Water delivery: public or private?

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Content

Foreword

The landscape within which human rights are protected and realised has changed dramatically in the last few decades. One of the main driving forces for this change is economic globalisation and the weakening of the traditional state. In many parts of the world, the private sector is becoming increasingly involved in performing functions that have traditionally been reserved for the state. Even the provision of basic services, such as water, is not exempt from this development. Private sector involvement varies from the outright sale of public assets to the outsourcing of essential service delivery functions. Moreover, the public sector is pressurised to 'downscale' and make efficiency gains by placing certain trading functions at arms length in semi-private entities. The result of all of this is the increasing commodification of the provision of basis services, such as water.

However, such basic services are guaranteed within a human rights framework as part of international law. In principle, it is only states that are the bearers of human rights obligations in international law. The extent to which private entities can bear human rights obligations remains controversial and human rights law is not concerned with whether the ultimate provider of socio-economic goods and services is either the state or the individual.

This book contains a compilation of papers dealing with access to water. In South Africa, many cities and municipalities have delegated bulk water purification and management to private water services providers. Some view this as abdication from state responsibility and a violation of the constitutionally protected right of access to sufficient water. Others, including the state, argue that private sector involvement is indispensable for realising access to water. The chapters in this book are based on presentations at a seminar that was held in Utrecht, the Netherlands, in March 2005. The seminar was entitled 'Water Delivery in South Africa and the Netherlands: Public or Private?' and it was

organised by the Community Law Centre (University of the Western Cape) and the Institute of Constitutional and Administrative Law (Utrecht University).

The article by De Gaay Fortman sheds a sharp and piercing light on the essence of access to water as an *entitlement* rather than an abstract right. He argues that a sole focus on access to water as a human right that becomes real only through standard-setting, supervision and enforcement ignores the actual content of rights as instruments for transformation. Mbazira offers a case study that brings home the reality of two South African municipalities attempting to deliver this entitlement through engaging private contractors. He concludes that the privatisation of water delivery and the insistence on cost recovery negatively impacts on access to water becoming a reality.

Johnson approaches the growing momentum for private sector involvement in water delivery in South Africa from a democratic perspective. By means of a legal analysis of a selection of public-private partnership contracts, she answers the question as to whether the practice of these partnerships in fact lives up to the ideals and advantages with which they are normally associated. De Visser makes a comparison with the Netherlands and discusses a move to the contrary: in the face of a strong trend towards liberalisation of network sectors in the Netherlands, the Dutch government has firmly rejected any private sector involvement in water delivery.

The restructuring of Johannesburg's water services management is discussed by Schmitz. He relays the story of a city walking the tightrope between opportunities for investment and efficiency gains through privatisation on the one hand and the need for retaining state control and state accountability on the other. Raven, Warner and Leeuwis present a case study of integrated water management in the Lower Blyde in South Africa. They painfully expose how the various governmental and private stakeholders fail in reaping the benefits that would flow from the integration of an existing water irrigation project with improved access to drinking water for disadvantaged communities. They conclude that the

progressive legal framework for multi-stakeholder participation is by no means a guarantee for success.

In sum, the contributions put access to water in a human rights perspective. They explore the benefits and disadvantages associated with either public or private delivery of water. The book is useful not only for human rights lawyers but also for those involved in public policy making and implementation especially in the areas of socio-economic goods and services.

Jaap de Visser
Christopher Mbazira

I Safe water

An Enquiry into Water Entitlements and Human Rights

Bas de Gaay Fortman[♠]

1. INTRODUCTION

Privatisation of water delivery is a human rights issue in two distinct ways. Firstly, it implies an institutional change that will tend to impinge on existing access to water, and hence affect human rights implementation. Secondly, access to safe water is an entitlement, which, although obviously linked to basic human dignity, is still far from being realised for everyone. The issue here is that privatisation tends to affect human rights as a transformational mission, too. Thus, not surprisingly, water issues receive a great deal of attention in the human rights debate. Indicative in this respect are two recent articles in subsequent issues of the Netherlands Quarterly of Human Rights, one on access to water as a human right and the other on that right in the light of "the human rights-based approach to development".[1]

In its General Comment No. 15 (2002) the United Nations Committee on Economic, Social and Cultural Rights declares water straight away as being "indispensable for leading a life in human dignity". As such it "is a prerequisite for the realisation of other human rights."[2] Without indulging in any further effort to first establish a certain measure of conceptual clarity, the Committee immediately takes the following position:

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk

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1 See Tully 2005: 35-64; Filmer-Wilson 2005: 213-242.

2 E/C.12/2002/11, 20 January 2003, p. 1.

> of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.[3]

In what follows in this General Comment we encounter an endeavour that seeks to combine deductive reasoning –rights derived from positive international law that would have to be implemented- with inductive efforts to determine what people require in order to sustain their daily livelihoods. Indeed, the two approaches are completely mixed up, as becomes clear in the following statement:

> The Committee notes the importance of ensuring sustainable access to water … as it is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

In this chapter an attempt will be made to keep the two approaches distinct, although naturally not separated. The primary focus will be on what I should like to call “upstream human rights”, meaning the upstream struggle that people at grassroots level face when attempting to realise their rights under the law. “Downstream human rights”, on the other hand, refers to the venture to move the protection of basic human dignity from international standards to people at the grassroots. Let us first have a look at that endeavour.

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[3] Ibid., p. 2.

2. ACCESS TO WATER IN A DOWNSTREAM HUMAN RIGHTS PERSPECTIVE

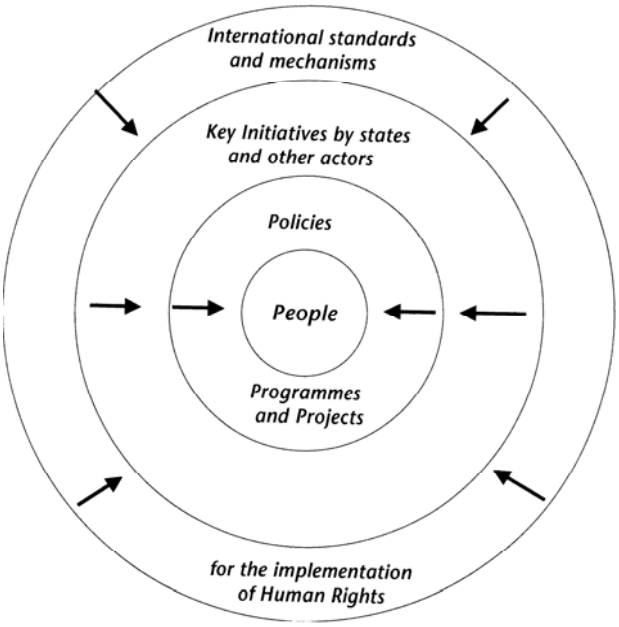

Figure 1 Human rights in a downstream perspective

The concentric circles presented in Figure 1 schematically exemplify human rights as a downstream effort: from standards set internationally downward towards people's daily lives. Human rights, as we know, constitute an attempt to protect basic human dignity by law.[4] As an international endeavour this effort is of relatively recent origin. It is a highly juridical venture, grounded in three stages: standard setting, supervision of observance, and enforcement. It is particularly the latter that has proved to be rather difficult. Actually, as international implementation of the standards tends to be extremely weak –*vide* the usual fate of Concluding Observations of the various Treaty Bodies with regard to both country reports and complaint cases- the whole

[4] See De Gaay Fortman 2001: 3.

emphasis in the downstream human rights venture tends to be on further specification of rights and duties. In the case of water this approach resulted in General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights, declaring a "human right to water" as being inherent in the Covenant.

A first conceptual question is of course whether such a proclamation is really required. A Universal *Declaration* of Human Rights (UDHR) had already been passed in 1948, which subsequently has been endorsed to such an extent that its core articles in respect of the protection of basic human dignity are generally regarded as customary international law.[5] It includes, *inter alia*, the right to a standard of living adequate in terms of health and well-being (article 25). Article 12 of the ICESCR defines the right to health as "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[6] As the specification of what that entails in article 12, para 2 under a, b, c, and d is obviously not limitative, the United Nations Committee on Economic, Social and Cultural Rights might well have addressed water entitlements in its previous General Comment (No. 14).

Yet, water became the subject of a separate General Comment, *viz.* No. 15 in which the following reasoning is employed:

> The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival … [It] is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) **…**

In downstream human rights circles, representing -just to recall- those quarters that are primarily concerned with the protection of human dignity from the perspective of international standard-setting and supervision, issues discussed in this respect include the question whether sets of claims that have not been explicitly recognised in legally binding documents, might nonetheless be seen as "inherent", "tangential"

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5 Cf. Klein Goldewijk and De Gaay Fortman 1999: 7.

6 On the right to health see Toebes 1999.

or "implied" rights.[7] Evidently, the Committee opted for the inherent position, connecting the "right to water" primarily to article 11 (adequate living standard, with particular emphasis on housing and food) and article 12 on health. However, it found more links:

> The right [to water] should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity. … The right to water has been recognized in a wide range of international documents, including treaties, declarations and other standards. For instance, Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to […] water supply". Article 24, paragraph 2, of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water" … The right to water has been consistently addressed by the Committee during its consideration of States parties' reports**,** in accordance with its revised general guidelines regarding the form and content of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, and its general comments.

Thus, the newly declared right to water would appear to stand on firm juridical ground. Nevertheless, the whole downstream venture is faced with three critical limitations[8]:

(1) Protection of human dignity by law assumes "law and order" in the sense that law functions as a way of guaranteeing security of people in their person, in their possessions and in their deals (implying that *pacta sunt servanda*), and settling disputes based upon conflicting interests in an ordered manner. However, in many a politico-juridical setting the role of universalist state law is rather constrained.

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7 See, for example, Tully 2005: 37.

8 For a more detailed discussion of these limitations see De Gaay Fortman and Salih 2003: 91-111.

(2) The values behind human rights norms have to be "received" in the sense of a cultural reception of the law.[9] In reality there tend to be serious politico-cultural constraints, although these may well differ depending upon the concrete context.
(3) Human rights norms do not reflect all core aspects of justice in the same way. It is particularly in respect of the principle of equality as more than just formal equality of all before the law that their meaning is rather limited. The reason is that inalienable subjective rights tend to be formulated in a rather absolute manner: everyone has the right to …, whereas the struggle for social justice has to be directed against substantive socio-economic inequality that is of a relative nature. Indeed, human rights appear to function inadequately as a normative instrument in combating growing socio-economic inequality.

A review of these limitations with regard to water instigates the following brief comments:

(1) Luckily, law is more than just state law, official courts and enforcement agencies. If, indeed, the realisation of fundamental norms binding the use of power were purely dependent on formal legal processes, deficits in the enforcement of crucial standards would be much worse in many an environment. Fortunately, however, law can also work through *informal* mechanisms or, in another terminology, as *living law*.[10] While 'law' manifests itself as regulation of power, living law has the nature of 'anti-power'. For example, through protest and resistance the building of a dam that would cut people off from their existing water supplies may actually become impossible even if it had been incorporated in an official act of parliament. In a similar vein, agencies supplying water to households may be forced to tolerate tapping off practices that are not based on any formal contract. Notably, entitle-

9 See De Gaay Fortman 1995: 62-78.
10 While the term 'living law' is used in different meanings I use it here in the sense of *informal* processes of setting, monitoring and enforcing norms pertaining to order and justice within a certain community. See De Gaay Fortman 2001: 11.

ments protected by living law may well be affected by privatisation policies.

(2) Politico-cultural reception of access to safe water as a human rights issue is bound to require collective action. Indeed, in many a politico-economic context the transformation of declared rights into acquired rights *with* guaranteed freedoms and entitlements for everyone, calls for long and enduring struggles. As for civil and political rights, it is the political order that has to be confronted. In the case of economic, social and cultural rights it is the entitlement (sub)systems that lie behind structural non-implementation which would have to be changed. This means a confrontation with the economic powers that be.

(3) Notably, in struggles for access to water and sanitory services a core issue is socio-economic inequality. While in international human rights standards the principle of *substantial* rather than just formal equality is poorly embedded,[11] religion-based views on justice tend to take a much deeper and more encompassing perspective. Reference may be made, for example, to Christian social thinking as developed in both the Roman Catholic Church and the Ecumenical Movement.[12] Indeed, integration of the principle of *equitable distribution* –posited by the UN General Assembly resolution on the Right to Development- requires an embedding of human rights struggles in pertinent religious settings rather than just in secular human rights discourse.

Actually, all three observations point to a need for more than just downstream efforts that spell out all possible implications of human rights in terms of access to water. An upstream human rights perspective appears to be essential. This requires, first of all, some basic understanding of the meaning of rights in processes of acquiring basic necessities such as safe water and sanitary services.

[11] See De Gaay Fortman 2003: 161 ff.

[12] See De Gaay Fortman and Klein Goldewijk 1998: chapter 3.

3. ACCESS TO WATER IN THE LIGHT OF RIGHTS, ENTITLEMENTS AND CLAIMS

Perusing general comments of the committees supervising the implementation of the various covenants and conventions, as well as the vastly increasing bulk of literature discussing these, one is struck by a rather fundamental confusion in human rights terminology. Evidently, terms as "rights", "entitlements", "access", and "freedoms" are used both as synonyms and as elements of a cocktail in which they can be freely mixed.

In General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights water is principally classified as a right but generally discussed as an entitlement. Crucial is the statement already quoted at the onset of this chapter: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." At this point, one question has to be asked first: do rights really *entitle* people? If that were generally true, why then do so many people in our world today lack "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses"? I would rather speak of entitlement *failure* in that respect: 1.2 billion persons on this earth suffer from lack of access to potable water, not because resources are lacking but as a result of deficient entitlement.[13]

A natural response to such terminological criticism could be: "It is true that entitlements following from rights do not always materialise but that means no more nor less than that rights are often violated. Unfortunately, this applies above all to human rights in general and to economic, social and cultural rights (ESC rights) in particular." Should we conclude, then, that ESC rights are rights without remedies? Indeed, in much of the literature we find comparable arguments. Rather typical for much human rights discourse in the United States, for example, is Wronka's distinction

[13] See Sen 1981. Problematic is, however, that Sen identifies entitlements with rights, meaning "legal rights" as opposed to the "moral rights" that we know as *human* rights. In the Human Development Report 2000 –which is substantially based on Sen's conceptual work- the terminology has moved towards "abstract" rights and "concrete rights". In my view a significantly more comprehensible way to address the issues involved in structural non-implementation of human rights is through a clear distinction between (abstract) rights and (concrete) entitlements. See De Gaay Fortman 2000.

between "rights as ideals", "rights as enacted" and "rights as realized".[14] Thus, General Comment No. 15 would simply constitute the beginning of a process, moving from the proclamation of a right to water as an ideal through enactment in national legislation towards realisation of the entitlements necessary to acquire safe water from day to day.

This view would imply that those lacking access to safe water and sanitary services would have to wait first for local enactment. However, it is precisely in respect of their transformational role that human rights may operate as a powerful weapon before any local legislation has been effectively enacted. Notably, people's struggle is tuned to daily acquirement in the sense of sustainable livelihoods, rather than abstract rights. Subjective rights constitute neither more nor less than a commitment towards legal protection of related interests on the part of those holding them. Thus, in case of dispute the owner of a thing will invoke her property right. In fact, ownership implies abstract acknowledgement of claims based on the rightholder's interests. Entitlements, in contrast, refer to concrete protected opportunities to satisfy one's needs. Indeed, what makes entitlements that meaningful is *actual* legitimate access to specific resources and *actual* legitimate command over definite goods and services. Entitlement is concrete, in other words, while the qualification "legitimate" refers to authoritative protection. Naturally, concrete titles may well find such authoritative protection in rights, as is clearly the case when owners who actually possess a property use it to acquire what they need. It is on the basis of entitlements that we may claim what we require in terms of daily livelihoods.

Let us look at shelter as an illustration here. Owners who had to flee the land retain their property rights but as refugees they loose the opportunity to claim daily access in order to attain a roof over their head. A person with a lesser right, a tenant for example, who still occupies the place, does not own it and yet remains entitled to find shelter. Obviously, that entitlement is based on another right: tenancy. Noteworthy is the position of the tolerated squatter: a *de facto* entitlement without any formal right to protect it.

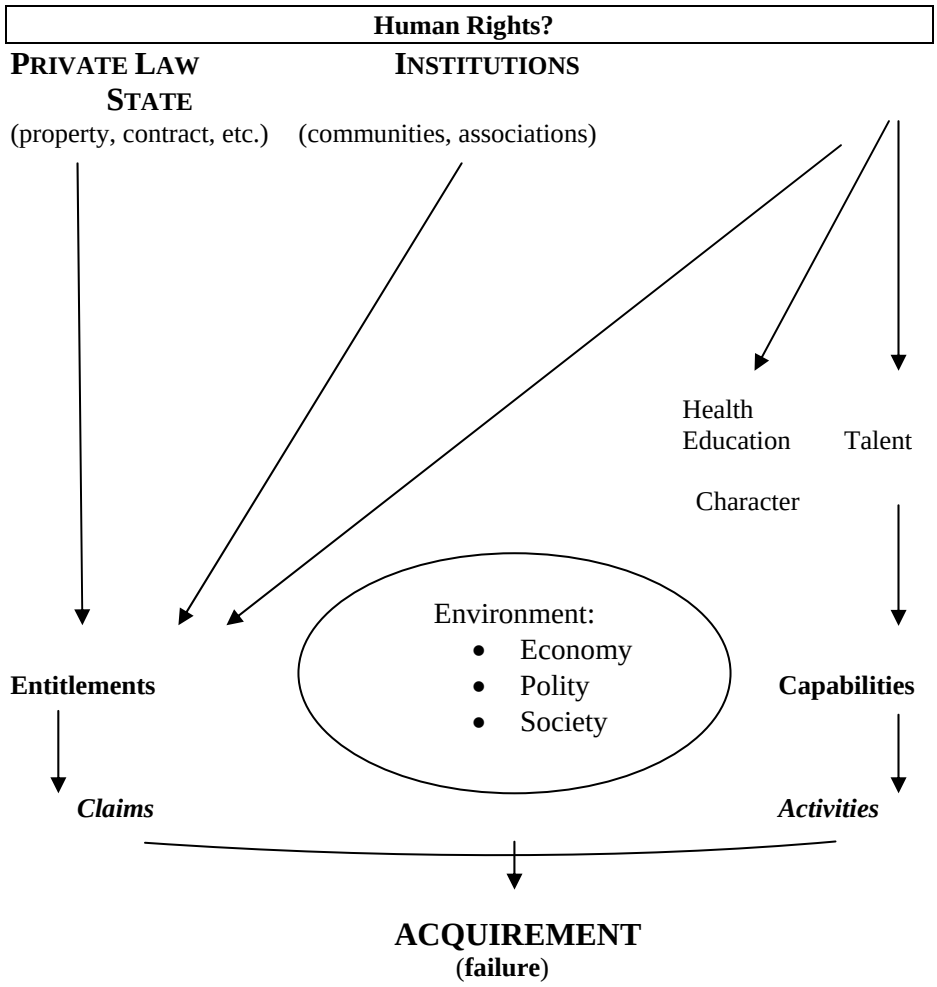
If they had to choose, people would obviously prefer entitlements without rights to rights without entitlements. Indeed, in efforts to sustain our

[14] Cf. Wronka 1992: 28-30.

daily livelihoods it is entitlements that count, as they constitute the basis for our claiming behavior.

What is meant here may be illustrated with a figure:

Figure 2 Overcoming Acquirement Failure (B. de Gaay Fortman)



What really counts then, is people's acquirements, or its failure. Why do certain people fail to acquire what is essential in respect to their human dignity? The center of this figure depicts the environment in

which efforts are made to acquire what people need in terms of sustainable livelihoods. In situations of structural acquirement failure, these are usually highly adverse in terms of extreme pressure on resources in the context of a mal-functioning economy, bad government, severe structural inequalities and serious socio-cultural constraints.

Given the environment, what a person acquires in terms of daily livelihoods is then based on two pillars: actually employed activities and honored claims. Those two sources of acquirement are closely related. For example, in order to work for an income one has to be entitled to do so. In fact, a job tends to be much more than just a matter of "tenancy" of labor as it used to be envisaged in Roman law (*locatio conductio operum*); it is also an institutional entitlement that means a great deal more than just being paid. A farmer who wishes to work on a piece of land needs access to start with. While people's activities are rooted in their capacities, claims find their basis in entitlements, i.e. authoritatively protected (and hence legitimate) access to resources and similar command over goods and services. Our entitlements are rooted in access to resources, protected by private law, institutions of a more or less autonomous character and/or the State. Hence, there is a need for a functioning system of civil and commercial law, for institutions protecting entitlements of those associated with them, e.g. family, traditional communities but also modern associations, and for a State protecting, arranging and rearranging people's entitlements in an effective and fair way. Strikingly, the state appears to play a pivotal role in the whole process: in its influence on people's capacities through provision of basic public services like health and education; in its protection of private entitlement systems, including those of an institutional rather than purely individual nature; and in the way in which it directly or indirectly arranges and rearranges entitlements.

Notably, water privatisation shifts the State's authority with regard to water access from direct public command over the required resources towards a responsibility for the effective functioning of private law as a system guaranteeing already acquired access to safe water. Moreover, through such schemes it cannot escape its responsibilities for actual and equitable access to water and sanitary services. In

this connection, international human rights law implies that by embarking upon such schemes states cannot escape their responsibilities to respect, to protect and to fulfill their human rights obligations following from the standards to whose observance they are committed. What does that imply in terms that are more concrete?

4. UPSTREAM APPROACHES TO THE REALIZATION OF WATER NEEDS

At the top of Figure 2 we see *human rights* still hanging in the air. In efforts to sustain daily livelihood their role would have to materialise in two distinct ways: by protecting already secured entitlements essential for upholding basic human dignity and by functioning as an inspiration to start the entire human rights venture *upstream*, i.e. from the perspective of *everyone*. To understand the meaning of the latter, let us now look at human rights as an upstream venture.

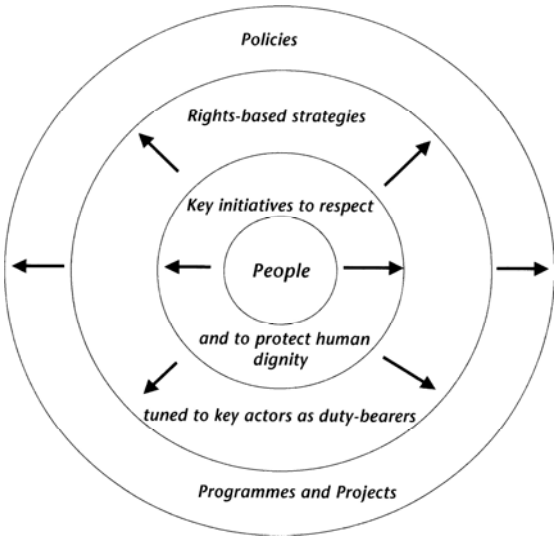


Figure 3 Human rights in an upstream perspective

The entire course of action begins here with people themselves in processes of self-identification as rightsholders. The dual endeavour is

to find protection against all actual and potential abuse of power, and to secure the fundamental freedoms and basic entitlements that follow from respect for everyone's basic human dignity. Notably, human rights are empowering. As Alston has argued: "It has the potential to empower people at the grassroots level into believing that they have a right to education, to health care or to any of the other rights proclaimed in the international instruments."[15]

The Human Development Report 2000 with its thematic focus on Human Rights discusses the implications of this interpretation of the human rights venture in chapter 4: *Rights empowering people in the fight against poverty*. At this point the whole so-called "rights-based approach" has to be made concrete. Naturally, this appears to be far from easy. Basic economic rights such as the right to a decent standard of living (article 25, UDHR) "are not just development goals", it is rightly noted (p. 73), yet, such "rights do not mean an entitlement to a handout" (id.). Thus, a person without access to safe water cannot simply go to court and claim the necessary provision. This view is also held by the Constitutional Court of South Africa, a judicial institution that bases its judgments on sweeping legal provisions such as article 27 (1) which states that "Everyone has the right to have access to … "sufficient food and water". However, in such a juridical setting one should never forget that rights correspond with duties and that the primary persons to whom duties apply are the rightsholders themselves. Indeed, my human right to health demands, first of all, my own efforts to secure a healthy environment, including access to safe water and sanitary services. It is only when such endeavours touch upon serious constraints in which others are involved that the responsibilities of these other dutybearers are activated.

Problematic in this respect is that, although the whole idea of rights is based upon the expectation that evident violations would lead to contentious action resulting in redress, *human* rights often remain without effective implementation. This is due to two crucial obstacles:

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15 Philip Alston, The Rights Framework and Development Assistance, *Symposium Paper – A Human Rights Approach to Development*, Oslo 1998, quoted by Wilson 2005: 217.

firstly, the often prevailing inadequacy of law as a check on power, and secondly, the lack of reception of these rights in many cultural and politico-economic contexts.

Yet the implication of such critical constraints in the operational impact of universal human rights is not that these rights lose all meaning in processes of development and the attack on poverty. While in Western history individual human rights have been afforded a place in the statute books at the end of processes of societal transformation, in most of the developing world these internationally accepted standards merely stand at the beginning of emancipation and social change. Their function, in other words, is not so much *protection* (notably, what ought to be protected would still have to be acquired), but rather *transformation*. Moreover, these internationally recognised rights play their part not merely as legal resources (implying a reliance on functioning legal systems), but also as political instruments in the sense of internationally enacted standards of legitimacy that are meant to govern any use of power.

Actually, a judicial case-by-case approach to concrete violations of human rights is just one possible option in efforts to realise human rights. Legal literacy programmes are a way of raising people's awareness of rights in general. A political case-by-case approach uses protest and other forms of dissent as ways of protecting fundamental interests against policies and action that violate people's human dignity. Even in the lives of those already facing daily hardships, such resistance appears to be often necessary. The most pressing challenges, however, lie in persistent *non-implementation* of human rights. It is the economic, political and social structures behind such situations that would have to be addressed. Here collective action would be called for, aiming at structural reforms.

These four distinct types of human rights strategies may be illustrated by a simple matrix showing the focus of human rights with regard to two major functions, protection and transformation, as well as two categories of means towards implementation: legal resources and political instruments.

Figure 4 Human rights in a functional as well as an instrumental setting

Functional Instrumental	Protective	Transformational
Legal resources	Judicial action (case by case)	Legal literacy programmes aiming at awareness-building
Political Instruments	Dissent and protest against policies and actions violating human dignity	Collective action addressing power relations embodying structural injustice

I should now like to illustrate this matrix on human rights strategies with examples relating to water.

The left upper box refers to contentious action in order to protect actual freedoms and entitlements. The following case[16] had to do with inhabitants of a block of flats in South Africa in 2001.[17] A resident took successful legal action against the local council for disconnection of water supply to the flats as a response to non-payment of water charges. The High Court ordered reinstatement of water supply on the grounds that the conditions and procedures for disconnection had not been "fair and equitable" in accordance with the South African *Water Services Act 108* of 1997. The Council had not given reasonable notice of termination or the opportunity to make representations. This prevented any application of the rule that water supply may not be discontinued if it results in a person being denied access to basic water services due to non-payment, where that person proves inability to pay for basic services. The water supply to the flats thus had to be reinstated.

In its legal reasoning, the court referred to the constitutional right in South Africa to access to water [section 27(1)(b)] as well as the In-

16 Taken from the Right to Water website: http://www.righttowater.org.uk/code/legal_2.asp.

17 *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* at the High Court of South Africa (Witwatersrand Local Division), Case No: 01/12312.

ternational Covenant on Economic, Social and Cultural Rights (1966), and General Comment 12 of the UN Committee on Economic, Social and Cultural Rights on the Right to Food.[18]

From a strategic perspective, it appears to be important to follow up such judicial successes with accurate monitoring of the follow-up and, if necessary, political pressure towards enforcement. In the famous South African *Grootboom* case[19], for example, the mandatory order of the Constitutional Court of South Africa still demanded political pressure towards its execution. Incidentally, in South Africa the *Grootboom* case had an important effect on evictions from squatter areas in general, particularly from a preventive perspective. Indeed, while the four boxes of the upstream human rights strategy matrix of figure 4 can be distinguished, they cannot be separated.

The right upper box relates, for example, to cases that are brought to court even when litigants know they have a zero chance of direct success. The whole endeavour then becomes an exercise in conscientisation. Another way of aiming at legal awareness-building or legal literacy is found in *quasi-judicial activism* through the use of public tribunals. While lacking any formal authority, these can have a significant impact on people's awareness of their rights, in turn strengthening their position vis-à-vis the Government by empowering them to demand the needed water services. Such tribunals can be constituted both *ad hoc* and on a permanent basis. An example of the latter is the International Water Tribunal, an independent non-governmental forum for adjudicating water issues. An independent jury evaluates cases on the basis of a declaration the Tribunal formulated, the "Amsterdam Declaration".

In one decision of the International Water Tribunal, a physician and engineer brought a case against the Israeli government on the grounds of a violation of the right to health of Arab villagers living in non-recognized areas. The applicant argued that Israel was deliberately not

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[18] NB: this case pre-dated the adoption of General Comment No. 15 on the Right to Water.

