup>157</sup> A study of World Bank loans between 1996 and November 2002 by the International Consortium of Investigative Journalists reported that the World Bank conditioned loans on the privatisation of water services in about one third of its projects. See, Water Barons- Centre for Public Integrity, *Promoting Privatisation*, Available at [www.projects.publicintegrity.org/water/report.aspx?aid=49](http://www.projects.publicintegrity.org/water/report.aspx?aid=49) visited on 23 October 2009.

<sup>158</sup> Ibid.

<sup>159</sup> Thomas M. Kerr, "Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing", (1995) (19) *Geographical and International Environmental Law Review* 91.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

and Latin America. The increase in privatisation has been largely driven by a desperate need for increased capital investment in water supply and services.<sup>163</sup>

### 3.3 Process and method of privatisation

Privatisation of water services is normally associated with contracts that take different forms, namely leases and management contracts for existing facilities (without new private sector investment), concessions (requiring the private sector to invest in facilities), divestitures (sale by the state of some or all the equity in state owned enterprises) and the Greenfield investments (including Build-Operate-Transfer [BOT] schemes).<sup>164</sup>

### 3.4 Leading multinational water companies<sup>165</sup>

The water sector is dominated by a few international companies. These firms are largely based in France, Germany, and the United Kingdom. They include Suez,<sup>166</sup> Vivendi<sup>167</sup> and Saur from France, and RWE-Thames (Germany, UK). Foremost among them are two French firms, Veolia<sup>168</sup> Environment and Suez. These firms benefit from long and varied experience in the water and wastewater services industry, including experience with concessions, leases, and management contracts. This extreme growth of a handful of private companies has raised great concern. There is a growing fear that they will soon control a huge part of the world's water resources. Up to now, privatisation has been concentrated in poorer countries where

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<sup>163</sup>See World Bank Toolkits for Private Participation in Water and Sanitation, World Bank, Washington D.C. available at <http://rru.worldbank.org/Toolkits/WaterSanitation>, visited on 10 October 2009. Finger M, Allouche J., *Water privatisation, transnational corporations and the re-regulations of the water industries*. Spon: London and New York, 2001 see also Finger M, Allouche J. *The transformation of the global water sector: the role of the World Bank and 'Public Sector TNCs' l'IDHEAP Working Paper 6" 2002.* , Chavanes-pres-renens: Institute of Higher Education and Public Administration.

<sup>164</sup> Finger and Allocuch 2002, 81-82.

<sup>165</sup> See appendix 2 for the table of the leading multinational water companies.

<sup>166</sup> See Suez website at [www.suez.com](http://www.suez.com). A French company that holds 22% of the world water market is combined with the second US operator U-WATER and the British NORTHUMBRIAN. SUEZ specialises in local and municipal water distribution systems. It operates especially in South Africa, Guinea-Bissau and Cameroon. SUEZ is a member of the European Services Forum. It generously sponsored the Johannesburg 2002 World Summit on Sustainable Development and managed to secure several contracts funded by World Bank loans in developing countries.

<sup>167</sup> A French corporation, holding a 36% stake in the world water market, is the biggest conglomerate. It is active in 100 countries, including Burkina Faso, Gabon, Niger, Chad and Kenya According to the Center for Public Integrity, The Vivendi Universal, the parents of Vivendi Environment, reported earning over \$5 Billion in water related revenue in 1990; by 2002 the amount increased to over \$12 billion. See [www.projects.publicintegrity.org/water/report.aspx?aid=49](http://www.projects.publicintegrity.org/water/report.aspx?aid=49) visited on 23 October 2009.

<sup>168</sup> See Veolia website at [www.veoliawater.com](http://www.veoliawater.com).

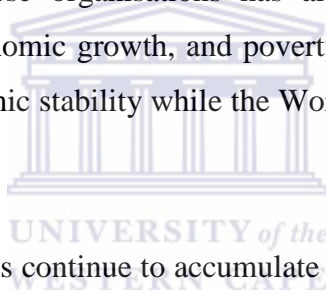
international financials used its leverage to force governments to privatise their water utilities in exchange for loans.<sup>169</sup>

### **3.5 International financial institutions**

The largest of these organisations are the World Bank, the International Monetary Fund (IMF), and regional banks. The regional banks are the African Development Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, and Inter-American Development Bank. All these agencies are called multilateral or international financial institutions.

#### **3.5.1 The World Bank and the International Monetary Fund (IMF)**

Both the World Bank<sup>170</sup> and the IMF<sup>171</sup> were created after World War II by forty-four (44) nations at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire. The purpose of these organisations has always been to promote financial stability, international trade, economic growth, and poverty reduction.<sup>172</sup> The IMF generally gives short-term loans for economic stability while the World Bank gives long-term loans for development.<sup>173</sup>



These global finance organisations continue to accumulate and exercise a great deal of power over the direction and prioritisation of reconstruction and development programmes in countries devastated by war and under-development.

The international financial institutions provide the vast majority of international loans for water development. These loans come with political recommendations and expectations that allow international financial institutions to exercise a great deal of influence over national policy in the countries to which they lend. Their stipulations often require governments to change their policies on water service in order to receive loans. As a result, in the last decade,

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<sup>169</sup> Madeley J., *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor*. Zed: London, 1999.

<sup>170</sup> The World Bank is one of the United Nations' specialised agencies. It is made up of 184 member countries, its mission is to fight poverty and improve the living standard of people around the world, and it provides loans. See [www.worldbank.org](http://www.worldbank.org).

<sup>171</sup> The International Monetary Fund (IMF) is an organisation with 184 member countries, established to create international monetary cooperation, exchange stability and orderly exchange arrangements, and to foster economic growth and employment levels. See [www.imf.org](http://www.imf.org).

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

with few exceptions, water systems in developing countries went from a sector that is fully provided by governments as a public service to a partially privatised sector.<sup>174</sup>

International financial institutions view the private provision of water services as the most realistic option for water services. They argue that there is a wide range of solutions to water problems and private sector involvement is one of them<sup>175</sup>. The World Water Council's analysis of the Third World Water Forum includes the following remarks: "The Second Forum made the notion that water is everybody's business accepted by the whole spectrum of participants, not the exclusive business of governments and water professionals".<sup>176</sup> Thus, the promotion of the private sector is part of the stakeholder language that situates governments as exclusive and stakeholders as inclusive.<sup>177</sup>

It has been argued by the critics of major lending institutions, particularly the public services unions, that the World Bank and its sister organisation, the IMF, have undue influence over the governments of developing countries. The Bank uses the lever of loan conditionality to influence policy-making at a local level. The dispersal of loan funds is conditional upon the implementation of specific policies.<sup>178</sup>

In order to foment support for the private provision of water services, the international financial institutions encourage "stakeholders"<sup>179</sup> in water supply and services to involve themselves in the process of developing water policy. The most prominent non-governmental organisations are the World Water Council<sup>180</sup> and the Global Water Partnership (GWP).<sup>181</sup>

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<sup>174</sup> Skair L., *The Transnational Capitalist Class*. Blackwell: Oxford, 2001, see also David A McDonald & Greg Ruiters "Theorizing Water Privatisation in Southern Africa" in McDonald & Ruiters (eds).

<sup>175</sup> See World Bank., *Approaches to private participation in water services, a toolkit.*, available at [www.http://rru.worldbank.org/Documents/Toolkits/Water/Water\\_Full.pdf](http://rru.worldbank.org/Documents/Toolkits/Water/Water_Full.pdf) visited on 10 October 2009.

<sup>176</sup> See World Water Forum, [www.http://www.worldwatercouncil.org/index.php?id=17](http://www.worldwatercouncil.org/index.php?id=17)

<sup>177</sup> Bakker, K, "The 'Commons' versus the 'Commodity': After-globalization, anti-privatisation and the right to water in the global South", (2007) *Antipode* 39 (3): 430-455.

<sup>178</sup> McDonald, D., *The Bell Tolls of Three: Cost-Recovery, Cut-offs and Affordability of Municipal Services in South Africa*. Human Sciences Research Council (HSRC) Report. Pretoria, 2002.

<sup>179</sup> The Term "stakeholder" is used by international financial institutions to refer to those who can affect water policy, such as private companies, non-governmental organisations and local people. Stakeholder involvement differs from citizen involvement because it includes the private sector in the decision-making process. See [www.rru.worldbank.org/Documents/Toolkits/Water/Water\\_Full.pdf](http://rru.worldbank.org/Documents/Toolkits/Water/Water_Full.pdf).

<sup>180</sup> The World Water Council is not an open group. It charges each organisation from developed countries \$70-\$1000 per year and from developing countries \$250-\$585 per year in order to be part of the visioning process for water policy ([www.worldwatercouncil.org](http://www.worldwatercouncil.org)). In most cases the financial barrier prohibits many small non-governmental organisations and citizens, especially from developing countries, from joining the council. The UN and the World Bank are founding members of the WWC. The council describes itself as "the world's water-policy think tank". It was formed in 1996, is located in France, and has 175 member groups, including

Both of these organisations were created and supported by international financial institutions, including the World Bank, regional development banks, non-governmental aid organisations and transnational water corporations<sup>182</sup> so as to establish and expand privatisation of water supply and services.

### **3.6 Debate over private provision of water services**

There are different groups that are involved in the debate over privatisation of water services. This includes international financial institutions, multinational water companies and their supporters and opposition movements. Each of these groups presents its own view on the inevitability of the private provision of water services.<sup>183</sup>

### **3.7 Privatisation in developing countries**

In developing countries, particularly in Sub-Saharan Africa, there are very large poor urban populations, most of whom rely on informal water and sanitation provision. Many cities have poor, limited and underfunded public water and sewerage networks. Public sectors tend to be characterised by weak institutional – and thus regulatory – capacity. In a context of such weak institutions, most countries have been under substantial donor pressure to privatise in order to access loans or debt relief. Many countries in developing countries from North America and Asia to Sub-Saharan Africa have adopted some form of privatisation.<sup>184</sup> Most contracts were set up in the late 1990s or early 2000s. In sub-Saharan Africa, most contracts are dominated by European multinational water companies like Vivendi and Saur. For instance, Saur received about 20 per cent of its revenue for 2001 from sub-Saharan Africa.<sup>185</sup> The uncertain situations of many water utilities and public sectors in developing countries are reflected by the number of cases in which companies and governments have been unable

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many professional associations, global water corporations, government water ministries and global financial institutions.

<sup>181</sup> Global Water Partnership was established in 1996 and is located in Stockholm, Sweden. It is funded by government aid agencies (Canada, Denmark, Germany, Luxembourg, Netherlands, Norway, Sweden, Switzerland and the UK). Its co-sponsors include the UNDP and The World Bank, and it describes itself as an 'action-oriented network' of organisations with interest in water issues. See [http://www.gwptoolbox.org/index.php?option=com\\_content&view=article&id=7&Itemid=5](http://www.gwptoolbox.org/index.php?option=com_content&view=article&id=7&Itemid=5)

<sup>182</sup> Special Report by the International Forum on Globalization (IFG), Barlow M, Clarke T., *Blue Gold: The Battle against Corporate Theft of the World's Water*, News Press, 2002.

<sup>183</sup> See chapter one on the debate over privatisation of water supply and services.

<sup>184</sup> See appendix 3.

<sup>185</sup> See chapter 5, Above.

to reach agreements in contract negotiations. This has been the case, for example, in Argentina (Buenos Aires)<sup>186</sup> and South Africa (Dolphin Coast)<sup>187</sup> amongst others.

### **3.8 Challenges of privatisation of water supply and services in realisation of the right to water**

Privatisation of water supply and sanitation has the potential for both opportunities and pitfalls. In terms of service improvement, private sector participation has the capacity to provide much needed investment to expand and rehabilitate the infrastructure and increase efficiency and flexibility without putting an additional burden on public finances. It is true that private actors can play a role in the realisation of human rights.<sup>188</sup> In the context of housing, for example, the Constitutional Court of South Africa, in the case of *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*, stated that “[i]t is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing”.<sup>189</sup> Similarly, private agencies can also play a great role in provision of water supply and services. In short, private agencies have played and will continue to play an important role in the realisation of the human right to water. However, there is also the risk that the participation of the private sector in the water market may shift the focus of service provision away from the public interest in favour of profit,<sup>190</sup> excluding from the services those who are unable to pay and resulting in<sup>191</sup> arbitrary disconnections, unreasonable water prices, installation of pre-paid meters thus potentially violating right to water.<sup>192</sup> In addition the public health cost of water-borne diseases is not included in the private companies’ approaches and policies to water provision.<sup>193</sup> Therefore, a greater degree

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<sup>186</sup> See Chapter 6, above.

<sup>187</sup> See Chapter 5, above.

<sup>188</sup> Liebenberg argues: “The state should be entitled to rely on private mechanisms of delivery in appropriate circumstances”. She cites the provision of education by private institutions and adult education by NGOs as examples of private sector contribution to service delivery. See Liebenberg (1999) 41-1 41-35.

<sup>189</sup> 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para 35.

<sup>190</sup> See chapters 4,5,6,7 how the private provision of water supply and services has affected the realisation of the human right to water to poor in selected countries.

<sup>191</sup> The impact of privatisation of water supply and services, particularly the implementation of cost recovery measures, which more often leads to disconnection of water services or installation of pre-paid meters may lead to the removal of subsidies by the governments because of privatisation.

<sup>192</sup> Bond, McDonald and Ruiters 2003:10-13.

<sup>193</sup> The opponents of privatisation have also argued that the public health cost of water-borne diseases is not included in the private companies’ costs, saying that it’s a negative externality, not affecting their income. The World Health Organisation has extensive documentation showing that a huge number of people become ill and die every year from not having access to clean water, therefore the governments pay the public health costs for the spread of infectious diseases due to water like diarrhea, while the private companies make income from providing water.



of care is required in the implementation of privatisation of water supply and services to ensure the maintenance of basic service levels and to ensure that the poor have access to a sufficient supply of water.<sup>194</sup>

### **3.9 Appraisal of the impact of the privatisation in the progressive realisation of the human right to water**

The implementation of the policies of cost-recovery, for instance installation of pre-paid meters and disconnection, may greatly constitute a denial of human rights, especially to the poor. In such instances, state intervention in the form of subsidies and other support measures is critical to increase or sustain access by poor communities to socio-economic rights like water. In order to ensure that a water privatisation initiative will result in more access to (rather than denial of) human rights, many have rightly argued that states should carry out a human rights impact assessment before embarking on privatisation.<sup>195</sup>

The United Nations High Commissioner for Human Rights has summarised some of the ways in which privatisation can undermine the enjoyment of socio-economic rights.<sup>196</sup> Similarly, the often-cited Vienna Declaration and Programme of Action (1993) states, in respect of the principle of the interdependence of all human rights, that “[h]uman rights and fundamental freedoms are the birthright of all human beings. Their protection and promotion is the first responsibility of governments”. More recently, the preamble to the declaration on the rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms has stressed that “the prime responsibility and duty to promote and protect human rights lies with the state.”<sup>197</sup> It is therefore clear that the duties to respect, protect, promote and fulfil human rights remains with the state, including the privatisation of water supply and services.

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<sup>194</sup> Many commentators attribute the increase in disconnections, installation of pre-paid water meter, and increase in water tariffs that have taken place around the world and particularly in developing countries since the inception and adoption of privatisation and commercialisation of water supply and services. See P. Maclnnes, “Entrenching Inequalities: The Impact of Corporatization on Water Injustices in Pretoria”, in David A McDonald & Greg Ruiters (eds.) *The Age of the Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005. .

<sup>195</sup> Amnesty International *Human rights principles regarding the delivery of essential services* (2003)

<sup>196</sup> See UN High Commissioner for Human Rights “Economic, social and cultural rights: Liberalisation of trade in services and human rights” Report of the High Commissioner E/CN 4/Sub 2/2002/9, 25 June 2002.

<sup>197</sup> UN General Assembly Resolution 53/144 of 9 December 1998 para 7.



As discussed in chapter two above, the Committee on ICESCR has interpreted this obligation to include the duty not only to prevent violations of these rights by private actors but also to control and regulate them. In respect of the right to water, for example, the Committee on ICESCR has stated that the state has an obligation to prevent third parties from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.<sup>198</sup> Not only are state parties enjoined to take legislative and other measures to restrain third parties from committing such acts as denying equal access to adequate water for all, and arbitrary disconnections and price increases of water resources, they are also required to establish an effective regulatory system, which includes independent monitoring, public participation and imposition of penalties for non-compliance.<sup>199</sup>

### **3.10 Concluding remarks**

This chapter presented the shape and direction that the debate around private provision of water supply and services debate is taking. The debate centres on the idea of managing water as an economic good using market-like or market friendly instruments where price functions as the main mechanism that guides decisions on allocation, distribution and consumption. On the other side of the debate are the few that consider water to be the essence of life itself and should therefore not be treated as a commodity based on the market principles. Both approaches have elements in them worthy of consideration.

Whichever side of the debate one supports, the ultimate determinant for the viability of privatisation as a better economic policy to supplant state-owned enterprises will be the availability of concrete evidence of more efficient and effective service delivery by the private sector. The impression one gets at the moment is that in developing countries, as will be seen in the following chapters 4, 5, 6 and 7, the privatisation of water does not seem to be living up to expectations.

The profit-seeking motive of the private sector seems difficult to reconcile with providing service to the poor. In other words there is a diverging interest between the public sector, private sector and consumers, which seems hard to reconcile. Although financial sustainability is considered vital, financial profitability should not be the main goal of water services.

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<sup>198</sup> General Comment No 15. See chapter two above.

<sup>199</sup> See chapter two.

The following chapters 4, 5, and 6, look at the impact of privatisation of water supply and services in the selected countries, with the aim of establishing if they have allocated the provision of the right to water in their legislative framework and if their policies of privatisation are consistent with international law and with their own legislative framework on the right to water.



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## Chapter Four

### Appraisal of the Impact of privatisation of Water Supply and Services on the Fulfilment of the Human Right to Water in Namibia

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#### 4.1 Introduction

This chapter examines the impact of privatisation of water supply and services on the fulfilment of the human right to water in Namibia. It reviews the legislative framework with a view to establish the existence of the human right to water and to assess whether the policy of privatisation is consistent with their constitutional obligation relating to the realisation of the human right water. Similarly, the chapter makes an appraisal of provision of water supply and services, assessing the impact of cost recovery and privatisation of water supply and services and their impact on the progressive realisation of the human right to water.

#### 4.2 Legislative framework

In Namibia, the Constitution of the Republic of Namibia, The Namibia Water Corporation (Namwater) Act 12 of 1997<sup>200</sup> and Water Resources Management Act 24 of 2004 are amongst legislative instruments that directly outline water resources management in Namibia. The government has also adopted a strategy, called the Integrated Water Resource Management-process, which involves decentralisation, privatisation and community management.<sup>201</sup>

##### 4.2.1 Constitution of the Republic of Namibia

In Namibia, the Constitution is the supreme law of the land. It provides an extensive array of human rights. Article 95 (1) of the Constitution makes provision for the utilisation of living natural resources on a sustainable basis for all Namibians both present and future. It obliges the government to promote and maintain the welfare of the people, through policies aimed at maintaining “an acceptable level of nutrition and standard of living of the Namibian people and improving public health.”<sup>202</sup> Article 100 of the Namibian Constitution states that “the land, water and natural resources belong to the state unless they are otherwise lawfully owned. The custody of these resources lies with the government and the responsibility for overall management of the national water resources cannot be divorced from the

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<sup>200</sup> Namibia Water Corporation (Namwater) Act 12 of 1997.

