

Resolving the crisis of access: a case for recognition of the human right to water

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Resolving the crisis of access:
a case for the recognition of the human right to water

Cristy Clark

A thesis in fulfilment of the requirements for the degree of
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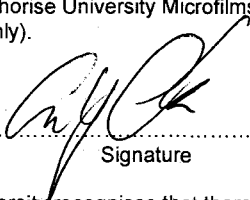
The world is experiencing a water crisis. A fundamental aspect of this crisis is the lack of access to basic water services experienced by poor and marginalised communities in the Global South. At least 780 million people do not have access to safe water, while between three and four billion people (half the world's population) lack a household water connection. The dominant response to this crisis has been framed within the good governance approach to development, largely reliant on market-based water governance reforms that focus on increasing the efficiency and financial sustainability of water utilities. However, in response to a growing recognition of the need to address the crisis of access and the systematic exclusion of the poor that underpins it, a human right to water has emerged in international law. In 2010 the existence of this right to water was recognised in Resolution 15/2010 of the Human Rights Council, which built on the 2010 resolution of the UNGA on the right to water and sanitation, and on General Comment No.15 of the United Nations Committee on Economic Social and Cultural Rights in 2002.

This study examines how the recognition and implementation of the right to water could address the crisis of water access facing the urban poor in the Global South. Central to this question is an analysis of the tension between the right to water, with its focus on equity and participation, and the good governance approach to water reform, with its focus on efficiency and financial sustainability. This question is investigated by examining and comparing case studies of water governance reform in Manila, Philippines and Johannesburg, South Africa. The study concludes that the right to water can help to address the crisis of access by increasing the emphasis on service delivery for the poor, particularly by empowering them to participate in water governance. It is through this participation that poor and marginalised communities can help to develop and implement water policies that better respond to their needs and to their entitlement to safe and affordable water services.

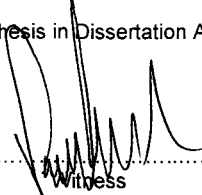
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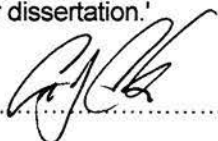
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Acronyms

ANC	African National Congress (South Africa)
CA	MWSS Concession Agreement (Philippines)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic Social and Cultural Rights
CRC	Convention on the Rights of the Child
DCRA	Debt Capital and Restructuring Agreement (Philippines)
DPLG	Department of Provision and Local Government (South Africa)
DWAF	Department of Water Affairs and Forestry (South Africa)
EPA	Extraordinary price adjustment (Philippines)
FAO	Food and Agriculture Organisation of the United Nations

FBS	Free Basic Services
FBW	Free Basic Water
GC 15	General Comment No.15 on the right to water
GEAR	Growth, Employment and Redistribution strategy (South Africa)
HRC	Human Rights Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IFI	International financial institution
ILA	International Law Association
IMF	International Monetary Fund
LOS	Level of Service (South Africa)
Lpcpd	Litres per capita per day
MWSS	Metropolitan Waterworks and Sewerage System (Philippines)
NGO	Non-government organisation
NRW	Non-revenue water
NWRB	National Water Resources Board (Philippines)
ODA	Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	The Office of the High Commissioner for Human Rights
pcm	Per cubic metre
PPM	Prepayment meter
PSP	Private sector participation
RDP	Reconstruction and Development Plan (South Africa)
RO	Regulatory Office (Philippines)
RORB	return on rate base (Philippines)
SSWPs	Small-scale water providers
UNDP	United Nations Development Programme

UNECE	United Nations Economic Commission for Europe
UNGA	United Nations General Assembly
VIP	Ventilated Improved Pit
WHO	World Health Organisation
WSS	Water supply and sanitation
WSSD	World Summit on Sustainable Development
WWAP	UN World Water Assessment Programme
WWC	World Water Council

Glossary

Asian Financial Crisis	The Asian Financial Crisis began in Thailand in July 1997 and spread to much of Asia, with Indonesia and South Korea being the worst hit. All affected countries saw their currency significantly devalued in relation to the US dollar, which had the effect of increasing their levels of foreign debt. In the Philippines ‘[t]he crisis was immediately transmitted to the country through the sharp depreciation of the peso—from a stable rate of P 26.4 to a U.S. dollar in June 1997 to a rate of P 42.7 by January 1998.’ ¹
Barangway	A barangway is the name for a local government area in Manila.
Global South	Due to the problematic use of the terms developed and developing, ² West and East, or First and Third World, this paper uses the terms

¹ Florian A. Alburo, 'The Asian Financial Crisis and Philippine Responses: Long-Run Considerations' (1999) XXXVII(4) *The Developing Economies* 439, 446.

² For example dependency theorists argue that ‘development’ is simply a new method of colonisation, or neo-colonisation and requires the impoverishment of those people at the margins, be they the nations of the Global South, or the non-elite sectors of their populations. See, eg, Arturo Escobar, 'The Making and Unmaking of the Third World Through Development' in Majid Rahnema and Victoria Bawtree (eds), *The Post-development Reader (1997)* (1995); Ivan Illich, 'Development as planned poverty' in Majid Rahnema and Victoria Bawtree (ed), *The Post-development Reader (1997)* (1971); Andre Frank, 'The Development of Underdevelopment' in K. Mingst and J. Snyder (ed), *Essential Readings in World Politics (2001)* (1966).

/Global North	<i>Global North</i> and <i>Global South</i> , which have increasingly gained broad acceptance in recent years. These terms and the related terms <i>economic South</i> and <i>North</i> , refer to the poverty that exists both between and within countries, and to the older geographic division between what has been termed <i>First</i> and <i>Third Worlds</i> . ³
Neoliberalism	A political-economic approach based on the core belief that greater exposure of countries to market forces will result in prosperity through a process of economic liberalisation. Neoliberal policy prescriptions often include fiscal discipline (or ‘austerity’), liberalisation, privatisation, and deregulation. ⁴
Non-revenue water	NRW is the ‘difference between the amount of water put into the distribution system and the amount of water billed to consumers.’ ⁵ This water is usually lost through leakage, water theft, and inadequate billing.
Subsidiarity principle	The principle prescribes that policy and management decisions should be made at the lowest effective level. In relation to State functions, this principle encourages decentralisation, including the devolution of responsibility for local services to local governments.
Economic liberalisation	The removal of government controls, often through the corporatisation or privatisation of a government service, in order to increase the influence of market-forces.

³ Walden Bello, 'The Global South' in Tom Mertes (ed), *A movement of movements: Is another world really possible?* (2004), 56

⁴ John Williamson, 'What Washington means by policy reform' in John Williamson (ed), *Latin American adjustment: how much has happened?* (1990).

⁵ Bill Kingdom, Roland Liemberger and Philippe Marin, 'The Challenge of Reducing Non-Revenue Water (NRW) in Developing Countries: How the Private Sector Can Help: A Look at Performance-Based Service Contracting' (Water Supply and Sanitation Board Discussion Paper Series, Vol 8, World Bank, 2006) <<http://siteresources.worldbank.org/INTWSS/Resources/WSS8fin4.pdf>> at 26 September 2011, executive summary.

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Chapter 1. Introduction

1.1 Background – the global water crisis

Human beings cannot live without water. We are critically reliant on it, not only to drink, but also to grow food, wash, and run industries. Without fresh water there can be no life on this planet. Yet only 2.5 percent of the world's water is fresh water and almost 70 percent of this is locked away in the ice sheets and glaciers in the Antarctic, Greenland and mountainous areas.¹ Most of the remaining 30 percent is stored as groundwater, leaving just a tiny fraction of the world's water to circulate as renewable rainwater in rivers and lakes.² Clean water supplies are also dwindling due to the impact of human activity, while demand continues to increase.³ The UN World Water Assessment Programme ('WWAP') has estimated that 'by 2050, at least one-in-four people is likely to live in countries affected by chronic or recurring shortages of freshwater.'⁴

1.1.1 A crisis of access

While a visible feature of the water crisis may be the growing scarcity of water itself,⁵ the water crisis is predominantly a crisis of access. It is this *crisis of access* that is the

¹ UNESCO and WWAP (eds), *The United Nations World Water Development Report 1: Water for People, Water for Life* (2003) 67.

² Ibid.

³ See, eg, UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk* (2012), 44-76.

⁴ UNESCO and WWAP (eds), *The United Nations World Water Development Report 2: Water a shared responsibility* (2006) 10.

⁵ It is the subject of debate as to whether water scarcity is growing, since the amount of water on the planet remains unchanged. (See, eg, Eric H. Oelkers, Janet G. Hering, and Chen Zhu, 'Global Water Sustainability: Water: Is There a Global Crisis?' in *Elements* (2011) vol 7(3) 157.) Gleick and Palaniappan distinguish between three measures of water scarcity based on measures of 'peak renewable water,' 'peak peak non-renewable water,' and 'peak ecological water,' all of which are showing signs of strain in many regions of the world. (See, eg, Peter H. Gleick and Meena Palaniappan, 'Peak water limits to freshwater withdrawal and use' in *PNAS (Proceedings of the National Academy of Sciences)* (2010) vol 107(25) 11155, especially 11158-11159.) Additionally, when water scarcity is measured according to the Falkenmark water stress indicator it is clear that the amount of freshwater available for human

focus of this study. At least 780 million people do not have access to safe water,⁶ while a total of 3 to 4 billion people (or half the world's population) currently lack a household water connection.⁷ The overwhelming majority of these people are located in the *Global South* – a term that refers to the poverty that exists both between and within countries, and to the older division between what has sometimes been termed the *First* and *Third Worlds*.⁸ It is for this reason that the Global South is the geographic focus of this thesis. Furthermore, the political and economic conditions that have created this crisis of access are specific to the Global South.⁹ These political and economic conditions include the systematic exclusion of the poor from accessing sufficient water.¹⁰

The United Nations Development Programme ('UNDP') highlights how public policy decisions in many jurisdictions have created structural barriers, including 'market structures, institutional rules and patterns of service provision'¹¹ that systematically exclude the poor. This exclusion is exacerbated by increased scarcity, because water tends to flow to power – with governments allocating rights to those groups that have the most political or commercial influence.¹² As UNDP has argued:

First, water is power—and when water is in short supply, power relations figure prominently in determining who gets access to water and on what terms. Second, when

consumption in many regions of the world is reducing on a per capita level due to contamination, population growth and the overextraction of groundwater, and it is widely agreed that up to two-thirds of the world's population will be affected by water scarcity over the next several decades. (See, eg, Frank R. Rijsberman, 'Water scarcity: Fact or fiction?' in *Agricultural Water Management* (2006) vol 80(1–3) 5, especially 9.)

⁶ *Progress on Drinking Water* (UNICEF and WHO, 2012) 5.

⁷ UNESCO and WWAP, above n 3, 142.

⁸ Walden Bello, 'The Global South' in Tom Mertes (ed), *A movement of movements: Is another world really possible?* (2004) 56. For a discussion of the evolution of the term 'Global South,' and the reason for its adoption, please see the glossary above.

⁹ A similar history of political and economic conditions does exist in the Global North, but a more developed welfare state in many areas has changed some of the issues and outcomes.

¹⁰ See UNDP, *Human Development Report - Beyond scarcity: Power, poverty and the global water crisis* (2006) 80.

¹¹ Ibid.

¹² Ibid 177.

water shortages intensify, people lacking a voice in allocation decisions tend to be the first in line for adjustments to reduced supplies.¹³

Evidence for this systematic exclusion can be seen within the history of rural water governance across the Global South, in that water-intensive agricultural projects, large dams, over-extraction, and contamination all demonstrate a pattern under which gains and losses have been unevenly distributed. For example, FAO and IFAD report that the over-allocation of water to non-subsistence agriculture, along with the promotion of chemical inputs that have contaminated sources, means that water quality has been degraded and insufficient water has been left to meet basic needs of the rural poor.¹⁴

This pattern of systematic exclusion is also reflected in urban areas and it is this issue of access to water for the *urban poor* that will be the primary focus of this study. In urban areas, poor and marginalised households make up a disproportionate percentage of the unserved and underserved sections of the population, either because their areas (often on the outskirts of cities or in informal settlements) are the last to be reached by the water network or because they cannot afford to pay the connection fee.¹⁵ Across the Global South, informal water vendors and small-scale water providers ('SSWPs') service 20-47 percent of households.¹⁶ Despite this fact, governments rarely regulate the quality of water provided by these vendors or the prices charged for it.¹⁷ This means that it is most often the poor who are forced to turn to informal sources of water, which are either unsafe, expensive, or both.¹⁸ It is not uncommon for these poor urban households to pay between 10 and 20 times as much for water as wealthy households in the same city.¹⁹

¹³ Ibid 173.

¹⁴ FAO and International Fund for Agricultural Development (IFAD), 'Chapter 7: Water for Food, Agriculture and Rural Livelihoods' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 2: Water a shared responsibility* (2006) 258.

¹⁵ UNDP, above n 10, 77-78.

¹⁶ Bethan Emmett, *In the Public Interest - Health, Education, and Water and Sanitation for All* (Oxfam and WaterAid, 2006) 48.

¹⁷ Ibid 49.

¹⁸ UNDP above n 10, 77-78. See also UNESCO and WWAP (eds) (2012) above n 7, 68.

¹⁹ UNDP, above n 10, 83; Emmett above n 16, above, 49; Arthur C. McIntosh, 'Hiking tariffs to help the poor' (ADB Review - News from the Asian Development Bank, ADB, 2003).

Ideally, the poor would be connected to the public water system, with its lower prices and superior water quality. However, there remain many barriers to connection, including high fees,²⁰ lack of government funds for expanding connections,²¹ and official discrimination against communities living in informal settlements.²²

1.1.2 Resolving the crisis of access to water

Approaches to resolving this crisis of water access have historically been part of a response to the broader water crisis, which encompasses the issue of water scarcity. Scarcity of water affects productivity and the environment, as well as intensifying the crisis of access referred to above. From a productivity perspective, increased water scarcity means industry and agriculture will have to adjust to using less water to service growing populations.²³ From an environmental perspective, increased scarcity threatens ecosystems, and the health and livelihoods of people who rely on them, both now and for the future.²⁴

Over the last 15 years there has been a focus on the role of governance in both creating and exacerbating the water crisis. According to Rogers, '[w]ater governance refers to the range of political, social, economic and administrative systems that are in place to regulate development and management of water resources and provisions of water services at different levels of society.'²⁵ Reports such as the UN's triennial World Water Development Report,²⁶ UNDP's 2006 Human Development Report,²⁷ along with others from the World Bank,²⁸ and the World Water Council,²⁹ have all drawn attention to the

²⁰ See McIntosh above n 19; UNDP above n 10, 97; Foster, Gomez-Lobo and Halpern, *Designing direct subsidies for the poor - A water and sanitation case study* (The World Bank, 2000).

²¹ See James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003) 6-7; McIntosh above n 19, 73-87.

²² See, eg, Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, UN Doc A/HRC/21/42 (2012) paras 10, 56.

²³ UNESCO and WWAP, above n 3, 59-62, 480-500.

²⁴ *Ibid* 110-122, 502-515.

²⁵ Peter Rogers and Alan W. Hall, 'Effective Water Governance' (GWP Technical Committee Background Papers No. 7, Global Water Partnership, 2003) 7.

²⁶ UNESCO and WWAP, above n 3.

²⁷ UNDP, above n 10.

²⁸ World Bank, *Water resources sector strategy: Strategic directions for World Bank engagement* (2004);

imperative of reforming past approaches to water governance in order to remedy past mistakes and successfully tackle the water crisis.

The World Bank and the World Water Council argue that the water crisis is caused by a failure of governments to adequately recognize the economic value of water, which has led to inefficient water management.³⁰ These organisations cite the problems of water wastage by industry, agriculture and urban consumers, which have been encouraged by past policies that have reduced the cost of water, often through ill-conceived government subsidies.³¹ In response, these organisations have sought to address the water crisis by promoting the ‘good governance’ approach to water reform.³²

While the theory of ‘good governance’ encompasses considerations of equity, transparency, accountability and participation, the practical application of this approach applied by the World Bank and other major donors has primarily focused on increasing the financial sustainability and efficiency of water governance.³³ This approach reflects the dominant neoliberal economic ideology that has framed the approach to development adopted by these organisations since the 1980s.³⁴

R. Maria Saleth and Ariel Dinar, *Water challenge and institutional response* (in Policy Research Working Paper, World Bank, 1999).

²⁹ William J. Cosgrove and Frank R. Rijsberman, *World Water Vision* (World Water Council, 2000); Winpenny, above n 21.

³⁰ Ibid; World Bank, *Meeting the Challenge of Water* (2003)

<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20106806~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>> at 10 October 2004.

³¹ Winpenny, above n 21, 6-7; McIntosh, above n 19; World Bank, *Water supply & sanitation: Pricing and subsidies* (2009) <<http://go.worldbank.org/SJB13DFZW0>> at 1 May 2009; Kristin Komives et al, *Water, electricity, and the poor - Who benefits from utility subsidies?* (World Bank, 2005) 6-7.

³² See, eg, World Water Council, *Right to Water* (2005)

<<http://www.worldwatercouncil.org/index.php?id=705>> at 5 December 2005; Salman M. A. Salman and Siobhan McInerney-Lankford, *The human right to water: legal and policy dimensions* (2004); Green Cross International, *Fundamental principles for a framework convention on the right to water*, WaterTreaty.org (2005); Winpenny, above n 21.

³³ Ibid.

³⁴ See Section 2.1.1 below for a discussion of the meaning of the term neoliberalism. See also David Harvey, *A Brief History of Neoliberalism* (2005); Joseph Stiglitz, *Globalization and its Discontents* (2002); Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (2005).

The framework that is promoted under this neoliberal good governance approach has involved the application of the 'Dublin Principle',³⁵ which recognises water as an economic good, and the adoption of free-market water policies, including the liberalisation of water services (the removal of government controls), private sector participation ('PSP'),³⁶ and full cost recovery (an arrangement under which consumers pay for the full cost of the water they consume, rather than relying on subsidies).³⁷

However, this focus on efficiency and financial sustainability has done little to address the systematic exclusion of the poor from accessing water services. While scarcity is part of the picture, the underlying cause of the crisis of *access* to water is the failure of governments to grant sufficient priority to basic human needs.³⁸ Another criticism of the good governance approach is that it has served to commodify water, and failed to respect the social values of water.³⁹ Critics of this commodification of water argue that free-market water policies do not necessarily improve governance, but instead shift control away from the community and compromise economic access for the poor.⁴⁰ For example, UNDP has warned that since 729 million people without clean water live on

³⁵*The Dublin Statement on Water and Sustainable Development: Report of the International Conference on Water and the Environment*, A/CONF/151/PC/112 (1992) *ibid* Principle 4 ('Water has an economic value in all its competing uses and should be recognized as an economic good.').

³⁶ It should be noted that interest in PSP has waned since over the last decade, partly due to the decision by several large water corporations to withdraw from operating in the Global South, and partly because there have been a significant number of private water concessions that have failed due to bankruptcy or the concessionaire's failure to meet its contractual obligations. See David Hall and Emanuele Lobina, *Water Privatisation* (Public Services International Research Unit (PSIRU), 2008) 8-9.

³⁷ See, for example, World Bank, above n 30; Winpenny, above n 21; Rachel Cardone and Catarine Fonseca, *Financing and Cost Recovery* (International Water and Sanitation Centre, 2003).

³⁸ UNDP, above n 10. See also Karen Bakker, 'The 'commons' versus the 'commodity': Alter-globalization, anti-privatization and the human right to water in the global south' (2007) *Antipode* 430; Maude Barlow, *Blue covenant : the global water crisis and the coming battle for the right to water* (2007).

³⁹ See, eg, Bakker, above n 38; Barlow, above n 38; Adam Davidson-Harden, Anil Naidoo and Andy Harden, 'The geopolitics of the water justice movement' (2007) (11) *Peace Conflict & Development*; Patrick Bond, *When Commodification Annuls the Human Right to Water* (School of Development Studies, University of KwaZulu-Natal, 2005).

⁴⁰ *Ibid*.

less than \$2 a day, ‘full cost recovery would put water security beyond the reach of millions of people now lacking access to water.’⁴¹

1.1.3 Human right to water

In response to a growing recognition of the need to address the crisis of access and the systematic exclusion that underpins it, a human right to water has emerged in international law. In 2010 the existence of this right to water was recognised in Resolution 15/2010 of the Human Rights Council (‘HRC’),⁴² which built on the 2010 resolution of the United Nations General Assembly (‘UNGA’) on the right to water and sanitation,⁴³ and on General Comment No.15 (‘GC 15’) of the United Nations Committee on Economic Social and Cultural Rights (‘CESCR’) in 2002.⁴⁴ The right to water has also been recognised in a number of regional human rights instruments and has been given domestic protection by a wide range of States.⁴⁵

As will be discussed in Chapter 3, the recognition of the right to water is the culmination of a history of expanding international recognition from within international treaty law and at the political level through various UN, regional and national government declarations.⁴⁶ This recognition is a reflection of a growing understanding that water is essential to life and central to the effective realisation of a range of other human rights including the rights to an adequate standard of living;⁴⁷ health;⁴⁸ life;⁴⁹ education;⁵⁰ and equality.⁵¹ It is because water is essential to the

⁴¹ UNDP, above n 10, 97.

⁴² *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

⁴³ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010).

⁴⁴ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002).

⁴⁵ For a detailed discussion of this regional and national recognition see Chapter 3 below.

⁴⁶ Discussed in detail in Chapter 3 below.

⁴⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI); *ibid*, Article 11(1), entered into force 3 January 1976.

⁴⁸ *Ibid* Article 12(1).

⁴⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), Article 6.

⁵⁰ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI) Article 13. This right is also reinforced in Article 14.

realisation of these rights that the right to water, as recognised by the HRC,⁵² UNGA,⁵³ and GC 15⁵⁴ has been derived from these listed rights.

The right to water means that everyone has the right to access a sufficient quantity⁵⁵ of safe water to meet his or her basic needs. This in turn imposes obligations on governments to protect, promote and fulfil the right to water through water governance processes that are designed around the progressive realisation of the right. However, despite the emerging consensus on the existence of this right, debate continues over its substantive content; the implications of the right for the good governance approach to water reform; and whether framing water as a human right adequately protects all of its environmental and social values.

Bakker argues that these eco-social values are better reflected in a '*commons* view of water,'⁵⁶ which recognises that 'water is a flow resource essential for life and ecosystem health: non-substitutable and tightly bound to communities and ecosystems through the hydrological cycle.'⁵⁷ These unique qualities correspond to what Morgan describes as the communal nature of water as well as the connection that many communities have with this resource.⁵⁸ Bakker argues that these qualities mean, 'collective management of water by communities is not only preferable but also necessary.'⁵⁹

Bakker's solution is to argue that rather than continuing to campaign for the recognition of the human right to water, water justice activists should focus instead on campaigning

⁵¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, Article 3.

⁵² *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

⁵³ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010).

⁵⁴ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002).

⁵⁵ While there is broad agreement that the right to water guarantees everyone access to 'sufficient' water, the precise meaning of the word 'sufficient' and, particularly, whether it can be defined as a specific minimum allocation of water per day, remains controversial. See Section 3.2.1 below.

⁵⁶ Bakker, above n 38, 441.

⁵⁷ Bakker, above n 38, 441.

⁵⁸ Morgan, above n 64, 14.

⁵⁹ Bakker, above n 38, 441.

for the (re)establishment of the *commons*.⁶⁰ However, community participation in water governance can also be facilitated within a human rights approach, particularly if this approach recognises a human right of participation.

1.2 The objective of the study

The objective of this study is to examine how the recognition and implementation of the right to water might address the crisis of water access facing the urban poor of the Global South. Central to this question is the analysis of the tension between the right to water, with its focus on equity and participation, and the good governance approach to water reform, with its focus on efficiency and financial sustainability. This tension reflects a broader friction between human rights and development. In this way the issue of access to water serves as a case study of the wider ‘human rights and development’ debate that has been highlighted by scholars such as Alston,⁶¹ Nelson⁶² and Langford⁶³ in response to the Millennium Development Goals (‘MDGs’).

1.3 Framework for the enquiry

In examining the implications of the right to water for the crisis of access, this study focuses on the interrelationship between the good governance approach to water reform and the obligations created by the recognition of the right to water. This recognition appears to offer a valuable supplement to the good governance approach, by increasing the attention paid to equity and participation. It may also serve to increase accountability by recognising that the poor and marginalised have a legal entitlement to

⁶⁰ Bakker, above n 38. But see Karen Bakker, ‘Commons versus commodities: Debating the human right to water’ in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012) 19 where she modifies her view and argues that a human right to water has some value as a campaigning tool.

⁶¹ Philip Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals’ (2005) 27 *Human Rights Quarterly* 755.

⁶² Paul Nelson, ‘Human Rights, the Millennium Development Goals, and the Future of Development Cooperation’ (2007) 35(12) *World Development* 2041.

⁶³ Malcolm Langford, Andy Sumner and Alicia Yamin (eds), *MDGs and Human Rights: Past, Present and Future* (2013 (forthcoming)).

access water and by giving them another mechanism through which to hold their governments to account for failing to respect, protect and fulfil their rights.

However, this emphasis on equity and participation can also conflict with the efficiency and financial sustainability goals of good governance reform and there is an ongoing debate over how best to navigate this clash of values. Morgan argues that the controversial nature of PSP and the social activism that has grown up around its introduction relates to the inherent contradiction between:

images of water as a communal natural resource held in common, as a human right and fundamental need, even as a sacred fluid and physical mystery, [being] brutally confronted with the legal and regulatory frameworks that ensure the sustainability and efficiency of massive capital investments into the physical infrastructure that makes access to water the effortless turn of a tap.⁶⁴

This discord between the eco-social values of water on the one hand and the economic values on the other are reflected in the debates that have emerged around the content and obligations of the right to water, and over the kind of water governance approach that is compatible with its realisation. For a time, water justice activists had promoted the recognition of the right to water as a potential trump card against commodification, including the imposition of PSP and other market-focused good governance reforms in the Global South.⁶⁵ However, the right to water that has ultimately emerged at the international level explicitly accepts the possibility of PSP and other commercial approaches to water governance.⁶⁶

It is in response to this shift that Bakker argues that mobilising around a *commons*-approach to water governance is preferable to campaigning for the right to water, because:

Human rights are individualistic, anthropocentric, state-centric and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatisation. Moreover, ‘rights talk’ offers us an unimaginative

⁶⁴ Bronwen Morgan, 'Water: frontier markets and cosmopolitan activism' (2004) *Soundings: a Journal of Politics and Culture* 10, 14.

⁶⁵ For a discussion of this approach, see, eg, Bakker, above n 38; Davidson-Harden et al, above n 39.

⁶⁶ *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010) paras 6-8.

language for thinking about new community economies, not least because pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.⁶⁷

One response would be to argue that Bakker's proposal is impractical in the context of urban water services, because a commons-based approach to water management cannot ensure the necessary efficiency and financial sustainability necessary to meet the needs of large populations. However, as Ostrom has demonstrated in her Nobel-winning research, commons-based resource management has a long and successful history.⁶⁸ Furthermore, the translation of this participatory water governance approach to the large urban context of Porto Alegre, Brazil, where the City's well-known participatory budgeting process achieved a successful balance between equity and efficiency within the water and sanitation sector.⁶⁹

An alternative response, and the one adopted by this thesis, is to argue that although participation is fundamentally important, it can be insufficient on its own to ensure equity due to the existing power imbalances and institutional weaknesses in many communities.⁷⁰ Furthermore, and most significantly, a collective action approach to water governance can be advanced *within* the framework of human rights. As will be discussed in Chapter 4, this reflects the growing recognition that participation is itself a human right,⁷¹ and is a vital companion or prerequisite to the right to water. It may be that this participatory understanding of the right to water is compatible with PSP and

⁶⁷ Ibid 447.

⁶⁸ Elinor Ostrom, *Governing the Commons: The Evolution of of Institutions for Collective Action* (1990); Elinor Ostrom and Roy Gardner, 'Coping with asymmetries in the commons: Self-governing irrigation systems can work' (1993) 7(4) *Journal of Economic Perspectives* 93.

⁶⁹ Porto Alegre has near universal access to water and its water and sanitation system has run at a surplus for many years. See, eg, Hélio Maltz, 'Porto Alegre's water: public and for all' in Brid Brennan et al (eds), *Reclaiming Public Water* (2007); Rualdo Menegat, 'Participatory democracy and sustainable development: integrated urban environmental management in Porto Alegre, Brazil' (2002) 14(2) *Environment and Urbanization* 181, 194.

⁷⁰ See, eg, Frances Cleaver, 'Institutions, agency and the limitations of participatory approaches to development' in Bill Cooke and Uma Kothari (eds), *Participation: the new tyranny?* (2001); Section 4.4 below.

⁷¹ See Section 4.4 below.

other forms of commercialisation, but if it is able to advance equity and access to water through community participation in water governance, then it may still have a valuable role to play in resolving the crisis of access. Furthermore, a human rights framework may also serve to enhance the establishment of the necessary equity, institutional support and participatory culture needed to make participatory management a success.

Nevertheless, the inherent tension between the economic values of good governance and the social values of the right to water is the reason why debate over the substantive content of the right to water continues, despite the emerging international consensus of the existence of the right. This debate has focused on whether to continue to treat water as an economic good, the appropriate role of the private sector in the delivery of water services, and the meaning and significance of community participation in water governance.⁷² All of these issues have implications for how the recognition of the right to water might affect the current good governance approach to addressing the water crisis, and ultimately, how it might address the crisis of access to water for the poor.

1.4 Outline and scope of the study

This study is divided into three parts. Part one sets out the historical and theoretical background, and adopts an interdisciplinary approach that incorporates human rights law and development theory. Chapter 2 sets out the historical context in which the theory of good governance developed and reviews how it has been applied to urban water reform in the Global South. Chapter 3 outlines the legal status of the right to water and examines the ongoing debates around its substantive content, including the meaning of the requirements that water services be sufficient, physically accessible, affordable, and non-discriminatory. Chapter 4 considers the issue of participation and analyses its role and status within both good governance and human rights theory. The question of whether there exists a right of participation in international law, particularly in relation to environmental management and water governance, is also examined.

⁷² UNDP, above n 10; Deborah Moore and Penny Urquhart, *Global Water Scoping Project* (WaterAID, 2004); UNESCO and WWAP, above n 4, chps 2 and 12; Barlow, above n 38; Eric Gutierrez et al, *New Rules, New Roles: Does PSP Benefit the Poor? - Synthesis Report* (in *New Rules, New Roles: Does PSP Benefit the Poor?*, WaterAid, Tearfund, 2003); Karen Bakker and Kate Martin, *The Water Dialogues: An International Summary Report* (The Water Dialogues, 2009).

Part two of the study contains two chapters, which contrast two different approaches to water governance reform - the good governance approach and an approach that includes the recognition of the right to water - through the analysis of two case studies in Manila in the Philippines and Johannesburg in South Africa. A qualitative methodological approach has been applied to these case studies, including long form interviews, which were conducted in Manila and Johannesburg in late 2006⁷³ with key stakeholders,⁷⁴ and the qualitative document analysis of scholarly articles and books; UN, World Bank and government reports; legal instruments; and case law.

Chapter 5 describes Manila's experience with a good governance approach to water reform, which commenced in 1997 with the privatisation of Manila's water and sanitation system.⁷⁵ As a historical case study, the chapter examines the good governance approach as it was being implemented before the widespread recognition of the right to water.

⁷³ The issues around the implementation of PSP in Manila have been assessed as a historical case study. In South Africa, a significant part of the information contained in these interviews was central to the facts and arguments considered in the *Mazibuko* case and, thus, remains relevant to the development to the legal interpretation of the right to water in South Africa today. Other information concerning legislation, policy and community responses in both Manila and South Africa since 2006 has been updated through document analysis, web and listserve updates, and ongoing email conversations with key stakeholders.

⁷⁴ In Manila, these stakeholders included senior personnel within the private water concessionaires (Manila Water and Maynilad), water authorities (the Metropolitan Waterworks and Sewerage System 'MWSS' and the National Water Resource Board 'NWRB'), solicitors and legal academics, and campaigners from within the major NGOs working on the right to water within Manila. In Johannesburg, these stakeholders included a solicitor working on the *Mazibuko* case, an applicant in the case, academics, campaigners from within the major social movements working on the right to water in Johannesburg, and several residents of Phiri and Orange Farm (two communities impacted by the introduction of prepaid water meters, which was the focus of the *Mazibuko* case). The former director-general of the South African Department of Water Affairs and Forestry was also interviewed, and further interviews were sought with numerous other government personnel within the Department, Johannesburg Water and the City of Johannesburg. All but one government officer declined the request for an interview and the one officer who did accept, on the condition that the interview be conducted via email, ultimately did not reply to emails. Nonetheless, extensive affidavit evidence from the *Mazibuko* case from a wide range of government officers working on water policy for the Department of Water Affairs and Forestry, Johannesburg Water and the City of Johannesburg was available for analysis.

⁷⁵ See Mark Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000).

Chapter 6 describes South Africa's experiences with water governance reforms that were undertaken in the context of its constitutional recognition of the right to water. The chapter contains a particular focus on how these reforms manifested in Johannesburg, and on the outcomes of the first judgment from the Constitutional Court on the right to water: *Mazibuko v City of Johannesburg* (2009).⁷⁶

Part three of the study contains three chapters. Chapter 7 provides an analysis and some conclusions on what these case studies can tell us about the interrelationship between the good governance approach to water reform and the right to water, and the implications of the right to water for resolving the crisis of access to water facing the urban poor of the Global South. Chapter 8 provides an analysis and some conclusions on what these case studies can tell us about the role of participation within the good governance and human rights approaches, and the potential contribution of participation to resolving the crisis of access. Chapter 9 contains a brief conclusion, which seeks to integrate these analyses and outlines some possible implications for current approaches to both the practice of water governance reform and the ongoing debates around the content and relevance of the right to water.

The thesis concludes that the right to water can make a valuable contribution to resolving the water crisis by balancing the emphasis on financial sustainability and efficiency underlying the good governance approach with a stronger focus on equity and participation. It also suggests that these potential contributions can be strengthened by recognising participation as a right in itself, and as one that is essential to the realisation of the right to water.

Although this study seeks to place the crisis of access to water within the larger context of global water scarcity, the focus of this inquiry is on the potential of the right to water to address the issues of systematic exclusion and inequality. As such, although this study touches on the issues of financing water reform and increasing efficiency in governance, it is not a comprehensive analysis of those broader aspects of the crisis that include issues of water scarcity. The environmental aspects of the water crisis and the challenges of ensuring the sustainable management of water resources are also beyond the scope of this study.

⁷⁶ *Mazibuko v City of Johannesburg* (2009) 28 ZACC .

The empirical dimension of the thesis is a focus on two major cities. These case studies – Manila and Johannesburg – were selected to highlight two approaches to water governance reform that have been applied to two very specific national contexts. The research in this thesis is up-to-date up to the end of 2012, with the exception of Manila, which is examined as a historical case study of the good governance approach as it was in the early 2000s and focuses primarily on the period up to 2006. Although, recent developments in South Africa and elsewhere suggest a growing acceptance of more participatory approaches to water governance, these developments are not included in the thesis and will require future exploration.

Chapter 2. Water governance and the need for reform

Many urban water systems have suffered from decades of poor governance. They have often been inefficient, poorly regulated, unresponsive to community needs, and plagued by financial deficits and corruption.¹ As a result, almost one billion people have been unable to access sufficient quantities of safe water to meet their basic needs.²

Most of the urban water systems of the Global South were originally constructed to service elite enclaves of the population.³ According to the United Nations Development Programme ('UNDP'),⁴ this legacy has been carried forward into the present. As a result, many public water systems are in crisis. A lack of maintenance and failure to expand water systems across the Global South means that large sections of the community either experience unreliable service or none at all.⁵ Pipes are old, with leaks causing systems to lose over 50 percent of water; health and safety standards are often unmet; and corruption is rife.⁶ These problems are not the preserve of countries of the Global South – they also exist in the Global North.⁷ However, this thesis focuses on the issues facing the Global South.

There is broad agreement that the problems facing urban water systems exist because of a general 'lack of political will to prioritise and act on water issues, the failure of the public sector to adequately deliver water services and the lack of financial investment in the water sector.'⁸ Today the health and economic benefits of expanding access to the public system are better understood. However, the governance challenges are complex,

¹ See, eg, UNDP, *Human Development Report - Beyond scarcity: Power, poverty and the global water crisis* (2006), chp 2.

² *Progress on Drinking Water* (UNICEF and WHO, 2012), 5.

³ UNDP, above n 1, 86, 89.

⁴ Ibid.

⁵ World Bank, *The World Bank Group's Program for Water Supply and Sanitation* (2004) 13; James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003), 21.

⁶ Ibid.

⁷ See, eg, UNDP, above n 1, 89, which notes that water utilities in the UK are frequently fined for failing to reduce water leakage.

⁸ Deborah Moore and Penny Urquhart, *Global Water Scoping Project* (WaterAID, 2004), 10.

and it is widely agreed that they include the need for increased finance, greater efficiency, equity, and improved transparency, accountability and participation.⁹

The majority of reforms that have taken place over the last 15 years have been framed within the ‘good governance approach,’ which has dominated development policy over the last two decades.¹⁰ This chapter will examine the theory and practice of the good governance approach to water reform, in order to analyse its impact on the central challenges of the water crisis and, specifically, on access to water for the poor and marginalised.

2.1 The meaning of good governance in the water reform context

At its narrowest, ‘good governance’ refers to the quality of institutions as fostered by government.¹¹ A slightly broader definition includes the behaviour of politicians and bureaucrats, in addition to the quality of the institutions they manage.¹² But there is no universal agreement on the key indicators of good governance.

UNDP has adopted a broad definition of good governance, arguing that it is ‘among other things, participatory, transparent and accountable. It is also effective and equitable.’¹³ The Global Water Partnership provides a similar list, arguing ‘the

⁹ Ibid.

¹⁰ World Bank, *Meeting the Challenge of Water* (2003)

<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20106806~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>> at 10 October 2004.

¹¹ See Julie Aubut, ‘The good governance agenda: who wins and who loses. Some empirical evidence for 2001’ (Working Paper Series, Development Studies Institute, London School of Economics and Political Science, 2004) <<http://www2.lse.ac.uk/internationalDevelopment/pdf/WP48.pdf>> at 5 June 2011 8, where she cites a number of academics who employ this narrow version of ‘good governance’ in their work, including Knack, S. (2000) *Aid dependence and the quality of governance: a cross-country empirical analysis*, World Bank, Washington DC, available at <http://econ.worldbank.org/docs/1151/pdg>; North, D. (1995) ‘The new institutional economics and third world development,’ in Harris, J. et al., *The new institutional economics and third world development*, Routledge, 17-26.

¹² World Bank, *Governance and development* (1992) 1.

¹³ UNDP, *Governance for sustainable human development: A UNDP policy document* (1997)

<<http://mirror.undp.org/magnet/policy/>> at 12 November 2012 chp 1.

necessary conditions for good governance are inclusiveness, accountability, participation, transparency, predictability and responsiveness.¹⁴

However, although the theory of good governance encompasses this broad range of indicators, its application has tended only to emphasise efficiency and financial sustainability. This narrower approach reflects the historical context in which good governance emerged and the prevailing economic ideology of the time, which was (and remains) neoliberalism.

2.1.1 Historical background to good governance

Good governance emerged out of an approach to development that began in the 1980s known as the 'Washington Consensus.' Williamson initially coined this term in 1989 to describe a set of policy reforms that were being applied to Latin America.¹⁵ These included policies of fiscal discipline (or 'austerity'), liberalisation, privatisation, and deregulation, which were considered by 'Washington'¹⁶ to be key to economic growth.¹⁷ As these same policies were applied more broadly to other developing countries, so too was the term Washington Consensus,¹⁸ although the term *neoliberalism* has superseded it in more recent literature.¹⁹ This economic approach is based on the core belief that greater exposure of countries to market forces will result in prosperity through a process of economic liberalisation.²⁰

¹⁴ Peter Rogers and Alan W. Hall, 'Effective Water Governance' (GWP Technical Committee Background Papers No. 7, Global Water Partnership, 2003) 9.

¹⁵ John Williamson, 'What Washington means by policy reform' in John Williamson (ed), *Latin American adjustment: how much has happened?* (1990).

¹⁶ By which he meant 'Congress and senior members of the administration and the technocratic Washington of the international financial institutions, the economic agencies of the U.S. government, the Federal Reserve Board, and the think tanks': *ibid* 1.

¹⁷ *Ibid*.

¹⁸ John Williamson, 'A short history of the Washington Consensus' (Paper presented at the *From the Washington Consensus towards a new Global Governance*, Barcelona, 24-25 September 2004).

¹⁹ See, eg, *ibid*; Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (2005); *ibid*; Joseph Stiglitz, *Globalization and its Discontents* (2002); Patrick Bond, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2nd ed, 2000).

²⁰ Jagdish Bhagwati, *In Defence of Globalization* (2004) 66-67; Thomas Friedman, *The Lexus and the Olive Tree* (2000) 210, 442-444; Kenichi Ohmae, *The Borderless World: power and strategy in the*

The principles of neoliberalism informed the structural adjustment programs prescribed to developing countries by the World Bank and the International Monetary Fund ('IMF') in the 1980s and 1990s²¹ (and many of the conditions that these institutions continue to attach to their loans and development assistance programs).²² However, many recipient countries (particularly those in sub-Saharan Africa) experienced a period of decelerated economic growth during this period,²³ instead of the prosperity that had been predicted.²⁴ In response, the World Bank began to look for reasons to explain why their predictions for growth had been incorrect and why some countries, in particular, had experienced such negative results from the prescribed structural adjustment programs.²⁵ This review led the World Bank to the conclusion that the *quality of the domestic governance environment* is an essential precondition for effective economic development and aid effectiveness.²⁶ In response, the Bank began promoting 'good governance' as a central part of its mandate, particularly in the areas of 'public sector management, accountability, the legal framework for development, and information and transparency.'²⁷

interlinked economy (1999) 11; *ibid* 187.

²¹ World Bank, *Assessing aid: what works, what doesn't and why* (1998).

²² See, eg, Jomo Kwame Sundaram, Oliver Schwank and Rudiger von Arnim, 'Globalization and development in sub-Saharan Africa' (DESA Working Paper No. 102, UNDESA, 2011), 3; Hetty Kovach and Yasmina Lansman, *World Bank and IMF conditionality: a development injustice* (European Network on Debt and Development (Eurodad), 2006); Anup Shah, *Structural adjustment: a major cause of poverty* (2010) <<http://www.globalissues.org/article/3/structural-adjustment-a-major-cause-of-poverty>> at 24 June 2011.

²³ For a detailed analysis of how and why this occurred see Sundaram et al, above n 22. See also Alfredo Saad-Filho, 'The Political Economy of Neoliberalism in Latin America' in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (2005) 227; Patrick Bond, 'Neoliberalism in Sub-Saharan Africa: From Structural Adjustment to NEPAD' in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (2005) 232; Stiglitz, above n 19.

²⁴ See, eg, Sundaram et al, above n 22.

²⁵ World Bank, above n 12.

²⁶ World Bank, *Governance and development* (1992) 3. For a critical analysis of the World Bank's adoption of the good governance agenda, see also Bidyut Chakrabarty and Mohit Bhattacharya, 'Introduction' in Bidyut Chakrabarty and Mohit Bhattacharya (eds), *Governance discourse: a reader* (2008) 1.

²⁷ World Bank, above n 12, 2.

The World Bank's new focus on improving the quality of governance in recipient countries spread quickly, with many development organisations adopting their own approaches to good governance. These approaches had their roots in each organisation's historical approach to development, which perhaps explains the lack of a single agreed-upon definition of the term 'good governance.'²⁸ Nonetheless, the underlying motivation for good governance from the perspective of the World Bank and many other major donors remained grounded in ensuring the success of neoliberal economic reforms. Therefore, while non-economic issues were included in the theory of good governance, the emphasis and key criteria for success focused on financial sustainability and efficiency, and other considerations were primarily valued where they could be shown to contribute towards these fundamental goals.²⁹

2.1.2 The role of participation in good governance

The Organisation for Economic Co-operation and Development's ('OECD') 1995 definition of good governance includes issues of democratisation and participatory development.³⁰ It argues that 'there is a vital connection between open, democratic and accountable systems of governance and respect for human rights, and the ability to achieve sustained economic and social development.'³¹ The OECD points out that many features of good governance, such as accountability and transparency, can only be assured through citizen participation and that respect for human rights is crucial to enabling and encouraging such participation.³²

In its early work on good governance the World Bank indicated that it viewed political issues, such as democratisation, as 'beyond its mandate,'³³ although the issue of participation began to emerge as a key element of the Bank's approach to good

²⁸ Aubut, above n 11.

²⁹ See Chakrabarty and Bhattacharya, above n 26, 2.

³⁰ OECD, 'Participatory development and good governance' (Development Co-operation Guidelines Series, 1995)

³¹ Ibid 5.

³² Ibid 6.

³³ World Bank, above n 12, 8.

governance. This broadened focus was codified with the adoption of the 1994 Participation Policy under the direction of its then new president, James Wolfensohn.³⁴

The new emphasis on participation within the movement for good governance resulted in some tangible results. One of these was the increase in the decentralisation of service delivery, planning, and the implementation of development programs, including water services, in order to make them more responsive to local communities.³⁵ As part of this trend, many countries, including India, Philippines and Brazil, began to bolster local governance institutions, bringing governance processes closer to the community and devolving some power to lower tiers of government.³⁶

Another valuable outcome that emerged from the World Bank's new focus on participation was its insistence on the inclusion of community involvement in the Poverty Reduction Strategy Paper planning process.³⁷ While much of the participation that subsequently took place was fairly superficial and mechanically applied, it did result in the widespread expansion and capacity development of many civil society networks in participating countries, which enhanced their engagement with governments on other issues in subsequent years.³⁸

³⁴ See Maria Aycrigg, 'Participation and the World Bank: success, constraints, and responses' (Paper presented at the *International Conference on Upscaling and Mainstreaming Participation: of Primary Stakeholders: Lessons Learned and Ways Forward*, Washington DC, November 1998) 1; Balakrishnan Rajagopal, *International Law from Below: Development Social Movements and Third World Resistance* (2003) 149; Rajesh Tandon, 'Participation, citizenship and democracy: reflections on 25 years' of PRIA' (2008) 43(3) *Community Development Journal* (Oxford University Press) 284, 289.