[19] Constitutional Court of South Africa: *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC). Cf. De Gaay Fortman, 2001.

connecting "unrecognized villages" to the national drinking water network, to which neighboring Jewish communities had access, as part of its Planning and Building Law. The applicants presented evidence of a connection between outbreaks of disease, such as hepatitis among children, and a contaminated and insufficient water supply, and argued that the applicable zoning law is discriminatory. The Tribunal found that the denial of water by the Government as a means to enforce zoning or planning had a negative impact on the health of those living in the villages and was unjustifiable. This decision was handed down despite the fact that the precise nature of the Government's obligation to provide adequate water and sanitation had not been determined.[20] It advised the Government to connect the villages to the water network and find equitable alternative solutions to planning and zoning in cooperation with those affected.[21]

Highly relevant in respect of the use of legal resources to secure people's basic entitlements is public (or social) action litigation. India is the primary example here. As explained by Chief Justice Bhagwati in a booklet entitled *Law as Weapon*, the Supreme Court of that country took the view

> that it was necessary to depart from the traditional rule of *locus standi* and to broaden access to justice by providing that where a legal wrong or a legal injury is caused to a person or a class of persons who by reason of poverty, disability or otherwise are socially and economically in disadvantaged positions and are unable to approach the court for relief, any member of the public or social action group acting bona fide can maintain an application in the High Court or the Supreme Court seeking redress for the legal wrong or injury caused to such person or class person.[22]

It was also felt that such persons acting on behalf of the marginalised and underprivileged could not be expected to incur the expenses re-

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20 Ripple in Still Water, Reflections by Activists on Local and National level work on Economic, social and cultural rights, Chapter 2, http://www1.umn.edu/humanrts/edumat/IHRIP/ripple/chapter2.html.

21 Kanaaneh, McKay & Sims 1995: 190-205.

22 Bhagwati 1990: 110.

quired for a regular writ petition to be filed in court. Hence, "epistolary jurisdiction" developed, where the court could be moved by not more than a letter on behalf of the disadvantaged group. Naturally, from an upstream human rights perspective this development, aptly depicted as the Supreme Court of India becoming the Supreme Court *for Indians*[23], constitutes a highly significant advance in connecting upstream collective action with national and international standards and mechanisms. One particular High Court case may serve as an illustration here:

For the Kerala High Court in *Attakoya Thangal v. Union of India* (1990),[24] Justice Sankaran Nair, recognised that: "The right to sweet water and the right to free air, are attributes of the right to life for these are the basic elements which sustain life itself."[25] Petitioners in this case claimed that a Government scheme for pumping up ground water in order to supply potable water to the coral isles of Lakshadweep would upset the fresh water equilibrium, leading to salinity in the available water resources and causing long-term harm in violation of their right to life under article 21 of the Constitution.

The Kerala High Court, in its judgment, ordered a report to analyse the situation on the basis of the petitioner's claims. On reviewing the results, it determined that the scheme could not go ahead without endorsement by the competent Ministry of Science and Technology and the Ministry of Environment, in satisfaction of sufficient safeguards, restrictions and effective monitoring at all levels of the scheme. Justice Sankaran Nair held that if considered necessary, statutory regulations should be made and a responsible agency set up for monitoring the functioning of the system. Above all, he maintained the onerous responsibilities of the Executive Government in providing civic amenities and the fact that "the administrative agency cannot be permitted to function in such a manner as to make inroads, into the fundamental right under Art. 21 (the right to life)".

The two lower boxes in the Human Rights Strategies matrix concern the use of human rights as political instruments. The left one in-

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23 Upendra Baxi, as quoted by Bhagwati 1990: 111.

24 http://www.dundee.ac.uk/iwlri/Documents/Treaties/NationalCases/Attakoya Thangal v. Union of India.pdf [accessed 22 October 2005].

25 Judgement above, para 8.

cludes social protest against political and economic decisions resulting in serious negative consequences in terms of people's entitlements to safe water. The International Rivers Network, for example, supports local communities working to protect their rivers and watersheds. It fights "to hold destructive river development projects…"[26] An illustration is the World Bank's Lesotho Highlands Water Project "sold as a way of pulling Lesotho out of poverty while supplying water to South Africa". On September 21, 2005, some five hundred people from dam-affected communities marched in the capital Maseru to express their grievances, including "lack of water and sanitation in resettled communities".

Obviously, in terms of entitlements protection such collective action is of great importance, whether coupled with judicial action –the left upper box- or not. International NGOs like the International Rivers Network play an important part in monitoring plans and policies that are evidently in contravention of the prerequisite of people's participation and equitable distribution of benefits as stipulated in art 2 (3) of the UN General Assembly Resolution of 1986 on the Right to Development (GADRD). In policies for water privatisation, too, a careful monitoring of effects on existing entitlement positions serves as a necessary basis for effective protection.

In a world in which failure in the implementation of human rights tends to be structural rather than just incidental, the right lower box is especially important. At this point we touch upon human rights as internationally endorsed standards of legitimacy, to be used in collective efforts to transform economy, polity and society.

5. RIGHTS-BASED STRATEGIES TO SECURE SUSTAINABLE ACCESS TO WATER

The character of human rights as 'declaratory' rather than 'conclusive' affects economic, social and cultural rights in particular and manifests itself especially in countries in the South. This has to do with a *socio-*

[26] http://www.irn.org/basics/ard/index.php?id=/basics/about.html [accessed 22 October 2005].

economic context: no jobs, no access to land and hence extreme pressure on scarce productive resources. Such conditions appear to breed frustration and aggression rather than recognition of other people's freedoms and needs. But there is also a *political* setting that finds its background in the history of colonialism and its effects on the distribution and control of power, both internationally and in local contexts. As a result, the struggle for *social justice* in the developing world faces serious constraints. Internationally, that endeavour has not yielded impressive fruits up until now. As a result of decisions taken in the name of economic progress, the poor often have to face increasing hardships. In that dim light the idea emerged to connect the struggle for human development to human rights.

The already cited *Human Development Report 2000* with its special focus on human rights, constituted a first response to UN Secretary General Annan's appeal for a 'mainstreaming' of human rights. What is meant here is the incorporation of human rights standards in day-to-day economic and political decision-making. Indeed, a persistent effort towards integrating development, security and governance through a compelling focus on the human being – *human* development, *human* security and *human* rights – characterises the approach taken in the Human Development Reports of the United Nations Development Program. It is basic human dignity that links the three together.

Notable in the discourse that is usually employed in this connection is, first of all, the use of the term "approach". Apparently, the idea is no longer to plan, steer or direct but just to *approach* poverty and the need for development. This terminology is in line with the earlier shift in emphasis from development as programming structural improvement of the economy to *human development* as "a process of expanding the real freedoms that people enjoy." The language used here is Amartya Sen's (see, for example, his *Development as Freedom*[27]). It is indeed, particularly Sen's thinking that appears to have influenced the Human Development Reports in general and the 2000 Report on the human rights approach to development in particular. In an earlier

[27] Sen 1999.

publication to which the Human Development Report 2000 refers, Sen had already summarised the case for human rights from a developmental perspective in three aspects: "(1) their *intrinsic* importance, (2) their *consequential* role in providing political incentives for economic security, and (3) their *constructive* role in the genesis of values and priorities".[28]

The United Nations Development Program has translated the constructive role of human rights principally in a policy to create "enabling environments". Indeed, they admit, poverty is a brutal denial of human rights. However, what that means concretely is that environments must be established under which people can realise their rights under the law. Yet, many people live in disabling environments; hence the first challenge is a struggle from below to secure the concrete entitlements that are supposed to be protected.

As opposed to all the specific rights that one could deduce from the International Bill of Human Rights, Figure 3 above is based on a starting point in what one might call inductive rights or rather *inductive entitlements*. The essence at this juncture is what people at the grassroots themselves see as the minimum necessities required in order to respect and protect their basic human dignity? Not surprisingly, empirical research has shown that access to water scores very highly here. While for women in Bangladesh, for example, an end to domestic violence appeared to come first, access to water came second and a private wash place third.

Despite the tremendous weight of safe and accessible water, traveling around our world today confronts one continuously with a huge human rights deficit in this respect. A *global* deficit indeed, for with a more equitable distribution the average global per capita income (2004) of US$ 5,130 would be more than sufficient to secure access to safe water for everyone. With an average per capita income of US$ 2,630 this point can still be made for just South Africa. However, just out of Cape Town airport the visitor is already confronted with Khayelitsha Site C and its despicable sanitary conditions. For those living there in conditions of continuous hardship, water appears to be

[28] Sen 1999: 99.

a matter of filthy buckets to be carried on simple trolleys from there to here.

What then is the answer? The international community now sees the answer in the Millennium Development Goals (MDGs), which stipulate, amongst other things that by 2015 the percentage of people lacking access to clean water must be halved. Laudable, indeed, as that would mean major progress in poverty reduction. Yet, three major issues remain. First, if that target is reached as a result of significant steps forward in China, this will not be of much comfort for those in South Africa who are still lacking access to safe water. In other words, the MDGs should be brought down to each and every local level, including Khayelitsha Site C. A second question arises, however: which half of the people there is to have access to clean water by 2015, and, more critically, which half is not? A third issue concerns people suffering here and now. Would it be of much console to them that in 2015 things will be better? The MDGs constitute an exercise in benchmarking, and such endeavours tend to be useless without solid monitoring and action as to developments today.

Consequently, although the millennium development goals may well be seen as a firm step forward in global responsibility for the predicament of the world's poor, they remain rather abstract statistics. A global attack on poverty requires a firmer basis: human rights as a tool for collective action. Actually, as the core notion is that people living in daily hardship have rights, like everyone else, and that these rights should serve as the starting point in every development strategy, the term "approach" is not correct. As tools in struggles against the injustices that lie at the roots of poverty, human rights are above all a conviction and a commitment. Consequently, *rights-based strategies* would appear to be the more appropriate terminology.

A major challenge in rights-based strategies is always to identify not only rightsholders but duty bearers too, and to call the latter to their obligations. At this point it is important to note that water privatisation does not discharge the state from its responsibilities to guarantee both water delivery and access to it. We find an example of the interplay of actors in Bolivia, where in 1999 the Government granted a water and sewer services concession to Bechtel, a single-bidder multi-national water corporation enjoying World Bank Support. Popu-

lar unrest over this decision soon after forced the government to reacquire control. However, as is commonly the case, private sector participation was a precondition to development assistance and reacquisition rendered the government liable for cancellation of its concession.[29] Notable in such an upstream action based on human rights as political standards of legitimacy is the capacity to redress non-State actors as duty bearers. This is a crucial issue in rights-based strategies, distinguishing these from state-focused approaches such as the MDGs. The behavior of a broad range of actors impacts directly and significantly on the access of those living in poverty to water of sufficient quality and quantity. Notably, General Comment 15 of the UNCESCR fails to redress non-State actors in any substantive manner. However, an upstream movement focuses more on private rather than solely government actors and can extend to industrial and agricultural applications rather than just personal use. As Tully has noted:

> the impact of the human rights approach upon global water resource allocation will be marginal. General Comment 15 – is limited to sufficient and continuous water for personal and domestic use. Household use constitutes just six percent of global water consumption, with industrial applications 20 percent and agriculture 74 percent.[30]

To illustrate the need to connect downstream with upstream action, let us now end this enquiry with a water project that may be seen as indicative for the required connection between productive endeavors and a human rights-based focus on (re)distribution. I am referring here to the *Vitens* venture in Mozambique. Vitens Ltd is a Dutch company with a great deal of experience in water delivery. In 2005 its customers received a flyer entitled WATER FOR US WATER FOR THEM. Water, it said, is a life issue, and while we simply open our tap and get it, for one billion people in our world today this is far from a reality. What we should do now is not a matter of giving but sharing: sharing our knowledge and expertise. Hence, Vitens customers are called upon to contribute to a new foundation: Water for Life.

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29 Tully 2005: 47.
30 Tully 2005: 57.

The relevant documents show that this is a so-called PPP project - *Public Private Partnership*- with three major partners: the Mozambican Water Board (FIPAG: Fundo do Investimento e Património do Abastecimento de Água), the Netherlands Government (Development Co-operation), and Vitens. Furthermore, the African Development Bank also decided to participate. The project aims at impressively increased proportions of the local population in four towns, which would get access to clean water. As such it is based on MDG 7: to ensure environmental sustainability. One of its targets, following from an extension in 2002 in Johannesburg, is directly linked to safe drinking-water and basic sanitation. It specifically calls to:

> halve, by 2015, the proportion of people without sustainable access to safe drinking-water and basic sanitation.

As is not uncommon in regard to the MDGs, the world is on track to meet the drinking-water target, but according to the World Health Organization (WHO), sub-Saharan Africa lags behind.[31] Thus, progress between 1990 and 2002 appears to fall short of what would be needed to achieve the MDG target of 75% coverage by 2015. Hence, the choice for Mozambique appears to be well-considered, and the same is likely to be true for the choice of the four towns and the townships within these. Yet, there are some valid queries:

- Is there any co-ordination among donors in general as to their policies on increasing water delivery, on a global, regional as well as a local basis?
- As the Vitens field visits in Mozambique revealed a serious institutional, financial, operational and managerial weakness in the running of the local Empresas de Agua (EdA), an improved functioning of these entities would seem to require more than just an external institutional training component in the project. How is that crucial issue being addressed?
- Especially important are the participatory and distributional issues stipulated in article 2 (3) of the GADRD of 1986.

[31] http://www.who.int/water_sanitation_health/2005advocguide/en/index2.html (accessed on 23 October 2005).

There are evidently linked issues concerning water pricing, billing, collection and cutting off policies, for example. What procedures have been established to guarantee accountability of all actors involved in the project?

- Another obvious concern is the effect of the project on conscientisation inside the Netherlands. Vitens' customers are requested to contribute just once to the Water for Life foundation. Why not ask them to agree to a supplement on their own water bill, entailing a permanent link between water consumption here and there?

The point is that endeavors towards increased productivity should always be accompanied by (re)distributional efforts focusing on entitlement systems and their (mal)functioning. In practice this requires an involvement of strong civil society organisations, willing and able to connect the laudable downstream venture with upstream collective action. Naturally, a company like Vitens cannot be expected to organise entitlement (sub)systems analysis, public pressure, advocacy and lobbying at the Moçambican national and local level. One would hope, then, that the donor government (in this case the Netherlands) raises such issues up with the national and local NGO world. In methodological terms the whole challenge is to connect downstream production tuned MDG policies with upstream rights-based strategies.

In South Africa, the development of a strong civil society happens to be much further advanced than in neighboring Mozambique. Indeed, in that country impressive research is being conducted by non-governmental agencies into the effects of privatisation and commercialisation of water delivery on water entitlements.[32] Hence, it might be helpful if Dutch non-governmental co-financing entities active in both South Africa and Mozambique were to enhance South-South co-operation in rights-based water strategies.

Finally, it is primarily at the global level that rights-based strategies are required in order to address inequities. Indeed, the huge gap in global income distribution –per capita income in the richest country, Luxembourg, is an incredible 450 times higher than in the poorest

[32] See, for example, Booysen 2004. On Increasing privatisation of water service provision and its impact see also Tully 2005: 49, 52-53.

one, the Democratic Republic of Congo- is reflected in access to water, too. Hence, structural reforms in international water governance should get top priority on the agendas of global bodies such as the G8 and the World Trade Organization (WTO).[33]

[33] Tully 2005: 49.

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II Comparing Water Delivery in South Africa and the Netherlands

dr. Jaap de Visser[♠]

1. INTRODUCTION

This paper is concerned with the liberalisation of water services in the Netherlands and South Africa. It will examine the legal framework for water delivery in both countries and pay attention to the policy and legal developments surrounding the liberalisation of the delivery of potable water. The aim of this paper is to highlight important developments and ideas that could spur a further debate on the comparison between the two countries.

First, definitions will be introduced for some of the terminology used in the paper.

Second, the general Dutch policy on the liberalisation of network sectors will be discussed as it provides a useful overview of some important considerations in the discourse about liberalisation of network sectors. This will be followed by some remarks on the Dutch legal framework on water delivery with specific reference to recent developments aimed at halting privatisation moves in the water sector. The paper will continue by presenting an overview of the South African legislation that makes up the framework for water delivery by municipalities. Some examples of liberalisation efforts will be discussed briefly and finally, the developments surrounding the right of access to water in South Africa will be highlighted.

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1.1 Network sectors and competition

The provision of potable water is a *network sector*. In network sectors, the provision of the service is dependent on the existence of a network, namely the water piping infrastructure. Other examples of network sectors are electricity, telecommunication, internet-access and railway services. What sets network sectors aside from many other types of service delivery is that they generally have the characteristics of a 'natural monopoly': residents do not have the freedom to choose their service provider. Naturally, this opens up the possibility of abuse of that monopoly at the cost of the user. It necessitates a strong role for the government in the delivery of that service.

On the other hand, those who advocate the insertion of the element of competition point towards the benefits of competition between service providers: the pressure of competition and the watchful eye of critical shareholders will provide incentive to providers to perform. They will attempt to distinguish themselves through lower prices and better quality. Competition will result in room for innovation and will increase the productivity of delivery processes. Citizens will enjoy more choices and there will be room for entrepreneurial activity.[1]

Various modalities of competition can be distinguished.[2] Competition *between networks* means that customers are offered the choice between various networks. Competition *on the market* entails that one or more private entities operate and compete on the same network for customers. Competition *about the market* refers to a situation where the infrastructure remains in public hands whilst private agencies can compete for a concession. Competition *through comparison* is a modality in which public or private entities are compared by a supervisory entity on the basis of benchmarking.

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1 See, for example, TK 1999-2000, 27 018, nr. 1 p. 7.

2 The distinctions used here are those that feature in the Dutch Government's policy paper entitled "Public interests and Market Regulation", TK 1999-2000, 27 018, nr. 1, p. 18, see further below.

1.2 Liberalisation

It is apposite to clarify the terminology used in this paper. Various terms and concepts, such as ‘privatisation’, ‘liberalisation’, ‘restructuring’ and ‘placing a government agency at a distance’ are used and their capricious use can lead to misconceptions.

Liberalisation is referred to as the introduction of competition in a (network) sector. The aim of liberalisation is to capitalise on the pressure that is generated by competition on price and quality. It could but does not have to include *privatisation*. *Privatisation* is the selling of public assets to the private sector. It is usually the last step in a process of introducing market functioning in a network sector.

1.3 Restructuring

The rather ambiguous term ‘restructuring’ has been chosen to facilitate a comparison of various initiatives and processes in South Africa and the Netherlands that do not qualify as *liberalisation*. Restructuring refers to the process of taking a public service, provided directly by the government, and placing this service ‘at a distance’ whilst ensuring a certain degree of control. The Dutch speak of *verzelfstandiging* which literally means ‘providing independence’. This is not akin to privatisation because the utility remains in public hands. The primary aim of the restructuring is not to insert competition but rather to make efficiency gains by establishing ‘autonomous’ public units that provide the service.

This paper continues by outlining some of the important developments surrounding liberalisation and privatisation of potable water delivery in the two countries.

2. LIBERALISATION OF THE NETWORK SECTORS IN THE NETHERLANDS

In 1999, developments in network sectors of electricity, water and railways prompted the Dutch Parliament to request the national Cabinet to take a position on the privatisation and restructuring of those sectors.[3] In response, the cabinet issued a policy paper entitled 'Public interests and market regulation'. The question posed in the paper was how the government could most effectively safeguard public interests in these sectors. The emphasis was put on two themes, namely the consequences of liberalisation for 'customers' and supervision of the performance of these companies.[4]

In this policy paper, the Dutch government underscored its commitment to liberalisation of network sectors. It indicated that the public interest is not necessarily best served by public property. The principle was put forward that the modality with the most intensive form of competition must be opted for if it is technically and economically attainable.[5] The term 'economically attainable' must be understood to mean that a market can be created where companies *effectively* compete. Government thus unequivocally pronounced a preference for as much liberalisation of as many network sectors as possible. This commitment was phrased in the 'Third Way' vocabulary of the nineties: 'governments should steer, not row' and 'if government operates as a director, instead of an actor it will be able to firmly determine the rules according to which the market serves the public interest'. The prevailing notion is that the government should concern itself with market regulation (*marktordening*) and anticipate possible market failures in this regulatory scheme.[6]

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3 Debate in Lower House on the Department of Economic Affairs' budget 26/27 October 1999 and General Budget Debate in Senate on 16 and 17 November 1999.

4 TK 1999-2000, 27 018, nr. 1, p. 1.

5 TK 1999-2000, 27 018, nr. 1, p. 18; See also Blokland & Van Zijp 2002: 21.

6 Blokland & Van Zijp 2002: 23.

In identifying what the role of government is in ensuring that the market serves the public interest the Cabinet distinguished five phases, namely:

- identifying public interests involved;
- translating these into clear norms or conditions;
- establishing strong and independent supervision;
- determining the modus of market regulation; and
- deciding on the ownership of utilities.

These five phases will be briefly alluded to.

2.1 Public interests

Government defined the public interests involved in network sectors as including the following:

- *Universal service delivery*. Public services must be available to all consumers at roughly the same price.
- *Protection against the power of the provider*. The inherently unequal relationship between the provider and the consumer necessitates protection by the government.
- *Security of delivery*. The absence of a possibility to immediately change to another service provider when the service breaks down, combined with the essential nature of the service necessitates security of delivery.
- *Product quality*. There are distinct features of a public service, the quality of which belongs to the public interest. Examples are those aspects of a service that have an impact on health and security, such as the level of contamination of water, the secure transport of electricity amongst others. Both the establishment of norms and controlling compliance is the government's task.
- *Integrity of the market*. The government must protect the integrity of the market by countering monopolies and abuse of monopolies.[7]

[7] TK 1999-2000, 27 018, nr. 1, p. 8.

The above imperatives should then guide the government in devising sector-specific norms and standards.

2.2 Supervision

The Dutch government made it clear that supervision and market regulation are more important than the issue of ownership. After many years of experience with the restructuring of organs and the placing of specific government agencies 'at a distance' the conclusion is that public ownership creates an illusion of public involvement which cannot be translated into direct political instruction. Ownership control, which entails government using its position as shareholder or its ability to appoint members to a board of directors or a board of trustees, has proved to be largely ineffective in exercising supervision.

These insights were prompted within the constitutional doctrine of 'ministerial accountability': the accountability of national Ministers to Parliament.[8] Ministers are politically responsible for all acts and omissions performed within the departmental hierarchy. However, the accountability is limited by the notion that there can be no accountability without powers. This, combined with the restructuring of central state agencies into public utilities and a concomitant decrease of the Minister's powers vis-à-vis those agencies resulted in the doctrine of 'ministerial accountability' losing much of its use as a mechanism to exercise control over delivery.

The cabinet stated that government needs to guarantee the public interests *through public means*. The notion of independent supervisory entities was presented as the preferred option. In sum, experience has shown that being sole shareholder is not sufficient for the state to effectively supervise the performance of a privatised service. Public supervision, preferably by an independent entity is necessary.[9]

The reasoning of the government is interesting because, on the one hand, it firmly believes in the benefits of liberalisation and it trusts that

8 Article 42(2) of the Dutch Constitution.
9 Blokland & Van Zijp 2002: 22

shareholders (and consumers) will immediately punish underperformance.[10] However, when it comes to situations where government itself is (sole or majority) shareholder, it warns that the expectations are too high and it apologises for the limited influence it can exert through private interests.

2.3 Market regulation

The Dutch government is at pains to say that competition is not regarded as a goal in itself but rather as a means to provide service providers with an incentive to optimise their performance.[11] Determining the modus of market regulation deals with the question as to whether or not competition could be useful in safeguarding the public interests.

The various modalities of competition, referred to above, are at play here, except to say that competition *between networks* is not (yet) possible with water and electricity. It currently takes place only in the internet connection (telephone line vs. cable) and telecommunication (mobile vs. land line) markets.

2.4 Ownership

The final question is the issue of ownership, namely whether the agency that delivers the public service is in private hands or public hands. In the policy paper, Cabinet expresses the opinion that ultimately, regulation and supervision are more important than the issue of ownership. However, supervision and public ownership could result in a conflict of interests and, therefore, private ownership is, in principle, the preferred option.[12]

The general Dutch policy on liberalisation of network sectors is clearly predisposed to far-reaching liberalisation with private ownership as the

[10] TK 1999-2000, 27 018, nr. 1, p. 14.
[11] TK 1999-2000, 27 018, nr. 1, p. 5.
[12] TK 1999-2000, 27 018, nr. 1, p. 5.

preferred end result. Government's role should be limited to regulation and supervision, rather than involvement in the provision of the service itself. Moving to one of the network sectors, namely the delivery of potable water, an interesting deviation from this general policy can be identified.

3. WATER SERVICES IN THE NETHERLANDS

Article 22 of the Dutch Constitution instructs the government to 'take measures to promote public health'. The government's duty to provide potable water is generally derived from this socio-economic right. However, this is not interpreted to mean that the government itself must necessarily exercise the production, distribution and delivery of potable water.

The European Union regards competition in the water sector as a matter that has little or no communitarian importance. It is therefore left to the Member States to develop and implement policy. European Community Law leaves it up to the Member States to determine the structure of the potable water delivery. Directives are concerned with the quality of water delivered rather than with the way in which the water is delivered.[13] It is understood that this exception to the principles of competition and free market is justified in light of the specific nature of the service.

Currently, the delivery of potable water is conducted by approximately 20 regional water utilities. These private water utilities are owned by provinces and municipalities with the exception of the Water Company Amsterdam (*Waterleidingbedrijf Amsterdam*), which is a department of the municipality of Amsterdam. However, in principle, there are no legal impediments to a water utility selling assets to private parties.[14] The question as to whether or not the water sector should undergo a process of liberalisation was still left open in 1998 when the Cabinet issued a

[13] Directive 98/83/EC 3/11/1998 Concerning the quality of potable water (PbEG L 330). TK 2001–2002, 28 339, nr. 3 p. 7.

[14] TK 1997–1998, 25 869, nr. 1, p. 9.

'Framework Memorandum on Water Infrastructure Act' (*Hoofdlijnen Notitie Waterleidingwet*) in which the following statement appeared:[15]

> The cabinet does not support privatisation of water delivery but it does support the introduction of instruments that could improve efficiency. Bench marking can be considered in that respect, *as well as other modalities of market functioning* which must still be investigated.[16]

Government thus appeared at least to be interested in a modality of market functioning whereby the operational task of the water utility is outsourced.[17]

Developments in the sector itself caused the process to be fast-tracked. These developments concerned, amongst other things, the increasing cooperation between energy corporations and water utilities and the emergence of 'multi utility' corporations. The transfer of parts of the authority over water utilities to private corporations (electricity utilities have been privatised) was therefore on the cards.[18] The Dutch Lower House passed a motion, directing the Cabinet in 1998 to take the necessary measures, to ensure that water utilities remain in public hands and to submit a Bill to that extent.[19]

In 2002, the Cabinet submitted a Water Infrastructure Amendment Bill.[20] In the Explanatory Memorandum, government stated unequivocally that the provision of water to households will, also in the future, remain completely in the hands of the State.[21] In fact, the key theme in this Bill was the wish of Parliament and of government to 'guarantee the public nature of water provision' and this principle is to be laid down in a

15 TK 1997–1998, 25 869, nr. 1.
16 TK 1997–1998, 25 869, nr. 1, p. 10.
17 TK 1997–1998, 25 869, nr. 1, p. 26.
18 TK 2002–2003, 28 339, nr. 6, p. 2. For example, NUON, a large, privately owned, multi utility took over *NV Waterleiding Friesland*, thereby signalling a development in the direction of privately owned water utilities. See TK 2002–2003, 28 339, nr. 6, p. 12.
19 'Motie Feenstra', TK 1997-1998, 25 869, nr. 2.
20 TK 2001–2002, 28 339, nrs. 1–2.
21 TK 2001–2002, 28 339, nr. 3 p. 1.

proposed new article 1a of the Water Infrastructure Act. The government wants to retain full ownership of the water companies by provinces and municipalities.[22] In anticipation of the Bill and the processing of the Bill, government published an announcement in the government paper (*Staatscourant*), which stated that legislation to secure the public ownership of existing water utilities was being prepared. New companies, resulting from mergers, could therefore no longer expect to enjoy the same status as the existing ones.[23] As the activity of the delivery of potable water is subject to government affording the deliverer a suitable status, this effectively placed a moratorium on the selling off assets to private entities. The Water Infrastructure Amendment Act came into operation on 1 July 2005.

The amended Water Infrastructure Act gives the existing water utilities the exclusive right to produce and deliver water. The sale of interests in water utilities to entities which are not 'qualified legal entities'[24] is prohibited.[25] Actions that amount to the selling of interests in water utilities,[26] the selling of or use of water infrastructure as collateral[27] or the issuing of new shares must be reported to the Minister. Importantly, the conclusion of an agreement whereby the authority over the utility is exercised by or together with third parties or whereby the transfer of authority

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22 TK 2001–2002, 28 339, nr. 3, p. 4.

23 TK 2002–2003, 28 339, nr. 6, p. 12.

24 The Bill defines a 'qualified legal entity' as:

- a public legal entity; or
- a corporation:
  - whose constitution stipulates that its shares are to be held by public legal entities only
  - that is not legally bound to share the authority over its water business with entities other than public legal entities or corporations as meant in this definition.

The last part appears to cater specifically for the 'multi utility' corporations that engage in more than just the delivery of water, such as for example, NUON, who engages in, amongst other things, water delivery and the delivery of electricity.