<sup>201</sup> S. Luyanga, R. Miller, J. State., “Index number analysis of Namibian water Intensity,” (2006) 57 *Ecological Economics*, 374-381.

<sup>202</sup> Diescho, J. *The Namibian Constitution in Perspective*. Windhoek: Gamsberg Macmillan Publishers, p 70, 1994

government.”<sup>203</sup> Namibia is party to various international human right, environmental covenants, treaties, convention and protocols, article 144 of the Namibian Constitution mentions two sources of international law which will be applicable in Namibia: general rules of public international law, and international law agreements binding upon Namibia.<sup>204</sup>

#### **4.2.2 Water Resource Management Act**

The aim of the Water Resource Management Act 24 of 2004,<sup>205</sup> among other objectives is to provide the management, development, protection, conservation and use of water resources. Among the key fundamental principles of the Act is equitable<sup>206</sup> and within a reasonable distance, distribution and access to sufficient amount of water for all citizens.<sup>207</sup> The Act sets out and recognises the human right to water<sup>208</sup> in its principle 3(i), additionally, the Act calls for openness and transparency of information regarding the management of water resources to the public.<sup>209</sup> On the other hand, the Act recognises the economic value of water and the need for cost effective development.<sup>210</sup>

#### **4.2.3 Namibia Water Corporation (Namwater) Act 12 of 19**

The Namwater Act was promulgated in October 1997, before the formation of Namwater, the state paid for water infrastructure. Water tariffs included only the costs related to the maintenance of infrastructure and did not cover the costs of infrastructural investments.<sup>211</sup>

The legal basis of the Namwater’s operation is outlined in the Namibia Water Corporation Act of 1997.<sup>212</sup> The company is mandated to “carry out the business of bulk water supply to customers.” Section 42 (1) of the Namwater Act restricts the operations of Namwater to provisions of the Water Act of 1956, except where expressly stated otherwise. Since its establishment in April 1998, Namwater holds the position of a national monopoly on water supply. Namwater is legally responsible for bulk water supply to urban centres, certain mining projects and a few rural areas. Namwater tariffs are calculated on a schematic basis

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<sup>203</sup> Constitution of Namibia, Article 100.

<sup>204</sup> Constitution of Namibia, Article 144.

<sup>205</sup> Water Resource Management Act, 24 of 2004.

<sup>206</sup> Water Resource Management Act, 24 of 2004, 3(a) and 3(b).

<sup>207</sup> Ibid 3 (b).

<sup>208</sup> Ibid 3 (i) “essentiality of water in life, and safe drinking water as a basic human rights”.

<sup>209</sup> Ibid 3 (f) “Openness and transparency, by making available water resources information accessible to the public.

<sup>210</sup> Ibid 3 (h).

<sup>211</sup> McClune J., *Water Privatisation in Namibia: Creating a new Apartheid?* LaRRI: Windhoek. 2004

<sup>212</sup> Namwater Act 12 of 1997.

within four zones. Within each zone, tariffs are structured to recover the costs<sup>213</sup>. The Act obliges Namwater to supply water, first, on a full cost-recovery basis and, second, at affordable prices. The municipalities buy bulk water from Namwater and sell it to low income households.<sup>214</sup>

#### **4.2.4 Local Authorities Act**

Section 30 (1) of the Local Authorities Act 23 of 1992, amongst other duties, the act stipulates that the municipalities must (a) supply water to the residents in their area for household, business or industrial purposes<sup>215</sup> and (b) provide, maintain and carry on a system of sewerage and drainage, for the benefit of the residents in their area.<sup>216</sup> Section 35 of the Act stipulates that local authorities may supply water to person other than resident;<sup>217</sup> The Act is directly enforceable in a court of law. This means the obligation of the local authorities to provide services, (including water services) “to the benefit of its residents” can give rise to legal action in a court of law if the local authorities fail to discharge their obligation.<sup>218</sup>

#### **4.2.5 The Water Supply and Sanitation Sector Policy**

The WASP<sup>219</sup> was approved by cabinet in 1993, and was the first step to address the imbalances created under the apartheid era. The policy sets out priorities for water use and management and makes it clear that communities should be in charge of their own water supply services. The Dublin Principles clearly influenced this policy. Similarly the goals of the 2000 *White Paper Water Act*<sup>220</sup> built on this theme, presented an integrated basin-scale framework where access to water was made more equitable, sustainable and service efficient.

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<sup>213</sup> McClune (2004:15).

<sup>214</sup> Ibid.

<sup>215</sup> Local Authorities Act 23 of 1992, section 30 (1) (a).

<sup>216</sup> Local Authority Act, no.23 of 1992, section 30 (1)(b).

<sup>217</sup> Ibid, section 35.

<sup>218</sup> Ibid.

<sup>219</sup> The Water Supply and Sanitation Sector Policy (WASP) 1993.

<sup>220</sup> The National Water Policy White Paper was adopted in 2000. The water policy provides a framework for equitable, efficient, and sustainable water resources management and water services; and calls for integrated water resources management of Namibia's water resources with participation of all Namibians.

#### 4.2.6 Namibian Water Resources Management Review

The NWRMR<sup>221</sup> was launched to make recommendations that will enable Namibia to achieve equitable access to and sustainable development of fresh water resources by all sections of the population, particularly the rural and urban poor.<sup>222</sup> The task of the review team was to review water resources management, develop a water policy and revise the outdated water legislations and to make policy recommendation; the process yielded a new legislative framework, a National Water Policy and finally in 2004 the Water Resources Management Act.<sup>223</sup>

#### 4.3 Provision of water supply and services

The provision of water supply and services in Namibia, are provided by Government, Namibia Water Corporation Ltd (Namwater) which supply water in bulk to industries, municipalities and Directorate of Rural Water Supply in the Ministry of Agriculture, Water and Forestry. The later supplies water to rural area. Namibian Government is the sole shareholder of the Namwater.<sup>224</sup>

Almost all the acts in Namibia support the economic approach to water resource management, and they are built on the fourth part of the Dublin Principle, which states that water is an economic good and that individuals will have to pay for it. For example, the Water Resource Management Act 24 of 2004, mentioned above, emphasises the need to recognise the economic value of water resources and the need for the development of cost effective management, similar support for cost recovery can be seen in WASP and Namwater Act.<sup>225</sup> The first performance contract for Namwater set out a five-year financial target and granted it the power to “determine and levy, in consultation with the minister, and recover tariffs on a full cost recovery basis for water supplied.”<sup>226</sup> The reference to full cost recovery reinforced government’s increasing emphasis on water’s economic aspects rather than its being a public good and essential human right.<sup>227</sup>

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<sup>221</sup> Namibia Water Resources Management Review Act of 1998.

<sup>222</sup> Ibid.

<sup>223</sup> Water Progress is Praised- The Namibian, 26 March 2003.

<sup>224</sup> Namibian Water Corporation Ltd (NAMWATER), [www.namwater.com.na](http://www.namwater.com.na), 20 September 2009.

<sup>225</sup> See Namwater Act, and WASP above.

<sup>226</sup> MAWRD. Namibian Water Resources Management Review, Theme Report, Financial and Socio-economic issues. Windhoek: MAWRD.

<sup>227</sup> McClune (2004:15).

Apart from Namwater, there are also other private companies that have been contracted to Windhoek. These include Berliner Wasser Betriebe (BWB) of Germany, Vivendi of France, The VA Tech WABAG of Australia, amongst others.<sup>228</sup> For example, The VA Tech WABAG of Australia signed a 20-year management contract to provide drinking water to Windhoek via a water reclamation plant near the Goreangap Dam. Critics argue that privatisation was forced on the city by the European Investment Bank.<sup>229</sup>

#### **4.3.1 Appraisal of privatisation of water supply and services in Namibia**

The right to water has been explicitly mentioned in the Water Resource Management Act of 2004<sup>230</sup>. Likewise, the government has ratified several international instruments that support the right to water. Despite that, the Namibian government can be seen as adopting an economic approach to water supply and services. The next section will discuss the case examples on the experience and impact of cost recovery and privatisation of water supply and services and how this affects the progressive realisation of the human right to water.

##### **4.3.1.1 The Case of the Democratic Resettlement Community (DRC)<sup>231</sup>**

The DRC is an informal settlement on the outskirts of Swakopmund. The pre-paid system was apparently introduced as a result of poor payments received from DRC residents. Following the introduction of the pre-paid water meters, many people have been left without access to sufficient water and sometimes without any water supply at all. The prepaid meters have caused great inconvenience to people who have to travel a long distance to buy credits. On several occasions shack fires have burned out of control because residents have insufficient credit on their cards to get water. Several people have died as a result and others had to watch their neighbours and their children burn to death, as they were unable to do anything about the fires.<sup>232</sup> On several occasions, the people had marched to demand crucial services. Yet it seemed that the marches, petitions and even the formation of the DRC Residents Committee did little to persuade the authority to pay attention to the plight of the community. In one of the demonstrations at the municipal offices in October 2001, Jeftha

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<sup>228</sup> Omu Kakujaha-Matundu, *Overview of privatisation in Namibia, a paper presented at the Bank of Namibia, Annual Symposium 17, 2009* Windhoek.

<sup>229</sup> *ibid.*

<sup>230</sup> Water Resource Management Act 24 of 2004, principle 3 (i).

<sup>231</sup> McClune (2004: 15)

<sup>232</sup> "DRC community angry over water problems, shack fires" – *The Namibian*, 8 October 2001. It was reported that a six-year old died in one of the fires.



Muchero, a community organiser, explained that the installation of “pre-paid meters” would only make the situation worse for the poorest people:

*What if you don't have this card and your shack is on fire... We need “koop krag” first to make our homes safer. What are we paying for? As soon as the municipality starts to give us proper services, then we will start paying our accounts.*<sup>233</sup>

The above case example of the DRC demonstrate how water privatisation infringed the rights to water of the resident of DRC, by disconnecting water supply, limiting the water supply and installation of pre-paid meter, the governments has failed to ensure that the activities of their institution in this case Namwater and their official not to interfere with resident rights to access water.

#### **4.3.1.2 The Case of Usakos**

In the town of Usakos, the supply pressure was reduced by 50% cent for more than a month in 2003, effectively cutting off water to certain areas. In this case, the lower lying (traditionally white) residential areas are not affected while the (Black) townships in the higher areas lost water for more than a month. People have to travel for up to 12 km to adjacent farms to buy water Maclune argued that where the black area are cut, for non-payments as a racial and class discrimination<sup>234</sup>, on several occasions this led to community protests<sup>235</sup>. Similarly the water services reduction and installation of pre-paid meters were also reported in Rundu where the mayor appealed to the resident to use new prepaid water meters and threatened to have their water pipes closed will the water pipes be vandalized<sup>236</sup>, water services reduction were also reported in Opuwo, and Kalkrand.<sup>237</sup> The above case shows the impacts of cost recovery, where the poor people who could not afford to pay for water supply and services, their water supplies are cut off thus violating their right to access water supply and services.

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<sup>233</sup> Water woes worsen for DRC resident- The Namibian, 7 August 2002.

<sup>234</sup> Maclune (2004:33).

<sup>235</sup> Maggi Barsed, Residents protest after Usakos water cut- The Namibian, 23 July 2003.

<sup>236</sup> Rundu resident urged to use water meter system- The Namibian, 9 July 2003.

<sup>237</sup> The Namibian 2003.

#### 4.3.1.3 The Case of Tsumeb Municipality and Oshakati area<sup>238</sup>

In another case, the Tsumeb Municipality suspended water services to all government schools for more than a week when the Ministry of Basic Education failed to settle its debt. The Gustav Kandkii Junior Secondary School in Otjinene is another good example, where water supplies were cut by Namwater in January 2004 due to non-payment of water bills by the Ministry of Regional and Local Government and Housing. In the case of Oshakati, residents who had their water cut because they could not pay their bills faced a serious health risk as they were forced to resort to the dirty water from flood pans,<sup>239</sup>

To all the above cases of disconnection, installation of the pre-paid meters and price increases, The Permanent Secretary in the Ministry of Regional and Local Government and Housing responded by stating that “we are not in a position to bail them out. We hope that they will work very hard to pay their accounts”.<sup>240</sup>

#### 4.4 Concluding remarks

This chapter has demonstrated that a legislative framework on the right to water exists in Namibia.<sup>241</sup> The above examination of the legislative framework of Namibia reveals that they have provided a legal framework for the right to access sufficient water.<sup>242</sup>

The Namibian government is also signatory to international laws such as the Convention on the Elimination of all Forms of Discrimination against Women of 1979 and the Convention on the Rights of the Child of 1989, as well as the ILO Convention on the Elimination of Child Labour. International law is recognised as part of Namibian law by virtue of Article 144.<sup>243</sup> The legal framework defines benchmarks for the realisation of the right to water and protects consumers from unlawful disconnections and limitation of services.

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<sup>238</sup> *ibid.*

<sup>239</sup> Water defaulters face risks- The Namibian, September 2002.

<sup>240</sup> *ibid.*

<sup>241</sup> Rights to water are clearly mentioned in the Water Resources Management Act of 2004. The right can also be implied in the Constitution of Namibia, Article 100, Local Authority Act of 1992.

<sup>242</sup> Similarly the Preamble of the Constitution of Namibia States that no person may be discriminated against on the grounds of race, sex or socio-economic standing. Article 95 obliges the government to promote and maintain the welfare of people, through policies, among others, aimed at maintaining an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.

<sup>243</sup> Erasmus, G. *The Namibian Constitution and the application of international law in Namibia*, In Van Wyk, D, M Wiechers & R Hill. Constitutional and international law issues. Pretoria: VerLoren Van Themaat Centre for Public Law studies, p94. 1991.

The Local Government Authorities Act is directly enforceable in a court of law and the obligation of the local authorities to provide services (including water services) “to the benefit of its residents” is actionable in court if they fail to do so. It is questionable whether these measures are in accordance with those legal stipulations and whether the government’s policy on cost recovery and privatisation of water and waste-water services is in fact to the benefit of the residents. The evidence uncovered in the course of this research strongly suggests that it is not the case, as can be seen from the case of DRC, Usakos, and Tsumeb which shows policies of cost recovery in practice, cases of water disconnection, and installation of pre-paid meters. Where the majority of the poor and vulnerable are left without sufficient access to water, this has violated the right to water.

The state must therefore put measures in place to ensure that poor people have access to minimum levels of water for personal and domestic use. Such measures could include free basic water policies, as it is the case in South Africa, subsidies and other similar measures. It is therefore clear that the state, as the ultimate bearer of socio-economic rights obligations, has the duty to ensure that their policy on cost recovery and privatisation of water supply and services does not compromise accessibility, availability, quality and acceptability of basic services. Most importantly, it must not result in the denial of access by vulnerable and poor people to socio-economic rights. Not only regulatory mechanisms but assistance and implementation measures must be put in place for the state to discharge its obligations.

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## Chapter Five

### Appraisal of the Impact of privatisation of Water Supply and Services on the Fulfilment of the Human Right to Water in South Africa

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#### 5.1 Introduction

This chapter examines the impact of privatisation of water supply and services on the fulfilment of the human right to water in South Africa. It reviews the legislative framework and provision of water supply and services in South Africa, with a view to establishing the existence of the human right to water and assessing whether the policy of and experiences of cost recovery and privatisation of water supply and services is consistent with the constitutional obligation relating to the realisation of the human right to water.

#### 5.2 Legislative framework

This section will make a review of the legislative framework and how the human right to water has been enforced in South Africa.

##### 5.2.1 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa 108 of 1996 as adopted on May 1996<sup>244</sup> is the supreme law of the Republic. Any law or conduct that is inconsistent with the Constitution is invalid.

South Africa is one of the few countries in the world that recognises the basic right to sufficient water in its Constitution and explicitly requires the consideration of international law in interpreting its Bill of Rights.<sup>245</sup>

South African Constitution enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedoms. The Constitution includes numerous social and economical rights in its Bills of Rights, in direct relation to water is Section 27(1) (b) of the Constitution, in addition to providing access to sufficient food, health care services and social security, it includes the right to have access to “sufficient water.”<sup>246</sup> In terms of section 27 (2), the state is enjoined to take “reasonable legislative” and other measures, within its

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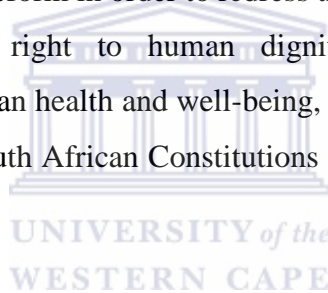
<sup>244</sup> Constitution of the Republic of South Africa 1996.

<sup>245</sup>The Constitution of the Republic of South Africa 108 of 1996, 39 (1)(b) explicitly calls for the consideration of the international law when interpreting the Bill of Rights.

<sup>246</sup> Constitution of the Republic of South Africa 1996, section 27 (1) (b).

available resources, to achieve the progressive realisation of these rights.<sup>247</sup> Section 7(2) obliges South Africa to respect, protect, promote, and fulfil the rights in the Bill of Rights, including rights to access water.<sup>248</sup> The recognition of the right to have access to sufficient water imposes certain duties on both state and non-state actors that can be enforced by the court.<sup>249</sup>

A number of other rights in the Constitution are also pertinent to realising the rights to water, for instance, Section 24 of the Constitution enshrines the right to an environment that is not harmful to human health and well-being. It also obliges the state to take reasonable legislative and other measures to prevent pollution and ecological degradation and to promote sustainable use and development of the country's natural resources.<sup>250</sup> Pursuant to these requirements and notwithstanding the requirements contained in section 25, section 25(8) recognises that no provision therein may impede the state from taking legislative measures to achieve water, land, and related reform in order to redress the results of past racial and gender discrimination. Therefore, the right to human dignity,<sup>251</sup> life<sup>252</sup> and health<sup>253</sup> and environmental protection,<sup>254</sup> human health and well-being, and children's rights<sup>255</sup> are closely linked to the right to water in South African Constitutions and these rights are justifiable and can be enforced in court.



### 5.2.2 Water Services Act

The Water Service Act (WSA)<sup>256</sup> is the act that gives effect to the constitutionally recognised right to have access to sufficient water. The objectives of Water Services Act are to, among other things, provide “the right of access to basic water supply and the right to basic

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<sup>247</sup> *In The Case of Government of the RSA v Grootboom* (2000 (11) BCLR 1169 (CC). the court indicated that it would not dictate to government which particular policy choices to adopt. Instead, it developed a standard of what is “reasonable” to test whether government was complying with its constitutional commitment to realise social and economic rights. The Court quoted General Comment 3 of CESCR to elaborate that progressive realisation entails “an obligation to move as expeditiously and effectively as possible towards that goal”, Para.45. *In the case of Minister of Health and Others v Treatment Action Campaign and Others (TAC Case) 1 2002 (10) BCLR 1033 (CC)* the court explains the meaning of the terms “progressive realisation” and “availability of resources”.

<sup>248</sup> The Constitution of the Republic of South Africa, section 7(2).