³⁵ World Bank, *Water sector resources strategy: Strategic directions for World Bank engagement* (World Bank, 2004); Jona Razzaque, 'Public participation in water governance' in Joseph W. Dellapenna and Joyeeta Gupta (eds), *The evolution of the law and politics of water* (2009) 355. See also Tandon, above n 34, 290; Mary Galvin and Adam Habib, 'The Politics of Decentralisation and Donor Funding in South Africa's Rural Water Sector' (2003) 29(4) *Journal of Southern African Studies* 865 865-866; World Bank Independent Evaluation Group (IEG), *Decentralization in client countries: an evaluation of World Bank support 1990-2007* (World Bank, 2008)

³⁶ Tandon, above n 34, 290.

³⁷ Diane M Guthrie, 'Strengthening the principle of participation in practice for the achievement of the Millennium Development Goals' in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 163, 175.

³⁸ Ibid 176.

Additionally, since 1999 the World Bank has imposed a range of consultation, disclosure and accountability requirements prior to the approval of large-scale infrastructure projects.³⁹ These conditions have also required that an effective enforcement mechanism through the Inspection Panel of the World Bank, established in 1993, be available to affected parties to seek a remedy if adversely affected by the Bank's failure to follow its operational policies and procedures.⁴⁰

However, despite this growing recognition of the importance of participation, the World Bank's approach to the concept of good governance remained grounded in its concurrent commitment to neoliberal economics and its focus on increasing efficiency, financial sustainability, and on the general rollback of the State in areas such as service delivery.⁴¹ As will be discussed below, this has ultimately constrained the capacity of good governance reforms to increase participation in water governance.⁴²

2.1.3 Good governance and water reform

As good governance theory came to inform the practice of development, it also came to influence the reform of water supply and sanitation ('WSS') systems across the Global South.⁴³ Programs designed to address the problems facing the WSS sector emerged in

³⁹ See World Bank, *The World Bank operational manual - operational policies - environmental assessment OP 4.01* (1999). These policies have also been reviewed and updated over the years. See, for example, *IFC policy and performance standards on social and environmental sustainability and policy on disclosure of information - review and update - "Progress report on phase I of consultation"* (International Finance Corporation (IFC), 2010).

⁴⁰ See World Bank (2011) *The Inspection Panel*, accessed at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html> on 5 October 2011; Dana L. Clark, *A citizen's guide to the World Bank Inspection Panel* (2nd ed, 1999).

⁴¹ See Chakrabarty and Bhattacharya, above n 26, 2.

⁴² See Section 3.4.2 and Chapter 5 below.

⁴³ See, eg, M P Mosley, Wouter Lincklaen Arriens and Ellen Pascua, *Water sector reforms: tracking progress in Asia and the Pacific* (ADB, 2004); Eric Gutierrez et al, *New Rules, New Roles: Does PSP Benefit the Poor? - Synthesis Report* (in *New Rules, New Roles: Does PSP Benefit the Poor?*, WaterAid, Tearfund, 2003); Selim Jahan and Robert McCleery, *Making Infrastructure Work for the Poor - Synthesis Report of Four Country Studies (Bangladesh, Senegal, Thailand and Zambia)* (United Nations Development Programme (UNDP), 2005).

the mid-1990s in response to the need for additional finances and increased efficiency.⁴⁴ Attempts were also made to help water governance become more transparent, accountable, and open to community participation, by improving the capacity of the regulator or, more commonly, establishing regulatory independence.⁴⁵ This involves separating the regulatory function from the utility in charge of running the system.⁴⁶ The degree to which such independence or autonomy can be secured is a debated issue,⁴⁷ but Maggetti et al have found that both *de jure* and *de facto* independence can be secured in practice, where regulatory capture is avoided.⁴⁸

Nonetheless, the primary focus of policy prescriptions for water reform has been on *liberalisation* – the removal of government controls (through corporatisation or private sector participation – ‘PSP’) – with the assumption that this will automatically increase investment, financial sustainability, and efficiency, and that transparency, accountability, and participation will then naturally follow.⁴⁹ Proponents of this approach have argued, quite legitimately, that public water authorities have had decades to prove themselves capable of managing WSS systems, and have, by and large, failed.⁵⁰

2.2 Financing water reform and access

Financial sustainability has been a central focus of good governance reform partly because many of the public water systems of the Global South are in a state of financial crisis. Budgets are often sufficient to cover the day-to-day operational expenses, but fail to take into account the constant need for maintenance and development.⁵¹ This means

⁴⁴ Ibid.

⁴⁵ See, eg, Sophie Trémolet and Catherine Hunt, ‘Taking Account of the Poor in Water Sector Regulation’ (Water Supply and Sanitation Working Notes, Note No 11, World Bank, 2006).

⁴⁶ Martino Maggetti, Karin Ingold, Frédéric Varone, ‘Having Your Cake and Eating It, Too: Can Regulatory Agencies Be Both Independent and Accountable?’ in *Swiss Political Science Review* (2013) Vol 19(1), 1, 1.

⁴⁷ Warrick Smith, *Utility Regulators: The Independence Debate* (World Bank, 1997).

⁴⁸ Maggetti et al, above n 46, 15-17.

⁴⁹ UNDP, above n 1, 88-93, 173; World Bank, above n 10.

⁵⁰ See, eg, Winpenny, above n 5, 7.

⁵¹ Rachel Cardone and Catarine Fonseca, *Financing and Cost Recovery* (International Water and Sanitation Centre, 2003), 16-19.

that as the system ages, water utilities are unable to afford to pay for necessary repairs and the system becomes more and more inefficient.⁵² This can become a vicious cycle, as running costs start to increase when pipes leak and increasing quantities of water is lost.⁵³ A system that cannot afford maintenance also cannot afford to extend its infrastructure, leaving large sections of the population unserved by the network.⁵⁴ As will be discussed in Chapter 5, this steady decline of the WSS system due to inadequate cost recovery is what happened in Manila and was a key reason for its privatisation in 1997.

In 2009 the UN estimated the annual gap between the financing needs and projected revenues for WSS services to be around US\$115.2 billion worldwide.⁵⁵ Of this about 50 percent was required for the Global South.⁵⁶ These additional funds have to come from one of three main sources: public expenditure (raised through taxation); tariffs; and external investment (either from the private sector or overseas development aid – ‘ODA’).⁵⁷

2.2.1 Public expenditure

Governments frequently under-fund their public water systems, partly because water tends to be the responsibility of local municipalities, and partly because the long-term nature of water investments can make them invisible in electoral terms and politically unattractive.⁵⁸ Another significant factor is that the majority of people who are not being adequately serviced by the water network are poor and lack political power, and so governments have little incentive to prioritise their needs.⁵⁹ Instead, they tend to focus on keeping tariffs low for those already connected to the service – effectively

⁵² See, for example, the case of Manila outlined in Chapter 4 below.

⁵³ Ibid.

⁵⁴ Winpenny, above n 5, 9; Cardone and Fonseca, above n 51, 21.

⁵⁵ UNESCO and WWAP (eds), *The United Nations World Water Development Report 3: Water in a Changing World* (2009), 59, Table 4.3. These figures were not updated in the 2012 World Water Development Report.

⁵⁶ Ibid.

⁵⁷ See Cardone and Fonseca, above n 51, 15, 18, 46-60.

⁵⁸ Winpenny, above n 5, 9.

⁵⁹ Winpenny, above n 5.

providing large public subsidies to the wealthy, while ignoring the needs of the poor who remain permanently shut out of the water system.⁶⁰

Many governments in the Global South also face budget constraints that prevent them from adequately funding their WSS systems. In some instances this is partly because they have selected to spend a disproportionate percentage of their budget on the military, as is the case in Ethiopia (which spends 10 times more on its military than it does on WSS) and Pakistan (which spends 47 times more).⁶¹ However, most of these governments, including the post-Apartheid government in South Africa (discussed in Chapter 6), have been advised by the International Financial Institutions (‘IFIs’) to limit the amount they spend on public services under policies of fiscal discipline (or austerity).⁶²

At the macroeconomic level, the logic behind these policies is that it is necessary to limit public spending and increase fiscal discipline in order to reduce public deficits.⁶³ In relation to the WSS sector, a similar logic applies, with the IFIs arguing that the financial crisis facing many WSS systems is compounded by financial mismanagement and a failure to consider the need for financial sustainability.⁶⁴ The World Bank describes these problems as ‘profound failures in water governance.’⁶⁵ The good governance policies are, thus, designed to both support and enforce financial sustainability by improving financial management and reducing reliance on public revenue.

A common reform designed to increase financial sustainability is the privatisation or corporatisation of WSS services. In this context, privatisation refers to the more intensive kinds of PSP, such as the full sale of WSS infrastructure (or *divestiture*) to the private sector (as took place in England and Wales in 1989)⁶⁶ and the leasing out of this

⁶⁰ UNDP, above n 1, 77-78.

⁶¹ UNDP, above n 1, 8-9.

⁶² See, eg, WaterAid, *International Financial Institutions (IFI), Conditionality and Privatisation of Water and Sanitation Systems* (WaterAid, 2003) 2-3. See also (more generally) Stiglitz, above n 19, 53-78.

⁶³ See, eg, Stiglitz, above n 19, 53-78.

⁶⁴ See, eg, World Bank, *Guide to Ring-Fencing of Local Government-Run Water Utilities* (Water and Sanitation Programme (WSP), 2010) 1-2.

⁶⁵ World Bank, above n 10.

⁶⁶ Caroline van den Berg, *Water Privatization and Regulation in England and Wales* (in *Public Policy for*

infrastructure in the form of a long-term concession (as took place in Manila in 1997).⁶⁷ The IFIs have recommended privatisation as a solution to problems of financial sustainability, because it is expected to deliver investment,⁶⁸ to result in increases in efficiency,⁶⁹ and to shift much of the financial risk of the system on to the private sector.⁷⁰ However, as will be discussed in Chapters 5 and 7, in relation to the Manila case study, these outcomes have not always been demonstrated in practice.

Corporatisation involves ‘ring-fencing’ the budgets of water utilities, meaning that they are separated from that of other government departments and cannot be subsidised from other budgets or have their profits diverted for other purposes.⁷¹ The World Bank recommends that municipalities ring-fence their water operations because it ‘leads to more accurate information that can be used for making decisions about resource allocation, management and operational changes and improvements, and tariffs.’⁷² The general idea is that ring-fencing will lead to the ability to collect more accurate data about the performance of the water utility, and the true costs of operations and maintenance, in order to enable municipalities to increase efficiency, and to set tariffs at a level that will enable the system to be financially sustainable.⁷³ As will be discussed in Chapter 6, corporatisation was adopted by the City of Johannesburg to tackle the financial crisis facing its WSS system in early 2000.⁷⁴ The City also took out a five-year

the Private Sector, Note No. 115, World Bank Group, 1997).

⁶⁷ See Chapter 5 below. See also Mark Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000).

⁶⁸ See Section 2.2.3 below.

⁶⁹ See Section 2.3 below.

⁷⁰ World Bank, *Approaches to Private Participation in Water Services: A Toolkit* (2006), particularly 5-6, 10-12, 97-123.

⁷¹ World Bank, above n 64, 1.

⁷² Ibid.

⁷³ See World Bank, *Guide to Ring-Fencing of Local Government-Run Water Utilities* (Water and Sanitation Programme (WSP), 2010) 1-2.

⁷⁴ See Laila Smith, *Neither Public nor Private: Unpacking the Johannesburg Water Corporatisation Model* (in Programme Paper Number 27, United Nations Research Institute for Social Development Social Policy and Development, 2006).

private management contract and introduced significant reforms in data and tariff collection, and efficiency of operations.⁷⁵

The downside of corporatisation and the ring-fencing of WSS systems is that it can serve to mask the inherently interconnected nature of public service provision. This fragmented approach to budgeting creates the potential for irrational externalities, particularly in relation to health care.⁷⁶ For example, while increasing tariffs can lead to savings in the provision of WSS services, it can potentially create far more significant public health expenses, by, for example, leading to outbreaks of cholera.⁷⁷ When poor people cannot afford to purchase treated water they turn to untreated natural sources instead, and this can lead to disease outbreaks.⁷⁸ The South African Department of Health highlighted this problem in 1999:

It is common knowledge that lack of water and sanitation is a common cause of cholera, diarrhoea or other illnesses that afflict so many in our country and that there is a relationship between various communicable diseases, including TB, and conditions of squalor. Yet we often have not structured our institutions and service delivery systems in ways that can easily respond to these realities.⁷⁹

Despite these calls for a more holistic approach to service budgets, public funding remains low for all of the reasons discussed above. This has meant that, under the good governance approach, tariffs and external investment have become the focus for securing the additional funds necessary to maintain and expand the WSS systems of the Global South.⁸⁰

⁷⁵ See Ibid; Carina van Rooyen et al, *The Water Dialogues: Johannesburg Case Study* (The Water Dialogues South Africa, 2009) 80.

⁷⁶ See Patrick Bond and Jackie Dugard, 'Water, human rights and social conflict: South African experiences' (2008) 10(1) *Law, Social Justice and Global Development* 7-8.

⁷⁷ See, eg, David Hemson et al, 'Still paying the price: Revisiting the cholera epidemic of 2000 – 2001 in South Africa' (Municipal Services Project, 2006); Hameda Deedat and Eddie Cottle, 'Cost Recovery and Prepaid Water Meters and the Cholera Outbreak in KwaZulu-Natal: A case study in Madlebe' in David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002).

⁷⁸ See, eg, Ibid.

⁷⁹ Department of Health, 'Health Sector Strategic Framework, 1999-2004 (South Africa, 1999), cited in Bond and Dugard, above n 76, 7.

⁸⁰ Cardone and Fonseca, above n 51, 22.

2.2.2 User tariffs

User tariffs are the most direct source of funding for WSS services, but they have also proven to be the most controversial.⁸¹ Tariffs have historically been subsidised worldwide and, as a result, consumers that have been fortunate enough to be connected to the system have come to expect low fees for publicly provided water, and to exert political pressure for these low fees to be maintained.⁸²

The problem with low prices is that they signal to consumers that water is a low value commodity and those with the means to do so often waste it as a result.⁸³ (A very similar dynamic of public subsidies and underpriced water exists in relation to water for industry and irrigated agriculture, and the effect has also been to encourage wasteful behaviour.⁸⁴) Another problem is that low prices (coupled with inadequate public finance) do not leave enough funds for upgrading and expanding public infrastructure in order to assist the poor to gain access to clean affordable water.⁸⁵

On the other hand, water has been historically subsidised because of its social value in maintaining public health.⁸⁶ As mentioned above, without measures to ensure affordability for the poor, there is a risk that increasing tariffs will have costly results for public health, by reducing their capacity to afford adequate access to water services.

(a) Cost recovery

The process of collecting user tariffs for water and sanitation services is often referred to as 'cost recovery.' In essence, cost recovery involves the recovery of all or some of

⁸¹ UNESCO and WWAP, above n 55, 61.

⁸² See, eg, UNESCO and WWAP, above n 55; Moore and Urquhard, above n 8, 20. But see James Winpenny, 'Chapter 12: Investment and financing in water for a more sustainable future' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 4* (2012) 309, 318, who believes that it is actually politicians who are more unwilling to raise tariffs, than consumers being unwilling to pay.

⁸³ Ibid.

⁸⁴ Jane Barr et al, 'Chapter Seven: Regional challenges, global impacts' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk* (2012) 174, 220.

⁸⁵ World Bank, *Rural Water Supply and Sanitation* (2002)

<<http://www.worldbank.org/watsan/rural.html#pubs>> at 14 November 2004.

⁸⁶ UNDP, above n 1, 29-31.

the costs associated with running and maintaining a WSS system.⁸⁷ According to Cardone and Fonseca, this can include:

- ‘Financial costs (operating costs, capital costs, cost of servicing capital);
- ‘Economic costs/benefits (lost value of water for other uses, gains from productive use, pollution created or alleviated ...); and
- ‘Support costs (institution building, ... information systems, monitoring and assessment, regulation, planning and strategy development).’⁸⁸

In part because of their ideological commitment to fiscal discipline, the IFIs and the World Water Council (‘WWC’) argue that since the necessary funds to maintain a fully functioning WSS system will never be available from government or donor funds, full cost recovery from water users is often the only way of guaranteeing financial sustainability.⁸⁹ For this reason, the IFIs often make increased cost recovery a condition of project loans for countries seeking to improve their WSS systems.⁹⁰ In a sample review of 14 programs in the Global South ‘[t]he IFIs have demanded that public WSS utilities [in 7 of these countries] start charging higher prices for WSS services to cover a larger proportion of costs, ideally achieving *full cost-recovery* (including operation and maintenance costs, asset depreciation and debt service).’⁹¹

This focus on full cost recovery involves removing all public funding from WSS utilities and leaving user-fees (or tariffs) to cover the total cost of running system. This makes sense from a financial sustainability perspective, since it results in a system that is entirely self-sustaining. However, the impact on the poor is less straightforward, because it has the capacity to both expand physical access to water and to create economic barriers to access for the poor.

⁸⁷ For a technical discussion of cost recovery, see Cardone and Fonseca, above n 51.

⁸⁸ Cardone and Fonseca, above n 51, 15.

⁸⁹ World Bank, *Water supply & sanitation: Pricing and subsidies* (2009)

<<http://go.worldbank.org/SJBI3DFZW0>> at 1 May 2009; Vivien Foster and Tito Yepes, *Is cost recovery a feasible objective for water and electricity? The Latin American experience* (in World Bank Policy Research Working Paper, World Bank, 2006); Kristin Komives et al, *Water, electricity, and the poor - Who benefits from utility subsidies?* (World Bank, 2005); Winpenny, above n 5, 18.

⁹⁰ WaterAid, above n 62, 12.

⁹¹ WaterAid, *International Financial Institutions (IFI), Conditionality and Privatisation of Water and Sanitation Systems* (WaterAid, 2003).

(b) The merit and impact of subsidies

If a policy of full cost recovery is not adopted, then by definition water and sanitation services are being subsidised. However, the question of whether and when it is appropriate for the government to subsidise tariffs is a controversial one, not least because the merit and impact of subsidies is a complex issue. Historically, tariffs have supported low-cost access only for those who have been fortunate enough to be connected to the water system.⁹² Since poor consumers are frequently either not connected to the system or live on the periphery where service is most likely to be interrupted due to poor maintenance,⁹³ the money spent on subsidies would often be of greater benefit to the poor if it were spent on expanding access to the system or on maintenance so that peripheral areas could receive higher levels of service.⁹⁴

UNDP points to the examples of Bangalore, India, and Kathmandu, Nepal, which both apply a rising block tariff structure, in cities where many poor households are not connected to the formal system: 'In Bangalore the wealthiest 20% of households receives 30% of the water subsidy and the poorest 20% receives 10.5%. In Kathmandu the average nonpoor household receives 44% more subsidy than the average poor household.'⁹⁵ In these contexts, subsidies operate against the interests of the poor because the combination of unsustainably low levels of cost recovery and insufficient public funding prevents public water utilities from expanding and improving access.⁹⁶

Under these conditions, the capacity of poor people to physically access water services is compromised by pressure from the middle and upper classes to pay lower tariffs. This is part of the reason that the WWC and many donors, including the World Bank, recommend that governments move towards a policy of full cost recovery in order to fund maintenance and expansion for unconnected households.⁹⁷

⁹² Ibid.

⁹³ See, eg, UNDP, above n 1, 99; William J. Cosgrove and Frank R. Rijsberman, *World Water Vision* (World Water Council, 2000), 2.

⁹⁴ Winpenny, above n 5, 6-7; Arthur McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003), 73-87.

⁹⁵ UNDP, above n 1, 99.

⁹⁶ Winpenny, above n 5, 6-7; McIntosh, above n 94, 73-87.

⁹⁷ See Moore and Urquhard, above n 8, 20-21; WaterAid, above n 62, 10-13; Cosgrove and Rijsberman, above n 93.

The WWC also points out that full cost recovery does not preclude governments from providing ‘targeted, transparent subsidies to low-income communities and individuals to allow them to pay to meet their minimum requirements and to encourage user participation in decision-making.’⁹⁸ The World Bank, however, often discourages the use of even targeted subsidies, arguing that it is those who are yet to be connected to the system that most need government assistance.⁹⁹

The World Bank also argues that most poor households already spend a considerable proportion of their income on obtaining water either through (expensive) small-scale water providers (‘SSWPs’) or through the income lost while collecting water from distant sources.¹⁰⁰ Therefore, it hypothesises that the poor would be willing to pay full price for reliable supplies from the public system, and this hypothesis is often substantiated by surveys of poor communities themselves.¹⁰¹ The WWC supports this argument, pointing out that even significantly increased public tariffs tend to be substantially lower than the rates that the poor are forced to pay for water from SSWPs.¹⁰²

However, those critical of this approach, argue that there is a difference between *willingness* and *capacity* to pay.¹⁰³ While increasing tariffs might lead to increased connections and thus enable the poor to connect to the system, it might also compromise their capacity to *maintain* this access to water, or force them to sacrifice other important needs such as food or health care in order to afford to pay for water.¹⁰⁴

Another issue is that poor communities are often prevented from accessing water from the formal network due to high connection fees, and full cost recovery programs can

⁹⁸ Cosgrove and Rijsberman, above n 93, 2.

⁹⁹ World Bank, above n 89; Komives et al, above n 89, 6-7.

¹⁰⁰ See, Cardone and Fonseca, above n 51, 11; Komives et al, above n 89, 37-40; Vivien Foster, Andres Gomez-Lobo and Jonathan Halpern, *Designing direct subsidies for the poor - A water and sanitation case study* (World Bank, 2000).

¹⁰¹ See, Cardone and Fonseca, above n 51, 11; Komives et al, above n 89, above, 37-40; *ibid*.

¹⁰² See, for example, Moore and Urquhard, above n 8, 21; McIntosh, above n 94.

¹⁰³ UNDP, above n 1, 77-78.

¹⁰⁴ *Report of the United National High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC sess, UN Doc A/HRC/6/3 (2007) para.28.

serve to increase these fees, thus creating a financial barrier to connection.¹⁰⁵ One method of responding to this problem is for governments to support connection subsidies for poor households.¹⁰⁶ Despite its general opposition to subsidies, the World Bank does promote programs that are designed to subsidise connections for poor households.¹⁰⁷ Once higher numbers of poor households are connected to the system, there is less justification for opposing the use of subsidies to ensure that tariffs remain affordable for poor households.¹⁰⁸ However, targeting the poor is more difficult than it might first appear.¹⁰⁹

There are three main options available for subsidising tariffs for the poor: targeted subsidies, lifeline tariffs, and rising block tariffs.¹¹⁰ A successful example of targeted subsidies has been applied in Chile.¹¹¹ Subsidies are provided on a sliding scale for eligible low-income households and administered through the national and municipal budgets.¹¹² The system in Chile has been shown to work well at avoiding middle and upper class welfare, but it does require individual household connections and a well-established social welfare system to identify and properly target low-income households.¹¹³

Lifeline tariffs require less sophisticated bureaucracy as they can involve the provision of a certain minimum quantity of water to all households for free or at a low price.¹¹⁴ Lifeline tariffs can also be used in conjunction with a rising block tariff scheme, under which '[t]he rate per unit of water increases as the volume of consumption increases.'¹¹⁵

¹⁰⁵ See, eg, McIntosh, above n 94.

¹⁰⁶ See, eg, UNDP, above n 1, 97; Cardone and Fonseca, above n 51, 32 ('In general, subsidies should be allocated to promote access for the poor, rather than ongoing subsidies for consumption, which tend to have high administrative costs and tend to not reach the poorest of the poor.')

¹⁰⁷ See, eg, Komives et al, above n 89, 37-40; and Foster, Gomez-Lobo and Halpern, *Designing direct subsidies for the poor - A water and sanitation case study* (World Bank, 2000).

¹⁰⁸ UNDP, above n 1, 98.

¹⁰⁹ See, eg, Cardone and Fonseca, above n 51, 51, 53-54.

¹¹⁰ Cardone and Fonseca, above n 51, 49-51, 53-54.

¹¹¹ UNDP, above n 1, 98.

¹¹² UNDP, above n 1; Cardone and Fonseca, above n 51, 54.

¹¹³ Ibid.

¹¹⁴ UNDP, above n 1, 98; Cardone and Fonseca, above n 51, 51.

¹¹⁵ Cardone and Fonseca, above n 51, 49.

Both approaches can result in households with high water usage (somewhere above 200 or 300 litres per person per day) cross-subsidising the costs of households with low water usage, which should theoretically benefit the poor (who tend to use less water).¹¹⁶ Both systems, however, require individual household connections and metering in order to effectively target poor households.¹¹⁷ It is very common for poor households to share connection points either because they cannot afford individual connections or the water provider has not made one available.¹¹⁸ In such situations, the poorest households can end up paying higher rates than middle class households under either lifeline or rising block tariff systems.¹¹⁹ The discriminatory impact of this outcome will be discussed further in Chapters 5 and 7 in relation to the Manila case study (where communities living in informal settlements have been forced to share a connection and pay the highest block tariff rate as a result).

In response to the complexity of ensuring both physical and economic accessibility through cost recovery policies, the United Nations World Water Assessment Programme (WWAP) recommends that governments strive for *sustainable cost recovery* rather than *full cost recovery*.¹²⁰ According to WWAP, ‘the challenge for policy-makers is to make decisions about the acceptable trade-offs among different objectives and about who bears the costs.’¹²¹ One of these objectives is affordability and WWAP suggests that this should be generally taken to mean that water should be priced below 3 percent of net household income (or 5 percent in some cases).¹²² In its most recent 2012 report, WWAP also recommends:

When attempting to make choices about how to place value on water resources in particular regions ..., it may be useful to couch decision-making within the rights-based approach that the UN has adopted. Despite varying trends on how to treat water resources in different regions, the rights-based approach can provide a baseline where

¹¹⁶ See, eg, UNDP, above n 1, 98; Cardone and Fonseca, above n 51, 51.

¹¹⁷ UNDP, above n 1, 98.

¹¹⁸ Ibid.

¹¹⁹ UNDP, above n 1.

¹²⁰ UNESCO and WWAP, above n 55, 66.

¹²¹ UNESCO and WWAP, above n 55.

¹²² Ibid.

the protection of water rights, particularly of the most vulnerable, underpins other enterprises, legislation and policies governing transactions.¹²³

This argument regarding the value of using the recognition of the right to water to frame a new approach to the water crisis (including the issue of cost recovery) is examined in more detail in Chapter 3.

Achieving the balance between financial sustainability and affordability is challenging, and even more so when public investment is limited by the austerity policies that often accompany good governance reform. This challenge is compounded further by the need for WSS systems to generate a profit after the introduction of PSP. Nonetheless, as will be discussed in Section 2.2.3, the IFIs continue to impose PSP as a condition on many governments of the Global South due to the belief that it will contribute to financial sustainability.

2.2.3 External investment

External finance is the third source of funding available for the WSS sector. This category of finance includes both private investment and ODA. In the late 1990s and in the early 2000s, in line with the market-focus of the good governance approach, there were ‘great hopes [...] for major investments by the international private sector.’¹²⁴ The WWC proposed that ‘[p]rivate actors can ... provide the main source of infrastructure investment.’¹²⁵ On the strength of these hopes the IFIs pressured many governments in the Global South to open up their WSS markets to private water corporations.¹²⁶

(a) PSP and conditionality

The most significant mechanism used by the IFIs to impose PSP on governments of the Global South has been loan conditionalities. These conditionalities are mostly administered through the International Bank for Reconstruction and Development

¹²³ Winpenny, above n 82, 220.

¹²⁴ Cosgrove and Rijsberman, above n 93, 61.

¹²⁵ Cosgrove and Rijsberman, *World Water Vision* (World Water Council, 2000) 64.

¹²⁶ Bethan Emmett, *In the Public Interest - Health, Education, and Water and Sanitation for All* (Oxfam and WaterAid, 2006), 9; Maude Barlow and Tony Clarke, *Blue Gold: The Battle Against the Corporate Theft of the World's Water* (2002) 156-161; Kate Bayliss, *Privatisation and Poverty: The Distributional Impact of Utility Privatisation* (Paper No. 16, Centre on Regulation and Competition, 2002) 3.

(‘IBRD’), a division of the World Bank that provides low interest loans to governments for developmental purposes. For example, in 1999 the IBRD provided a US\$117 million loan to Mozambique to finance infrastructure development.¹²⁷ The condition attached to this loan, and the extension of the country’s debt relief package, was that Mozambique open up its WSS system to PSP.¹²⁸ The same kinds of conditions were also imposed on Burkina Faso, Ghana, and Nigeria.¹²⁹ The IMF has also imposed similar loan conditions on countries in the Global South. For example, ‘a random review of IMF loan documents involving 40 countries revealed that the IMF imposed conditions requiring water privatisation or cost recovery on 12 countries in the year 2000.’¹³⁰

This trend has continued across public service provision more broadly (including health, education, water and sanitation).¹³¹ For example, ‘[a] 2006 study of 20 countries receiving World Bank and IMF loans found that privatisation was a condition in 18 of them...’¹³² Wood also reports that ‘[a] 2006 study of debt cancellation found that reforms requiring some form of privatisation were a pre-condition for debt relief in over half the [qualifying] countries...’¹³³ This issue is also not limited to the Global South. In the wake of the EU financial crisis, the European Commission and the IMF have been imposing PSP as a condition of the bailouts being provided to countries such as Greece and Portugal.¹³⁴ These conditions have been imposed despite strong public opposition in many countries.¹³⁵

¹²⁷ Barlow and Clarke, above n 126, 161.

¹²⁸ Ibid.

¹²⁹ WaterAid, above n 62, 6.

¹³⁰ Barlow and Clarke, above n 126, 163.

¹³¹ See, eg, Emmett, above n 126.

¹³² Emmett, above n 126, 9.

¹³³ Angela Wood, *Tightening the chains or cutting the strings. The status of HIPC conditionality in 2006* (Jubilee Debt Campaign, 2006) 17.

¹³⁴ See *EU Commission forces crisis-hit countries to privatise water* (2012) Corporate Europe Observatory <<http://corporateeurope.org/pressreleases/2012/eu-commission-forces-crisis-hit-countries-privatise-water>> at 21 November 2012; Água é de todos (Portugal) et al, *Open letter to EU Commission on water privatisation* (2011) Corporate Europe Observatory <<http://corporateeurope.org/open-letter-eu-commission-water-privatisation>> at 21 November 2012.

¹³⁵ Wood, above n 133, 5.

Donors also wield considerable influence over the policies of governments in the Global South even when conditionalities are not imposed. As Oxfam points out, '[f]or some of the poorest countries, donor aid is equivalent to half the national budget. Advice from outside experts, funded by aid, is highly influential in determining the kinds of reforms a government adopts.'¹³⁶ While sometimes this advice involves explicit directions to privatise water systems, it can also influence policy in more subtle ways by prescribing reforms to the public sector that are more geared towards creating future potential for private sector investment than they are with ensuring the ongoing viability of the public operator.¹³⁷

(b) Corporate water lobby

It is not only donors that have been influential in promoting PSP as the solution to the investment deficit facing many WSS systems in the Global South. The corporate water lobby has also been influential in promoting private investment as a solution to the water crisis and, specifically, as the most efficient means of increasing access to water for the poor.¹³⁸ Suez and Veolia, two of the world's largest water corporations, have claimed special expertise in delivering universal access to water and explained that they see their role as implementers of the right to water.¹³⁹

However, as Russell argues,¹⁴⁰ although several corporations have adopted the language of rights, it is clear that they view water primarily as a business opportunity. Water has been described as the oil of the 21st Century, and glossy brochures highlighting profit potential have been produced to entice financial interest in this 'exciting investment opportunity.'¹⁴¹ ABN AMRO Private Banking Asia released one such brochure in July 2006. The brochure states, '[d]windling resources coupled with rising demand has made water a precious commodity. No other commodity is experiencing such a rise in

¹³⁶ Emmett, above n 126, 9.

¹³⁷ Moore and Urquhard, above n 8, 19; WaterAid, above n 62, 4, 9-10.

¹³⁸ See Anna Russell, 'Incorporating social rights in development: transnational corporations and the right to water' (2011) 7(1) *International Journal of Law in Context* 1.

¹³⁹ Ibid.

¹⁴⁰ Ibid 12-14.

¹⁴¹ See, for example, Fred Pearce, *When the rivers run dry: water - the defining crisis of the twenty-first century* (2006).

demand juxtaposed with declining supply.’¹⁴² ABN AMRO then reassures investors that, although water has traditionally been provided by the government, the private water market is opening up: ‘We see governments across the world increasingly privatising their water infrastructures, which has been a boon to industrial companies the like of Suez and Veolia Environment.’¹⁴³ Finally, ABN AMRO describes Asia as a ‘sweet spot’ for investors because companies will be subject to less pricing regulation and, therefore, able to make substantial profits.¹⁴⁴

This tension between providing investment to expand access and the corporate imperative to profit highlights the fact that relying on the private sector for external funding has potential repercussions. One such repercussion is the pressure that it places on water prices, while another is the pressure for water policies to reflect the interests of corporations rather than the public. Over the last 15 years, large water corporations have been active in lobbying to ensure that favourable policy decisions have been taken by both national governments and the IFIs.¹⁴⁵ At times they have also been able to take quite an active role in determining the actual content of this policy, both at a domestic and global level.¹⁴⁶ This has been achieved through their participation in organisations like the WWC¹⁴⁷ (which exists ‘to provide decision makers with advice and assistance on global water issues,’¹⁴⁸ and to organise the triennial World Water Forum),¹⁴⁹ and

¹⁴² Alex Kwan and Roger Groebil, *Water as an investment theme: It's scarce and ABN AMRO Private Banking Asia thinks water is a great investment* (ABN AMRO Private Banking Asia, 2006) 1.

¹⁴³ Ibid 2.

¹⁴⁴ Ibid 3.

¹⁴⁵ Barlow and Clarke, above n 126, 156-157.

¹⁴⁶ Barlow and Clarke, above n 126.

¹⁴⁷ Barlow and Clarke, *Blue Gold: The Battle Against the Corporate Theft of the World's Water* (2002) 158.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid; President of the 63rd Session UNGA, *Statement from The President of the 63rd Session - United Nations General Assembly - To the Fifth World Water Forum Delivered by Maude Barlow, Senior Advisor on Water to the President* (2009) (‘I am concerned that the World Water ... Forum’s orientation is profoundly influenced by private water companies. This is evident by the fact that both the president of the World Water Council and the alternate president are deeply involved with provision of private, for-profit, water services.’).

through a variety of lobby groups like International Private Water Association and the National Association of Water Companies.¹⁵⁰

(c) Adequacy of private investment

In recent years there has been a growing acceptance that the hopes of the late 1990s and early 2000s that private finance would bridge the WSS investment gap will not be realised. This is partly due to ongoing failings in water governance (such as inadequate human and institutional capacity, weak regulation, and corruption),¹⁵¹ but the most significant issue is the challenge of extracting sufficient profit from the population of the Global South. As WWAP stated in 2009:

The landscape for private water operators today is very different from that of a decade ago. Several major multinationals have withdrawn from international projects, leaving just two or three to pursue system concessions, build-operate-transfer and management contracts, especially in the Middle East, China and South-East and East Asia.¹⁵²

Despite making this observation, WWAP pointed out the large number of small and medium-sized private water companies investing in the water sector, and claimed, '[e]xternal private investment in the water sector is significant, of the same order as that of official development assistance.'¹⁵³ WWAP supports this claim by citing average financial inputs over a 19-year period from 1991 to 2009,¹⁵⁴ but a different picture emerges when more recent trends in financing are examined and when these figures are analysed from the perspective of the poorest regions of the Global South.

¹⁵⁰ Barlow and Clarke, above n 126, 159.

¹⁵¹ See, eg, Richard Connor, Patrik Kintenberg, Anthoney Turton and James Winpenny 'Chapter 5: Water management, institutions and capacity development,' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk* (2012) 142-143.

¹⁵² UNESCO and WWAP, above n 55, 62-63.

¹⁵³ UNESCO and WWAP (eds), *The United Nations World Water Development Report 3: Water in a Changing World* (2009), 63. In its Fourth World Water Development Report, WWAP appear to retreat from these claims by acknowledging that commercial finance has become more difficult to raise and has declined significantly since 2007: Winpenny, above n 5, 318. Instead they argue that PSP raises finance through efficiency dividends rather than through direct investment: 319. However, they did not provide any new data that would allow for the kind of comparison outlined below.

¹⁵⁴ *Ibid* 63.

Private investment in the WSS sector peaked at just under US\$10 billion in 1997, when several large concessions were taken up in East Asia (including the two concessions in Manila that will be discussed in Chapter 5).¹⁵⁵ Since then private investment has declined to a low of just under US\$2 billion in 2009; rising only slightly to US\$2.3 billion in 2010.¹⁵⁶ It is also worth noting that out of US\$62.5 billion contributed to the water sector by private investment from 1991 to 2010, only US\$266 million (or 0.004 percent) of that went to Sub-Saharan Africa and only US\$355 million (or 0.005 percent) went to South Asia.¹⁵⁷ In contrast, over that same period ODA to the WSS sector has been steadily rising from a low of US\$3.7 billion in 1991 to US\$8.6 billion in 2009.¹⁵⁸ Of this, Sub-Saharan Africa received 28 percent of total aid to the water sector.¹⁵⁹ So while it is true that private investment in the water sector remains significant (particularly for some regions), ODA is of far greater significance over-all and most particularly for the poorest regions of the Global South.

2.3 Increasing efficiency and access to water

In addition to financial sustainability, good governance reform has also focused on improving efficiency. The main benefit of this is that increased efficiency can reduce expenses and, thus, feed back into the financial sustainability of the system.¹⁶⁰ Increased efficiency can also help to address the issue of water scarcity, by reducing water wastage.

WSS systems have two main categories of overheads that can be reduced with gains in efficiency: the cost of staff and the cost of water, which may include the cost of necessary infrastructure (such as dams, pipelines, pumps, or desalination plants) and the environmental externalities associated with diverting surface water or extracting

¹⁵⁵ OECD, *Aid to Water and Sanitation* (2012)

<<http://www.oecd.org/dac/aidstatistics/aidtowaterandsanitation.htm>> at 3 April 2012,

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ UNESCO and WWAP, above n 55, 60.

groundwater resources.¹⁶¹ Efficiency can be also increased through capacity building - by improving the ability of staff to manage the water system more effectively.

2.3.1 Reducing overheads to increase efficiency

Staff costs represent a significant expense for water utilities, particularly for those in the Global South that have higher than necessary numbers of staff. Efficient water utilities operate well with between two and five staff per 1,000 connections.¹⁶² In contrast, many inefficient water utilities in the Global South operate with over 20 staff per 1,000 connections.¹⁶³ Good governance reform has focused on reducing staff-to-connections ratios, in order to reduce the overall cost of staff. However, this is not a straightforward issue, since it is also important that staff are paid competitive salaries or water utilities have trouble attracting and retaining sufficiently qualified staff.¹⁶⁴ This means that governance reform must carefully balance the goals of employment, efficient staff ratios, and market-appropriate wages.

The other major expense for water utilities is the cost of water. This is affected by two main factors. First, is the issue of non-revenue water ('NRW'), which is the 'difference between the amount of water put into the distribution system and the amount of water billed to consumers.'¹⁶⁵ Second, is the broader impact of high water consumption.

There are three main categories of NRW; real losses (where water is lost in transition through leaks); apparent losses (where illegal connections, faulty meters or ineffective billing systems prevent utilities from charging for water); and unbilled authorised

¹⁶¹ In cases where the bulk water provider is separated from the utility (such as in both Manila and Johannesburg, which will be discussed in detail in Chapters 5 and 6 below) the cost of water for the utility is the amount charged by the bulk water provider.

¹⁶² McIntosh, above n 94, 53, 99; Nicola Tynan and Bill Kingdom, *A water scorecard: setting performance targets for water utilities*, (2002) 2.

¹⁶³ Ibid.

¹⁶⁴ McIntosh, above n 94, 99.

¹⁶⁵ Bill Kingdom, Roland Liemberger and Philippe Marin, 'The Challenge of Reducing Non-Revenue Water (NRW) in Developing Countries: How the Private Sector Can Help: A Look at Performance-Based Service Contracting' (Water Supply and Sanitation Board Discussion Paper Series, Vol 8, World Bank, 2006) <<http://siteresources.worldbank.org/INTWSS/Resources/WSS8fin4.pdf>> at 26 September 2011, executive summary.

consumption.¹⁶⁶ NRW represents a huge drain on already strained water budgets. In 2006 Kingdom et al estimated the overall NRW levels in the Global South to be around 40-50 percent of the water produced,¹⁶⁷ causing a total annual cost to water utilities worldwide of around \$47 billion.¹⁶⁸ Reducing NRW is, thus, an important means of increasing the financial sustainability of the system and of reducing water wastage.

Reducing water wastage is particularly relevant in this age of water scarcity as it often means that not only is more water made available (for people and the environment), but that the water is less expensive. In many areas of the world the cheapest sources of water have already been exploited.¹⁶⁹ When water consumption is high, either due to high NRW or to other kinds of wastage, new sources of water have to be tapped and these water sources are likely to be more expensive due to their increased distance from the system, the need to drill deeper, or the need for additional treatment due to increased levels of contamination.¹⁷⁰ For this reason, reducing over-all water consumption through demand management techniques, such as the use of appropriate price signals for high-volume use and increased environmental regulation, can help to contain the price of water, making it more affordable for low-volume household consumers (in addition to resulting in environmental benefits).

While demand management can lead to greater equity for the poor, by reducing (or containing) the cost of water and increasing the financial sustainability of the utility, it can also have inequitable impacts if particular approaches are adopted.¹⁷¹ Prioritising

¹⁶⁶ See UNESCO and WWAP, above n 55, 249; McIntosh, above n 94, 59-65 ('NRW includes water not billed as a result of leakage, illegal use, inadequate measurement, and free (authorized) use.');

Francisco González-Gómez, Miguel A. García-Rubio and Jorge Guardiola, 'Why Is Non-revenue Water So High in So Many Cities?' (2011) 27(2) *International Journal of Water Resource Development* 345, 347.

¹⁶⁷ Kingdom, Liemberger and Marin, above n 165, 2. This report appears to be the most recent authoritative source of data on NRW in the global south. It is cited as a primary data source for more recent reports, including: Alan S. Wyatt, *Non-Revenue Water: Financial Model for Optimal Management in Developing Countries* (Research Triangle Institute Press, 2010); UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk* (2012) 557.

¹⁶⁸ Kingdom, Liemberger and Marin, above n 165, executive summary.

¹⁶⁹ UNESCO and WWAP, above n 55, 59.

¹⁷⁰ Ibid.

¹⁷¹ See, eg, see González-Gómez, García-Rubio and Guardiola, above n 166, 354 ('[T]here is a political cost associated with the control of unauthorized consumption. A large percentage of illegal connections

the reduction of NRW at the lower end of the market, by targeting certain kinds of illegal connections, imposing disconnections for nonpayment regardless of capacity to pay, or physically restricting water access for the poor (in order to force them to stay within budget) will generate savings, but the negative social impact will be borne by the most vulnerable parts of the community.¹⁷² As will be discussed in Chapters 5 and 6, these demand management approaches that target consumption by the poor were adopted in both Manila and Johannesburg. As a result, both WSS systems increased in efficiency, but this raises the question of whether it is either necessary or appropriate for the poor to bear the cost of these improvements (and is an issue that will be examined in Chapter 7).

2.3.2 Building institutional capacity

Reforming public water systems in the Global South is challenging, because many lack the institutional capacity to run efficiently.¹⁷³ Workers are not provided with sufficient training and senior-staff often lack the experience or skills to properly manage the system.¹⁷⁴ As will be discussed in relation to Manila, a combination of high levels of job security, low pay, and a lack of incentives also means that job performance is not always optimised.¹⁷⁵

A growing trend towards decentralisation, which can be beneficial in terms of increasing responsiveness and encouraging community participation, has also

are found in marginal districts in large cities, and taking steps to charge the most disadvantaged sectors of the population for a basic service could spark adverse social reactions.’)

¹⁷² See the examples of Manila and Johannesburg in Chapters 8 and 9 below; Laila Suryodipuro et al, *Regional Assessment Survey and Workshop on Full Cost Recovery for Water Utilities in Southeast Asia: Sharing International Experience and Best Practices* (USAID and OECD, 2005) 12 (‘In Vietnam and the Philippines, several surveyed utilities adopted strict disconnection policies for non-payment and strict penalties for water theft.’); Trémolet and Hunt, above n 45, 16, 66-69 (citing (with approval) the example of Durban, South Africa where NRW was reduced by restricting the amount of water available to poor communities).

¹⁷³ Winpenny, above n 5, 9-11, 19-21; UNDP, above n 1, 77, 89.

¹⁷⁴ Winpenny, above n 5, 9-11, 19-21.

¹⁷⁵ See, eg, Dumol, above n 67, 18-19 in relation to Manila’s public water utility prior to 1997. See McIntosh, above n 94, in relation to the widespread nature of these challenges across Asia.

exacerbated institutional capacity problems in some countries.¹⁷⁶ This has been particularly problematic when local governments have been given full responsibility for service provision, while fiscal discipline policies have reduced the financial resources available to them to fulfil their service obligations.¹⁷⁷ This is what has happened in South Africa, where responsibility for water and sanitation has been devolved to local governments, which lack both the institutional capacity and the financial resources to properly run the sector.¹⁷⁸ As will be discussed in Chapter 6, this has hampered the government's attempt to ensure universal access to water and reduced the efficiency of the sector.¹⁷⁹

Low institutional capacity is one of the reasons given by the IFIs and other donors for encouraging PSP. The theory is that experienced water corporations will not only have a stronger capacity and motivation to increase the efficiency of the water system (particularly by reducing staff and NRW),¹⁸⁰ but that they will develop these capacities within the country by retaining staff and introducing new technology, policies and systems that can be retained when the water utility reverts to public control.¹⁸¹ However, a comprehensive review of the early years of PSP (up to 2003) demonstrated that it did not tend to result in capacity development, and, instead, often resulted in a loss of public capacity by making the sector more dependent on the private sector.¹⁸²

2.3.3 The impacts of commodification

The theory behind these market-based water governance reforms, including full cost recovery, corporatisation and PSP, is that the market will enable water to be valued appropriately and this will lead to increased efficiency and a less wasteful approach to

¹⁷⁶ Winpenny, above n 5, 11.

¹⁷⁷ Ibid.