25 Article 3m.

26 Article 3l(1)(b).

27 Article 3l(1)(c) and (d).

is, in practice, facilitated, must also be reported.[28] Should the Minister conclude that an interest in, or authority over a utility is transferred contrary to the above prohibitions, he or she can issue directives to reverse the consequences of these illegal actions. Such a directive can be backed up by a legal instruction (*last onder dwangsom*).[29]

The Explanatory Memorandum explains the choice for public ownership by debating the various modalities for competition in the water sector. First, competition *between networks* is practically impossible. Second, competition *on the market*, that is, allowing more than one provider to use the network, was rejected. Not only would this modality be very complicated from a technical point of view but also problematic against the backdrop of the need to guarantee the quality of the water delivered.[30] If various agencies use the same infrastructure, water of varying quality would mix and it would become impossible to guarantee the quality of water or even to identify parties responsible for the delivery of water of inferior quality.[31] Competition *about the network* could have been an option and is in fact used in, for example, France. However, the Cabinet stressed that every step in the process leading up to the delivery of water to customers ultimately has an impact on the quality of the service provided. This necessitates integrated quality management, which is then translated into a preference for the ownership and management of the infrastructure as well as the production and distribution of potable water to remain in the same hands.[32] This is an important aspect that distinguishes water delivery from electricity delivery: transporting electricity does not materially affect the quality of the product whereas the method and quality of transporting water is critical in terms of the quality of the product.[33]

The amended Water Infrastructure Act also contains a new article 3p, which establishes a duty for water utilities to connect to the water infra-

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28 Article 3l(1)(f).
29 Article 3o.
30 TK 2001–2002, 28 339, nr. 3 p. 2.
31 TK 2002–2003, 28 339, nr. 6, p. 9 and nr. 3 p. 2.
32 TK 2001–2002, 28 339, nr. 3 p. 3.
33 TK 2002–2003, 28 339, nr. 6, p. 3.

structure and deliver water to anyone who so requests. The Act continues to state that tariffs and conditions must be 'reasonable, transparent and non-discriminatory'. The Minister is then empowered to determine regulations to give further content to article 3p.

3.1 Outsourcing of management and operational aspects

Interestingly, in articles 3l(f) and 3m of the Water Infrastructure Act, government appears to part with the idea of outsourcing critical aspects of water delivery. This article prohibits the 'management' (*exploitatie*) of water utilities by entities that are not 'qualified legal entities'.[34] It seeks to prevent the situation where such a third party is given the opportunity to influence decisions of the water utility and control those assets that are essential to the delivery of the service. The article is not meant to impede the outsourcing of tasks, such as the design and construction of infrastructure and water metering, to legal entities that are not qualified in terms of the Act. In such instances, the water utility remains responsible for the management of the utility and for the quality of the water delivered. The situation changes when the management of water provision is performed by a third party.[35] Such a third party then becomes the provider of potable water. Control over the water utility would then effectively be transferred to a third party, which is in conflict with the essence of the Act.

3.2 Benchmarking

The only remaining methodology for inserting an element of competition in the water sector was thus the use of the least intensive form; which is *benchmarking*.[36] Indeed, the government proposes to regulate the maximum tariffs for each water utility on the basis of comparisons between the various utilities. This should provide an incentive to water utilities to improve their performance and, importantly, to ensure that their customers

34 See Explanatory Memorandum, TK 2001–2002, 28 339, nr. 3, p. 11.
35 TK 2002–2003, 28 339, nr. 6, p. 19.
36 Blokland & Van Zijp 2002: 21.

profit from efficiency gains.[37] The performance of water utilities will be measured according to criteria that relate to financial performance but also to water quality, the environment and service levels amongst others.

Most water utilities supported the key theme of the Bill. Some companies called on government to permit private parties to hold minority interests in the new water utilities. However, the government opted for a 100% government interest in order to avoid tension between profit maximisation and quality maximisation.[38]

3.3 Supervision

During the parliamentary process, the question as to how water utilities must be supervised reared its head time and time again, despite government's insistence that the Bill was primarily meant to secure the public nature of water utilities. Prior to the new legislation, supervision took place through ownership control by municipalities and provinces. Water utilities had already embarked on voluntary benchmarking. Against the background of government's insistence on independent supervision of network sectors and its rejection of supervision through private means (i.e. ownership control: exercising the rights attached to shares belonging to municipalities and provinces) it was not unlikely that government would follow through its preference for independent supervision.

Surprisingly, the Deputy Minister concluded in a letter to the Senate (*Eerste Kamer*),[39] that government does not intend changing the current decentralised supervision design. The department came to the conclusion that the decentralised supervision through private means suffices in terms of securing the quality and delivery of water. Combined with a compulsory benchmarking, this should be sufficient. In sum, government intends to maintain the 'decentralised supervision' through private means and combine it with compulsory benchmarking.[40]

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37 TK 2001–2002, 28 339, nr. 3, p. 3-4.
38 TK 2001–2002, 28 339, nr. 3 p. 6.
39 Eerste Kamer, vergaderjaar 2003–2004, 28 339, E.
40 Eerste Kamer, vergaderjaar 2003–2004, 28 339, C 2, p. 2.

3.4 Assessment of developments in Netherlands

Against the background of its obvious preference for liberalisation of network sectors it is interesting that the Dutch government so clearly marks off water delivery as a public task. Section 22 of the Constitution is being translated into a legislated notion of water delivery as a public task. Developments that qualify as 'precursors' to the privatisation of water utilities are effectively halted by this legislation.

Interestingly, in its policy paper on liberalisation of network sectors, government is at pains to argue that public property, combined with the notion of semi-autonomous utilities does little to ensure safeguarding the public interests. However, as far as the system of 'decentralised supervision' in the water sector is concerned, the conclusion appears to be quite the opposite: the current system of municipalities (and provinces) exercising supervision over water utilities through ownership control suffices and there is no need for independent supervision.

After examining the Netherlands' general policy on liberalisation of network sectors and reviewing the debate on the Water Infrastructure Act in light of this policy, this paper will now address the background to potable water delivery in South Africa and to some of the recent developments.

4. POTABLE WATER SUPPLY IN SOUTH AFRICA

South Africa's Bill of Rights includes a right of access to water. Section 27(1)(c) affords everyone the right to have access to sufficient food and water. Municipalities are responsible for the delivery of potable water. Schedule 4B of the Constitution lists 'Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems' as a local government competency. Supervision is conducted by national and provincial governments. They must see to the municipalities' performance of this function by regulating the exercise by

municipalities of their executive authority.[41] The national Minister, responsible for water affairs, determines the institutional and policy framework within which water is delivered, sets minimum standards for water delivery and is responsible for monitoring and supervising water delivery by the municipalities.

South Africa's challenges in terms of the supply of potable water are enormous. The extension of water infrastructure to areas that were deprived of water and sanitation during apartheid has been and is one of the government's top priorities. At his State of the Nation Address in 2004, President Thabo Mbeki committed his government to ensuring access to clean running water for all households within five years.[42] The White Paper on Municipal Service Partnerships says that 'it has been conservatively estimated that the total cumulative backlog is about R47-53 billion, with an average annual backlog of R10.6 billion… if these backlogs are addressed through public sector resources alone, many communities will receive adequate services only in the year 2065.'[43] It is clear that government is firmly intent on involving the private sector in the extension of delivery of potable water.

4.1 Legal framework for water supply

The Water Services Act, which is the key Act in terms of the institutional framework for water delivery, provides that '[e]veryone has a right of access to basic water supply and basic sanitation'[44] and that every institution involved in water delivery must take reasonable measures to realise these rights.

In translating this into an institutional design, the Act makes a distinction between water services *authorities* and water services *providers*. Water services *authorities*[45] are responsible for ensuring access to water in

41 S 155(7) Constitution; see also ss 154(1) and 139 of the Constitution.
42 See Steytler 2004: 4.
43 Municipal Service Partnerships White Paper of 2000 at p. 1.
44 S 3(1) Water Services Act.
45 Section 1(xx) Water Services Act 108 of 1997.

their jurisdictions.[46] They obtain bulk water from Water Boards, which are public bodies that are set up for that purpose.[47] A water services authority is expected to regulate water delivery through its by-laws.[48] In line with the constitutional design which says that municipalities are responsible for the delivery of potable water (see above), the Water Services Act designates municipalities as water services authorities. A water services *provider* refers to *any person who provides water services to consumers*[49] with the approval of the water services authority.[50] The Act goes on to say that no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question without the approval of that water services authority. The Act instructs water services authorities to closely monitor the performance of the water service provider. A water services authority can also act as a water service provider. The Act instructs it to manage and account separately for those functions.[51] The above distinction between service authority and service provider, a pivotal aspect of the Water Services Act, leaves room for the liberalisation of water delivery because the Act is silent on the public or private nature of the water services provider. Third parties can be contracted in by municipalities, nominated as water service providers, and be tasked to provide water to consumers.

When comparing this to the new legislation in the Netherlands, it is clear that this type of outsourcing of the 'management' of water schemes to private contractors would not be permitted in the Dutch context: it would offend articles 3l(f) and 3m of the Water Infrastructure Act.[52] In other words, as far as the outsourcing of 'management' of water schemes is concerned, the South African legal design allows for more far-reaching liberalisation compared to the Dutch legal design. If one considers that, in

46 Section 11 Water Servces Act 108 of 1997.
47 In certain (rural) areas, Water Boards are also involved in the retail sale of water.
48 S 21(1) Water Services Act.
49 Section 1(xxi) Water Services Act 108 of 1997.
50 S 22(1) Water Services Act.
51 S 20(1) Water Services Act.
52 Proposed articles 3l(f) and 3m of Water Infrastructure Act.

general, the Dutch government has a strong preference for liberalisation of network sectors, this exception becomes particularly noteworthy.

However, in South Africa, this kind of restructuring of municipal service delivery is also subject to critical local government legislation, such as the Municipal Systems Act. The Municipal Systems Act requires a municipality to follow a particular procedure if it wants to change the way in which it delivers a service. Importantly, when a municipality decides how to restructure its water delivery system, it must *first* assess the possibilities of an internal service delivery mechanism (such as a department or a business unit of the municipality).[53] The assessment must include the costs and benefits of delivering the service internally, the municipality's (future) capacity and the extent to which improvements of the municipality's administration could facilitate the internal delivery.[54] After the assessment has been completed the municipality may explore an external service delivery mechanism, whereby it must, among other things, take into account the views of the community and of organised labour.[55] It is important to emphasise that the municipality may not explore external mechanisms, *before* having assessed the possibility of internal delivery. McDonald and Ruiters argue that the Act places the public sector 'on equal footing' with the private sector:

> Although a municipality must 'first assess…internal mechanisms' when evaluating service delivery options, it may, *at the same time*, 'explore the possibility of providing the service through an external mechanism'.[56]

It is submitted that the phrase 'at the same time' incorrectly suggests that a municipality can explore internal and external mechanisms *simultaneously*. In so doing, it falsely permits the conclusion that the public and private sectors are placed on an equal footing. This does not do justice to the Systems Act's instruction to municipalities to not liberalise service

53 S 78(1) Municipal Systems Act 32 of 2000; Evans 2004: 11.
54 S 78(1)(a) Municipal Systems Act.
55 S 78(3) Municipal Systems Act.
56 McDonald and Ruiters 2004: 26 (emph. added).

delivery without having disqualified internal service delivery on rational grounds. The Supreme Court of Appeal described the purpose of the procedure as one that:

> compel[s] a municipality, in the stated circumstances, when considering 'how' [to deliver a municipal service], to consider first how it could be done through an appropriate internal mechanism. Only after that has been done may the provision of the service through an external mechanism be considered.[57]

The Act goes on to identify the municipality's responsibilities in the event of liberalisation of (water) delivery. The municipality remains responsible for regulating the provision of the service, monitoring the provider's performance, including the service in its planning and controlling the setting of tariffs.[58] The external service provider may be given the right to set tariffs, albeit within the limits set by the municipal council.[59] The Act lists the elements that can be passed on to the external service provider. They include: service delivery planning, operational planning and management, undertaking social and economic development related to the service, customer management, financial management and the collection of service fees.[60] The municipality must ensure the continuity of the service and must take over the service if the external service provider fails to deliver.[61]

4.2 Municipal entities

Local government legislation provides for the establishment of municipal entities. Municipalities can, alone or together with other municipalities

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57 *South African Municipal Workers Union (SAMWU) v City of Cape Town* Case No: 262/02 at para. 13, available at <http://www.law.wits.ac.za> (accessed 14 January 2005).

58 S 81(1) Municipal Systems Act.

59 S 81(3) Municipal Systems Act.

60 S 81(2) Municipal Systems Act.

61 S 81(2)(d) Municipal Systems Act.

establish or acquire ownership control in companies whose aim is to provide that particular service.[62] Municipalities can also establish service utilities.[63] The Act defines 'ownership control' as including at least the following powers:

- appoint/remove majority of the board of directors
- appoint/remove the chief executive officer
- majority of votes in meetings of board of directors or in general meetings.[64]

These utilities could also be contracted in by other municipalities to provide water services.[65] In fact, large water utilities, such as Rand Water (Johannesburg) and Umgeni Water (Durban) are even engaged in private contracts to run services outside of the country.[66] This legal framework for municipal entities sets the scene for the establishment of utilities, similar to the Dutch water utilities.[67]

4.3 Liberalisation initiatives

When viewed through the prism of the definition introduced at the beginning of this paper, it becomes clear that South African legislation permits liberalisation of the water sector through competition *about the market* (concession to manage and operate water services). It also permits and stimulates the 'corporatisation' of water services by providing a framework for the establishment of water utilities owned by municipalities.

Experiences to date with competition about the market have not shown the kind of successes that were anticipated. The 30-year manage-

62 S 82(1)(a) en (b) Municipal Systems Act.
63 S 82(1)(c) Municipal Systems Act.
64 S 1 Municipal Systems Act.
65 S 76(b)(i) Municipal Systems Act.
66 Rand Water is involved in ventures in, amongst other countries, Jordan and Ghana. Umgeni is involved in Nigeria. See McDonald and Ruiters 2004: 29.
67 Albeit that South African provinces cannot take part in municipal entities, which sets them apart from many Dutch water utilities.

ment and operations concession in Nelspruit (Mpumalanga Province) is a case in point. The concession was granted by the Nelspruit municipality to Greater Nelspruit Utility Company (GNUC), a joint venture between Dutch Nuon and British BiWater. This so-called 'Nelspruit Water Concession' was hailed as the type of public-private partnership that is needed to ensure investment to extend and sustain water services. GNUC was to manage and operate water service delivery and ensure infrastructure investment to extend services. Indeed, infrastructure was extended to previously excluded areas.[68] However, GNUC experiences great difficulties in handling the South African realities, particularly deep poverty and non-payment for water services.[69] Non-payment for municipal services is a phenomenon that continues to seriously impede the functioning of local authorities. Grinding poverty, combined with the legacy of non-payment as a means of protest against illegitimate apartheid local authorities render it a pernicious problem. Smith argues that these realities render the South African context unfit for concessions because these matters require political involvement: 'It is a political issue when it comes to poor people's ability to pay.'[70]

Another example is the 10-year concession granted by the Fort Beaufort Transitional Local Council to Water Services South Africa (WSSA), a subsidiary of French water-multinational Suez. The contract entailed that WSSA would manage and operate water and sanitation services in return for whopping management fees.[71] Curiously, the municipality carried the risk for non-payment by residents, which impacted on the contract payments. When payment crises continued these fees started absorbing a fifth of the municipality's budget.[72] Inevitably, the municipality defaulted on the payments. This prompted WSSA to threaten discontinuing water delivery to the municipal residents. Court intervention was necessary for the municipality to have the contract nullified (on the ground that

68 Smith, Gillet & White 2004: 135.
69 Smith 2003: 8.
70 Smith 2003: 9.
71 De Visser 2002: 11.
72 Ruiters 2004: 159.

public participation procedures were not followed before the contract was entered into).[73]

It is suggested that the above examples highlight two important considerations. First, liberalisation of water provision inevitably results in more rigorous cost recovery: water provision is further commodified and is provided on the basis of ability to pay rather than on the basis of need. Second, there is a frightening lack of ability at municipal level to enter into the right contracts, to clearly delineate responsibilities between service *provider* and service *authority* and to monitor performance of the service provider. Liberalisation of water service delivery is too often used as a panacea for problems that require political involvement.

Both these considerations are far less poignant in the Netherlands. Ability or willingness to pay for water consumption is generally not a problem. The odd water disconnection[74] does not warrant the same kind of suspicion as the massive water disconnections in impoverished South African townships do. The long standing experience with market-based partnerships in the Netherlands and a generally well-equipped and skilled municipal staff will go a long way in ensuring that the right contracts are entered into.

An element that points towards accepting the need for liberalisation in South Africa is the need for water conservation. The commodification of water and stringent cost recovery methods, such as progressive tariffs systems could prove useful in conserving water. Jonker remarks that there appear to be no significant problems surrounding achieving the delivery

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73 De Visser 2002: 11.

74 In principle, water utilities determine the conditions under which they provide their service. The proposed legislation will insert a clause that requires these conditions to be "reasonable, transparent and non-discriminatory". See TK 2002–2003, 28 339, nr. 11, p. 1. Currently, clause 9 of the General Conditions on Potable Water (*Algemene voorwaarden drinkwater*) (that are generally used by water utilities) stipulate that the water utility is entitled to cease water delivery if the consumer does not honour a payment plan. The water utility may not use this power unless it is warranted by the failure on the part of the user to honour the agreement. In addition, the water will not be disconnected if the user applies within 10 days to the Mediation Commission (*Geschillen Commissie*).

of the required *quantity* of water in the Netherlands.[75] South Africa faces a situation of increasingly problematic water scarcity. Increasing demands, urbanisation and climate change are putting enormous strain on South Africa's ability to supply water. For example, residents of Cape Town are getting used to water restrictions being imposed on them in the dry period from December-February to prevent water reserves from being depleted.

4.4 Supervision

As stated earlier, supervision of South African water service delivery is performed by the national department of Forestry & Water Affairs and the national department of Provincial and Local Government.
Smith argues that supervision of large public-private partnerships such as the Nelspruit Concession by national government fails:

> …neither the national Departments of Water Affairs and Forestry (DWAF) or Provincial and Local Government (DPLG) have sufficient knowledge of the Nelspruit PPP to be able to act effectively as watchdog.[76]

Smith proposes an independent regulator to oversee these partnerships. This kind of independent supervision would be along the lines of the abovementioned Dutch general policy which entails a preference for independent supervision. However, in the case of water delivery, this option was rejected in the Dutch water sector.

4.4.1 Supervision by the courts?

The legal framework for socio-economic rights in the South African Constitution provides an additional dynamic to the comparison between the Netherlands and South Africa. Socio-economic rights in the Dutch Constitution are generally interpreted by government and by the courts as 'in-

[75] Jonkers 2001: 18.
[76] Smith, Gillet & White 2004: 139.

structions' to government that are not enforceable by citizens. Socio-economic rights in the South African Constitution, however, are phrased and interpreted as fundamental rights that impose on the state both negative and positive duties and, importantly, they are justiciable in court.

Mention has already been made of the right of access to water, as enshrined in section 27(1)(c) of the Constitution. In its landmark *Grootboom* judgment,[77] the Constitutional Court established a test by which a court is to judge whether government is violating duties imposed by socio-economic rights, such as the right of access to water. Importantly, the standard set by the Constitutional Court stopped short of identifying an *individual* entitlement to a particular government services, such as water, housing or medical care. Critical to the assessment of the state's performance in light of socio-economic rights is the question as to 'whether the legislative and other measures taken by the state are reasonable'.[78] The 'reasonableness' test extends to programmatic requirements such as the clear allocation of responsibilities over various state actors and financial and human resources. It also requires government policies to cater for both long and short term needs. Policies that ensure long term progress but exclude or ignore those whose needs are most urgent are not 'reasonable'.

It is submitted that the latter element in particular, injects the possibility of judicial intervention into the liberalisation debate. If liberalisation policies in South Africa merely achieve statistical advances in the extension of water infrastructure, organisational efficiency and water conservation whilst confronting the most vulnerable sections of society with rigorous cost recovery methods such as the disconnection of water delivery, the courts are likely not to shy away from deciding that these policies are 'unreasonable' for want of compliance with section 27(1)(c) of the Constitution.[79]

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77 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

78 At para. 41.

79 De Visser, Cottle & Mettler 2003: 49.

The emergence of case-law on socio-economic rights in South Africa is particularly interesting against the backdrop of the Dutch discussion surrounding supervision of liberalisation efforts in network sectors. It has already been noted that the proclaimed failure of supervision through ownership control by the government is not entirely consistent with the strong reliance on supervision by private shareholders. In addition, government did not follow through its preference for independent public supervision in the water sector by deciding that decentralised supervision through private means is a satisfactory means of supervision. The question may be asked as to what this means for the accountability of government towards citizens for the quality of service delivery. How much accountability does voter representation on a municipal council that owns a minority interest in a water utility translate into? The fact of the matter is that Dutch citizens, in their dealings with public utilities, experience themselves to be customers of a service delivered through the market, rather than citizens, receiving a service for which government is responsible. They rely on consumer protection rules to protect their interests whilst government takes its instruction from article 22 of the Constitution, which entails a socio-economic right. By comparison, South African citizens are offered some protection by enforceable socio- economic rights which the courts are ready and willing to use to review government policies. This review does not result in an individual entitlement of the claimant. This would indeed be difficult to uphold in many respects, not in the least with reference to the doctrine of separation of powers between the executive, legislative and judicial branch of government. However, the ‘reasonableness’ test provides a useful tool for citizens to hold government accountable. Why should Dutch citizens not be entitled to have the courts review the reasonability of liberalisation processes? This would prove particularly useful in the face of government’s strong preference for as much liberalisation of as many network sectors as possible.

It will of course be argued that, amongst other things, the phraseology of article 22 of the Dutch Constitution does not permit an interpretation whereby courts review the ‘reasonability’ of government programmes. Article 22 is phrased as an instruction to government rather than as an en-

titlement for individual citizens. However, it is suggested that a 'reasonability review' does not hinge on the question as to whether or not the relevant clause is phrased as an individual entitlement. In delivering the *Grootboom* judgment, the Constitutional Court of South Africa did not investigate individual entitlements. It rather assessed whether or not government's policies, legislation and programmes are reasonable against the backdrop of the instruction embedded in the Bill of Rights. When viewed like this, the difference with the doctrine surrounding article 22 of the Dutch Constitution suddenly seems less obvious.

5. CONCLUDING REMARKS

This paper has examined the discussion in South Africa and the Netherlands surrounding the liberalisation and restructuring of water services. It is clear that there is a vast difference between the two countries. The Netherlands does not have to deal with vast infrastructure backlogs and does not face the same water shortages as South Africa. The level of experience and extent of government's regulatory capacity to oversee the liberalised delivery of services can hardly be compared.

The Dutch government's overall policy is clear: liberalisation of network sectors is proffered as the key to more efficiency, lower prices and better quality. However, the Dutch government is drawing the line *before* the privatisation of water utilities and is firming up the legal framework surrounding its public responsibility. In the context of this paper, the prohibition of private sector involvement in the actual management and operation of water services is noteworthy because this is permitted in South Africa and in fact one of the emerging trends. Contrary to what might be expected (considering the political profiles and history of governments in both countries) the Dutch legal framework is now less receptive of liberalisation of the water sector than South Africa is. Local government legislation, most notably the Municipal Systems Act, indeed puts up a barrier to hasty liberalisation and restructuring processes. However, it is expected, in the long run, these procedural impediments will not stop the

South African government's clearly outlined policy in favour of liberalisation from being implemented. The gigantic infrastructure backlogs that were mentioned perhaps leave South Africa with no other choice but to harness private sector investment into water delivery.

It was suggested that the South African approach on socio-economic rights offers insights that should prompt a debate on revisiting the interpretation of socio-economic rights in the Dutch Constitution. The South African Constitutional Court unlocked the dichotomy between unacceptable individual entitlements and meaningless statements of intent. It provided a functional standard of 'reasonableness' against which government's performance can in fact be measured. In the face of diminishing democratic controls and loss of accountability with respect to liberalised service delivery, a rethink of the role of the courts in enforcing the socio-economic rights included in the Dutch Constitution seems apposite.

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III Privatisation and the Right of access to sufficient water in South Africa: the case of Luhkanji and Amahlati

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1. INTRODUCTION

The different ways water privatisation has taken place in South Africa include out-sourcing (the operation, management and maintenance of the water systems), lying of new pipes and making new connections. This is in addition to meter installation and reading, debt collection and the carrying out of disconnections. In the same context the 1996 Constitution protects the right of access to sufficient water.[1] Though international human rights law is neutral on privatisation it is concerned that it should not compromise the enjoyment of human rights.[2] It is also concerned that the process of privatisation ensures participation and consultation with the people. In the South African context, though the Constitution recognises the horizontal application of the Bill of Rights, the ultimate responsibility to ensure that all human rights are realised falls on the state. Privatisation *per se*, does not exonerate the state from this responsibility.

Government disputes the fact that it has privatised water and instead chooses to call it 'outsourcing' or 'delegated water management'. From a conservative point of view privatisation is associated with the complete divestiture of public assets. This paper will, however, argue that privatisation may take place without divestiture. Other forms of privatisation include leasing concessions, servicing contracts,

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1 1996 Constitution, Act No 108 of 1996.

2 Tsemo 2003: 2.

public/private partnerships as well as operation and management arrangements.

In Lukhanji and Amahlati, the operation of the water systems has been 'outsourced' to Water and Sanitation Services South Africa (WSSA). WSSA is a South African subsidiary of the French multinational corporation Suez (formerly Suez Lyonnaise) which has been involved in the provision of water services in many parts of the world.[3] Although the privatisation of water has seen improved services in both Lukhanji and Amahlati, the two municipalities are struggling to cope with financial obligations under the contracts. The municipalities have been forced to resort to debt collection mechanisms such as pre-paid meters, water restrictors and rigorous debt recovery. These methods have affected the enjoyment of the right of access to sufficient water. The municipalities' indigent people's policies, even though commendable, have not been publicised adequately.

2. WHAT IS WATER PRIVATISATION?

The term privatisation derives from economic and political models that define the relationship between the public authorities and the citizens in respect of delivery of public services. Though privatisation has been associated mainly with the full divestiture of state assets it includes the various forms of delegation of public duties to the private sector.[4] Privatisation may take the following forms: partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out specific activities to private actors, and management or employee buyout.[5]

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3 WSSA has managed water services in Argentina, Indonesia, Philippines and the United Kingdom amongst others.

4 Bond, McDoonald & Ruiters 2003: 10 – 13.

5 See Chirwa 2004: 220.

In relation to water:

> [p]rivate sector participation in the delivery of water services can take a variety of different forms – from one person fixing water pipes in a small section of a township to a large multi-national corporation providing bulk water supply and bulk sewerage treatment. The size and types of contracts can vary as well, from a one-year fee-for-service, renewable contract to a thirty year license. Ownership of asserts also varies, with the state retaining ownership in some cases and the private company in others.[6]

According to Booysen:

> ... [i]n many analyses 'privatisation' is used to encompass the range of manifestations of private sector involvement in the delivery of public services, not just with reference to divestiture or the complete transfer of public enterprise to a private actor. This conception of privatisation articulates with the Department of Water Affairs' 'private operation' – the operation of water assets by the private sector, done on behalf of government, and through a lease contract, concession, or a build-operate-train-transfer (BOTT) contract. Private operations may include: support services (consulting, outsourcing meter reading, cleaning, maintenance), contracting (construction, operations, management) …[7]

In both contracts as considered in the case study, the municipalities have not relinquished ownership of the water system to WSSA. WSSA's responsibilities, for which a monthly payment is made, are described as:

> ... management, operation and maintenance of the system; rehabilitation of the existing system; keeping and updating all records required for the proper management of the system; and other responsibilities as may be agreed upon by the parties.[8]

Though ownership of the system has not been relinquished to the private water provide, the Lukhanji and Amahlati contracts nevertheless perpetuate a form of privatisation. The Municipalities have chosen to

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6 Bond, McDoonald & Ruiters 2003: 10.
7 Booysen 2004: 8 (footnotes omitted).
8 Clause 3.1 of both contracts.

delegate to a private service provider functions that they could have discharged themselves. Whether they are justified in doing this is not the scope of this paper.

2.1 The policy basis for privatisation

Victoria Johnson has excellently discussed the policy basis for privatisation of public services in South Africa. She also discusses what she describes as 'drivers' and 'dangers' for 'outsourcing'.[9] She makes reference to two government white papers: the White Paper on Local Government of 1998, and White Paper on Municipal Private Partnerships of 2000, as the basis for 'outsourcing' in South Africa.[10] The 1998 White Paper lays down a set of 'guiding principles' for municipalities to follow in determining the mechanisms of service delivery. These include: accessibility of services, affordability, quality of products, accountability, integrated development, sustainability, value-for-money, ensuring and promoting competitiveness of local commerce and industry and promotion of democracy.[11] The White Paper lists the various outsourcing mechanisms available to municipalities. These include: corporatisation, public-public partnerships, partnerships with community-based organisations and non-governmental organisations, contracting out, leases and concessions and transfer of ownership (which the White Paper describes in brackets as 'privatisation').[12] This description appears to derive from the misconception that it is only complete transfer of ownership of public assets that amounts to privatisation. But as already discussed above, ownership is a question of degree: contracting out, leases and concessions are also a form of privatisation. Privatisation can result in complete divestiture of assets were all proprietary interests are transferred to a private entity. But it could also occur with a transfer of limited proprietary rights which

9 Victoria: 2004.

10 The white papers will be referred to as the 1998 and 2000 white papers respectively.

11 See summary by Victoria 2004.

12 Para 2.2. For a detailed description of the different mechanisms, see Victoria 2004: 7 – 9.

may take the form of leases for defined periods after which the property reverts to the public entity.