<sup>249</sup> *Ibid*, Section 27 (2).

<sup>250</sup> *Ibid*, Section 24.

<sup>251</sup> *Ibid*, Section 10.

<sup>252</sup> *Ibid*, Section 9.

<sup>253</sup> *Ibid*, Section 27.

<sup>254</sup> *Ibid*, Section 24.

<sup>255</sup> *Ibid*, Section 28.

<sup>256</sup> The Water Services Act No. 108 of 1997.

sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being,”<sup>257</sup> “to provide a regulatory framework for water services institutions,”<sup>258</sup> and “monitoring of water services and intervention by the Minister or by the relevant Province.”<sup>259</sup>

The WSA gives preference to basic water supply over other uses of water, section 5 states (that) “if the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.”

Section 9 and 10 of the WSA authorise the Minister to prescribe national standards for water services.<sup>260</sup> In a compulsory national standard emanating from section 9 (d) of the WSA the Minister promulgated a minimum standard for water supply services, which is set at a minimum quantity of potable water of 25 litres per person per day or 6000 litres per household per month and within 200 meters from household<sup>261</sup> furthermore, the WSA gives the Minister powers to set norms and standards with regard to tariffs.<sup>262</sup> According to WSA, the Minister may differentiate on an equitable basis between a numbers of factors, including socio-economic and physical attributes of an area,<sup>263</sup> section 10(3) state that, no water services institutions may use tariffs that are “substantially” different from the prescribed norms<sup>264</sup>

The Act provides the national government the legislative and executive authority to oversee the effective performance of municipalities in their functions as water service authorities. The Act similarly imposes an obligation on all water service authorities to ensure efficient, affordable, economical and sustainable access to water services, for all water users.<sup>265</sup> This

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<sup>257</sup> Ibid, section 2 (a).

<sup>258</sup> Ibid, section 2 (d).

<sup>259</sup> Ibid, section 2 (d).

<sup>260</sup> The Ministerial ‘Regulations relating to a compulsory national standards and measures to conserve water’ from 2001 are based on this authorisation, see Republic of South Africa, Regulations relating to compulsory national standards and measures to conserve water, available at dwarf website, [www.dwarf.gov.za](http://www.dwarf.gov.za) , Ministerial Regulation 3 specifies the term basic water supply and refers to minimum standards, as a minimum quantity of potable water of 25 litre per person per day or kilolitres per household per month. See also DWAF, Strategic Framework for Water Services (September 2003), 27.

<sup>261</sup> Ibid.

<sup>262</sup> WSA, section 10.

<sup>263</sup> Ibid, section 10 (2).

<sup>264</sup> Ibid, section 10 (3).

<sup>265</sup> WSA, section 11(2).

obligation is complemented by section 11(4), which provides that “a water services authority may not unreasonably refuse or fail to give access to water to a consumer or potential consumers in its jurisdiction.”<sup>266</sup>

Additionally, the Act provides for procedures that have to be followed before water is either limited or disconnected.<sup>267</sup> The Act states that the procedure for limiting or disconnecting water services must be fair and equitable. In addition to, reasonable notice of intention to limit or discontinue water services which must be given to customers.<sup>268</sup>

Furthermore Section 19 states that a water services institution “may only enter into contract with a private sector water service provider after it has considered all known public water services providers which could be able and willing to perform the relevant functions”.<sup>269</sup> In addition, before entering into any such arrangements, the water services authority must publicly disclose its intention to do so.<sup>270</sup> The Act also requires the Minister to ensure that services are provided on an efficient, equitable, cost effective and sustainable basis. Terms of contract should be fair, not only to the parties but to the customers as well.<sup>271</sup>

### 5.2.3 The National Water Act

The major aims of the National Water Act<sup>272</sup> are to meet the basic human needs of present and future generations, promote equitable access to water, facilitate social and economic development and reduce and prevent pollution of water services.<sup>273</sup> The Act endorses the concept of tradable rights for water use, including the use of effluent discharge. Under this Act, the allocation of water depends on the principle of sustainability along with a range of mechanisms for the protection of natural water resources. The act also supports demand management through tariff, water pricing and conservation measures.<sup>274</sup>

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<sup>266</sup> WSA, Section 11 (4)

<sup>267</sup> Water Services Act No. 108 of 1997, Section 4 (3).

<sup>268</sup> Ibid.

<sup>269</sup> Ibid, section 19 (2).

<sup>270</sup> Ibid, section 19 (3).

<sup>271</sup> Water Services Act, Section 11(2) (a) and Section 11 (2) (e).

<sup>272</sup> National Water Act, 36 of 1998.

<sup>273</sup> National Water Act (NWA) No. 36 of 1998, sections 2 (a) & (b).

<sup>274</sup> Ibid, section 56.



The National Water Act establishes the national government as the public trustee of the nation's water resources.<sup>275</sup> This means the government must ensure that water resources are conserved and used so that the public's water needs will meet present and future needs. The Act indicates that water use can be authorised under three circumstances, water use without a license,<sup>276</sup> water use requiring a license,<sup>277</sup> and situations where the responsible authority has dispensed the license requirements for a period of time.<sup>278</sup> Likewise, the Act empowers the minister to establish "from time to time, after consultation, a pricing strategy that may differentiate among geographical areas, categories of water users or individual water users".<sup>279</sup> According to the NWA, "water use charges are to be used to fund the direct and related costs of water resources management, development and use, and may be used to achieve an equitable and efficient allocation of water",<sup>280</sup> The setting of differentiated charges is, according to section 56 (4), to achieve social equity.<sup>281</sup>

#### **5.2.4 The Municipal Systems Act**

The Municipal Systems Act regulate the internal system of administration of municipality<sup>282</sup> In ensuring that services are provided to communities, the Systems Act requires the Municipality to "give effect to the provisions of the Constitution."<sup>283</sup> In this regard, it must "(a) give priority to the basic needs of the local community; (b) promote the development of the local community; and (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services."<sup>284</sup> In addition the provision of services must be "environmentally sustainable and be regularly reviewed with a view to upgrading, extension and improvement."<sup>285</sup> The Act sets out requirements for partnerships with others, which must be fulfilled.

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<sup>275</sup> The National Water Act of 1998, Section 3.

<sup>276</sup> This occur if the water uses falls under schedule 1 annexed to the NWA, where no license is required, see NWA at section 22 (1) (a) (i) and Schedule 1. These uses have minimal or insignificant impact on water resources it include taking water from a water source for a domestic use.

<sup>277</sup> A licence is a legal entitlement to use water, granted for a maximum of 40 years, see NWA, and section 28 (1) (e). As with issuance of license the Minister or Responsible Authority must consider a number of factors when issuing licenses, including the meeting of the Reserve.

<sup>278</sup> The situation where no license is required under an existing lawful use occurs; if the use of water was authorized between October 1996 and September 1998, see NWA, section 32.

<sup>279</sup> NWA, section 5 (1).

<sup>280</sup> Ibid, at Chapter 5, Part 1 Preamble.

<sup>281</sup> Ibid, section 56 (4).

<sup>282</sup> Municipal Systems Act No. 32 of 2000.

<sup>283</sup> Ibid, section 73(1).

<sup>284</sup> Ibid.

<sup>285</sup> Ibid. at sections 73(2)(d) & (e).

### 5.2.5 Free Basic Water Policy

The government adopted the free basic water policy<sup>286</sup> in June 2001 based on regulations under the Water Services Act.<sup>287</sup> Implementation of this policy started in July 2001.<sup>288</sup> The adoption of this policy targets the water needs of the most impoverished citizens by guaranteeing each household a free minimum quantity of potable water.

In terms of the policy, every household is entitled to at least 6 kilolitres (kl) per month, or 25 litres of water per person per day.<sup>289</sup> The idea behind the Free Basic Water policy is ambitious and progressive. In line with the constitutional requirement to progressively realise access to water for all South Africans, it implies that every person has the right to an affordable, basic amount of water and access to sanitation services.<sup>290</sup> Free Basic Water policy allows local municipalities to choose between various approaches to implementing the strategy, such as rising block tariffs or targeting credits.<sup>291</sup>

The Free Basic Water policy was perceived as “a vehicle for expedient delivery by [the South African government] within the context of [the] Constitution and the fundamental rights to basic services”.<sup>292</sup> Regarded as part of the government’s strategy to alleviate poverty and improve public health, the policy represents a response to the significant problems facing the country with respect to access to basic water and sanitation services of large parts of the population.<sup>293</sup>

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<sup>286</sup> South Africa, DWAF, Free Basic Water Implementation Strategy Document (2001) [hereafter FBW Implementation Strategy].

<sup>287</sup> See Norms and Standards in respect of Tariffs for water services in terms of section 10 (1) of the Water Services Act (Act. No. 108 of 1997).

<sup>288</sup> The idea of FBW dates back to when the African National Congress (ANC) came to power. The goal of access to basic water for everyone was for the first time articulated in the ANC’s election manifesto, the Reconstruction and Development Programme (RDP). See Mosdell, T., “Free Basic Services: The Evaluation and impact of free basic water policy in South Africa”. (2006) *In Democracy and Delivery: Urban Policy in South Africa*, ed. U.Pillay, R. Tomlinson, and J. DU Toit, pp. 283-301. See also. African National Congress, Reconstruction and Development Programme, , A policy framework, para 2.6.6. and 2.6.10.1. available at: [www.anc.org.za/rdp/rdp.html](http://www.anc.org.za/rdp/rdp.html). 20 October 2009.

<sup>289</sup> Regulation 3 of the Government Notice R 509 of 8<sup>th</sup> June 2001 defines the basic services level as a “minimum quantity of potable water of 25 litres per person per day (ppd) or 6 kilolitres per household per month”.

<sup>290</sup> South Africa, DWAF, Free Basic Water Implementation Strategy Document (2001) [hereafter FBW Implementation Strategy], section 3.2.

<sup>291</sup> Ibid, section 8.

<sup>292</sup> See Paragraph 2.6.6, of Reconstruction and Development Programme; 1994 White Paper, para. 15.

<sup>293</sup> FBW is financed via cross-subsidisation through a rising block tariff system: users who consume more than the basic supply have to pay more for additional units in a cross subsidisation from high volume to low volume users. See Arnold M. Muller, *Sustaining the Right to Water in South Africa* 5, Occasional Paper 2006/29, UNDP Human Development Report Office, available at: [www.hdr.undp.org/hdr2006/pdfs/background-docs/Thematic\\_papers/Muller\\_Arnold.pdf](http://www.hdr.undp.org/hdr2006/pdfs/background-docs/Thematic_papers/Muller_Arnold.pdf). 10 October 2009.

### **5.2.6 National Water Resource Strategy, 2004**

In 2004 Department of Water Affairs and Forestry published the National Water Resource Strategy (NWRS) 2004,<sup>294</sup> which provides the implementation framework of the NWA, 98. Among the main objectives of the NWRS is the establishment of the national framework for managing water resources. Section 3 of the NWRS empowers the Water Minister to establish pricing strategies for water that include charging for such activities as information gathering, controlling water uses, and water conservation. Likewise, the Act states that the costs for design, construction, operation and maintenance of waterworks can be passed on as user fees to customers, provided such tariffs are equally distributed.<sup>295</sup>

### **5.2.7 Strategic Framework for Water Services, 2003**

The strategic framework for water services (SFWS) outlines key strategies to implement the WSA. Including a comprehensive summary of policy with respect to water services sector and it provides strategic framework for its implementation,<sup>296</sup> This includes clarifying the institutional framework in the water service sector,<sup>297</sup> outlining the financial framework needed to ensure access to water,<sup>298</sup> including the Free Basic Water programme, and seeking to elaborate on Water Service Development Plan procedures.<sup>299</sup>

### **5.2.8 Court decisions on the right to water**

The question of right to water supply and services has also been the object of several decisions. This section will make an appraisal of court cases that have been heard before South Africa courts on access to water; disconnection of water supply and services and installation of pre-paid meters. In order for a rights to be realised, the court have to play a very important role, so that, those whose rights are infringed by either disconnection or denied access to water can seek for their rights in courts, the section will outline court cases which point both positive and negative legal decisions regarding the rights to water in South Africa.

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<sup>294</sup> National Water Resource Strategy (NWRS) 2004. Available at <http://www.dwaf.gov.za/Documents/Policies/NWRS/Sep2004/pdf/AppendixG.pdf>, 10 October 2009

<sup>295</sup> Ibid. NWRS emphasises the Water Tribunal, officially established through the 1998 Water Services Act, which replaces the Water Court. The Tribunal represents an important body for those seeking legal assistance in securing the right to water as it provides a mechanism through which individuals are able to put procedural rights into practice in order to guarantee service delivery.

<sup>296</sup> DWARF, 2003, Strategic Framework for Water Services, (SFWS), section 1.4.

<sup>297</sup> Ibid, section 3.

<sup>298</sup> Ibid, section 4.

<sup>299</sup> Ibid, section 6.

### 5.2.8.1 Constitutional Court cases

This section discusses the Constitutional Court cases dealing with socio-economic rights that have bearing on the rights to water.

#### 5.2.8.1.1 *Mazibuko and Others v The City of Johannesburg and Others*<sup>300</sup>

This case concern with fundamental right to have access to sufficient water and the right to human dignity, the five applicants all resident of Phiri, a township in Soweto, Johannesburg.<sup>301</sup> All of whom are poor residents of Phiri brought the case against the City, Johannesburg Water, and the Minister to challenge the adequacy of Johannesburg's Free Basic Water policy, which allows only 6000 free litres of water per household monthly, or 25 litres per person per day for a household of 8. They also disputed the legality of installing a pre-paid water meter system in Phiri as part of a water sustainability program known as Operation Gcina'manzi ("to save water").<sup>302</sup>

The case concerns two major issues: the first is whether the city's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every account holder in the city (the Free Basic Water policy) is in conflict with section 27 of the Constitution or section 11 of the Water Services Act. The second major issue is whether the installation of pre-paid water meters by the first and second respondents in Phiri was lawful.

The case was first heard in South Gauteng High Court in April 2008.<sup>303</sup> The High Court deemed the meters to be "unlawful" and "unfair," given that the city's water services by-laws did not provide for the installation of pre-payment meters and that the Free Basic Water policy did not meet reasonable standards. The court held that the pre-paid meters had no basis in law and had been implemented in a procedurally unfair manner. It ruled that the City should provide at least 50 litres of free water daily to residents of Phiri. A minimum of 20

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<sup>300</sup> *Mazibuko and Others v The City of Johannesburg and Others*, 2009 (39) (09) ZACC 28 (CC).

<sup>301</sup> Phiri is one of the townships forming the larger area of Soweto that falls within the area of City of Johannesburg, the resident are mainly poor and uneducated. Phiri, being one of the oldest townships of Soweto had neglected, old and poor piping of water infrastructure save the unaccounted water usage, in 2004 the City introduced prepayment meters in Phiri. This was through an operation called "Operation Gcinamanzi" (OGM). The goals of the OGM were to reduce water loses and demand, rehabilitate the water network, and improve rate of payments, each prepayment meter dispenses 6 kilolitres free water per stand per month. For more on Phiri See Jackie Dugard 'The Phiri water case ( Mazibuko and Others v City of Johannesburg and Others): Can human rights traverse the commercialization of water in South Africa?' paper for the Social Movements and/in Postcolonial Conference, University of Nottingham, 24-25 June 2008.

<sup>302</sup> Ibid.

<sup>303</sup> *Mazibuko and Others v City of Johannesburg and Others*, (2008) 4 All SA 471 (W).

litres of water per person per day for basic survival, and 50 to 100 litres per day per person to meet most health needs.<sup>304</sup>

The case went to the Supreme Court of Appeal,<sup>305</sup> upon the respondents' appeal, The Supreme Court of Appeal, ruled in favor of the applicants but varied the terms of the ruling. The Supreme Court found that the free basic water policy was in violation of section 27 (2) the court deemed the pre-paid meters unlawful because they automatically shut off the water supply when the free limit has been reached. However, the Supreme Court suspended that ruling for two years to give the city time to amend its by-laws<sup>306</sup>, denying the residents immediate relief. The Court declared that 25 litres per person per day, or 6 kilolitres monthly per household, was not adequate but then named a necessary amount *lower* than what the High Court ruled sufficient. The Supreme Court found that “42 litres water per Phiri resident per day would constitute sufficient water in terms of s 27(1) of the Constitution.”<sup>307</sup>

The Phiri resident were disappointed by these terms, they asked for an appeal of the Supreme Court ruling in order to reinstate the High Court granting 50 litres per person day, Although the applicants agreed with the Supreme Court that the pre-paid meters were unlawful, they disagreed that the Court should suspend the order for two years to allow the city to rectify its by-laws. The applicants also disagreed with the Supreme Court's minimum water quota per person per day. Instead of 42 litres, the applicants deemed 50 litres per person day to be the minimum need, as the High Court had ruled. The respondents sought permission to cross appeal; an appeal against the SCA was taken to the Constitutional Court of South Africa on 8 October 2009.

At the Constitutional Court, the Court found the actions of the city and its water service programs to be *constitutionally sound*.<sup>308</sup> The Court recognized that the city is, in fact, working toward the “progressive realisation” of the achievement of access to sufficient water, but that it will take time for everyone to have adequate access. Also, the Court found that quantifying a sufficient amount of water is not an appropriate matter for a court to handle. The exact quantity should be decided on by the government, the Court argued, that City of

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<sup>304</sup> Ibid, Para 183.5.1.

<sup>305</sup> *City of Johannesburg and Others V Mazibuko and Others*, 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA).

<sup>306</sup> Ibid, paras 58-60.

<sup>307</sup> Ibid, para 62.

<sup>308</sup> *Mazibuko and Others v The City of Johannesburg and Others*, 2009 (39) (09) ZACC 28 (CC).

Johannesburg has already developed a protocol accounting for 6 kilolitres per month. The Court also deemed that the city was authorized to install pre-paid meters based on the city's by-laws and national legislation.<sup>309</sup> The Court's ruling, written by Justice Kate O'Regan and supported by all other judges sitting in the case, found as follows:

*“The City’s Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri is found lawful. Accordingly, the orders made by the SCA and the High Court are set aside.”*<sup>310</sup>

On the concept of reasonableness, the court found, that the city's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services.<sup>311</sup> The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable” This is wholly ignored in the reasoning behind the Constitutional court judgment's section on ‘progressive realisation’ of water rights.<sup>312</sup> As discussed above, the Phiri residents are mainly poor and uneducated. The majority of the residents are unemployed and there are widely reported cases of HIV/AIDS. the court's jurisprudence did not do enough to protect these mostly vulnerable groups who face an absolute deprivation of minimum essential levels of water supply and services, they are potentially in danger of suffering from irreparable harm to their lives, health and the sense of human dignity because of the insufficient supply of water.

Sandra Liebenberg argued that the justificatory elements of the reasonableness test should be tightened when dealing with situations where vulnerable groups are deprived of basic essential levels of social goods and services<sup>313</sup>, Liebenberg contend that the high standard of justification is warranted in this kind of situation where the life of the most vulnerable are at risk.<sup>314</sup>

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<sup>309</sup> Ibid.

<sup>310</sup> Case CCT 39/092009/ZACC/28.

<sup>311</sup> Ibid.