¹⁷⁸ See Section 6.3.2 below. See also Laila Smith and Susan Hanson, 'Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery' (2003) 40(8) *Urban Studies* 1517, 1518; Rose Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power' (2005) 18(1) *Georgetown International Environmental Law Review* 149, 165-166.

¹⁷⁹ Ibid.

¹⁸⁰ See, eg, World Bank, *Approaches to Private Participation in Water Services: A Toolkit* (2006) 3.

¹⁸¹ See, eg, ibid 22.

¹⁸² Gutierrez et al, above 43, 11-14.

water management.¹⁸³ One benefit put forward for treating water primarily as an economic good (and, thus, partially commodifying it) is that the market will encourage 'high-value' water use to be prioritised.¹⁸⁴ However, the problem with commodifying water is that it is a resource with considerable social values that are not naturally reflected in the market.¹⁸⁵ These social values include the importance of water to maintaining human health, to sustaining livelihoods and to the environment. While industry may place a high economic value on water and be willing (and able) to pay for it, the poor do not have a comparative capacity to participate in the market, despite the significant social value that they attach to water. The same problem exists for other kinds of water use, like small-scale farming or water for the environment, which have a high social value but are not necessarily economically productive.

The experiences of Australia and Chile in introducing tradable water rights demonstrate these issues with commodifying water.¹⁸⁶ Chile introduced tradable water rights under the 1981 National Water Law as part of broader economic liberalisation reforms.¹⁸⁷ Under these laws, water rights could be traded as a commodity detached from land.¹⁸⁸ Similar reforms were introduced in Australia after 1994 when the Council of Australian Governments agreed to a water reform agenda that included unbundling water rights from land in order to enable them to be traded separately on the market.¹⁸⁹ In both Chile and Australia, water use did become more efficient in that it was traded to 'high-value'

¹⁸³ See, eg, Henning Bjornlund and Jennifer McKay, 'Aspects of water markets for developing countries: experiences from Australia, Chile, and the US' (2002) 7 *Environment and Development Economics* 769, 771.

¹⁸⁴ See, eg, *ibid*, 771, 784.

¹⁸⁵ See, eg, Hubert H.G. Savenije and Pieter van der Zaag, 'Water as an Economic Good and Demand Management Paradigms with Pitfalls' (2009) 27(1) *Water International* 98.

¹⁸⁶ See, eg, Carl J Bauer, 'Results of Chilean water markets: Empirical research since 1990' (2004) 40 *Water Resources Research* <<http://www.agu.org/pubs/crossref/2004/2003WR002838.shtml>> at 16 November 2012; J. G. Tisdell, 'The environmental impact of water markets: An Australian case-study' (2001) 62 *Journal of Environmental Management* 113; Bjornlund and McKay, above n 183.

¹⁸⁷ UNDP, above n 1, 179.

¹⁸⁸ UNDP, above n 1.

¹⁸⁹ See, eg, Janice Gray, 'Legal approaches to the ownership, management and regulation of water from riparian rights to commodification' (2006) 1(2) *Transforming Cultures eJournal* 64 <<http://epress.lib.uts.edu.au/journals/TfC>> at 20 November 2012, 84.

uses such as large irrigators.¹⁹⁰ However, equity and the environment did not fare so well.¹⁹¹ UNDP argues that equity suffered in Chile, because:

The allocation of water rights without limit or restriction predictably gave rise to speculation and water monopolies. ... [As a result] water rights have become more concentrated in the hands of large commercial farmers and urban water traders. The poorest third of farmers have seen their share of water rights fall by more than 40% since 1981.¹⁹²

UNDP found a similar problem with the environment, as '[w]ater scarcity prices did not reflect the costs of environmental damage related to overuse for a familiar reason: environmental externalities are not adequately priced in free markets.'¹⁹³ Research has found a similar pattern in Australia, with trade serving to widen 'the gap between smaller and water-poor farmers and larger water-rich farmers,'¹⁹⁴ resulting in less water being allocated to the environment.¹⁹⁵ These experiences demonstrate that a market-based approach to water governance reform, such as the one being promoted by the IFIs, carries with it a risk of further entrenching the inequality of access and lack of concern for environmental sustainability that underlies the water crisis.

The results experienced in Australia and Chile are often described as 'market distortions.'¹⁹⁶ It is theoretically possible to avoid these sorts of distortions through the use of carefully designed and effective government regulations.¹⁹⁷ Historically, however, there have been very few examples of strong water regulators in the Global

¹⁹⁰ See Bjornlund and McKay, above n 183, 771, 784. See also UNDP, above n 1, 179.

¹⁹¹ See, eg, Tisdell, above n 186, 119; Bjornlund and McKay, above n 183, 785-86.

¹⁹² UNDP, above n 1, 179.

¹⁹³ UNDP, above n 1.

¹⁹⁴ Bjornlund and McKay, above n 183, 786.

¹⁹⁵ Tisdell, above n 186, 119.

¹⁹⁶ See, eg, UNDP, above n 1, 180.

¹⁹⁷ See, eg, Bjornlund and McKay, above n 183, 788.

South,¹⁹⁸ and it is worth noting that these distortions occurred in Australia despite its strong regulatory capacity.¹⁹⁹

One approach to the challenges of regulating natural monopolies²⁰⁰ such as water utilities has been to rely on public ownership.²⁰¹ However, for this to be an effective solution, there needs to be effective good governance processes in place.²⁰² Unfortunately this has not tended to be the case for many public water utilities in the Global South. Instead, they have often been plagued by political interference and corruption, and have been lacking in both accountability and transparency.²⁰³

This low regulatory capacity is a particular problem when PSP is part of the governance reform process. The large multinational water corporations that often participate in these deals are highly experienced at conducting negotiations and the information asymmetry between them and the relatively inexperienced governments (or regulatory authorities) of the Global South can present serious challenges.²⁰⁴ A strong, capable and autonomous regulator is required to understand and enforce the contract (or terms of service) and to protect the interests of the community.²⁰⁵ The difficulty is that where the public system is most lacking in capacity and accountability there is little hope of finding a strong public regulator, and it is in these very situations that PSP has most

¹⁹⁸ Winpenny, above n 5, 10; Emmett, above n 126, 62; Ariel A. Casarin, Jose A. Delfino and Maria Eugenia Delfino, 'Failures in water reform: Lessons from the Buenos Aires's concession' (2007) 15 *Utilities Policy* 234, Bjornlund and McKay, above n 183, 792.

¹⁹⁹ See, eg, Quentin Grafton et al, 'An Integrated Assessment of Water Markets: Australia, Chile, China, South Africa and the USA' (Research Paper 10-09, ANU Centre for Water Economics, Environment and Policy, 2010) 8.

²⁰⁰ Water utilities are natural monopolies in that they belong to an industry in which it is more cost effective and efficient for control to be concentrated in a single entity, because high set-up costs make competition inefficient: see, eg, William J Baumol, 'On the Proper Cost Tests for Natnral Monopoly in a Multiproduct Industry' (1977) 67 *American Economic Review* 809, 810.

²⁰¹ P. Joskow, *Regulation of natural monopolies* (Center for Energy and Environmental Policy Research, 2005) 63.

²⁰² UNESCO and WWAP, above n 55, 56.

²⁰³ See McIntosh, above n 94, 115; Cosgrove and Rijsberman, above n 93, 3.

²⁰⁴ See, eg, McIntosh, above n 94, 115-120.

²⁰⁵ Ibid.

often been promoted.²⁰⁶ On the other hand, a strong and independent regulator is also valuable to the operation of a publicly controlled water utility and PSP at least provides the impetus to bolster regulation.²⁰⁷

2.4 The role and importance of participation in governance

In addition to regulation, another mechanism for increasing transparency and accountability, and reducing the risks of corruption, is to enhance public participation in water governance. This potential for participation to enhance the quality of water governance has been recognised by good governance theory,²⁰⁸ but, like equity, participation has not often been prioritised in practice, because the emphasis on efficiency and market-based solutions have not created the necessary conditions for participation to flourish.²⁰⁹ The Manila case study, discussed in Chapter 5, demonstrates some of these problems, in that the public were excluded from both the water privatisation process and the subsequent contract renegotiations in order to enable the government and the private service providers to prioritise commercial imperatives over the public interest.

2.4.1 The benefits of participation from a good governance perspective

The WWC highlighted the benefits of participation to good water governance in 2000.²¹⁰ Essentially it argued that transparency, accountability and participation can result in four main categories of benefit; (1) increased community ownership and empowerment; (2) increased incentives for (public and private) operators to maximise social welfare, and for community members to take responsibility for sustainable management; (3) reduced corruption and elite capture; and (4) increased responsiveness by way of improving staff capacity and incentive structures.²¹¹

²⁰⁶ Emmett, above n 126, 59-61.

²⁰⁷ See, eg, McIntosh, above n 94.

²⁰⁸ Cosgrove and Rijsberman, above n 93, 64.

²⁰⁹ Emmett, above n 126, 7, 56. See also the case of Manila discussed in Chapters 5 and 8 below.

²¹⁰ Cosgrove and Rijsberman, above n 93, 64.

²¹¹ Ibid.

Participation has been shown to be an effective tool for better engaging the community (or ‘beneficiaries’) in the development process.²¹² In addition, it has been shown to increase the likelihood of community ownership when projects or policies better reflect their priorities, particularly where they were included in the initial planning process.²¹³ An increased sense of community ownership has also been correlated with sustainability, because community members are more capable of playing a lead role in monitoring and evaluating its implementation when they are invested in the process.²¹⁴

This contribution to accountability through activities such as monitoring and evaluation is one of the reasons that participation is considered by many theorists and organisations to form part of the cornerstone of good governance.²¹⁵ Creating an empowered and protected role for consumers to participate in water governance can also result in policies that better reflect their needs and priorities, and encourage them to take some responsibility for the sustainable management of water resources.²¹⁶

Enhancing participation has also been shown to reduce corruption, by increasing transparency and accountability.²¹⁷ In addition, participation enhances community access to information and creates opportunities to hold providers to account for corrupt behaviour. Corruption can include falsified meter readings;²¹⁸ collusion and favouritism in public procurement;²¹⁹ nepotism in the allocation of public positions and the

²¹² Siddiquir Osmani, 'Participatory governance: An overview of issues and evidence' in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 1 4-5; Food and Agriculture Organization of the United Nations (FOA) (1995) *Water sector policy review and strategy formulation - A general framework*, FAO Land and Water Bulletin 3, World Bank UNDP, FOA, Rome chp 9.

²¹³ See, eg, Ghazala Mansuri and Vijayendra Rao, *Evaluating Community-Based and Community-Driven Development: A Critical Review of the Evidence* (World Bank, 2003).

²¹⁴ World Bank, *The World Bank participation sourcebook* (1996) 96, 216.

²¹⁵ See, eg, Chakrabarty and Bhattacharya, above n 26, 8; Asian Development Bank (ADB) (1995) *Governance: sound development management*, ADB, Manila, accessed on 5 October 2011 at: <http://www.adb.org/Documents/Policies/Governance/govpolicy.pdf> 8-10.

²¹⁶ Cosgrove and Rijsberman, above n 93, 3.

²¹⁷ UNESCO and WWAP, above n 55, 55.

²¹⁸ Ibid.

²¹⁹ UNESCO and WWAP, above n 55.

recruitment of consultants;²²⁰ profiting from unfavourable contracts;²²¹ and illegally selling NRW to SSWPs.²²² As a result of corruption, people are often forced to pay additional illegal ‘fees’ or bribes to receive service – a situation that further disadvantages the poor who are forced to pay a higher percentage of their income on these illegal fees.²²³ Effective reporting procedures can highlight these actions and, when coupled with accountability measures, provide an effective deterrent. In 2008, Transparency International estimated that corruption raised the price of connecting households in the Global South to the WSS system by as much as 30 percent.²²⁴ This means that by reducing corruption, participation has the potential to increase the efficiency and financial sustainability of water utilities, and make water services more affordable for the poor.²²⁵

Increased participation can also improve the responsiveness of water utilities by empowering consumers to create pressure for improvements.²²⁶ This can have a flow-on effect on the efficiency and financial stability of the utility, as people are more willing to pay for good service and less likely to seek out illegal connections.²²⁷ Improved responsiveness also encourages people to report leaks or broken metres, and means they tend to be fixed earlier.²²⁸ This can help to reduce NRW and further increase efficiency.

2.4.2 The good governance approach and participation

In practice, the theoretical recognition of the importance of participation has not translated into the kind of water governance reform that actually supports community involvement. Instead, the good governance approach has adopted a fairly uncritical approach to participation and this has led to simplistic solutions, such as the assumption that market-based reforms, particularly including PSP, will automatically increase

²²⁰ Ibid; McIntosh, above n 94, 114.

²²¹ McIntosh, above n 94, 114.

²²² McIntosh, above n 94, 101.

²²³ Emmett, above n 126, 55-56.

²²⁴ Transparency International, *Global Corruption Report 2008: Corruption in the Water Sector* (2008) xxiv.

²²⁵ McIntosh, above n 94, 100.

²²⁶ McIntosh, above n 94, 100-101.

²²⁷ UNESCO and WWAP, above n 55, 61.

²²⁸ McIntosh, above n 94, 100.

accountability, transparency, and community empowerment.²²⁹ The WWC has also argued that higher tariffs will increase responsiveness by raising consumer expectations and creating the necessary pressure for change.²³⁰ These assumptions have not always proven correct, and (as discussed above) liberalisation has instead tended to raise new barriers to community participation, particularly when the PSP route is selected.²³¹

Despite predictions to the contrary,²³² PSP does not seem to have had any impact on levels of accountability or corruption in the water sector.²³³ The fact is that corruption remains a major problem in both private and publicly provided services.²³⁴ As McIntosh notes, convictions against some of the large private water companies for corruption demonstrate that the private sector is not immune from corruption.²³⁵ The only real difference is that PSP provides opportunities for different kinds of corruption.²³⁶ For example, '[w]here providers are private but are funded publicly, corruption is mainly about overcharging governments and failing to deliver quality services. This is particularly likely where government capacity for oversight and the enforcement of contracts is weak.'²³⁷

Concession agreements and management contracts are made between governments and private water companies, leaving no clear role for the consumer in terms of gaining access to information or holding the provider to account for failing to provide adequate service or to fund expansions in line with contractual targets.²³⁸ The Manila case study, discussed in Chapter 5, highlights some of these problems. Civil society in Manila attempted to mount legal challenges to contractual breaches that were against the public interest, and were repeatedly denied standing, because they were not parties to the

²²⁹ See, eg, Cosgrove and Rijsberman, above n 93, 41; Winpenny, above n 5, 10

²³⁰ Cosgrove and Rijsberman, above n 93, 41.

²³¹ See Chapters 5, 7 for a discussion of this issue in relation to Manila's experience with PSP.

²³² See, eg, Cosgrove and Rijsberman, above n 93, 41; Winpenny, above n 5, 10

²³³ Emmett, above n 126, 7.

²³⁴ Emmett, above n 126.

²³⁵ McIntosh, above n 94, 105.

²³⁶ Daniel Santoro, *The 'Agua' tango: Cashing in on Buenos Aires' Privatization* (in *The Water Barons*, The Centre for Public Integrity, 2005) 10; Emmett, above n 126, 56.

²³⁷ Emmett, above n 126, 56.

²³⁸ See, eg, *ibid*; the management of the Concession Agreement in Metro Manila as outlined in Chapter 5 below. See also McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003); *ibid*, 93.

contract. Furthermore, the pressure exerted on government in the Global South by the IFIs and large bilateral donors to adopt liberalisation policies, including PSP, has left no role for public participation and has often led to the imposition of these policies despite strong public opposition.²³⁹

There is some evidence to support the theory that increased cost recovery can result in empowering consumers to hold service providers to account for poor quality service.²⁴⁰ However, by linking influence to purchasing power, the full cost recovery approach to ensuring accountability tends to entrench the prioritisation of wealthy consumers. There are other mechanisms for increasing transparency, accountability and participation that can also have a positive impact on service standards.²⁴¹ These can include transparent administration and publicly accessible information,²⁴² mechanisms for consumer complaints and legal redress,²⁴³ and participatory processes.²⁴⁴

Another mechanism for increasing community participation favoured by the good governance approach is to decentralise water services in order to enable decision-making to be made at the lowest possible level. This is a positive application of the subsidiarity principle (discussed in Section 4.2.3(b) of this thesis)²⁴⁵ and can help water providers better understand local conditions and encourage them to be more responsive to local communities. However, decentralisation can also exacerbate problems if it is not carried out effectively.²⁴⁶ As mentioned above, the fiscal austerity that often accompanies good governance reforms can result in the transfer of responsibilities to local government, without the transfer of sufficient finance or capacity development,²⁴⁷

²³⁹ See Section 2.2.3(a) above.

²⁴⁰ Cosgrove and Rijsberman, above n 93, 41.

²⁴¹ Ibid.

²⁴² See Mike Muller, Robin Simpson and Meike van Ginneken, 'Ways to improve water services by making utilities more accountable to their users: A review' (Water Working Note 15, World Bank, 2008) 16-19; McIntosh, above n 94, 113.

²⁴³ Muller et al, above n 242, 36-42.

²⁴⁴ See Muller et al, above n 242, 20-35.

²⁴⁵ The subsidiarity principle prescribes that policy and management decisions should be made at the lowest effective level.

²⁴⁶ UNESCO and WWAP, above n 55, 246.

²⁴⁷ Ibid. See also above n 177.

leaving them ill-equipped to manage the system, let alone to facilitate community participation.

A final limitation of the good governance approach to participation is that it has tended to value participation only for its capacity to increase the dominant goals of efficiency and financial sustainability. This instrumental approach to participation has led to two main outcomes. The first is a tendency for participatory approaches to be abandoned when their benefits (such as those discussed above) were not immediately apparent or were difficult to establish, particularly in cases where they threatened to cost too much or slow things down.²⁴⁸ The second is that it has led to a fairly mechanical and superficial approach to participation, with an emphasis on techniques such as information sharing that do not result in the transfer of power to the community.²⁴⁹ As a result, despite the recognition under the theory of good governance that participation can improve governance and water services for the poor, it has not been prioritised in practice.

Conclusion

The crisis facing many urban WSS systems in the Global South is complex and requires a sophisticated policy response. The underlying cause of this crisis is a history of poor governance that has been financially unsustainable, inefficient, inequitable and non-participatory. The negative results of this crisis have been disproportionately borne by the poor, who have suffered from inadequate access to safe water and from the negative financial and health impacts that flow from this water poverty.

In this context, the recognition of the importance of water governance reform is a positive development. So too is the focus on improving the financial sustainability and efficiency. However, the market-driven approach that has dominated the good governance agenda has not proven to be a holistic solution. This is because an over-emphasis on increasing financial sustainability and efficiency has failed to address the structural barriers that prevent poor people from accessing adequate WSS services.²⁵⁰ The commodification of water has instead served to entrench these structural barriers by

²⁴⁸ See, eg, Aycrigg, above n 34; Anna F.S. Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1, 12.

²⁴⁹ Ibid. See also Section 4.4.1 below.

²⁵⁰ See, eg, UNDP, above n 1, 88-93.

failing to recognise the inequitable results of regulating access through the market and by creating additional challenges for regulation and community participation.

A more balanced approach is necessary to ensure that water governance reform results in increased access for the poor.²⁵¹ While increased financing and efficiency does help to expand access to water, a simultaneous focus on improving equity and participation is also essential to meeting the needs of the poor and marginalised. The following chapter will examine the right to water and consider whether it might bring some equilibrium to water governance reforms by giving the poor and marginalised a legal entitlement to challenge the structural barriers preventing them from accessing adequate water services and by highlighting their right to participate in water governance.

²⁵¹ See, eg, UNDP, above n 1.

Chapter 3. The human right to water

In July 2010, the United Nations General Assembly ('UNGA') adopted a resolution recognising the human right to water and sanitation.¹ The Human Rights Council ('HRC') followed this by adopting a similar resolution on 24 September 2010,² which affirmed the existence of the human right to safe drinking water and sanitation. The resolution situates the right as being derived from the right to an adequate standard of living,³ and inextricably related to the right to the highest attainable standard of physical and mental health,⁴ as well as the right to life and human dignity.⁵

These resolutions build on a growing international recognition of the right to water, which has been reflected in a number of UN declarations and recognised in *General Comment No.15* ('GC 15'),⁶ adopted by the Committee on Economic Social and Cultural Rights ('CESCR'), in which it found that a right to water can be implied from the right to an adequate standard of living and the right to the highest attainable standard of physical and mental health.⁷ CESCR also concluded that the right to water guarantees access for everyone to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'⁸

¹ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010). 41 countries abstained from the vote, but no country voted against the resolution. Some of the reasons expressed by countries for abstaining will be discussed below.

² Resolution on Human rights and access to safe drinking water and sanitation, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

³ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 3 January 1976, 160 States Parties (as of 3 October 2012), art 11(1).

⁴ Ibid art 12(1).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 23 March 1976, 167 States Parties (as of 3 October 2012) art 6(1).

⁶ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002).

⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 3 January 1976, 160 States Parties (as of 3 October 2012), arts 11(1), 12(1).

⁸ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc

There is broad agreement on the existence and scope of the right to water, but the specifics of its precise content requires contextual interpretation, particularly in relation to the meaning of sufficiency and affordability. The question of what kind of obligations this right imposes on States has been more contentious and relates primarily to historical debates around the enforcement of socioeconomic rights, the meaning of the standard of progressive realisation, and the issue of whether socioeconomic rights contain obligations of immediate effect.

This chapter examines the historical development of the right to water and its content.⁹ The issue of the compatibility of the right to water with good governance reforms, including private sector participation ('PSP'), is also considered and will be further addressed in Chapters 7 and 8.

3.1 International law and the right to water

3.1.1 Treaties and the right to water

The existence of the right to water has historically been contentious in international law. Within treaty law it has been explicitly recognised only for a distinct number of groups in specific circumstances.¹⁰ However, the right can also be implied from other treaty rights.

(a) Explicit recognition

The earliest example of a specific guarantee of access to water can be found in Article 11 of the *Geneva Convention relative to the Treatment of Prisoners of War (1929)*,¹¹ which states, '[p]risoners shall also be afforded the means of preparing for themselves such additional articles of food as they may possess. Sufficient drinking water shall be

E/C/12/2002/11 (2002), paras 1, 2.

⁹ The recent incorporation of sanitation into the recognition of the human right to water will not be the focus of this thesis.

¹⁰ See *Convention of the Rights of the Child* 1989, art 24, para 2; *Convention on the Elimination of All Forms of Discrimination Against Women* 1981, art 14, para 2; *Convention on the Rights of Persons with Disabilities, opened for signature 2006*, art 28(2)(a) discussed below.

¹¹ *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 27 July 1929, 75 UNTS 135, art 11, entered into force 19 June 1931 (53 States Parties as of 4 October 2012).

supplied to them.’ The *Third Geneva Convention of 1949*¹² also required States Parties to supply prisoners of war with ‘sufficient drinking water’ and ‘sufficient water and soap for their personal toilet and for washing their personal laundry’ under Articles 26 and 29.¹³ Although these provisions do not constitute an explicit recognition of water as a human right, they recognise the fundamental importance of guaranteeing access to water to people under the direct control of the State. This has been expanded on in respect of at least some categories of women in Article 14(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (‘CEDAW’),¹⁴ which requires that States Parties ensure women in rural areas have the right to ‘enjoy adequate living conditions, particularly in relation to [...] water supply.’¹⁵ Similarly States are now required to combat disease and malnutrition in children ‘through the provision of adequate nutritious foods and clean drinking-water’ by Article 24(2) of the *Convention on the Rights of the Child* (‘CRC’)¹⁶ The right to water is also recognised under Article 28(2)(a) of the *Convention on the Rights of Persons with Disabilities*,¹⁷ which recognises a right of ‘equal access by persons with disabilities to clean water services...’

The right has also been explicitly recognised in a number regional conventions, such as article 14(1) of the *African Charter on the Rights and Welfare of the Child*¹⁸ which requires States Parties ‘to ensure the provision of adequate nutrition and safe drinking water’ in the context of the right to enjoy the best attainable standard of health. Article

¹² *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, entered into force on 21 October 1950 (194 States Parties as of 4 October 2012).

¹³ Articles 20 and 46 also make it clear that this obligation to supply sufficient drinking water extends to periods of transfer or evacuation.

¹⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, United Nations, Treaty Series, vol 1249, 13, entered into force on 3 September 1981 (187 States Parties as of 3 October 2012).

¹⁵ *Ibid* art 14(2).

¹⁶ *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1599 UNTS 530, entered into force on 2 September 1990, 193 States Parties (as of 3 October 2012).

¹⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 2006, entered into force on 3 May 2008 (124 States Parties as of 3 October 2012).

¹⁸ *African Charter on the Rights and Welfare of the Child*, opened for signature 11 July 1990, OAU Doc CAB/LEG/24.9/49, entered into force on 29 November 1999, 45 States Parties (as of March 2010).

15 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*¹⁹ also declares that women shall be provided with access to clean drinking water, while article 39 of the *Arab Charter on Human Rights* recognises the right to 'highest attainable standard of physical and mental health' and subsection 2(e) makes specific mention of including the 'provision of the basic nutrition and safe drinking water for all.'²⁰

However, these treaties are only binding on their parties and do not give rise to general right to water in international law as they are mostly limited in their application to specifically defined groups, and the scope of protection remains unclear. The right to water protected under the CRC,²¹ for example, appears to be limited to that amount necessary to prevent malnutrition and disease, while the right to water protected under the *Convention on the Rights of Persons with Disabilities*,²² appears to be tied to the prevention of discrimination.

(b) Implicit recognition

The absence of any specific globally applicable treaty norm on the right to water does not, however, mean that the right cannot be found in treaty law. Rather, as made clear in GC 15, the right can be implied from other recognised rights. In this context CESCR's GC 15 can be described as 'a milestone in the emergence of the human right to water.'²³ Subsequent developments confirm its important contribution to the recognition of the right to water in international law.

GC 15 was adopted in 2002 by CESCR, the body responsible for the supervision of the implementation of the rights protected under the International Covenant on Economic,

¹⁹ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* opened for signature 11 July 2003, entered into force 25 November 2005, 28 States Parties (as of 22 July 2010).

²⁰ *Arab Charter on Human Rights*, opened for signature 15 September 2004, 102nd Session, Resolution 5437, entered into force 15 March 2008, 7 States Parties (as of 26 November 2012), art 39(2)(e).

²¹ *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1599 UNTS 530, art 24(2), entered into force on 2 September 1990.

²² *Convention on the Rights of Persons with Disabilities*, opened for signature 2006, art 28(2)(a).

²³ Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012) 38.

Social and Cultural Rights ('ICESCR').²⁴ General Comments are an authoritative interpretation of the ICESCR and provide a legally significant – albeit not legally binding – explanation of the nature of the existing obligations of State Parties to the Covenant.²⁵

When the ICESCR was drafted in 1966, it did not specifically list access to water as a protected right. Barlow argues this oversight was due to the perception that water, like air, would always be freely available.²⁶ Nonetheless, Article 11(1) of the ICESCR guarantees the right to an adequate standard of living and those rights that are indispensable to the realisation of this right, 'including' food and housing.²⁷ According to GC 15 the word 'including' indicates this is intended to be a non-exhaustive list and access to water and sanitation are equally indispensable to the realisation of the right to an adequate standard of living.²⁸ Article 12(1) of ICESCR guarantees the right to the highest attainable standard of health. GC 15 confirms that access to fresh water is

²⁴ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (Third ed, 2008) 277. See also OHCHR, 'The Committee on Economic, Social and Cultural Rights' (Fact Sheet No. 16 (Rev.1), 1996) < <http://www.unhcr.org/refworld/docid/4794773cd.html> > at 8 July 2009 14.

²⁵ See Economic and Social Council Resolution 1990/45, para. 10. See also Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 91. In practice, General Comments have been highly influential in establishing accepted interpretations of the ICESCR: See Salman M. A. Salman and Siobhan McInerney-Lankford, *The human right to water: legal and policy dimensions* (2004), 5, 49. See also B Simma 'Die internationale Kontrolle des VN-Paktes über wirtschaftliche, soziale und kulturelle Rechte: neue Entwicklungen.' In *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt*, edited by U. Beyerlin et al., 579-93. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 120. Berlin: Springer Verlag, 1995, cited in Winkler, above n 23, 40, who argues that General Comments will become so central to the interpretation of the Covenant that they will be eventually be deemed to be legally binding themselves.

²⁶ Maude Barlow, *The right to water: the campaign for a United Nations treaty* (2006). Of course, it is also no longer possible to take access to clean air for granted, particularly for residents of highly polluted cities in rapidly industrialising nations like China and India.

²⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 3 January 1976.

²⁸ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 3.

fundamental to the attainment of this right.²⁹ Thus, the right to water – or at minimum, the right to an adequate amount of safe water³⁰ is articulated as a prerequisite for the realisation of other human rights.

It has been argued that this approach of implying a right to water can also be applied to other treaties such as the *1946 Constitution of the World Health Organisation*, which states, the enjoyment of the ‘highest standard’ of health is one of the fundamental rights of every human being;³¹ and Article 6(1) of the *International Covenant on Civil and Political Rights*,³² which requires State Parties to guarantee the right to life.

Traditionally the right to life has been interpreted as containing only negative obligations, such as prohibiting the act of arbitrarily extinguishing someone’s life.³³ However, a more expansive interpretation, which reflects the growing acceptance of the interdependence and indivisibility of all rights,³⁴ argues that ‘the protection of this right requires that States adopt positive measures.’³⁵ Considering that water is essential to sustaining life, there is a strong argument to suggest these positive measures include the protection of the right to water.³⁶ The scope of the protection provided under the right to

²⁹ Ibid.

³⁰ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) paras 1-2.

³¹ WHO, *The Right to Water* (2003) 8.

³² *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 23 March 1976, 167 States Parties (as of 3 October 2012).

³³ See Yoram Dinstein, 'The Right to Life, Physical Integrity and Liberty' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), 115-116.

³⁴ See *Declaration on the Right to Development*, 97th plenary meeting, UN Doc A/RES.41/128 (1986); *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993). See also Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81; Craig Scott, 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769. But see *contra* Daniel J. Whelan, *Indivisible Human Rights: A History* (2010).

³⁵ *CCPR General Comment No. 6: Article 6 (Right to life)*, 16th HRC sess, UN Doc HRI/GEN/1/Rev.6, 127 (1982), para 5.

³⁶ See, eg, Malcolm Langford et al, *Legal Resources for the Right to Water: International and National Standards* (Centre on Housing Rights and Evictions (COHRE), 2004), 18; Winkler, above n 23, 54.

life is narrower than that provided under the right to an ‘adequate standard of living’,³⁷ or ‘the highest attainable standard of health,’³⁸ as it is confined to guaranteeing sufficient water for survival.

The right to water can also be implied under regional human rights instruments that recognise rights such as the right to life, health or a healthy environment. For example, the *African [Banjul] Charter on Human and Peoples' Rights*³⁹ recognises every individual has, ‘the right to enjoy the best attainable state of physical and mental health.’⁴⁰

Article 4 of the *American Convention on Human Rights*⁴¹ protects the right to life. The Inter-American Court of Human Rights has interpreted this right broadly and as including the right of ‘access to the conditions that guarantee a dignified existence.’⁴² As an essential prerequisite to survival, it is arguable that water would constitute one of these *conditions of dignified existence*. An Additional Protocol in the Area of Economic, Social and Cultural Rights⁴³ was added to the Convention in 1988 and Article 11 of this Protocol guarantees everyone ‘the right to live in a healthy environment and to have access to basic public services.’ There is a strong argument that water services constitute a ‘basic public service’ and would, therefore, be protected under Article 11.

³⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), art 11, entered into force on 3 January 1976.

³⁸ *Ibid* art 12.

³⁹ *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM. 58, entered into force on 21 January 1986, 53 States Parties (as of 3 October 2012).

⁴⁰ *Ibid* art 16.

⁴¹ *American Convention on Human Rights*, opened for signature 22 November 1969, OAS, Treaty Series, No 36, entered into force on 18 July 1978, 25 States Parties (as of 3 October 2012).

⁴² See, eg, case of the ‘*Street Children*’ (*Villagran-Morales et al.*) v. *Guatemala*, Inter-American Court of Human Rights (IACrHR), 19 November 1999, available at: <http://www.unhcr.org/refworld/docid/4b17bc442.html> [accessed 3 October 2012] para 144.

⁴³ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS, Treaty Series, No 69, entered into force on 16 November 1999, 16 States Parties (as of 26 November 2012).

The American Convention largely superseded the *American Declaration on the Rights and Duties of Man*,⁴⁴ but the Declaration is still used in relation to those States that are not parties to the Convention.⁴⁵ Article IX protects the right to housing, while the right to health is protected under Article XI. Both of these rights could be interpreted as implicitly protecting the right to water.⁴⁶

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁴⁷ recognises the right to health in Article 11 under which ratifying States commit to take appropriate measures ‘to remove as far as possible the causes of ill-health; [...and] to prevent as far as possible epidemic, endemic and other diseases.’ It has been argued that access to fresh water is necessary to the realisation of these listed rights.⁴⁸ Article 31 also protects the right to housing, and this could also be interpreted as implicitly including a right to water, in the similar manner to that set out by the CESCR in its *General Comment No.4* on the right to adequate housing.⁴⁹

⁴⁴ *American Declaration on the Rights and Duties of Man*, , open for signature 2 May 1948, OEA/Ser.L V/II.82 doc 6 rev 1, 17 (1948). The Declaration has been largely superseded by the Convention, but is used in relation to those American States that are not party to the Convention.

⁴⁵ See Tara Melish, 'The Inter-American Commission on Human Rights' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 372 343. Melish explains that the Inter-American Commission on Human Rights retains a supervisory jurisdiction to those OAS Member States who are not party to the Convention under the *Statute of the Inter-American Commission on Human Rights*, art. 1.2, Oct 1979.

⁴⁶ CESCR has interpreted the right to health contained in art 12(1) of the ICESCR as providing implied protection for the right to water: *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 3. See also *General Comment No. 4 on the right to adequate housing* 6th CESCR sess, UN Doc E/1992/23 (1990), para 8(b) ('All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water...').

⁴⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS No.: 005, entered into force on 3 September 1953, 47 States Parties (as of 4 October 2012).

⁴⁸ See, eg, COHRE et al, above n 29, 39-40; Winkler, above n 23, 58.

⁴⁹ *General Comment No. 4 on the right to adequate housing* 6th CESCR sess, UN Doc E/1992/23 (1990), para 8(b) ('All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, ... sanitation and washing facilities...').

Finally, Article 38 of the *Arab Charter on Human Rights*⁵⁰ protects ‘the right to an adequate standard of living, ... including food, clothing, housing, service and the right to a healthy environment.’ It is possible to interpret this Article as implying a right to water, in much the same way as Article 11(1) of the ICESCR, particularly due to the inclusion of the word ‘services.’ Article 39 also recognises the right to ‘highest attainable standard of physical and mental health’ and subsection 2 makes specific mention of including the: ‘...(e) provision of the basic nutrition and safe drinking water for all’ and ‘(f) [c]ombating environmental pollution and providing proper sanitation systems...’

3.1.2 Recognition of the right to water in customary international law

Although various interpretations of treaties signify the existence of the right to water with reference to certain groups and in certain circumstances, the question remains as to whether a general right to water can be said to exist in customary international law. Customary international law results from ‘a general practice accepted as law.’⁵¹ According to the International Court of Justice this requires two elements: consistent practice (‘state practice’) and a sense of legal obligation (‘*opinio juris*’).⁵² Both state practice and *opinio juris* can be evidenced by the statements and actions of States in international fora,⁵³ while State actions at the domestic level, such as the decisions of domestic courts and legislative protection, are also relevant examples of state practice.⁵⁴ Although a comprehensive examination of state practice and *opinio juris* is beyond the

⁵⁰ *Arab Charter on Human Rights*, opened for signature 15 September 2004, 102nd Session, Resolution 5437, entered into force 15 March 2008, 7 States Parties (as of 26 November 2012). Reprinted in *International Journal of Human Rights* (2005) 12, 893.

⁵¹ *Charter of the United Nations*, opened for signature 26 June 1945, chapter XIV, *Statute of the International Court of Justice*, art 38(1)(b), entered into force on 24 October 1945 (193 Member States as of 4 October 2012).

⁵² *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969) 4 ICJ Rep para 77.

⁵³ Ian Brownlie, *Principles of Public International Law* (7th ed. 2008) 6-7.

⁵⁴ Roberts has argued that State actions at the domestic levels (such as the decisions of domestic courts and legislative protection) are particularly relevant in the context of human rights: Anthea Elizabeth Roberts, ‘Traditional and modern approaches to customary international law’ (2001) 95 *The American Journal of International Law* 757, 777-778.

scope of this thesis, a cursory examination of the history of State declarations at official international and regional conferences, together with constitutional and legislative actions at the domestic level, demonstrates a growing consensus in support of the existence of a general human right to water in international law.

(a) Recognition at the international level

The earliest recorded statement acknowledging the existence of the right to water at the international level originates from the 1977 *UN Conference on Water* in Mar del Plata, Argentina which recognised the principle that ‘all people ... have the right to have access to drinking water in quantities and of a quality equal to their basic needs.’⁵⁵ In 1992 the *International Conference on Water and Sustainable Development* (the ‘Dublin Conference’) recognised ‘the basic right of all human beings to have access to clean water and sanitation at an affordable price.’⁵⁶ Although this conference was highly influential in shaping water governance policy, it was not attended by State officials, but rather by a group of experts designated by States.⁵⁷ Nonetheless, State representatives did accept *Agenda 21* at the *UN Conference on Environment and Development* (the ‘Rio Summit’) that same year, which endorsed the resolution of the *Mar del Plata Water Conference* that all people have the right to access to drinking water.⁵⁸ This was followed with a statement in the *Programme of Action* from the 1994 *UN International Conference on Population and Development* in which States affirmed that all individuals ‘[h]ave the right to an adequate standard of living for themselves and their families, including ... water and sanitation.’⁵⁹

In 2000, the right to water was explicitly recognised in UNGA Resolution A/Res/54/175 on the *Right to Development*,⁶⁰ with States affirming that ‘the rights to

⁵⁵ *Report of the United Nations water conference, Mar del Plata*, UN Doc E/CONF.70/29 (1977), para II(a).

⁵⁶ *The Dublin Statement on Water and Sustainable Development: Report of the International Conference on Water and the Environment*, A/CONF/151/PC/112 (1992), Principle 4.

⁵⁷ See Winkler, above n 23, 82.

⁵⁸ *Rio Declaration: Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (1992), Chapter 18 of Agenda 21.

⁵⁹ *Report of the United Nations International Conference on Population and Development*, UN Doc A/CONF.171/13 (1994).

⁶⁰ *The Right to Development*, UN Doc A/RES/54/175 (2000), para 12(a).

food and clean water are fundamental human rights...' This Declaration was not adopted by consensus. Ten States voted against it, while a further 38 States abstained and 21 were absent⁶¹ and by the 2002 *World Summit on Sustainable Development* ('WSSD'), it appeared that States were in retreat from this apparent consensus on the right to water. Although the issue of the right to water was on the agenda of the WSSD, during the PrepCom held in Bonn in 2001 States were reluctant to fully commit to recognising the right.⁶² Instead the *Bonn Recommendations for Action* merely states that 'many people regard access to drinking water and sanitation to be a human right.'⁶³ Furthermore, the *Johannesburg Plan of Implementation*, adopted at the WSSD, does not mention the right to water.⁶⁴ The unsettled nature of the right to water in the early 2000s was also reflected at the triennial World Water Fora,⁶⁵ and in the Ministerial Declarations which, at least until 2012, either ignored the right or simply went as far as describing water as a 'human need.'⁶⁶

Despite the apparent retreat at WSSD, after GC 15, the recognition of an emerging right to water continued at regional and international levels. In October 2001, the Council of Europe (representing 46 European States) adopted *Recommendation 14*, which provides that everyone has the right to a sufficient quantity of water for his or her basic needs.⁶⁷ This was followed by *Recommendation 1731* in January 2006, which states,

⁶¹ *Assembly Endorses Initiatives on Transnational Organized Crime, Gender Equality, Action Against Racism*, Press Release GA/9690, (1999), Annex XVIII.

⁶² *Human Rights and Access to Water* (Comments by the Federal Republic of Germany pursuant to op. 1 of A/HRC/Dec.2/104, 2007) 4.

⁶³ 'Bonn Recommendations for Action' (*International Conference on Freshwater*, Bonn, 2001), intro.

⁶⁴ *Johannesburg Plan of Implementation: Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

⁶⁵ For a discussion of the politics surrounding the recognition of the right to water at the Fourth World Water Forum, see Henri Smets, *The right to water at the 4th World Water Forum in Mexico* (Water Academy, 2006); Céline Dubreuil, *Synthesis on the right to water: 4th World Water Forum, Mexico* (World Water Council, 2006).

⁶⁶ See, eg, Fourth World Water Forum, Ministerial Declaration, (2006), para 2; Fifth World Water Forum, Ministerial Statement, Ministry of Foreign Affairs of Turkey (2009) para 15 ('We recognize that access to safe drinking water and sanitation is a basic human need.')

⁶⁷ Council of Europe (2001) Recommendation Rec (2001)14 of the Committee of Ministers to member States on the European Charter on Water Resources (Adopted by the Committee of Ministers on 17 October 2001, at the 769th meeting of the Ministers' Deputies).

‘[r]ecognising access to water as a fundamental right could serve as an important tool to encourage governments to improve their efforts to meet basic needs and accelerate progress towards achieving the MDGs.’⁶⁸ In May 2006 the Coordinating Bureau of the Non-Aligned Movement (Representing 116 States), recalled GC 15 and, ‘acknowledged the right to water for all.’⁶⁹ In November 2006 the *Declaration of the Africa-South America Summit* recognised the right to have access to clean and safe water,⁷⁰ as did the declaration, or *Message from Beppu*, adopted at the 1st Asia-Pacific Water Summit in December 2007.⁷¹

Since the release of GC 15, States have increasingly advocated for greater clarification on the existence of a human right to water within the UN human rights system. In 2007, the UN High Commissioner on Human Rights released a report on the scope and content of the human rights obligations related to the equitable access to safe drinking water and sanitation under human rights’ instruments.⁷² The Report concluded, ‘it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses...’⁷³ The report also highlighted the lack of existing mechanisms to monitor the realisation of the right to water and sanitation.⁷⁴ In response the HRC appointed an Independent Expert on the issue of human rights obligations relating to access to safe drinking water and sanitation.⁷⁵

In July 2010, Bolivia introduced a resolution on the human right to water and sanitation at the UNGA.⁷⁶ The resolution was adopted without formal dissent, but 41 countries

⁶⁸ Council of Europe (2006) Parliamentary Assembly's Recommendation 1731.

⁶⁹ *Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement - Final Document*, 30 May, NAM/MM/COB/8 (2006) para 186.

⁷⁰ 'Declaration' (*First Africa-South America Summit*, November 2006), para 18.

⁷¹ 'Message from Beppu' (*First Asia-Pacific Water Summit*, Beppu, Japan, 3-4 December 2007).

⁷² *Human Rights and Access to Water*, 2nd HRC sess, UN Doc A/HRC/Dec.2/104 (2006).

⁷³ *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC session, UN Doc A/HRC/6/3 (2007) para 66.

⁷⁴ *Ibid* para 69.

⁷⁵ *Human rights and access to safe drinking water and sanitation*, 7th HRC sess, UN Doc A/HRC/RES/7/22 (2008).

⁷⁶ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010). The

abstained from the voting (while another 22 were absent) largely because they were concerned about the procedural problems with its introduction. Some of the abstaining countries expressed a belief that the resolution was premature and that it would have been more appropriate to wait for the completion of the formal process of developing a substantive interpretation of the right to water already underway at the HRC.⁷⁷ These countries also expressed concerns around the lack of clarity provided by the resolution over what responsibilities the right to water will impose on governments,⁷⁸ and argued that it would have been better to allow time for these issues to be more fully considered.⁷⁹

The representative of the United States expressed concern that ‘the text could undermine that work because it described the right to water and sanitation in a way not reflected in existing international law.’⁸⁰ Similarly the representative from the UK abstained from voting on the resolution on the grounds that ‘there was no sufficient basis for declaring or recognizing water or sanitation as freestanding human rights, nor was there evidence that they existed in customary law.’⁸¹

On 24 September 2010, the HRC did adopt a resolution on the human right to water and sanitation⁸² reaffirming UNGA Resolution 64/292,⁸³ and affirming ‘that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard

resolution was co-sponsored by 33 States.

⁷⁷ UNGA Department of Public Information, *General Assembly Adopts Resolution Recognizing Access To Clean Water, Sanitation As Human Right, By Recorded Vote Of 122 In Favour, None Against, 41 Abstentions* (2010). Others, such as the UK and the USA, disputed the very existence of a freestanding human right to water, and rejected the UNGA’s declaration that such a right exists.

⁷⁸ For example, the representative of the United States expressed concern that ‘the legal implications of a declared right to water had not yet been fully considered in the Assembly or in Geneva’: *ibid*; John F. Sammis, *Explanation of Vote by John F. Sammis, U.S. Deputy Representative to the Economic and Social Council, on Resolution A/64/L.63/Rev.1, the Human Right to Water* (2010).

⁷⁹ UNGA Department of Public Information, *above n 77*.

⁸⁰ *Ibid*, *above*; Sammis, *above n 78*.

⁸¹ UNGA Department of Public Information, *above n 77*.

⁸² *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

⁸³ *Ibid* para 1.

of physical and mental health, as well as the right to life and human dignity.’⁸⁴ Importantly, the Resolution was adopted by consensus although there was ongoing debate around the status of the right, and over the kinds of obligations that it imposes on governments, including the compatibility of these obligations with PSP. In relation to this debate, two of the key sponsors of the resolution, Spain and Germany, made specific mention of the compatibility of the right to water with PSP, with Germany stating that States are free to choose the type of service provision, whether public, private or a mixture.⁸⁵ This was also reflected in paragraph 7 of the resolution,⁸⁶ which:

Recognizes that States, in accordance with their laws, regulations and public policies, may opt to involve non-State actors in the provision of safe drinking water and sanitation services and, regardless of the form of provision, should ensure transparency, non-discrimination and accountability.

In apparent response, Cuba expressed concern around the shift in language between the UNGA resolution and the resolution adopted by the HRC, arguing ‘[t]he exercise of this right should not be subjected to the narrow interest of profit seeking in providing this type of services.’⁸⁷

In further demonstration of an ongoing lack of consensus, the representative from the United Kingdom, Peter Gooderham, said ‘the United Kingdom regretted having to dissociate itself from the consensus’ and objected to the fact that ‘this resolution recalled and reproduced text from a General Assembly resolution of July 2010 on which 41 States, including the United Kingdom, abstained.’⁸⁸ Nonetheless, the UN Special Rapporteur on the human right to water welcomed the resolution for reaffirming the fact that:

⁸⁴ Ibid para 3.