The 2000 White Paper concretises the 1998 paper and lists the benefits of outsourcing. According to Victoria:

> ... this policy document is careful to point out that outsourcing is not Government's 'preferred' option for improving service delivery, it is merely one of many service options which should receive equal status. However, the underlying arguments and descriptions of the benefits of outsourcing in this White Paper certainly leave an impression of, if not a 'preferred' option, certainly a highly desirable one.[13]

The drivers identified include: efficiency, skills transfer, lower costs, value-for-money, certainty of the municipality as regards its costs and social upliftment and/or economic development.[14] Victoria categorises the drivers as follows: capital investment, value for money, greater efficiency, skills transfer, and risk transfer. She groups the dangers as follows: accountability, public buy-in (public participation, transparency, etc.), consumer protection, inappropriate risk allocation and protection of service environment. The first three of these groups have far reaching effects for human rights, and in particular the right to enjoy a specific service. According to Victoria:

> [o]ne of the greatest dangers in outsourcing a service is the risk of loss of accountability on the part of the municipality. The municipality, no longer face to face with its community and one step removed from actual service delivery, may be tempted to divest itself entirely of its responsibility to the consumers. In other words, it may be inclined to remain passive and just leave the contractor to get on with the job. This poses a great risk to the community which the municipality serves.[15]

Additionally, the absence of transparency and public participation is 'a threat to the country's democratic principles and to the success of the

13 Victoria 2004: 11 (footnote omitted).
14 See summary by Victoria 2004: 10 – 11.
15 Victoria 2004: 8.

outsourcing itself … [This] could lead to service boycotts, damage to infrastructure and thus prejudice to the service delivery itself'.[16]

Without undermining the relevance of public participation and transparency to human rights, the most important threat to poor people is absence of consumer protection. The absence of consumer protection may decrease affordability and accessibility. The principles behind privatisation, such as cost recovery and subsidy removal are inherently detrimental to the enjoyment of socio-economic rights.[17] The profit-motivated nature of the private sector and its operation on the basis of business principles shifts attention on the wealthy at the expense of the poor. Systems serving those with ability to pay may be preferred to those serving poor people.

3. LEGAL FRAMEWORK FOR THE RIGHT TO WATER

3.1 The 1996 Constitution

The 1996 Constitution entrenches a justiciable Bill of Rights with a range of rights; these include the socio-economic rights. Section 27(1)(b) provides that:

> 27 (1) Everyone has the right to have access to –
> ….
> Sufficient food and water; …

Section 27(2) provides that: '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' Section 26(2), which is the same as section 27(2), has been construed in the *Grootboom* case.[18] The Constitutional Court held that '[w]hat constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government:

16 Victoria 2004: 39.
17 Chirwa 2004: 228.
18 2000 (11) BCLR 1169 (CC).

national government, provincial government and local government.'[19] A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[20] Though each sphere of government must accept responsibility for the implementation of particular parts of the programme, the national sphere of government retains the responsibility of ensuring that all the programmes and strategies are adequate to meet the State's constitutional obligations.[21] The programme must be balanced and flexible and must in addition to the medium and long term needs, make provision for the short-term needs.[22] 'Those whose needs are the most urgent … must not be ignored by the measures aimed at achieving realisation of the right'.[23]

The term progressive realisation 'shows that it was contemplated that the right could not be realised immediately' but 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and where possible lowered over time.'[24] In the context of privatisation, the government still bears the ultimate responsibility of ensuring progressive realisation of the rights. Unless the state puts in place special measures, contractual or otherwise, it is hard to force private actors to progressively realise rights.

In the *TAC* case,[25] the Court applied the reasonableness test to find that the government's programme of providing Nevirapine was unreasonable. This is because the government programme confined the drug to selected research sites, thereby denying those outside these sites access to health care services.

Though the Court has not been confronted with a right of access to water case, the same principles above would apply to such case. What is lacking from the cases, however, is an exhaustive definition of the content of the rights. In the *Grootboom* case, though a distinction was

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19 Para 39.
20 As above.
21 Para 40.
22 Para 43.
23 Para 44.
24 Para 45.
25 2002 (10) BCLR 1033 (CC).

drawn between 'the right of access to adequate housing' and 'the right to adequate housing',[26] access to housing was not defined sufficiently. The *Tac* case has been criticised for the virtual absence of any analysis of what the right to have access to health care services involves.[27] In future, the Court may wish to borrow from the approach adopted at the international level to give content to the right to water.

3.2 The right to water at the international level

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has given content to the right in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[28]

The CESCR has stated that:

> [t]he use of the word 'including' [in article 11 of the ICESCR] indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions of survival.[29]

The right contains both freedoms and entitlements: 'freedoms include the right to maintain access to existing water supplies … and the right to be free from interference, such as ... arbitrary disconnections or contamination of water supplies'. '[T]he entitlements include the right to a system of water supply and management that provides equal opportunity for people to enjoy the right to water.'[30] The water must be adequate for human dignity, life and health. 'The adequacy of water should not be interpreted narrowly by mere reference to volumetric quantities and technologies. Water should be treated as a social and

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26 Para 35.
27 Bilchitz 2003: 6 .
28 International Covenant on Economic, Social and Cultural Rights 1966.
29 General Committee No. 15.
30 General Comment No. 15, para 10.

cultural good, and not primarily as an economic good.'[31] The factors that have to be considered when determining adequacy include: availability, quality, and accessibility.

The obligation to realise the right to water is on the state even when the services have been privatised. Paragraph 24 of its General Comments, the CESCR provides that:

> [w]here water services … are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

The state must monitor the third party's compliance with the right and 'must be prepared to intervene, for instance by terminating the contract if there is one, or by providing redress to the victims of the violation.'[32]

3.3 Legislation and benchmarks

3.3.1 The Water Services Act

The Water Services Act (the Act)[33] is South Africa's framework legislation for the realisation of the right of access to sufficient water. The main objective of this Act is to advance the right of access to basic water and the right to basic sanitation. The Act re-assures the right of access to sufficient water and imposes an obligation on all water services institutions, which includes private service providers, to take reasonable measures to realise this right. The ranges of matters that the Act deals with are discussed in the following sections.

3.3.2 Basic water, limitation and disconnections

The Act provides procedures that have to be followed before water is either limited or disconnected. Section 4 (3) provides as follows:

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31 General Comment No. 15 , para 11.
32 Macbeth 2004: 154.
33 Act No. 108 of 1997.

> (3) Procedures for the limitation or disconnection of water services must –
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> a) be fair and equitable;
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> b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless
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> (i) other consumers would be prejudiced
>
> (ii) there is an emergency situation; or
>
> (iii) the consumer has interfered with a limited or discontinued service; and
>
> *(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.* [Emphasis supplied]

This provision ensures that even those that do not have the means to pay have access to at least basic water. By regulations, the Minister has set a benchmark by defining the minimum standards for basic water supply.[34] Regulation 3 provides as follows:

> 3. The minimum standard for basic water supply services is –
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> (a) the provision of appropriate education in respect of effective water use; and
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> (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –
>
> (i) at a minimum flow rate of not less than 10 litres per minute;
>
> (ii) within 200 metres of a household; and
>
> (iii) with an effectiveness such that no consumer is without water for more than seven full days in any year.

This standard has, however, been criticised for its inadequacy to meet the basic levels of water supply: 'For households of 8 people, six kilolitres of water amounts to two flushes of a toilet per person per day

[34] Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2004. They have been referred to in this paper as "the basic water regulations".

and will therefore be completely inadequate.'[35] An amount of up to 50 litres is proposed as sufficient for one's drinking, sanitation services, bathing and preparation of food.[36] The World Health Organisation (WHO) has not endorsed any standard of water in terms of quantity. It has, however, been suggested that 'intermediate access' levels will result in use of up 50 litres per capita per day and 'optimal access' will result in even much higher quantities.[37] 'Intermediate access' is used to mean access where water supply is on plot, and 'optimal access' to mean 'multiple tap in house'.[38] This means that the water needs of people vary with the level of access. The closer the water is brought to the people the more will be their water needs. Any minimum standard should take this factor into account and should be revised as access improves. Additionally, it is hard to understand why, despite stating that the minimum for each individual is 25 litres, 6 kilolitres is set for all households irrespective of the size of a particular household. The presumption that on average most households have up to eight people may not hold in some cases. Households vary not only in size but also in the levels of access, which may call for a case-by-case consideration. However, at this stage one should appreciate the administrative hurdles that case-by-case consideration would impose. But simple methods, such as grouping households, could be used to reduce on such hurdles.

In *Manqele v Durban Transitional Metropolitan Council*,[39] the applicant had her water disconnected on the ground of non-payment. She contended that the discontinuation was unlawful and invalid. Among other things, she argued that the procedures outlined in section 4(3) of the Act were not followed. '[T]he discontinuation resulted in the applicant and those dependent upon her being denied access to basic service'.[40] She sought an order directing the respondents to maintain basic water services to her premises.[41] The respondents contended

35 De Visser, Cottle & Mettler 2003 (1): 19, see generally De Visser, Cottle & Mettler 2003 (2).
36 Gleick 1998: 9, Kidd 2004: 135.
37 Bartram & Howard 2003: 25
38 Bartram & Howard 2003: 25.
39 2002 (6) SA 423 (D).
40 P 424, para I.
41 As above para J.

that in the absence of the basic water services regulations, the applicant had no enforceable right to water.[42]

The Court held that:

> It is clear that the Water Services Act was directed at achieving the right embodied in the Constitution. The difficulty, however, is that in the absence of regulations defining the extent of the right to basic water supply, I have no guidance from the Legislature or executive to interpret the content of the right embodied in s 3.
>
> The interpretation that the applicant wishes me to place upon s 3 of the Act, in the prescription of the minimum standard of water supply services necessary to constitute a basic water supply, requires me to pronounce upon and enforce upon the respondent the quantity of water that the applicant is entitled to have access to, the quality of such water and acceptable parameters for 'access' to such basic water supply. These are policy matters, which fall outside the purview of my role and function, and are inextricably linked to the availability of resources. Given the fact that the prescribed minimum basic water supply has not yet been promulgated …[43]

It is submitted that the judge misunderstood the applicant's contention; the applicant was not calling upon the court to define the minimum basic supply. The argument was that once the respondents had set a minimum of basic water supply, they were precluded from interfering with the enjoyment of that right.[44] The question was whether the respondent's retrogressive measures were lawful. In the *Grootboom* case, the Court endorsed the definition accorded by the CESCR to the term 'progressive realisation'.[45] The CESCR has stated that:

> It … imposes an obligation to move as expeditiously and effectively as possible … *[m]oreover any deliberately retrogressive measures in that regard require the most careful consideration and would need to be fully justified* by reference to the totality of

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42 P 426 para J.
43 P 427 para D – F.
44 See the contention at p 427 paras A – C.
45 General Comment No. 9.

> the rights provided for in the Covenant and the context of the full use of the maximum available resources.[46][Emphasis supplied]

The *Bon Vista* case[47] represents a departure from the approach in the *Manqele* case. In the *Bon Vista* case the respondents had discontinued the supply of water to a block of flats on the ground of non-payment. The applicants contended that the discontinuation was unlawful. The Court read section 27(2) together with section 7 of the Constitution, against the background of international law, to define the duty on the respondents to respect the right of access to water as follows:[48]

> On the facts of this case, the applicants had access to water before the Council disconnected the supply. The act of disconnecting the supply was *prima facie* in breach of the Council's constitutional duty to respect the right of access to water. In accordance with what is referred to as the two-stage approach, that places a burden or an onus on the Council to justify the breach.[49] [Footnote omitted]

The Court described the form that the notice of intention to limit or discontinue water services as contemplated in section 4(3)(b) of the Act should take:

> ...when a consumer is in arrears in respect of payments for water services, the account sent out by the Council contains a standard printed section informing him or her that if arrears are not paid, the service will be discontinued. Again it is not necessary to decide whether such notices comply with the requirements in the Act. Without deciding the matter, however, I must express my doubts about whether such a standard notice, if it does not inform the consumer of his or her statutory right to make representations, meets the requirements of the Act. The right is not to have real meaning unless the service provider informs consumers of its existence, which it could easily do.

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46 General Comment No. 9, para 9.

47 *Bon Vista Mansions v South Metropolitan Local Council* 2002 (6) BCLR 625 (W).

48 P 628 – 30, paras 11 – 15 .

49 P 630 para 20.

> A genuine opportunity to make representations is particularly important in the light of the provision that water supply may not be discontinued if it results in a person being denied access to basic water services for non-payment, where that person proves to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic water services.[50]

Though it was, like the *Manqele* case, decided before the promulgation of the basic water regulations, the Court in *Bon Vista* relied on the Constitution and the Act to operationalise the right to water. The case lends itself to the 'generous' approach to the interpretation of the Bill of Rights. This approach gives a wide, as opposed to a restrictive interpretation of the provisions of the Bill of Rights.[51] In the *Manqele* case the Court had adopted a very narrow approach to section 27(2) of the Constitution.

3.3.3 Water standards and tariffs

Section 10 of the Act empowers the Minister to prescribe norms and standards for tariffs. The norms are intended to, among other things, ensure equitable tariffs for the enjoyment of the right to water. The Minister has made the *Norms and Standards in respect of Tariffs for Water Services in terms of Section 10(1) of the Water Services Act* (the tariff regulations).[52] Regulation 2 requires services institutions among others to recover the costs of: water purchase, overheads and capital not financed through grant, subsidy or donation.

Recovery of capital injections has the potential of encouraging quality improvements over time. Unfortunately, this is done at the risk of commercialising water services. This is especially so when the service is left in the hands of the naturally profit-motivated private actors. Even though the regulations make provision for subsidisation, it is not imposed as an obligation or defined with precision. To provide the mandatory basic water, the municipalities have chosen to subsidise this by charging incremental tariffs (block tariffs), which increase with the volume of water consumed, for those households (presumably

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50 P 631, para 26.

51 See *S v Zuma* 1995 (2) SA 642 (CC), para 14.

52 June 2001.

middle-class) that exceed the 6 kilolitres of water. But due to the high levels of unemployment and the growing consumer debt this may prove problematic.[53] There is a need for the national government to intervene and provide subsidisation where the need arises. This is because the national government bears the ultimate responsibility to ensure the realisation of the socio-economic rights in the constitution.

But in addition to ensuring the recovery of costs, the tariff regulations require the water services institutions to ensure *that all households have access to basic water supply and basic sanitation.*[54] This, in my opinion, should rank highly over the others. It derives directly from the right of access to water as enshrined in the Constitution. In fact, the regulations require that the tariffs for households supplied through a communal water services work 'must be set at the lowest amount, including a zero amount'.[55] However, a trend has emerged were communal stand pipes are replaced with pre-paid meters thereby limiting access.

3.3.4 The duty to provide access to water

The Act imposes an obligation on all water services authorities 'to progressively ensure efficient, affordable, economical and sustainable access to water services' to all consumers or potential consumers in its area of jurisdiction.[56] The extension of the obligation to cover potential consumers means that even in the absence of any contractual relationship, potential consumers may compel the authority to provide them with water. This duty is complimented in stronger terms by section 11(4), which provides that '[a] water services authority may not unreasonably refuse or fail to give access to water services to a consumer or *potential consumers* in its area of jurisdiction'.[57]

3.3.5 Contracts and joint ventures

According to section 19 water services institutions 'may only enter into a contract with a private sector water services provider after it has

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53 See Table 6 of the Report, Tariffs and Fees in Lukhanji and Amahlati , p. 44. See Deedat, Pape & Qotole 2001: 18.

54 Reg. 2(a).

55 Reg. 5.

56 S 11(1).

57 Emphasis supplied.

considered all known public water services providers able and willing to perform the relevant functions.'[58] Before entering into any such arrangements, 'the water services authority must publicly disclose its intention to do so.'[59] The Act requires the Minister to ensure that water services are provided on an efficient, equitable, cost effective and sustainable basis; that the terms of the contract are fair, not only to the parties but to the consumers as well; and compliant with the Act.[60] The Minister has promulgated the *Water Services Provider Contract Regulations* (the Contract Regulations).[61] The regulations require that the contract set forth the manner and means by which any relevant portion of the water services development plan will be implemented.[62] This is very important because it binds the contract service provider to the terms of the water plan. However, this has practical difficulties. Some of the undertakings in the water plan may impose obligations of which only a government institution is able to discharge.

Where the contract provides for the water services provider to provide services directly to the consumers, the contract must require such provider to prepare and publish a consumer charter.[63] This charter must in addition to fulfilling the requirements of section 4, as already discussed above, provide for a system of dealing with consumer complaints and set out a consumer's right to redress.[64] The regulations also require that a water services provider should, 'in terms of the contract ensure access to such information as might be reasonably called for by a consumer or potential consumer.'[65]

[58] S 19(2).
[59] S 19(3).
[60] As above.
[61] August 2001.
[62] Reg. 3(a).
[63] Reg. 13.
[64] As above.
[65] Reg. 18.

4. THE LUKHANJI AND AMAHLATI CONTRACTS

Both contracts were concluded pre-1994 when the two locations, Lukhanji and Amahlati, were then known as Queenstown and Stutterheim respectively. WSSA is the service provider in both contracts. The municipalities were persuaded that WSSA would not only implement an integrated approach to meet the demands of the consumers, but would also provide affordable and acceptable standards of the service followed by the ability and willingness to pay.[66] The municipalities would be saved money by providing 'world-class' technical and organisational services at lower-than-usual municipal costs, while effectively managing the customers,[67] and would save the municipalities from 'a technical burden'.[68]

4.1 The process of entering into the contracts

The current legal regime applicable to the process of out-sourcing at the local government level does not apply to these pre-1994 contracts. For instance, consultation with stakeholders, and especially with the community, was not legally or constitutionally required.[69] In Lukhanji the municipality put out an open-ended tender, which complied with the then valid relevant Municipal Ordinance for tendering procedures.[70] In Amahlati a consultant-specialist in water supply and sanitation prepared the tender documents and Aqua-Gold won.[71] In Lukhanji, the contract was signed on the 18 June 1992 to run for a period of 25 years.[72] The Amahlati contract on the other hand was signed on 28 September 1993 to run for a period of ten years.[73] After 1994 the Lukhanji contract was extended to cover Ezibeleni and Mlungisi.[74]

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66 WSSA "Proposal for Management, Operation and Maintenance of Fort Beaufort Water and Sanitation Services" 1995 as quoted by Ruiters 2002: 43.
67 Ruiters, as above, p. 45
68 Report, p. 23.
69 Report, p. 28.
70 Ordinance 20 of 1974.
71 See Report, table 4 at p 32.
72 Annex 1 to the contract.
73 Annex 1 to the contract.
74 Booysen 2004: 25.

The Amahlati contract came to an end towards the end of 2003. WSSA has however continued to provide water, initially on an annual but now on monthly renewal basis.[75] There are moves afoot to renew the contract but this is now subject to the on-going section 78 process of the *Local Government: Municipal Systems Act*.[76] The Lukhanji contract continues to run to the satisfaction of all the parties. Recently, however, the contract has come under severe pressure for re-negotiation due to the severe and persistent cash-flow crisis.[77] After 1992 Lukhanji saw an increase of the tariffs by over 150 per cent, from R 15 to R 38 leading to consumer payment boycotts. [78] By 1997 and 1999 the consumer debt had rised to R26 million and R35 million respectively.[79] In Amahlati, by 1997, 45 percent of the town's 4,468 households were not paying their bills on a regular basis.[80] Though the current statistics show that there has been an increase of between 1 percent and 10 percent annually,[81] the debt burden is still a problem. The individual debts have soared because of the use of water beyond the 6 kilolitres of free basic water.

4.2 Municipality obligations: A case of defection?

Even when services have been privatised the state has an obligation to ensure that everyone has access to the service on a progressive basis. By both the Lukhanji and Amahlati contracts, the municipalities remain responsible towards the consumers. WSSA only supplies the water and bills the municipalities.

What is evident, however, is ignorance on the part of the consumers of the role of WSSA and its relationship with the municipalities.[82] This raises questions as to the level of openness and information availed to the consumers. As has been mentioned, at the time of con-

75 Booysen 2004: 23.
76 Act No 32 of 2000 as amended
77 As above.
78 Ruiters 2002: 48.
79 Ruiters, 2002: 49, 50.
80 Ruiters 2002: 50.
81 Booysen 2004: 43, 44.
82 Booysen 2004: 46.

clusion of the contracts, the current legal requirements relating to consultation with the public were not applicable. However, the implementation of the contracts spans through the new legal order. The Constitution confers on everyone a right of access to information required for the enjoyment of the rights in the Constitution.[83] In addition, amongst the rights that the Municipal Systems Act confers on citizens in the enjoyment of public services is to demand openness and disclosure of public issues.[84] One could conclude that the contracts are subject to these provisions of the law. Contrary to this, the two contracts have confidentiality clauses, which provide that: '[t]he documentation contained herein has been developed exclusively by the OPERATOR, and shall not be disclosed to third parties without the written approval of the OPERATOR.'[85] From a positive perspective however, the communities know that it is the municipality that is at the forefront of water service delivery.[86]

Views were expressed on the role that WSSA played behind the scenes. Some members of the community, especially in Lukhanji, believe that the municipality's pursuit of payment for services was linked to the presence of a private company, which is exerting pressure to get paid.[87] It was found that "Lukhanji experienced a severe 'cash flow' crisis, which was in a large part attributed to its monthly payments to WSSA."[88] However, this is also attributed to the outstanding sums of up to R95 million, owed by the consumers and which is increasing by R1 million every month.[89] But unlike Lukhanji, which serves many rural areas, Amahlati's socio-economic conditions are different because it is predominantly white. This reflects on the ability of the consumers to pay for municipal services. Lukhanji's indigent people's bracket is growing by the day, thereby exerting pressure on the municipality's resources. This goes to confirm the fact that in the absence of adequate subsidisation from the national govern-

83 Section 32.
84 Section 5, Municipal Systems Act, No. 32 of 2000. In the *TAC case* the Court said that an reasonable programme must have its contents published, para 123.
85 Clause 2.2.2.
86 Booysen 2002: 47.
87 Booysen 2002: 48.
88 Booysen 2004: 65.
89 Booysen 2004: 6.

ment, municipalities with large numbers of indigent people (mostly rural and unemployed) will find it hard to sustain the provision of services on a purely commercial basis. As already mentioned, in the *Grootboom* case, the Court emphasised that the primary responsibility to ensure that socio-economic rights are realised rests with the national government.

WSSA is dissatisfied with the manner in which the municipalities are managing customers and has expressed a desire to take over this management. Though this is masked as necessary for them to take accountability for the service they provide,[90] the actual intention is to manage the consumer debt.[91] They reckon that they would be more effective in getting people to pay.[92] They are also of the opinion that this would create sustainable service delivery in what they refer to as 'adding value'.[93] The relationship between WSSA and the consumers will become a purely business one if WSSA takes over. WSSA may not be in a position to pursue the pro-poor and indigent people's policies that the municipalities have adopted. Though bound by contract to do so, enforcement problems would arise. It is also true that people's socio-economic circumstances change, and so should the pro-poor people policies. Long-term contractual undertakings have a potential of instilling rigidity. In the *Grootboom* case, the Court underscored the importance of flexibility in government programmes, which must be designed to respond to unforeseeable changes.[94]

4.3 Access to water, basic free water, and the pro-poor people policies

Like all the other municipalities, and in accordance with the basic water regulations, both Lukhanji and Amahlati provide the 6 kilolitres of free water. But by 2004, free basic water was estimated to have been supplied to 644, 000 people or 40 percent in the whole of Amathole

90 Booysen 2004: 45.
91 Booysen 2004: 45.
92 Booysen 2004: 45
93 Booysen 2004: 45.
94 Para 43.

District.[95] In Lukhanji, it is estimated that 50 percent have been supplied with the water.[96] The Constitution and the Act guarantee this right to everyone. There is no indication that the state lacks the capacity either due to resources or other constraints to make this free water immediately available to everyone. In both localities, the community voices indicate ignorance of the existence of this water. A duty is imposed on the state to educate all persons on the existence of a right and how best to enjoy it. Regulation 3(a) of the Basic Water regulations imposes a duty on the state to educate people on water use. Properly interpreted, this education should also include education on the availability of the free water. In the *Bon Vista* case the Court was of the view that the right is not to have real meaning unless the service provider informs consumers of its existence.[97] In the *TAC* case the Court held that 'for a public programme to meet the constitutional requirements of reasonableness, its contents must be made known appropriately.'[98] Lukhanji and Amahlati should ensure that infrastructural deficiencies, financial and other constraints are eliminated in order to make this water available to all.

On a positive note however, in addition to the free basic water, Lukhanji has adopted a pro-poor people policy, which allows indigent persons to enjoy free water in excess of the 6 kilolitres.[99] In addition to this policy, a policy of rebates has been adopted. This allows households that have an income of between R1,100 and R1,400 to qualify for a rebate of R65 per month on municipal rates.[100] But like the free basic water policy, the community voices indicate ignorance of existence of this policy.[101] As already indicated above, the municipalities have a duty to publicise the policies that facilitate the enjoyment of the right to water.

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95 Booysen 2004: 53, quoting Information sheet of Amathole District Municipality 2004: 5.
96 Booysen 2004.
97 Para 26.
98 *TAC* case para 123.
99 Booysen: 2004 52 & 49.
100 Booysen 2004: 53.
101 Booysen 2004: 62 – 63.

4.5 Debt collection, pre-paid meters and disconnections

4.5.1 Debt collection and disconnections

The municipal water debt is huge and increasing by the day. There is a general willingness to pay on the part of the consumers. Their problem, however, is the inability to pay, which is caused mainly by unemployment.[102] The inadequacy of the free basic water has forced households to use far above the allocated 6 kilolitres of free water, leaving them in debt. In Lukhanji, and in most parts of Amahlati, the municipalities do not 'cut' water but instead 'cut' electricity for water debts. This policy raises some issues of legality. Without prior agreement between the municipality and the consumers, unless both water and electricity are supplied under the same contract, the policy may violate some principles of contract law. The policy, in addition, invokes human rights questions. Unlike water, electricity is not an explicit right protected by the Constitution. It is however relevant to the enjoyment of a number of other rights. These include: the right to food, housing and health care. In the *Grootboom* case, the Court stated that 'housing entails more that bricks and mortar. It requires available land, appropriate services such as the provision of water …'.[103] Though the Court did not mention electricity, the relevance of electricity in the enjoyment of the right to housing, and the other rights mentioned above cannot be doubted. By 'cutting' electricity therefore, the municipalities are indirectly interfering with some of the rights, 'cutting' water is even worse.

4.5.2 Water restrictors

To manage the consumer debt the municipalities have introduced water restrictors. These are devices that restrict the amount of water that goes through the consumer's system for a set period of time. They are used to assist in minimising revenue losses resulting from water pilfering and unpaid use.[104] On its face, this policy does not violate the Constitution since it allows consumers to access the free basic water.

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102 Booysen 2004: 64.
103 Para 39.
104 Booysen 2004: 57.

But a critical look reveals that this system violates not only provisions of the Bill of Rights but of the Act as well.

The devices are being installed in households that have been defaulting on their debts. This amounts to discrimination in terms of section 9 of the Constitution. Though this provision does not list 'economic status' as one of the grounds upon which discrimination is prohibited, it may be argued that this is an analogous ground. In the *Harksen*[105] judgment the Constitutional Court said that an analogous ground is one which is based on attributes or characteristics which have 'the potential to impair the fundamental dignity of persons as human beings, or affect them in a comparatively serious manner'.[106] There is no doubt that these restrictors perpetrate lack of access to water for those who find the 6 kilolitres inadequate. This amounts to infringement of their human dignity; they will not be able to meet their water needs such as hygiene and preparation of food. In this respect, they are affected in a serious manner as compared to their counterparts that are economically well-off. One of the contentious issues at the passing of the Promotion of Equality and Prevention of Unfair Discrimination Act[107] was whether 'economic status' should be included as one of the grounds of discrimination.[108] In the end it was resolved that it be included as a directive principle acknowledging that there is overwhelming evidence about the importance of, impact on society and link to systematic disadvantage and discrimination of, among other things the ground of socio-economic status and HIV status.[109] The Constitutional Court has already declared HIV status an analogous ground.[110] It follows that socio-economic status is an analogous ground as well.

From the perspective of the Act, using restrictors amounts to disconnection without notice, and without giving the consumer an opportunity to make representations as to his or her inability to pay. This violates section 4 of the Act as set out above.

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105 *Harksen v Lane* NO 1998 (1) SA (CC).
106 Para 46.
107 Act No. 43 of 2000.
108 De Vos 2004: 6.
109 S 34(1).
110 In *Hoffman v South African Airways* 2001 (1) SA 1176 (CC).

4.5.3 Pre-paid meters – lessons from Kwazulu-Natal

Describing the problem with pre-paid meters in Stutterheim, Ruiters says that:

> [p]repaid metering is a new political technology since individuals end up self-disconnecting: no billing and no meter reading is required, and domestic water consumption or lack thereof becomes statistically invisible. Prepayment is seen as an alternative to municipal disconnection to when 'customers' cannot afford to pay accounts ... self-disconnection is invisible and masks the extent to which people go without water supply. These transactions are not in the public domain and can be blamed on the individual sovereign consumer.[111]

At the time of introducing pre-paid meters in Madlebe in Kwazulu-Natal, it was argued that this was necessary for a sustainable service delivery system. It was also argued that the system would also save the costs of monitoring and reading meters.[112] A few years after completion of the project of installation, there was a severe cholera outbreak claiming a number of lives. The Department of Water Affairs and Forestry (DWAF) and the uMthlathuze Water Board (MWB) project, the implementers of the project, officially disassociated the cholera outbreak from pre-paid meters.[113] But community-based research by Deedat and Cottle argues the contrary. Their research discloses the fact that the introduction of these meters in a place that previously had communal stand pipes with free water prevented a sizeable number of residents from accessing water. Even for those who could afford, supply was not always guaranteed. This was because of persistent breakdowns associated to the sophisticated nature of the pre-paid water technology.[114] A breakdown of the meters in the days preceding the cholera out-break forced people to resort to unsafe sources for water.[115] The failure of the pre-paid meters in Madlebe had huge financial implications as reported by Deedat and Cottle. The maintenance

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111 Ruiters 2002: 53.
112 Deedat & Cottle 2002: 87.
113 Department of Water Affairs and Forestry 2000: 82.
114 Deedat & Cottle 2002: 89 – 90.
115 Deeadat & Cottle 2002: 90 – 2.

of the meters was at a high cost and their eventual removal meant a loss of R3000, the cost of every meter.[116] In addition, a lot of money was spent on containing the cholera outbreak and the treatment of victims.