<sup>312</sup> Van Bueren, G, “Alleviating Poverty Through the Constitutional Court” (1999) 15 *SAJHR* 52-74.

<sup>313</sup> Liebenberg, S., “South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?” (2002) *Law, Democracy and Development* 175.

<sup>314</sup> Ibid.



Bilchitz<sup>315</sup> believes that while using the reasonable standard, deference is not owed to the government in defining the content of a right but only in allowing it a margin of appreciation to decide which measures it will adopt in fulfilling its obligations. In giving effect to the right, the measures the government adopts must be reasonable in relation to the objective it seeks to achieve which is to realise that the rights enunciated in the Constitution.<sup>316</sup> Additionally, Bilchitz in his analysis of Section 27 argue that right can be fulfilled to differing degrees. He sees each socio economic right as giving rise to two obligations: the first is to immediately realise a certain minimum level of provision, and the second is to improve the level of provision beyond this lower threshold if the right is to be fully realised. This approach acknowledges that there is only one right, but the right itself places two different obligations upon the state<sup>317</sup>

Section 33 of the constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair<sup>318</sup> and section 3 of the Water Services Act requires that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Therefore the disconnection of a person's water supply would qualify as administrative action that materially and adversely affects a person's right to have access to water and therefore such action must be procedurally fair. According to section 4 (3)(b) of the Water Services Act, a water services provider would be required to notify the consumer of its intention to disconnect the water supply for the reasons like consumers non-payments for past water usage<sup>319</sup>. Similarly, the consumer ought to be notified of an opportunity to pay the arrears and be invited to make a representation as to why his or her supply should not be disconnected. But what one sees from the Mazibuko case is that Phiri resident have not been offered that adequate opportunity to make a representation when the operation of Gcin'manzi was implemented, despite that, the court found that it will be burden on the council to notify the customers whenever they run out of water, this is infringement of their rights to water.<sup>320</sup>

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<sup>315</sup> Bilchitz, D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1-26.

<sup>316</sup> *Ibid.*

<sup>317</sup> Liebenberg, S, "Basic rights claims. How responsive is 'reasonableness review'?" *ESR Review* vol 5: 11

<sup>318</sup> The Constitution of the Republic of South Africa, section 33.

<sup>319</sup> WSA, Section 4 (3) (b).

<sup>320</sup> *Mazibuko and Others v The City of Johannesburg and Others*, 2009 (39) (09) *ZACC* 28 (CC).



### 5.2.8.1.2 *The Case of the Republic of South Africa and Others v. Grootboom and Others*<sup>321</sup>

This case was brought to the Constitutional Court by a group of families forced from a parcel of land on which they had informally built homes, in an attempt to clear land, municipality bulldozed and burnt the settlement and made no efforts to help the families secure new housing.<sup>322</sup> The court primarily concerned itself with right to housing.

The families brought suit, charging a violation of their constitutional right to housing under section 26 and violations of rights of children under section 28,<sup>323</sup> The court ruled in favour of the evicted families on the grounds that the State had an obligation to provide access to housing for the poor.<sup>324</sup> The Court pointed out that section 26 (2) and section 27 (2) of the constitutions obliges the State to establish a coherent programme directed towards the progressive realisation of the rights enshrined in these section.<sup>325</sup> The Court quoted General Comment 3 of ICESR to elaborate that progressive realisation entails “an obligation to move as expeditiously and effectively as possible towards that goal.”<sup>326</sup> Of particular importance, the court explicitly states that the programme that excludes a significant group of society cannot be reasonable. The notion of reasonableness developed in this judgment has become the litmus test against which the realisation of socio-economic rights is tested.<sup>327</sup> Thus, a statistical advance regarding the progressive realisation of rights is not sufficient; rather, the needs of the most desperate have to be taken into accounts.<sup>328</sup>

The Court found that the government’s housing programme failed to meet the short-term goal of addressing those in desperate need and thus did not comply with section 26 (2).<sup>329</sup> The Court, however, refused to give directives to the national government with regard to how it should address this inadequacy. The Court also rejected the notion of minimum core obligations, as set forth by the CESCR.<sup>330</sup>

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<sup>321</sup> *In the Case of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

<sup>322</sup> *Ibid*, paras.7-8.

<sup>323</sup> *Ibid*, para.12.

<sup>324</sup> *Ibid*.

<sup>325</sup> *Ibid*, para.12

<sup>326</sup> *Ibid*, para 45.

<sup>327</sup> see Lieberberg, S “South African’s Evolving Jurisprudence on Socio-Economic Rights: and effective tool to challenging poverty, (2002) (2) (6) *Law and Democracy* 159-191.

<sup>328</sup> Choma H.J., “ The environmental rights entered in the constitutions: A critique “,(2008) (5) *The Journal of US-China Law Review*. 1

<sup>329</sup> *Grootboom*, para. 95.

<sup>330</sup> *Ibid*, para.34.

In regards to a minimum core, the court has been criticised for not being far-reaching enough, for example, Liebenberg argue (that) “The court did not say that the minimum core needs of disadvantage groups must be first met before improvements are made to the social benefits enjoyed by relatively more advantaged groups...the judgement requires only that “a significant number” of desperate people in need are afforded relief, “through not all of them need receive it immediately,”<sup>331</sup> according to Liebenberg this reasoning does not assist in establishing an entitlement to relief in individual cases.

Similarly Winkler argued that the court should have applied the minimum core approach developed by the CESC<sup>332</sup> according to Winkler, the approach could have provided for more far reaching and more specific decision on the obligation to fulfil the human right to water.<sup>333</sup>

In direct relation with the rights to water, the Court emphasised the importance of recognizing the interdependency of the right to housing with other rights in the Bill of Rights, it mentioned that, “all the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equity, the foundational values of our society, are denied those who have no food, clothing or shelter,”<sup>334</sup>

Although the courts’ ruling does not give budgetary priority to the poor, this precedent is powerful for the protection of water and sanitation rights because it sends the message that the state must at a minimum, protect all socio-economic rights, such as access to water.<sup>335</sup>

#### **5.2.8.2 Lower court cases**

This section examines the Lower Court cases dealing with socio-economic rights that have bearing on the rights to water.

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<sup>331</sup> Liebenberg, S “South African’s Evolving Jurisprudence on Socio-Economic Rights: and effective tool to challenging poverty, (2002) (2) (6) *Law and Democracy* 159-191.

<sup>332</sup> Winkler, I ‘Judicial Enforcement of the Human Rights to Water- Case Law from South Africa, Argentina and India’, *Law, Social Justice & Global Development Journal (LGD)*. Available at [http://www.go.warwick.ac.uk/elj/lgd/2008\\_I/winker](http://www.go.warwick.ac.uk/elj/lgd/2008_I/winker).

<sup>333</sup> Ibid.

<sup>334</sup> Grootboom, Para. 23.

<sup>335</sup> Ibid.

### 5.2.8.2.1 *The Case of Manqele v Durban Transitional Metropolitan Council*<sup>336</sup>

The applicant, an unemployed woman who occupied property with seven children had her water disconnected for lack of payments, the applicant was receiving the six kilolitres of free basic water but she has been using more than this amount, when she could not pay for the additional water she consumed, her water was discontinued, she sought a declaratory order that the discontinuation of water services to her premises was unlawful. She argued that the by-laws in terms of which the water service was disconnected were *ultra vires* the Water Services Act.<sup>337</sup>

Manqele relied on her right to a basic water supply as referred to in the Act and did not rely on the Constitution.<sup>338</sup> The council argued, successfully, that as no regulations had at that time been promulgated to give meaning to the right to a 'basic' water supply, the right she relied on had no content.

Manqele was thus denied a remedy, the court held that although the Water Services Act intends to outline procedures for achieving the Constitutional right to water, the Act did not explicitly define the extent of the right to water, as such the court found that it had inadequate guidance to interpret right to water, this right embodied in section 3 of the Water Services Act. The judge argued that these policy matters that are lined to the availability of resources and thus outside of his purview.<sup>339</sup> The judge also commented on the fact that she had illegally reconnected to the water supply; arguably implying that this also underpinned her denial of a remedy.

Kidd argued that the court fails to distinguish between a person's past behaviour and his or her current ability to pay. He is hence of the opinion that a person falls in the ambit of section 4(3) (c) if he or she proves that he or she is currently unable to pay for water services. The result is that a needy person may not be denied basic water services for non-payments. Instead water services can be limited;<sup>340</sup> the court would have been required to undertake a

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<sup>336</sup> *In Manqele v Durban Transitional Metropolitan Council*, High Court (Durban and Coast Local Division) of South Africa, Judgement of 7 February 2001, (2002) 2 A11 SA 39 (D).

<sup>337</sup> *Ibid.* para. 41.

<sup>338</sup> *Ibid.*, paras 41-44.

<sup>339</sup> *Ibid.*

<sup>340</sup> Michael Kidd, "Not a Drop to Drink: Disconnection of Water Services for Non-Payments and the Right to Access water", 20 *South African Journal on Human Rights* 119, 131 (2004).

more detail analysis<sup>341</sup> and to interpret the constitutional right to water, if the applicant had based her application on her constitutional rights.<sup>342</sup> This case pre-dates amendment to Water Services Act in 2002, which clearly define the right to water.

It has been suggested by several scholars that if the South African Court would use the reasonableness test alongside the minimum core approach then the realisation of socio-economic rights would be more effectively achieved.<sup>343</sup> As Liebenberg has pointed out, core obligations and the reasonable test share many ends, most importantly “a duty that the state must ‘plan, budget and monitor’ to ensure that ‘a significant number of desperate people in need are afforded relief.’”<sup>344</sup>

#### ***5.2.8.2.2 The Case of the Residents of Bon Vista Mansions v. Southern Metropolitan Local Council***<sup>345</sup>

The case was brought by a resident of the Bon Vista Mansions apartment complex on behalf of himself and other residents to the High Court of South Africa, successfully argued that the right to water is enforceable by the court. Arguing that the local municipal council had violated their rights by discontinuing water services due to lack of payments, they demanded the supply of water be reinstated.<sup>346</sup>

In the *Bon Vista Mansions* decision,<sup>347</sup> the court held that the disconnection of the water supply would constitute a *prima facie* breach of the state’s constitutional duty to respect the right of access to water and thus the onus of proof is on the municipality to justify the disconnection.<sup>348</sup> The court, citing section 4(3) of the Water Services Act, held that procedures employed to effect a disconnection have to be fair and equitable.<sup>349</sup> They should not result in a person being denied access to basic water services for non-payment where the person proves, to the satisfaction of the water services authority, that he or she is unable to

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<sup>341</sup> De Visser, J., ‘From the Courts: Manqele v Durban Transitional Metropolitan Council, Disconnection of Water Supplies’, 3 *Local Governments Law Bulletin* 1 (2001).

<sup>342</sup> *Ibid.*

<sup>343</sup> Liebenberg, S., “South Africa’s evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?” (2002) *Law, Democracy and Development* 175.

<sup>344</sup> *Ibid.*

<sup>345</sup> *The Case of the Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* 2002 (6) BCLR 625 (w).

<sup>346</sup> *Ibid.*

<sup>347</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* [2002] (6) BCLR 625 (W).

<sup>348</sup> *Ibid.*, para, 20.

<sup>349</sup> *Ibid.*, para, 23.

pay for the basic services.<sup>350</sup> Therefore, the onus rests on the local authority to show that it has legally valid grounds for disconnecting the water supply and has acted in compliance with the Constitution and the WSA.<sup>351</sup>

### ***5.2.8.2.3 The Case of Highveldridge Residents Concerned Party v. Highveldridge TLC and Others***

In the *Highveldridge* decision,<sup>352</sup> the Transvaal Provincial Division granted an association of water users, which was not properly incorporated, a standing to bring an urgent application for the reconnection of their water supply. The Court noted that a constitutional right was allegedly threatened when their water supply was cut off. The Court assessed the balance of convenience and argued that any potential losses of the respondents could outweigh the human need and suffering that would occur due to the lack of fresh water. The Judge therefore ordered the respondent to reinstate the water supply pending the finalisation of the matter.<sup>353</sup>



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<sup>350</sup> Ibid, para, 26.

<sup>351</sup> Ibid. para. 20-26.

<sup>352</sup> *Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Council and Others, Transvaal Provincial Division, Judgment of 17 May 2002 (1) BCLR 72 (T).*

<sup>353</sup> Ibid. para. 86.

### 5.3 Provision of water supply and services

In South Africa the provision of water supply and services are provided by Water Service Authority (WSAUs)<sup>354</sup> and Water Services Provider (WSP), WSA defines water services providers as “any person who provides water services to consumers (retail) or to other water services institutions (bulk)...”<sup>355</sup> the National Water Resource Strategy further defines the main duty of a Water Services Provider as “to provide water services in accordance with the constitution, the Water Services Act, and the by-laws of the Water Services Authority..”<sup>356</sup> Furthermore, section 76 of the Municipal System Act, state that a municipality can provide a municipal service either by itself, or by entering into a services agreement with an external mechanism<sup>357</sup> thus, the provision of water supply and services can be made by Water services authority (WSAUs),<sup>358</sup> and WSP. The WSAU can act as WSP itself or can contract it out to external mechanism such as other municipalities, an organ of the state including traditional authority and water committees or to any other competent entities, institutions, or persons such as water boards, local municipalities, and private water companies.

South Africa is progressively involving the private sector in water supply and services. For this purpose, municipalities have adopted business models for water services.<sup>359</sup> South Africa is also a signatory to a number of international agreements endorsing privatisation, including the General Agreement on Trade in Services (GATS). In particular, the WSA and the NWA entrenched the opportunities for private sector involvement in post-apartheid South Africa.<sup>360</sup> As the government tends towards privatisation of water supply and services, the principle of cost recovery became official policy with the adoption of the “Growth, Employment and Redistribution” (GEAR) policy framework adopted in 1996.<sup>361</sup> GEAR policy can be characterised as supporting privatisation and corporatisation of water supply and services,

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<sup>354</sup> The WSA defines WSAUs as “any municipality including a District or Rural Council as defined in the Local Government Transition Act, 1993 (Act no. 209 of 1993), responsible for ensuring access to water Services.

<sup>354</sup> WSA, section 4 (1) & (2).

<sup>355</sup> WSA, section 1 (xxiii).

<sup>356</sup> DWAF, Strategic Framework for Water Services (September 2003) at section 13.

<sup>357</sup> Municipal System Act (MSA), Para. 74).

<sup>358</sup> The WSA defines WSAUs as “any municipality including a District or Rural Council as defined in the Local Government Transition Act, 1993 (Act no. 209 of 1993), responsible for ensuring access to water Services.

<sup>359</sup> See S. Flynn and D. Mzikenge Chirwa., *The Constitutional Implications of Commercializing Water in South Africa*, in McDonald A & Greg, Ruiters (eds.) *The Age of Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005.

<sup>360</sup> See, e.g., Section 19, WSA.

<sup>361</sup> Republic of South Africa, Growth, Employment and Redistribution, A Macroeconomic Strategy Para. 7.1. (1996).

and financial trade liberalisation.<sup>362</sup> McKinley argued that the government drastically decreased grants and subsidies to local municipalities and city councils as a result of the GEAR framework following the neo-liberal economic advice of the World Bank, IMF and various Western governments.<sup>363</sup>

Since 1999, several municipalities have entered into long-term contracts with multinational water companies. These include Nelspruit, which entered a 30-year concession to Biwater since 1999.<sup>364</sup> Eastern Cape municipalities (Stutterheim and Queenstown) entered into long-term contracts with Water Services South Africa, a Suez-Lyonnaise Subsidiary; while Dolphin Coast entered a 30-year concession contract with SAUR since 1999.<sup>365</sup> Johannesburg Water, a corporatised municipal water utility, signed a five-year management contract with Johannesburg Water Management Company in 2001.<sup>366</sup> The Johannesburg Water Management Company is a joint venture between Ondeo (a water subsidy of Suez), Northumbrian Water (acquired by Suez in 1996) and Water and Sanitation Services South Africa.<sup>367</sup>

### 5.3.1 Appraisal of private provision of water supply and services in South Africa

There is a growing literature on the impact of the privatisation of water supply and services in South Africa.<sup>368</sup> South Africa's water legislative framework as shown above illustrates a unique approach taken, the explicit recognition of the right to water and implementation of FBW and enforcement mechanisms. These new policies have led to an increase in service provision to those previously marginalized. On a national average across all nine provinces,

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<sup>362</sup> McDonald and Pape (2002).

<sup>363</sup> McKinley, D. 'the Struggle Against Water Privatisation in South Africa. In Reclaiming Public Water: Achievements, Struggles and Visions from Around the World,' ed. Transnational Institute (TNI), pp. 181-190. Porto Alegre: TNI, 2005.

<sup>364</sup> Bond, McDonald & Ruiters, G., "Water Privatisation in SADC: The State of the Debate 4 No 4, (2003) *ESR Review* pp.10-13.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid .

<sup>367</sup> David A. McDonald and Greg Ruiters, 2005. "Theorizing Water Privatisation in Southern Africa", in David A. McDonald and Greg Ruiters eds., *The Age of Commodity, Water Privatisation in Southern Africa: 2005*

<sup>368</sup> see Chirwa, D., "Socio-Economic Rights and Privatisation of basic services in South Africa, A theoretical framework". *ESR Reviews, Economic and Social Rights in South Africa*, a quarterly publication by the Community Law Centre, University of the Western Cape. Bond, P., "An answer to marketization: decommodification and the assertion of rights to essential services". (2002) *Multinational Monitor* (July-August, (14-17). Budds, J. & G, McGranahan., "Are the debates on water privatisation missing the point? Experiences from Africa, Asia and Latin America" (2003) 15 (2) *Environment & Urbanization* 87-113. Ramandham, V., *Privatisation in Developing Countries*, Routledge Publishers: London, 1989. Pape, J. & MacDonald, D., *Cost recovery and the delivery of basic services in South Africa*, (eds.) Pretoria: HSRC, 2002. To mention but a few.



87 percent (87%) of municipalities have reported that they are providing free basic water services, serving a significant number of people.<sup>369</sup> On the other hand, these new policies have led to the adaptation of the cost recovery policy which has led to the disconnection of water supply and installation of pre-paid meters potentially violating the right to water.<sup>370</sup> Based on case these studies, this section will appraise privatisation of water supply and services in South Africa. Particular attention is paid to ways in which the cost recovery policies have affected the realisation of the human right to water and the redistribution effort.

### 5.3.1.1 The case of Sebokeng/Evaton

The Sebokeng and Evaton areas form part of the Emfuleni Local Municipality which is located to the south of Johannesburg – the main industrial centre of South Africa.<sup>371</sup> The Sebokeng and Evaton areas are predominantly low-income residential area. In 2004, the Municipality appointed WRP - a Miya Group Company - to design and commission what is understood to be one of the largest advanced pressure management installations in the world as the first phase of a long term strategy to reduce water wastage in the area.<sup>372</sup>

The project was the first of its type where Emfuleni Local Municipality partnered with the private sector (WRP Pty Ltd) to build an advanced pressure management system, Public-Private Partnership formed to fast-track a very serious problem which has been continuing for many years. The installation is also thought to be one of the largest advanced pressure control installations in the world and is addressing what is one of the highest minimum night flows ever recorded for an area the size of Sebokeng and Evaton. The use of this system led to a

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<sup>369</sup> DWAF Annual Report 45, for up to date information, see DWAF site for implementation status of Free Basic Water Services available at: [www.dwaf.gov.za/freebasicwater](http://www.dwaf.gov.za/freebasicwater).