⁸⁵ *Human Rights Council extends mandates on Housing, Indigenous People, Protecting Human Rights while Countering Terrorism and Mercenaries* (Human Rights Council, 2010).

⁸⁶ *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010) para 7.

⁸⁷ *Human Rights Council extends mandates on Housing, Indigenous People, Protecting Human Rights while Countering Terrorism and Mercenaries* (Human Rights Council, 2010).

⁸⁸ Ibid. The United Kingdom also objected to the inclusion of a freestanding right to sanitation, stating that, ‘there was no basis in international law for recognising a human right to sanitation. The adoption of the resolution today did not change this position.’

The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable. Hence from today onwards we have an even greater responsibility to concentrate all our efforts in the implementation and full realization of this essential right.⁸⁹

Since 2010 a greater level of consensus on the existence and content of the right has emerged. In March 2012 the *Ministerial Declaration of the Sixth World Water Forum* recognised the human right to water for the first time.⁹⁰ Paragraph 3 of the Declaration acknowledges the adoption of UN resolutions on the human right to safe and clean drinking water and sanitation,⁹¹ and commits ‘to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as a part of our efforts to overcome the water crisis at all levels.’⁹²

In June 2012 the *Outcomes document of the UN Conference on Sustainable Development* (popularly known as the Rio+20 Earth Summit) officially recognised the right to water in paragraph 121, which states, ‘[w]e reaffirm our commitments regarding the human right to safe drinking water and sanitation, to be progressively realized for our populations with full respect for national sovereignty.’⁹³ The inclusion of this statement had been the subject of debate in the lead-up to the conference, with Israel, the United States and Canada lobbying for it to be deleted.⁹⁴ However, in June, Canada made the historic decision to recognise the right to water for the first time,⁹⁵ and the

⁸⁹ *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

⁹⁰ Sixth World Water Forum, *Ministerial Declaration*, (2012). Note that this declaration has been criticised for not going far enough in recognising water as a human right and for promoting privatisation policies in relation to increasing access to water: Claire Provost, ‘World Water Forum declaration falls short on human rights, claim experts’, *The Guardian* 14 March 2012. This debate around the content and obligations of the right to water will be discussed in more detail below.

⁹¹ A/RES/64/292; A/HRC/RES/15/9; A/HRC/RES/16/2; A/HRC/RES/18/1.

⁹² Sixth World Water Forum, *Ministerial Declaration*, (2012).

⁹³ *The future we want: Report of the United Nations Conference on Sustainable Development (Rio+20)*, UN Doc A/CONF.216/L.1 (2012).

⁹⁴ See, eg, International Water and Sanitation Centre, *Rio+20: Canada finally recognises human right to water and sanitation* (2012) <<http://www.source.irc.nl/page/72202>> at 31 October 2012 .

⁹⁵ See, eg, Amnesty International (Canada), *Canadian recognition of human rights to water and*

paragraph was eventually included by consensus at the conference. Finally, in September 2012, the HRC adopted Resolution 21 (2012) on the human right to safe drinking water and sanitation.⁹⁶ This resolution was adopted by consensus and, significantly, States made only supportive statements in the accompanying debate.⁹⁷

(b) Recognition at the national level

As outlined above, 2012 could be described as a turning point in the consensus recognition of the human right to water in international law. This recognition has both influenced and been influenced by state practice at the national level where a number of States have also taken the step of individually recognising the right to water.

On 14 April 2005 the Belgian Parliament adopted a *Water Resolution* requesting that the Federal Government,

confirm that access to safe water in adequate quantity and quality is a basic human right and to take an initiative to include this right explicitly into the Belgian Constitution; to have this same right also included into relevant international treaties and above that to insist that governments are at all levels under the obligation to guarantee this basic right...⁹⁸

In November 2006 the United Kingdom officially recognised the right to water in the context of shifting the focus of its development program to better secure the right to water for the global poor.⁹⁹ The Netherlands also recognised the right to water on World Water Day in 2007 through an announcement by the Dutch Minister for Development

sanitation must be followed by action (2012) <<http://www.amnesty.ca/media2010.php?DocID=1598>> at 31 October 2012 .

⁹⁶ *Resolution on the human right to safe drinking water and sanitation*, 21st HRC sess, UN Doc A/HRC/21/L.1 (2012).

⁹⁷ *News & Media: Human Rights Council Adopts 10 Resolutions on Safe Drinking Water, Preventable Maternal Mortality and Use of Mercenaries* (2012) United Nations Office at Geneva <[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/94F3F4EA614DE009C1257A86004877F8?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/94F3F4EA614DE009C1257A86004877F8?OpenDocument)> at 1 November 2012 .

⁹⁸ *Chambre Des Représentants De Belgique, Proposition De Résolution: Accès à l'eau pour chacun*, DOC 51 1666/003, (2005).

⁹⁹ UK Department for International Development (DFID), *UK recognizes the right to water as Hilary Benn launches call for Global Action Plan to solve water crisis*, Press release (DFID, 2006).

Cooperation.¹⁰⁰ As of December 2012, ten national constitutions explicitly recognise water as a human right: South Africa,¹⁰¹ Uruguay,¹⁰² the Democratic Republic of the Congo,¹⁰³ Nicaragua,¹⁰⁴ The Maldives,¹⁰⁵ Ecuador,¹⁰⁶ Bolivia,¹⁰⁷ Kenya,¹⁰⁸ Dominican

¹⁰⁰ Bert Koenders, *Speech delivered by the Dutch Minister for Development Cooperation in The Hague on the occasion of World Water Day*, (2007). For an unofficial English translation of key excerpts see also COHRE, *Netherlands recognize the right to water* (2007).

¹⁰¹ *Constitution of the Republic of South Africa 1996*, s 27: 'Everyone has the right to have access to [...] sufficient food and water'. See also *Water Services Act 1997* (South Africa), s 3.

¹⁰² *Constitution of the Oriental Republic of Uruguay 1967, con las modificaciones plebiscitadas el 26 de noviembre del 1989, el 26 noviembre del 1994, el 8 de diciembre del 1996 y el 31 de octubre del 2004*, art 47: 'Water is an essential natural resource for life. Access to drinking water and the sewerage system, constitute a fundamental human right.' It also states that National Water and Sanitation policies will give priority to the provision of drinking water for the population, and that social grounds must prevail over economic grounds.

¹⁰³ Article 48 of *Constitution of the Democratic Republic of the Congo* (2005), guarantees access to drinking water: 'The right to decent housing, the right of access to drinking water and to electric energy are guaranteed. The law establishes the conditions for the exercise of these rights.'

¹⁰⁴ *Constituciones de las Republica de Nicaragua 1987, con las Reformas de 1995, 2000, 2004 y 2005*, confirms in art 105 that it is the obligation of the State to promote, facilitate and regulate the provision of the basic public services of energy, communication, water... and the population has an inalienable right to have access to these services.

¹⁰⁵ *Constitution of the Republic of Maldives 2008*, art 23(a): 'Every citizen the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources: (a) adequate and nutritious food and clean water...'

¹⁰⁶ *Constitución Política del Ecuador 2008*, art 12: 'The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life.' ['El derecho humano al agua es fundamental e irrenunciable.']. art 66: 'The following rights of persons are recognized and guaranteed: ... 2. The right to a decent life that ensures ... clean water...' ['Se reconoce y garantizará a las personas: ... 2. El derecho a una vida digna, que asegure ... agua potable...'].

¹⁰⁷ *Constitution of the Republic of Bolivia 2009*, art 16(I) 'Everyone has the right to water and food.' ['Toda persona tiene derecho al agua ya la alimentación.']; art 20(I) 'Everyone has the right to universal and equal access to basic services of water, sewer, electricity, household gas, postal and telecommunications.' ['Toda persona tiene derecho al acceso universal y equitativo a los servicios básicos de agua potable, alcantarillado, electricidad, gas domiciliario, postal y telecomunicaciones.'].

¹⁰⁸ *Constitution of Kenya 2010*, s 43(1)(d): 'Every person has the right— ... (d) to clean and safe water in adequate quantities...'

Republic,¹⁰⁹ and Morocco.¹¹⁰ In addition, courts in India, Pakistan, Bangladesh, Nepal, Brazil, and Argentina have found that a right to water can be implied from other explicit rights in their national constitutions, including the rights to life, education, and a healthy environment.¹¹¹ A significant number of other States, including Algeria,¹¹² Angola,¹¹³ Bangladesh,¹¹⁴ Belarus,¹¹⁵ Burkina Faso,¹¹⁶ Dominican Republic,¹¹⁷ France,¹¹⁸

¹⁰⁹ *Constitution of the Dominican Republic 2010*, art 61(1) ([Unofficial translation] ‘Everyone has the right to comprehensive health care. Accordingly: (1) The State shall ensure the protection of the health of all people, access to clean water...’ [Spanish original version] ‘Toda persona tiene derecho a la salud integral. En consecuencia: 1) El Estado debe velar por la protección de la salud de todas las personas, el acceso al agua potable...’).

¹¹⁰ *Constitution of Morocco 2011*, art 31 ([Unofficial translation] ‘The state, public institutions and local authorities conduct their work to mobilize all means available to facilitate equal access of citizens to the conditions allowing them to enjoy the following rights: ... access to water and a healthy environment...’ [French official version] ‘L’Etat, les établissements publics et les collectivités territoriales Œuvrent à la mobilisation de tous les moyens à disposition pour faciliter l’égal accès des citoyennes et des citoyens aux conditions leur permettant de jouir des droits : ... à l’accès à l’eau et à un environnement sain...’)

¹¹¹ See Langford et al, above n 36, 110-117; Inga Winkler, ‘Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India’ (2008) 1 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/winkler/winkler.pdf> at 14 November 2012.

¹¹² *Water Law no. 05-12*, 4 August 2005, accessed on 29 October 2012 at: <http://www.joradp.dz/HFR/Index.htm> (French Original Version), art 3 (‘The principles on which the use, the management and the sustainable development of water resources are as follows: - the right of access to water and sanitation to satisfy the basic needs of the population respecting equity and the rules set forth by the present law relating to public water and sanitation services...’)

¹¹³ *Water Act*, 21 June 2002 [Unofficial Translation], accessed on 29 October 2012 at: <http://www.pl-consulting.biz/waterlex/index.php?r=legalDocument/customView&id=33>, art 9(1) (‘The management of water resources is governed by the following principles: (a) the right to water of the citizen and of collective entities; ... (g) water as a social good, renewable, limited and with economic value; ...’) [Portuguese original version available at: <http://faolex.fao.org/docs/pdf/ang63753.pdf>]

¹¹⁴ *National Water Policy*, 1999, accessed on 29 October 2012 at: [http://www.mowr.gov.bd/Documents/National%20Water%20Policy%20\(English\).pdf](http://www.mowr.gov.bd/Documents/National%20Water%20Policy%20(English).pdf) Preface (‘Availability of water, in both quantitative and qualitative terms, is a basic human right and sound planning is necessary to ensure it.’); 1 (‘Its availability for sustenance of life, in both quantitative and qualitative terms, is a basic human right and mandates its appropriate use without jeopardising the interest of any member of the society.’)

¹¹⁵ *Law on drinking water supply*, Law No. 271-Z of 24 June 1999, as last amended 20 July 2006

Guinea,¹¹⁹ Indonesia,¹²⁰ Latvia,¹²¹ Mauritania,¹²² Namibia,¹²³ Nicaragua,¹²⁴ Paraguay,¹²⁵ Ukraine,¹²⁶ and Venezuela,¹²⁷ have enacted other legislation that formally recognises

(unofficial translation), accessed on 29 October 2012 at:

<http://pravo.by/webnpa/text.asp?RN=H19900271>, art 19 ('The users of drinking water have the right: to be provided with drinking water from the centralized and non-centralized drinking water supply systems in accordance with the norms governing drinking water quality and the standards for drinking water consumption...'), art 31 ('The republic of Belarus guarantees each natural person within its territory the provision with drinking water in accordance with the standards for drinking water consumption and the established norms of quality.')

¹¹⁶ *Loi No. 002-2001, Portant Loi D'Orientation Relative a la Gestion De L'eau 2001* ((Burkina Faso), art 2 ([Unofficial translation] 'The law acknowledges that everyone has the right to avail of water corresponding to his or her needs and for the basic needs of his/her life and dignity.')

¹¹⁷ Law No. 64-00, General Law on the Environment and Natural Resources 2000 (Dominican Republic), art 127 ('Every person has a right to use water to satisfy his vital needs of feeding and hygiene of his family and his animals...').

¹¹⁸ *Code de l'environnement (Version consolidée au 15 octobre 2012) 2012* (France), L210-1, as amended by *Loi n° 2006-1772 du 30/12/06 sur l'eau et les milieux aquatiques 2006* (France), ([Unofficial translation] 'Within the framework of laws and regulations and the rights previously established, the use of water belongs to all, and every person has the right to access safe drinking water, for health and hygiene, under conditions that are economically acceptable to all.')

¹¹⁹ *Loi Portant Code De L'eau (Water Code, Law No. L/94/005/CTRN) 1994* (Guinea), art 6(1) ([Unofficial translation] 'Subject to the provisions stipulated in article 4 of the present law, everyone has an inalienable right to access water resources and a right to use them for domestic purposes.')

¹²⁰ *Law No. 7/2004 on Water Resources 2004* (Indonesia), art 5 ('The state guarantees the right of every person in obtaining water for minimum rudimentary daily use to fulfill a healthy, clean and productive life.').

¹²¹ *Law on Water Management 2002* (Latvia), art 17(1) ('Natural and legal persons shall have the right to ... use free of charge water resources for ... personal needs, where the amount of water abstracted for personal needs does not exceed the limits fixed by the Cabinet of Ministers.').

¹²² *Water Code, Law No. 2005-030 2005* (Mauritania), art 2(2) ([Unofficial translation] 'The use of water is a right recognised for all, subject to the laws and rules in force.')

¹²³ *Water Resources Management Act, Act No. 24 of 2004 2004* (Namibia), art 3 ('Fundamental principles: This Act must be interpreted, and be reasonably and fairly applied, in a manner that is consistent with and promotes the following fundamental principles - (a) equitable access to water resources by every citizen, in support of a healthy and productive life; ... (c) essentiality of water in life, and safe drinking water a basic human right...'), art 26(1) ('Reliability of Water Supply: The Minister must ensure that all Namibians are provided with an affordable and a reliable water supply that is adequate for basic human needs.')

the right to water. The United Kingdom has also demonstrated its respect for the right to water by enacting legislation prohibiting the disconnection of water services for non-payment.¹²⁸

As has been outlined above, it is evident that States have recognised the existence of the right to water at both the international and national level; what is now at issue is the content of the right.

3.2 Content of the right to water

According to GC 15 fulfillment of the right to water requires the provision of 'sufficient, safe, physically accessible and affordable water for personal and domestic uses'.¹²⁹ Despite general agreement on the existence and broad content of the right to

¹²⁴ *Law governing the suspension of concessions for the use of water, Law 440 of 11 August 2003*

(Nicaragua), art 1 ([Unofficial translation] 'Access to water constitutes a citizens' right and a human right, inviolable and indispensable. The State shall guarantee and facilitate the adequate provision of potable water at just and popular prices for each and all Nicaraguans.'). cited in Thorsten Kiefer et al, *Legal Resources for the Right to Water: International and National Standards - 2nd edition* (Centre on Housing Rights and Evictions (COHRE), 2008) 96.

¹²⁵ *Law on Water Resources, Law 3239 2007* (Paraguay), art 3(b) ([Unofficial translation] 'Access to water for the satisfaction of basic needs is a human right and [such access] must be guaranteed by the State in adequate quantity and quality.'). art 4 ([Unofficial translation] 'The National Water Resource Policy shall be guided by the following fundamental objectives: ... (b) To guarantee that all inhabitants have access to potable water, given that this is a human right.'). art 16 ([Unofficial translation] 'Every natural person has a right to access to a minimum quantity of potable water per day that is sufficient for the satisfaction of their basic needs. The minimum quantity of water per person per day shall be established by regulation by the Ministry of Public Health and Social Welfare.'). cited in Kiefer et al, above n 124, 96.

¹²⁶ *Law of Ukraine on ensuring the sanitary and epidemic safety of the population, Law No. 4004-XII (as last amended 07 February 2002) 1994* (Ukraine), art 4 ('Citizens shall have the following rights to: foodstuffs, drinking water, work conditions, education, up-bringing, household surroundings, recreation, and the environment that are safe for their life and health.').

¹²⁷ *Water Law 2007* (Venezuela), art 5(1) ([Unofficial translation] 'Access to water is a fundamental human right.').

¹²⁸ *R v Director General of Water Services* (1999) Env LR 114 (QBD), section 1. See also Explanatory Notes, para 7.

¹²⁹ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 2.

water, the precise meaning of these requirements requires closer analysis. The interpretation of these terms is highly contextual and raises complex governance questions around how to best balance efficiency and equity goals. The most contentious amongst these have been sufficiency, physical accessibility and affordability and it is these terms that will be discussed below.

3.2.1 The meaning of sufficiency

There is no consensus on what it means to have a right to sufficient water for personal and domestic use. It is also unclear whether it is desirable or possible to quantify such an amount. The World Health Organisation ('WHO') Guidelines state that every human needs a minimum of about 20 litres per capita per day ('Lpcpd') in order to satisfy her basic needs.¹³⁰ However, WHO describes this amount as a *basic* level of service where the risk to health remains *high*, and contrasts it with an *intermediate* level of around 50 Lpcpd.¹³¹ It is at this intermediate level of around 50 Lpcpd that householders find it easier to ensure good hygiene and the risk to health drops to *low*.¹³² Households with an intermediate level of water service are estimated to use 30 times more water for child hygiene than those with a basic level of service.¹³³ To put these figures into context, households in Australia use an average of around 260 Lpcpd (with 150 litres of this being used indoors),¹³⁴ and it takes around 200 litres to run an average-sized bath.¹³⁵

While around 20-25 Lpcpd is sufficient for people to have enough water for consumption, it is inadequate for them to maintain personal hygiene, to wash their clothes, clean their homes, or maintain adequate sanitation.¹³⁶ In order to undertake

¹³⁰ Guy Howard and Jamie Bartram, *Domestic water quantity, service level and health*, World Health Organisation (2003), 22.

¹³¹ WHO, above n 31, 12, 14; Howard and Bartram, above n 130, 22-23.

¹³² WHO, above n 31, 14.

¹³³ WHO, above n 31.

¹³⁴ Australian Bureau of Statistics (2005) 'Household Water Use and Effects of the Drought' in *Australian Economic Indicators*, (July issue) at http://www.abs.gov.au/AUSSTATS/abs@.nsf/46d1bc47ac9d0c7bca256c470025ff87/a0b004e8941b6fbfc_a25702f007a793b!OpenDocument.

¹³⁵ David A. McDonald, 'No Money, No Service: South Africa's Attempts to Recover Costs for Water and Power are Harming its Poorest Citizens' (2002) (Spring) *Alternatives Journal* 16.

¹³⁶ See Howard and Bartram, above n 130, 22-23.

these activities and lead a healthy life, 50-70 Lpcpd are required in the medium term.¹³⁷ WHO also makes it clear that a long-term solution should provide people with a higher amount of water, which will allow households to provide for people with higher than average needs and, where relevant, to tend to kitchen gardens (which are an essential source of nutrition for many households).¹³⁸

Context is also relevant to the determination of sufficiency, in that there are a range of factors that will affect the quantity of water required by a particular individual for their personal and domestic needs.¹³⁹ For example, unlike many rural households, urban users do not have access to alternative sources of water for washing and sanitation, which increases the amount of water that they need to obtain from improved sources.¹⁴⁰ Howard and Bartram also set out various factors that impact on individual requirements for water, including geographic location (such as a dry, hot climate) and membership of high-needs population groups, including young children, pregnant and lactating women, the elderly and the terminally ill.¹⁴¹

All of these issues make it difficult to attach an exact quantity on the requirement that everyone have access to *sufficient* water. In GC 15, CESCR states that '[t]he quantity of water available for each person should correspond to WHO guidelines,'¹⁴² but they do not elaborate further on what that might mean in terms of a quantified amount. OHCHR, on the other hand, interprets WHO guidelines to mean that 'between 50 and 100 [Lpcpd] are needed to ensure that all health concerns are met.'¹⁴³ The Office of the

¹³⁷ See *ibid*, 22-24; B.J. Reed, *Minimum water quantity needed for domestic uses (WHO technical note for emergencies no. 9)*, WHO (2005).

¹³⁸ *Ibid*.

¹³⁹ María De Los Ángeles García-Valiñas, Roberto Martínez-Espiñeira and Francisco González-Gómez, 'Measuring Water Affordability: A Proposal for Urban Centres in Developed Countries' (2010) 26(3) *International Journal of Water Resource Development* 441, 446.

¹⁴⁰ See, eg, Peter Henry Gleick, *Supporting affidavit in Mazibuko v City of Johannesburg*, In the High Court of South Africa (Witwatersrand Local Division) (2005), para 22.

¹⁴¹ Howard and Bartram, above n 130, 5-6.

¹⁴² *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 12(a).

¹⁴³ *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC session, UN Doc A/HRC/6/3 (2007) 11, citing Howard

High Commissioner for Human Rights (‘OHCHR’) also cautions that the ‘threshold of 25 [Lpcpd] represents the lowest level to maintain life, but this amount raises health concerns because it is insufficient to meet basic hygiene and consumption requirements.’¹⁴⁴ The UN Special Rapporteur on the human right to water has also promoted this upper figure of 100 Lpcpd.¹⁴⁵ She qualifies her argument by saying that what this actually means in practice will depend on the specific context and the particular needs of the individuals in question, but concludes that 100 Lpcpd is a good guide, while 15 Lpcpd is the minimum required for emergencies.¹⁴⁶

There is clearly a tension between recognising the contextual issues that will shape the precise water needs of each individual and the need to provide a quantified amount as a guide to policy makers. There is a risk that failing to provide a specific figure may reduce the impact of the right to access *sufficient* water, since it effectively leaves the determination of quantity to the State. On the other hand, there is a risk that an overly specific quantity may reduce the right to the lowest common denominator amount, thus rendering it *insufficient* for many people or, alternatively, result in a minimum requirement that is unachievable for some governments. These issues will be examined in more detail in Section 4.3.2.

3.2.2 The meaning of physical accessibility

Another criterion for the effective exercise of the right is that water must be physically accessible, which means that it will preferably be available inside, or in close proximity to, the home.¹⁴⁷ According to data from WHO, this has implications not only for how much water will be collected and, thus, available for household use, but also for the

and Bartram, above n 130, 22.

¹⁴⁴ Ibid, citing Guy Hutton and Lawrence Haller, *Evaluation of the costs and benefits of water and sanitation improvements at the global level* (World Health Organization, 2004).

¹⁴⁵ Catarina de Albuquerque, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, 15th sess HRC, UN Doc A/HRC/15/31 (2010) para 19.

¹⁴⁶ Ibid.

¹⁴⁷ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 12(c)(i); *Report of the United National High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC sess, UN Doc A/HRC/6/3 (2007) para 25.

amount of time that is otherwise available to members of the household (usually the female members) for other economic activities or for attending school.¹⁴⁸ WHO believes that physical accessibility is the most important factor in ensuring adequate access to water and that the focus should be on improving the level of service provided from 'basic' to 'on-plot' (intermediate access) and finally to 'multiple taps in house' (optimal access).¹⁴⁹

Recent debate seems to be shifting towards that idea that rather than requiring access to *within 200m* or *1000m* of the house,¹⁵⁰ the right to physically accessible water requires that water be available *inside* the house.¹⁵¹ Connor et al refer to this shift in the 2012 World Water Development Report when they argue that the 2010 Joint Monitoring Programme's finding that '884 million people still use unimproved sources for drinking water ... represent a significant under-estimation.'¹⁵² They argue that when '[m]easured against the more precise and rigorous standards now defined under the right to water, ... the [real] number of people without access to safe and reliable tap water *in their homes* is between 3 and 4 billion [emphasis added].'¹⁵³ It may be that providing a water connection inside the home is an unrealistic minimum standard for many countries,¹⁵⁴ but this 'optimal access' could be considered to be the target for the progressive realisation of the right to water.¹⁵⁵

3.2.3 The meaning of affordability

The third criteria for the realisation of the right is that water must be affordable – or *economically accessible*.¹⁵⁶ This is a complex issue and the definition of affordability

¹⁴⁸ WHO, above n 31, 15.

¹⁴⁹ Howard and Bartram, above n 130, 24-25.

¹⁵⁰ See, eg, WHO, above n 31, 15.

¹⁵¹ See, eg, Richard Connor et al, 'Chapter 5: Water management, institutions and capacity development' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water under Uncertainty and Risk* (2012) 133 142.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ See, eg, WHO, above n 31, 15.

¹⁵⁵ Howard and Bartram, above n 130.

¹⁵⁶ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc

remains unsettled.¹⁵⁷ The United Nations Development Programme ('UNDP') suggests that affordability might be defined by a ceiling of three percent of household income, while conceding there is scope for debate on the exact figure.¹⁵⁸ This figure of three percent is repeated often in the literature,¹⁵⁹ with a range of three to five percent being the norm.¹⁶⁰

More controversially, OHCHR and CESCR's GC 15 have both argued that in some circumstances affordability might require the provision of free water.¹⁶¹ Opponents of free water, such as the World Bank, argue that it goes against the Dublin Principle of recognising the economic value of water, and demonstrates the tension between affordability and the focus on cost recovery and financial sustainability that is fundamental to the good governance approach.¹⁶² As Salman and McInerney-Lankford observe, '[m]ost, if not all, water resources specialists would argue strongly against free water. Demand management would by necessity require some form of pricing of water.

E/C/12/2002/11 (2002), para 12(c)(ii).

¹⁵⁷ See García-Valiñas, Martínez-Espiñeira and González-Gómez, 'Measuring Water Affordability: A Proposal for Urban Centres in Developed Countries' (2010) 26(3) *International Journal of Water Resource Development* 441; Meera Mehta, Thomas Fugelsnes and Kameel Virjee, 'Financing the Millennium Development Goals for Water and Sanitation: What Will it Take?' (2005) 21(2) *International Journal of Water Resource Development* 239 243; Tapio S Katko, 'Cost recovery in water supply in developing countries' (1990) 6(2) *International Journal of Water Resource Development* 86.

¹⁵⁸ UNDP, *Human Development Report - Beyond scarcity: Power, poverty and the global water crisis* (2006), 97.

¹⁵⁹ See, eg, UNESCO and WWAP (eds), *The United Nations World Water Development Report 3: Water in a Changing World* (2009), 66.

¹⁶⁰ See, eg, Henri Smets, 'Access to drinking water at an affordable price in developing countries' (2009) A 88 *Options Méditerranéennes* 57; *Managing Water for All: An OECD Perspective on Pricing and Financing* (OECD, 2009) 73-94; Vivien Foster and Tito Yepes, *Is cost recovery a feasible objective for water and electricity? The Latin American experience* (in World Bank Policy Research Working Paper, World Bank, 2006) 16; Arthur McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003), 20. Contra Alexander McPhail, 'The "Five Percent Rule" For Improved Water Service: Can Households Afford More?' (1993) 21(6) *World Development* 963.

¹⁶¹ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 28; *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 27.

¹⁶² See, eg, Salman and McInerney-Lankford, above n 25, 70-71.

Free water is an invitation for misuse and abuse.’¹⁶³ In response, OHCHR argues that affordability ‘defines limits to cost recovery and highlights the fact that it should not become a barrier to access to safe drinking water.’¹⁶⁴ As discussed in section 2.2.2(b), free water can be provided for low-volume users and funded through cross-subsidies in a manner that is broadly consistent with demand management and financial sustainability imperatives. This approach may be necessary to ensure genuine affordability for the poorest households.

3.3 Obligations imposed under the right to water

The nature of the obligations imposed under the right to water has tended to be more controversial than the interpretation of the content of the right.¹⁶⁵ This is partly due to the history of debate over the nature and enforceability of socioeconomic rights, which has focused on their budgetary implications and the reality of the resource constraints facing many countries.¹⁶⁶ CESCR has been an active participant in this debate and has

¹⁶³ Salman and McInerney-Lankford, above n 25, 70. See also Anna Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1, 12, who documents concerns from senior personnel from within various international organisations' water programs 'over the right to water being associated with free water and undermining the sustainability of the limited resource.'

¹⁶⁴ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007); *Report of the United National High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC sess, UN Doc A/HRC/6/3 (2007) para.28.

¹⁶⁵ See, eg, *Human Rights Council extends mandates on Housing, Indigenous People, Protecting Human Rights while Countering Terrorism and Mercenaries* (Human Rights Council, 2010).

¹⁶⁶ For arguments against the imposition of socioeconomic rights due to their budgetary implications, see, eg, Daniel J. Whelan, 'Unpacking a 'violations approach' to protecting economic, social and cultural rights' (Paper presented at the *Annual Meeting of the American Political Science Associate*, Chicago, 30 August - 2 September 2007); Michael J. Dennis and David P. Stewart, 'Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health?' (2004) 98(3) *American Journal of International Law* 462; Cass R. Sunstein, 'Against positive rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe' (1993) 2(Winter) *Eastern European Constitutional Review* 35 (Although note

sought through its General Comments to elaborate on the obligations imposed under the ICESCR in order to give more certainty and weight to the socioeconomic rights it protects. This has included identifying the obligations of immediate effect that apply to all socioeconomic rights regardless of resource constraints, such as non-discrimination, the obligation to take immediate steps, and the presumption against retrogressive measures.¹⁶⁷ Most controversial,¹⁶⁸ has been CESCR's promotion of the concept of *minimum core obligations*¹⁶⁹ – or those obligations that are so essential that no limitations can reasonably be justified.

3.3.1 Respect, protect, fulfil

The least controversial aspect of CESCR's clarification of socioeconomic rights is their delineation of the obligations imposed on States Parties by the ICESCR into three categories of duties: *respect*, *protect* and *fulfil*.¹⁷⁰

The obligation to *respect* can generally be correlated with the 'negative' duty not to take any actions that might negatively impact on socioeconomic rights.¹⁷¹ In relation to the

that he appears to have changed his mind in more recent years: Cass R. Sunstein, *The second bill of rights: FDR's unfinished revolution and why we need it more than ever* (2004)). But see *contra* Leckie, above n 34; Sandra Liebenberg, *Needs, rights and transformation: Adjudicating social rights*, Center for Human Rights and Global Justice working paper - Economic and social rights series, NYU School of Law (2005); Malcolm Langford, 'The justiciability of social rights: from practice to theory' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 3.

¹⁶⁷ See *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990).

¹⁶⁸ See Section 3.3.2(c) below.

¹⁶⁹ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) para 10.

¹⁷⁰ See *General Comment No. 12 on the right to adequate food (Art.11)* 20th CESCR sess, UN Doc E/C.12/1999/5, para 15. The Committee affirmed that these categories of obligations applied to the right to water in *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C.12/2002/11 (2002) para 20. For a more general discussion of these categories of obligations see also Leckie, above n 34, 91 (citations omitted).

¹⁷¹ See *General Comment No. 12 on the right to adequate food (Art.11)* 20th CESCR sess, UN Doc E/C.12/1999/5, para 15; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*,

right to water, CESCR states, ‘the obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water [...]’.¹⁷²

The obligation to *protect* places an obligation on governments to prevent the impairment of rights by third parties.¹⁷³ This obligation primarily requires State regulatory action to prevent third parties from infringing the rights of others, and would include measures to prevent third parties from contaminating water sources or denying others access to adequate water.¹⁷⁴ This has particular relevance to the ongoing obligations of government to protect the right to water in situations where the public system has been contracted out to private entities. These issues were addressed by the UN Special Rapporteur on the human right to water in a 2010 report,¹⁷⁵ where she emphasized that ‘[t]he delegation of water and sanitation service delivery does not exempt the State from its human rights obligations.’¹⁷⁶

The obligation to *fulfil* involves an obligation to take positive action to provide for the realisation of the rights protected under the ICESCR – including obligations such as funding and carrying out programs designed to directly assist in the realisation of the rights in question, as well as adopting appropriate legislative, judicial and administrative frameworks to support the promotion of these rights.¹⁷⁷ In order to

ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 10.

¹⁷² *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C.12/2002/11 (2002), para 21.

¹⁷³ See *General Comment No. 12 on the right to adequate food (Art.11)* 20th CESCR sess, UN Doc E/C.12/1999/5, para 15; and OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 10.

¹⁷⁴ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C.12/2002/11 (2002), para 23.

¹⁷⁵ Albuquerque, above n 145.

¹⁷⁶ *Ibid* paras 15-16.

¹⁷⁷ See *General Comment No. 12 on the right to adequate food (Art.11)* 20th CESCR sess, UN Doc E/C.12/1999/5, para 15; and OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 10.

provide further clarity, CESCR has outlined three subcategories of the obligation to fulfil: *facilitate*, *promote*, and *provide*.¹⁷⁸

The most significant aspect of this obligation to *facilitate* in relation to the realisation of the right to water is the need to expand services to previously unserved and underserved areas – particularly by connecting these areas to the public network and removing any structural barriers to access (such as prohibitions against providing connections to informal settlements). Other positive measures to both *facilitate* and *promote* may include empowering individuals and groups to participate in water governance (an issue that will be discussed further in Section 3.4.3 and Chapters 4 and 8). This also raises the issue of transparency or access to information, as the community will need access to relevant information in order to participate effectively.¹⁷⁹ Finally, as noted above, the obligation to *provide* might require the provision of free water,¹⁸⁰ or the provision of State subsidies for the poor.¹⁸¹

3.3.2 The meaning and enforceability of progressive realisation

This argument that the obligation to *provide* access to water might require the provision of free water or subsidies raises the controversial issue of resource constraints and whether it is realistic or possible to enforce positive rights.¹⁸² When the ICESCR was drafted, the acknowledged concern that governments of the Global South lacked

¹⁷⁸ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 25.

¹⁷⁹ *Ibid* para 12(c)(iv).

¹⁸⁰ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para.28.

¹⁸¹ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 27.

¹⁸² ‘Positive’ rights can be theoretically distinguished from ‘negative’ rights due to the fact that they impose an obligation on the State to take action, as opposed to obliging them to refrain from acting. However, the distinction between these two groups of rights has been critiqued. It is argued that the distinction is unsustainable as the realisation and protection of all rights require both positive and negative actions from the State. See, eg, Scott Leckie, ‘Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 81; Craig Scott, ‘Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ (1989) 27 *Osgoode Hall Law Journal* 769.

sufficient resources to immediately fulfil their obligations under the Covenant,¹⁸³ led to the inclusion of Article 2(1),¹⁸⁴ which provides that these obligation are ones of *progressive realisation*, subject to the availability of resources:

Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its *available resources*, with a view to achieving *progressively* the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁸⁵

The interpretation of Article 2(1) has been the subject of debate.¹⁸⁶ It has been argued that the standard of progressive realisation, and the qualification regarding resource availability, means that the obligations under the ICESCR are ‘devoid of meaningful content.’¹⁸⁷ However, CESCR,¹⁸⁸ the International Commission of Jurists,¹⁸⁹ and many

¹⁸³ See, eg, Whelan, above n 166, 30, citing U.N. Doc. E/CN.4/SR.248, 6. See also OHCHR and International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 687-688 for an account of the debates around the drafting of the ICESCR and the impact of resource constraints on the immediate implementation of the rights contained in the Covenant.

¹⁸⁴ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), Article 2(1), entered into force on 3 January 1976.

¹⁸⁵ *Ibid.*

¹⁸⁶ For an overview of this debate, see Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Politics, Morality* (2nd ed, 2002) 246-275. For a detailed analysis of this issue in the context of South Africa’s constitutional recognition of socioeconomic rights, see Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 191-198. For an overview of the historical debates on this subject, including the related issue of global justice and the demands of the Global South for resource redistribution in the context of socioeconomic rights, see Whelan, above n 34; Arjun Sengupta, ‘On the Theory and Practice of the Right to Development’ in Arjun Sengupta, Archana Negi and Moushumi Basu (eds), *Reflections on the Right to Development* (2005) 81.

¹⁸⁷ See, eg, Dennis and Stewart, above n 166. For a summary of other examples of these arguments, see also Alston and Steiner, *International Human Rights in Context: Law, Politics, Morality* (2nd ed, 2002) 246.

¹⁸⁸ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990); *General Comment No. 9: The Domestic Application of the Covenant*, 19th CESCR sess, UN Doc E/C.12/1998/24 (1998).

¹⁸⁹ *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986).

scholars have contradicted this analysis and argued that it is possible to find some meaningful content within the standard of progressive realisation, even in the context of genuine resource scarcity.¹⁹⁰ This argument has been reinforced recently by a number of judiciaries,¹⁹¹ with the South African Constitutional Court being a leading example of developing a distinct jurisprudence around the concept of progressive realisation.¹⁹²

(a) Maximum available resources

According to OHCHR, '[t]he "maximum available resources" clause, qualifying the obligation to take steps towards the full realisation of rights, is a key defining feature of the concept of progressive realisation.'¹⁹³ The standard of progressive realisation was intended to bring a degree of flexibility in the application of the obligations imposed under the ICESCR.¹⁹⁴ The reference to available resources as a qualifier to the

¹⁹⁰ See, eg, Leckie, above n 34; Langford, above n 166, 29-40; Tara J. Melish, 'Rethinking the 'Less as more' thesis: Supranational litigation of economic, social and cultural rights in the Americas' (2007) 31 *N.Y.U. Journal of International Law & Politics* 171.

¹⁹¹ Progressive realisation has been considered in several jurisdictions, including Argentina: *Viceconti v. Ministry of Health and Social Welfare - Poder Judicial de la Nación*; Ecuador: *Mendoza & Ors v Minister of Public Health and the Director of the National AIDS-HIV-STI Program* (Tribunal Constitucional, 3ra. Sala, Ecuador, Resolucion No. 0749-2003-RA, 28 Jan. 2004); India: *Unnikrishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645; Colombia: see Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) citing T-595/02; T-025/04 (in which the Colombian Constitutional Court explicitly refers to General Comments Nos 3 and 14); T-602/03.

¹⁹² For leading examples of South African jurisprudence on the progressive realisation of socioeconomic rights see *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC); *Minister of Health v Treatment Action Campaign* ['TAC case'] (2002) 5 SA 721 (ZACC). For an thorough analysis of the role of progressive realisation in socioeconomic rights jurisprudence in South Africa (and beyond) see Liebenberg, above n 186, 187-202. See also Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa' (Public Law Working Paper No 12, University of Chicago, 2001) – Sunstein had long argued against the idea that socioeconomic rights had any meaningful content until he was convinced by the emerging jurisprudence in South Africa.

¹⁹³ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para. 5.

¹⁹⁴ See, eg, *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the*

obligations imposed on States Parties under the ICESCR is an acknowledgement that ‘in many countries the full realisation of those rights could only be achieved over a period of time owing to resource constraints.’¹⁹⁵ This acknowledgement responds to the fact that the fulfilment of economic, social and cultural rights will often involve a greater claim on the public purse than civil and political rights. While this difference is a matter of degree rather than of nature, it does have some implications for the capacity of resource scarce countries in the Global South to immediately fulfil all of their obligations under ICESCR.¹⁹⁶

Nonetheless, an important consideration regarding the calculation of ‘available resources’ is over-all spending priorities. As CESCR declares in *General Comment No.3*, the obligation of progressive realisation should not be dependent on a State Party’s capacity to increase available resources.¹⁹⁷ States Parties are instead obliged to make effective use of the resources that they already have available to them, while paying attention to ensure non-discrimination in their allocation.¹⁹⁸

This is particularly relevant to the right to water since the realisation of this right would actually result in financial savings for many governments.¹⁹⁹ As UNDP points out,²⁰⁰ the cost of providing access to basic water and sanitation services are dwarfed by the returns generated in increased productivity and reduced burdens on the health system.

Covenant), 5th CESCR sess, UN Doc E/1991/23 (1990) para. 9; and OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para. 8.

¹⁹⁵ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 5.

¹⁹⁶ See Aoife Nolan, Bruce Porter and Malcolm Langford, *The justiciability of social and economic rights: an updated appraisal* (in Working Paper, Center for Human Rights and Global Justice, 2007) 8-9.

¹⁹⁷ *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986) para 27; *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) paras 10, 12.

¹⁹⁸ Ibid.

¹⁹⁹ See, eg, UNDP, above n 158, 43.

²⁰⁰ See, eg, UNDP, above n 158, 43-46.

For example, they estimate that countries in the Global South would save around \$1.6 billion from their annual health budgets if they provided universal access to even the most basic water and sanitation services.²⁰¹

(b) Obligations of immediate effect

OHCHR notes that the relevance of resource availability is also dependent on the cost of fulfilling particular categories of obligation.²⁰² Although the obligation to *fulfil* may involve a claim on the public purse, the obligations to *respect* and *protect* will often involve so-called negative duties that do not have significant resource implications for the State. In recognition of this, CESCR has outlined a number of *obligations of immediate effect*,²⁰³ including the obligation of non-discrimination (contained in article 2(2));²⁰⁴ the obligations ‘to take steps’ and to use ‘all appropriate means,’²⁰⁵ and the presumption against retrogressive measures.²⁰⁶

The UN Special Rapporteur on the human right to water asserts that ‘States have an immediate obligation to guarantee non-discrimination in the exercise of the rights to water and sanitation.’²⁰⁷ The obligation of non-discrimination, thus, requires that States

²⁰¹ UNDP, above n 158, 43.

²⁰² OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 9.

²⁰³ See, eg, *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990), para 1. See also Leckie, above n 34, 93; *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986), paras 8, 16, 21, 35; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 15.

²⁰⁴ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI) Article 2(2), entered into force on 3 January 1976.

²⁰⁵ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, GA Res 2200A (XXI) Article 2(1), entered into force on 23 March 1976.

²⁰⁶ See *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) para 9.

²⁰⁷ Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, UN Doc A/HRC/21/42 (2012) para 51.

pay special attention to vulnerable or marginalised individuals and groups, including homeless populations and slum dwellers,²⁰⁸ persons with disabilities,²⁰⁹ indigenous communities,²¹⁰ prisoners and detainees,²¹¹ and women and children.²¹² In relation to water, this special attention includes taking steps to encourage the participation of women and indigenous peoples in water management decisions;²¹³ to prevent the encroachment and pollution of rural and indigenous peoples' water sources;²¹⁴ and to ensure that homeless populations and slum dwellers have access to properly maintained water facilities.²¹⁵ In relation to informal settlements, this also raises the issue of preventing discrimination in relation to housing or land status – a common global problem where people are denied access to the water system due to their lack of legal tenure, and one that can often be corrected simply through a change of legislation or policy.²¹⁶ It also requires addressing the entrenchment of this discrimination, such as the fact that slum dwellers (and homeless populations) are often not officially recognised, with the result that their lack of access to services is not recorded or addressed.²¹⁷

In GC 15, CESCR also emphasizes that the enforcement of the right to water includes the rigorous application of principles of non-discrimination, especially at the level of resource allocation and choice of service models.²¹⁸ OHCHR also notes that the 'principles of equality and non-discrimination require [...] that priority in allocating limited public resources is given to those who do not have access or who face

²⁰⁸ Ibid para 22, 35, 42.

²⁰⁹ Ibid para 26.

²¹⁰ Ibid para 30; *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 16.

²¹¹ Albuquerque, above n 207, para 28; *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 16.

²¹² Ibid para 16; Albuquerque, above n 207, para 22, 25.

²¹³ Ibid para 16(a), (d).

²¹⁴ Ibid para 16(c), (d).

²¹⁵ Ibid para 16(c).

²¹⁶ See, eg, ibid para 16(c); *Water and Sanitation in the World's Cities* (United Nations Human Settlements Programme (UN-Habitat), 2003).

²¹⁷ Albuquerque, above n 207, 35.

²¹⁸ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 14.

discrimination in accessing safe drinking water and sanitation.’²¹⁹ This would include giving priority to institutions that serve marginalised and vulnerable groups ‘such as schools, hospitals, and refugee camps.’²²⁰ It also requires that special attention be paid to the rights of minorities and vulnerable populations when scrutinising government decisions around resource allocation.²²¹

The obligation of non-discrimination also has implications for the pricing of water services. Tariffs and, particularly, connection fees that are prohibitive for the poor are a form of discrimination.²²² This is an issue for the kind of water governance model that is compatible with the full realisation of the right to water. A market-dominated model of water governance that focuses excessively on efficiency and financial sustainability risks, at best, ignoring issues of equity and non-discrimination, and, at worst, further entrenching inequitable patterns of water access that stem from the historic exclusion of the poor.²²³

²¹⁹ *Report of the United National High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC sess, UN Doc A/HRC/6/3 (2007) para. 24.

²²⁰ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para. 24.

²²¹ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), Article 2(2), entered into force 23 March 1976. See also *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), paras 13, 14. See also *CCPR General Comment No. 18: Non-discrimination*, 37th HRC sess, UN Doc HRI/GEN/1/Rev.1, 26 (1989), para 10. [This General Comment applies to the ICCPR rather than the ICESCR. However, Article 2(2) of the ICESCR is mirrored in the ICCPR and so it is relevant to both Covenants.]

²²² See *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 15; UNDP, above n 158, 99.

²²³ See, eg, Hulya Dagdeviren, 'Waiting for Miracles: The Commercialization of Urban Water Services in Zambia' (2008) 39(1) *Development and Change* 101; Jackie Dugard, 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) 42(2) *Review of Radical Political Economics* 175; Patrick Bond, *When Commodification Annuls the Human Right to Water* (School of Development Studies, University of KwaZulu-Natal, 2005); Nancy Birdsall and John Nellis, 'Winners and losers: Assessing the distributional impact of privatization' (2003) 31(10) *World Development* 1617; Kate Bayliss, *Privatisation and Poverty: The Distributional Impact of*

A standard of progressive realisation also indicates that States Parties should continue to 'take steps' to realise the rights protected under the ICESCR, meaning that doing nothing would be considered to be a violation of the Covenant.²²⁴ Additionally, it means that States should refrain from taking steps that would negatively impact on the realisation of the rights protected under the ICESCR – a rule that has often been described as the 'presumption against retrogressive measures.'²²⁵ In relation to the right to water, CESCR has stated:

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.²²⁶

This issue has been controversial in relation to the right to water, because of the issue of enforcing cost recovery through disconnections for non-payment. While some argue that the threat of disconnections is necessary to ensure that water bills are paid in order to ensure the financial sustainability of the system,²²⁷ others assert that disconnection should be considered a violation of the right to water and that there are other, more acceptable, methods available to encourage payment.²²⁸

Utility Privatisation (Paper No. 16, Centre on Regulation and Competition, 2002).