Based on their experience with reconnections and disconnections, most residents in the cases-study are in favour of pre-paid meters because they allow them to use services as far as they can afford.[117] On the question of whether or not the self-disconnection would not deny them access to water, there was indication that the water would be sourced from neighbours.[118] The experience of the people of Madlebe indicates that this was not a sustainable alternative: neighbours could not give out water for a long-time.[119] The installation of pre-paid meters comes at a huge cost to the consumer. The R800 installation fee is beyond the reach of most consumers, especially the unemployed. The poor, those who could not afford to maintain the meters, were marginalised and denied their constitutional right of access to sufficient water. Additionally, just like the water restrictors, these meters violate section 4 of the Act. They allow the consumer, who is unable to pay, to be disconnected without notice and without chance to make representations as to his or her inability to pay. It is because of these reasons that devices similar to pre-paid meters were abolished in the United Kingdom.[120]

5. CONCLUSION

The experiences of Lukhanji and Amahlati disclose a dilemma faced by municipalities as they outsource the provision of public services. The municipalities are caught between the need to ensure enjoyment of socio-economic rights such as access to water, and the need to ensure cost recovery from consumers struck by poverty caused mostly by unemployment. This has forced the municipalities to adopt new

116 Deedat & Cottle 2002: 93.
117 Report, p. 72.
118 Report, p. 72.
119 Deedat & Cottle 2002: 89.
120 In the *case R v Director General of Water Services ex parte Lancashire County Council and others.* EWHC Admin 213 (20 Feb 1998).

policies to manage consumer debts. The policy, which is likely to impact more on enjoyment of the right of access to water is the introduction of pre-paid water meters and the water restrictors. These gadgets allow consumers to be disconnected without being given chance to make representations as to their inability to pay. The pre-paid meters other than enable the consumers to manage their debt have disastrous effects in terms of reduced access to water by the poor.

Even though the municipalities' compliance with the obligation to provide free basic water, and their adoption of indigent people's policies are commendable their full implementation has not been achieved. This is because of the prevalent ignorance of their existence amongst the consumers caused by the lack of dissemination of information. The provision of 6 kilolitres of water to all households as the minimum basic water without considering the size of the household too needs to be examined. If this is not done, it may be argued that the criteria are unreasonable and a violation of the Constitution.

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IV OUTSOURCING OF BASIC SERVICES: CONTRACT ANALYSIS

Victoria Johnson[♠]

1. INTRODUCTION

This paper is an extract from a research paper commissioned by the Community Law Centre and funded by the Dutch funding agency ICCO. The full research paper analyses the policy and legislative outsourcing framework; describes the general features of current outsourcing contracts, looks at case studies to determine the practical relevance of contract provisions and gives a brief overview of international trends in municipal outsourcing, specifically with reference to contract renegotiation. This extract deals only with the description of current contract provisions and has been amended to suit current publication requirements.

Certain factors tend to drive outsourcing initiatives ("drivers") while others constitute a danger associated with this form of service delivery mechanism ("dangers").

Typical "drivers" include:

- Capital investment
- Efficiency
- Skills transfer
- Risk transfer
- Value for money

Typical "dangers" include:

- Loss of accountability
- Lack of public buy-in
- Consumer protection
- Inappropriate risk allocation

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- Continuity
- Asset protection

It is within this context that a range of current South African outsourcing contracts have been analysed to assess to what extent they translate the drivers into binding contract terms and how effectively they mitigate or avoid the typical dangers associated with outsourcing. The parameters of this paper do not allow for an authoritative analysis of the legal, financial or other implications of each individual contract.

2. CONTRACTS

The contracts analysed for this paper include:

- two long-term water service contract between rural municipalities and a private company;
- two long-term water concession contracts between an urban and rural municipality and private companies;
- one solid waste contract between a municipal entity and metropolitan municipality;
- one electricity services contract between a city and a municipal entity;
- one water services contract between an urban municipality and municipal entity;
- four water services contracts between municipalities (three rural, one city) and water boards; and
- four solid waste services contracts between metropolitan municipalities and Community Based Organisations (CBOs).

2.1 General Features

On an initial reading, one is struck by the inaccessibility and sheer length of many of these contracts which, with annexures, can reach anything up to 600 pages. Excessively long sentences are often used and the language is not reader friendly. The clause below is an exam-

ple both of the style and inaccessible formulation of some contract provisions:

> *"In the event that any of the existing assets reflected in the schedules to the lease agreements cannot be located despite diligent search by the CONCESSIONAIRE or in the event that the CONCESSIONAIRE cannot confirm the existence of any such existing asset in the course and scope of the inventory referred to in 17.1 and the CONCESSIONAIRE notifies the COUNCIL of such fact and that such existing assets are required by the CONCESSIONAIRE to enable it to operate the works and/or fulfil its other obligations under this contract the CONCESSIONAIRE shall be entitled to purchase a similar asset on an arms length basis at its own cost and recover the cost associated with the purchase of the asset from the COUNCIL by off-setting same against and deducting same from the rentals due to the COUNCIL in terms of the lease agreements, provided that, should such cost exceed the amount of the rentals due under the lease agreements, the COUNCIL shall refund such excess to the CONCESSIONAIRE within 30(thirty) days of the date on which the CONCESSIONAIRE purchased such asset."*

In many contracts it is difficult to understand the rationale behind the contract. The introductory sections of the contracts are usually widely worded with lofty ideals and offer little insight into the true reasons behind the outsourcing initiative.

The complexity and length of these contracts could impact on public participation and transparency objectives. A member of the public wanting to comment on a proposed service delivery agreement would find it a difficult task just to understand the contract, let alone formulate meaningful comment. Complex contracts could also pose a threat to contract monitoring. Regardless of what structures are set up to monitor a contract, if the people doing the monitoring do not have the essential provisions of the contract at their fingertips they may find it difficult to fulfil their obligations effectively.

3. CONTRACTS AND "DRIVERS & DANGERS"

3.1 Capital Investment

The prospect of access to outside capital to fund an infrastructure project can be a significant driver for an outsourcing strategy. There is a well documented infrastructure backlog in South Africa, which public sector resources alone are incapable of meeting. The introduction of private capital to meet this backlog could, in theory at least, offer a solution to the problem.

Concession or lease contracts are the typical mechanisms used for these projects. However, these long-term contracts are notoriously complex and pose a host of risks, including a loss of accountability and risks of monopoly pricing.[1] Currently, however, the majority of municipal outsourcing contracts in South Africa are for service provision only. Two of the sample contracts involving capital investment (water concession contracts) were renegotiated a few years after being entered into and the capital infrastructure projects temporarily suspended or reduced as a result of financial problems on the part of the private companies involved. These issues and associated case studies are dealt with in more detail in the full research paper.

3.2 Efficiency

3.2.1 Introduction

The theory behind outsourcing offering efficiency benefits is that the private sector, because it is not constrained by bureaucratic red-tape, can manage a service with more innovation and flexibility thus leading to greater efficiency.

Whether the private sector is indeed inherently more efficient than the public sector remains the subject of debate. As a recent report suggests, "much of the case for PPPs rests on the relative efficiency of the private sector. While there is an extensive literature on this subject, the theory is ambiguous and the empirical evidence is mixed."[2]

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1 Department of Provincial and Local Government 1998: 2.2.6.

2 IMF 2004: 25.

3.2.2 Contracts on Efficiency

Efficiency is a difficult concept to tie down in a contract. The procurement process should at least ensure that the contractor has the necessary skills and expertise to perform the contract. And the contract will of course oblige the contractor to perform the service to particular standards. The municipality will have to ensure that the contract contains clear performance targets, penalties for non-performance and possibly incentives for excellent service. This will enable the municipality to objectively judge the contractor's efficiency. This again highlights the importance of effective monitoring and the need to set clear contract outputs, something which, as seen below, the contracts do not make adequate provision for.

Only one sample contract, a water services contract with a municipal entity, provides for a benchmarking study to take place at the option of the municipality. This is designed to enable the municipality to compare the service provider's cost structures and tariffs with similar municipalities and so assess value for money and relative efficiency of the service provider. This contract also contains detailed performance indicators, making it comparatively sophisticated in its treatment of "efficiency" and setting it apart from the other sample contracts.

3.3 Skills Transfer

3.3.1 Introduction

A lack of skills and capacity is a central challenge facing municipal service delivery in South Africa. Outsourcing offers the potential of skills transfer from the service provider to an under-capacitated municipality, thus empowering the municipality to fulfil its obligations without the need for external help. However, a distinction must be made between an external service provider (potentially) having superior skills and the actual transfer of those skills. If the municipality does not actively seek skills transfer then it risks being locked into using that, or other, external providers indefinitely.

A contract with an under-capacitated municipality should therefore provide a clear programme mapping out how skills transfer will take place, by whom and by when and identifying who will be trained and how the effectiveness of skills transfer will be tested.

3.3.2 Contracts and Skills Transfer

Surprisingly, most of the sample contracts contain no skills transfer provisions. Only two contracts deal with this issue and oblige the service provider to conduct training and mentorship campaigns and programmes to build capacity and transfer skills. However, the provisions lack any real detail. For example, no person or structure is made responsible for the training, no timelines are set for when the training will take place, how often and in what manner, no indication is given of the nature of skills required and no method is set for determining the success of the training.

3.4 Risk Transfer

3.4.1 Introduction

There are a wide range of risk categories applicable to outsourcing. These may include construction risk, financial risk, demand risk, operational risk, political risk and risks associated with change of law and *vis major*. The identification, costing and allocation of risks can be a complex exercise but is critical to ensure an effective and sustainable contract. Inappropriate risk transfer could place the municipality under financial pressure and impact directly on value for money and affordability.

Usually, the more risk a contractor is forced to take on, the more compensation it will demand, either in the form of more money or greater autonomy. Risk transfer is therefore not simply about the municipality trying to push as much risk the contractor's way as possible; it is about finding the right balance, which may differ in each case, between the cost of risk and where it is most appropriately placed.

The sample contracts usually contain a general provision stating that the service provider provides the services entirely at its own risk. This is the "default" risk position but the contracts go on to detail all the circumstances which reverse or limit this general transfer of risk. This can quite significantly water down the actual risk transferred to the service provider. This process can take a number of forms, including by:

- allowing the service provider to change its business or operating plan;
- providing for a review of the service provider's base charge; or

- forcing a review of tariffs.

3.4.2 Amendment of Business Plan

Many contracts allow the service provider to amend its annual business plan on the occurrence of certain risk events (or at least to request an amendment). This enables the service provider to continually adjust (and reduce) its service obligations to accommodate any difficulties which arise during the contract term. Examples of factors in the sample contracts, which justify amending a business plan include:

- "financial constraints" of the service provider;
- legislative amendments;
- unforeseen circumstances;
- damage to the system;
- adverse governmental action; and
- changes to credit control or tariff policies.

There are two problems with this approach. Firstly, the risk events which justify a request for an amendment to a business plan are often so widely or vaguely worded that they include any conceivable event. The protection offered by these provisions is powerful and significant. It would be preferable to limit the service provider's right to amend its business plan to a few clearly defined events and not widely worded matters such as "unforeseen events", which are better dealt with under *vis major* provisions.

The second problem with this approach is that many contracts do not allow the municipality discretion whether to approve an amendment to a business plan or not. Instead, if the parties cannot agree to an appropriate amendment after one of the risk events has occurred, dispute resolution mechanisms kick in. This takes the matter out of the municipality's hands. The same method is used in contracts which allow for a revision of base charges to take into account changing circumstances.

3.4.3 Amendment of Service Provider Charge

In other contracts, the service provider's base charge is similarly capable of being adjusted to protect the service provider against changing circumstances. National Treasury specifically warns against allow-

ing for payment review during the contract term due to unforeseen circumstances as this could have a negative impact on both value for money and affordability.[3]

An example of such a provision can be found in a water concession contract which allows the base charge to be modified, *inter alia*, on the occurrence of "any event which actually or will prospectively affect" the company's revenues, costs or general economic position.

This catch-all phrase does not even require the "event" to be unforeseeable. However, the municipality is entitled to reject a claim for an increase if the need arises from a difference between actual and projected service demand, low consumer payment levels or inefficiencies on the part of the company. On the face of it then, the company is taking on the "demand risk" and "consumer payment risk". These are significant risks in any outsourcing contract. But this is not the full picture. The company is offered direct relief in the form of a reduction of capital programme obligations if actual water demand differs from that projected or if consumer payments differ from the projections.

3.4.4 Conditional Service Obligations

The sample contracts offer additional protection to service providers by making service provision "subject to" the existence of certain pre-existing conditions. The service provider is commonly relieved of providing the service to particular standards (of efficiency and/or fairness) if there is a problem with resource availability (e.g. availability of raw water) or subject to the duty of consumers to pay reasonable charges, in emergency situations or because of problems caused by the nature topography and zoning of land.

3.4.5 Tariff Amendment

Another method of protecting the service provider against a host of risks is by way of review and amendment of tariffs. Some of the "events" in the sample contracts which justify a request for tariff amendment include:

- increased bulk water costs;
- material adverse governmental action/legislative changes;

[3] National Treasury 2004: 149.

- emergency situation;
- "any event" (whether foreseen or not) beyond the control of the company which affects operating costs;
- unforeseen population settlement patterns;
- unforeseen circumstances; and
- "any event, occurrence, circumstance or condition" which affects the operation, maintenance and recovery of income costs of the company.

Many contracts purport to fetter the municipality's tariff setting powers. For example, one contract (with a water board) states that the municipality "agrees to an extraordinary review of and adjustment of tariffs…" on the occurrence of any of the events above. This reads as a positive obligation to amend the tariffs. Other contracts provide that "in addition" to other factors the municipality takes into account when setting tariffs, it "shall base" the tariffs on the service provider's business plan and budget.

In another contract, with a private company, it is specifically provided that tariffs cannot be changed to offset deficits caused by "entrepreneurial risks". However, the service provider can request an extraordinary review of tariffs if components become more expensive or for "any event" which affects operating costs. This contract also provides that new factors can only be introduced into the tariff determination formula "if both parties agree".

3.4.6 Performance Guarantees

A few contracts oblige the service provider to furnish a performance guarantee to protect against the risk of breach. The performance guarantee can only be called upon if the service provider commits a breach. Other risk events, such as *vis major* and change in law, do not involve breach and so the performance guarantee would not be relevant.

3.4.7 Vis Major

National Treasury makes detailed recommendations on the treatment of *vis major*. It suggests a distinction be made between different categories of *vis major* events, with the service provider taking on far more risk than is currently reflected in the sample contracts. For example, it is recommended that *vis major* events be restricted to events likely to have a material adverse effect on a party and which are uninsurable.[4] This would include war, civil war, terrorism and nuclear, chemical or biological contamination. Because these risks are such unusual events, National Treasury recommends they be shared by the parties.

Then there are events beyond the service provider's control but for which it should bear the financial risk.[5] These are "relief events" and would include fire, flood, earthquake, strike, lockout, accident at the works and so on (events that last a finite time). All the service provider should hope for under a "relief event" is a temporary relief of service obligations. In other words, relief from the right the municipality would otherwise have had to terminate the contract or claim damages for non-performance. The service provider should have no right to compensation for losses suffered as a result of the event, not even an extension of the contract term. This is a significantly different approach to that found in the sample contracts, which are far more favourable to the service provider.

None of the sample contracts make a distinction between different categories of *vis major* event and tend to include far more under this definition than one would typically expect, for example operational risks. They almost invariably allow for a suspension of the service provider's (and municipality's) duties in so far as they are unable to perform and allow for termination if the *vis major* event continues beyond a specified period or for an extension of the contract period equal to the duration of the event.

Some contracts allow the service provider to claim financial compensation from the municipality for the effects of the *vis major* event. In two contracts with private companies the municipality is even obliged to continue paying the company's fees and financial damages,

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4 National Treasury 2004: 201.

5 National Treasury 2004: 186.

including (unusually) consequential damages if the event was uninsurable.

3.4.8 Material Adverse Governmental Action

Most of the sample contracts contain provisions regarding the risk of "material adverse governmental action" (or similar wording). This is the risk of, for example, a change in legislation, which materially affects the contract.

The cost of complying with current or foreseeable law should be built into the service provider's price. But who should bear the risk of unforeseen government conduct? There is no reason why a service provider should be in better position in an outsourcing contract than its counterparts in non-municipal business. The only exception is if the adverse government conduct is not of general application and instead specifically targets the service provider or municipal outsourcing. The risk of government conduct having a general effect, which was not foreseen, should therefore be borne by the service provider. Conduct that discriminates against the service provider or municipal outsourcing in particular should be borne by the municipality.

The sample contracts, however, generally offer the service provider wide protection against this risk. They, almost without exception, make no distinction between laws of general and limited application. In one contract, with a private company, the municipality not only bears all risk of adverse governmental conduct but is also under a duty to place the company in the same position it was before the adverse conduct occurred. If it does not the company has a right to cancel the contract.

If the municipality bears the risk of adverse governmental action, the service provider should at least be obliged to mitigate the effect of the government conduct. This concept is generally not reflected in the sample contracts. Governmental conduct is not necessarily adverse. National Treasury suggests that unforeseeable government conduct which economically benefits the service provider should entitle the municipality to a share in the value of the benefit. This concept was not evident in any of the sample contracts.

3.5 Value for Money

3.5.1 Introduction

Value for money is a key driver of outsourcing; the promise of an external service provider often being to provide both a better and cheaper service. Value for money cannot be judged solely on financial terms. It is as much a question of the quality and value of the outputs as it is the cost of the inputs and can therefore become a relatively complex concept. The process of competitively selecting a service provider should ensure the most cost effective of available providers is chosen, thus maximising the benefit to the municipality and contributing to value for money.

3.5.2 Financial Benefit

Although value for money is not solely a financial issue, South African legislation does require the existence of "significant financial benefit" before such a contract may be entered into.[6] Without insight into the financial structure of each contract it is not possible to determine whether a contract in fact offers such financial benefit. However, if one assumes that at the time of entering into the contract the municipality expected some financial benefit – this expectation could be threatened if the contract, for example, does not allocate risk effectively (leading to unexpected future expenses or high risk mitigation costs) or leaves aspects of the contract for future determination by the parties and these aspects have significant financial consequences.

3.5.3 Measurable Outputs

A contract must contain clear and measurable outputs to enable the municipality to conduct ongoing assessments on whether it is getting what it expects out of the contract, including its expectations on value for money.

Outsourcing contracts are usually for relatively long periods of time. During the contract period circumstances may, and usually do, change. The effect may be a slow adjustment over time of service targets or other outputs to take into account the changing service envi-

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6 S 33 Municipal Finance Management Act 56 of 2003 (this applies only to contracts of more that 3 years duration).

ronment. If the municipality is unable to monitor and assess the financial impact of these variations it will be unable to ensure that value for money continues to be achieved. It is therefore critical for the service provider's record keeping and reporting obligations to be tied down in detail in the contract and for the municipality's monitoring obligations to be treated likewise.

3.5.4 Contracts and value for money

The conclusions reached under "risk transfer" show that value for money could be threatened by inadequate and unclear risk allocation provisions. The "accountability" section below concludes that monitoring provisions in the contracts are not always adequate. This could likewise prejudice value for money in the long run.

3.6 Accountability

3.6.1 Introduction

A significant danger associated with outsourcing is the risk of a loss of accountability. This is a risk particularly associated with long term contracts such as lease and concession contracts.[7]

An effective way for a municipality to ensure accountability is by diligently monitoring contract compliance and performance. Monitoring can only be effective if the contract requires comprehensive record keeping, regular reporting and clear and measurable outputs. This is also crucial to enable the municipality to impose penalties for poor performance (or to reward excellent performance). Legislation in South Africa places positive obligations on the municipality to perform monitoring and regulatory duties effectively. These include provisions obliging the municipality to ensure it has sufficient capacity to ensure effective monitoring.[8]

Accountability could also be threatened if the service provider is able to exercise undue influence over the municipality's legislative, strategy and policy-making powers. This risk will vary depending on the nature of the entity. It would be most dangerous when contracting

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7 Department of Provincial and Local Government 1998: 2.2.6.

8 S 116 Municipal Finance Management Act 56 of 2003.

with a private company and least so with a municipal entity.[9] The contract, particularly a contract with a private entity, should therefore provide a clear boundary between the parties' "authority" and "provider" roles respectively and should ensure that the municipality can perform its legislative functions unfettered and in the best interests of its community.

3.6.2 Contracts and Monitoring

The sample contracts vary widely in their treatment of monitoring. Some merely pay lip-service to monitoring obligations. Some examples of typical monitoring provisions are set out below.

Long Term Water Concessions

Despite the large scale and long term nature of these contracts, in these contracts no liaison person is appointed, no monitoring office is set up and (with limited exceptions) no obligations are set on reporting requirements.

The contracts require record keeping on a continuous basis but the municipality's role is a passive one; it being entitled to inspect the information at its discretion. The contracts generally do not detail who should prepare what reports, in what format, by when and where they should be submitted.

Contracts with Water Boards on Monitoring

Most of these contracts set up a monitoring office and provide detailed lists of what this office must monitor. The service provider is obliged to co-operate with this office and provide the requisite information. The service provider is typically obliged to provide a host of clearly described monthly reports (e.g. customer complaints, volume of water sold), quarterly reports (e.g. summary of repairs and maintenance) and annual reports (e.g. business plan, financial statements).

Some contracts also establish a co-ordinating committee for sharing of information and ensuring contract implementation. The committee is made up of representatives from both the municipality and service provider and is obliged to meet at defined periods. Only one

[9] It could be argued that it is beneficial for a municipal entity to participate in strategy and planning sessions.

contract obliges the service provider to pay a monitoring and compliance fee.

None of the contracts contain pre-determined levels or standards against which to measure performance and there is no contractual system of penalties for non-performance or poor performance. Service levels or performance targets would be included in the service provider's annual "business" or "operating" plan but the contracts do not specify at what level of detail these service levels and targets should be set by the service provider. Because of this contract configuration (namely specific service obligations being devised and approved annually as annexures to the contract instead of in the body of the contract) there is a risk that the service levels are described in too generalized a manner for effective performance monitoring to take place.

Municipal Entities on Monitoring

More comprehensive monitoring provisions are found in two contracts with municipal entities (in the water and solid waste sectors). A monitoring office is established with a list of clearly defined functions and the service provider must pay a monthly monitoring fee.[10]

One contract contains a detailed schedule of key performance indicators separated into key performance areas, key performance indicators and annual performance indicators. It also specifically obliges the service provider to devise a water service delivery plan containing "detailed and measurable" performance indicators. The service provider must compile an annual report and is specifically obliged to compare its performance during that year with its performance in the previous year.

CBOs on Monitoring

CBO contracts are quite different to the other service delivery agreements. The municipality retains a tight control on what happens in the contract and leaves little to the contractor's own entrepreneurial initiative. This, however, makes it easier for the municipality to monitor performance. The CBO contracts all allow for monthly payments to

[10] However, the contracts do not specify who would sit in the monitoring office and what its relationship to, or within, the municipality would be.

the contractor with payments fluctuating according to the actual work completed. This means that each month the municipality has to satisfy itself that the work has in fact been performed.

Contracts and Legislative Functions

Some contracts allow the service provider to participate in the policy and strategy deliberations of a municipality. This was seen to some extent under the risk analysis above, with some contracts purporting to grant the service provider influence over the municipality's tariff setting powers.

Certain contracts skate very close to purporting to grant legislative power to the service provider. For example, two water contracts with private companies state that any amendment to service by-laws will first be negotiated "and agreed" between the parties. Another contract, in the electricity sector, provides that the municipality will adopt by-laws "in consultation with" the municipal entity.

Service provider input can be positive where the municipality has a capacity or skills deficit and the service provider is able to provide practical assistance. One contract was open about this intention, allowing the municipality to benefit from the skills and expertise of the public sector provider (a water board). However it is a different story if the service provider is a private company and, as a general rule, any encroachment on a municipality's independence and autonomy poses a threat to accountability.

Finally, in a startling example of a municipality divesting itself of accountability, a concession contract provides that any reduction in tariffs which may be necessary to support indigent consumers will require the prior written approval of the company's financiers.

3.6.3 Contracts and Decision-making

Some contracts divest the municipality of the power to make decisions on important contractual issues and instead refer them to "independent" panels. As was seen under the risk transfer analysis above, many important decisions (such as approving significant amendments to a business plan) are not left to the discretion of the municipality and are instead decided by structures with no political accountability. This weakens a municipality's independence and could threaten accountability.

Contractual decisions and approvals should remain within the municipality's discretion with dispute resolution being reserved only for contractual disputes.

3.7 Public buy-in

3.7.1 Introduction

Municipal policy and legislation places a strong emphasis on the importance of public participation and transparency in an outsourcing process and render the service delivery contract a public document.[11]

Contracts should therefore contain a confidentiality clause (if at all) which is drafted as restrictively as possible and limits "confidential" matters to those which, if made public, would lead to actual prejudice to either of the parties.

Public participation does not end with the signing of the service delivery contract. The national policy correctly notes that if a subsequent amendment to a contract materially alters the contract, the whole purpose of competition may be negated.[12] The legislation recognises this principle and ensures that the municipality is obliged to conduct a public participation process if a material amendment to a service contract is contemplated.[13]

3.7.2 Contracts and Confidentiality

Most of the sample contracts, with the exception of the CBO contracts, contain a confidentiality clause. This is usually widely worded and applies even after contract termination. The confidentiality clauses do not clearly define what constitutes confidential information. One concession contract goes so far as to say "anything" arising from the contract must be regarded as confidential. Another concession contract deems any information acquired "pursuant to the implementation of this contract" as confidential and prohibits either party from disclosing the contents of the contract without the other's written consent.

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11 S 80(2) and s 84 Systems Act 32 of 2000 and s 33 Municipal Finance Management Act 56 of 2003.

12 Department of Provincial and Local Government 2000: 4.11.

13 S 77 Systems Act 32 of 2000 and s 116(3) Municipal Finance Management Act.

The test for confidential information should be whether disclosure would cause prejudice to the legal or commercial interests of the party. This principle-based approach is not evident in the contracts and the issue is left vague.

3.7.3 Contracts and Amendments

Contract amendment is of particular importance when it comes to the creation of new service areas. There is a risk of the incumbent provider being in an unfairly advantageous position to take over the new service area. Most sample contracts allow for a negotiation process before extension of either the service area or scope of services. The incumbent service provider is thus given an opportunity to amend the scope of its contract quite significantly without a public process. In some contracts the service provider is given a right of first refusal but in others the municipality ultimately decides whether the service provider may extend its scope of services.

In two long term contracts with private companies the municipality is given a wide power to increase the scope of the contract simply by agreement with the company.[14] Similarly one of the CBO contracts allows the municipality, entirely at its discretion, to "increase", "decrease" or "change the method" of the service. The contract does not require agreement between the parties and any additional fees are determined by the municipality "after consultation" with the contractor. This puts the municipality in a markedly more powerful position than the contractor and also allows the municipality to significantly amend the scope of the contract without following a competitive process.

3.8 Consumer Protection

The risk of monopoly pricing and "cherry picking" high income users to the detriment of the poor are specifically identified as risks in concession and lease contracts.[15] Policy and legislation emphasise the importance of ensuring the service remains affordable if outsourced.

[14] Some significant examples include the parties agreeing that the company will do meter reading, revenue collection, disconnections, fix pipelines or do major repair works.

[15] Department of Provincial and Local Government 1998: 2.2.6.

Most contracts do acknowledge the need to supply a basic service and oblige the service provider to give priority to a basic supply.

In theory, the factors a municipality is legislatively obliged to consider when adopting its tariff policy[16] and its power to set its own credit control and indigent policies should limit the risk of unfair treatment of consumers. Although the municipality will always retain sole authority to set tariffs it is clear that an outsourcing contract can impact on this discretion. From the risk transfer analysis above, it is apparent that some contracts purport to grant the service provider influence over tariff setting. But, if tariffs are liable to being hiked to account for contractual difficulties or future unknown risks, then not only tariff affordability but also the overall value for money which the contract initially offered, may be weakened.

Most sample contracts allow the service provider (if performing this function) to disconnect the service for non-payment, but make this subject to the municipality's credit control policy or by-law. In those contracts which set out a procedure for disconnection, no provision is made for the consumer to make representations prior to cut-off. This is despite the fact that, in the water sector at least, this is a legal requirement.[17] In one concession contract, no right to make representations is granted to the ordinary consumer, although such a right is given to hotels and industry.

3.9 Continuity

A municipality is legally obliged, when entering into a service delivery agreement, to ensure "continuity" and uninterrupted service delivery.[18] The legislation does not, however, contain detailed provisions on how to limit this risk.

Most contracts have detailed handover provisions and emphasise the importance of ensuring continuity. One water services contract with a municipal entity acknowledges that termination of the contract is a "process" and not an "event". This is a useful basis on which to approach this issue. Another contract, also with a municipal entity but

16 S 74 Systems Act 32 of 2000.
17 S 4 Water Services Act 108 of 1997.
18 S 81 Systems Act 32 of 2000.

in the electricity sector, specifically obliges the service provider to continue rendering the service despite termination of the agreement. This is to give the municipality time to make alternative arrangements and thus avoid service interruption.

Two of the contracts with water boards, however, require the service provider to draft a "transfer plan" only a few months before the contract expires. Given the complexity of handover arrangements this seems insufficient time, especially as the draft plan would still need to be approved by the municipality.

3.10 Asset protection

If municipal service assets are transferred to the service provider, there is a risk that the assets will not be adequately repaired or maintained. An external provider may perform the minimum short-term maintenance and repair work to see the assets through to the end of the contract term, leaving the municipality with a nasty surprise when it ultimately regains possession. Effective monitoring of asset repair and maintenance is thus critical, especially when the contract is nearing an end.