<sup>370</sup> There have been a significant number of disconnections in South Africa, in particular in the period between 1994-2000. According to a survey of the Municipal Services Project as many as 10 million people in South Africa had experienced water cut-offs since 1993. For more literature on disconnection of water services. See Pape, J. & MacDonald, D., *Cost recovery and the delivery of basic services in South Africa*, (eds.) Pretoria: HSRC, 2002. P. MacInnes., *Entrenching Inequalities: The Impact of Corporatization on Water Injustices in Pretoria*, in David A McDonald & Greg Ruiters (eds.) *The Age of the Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005. Chirwa, D., “Socio-Economic Rights and Privatisation of basic services in South Africa, A theoretical framework”. *ESR Reviews, Economic and Social Rights in South Africa*, a quarterly publication by the Community Law Centre, University of the Western Cape. De Visser et al., 2002. “The Free Basic Water Supply Policy”, *ESR Reviews, Economic and Social Rights in South Africa*”, a quarterly publication by the Community Law Centre, University of the Western Cape. Morgan, B., “Turning off the Tap, Urban Water Service Delivery and the Social Construction of Global Administrative Law”, (2006b) 17(1) *European Journal of International Law*, 215–246.

<sup>371</sup> Mckenzie, RS, Wegelin., Seboking/Evaton Pressure/Leakage reduction: Public –Private Paternership, conference proceedings, available at <http://waterloss2007.com/Leakage2005.com/pdf/Sebokeng-Evaton%20Pressure-Leakage%20Reduction%20-%20Public%20Private%20Partnership.pdf> , 20 September 2009

<sup>372</sup> Ibid.

reversal in wastage rates, bringing down the costs (by approximately R20 million in the first year and R27 million in the second) benefiting both the service provider and end-users.<sup>373</sup> This case demonstrates a positive impact of privatisation of water services where the partnership between public-private partnerships solves the problem of wastage of water.<sup>374</sup>

### **5.3.1.2 The case of Nelspruit**

After Biwater took over water supply in Nelspruit, the water bill increased between R400 to R500 from the flat rate of R70 that residents used to pay. This resulted in a dramatic decline in the payment for services, leading to disconnections and legal actions.<sup>375</sup> This case demonstrated the impact of privatisation of water supply, when the price increased, most of the customers who are very poor were unable to pay for water, and that lead Biwater company to disconnect their water supply which is an infringement of their rights to water.<sup>376</sup>

### **5.3.1.4 The case of Queenstown**

Similarly, the water rates increased in Queenstown after privatisation, from R15 to R39 per month. Many local residents were unable to pay the ever increasing bill, resulting in disconnection and the introduction of the prepaid meters to recover the cost.<sup>377</sup> Queenstown township consumer debt grew rapidly once the flat rate was increased. In April 1999, 8000 households (or 62% of the township households in Queenstown municipality) reported to council offices for an arrangement to pay off their arrears. Due to the financial hardship, many failed to make payments. A month later, the Queenstown council hired a private armed security company to cut off water services.<sup>378</sup> This case also shows the negative impact of privatisation.

## **5.4 Concluding remarks**

The South African constitution, legislation and regulations mentioned above recognise rights to water. They have also made significant progress in the implementation of the rights to water, particularly the implementation of FBW.<sup>379</sup> On the other hand, the South African

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<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> Bond, McDonald and Ruiters. (2003).

<sup>376</sup> ibid

<sup>377</sup> Ibid.

<sup>378</sup> Daily Dispatch, 5 May, 1999.

<sup>379</sup> South African courts have also addressed a large range of issues relating to different kinds of obligations. Not only has the obligation to respect existing access to water proven to be justiciable, but the recent judgment in the Mazibuko Case shows that courts can also enforce the obligation to fulfil.

government can also be seen as embracing the economic approach to water supply and services influenced by international financial institutions<sup>380</sup> such as the World Bank.<sup>381</sup>

From the case studies illustrated above, the introduction of the policy of cost recovery and the privatisation of water supply and services have led to increases in the water price,<sup>382</sup> installation of pre-paid metering systems,<sup>383</sup> and disconnections of the water supply and services. This practice is widespread in South Africa and has, in effect, prevented the realisation of the right of access to water for impoverished communities.<sup>384</sup> These measures will likely have dramatic health consequences as people might be forced to resort to polluted rivers and streams to draw water for daily survival, resulting in unhygienic conditions. For example, the cholera outbreak in 2002 in Kwazulu Natal was as a result of people using polluted rivers as a result of the disconnection of the water supply.<sup>385</sup> The case studies above also show that individuals in poor municipalities are paying higher tariffs for services than those in areas where infrastructure was laid during the apartheid era. For example, the residents of Phiri in Soweto are paying more for water than people in other parts of Johannesburg. In this way individuals previously prevented from services delivery during the apartheid era are at a continued disadvantage despite having acquired rights to free basic minimums and to equal, non-biased service delivery.<sup>386</sup> On the other hand, the case examples of Sebokeng/Evaton show that, partnership between public-private partners can significantly solve the problem of wastage of water.<sup>387</sup> Thus in South Africa there is both positive and negative impact of privatisation of water supply and services, from the case studies above it

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<sup>380</sup> McKinley (2005:2) found that South Africa has been influenced by the World Bank and IMF. He further mentions that the World Bank advised the South African government to introduce “ a credible threat of cutting water services”, for non-payments. As part of the Growth Employment and Redistribution (GEAR) framework and following the neo-liberal economic advice of the World Bank, IMF and various Western governments, the South African government drastically decreased grants and subsidies to local municipalities and city councils and supported the development of financial instruments for privatised delivery.

<sup>381</sup> Jaap de Visser et al., 2002. “The Free Basic Water Supply Policy”, Economic & Social Rights Review, 3 (Determining that a right to water requires both physical and economic access to water ) available at [http://www.communitylawcenter.org.za/ser/esr2002/2002july\\_water.php/](http://www.communitylawcenter.org.za/ser/esr2002/2002july_water.php/)

<sup>382</sup> See S.Africa. CHR Report, “...the most vulnerable amongst the sectors of the community, the unemployed, people who live in dire poverty are amongst those denied access to the right to water. The cause of this is due to the inability to pay for water, uncompleted, abandoned and dysfunctional projects”.

<sup>383</sup> To use prepayment meters people are required to obtained water cards which work like prepaid phone cards. Usually these cards are charged with six kilolitres of water per household per month (The FBW amount) and once the units are exhausted the water is automatically cut off.

<sup>384</sup> See cases above, Nelspruit and Queenstown.

<sup>385</sup> See Cottle, Edward and Hameda Deedat., *Cost Recovery and Prepaid water meters and the cholera outbreak in KwaZulu-Natal*. In McDonald, David and John, Pepe eds. (2002) *Cost recovery and the Crisis of services delivery in South Africa*. Cape Town, South Africa: Human Research Council, (2002). See also Diarrhoea is a water-borne disease. See [http://www.afrol.News2002/sa024\\_water\\_private.htm](http://www.afrol.News2002/sa024_water_private.htm).

<sup>386</sup> See Chirwa 2004.

<sup>387</sup> See The Case of Sebokeng/Evaton above.

can deduced that the rights to water are violated by both private and public providers, for example, Mazibuko water case concerned the poor residents of Phiri against the City, Johannesburg water, and the Minister to challenge the adequacy of Johannesburg's free basic water policy amongst other things. In this case, the city and Johannesburg water are government's agents and the fire breakout in the Phiri residential area led to the death of two small children in 2005. The fire broke out as a result of insufficient water credits on a resident pre-paid card after their prepaid meter water supply automatically got disconnected, this is in violation of their rights similarly, the case of Nelspruit shows the rapid increase in water prices and disconnection of water services, thus violating their rights to water by Bewater, a private company. Therefore, in this case, both water providers; public and private have violated the rights to water. In this regards, no matter who acts as WSP, whether a private or public entity, it must conform to the conditions set forth in the WSA. These including, among other things, accessibility to the public, accordance with by-laws created by the WSAU, and providing for circumstances for limiting and discontinuing water services and procedures for doing so in a fair and equitable manner with reasonable notice and an opportunity to make a representations to the WSA.<sup>388</sup>

Section 27 (2) of the South African Constitution stipulates that the state must take reasonable measures within its available resources to achieve the progressive realisation of the right to water. Under its minimum core obligations the state has the duty to provide everyone with minimum services, at least 20 litres of water per day. This can be realised by using all possible means to develop infrastructure and to extend the FBW policy to all. The adoption of a core approach in South Africa does not seem realistic where a significant number of people lose access at the same time.

The landmark Grootboom judgement of the South African Constitutional Court has to be taken into account. While the court is primarily concerned here with a right to housing, the court also refers to water and emphasises that all socio-economic rights have to be interpreted together.<sup>389</sup> According to the Constitutional Court, section 27 (2) of the Constitutions obliges the state to establish a coherent programme directed towards the progressive realisation of these rights, and it has to be ensured that measures are reasonable in their conception and

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<sup>388</sup> WSA, section 4 (1) & (2).

<sup>389</sup> See *Government of the Republic of South Africa and Others v. Grootboom and others*, 2000 (11) BCLR 1169 (CC) at 1190.

their implementation. Furthermore, the court explicitly states that a programme that excludes significant groups of society cannot be reasonable. The important legacy of Grootboom is that it demonstrated that the court was willing to direct the government to enforce a socio-economic right even within the budgetary constraints related to the provision of water.<sup>390</sup>

South African Courts have addressed a large range of issues relating to different kinds of obligations. While the legacy of the Grootboom judgement is praised, the Phiri water case was disappointing. The Constitutional Court ruling, written by Justice Kate O'Regan found the installation of pre-paid meters in Phiri to be lawful despite Phiri applicants showing mountains of evidence to show that there was no serious consultation with community residents in the implementation of Gcin'amanzi and the forced installation of pre-paid meters. This shows that the Constitutional Court has not fully considered the plight of the poor.



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<sup>390</sup> According to section 4 (3) (c) of the WSA and in conjunction with regulation 3 water services may be limited but not completely disconnected.

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## Chapter Six

### Appraisal of the Impact of privatisation of Water Supply and Services on the Fulfilment of the Human Right to Water in Argentina

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#### 6.1 Introduction

This chapter examines the impact of privatisation of water supply and services on the fulfilment of the human right to water in Argentina. It reviews the legislative framework and provision of water supply and services with a view to establishing the existence of the human right to water and assessing whether their policy of cost recovery and privatisation is consistent with their constitutional obligation relating to the realisation of the human right to water.

#### 6.2 Legislative framework

In Argentina, realisation of human rights is gradually being developed. One can identify several measurable advances shown in different social sectors with respect to water and human rights objectives. Among these are gradual improvements to sanitary infrastructure, the recuperation and maintenance of water resources, movements to recognise, respect and protect the cultures and livelihoods of the riverside inhabitants, and the gradual awareness and promotion of access to fresh water as a human right.<sup>391</sup>

##### 6.2.1 The Argentine National Constitution<sup>392</sup>

Argentina has not explicitly recognised the human right to water in its Constitution, but it has included the right to a healthy environment in Constitution Article 41,<sup>393</sup> from which rights to water can be implied. Additionally the Constitution has incorporated several international human rights instruments,<sup>394</sup> including the ICESCR, the Convention on the Rights of the

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<sup>391</sup> Picolotti, J . The Right to Water in Argentina, available at [www.rightowater.org.uk/pdfs/argentina\\_Cs.pdf](http://www.rightowater.org.uk/pdfs/argentina_Cs.pdf), 20 September, 2009.

<sup>392</sup> The Argentine National Constitution.

<sup>393</sup> Constitution of Argentina, ch. VI 75(22), Art. 41 reads “All inhabitants enjoy the right to a healthy environment, balanced, apt for human development and in a manner so that productive activities satisfy present necessities without jeopardizing those of future generations; and must preserve it (the environment). Environmental damage will generate primary obligation of recomposition, as stipulated by the law.”

<sup>394</sup> The Argentine government ratified six international human rights treaties. The instruments of ratification of the International Convention of Civil and Political Rights and the International Convention of Economic, Social and Cultural Rights were both deposited in August of 1996.



Child and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>395</sup> These treaties enjoy constitutional status and are to be implied to complement the rights explicitly guaranteed by the Constitution.<sup>396</sup> This has generated significant changes in the way and reach of jurisdictional protection of these recognised rights stemming from these international instruments, which through these agreements jurisdictionally grants Argentines the possibility of demanding these rights.

### 6.2.2 Water and Civil Code

Several articles of Argentina's civil code refer to issues related to water resources. Article 2341 states that "individuals have right of use and enjoyment of public goods of the state or states, but they will be subject to the dispositions of this code and the general or local decrees."<sup>397</sup> This article grants the possibility of individuals using and enjoying water resources pursuant to the present regulations.

### 6.2.3 Court decisions on the right to water

This section examines court cases which have recognised explicitly or implicitly the human rights to water in Argentina. Argentina has taken significant steps within the court system to protect the right to water.

#### 6.2.3.1 *The case of Marchisio José Bautista v Otros*

The case *Marchisio José Bautista v Otros*<sup>398</sup> deals with access to safe drinking water. The case took place in poor neighbourhoods in the city of Córdoba. The residents are not connected to the public water distribution network; they rely on domestic groundwater wells that are, heavily polluted with faecal matter and other contaminants. The case was litigated with support of an Argentine NGO (CEDHA) and addressed specifically the right to safe drinking water.<sup>399</sup>

In its judgment, the Court acknowledged this right as being implied in the right to health and ruled that the State was *inter alia* responsible for violating the human right to water. It made specific reference to several international human rights instruments incorporated in the

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<sup>395</sup> The Argentine National Constitution, Art. 75 Para. 22.

<sup>396</sup> Art. 75 para. 22 of the Argentine National Constitution incorporated international human rights treaties within Argentina's constitutional rank.

<sup>397</sup> Water and Civil code, Article 2341.

<sup>398</sup> Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial: Marchisio José Bautista y Otros, Acción de Amparo (Expte. No. 500003/36), 19 October 2004.

<sup>399</sup> Marchisio José Bautista judgment at Para. V .



Argentine Constitution: Article 25 of the Universal Declaration of Human Rights as well as Articles 11 and 12 of the Social Covenant. Moreover, the Court specifically mentioned General Comment 15 on the Right to Water, stressing that access to safe water is indispensable for the right to health. The Court continued to point out that the right to health includes measures to be taken to prevent damage to health such as providing water and obliged the state to take positive measures.<sup>400</sup> The court ordered the state to address the situation immediately and to take urgent measures, to provide 200 litres of safe drinking water per household per day until the full access to the public water services is ensured.<sup>401</sup> This case demonstrates that the courts in Argentina instructing public water provider to take positive measures in order to provide safe drinking water.

#### **6.2.3.2 *Quevedo Miguel Angel v Otros c/ Aguas Cordobesas S.A***

In *Quevedo Miguel Angel v Otros c/ Aguas Cordobesas S.A.*<sup>402</sup> The water supply of a group of indigent families in the City of Cordoba had been disconnected by the water services company due to non-payment. In its judgment, the Court stated that the provision of a minimum quantity of drinking water must be guaranteed to everyone, which follows from its character as a public utility. By making reference to a provincial law that establishes that everyone has the right to receive adequate public services to meet their needs, the judge held that the state is responsible for providing drinking water, as it is an essential service.<sup>403</sup> Furthermore, the court had to consider the regulatory framework of the concession establishing a guaranteed amount of 50 litres daily per family that were to be provided regardless of payment. The court held that such an amount is not sufficient to meet the basic requirements of hygiene and health of a standard family. The court therefore ordered the company to provide a minimum of 200 litres of potable water daily per family.<sup>404</sup> This clearly shows that the judgment refers to the state's obligation to protect the right to water.

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<sup>400</sup> *ibid.* at Para. VIII.

<sup>401</sup> *ibid.* at Para. VIII.

<sup>402</sup> Ciudad de Córdoba, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial: *Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A.*, Acción de Amparo, 8 April 2002, <<http://www.cedha.org.ar/docs/doc220-spa.doc>> (22 June 2006).

<sup>403</sup> *Quevedo Miguel Angel* judgment at Para. VII.

<sup>404</sup> *ibid.* at Para. VIII).

**6.2.3.3 Case of User and Consumers in defense against Aduas del Gran Buenos Aires S.A.**  
*In the Case of User and Consumers in defence against Aduas del Gran Buenos Aires S.A.* In June 2002,<sup>405</sup> in the city of Buenos Aires, the president of the organization *Users and Consumers*, Alejandro Fiorenza, interposed an *amparo* (injunction) protection against Aguas del Gran Buenos Aires S.A. in order to declare the unconstitutionality and nullification of interrupting the provision of water as a measure against lack of payment. As a preventive measure, the demanded party is ordered to cease the water provision interruptions and to proceed to the restoration of the interrupted services and to abstain from carrying out such interruptions in the communal area of Moreno.

### **6.3 Provision of water supply and services**

From 1870 through to 1980, water services in Argentina were provided by the federal company Obras Sanitarias de la Nación (OSN) and a number of not-for-profit cooperatives. In 1980, OSN's jurisdiction was restricted to the federal district and 17 municipalities of the suburban Greater Buenos Aires area.<sup>406</sup> The OSN remained under control of the federal government; the responsibility for public water services in the rest of the country was transferred to local governments.<sup>407</sup> This means, before privatisation, public companies provided water services in two-thirds of the municipalities while not-for-profit cooperatives provided services in the remaining one-third. Between 1991 and 1999<sup>408</sup>, about half of the public water companies servicing 28 percent of the country's municipalities and covering almost 60 percent of the country's population were privatised.

In the early 1990s President Menem's sweeping neoliberal reforms to the Argentine economy set the state for the entry of the international private sector into the water sector. To streamline privatisation process, the President declared an economic state of emergency regarding public services, including water and sanitation.<sup>409</sup> Through such an order, Menem was able to expand privatisation of water supply and sewerages around the country.<sup>410</sup>

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<sup>405</sup> Case No. ARB/97/3.

<sup>406</sup> Jose' A. Delfina and Ariel A. Casarin, "The Reform of the Utilities Sector in Argentina", Discussion Paper No. 2001/74, United Nations University (UNU), World Institute for Development Economics Research, September, 2001.

<sup>407</sup> Artana, Daniel, F Navajas and S Urbiztondo, *Regulation and Contractual Adaptation in Public Utilities: The Case of Argentina*, Inter-American Development Bank, Washington DC.

<sup>408</sup> Daniel Santoro, The 'Agua' Tango: Cashing in on Buenos Aires' Privatisation, the centre for public integrity, see <http://project.publicintegrity.org/water/report.aspx>. 20 September 2009.

<sup>409</sup> National Administrative Reform Law (No 23, 696).

<sup>410</sup> International Centre for Public Integrity (ICPI). available at [www.projects.publicintegrity.org/water/report.aspx?aid=50](http://www.projects.publicintegrity.org/water/report.aspx?aid=50). 20 September 2009.