²²⁴ Leckie, above n 34, 93.

²²⁵ See *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) para 9.

²²⁶ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 19.

²²⁷ USAID and OECD, *Regional Assessment Survey and Workshop on Full Cost Recovery for Water Utilities in Southeast Asia: Sharing International Experience and Best Practices* (2005) 12, 15, 18-19; Water and Sanitation Program, *Cost Recovery in Urban Water Services: Select Experiences in Indian Cities* (World Bank, 2011) 8.

²²⁸ Bond, above n 223; David A. McDonald, 'The Theory and Practice of Cost Recovery' in David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002); Michael Kidd, 'Not a Drop to Drink: Disconnection of Water Services for Nonpayment and the Right of Access to Water' (2004) 20(1) *South African Journal on Human Rights* 119; Bronwen Morgan, 'Turning off the tap: Urban water service delivery and the social construction of global administrative law' (2006) 17(1) *European Journal of International Law (EJIL)* 215.

(c) Minimum core obligations

In *General Comment No.3*, CESCR also identifies certain immediate obligations that exist at the core of the rights guaranteed under the ICESCR; arguing that '[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.'²²⁹ CESCR explains that a State party that fails to meet these minimum core obligations 'is, *prima facie*, failing to discharge its obligations under the Covenant.'²³⁰

Adopting a minimum core obligation approach to the right to water means that States are under an immediate obligation to provide a minimum quantity of drinking water to every individual or household, rather than having to adopt policies and plans of actions designed to increase the number of households that are connected to the water system over a period of time. A possible criticism of this approach is that some States may not be able to immediately provide a minimum quantity of water to their populations, either due to resource constraints or a lack of technical capacity.²³¹ As will be demonstrated by the South African case study, discussed in Chapter 6, it also raises the difficult question of quantifying what such a minimum amount ought to be.

Another concern is that the determination of a minimum core forces the courts to consider issues that are beyond their institutional capacity. This concern has been central to the Constitutional Court of South Africa's decision not to adopt the concept.²³² In the significant *Grootboom* judgment,²³³ the Constitutional Court of South Africa developed a model of 'reasonableness review' for considering positive duties, in lieu of a minimum core content approach.²³⁴ The central question posed by this form of review is whether the means chosen by the State are reasonably capable of facilitating

²²⁹ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990). para 10. See also United Nations Commission on Human Rights, Resolution 1993/14.

²³⁰ *Ibid* para 10.

²³¹ Although see above nn 197-201 and accompanying text, for an argument against this point.

²³² *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC) paras 32, 33; *Minister of Health v Treatment Action Campaign ['TAC case']* (2002) 5 SA 721 (ZACC) para 34; *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 52-62.

²³³ *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC) para 41.

²³⁴ See Liebenberg, above n 186, 151-157.

the realisation of the socioeconomic rights in question.²³⁵ This is a deferential standard, designed to give the State a degree of discretion in determining the content of any measures adopted to meet its obligations,²³⁶ partly in recognition of the resource constraints that currently limit the South African government's capacity to immediately fulfil the socioeconomic rights recognised under the Constitution.²³⁷

Bilchitz recognises this issue of resource constraints in his defence of the concept of a minimum core, but claims that recognising the minimum core is an important means of according a higher priority to what he describes as people's 'minimum interest' in basic survival while continuing to progressively realise people's 'maximum interest' in living a life of dignity that allows them to flourish.²³⁸ He rejects the inclusion of a 'thicker' concept of the good life within the minimum core, arguing that there is no universal agreement on what such a life entails.²³⁹

There are several problems with this 'basic survival needs' approach. The first is the risk of under-inclusion that would stem from an inaccurate assessment of the actual needs of the community in question. A 'survival needs' approach to the definition of the minimum core might, for example, result in an allocation of 20-25 litres of water per person per day as being an adequate minimum threshold for the realisation of the right to water, since this amount corresponds to the WHO's definition of a 'basic allocation.'²⁴⁰ However, individuals living on this basic water allocation face a high risk of adverse health impacts and live precariously close to the edge of survival.²⁴¹ Furthermore, this basic allocation does not account for water needs that go beyond those

²³⁵ *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC) para 41.

²³⁶ *Ibid.*

²³⁷ See, eg, *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) 12 BCLR 1696 (CC), para 30.

²³⁸ David Bilchitz, 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal*, 493-494; David Bilchitz, 'Towards a reasonable approach to the minimum core: Laying the foundations for future economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights*, 13.

²³⁹ David Bilchitz, *Poverty and Fundamental Rights* (2007), 62.

²⁴⁰ WHO, above n 31, 12, 14; Howard and Bartram, above n 130, 22-23.

²⁴¹ *Ibid.*

of the average person, which leaves those with additional water needs without enough water to meet their basic survival needs.²⁴²

Pieterse promotes an alternative approach by arguing that socioeconomic rights adjudication must be grounded in ‘a substantive conception of the good society,’ and should focus on the protection and realisation of human dignity.²⁴³ This approach would lead to a minimum core that grants everyone access to sufficient goods and services to enable them to live with dignity.²⁴⁴ This dignity-based approach might instead result in a minimum core right to somewhere between 50-100 litres of water per person per day.²⁴⁵ People living with this allocation of water face only a low risk of adverse health impacts.²⁴⁶ Furthermore, this allocation allows for a small buffer to adequately provide for the survival needs of those groups of people who require more than average amounts of water.

In addition to avoiding the risk of under-inclusion, this dignity-based approach could help to avoid the risk of reducing rights-claimants to ‘passive . . . recipients of predefined services rather than as agents involved in interpreting their needs and shaping their life conditions.’²⁴⁷ If the minimum core is grounded in ‘a substantive conception of the good society,’ then arguably the implication is that everyone needs to be able to participate in the dialogue over what such a good society entails – and, by extension – over the substantive content of the right to water. This latter benefit could be reinforced through the incorporation of participatory rights into the right to water framework – a concept that is discussed further in Chapter 4. Policies and plans that are designed to realise the right to water are less likely to lose sight of the context-specific rights (or needs) of individuals and communities when community participation is incorporated into their development, implementation and evaluation.

²⁴² Howard and Bartram, above n 130, 5.

²⁴³ Edgar Pieterse, 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796, 802 (citations omitted).

²⁴⁴ Ibid.

²⁴⁵ WHO, above n 31, 12, 14; Howard and Bartram, above n 130, 22-23.

²⁴⁶ Ibid.

²⁴⁷ Nancy Fraser, *Unruly Practices: Power, Discourse And Gender In Contemporary Social Theory* (1989) 174 cited in Katherine G. Young, 'The minimum core of economic and social rights: a concept in search of content' (2008) 33 *Yale Journal of International Law* 113, 132.

3.4 Good governance and the right to water

The final issue of contention raised by the right to water is the question of what style of water governance is compatible with the obligations imposed by the right. The two most debated issues in relation to the tension between the realisation of the right to water and good governance reforms (including PSP) are physical access and affordability. While there is significant literature on the broad subject of participation in water governance,²⁴⁸ the centrality of this issue to the debate over the tension between the realisation of the right to water and good governance reforms has received less focus.

In response to this apparent tension, the UN Special Rapporteur on the human right to water released a report in 2010 in which she emphasised that there was nothing inherently incompatible between PSP and the right to water.²⁴⁹ She did, however, highlight that the introduction of PSP does not absolve the State from its ongoing obligations under the right to water, including the need to ensure accessibility, affordability and participation.²⁵⁰

3.4.1 Good governance and physical accessibility

Critics of PSP argue that the private sector delays the expansion of access to water for poor and marginalised communities because it targets the more profitable neighbourhoods when funding new infrastructure.²⁵¹ In response, the UN Special Rapporteur on the human right to water argues that States retain the power to negotiate contracts that mandate service expansions into unserved or underserved areas, but often choose not to exercise this power.²⁵² Although this point does not undermine the argument that PSP presents considerable regulatory challenges that may be beyond the capacity of many governments of the Global South (as will be discussed in Chapters 5

²⁴⁸ See, eg, Kate Berry and Eric Mollard (eds) *Social Participation in Water Governance and Management: Critical and Global Perspectives* (2010).

²⁴⁹ Albuquerque, above n 145.

²⁵⁰ Ibid.

²⁵¹ Albuquerque, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, 15th sess HRC, A/HRC/15/31 (2010) para 39.

²⁵² Ibid para 40.

and 7 relation to the Manila case study),²⁵³ it does highlight the ongoing significance of the State responsibility to *facilitate* access even in the context of PSP.

3.4.2 Good governance and affordability

The question of what kind of cost recovery policies are necessary to guarantee affordability also remains contentious.²⁵⁴ As discussed in Section 2.2.2, the IFIs have traditionally promoted full cost recovery in order to guarantee the financial sustainability of water system,²⁵⁵ or to guarantee profit under PSP arrangements.²⁵⁶ This approach is supported by some scholars, such as Katko,²⁵⁷ Mehta,²⁵⁸ and McPhail,²⁵⁹ who argue full cost recovery is necessary to enable many water utilities to perform adequate maintenance and to extend the network to outlying communities and informal

²⁵³ See Section 2.3.4(b) above. See also *ibid* 37, 51-52, 56-60.

²⁵⁴ For an overview of this debate see Rachel Cardone and Catarine Fonseca, *Financing and Cost Recovery* (International Water and Sanitation Centre, 2003), 11. For a critical academic perspective on the impact of cost recovery on affordability, see Hubert H.G. Savenije and Pieter van der Zaag, 'Water as an Economic Good and Demand Management Paradigms with Pitfalls' (2009) 27(1) *Water International* 98; Morgan, 'Turning off the tap: Urban water service delivery and the social construction of global administrative law' (2006) 17(1) *European Journal of International Law (EJIL)* 215; Laila Smith and Susan Hanson, 'Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery' (2003) 40(8) *Urban Studies* 1517; David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002). But see *contra* Mehta et al, above n 157; Katko, above n 157, 88.

²⁵⁵ World Bank, *Water supply & sanitation: Pricing and subsidies* (2009) <<http://go.worldbank.org/SJBI3DFZW0>> at 1 May 2009; Celine Nauges and Caroline van den Berg, *Water markets, demand and cost recovery for piped water supply services: evidence from southwest Sri Lanka* (in World Bank Policy Research Working Paper, World Bank, 2006); Foster and Yepes, *Is cost recovery a feasible objective for water and electricity? The Latin American experience* (in World Bank Policy Research Working Paper, World Bank, 2006); Kristin Komives et al, *Water, electricity, and the poor - Who benefits from utility subsidies?* (World Bank, 2005); Ariel Dinar and Ashok (eds) Subramaniam, *Water Pricing Experiences: An International Perspective* (in Technical Paper, World Bank, 1997).

²⁵⁶ See, eg, Deborah Moore and Penny Urquhart, *Global Water Scoping Project* (WaterAID, 2004) 19; WaterAid, *International Financial Institutions (IFI), Conditionality and Privatisation of Water and Sanitation Systems* (WaterAid, 2003) 4, 9-10.

²⁵⁷ Katko, above n 157.

²⁵⁸ Mehta et al, above n 157, 243

²⁵⁹ McPhail, above n 160.

settlements.²⁶⁰ Nonetheless, UNDP,²⁶¹ WHO,²⁶² OHCHR,²⁶³ and Oxfam and WaterAid,²⁶⁴ all argue against the automatic imposition of full cost recovery measures, because of the risk that they will compromise affordability for the poor. Salman and McInerney-Lankford also cite the examples of concession agreements in Cochabamba, Bolivia, and other parts of Latin America, Asia and South Africa where PSP led to tariff increases that compromised affordability for the poor.²⁶⁵ They argue that ‘legitimate questions have been raised about the inevitable increases in tariffs that poor people cannot afford, and that, in turn, would threaten the concept of the human right to water.’²⁶⁶

3.4.3 Good governance and participation

Finally, the introduction of good governance reforms such as corporatisation and PSP can also hamper efforts to realise the right to water by reducing the capacity of the community to participation in water governance. As discussed in Section 2.4.2, despite the theoretical recognition of the value of participatory water governance, good governance reforms have often served to exclude the community, by placing decision-making power in the hands of the private sector; reducing the public’s access to information; and limiting opportunities to hold the State and water service provider to account.²⁶⁷ As will be discussed in relation to the case studies in Manila and South

²⁶⁰ See also World Bank, *Water supply & sanitation: Pricing and subsidies* (2009)

<<http://go.worldbank.org/SJBI3DFZW0>> at 1 May 2009; Komives et al, above n 255, 5; McIntosh, above n 160.

²⁶¹ UNDP, above n 158, 97.

²⁶² WHO, above n 31, 16, 25, 28-29.

²⁶³ OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) *Report of the United National High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 6th HRC sess, UN Doc A/HRC/6/3 (2007) para.28.

²⁶⁴ Bethan Emmett, *In the Public Interest - Health, Education, and Water and Sanitation for All* (Oxfam and WaterAid, 2006), 86-87.

²⁶⁵ Salman and McInerney-Lankford, above n 25, 70-71.

²⁶⁶ Ibid.

²⁶⁷ See, eg, UNDP, above n 158, 102, 192-194.

Africa, the resulting lack of opportunity to participate in water governance has a significant impact on the extent to which water management decisions incorporate the experiences and perspectives of the community (and especially of poor and marginalised sections).²⁶⁸

This issue has been acknowledged by the UN Special Rapporteur on the human right to water, who stresses that any decision to delegate water management to a third party must be made in a open and participatory manner.²⁶⁹ In this context, she highlights the problem of donor conditionalities, which can ‘undermine democracy and the capacity of local authorities to address and solve local problems.’²⁷⁰ She also emphasises the importance of transparency and public access to information about all stages of the privatisation process,²⁷¹ and the need to ensure that mechanisms are available for the public to easily hold the service provider to account for any (alleged) breaches of human rights.²⁷²

As Chapter 4 will argue, participation is often a prerequisite to the realisation of socioeconomic rights, including the right to water, because where participation is scarce or absent for particular groups, they lack the power to demand access to their rights.²⁷³ Participation in consultations and other management processes allows marginalised communities to apply the necessary pressure to ensure that water service providers and policy makers take their needs into consideration, while accountability mechanisms allow them to take action against poor or inequitable service.

The issue of participation was recognised to a limited degree in paragraph 48 of GC No 15, which states:

The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may

²⁶⁸ See Chapter 8 below.

²⁶⁹ Albuquerque, above n 145, para 34.

²⁷⁰ Ibid para 35.

²⁷¹ Albuquerque, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, 15th sess HRC, A/HRC/15/31 (2010) para 36.

²⁷² Ibid paras 58-60.

²⁷³ See, eg, UNDP, above n 158, 102, 192-194.

affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.²⁷⁴

However, Salman and McInerney-Lankford are critical of GC 15 for being ‘silent on the issue of participation of the users in the operation and management of water resources.’²⁷⁵ They point out that the importance of adopting a participatory approach to water management was emphasised in the second of the Dublin Principles,²⁷⁶ and that the need for participation highlights ‘the interdependence of social and economic rights on the one hand, and political and civil rights on the other.’²⁷⁷ Salman and McInerney-Lankford argue in favour of a ‘right to manage, or participate in the management of, the water resources,’²⁷⁸ and promote this as a positive alternative to the privatisation of water services.²⁷⁹ They link this right of participation with an argument that the right to water should confer duties and obligations on users ‘to conserve water, use it in a sustainable manner, or protect and pay for it.’²⁸⁰ This highlights the potential for participatory water management to offer an alternative model of governance reform that might also serve to promote a more sustainable approach to water consumption and management, thus addressing the scarcity aspect of the water crisis in addition to helping to increase access.

A belief in the value of incorporating public participation into water governance is also at the heart of civil society calls for a ‘commons-based water management approach.’²⁸¹ Proponents of this approach argue that ‘the best way to ensure equitable distribution of water, to expand delivery in a manner that does not favour the wealthier at the expense

²⁷⁴ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 48.

²⁷⁵ Salman and McInerney-Lankford, above n 25, 74.

²⁷⁶ Salman and McInerney-Lankford, above n 25, 75, citing *The Dublin Statement on Water and Sustainable Development: Report of the International Conference on Water and the Environment*, A/CONF/151/PC/112 (1992), Principle 2.

²⁷⁷ Salman and McInerney-Lankford, above n 25, 75.

²⁷⁸ *Ibid.*

²⁷⁹ Salman and McInerney-Lankford, above n 25 (But note that these ‘cooperative solutions’ are also promoted as alternatives to public water utilities, indicating that the emphasis remains on user payment rather than public funding.)

²⁸⁰ *Ibid* 74.

²⁸¹ Adam Davidson-Harden, Anil Naidoo and Andy Harden, ‘The geopolitics of the water justice movement’ (2007) (11) *Peace Conflict & Development*, 32.

of the poorer, and to reduce conflict is through participatory processes that respect the needs of the community.’²⁸² This approach proposes that water be understood as being part of the *commons* and, thus, subject to community control, in order to oppose the neoliberal definition of water as a commodity, subject to private control.²⁸³

Some civil society advocates of this *commons*-based approach to water management have described it as ‘a key companion to the human right to water.’²⁸⁴ As discussed in the introduction, other proponents go further and argue that water justice campaigners should abandon their focus on the human right to water and focus exclusively on promoting the *commons*.²⁸⁵ These arguments are based on concerns over the framing of the right to water as being compatible with PSP and the implication that community control is not a central component of the right to water.²⁸⁶

However, by recognising the participatory rights associated with the right to water, it is possible to promote a more expansive interpretation of the right to water, which could serve to enhance community control over water governance and, thus, secure many of the gains sought by those advocating for a *commons*-approach.

Conclusion

With the adoption of the resolutions of the UNGA²⁸⁷ and the HRC,²⁸⁸ it can now be said that a right to water has been recognised in international law, primarily derived from the

²⁸² Ibid.

²⁸³ Ibid 6, 30.

²⁸⁴ Davidson-Harden, Naidoo and Harden, 'The geopolitics of the water justice movement' (2007) (11) *Peace Conflict & Development* 32.

²⁸⁵ See Karen Bakker, 'The 'commons' versus the 'commodity': Alter-globalization, anti-privatization and the human right to water in the global south' (2007) *Antipode* 430; Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012); Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317.

²⁸⁶ See Bakker, above n 285, 447.

²⁸⁷ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010). 41 countries abstained from the vote, but no country voted against the resolution. The reasons expressed by many of countries for abstaining will be discussed below.

²⁸⁸ *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN

rights to an adequate standard of living, and to the highest attainable standard of physical and mental health.²⁸⁹ It is also broadly agreed that this right guarantees access for everyone to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’²⁹⁰ However, the interpretation of this content and the question of what kind of obligations this imposes on States remains contentious.

While context is relevant to the determination of sufficiency, it is argued that between 50-100 Lpcpd is a reasonable minimum ongoing amount, particularly for a minimum core content founded on the promotion of human dignity. An amount somewhere above 100 Lpcpd could be considered optimum and as the target for the progressive realisation of the right. Affordability is also influenced by context, but between 3-5% of income is widely accepted to be a maximum amount, while the merits of providing free water continue to be debated. Finally, the standard for physical accessibility seems to be evolving towards the goal of in-house connections, with a distance of between 200-1,000 metres being considered as a minimum standard.

In relation to the compatibility between the obligations imposed by the right to water and the good governance approach to water reform, this chapter acknowledges the findings of the UN Special Rapporteur on the human right to water that there is nothing inherently incompatible about PSP and the realisation of the right.²⁹¹ However, this does not absolve the State from its obligations to protect and facilitate the right to water, and this might include an obligation to provide subsidies to ensure affordability, and to negotiate contracts that guarantee a non-discriminatory approach to expanding access. Private water providers should also acknowledge their own responsibilities to uphold the right to water, which may include undertaking human rights audits and not entering into contracts where human rights standards cannot be respected.²⁹²

Doc A/HRC/15/L.14 (2010).

²⁸⁹ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 3 January 1976, 160 States Parties (as of 3 October 2012).

²⁹⁰ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), paras 1, 2.

²⁹¹ Albuquerque, above n 145.

²⁹² Anna Russell, 'Incorporating social rights in development: transnational corporations and the right to water' (2011) 7(1) *International Journal of Law in Context* 1, 26.

Some of these obligations may be in tension with the central goals of good governance. Affordability places pressure on financial sustainability, while efficiency might be compromised by the obligations to ensure non-discrimination and participation. However, the process of navigating these tensions offers an opportunity to improve the good governance approach, by ensuring that policies designed to achieve these economic goals are more responsive to their social effects. This process of integrating the right to water into the reform process will also increase the emphasis on ensuring that these policies result in increased access for the poor.

This same argument applies to the incorporation of community participation into the water governance process, which good governance theory has itself acknowledged as critical to an effective reform process (be it PSP-focused or otherwise).²⁹³ Participation is also recognised as a necessary pre-condition and a component of the right to water, in addition to being a right in itself, although what this means in practice is currently ill defined. It is these issues around participation and water governance that will be examined further in Chapter 4.

²⁹³ See Section 2.4 above.

Chapter 4. Participation

In the commentary to article 18 of the *Berlin Rules on Water Resources*,¹ the International Law Association notes,

In contemporary society, legitimacy largely depends on the consent of the governed, and hence on the sense that the governed have a voice through direct participation, representation, deliberation, or other methods. [...] Given the central importance of water in people's lives, the now generally recognised right of people to participate in decisions affecting their lives must apply to decisions concerning waters.²

In examining the question of whether the right to water can be a valuable solution to the crisis of water access, its contribution to increasing equity is a key consideration. There are a number of issues that are relevant to this question, including affordability, non-discrimination, and participation. This potential for the right to water to increase the emphasis on affordability and non-discrimination in current approaches to water governance reform has been widely acknowledged.³ Comparatively little consideration has been given to the possibility that the right to water will also increase the priority given to participation and why this is significant to improving governance and increasing equity and access to water.

This chapter examines the difference between the human rights approach to participation and the approach adopted under the good governance agenda. This examination will start with a discussion of the historical evolution of the theory of participation within development practice in order to contextualise how participation came to be understood by good governance theory and, later, by the human rights-based approach to development. Good governance has traditionally valued participation for its

¹ Joseph W Dellapenna, 'The Berlin Rules on Water Resources' (Report of the 71st Conference, International Law Association, 2004).

² Ibid art 18.

³ See, eg, Sarah Hale, 'The Significance of Justiciability: Legal Rights, Development, and the Human Right to Water in the Philippines' (2007) XXVII(No.2 (Summer-Fall)) *SAIS Review* 139; Catarina de Albuquerque, *Integrating non-discrimination and equality into post-2015 development agenda for water, sanitation and hygiene*, 67 sess UNGA, A/67/270 (2012); Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012).

instrumental purposes to development, whereas the human rights approach to participation recognises its intrinsic and legitimising value to individuals and communities. The significance of this difference is considered, and it is argued that a human right to participation, viewed as either a prerequisite to, or a component of, the right to water, can answer a number of concerns about human rights raised by those who argue that water justice campaigners should avoid human rights rhetoric and focus instead on championing the *commons*. Finally, the limitations of participation are discussed, and some possible solutions are proposed in response to the main critiques of participatory development.

4.1 Participation in development

Osmani defines 'effective participation' as,

one in which all the relevant stakeholders take part in decision-making processes and are also able to influence the decisions in the sense that at the end of the decision-making process all parties feel that their views and interests have been given due consideration even if they are not always able to have their way.⁴

The World Bank shares a similar definition, defining participation as 'a process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them.'⁵ What this means in practice, however, is a contested issue.⁶ A wide range of underlying agendas, within various theories and practices of politics and development, have shaped the concept of participation.

⁴ Siddiqui Osmani, 'Participatory governance: An overview of issues and evidence' in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 1 n. 4.

⁵ See World Bank, *The World Bank participation sourcebook* (1996).

⁶ See Sherry R. Arnstein, 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216; Maria Aycrigg, 'Participation and the World Bank: success, constraints, and responses' (Paper presented at the *International Conference on Upscaling and Mainstreaming Participation: of Primary Stakeholders: Lessons Learned and Ways Forward*, Washington DC, November 1998); Bill Cooke and Uma Kothari (eds), *Participation, the new tyranny?* (2001); Andrea Cornwall and John Gaventa, *From users and choosers to makers and shapers: Repositioning participation in social policy* (in IDS Working Paper 127, Institute of Development Studies, 2001); Diane M Guthrie, 'Strengthening the principle of participation in practice for the achievement of the Millennium Development Goals' in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 163

4.1.1 Emergence of participatory development

The policy trend towards the adoption of formal mechanisms for public participation in policy making started in the 1960s and 70s in response to the crises of legitimacy facing many governments in the Global North.⁷ This trend filtered down to the Global South, both through the actions of governments and the increasing adoption of participatory development techniques by development agencies in the 1970s and 80s.⁸

Tandon argues that the early model of development established in the post-World War II period was focused on top-down, expert-led, economic assistance from the 'developed' to the 'developing' world.⁹ This was further reinforced by the creation of specialized bodies within the United Nations ('UN') that employed experts and concentrated on dispensing their knowledge throughout the Global South.¹⁰ This model of development largely ignored the existence of local knowledge, community networks and self-help systems that already existed throughout the Global South.¹¹ Nonetheless, some non-government organisations did recognise and support these grassroots initiatives and, in doing so, their experience went on to inform the work of several UN agencies which began to experiment with using participatory techniques in health, education and water projects.¹²

By the late 1960s, there was a growing recognition that the top-down, expert-led model of development was failing to incorporate local knowledge and failing to ensure local ownership of projects; leading to programs that were inappropriate, unsustainable,

⁷ See John Gaventa, 'Exploring citizenship, participation and accountability' (2002) 33(2) *IDS Bulletin* 1, 1; Cornwall and Gaventa, above n 6, 4; Jona Razzaque, 'Public participation in water governance' in Joseph W. Dellapenna and Joyeeta Gupta (eds), *The evolution of the law and politics of water* (2009) 355; Marion Barnes, Janet Newman and Helen Sullivan, *Power, participation and political renewal: case studies in public participation* (2007) 33.

⁸ Razzaque, above n 7, 355; Rosemary McGee, 'Participating in Development' in Uma Kothari and Martin Minogue (eds), *Development theory and practice* (2002) 92-95.

⁹ Rajesh Tandon, 'Participation, citizenship and democracy: reflections on 25 years' of PRIA' (2008) 43(3) *Community Development Journal* (Oxford University Press) 284, 286, 287.

¹⁰ Ibid 287.

¹¹ Ibid 287.

¹² Ibid 287.

ineffective and inefficient.¹³ It was in this context that the existing models of successful community participation began to be noticed and gradually to be incorporated into development practice.¹⁴ By the 1970s, there had been a proliferation of new research and theories around the concept of participatory development – or community-based development, as it was often known.¹⁵ These early theories, which were brought into development by theorists like Chambers and Cernea,¹⁶ recognised the *agency* of development recipients and were influenced by a number of key theories and theorists on participatory education and popular mobilisation, including Gandhi, Horton and Freire.¹⁷

Despite the radical roots of this theory, early practical models of participation in development often took a more restrained approach, focusing largely on beneficiary participation and the establishment of consultative mechanisms.¹⁸ A popular method was the creation of user committees and the inclusion of representatives from marginalised groups into these new participatory structures.¹⁹ The World Bank, for example, began to adopt participatory development processes (or ‘community driven development’)²⁰ in the 1970s and 80s in response to the initiative of host countries.²¹ Initially, these participatory processes were fairly limited, technocratic approaches consisting primarily of information sharing or consultation, and focused on increasing the efficiency of projects and the encouragement of cost sharing.²²

¹³ Ibid 288.

¹⁴ Ibid 288.

¹⁵ Ibid 288.

¹⁶ McGee, above n 8, 94. See Robert Chambers, *Rural Development — Putting The Last First* (1983); Michael M. Cernea (ed), *Putting People First: Sociological Variables in Development* (1985).

¹⁷ See Tandon, above n 9, 288. See also Paulo Freire, *Pedagogy of the oppressed* (1970); Myles Horton and Paulo Freire, *We make the road by walking: conversations on education and social change* (1990).

¹⁸ See Cornwall and Gaventa, above n 6, 4; Arnstein, above n 6, 6; Barnes, Newman and Sullivan, above n 7, 7; Tandon, above n 9, 289.

¹⁹ See Cornwall and Gaventa, above n 6, 5; Tandon, above n 9, 289.

²⁰ See, eg, Ghazala Mansuri and Vijayendra Rao, *Evaluating Community-Based and Community-Driven Development: A Critical Review of the Evidence* (World Bank, 2003).

²¹ See Samuel Paul, *Community participation in development projects: the world bank experience* (in World Bank Discussion Paper, World Bank, 1987).

²² See *ibid*.

Participation had been mainstreamed in most large-scale development projects by the mid-1990s.²³ However, as discussed in Chapter 2, within the World Bank, and also within the larger policy sphere, participation was quickly subsumed within the ‘good governance’ agenda.²⁴ This meant that participation was chiefly understood as an instrumental tool through which to contribute to the primary goals of financial sustainability and efficiency. As a result, Aycrigg reports that participation became an optional feature of development programming, and when this instrumental value could not be established, participatory processes were sidelined or abandoned altogether.²⁵

4.1.2 Instrumental values of participation

The instrumental values attributed to participation include the improvement of both efficiency and equity, both of which contribute to better development outcomes.²⁶ Osmani argues that participation is fairly unique in terms of its capacity to increase both efficiency and equity, as ‘in most cases of public policy one has to face a trade- off between the two.’²⁷ He explains that participation contributes towards efficiency by improving decision-making in relation to the allocation of budgetary resources, the management of common property resources, and the delivery of community services.²⁸ If elite capture (‘a phenomenon where resources transferred for the benefit of the

²³ Tandon, above n 9, 289-290.

²⁴ See Gaventa, above n 7, 1; Bidyut Chakrabarty and Mohit Bhattacharya, ‘Introduction’ in Bidyut Chakrabarty and Mohit Bhattacharya (eds), *Governance discourse: a reader* (2008); Tandon, above n 9, 291; Osmani, above n 4, 1; Razzaque, ‘Public participation in water governance’ in Dellapenna and Gupta (eds), *The evolution of the law and politics of water* (2009) 355.

²⁵ See, eg, Aycrigg, above n 6.

²⁶ See Osmani, above n 4, 2-4; World Bank (2001) *Participation in project preparation – lessons from World Bank-assisted projects in India*, World Bank, Washington DC, accessed on 6 October 2011 at: http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/06/29/000094946_01062004023450/Rendered/PDF/multi0page.pdf, 8: “The instrumental view of participation is in line with current mainstream thinking in the Bank on participation. The intrinsic value view is gaining increasing acceptance, through adoption of extended frameworks for attacking poverty related to empowerment, vulnerability, and opportunity.”

²⁷ Osmani, above n 4, 6.

²⁸ Osmani, ‘Participatory governance: An overview of issues and evidence’ in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 14.

masses are usurped by a few’)²⁹ is avoided, participation can also provide weaker segments of society with the opportunity to express their preferences and to hold governments to account if they fail to respond.³⁰ This opportunity can serve to improve equity by empowering weaker segments of society, increasing their political influence, and expanding their social capital.³¹ However, while these instrumental values for participation are widely recognised, they are not particularly well supported by evidence and this has had implications for the level of priority that has been accorded to participatory practices in developing programming.

(a) Participation and efficiency

Participation is believed to improve efficiency in a variety of ways. Osmani reports that directly involving community members in decision-making processes can have a positive impact on efficiency by increasing allocative efficiency and responsiveness.³² Allocative efficiency requires that ‘resources are allocated in accordance with the preferences of the people concerned.’³³ Decisions based on an incorrect reading of peoples’ preferences, due to market failure or the distance of top-down bureaucracy, will result in a waste of resources – or, a ‘loss of allocative efficiency.’³⁴ By contrast, the Food and Agriculture Organisation of the United Nations (‘FAO’) reports that when community members participate in the decision-making processes that affect them, it is easier for their preferences to be expressed and understood.³⁵

It is also hypothesized that participation can improve other measures of efficiency. As discussed in Section 2.4.1, participation is thought to increase community ownership

²⁹ Diya Dutta, *Elite Capture and Corruption: Concepts and Definitions* (National Council of Applied Economic Research, 2009) 3. See also Jean-Philippe Platteau and Frédéric Gaspart, *Disciplining Local Leaders in Community-Based Development* (Centre for Research on the Economics of Development, Belgium, 2004).

³⁰ Osmani, above n 4, 6-7.

³¹ Ibid, 1, 7.

³² Osmani, ‘Participatory governance: An overview of issues and evidence’ in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 1 4.

³³ Ibid 4.

³⁴ Ibid 4.

³⁵ See FAO, ‘Water sector policy review and strategy formulation - A general framework’ (1995) 3 *FAO Land and Water Bulletin*, chp 9. See also Osmani, above n 4, 4.

over projects.³⁶ Both Osmani³⁷ and FAO³⁸ report that this ownership effect can improve technical efficiency (a term for how efficiently resources are used to achieve a particular outcome) by improving accountability and the exchange of relevant information between local communities and bureaucrats. The World Bank³⁹ have also found that participation reduces project costs, as community members are often more willing to contribute to the project by way of volunteer labour or cash contributions when given the opportunity to participate in the planning and implementation stages.

(b) Participation and equity

Participation is also thought to increase equity by empowering marginalised groups to voice their rights and needs.⁴⁰ Beyond just voicing these rights and needs, participation can also help marginalised sections of the community to identify themselves as rights-bearers, increasing their expectation of having their rights fulfilled and the likelihood that they will organise amongst themselves to demand responsiveness from government and other non-state actors.⁴¹ UNESCO reports that this empowering effect of participation can assist in combating the tendency for policy and planning to predominantly reflect the needs of elite sections of the community.⁴² This process is particularly important in relation to gender equity, as recognised by the World Water Council in its World Water Vision Report, where it argued that ‘democratic processes give women better opportunities to benefit equitably from the use of water resources and to take full part in decision-making.’⁴³

This kind of empowerment has often been described as building ‘social capital,’ which can be summarised as ‘the networks of relationships between different individuals and

³⁶ See, eg, Mansuri and Rao, above n 20.

³⁷ Osmani, above n 4, 4-5.

³⁸ FAO, above n 35, chp 9.

³⁹ See World Bank, above n 5, 159-160, 176, 213, 216, 223, 229, 233, 244.

⁴⁰ UNESCO, ‘Chapter 11: Sharing Water’ in UNESCO and WWAP (eds), *The United Nations World Water Development Report 2: Water a shared responsibility* (2006) 372, 389.

⁴¹ Osmani, above n 4, 7

⁴² UNESCO, ‘Chapter 11: Sharing Water’ in UNESCO and WWAP (eds), *The United Nations World Water Development Report 2: Water a shared responsibility* (2006) 372, 389.

⁴³ William J. Cosgrove and Frank R. Rijsberman, *World Water Vision* (World Water Council, 2000), 3.

groups operating outside the market sphere.’⁴⁴ Participatory governance can contribute to the development of two kinds of social capital; the ‘bonding’ type that allows community members to strengthen connections within fairly homogenous groups, and the ‘bridging’ type, that facilitates networking between people from different backgrounds.⁴⁵ Both kinds of social capital increase the power of individuals and communities to organise together and lobby for their rights to be recognised and fulfilled, and generally to exert more influence on the political and policy process.⁴⁶

(c) Evidence for the impact of participation

The true impact of participation is difficult to isolate and measure.⁴⁷ However, a strong body of evidence does exist to support the proposition that democratic participation has a positive impact on both good governance and human development.⁴⁸ For example, Sen demonstrated that democratic participation prevents humanitarian disasters, including famines.⁴⁹ Sen’s theory has been widely researched and widely misunderstood. He did not argue that democracy prevents hunger or even starvation, just that it prevented the development of the full-scale famines that had occurred, for example, in India prior to independence.⁵⁰ He hypothesizes that this is because

⁴⁴ Osmani, above n 4, 7. For a broader discussion of social capital, see also James Coleman, ‘Social capital in the creation of human capital’ (1988) 94 *American Journal of Sociology* 95; Robert Putnam, ‘Bowling Alone: America’s Declining Social Capital’ (1995) 6(1) *Journal of Democracy* 65.

⁴⁵ Osmani, above n 4, 7

⁴⁶ See, eg, Milton J. Esman, *Social capital and empowerment* (in *Think Pieces: Empowerment, CDD and Social Capital*, World Bank, 2003); Olivia C. Estrella Lopez, *Social capital and government in the production of public goods* (Universidad Autónoma de Barcelona, Departamento de Economía e Historia Económica, 2003).

⁴⁷ See Sidney Verba, Norman H Nie and Jae-on Kim, *Participation and political equality: a seven-nation comparison* (1978); Adam Przeworski, ‘Democracy, social inclusion, and development’ in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008); Osmani, above n 4, 10.

⁴⁸ See Przeworski, above n 47; Osmani, above n 4, 10.

⁴⁹ Amartya Sen, *Poverty and famines* (1981). See also Przeworski, above n 47; Osmani, above n 4, 12, citing Jean Dreze and Amartya Sen, *Hunger and public action* (1989); Jean Dreze and Amartya Sen, *India: Economic development and social opportunity* (1995).

⁵⁰ See, eg, Michael Massing, ‘Does Democracy Avert Famine?’, *New York Times* 1 March 2003.

democratic governments ‘have to win elections and face public criticism, and have strong incentive to undertake measures to avert famines and other catastrophes.’⁵¹

Przeworski also reports a proven link between democracy and rates of survival and education in children,⁵² while electoral participation by the poor has been shown to improve their relative income, even when those elections are not competitive and take place under an autocratic government.⁵³ Osmani argues that this demonstrates that participation generates more equitable policies even without the accompanying threat of electoral defeat.⁵⁴ Perhaps this can be attributed to the empowering effect of participation itself or its capacity to augment the social capital of poor communities. In comparisons between countries of similar levels of per capita income, higher levels of electoral participation have also been associated with lower levels of absolute poverty.⁵⁵

Despite these proven benefits, Chakrabarty argues that democracy, at least when it comes in the form of representative democracy, provides no guarantee that the needs of the most vulnerable in society will be taken into consideration.⁵⁶ Participatory theory has focused more closely on the potential power of participation to increase equity and efficiency through more direct forms of community engagement, such as consultation, village-level meetings, local committee structures, partnerships, and access to administrative and judicial procedures for ensuring accountability.⁵⁷ However, despite the extensive theory on the subject, there is currently little empirical evidence available to support the theory that participation contributes to both efficiency and equity at this micro level, partly because it is difficult to collect this kind of data. Another issue, which will be discussed further in section 4.4.2, is that most communities are non-homogenous, particularly in the urban context, which means that community representatives rarely represent everyone. This is most significant for marginalised groups, who are often prevented from full participation due to existing inequality.’

⁵¹ Ibid.

⁵² Przeworski, above n 47.

⁵³ Przeworski, above n 47; Osmani, above n 4, 13-14

⁵⁴ Osmani, above n 4, 10-12.

⁵⁵ Przeworski, above n 47. See also Verba, Nie and Kim, above n 47.

⁵⁶ Chakrabarty and Bhattacharya, above n 24, 8.

⁵⁷ Osmani, above n 4, 6

(d) Participation and common property resources

The one area where a body of evidence does exist to support arguments that direct participation improves both efficiency and equity is in relation to the management of public services, including water supply and sanitation ('WSS') systems.⁵⁸ There are a range of studies documenting the long history of participatory management of common property resources, such as water, and the fact that this practice has traditionally proven to be successful.⁵⁹ Water has been treated as a common good by human societies throughout history.⁶⁰ The United Nations Development Programme ('UNDP') reports that '[t]he world's earliest legal statutes recognised the special character of water. Under Roman law in the third century, *aqua profluens* (flowing water) was a common good, neither public nor private, emphasising equity and society-wide ownership.'⁶¹ This common-good view of water resources continues to be reflected in many systems of customary water rights and in the community-participation that is fostered within the resulting water governance structures.⁶²

This reality undermines the idea of the *tragedy of the commons* made popular by Hardin.⁶³ In his 1968 paper of the same title, Hardin argued that whenever a valuable resource is treated as part of the commons, and (crucially) not subject to private property rights, that resource would be quickly depleted, as there will be nothing to deter individuals from externalising the negative consequences of overuse.⁶⁴ Mansuri reports that Hardin's thesis, supported by property rights theorists (like Demsetz⁶⁵ and

⁵⁸ See, eg, Gaventa, above n 7, 9

⁵⁹ See, eg, Rutgerd Boelens and Hugo de Vos, 'Water Law and Indigenous Rights in the Andes' (2006) 29(4) *Cultural Survival Quarterly* 18; 'Indigenous Peoples Kyoto Water Declaration' (*Third World Water Forum*, Kyoto, Japan, 2003); Jessica Owley, 'Tribal Sovereignty over water quality' (2004) Fall *Journal of Land Use and Environmental Law*, Vandana Shiva, *Water Wars* (2002) 24; David H. Getches, 'Indigenous Peoples' Rights to Water Under International Law' (Paper presented at the 2004 ILSA Fall Conference, Colorado School of Law, 21-23 October 2005).

⁶⁰ Ibid.

⁶¹ UNDP, *Human Development Report - Beyond scarcity: Power, poverty and the global water crisis* (2006).

⁶² See above n 59.

⁶³ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243

⁶⁴ Ibid.

⁶⁵ Harold Demsetz, 'The Private Production of Public Goods' (1970) 13(3) *Journal of Law and Economics*

North⁶⁶), generated scepticism in ‘the World Bank and other multi-laterals about the viability of any local collective action in the provision of public goods, and created ... an emphasis on the development of private property rights.’⁶⁷ (The impact of this policy shift in relation to water governance can be seen in the ongoing focus on PSP within World Bank policy today, as discussed in Chapter 2).

However, Hardin’s thesis was significantly challenged by Nobel laureate Elinor Ostrom’s work on the *commons*,⁶⁸ which demonstrated that cooperative institutions to manage common property resources were in fact widespread and often highly successful. Ostrom’s work established that the ‘inexorable depletion’ argument only really applies to ‘open access’ or ‘global’ commons, like the high seas or the atmosphere.⁶⁹ Most local commons have historically been subject to ‘well-defined rules of access and use’ that have been established in response to local conditions and have continued to be adapted to remain in tune with local culture and traditions without resorting to enclosure through private property rights.⁷⁰ As UNDP points out, drawing on examples from Senegal, ‘customary law often involves strict controls on water use, with water rights structured to balance claims based on inheritance, social need and sustainability. Institutional cooperation is common.’⁷¹

Not only is cooperation at the community level common; it can also outperform alternative models, such as central government management or market control, in terms of both efficiency and equity.⁷² Ostrom’s research suggests that participatory community management is the ‘superior institutional framework’ in terms of ensuring both efficient and equitable water allocations in irrigation systems, particularly in terms

293.

⁶⁶ Douglass North, *Institutions, Institutional Change and Economic Performance* (1990).

⁶⁷ Mansuri and Rao, above n 20.

⁶⁸ Elinor Ostrom, *Governing the Commons: The Evolution of of Institutions for Collective Action* (1990); Elinor Ostrom and Roy Gardner, ‘Coping with asymmetries in the commons: Self-governing irrigation systems can work’ (1993) 7(4) *Journal of Economic Perspectives* 93.

⁶⁹ Ibid. See also Osmani, above n 4, 16-17.

⁷⁰ See *ibid.* See also Mansuri and Rao, above n 20, 7.

⁷¹ UNDP, above n 61, 185.

⁷² See Osmani, above n 4, 14.

of ensuring that water gets to the tail-end users during the dry season.⁷³ Similar findings have been made in relation to rural water supply projects and forest management, with community involvement increasing the local sense of ownership, willingness to contribute, and concern for preservation.⁷⁴ These findings support the ‘commons-based water management approach’ that has been promoted by civil society advocates within the water justice movement, either as a companion or an alternative to the human right to water (an issue to which we will return in Section 4.3).⁷⁵

4.1.3 Intrinsic value of participation

Beyond its instrumental benefits, participation also has an intrinsic value.⁷⁶ This intrinsic value of participation is reflected in Sen’s thesis on the idea of ‘development as freedom.’⁷⁷ In this seminal work, Sen argued that development consists, or at least should consist, of the expansion of freedom.⁷⁸ Relevantly, Sen defined freedom as the capacity to be and do those things that human beings have reason to value, including the capacity to participate in decision-making processes that affect their lives.⁷⁹ Sen makes a clear distinction between outcomes and process. While the expansion of the opportunity to live a life free from water poverty is a valuable *outcome* of development, the *process* by which this outcome is achieved is also relevant.⁸⁰ Sen argues that

⁷³ See Ostrom and Gardner, above n 68, 104. See also Ostrom, above n 68.

⁷⁴ See World Bank, *World Development Report: Infrastructure for Development* (1994); Osmani, above n 4, 15-18.

⁷⁵ See Adam Davidson-Harden, Anil Naidoo and Andy Harden, 'The geopolitics of the water justice movement' (2007) (11) *Peace Conflict & Development*; Karen Bakker, 'The 'commons' versus the 'commodity': Alter-globalization, anti-privatization and the human right to water in the global south' (2007) *Antipode* 430; Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012); Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317.

⁷⁶ Przeworski, above n 47.

⁷⁷ Amartya Sen, *Development As Freedom* (1999).

⁷⁸ Ibid.

⁷⁹ Ibid 36. See also 93-94 ('For example, a person with a high income but no opportunity of political participation is not 'poor' in the usual sense, but is clearly poor in terms of an important freedom.')

⁸⁰ Ibid, particularly 36; 93-94. See also Amartya Sen and Jean Dreze, *India: Development as Participation* (2002).

development should contribute to the expansion of both of these kinds of freedoms, because people attach a *separate and additional* value to the capacity to take part in, and influence, the process that defines and produces this valuable outcome.⁸¹ By participating, people become the agents of their own development rather than passive beneficiaries of charity.⁸²

Understanding this intrinsic value of participation requires a focus on the participatory processes that are claimed from below as well as those that are created from above.⁸³ This understanding of participation draws on human rights and on sustainable development's recognition of people's capacity and entitlement to participate in the management of their natural resources and public goods.⁸⁴ The relevance of this is that when participation is viewed through a human rights framework, it is valued for more than its capacity to increase the efficiency of a project or policy. This should ultimately increase the priority accorded to participation itself.