The need to protect assets is reflected in a variety of legislative provisions, including a duty on the municipality to take over the assets at the expiry of the contract,[19] a prohibition on prejudicing the use of a basic service asset if that asset has been used as security[20] and a specific obligation to protect assets in the water sector.[21] Legislation also specifically prohibits a municipality from transferring ownership of any infrastructure necessary to provide a basic minimum service.[22]

In a long term contract it is prudent to oblige the service provider to furnish a maintenance bond or to provide for a maintenance reserve or the withholding of later payments to build up some protection for the municipality on hand over. The sample contracts generally have detailed provisions on asset protection, insurance, maintenance and repair and the creation of asset registers. They typically prohibit the service provider from disposing of the core assets. However, only one

19 S 81 Systems Act 32 of 2000.
20 S 48 Municipal Finance Management Act 56 of 2003.
21 Regulation 11 Water Services Provider Contract Regulations August 2001.
22 S 14 Municipal Finance Management Act 56 of 2003.

contract (a long term water concession) requires the provision of a maintenance bond close to the end of the contract period.

3.11 Water Services Act

The Water Services Act requires that a service delivery agreement contain an incentive for efficient and effective performance.[23] While some of the contracts have penalties for poor performance, none in the water sector provide incentives for good performance. The legislation also prohibits a contract from extending beyond 30 years.[24] However, a number of the sample contracts allow for indefinite contract extension.

4. CONCLUSIONS

4.1 Public Participation

It is important for an outsourcing initiative to be transparent and to encourage public participation. This paper reveals that current outsourcing contracts are difficult to understand. This can, to a large extent, be attributed to poor drafting but the fact is that the contracts are often inherently complex documents. Possible approaches to this problem include:

- the preparation of a contract synopsis, written in plain language and summarising the rights and obligations of the parties and what they each expect to gain out of the contract; and
- fleshing out the introductory (non-binding) section of the contract to give a fuller story of the background to the contract.

[23] Regulation 12 Water Services Provider Contract Regulations August 2001.
[24] Regulation 9 Water Services Provider Contract Regulations August 2001.

4.2 Risk Transfer

The tendency found in the sample contracts to cushion the service provider from certain risks could threaten value for money, accountability and affordability. The unclear allocation of risk makes it difficult to determine where a particular risk actually lies. Municipalities should consider treating risk more scientifically and conducting a thorough process of identifying, costing and then, in clear contract terms, appropriately allocating the risks.

4.3 Monitoring

The monitoring provisions in the sample contracts are capable of significant improvement. Contracts with public sector providers and municipal entities are more detailed than contracts of a long-term nature with the private sector. Clearly, if anything, this should be the other way round. Given the impact that poor monitoring can have on a host of other outsourcing objectives, it is critical that municipalities get this aspect right.

4.4 Skills Transfer

Skills transfer, despite its importance in municipal service delivery, plays a minor role in the formulation of current outsourcing contracts. Failure to adequately transfer skills could render the municipality vulnerable to being “locked-in” to using only external service providers and not having a real choice at the completion of a contract. This is exacerbated the longer a contract endures. For essential services particularly it is highly undesirable for a municipality to be in a position where it becomes incapable of performing the service itself. This aspect should thus be treated more scientifically in municipal outsourcing contracts.

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V Some for all forever? A policy analysis of the establishment of Johannesburg's new water utility

Tobias Schmitz[♠]

1. INTRODUCTION

This paper examines the gaps between the policy and the implementation of a set of new water management arrangements for the city of Johannesburg over the last five years. These arrangements, often loosely and imprecisely referred to as 'privatisation', must be placed in the broader context of the trans-national expansion of a new type of Multinational Corporation, specialised in the construction, operation and maintenance of urban services. At the same time, they must be placed against the background of a generalised global policy shift entailing the sanctioning of a greater role of the private sector in service delivery (albeit with the precise mix of state and market differing from one country to another). Against this background the concrete experiences of individual cities provide important material that can be utilised to reflect on the policy assumptions embedded in the various 'models' of privatisation, which include: concessions, joint ventures, and management contracts to mention a few.

In the case of Johannesburg, major issues permeated the policy debate in relation to equity (inequalities in access to water supply and sanitation in the city), efficiency (a bureaucratic, unresponsive and bankrupt service delivery institution) and sustainability (the city draws water from a complex mix of water transfer schemes extending 400km into the hinterland). Sparked by a city-wide crisis in 1997, the city's transformation programme (iGoli 2002) resulted in the establishment of a partnership programme or co-production of water services between the local state, an independent utility, and a private consortium, bound together by a series of contracts and monitoring arrangements. Through these means it was hoped that a ring-fenced private entity

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could leverage private development capital on the open market, increase the efficiency of service delivery, and assist the government in achieving its electoral promise of achieving universal access to water supply and sanitation.

Muddling with organograms, however, is a necessary but not sufficient condition for institutional change. The end result of Johannesburg's new water arrangements is much more the result of a highly political process of interactions between government, the new utility and actors in civil society than it is the result of technocratic system-tweaking. This paper looks at the original policy goals from the point of view of the actual events that took place and evaluates these from the point of view of the professed advantages of 'privatising' water services.

The paper has two parts. In part one, the scene is set by asking a number of important preliminary questions – what is privatisation exactly, what is the current position of South African law on the privatisation of water management, what is the current global trend on the privatisation of water services, and what were the challenges facing the city of Johannesburg when its leaders decided to embark on the new journey in water management? In part two, the story is told of the transformation of Johannesburg's water management institutions, with particular emphasis on the gap between the policy outcomes that emerged and the original goals that had been set by initiating the transformation.

2. SETTING THE SCENE

2.1 Unpacking the concept of privatisation

To tackle the first question, then, is to enter the debate on privatisation by defining the term itself. Unfortunately, the term has become heavily loaded in a political sense and it has been used to describe such a wide variety of situations that it is no longer quite clear what the term means. Privatisation can for example be used in a positive sense, which is, the pursuit of greater efficiency of production of goods and services. It can also be used in a negative sense, for instance, as the abdication of authority by government and the 'sellout' of publicly

held goods. Also, it can either refer to the transfer of *ownership* of infrastructure or to the retention of ownership but the transfer of operational *control* to another party.

Given this diversity of interpretations, defining the term is best done in a negative sense, which is by describing what privatisation is *not*. The Oxford dictionary does this by describing privatisation as 'denationalisation', or the relinquishing of state control.

This leaves open both the question to what *degree* control is relinquished, as well as the question what *aspects* of control are relinquished. It is also noteworthy that by referring to 'control' one sidesteps the issue of 'ownership' as an element of privatisation. Clearly, two scenarios are possible in which *control* over water infrastructure is in private hands and the *ownership* of the infrastructure is public in the one case and private in the other.

These two scenarios involve very different sets of institutional relationships between the state and the private sector, and yet they are both privatisation by virtue of the transfer of control from the state to the private sector. Clearly, the defining term here is 'control'. *While ownership of an asset is a means to exert control it does not in itself guarantee it*. Therefore, with regard to privatisation, it would be logical to conclude that the issue of ownership is only important insofar as it affects control.

'Privatisation', then, is a broad term, interchangeable with the concept of denationalisation. It is a domain, or a basket, denoting commonality in respect of reduced state control, but equally and as importantly containing diversity. Within the basket of privatisation or denationalisation initiatives that can be observed around the world, there are a wide range of different institutional arrangements for the division of tasks between the public and the private sector. We can proceed to define privatisation as follows: The term **'privatisation'** denotes a wide range of methods by which previously public goods are wholly or partially produced by the private sector or by private sector methods.

Privatisation covers a spectrum:

- The extreme case in which both ownership and control of public goods is transferred to the private sector;
- Long term transfer of control (concession): ownership remains in public hands but control is transferred for a long period, typically thirty years;
- Short term transfer of control (management contract): ownership remains in public hands and control is transferred for a limited period;
- Both ownership and control remain in public hands but private sector elements (performance bonuses and 'incentivisation') are introduced into the operation of a government department.

Two final points need to be made on the concept from a practical point of view. First, it should be noted that in the great majority of cases, ownership of infrastructure remains in public hands. In practice, it is rare for the ownership to be transferred to the private sector. This is important, because all too often privatisation is equated by the anti-globalisation movement with a 'sellout' by government, which in technical terms it is usually not. Second, by focussing the debate on 'privatisation', an important issue is often forgotten, namely that in the provision of services it is possible for the state to enter into a partnership with other kinds of civil society organisations that may or may not operate for profit. In South Africa, Rand Water Board, a non-profit entity, supplies bulk water to some 20 million consumers. It has enormous human resource capacity, know-how, capital, and is well versed in interactions with local governments. Why then should a terminological manoeuvre exclude the examination of partnerships between the state and these kinds of organisations? For that matter Mvula Trust, a similarly non-profit organisation, has a long and successful history of partnering with rural communities in the construction, operation and maintenance of domestic water supply schemes. Similarly, focussing the debate on 'privatisation' excludes the examination of other forms of partnership that may deliver results in very different and instructive ways. I would submit the idea that concentrating the debate on Ostrom's concept of co-production is a more ap-

propriate manner of examining privatisation (and other ways of producing public goods). Ostrom defines co-production thus: 'Co-production is a process through which inputs from individuals who are not 'in' the same organisation are transformed into goods and services'.[1]

The joint production of public goods by the state together with organisations in civil society does not necessarily mean that the latter institutions operate on a for-profit basis. 'Privatisation' is a special case within this group of institutional set-ups. It is worth examining on its own, but doing so should not occlude the fact that there are other forms of partnership that are equally worth examining.

2.2 Privatisation in South African law

Raising the issue of privatisation in the South African context needs to be done with a particular amount of care, as there are multiple and contradictory legal processes emerging from a number of government departments. On the one hand the water law review process initiated by the Department of Water Affairs and Forestry (DWAF) in 1996 culminated in the promulgation of the National Water Act of 1998 (Water Act).[2] This Act effectively nationalised the South African fresh water bulk, which had historically been largely privately controlled.[3]

On the other hand, the Department of Provincial and Local Government initiated the development and promulgation of the Municipal Systems Act of 2000,[4] which enabled Municipalities to enter into partnerships with external 'Water Services Providers' for the provision of domestic (and industrial) water supply and sanitation.[5] This ushered the 'privatisation' period into local water management in the

1 Ostrom Elinor Ostrom (1996): Crossing the great divide: co production, synergy, and development. Article published in World Development vol. 24 no. 6 of 1996.
2 Act 36 of 1998.
3 Schmitz 1999, Vos 1972, Rabie 1989.
4 Act 32 of 2000.
5 Schmitz 1999, Vos 1972, Rabie 1989.

country. Given these two apparently contradictory processes, what can be said about the current status of water management?

Firstly, it should be noted that as stated above, South African water has been nationalised, not privatised. Historically the riparian doctrine enshrined private control over water in South Africa. In 1814 the British took formal possession of the Cape colony, and from this point onwards British and American law began to creep into the Roman-Dutch system that had prevailed until then. A tremendously important court case was heard in 1850 (*Retief versus Louw*)[6] in which the judge pronounced that water was common to all riparian owners and, following the American example, should be shared proportionally amongst all the landowners along the stream. This decision introduced riparian law into South Africa and effectively 'privatised' South African water.[7] However, as I have argued elsewhere[8], this situation of private rural control over water resources was untenable in the context of increasing water scarcity and ongoing urban development, and the subsequent history of water law was in fact in the direction of increasing national control. This history was subdivided (roughly) into three phases marked each by the promulgation of a new water Act – the 1918 Irrigation and Conservation of Waters Act, the 1956[9] Water Act and the 1998 Water Act. Each time the new epoch of water law represented an overhauled view of the role of water in the economy, and the economy shifted from the dominance of agriculture through that of mining to that of the urban-industrial conglomerates. Each time a completely new framework was required to match the new economic reality. And through time the process chipped away at private control until finally in 1998 ownership of water was vested in the symbolic hands of the state president. 'Partisan' legislation which favoured the allocation of a scarce resource to white agriculture or white commercial interests has made way for a more open ended system via catchment management in which centralist and technocratic allocation mechanisms have made way for democratic settlements amongst stakeholders. This process ran roughly as follows:

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6 See Schmitz 1999, Vos 1972

7 See for instance Vos 1978; Rabie 1989.

8 Act 54 of 1956.

- From 1652 to 1815 water was *res omnium publicae* or common property under Roman Dutch law as introduced by the dutch settlers;
- After *Retief versus Louw*, in the period from 1815 to 1998, riparian law held sway;
- The judge declared that water should be shared proportionally amongst the landowners along a stream;
- This legal process was formalised after Union with the promulgation of the Irrigation and Conservation of Waters Act of 1912;
- As the name of the Act suggests, irrigation farming had a particularly high status within the group of stakeholders wishing to gain access to the resource;
- By 1956 urban development and the growth of the mining industry forced national intervention to wrest some of the control out of irrigators hands and provide burgeoning municipalities with rights *vis-à-vis* the needs of their industries and residents.
- The 1956 Water Act achieved a greater balance between diverse white commercial interests;
- From 1956 onward growing social inequalities required national intervention in access to water for basic human needs; apartheid relocated millions of South Africans to arid areas with very sparse water supplies;
- The increasing scarcity of water led to escalating conflicts between stakeholders and required collective rather than centralist planning (Catchment Management Agencies);
- In 1998 water was effectively nationalised through the 1998 Water Act.

Overall, then, the historical trend in South African water law has been in the direction of increasing state control over water, resulting ultimately in its *nationalisation* rather than its *privatisation*. Why, then, is there such an active debate about the privatisation of South Africa's water services?

The answer to this question would seem to lie in the fragmentary nature of the state. Interventions of one state department may be in the

opposite direction to the interventions of another. Thus while one government department may be engaged in maximising state control over water resources, another may be engaged in increasing private control. And in fact, this is what has happened in South Africa. While the Water Resource Management Division of DWAF was developing the 1998 Water Act, the Water Services Division of the same department was developing the Water Services Act of 1997.[10] The latter Act made a distinction between 'water services authorities' and 'water service providers', paving the way for public-private partnerships in municipal water supply and sanitation management. The deep crisis in the finances of most of South Africa's municipalities had raised the question of how the rollout of new water supply infrastructure was going to be financed, given that access to water is a constitutionally guaranteed right. It was hoped that through public-private partnerships government might leverage private capital for development purposes, increase the efficiency of service delivery, and relieve local government of some budgetary stress. These ideas were not new; rather, they are part and parcel of a global process which might be termed the 'globalisation of local government'. What is this new policy thinking?

2.3 The globalisation of local government

The transformation of Johannesburg is in many ways linked to the trans-national expansion of a new type of Multinational Corporation, specialised in the construction, operation and maintenance of urban services. Thus, for instance, this new-era multinational could specialise in areas such as urban refuse removal, electricity distribution, transport, water supply, water purification, or it could provide combinations of such services in combined packages. The genesis of the new urban services multinational is rooted in events in Europe and the United States in the late 1970's and early 1980's, and has different specific origins in the various countries. A common theme amongst them is a shift in the approach of local government in the provision of service relative to the past. In all cases, the shift has been towards the sanctioning of a greater role of the private sector in service delivery,

[10] Act 108 of 1997.

but the precise mix of state and market has differed from country to country. Both in the United States and in Great Britain, co-production initiatives were linked to the desire to cut back on public expenditure, as well as to the desire to 'free' or 'create space' for the market and increase the overall efficiency of service provision. In both countries, also, co-production was seen as a means to combat urban decay and the idea thus had a specifically urban bent.[11]

In some cases, the model followed was for local government to withdraw and to sell or contract out various aspects of service provision to the private sector. In great Britain, for instance, state-owned infrastructural assets were subdivided and sold to the private sector. In France, local government remained the owner of the water supply infrastructure, but the operation and maintenance of systems was transferred to the private sector under a series of concessions. In other cases, rather than the state pulling back and allowing a greater role for the private sector, local government itself was restructured and remodelled along principles normally associated with the private sector. Thus in the Netherlands and Germany, local government introduced incentives for cost-cutting and efficiency gains, without relinquishing government authority over service delivery.

This shift in the approach of western local government is currently having a major effect upon the provision of urban service around the world. In many middle and lower income countries, local government transformation is being driven on the one hand by a weak financial position and on the other hand by outdated and inadequate infrastructure. Rural-urban migration and population growth has placed pressure on urban infrastructure, and decision makers in many municipalities are faced with difficult choices with regard to the trade offs between extending service provision to the un-served as against maintenance of the existing infrastructure. This takes place against the background of stressed municipal budgets and many competing and urgent needs. Co-production arrangements are often considered against the background of the prospect of enticing investment from foreign companies in infrastructure development, and of leveraging private sector capital for social and economic development.

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[11] See Weaver & Manning 1991.

On the other hand, transformation is being driven by foreign corporations based in a number of western countries, assisted in some cases by multilateral institutions such as the World Bank. Historically, because of the rollback of the state in urban services provision in the United States, Great Britain, France and Spain, new markets were created in Europe and America that enabled the genesis and expansion of private companies with expertise in amongst other things urban water supply and sanitation provision. These companies expanded within the borders of the nation states in which they came into existence through a variety of mechanisms. These situations, though different in approach, all had the same overall effect, creating space for the emergence of specialised firms that could tender for contracts in different geographical areas.

Next, the drive for increased profits led to a gradual increase in the scale of the activities of the more successful companies. Having reached the upper limits of the growth capacity within their respective countries (for instance water is now 75 percent privatised in France), they subsequently began to expand across national borders, creating a series of new multinational companies specialised in urban services provision. Thus, again taking examples from the water sector, the CEO of Britain's Thames Water is currently aiming to source one third of the company's revenue from outside Great Britain.[12] These companies are currently estimated to earn an annual US $ 400 billion in revenues from sales. The world's leading company, Suez (previously Suez Lyonnaise), based in Paris, accounted for US $ 39 billion in 1999.[13] At the current level, the world private water industry is 40 percent of the size of the world oil industry and 30 percent larger than the world pharmaceutical industry. Leveraging some of the capital generated by such companies for urban development purposes is an enticing prospect for many urban planners. So too is South Africa, where many municipalities were facing dire financial problems, and where the new political elite had been elected into power under the umbrella of a programme promising to vastly expand and upgrade service provision to the poorer section of the community.

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12 See The Economist, 25/03/2000.

13 Ibid.

3. TRANSFORMING JOHANNESBURG'S WATER MANAGEMENT

3.1 The restructuring of services in the city

Since 1997, there has been an ongoing debate about the overall governance structure of the city of Johannesburg which eventually led to a fundamental restructuring of the institutions that manage services in the city. This of course includes water services: water services are a politically important but institutionally relatively small part of the overall transformation of the city. The city's transformation programme has resulted in the establishment of a partnership programme or co-production of water services between the local state, an independent utility, and a private consortium, bound together by a series of contracts and monitoring arrangements. The most important rationale that the administration of the city had for embarking upon an institutional restructuring was the unfolding of a financial crisis. This crisis was beginning to paralyse the key functions of the administration at a time when political promises had been made to extend and upgrade services. This financial crisis, then, was the direct cause of a transformation programme that included the creation of an independent water utility and the farming out of the management of this utility to a private consortium.[14]

In 1997 Johannesburg's income had been reduced by R 2,1 billion in arrears owed to the city , spending was restrained by a budget deficit of R 300 million, and the city had an overdraft of R 405 million.[15] The city had developed large backlogs in the rollout of new infrastructure, and had for the last year not maintained existing facilities. When a team of consultants was called in to analyse the situation, they declared that the unification of Johannesburg in 1995 had resulted in a bloated and inefficient administration.[16] The city put forward a plan, known as iGoli 2002, which envisaged the abolition of the four local councils, the rationalisation of the city's management team, the cut-

14 Fihla 2001.

15 Greater Johannesburg Metropolitan Council 2000.

16 The 1995 local elections integrated the eleven separate administrations created by apartheid into one, but this was divided into four metropolitan sub-structures which were presided over by a central council. It was this layering of councils that led to proposals for a 'unicity' under one mayor.

ting back of the scope of management to policy formulation, the regulation of contracts and the monitoring of service delivery. Each line function was to be ring-fenced in financial terms, meaning that the responsibility for financial control lay not with the central finance department but within each department itself.

A key element in the new ring-fencing programme was the creation of ten independent service provider companies, legally structured into either utilities, agencies or corporatised entities (UAC's). These entities, which had previously been departments within the municipality and had featured on the municipal budget, would be transformed into business enterprises and held at (financial) arms-length from the 'core' policy work of the council and its support institutions. This particular element of the Igoli 2002 programme was particularly controversial, as it went to the core of tensions within the ANC-SACP-COSATU[17] alliance in which the SACP and COSATU were feeling increasingly aliened from a body of government policy that was taking an increasingly pro-market stance. From October 1999 onwards, the iGoli 2002 plans led to growing tensions between the Johannesburg Council and organisations opposed to the privatisation of municipal services such as the South African Communist Party and the South African Municipal Workers Union (SAMWU). SAMWU in particular embarked upon a programme of mass action in which it made vocal its opposition to iGoli 2002 in general and in which it used each concrete step taken by the council in the direction of restructuring as an opportunity to organise strikes and protest marches.[18] iGoli was particularly threatening to SAMWU, as it was not yet clear at the time how many of the city's workers would retain their jobs as municipal workers after transformation, and SAMWU stood to lose a large number of members.

Three of the restructured entities were to become utilities, operating in a monopoly market and raising their own revenue. These were the utilities for water, electricity and waste management. They were to operate under license from Council and would be run by a board of directors appointed by Council. Legally the utilities were to exist as

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17 African National Congress, the South African Communist Party and the Congress of South African Trade Unions alliance.

18 Hlubi 2003.

'Municipal Business Enterprises', an institutional concept which refers to a private company (legally registered as a company and operating on profit principles) operating under contract to the municipality. By separating the financial statements of the utility from those of the Municipality, it was hoped that loans for capital development could be raised in markets to which the Municipality could under normal circumstances not gain access. In addition, some of the profits generated by the restructuring of the utilities into private companies would accrue to the Municipality through company dividends, as the municipality was to be the monopoly shareholder in the companies. Crucially, however, as will be seen later, the municipality was thereby also divesting itself of the responsibility for institutions which were also its key source of income.

Several mechanisms have been put in place to ensure that the Municipality retains its influence over the utility. The first, as mentioned earlier, is the fact that the city is the sole shareholder of the utility. Secondly, the city appoints the governing board of the utility. Third, each utility operates under a service contract which stipulates service targets that are in line with overall Municipal policy on the provision of water, electricity and waste removal. These targets include such items as the rollout of new services or the improvement of existing services to previously disadvantaged communities, and broad policy parameters with regard to the setting of tariffs.[19] Fourth, the city established a Contract Management Unit tasked with monitoring the adherence of each utility to terms of the agreement in the service contract.

3.2 Winning the tender

The new water services utility was named Johannesburg Water (JW), a legal person registered on 21 November 2000 and a consolidated organisation created by the merger of the water departments of the five municipalities that constituted Greater Johannesburg between 1995 and 2000. Its staff complement is some 2600 persons, its client base is essentially the population of Johannesburg, estimated at some

[19] For example, a stepped tariff that increases the cost with the volume used, thereby subsidising small scale (read 'poor') users.

3 million people, and its annual turnover is R 1.9 billion. The formal launch of the utility took place on 22 February 2001, by which time a management contract had been signed with the Johannesburg Water Management Company (JOWAM), the consortium that won the Municipal tender to implement the council's plans.

The tender provided for a twelve-person team from the winning consortium to join the workers employed by Johannesburg Water and drive the transformation into an efficient and market-oriented utility. This twelve-person team became the executive of the newly created utility, and in terms of the contract between the utility and the executive, each member of the executive had his or her own separate contract which could be anything up to five years in duration. Towards the end of this person's period of service in the utility, recruitment and mentorship would take place such that by the end of the five year contract all senior executives of the company had been replaced by local counterparts. In many other towns and cities throughout the world a concession of long (usually thirty years) duration is given to the contracted party in order to leverage multinational capital and apply it towards the improvement and expansion of services. In Johannesburg's case, this was not felt to be necessary because at a water wastage level of 30 percent for the city as a whole, any investments in the efficiency of the system would rapidly repay themselves through the potentially massive reduction in company overheads of the same 30 percent. At the level of policy expectations, it was hoped that surpluses generated through these efficiency gains would register as dividends to Council at the end of each financial year, which Council could largely reinvest in the further expansion and improvement of water services but which could also be drawn on by Council to spend on other line items on the Council budget. However, such an improvement in efficiency would require a rapid transformation in the management approach of the company, and hence the tender put out was for a five year contract to a management team with the necessary expertise to turn around the company in a short space of time. In short, the main intention of bringing in these companies was to bring in management expertise rather than investment, and that the application of this expertise would improve services while generating revenue for Council.

The winning consortium consisted of the British multinational Northumbrian with 51 percent shares, the French multinational Suez

Lyonnaise with 20 percent shares, and the South African Water Supply and Sanitation South Africa / Group Five with the remaining 29 percent. Their international competitors were the French company Vivendi and the British company Thames Water. Thames Water had bid at an incentive of 5 percent, which was the municipal maximum, Vivendi had bid at an incentive of 1,25 percent and the winning JOWAM had bid at an incredible incentive of 0,18 percent. According to Kenny Fihla, the contract was awarded to JOWAM on the basis of two considerations. The first was the reputation of Northumbrian in their rapid response mechanisms for client service - an important aspect of the public face of the municipality. The bottom line for the Council, however, was the price at which JOWAM offered itself:

> The second thing is that they came in, in our view not to make money – we think they were desperate to get a foothold in South Africa because they had lost the Durban bid by far…despite being highly reputable, despite having all these skills and so on – in fact they are the second biggest international water company – they were by far the cheapest[20]

Northumbrian and Suez Lyonnaise thus obtained their much wanted foothold on South African soil, and they did so in a very important area in water turnover terms. With a population of 3 million people, Johannesburg is the largest city in South Africa, consuming 1600 megalitres of water per day, and representing a potential annual turnover for the contractor of R 1.9 billion.

3.3 Regulating the utility

Having identified a suitable candidate with whom to enter into partnership, it remained for the municipality to bed down a structured pattern of interaction that was to give effect to the public-private partnership. Both the regulating and the regulated party needed to come to grips with the channels of communication that had been opened and the central subject matter of the discourse emerging between the parties. One official described it as follows:

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[20] Fihla 2001.

> Once the board was established a business plan was formulated [on an annual basis, T.S.] The Contract Management Unit [of the city, T.S.] had to come to grips with understanding business plans, for which it shares formal responsibility with Council and our portfolio committee. We meet with Jo'burg Water in the following manner: on a monthly basis we have a Municipal Entities Portfolio Committee which is chaired by an ANC Councillor and is made up of the other political parties. It makes recommendations which are put forward for approval to the mayoral committee. Once a month JW has to be present, and issues and report are presented around critical areas of service delivery and regulatory issues. We develop a whole range of compliance and client issues – we deal with tariffs, we deal with service delivery, and we deal with all the regulatory legislative parameters set by the national department. In the business plan are key performance areas, which are developed into key performance indicators with measurement tools. And baseline indicators, followed by the targets to be achieved. Our monitoring and evaluation now is in relation to those things. In addition to those things there are legislative parameters that set minimum standards of delivery that must be adhered to for water and sanitation[21].

A double contract structure was created to give effect to both the short and the long term goals of the utility. One contract is between the utility and the city (Johannesburg Metro-Johannesburg Water), which is a twenty five year contract along the lines of a classical concession. The aim of this contract is to create the room for manoeuvre necessary for the utility to recoup the costs incurred in large scale infrastructure investments and make profits over the long term despite these costs. The second contract runs between the utility and its so-called 'management operator' (Johannesburg Water-JOWAM), or the elite guard drawn from the winning consortium who are to transform the ethos and business practices of the organisation driven by incentives in the form of individual performance bonuses on termination of contract. This second contract is then just a management service, involving the (re)deployment of human resources rather than capital. The management team thus established forms the executive of the utility for the five years of the contract and empowers the workers and draws international expertise into the project.[22] The executive of JW is sourced

[21] Jameel 2003.
[22] Lautre 2002.

from JOWAM and counted fifteen people at inception each with different lengths of contract but up to a maximum of five years, which signals the end of the management contract with the consortium. The team was approximately half South African and half expatriate.

Johannesburg Water was thus created as an independent entity operating under contract to the city of Johannesburg. Once the core administrative centre of the city had cut itself off from the service delivery entities it had created, however, the question was how these entities would be brought back under some form of *de facto* control by the city. For this purpose two 'docking units' were created: the Contract Management Unit (CMU) and the Shared Services Centre (SSC). These docking units were created in a rather ad hoc fashion and their emergence created uproar within the upper echelons of the embryonic service delivery units. The units had been promised both implementation autonomy within the limits of their service delivery agreements and ring-fenced finances. These now seemed threatened by the emergence of a series of oversight institutions. These units were to provide support functions to the city's CEO, or its head of admin, in liaising with the service providers and ensuring certain commonalities such as common billing of residents, about which more will be stated below.

3.3.1 The Contract Management Unit

The CMU was rapidly established within the administration of the city. Its key task was to translate the policy objectives of the municipal government into a series of performance indicators and service targets for the newly independent institutions with which the city had entered into contracts. Thus the 'efficiency gains' of a lean and mean city immediately led to the creation of *new* administrative structures to monitor and regulate service delivery which, it was originally hoped, would function autonomously and relieve some of the pressures on the administration. But the CMU itself was not yet clear about its own identity:

> When we established all these companies, which was in the year 2000-2001 ..[…].. someone said hey how are we going to oversee the performance of these entities so it was a bit late in the day that they realised that we need to establish a contract management unit..[…]..and it was established with a very rudimentary structure and functionality – when I say rudimentary functionality I mean

> that suddenly two or three people had to grasp what the role of this unit was all about, so what they did was they absorbed anything and everything that had to do with these companies into the unit [23].