### **6.3.1 Appraisal of privatisation of water supply and services in Argentina**

The privatisation of water supply and services arise and are related to the reform of the water sanitation system in the early 1990s, after the commencement of participation by the private sector. As is common to other countries where privatisation has taken place the common challenges are cost recovery policies which have led to disconnection of water supplies. Additionally, large numbers of people are still without a sufficient water supply. The next section will assess the impact of cost recovery and privatisation of water supply and services and highlight how it has become a barrier to the realisation of the human right to water in Argentina.

#### **6.3.1.1 The Case of Buenos Aires, Argentina**

The Buenos Aires privatisation deal, accomplished in 1993, a contract for private participation by Aguas Argentinas<sup>411</sup> (a subsidiary of Suez) was signed for Buenos Aires, Argentina. The private participation led to rapid improvements in water availability. The percentage of the population served increased from 70 percent to 85 percent, an addition of 1.6 million customers. A 38 percent increase in drinking water capacity was developed, thus ending the problem of summer water shortages.<sup>412</sup> The privatisation reduced staff by 50 percent, reduced non-payment of water bills from 20 percent to 2 percent, and resulted in a more modern and efficient billing and water-delivery operation. Customer satisfaction improved upwards to 70 percent.<sup>413</sup>

During the first 8 years, Suez earned a 19 percent profit on its average net worth. Furthermore privatisation increased efficiency, profitability and labour productivity. There was increased access to the network, particularly in the poorer neighbourhoods.<sup>414</sup> The numbers of connections to the water network increased by 30 percent, and sewerage connections increased by 20 percent. 84.6 percent of the new connections were to lower-middle and low-income households.<sup>415</sup> Part of the success of the concession has been attributed to the

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<sup>411</sup> According to Daniel Santoro, Aguas Argentinas is a consortium controlled by two French corporate giants, Compagnie Générale des Eaux (now Vivendi) and Lyonnaise des Eaux (now Suez). The Argentina government granted a 30 year concession contract., see [www.icij.org](http://www.icij.org).

<sup>412</sup> Daniel Santoro, "The 'Aguas' Tango: Cashing In On Buenos Aires' Privatisation", – International Consortium of Investigative Journalists, November 2009, see [www.icij.org](http://www.icij.org). 20 September 2009

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> See Aguas Argentinas (2000), [http:// www.aguasargentinas.com](http://www.aguasargentinas.com). 20 September 2009.

inclusion of a wide range of external advisors during planning and implementation, most of them were from institutions that support privatisation.<sup>416</sup> Alcazar et al., stated that, the company's investment record has been impressive<sup>417</sup> similarly, Artana et al., affirmed that, the Buenos Aires concession as the most profitable water concession in the world, with rates of return approaching 40%.<sup>418</sup> The study conducted by Sebastian Galiani, Paul Gertler and Ernesto Schargrotsky showed, that privatisation of the water supply in Buenos Aires, Argentina actually led to improved health outcomes. The study focused on children<sup>419</sup> it found out that there was significantly larger increases in the proportion of households connected to water services in municipalities that privatised as opposed to municipalities that did not, service increases in previously underserved areas led to positive health outcomes, especially in child mortality.<sup>420</sup> It further argues that privatised firms are more efficient, invested more and provided better services.<sup>421</sup>

The case of water privatisation in Buenos Aires is one of the most noted for exemplary private participation.<sup>422</sup> The case was widely lauded by the World Bank, the Argentine government and the water industry, as an international success story. The privatisation in Buenos Aires eventually collapsed, because the company link water price to the United States of American dollar, as a result of the contractual clauses that permitted Suez to link water prices to the dollar, this is crucially important for the company because of Argentina's history of hyperinflation.<sup>423</sup> The government overruled that clause through an emergency decree, however, and by 2002 Suez had to write off \$500 million in losses mostly because of the Buenos Aires concession.<sup>424</sup>

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<sup>416</sup> World Bank, Reducing Regulatory Barriers to Private-Sector Participation in Latin America's Water and Sanitation Services, Transport, Water, and Urban Development Department: Water and Sanitation Division, Policy Research Working Paper #1322, July 1994.

<sup>417</sup> Alcazar, Lorena, Manuel A Abdala, and Mary M Shirley, *The Buenos Aires Water Concession*, The World Bank, Washington DC. 2000.

<sup>418</sup> Artana, Daniel, F Navajas and S Urbiztondo, *Regulation and Contractual Adaptation in Public Utilities: The Case of Argentina*, Inter-American Development Bank, Washington DC, pg 211.

<sup>419</sup> Galiani, S., Gertler, P. and Schargrotsky, E. (2005) 'Water for Life: The Impact of the Privatisation of Water Services on Child Mortality', (2005) *Journal of Political Economy* 113 (1): 83-120.

<sup>420</sup> Ibid.

<sup>421</sup> Ibid.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

<sup>424</sup> Artana, Daniel, F Navajas and S Urbiztondo, *Regulation and Contractual Adaptation in Public Utilities: The Case of Argentina*, Inter-American Development Bank, Washington DC, Page 211.

### 6.2.1.2 The Case of Tucumán

In 1995, Aguas del Aconquija, a subsidiary of Vivendi,<sup>425</sup> won a 30-year concession to run the water supply system for 1.1 million people in Tucumán. The private partner doubled water tariffs within a few months in order to meet the aggressive investment requirements specified in the concession. Due to political opposition and change in water quality, 80 percent of residents stopped paying their bills. In October 1998 the government terminated the concession. Vivendi agreed, but quickly filed a US\$100 million suit against the government, and joined several other companies who had filed complaints against Argentina with the World Bank arbitration panel.<sup>426</sup>

### 6.3 Concluding remarks

The Constitution of Argentina has not explicitly recognised the human right to water. However, the right to water is implicitly derived from the constitutional right to health which is understood to include the right to water in Argentina.<sup>427</sup> Additionally Argentina has incorporated several international human rights instruments including the Social Covenant, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. The human right to water has also been drawn from the court cases. The court cases in Argentina demonstrate the full spectrum of human rights obligations relating to socio-economic rights, despite not explicitly changing the legislative framework, Argentina affected an equitable right to water.

The cases outlined above address a broad range of issues: from the disconnection of water services, access to and provision of sufficient water supply and services by private companies and public services providers and water pollution. The courts have addressed the core obligations as well as the obligation to achieve the progressive realisation of the human right to water.

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<sup>425</sup> Formally the contract was with Vivendi's Argentine affiliate Aguas del Aconquija. The parent company was known as Compagnie Générale des Eaux (CGE) at the time of entering into the concession and more recently as Veolia, though still more popularly recognised as Vivendi, which will be the name used here. Although Aguas del Aconquija has a separate legal personality, it is controlled in substance by Vivendi.

<sup>426</sup> *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic*, Award, ICSID Case No. ARB/97/3 (12 November 2000), 40 ILM 426, also available (with subsequent decisions on the same case) at <http://www.worldbank.org/icsid/cases/awards.htm#award15>. The case was originally filed on February 19 1997, relying on a 1991 BIT between Argentina and France.

<sup>427</sup> Ibid.,.

The case study outlined above indicates the impact of privatisation of water supply and services in Argentina. In Buenos Aires case, it demonstrates how private sector participation can be used to improve equity and health outcomes, Galiani et al. illustrated that not only privatised firms were more efficient, invested more and provided better service, but the access also increased in privatised areas. In addition, they also show that welfare increases more with privatisation since for same levels of connection, child mortality decreased more in privatisation compared to that of the public sector and that it was the poor who benefitted the most.<sup>428</sup> Similarly, Benitez et al found that all categories of the population benefitted from access and coverage improvements, efficiency and quality as a result of privatisation in Argentina.<sup>429</sup> In addition, it is the poor who benefitted the most from access and productivity increase.<sup>430</sup>

On the contrary the studies conducted by Delfino and Casarin found that privatisation benefits wealthier people than poorer.<sup>431</sup> Likewise the above case studies shows the privatisation increases prices rapidly, as the case of Tucumán demonstrated, the private company Aguas del Aconquija, doubled the water tariffs while the privatisation in Buenos Aires collapsed, because of the company linking water price to the United States dollar. Thus, in Argentina there are both positive and negative impacts of the privatisation of water supply and services. Argentines are now more opposed to privatisation. In 1998, approximately 45 percent of people disagreed or strongly disagreed that privatisation had been beneficial.<sup>432</sup>

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<sup>428</sup> Galiani, S., Gertler, P. and Schargrodsky, E. 'Water for Life: The Impact of the Privatisation of Water Services on Child Mortality', (2005) *Journal of Political Economy* 113 (1): 83-120.

<sup>429</sup> Benitez, D., Chisari, O. and Estache, A. 'Can the Gains from Argentina's Utilities Reform Offset Credit Shocks?' in Ugaz C. Waddams Price (ed.), *Utility Privatisation and Regulation: A Fair Deal for Consumers?* Northampton, MA: Edward Elgar. (2003)

<sup>430</sup> Ibid.

<sup>431</sup> The empirical studies of the effects of water privatisation in Latin America, which were conducted by Delfino and Casarin, 2001, found, after comparing pre-privatisation and post-privatisation prices, 1992-1999 "that water and sewerage prices increased by 11% and following privatisation only 69% of poorer families benefited from water and sewage services, as compared to 89% of the wealthy". See Delfina J. and Casarin A., *The Reform of the utilities sector in Argentina*. Helsinki: UNU/WIDER; 2001. [www.wder.unu.edu/search.htm](http://www.wder.unu.edu/search.htm)

<sup>432</sup> Delfina J. and Casarin A., *The Reform of the utilities sector in Argentina*. Helsinki: UNU/WIDER; 2001



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## Chapter Seven

### Comparative analysis of the right to water and impact of privatisation of the three (3) selected countries

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#### 8.1 Introduction

The previous chapters (Chapter 4, 5 and 6) appraised privatisation of water supply and services and impact of cost recovery policy in the progressive realisation of human rights in the selected countries. This chapter makes a comparative analysis of the impact of cost recovery policy and privatisation of water supply and services on the fulfilment of the human water right within the countries named above,<sup>433</sup> assessing the common trends in recognition of the right to water, and different approaches that have been adopted by each country in the progressive realisation of the right to water.

#### 8.2 The Human Right to Water

##### 8.2.1 Namibia

The Preamble of the Constitution of Namibia states that no person may be discriminated against on the grounds of race, sex or socio-economic standing. Article 95 obliges the government to promote and maintain the welfare of people, through policies, among others, aimed at maintaining an acceptable level of nutrition and standard of living of the Namibian people and improving public health.

The Namibian government is also signatory to international laws such as The Convention on the Elimination of all forms of Discrimination against Women of 1979 and the Convention on the Rights of the Child of 1989, as well as the ILO Convention on the Elimination of Child Labour. International law is recognised as part of Namibian law by virtue of Article 144.<sup>434</sup>

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<sup>433</sup> See Chapters four to seven above.

<sup>434</sup> International treaties signed by Namibia (i.e. the President) and ratified by Parliament immediately become part of Namibian law. *LAC News*, Issue 13, November 2003, p.15.

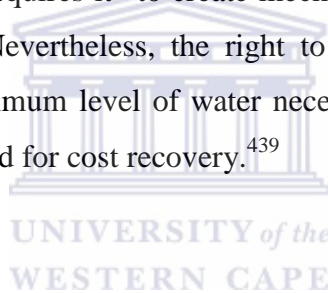


### 8.2.2 South Africa

South Africa is among the few countries in the world where the right to water is embodied in the Constitution.<sup>435</sup> The Constitution recognises a right to sufficient water<sup>436</sup> and explicitly requires the consideration of international law in interpreting its Bill of Rights.

The South African Constitutional Court has ruled that these rights are justifiable and there is an extensive body of case laws on socio-economic rights, in particular on the rights to housing, health and social security. In particular the Grootboom case has interpreted the right to water in a manner similar to that recognised by General Comment 15.<sup>437</sup> It can be regarded as a landmark judgment in the field of socio-economic rights and South Africa thus has taken a leading role in the national judicial enforcement of socio-economic rights.

The South African Commission on Human Rights indicates that the right does not oblige the state to provide free water, but requires it “to create mechanisms that enable people to have access to sufficient water.”<sup>438</sup> Nevertheless, the right to water in South Africa has been interpreted to require a free minimum level of water necessary for survival, above which a progressive pricing scheme is used for cost recovery.<sup>439</sup>



### 8.2.3 Argentina

Argentina has not included an explicit right to water in its constitution.<sup>440</sup> The Constitution has incorporated several international human rights instruments including the Social Covenant, the Convention on the Rights of the Child and the Convention on the Elimination of All forms of Discrimination against Women. These treaties enjoy constitutional status and

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<sup>435</sup> The Constitution of The Republic of South Africa, Sec 27 (1)(b) states that everyone has the right to have access to sufficient water. Section 27 (2) requires the state to take responsible legislative and other measures, within its available resources, to achieve the progressive realisation of this human right.

<sup>436</sup> REP. OF S. AFR. CONST. (Act 108 of 1996) ch. II, § 27(1)(b). The state assumes an obligation to take reasonable legislative or other measures, within its available resources, to realise the right progressively. *Id.* at § 27(2).

<sup>437</sup> Governmentt of the Republic of South Africa and Others v. Grootboom and Others, 2000 (2) SA 46 (CC), (11) BCLR 1169 (SA). See South African Commission on Human Rights., 3rd Economic and Social Rights Report 298-99, 409-10 (2003), [http://www.sahrc.org.za/esr\\_report\\_1999\\_2000.htm](http://www.sahrc.org.za/esr_report_1999_2000.htm) [hereinafter S. AFR. CHR REPORT]. For a discussion of the *Grootboom* case see chapter five above

<sup>438</sup> S. AFR. CHR REPORT, *supra* note 93, at 298.

<sup>439</sup> See *Grootboom*, 2000 (2) SA (46) (CC) (2001), (11) BCLR 1169 (SA) (adopting a provisional decision that requires the State to provide water until the family can provide for themselves); Local Government Municipal Systems Act 32 of 2000 § 74(2) (S. Afr.) (stating that a municipality’s tariff system must provide poor households access to basic services by applying a number of tariff principles, including tariffs that charge only for the costs of maintenance and operation costs; special tariffs based on low level consumption use or other basic levels of service; or some other direct or indirect method of subsidization of tariffs).

<sup>440</sup> CONST. ARG. ch. VI, §§ 75(22), 41(1).

are to be understood to complement the rights explicitly guaranteed by the Constitution.<sup>441</sup> Argentine states have dominion over the natural resources in their territories.<sup>442</sup> Argentina's national water management law partly pre-empts state regulation.<sup>443</sup> This law, however, does little to advance the constitution's human right to water, as the terms and obligations imposed by this right remain undefined and the law deals primarily with inter-jurisdictional waters rather than freshwater sources wholly located within any single jurisdiction.

### **8.3 Interpretation of the right to water by the court cases**

The right to water has also been drawn from court decisions. The right to water has been recognised as an integral part of several fundamental human rights by judicial decisions in South Africa and Argentina as shown in appendix 1, which shows a very remarkable case law that, has made the interpretation of the right to water by different courts from the selected countries. The case law dealt with an extensive range of issues relating to water from the availability of sufficient water resources<sup>444</sup>, to the case of disconnection, installation of pre-paid meters, and lack of access to water supply and services.

Thus it can be deduced that the right to water has proven to be justifiable in different courts as discussed above, and therefore the recognition of the right to water is thus not only lip-service, but the right has also proven to be an enforceable human right in many instances. The enforcement of the right to water depends in large parts on the willingness of the courts to interpret the provision in a broad sense.

Although international human rights law has not yet created legally binding obligations on states to recognise a human right to water, the courts have served to pressure some states into more fully developing a human right to water. Hence, South Africa, Argentina and Namibia all provide a right to water, derived either from constitutions, statutes, or from the interpretation of the courts, and, in some instances, from the international human rights instruments. Since the right to water as conceived by the General Comment No 15, has not been fully flushed out, no true examples exist to indicate the right's potential effects on

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<sup>441</sup> Art. 75 Para. 22 the Constitution.

<sup>442</sup> *Id.* at § 124(2).

<sup>443</sup> Law No. 25688, Dec. 30, 2002, Reporter, available at <http://infoleg.mecon.gov.ar/txtnorma/81032.htm>.

<sup>444</sup> See the Court Cases in the above chapters 4, 5, 6 and 7 These courts have addressed a broad range of aspects pertaining to the right to water. Issues including availability, accessibility, quality, quantity, affordability and fair procedures have been covered. Moreover, courts have addressed these issues under different human rights obligations. The obligations to respect and to protect are regarded as relatively easy to adjudicate.

developing countries. Nevertheless, the experiences of South Africa and Argentina offer unique lessons for the development and definition of an international right to water.

#### **8.4 Provision of water supply and services**

The provision of water supply and services, in all the selected cases are either provided by governments or private sectors, privatisation of water supply and services has taken place in various forms, from concession, management, leases and even boot. Additionally, the multinational water companies that are involved in operating all the selected companies are similar.<sup>445</sup> Moreover, the privatisation of water supply and services in most of the selected countries is supported by the international financial institutions, the World Bank and IMF.<sup>446</sup> In all the case studies above, international financial institutions have used their financial leverage to force governments to privatise their water utilities in exchange for loans.<sup>447</sup>

#### **8.5 Common Trends**

The adaptation of the policy of cost recovery and privatisation of water supply and services is common in all the selected countries, the above study shows widespread practise of cost recovery. It can be observed in all the selected countries, instances where the governments departments, municipalities and other state agents that are concerned with provision of water supply and services adopted cost recovery policies, which in some cases, lead to limitation of water supply and services, disconnection or installation of pre-paid metering which greatly impacted the poor people's access to sufficient water, thus potentially violating their rights to water.

Similarly, the practice of privatisation of water supply and services is also common, while the contribution of water privatisation in the supply and delivery, building of water infrastructure, creation of employment, and increase in GDP cannot be ignored; the negative impact of privatisation in the realisation of the human right to water has been huge too, particularly for vulnerable communities.

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<sup>445</sup> See appendix 2 and 3.

<sup>446</sup> See chapter 3 above for the role of international financial institutions in the privatisation of water supply and services.

<sup>447</sup> See chapter 3 above. See also ICIJ – they further say that privatisation has been concentrated in poorer countries where the World bank has used its financial leverage to force governments to privatise their water utilities in exchange for loans.

Thus, in spite of the progress made by recognising the right to water in selected countries and the provision and expansion of the FBW as the case of South Africa, many of the selected countries can be seen as embracing economic approaches to water management, actively promoted by international financial institutions including the World Bank and IMF. These approaches can be seen as potential challenges to the realisation of the human right to water; particularly the policy of cost recovery<sup>448</sup> which has become a barrier to the realisation of sufficient water supply and services. The following section will briefly compare and assess the consequences and impact of the cost recovery and privatisation of water supply in realisation of the human right to water in selected countries.

### **8.5.1 Improved provision of water supply and services**

The case of Buenos Aires, Argentina, it demonstrates how private sector participation improves equity and health outcomes;<sup>449</sup> similarly the case of Sebokeng/Evaton shows how public-private partnership solved the problems of water leakages.<sup>450</sup>

### **8.5.3 Increase of the price**

The cost recovery policies and privatisation of water supply and services has invariably led to an increase in prices in most of the selected countries. In Argentina for example; Aguas del Aconquija, a subsidiary of Vivendi, doubled the water tariffs within a few months of operation that led to 80% of the residents boycotting the bill payments and eventually their contract was terminated. Similarly, a case of price increase is also reported in Nelspruit and Queenstown in South Africa<sup>451</sup> which has prevented significant numbers of poor people from the realisation of their right to water.