4.2 Conceptualising participation as a human right

The intrinsic value of participation is acknowledged in the growing recognition that participation is itself a human right. This understanding of participation also goes beyond concepts of representative democracy. As UNDP argues,⁸⁵ elections are not enough to guarantee inclusive democracy. Instead new ways must be found to ensure real participation in decision-making, particularly for marginalised groups. Contemporary citizenship theory reflects this more active concept of citizenship;⁸⁶ as 'one which recognises the agency of citizens as "makers and shapers" rather than as

⁸¹ Ibid.

⁸² See Cornwall and Gaventa, above n 6; Osmani, above n 4, 3

⁸³ Barnes, Newman and Sullivan, above n 7, 51.

⁸⁴ Tandon, above n 9, 294.

⁸⁵ UNDP, above n 61, 7-9.

⁸⁶ And here 'citizenship' incorporates the emerging concepts of 'transnational' or 'denationalized' citizenship, which go beyond the nation state. See, eg, Saskia Sassen, 'The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics' (2002) 46 *Berkeley Journal of Sociology* 4; David Owen, 'Transnational Citizenship and the Democratic State Modes of Membership and Voting Rights' (2011) 14(5) *Critical Review of International Social and Political Philosophy* 641.

“users and choosers” of interventions or services designed by others.’⁸⁷ From this perspective, participation can be seen as a fundamental citizenship *right*, one that empowers citizens to protect and realise their other human rights.⁸⁸ Lister⁸⁹ argues that this kind of active citizenship recasts people as agents in the political process, changing their self-identity in the process.

This framing of participation as a human right in itself has its roots in liberal theories of citizenship.⁹⁰ However, historically this recognition has focused on participation in representative democracy and, until recently, it is this less direct form of participation that has been given legal protection through a range of international and regional human rights instruments.⁹¹ In recent decades, however, a more direct and active form of participation has started to be incorporated into a number of regional human rights and environmental management instruments.⁹²

Gaventa argues that the conceptualisation of participation as a right in itself stems partly from the expansion of the concept of social and economic rights to include those rights that enable the realisation of other rights, ‘including the right to claim rights...’⁹³ Although the right to political participation has long been recognised in the context of civil and political rights, its extension into the realm of social rights ‘politicises’ those rights and places citizens into the role of creators or claimants of those rights.⁹⁴ In this way, participation can be seen as an essential prerequisite to socioeconomic rights, like the right to water, because it is only through the right to participate in the policy and decision-making processes around the provision of water services, that people or communities can ensure that their right to water is realised and that water services are delivered in a manner that is responsive to their community-specific needs.⁹⁵

⁸⁷ Cornwall and Gaventa, above n 6.

⁸⁸ See, eg, Gaventa, above n 7, 4.

⁸⁹ Ruth Lister (1998) “Citizen in action: citizenship and community development in Northern Ireland context,” in *Community Development Journal*, Vol 33, No 3: 226-235, 228.

⁹⁰ Gaventa, above n 7, 4.

⁹¹ Ibid. See also below nn 96-98 and accompanying text.

⁹² See, below nn 102-118, 132-141 and accompanying text.

⁹³ Gaventa, above n 7, 4.

⁹⁴ Lister, above n 89, 226-235; Gaventa, above n 7, 5 (citations omitted).

⁹⁵ Ibid.

4.2.1 Human rights law

The evolution of participation from a right to representation to a right to more direct forms of participatory governance can be seen in its changing status in international law. Early recognitions of the right to participate can be seen in the non-binding *Universal Declaration of Human Rights*,⁹⁶ which recognises a right to political participation and freedom of assembly, opinion and expression in articles 19 and 20. These rights are elaborated further in articles 19 and 25 of the *International Covenant on Civil and Political Rights* ('ICCPR'),⁹⁷ but again the focus is primarily on participation in representative democracy and the ICCPR provides little protection for direct participation in public affairs.⁹⁸

Participation is provided with a similar level of protection to that provided under the ICCPR through several regional human rights instruments,⁹⁹ under which the scope of the right to participation is largely restricted to participation in representative democracy. However, the recent articulation of the right within the *Charter of Fundamental Rights of the European Union*¹⁰⁰ seems to be moving towards the protection of a more direct form of participation through its recognition of 'citizenship rights'¹⁰¹ including the right to good administration (article 41); the right of access to documents (article 42); the right to refer to the Ombudsman (article 43); and the right to petition the European Parliament (article 44). As will be addressed in Section 4.2.2, this

⁹⁶ *Universal Declaration of Human Rights*, UN Doc A/RES/ 217A(III) (1948) arts 19, 20.

⁹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI) arts 19, 25.

⁹⁸ Although article 25(a) does mention direct participation in the conduct of public affairs, this is not a guaranteed right as it is provided in the alternative to participation 'through freely chosen representatives.'

⁹⁹ See, eg, *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, arts 9-13, entered into force 21 October 1986; *American Convention on Human Rights*, opened for signature 22 November 1969 arts 12, 13, 15, 16, 22, 23, entered into force 18 July 1978; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS No 005, arts 10-11, entered into force 3 September 1953.

¹⁰⁰ *Charter of Fundamental Rights of the European Union*, opened for signature 7 December 2000, C 364/01, entered into force 1 December 2009.

¹⁰¹ *Ibid* chp 5.

right to a more direct form of participation is also being recognised specifically in relation to water governance.

4.2.2 A right to participate in water governance

It is within laws relating to water and environmental management that the shift towards the recognition of a more direct form of participation becomes most evident.¹⁰² An early example of this shift can be seen in the *Espoo Convention*,¹⁰³ which was developed by the United Nations Economic Commission for Europe ('UNECE'), and is primarily open to European States for signature.¹⁰⁴ Articles 2, 3 and 6 of the *Espoo Convention*¹⁰⁵ provide a limited degree of protection for affected communities in signatory countries to participate in environmental impact assessments in relation to 'proposed activities.'

The *Helsinki Convention* (1992)¹⁰⁶ and its *Protocol on Water and Health* (1999),¹⁰⁷ also form a legal framework for Europe in the field of water management and the protection of human health and safety. The *Helsinki Convention* protects the right to public information,¹⁰⁸ while the *Protocol* provides for broader rights in relation to accessing public information and public participation,¹⁰⁹ including article 5(i), which provides:

¹⁰² See ILA 2004: art 18. See also Razzaque, above n 7, 355.

¹⁰³ *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, United Nations, Treaty Series, vol 1989, 309, entered into force on 10 September 1997 (45 States Parties).

¹⁰⁴ *Ibid* art 16.

¹⁰⁵ *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, United Nations, Treaty Series, vol 1989, 309, arts 2, 3, 6.

¹⁰⁶ *Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention)*, opened for signature 9 April 1992, L73, 16/03/1994, 20, United Nations, Treaty Series, vol 2515, 3, entered into force on 17 January 2000.

¹⁰⁷ *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 June 1999, entered into force 4 August 2005.

¹⁰⁸ *Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention)*, opened for signature 9 April 1992 art 17.

¹⁰⁹ *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 June 1999 art 5(i) (public access to information and public participation in decision-making); and art 10 (public access to information).

Access to information and public participation in decision-making concerning water and health are needed, inter alia, in order to enhance the quality and the implementation of the decisions, to build public awareness of issues, to give the public the opportunity to express its concerns and to enable public authorities to take due account of such concerns. Such access and participation should be supplemented by appropriate access to judicial and administrative review of relevant decisions.

Additionally, the *EU Water Framework Directive*¹¹⁰ ('WFD') also requires its 27 member states to ensure public participation in decision-making processes around water resources.

(a) The Aarhus Convention

The strongest recognition of participatory rights, however, comes from the *Aarhus Convention* (1998),¹¹¹ which is devoted entirely to participatory rights.¹¹² Although it is a regional agreement, having been developed by UNECE, article 19(3) provides that it is open to accession by any UN Member State ('upon approval by the Meeting of the Parties').¹¹³ The *Aarhus Convention* covers the right to access publicly held environmental information (article 4); the right to public participation in environmental decision-making from an early stage (articles 6-8); and for access to procedural justice, by granting the right to challenge public decisions made in violation of environmental laws in court (article 9).¹¹⁴

The *Aarhus Convention*¹¹⁵ builds on Principle 10 of the *Rio Declaration* (1992),¹¹⁶ which states:

¹¹⁰ *EU Water Framework Directive*, opened for signature 23 October 2000, Directive 2000/60/EC, entered into force 22 December 2000. See also Sharon Hophmayer-Tokich, 'Public Participation under the EU Water Framework Directive – processes and possible outcome' (Paper presented at the A preparatory paper for the NOLIMP workshop on public participation and cost- effectiveness analysis, 2005).

¹¹¹ *Convention on Access to Information, Public Participation in Decision- making and Access to Justice in Environmental Matters (Aarhus Convention)*, opened for signature 25 June 1998, United Nations, Treaty Series, vol 2161, 447, entered into force on 30 October 2001.

¹¹² Ibid

¹¹³ Ibid art 19(3). As of 26 September 2012 there were 46 Parties to the *Aarhus Convention*.

¹¹⁴ Ibid

¹¹⁵ Ibid.

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. ... States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Razzaque describes the *Aarhus Convention* as signalling 'a shift from reactive participation to active participation at the local level and a collective management of shared water resources.'¹¹⁷ It has been influential in shaping the meaning of public participation within water and environmental management, and this shift in practice is starting to be reflected in numerous European Union directives and in national legislation.¹¹⁸ Razzaque also argues that the Constitutional protection of the right to water or the right to a healthy environment might also provide some judicial protection for a right of public participation,¹¹⁹ but this has not always been realised in practice, as demonstrated by the South African case of *Mazibuko v City of Johannesburg (Mazibuko)*¹²⁰ (discussed in Chapters 6 and 8).

(b) United Nations declarations

These legal developments in recognising the value of active community participation in water and environmental management provide strong legal support for the argument that a right to participate in water governance should be considered to be a prerequisite or companion to the human right to water. Further support for this proposition can be found in the emerging recognition of this right of participation within a number of UN declarations.

This emerging recognition can be seen in the 1972 *Stockholm Declaration*,¹²¹ the *Rio Declaration*¹²² and *Agenda 21*¹²³ (which both came out of the Rio Earth Summit in

¹¹⁶ *Rio Declaration: Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (1992), Principle 10.

¹¹⁷ Razzaque, above n 7, 361.

¹¹⁸ See Czeslaw Walek, 'The Aarhus Convention and its practice impact on NGOs - examples of CEE and NIC countries' (2000) 3(1) *The International Journal of Not-for-Profit Law; The OSCE and the Aarhus Convention* (n.d.a.) Organization for Security and Co-operation in Europe (OSCE) <http://www.osce.org/eea/item_11_15634.html> at 10 May 2010; Razzaque, above n 7, 363.

¹¹⁹ Razzaque, above n 7, 363.

¹²⁰ *Mazibuko v City of Johannesburg* (2009) 28 ZACC .

¹²¹ *Stockholm Declaration: Report of the United Nations Conference on the Human Environment*, UN

1992), the 2001 *Bonn Recommendations for Action*,¹²⁴ and the 2002 *Johannesburg Plan of Implementation*,¹²⁵ all of which call for increased community involvement in environmental decision-making.

In the lead up to the Rio Earth Summit, a PrepComm adopted the *Dublin Statement on Water and Sustainable Development*,¹²⁶ which recognises the importance of participation in relation to water governance in Principles 2 and 3.¹²⁷ This recognition was then incorporated into Chapter 18 of *Agenda 21*,¹²⁸ which calls on governments to facilitate ‘the active participation of women, youth, indigenous people and local communities in water management,’ in order to ensure that projects and programs are designed and implemented in a manner ‘that are both economically efficient and socially appropriate...’ The *Bonn Recommendations for Action*¹²⁹ also highlighted the importance of the *subsidiarity principle*, which prescribes that policy and management decisions should be made at the lowest effective level.

These declarations reflect a progressive and intensive vision of public participation in water and environmental management. However, until recently,¹³⁰ they have not been followed up with any concrete obligations, and the participatory elements of the *Dublin Statement*, in particular, have generally been trumped by the simultaneous focus in Principle 4 of taking an economic approach to water management (as discussed in Chapter 2).¹³¹

Doc. A/CONF.48/14/Rev.1 (1973) preamble (6), (7).

¹²² *Rio Declaration: Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (1992) Principle 10.

¹²³ UNCED, *Agenda 21* (1992).

¹²⁴ ‘Bonn Recommendations for Action’ (*International Conference on Freshwater*, Bonn, 2001).

¹²⁵ *Johannesburg Plan of Implementation: Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

¹²⁶ *The Dublin Statement on Water and Sustainable Development: Report of the International Conference on Water and the Environment*, A/CONF/151/PC/112 (1992).

¹²⁷ Ibid principles 2, 3.

¹²⁸ UNCED, *Agenda 21* (1992) chp.18.9(c).

¹²⁹ ‘Bonn Recommendations for Action’ (*International Conference on Freshwater*, Bonn, 2001) rec 11.

¹³⁰ See above nn 100-118 and accompanying text.

¹³¹ See *The Dublin Statement on Water and Sustainable Development: Report of the International Conference on Water and the Environment*, A/CONF/151/PC/112 (1992) principle 4.

(c) Berlin Rules on Water Resources

In 2004, the International Law Association ('ILA'), a non-governmental organisation comprised of international legal experts, published the *Berlin Rules on Water Resources*.¹³² This document sought to summarise the state of all customary international law on water resources to date and was a follow-up to the ILA's 1966 *Helsinki Rules*,¹³³ which had been influential in shaping State practice around internationally shared fresh waters.¹³⁴

In the *Berlin Rules*, the ILA asserts that a right of public participation in the management of water resources exists in customary international law.¹³⁵ Specific details of this right are set out in articles 4, 17-21, 30 and 69-71. Article 4 recognises a State duty to take steps to ensure public participation in the management of waters, while article 18 emphasises that people should be 'able to participate, directly or indirectly, in processes by which those decisions are made and have a reasonable opportunity to express their views on plans, programmes, projects, or activities relating to waters.'¹³⁶ Article 18 also emphasises people's rights to access information in order to participate in water governance, while article 70 emphasises the right to have effective administrative and judicial remedies.¹³⁷

The development of the *Berlin Rules* was significantly influenced by *GC 15, Agenda 21* and the *Aarhus Convention 1998*.¹³⁸ The ILA notes that these instruments clearly establish a right for people to participate in the water governance decisions that affect

¹³² Dellapenna, above n 1. See also Joseph W Dellapenna, *The Berlin rules on water resources: the new paradigm for international water law* (2006).

¹³³ International Law Association, 'The Helsinki Rules on the Uses of the Water of International Rivers' (*Fifty-second conference*, Helsinki, 1966).

¹³⁴ Ibid; Dellapenna, above n 1; Dellapenna, above n 132. See also *Convention on the Law of the Non-navigational Uses of International Watercourses*, opened for signature 21 May 1997, GA Res 51/229, not yet entered into force (The Convention was modeled on the Helsinki Rules).

¹³⁵ Dellapenna, above n 1, arts 4, 17-21, 30, 69-71.

¹³⁶ Dellapenna, 'The Berlin Rules on Water Resources' (Report of the 71st Conference, International Law Association, 2004).

¹³⁷ Ibid.

¹³⁸ See Dellapenna, above n 132.

their lives.¹³⁹ The ILA notes that this proposition is based on a broader principle that people should have the right to participate in all decisions that affect their lives, and that support for this general principle is provided in so many international instruments ‘that there can be little doubt that a right of public participation has now become a general rule of international law regarding environmental management even beyond the specific provisions of these agreements.’¹⁴⁰ They go on to note that most of these international environmental instruments ‘do not contain provisions for the realisation of individual rights relative to the instruments,’ meaning that general human rights instruments remain more useful in terms of actually securing the right.¹⁴¹

However, the ILA members were not in unanimous agreement over the content of the *Berlin Rules*.¹⁴² Four members of the Water Resources Committee published a critical paper in which they questioned the legal foundation of a number of details of the *Rules*.¹⁴³ In relation to the participatory aspects of the rules, they questioned whether these rules truly embodied current customary international law, or whether they were more appropriately described as expressions of emerging customary international law.¹⁴⁴

4.3 Development and human rights

In addition to being recognised in human rights law and in the emerging law of water and environmental management, the intrinsic value of participation and its status as a human right has also been recognised through more recent approaches to development, including sustainable development,¹⁴⁵ and the rights-based approach to development.¹⁴⁶

¹³⁹ Dellapenna, above n 1, art 18.

¹⁴⁰ Dellapenna, 'The Berlin Rules on Water Resources' (Report of the 71st Conference, International Law Association, 2004).

¹⁴¹ Ibid.

¹⁴² Slavko Bogdanovic et al, *ILA Berlin Conference 2004 - Water Resources Committee Report Dissenting Opinion* (2004)

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ World Commission on Environment and Development, "*Our Common Future*" (United Nations General Assembly (UNGA), 1987) (Sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs...').

What these approaches have in common is the recognition that rather than being passive recipients of top-down development projects, people have both a right to development – as recognised in the 1986 UN *Declaration on the Right to Development*¹⁴⁷ – and a right to participate as active agents in shaping the development process.¹⁴⁸ Gaventa argues that this perspective on development views communities as ‘rightful claimants’ of their human rights rather than as ‘beneficiaries’.¹⁴⁹ As such, the State becomes accountable to its citizens and is obliged to protect and promote their rights, including their participatory rights, through the development process.¹⁵⁰

In relation to water, this approach to development recognises that people have both a right to access water and a right to participate in the process of securing this access. It also emphasises that empowering people to participate in water governance has the capacity to contribute to more equitable and sustainable outcomes, thus simultaneously addressing the crisis of access and the crisis of scarcity.

Razzaque argues that these principles have begun to have an impact on accepted theories of water governance reform.¹⁵¹ By the late 1990s, many national water policies were beginning to either require or encourage community participation in the planning, development, and management of the water sector.¹⁵² This shift stems partly from the growing recognition that the participation of affected community members is essential to successful environmental decision-making and central to the principle of environmental justice.¹⁵³ It also reflects the understanding that the historical

¹⁴⁶ Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance* (The Human Rights Council of Australia, Inc., 1994 (republished in 1995, 2001)).

¹⁴⁷ *Declaration on the Right to Development*, 97th plenary meeting, UN Doc A/RES.41/128 (1986).

¹⁴⁸ Ibid preamble, art 1; *Rio Declaration: Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (1992) principles 3, 10; UNCED, *Agenda 21* (1992), chapter 23; Human Rights Council of Australia, above n 146. See also Osmani, above n 4, 3.

¹⁴⁹ Gaventa, above n 7, 2.

¹⁵⁰ Ibid.

¹⁵¹ See Razzaque, above n 7, 354-355.

¹⁵² Ibid 362 (citing the National Water Policy of Bangladesh (1999); the National Water Policy of India (2002); the National Water Policy of Pakistan (2004)).

¹⁵³ Razzaque, 'Public participation in water governance' in Dellapenna and Gupta (eds), *The evolution of the law and politics of water* (2009) 355.

authorisation of large dams and water service concessions without community consultation or civil society scrutiny has proven to be problematic.¹⁵⁴ Razzaque argues that there is a growing consensus that such projects lack legitimacy due to the democratic deficiency of their approval processes.¹⁵⁵ He also argues that this focus on community participation and legitimacy is particularly strong in relation to water governance ‘due to increased public awareness and concern about the relationships between environmental health and human well-being.’¹⁵⁶

As mentioned above, this growing recognition of a human right to participate in water governance also provides a response to the concerns of those seeking to promote a commons-based approach to water governance in lieu of a human rights approach. Bakker’s critique of human rights for ‘occluding possibilities for collective action’¹⁵⁷ fails to account for this rights-based understanding of participation. When participation is understood as a human right, prerequisite to the right to water, human rights can serve to advance such a collective action approach to water governance. The incorporation of participation into the theory of good governance suggests there is scope for it to be promoted within current approaches to water reform. As the ILA recognise in their 2002 *Declaration of Principles of International Law Relating to Sustainable Development*, there are significant overlaps between sustainable development and good governance, particularly in their promotion of inclusive public participation, and of the need for transparency and access to procedural justice.¹⁵⁸

A rights-based approach to participation recognises that the *commons* can be described as a verb or activity.¹⁵⁹ Community participation in water governance can, thus, be described as *commoning*. Linebaugh’s historical work demonstrates that it was through such a process of *commoning* that many rights have been obtained.¹⁶⁰ As De Angelis

¹⁵⁴ Ibid 353.

¹⁵⁵ Ibid 353.

¹⁵⁶ Ibid 354.

¹⁵⁷ Bakker, above n 75, 447.

¹⁵⁸ International Law Association, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (in The 70th Conference of the International Law Association, 2002) arts 5, 6.

¹⁵⁹ Peter Linebaugh, *The Magna Carta manifesto: liberties and commons for all* (2008) 297.

¹⁶⁰ Ibid.

argues, ‘rights were not “granted” by the sovereign, but ... already-existing common customs were rather acknowledged as de facto rights.’¹⁶¹

4.4 Limitations of participation

Despite the lip service being paid to empowering marginalised communities through the use of participatory processes, critics have asserted that very little devolution of power has taken place in reality.¹⁶² In the context of water governance, Razzaque argues that despite participation being ‘the new watchword’ in so many national water policies, the fact remains that ‘people rarely participate, raising a question as to whether these policies are adequately implemented.’¹⁶³ Some of the reasons for why this might be the case include the fact that effective participation is time and resource intensive and can be hampered by existing inequalities and barriers within a society.

4.4.1 Participation is time and resource intensive

Participation can take place at four broad stages of the project or policy cycle, but the most effective kind will take place at all of these stages.¹⁶⁴ The first entry point for participation is at the stage of preference selection or project identification.¹⁶⁵ At this stage participatory processes like consultation can be used to determine the priorities and needs of the community, and their preferences in relation to the methods of achieving these desired outcomes.¹⁶⁶ The second entry point is the project or policy formulation stage where participatory processes might be used to allow community members to assist in setting out the details of the project or policy, including the rules and institutions that will govern it.¹⁶⁷ The third is the implementation stage where

¹⁶¹ Massimo De Angelis, 'On the commons: a public interview with Massimo De Angelis and Stavros Stavrides' (2010) 17 *An Architektur, e-flux journal* 2.

¹⁶² See Cooke and Kothari, above n 6; Line Skou Hauschildt and Rasmus Lybaek, *The 'tyranny' of participation* (in Student papers, Aarhus University, 2006); Tandon, above n 9, 291; John Gaventa, 'Towards Participatory Governance: Assessing the Transformative Possibilities' in S Hickey and G. Mohan (eds), *From Tyranny to Transformation* (2004).

¹⁶³ Razzaque, above n 7, 362.

¹⁶⁴ Osmani, above n 7, 8-9.

¹⁶⁵ Ibid; World Bank, above n 5, 197.

¹⁶⁶ World Bank, above n 5, 197, 204.

¹⁶⁷ Osmani, above n 7, 8-9.

community members can play an active role in rolling out the project or policy.¹⁶⁸ Finally, participation can take place during the monitoring and evaluation stage, in order to ensure accountability.¹⁶⁹

The intensity of participation also plays a role in determining its effectiveness.¹⁷⁰ In 1969, Sherry Arnstein wrote what has come to be seen as a seminal article entitled *A ladder of citizen participation*,¹⁷¹ in which she set out the eight levels of participation from (1) Manipulation and (2) Therapy (which she described as ‘nonparticipation’), through to (3) Informing, (4) Consultation, and (5) Placation (which she described as ‘tokenism’), to (6) Partnership, (7) Delegated Power, and (8) Citizen Control (which she described as ‘citizen power’).¹⁷² She introduces this ladder by arguing that ‘[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.’¹⁷³

Though she was writing about the emerging practice of participation in the Global North, Arnstein’s observations are just as relevant to the practice of participation throughout the world. Often participation in project and policy processes takes the form of *tokenism* at best, and *nonparticipation* at worst, while the real shift in control needed to accomplish the creation of citizen power is rare.¹⁷⁴

Moving beyond information-sharing or token consultations into more empowering forms of participation like collaborations or partnerships requires that community members be included from the very beginning of the project or policy identification process and continually involved throughout the planning, implementation, monitoring, and evaluation processes.¹⁷⁵ However, this kind of intensive participation is very time

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid 9.

¹⁷¹ Arnstein, above n 6.

¹⁷² Ibid 4.

¹⁷³ Ibid 1.

¹⁷⁴ See Cooke and Kothari, above n 6.

¹⁷⁵ See Arnstein, above n 6; Aycrigg, above n 6, 4.

consuming and requires additional resources to fund all of the necessary additional activities associated with community inclusion.¹⁷⁶

This time and resource intensive nature of participation can be problematic, particularly as there is only limited evidence to support the theory that participation contributes to efficiency, equity or empowerment.¹⁷⁷ Although some studies have demonstrated a positive link between democratic government and development outcomes for the poor, Aycrigg argues that most of the proof for the instrumental value of participation is 'impressionistic' and this can create challenges in terms of justifying the input of time and resources needed to make participatory processes effective.¹⁷⁸

In a survey on the adoption of participatory development within the World Bank, staff identified the 'unevenness of support for participation at the management level, the limited resources available for participation activities, and continuing scepticism about the value-addedness of participation, given the lack of verifiable indicators',¹⁷⁹ as the key barriers to the effective use of participatory development processes. Staff also reported that a lack of government commitment, partly as a result of an unwillingness to commit the necessary resources,¹⁸⁰ was '[t]he biggest single constraint and challenge to the Bank's ability to pursue participation across all its operations.'¹⁸¹

World Bank staff also commented that including community members in the identification or pre-identification stages of project planning could create tension as it raises expectations long before a project is implemented on the ground, if it even receives approval to proceed.¹⁸² This has tended to lead to the adoption of less intensive

¹⁷⁶ See, eg, Jean-Philippe Platteau, 'Pitfalls of participatory development' in UNDESA (ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 127-128; Aycrigg, above n 6, 4.

¹⁷⁷ See, eg, Frances Cleaver, 'Institutions, agency and the limitations of participatory approaches to development' in Bill Cooke and Uma Kothari (eds), *Participation: the new tyranny?* (2001) 26; Aycrigg, above n 6, 19.

¹⁷⁸ Aycrigg, above n 6, 17, 19.

¹⁷⁹ Ibid 17.

¹⁸⁰ Ibid 21.

¹⁸¹ Aycrigg, above n 6, 20.

¹⁸² Aycrigg, 'Participation and the World Bank: success, constraints, and responses' (Paper presented at the *International Conference on Upscaling and Mainstreaming Participation: of Primary Stakeholders: Lessons Learned and Ways Forward*, Washington DC, November 1998) 6.

forms of participation, meaning that community members have little opportunity to influence the resulting projects and policies,¹⁸³ and undermining the effectiveness of participation.¹⁸⁴

The time and resource intensive nature of participation also creates a barrier for many households, particularly female-headed and those facing extreme poverty, who do not have sufficient time or resources to participate in consultations or project implementation.¹⁸⁵ Additionally, households that lack security of tenure or who have low levels of trust in their neighbours, may be unwilling to devote time or resources to participatory processes due to their perception that they are less likely to experience positive returns from such activities.¹⁸⁶

4.4.2 Participation and the problem of inequality

Another barrier to effective participation is inequality. In 2001, a group of highly respected development practitioners and theorists published a book entitled *Participation, the new tyranny?*¹⁸⁷ in which they questioned the assumption that participation always resulted in positive outcomes for communities. This critique has led to a greater level of reflection on the true value of participation and on the need for participatory practices to be better grounded in careful analyses and understandings of the power dynamics between development practitioners, government officials and communities, and within communities themselves.¹⁸⁸

In the book's introduction, Cooke and Kothari argue that although the 'ostensible aim' of participation is to allow beneficiaries to assert control over the development processes that affect them, in fact the concept and practice of participation contains many problems that undermine this aim.¹⁸⁹ These problems include the *tyranny of the group* (or the reality that there is no such thing as a homogenous 'community,' and the

¹⁸³ Ibid 4.

¹⁸⁴ Ibid 4.

¹⁸⁵ See, eg, Somik Lall et al, 'Tenure, diversity, and commitment - community participation for urban service provision' World Bank, 2002); Cleaver, above n 177, 49-50.

¹⁸⁶ See, eg, Lall et al, above n 185, 21-22.

¹⁸⁷ Cooke and Kothari, above n 6.

¹⁸⁸ See, eg, Cleaver, above n 177; Gaventa, above n 7.

¹⁸⁹ Cooke and Kothari, above n 6, 5.

fact that this entails a risk of elite capture); and the *tyranny of process* (or the danger that participation is used to co-opt rather than empower communities, and other negative impacts of a formulaic application of participatory processes).¹⁹⁰

The *tyranny of the group* highlights the impact of inequality on the capacity of participatory processes to meet the needs of the poor and marginalised, and raises questions for those that propose abandoning the right to water in order to mobilise exclusively around a *commons*-approach to water management. As Bakker herself recognises, it is important not to romanticise the idea of communities; '[c]ommons, in other words, can be exclusive and regressive, as well as inclusive and progressive.'¹⁹¹

The *tyranny of process* highlights the problem of donor agencies seeing participation only as a means of engaging stakeholders or beneficiaries in their already determined development projects, because it is seen as a means of making development projects more acceptable, efficient and sustainable.¹⁹² Under this economically driven perspective, the concept of participation is extended to cover policies of *cost-sharing* and *user-pays*, often with limited benefits flowing back to communities.¹⁹³

Cornwell and Gaventa argue that all too often 'community participation' has meant informing the community about pre-determined policies or projects, while real control continued to remain in the hands of government or project officers.¹⁹⁴ As a World Bank staff member has observed, '[p]articipation during preparation results in some tinkering around the edges of an already defined project, when it is too late for primary stakeholder views and concerns to be factored into project design.'¹⁹⁵ As will be discussed in Section 6.5, this is what happened in the City of Johannesburg, South Africa, when a new water policy – Operation Gcin'amanzi – was introduced into Soweto without any prior consultation with the community. This lack of participation resulted in Operation Gcin'amanzi being perceived as illegitimate and in widespread community protests against its implementation.

¹⁹⁰ Ibid.

¹⁹¹ Bakker, above n 75, 446.

¹⁹² McGee, above n 8, 94-95.

¹⁹³ Ibid 95.

¹⁹⁴ Cornwall and Gaventa, above n 6, 11.

¹⁹⁵ Cited in Aycrigg, above n 6, 4 (para 11).

A similar kind of critique has been levelled at participation through rights-litigation, with social movements traditionally sceptical of the value of legal mobilisation due to a perceived risk of co-option as opposed to critical participation.¹⁹⁶ In this context, it is often argued that engaging in the litigation process can serve to de-radicalise social movements, by forcing them to frame their claims in the depoliticised language of the courts and to cede power to the judiciary to shut down future debate on the issues involved.¹⁹⁷ In this way the legal process of rights-interpretation can serve to reinforce the status quo, rather than create the kind of social transformation being sought.¹⁹⁸ These issues will be discussed further in Chapter 8, particularly in relation to the *Mazibuko* case – which was mounted in response to Operation Gcin'amanzi (discussed above).

4.4.3 Prerequisites to effective participation

These critiques and challenges do not negate the potential benefits of participation to realising the right to water, but they do demonstrate the importance of ensuring that participatory processes are properly grounded in a critical understanding of existing power dynamics, and are embedded in a broader process of empowerment and improved governance.¹⁹⁹ This should lead to the employment of more empowering participatory processes, including those that focus on building the social capital of marginalised groups.

Osmani argues that a small amount of participation can go a long way.²⁰⁰ While the institutional framework and the initial conditions, such as existing levels of social

¹⁹⁶ See, eg, Edgar Pieterse, 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796; Malcolm Langford, 'The justiciability of social rights: from practice to theory' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 3, 38-39; Danie Brand, 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed), *Theories of social and economic justice* (2005) 17; Jackie Dugard, 'Civic action and the legal mobilisation: The Phiri water meters case' in J Handmaker and R Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71.

¹⁹⁷ See, eg, Pieterse, above n 196; Brand, above n 196.

¹⁹⁸ See, eg, Pieterse, above n 196, 815-816.

¹⁹⁹ See, eg, Hauschildt and Lybaek, n 162, 34; Osmani, above n 7, 8; Guthrie, above n 6, 190-191.

²⁰⁰ Osmani, above n 7, 9-10.

capital, the balance of competing interests, and economic conditions, will have a considerable impact on the effectiveness of participation, participation can be self-reinforcing so long as a 'minimum threshold of quality' can be obtained.²⁰¹ In the context of water, this means that by participating in water governance disadvantaged groups can increase their social capital and awareness of their right to water services, and that this can also enhance their capacity to claim these services. Osmani argues that once this happens, participation, empowerment and social capital can serve to reinforce each other, and it becomes possible to build on this 'synergistic relationship.'²⁰²

This positive cycle, however, depends on whether participation is effective, which highlights the fact that there are a number of prerequisites to the implementation of meaningful or effective participation, including transparency, accountability and procedural justice.²⁰³ In order for the community to participate effectively in water governance it is necessary for them to have sufficient access to relevant information.²⁰⁴ This raises the need for a public right to access information, including through freedom of information laws, which can play a role in ensuring the transparency of governance processes.²⁰⁵ Equally important is access to procedural justice and accountability. The capacity to challenge government decisions (through processes such as administrative review), to seek legal redress for violations of the right to water (and the right of participation), and to enforce responsiveness from public or private water service providers is also essential.²⁰⁶

²⁰¹ Ibid.

²⁰² Ibid 8.

²⁰³ See Guthrie, above n 6, 173.

²⁰⁴ See, eg, Andrea Cornwall, Henry Lucas and Kath Pasteur, 'Accountability through Participation' (2009) 31(1) *IDS Bulletin* 1, 8; Razzaque, above n 7, 363; Claire Cronin, *Access to information critical in democracy* (Pacific Islands Development Program/East-West Center, 2008); World Bank, above n 5, 174.

²⁰⁵ Razzaque, above n 7, 363.

²⁰⁶ See Langford, above n 196, for a thorough discussion of the use of socioeconomic rights litigation to hold governments to account. See particularly page 19 for a discussion of the South Africa case of *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd & Ors Case No. 1277/2001 (unreported)*, where a municipality was successful in nullifying a six year water privatisation contract due to its own failure to comply with the legislative consultation and public participation requirements. Similar arguments were made in relation to the imposition of prepaid water meters in the suburb of Phiri, Soweto in *Mazibuko v City of Johannesburg* (2009) 28 ZACC, but were unsuccessful in this case (see

Conclusion

Asserting a stronger role for participation within the good governance approach to water reform will require overcoming the common perception that participation is only worthwhile when it is cost effective, does not compromise efficiency, and comes with proven dividends in terms of financial sustainability or increased efficiency.²⁰⁷ With the growing recognition of the intrinsic value of participation in empowering individuals and communities, it has come to be understood as more than just a useful tool.²⁰⁸ From a human rights perspective, it is now understood that participation is a necessary ‘prerequisite for making other rights claims,’²⁰⁹ including the right to water, and that it is a fundamental human right in, and of, itself.²¹⁰

Participation enables communities and individuals to have their needs and priorities taken into account in the creation of water policies; to play a role in determining how water resources will be managed and distributed; to take part in implementation of these policies; and to play an active role in the monitoring and evaluation of this process. In this way participation provides a broader means of protecting and claiming the right to water than traditional legal remedies, and may obviate the need to assert a legal claim in the first instance.²¹¹

Nonetheless, participation has its limitations and it would be a mistake to view it as a panacea to the structural inequalities that prevent the poor from accessing sufficient water services. While participation can be empowering, a minimum level of equality and a framework of institutional support is required to enable people to participate effectively in decision-making processes. It is possible that good governance reform could be geared towards creating this institutional support, while the legal recognition of the right to water might help to increase equity in relation to water access. In this way the crisis of access to water may be resolved through a careful combination of all three remedies – governance reform, the right to water and participation. The question of

Chapter 6 below).

²⁰⁷ See, eg, Aycrigg, above n 6.

²⁰⁸ Gaventa, above n 7, 3.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ See, eg, Ibid 8.

whether this is the case, and what this might look like in practice, will now be considered through the analysis of two case studies of water governance reform in Manila and South Africa.

Chapter 5. Implementing good governance water reform in Manila

The privatisation of Manila's public water system took place in 1997 during the peak of the trend for private sector participation ('PSP') in the water supply and sanitation ('WSS') sector of the Global South. It was the biggest water privatisation project of its time and was held up as the model for all future projects of a similar nature. Since then it has been variously described as either a notable success¹ or a notorious failure,² and there is truth in both descriptions. This chapter examines the recent history of water reform in Manila, primarily over the ten-year period between 1997 and 2007, and the particular impact of the good governance approach.

5.1 Water governance in the Philippines

The Metropolitan Waterworks and Sewerage System ('MWSS') of the greater city of Manila was established in 1878, making it the oldest water system in Asia.³ By the mid-1990s its coverage area included 14 adjoining cities and municipalities and a population of about 11 million people.⁴ However, Dumol reports that MWSS was largely failing in its duty to provide WSS services to the people of Metro Manila.⁵ Only two-thirds of its coverage population were receiving water services, and then only for an average of 16

¹ See, eg, Mark Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in Directions in Development, 20766, World Bank, 2000); Raul Fabella, 'The Privatization of the Metropolitan Waterworks and Sewerage System: How and Why It Was Won' in The Asia Foundation (ed), *Built on Dreams, Grounded in Reality: Economic Policy Reform in the Philippines* (2011) 65; Mai Flor, *MWSS Privatization: Lessons on Good Governance* (ADB, 2009).

² See, eg, Jude Esguerra, *The Corporate Muddle of Manila's Water Concessions* (in New Rules, New Roles: Does PSP Benefit the Poor?, WaterAID and Tearfund, 2003); Mae Buenaventura and Bubut Palattao, 'Taking Stock of Water Privatization in the Philippines - The Case of the Metropolitan Waterworks and Sewerage System (MWSS)' (2004) 14 *PAID!* 12; Freedom from Debt Coalition, *Recalibrating the Meter: A ten year overview of the MWSS Privatization Deal* (2008).

³ Dumol, above n 1, 5.

⁴ Ibid.

⁵ Ibid.

hours per day,⁶ while just eight percent of its coverage population were receiving sanitation services.⁷

MWSS was a government corporation, operating independently of the national legislature ('Congress'), but often turning to Congress for subsidies to assist it in its operations.⁸ Despite these subsidies, MWSS was unable to afford to expand its operations to cover the growing population of Metro Manila or to pay for repairs and maintenance for its aging infrastructure.⁹ These financial problems were primarily the result of inefficiency.¹⁰ Non-revenue water ('NRW')¹¹ was somewhere between 56 and 63 percent.¹² The staff-per-1,000-connections ratio¹³ was the highest in Asia.¹⁴ Additionally, and perhaps most crucially, MWSS had reached the point where it was struggling to service its debts of USD800 million.¹⁵

Due to the political pressure not to raise tariffs, service quality was deliberately reduced whenever MWSS was placed under financial pressure.¹⁶ This default solution meant that new revenue was never available to increase efficiency or to expand services to the 33 percent of the population relying on alternative sources of water. While wealthier

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Section 2.3.1 above for a discussion of NRW, which is 'difference between the amount of water put into the distribution system and the amount of water billed to consumers.' Bill Kingdom, Roland Liemberger and Philippe Marin, 'The Challenge of Reducing Non-Revenue Water (NRW) in Developing Countries: How the Private Sector Can Help: A Look at Performance-Based Service Contracting' (Water Supply and Sanitation Board Discussion Paper Series, Vol 8, World Bank, 2006) <<http://siteresources.worldbank.org/INTWSS/Resources/WSS8fin4.pdf>> at 26 September 2011, executive summary.

¹² See Dumol, above n 1, 5; Arthur McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003), 175 (who gives a figure of 63%).

¹³ See Section 2.3.1 above for a discussion of staff-to-connections ratios and efficiency.

¹⁴ Dumol, above n 1, 40.

¹⁵ Ibid, 19.

¹⁶ Raul Fabella, 'Shifting the boundary of the state: the privatization and regulation of water service in metropolitan Manila' (Paper No 123, Centre on Regulation and Competition, Institute for Development Policy, University of Manchester, 2006) 18.

residents could afford to dig private wells and purchase bottled water, it was the urban poor who suffered the most under the status quo. Unserved poor households were forced to pay up to 13 times as much as those households with piped water in order to buy their water from small-scale water providers ('SSWPs').¹⁷

5.2 Right to water in the Philippines

The right to water is not explicitly recognised under either the Philippine Constitution or any other legislation in the Philippines. Article XII, section 2 of the Philippine Constitution states all waters of the Philippines belong to the State and water is regulated by the *Water Code of the Philippines (1979)*¹⁸ and the *National Water Crisis Act of 1995*.¹⁹ Under the 1979 Water Code, a 'water right' is a right granted by a water permit to Filipino citizens and corporations for any beneficial use (as defined under the Code).²⁰ While domestic and municipal users are granted priority under this system,²¹ their right to water is not guaranteed nor provided with any legal protection from government-sanctioned infringement. Additionally, those urban water users that receive their water through municipalities are not protected as permit-holders under the system.²²

Despite this lack of explicit recognition, Gutierrez²³ argues that a right to water can be implied under both international norms and the Philippine Constitution and that this right should be capable of being invoked in the Philippine courts. The basis for this argument lies in Article II of the Constitution, which includes a recognition of the right

¹⁷ Xun Wu and Nepomuceno A. Malaluan, 'A tale of two concessionaires: a natural experiment in water privatisation in Metro Manila' (2008) 45(1) *Urban Studies* 207, 213.

¹⁸ Presidential Decree No. 1067 December 31, 1976.

¹⁹ *Republic Act No. 8041* - An Act to address the national water crisis and for other purposes (National Water Crisis Act of 1995); *Constitution of the Republic of the Philippines 1987*.

²⁰ Presidential Decree No. 1067 December 31, 1976, art 20 ('Beneficial use of water is the utilization of water in the right amount during the period that the water is needed for producing the benefits for which the water is appropriated.').

²¹ *Ibid* art 22.

²² Sarah Hale, 'The Significance of Justiciability: Legal Rights, Development, and the Human Right to Water in the Philippines' (2007) XXVII(No.2 (Summer-Fall)) *SAIS Review* 139 141.

²³ Ibarra M. Gutierrez III, *Water and Human Rights*, University of the Philippines Institute of Human Rights (2006). (Gutierrez is a legal academic at the University of the Philippines.)

to health.²⁴ Section 9 of Article II provides that '[t]he State shall promote a just and dynamic social order that will ... free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.'²⁵

Gutierrez argues that these declarations imply the existence of a right to water because the rights to health, life and an improved quality of life cannot be attained without access to adequate water resources.²⁶ Although Article II had generally been considered to be declaratory in nature, and not justiciable, the Supreme Court has found that it could form the basis of legally enforceable rights.²⁷ This finding by Davide J (now CJ) in *Oposa v. Factoran* (1993)²⁸ related to the right to a balanced and healthful ecology contained in section 16 of Article II.

Gutierrez argues that the right to water can also be inferred from Article XIII, which deals with Social Justice and Human Rights. Section 1 of this article provides that 'the Congress shall give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity...' According to Gutierrez, this is an obligation that can only be attained if access to water is guaranteed.²⁹

Finally, under Article II, Section 2 of the Constitution, the Philippines 'adopts the generally accepted principles of international law.' The Supreme Court has found, in the case of *Tañada v. Angara*,³⁰ that this section effectively incorporates the generally accepted principles of international law into the law of the land and Gutierrez asserts that since the publication of GC 15, these principles include the recognition of a right to water.³¹ This argument would be further strengthened by legal developments since GC 15, particularly including the Resolutions at the HRC and the UNGA.³²

²⁴ *Constitution of the Republic of the Philippines 1987*, s 15.

²⁵ *Ibid* Article II, ss 4, 5, 9.

²⁶ Gutierrez, above n 23.

²⁷ *Ibid*.

²⁸ G.R. No. 101083, July 30, 1993.

²⁹ Gutierrez, above n 23.

³⁰ G.R. No. 118295 May 2 1997.

³¹ Gutierrez, above n 23.

³² *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010); *The human right to water and sanitation*, 64th UNGA sess, UN Doc

Gutierrez's arguments are also somewhat supported by *Tatad v Secretary of the Department of Energy* (1997)³³ where a majority of the Supreme Court found that the Constitution protects economic rights, while striking down a deregulation law that would have permitted three oil companies to avoid seeking permission of the Regulator before increasing prices.³⁴ At the conclusion of his majority judgment, Puno J declared:

The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well. The protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the exoterics of living and less with the esoterics of liberty. Hence, ... this Court [must] be vigilant in upholding the economic rights of our people especially from the onslaught of the powerful.³⁵

The Supreme Court has also inferred a right of access to electricity and a right to be reasonably charged for electricity consumption in *Energy Regulatory Board v. Manila Electric Company* (2002).³⁶ In that case the Court found the right to electricity was an 'economic right to a basic necessity of life.'³⁷ They also held that '[w]hen private property is used for public purposes and is affected with public interest, it ceases to be *juris privati* only and becomes subject to regulation.'³⁸

However, after a thorough review of the Philippine Constitution and water legislation, Hale argues, 'there is no absolute right to water, including affordability, within Philippine law,'³⁹ and Gutierrez acknowledges that it has not been the practice of Filipino judges to recognise a justiciable right to water.⁴⁰ This being the case, any discussion of a justiciable right to water for urban water-users in Manila remains

A/Res/64/292 (2010).

³³ G.R. No. 124360 (5 November 1997).

³⁴ *Tatad v Secretary of the Department of Energy* G.R. No. 124360 (5 November 1997).

³⁵ Ibid.

³⁶ G. R. No. 141369 (15 Nov. 2002); Resolution on Motion for Reconsideration (9 Apr. 2003).

³⁷ *Energy Regulatory Board v. Manila Electric Company* G. R. No. 141369 (15 Nov. 2002); Resolution on Motion for Reconsideration (9 Apr. 2003).

³⁸ *Energy Regulatory Board v. Manila Electric Company* G. R. No. 141369 (15 Nov. 2002); Resolution on Motion for Reconsideration (9 Apr. 2003).

³⁹ Hale, above n 22, 142-143.

⁴⁰ Gutierrez, above n 23.

academic at present and the facts outlined below will be primarily considered within the good governance framework discussed in Chapter 2.