The atmosphere of haste surrounding the functions of the CMU continued for some time: on the one hand it was designed to perform an absolutely pivotal task in orchestrating much of the institutional restructuring that the city was to undergo.[24] On the other hand precisely this pivotal role became a bottleneck in view of the multiplicity of tasks with which the unit was burdened. It was faced with the establishment of entities that could report to the city on milestones achieved while simultaneously forging ahead on implementation of service delivery amid the complexities of monitoring and data collection on a new, reliable and city-wide basis. Given the initially small team whose job it was to manage this process, workload was in excess of production capacity and priorities had to be made. In the end, it was the monitoring function that took the back seat as new relations were forged and the governing boards of the newly established entities were put in place.

> We spent at least eighty percent of our time doing shareholder issues - the regulatory issues kicked in about eight months ago [*i.e. Sept. 2002, T.S.]* through the quarterly reports where we started to monitor service delivery issues pertaining to each utility. There were only four to five key specialists in the unit - it was a tiny unit which did not have the resources to go forward… […].. if you think about three to four people tasked with twelve companies to oversee for the total - the city's budget is R 10 billion of which 70% is under the control of this unit, so we oversee R 7 billion. Four to five specialised people (supported by administrative staff) were required to fulfil that mandate. So something had to give, and the thing that took a back seat was the compliance and regulatory side.[25]

Thus, whereas the name 'Contract Management Unit' suggests a primarily technical process, in actual fact the CMU found itself embarking upon a range of institution building measures before it could begin

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23 Govender 2003.

24 That is, the transformation of the municipal units providing services to the city;

25 Govender 2003.

to manage contracts. In building these institutions, the CMU found itself faced by a number of paradoxes:

- The utility had to be 'independent' from and yet 'responsive' to council;
- The financially 'ring fenced' utility had to enter into financial relations with the city; and
- The CMU was both a shareholder keen to maximise the independence of the utility and a manager laying down restrictive conditions under which the utility had to perform.

The CMU's director expressed the latter paradox as follows:

> We held two conflicting roles immediately - one was the shareholder role and one was the compliance and regulatory role – so we were kind of what they call schizophrenic - we sat on the boards when it suited them and when they needed a shareholder we performed that role as the shareholder representative. And at the same time we were also asked to do the regulatory function, but over that twelve months we never got to do the monitoring of the regulatory and compliance element effectively – what we essentially did for that twelve months was to spend our role on shareholder activities like corporate governance and financial sustainability of the companies and overseeing the performance of the companies from an operational and financial point of view and so forth[26].

Again, given the stressed conditions under which the CMU had to work in its start-up period, it was necessary to prioritise issues, and the most pressing issue of institution building, or the shareholder side of the CMU identity, took centre stage. However, as the utility began to take form, the identity of the CMU as a monitor of contracts resurfaced and the dual identity became manifest as a problem within the organisation. Rather than resolving the organisation's dilemma, however, it was in fact split in two with each subsection retaining one of the organisation's previous identities:

[26] Govender 2003.

> After twelve months this issue of the conflict emerged and we engaged a team using USAID funding to help us unpack the roles, with the result that we have a shareholder strategic plan and a CMU strategic plan which says: we could not perform our monitoring as effectively as we would have liked to because we had to bed down systems within the unit around shareholder issues which was never done before in the history of municipalities in South Africa or Africa for that matter. So we spent that time but in parallel to that process we were doing things in a very ad hoc manner, as the Council had requested data on monitoring service delivery and regulatory issues on tariffs and so forth we took them as they came along but we spent at least eighty percent of our time doing shareholder issues - the regulatory issues kicked in about eight months ago through the quarterly reports where we started to monitor service delivery issues pertaining to each utility..[..]… These strategic plans have now been approved, and Council has approved a split of the CMU into a shareholder unit and a contract management unit – so we are now embarking on a monitoring and evaluation programme for each of the entities, putting together key performance indicators, key performance areas, and that is going to be the basis of overseeing the regulatory and compliance aspects together with the client issues around service delivery in the CMU.[27]

All in all, the establishment of the CMU with its attendant practical problems in actually establishing a new set of institutional relations had the effect that in the first eighteen months of the utility's existence, the CMU could not actually monitor service delivery on behalf of the city. There was a contractual agreement between the city and the utility that for the moment meant little in practice. But as institution building went ahead the CMU began to define the tasks that it was itself primarily tasked to do.

3.3.2 The Shared Services Centre

In a parallel process, the process of ring-fencing the finances of the UAC's led to a series of dilemmas surrounding the control of municipal income. By cutting its bond with the utilities, agencies and corporate entities, the city had effectively cut itself off from its main source of revenue; the sale of services to residents. Other than property taxes

[27] Ibid.

and means tested income transfers from central government[28] (the so-called equitable share), local governments in South Africa only had the sale of services from which to finance ambitious infrastructure and service delivery programmes. In effect therefore, the creation of the UAC's emptied the municipal coffers into the internal finances of the UAC's with little more than a contract to steer the way in which they utilised these revenues. Overnight, therefore, this created a problem of maintaining indirect control, which ostensibly was laid down in management contracts and service level agreements but which in fact created an immediate and urgent cash flow problem within the municipality.

On the one hand it was reasoned that the municipality remained sole shareholder of the water utility. As a result, it would be the sole beneficiary of the financial improvements that were the result of cutting back on water losses and improving the rate collection system. On the other hand, the utility itself needed time to reorganise itself and it could be expected that it would take some time before JW began to make a significant profit. Therefore it could be reasonably expected that municipal income from the dividends of (amongst other entities) JW would take some time to materialise.

The historical reality was that income from the water accounts was integrated into municipal accounts, and that revenue from water sales was utilised for purposes other than merely the operation and maintenance costs of those institutions concerned with providing water services in the city. An element of cross-subsidy to other organs within the municipality was a reality, even if the precise nature of this transfer was not transparent. Cutting this source of income off therefore had the potential consequence that many non-water activities in the city would be threatened in their existence as the municipality would have to find short and long term solutions to the question where the substitute revenue was going to come from.

In essence, therefore, the policy of ring - fencing was at odds with its short term consequences. The original intention had been to trans-

[28] The so-called 'equitable share' is a financial transfer from central government to local government that is dependent on the level of income a municipality has. It is by no means sufficient to replace income from sales of electricity or water.

fer the municipal water accounts to Johannesburg Water in batches of 20 000:

> On the transfer of billing, in the original deal that we signed between Johannesburg Water and the City – the so-called Service Delivery Agreement - it was agreed that Johannesburg Water was to take over billing for water customers in an incremental manner, but that it would in fact take over the billing. That was to take eighteen months to two years, in data bases of which there are some sixty nine. We would take over one every three months, so that after a couple of years we were in control of our own revenue[29]

However, this plan entailed commencing the transfers at the bulk end by transferring the most voluminous commercial consumers first. Upon signing the Service Level Agreement (SLA), the transfer of databases did in fact commence. A total of fifteen thousand high-end customers were transferred to JW, representing 3 percent of the total of some 500 000 customers but because of the special status of the high-end consumers this 3 percent brought in about 33 percent of Johannesburg Water's ultimate revenue from water sales. However, this phased transfer of customers was brought to a halt by the city administration when it was realised what the consequences of continued transfer would be. At the same time that the ring-fenced entities were being established, fence 'cutters' within the same administration were therefore ensuring that financial flows returned to the city or moved between one entity and another.

A key landmark in this process was the establishment of the so-called SSC, which was henceforth to handle the joint billing of all UAC's in the city. This entity had not been envisaged in the original iGoli plan, and it was a stop-gap measure introduced to stem the flow of finances out of the municipal coffers. The chair of the municipal portfolio committee on water affairs describes the diluting of the ring-fencing process as follows:

> Indeed, the intention was to ensure that these stand alone utilities are ring-fenced, that they are responsible for their customer base, they are responsible for the entire value chain, opening an account,

[29] Still 2004.

> providing a service, dealing, credit control, marketing, customer service, you name it. But there are some technical issues which the city has to resolve first..[…].. But..[…]..in as much as we have the stand alone utilities, the issue of cross subsidisation in local government is a reality. For cleaning the streets for example, they are not charging any specific individual. For providing libraries, parks, the zoo and other public booths if you like which are commonly shared by the city of Johannesburg there must be some elements of cross-subsidisation because the truth is that it is Johannesburg Water and City Power which generate a surplus in their business. The rest really, they survive on the basis of subsidies. Now the city cannot afford to say: we will only get a dividend as a 100% shareholder of Johannesburg at the end of the financial year. You can't because we need to cross subsidise these services virtually on a month to month basis. Now what we have done is to ensure that the system is driven by a business plan which Johannesburg Water developed, and of course there is a Service Delivery Agreement between the city of Johannesburg and Johannesburg Water as a service provider, to say: these are the targets we are setting ourselves in terms of extending the infrastructure, ensuring access, etc. etc. And then we will say: how much will it cost as water to achieve these targets, including operating expenses, the cap-ex, and all your running costs. Then the city guarantees those up front. But then the surplus goes back to the city as I have said, to pay for primary health care, libraries, parks, cemeteries, and everything else[30]

The SSC was visualised as a unit which would handle all the billing of services provided to residents by the city. It is a centralised clearing house located within the municipal administration which handles customer bills for key services such as water, electricity, refuse collection and so forth in an integrated manner. The great advantage of its existence from the point of view of the administration is that its revenue from service provision is unified and that there is therefore a single point of reference in as far as the city budget is concerned – a very important issue for a city struggling to balance its books. Revenue would thus remain under the control of the city, and the service providers such as the water utility would be paid for their services by the SSC.

30 Hlongwa 2003.

However, this was certainly not in line with the original iGoli vision of financially ring-fenced entities – on the contrary, it gave a new lease of life to a process of financial centralisation that had been taking place within the city for some time. In the immediate post-election period, after 1995, the city had been run by four metropolitan councils under the umbrella of the Greater Johannesburg Metropolitan Council, which, paradoxically, had in fact been ring-fenced themselves. This created in each case 'an administrative edifice that would be able to stand alone as a discrete entity'.[31] In fact, the existence of multiple and independent administrative structures within the city was one of the key rationales for the iGoli 2000 plan which centralised the administration under one council partly in order to cut costs and remove inefficiencies.

The move to create a SSC dealt a serious blow to the relations that were being built up between the city and the 'independent' service providers: on the one hand entities such as the water utility were being given the freedom to run their organisations on a new set of principles and provided with the incentive to cut costs and begin to make a profit. On the other hand the financial means with which these entities were to carry out these improvements were kept out of their reach. The CEO of JW was incensed by the move, and it drew the attention of Johannesburg Water away from its core mission, replacing it by a struggle to regain the operating and development capital on which it had depended:

> We got the top customers, but we have not been able to take over more – we have had a big fight with the city on this but the long and the short of it is that they did not honour the agreement if you like – they kept the billing in the revenue unit of the city where there is a consolidated bill. All of that it is still being vigorously discussed because we would like to get control of more of our customers - we don't think it is an optimal solution for either ourselves or the city - we think we can do better than them and we should get control over more of our customers so that it is under negotiation and we are not sure how things are going to turn out. The impact is that we feel we are getting less money – we feel we are losing more money as commercial billings that we would do ourselves. There are a lot of data problems to fix up – people who

[31] City of Johannesburg 2001: 18.

> are not on the data base, people who are getting incorrectly billed, people whose adjustments to their account are not going through, etc. – so what we would call commercial losses. The net result of that is that we feel we are losing money that we should be getting or that alternatively there is money to be got and that it will take a few years to fix this all up and it is being delayed. The net impact of less money is more pressure on the water tariffs for those people who are paying and less money for rehabilitation of the network[32].

Rather than becoming an independent for-profit entity, therefore, JW has become (or rather remains) an entity which needs to apply to the municipality for amongst other things the capital expenditures necessary to cut back on water consumption.

4 CONCLUSIONS

This paper has analysed a number of gaps between the policy and the implementation of a 'privatisation' project involving the restructuring of water services management in the city of Johannesburg. To do this, it has been first necessary to examine the concept of privatisation itself and to stress that the loose usage of the term has led to a situation in which it refers to a broad spectrum of different institutional arrangements. What these usages do have in common is the idea that state control is relinquished to some degree. Also, in all but the most extreme practical cases the state does retain a significant amount of control over resource management but may partner with actors in civil society in the production of public goods.

It was also deemed important to place the case of Johannesburg against the background of a global policy shift entailing the sanctioning of a greater role of the private sector in the production of public goods. This development has created the space necessary for the

[32] till 2004. Govender puts it as follows: 'We will have fights about us treading on their toes – they say we are trying to run their company – we are trying to understand the dynamics without interfering in their company too much – but the role of the city as a shareholder is such that if there are water bursts and when there are problems with sanitation the community comes to the mayor to complain, they don't go the JW'.

emergence of a number of multinational companies specialised in local service delivery – or the 'globalisation of local government'. For cities faced with dire financial constraints, the prospect of enticing a multinational or private consortium into long term investments in urban infrastructure is an attractive one.

With regard to the 'privatisation' of Johannesburg's water services it was argued that on many fronts, the historical trend is in fact in the direction of nationalisation, not privatisation. The evolution of South African water law shows a pattern of increasing state control over a scarce resource. And while there are also policy tendencies sanctioning municipal service partnerships, in fact in Johannesburg the iGoli 2002 plan has been frozen, Johannesburg Water has legal but not financial autonomy, and 'rationalisation has in fact led to the creation of new administrative structures such as the CMU and the SSC. The local state has held back from its plan of farming out the management of water services to a private operator.

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VI Beyond the new South African water acts: integrating water and society in the Lower Blyde

Bert Raven (corresponding author), Jeroen Warner and Cees Leeuwis[♣]

1. INTRODUCTION: THE NEW WATER CONTEXT

In international water circles, the 1998 South African National Water Act is praised as a model of progress. With its far-reaching provisions for minimum rights to drinking water, ensuring environmental flows and facilitating multi-stakeholder participation (MSP), it is obviously inspired by contemporary thinking on Integrated Water Resource Management (IWRM). In tandem with IWRM, the South African government also seeks to promote social integration, remedying the racial rifts codified under apartheid. IWRM requires an integrated society[1], but can legal and technical intervention do the trick on the ground? This article investigates a case study in rural South Africa focusing on an ambitious pipeline project bringing water to a dry area, combining irrigation and drink water issues. We shall first explain the rationale behind applying concepts such as IWRM and MSP in a water-stressed environment, and how they are enshrined in institutional reform, especially that of building Water Users Associations in South

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Drs. J. Warner, Project Coordinator Multi-stakeholder Platforms for Intergated Catchment Management, Irrigation and Water Engineering group, Wageningen University.

1 Warner 2000.

Africa.[2] After this we shall analyse the pipeline project. Investment in and improvement of the water infrastructure are a technical means to interlink the different uses and users. Pipelines can make entitlements to water rights and developmental aspirations real. But of course they also channel power, benefiting some rather than others. We shall indicate how the project uncovered dormant tensions, often with a long history, showing up possibilities and pitfalls of integration in a deeply raven society.

We will argue that it constitutes a rather great leap of faith to believe that the law can handle the many historic and contemporary conflicts between black and white, rich and poor amongst others.[3] It reflects a belief in legal engineering that overlooks the need to address and facilitate conflict as an integral element of the process of change.[4]

1.1 Water stress

Agricultural scientists claim that to reduce hunger and poverty for a growing population the water supply, especially irrigation, must be increased by 15 to 20 percent in the coming 25 years. Environmental scientists state that water use needs to be reduced by 10 percent in the same period to protect rivers, lakes, and wetlands on which millions of people depend for their livelihoods and to cater for the growing demands of cities and industries. Caught between equally desirable goals of productivity, equity, sustainability and stability, the different goals are not adding up thus creating water dilemmas.[5]

Röling argues that the only way out of these conflicting goals in water resource management is bringing together multiple, and increasingly interdependent stakeholders to negotiate and agree on collective action with respect to the sustainable water use and ecology. These processes of engaging different stakeholders in collective learning, problem solving and decision-making are often referred to as social

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2 Raven 2003.
3 Spiertz 2000.
4 See for example Benda-Beckmann 1993 on concepts of social and legal engineering.
5 Röling 2002; Dialogue on Water, Food and Environment.

learning.[6] The focus on stakeholder negotiation constitutes an alternative to two classical strategies in governance: on one side government and experts making decisions and solving our problems (political authority), on the other side free market forces with minimal guidance of government (price mechanism). Failure at both ends of this spectrum of governance mechanisms has led to interest in more participatory forms of democratic government and self-organisation. We will briefly discuss IWRM and MSP as two interrelated concepts that are expected to lead the way.

1.2 Integrated Water Resource Management (IWRM)

Since the 1990s water is more and more being seen as an integrated ecological system. Following Mitchell,[7] three levels of integrative water management can be distinguished. Firstly, a water system comprises components of groundwater, surface water, water quantity and quality. Each component may influence other components and therefore needs to be managed in an integrated way. A second level of integration addresses the interaction between water, land and the environment, recognizing that changes in one field has consequences for the others. A third and even broader level is to approach integrated water management with reference to the interrelationships between water, water users and socio-economic developments in a certain region. Thus, IWRM is recognition of the complexity and dilemmas in water management.

Despite broad acceptance of the IWRM concepts its actual implementation in practice is not a smooth and quick process but rather hesitant and unsystematic.[8] Mitchell suggests that in the face of uncertainty individuals are cautious and follow an incremental strategy in which they move forward slowly. There is no blueprint to rely on and people need to adapt to the new circumstances.

Integrated water management emphasizes on co-operation and coordination because fragmentation and shared responsibilities are likely always to exist. Boundary realities at once become a barrier to and a

6 Woodhill & Röling 1998.
7 Mitchell 1990: 1-21.
8 Mitchell 1990.

rationale for integration.[9] Kellow states rather than to stress the degree of fragmentation the adequacy of the coordinating mechanisms should be looked at, because that is the crucial test of institutional adequacy. He feels that the effectiveness of integrative management should be judged by judging the effectiveness of the coordinating mechanisms.[10] In the case study, therefore, we especially focus on the challenges of co-ordination across boundaries.

1.3 Multi-Stakeholder Processes (MSP)

To deal with water dilemmas presented and potentially intensified by IWRM, the growing divergence of stakes and the surfacing conflicts, IWRM philosophy proposes MSP. MSP is seen as a peaceful means to manage conflict and a means to create win-win situations[11].

In recent literature there seems to be considerable optimism about stakeholder participation and self-management to solve many of the problems of IWRM. Water users have more direct local information on the physical system and the system of rules governing its use. Less bureaucratic procedures are to be expected and stakeholders thought to be more motivated. Nevertheless, different nuances in this optimism can be made especially concerning the dynamics of internal and external water politics of the different stakeholders. So far the existing literature has not provided a clear sense of benefits, costs and perception of farmers and different stakeholders in participating in Water

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9 Eddison commented that the major management problems are always at boundaries (points and borders situated between states, levels of government, agencies, and department divisions). Definitive resolution of boundary problems is not possible because there are always several different and plausible approaches and every solution will have its weakness (Eddison, 1985:149). In many cases the call for integration and integrative management tends to lead to mergers and reorganizations (as happened with the Dutch Water Boards). For implementing integrated water management just reorganisation of (public) agencies is too simplistic.

10 Kellow 1985: 188.

11 Others are not so optimistic, seeing IWRM and MSP philosophy as a potential instrument to avoid politicisation (Wester & Warner 2002). They argue the terms suggest a non-existant neutrality and vagueness that renders it highly suitable for abuse by those in power.

Users Associations (WUAs).[12] Ostrom argues that multi-stakeholder institutions do not function in a vacuum but are constituted and embedded in a larger institutional framework (constitutional dimension, inter institutional relations). An institution has its own rules and practices of administration (governance and finance), and has a concrete impact (or lack of impact) on the ground.[13] Several synthesis studies were carried out to identify design principles for success in (farmer) stakeholder participation in irrigation (Uphoff 1986, Vermillion 1996).

In various places across the globe the occurrence of multi- stakeholder platforms (MSPs) is witnessed. Warner and Verhallen distinguish three main motivations for the emerging MSPs:

- Improving of management capacity (a wider range of ideas, self-governance and self finance);
- Accommodating different interests (social learning, negotiation, conflict prevention); and
- Empowering disadvantaged people at the local level (democratisation of water management).[14]

Institutional innovation in a complex social context is a process of meaningful change from divergence (conflict of interests) towards convergence (coordinated action). Institutional innovation in MSPs can be regarded as a process of renegotiating new institutional agreements with a broad range of stakeholders involved. This is likely to bring conflict. We hold that there is unlikely to be meaningful change without conflict arising. A water conflict, however, is no isolated conflict: when conflict surfaces on one issue, other parallel or sometimes underlying conflicts may occur as well. Water conflicts are often triggered by an intervention, urging stakeholders to deal with the new situation.

Such conflicts may be clear at the outset, or emerge as intervention processes unfold. The task of process leadership is to ensure (within and outside stakeholder groups) that tensions are dealt with or, if pos-

12 Meinzen-Dick 1996; Rhoades 1998.
13 Ostrom 1992; see also Ostrom Gardner & Walker 1994.
14 Warner & Verhallen 2004.

sible, turned into positive forces. Crucial in the process from divergence to convergence is how stakeholders deal with conflict and friction, and how this process is facilitated.[15]

1.4 IWRM in practice: the Lower Blyde River

The concepts of IWRM and MSP are entrenched in modern water legislation and water policy. The underlying assumption often seems to be that negotiation processes between stakeholders can be implemented with sufficient 'legal engineering' and institutional (re) design. This leads to the following question: *How does the implementation of the concepts of IWRM and MSP work out in practice?*

To examine this question case study research has been done in the Lower Blyde River in South Africa, an arid country that depends heavily on water management (for example dams, pipelines and irrigation schemes). South Africa's new post-apartheid legislation highly advocates the principles of IWRM and MSP.[16] The country is internationally heralded as an example of innovative water management. The Lower Blyde River case is especially interesting because the new policies are faced with a highly complex reality. The area is rich in contrast in an ecological, socio-economical or political sense. All concerns of integrated water management are present in the area, and there are high stakes involved for all stakeholders.

The establishment of an irrigation pipeline marks a crucial phase in the region of the Lower Blyde River and a connected project to establish 800 ha of black emerging farms in the white irrigation area. Improvement of the domestic water supply for the neighbouring black communities is an important issue in the area. The Municipality plans to link this irrigation pipeline with an extension pipeline for domestic water supply, thus highlighting the conflicting multiple needs. To reflect this diversity the existing Irrigation Board has recently been transformed into a Water Users Association.

The case study is part of a recently concluded research project on Multi-Stakeholder Platforms for Integrated Catchment Management

15 Leeuwis 2004.
16 Warner & Simpungwe 2003.

(MSP-ICM),[17] run by Wageningen University in the Netherlands. The field study took place in the period from August until November 2003. In addition to a review of the literature, in-depth interviews with stakeholders and dialogues with experts were held. Two well-attended stakeholder workshops were organised for feedback on the research findings.[18]

2. THE SOUTH AFRICAN WATER ARENA

2.1 Water scarcity

South Africa is an arid (semi arid) country where the climate varies from desert and semi-desert in the west to sub-humid along the eastern coastal area. The country's water resources are, in global terms, scarce and extremely limited. South Africa has an average rainfall for the country of about 450 mm per year, well below the world average of about 860 mm per year, and yet evaporation is comparatively high. Additionally, there is a strong seasonality of rainfall.[19]

As a consequence of the topography and rainfall distribution, the natural availability of water across the country is very unevenly distributed. More than 60 percent of the rivers flow arising from only 20 percent of the land area. There are no truly large or navigable rivers in South Africa. Groundwater therefore plays a pivotal role especially in rural water supplies in the country. To insure against this erratic water supply, large dams were constructed to enlarge water storage capacity. Currently the dams hold more than half of mean annual runoff for the country (total estimated annual runoff is 49 200 million m3 per year). Water use in South Africa is dominated by irrigation, which uses around 60 percent of all water used in the country. Domestic and urban use accounts for around 11 percent of water use, while mining and some large industries account for around 8 percent of use by reducing runoff into rivers and streams. In 2025 a serious deficit of water is

[17] See for more information the website: www.waterforfoodandecosystems.nl/msp.

[18] Maruleng Municipality Hoedspruit, 30-10-2003 (on local stakeholder participation) and at IWMI Pretoria, 21-11-2003 (on the role of government).

[19] Department of Water Affairs and Forestry 2002.

expected, while pollution of surface and groundwater is a growing problem.[20]

2.2 Apartheid water legislation

The governance of the water sector in South Africa reflects the political changes in the society. Water management moved from the pre-colonist collective realm to become a publicly regulated resource in terms of Dutch-Roman law. Under Anglo-Saxon jurisprudence and the pressures for settler expansion and economic development, water management was captured as a private resource for a minority.[21]

Much of South Africa's past water legislation was largely oriented towards irrigated commercial agriculture. The central principle in the previous water law was a link between the right to use water and the ownership of land adjacent to that water (the riparian right principle). The 1956 Water Act consolidated the system of riparian rights resulting in commercial white land-owning farmers having essentially unconstrained access to water. In commercial agriculture areas, the Irrigation Boards that administrated the allocation of water were serving the needs of these farmers.

The rural black and coloured people simply did not have sufficient (financial) capacity to get access to the administration for establishing water rights while private black landownership was not allowed. The fact that black people were concentrated in homelands with marginal water resources and infrastructure, and with only informal or customary traditional land use rights contributed largely to the inequity.[22] Government dams were, and still are, located in areas of urbanisation and commercial estate farming, meaning that the rural population was forced de facto to turn to groundwater abstraction. Proper infrastructure to reach the groundwater resources in the former homelands was often lacking.[23]

In commercial agriculture areas, the Irrigation Boards that administrated the allocation of water were serving the needs of the white

[20] Department of Water Affairs and Forestry 1997.
[21] Muller 2000.
[22] Ramazotti 1996.
[23] Jaspers 2001.

farmers. Under the apartheid governments a number of (more or less state-owned) irrigation schemes were built in the homelands. In theory, rural black communities and smallholder irrigation schemes could benefit from the same conditions as the commercial farmers in white areas. However, the lack of proper infrastructure, of property rights regarding resources, and the subsistence nature of their productive activities strongly limited the potential for improvement and intensification. Most black populations were not only deprived of access to water and land for irrigation purposes but also of adequate and clean water for domestic use.[24] Many of the irrigation schemes in the former homelands collapsed in the transition time of the early 1990s.

2.3 The new National Water Act

In the late 1990s the dynamism of the 'new South Africa' has been reflected in two new Water Acts. For potable water supply issues a new Water Services Act (WSA) was established in 1997.[25] On general water management the new National Water Act (NWA)[26] replaced the old law in 1998. The purposes of the new Water Acts include: managing the nation's water resources in manner that takes into account the basic human needs of present and future generations; promoting equitable access to water; redressing past racial and gender discrimination; facilitating social and economic development; and protecting aquatic and associated systems.

The Department of Water Affairs and Forestry (DWAF) is responsible for the implementation of the new Water Acts. There is an extensive decentralization and delegation process; water management to Catchment Management Agencies (CMAs)/ Water Users Associations (WUAs), and drinking water authority to newly formed municipalities). Internally the DWAF is involved in a major reorganisation (downsizing, privatisation and redressing apartheid inequity). The South African public administration is in charge of water management at all levels. This has caused, among others, staff capacity problems.

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24 Perret 2002: 283-300.
25 Act No 108 of 1997.
26 Act No 36 of 1998.

The three main innovations in the NWA are:

1) The replacement of riparian water rights by a system of licensing water use;
2) The introduction of a reserve for basic human needs and ecology;
3) The introduction of new water management institutions.

These water management institutions include CMAs and WUAs.[27] CMAs are statutory bodies (chapter 4 NWA) governed by a Board, representing a broad stakeholder grouping together with experts. CMAs are the second tier under the national level. Still under debate is the question whether WUAs should become the third tier of water management in South Africa. Nineteen CMAs will be established in South Africa. CMAs can delegate powers to for example WUAs, international water management bodies, catchment management committees, or water services institutions. The Lower Blyde WUA falls under the overarching Olifants CMA.

2.3.1 Water Users Associations (WUA)

A WUA is a statutory body established by the Minister under Section 92 of the NWA. They are, in effect, co-operative associations enabling stakeholders within a community to pool their resources (money, human resources, and expertise) to carry out local water management activities. A WUA may be established for any form of water use as described in the NWA,[28] as long as its objectives do not conflict with a CMA strategy for the area in which it operates. This is a significant change from the 1956 Act, which only provided for the establishment of institutions focused on irrigation. Thus, a WUA can be single-purpose or multi-sector, dealing with a variety of water uses and issues within its area of operation. It is for example possible for a WUA to function as a water supplier for domestic purposes in terms of the Water Services Act.

Either the Minister of Water Affairs and Forestry or local stakeholders themselves may initiate the establishing process of a WUA.[29] The proposal must include a draft constitution. A WUA must also be

[27] DWAF CMA and WUA guides 2000.
[28] Section 21.
[29] Section 91.

financially viable, and self financed. The WUA proposal needs to be evaluated and approved by the Minister. The WUA should recognise and encourage the active participation of the multiple users of water. Previously disadvantaged individuals and groups should become part of the management of these WUAs. The constitution must be clear about how racial and gender representation will be achieved. It cannot entrench vested interests, or allow any group to dominate another.