### **8.5.2 Disconnection of water supply and installation of prepayment meters**

In all the selected countries, there are many cases of water disconnections as a result of non-payment for water services, and the installation of prepaid meter systems. In Namibia for example, in the Democratic Resettlement Community (DRC), after introduction of prepaid meter systems, many people were left without access to sufficient water. In 2000, South Africa experienced one of its worst cholera epidemics. The reasons for the outbreak were

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<sup>448</sup> The cost recovery approaches to water has led to increase use of disconnection of services in the face of non-payments, installation of pre-paid metering systems.

<sup>449</sup> See case of Buenos Aires, Argentina chapter six above

<sup>450</sup> See the case of Sebokeng/Evaton in Chapter five above

<sup>451</sup> McDonald, D (2002).

traced back to the installation of prepayment water meters in KwaZulu Natal. As many people were unable to pay for water; they turned to polluted rivers which resulted in the cholera outbreak that affected a great number of people.<sup>452</sup> The disconnection of water in most cases occurred without any warning or due process prior to discontinuation or limitation of services and this greatly infringed the realisation of poor people's right to water as enshrined in the respective countries legislative frameworks.

### **8.5.3 Lack of services and discrimination**

Cases of private companies failing to supply the low-income areas after winning the contract have also been reported. In South Africa, the subsidiary of Paris-based Suez failed to supply low-income areas since it won the water contract in 1993. Suez renegotiated its Dolphin Coast contract in mid-2001 due to lack of profits and a similar incident was also reported in the impoverished Nkonkobe area of the Eastern Cape.<sup>453</sup>

### **8.5.1 Outcomes**

The above experience shows that private companies are increasingly running up against strong opposition in South Africa<sup>454</sup>, Namibia<sup>455</sup>, and Argentina<sup>456</sup> mostly because of the vital nature of water. Several contracts have been terminated in Argentina and South Africa as a result of failure of the private companies to provide services, and increasing of their prices.

## **8.6 Appraisal of the impact of privatisation in the progressive realisation of the human right to water in the selected countries: common trends**

The above evidence from case study of cost recovery and privatisation of water supply in the selected countries inevitably shows the case of the disconnection, installation of pre-paid meters and reduced access to water, for the poor in all the selected countries.<sup>457</sup> As the

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<sup>452</sup> South Africa Department of Health, Report on Cholera outbreak, McDonald and Pepe, Deedat and Cottle.

<sup>453</sup> Hall David, Bayliss Kate, Public Services International Research Unit at Business School of the University of Greenwich et. al., "Water Privatisation in Africa" June 2002, Available online: <http://www.psir.org/publicationsindex.asp> Downloaded: 21.02.2006.

<sup>454</sup> The opposition in South Africa includes NGOs, human rights activities, the Coalition Against Water Privatisation which was formed out of resistance. Several cases of the people resisting installation of meters, disconnection and price hikes have been reported. See De Visser, J., Cottle, E., & Mettler, J. 2003. "Realising the right of access to water, Pipe dream or watershed?", *Law Democracy and Development*, 7:42. See also Morgan, B, 2007, McDonald, D.A. and John Pape, eds., 2002.

<sup>455</sup> See chapter four above.

<sup>456</sup> See chapter six above.

<sup>457</sup> PUBLIC CITIZEN, op cit, 2003. For more documentation on these global trends, see Holland, Ann-Christin, *The water business: Corporations versus people*. Africa is obviously another important regional example highlighting these trends. For a good set of case studies highlighting tensions around privatisation of water in

privatisation in Buenos Aires in Argentina, the case of Usakos town in Namibia, and the case of KwaZulu natal in South Africa demonstrate, private companies and cost recovery policies will privilege those areas where profit is bigger and risk-free.<sup>458</sup>

The effects of the application of a policy of cost-recovery, particularly the practice of water prepayment and of disconnections, have in effect prevented the realisation of the right of access to water for impoverished communities, found in the legislative framework of all the selected countries.

The above experiences from privatisation show 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 water and even electricity disconnected in most instances.

Water is essential for life and health. The human right to water is indispensable for leading a healthy life in human dignity. It is a prerequisite to the realisation of all other human rights. Under the Human Rights manifestos and fundamental rights in the constitutions of Argentina, South Africa and Namibia, the right of access to safe water is one of the rights. But for many, it is still inaccessible or difficult to access this vital resource. Very often, lack of water for personal and domestic hygiene causes water-borne diseases like diarrhoea, worms, eye infections, skin diseases etc. Unless monitoring, implementation and enforcement mechanisms are put in place, constitutional and legislative protection serves little purpose. Nevertheless, explicit constitutional recognition of the right to water as it occurs in South Africa clearly enhances the legal status of such rights and provides a more discrete mechanism for enforcement. Even so, there remains a substantial limitation upon directly enforcing any wide-ranging right to water, not least being the high costs of pursuing enforcement through any court or tribunal system.

In a country with as many poor, unemployed and underemployed people with little access to resources and information, it is important to acknowledge that demand-driven and cost-

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the Southern African region, the authors recommend McDonald, D. & RUITERS, G, 2005. *The age of commodity: Water privatisation in Southern Africa*.

<sup>458</sup> See case studies in Chapter four- seven

sharing features will do little to secure the right to water for all. In fact it can be argued that with so many people dependent on daily wage labour and almost never making even the minimum wage per day, imposition of costs for drinking water provision will lead to a violation of the right to water.

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 all the selected countries has tended to violate this obligation.





## Chapter Eight

### Conclusion and Recommendation

#### The human right to water

This study has revealed that the human right of access to safe drinking water is recognised by the international community as the most essential element of life. As the discussion of international human right instruments indicates, this right has not however been clearly defined in international law. It has not been expressly recognised as a fundamental human right. Instead, the right to water is implied from other rights recognised by binding international instruments. The discussion has, however, indicated that the right to water is expressly included in non-binding instruments that are designed to achieve specific ends.

Although the International Bill of Human Rights does not explicitly recognise the right to water,<sup>459</sup> it can be argued that the right to life as stipulated by Article 3 of the Universal Declaration of Human Rights implies the right to water. A standard of living that is adequate for the health and wellbeing of individuals presupposes the availability of a minimum amount of clean water. The realisation of both the right to an adequate standard of living, including sufficient food and shelter, as recognised by article 11 of the ICESR, and the right to physical and mental health, as stipulated by article 12 of the ICESR, presuppose access to drinking water. This was confirmed by General Comment No 15, of the UN Committee on Economic, Cultural and Social Rights.<sup>460</sup> This imposes an obligation on states to respect, protect, promote and fulfil the right to water. The duty to *respect* refers to the responsibility of the state to ensure existing access to water is not interfered with. The duty to *protect* refers to an obligation of the state to ensure that private actors do not interfere with the right to water. The obligation to *promote* requires a state to take steps to ensure that there is suitable education on the hygienic use of water, the protection of water resources and methods of minimising water wastage, and the duty to *fulfil* means that governments have the duty to gradually ensure that everyone has access to water.

However, UN Committee's General Comment 15 does not have a law-making power; its interpretation has to be accepted by the state parties to the Covenant. Similarly the

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<sup>459</sup> The International Bill of Rights refers to the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants on Human Rights.

<sup>460</sup> General Comment No. 15 (2002), E/C.12/2002/11, 26 November 2002, available at <http://www.unhcr.ch/html/menu2/6/cescr.htm>.

committee's action alone cannot create a right to water. Its declaration of the right is nevertheless constructive overall, and it encourages states to make real progress in raising the awareness of the international community regarding the seriousness of problems of access to water.

Although international human rights law has not yet created legally binding obligations on states to recognise a human right to water, the case study above shows that South Africa has explicitly recognised the right to water in its legislative framework, while Argentina and Namibia provides a right to water, derived either from international human rights instruments, constitutions, statutes, or from the interpretations of the courts. Since the right to water as conceived by the General Comment No 15, has not been fully fleshed out; no true examples exist to indicate the right's potential effects on developing countries. Nevertheless, the experiences of South Africa and Argentina offer unique lessons for the development and definition of an international right to water.

### **Privatisation of water supply and services**

This study reviewed the debate on privatisation of water supply and services. The debate centres on two opposing understandings of managing water. On the one hand is the idea of managing water as an economic good using market-like or market friendly instruments where price functions as the main mechanism that guides decisions on allocation, distribution and consumption. On the other side of the debate are those that consider water as the essence of life itself and should not therefore be treated as a commodity based on market principles. Both approaches have some merits.

Privatisation of water supply and sanitation has the potential both for opportunities and difficulties. In terms of service improvement, private sector participation has the capacity to provide much needed investment to expand and rehabilitate the infrastructure. It has also the capacity to increase efficiency and flexibility without putting an additional burden on public finances as the case of Buenos Aires, Argentina demonstrated private participation can be used to improve equity and health outcomes, However, there is also the risk that the participation of the private sector in the water sector may shift the focus of service provision away from public interest towards profit, excluding from the services those who are unable to pay, thus, preventing the realisation of the right to access to water for the poor. The experiences from privatisation, as shown in this study, show the extreme difficulty in using

privatisation as a measure to progressively realise the right to water in a community where poverty is rife. What is clear from the case study above is the rampant practice of policy of cost recovery that has led to disconnections, installation of pre-paid meters and, as a result, prevented or reduced access to water for the poor. The commercial benefits that are supposed to accrue from privatisation of water services are also a cause of contention. As the cost recovery mechanism and privatisation of water services in various towns in Argentina, Namibia, and South Africa demonstrate, the practise of cost recovery by governments or its agents and privatisation often privilege those areas where profit is bigger and risk-free. This is despite the existence of the human right to water within the selected countries legislative framework.

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 all the selected countries has led to cases where this obligation has been violated.

### **Recommendations**

Every government and state must put measures in place to ensure that the poor have access to minimum levels of water for personal and domestic use. Such measures could include free basic water policies such as in South Africa, subsidising the poor, and other similar measures that can contribute to the wellbeing of the poor. As discussed in chapter two above, it is clear that, as the ultimate bearer of socio-economic rights obligations, the state has the duty to ensure that privatisation and cost recovery on water supply and services does not compromise accessibility, availability, quantity and acceptability of water. In particular it must not result in the denial of access of water to poor communities. Furthermore, states are required to regulate and monitor private water providers and ensure that private provision of water does not compromise equal, affordable and physically accessible water for all.

Private water providers can contribute to the respect and promotion of the right to water by ensuring that priority is given to those who do not have access (including those within informal settlements and to other marginalized and vulnerable areas or groups) in the extension of water supply and services, providers should consider their ability to pay into disconnection policies in ensuring that where disconnection are carried out, they do not lead

to the denial of the minimum amount of water considered essential for personal and domestic use.

The state must work to improve access to justice, assuring its effectiveness in the prevention of future damages, where private actors should be brought to book if they fail in their obligations and everyone should obtain judicial resolution where access to fresh water is guaranteed as a human right.



## Bibliography

### Books

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1. Alcazar, Lorena, M. Abdala, A and Mary M S., *The Buenos Aires Water Concession*, The World Bank, Washington DC, 2000.
2. Amoako, B., *Human rights in Africa: The conflict of Implementation*, University Press, 2000.
3. Artana, D. Navajas, F. and Urbiztondo, S. *Regulation and Contractual Adaptation in Public Utilities: The Case of Argentina*, Inter-American Development Bank, Washington DC, Page 211.
4. Barlow, M. and Clarke, T., *Blue Gold: The Battle against Corporate Theft of the World's Water*, New Press, 2002.
5. Bay, C., *Human needs as human rights*, in Coate, R.A. and Rosati, J.A., eds., *The Power of human needs in world society*, 1988.
6. Bay, C., *Human needs as human rights*. (Eds.) Coate, R.A and Rosati, J.A., *The Power of human needs in World Society*, Lynne Rienner Publishers: Boulder, 1988.
7. Bayliss, K. and Hall, D., *Unsustainable conditions – The World Bank, Privatisation, Water and Energy*, London: Public Services International, 2002.
8. Benitez, D., Chisari, O. and Estache, A. 'Can the Gains from Argentina's Utilities Reform Offset Credit Shocks?' in Ugaz C. Waddams Price (ed.), *Utility Privatisation and Regulation: A Fair Deal for Consumers?* Northampton, MA: Edward Elgar. 2003.
9. Birnie, P. W and Boyle, A. E., *Basic Documents on International Law and the Environment*, Clarendon Press, Oxford, 1995.
10. Cottle, E. and Hamed, D., *Cost Recovery and Prepaid water meters and the cholera outbreak in KwaZulu-Natal*. In McDonald, David and John, Pepe eds. (2002) *Cost recovery and the Crisis of services delivery in South Africa*. Cape Town, South Africa: Human Research Council, 2002.
11. De Visser, J and Mbazira, C., (Eds.) *Water Delivery: Public or Private*, Community Law Center, University of the Western Cape, Cape Town, South Africa, 2006.
12. De Waal J, Currie I and Erasmus G., *The Bill of Rights Handbook*, Juta and Company Ltd.

13. Delfina J. and Casarin A., *The Reform of the utilities sector in Argentina*. Helsinki: UNU/WIDER; 2001
14. Diescho, J., *The Namibian Constitution in Perspective*. Windhoek: Gamsberg Macmillan Publishers, p 70ff, 1994.
15. Dugard, J. “The Phiri Water Case (Mazibuko and Others v City of Johannesburg and Others): Can human rights traverse the commercialization of water in South Africa?”, 2008.
16. Erasmus, G., *The Namibian Constitution and the application of international law in Namibia*, In Van Wyk, D, M Wiechers and R Hill. Constitutional and international law issues. Pretoria: VerLoren Van Themaat Centre for Public Law studies, p94. 1991.
17. Finger M, and Allouche J. *The transformation of the global water sector: the role of the World Bank and ‘Public Sector TNCs’ l’IDHEAP Working Paper 6” 2002.* , Chavanes-pres-renens: Institute of Higher Education and Public Administration
18. Finger, M. and Allouche, J., *Water Privatisation: Trans-national corporations and the re-regulation of the water industry*, Spon Press: New York, 2002.
19. Flynn, S. and Mzikenge Chirwa, D., *The Constitutional Implications of Commercializing Water in South Africa*, in McDonald A and Greg, Ruiters (eds.) *The Age of Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005.
20. Frans, V., *International Human Rights Law in Africa*, Oxford, 2007.
21. Galiani, S., P. Gertler, E. S. and Struzeneger., *The benefits and costs of privatisation in Argentina: A microeconomic analyse*, Mimoe, Universidafe de san Andres, Berkely and D.Tella, 2005.
22. Giddens, A., *The third way: and its critics*. Blackwell Publishers Inc.: Malden, MA 2000.
23. Glazewski, J. I., *Environmental law in South Africa*, (2<sup>nd</sup>ed) Butterworth’s, Durban, 2005.
24. Glazewski, J. I., *Environmental law in South Africa*, Butterworth’s, Durban, 2002.
25. Gleick, P., *The Privatisation of Water and Water Systems*. Ed. P. Gleick. *The World’s Water: The Biennial Report on Freshwater Resources*, Island Press: Washington D.C.
26. Graig R. K., *The Clean Water Act and the Constitution: Legal Structure and Republic right to a clean and Healthy Environment*, Environmental Law Institute, 2004.
27. Gray, J., *Liberalism*. University of Minnesota Press: Minneapolis, 1986.
28. Hodgson, S., *Modern Water rights theory and practice*, FAO, UN, ROME, 2006.

29. Kakujaha-Matundu, O. *Overview of privatisation in Namibia, a paper presented at the Bank of Namibia, Annual Symposium 17, 2009 Windhoek.*
30. Kidd, M., *Environmental law: A South African Guide*, Juta and company Ltd, Cape Town, 1999.
31. Krajewski, M. *The Right to Regulate and Obligation to Liberalize – The Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, London: Kluwer Law International, 2003.
32. MacInnes, P., *Entrenching Inequalities: The Impact of Corporatization on Water Injustices in Pretoria*, in David A McDonald & Greg Ruiters (eds.) *The Age of the Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005.
33. Madeley J., *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor*. Zed: London, 1999.
34. McClune J., *Water Privatisation in Namibia: Creating a new Apartheid?* LaRRI: Windhoek. 2004.
35. McDonald, D. A and Pape, J., *The Theory and Practice of Cost Recovery; Cost Recovery and the Crisis of Services Delivery in South Africa*, Zed Press: London and HSRC Publisher, 2002.
36. McDonald, D. A and Ruiters, G., *Introduction: From public to private (to public again)* in David A McDonald and Greg, Ruiters (eds) *The Age of Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005.
37. McDonald, D. A and Ruiters, G., *Theorizing Water Privatisation in Southern Africa*, in David A McDonald and Greg, Ruiters (eds) *The Age of Commodity: Water Privatisation in Southern Africa*, London: Earthscan, 2005.
38. McDonald, D. A., *The Bell Tolls of Three: Cost-Recovery, Cut-offs and Affordability of Municipal Services in South Africa. Human Sciences Research Council (HSRC) Report*. Pretoria, 2002.
39. McKinley, D. 'the Struggle Against Water Privatisation in South Africa. In Reclaiming Public Water: Achievements, Struggles and Visions from Around the World,' ed. Transnational Institute (TNI), pp. 181-190. Porto Alegre: TNI, 2005.
40. Merquior, J. G., *Liberalism, old and new*. Twayne Publishers: Boston, 1991.
41. Morgan, B., *Global business, local constraints: the case of water in South Africa, Chapter 10 of Making Global Self-Regulation Effective in Developing Countries*, ed. Dana Brown and Ngaire Woods, Oxford: Oxford University Press, 2007.



42. Pape, J. and MacDonald, D.A., *Cost recovery and the delivery of basic services in South Africa*, (eds.) Pretoria: HSRC, 2002.
43. Petrella, R., *The water manifesto: Arguments for a world water contract*, Palgrave: New York, 2001.
44. Ramandham, V., *Privatisation in Developing Countries*, Routledge Publishers: London, 1989.
45. Roth, G., *The Private Provision of Public Services in Developing Countries. EDI series in Economic Development*, Oxford University Press, 1987.
46. Scanlon, J., Cassar, A. and Nemes, N., *IUCN Environmental Policy and Law Paper No. 51. IUCN Environmental Law Programme*, Gland, Switzerland and Cambridge, UK: IUCN), 2004.
47. Thompson, H., *Water Law, A practical approach to resource management and the provision of services*, Juta and Company Ltd, Cape Town, 2006.
48. Williamson, J., *The progress of policy reform in Latin America, policy analyses in International economic*, Washington DC, Institute for International Economics 1990.