5.3 Policy identification - privatisation

In January 1997, the Government of the Philippines privatised the MWSS through a competitive bidding process.⁴¹ Government advisors had presented privatisation to the President of the Philippines as the solution to all of the problems of MWSS.⁴² The claim was that through private investment and the injection of private sector efficiency it would be possible to expand distribution services, provide new water supply sources, and reduce NRW all at a lower tariff than was currently being charged to consumers.⁴³ In 1993, the government had solved a power supply crisis in Manila through PSP, and so President Ramos had good reason to believe subsequent advice.⁴⁴

5.3.1 The process of privatisation

In 1995, Congress passed the *National Water Crisis Act*,⁴⁵ which reorganised MWSS, authorised the retrenchment of personnel, criminalised water theft, and gave the President the authority to privatise the company.⁴⁶ Once a legal avenue was open, the MWSS administration began to actively pursue a mandate from the President to privatise MWSS.⁴⁷ Despite the fact that the Buenos Aires concession was ultimately unsuccessful,⁴⁸ the Philippines administration was encouraged by its early success to

⁴¹ Dumol, above n 1.

⁴² Ibid, 9-11.

⁴³ Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000) 9.

⁴⁴ Ibid 9-10; Interview with Palattao, above n 44.

⁴⁵ *Republic Act No. 8041 - An Act to address the national water crisis and for other purposes* (National Water Crisis Act of 1995); *Constitution of the Republic of the Philippines 1987*.

⁴⁶ Dumol, above n 1.

⁴⁷ Ibid, 25.

⁴⁸ Water privatisation in Buenos Aires started out as a success until the Argentinean currency crisis in 2000 when the water utility began to experience serious liquidity problems. See Wu and Malaluan, above n 17, 211; Ariel A. Casarin, Jose A. Delfino and Maria Eugenia Delfino, 'Failures in water reform: Lessons from the Buenos Aires's concession' (2007) 15 *Utilities Policy* 234; Alexander J Loftus and David A McDonald, 'Of liquid dreams: a political ecology of water privatization in Buenos Aires' (2001) 13(2) *Environment and Urbanization* 179; Florencia Almansi et al, *Everyday water struggles in Buenos*

pursue a similar model of privatisation (a long-term concession agreement) and a similar bidding process.⁴⁹

Unlike the model adopted in Buenos Aires, the national government also decided to divide MWSS into two concessions, as had been done in Paris when it privatised its WSS system in 1861.⁵⁰ The decision to create two concessions was made in order to enable regulators to make comparisons between the two zones, thus overcoming some of the information asymmetry inherent in a privatised arrangement.⁵¹ It also gave the government more leverage in negotiations with concessionaires.⁵²

Another difference between the Buenos Aires concession and the privatisation of MWSS was the requirement under the Philippine Constitution that all public utilities be owned and controlled by Filipinos.⁵³ This meant that 60 percent of each of the concessionaires had to be owned by a local corporation and that its officers were required to be Filipinos.⁵⁴ Since no local firm had any previous experience in running a water utility, this requirement meant that a joint venture arrangement between domestic companies and multinational water corporations was the only realistic option available.⁵⁵ The size of the undertaking, and the pre-qualification restrictions imposed by the government,⁵⁶ also meant that only a small number of domestic companies were big enough to bid for the concession.⁵⁷

Aires: the problem of land tenure in the expansion of potable water and sanitation service to informal settlements (in *New Rules, New Roles: Does PSP Benefit the Poor?*, WaterAID, TearFund, 2003) 24.

⁴⁹ Dumol, above n 1, 12.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid, 45-49; Wu and Malaluan, above n 17, 213.

⁵³ *Constitution of the Republic of the Philippines 1987*, s 11.

⁵⁴ Dumol, above n 1, 38.

⁵⁵ Ibid 38-39.

⁵⁶ Ibid 29.

⁵⁷ Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000) 38-39; McIntosh, above n 12, 175. The IFC is the member of the World Bank Group that finances private sector investments and advisory services to business and government in order build the private sector in developing countries.

5.3.2 Drafting a 'model contract'

Every effort was made to ensure that the privatisation process was a success. The MWSS Board hired the International Finance Corporate ('IFC') in November 1995 as lead advisors for the design and the implementation of the privatisation project.⁵⁸ In drafting the concession contract, the IFC and the government sought to balance the need to attract private investors, by minimising the risks involved to the concessionaires, and the need to guarantee improvements efficiency, financial sustainability and access.⁵⁹ To this end, the Concession Agreement ('CA') included ambitious service expansion targets, the establishment of a Regulatory Office ('RO'), clear dispute resolution mechanisms, and specific procedures for contract amendment and termination (including a requirement for the concessionaires to deposit a substantial performance bond).⁶⁰ At the conclusion of the bidding process the deal was viewed as a genuine success and a model to be emulated internationally.⁶¹

(a) Cost recovery and financial sustainability

Although good governance theory promotes PSP as a means of increasing cost recovery and, thus, financial sustainability, Manila's privatisation process was designed to ensure that tariffs would go down – at least in the initial five-year period. This was done in order to avoid any public backlash against the process.⁶² A range of tariff adjustment mechanisms were then incorporated into the CA to protect concessionaires against the risk of failure while ensuring that the public would continue to enjoy lower prices.⁶³ These mechanisms recognised three grounds for adjusting rates: inflation,⁶⁴

⁵⁸ Dumol, above n 1, 29.

⁵⁹ Esguerra, above n 2, 13; Dumol, above n 1, 13.

⁶⁰ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997), arts 5 (service obligations), 6.4 (concession fees), 6.9 (performance bond), 7 (obligations of MWSS), 10 (events of early termination, penalties), 11 (regulatory office), 12 (dispute resolution), 16.10 (force majeure), schs 2 (water service expansion targets), 3 (sewerage service expansion targets).

⁶¹ Dumol, above n 1, 29; Fabella, above n 16, 15.

⁶² Dumol, above n 1, 42.

⁶³ Ibid, 13, 55; Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) arts 2.4 (CPI adjustments), 9.3 (extraordinary price adjustments), 9.4 (rate rebasing).

⁶⁴ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 2.4 (inflation was to be calculated using the consumer price index).

extraordinary price adjustment (EPA) and rate rebasing.⁶⁵ The EPA mechanism was designed to protect the contract from a claim of *force majeure* and take into account particular unforeseen events such as currency devaluations.⁶⁶ A rate-rebasing exercise was scheduled to take place once every five-years (with the first being optional, at the discretion of the RO)⁶⁷ to review the tariffs in light of the efficiency gains and the investments that should have been made during that time,⁶⁸ and was designed to discourage the prospective concessionaires from deliberately bidding at a level that would require them to operate at a loss under the assumption that a better rate could be negotiated further down the track – a practice known as ‘dive bidding’.⁶⁹

Crucially, for the financial sustainability of the system, the CA also committed the winning bidders to the payment of concession fees amounting to around USD1.2 billion over the life of the concession period, which would be used to service the existing debts of MWSS and to finance the operations of the new MWSS RO.⁷⁰

(b) Expanding and improving access

The CA imposed obligations to maintain existing assets and to significantly expand the service coverage in each zone.⁷¹ The concessionaires committed to expanding the service coverage of the water system from 67 percent in 1997 to 96 percent by 2006, and universal coverage thereafter.⁷² The concessionaires also committed themselves to maintaining and upgrading existing infrastructures.⁷³ The expectation was that they

⁶⁵ Ibid arts 9.2, 9.3, 9.4; Dumol, above n 1, 51; Esguerra, above n 2, 14-15; Wu and Malaluan, above n 17, 215.

⁶⁶ Ibid art 9.3.

⁶⁷ Ibid art 9, s 9.3.4.

⁶⁸ Ibid art 9, s 9.3.4.

⁶⁹ See Esguerra, above n 2, 16.

⁷⁰ Wu and Malaluan, above n 17, 215.

⁷¹ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 6.5 (asset management obligations), schs 2 (water service expansion targets), 3 (sewerage service expansion targets).

⁷² Ibid sch 2. See also Esguerra, above n 2, 5-6; Wu and Malaluan, above n 17, 215.

⁷³ Dumol, above n 1, 29, 53, 63-64, 82.

would then recoup this investment by expanding their customer base and by increasing the efficiency of the system through the reduction of NRW.⁷⁴

(c) Regulation

Good governance theory recognises the need for regulatory independence in order to ensure both transparency and accountability.⁷⁵ Under a privatised system, independent regulation can also help to ensure that the public interest is not compromised in the pursuit of profit.⁷⁶ Given that government officials involved in the privatisation process considered that it was essential to complete the process well before the next congressional elections,⁷⁷ the constrained timetable meant that there was insufficient time to pass legislation necessary to create an independent RO.⁷⁸ Instead the RO was set up within MWSS, under the MWSS Board, meaning that it was forced not only to rely on the government for cooperation, but also on the fees of the concessionaires to pay its bills and salaries.⁷⁹ As will be discussed below, this lack of independence has had implications for the transparency of negotiations that have taken place during the life of the CA, the role that public interest has been able to play in the outcomes of these negotiations, and the influence of short-term political interests on both tariffs and service commitments.⁸⁰

One of the key roles for the RO was to regulate the tariffs charged by the Concessionaires. To assist this process, the CA carefully defined the tariff adjustment mechanisms for the regulator to follow when reviewing the tariffs set by the

⁷⁴ Ibid 107.

⁷⁵ See, eg, Sophie Trémolet and Catherine Hunt, 'Taking Account of the Poor in Water Sector Regulation' (Water Supply and Sanitation Working Notes, Note No 11, World Bank, 2006).

⁷⁶ See Wu and Malaluan, above n 17, 207; James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003), 10; See also Dumol, above n 1, 56; Selim Jahan and Robert McCleery, *Making Infrastructure Work for the Poor - Synthesis Report of Four Country Studies (Bangladesh, Senegal, Thailand and Zambia)* (United Nations Development Programme (UNDP), 2005) 19-20

⁷⁷ Dumol, above n 1, 56.

⁷⁸ Ibid; *Interview with Mai Flor, Lawyer for Ondeo (Maynilad)* (Manila, 24 October 2006).

⁷⁹ *Interview with Mary Ann Manahan, Advocacy Coordinator at Focus on the Global South* (Manila, 31 October 2006); *Interview with Palattao*, above n 44.

⁸⁰ Esguerra, above n 2, 25-26.

concessionaires, in order to stabilise tariffs in the initial decade of the concession period. It was hoped that this would provide a commercial incentive for the concessionaires to increase the efficiency of the water service,⁸¹ because this would be the only viable method of increasing profits.⁸²

5.3.3 Process focused on ensuring lower tariffs

A number of incentives were built into the bidding process and the design of the CA in order to encourage potential concessionaries to commit to lowering tariffs (at least for the initial period of the concession).⁸³ The concessionaires were given a six-year income tax holiday.⁸⁴ The CA also back-ended heavy investment commitments (by requiring them only towards the end of the concession period) in order to ensure that the first five-year period did not involve any significant financial outlays.⁸⁵ Water tariffs were also increased by 38 percent just months before the bid submission date.⁸⁶

Nonetheless, when the envelopes were opened everyone was surprised at just how low the bids actually were.⁸⁷ In the end, the Manila Water Company, Inc. ('Manila Water' - owned by investors that include transnational United Utilities and local firm Ayala Corporation) won the east zone concession with a bid to cut tariffs by 72 percent, while Maynilad Water Services, Inc. ('Maynilad' - a partnership between Lyonnaise des Eaux⁸⁸ and local company Benpres Holdings⁸⁹) won the west zone concession with a bid to cut tariffs by 43 percent.⁹⁰

Esguerra argues that the reason that the initial tariffs were so low is that they were deliberate dive bids.⁹¹ He points out:

⁸¹ Dumol, above n 1, 52, 107.

⁸² Esguerra, above n 2, 14; Dumol, above n 1, 52.

⁸³ Dumol, above n 1, 44.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid, 97.

⁸⁸ Lyonnaise des Eau is a French company that is now called Suez and their water division has been renamed Ondeo.

⁸⁹ Benpres Holdings is part of the Lopez Group of Companies.

⁹⁰ Dumol, above n 1, 84, 97.

⁹¹ Esguerra, above n 2, 16. **See contra** 'Ondeo's response to this case study' on page 12 (In which Ondeo

Aggressive dive bidding, or bidding at such a low level that will require the company to operate at a loss, is not irrational behaviour, at least when the bidder expects to be able to renegotiate once the contract is signed. [...] The gamble will have a greater propensity of paying off if regulatory structures are weak, or if there is a greater role for non-formal political interference to play a role in future decisions.⁹²

A similar argument has been made by Fabella who points out that the local partners of both winning consortiums were such large companies that they enjoyed the status of being ‘too big to fail,’ the ‘type of enterprise [which], when distressed, implicitly become wards of the state for systemic stability reasons,’⁹³ increasing the likelihood of an early and favourable rate rebasing exercise (to raise tariffs before the first five-year period was complete).

5.4 Implementing privatisation

The Manila CA was a classic example of good governance reform, in that PSP was selected for its assumed capacity to deliver increased investments, efficiency gains and service expansions. However, despite the attempts made to draft a CA that guaranteed these targets, while protecting the concessionaires from risk, two unexpected events in late 1997 placed a considerable financial strain on the newly privatised utilities. First, an unprecedented drought reduced available water by 30 percent, meaning the concessionaires had less revenue than they had originally counted on.⁹⁴ Then the Asian Financial Crisis in late 1997 caused a dramatic devaluation of the Peso; essentially doubling the financial obligations under the debt service agreement and making it far more expensive and difficult to obtain finance to pay for the improvements agreed to

argues that Maynilad’s bid was based on highly inaccurate ‘technical and operational data provided’ by the government and that the financial situation was exacerbated by the currency devaluation and the government’s unwillingness to renegotiate to appropriately accommodate these changed circumstances.).

⁹² Esguerra, above n 2, 16.

⁹³ Fabella, above n 16, 48.

⁹⁴ Wu and Malaluan, above n 17, 215. *Metropolitan Waterworks and Sewerage Systems (MWSS) v Maynilad Water Services Inc (Maynilad) in the matter of an ad hoc arbitration under the UNCITRAL Rules* (2003) UNC47/KGA (Unreported) (International Arbitration Panel) para 20; *Metropolitan Waterworks And Sewerage System (MWSS) v Hon Judge Daway* (2004) G.R. No 160732 (Unreported) (Regional trial court of Quezon City, Branch 90) [rehab case] para 20.

under the CA.⁹⁵ These events placed significant pressure on tariffs and threw Maynilad, which controlled the west zone and had accepted 90 percent of the former MWSS' debt burden, into a financial crisis from which it never recovered.⁹⁶ This financial crisis also triggered a series of contractual amendments that significantly undermined the careful balance created under the original CA and exposed some of the limitations and risks of privatisation.

In response to the challenges of the Asian Financial Crisis, Maynilad sought to renegotiate the terms of the CA with the government. In December 2000, it proposed amending the contract to allow for an automatic currency exchange rate adjustment to tariffs and for the postponement of some service obligations.⁹⁷ The CA already provided for a tariff adjustment to recover losses of this nature. However, the concessionaires were expected to spread out this kind of recovery over the entire life of the contract and Maynilad wanted to recover their losses over a period of just 18 months.⁹⁸ One reason that Maynilad was seeking this price adjustment mechanism, outside the terms of the contract, was that its creditors, including the ADB, were not willing to provide it with a project loan unless it was able to negotiate these tariff increases.⁹⁹ Maynilad had been relying on this project loan of USD350 million and, without this financing, could not afford to make the necessary investments needed to reduce NRW and to start to make a profit in the west zone.¹⁰⁰

⁹⁵ Wu and Malaluan, above n 17, 215. *Metropolitan Waterworks and Sewerage Systems (MWSS) v Maynilad Water Services Inc (Maynilad) in the matter of an ad hoc arbitration under the UNCITRAL Rules* (2003) UNC47/KGA (Unreported) (International Arbitration Panel) para 19.

⁹⁶ See Ibid.

⁹⁷ Esguerra, above n 2, 18. The proposed tariff adjustment would allow Maynilad to recover foreign exchange losses from consumers by adjusting rates on a monthly basis without the need for evaluation and approval by the regulatory office – rather than having to wait until the end of each calendar year as provided for in the contract. The postponed service obligations were those that Maynilad's creditors were concerned that it would not meet – thus running the risk of forfeiting its performance bond.

⁹⁸ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 9.3.4. See also Romel Bagares, 'Tantiongco railroad water rate hike petition', *Philippine Star* (Manila) 5 July 2001.

⁹⁹ Esguerra, above n 2, 18, 25.

¹⁰⁰ Ibid 18.

5.4.1 Renegotiations

Initially the government refused to allow Maynilad to increase its tariffs in the manner it was seeking.¹⁰¹ The MWSS Board established a technical working group headed by Chief Regulator Tansionco.¹⁰² The Chief Regulator recommended strongly that the Board adopt Maynilad's proposed price adjustments, and began to take an active role in advocating on behalf of Maynilad's proposal to increase its tariffs through an ad hoc adjustment process.¹⁰³ He and Maynilad drafted a memorandum of cooperation between MWSS and Maynilad that would have allowed Maynilad to raise water rates by PhP4.75 per cubic metre (pcm), or almost 100%,¹⁰⁴ in order to rapidly recover their foreign exchange losses.¹⁰⁵

(a) Memorandum of co-operation

Other members of the RO did not support the Chief Regulator's advocacy on behalf of Maynilad. Two other regulators, Alojipan, the deputy for financial regulation, and Ocaya, the deputy for administration and legal affairs, were concerned that the Chief Regulator was 'undermining the independence and the integrity of the regulatory office' by adopting such a partisan position.¹⁰⁶ This disagreement led to serious conflict within the RO. Alojipan and Ocaya claimed the Chief Regulator had 'been making decisions without consulting' the rest of the RO in contravention of the terms of the CA.¹⁰⁷ More controversially, Ocaya accused the Chief Regulator and Maynilad of outright corruption, stating, '[a] few millions in grease money for a corrupt director could be considered a justified expense by a Concessionaire and its stakeholders.'¹⁰⁸

¹⁰¹ Interview with Macra Cruz, Senior Administrator of MWSS (Manila, 30 October 2006); Interview with Flor, above n 72; Esguerra, above n 2, 25-27.

¹⁰² Esguerra, above n 2, 25.

¹⁰³ Ibid.

¹⁰⁴ Maynilad's initial bid committed the company to charging PHP 4.96 pcm for (at least) the first five years of the concession period: Esguerra, *The Corporate Muddle of Manila's Water Concessions* (in New Rules, New Roles: Does PSP Benefit the Poor?, WaterAID and Tearfund, 2003) 14.

¹⁰⁵ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 9.3.4; Esguerra, above n 2; Bagares, above n 98.

¹⁰⁶ Esguerra, above n 2, 25-26.

¹⁰⁷ Ibid.

¹⁰⁸ Personal communication quoted in Buenaventura and Palattao, above n 2, 47.

In response, the Chief Regulator and Maynilad tried to remove the two regulators who were opposing the price escalation proposal.¹⁰⁹ However, President Arroyo cancelled the memorandum of cooperation and instructed the Board to find ‘solutions that did not violate the contract and the parameters of the original bidding.’¹¹⁰ In response Maynilad announced that it would be forced to impose water blackouts within the west zone.¹¹¹ It also stopped paying its concession fees, claiming that its financial troubles gave it no option.¹¹²

(b) Amendment No. 1

The controversy within the RO led to the resignation of the Chief Regulator in August of 2001, but by October the government had bowed to the pressure to preserve the viability of Maynilad and agreed to amend the contract.¹¹³ Amendment No. 1 essentially inserted into the CA three additional recovery mechanisms that enabled both companies to pass on various costs to consumers: the accelerated extraordinary price adjustment, the special transitory mechanism, and the foreign currency differential adjustment.¹¹⁴ At the same time the MWSS Administrator served Alojipan and Ocaya (the two regulators who had opposed the amendments) with a termination letter stating that they had lost the ‘trust and confidence’ of the MWSS Board of Trustees.¹¹⁵

For the general public, Amendment No.1 essentially meant that tariffs were to increase immediately by almost 60 percent, despite the government’s promise that there would be no significant rate increase in the first 10 years of the CA.¹¹⁶ By early 2002 (after the

¹⁰⁹ Bagares, above n 98; Esguerra, above n 2, 26.

¹¹⁰ Esguerra, *The Corporate Muddle of Manila’s Water Concessions* (in New Rules, New Roles: Does PSP Benefit the Poor?, WaterAID and Tearfund, 2003); Bagares, above n 98.

¹¹¹ Interview with Cruz, above n 101; Interview with Palattao, above n 44.

¹¹² Ibid.

¹¹³ Interview with Cruz, above n 101; Romel Bagares, ‘MSWW disallows Maynilad rate hike’, *Philippine Star* (Manila) 25 August 2001.

¹¹⁴ Alexander Martin Remollino, ‘Drowning in A Cycle of Water Rate Hikes’ (2002) 2(31) *Bulatlat* <<http://www.bulatlat.com/news/2-31/2-31-water.html>> .

¹¹⁵ Ledivia V Carino, *Regulatory Governance in the Philippines: A profile* (in Working Paper Series, Paper No.44, Institute for Development, Policy & Managment, University of Manchester, 2002) 68; Romel Bagares, ‘QC court to rule today on 2 MWSS executives’, *Philippine Star* 6 November 2001.

¹¹⁶ Buenaventura and Palattao, above n 2, 26-28.

first rate review) rates had risen by 211 percent over the first five years of privatisation.¹¹⁷ Significantly, these amendments had been made without the requisite public hearings required under the contract by virtue of section 9 of the 1987 *Administrative Code*.¹¹⁸ Nor was a transparent process of amendment followed, which would have allowed for proper public scrutiny and accountability. For these reasons Amendment No.1 was very controversial and elicited public protest and scrutiny.¹¹⁹

5.4.2 Litigation

Despite the increase in tariffs that it enabled, Amendment No.1 was insufficient to guarantee Maynilad's financial stability. When the RO was not willing to approve its proposed 75 percent tariff increase in the 2002 rate rebasing exercise, Maynilad wrote to the government claiming that due to the government's breach of contract they no longer had necessary funds to carry out the project.¹²⁰ In December, when talks had failed to resolve the situation, Maynilad filed for arbitration under Article 12 of the CA,¹²¹ seeking an early contract termination and USD300 million in compensation.¹²²

(a) Arbitration

Maynilad claimed, as grounds for termination, that by failing to assist Maynilad to resolve its financial problems MWSS had violated Amendment No. 1 and article 7.1 of the CA,¹²³ which provided that 'MWSS shall, upon request of the Concessionaire,

¹¹⁷ Philippine Star, 'No improvement after 5 years of MWSS privatization - solon', *Philippine Star* (Manila) 11 April 2002.

¹¹⁸ *Administrative Code 1987* (Philippines) s 9.

¹¹⁹ Buenaventura and Palattao, above n 2, 28; Mayen Jaymalin et al, 'Water rate hike opposed', *The Philippine Star* (Manila) 5 October 2001.

¹²⁰ Interview with Palattao, above n 44. Maynilad's rate at the time of bidding was just over 19 pesos per cubic litres and it wanted to increase this rate to 34 pesos. After reviewing Maynilad's investments and financial management to date the Regulatory Office was only willing to approve a new rate of 26.75 pesos to be implemented in stages over a two-year period.

¹²¹ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 12.2.

¹²² *Metropolitan Waterworks and Sewerage Systems (MWSS) v Maynilad Water Services Inc (Maynilad) in the matter of an ad hoc arbitration under the UNCITRAL Rules* (2003) UNC47/KGA (Unreported) (International Arbitration Panel).

¹²³ *Ibid* para 30

cooperate in all reasonable ways to facilitate the Concessionaire's carrying out of its responsibilities under the Concession.'¹²⁴ In response MWSS claimed, 'Maynilad had mismanaged the concession and breached the CA to such extent that it amounts to abandonment of the concession...'¹²⁵ According to MWSS these breaches included, amongst other things, the non-payment of concession fees (amounting to around PhP6.77 billion or USD127 million),¹²⁶ Maynilad's failure to reduce NRW, and its failure to maintain adequate financial resources.¹²⁷ They also contended that Maynilad's Early Termination Notice was without any basis.¹²⁸

The arbitration process ran from February to August 2003 and the decision was handed down on 7 November 2003.¹²⁹ The Appeals Panel found that neither party's conduct had amounted to an Event of Termination and ordered Maynilad to pay its concession fees.¹³⁰ The decision also directed the parties to work together to resolve Maynilad's financial difficulties and authorised MWSS to draw on the USD120 million performance bond if Maynilad failed to pay its unpaid concession fees within 15 days.¹³¹

(b) Rehabilitation

Instead of paying its unpaid concession fees as ordered by the decision, Maynilad filed for corporate rehabilitation and sought a temporary restraining order on its creditors in order to prevent the government from drawing on the performance bond.¹³² This new

¹²⁴ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 7.1.

¹²⁵ *Metropolitan Waterworks and Sewerage Systems (MWSS) v Maynilad Water Services Inc (Maynilad) in the matter of an ad hoc arbitration under the UNCITRAL Rules* (2003) UNC47/KGA (Unreported) (International Arbitration Panel) para 32.

¹²⁶ See <http://www.xe.com/ict/>.

¹²⁷ *Metropolitan Waterworks and Sewerage Systems (MWSS) v Maynilad Water Services Inc (Maynilad) in the matter of an ad hoc arbitration under the UNCITRAL Rules* (2003) UNC47/KGA (Unreported) (International Arbitration Panel) para 33.

¹²⁸ *Ibid* para 32.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 35.

¹³¹ *Ibid* 35.

¹³² *Metropolitan Waterworks And Sewerage System (MWSS) v Hon Judge Daway* (2004) G.R. No 160732 (Unreported) (Regional trial court of Quezon City, Branch 90); Interview with Cruz, above n 101.

phase of litigation pushed the government into negotiations with Maynilad and together they agreed on a corporate rehabilitation plan designed to save Maynilad from insolvency.¹³³ The rehabilitation plan, announced to the public in March 2004 as Amendment No. 2, converted 71 percent of Maynilad's unpaid concession fees into a 63 percent equity for MWSS and enabled MWSS to draw on USD50 million of Maynilad's performance bond.¹³⁴ Additionally, Maynilad's local partner, Benpres Holdings, was to be relieved of all its guarantees.¹³⁵

Media and civil society were critical of the proposed Amendment No. 2, which they perceived to be a corporate 'bailout' of a politically well-connected family company.¹³⁶ Civil society contended that the proposed plan would result in MWSS purchasing Maynilad's shares for well over double their real value,¹³⁷ and would involve the government exposing taxpayers to Maynilad's outstanding debts of almost PhP11 billion (or around USD195 million).¹³⁸ As a result, the amendment was renegotiated. The result was the Debt Capital and Restructuring Agreement ('DCRA'), which included a full draw on the USD120 million performance bond,¹³⁹ and, significantly for poor communities, allowed Maynilad to prioritise 'opportunity areas' rather than focusing on supplying water to poor areas.¹⁴⁰

¹³³ *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation), Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005), paras 17-19; Nepomuceno Malaluan, *Maynilad Rehab Plan: Tinimbang Ka Ngunit Kulang* (2005) Action for Economic Reforms <http://www.aer.ph/index.php?Itemid=62&id=297&option=com_content&task=view> at 30 May 2008.

¹³⁴ Oscar M. Lopez, *Remarks of Oscar M. Lopez, Chairman, Benpres Holdings Corporation at the annual stockholders meeting*, (2004); Buenaventura and Palattao, above n 2, 51.

¹³⁵ Alexander Martin Remollino, 'GMA Faces New Suit Over Maynilad Bailout' (2004) IV(9) *Bulatlat*; Lopez, above n 134.

¹³⁶ Buenaventura and Palattao, above n 2, 51.

¹³⁷ *Ibid.*

¹³⁸ Remollino, above n 135; Lopez, above n 134.

¹³⁹ *Metropolitan Waterworks And Sewerage System (MWSS) v Hon Judge Daway* (2004) G.R. No 160732 (Unreported) (Regional trial court of Quezon City, Branch 90); William Kingdom, *Project Information Document - PH-PSD for MWSS Financial Rehab* (World Bank, 2006), 2; Buenaventura and Palattao, above n 2, 52.

¹⁴⁰ Benpres Holdings Corporation, *Quarterly Report Pursuant to Section 17 of the Securities Regulation Code and SRC Rule 17(2)(b) Thereunder* (The Securities and Exchange Commission, 2006) 3-5; Kingdom, above n 139, 2; Buenaventura and Palattao, above n 2, 52-53.

As will be discussed in Chapter 7, these developments demonstrate that commercial incentives, harnessed by market-based solutions like PSP, cannot by themselves guarantee improvements in efficiency, investment or service.¹⁴¹ This is because the market is unpredictable and influenced by both external events, such as currency fluctuations, and internal issues, such as corruption and poor management. This is a weakness in the good governance approach to water reform and highlights the ongoing need for transparency and accountability through both public participation and State intervention (preferably via a strong, independent regulator).

5.4.3 An uneven record of achievements

Despite these problematic developments in the early years of Manila's experience with PSP, both concessionaires had positive achievements, and it is necessary to take these into account in order to make a balanced assessment of the full impact of the good governance reforms that have taken place in Manila.

(a) Increased efficiency and financial sustainability

In contrast to Maynilad, Manila Water fared well even in the early years of the CA, both financially and in terms of improving efficiency. By 2007 the east concessionaire had reduced NRW to 22 percent.¹⁴² The company's profits also grew steadily (even at the conclusion of their income tax holiday) and its stock price increased by 100 percent between 2006 and 2007.¹⁴³ By 2010 Manila Water claimed to have expanded 24-hour water services to 99 percent of its coverage area and reduced NRW to just 11 percent.¹⁴⁴ The company is now investing in water services internationally.¹⁴⁵

Developments since 2007 also paint a more positive picture of Maynilad's performance. In January 2007, a new private consortium purchased 84 percent of Maynilad shares in

¹⁴¹ See Chapter 7, nn 12, 14-17, 36-44 for the literature on these issues.

¹⁴² Rhys Owen, 'Manila Water goes from strength to strength' (2008) 9(3) *Global Water Intelligence*.

¹⁴³ Ibid.

¹⁴⁴ Marianne Go, 'Metro water firms reduce system losses', *The Philippine Star* (Manila) 14 January 2011.

¹⁴⁵ See, eg, 'Ayala Corp. and unit Manila Water to invest in Vietnamese companies', *GMA News* 27 April 2012 <<http://www.gmanetwork.com/news/story/256426/economy/companies/ayala-corp-and-unit-manila-water-to-invest-in-vietnamese-companies>> at 23 May 2012; 'Manila Water in Australia', *Manila Standard Today* 12 May 2010.

a public bidding.¹⁴⁶ Within a year the new firm had paid off Maynilad's outstanding debts of USD240 million and begun to invest in infrastructure maintenance and improvements.¹⁴⁷ By 2010, Maynilad claimed to have expanded 24-hour water services to 83 percent of its coverage area (from a low of 32 percent in 2006),¹⁴⁸ and reduced NRW to 51 percent (from a high of 67 percent).¹⁴⁹

(b) Improved access to water for the poor

The PSP process in Manila has also been successful in improving water access for informal settlements. Many public water systems, including MWSS, have refused to provide water connections to households living in informal settlements.¹⁵⁰ In contrast, the private concessionaires in Manila have proven very willing to expand water connections to informal settlements, through the initiation of programs in partnership with development agencies.¹⁵¹ For example, between 1997 and 2000 an additional 35,000 poor urban households were provided with connections under Manila Water's *Water for the Poor* program ('*Tubig para sa Baragway*').¹⁵² According to Manila Water's website, this figure rose to a total of 1.6 million people in 2012.¹⁵³

¹⁴⁶ Maynilad, *History* (2009) <<http://www.mayniladwater.com.ph/about01.php>> at 23 May 2012.

¹⁴⁷ Ibid.

¹⁴⁸ Maynilad, *Maynilad marks fifth year of reprivatization; significantly improves services* (2012) <http://www.mayniladwater.com.ph/news_pop.php?id=229> at 23 May 2012.

¹⁴⁹ Go, 'Metro water firms reduce system losses', *The Philippine Star* (Manila) 14 January 2011.

¹⁵⁰ Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, A/HRC/21/42 (2012), 30, 35, 53, 56.

¹⁵¹ See, eg, PPIAF and ADB, 'The Design of the Manila Concessions and Implications for the Poor' (Paper presented at the *PPIAF/ADB Conference on Infrastructure Development – Private Solutions for the Poor: The Asian Perspective*, Manila, 28-30 October 2002); V.C. Rivera, Group Director, Regulatory and Planning, Manila Water Company, in McIntosh, above n 12, app 2, 169-172; Personal Communications with the author from Carlo Berina-Kim (NGO liaison, Manila Water); Mr Perry Riveria (Director of Regulation and Corporate Development, Manila Water).

¹⁵² See, eg, V.C. Rivera, Group Director, Regulatory and Planning, Manila Water Company, in McIntosh, above n 12, app 2, 169-172; Personal Communications with the author from Carlo Berina-Kim (NGO liaison, Manila Water); Mr Perry Riveria (Director of Regulation and Corporate Development, Manila Water).

¹⁵³ Manila Water, *Corporate Social Responsibility* (2012) <http://www.manilawater.com/section.php?section_id=4&category_id=23> at 23 May 2012.

Under Manila Water's *Water for the Poor* project water pipes are built up to the edge of informal settlements and community water organisations must arrange (and pay) to have the water connected from this bulk water outlet to individual households and must organise to collect the money from them in order to pay Manila Water.¹⁵⁴ A positive outcome of this arrangement is that the residents of the poorest areas of Manila do not have to raise the large amount of cash required to pay for an individual household connection (which, at over USD100, is unaffordable for many households).¹⁵⁵ Many also now save a lot of time by having water connections in their homes rather than having to queue for water.¹⁵⁶ The water is also safer and more reliable than the water they were forced to purchase from SSWPs.¹⁵⁷ Finally, this program has enabled many of these poor communities to directly manage their own water services, thus empowering them to participate in water governance at the local level.¹⁵⁸

(c) Inequitable service

However, under this project, participant communities are required to take complete financial responsibility for all NRW.¹⁵⁹ Manila Water also bills these customers at the highest bulk water rate, meaning they pay as much as four times per cubic metre than they would if they were being provided with an individual connection.¹⁶⁰ Under the terms of the CA, Manila Water could exercise its discretion and apply the lowest bulk

¹⁵⁴ Interview with Esguerra, at 154; Interview with Palattao, above n 44; Interview with Manahan, above n 79; Jude Esguerra, *Universal Service Coverage After the Crisis?* (United Nations Research Institute for Social Development, 2005) 31; Wu and Malaluan, above n 17, 222-223.

¹⁵⁵ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997), s 9.5. See also Shane Rosenthal, *The Manila water concessions and their impact on the urban poor* (Yale School of Forestry and Environmental Studies, 2001) 4 (The average monthly income in Manila was USD260, and so this figure represents several times the monthly income of poor households in Manila.); Wu and Malaluan, above n 17, 222-223.

¹⁵⁶ Maria Lourdes Baclagon, *Water for the Poor Communities (TPSB) - Philippines* (United Nations Economic and Social Commission for Asia and the Pacific, 2004) 22.

¹⁵⁷ *Ibid* 22.

¹⁵⁸ Esguerra, above n 154.

¹⁵⁹ *Ibid* 17, 23; McIntosh, above n 12, app 2, 175.

¹⁶⁰ Freedom from Debt Coalition, above n 2, 5; Interview with Esguerra, at 154; Interview with Palattao, above n 44; Interview with Manahan, above n 79; Esguerra, above n 154, 16, 31; Wu and Malaluan, above n 17, 222-223.

rate in recognition of low household usage, but it has chosen not to exercise this discretion and has no financial incentive to do so.¹⁶¹ Many communities must also pay additional levies (increasing the cost by up to seven times the original price) to cover extra expenses and to generate a profit for the community water organisation.¹⁶² Sometimes this profit is reinvested in the community in the form of paving or childcare facilities,¹⁶³ but sometimes a private entity acts as the on-seller and the increased charges leave the community as profit.¹⁶⁴

Many commentators are critical of the fact that the level of service being offered to poor communities with new connections is inferior to that offered to those already connected.¹⁶⁵ McIntosh points out that by permitting the concessionaires to outsource the work of providing individual connections (and allowing them to count these connections as part of their service targets), the CA provides incentives for the concessionaires to only sell bulk water to poor urban households.¹⁶⁶ He is also critical of the design of the rising block tariff, which subsidises wealthy households with individual connections, while penalising poor households with shared connections or those without connections who are forced to purchase their water from SSWPs (who purchase their water at the highest block rate).¹⁶⁷ Another problematic element of these bulk water connections is that while the RO regulates the tariffs charged to individual consumers by the concessionaires, these on-sellers are not properly monitored.¹⁶⁸ Instead the RO relies on self-reporting and does not have the capacity to verify the information provided.¹⁶⁹

These unequal results were also the subject of Congressional hearings in 2002, which led to a request for the RO to draft proposals for a more equitable method of calculating

¹⁶¹ Esguerra, above n 154, 16, 31.

¹⁶² Interview with Esguerra, above n 154; Interview with Palattao, above n 44; Interview with Manahan, above n 79; Esguerra, above n 154, 31; Wu and Malaluan, above n 17, 222-223.

¹⁶³ Interview with Manahan, above n 79.

¹⁶⁴ Ibid.

¹⁶⁵ See, eg, McIntosh, above n 12, app 2,175; Esguerra, above n 154, 25.

¹⁶⁶ McIntosh, above n 12, app 2,175.

¹⁶⁷ Ibid.

¹⁶⁸ Interview with Esguerra, at 154; Interview with Manahan, above n 79.

¹⁶⁹ Ibid.

tariff rates.¹⁷⁰ It is unclear at this stage whether or not these proposals have been, or will be, taken up.¹⁷¹

5.5 Public response

Civil society and community members have responded to the privatisation process by using litigation to challenge decisions of the concessionaires, the government and the regulator. Overall this litigation has had a positive impact, by bringing otherwise hidden issues into the public domain and forcing the government to justify its actions to the public. However, the issues raised by the litigation, and the responses of the government and the concessionaries to the claims raised, have also highlighted a concerning feature of Manila's approach to PSP, namely a tendency to exclude the public from participating in water governance by decreasing transparency, accountability and reducing the available avenues for community participation.

5.5.1 The rehabilitation case

The first court case was designed to stop the new rehabilitation plan (the DCRA) from being approved by means of a Petition for Certiorari filed with the Supreme Court by a coalition of public interest groups and affected individuals.¹⁷² The petition contained three main arguments. First, the petitioners argued that the 2005 Rehabilitation Plan and the DCRA were not in the public interest because they allowed Maynilad to substantially modify its contractual obligations.¹⁷³ The petitioners argued that the delays permitted by the DCRA would substantially improve Maynilad's position vis-à-vis its original bidding commitments, and negatively affect the quality of water services received in west zone.¹⁷⁴ For many residents (and particularly those living in poor communities), the terms of the DCRA also further delayed their access to any formal water services at all.

¹⁷⁰ Esguerra, above n 154, 25.

¹⁷¹ Esguerra, above n 154; Freedom from Debt Coalition, above n 2. Information on this review is not available on the MWSS website, or the MWSS-RO's website, nor is it available from the websites of either concessionaire.

¹⁷² *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court); Interview with Palattao, above n 44.

¹⁷³ *Ibid* paras 5, 21b.

¹⁷⁴ *Ibid*.

Second, the petitioners argued that the rehabilitation plan was contrary to public policy as it involved ‘a scheme to bail out Benpres Holdings Corporation (‘Benpres’) using USD60 million in public funds derived from the draw on the USD120 million performance bond.’¹⁷⁵ Under the deal Benpres would lose its entire stockholdings in, and receivables from, Maynilad worth around USD44.2 million, but it was to be absolved from its guarantees of more than USD130 million.¹⁷⁶ The petitioners also argued that this deal placed MWSS in an unsound financial position, because MWSS would be forced to loan additional money to, and forego receivables from, Maynilad instead of paying off its own maturing loan obligations.¹⁷⁷ According to a manager from the MWSS Financial Department this was likely to cause MWSS to post negative cash balances from 2006 to 2008, and again in 2011.¹⁷⁸ MWSS would also have to secure a new World Bank loan, which would further add to its debt.¹⁷⁹

Finally, the petitioners pointed out that the most recent 52 percent tariff increase¹⁸⁰ had taken place without the period of public consultation required under section 9 of the *Administrative Code of 1987*.¹⁸¹ The petitioners argued that compliance with the public consultation requirements ‘is a condition precedent for the validity of rate increases

¹⁷⁵ Ibid para 21a.

¹⁷⁶ *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* (2002) 6 SA 66 para 36; Benpres Holdings Corporation, *Quarterly Report Pursuant to Section 17 of the Securities Regulation Code and SRC Rule 17(2)(b) Thereunder* (The Securities and Exchange Commission, 2006) 4-5.

¹⁷⁷ *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court) para 34.

¹⁷⁸ Ibid para 34.

¹⁷⁹ Ibid para 34; Kingdom, above n 139.

¹⁸⁰ On 24 November 2004 the Regulatory Office had issued Resolution No. 04-014 increasing tariff rates from PhP19.92 to PhP30.19 (or by 52 percent), effective 1 January 2005.

¹⁸¹ *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation), Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005) para 5; *Administrative Code 1987* (Philippines) s 9 (‘Public Participation. - (1) If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule. (2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.’).

granted by government agencies.’¹⁸² To support their arguments they cited *Manila International Airport Authority v. Airspan Corporation*,¹⁸³ which had found that a similar rate increase was invalid for lack of the required prior notice and public hearing.¹⁸⁴

Initially the court allowed the petitioners to participate in the rehabilitation case, by allowing their arguments to be heard and giving them the opportunity to submit their evidence (including a valuation of Maynilad’s shares that they had obtained from expert witnesses).¹⁸⁵ However, in response to all of their claims, both MWSS and Maynilad argued that the petitioners should be denied standing since they were not parties to the CA. This argument was successful and the judge declared that the petitioners were ‘barred from further participating in the proceedings since they [were] not interested parties-of-record, citing section 6, rule 4 of the Interim Rules.’¹⁸⁶

The details of this case highlight a problematic issue with third-party control of water and sanitation services in that privity of contract arguments can be used to exclude the public from the water governance process, reducing both accountability and transparency in the process. From a participatory rights perspective,¹⁸⁷ the public have a direct stake in the water governance process and should, therefore, have the capacity to challenge bad policy decisions. From a right to water perspective, the contractual amendments contained in the rehabilitation agreement (and challenged in this case) had direct impacts on the right to water for many in the community. Delaying the service expansion targets directly affected the rights of unserved communities to physically (and affordably) access the water system, particularly as Maynilad were permitted to prioritise ‘opportunity areas.’ Additionally, bypassing the contractually required public consultation requirements for tariff increases, excluded the community from the process

¹⁸² *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation), Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005) paras 38-39.

¹⁸³ *Manila International Airport Authority v Airspan Corporation* (2004) G.R. No 157581 .

¹⁸⁴ *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation), Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005) paras 38-39.

¹⁸⁵ Interview with Palattao, above n 44.

¹⁸⁶ *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court) para 22; Interview with Palattao, above n 44.

¹⁸⁷ See Section 4.2 above.

of balancing financial sustainability with affordability. The entire process was also an example of poor governance, with the government being accused of providing a favourable deal to a well-connected family corporation at the expense of the public interest.¹⁸⁸

Nonetheless, the government did respond to the petition by requiring Maynilad to file yet another revised rehabilitation plan on 29 April 2005.¹⁸⁹ This new plan substantially adopted the petitioners' valuation of Maynilad's shares and MWSS' 84.4 percent interest was now to be purchased for USD22.67 million (or just over one third of the previous valuation).¹⁹⁰

5.5.2 Appeal to the NWRB

While the petitioners waited for the Supreme Court to overturn the Rehabilitation Plan submitted by MWSS and Maynilad, another venue was available in which to challenge the tariff increase announced by the RO. On 28 January 2005, a second group of petitioners – once again consisting of several public interest groups and consumers – lodged a complaint with the National Water Resources Board ('NWRB') requesting that they stop the implementation of the 52 percent tariff increase.¹⁹¹ As grounds for their request, the complainants argued that Maynilad no longer had a valid contract with

¹⁸⁸ The Lopez family, who part-owned Maynilad through their firm Benpress Holdings, is also the owner of the country's largest media corporation and runs several television networks: See Lopez Holdings, *Corporate Website*, at <http://www.lopez-holdings.ph/> at 5 March 2008. As discussed above, under the initial deal Benpres was to lose its entire stockholdings in, and receivables from, Maynilad worth around USD44.2 million, while being absolved from its guarantees of more than USD130 million.

¹⁸⁹ Action for Economic Reforms, *Maynilad rehab plan is anti-consumer*, (2005).

¹⁹⁰ *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation)*, *Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005) para 24.

¹⁹¹ The tariff increase was authorised by MWSS-RO Resolution No. 04-014. For further information about the petitioners arguments, see *Center for Popular Empowerment v Maynilad Water Services Inc* (2005) WRC/WUC Case No.05-062c (Unreported) (NWRB); *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division); Tech Torres, 'CA Upholds NWRB's authority to stop water rate hike', *Inquirer* (Manila) 31 May 2007; 'Court junks water rate hike due to CPE et al's petition', *Sunstar* (Manila) 1 June 2007 <<http://sunstar.com.ph/static/man/2007/06/01/news/court.junks.water.rate.hike.html>> at 5 March 2008.

MWSS and that the public consultations, required under section 9 of the *Administrative Code of 1987*,¹⁹² had not taken place prior to the approval of the tariff increase.¹⁹³

In response Maynilad and MWSS moved to have the complaint dismissed on the ground that NWRB had no jurisdiction over the concessionaires.¹⁹⁴ They argued that the ‘water tariffs are governed by the CA and it would be an impairment of contracts if its implementation would be stayed.’¹⁹⁵ However, the NWRB dismissed their arguments and ruled in favour of the complainants.¹⁹⁶ Maynilad then appealed to the Supreme Court. However, by this time the Deputy Administrator for Administration and Legal Affairs (DA) had already provided advice to MWSS reaffirming the jurisdiction of the NWRB and so MWSS did not join Maynilad in its suit.¹⁹⁷

The DA’s advice was substantiated when the Supreme Court dismissed Maynilad’s petition for lack of merit after finding that the NWRB’s jurisdiction over public utilities clearly covered the two concessionaires, which were agents of MWSS.¹⁹⁸ Gonzales-Sison J also found that Maynilad’s ‘business operations is imbued with public interest [and, therefore] the regulatory and adjudicatory power of the NWRB over water rates on all public utilities established by existing laws is deemed read into the CA.’¹⁹⁹ Nonetheless, the case remains pending.²⁰⁰

¹⁹² *Administrative Code 1987* (Philippines) s 9. (See above n 181-184 and accompanying text above.)