The NWA states that existing Irrigation Boards be transformed into WUAs.[30] There are almost 300 Irrigation Boards in South Africa with a majority in the Western Cape Province. The Irrigation Board institution links back to Dutch settlers/farmers and have been quite successful[31]. The NWA was expected to trigger a quick transformation process, but only a few WUAs have been established until now. The transformation process turned out to be much more time consuming and incremental than anticipated. The participation processes were not always satisfactory according to DWAF. Stakeholders sometimes felt they had to participate for the sake of participation, had to participate on organisational structure instead on real issues. Stakeholders, especially the poor ones, are expected to invest considerable time and energy in the process.[32] The Ministry of Water Affairs and Forestry itself has only limited staff available for this enormous transformation process. Furthermore the WUA policies are still changing and under debate, making the whole process rather precarious. This could easily lead to frustrations and bureaucracy.[33]

30 Section 98(1)(a).

31 The Water Boards in The Netherlands are among the eldest democratic institutions, dating back to the early middle ages. The Afrikaner farmers of Dutch decent must have been familiar with the Water Board institutions. Some of the old Dutch water governance terminology can still be retraced in South Africa of today *(e.g. 'Heemraden'*).

32 Koppen & Merrey 2002.

33 Faysse 2003; Raven 2003; Water Resource Council 2003.

3. STIMULANTS AND OBSTACLES IN REALISING IWRM

3.1 The Lower Blyde River: setting the scene

The Blyde River is unique in the region for its continuous flow and good water quality and is an important tributary for the Olifants River. The Olifants River is of poor water quality and during droughts there is lack of sufficient flow. The lower Olifants river basin therefore relies strongly on Blyde water, both from a quantity and a quality perspective. The Blyde River Dam stabilises the flow of the Blyde River to some extent. (See Map 1 below).

Map 1: The Olifants River Catchment in South Africa

The Blyde river subcatchment lies partly on an escarpment. Because of the escarpment, distinct differences in climate are found in the region. The climate varies from cool and relatively high rainfall in the Highveld (South West), to sub-tropical arid in the Lowveld (North East). The Lower Blyde River is situated in the Lowveld. Rainfall conditions are not ideal for the development of crops and irrigation is necessary in this region to reduce the risk of water shortages. The Lower Blyde River area has a good climate to grow fruits and vegetables. In winter it is still warm enough to grow fruits and vegetables

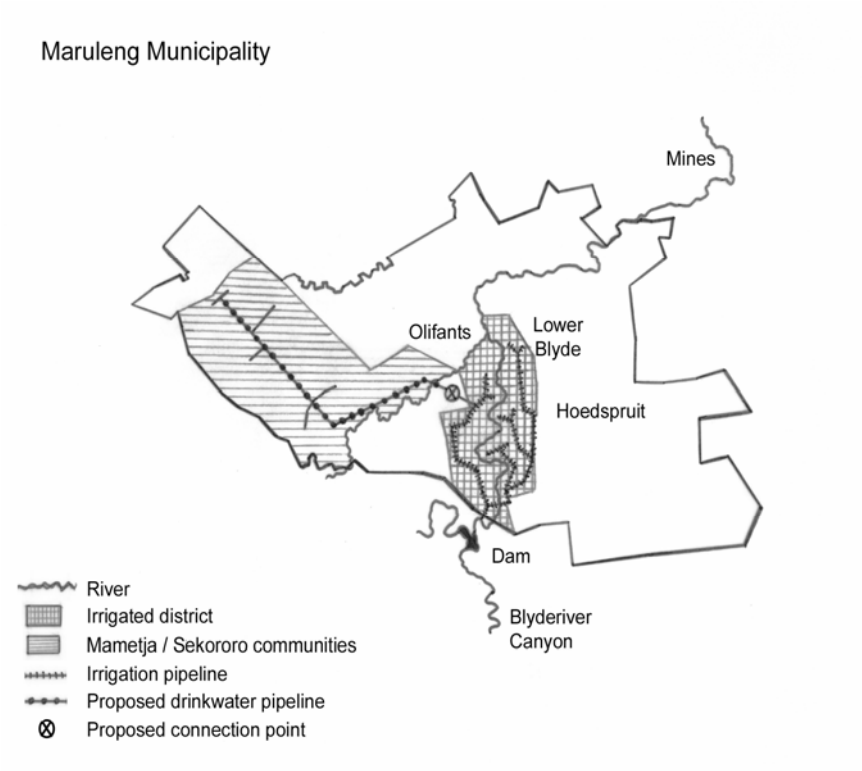
(no frost). The region has therefore a strategic slot market in this specific period in South Africa.[34]

Blyde river water is used for agricultural, industrial and domestic purposes. At the lower Blyde there is a relatively small white commercial irrigated farm area (approx. 400 km2). Adjacent to this irrigation district there are extensive black surrounding communities. Further downstream the Phalaborwa phosphorus Mines are an important stakeholder. The Blyde River Canyon (in the upper catchment) is the third largest canyon in the world and attracts around 900,000 tourists per year. The escarpment region of the Blyde and Sand catchment complex contains over 140 endemic species of plants and animals.[35] The booming sectors of (eco) tourism, game farms and nature conservation in the wider region cause growing pressure on the Blyde River (Kruger National Park, Biosphere Kruger to Canyon). Finally, there is an important international dimension: the Olifants/Blyde River plays a key role in the volatile water management situation in Mozambique (Masinguri Dam).(See Map 2).

[34] CSIR (Council for Scientific and Industrial Research) 1997.

[35] ROSA/IUCN (Regional Office for Southern Africa/International Union for the Conservation of Nature and Natural Resources) 2001.

Map 2: Maruleng Municipality and The Lower Blyde River



The irrigation area and these communities are both part of the Maruleng Municipality. The geographical boundaries of the municipality do not coincide with the Blyde sub-catchment boundaries. Maruleng Municipality has approx 140.000 inhabitants of which 90 percent belongs to black communities. In the former homeland system the black communities belonged to the homeland Lebowa (Pedi Tribe). The communities and settlements are mainly located in arid and dry areas. The socio- economic situation of the black communities is alarming.[36] Unemployment is high, at 80 percent, and basic infrastructure is sometimes lacking. The population in the black communities is growing very significantly. One of the respondents estimates that 50 percent of the population is aged under 15 and expects a doubled population in 5

[36] United States Agency for International Development 2002.

years. Like everywhere in South Africa, the AIDS epidemic is a problem.[37] Some employment can be found in the (eco) tourism industry (for example, in game farms) and in the mines (Phalaborwa), forestry and the government sector (teachers, nurses, and other government departments). Many younger men have left the village (and their families) to find work in the cities or in the mines. Women often head rural households, as the one remaining parent.[38] In recent years, the new government has been building houses, providing electricity, building schools and community halls in the last period.

3.2 Irrigation and Domestic Water Use in the Apartheid Era

Before the 1930s it was impossible to settle permanently in the Lowveld because of the presence of tsetse flies and malaria causing mosquitoes. Black tribes and voortrekkers used the Lowveld mainly for hunting and cattle. Only after DDT killed the tsetse flies in the 1930/40s permanent crop farming started in the area. The white farmers in the area took water from the river according to the riparian right system and expanded their irrigation area through a system of earthen canals. The canals were dug by hand without government help. According to a respondent, the old voortrekker mentality is 'a bit government-allergic'.

In the 1950s and 60s under the apartheid governments the irrigation lands were proclaimed for the white Afrikaner farmers exclusively. At first, the farmers used the river and the canal system mainly for flood irrigation to grow vegetables. However, from the 1960s onwards for the first time water pressure was felt in the irrigation area. The building of the Blyde River Dam in 1974 marked a second irrigation phase. The Dam was built by the government mainly as a back up for the Phalaborwa Mines downstream. The farmers refused to pay for the Dam. The farmers regarded Blyde River water as free for them to use. This resulted in a relatively small dam (approx 50 million cubic meters). In the same period the farmers started using individual dams and pumps on their farms.

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37 Maruleng Municipality, Integrated development plan, 2003.
38 Maruleng Municipality, Integrated development plan, 2003.

One of the main tasks of the Irrigation Board (IB), which was created in 1952 (before that it was a River Board), was to provide water equity among the irrigation farmers. According to respondents, malfunctioning of the earthen canal system resulted in water fights among the farmers. The IB was hardly able to maintain its authority in these matters. It became clear to the farmers that proper distribution was the key issue.

In the 1980s, more sophisticated irrigation techniques came in (like centre pivot, sprinklers and drip irrigation). Citrus and mango farming became profitable. The mid 1980s saw a real 'mango boom' taking off. In this period large scale 'foreign-owned' fruit companies started to establish themselves in the area.

In the black communities of Mametja/Sekororo, in the former Lebowa 'homeland', the main concerns around water centred on domestic water supply. Although the homeland system is now abolished, the current domestic water use situation still resembles that of the past. The black communities in the Lower Blyde region mainly depend on boreholes for water supply for domestic use. The quality of the groundwater is sometimes poor (salty and polluted). The main problem at this stage is not (yet) ground water availability but rather the poor technical infrastructure. The boreholes pump water into reservoirs, from where it runs to the public village taps. The villagers bring water containers on wheelbarrows to collect the water from the water taps. The tribal authorities in the villages have appointed water committees to allocate the water to different quarters in case of scarcity. These authorities play an important role in preventing and solving water conflicts in the communities.

Some Mametja/Sekororo villages have severe water shortages mostly due to poor borehole infrastructure. The boreholes often face technical problems. Illegal water connections are another experienced problem. This sometimes disturbs proper flow to the public taps even. In case of broken boreholes the communities sometimes resort to highly polluted water from the Olifants River. Domestic water problems are still rated first amongst other problems by the respondents in the black communities of Mametja /Sekororo.

3.3 Interventions in the transition period: Adapting the idea of a pipeline.

From 1989 until 1993 the region faced a very dry period with only 25 percent of the normal rainfall. This forced DWAF to imposed water restrictions. The deterioration of the earthen irrigation canal system led to water losses of more than 50 percent. These enormous water losses became unacceptable for the government and for the farmers. In 1993 the idea of a new irrigation pipeline came out as the most effective way forward.[39] The plan consisted of a connecting pipeline system between the Blyde Dam and the irrigation area (105 km pipeline with approx. 130 irrigation off-takes).[40]

In 1994 the new government of South Africa came into power. Apartheid was abandoned, and important changes in government policies and legislation were set in motion. The first stages of the Lower Blyde Irrigation Pipeline project coincided with this revolutionary political atmosphere. In 1995, under the new Environment Conservation Act,[41] an 'Environmental Impact Assessment Study' for the pipeline started (one of the first in the country). The study took nearly 3 years and included an (extractive) participation process, surveying all interested and affected parties.[42] In 1997 the (former) Irrigation Board officially proposed building a pipeline as replacement for the old canal system. Already in the early 1990s, the new South African government policy suspended all subsidies towards so-called 'former advantaged' irrigation schemes. The pipeline project was to be privately financed by the farmers and a commercial Bank (Rand Merchant Bank).

Under the new Minister of Water Affairs and Forestry, Kader Asmal, negotiations started about the new water work and allocation. The DWAF's interest was to save water and to empower formerly disadvantaged people at minimum costs. In the pipeline plans it was estimated that extra 10 percent water savings could be made on top of the regular savings.

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39 Council for Scientific and Industrial Research(CSIR) 1995.
40 Council for Scientific and Industrial Research (CSIR) 1997.
41 Act No 52 of 1994.
42 Council for Scientific and Industrial Research (CSIR) 1997.

Eventually, the Minister agreed with the pipeline project but on condition that the pipeline would provide water for 800 ha for black emerging farmers in the region. On this basis the bank provided the necessary loan and the work on the pipeline began. For the 'Blyde 800 ha project' DWAF provided the capital costs in the pipeline (approx. R20 million). Along with the idea of the irrigation pipeline a plan was developed to link another pipeline for water supply to the neighbouring Mametja/Sekororo villages. The idea was that DWAF joins hands with the municipality, communities and the white farmers who were planning the pipeline for irrigation purposes.[43]

Under the NWA, the existing IB was transformed into the Lower Blyde River Water Users Association (LBWUA) in 2002.[44] According its constitution, the primary function of the LBWUA is the management of the irrigation scheme in accordance with environmental policies and laws.

The constitution recognises in its opening statements that to achieve the purpose of the NWA, appropriate community, racial and gender representation must be reflected in the establishment of the WUA. The WUA constitution is meant to serve as a basis for fair, effective and sustainable water resource management for the benefit of its members as well as surrounding communities and the resource in general. The prevention of water wastage is specifically mentioned as a function of the WUA. Ancillary functions are the provision of services, training for members, other water institutions and surrounding communities. The constitution mentions the function of facilitating integrated resource management in the Blyde River basin. In a footnote it is stated that the association envisages extending its skills and experiencing in water management to neighbouring communities.
The WUA constitution provides for a management committee of 16 members and an elected chairperson. The WUA enables gives three categories of members in the MC: irrigators, other water users (e.g. domestic water users, nature reserves, and industries) and other affected parties (e.g. government agencies, communities). The Lower Blyde River WUA has to be primarily self-funded by its members. Each year, the WUA must produce an audited financial statement for

43 Department of Water Affairs and Forrestry Limpopo office / EVN 2002.
44 *Government Gazette*, 17th January 2002.

the preceding year for DWAF and a financial business plan for the next year.

As noted above, important initiatives were taken to work towards more integrated forms of water management. The adapted pipeline plan simultaneously dealt with irrigation and domestic water supply problems, and also forged linkages between development options for white irrigation farmers and those of neigbouring black communities. Moreover, new institutions where created which had a mandate to furthering the integration that had been set in motion.

3.4 Stagnation in realising IWRM

In this section we present the dynamics, tensions and stagnation that went along with efforts to implement the pipeline plans within the new legal and institutional set-up.

3.4.1 Financial problems and frictions among irrigators

The pipeline project faced many problems once the work started in 1997. In the course of the project the costs were skyrocketing. The Bank formally owns the infrastructure until the loans are paid back. The contract for building the pipe already went up from R100 to approx. R150 million. The initial costs for the farmers had been estimated at R1500 per ha but this had gone up to R4000 per ha, which severely jeopardised the economic viability of the project from the farmers' perspective. Because of the spiralling costs the WUA, the Bank and DWAF found themselves in a financial deadlock.

In this context it is relevant to note that there exists considerable diversity within the white irrigation community. As a consequence of the mango boom there are at present two sorts of commercial irrigation farms working in the irrigation area. There are the smaller Afrikaner family farms (approx. 30/40 ha). The older family farms are mainly producing vegetables (corn, seed maize, lucerne, sweet potatoes, tomatoes among others), while some also produce citrus and mango. Some of these farmers are economically struggling to keep their head above the water. Second, there are the larger 'estate farms' (250 ha and over) growing mainly citrus and mango and mostly owned by large (foreign owned) companies. The high costs for using the pipeline are an economic limitation for especially the smaller fam-

ily farms. Most respondents expect to see more large-scale foreign owned companies coming in and more family vegetable farms disappearing in the next decade. Thus, the financial difficulties were aggravated by a conflict between smaller farmers and bigger ones over the rising costs of the project. Some farmers simply refused to pay their contributions. Subsequently, the IB (as predecessor of the WUA) threatened to cut off their water. Farmers, in turn, threatened the IB with a lawsuit. As legal issues surfaced it became clear the IB was not properly delegated and mandated for the pipeline work by DWAF. A larger group of (small) farmers now refused to pay the Irrigation Board the money per ha necessary for the work to continue. The work was halted and delayed further. According to respondents the WUA was mainly established in 2002 by DWAF to ensure properly delegated authority to continue work on the pipeline. Opponents blame the Irrigation Board / WUA-officials for dealing with the new government in Pretoria in favour of the large companies but forgetting the interests of the smaller family farms.

As a result a group of farmers still refuses to pay the WUA contribution. Some farmers say they will try to get separate water licenses from DWAF, which enables them to continue using water from the river and the canals. Negotiations between WUA, the Bank and DWAF have started to find a way forward. DWAF is willing to make a substantial extra financial contribution of in the irrigation project. This can help to prevent collapse or bankruptcy of the project. With this ‘subsidy’ the costs will be brought down to approx. R2800 per ha for the participating farmers. In this manner DWAF is financially drawn into subsidizing the ‘former advantaged’ irrigation farmers against its own policy.

Against the background of these tensions, the building of the pipeline was delayed considerably, but eventually the irrigation pipeline became operational in August 2003. Meanwhile, distrust between DWAF and irrigation farmers continues to exist, as does the tension between small and large irrigation farmers.

3.4.2 The virtual status of the 800 ha project and multi- stakeholder participation

After the completion of the pipeline in 2003, attempts were made to revive the 'Blyde 800 ha black emerging farmers project', which had also come to a hold due to the pipeline problems. The success of the 800 ha project has become necessary to make the pipeline economically viable. The emerging farmers will have to pay for the operational costs of the pipeline (estimated at 600R per ha per year, DWAF paid for the capital costs).

Six years after its original inception, however, the 800ha emerging farmer project still has a rather virtual character. It is undecided which kind of different farm-models (joint ventures, private or community farms) and crops (vegetables, fruit, sugar) are best suitable for the emerging farmers (MBB 2000, DWAF 2001). Considerable controversy has arisen around a sugar production plan that was initiated by local businessmen (Blyde Valley Sugar Ltd, 2000). The resolution of such issues is complicated by the fact that there is disagreement about who is to take the lead in the development of the project. Formally, DWAF has central control over the 800ha project. However, the irrigation farmers have little confidence in government led farming projects and claim an important role for the WUA. Putting the WUA in charge of the project generates distrust at DWAF; not least since, without the emerging farmers on the ground, the WUA is not functioning yet as a platform that can incorporate the emerging farmers' interests. Officially, the WUA constitution provides 12 seats for irrigation farmers, of which maximum two seats are reserved for the black emerging farmers in the future. At present neither black emerging farmers, farm workers, women nor other so-called historically disadvantaged individuals (HDIs) are represented. So far only the irrigation farmers are present in the MC meetings, they are also the only paying members of the WUA. A telling statement in this context is that of a Maruleng Municipality representative who could take seat in the management committee of the WUA: "The municipality always gets an invitation but they never attend the meetings". A municipality respondent argues that "it is understandable for an understaffed institution such as the municipality to stay away from meetings where the role is merely to observe, the subjects are mainly internal farmer issues, and the influence in the decision-making process minimal". In

practice the same farmers of the former IB now attend the MC meetings of the WUA.

3.4.3 Deadlocks in domestic water provision and use

Based on new legislation the South African system of local government has been fundamentally restructured. The creation of Maruleng Municipality is a result of this operation. Since June 2003 DWAF has delegated the authority on domestic water services to the municipality (based on the WSA). Maruleng Municipality is now in charge of the extension pipeline project. DWAF Polokwane (Polokwane, former Pietersburg, capital of Limpopo province) is still highly involved in the water supply plans.

According to respondents in the communities, the issue of water supply through an extension of the Blyde River pipeline has been raised for many years (1995) but has still not been formalised. DWAF Polokwane has carried out a recent study on an extension of the irrigation pipeline to supply 31 villages with domestic water. This study mentions a project deadline in 2009.[45] A municipality respondent stated that the operational costs are approx R90 million, to be financed by DWAF Polokwane.

Until now no concrete plans and construction works have been undertaken. This causes considerable frustration in the black communities especially with the irrigation pipeline now running. According to a municipal respondent the project has been delayed not only by the problems in the irrigation pipeline project, but also because no proper financing arrangements are in place for the domestic water supply infrastructure. A feasibility study has shown that the costs of operation and maintenance of the domestic water network are too high for the municipality and the communities. A municipal respondent complained that DWAF left them with a task without sufficient financial and human resources. Considerable uncertainty and doubt exists regarding the willingness and ability in the communities to pay for this new water infrastructure. A municipal respondent stated that a new feasibility study will be undertaken concerning the costs of the extension pipeline for domestic water use. In the meantime, DWAF Polok-

[45] DWAF Limpopo / EVN 2002.

wane has promised to fund intermediate solutions, such as solving technical problems with the boreholes.

A related problem is that the deadlock in infrastructure development also affects the allocation of water for the domestic water use plans. According to the rules, no more Blyde River water can be allocated without new infrastructure being built. From the total runoff of the Blyde River Dam 160 million m3 per year can be used. DWAF has allocated that amount as follows: 90 million to the irrigation farmers; 50 million to the Phalaborwa mines and community (domestic use) and 20 million for the Reserve (basic human needs and ecological reserve). Water for domestic use has to come from either the 'Blyde 800 water' or from the water surplus of the farmers in the pipeline. In the last case the water has to be bought from the farmers. Another option is to buy or swap Blyde River water with the Phalaborwa mines. There is no DWAF decision on a water allocation for domestic water from the Blyde River for the Mametja / Sekororo communities. Formally the municipality has to request for new water allocation for domestic use. Such a request has not been done yet. In short, we see a situation of stagnation regarding the domestic water pipeline.

A complicating issue in reaching agreement about the domestic water pipeline project is a controversy about the kinds of water uses that will be allowed and the mechanisms in place to prevent illegitimate use of water. Important questions include whether water can be used for making bricks, for small-scale irrigation and/or as drink water for cattle. Productive use of domestic water will of course lead to a larger water use and demand. Some of the white irrigation farmers predict and fear water scarcity in the future.

In relation to the domestic water use, the new institutional set-ups prove not to be very effective in securing progress, either. As noted earlier, Maruleng Communities do not participate actively in the WUA as they doubt they can effectively exert influence and negotiate their cause in that platform. Despite the integrative spirit of the WUA constitution, the WUA does not seem to feel a special responsibility in domestic water supply delivery for the communities. In a workshop, the WUA chairman made it clear that he regarded any WUA involve-

ment in domestic water supply as a purely business decision.[46] In practice, there is a remarkable lack of contact between the two institutions that are supposed to cooperate under the new water legislation.

3.4.4 Wider tensions in the area: a ticking time bomb

In parallel with the frictions around water use, other issues are at play between black and white communities as well.

The newly established Maruleng Municipality has to co-operate with the tribal authorities on water issues in the Mametja/Sekororo communities. In actual practice there is competition between the ANC politicians who dominate the Maruleng Municipality board and the tribal authorities worried about losing political power. In the new South African Constitution, tribal authority is recognised as part of local government. Nevertheless, whether is their role and function is relevant in the new South Africa is still debatable. Some ANC politicians feel tribal authority is outdated and compromised its integrity by collaborating with the apartheid regime.

Competition between cattle keeping and game farms is especially significant. In the black communities cattle is an important factor for status and wealth (both with respect to livelihood, *Lebola/*dowry, and ceremonies). Game farming for tourism is expanding in the area. The white game farms, some owned by rich foreigners consist of large areas of up to 3000 ha. But these game farms do not offer much employment in the region, 5 to 40 workers per farm. Most of the game farms are fenced off because of the wild animals and also to secure the property of the land.

Respondents stated that cattle in the black communities often die in dry periods yet they could have survived on the game farms; "[s]ome game farms have helped out but the reluctance of the white farmers to save community cattle in their game farms caused anger in the black communities". One of the respondents says "it is a strange situation that only a handful of farmers own land all the way up to the mountains along the Blyde River with black communities suffering alongside with droughts and dying cattle".

[46] Workshop: Integrated Water Management in the Lower Blyde River, Maruleng Municipality Hoedspruit, 30-10-2003.

The recently introduced obligatory minimum wages is also subject to controversy in the region. According to some of the white irrigation farmers (employing approximately 10.000 farm labourers), the new minimum wages will inevitably lead to job losses. However, many black farmers feel that the white farmers' complaints are not genuine, and that they just want to maintain cheap labour. Some describe the overall social situation as a ticking time bomb. Some black respondents fear ill treatment by the irrigation farmers, while some white respondents fear a 'Zimbabwe-like situation' of white expulsion. Most respondents agree that communication between the white farmers and the black communities has remained rather poor.

One of the respondents argued that the detailed laws and regulations (for example those on labour and water) through which the government tries to address problems have created a situation of 'over-legislation' which is counter-productive for the establishment of better relationships between the communities:

> "First-world laws are to be implemented in a third world situation. This kind of over-legislation takes away the trust between the white and the black communities. Because of the implementation gap left by the government too much is expected from the white farmers. The government brings laws and taxes but not much administration. The rich are getting richer and blacker. The poor are getting poorer and stay black".

4. CONCLUSION

On paper, IWRM and MSP are highly relevant approaches to accommodate and co-ordinate the complex water issues at hand, such as competition between different uses and users. IWRM and MSP indeed find expression in South Africa's highly advanced water legislation. In the Lower Blyde area unacceptable water losses of the irrigation canal system coincided with unacceptable domestic water infrastructure in the black communities. After the transformation in South Africa, initiatives were taken to connect the existing plan for an irrigation pipeline with a plan to serve 800 ha of an emerging black farmers project, and with a plan to construct an extension pipeline for drink water for the neighbouring black communities. Thus, a promising start was

made to develop integrated solutions to the problems in the Lower Blyde region.

Instead of a multi stakeholder participation towards integration, actual practice in the Lower Blysde case shows rather an avoidance of such a process by the stakeholders. Although positive initiatives and actions have been undertaken, we have seen that a range of conflicts have surfaced and that there is a high degree of historically shaped distrust. The conflicts and distrust have not been constructively addressed and dealt with so far.

If we look in more detail at the dynamics in the Lower Blyde WUA we see that the WUA was instated mainly to secure the work on the pipeline. In practice the WUA has a strong focus on management improvement instead of accommodation of different stakeholders or empowerment of weaker stakeholders. Although the WUA needs to accommodate a multiplicity of stakeholders with very different constituencies and sources of legitimacy - emerging farmers, communities, local authorities, and traditional leaders - representation remains a problem. The interest-pay-say principle[47] in the South African case means that wealthier stakeholders can easily overpower the WUA. In practice the membership of the WUA is more or less the same as that of the old IB. At this stage the WUA does not function as a platform for MSP. There has been no real transformation process so far.

Despite the pipeline extension plan the domestic water situation has not improved for the black communities. This has resulted in growing tensions and frustrations, especially with the irrigation pipeline now running. The WSA provides basic domestic water rights but which the Maruleng Municipality cannot effectively deliver. Though DWARF has delegated water management to Maruleng Municipality, this has not been accompanied with the necessary financial and human resources.

Judged by its co-ordination mechanisms, IWRM in the Lower Blyde River has not been very effective so far. Co-ordination and co-

[47] The principle 'interest-pay-say', 'inherited' from the Dutch Water Boards means that the more an actor is interested in water management, the more they contribute to the Board's budget, and the weightier their vote will be in the decision-making process. It has been the guiding principle in Dutch local water governance for ages.

operation on crucial water issues between and within such key actors as WUA (small and large farms), Maruleng Municipality (ANC and tribal authority) and DWAF (Pretoria/ NWA and Polokwane/WSA) has been remarkably absent or strained in this case.

The new water institutions and the pipeline project that could have facilitated/triggered such a process of integration, then, have not resulted in IWRM and MSP. The pipeline project envisaged linking up of groups that habitually operate in isolation from each other and may have preferred to keep it that way. The case study indeed shows the problems with the implementation to be rather formidable and multifaceted.

This should not be all that surprising. Without attention for a process of altering social relationships and trust, formally created multistakeholder platforms are unlikely to succeed. As Kooiman & Warner (1998) argue, new forms of co-operation between the state (whose key coordinating mechanism is coercion), the market (price) and civil-society stakeholders (negotiation, self management) can only develop incrementally (see also Kooiman 1993). In this case, we observe a vacuum in the sense that no affirmative action is taken to address divergence of interests and emergent tensions. It is clear that a process towards convergence (coordinated action) will not happen by itself in the Lower Blyde region. Such a process needs adequate process leadership and facilitation in order to deal with tensions and damaged relations among the involved stakeholders.

The current role of DWAF as facilitator is unlikely do the trick. DWAF itself has a keen interest in specific outcomes, and therefore its neutrality can be called into question. DWAF as the state agency most responsible for the implementation this legislation is in a period of transformation. The role of DWAF in this case can be characterized as control at arm's length. It may be preferable to look for an authoritative, neutral, mandated process leader on the ground that can deal with the tendency of the actors involved to avoid communication and interaction with other stakeholders, and get them to cross established boundaries. Process leadership requires initiative, moral authority, credibility, and acceptability to all parties (Mutimukuru and Leeuwis, 2004), and these are qualities that cannot be simply secured by means of introducing a new law or platform.

The emphasis placed on an advanced legal framework has both positive and negative implications – the law can be a facilitator for change or a bottleneck impeding change. The advantage of a strong legal framework is that it provides enforceable principles that it is hard to wriggle out of. Claimants can come back to the principle when the implementation process stalls. However, rules can also limit the space for informal communication, relationship building and negotiation. Lawmaking defines the boundaries and space of the negotiation area, regulating the scope for discussion. Limiting the arena for negotiation to water issues also prevents hammering out package deals including adjacent issue-areas such as land rights, health, housing. Therefore, it is important to pay attention to the wider process and tensions.

Interestingly, the ambitious nature of the 1998 water law in a way is a continuation of the past. South Africa has long made blueprints for its development, putting great trust in rules, to the point of enshrining Apartheid in law at a time when many other countries practiced the same race discrimination but kept the law silent on it. The 'new' South Africa seems to be intent on utilising the same instrument that helped make it an international pariah, but this time to bring about justice and progress.

However, as one finds so often, there is a strong tendency to confuse legislation with implementation (Bolding *et al*, 1998). The principles need to be translated into tangible entitlements for those the law intends to benefit. When implementation and enforcement does not happen, the law remains a dead letter, allowing the government to hide behind rules and regulations instead of focussing on making the transformative process work.

The fact that the project has highlighted conflict should not be an immediate source of worry, given that conflict is the companion of change. In spite of its many problems, South Africa does have a functioning government and legal system, which can provide a stable environment and entryways for addressing the numerous water challenges besetting the new South Africa.

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