### Articles in Journals

---

1. Bakker, K., “The ‘Commons’ versus the ‘Commodity’: After-globalization, anti-privatisation and the right to water in the global South”, (2007) *Antipode* 39 (3): 430-455.
2. Bilchitz, D., “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *SAJHR* 1-26.
3. Bond, P. “Water Commodification and Decommodification: South African narratives from Johannesburg to Kyoto to Canun and back”. (2004) (15) (1) *Capitalism, Nature, Socialism* 7-25.
4. Bond, P., “An answer to marketization: decommodification and the assertion of rights to essential services”. (2002) *Multinational Monitor* (July-August, (14-17).
5. Bond, P., and Dugard, J., “ The Case of Johannesburg Water: What really happened at the prepayment ‘parish pump’”, (2008) *Law, Democracy and Development*.
6. Bond, P., McDonald, D. A and Ruiters, G. “Water Privatisation in SADC: The State of the Debate “ No 4, *ESR Review* pp. 10-13.

7. Budds, J. and McGranahan, G., "Are the debates on water privatisation missing the point? Experiences from Africa, Asia and Latin America" (2003) 15 (2) *Environment & Urbanization* 87-113.
8. Chirwa, D., "Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution", (2003) *Mediterranean Journal of human Rights* 29-68.
9. Chirwa, D., "Privatisation and socio-economic rights. Making Human Rights in a Globalizing World" *Human Rights Dialogue*.
10. Chirwa, D., "Socio-Economic Rights and Privatisation of basic services in South Africa, A theoretical framework". *ESR Reviews, Economic and Social Rights in South Africa*, a quarterly publication by the Community Law Centre, University of the Western Cape.
11. Choma, H.J., "The environmental rights entered in the constitutions: A critique", (2008) (5) *The Journal of US-China Law Review*.1.
12. David, W and Muria, K., "Norms on the Responsibilities of transnational corporations and other business enterprises with regards to human rights", 2003 (97) *AM.J.INT'L*. 901.
13. De Visser et al., "The Free Basic Water Supply Policy", *ESR Reviews, Economic and Social Rights in South Africa*", (2002) a quarterly publication by the Community Law Centre, University of the Western Cape.
14. De Visser, J., "From the Courts: Manqele V Durban Transitional Metropolitan Council", ( 2001) *Local Government Law Bulletin* (3/1).
15. De Vos P, , "Wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution", (1997) (13) *South African Journal on Human Rights* 67.
16. Delfina, J. A and Casarin,A. A, "The Reform of the Utilities Sector in Argentina", Discussion Paper No. 2001/74, United Nations University (UNU), World Institute for Development Economics Research, September, 20
17. Feigenbaum, H.B. and Henig, J.R., 1997. "Privatisation and political theory. (1997) *Journal of International Affairs*", 50 (2) (winter): 338-355.
18. Gayle, D. J. and Goodric, J. N., " Exploring the implications of privatisation and deregulations", in DJ Gyale and JN Goodric (eds.) (1990) (1) *Privatisation and deregulation in global perspective* 3.

19. Gessler, M. Brighu, B. and Franceys, R., “The challenge of economic regulation of water and sanitation in urban india”, (2008) *Habitat International* 49-57.
20. Gleick, P. H., “the Changing Water Paradigm—A Look at Twenty-first Century Water Resources Development”, (2000) *25 Water Intl.* 127.
21. Gleick, P. H., “the human rights to water”, (1999) *1(5) Water Policy* 487-503.
22. Gleick, P. H., *Basic Water Requirements for Human Activities: Meeting Basic Needs*, a. (1996) *21 WATER INT’L* 83.
23. Gleick, Peter, and Jon Lane., “Large International Water Meetings: Time for a Reappraisal”, (2005) *30 Water Intl.* 410.
24. Hardberger, A., “Life, Liberty, and the Pursuit of Water: Evaluating Water as a human right and duties and obligations it can creates,” (2005) *4 NW.U.J. INT’L Hum.RJT* 331.
25. Kerr, T. M. “Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing”, (1995) *8 GEO. INT’L ENVTL. L. REV.* 91, 91.
26. Kidd, M., “Not a Drop to Drink: Disconnection of Water Services for Non-Payments and the Right to Access water”, *20 South African Journal on Human Rights* 119, 131 (2004).
27. Liebenberg S., “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty”, 2002 (2) *6 Law and Democracy* 159-191.
28. Liebenberg S., “The Protection of economic and social rights in domestic legal systems, in A Eide, C. Krause and A Rosas (eds.) *Economics, Social and Cultural rights*”, (2001) *A textbook* 55.
29. Louma, J. R., “The Water Thieves.” (2004) *The Ecologist* (March)52-57
30. Luyanga, S. Miller, R. and State, J., “Index number analysis of Namibian water Intensity,” (2006) *57 Ecological Economics*, 374-381.
31. Macgregor, S., “Welfare, neoliberalism and new paternalism: Three ways for social policy in late capitalist societies”, (1999) *67 Capital & Class*, 91-118.
32. Morgan, B., “Turning off the Tap, Urban Water Service Delivery and the Social Construction of Global Administrative Law”, (2006b) *17(1) European Journal of International Law*, 215–246.
33. Mosdell, T., “Free Basic Services: The Evaluation and impact of free basic water policy in South Africa”. (2006) *In Democracy and Delivery: Urban Policy in South Africa*, ed. U. Pillay, R. Tomlinson, and J. DU Toit, pp. 283-301.

34. Philippe, C., “Water Law in India”, (2007) International Environmental Law Research Centre.
35. Ratner. S. R., “Corporation and Human Rights: A Theory of Legal Responsibility”, (2001) *Yale Law Journal*, 443, 449.
36. Saleth, R. M., “Water Institutions in India—Economics, Law, and Policy”, 1996 *Inst. Of con. Growth*.
37. Scanlon, J., Cassar, A. and Nemes, N. *IUCN Environmental Policy and Law Paper No. 51*. IUCN Environmental Law Programme (Gland, Switzerland and Cambridge, UK: IUCN), 2004.
38. Van Bueren, G, “Alleviating Poverty Through the Constitutional Court”, (1999) 15 *SAJHR* 52-74.

## Reports

---

1. Dublin Statement on Water and Sustainable Development, International Conference on Water and Environment, available at [www.wmo.ch/web/homs/documents/english/icwedece.html](http://www.wmo.ch/web/homs/documents/english/icwedece.html). (1992). (20 September 2009).
2. HABITAT. Partnership in the Water Sector for Cities in Africa: Report of the Cape Town Consultations. HABITAT, DWAF and UNDP; Nairobi, Kenya. (1997).
3. International Conference on Water and Sustainable Developments, Dublin, Ire, The Dublin Statement and Sustainable Development. (Jan 26-31, 1992).
4. International Council on Environmental Law, Resolution on the Right to Water, U.N. Doc,
5. International Conference on Freshwater. 2001. Ministerial Declaration, The Bonn Keys, Bonn Recommendations for Action. Conference reports available at: [www.water-\(2001\)](http://www.water-(2001)).
6. Protocol to the African Charter on Human and Peoples’ Right of Women in Africa, (2000).
7. Second International Water Tribunal, Amsterdam, Neth. Declaration of Amsterdam. (1992).
8. The High Commissioner, Report of the High Commissioner on Human Rights, Trade and Investment, delivered to the sub-com. On the promotion of Human Rights, U.N.

9. The European Directive Establishing a Framework for Community Action in the field of water policy, (Oct 2002).
10. United Nation, Earth Summit, Agenda 21, The United Nations Programme of Actions from Rio, (U.N Publication).
11. United Nation, World Water Report, (2<sup>nd</sup>) Presented on 22 March, World Water Forum in Mexico. (2006)
12. United Nations Taskforce on Water and Sanitation, available at [http://www.unmillenniumproject.org/reports/tf\\_watersanitation.htm](http://www.unmillenniumproject.org/reports/tf_watersanitation.htm). Final Report (January 2005).
13. UNHCHR. *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights, Report of the High Commissioner E/CN.4/Sub.2/2002*, (June 2002).
14. United Nation, Reports of the United Nationals Water Conference, Mar del Plata, Argentina, U.N Publication. (March, 1977).
15. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, Rio Declaration on Environment and Development. (June 3-4, 1992).
16. United Nations, Earth Summit, Agenda 21, The United Nations Programme of Action from Rio, U.N. ISBN 92-1100509-4; Sales No. E.93.1.11.166. U.N. Publications, (1993).
17. World Bank, Operation Evaluation Department, Bridging Troubled Water- Assessing the World water resources strategy, World Bank, (2002).
18. World Water Assessment Programme, Water for life, United National Development Report, UNESCO publishing (2004).
19. World Bank Toolkits for Private Participation in Water and Sanitation, World Bank, Washington D.C. (<http://periplum.cdinet.com/wstoolkits/>). (1997a).
20. World Bank “Sanitation and Clean Water” in *World Development Report 1992*, Ch.5. Washington: World Bank, (1997).
21. World Bank (1994) “Financing Needed Investments” in *World Development Report 1994*, Ch. 5. Washington: World Bank, (1997).
22. World Bank, *World Development Report 2000/2001*. Washington: World Bank, (2001).

23. WHO – UNICEF Joint Monitoring Programme for Water Supply and Sanitation: Meeting the MDG drinking water and Sanitation target: a mid-term assessment of Progress (2005).
24. WHO - UNICEF Water Supply and Sanitation Sector Monitoring Report 1996 (Sector status as of 1994), WHO, Geneva. (1996).
25. WHO, Right to Water, available at [www.who.org](http://www.who.org) and [www.unhcr.ch/html/menu2/6/who\\_ohchr.pdf](http://www.unhcr.ch/html/menu2/6/who_ohchr.pdf). (2003)
26. WTO. *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93, 29 (March 2001).
27. WTO. *Ministerial Declaration*, Ministerial Conference Fourth Session, Doha 9-14 November 2001. WT/MIN (01)/DEC/W/1, (14 November, 2001).
28. WTO. Note by the Secretariat. *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Art. VI.4 of the General Agreement on Trade in Services*, S/WPPS/W/9, (1996).

### **International Instruments**

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1. Convention on the Elimination of all Forms of Discrimination Against Women Adopted and Opened for Signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979.
2. Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1990.
3. International Covenant on Economic, Social and Cultural Rights 1996, adopted by United Nations General Assembly Resolution 2200a (XXI) of the 10 December 1996.
4. International Covenant on Civil and Political Rights, adopted 16/12/1996; GA Resolution 2200 (XXI), UN, Doc A/6316 (1996) 999 UNTS 171 (entered into force, 23/03/1976).
5. Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17; Annex to 1987 (9) Human rights quarterly 122-235
6. Universal Declaration of Human Rights 1948, adopted by the United Nations General Assembly on 10 December 1948.

7. General Comment No. 3 (Fifth Session, 1990) ( Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, 83-87) The Nature of the State parties' Obligations (art.2, Para. 1 of the Covenant).
8. General Comment No. 7 (Sixteen Session, 1997) [Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1998/22, pp 113-118, The right to adequate housing (art 11(1) of the Covenant); Forced evictions.
9. General Comment No. 12 (Twentieth Session, 1999) [Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/2000/22, pp 102-110, The Right to adequate food (art 11 of the Covenant).
10. General Comment No.14 (Twenty-Second Session, 2000) [Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/c. 12/2000/4, The Right to the highest attainable standard of health (art 12 of the Covenant).
11. General Comment No. 15 (Twenty-ninth session, 2000) [Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/C. 12/2002/11, The Right to Water (arts 11 and 12 of the Covenant).
12. Norms and responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted by the Sub-Commission at ITS 22<sup>nd</sup> meeting, on 13 August 2003, document E/CN.4/2003/12/Rev.2.

### **Regional Instruments**

---

1. African Charter on Human and Peoples' Rights, O.A.U Doc. CAB/LEG/67/3/Rev.5 (1982) (Entered into force, 21/10/1986).
2. Protocol to the African Charter on the establishment of the African Court on Human and People's Rights by the 34<sup>th</sup> session of the OAU Heads of States and Government July 1998, OAU Doc OAU/LEG/EXP/ACHPR/PROT(111).
3. European Council of Environmental law (ECE) Resolution on the Rights to Water (2000).



## National Legislation and Regulations

---

### *Namibia*

1. The Constitution of the Republic of Namibia.
2. Namibia Water Corporation Act 12, of 1997.
3. Local Authority Act of 1992.
4. Water Resources Management Act, 24 of 2004.
5. Namibian Water Resources Management Review.
6. Water Supply and Sanitation policy, 1993.
7. MAWRD (2000). Namibia Water Resources Management Review, Theme Report; Financial and Socio-economic issues. Windhoek: MAWRD.
8. MAWRD (2000). Namibia Water Resources Management Review, Theme Report; Legislative and Regulatory Framework. Windhoek: MAWRD.
9. MAWRD (2002). White Paper on Water Policy in Namibia. Windhoek: MAWRD.

### **South Africa**

1. Constitution of the Republic of South Africa, 1996 as adopted on May 1996, Act 108 of 1996.
2. The National Water Act, 54 of 1956.
3. The Water Service Act, 36 of 1997.
4. Local Government Municipal System Act, 32 of 2000.
5. Municipal System Act, No. 32 of 2000.
6. Free Basic Water Policy.
7. National Water Resource Strategy, 2004.
8. White Paper on National Water Policy for South Africa, DWAF, 1997.
9. Draft White Paper on Water Services, DWAF, 12 October, 2002.
10. DWAF, Establishment of a pricing strategy for water use charges in terms of section 56 (1) of the National Water Act, 1998, Government Gazette 20615 (12 November 1999).
11. DWAF, Norms and Standards in Respect of Tariffs for Water Services in terms of section 10 (1) of the Water Services Act (11 June 2001).

12. DWAF, Regulation relating to compulsory national standards and measures to conserve water (Gazette 223555, Regulation Gazette 7079) (8 June 2001).
13. DWAF, Strategic Framework for Water Services: Water is Life, Sanitation is Dignity (September 2003).
14. DWAF, Water and Sanitation Business: The role and responsibilities of Local Government and related institutions (March 2001).

### **Argentina**

1. Argentina National Constitution
2. National Administrative Reform Law , No 23, 696
3. Water and Civil Code

## **Cases**

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### **South Africa**

#### **Constitutional Court Cases**

*Government of the Republic of South Africa & Others V. Grootboom* 2000 (11) BCLR 1169 (CC).

*Mazibuko and Others v The City of Johannesburg and Others*, 2009 (39) (09) ZACC 28 (CC).

*Minister of Health v Treatment Action Campaign No. 22002* (5) SA 721 (CC).

*S V Makwanyane*, 995 (3) SA 391 (CC).

#### **Lower Court Cases**

*Bon Vista Mansions V South Metropolitan Local Council*, 2002 (6) BCLR 625 (W)

*City of Johannesburg and Others v Mazibuko and Others*, 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA).

*Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Council and Others, Transvaal Provincial Division, , 17 May 2002* (South Africa).

*Manqele v Durban Transitional Metropolitan Council*, 2002 (6) SA 423 (D)

*Mazibuko and Others v City of Johannesburg and Others*, 2008 (4) All SA 471 (W)

### **Argentina**

- 1) *Quevedo Miguel Angel v Otros c/Aguas Cordobesan S.A*, 2002
- 2) *Marchision Jose` Bautista y Otros*, 2004

3) *User and Consumers in Defense against del gran Buenos Aires S.A, 2002.*

### Internet Sources

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1. Aguas Argentinas, [www.aguasargentinas.com](http://www.aguasargentinas.com). [accessed 20 September 2009].
2. Barlow, Maude and Tony Clarke., “Water privatisation: the World Bank’s Latest Market Fantasy” Global Policy Forum., [www.globalpolicy.org/soecon/bwi-wto/wbank/2004/01waterpriv.htm](http://www.globalpolicy.org/soecon/bwi-wto/wbank/2004/01waterpriv.htm). [accessed 20 September 2009].
3. Charles, m., more protests flare over lack of services, available <http://www.thetimes.co.za/PrintEdition/Article.aspx?id=1032366>. [accessed 3 September 2009].
4. Daniel Santoro, The ‘Aguas’ Tango: Cashing in on Buenos Aires’ Privatisation,- International Consortium of Investigative Journalists, November 2009, see [www.icij.org](http://www.icij.org). [accessed 4 February 2010].
5. David Hall., Water multinationals in retreat: Suez withdraws investment, 2003 [www.psiu.org](http://www.psiu.org). [Accessed on 28 September 2009].
6. Delfina J. , Casarin A., The Reform of the utilities sector in Argentina, Helsinki: UNU/WIDER..2001 [www.wider.unu.edu/search.htm](http://www.wider.unu.edu/search.htm). [accessed 25 September 2009].
7. DRC Community angry over water problems, Shacks fires- The Namibian, 8 October 2001. [www.larri.com.na/files/water%20privatisation%20report-text.pdf](http://www.larri.com.na/files/water%20privatisation%20report-text.pdf). [accessed 3<sup>rd</sup> July 2009]
8. Kessler, T. 2004. The Pros and Cons of Private Provision of Water and Electricity Services, Citizens’ Networks on Essential services. [www.servicesforall.org/html/policy\\_toc.shtml](http://www.servicesforall.org/html/policy_toc.shtml). [accessed 20 September 2009]
9. LARRI., Water Privatisation in Namibia: Creating a New Apartheid, available at [www. http://www.larri.com.na/files/water%20privatisation%20report-text.pdf](http://www.larri.com.na/files/water%20privatisation%20report-text.pdf). [accessed 20 September 2009].
10. Lucky Sindane, High Price for operation Gcin’amanzi., Online version., [www.joburgnews.co.za](http://www.joburgnews.co.za). 14 October, 2005. [Accessed 1 November 2009].
11. Picolotti.J., The rights to water in Argentina., [www.righttowater.org.uk/pdfs/argentinas\\_cs.pdf](http://www.righttowater.org.uk/pdfs/argentinas_cs.pdf). [accessed 24th September 2009]
12. Rundu Resident urged to use water meter system- The Namibian, 9 July 2003, <http://allafrica.com/stories/200303260223.html>. [accessed 28 June 2009].

13. Shigwedha A., Water Progress is Praised- The Namibian, 26 March 2003. <http://allafrica.com/stories/200303260223.html>. [accessed 27 February 2010].
14. Suez website [www.suez.com](http://www.suez.com). [accessed 20 September 2009].
15. Water Barons- Centre for Public Integrity, Promoting Privatisation, [www.projects.publicintegrity.org/water/report.aspx?aid](http://www.projects.publicintegrity.org/water/report.aspx?aid). [Accessed 23 October 2009].
16. Third World Water Forum, Kyoto/Osaka, Japan, Summary Forum Statement, at <http://www.world.water-forum3.com/en/statement.html>. [accessed 27 September 2009]
17. The on-line Oxford English Dictionary, available at <http://dictionary.oed.com>. [accessed 4<sup>th</sup> May 2009].
18. U.N Global Compact. [www.unglobalcompact.org/docs/about\\_the\\_c/2.0](http://www.unglobalcompact.org/docs/about_the_c/2.0). [accessed 26 September 2009].
19. Water woes worsen for DRC resident- The Namibian, 7 August 2002. <http://allafrica.com/stories/200303260223.html>. [Accessed 28 June 2009].
20. Winker, I ' Judicial enforcement of the human rights to water- case law from South Africa, Argentina and India', Law, Social Justice & Global Development Journal (LGD). Available at [www.go.warwick.ac.uk/elj/lgd/2008\\_L/winker](http://www.go.warwick.ac.uk/elj/lgd/2008_L/winker)>. [Accessed 3 February 2010].