¹⁹³ *Center for Popular Empowerment v Maynilad Water Services Inc* (2005) WRC/WUC Case No.05-062c (Unreported) (NWRB); *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division); Torres, above n 191; Sunstar, above n 191.

¹⁹⁴ *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division); Torres, above n 191; Sunstar, above n 191.

¹⁹⁵ *Ibid* 2.

¹⁹⁶ *Ibid*; Torres, above n 191; Sunstar, above n 191.

¹⁹⁷ Atty Estrella T Decena-Zaldivar, *Legal Opinion No. 07-001*, Legal Opinion on the CA ruling on the NWRB jurisdiction, (2007).

¹⁹⁸ *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division) 9.

¹⁹⁹ *Ibid* 9.

²⁰⁰ Email from Mary Ann Manahan to Cristy Clark, 9 August 2013; Maynilad, *2010 Annual Report*, (2011) 71.

5.5.3 The public utility debate

Another issue that tested MWSS' commitment to transparency and public participation came out of the RO's resolution (of 30 July 2004) not to treat the concessionaires as public utilities.²⁰¹ This was relevant because under section 12 of the MWSS Charter a public utility is not permitted to exceed a return on rate base ('RORB' – essentially the equivalent of a profit margin) of more than 12 percent.²⁰² It was also relevant due to a recent finding within the energy sector that private entities acting as public utilities were not allowed to pass on their corporate income tax to consumers.²⁰³

In 2002, the Commission on Audit had investigated the financial operations of the two concessionaires at the request of the RO.²⁰⁴ The Commission found that in 1999 Manila Water had incurred a RORB of 41 percent, exceeding its allowable RORB by 29 percent.²⁰⁵ Initially the RO attempted to sanction Manila Water for exceeding their allowable RORB. However, after a period of negotiations with Manila Water, and a review of the CA by a newly created Technical Working Group, the RO declared that the concessionaires were actually agents of MWSS and, as such, not to be considered public utilities for the purposes of the RORB cap.²⁰⁶ This declaration was made despite the fact that Article 9 of the CA itself provides that water tariff adjustments were to be

²⁰¹ *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)* (2007) G.R. No 173044 (Unreported) (Supreme Court); Interview with Palattao, above n 44, 38-42.

²⁰² *Republic Act No. 6234 - An Act Creating The Metropolitan Waterworks and Sewerage System and Dissolving The National Waterworks and Sewerage Authority; and for other purposes 1971* (The Philippines); Interview with Palattao, above n 44; Freedom from Debt Coalition, *Water advocates picket MWSS over public utility issue* (2006)

<http://www.fdc.ph/index.php?view=article&catid=36%3Aadvocacy-on-water&id=159%3Awater-advocates-picket-mwss-over-public-utility-issue&option=com_content&Itemid=87> at 30 June 2008 2008.

²⁰³ *Republic v Manila Electric Company (MERALCO)* (2003) G.R. Nos. 141314 & 141369, 410 SCRA 130 (Supreme Court).

²⁰⁴ Interview with Palattao, above n 44.

²⁰⁵ *Interview with Bubut Palattao, Advocacy Coordinator at Freedom from Debt Coalition* (Manila, 1 November 2006).

²⁰⁶ *Ibid.*

made subject to the limitation that the concessionaires' rate of net return shall not exceed 12 percent per annum (as required by section 12 of the MWSS Charter).²⁰⁷

When a group of NGOs, led by the Freedom from Debt Coalition, discovered this declaration they decided to challenge it.²⁰⁸ In June 2006, they filed a case in the Supreme Court challenging the resolution of the RO.²⁰⁹ They argued that the *Public Service Act* explicitly states that WSS services are included in the list of public services.²¹⁰ They also pointed out that the RO's Technical Regulation Administrator had refused to endorse the declaration because he believed it to be in conflict with existing legal opinions.²¹¹

The public interest in this case was fairly evident since allowing the concessionaires to increase their profit levels would have an impact not only on the price of water for all water users, but also on the amount of money that the concessionaires would be required to reinvest in the water system to both maintain and expand services (affecting the rights of unserved and underserved sections of the community).²¹² However, the RO argued that the Supreme Court should dismiss the petition for want of merit.²¹³

The Supreme Court dismissed the petition on three grounds.²¹⁴ First, that the petition should have been lodged with the NWRB, which had exclusive original jurisdiction

²⁰⁷ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 9.

²⁰⁸ Interview with Palattao, above n 44.

²⁰⁹ *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)* (2007) G.R. No 173044 (Unreported) (Supreme Court); Interview with Palattao, above n 44.

²¹⁰ *Ibid*; Freedom from Debt Coalition, *FDC to ask SC invalidate MWSS board resolution* (2006) <http://www.fdc.ph/index.php?view=article&catid=36%3Aadvocacy-on-water&id=152%3Afdc-to-ask-sc-invalidate-mwss-board-resolution&option=com_content&Itemid=87> at 30 June 2008.

²¹¹ *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)* (2007) G.R. No 173044 (Unreported) (Supreme Court); Freedom from Debt Coalition, *FDC to ask SC invalidate MWSS board resolution* (2006) <http://www.fdc.ph/index.php?view=article&catid=36%3Aadvocacy-on-water&id=152%3Afdc-to-ask-sc-invalidate-mwss-board-resolution&option=com_content&Itemid=87> at 30 June 2008.

²¹² Esguerra, above n 154, 20-23.

²¹³ *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)* (2007) G.R. No 173044 (Unreported) (Supreme Court) para 11.

²¹⁴ *Ibid* paras 11-16.

over all cases contesting the rates or fees of water and sanitation services.²¹⁵ Second, that the concessionaires were indispensable parties to the proceedings and that their non-inclusion rendered the petition defective.²¹⁶ Finally, that the petition was barred under the doctrine of hierarchy of courts.²¹⁷ Despite the Supreme Court's concurrent original jurisdiction with the Regional Trial Court and the Court of Appeals, it cannot address issues of fact and this petition raised several that needed to be determined.²¹⁸ On 28 January 2008, the Freedom from Debt Coalition and the other parties to the case asked the Supreme Court to reconsider its ruling, but this appeal was denied.²¹⁹

Conclusion

When MWSS was privatised in 1997 it was facing a serious financial crisis. As a result, the millions of households who were unserved and underserved by MWSS were relying on expensive (and often unsafe) SSWPs and there was no reason to believe that this situation would improve. A decade after the privatisation process it is possible to say that by providing a commercial incentive, good governance reforms did encourage the Concessionaires to increase efficiency and to make significant new investments in the Metro Manila WSS system. As a result, the overall financial position of MWSS and the levels of service being delivered to the people of Manila have improved – particularly in the east concession area. Nonetheless, Maynilad's financial crisis also demonstrated that market-based reforms do not guarantee financial success, in part because they are vulnerable to external events like currency fluctuations.

Other aspects of the reform process could have also been improved. Equity was not prioritised and this was evident in the outcomes. When Maynilad renegotiated its

²¹⁵ Ibid paras 11-12. Despite this advice, the petitioners did not lodge a case with the NWRB (Email from Mary Ann Manahan to Cristy Clark, 9 August 2013).

²¹⁶ Ibid paras 13-14.

²¹⁷ Ibid paras 15-16.

²¹⁸ Ibid para 16.

²¹⁹ Tetch Torres, 'SC asked to reconsider ruling on MWSS row', *Inquirer.net* (Manila) 28 January 2008 <<http://newsinfo.inquirer.net/breakingnews/metro/view/20080128-115321/SC-asked-to-reconsider-ruling-on-MWSS-row>> at 7 December 2012; *National Advocacy against the Privatization of Essential Services and Commons (Water)* (2008) Freedom from Debt Coalition <http://www.fdc.ph/index.php?option=com_content&view=article&id=50:advocacy-on-water&catid=77:our-advocacies&Itemid=91> at 6 December 2012.

service targets, it was poor areas that were delayed. The reliance on commercial incentives also led to the imposition of high connection fees, which created an additional financial barrier to access, while the solution provided by Manila Water (the *Water for the Poor* program) meant that the poorest households were forced on to the most expensive block tariff rates.

Finally, although there were some positive initiatives in connecting informal settlements to the network and in providing a participatory governance framework at the local level, over-all the PSP process compromised transparency, accountability and participation. The RO was not given sufficient capacity or independence to act in the public interest, and the community was excluded from the water governance process. The issues raised by the public interest litigation initiated by civil society, and the exclusionary responses of the government and the concessionaires to their legal claims, highlight some of these concerning features of the good governance approach to water reform as put into practice in Manila. These will be examined in Chapters 7 and 8, along with the question of whether a stronger recognition of the right to water in the Philippines would have made any difference. First, Chapter 6 will consider the facts of the second case study, which focuses on water governance reform in South Africa.

Chapter 6. Implementing rights-based water reform in South Africa

South Africa was the first country in the world to explicitly recognise the right to water in its Constitution.¹ The Constitution also recognises a right of participation in governance,² and the African National Congress ('ANC'), South Africa's governing party, has recognised the interdependence of participatory rights to both the realisation of socioeconomic rights and the process of social and economic transformation envisioned for post-apartheid South Africa.³

These constitutionally recognised rights to water and participation have been given legislative force,⁴ and have been implemented through a series of water governance reforms, including decentralisation and the provision of free basic water.⁵ However, as this chapter will discuss, the realisation of these rights have also been compromised by the cost recovery imperatives facing the government, and the challenges of overcoming entrenched class (and racial) divisions in South African society.

This chapter seeks to summarise the recent history of water governance reform in South Africa. Chapters 6 and 7 will then analyse these facts in order to evaluate the impact of the recognition of the right to water on water reform, particularly in relation to increasing access to water for the poor and marginalised and enhancing community participation in water governance.

¹ *Constitution of the Republic of South Africa 1996*, s 27.

² *Ibid* s 33(1).

³ See, eg, Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 9.

⁴ *Water Services Act 1997* (South Africa); *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa).

⁵ See below. See also Department of Water Affairs and Forestry (DWAF), *Free Basic Water* (2012) <http://www.dwaf.gov.za/dir_ws/fbw/#> at April 2012 ; *Constitution of the Republic of South Africa 1996*, Schedule 4, Part B – 'The following local government matters to the extent set out in section 155 (6) (a), (7): [...] Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.'

6.1 History of water governance in South Africa

Two centuries of colonial rule, followed by fifty years of formal apartheid have left South Africa with a legacy of extreme polarisation.⁶ In 1993, the Gini coefficient – a World Bank measure of equality⁷ – was estimated to be 0.61, placing South Africa in a tie with Brazil as the most unequal country in the world.⁸ The 1998 Human Development Report ranked South Africa's black population 100 places lower than its white population on the human development index.⁹ The ongoing legacy of apartheid policies means that although black South Africans were given formal equality in 1994, they remain significantly disadvantaged in comparison to white South Africans in terms of income, employment, and access to resources and essential services, and this is even more marked in respect of those living in rural areas.¹⁰

Apartheid inequalities were starkly reflected in municipal water services. In 1993, only 43 percent of black South Africans had on-site access to running water as compared to 99 percent of white South Africans.¹¹ For women in households without running water, this meant travelling an average of 500 meters to access potable water from communal taps or natural sources.¹²

⁶ Rose Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power' (2005) 18(1) *Georgetown International Environmental Law Review* 149, 149-150.

⁷ World Bank, *GINI index* (2012) <<http://data.worldbank.org/indicator/SI.POV.GINI/>> at 10 December 2012 ('Gini index measures the extent to which the distribution of income (or, in some cases, consumption expenditure) among individuals or households within an economy deviates from a perfectly equal distribution. A Lorenz curve plots the cumulative percentages of total income received against the cumulative number of recipients, starting with the poorest individual or household. The Gini index measures the area between the Lorenz curve and a hypothetical line of absolute equality, expressed as a percentage of the maximum area under the line. Thus a Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality.').

⁸ Stephan Klasen, 'Social, Economic, and Environmental Limits for the Newly Enfranchised in South Africa?' (2002) 50(3) *Economic Development and Cultural Change* 607, 608-609.

⁹ Ibid, 609, citing UNDP, *Human Development Report - Consumption for human development* (1998).

¹⁰ Klasen, above n 8, 608-609, 615.

¹¹ Klasen, above n 8, 609.

¹² Francis, above n 6, 150 (citations omitted); David A. McDonald, 'The Bell Tolls for Thee: Cost Recovery, Cutoffs, and the Affordability of Municipal Services in South Africa' in David A. McDonald

6.2 The human right to water in South Africa

South Africa's historic constitutional recognition of the right to water was largely the result of two features of the context in which the Constitution was drafted. At the international level, socioeconomic rights had just started to receive a wider level of recognition and acceptance. The creation of CESCR in 1987,¹³ and the publication of *General Comment No 3* in 1990,¹⁴ had begun to shift the perception of socioeconomic rights from intangible and aspirational to concrete and justiciable.¹⁵

At the domestic level, the end of apartheid and the ascendance of the ANC to government were the culmination of a long struggle on behalf of South Africa's majority population for equality and full citizenship. Apartheid laws had denied the black population access not only to civil and political rights, but also to socioeconomic rights in a manner that had underscored the interdependent nature of these rights.¹⁶ A lack of democratic rights had disempowered the population from demanding access to socioeconomic rights, while their everyday struggle for survival in the face of systematic deprivation had limited their capacity to demand political freedom.¹⁷

Liebenberg believes that this history indicates that the Constitution was designed to play a transformative role, both in terms of promoting the realisation of socioeconomic

and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 161, 163.

¹³ Philip Alston, 'Out of the abyss? The challenges confronting the new U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*; Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in Philip Alston (ed), *The United Nations and Human Rights* (1992) 473; *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986).

¹⁴ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990); International Commission of Jurists (ICJ), *Maastricht guidelines on violations of economic, social and cultural rights* (United Nations, 1997); Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81.

¹⁵ Malcolm Langford, 'The justiciability of social rights: from practice to theory' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 3.

¹⁶ See, eg, Liebenberg, above n 3, xxi.

¹⁷ Nelson Mandela, 'Address: On the occasion of the ANC's Bill of Rights conference' in *A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee* (1991) 9, 12, cited in Liebenberg, above n 3, 9.

rights, and in terms of empowering South Africans to play an active role in the transformation of South African society.¹⁸ She argues that '[t]he ability of ordinary people to invoke civil and political rights such as the right of freedom of association and speech as well as socio-economic rights was seen as integral to their active participation in the process of reconstruction and development.'¹⁹ This was also reflected in the drafting process for the new Constitution, which was highly participatory.²⁰

Nonetheless, there was significant debate in South Africa over the inclusion of socioeconomic rights in the Constitution. Concerns were raised about the State's financial capacity to meet the cost burden of realising these rights, and the judiciary's institutional capacity to consider the budgetary and polycentric²¹ issues raised by their adjudication.²²

6.2.1 Constitutional right to water

The right to water is contained in section 27 of the Constitution, which states that '[e]veryone has the right to have access to ... sufficient food and water'.²³ Section 27 also lays out the state's responsibilities, stating that it 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'²⁴ As the Constitution allocates responsibility for the provision of water services to local government,²⁵ it binds all levels of government to take

¹⁸ Liebenberg, above n 3, 9.

¹⁹ Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 9.

²⁰ Jeremy Sarkin, 'The Drafting of South Africa's Final Constitution from a Human-Rights Perspective' (1999) 47(1) *The American Journal of Comparative Law* 67, 70-72.

²¹ 'Polycentric' refers to issues that involve a complex range of interlocking and interacting interests and potential repercussions. See Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 394-398.

²² Liebenberg, above n 3, 11-12, citing SALC, Interim Report: Project 58 *Group and Human Rights* (1991) 533-537; H Corder et al, *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992).

²³ *Constitution of the Republic of South Africa 1996*, s.27.

²⁴ *Ibid.*

²⁵ *Ibid.*, Schedule 4, Part B – 'The following local government matters to the extent set out in section 155 (6)(a), (7): [...] Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.'

‘reasonable legislative and other measures’ to progressively realise the right to water.

(a) Reconstruction and Development Plan

The policy background to the ANC’s promotion of socioeconomic rights was the Reconstruction and Development Plan (‘RDP’), which the ANC adopted in the lead up to the April 1994 elections.²⁶ The RDP declared that the State was going to provide equal access to essential services that had long been denied to black South Africans under apartheid.²⁷ Amongst many other promises, the RDP committed the government to providing 20-30 litres per capita per day (‘Lpcpd’) as a matter of priority, with a medium-term goal of 50-60 Lpcpd, and installing waterborne sanitation in every house.²⁸

(b) Water Services Act 1997 (Republic of South Africa)

The government codified the constitutional right to water through the *Water Services Act* 1997,²⁹ which regulates water services, including the provision of domestic water supply and sanitation (‘WSS’) services.³⁰ Section 3 of the Act provides,

(1) Everyone has the right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

‘Basic water supply’ is defined as ‘the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.’³¹

The Department of Water Affairs and Forestry (‘DWAF’)³² has published a number of regulations to the *Water Services Act*. These include the *Compulsory National*

²⁶ African National Congress (ANC), *Reconstruction and Development Programme* (1994) South Africa.

²⁷ Ibid.

²⁸ Ibid 2.6.6-2.6.7.

²⁹ *Water Services Act 1997* (South Africa) s 3.

³⁰ Ibid.

³¹ *National Water Act 1998* (South Africa) s 1(iii).

³² DWAF is now known as the Department of Water Affairs (DWA), but will be referred to as DWAF throughout this thesis for the purposes of consistency.

Standards,³³ section 3(b) of which sets out the minimum standard for basic water supply services as:

- (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 a supply for more than seven full days in any year.

6.2.2 Right of democratic participation

A dual commitment to democracy and socioeconomic rights is enshrined in South Africa's Constitution in a manner that makes it clear that they reinforce each other.³⁴ Section 7(1), for example, describes the Bill of Rights as 'a cornerstone of democracy in South Africa. It enshrines the rights of all people in [South Africa] and affirms the democratic values of human dignity, equality and freedom.'³⁵ Scholars have argued that the concept of democracy that is enshrined in the South African Constitution is a deep version of democracy – one that envisions opportunities for citizen participation well above and beyond voting in periodic elections.³⁶ This version of democracy is one that incorporates concepts of participatory and deliberative democracy into its representative model, thus allowing space for direct participation in decisions that materially affect the day-to-day lives of South Africans.³⁷

³³ *Guidelines for Compulsory national standards (Regulations under section 9 of the Water Services Act (Act 108 of 1997)) and Norms and standards for water services tariffs (Regulations under section 10 of the Water Services Act (Act 108 of 1997)) and Water Services Provider Contract Regulations (in terms of s19(5) of the Water Services Act, 1997) 2002* (South Africa).

³⁴ For an extended discussion of the commitment to democracy in the South African Constitution, see Thenuis Roux, 'Democracy' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd ed, 2006), and, in particular, see 10-58-62 in relation to the interaction between democracy and socioeconomic rights within the Constitution.

³⁵ *Constitution of the Republic of South Africa 1996*, s 7(1).

³⁶ See Roux, above n 34; Danie Brand, 'Writing the law democratically: A reply to Theunis Roux' in Stu Woolman and Michael Bishop (eds), *Constitutional Conversations* (2008) 97; Liebenberg, above n 3, 29-32.

³⁷ See Liebenberg, above n 3, 29-32. For a discussion of the meaning of both participatory democracy and

Liebenberg argues that democratic deliberation is central to the transformative agenda of South Africa's Constitution.³⁸ Here she cites Sachs J in the *TAC* case, where he argues that in a society like South Africa, 'where the majority were for centuries denied the right to influence those who ruled over them, the right "to be present" when laws are being made has a deep significance.'³⁹ As will be discussed below, this right 'to be present when laws are being made' is also significant to the realisation of the right to water for the poor and marginalised in South Africa.

Participatory rights in both the implementation and the monitoring and evaluation stages of policy are also enshrined in the Constitution. Section 33(1) entitles everyone to administrative action that is lawful, reasonable and procedurally fair.⁴⁰ This right is given legislative effect through the *Promotion of Administrative Justice Act 2000* ('PAJA'),⁴¹ which states that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.⁴² Section 3(2) elaborates that a person affected by a decision must be given:

adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons...⁴³

The Constitution also protects public participation in the legislative process by creating a duty on legislative bodies to facilitate public involvement.⁴⁴ In *Doctors for Life International v The Speaker of the National Assembly*,⁴⁵ the Constitutional Court set out

deliberative democracy, see Roux, above n 34, 10-14-18. In relation to the theory of participatory democracy, Roux cites Carole Pateman as being its 'chief theoretical exponent': C Pateman *Participation and Democratic Theory* (1970). For an extended discussion of the concept of deliberative democracy, see Jurgen Habermas, *Between Facts and Norms* (William Rehg trans, 1996).

³⁸ Liebenberg, above n 3, 29.

³⁹ *Minister of Health v Treatment Action Campaign* ['TAC case'] (2002) 5 SA 721 (ZACC), para 627.

⁴⁰ *Constitution of the Republic of South Africa 1996*, s 33(1).

⁴¹ *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa).

⁴² *Ibid* s 3(1).

⁴³ *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa) s 3(2).

⁴⁴ *Constitution of the Republic of South Africa 1996*, ss 59(1)(a), 72(1)(a), 118(1)(a).

⁴⁵ 2006 (12) BCLR 1399 (CC).

a test for determining whether a legislative body had acted reasonably in the fulfilment of this duty, and stated that this would be assessed against the specific context of the case, but that issues such as the nature and importance of the legislation concerned, and the intensity of its impact on the public were particularly relevant.⁴⁶ The Court also emphasised that this obligation required that legislative bodies provide opportunities for *meaningful* participation, and that they ensure that people have the capacity to take advantage of these opportunities.⁴⁷

However, in her analysis of the Constitutional Court's judgment in the case of *Merafong Demarcation Forum v President of Republic of South Africa*,⁴⁸ Nyati argues that 'the test for reasonableness in the duty to facilitate public involvement has no procedural safeguards'⁴⁹ and has set such a low standard that the legislature is able to pass after practicing only a 'minimalist approach to public participation'⁵⁰ rather than engaging meaningfully with the community. She argues further that '[s]etting such low standards means that judicial review of the other branches of government is ineffective.'⁵¹ The implications of this argument will be discussed further in Chapter 8.

6.3 Policy identification – good governance reform

Despite the ambitious goals set out in the RDP, and enshrined in the new Bill of Rights, when the ANC came to power they were faced with the reality that these promises had to be delivered under constrained economic conditions. Therefore, while equity and participation were given initial priority, the good governance issues of efficiency and financial sustainability also had to be considered.

6.3.1 Economic framework

Water governance reform in South Africa has taken place within the broader macroeconomic policies that have been adopted since 1993. The ANC was committed

⁴⁶ Ibid para 128.

⁴⁷ Ibid para 129.

⁴⁸ [2008] ZACC 10.

⁴⁹ Linda Nyati, 'Public Participation: What has the Constitutional Court given the public?' *Law, Democracy & Development* (2008) 12(2) 102, 109.

⁵⁰ Ibid.

⁵¹ Ibid.

to improving the lives of black South Africans, but it was limited in its capacity to redistribute resources.⁵² The ANC has been criticised for these compromises,⁵³ but others point out that such an approach was critical to the success of the relatively peaceful transition process.⁵⁴

It was because of limitations against redistributing available resources that the ANC moved to investigate options for rapidly expanding the economy. In the 1990s neoliberal economics was the dominant ideological approach to economic development.⁵⁵ Adopting this approach also came with a range of incentives, including World Bank and IMF approval, increased access to finance, and the promise of increased foreign investment.⁵⁶

It was in this context that the ANC made a policy shift towards neoliberalism and replaced the RDP with the Growth, Employment and Redistribution strategy ('GEAR'), which the government asserted was designed to implement the RDP but resulted in altering ANC policies on national development.⁵⁷ GEAR is a macroeconomic policy framework that has been described as 'South Africa's own, "home-grown" structural

⁵² See Patrick Bond, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2nd ed, 2000).

See also Francis, above n 6, 159.

⁵³ See, eg, Bond, above n 52, 63; John Pilger, 'Freedom Next Time', *Guardian* 11 April 1998.

⁵⁴ See, eg, Francis, above n 6, 159.

⁵⁵ For a thorough (and insider) description of the hegemonic power of the neoliberal approach to development in the 1990s, see Joseph Stiglitz, *Globalization and its Discontents* (2002). For a defense of this approach to economic governance, see Jagdish Bhagwati, *In Defence of Globalization* (2004); Thomas Friedman, *The Lexus and the Olive Tree* (2000); Nancy Birdsall, 'Life is Unfair: Inequality in the World' in K. Mingst and J. Snyder (eds), *Essential Readings in World Politics* (2001). For a strong critique of this approach, see Walden Bello, *Deglobalization: Ideas for a new world economy* (2002); John Cavanagh and Jerry Mander (eds), *Alternatives to Economic Globalization: A better world is possible* (2004). For critiques of this approach in specific relation to South Africa, see Bond, above n 52; Richard Peet, *Ideology, Discourse and the Geography of Hegemony: From Socialist to Neoliberal Development in Post Apartheid South Africa* (2002).

⁵⁶ See, eg, Bond, above n 52, 58-62; Klasen, above n 8, 621; Francis, above n 6, 155-9.

⁵⁷ Department of Finance, *Growth, Employment and Redistribution: A macroeconomic strategy (GEAR)* (1996) South Africa. For a critical discussion of the impact of GEAR on South Africa's poor, see Bond, above n 52, above (especially 58-62); David A. McDonald, 'No Money, No Service: South Africa's Attempts to Recover Costs for Water and Power are Harming its Poorest Citizens' (2002) (Spring) *Alternatives Journal* 16; Peet, above n 55.

adjustment programme.’⁵⁸ It covers a range of policy areas, including trade liberalisation, tax breaks for big business, labour market adjustments, and cuts in social spending – all designed to expand the South African economy and make it competitive in the international market.⁵⁹

In relation to the provision of essential services, GEAR adopted policies of ‘fiscal responsibility,’ including cost recovery, PSP,⁶⁰ and corporatisation.⁶¹ As discussed in Chapter 1, these are the kind of policies that are encouraged by the World Bank, which has stated that only a ‘fee reflecting the costs will encourage users to correctly value the service they receive, [...] and] help reverse the “entitlement mentality” that has been the historical result of subsidising public services.’⁶²

The result of these economic policies is that despite a transition to democracy, the dramatic economic polarisation of South African society remains entrenched and gaining the vote has not significantly improved the real political power or the standard of living of poor communities.⁶³ An illustration of this effect is that between 1995 and 2005, South Africa went down by almost three-quarters of a point on UNDP’s Human

⁵⁸ Coalition Against Water Privatisation (CAWP), Anti-Privatisation Forum (APF) and Public Citizen, *Nothing for Mahala: The forced installation of prepaid water meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa* (in Research Report No. 16, Centre for Civil Society, 2004) 5.

⁵⁹ Department of Finance, *Growth, Employment and Redistribution: A macroeconomic strategy (GEAR)* (1996) South Africa.

⁶⁰ The adoption of PSP in the water sector in South Africa was fairly short-lived. When new pro-poor policies were introduced in 2000/2001, including the policy of Free Basic Water (discussed in 7.2 below), it became unprofitable for the private sector to invest in South Africa’s water sector and it mostly pulled out. See Mike Muller, ‘Public-Private Partnerships in Water: A South African Perspective on the Global Debate’ (2003) 15(8) *Journal of International Development* 1115.

⁶¹ Department of Finance, *Growth, Employment and Redistribution: A macroeconomic strategy (GEAR)* (1996) South Africa 2.3, 3.2, 3.4, 7.1, 9, 10. For critical discussions of the impact of GEAR on access to basic services for the poor in South Africa, see McDonald, above n 57; Michael Kidd, ‘Not a Drop to Drink: Disconnection of Water Services for Nonpayment and the Right of Access to Water’ (2004) 20(1) *South African Journal on Human Rights* 119.

⁶² World Bank, *World Development Report: Infrastructure for Development* (1994) 44.

⁶³ See, eg, Bond, above n 52; Klasen, above n 8, 607, 618. See also World Bank, *World Development Report: Equity and Development* (2006) 201 (although the Bank only mentions the impact in relation to policy responses to ‘crises’). But see *contra* Brian Crisp and Michael Kelly, ‘The Socioeconomic Impacts of Structural Adjustment’ (1999) 43 *International Studies Quarterly* 533, 544.

Development Index ('HDI') from 0.745 to 0.674.⁶⁴

This process of entrenching inequality has compounded the challenges posed by the water scarcity that prevails in South Africa.⁶⁵ The decision to grandfather the water rights of large commercial farms, by exempting them from the new water licence rules, exacerbated existing levels of inequality.⁶⁶ There is not enough water left for the majority of South Africa's population to experience the same levels of water-use that are currently the norm in white households.⁶⁷ Despite accounting for only 10 percent of the population, white urban households accounted for more than 50 percent of residential water use in 2000.⁶⁸ In Johannesburg, for example, Klassen reports that these households used an average of 3,000 litres per household per day, while 27 percent of black households did not have access to piped water within the guaranteed radius of 200 metres of their homes.⁶⁹

The government acknowledged the imperative of addressing historic inequality in the 1997 *White Paper on National Water Policy*.⁷⁰

It is important that the introduction of realistic pricing for water does not further penalise disadvantaged communities who were already penalised during the apartheid

⁶⁴ UNDP, *National Human Development Reports for South Africa* International Human Development Indicators <<http://hdrstats.undp.org/en/countries/profiles/ZAF.html>> at 10 December 2012. In January 2012 the IMF itself came out against austerity, demonstrating that a marked shift has occurred in accepted economic theory: Larry Elliott, 'IMF warns of threat to global economies posed by austerity drives', *The Guardian* 20 January 2012. See also Olivier Blanchard and Daniel Leigh, 'Growth Forecast Errors and Fiscal Multipliers' (IMF Working Paper 13/1, 2013).

⁶⁵ Department of Water Affairs and Forestry (DWAF), *Overview of Water Resource Availability and Utilisation in South Africa* (1997) South Africa, Department of Water Affairs and Forestry (DWAF), *White Paper on National Water Policy for South Africa* (1997) South Africa.

⁶⁶ See, eg, Klasen, above n 8, 618; Francis, above n 6, 155.

⁶⁷ See Department of Environmental Affairs and Tourism, *White Paper on Environmental Management Policies for South Africa* (1997) South Africa 79, Department of Water Affairs and Forestry (DWAF), *A Pricing Strategy for Raw Water Use Charges* (1999) South Africa. See also Klasen, above n 8, 618-619; Francis, above n 6, 155; Mike Muller, 'Free basic water – a sustainable instrument for a sustainable future in South Africa' (2008) 20 *Environment and Urbanization* 67, 69.

⁶⁸ Francis, above n 6, 150 (citations omitted).

⁶⁹ Klasen, above n 8, 609.

⁷⁰ DWAF, above n 65, 6.5.2.

era. White communities were given a strong economic advantage under apartheid through access to cheap water, while economic development in black communities was restricted by a variety of factors, one of which was lack of access to affordable water. In the interests of equity and social justice, this aspect will have to be considered in the question of water pricing. The price to be levied for water reserved to meet basic needs must merit particular attention.

As an indication of the tension between ensuring equity and efficiency, the government instituted a policy of marginal cost recovery for basic water (high enough to cover operation and maintenance), despite this acknowledgement.⁷¹ It did so without first investigating whether the resulting price would be affordable for poor households.⁷²

As discussed in Chapter 1, full or marginal cost recovery policies reflect an efficiency-focused approach to water governance and this was reflected in the ANC's new water policies, which were focused on ensuring that new water-use allocations prioritised 'highly valued economic uses.'⁷³ The 1997 Water Policy document⁷⁴ also states that 'water is valued as an economic resource, ... it is widely agreed that the setting of the appropriate price for a natural resource such as water can be an effective mechanism to achieve its efficient and productive use.' In line with this approach, bulk water charges were steadily increased in order to raise money to increase infrastructure investment and to ensure the market reflected the scarcity of the resource.⁷⁵

6.3.2 Decentralisation

The provision of WSS services is the constitutional responsibility of local government in South Africa.⁷⁶ In theory, decentralised delivery should encourage a responsive and

⁷¹ Patrick Bond, *Johannesburg's Water Wars: Soweto versus Suez* (2006) <<http://www.passant-ordinaire.com/revue/48-611-en.asp>> at 18 May 2006 2006 6; Muller, above n 67, 72.

⁷² Bond, above n 71, 6; Muller, above n 67, 72.

⁷³ DWAF, above n 65; Department of Water Affairs and Forestry (DWAF), *A Pricing Strategy for Raw Water Use Charges* (1999) South Africa.

⁷⁴ Department of Water Affairs and Forestry (DWAF), *White Paper on National Water Policy for South Africa* (1997) South Africa, para 6.5.

⁷⁵ DWAF, above n 67.

⁷⁶ *Constitution of the Republic of South Africa 1996*, Schedule 4, Part B – 'The following local government matters to the extent set out in section 155 (6) (a), (7): [...] Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.'

participatory style of water management.⁷⁷ However, its application in South Africa has been compromised by the national government's decision to simultaneously withdraw financial and technical support from the water sector.⁷⁸

Local governments in South Africa receive funding from the National Government through several mechanisms outlined in the Constitution.⁷⁹ From 1991 to 1998, funding to local governments was reduced by 85 percent, while an additional 55 percent was withheld from 1997 to 2000.⁸⁰ Some efforts have been made to increase the level of funding provided to local governments for water management since 2000.⁸¹ However, as of 2008, national government funds remained insufficient to ensure universal access to adequate and affordable WSS services, particularly in uniformly poor municipalities (which cannot cross-subsidise from wealthy consumers).⁸²

When responsibility for WSS services was devolved to municipalities, staff had little relevant technical experience. Since insufficient funds were made available for capacity building, or wage increases necessary to attract skilled staff,⁸³ many municipalities still

⁷⁷ See Chapter 3 below, for more discussion of participation and decentralisation.

⁷⁸ See, eg, Kate Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation provision across 15 municipalities* (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008) 57-59; Laila Smith, *Neither Public nor Private: Unpacking the Johannesburg Water Corporatisation Model* (in Programme Paper Number 27, United Nations Research Institute for Social Development Social Policy and Development, 2006), 5; Francis, above n 6, 165-166; Alix Gowlland-Gualtieri, *South Africa's water law and policy framework - implications for the right to water* (in IELRC Working Paper, International Environmental Law Research Centre, 2007) 6.

⁷⁹ These include the Municipal Infrastructure Grant and the Local Government Equitable Share: *Constitution of the Republic of South Africa 1996*, s 214(I).

⁸⁰ McDonald, above n 57; Laila Smith and Susan Hanson, 'Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery' (2003) 40(8) *Urban Studies* 1517, 1522.

⁸¹ Francis, above n 6, 168-169.

⁸² See, *ibid*; Tissington et al, above n 78, 57-61; Gowlland-Gualtieri, above n 78, 6.

⁸³ Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation provision across 15 municipalities* (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008) 60. Muller argues that the initial skills shortage in South African municipalities was the result of 'many, mainly white, technically qualified officials [being] encouraged to take 'voluntary severance packages' and leave municipal service – often signing agreements which excluded them from future employment by the state

lack the technical capacity to adequately carry out the responsibilities of water sector management.⁸⁴ The former Director-General of DWAF has recognised this problem,⁸⁵ and argues that ‘currently many municipalities are in a state of crisis because they do not have enough [appropriately qualified] people on their staff.’⁸⁶

In 2008, Tissington et al documented high levels of illiteracy, and a lack of understanding of roles, responsibilities and local government legislation amongst municipal staff.⁸⁷ They also found that one in three municipal councillors could not read or write.⁸⁸ This lack of basic skills hampers the capacity of municipal workers to facilitate public participation in water governance, while community members have historically lacked the experience of genuine participation.⁸⁹ Until recently,⁹⁰ little has been done to provide the relevant training, and researchers report that where capacity building of local authorities and community members has been attempted (to enable them to participate effectively) it has proven difficult due to widespread illiteracy, language barriers, and reality of the ‘digital divide,’ which separates those who are familiar with technology from those are not.⁹¹

– and since there were no black skills to replace them, allowing less qualified or often completely unqualified candidates to take up positions.’ Muller, above n 67, 37. As a (white) outsider to South Africa, I do not intend to engage any further with this argument.

⁸⁴ Tissington et al, above n 78, 57; Muller, above n 67, 37-38.

⁸⁵ *Interview with Mike Muller, former Director-General of the Department of Water Affairs and Forestry* (Johannesburg, 4 October 2006).

⁸⁶ Mike Muller, quoted in ‘Developing crisis number two.’ *The Weekender* (17-18 May 2008) note 7, cited in Tissington et al, above n 78, 59.

⁸⁷ Tissington et al, above n 78, 60.

⁸⁸ *Ibid.*

⁸⁹ See, eg, Karen Goldberg, *The Water Dialogues: Cape Town Case Study* (2009) 47; Tissington et al, above n 78, 60 68-70; Francis, above n 6, 165-166.

⁹⁰ The recent introduction of the highly participatory, water governance-focused, *Raising the Citizens Voices* project into several South African municipalities will be discussed below. See also Laila Smith, ‘“Raising Citizens Voice in the Regulation of Water Services”: Building the foundations for local regulation in South Africa’ (Paper presented at the *Fifth World Water Forum*, Istanbul, Turkey, 2009).

⁹¹ See, eg, Barbara Schreiner, Ndileka Mohapi and Barbara Van Koppen, ‘Washing Away Poverty, Democracy and Gendered Poverty Eradication in South Africa’ (2004) August *Natural Resources Forum* 174, 176; Tissington et al, above n 78, 60.

6.4 Implementing water governance reforms

Prior to 2001, the policy response to the need to facilitate the realisation of South Africa's constitutional right to water focused on increasing efficiency and financial sustainability in order to increase physical access,⁹² while less attention was paid to affordability, equity or participation.⁹³

6.4.1 Early cost recovery and credit control policies

In response to the pressure of trying to meet an increasing demand with severely limited funds and capacity, local governments began to commercialise their WSS services.⁹⁴ The imperative to raise funds brought an increased focus on cost recovery, and tariffs were increased in order to ensure the financial sustainability of WSS systems and to enable them to expand services.⁹⁵ For households who could not afford these rising costs, this approach had a devastating impact on their ability to maintain access to water.⁹⁶ Significant water tariff increases between 1996 and 2000 led to unprecedented levels of household debt and to millions of people having their water cut off for non-payment.⁹⁷

Women, in particular, were forced to bear the burden of increased cost recovery measures.⁹⁸ As the traditional caregivers for the elderly and the sick (an increasing issue

⁹² See Patrick Bond and Jackie Dugard, 'Water, human rights and social conflict: South African experiences' (2008) 10(1) *Law, Social Justice and Global Development*, 2.

⁹³ See *ibid* 2.

⁹⁴ See, eg, Laila Smith and Ahmedi Vawda, 'Citizen vs. customer—Different Approaches to Public Participation in Service Delivery in Cape Town' (2003) 14(1) *Urban Forum* 26.

⁹⁵ See, eg, David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002).

⁹⁶ See, eg, Smith and Hanson, 'Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery' (2003) 40(8) *Urban Studies* 1517, 1528.

⁹⁷ See, eg, Patrick Bond and Jackie Dugard, 'The Case of Johannesburg Water: what really happened at the pre-paid parish pump' (2008) 12(1) *Law, Democracy and Development* 1, 17; Smith and Hanson, above n 80, 1533; McDonald, above n 12, 168; Hamed Deedat, 'Viva Prepaids, Viva! Assessing New Technology for Cost Recovery in the Rural Northern Cape' in David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 143, 154.

⁹⁸ See Jackie Dugard and Nthabiseng Mohlakoana, 'More work for women: A Rights-based analysis of Women's access to basic services in South Africa' (2009) 28(3) *South African Journal on Human Rights*

with the high prevalence of HIV and AIDS), it falls to women to source enough water to meet these responsibilities and to meet the needs of the household.⁹⁹

Some government officials argued that the policies of the apartheid government, along with the payment boycotts used against them (in the mid-1980s, the ANC called for South African townships to become 'ungovernable' in part by refusing to pay rent or service fees),¹⁰⁰ had created a 'culture of non-payment' in South Africa.¹⁰¹ A related criticism is the argument that black South Africans refuse to pay for services due to a so-called 'culture of entitlement.'¹⁰² However, the application of these criticisms to South Africa's poor fails to account for the issue of affordability. In a 2003 study, the number one reason given for non-payment of bills was an 'incapacity to pay due to insufficient income.'¹⁰³ Somewhere between 25 and 40 percent of South Africans are unemployed (with the 40 percent figure including those who are no longer actively looking for work).¹⁰⁴ The rate of unemployment is also considerably higher amongst black South Africans,¹⁰⁵ with some townships, like Soweto, having rates of 53 percent and higher.¹⁰⁶ In a 2000 study of household affordability,¹⁰⁷ 90 percent of low-income

(SAJHR) 546.

⁹⁹ See, eg, *ibid*; CAWP, APR and Public Citizen, above n 58, 10.

¹⁰⁰ Richard Tomlinson et al, 'The Postapartheid Struggle for an Integrated Johannesburg' in Richard Tomlinson (ed), *Emerging Johannesburg: Perspectives on the Postapartheid City* (2003) 3, 9.

¹⁰¹ This is reported (in a critical manner) by McDonald, above n 57, n26, 16.

¹⁰² This is reported (in a critical manner) by Patrick Bond, *South Africa's 'rights culture' of water consumption: Breaking out of the liberal box and into the commons?* (UNESCO, 2010) 1, 14. It is also discussed in relation to the depoliticisation of poverty and the creation of the concept of the 'undeserving poor' in Danie Brand, 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed), *Theories of social and economic justice* (2005) 17, where he refers to the government's 'fear that a basic income grant would breed in poor people a 'culture of entitlement' or dependency...'

¹⁰³ Smith and Hanson, above n 80, 1540-41.

¹⁰⁴ *Quarterly Labour Force Survey: Quarter 4 (October to December), 2012* (Statistics South Africa, 2013); Ethel Hazelhurst, 'SA unemployment gets worse', *Business Report* 31 October 2012.

¹⁰⁵ Hazelhurst, 'SA unemployment gets worse', *Business Report* 31 October 2012.

¹⁰⁶ *The Five Year Soweto Economic Development Plan 2008 – 2013* (City of Johannesburg, 2008), 85; *Strategic Analysis Paper - Food and Water Security in South Africa: Present and Future* (Future Directions International, 2012), 3.

¹⁰⁷ Embrahim Harvey, 'Researching the Public's Perceptions, Views and Concerns about the Planned

households gave unemployment, no income, or too low an income, as the main reason for the non-payment of water tariffs. Although providers were required to make arrangements with households to manage their repayments, many of these arrangements left households permanently in debt, while others imposed unrealistic payment schedules and then imposed disconnections or more serious action such as eviction proceedings when they were unmet.¹⁰⁸

Water disconnections are permissible under the 2003 Strategic Framework for Water Services, but are only intended as a last resort.¹⁰⁹ Additionally, section 4(3) of the *Water Services Act* states that procedures for the limitation or discontinuation of water services must not result in a person who is unable to pay being denied access to basic water services.¹¹⁰ In practice, however, researchers in 2005 and 2008 found that water service disconnections were the most common response to a poor household's failure to pay their water bills, even when this failure was a clear result of an inability to pay.¹¹¹ This uncompromising approach to disconnections was a direct result of the preoccupation with cost-recovery that was imposed on municipalities by national government policies.¹¹²

In 1994, when the ANC first came to power, 12 million South Africans did not have access to clean drinking water.¹¹³ While the ANC was able to provide an additional seven million people with access to water by 2002, the imposition of disconnection as a means of credit control also meant that at least that same number (if not many more) had their water cut off for non-payment.¹¹⁴ Additionally, over two million people had

Installation of Pre-Paid Water Meters in Soweto, South Africa.' (*African Studies Association Conference*, Boston, 30 October - 2 November 2003) 7.

¹⁰⁸ Francis, above n 6, 172, citing Mthetho Xali, "'They are Killing us Alive' A Case Study of the Impact of Cost Recovery on Service Provision in Makhaza Section, Khayelitsha' in David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002), 101&113. See also Smith and Hanson, above n 80, 1533.

¹⁰⁹ Department of Water Affairs and Forestry (DWAF), *Strategic framework for water services* (September 2003) 4.5.8.

¹¹⁰ *Water Services Act 1997* (South Africa) s 4(3).

¹¹¹ Tissington et al, above n 78, 50-53; Francis, above n 6, 170-173.

¹¹² See, eg, Tissington et al, above n 78, 52; Bond and Dugard, above n 97, 16-21.

¹¹³ ANC, above n 26. See also McDonald, above n 12.

¹¹⁴ Precise data on water disconnections in South Africa are not possible to obtain. This is because local

been evicted from their homes for failing to pay their accumulated debts on either their water or electricity bills.¹¹⁵

The impact of these early policies eventually forced authorities to reconsider their approach. Households who could not afford to purchase sufficient water, or whose water services were cut-off for non-payment, were forced to use water from untreated natural sources like streams, ponds or muddy puddles.¹¹⁶ Often these natural sources

governments rarely collect data on disconnections, nor are they willing to share this information [See Tissington et al, above n 78; Jackie Dugard, 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) 42(2) *Review of Radical Political Economics* 175 8]. Furthermore, with the introduction of prepaid water meters (discussed below), households 'self-disconnect,' and there is no notification to any authority on these occurrences. Nevertheless, a figure of 10 million disconnections between 1994 and 2004 is cited by CAWP, APR and Public Citizen, above n 58, 5, citing Statistics SA, *Census* (2001)

<<http://www.stassa.gov.za/default3.asp>> at . See also Bond and Dugard, above n 97, 17, who argue for a figure of 1.5 million people a year, based on the fact that former director-general of DWAF Mike Muller has 'conceded that in 2003 alone, 275 000 households were disconnected from water services at least once due to inability to pay, which amounts to 1.5 million or more people, and these do not include people whose pre-paid meters ran out at a time of insufficient funds to replenish water supplies (i.e., self-disconnection).' [citing Mike Muller, 'Turning on the Taps', *Mail and Guardian* (South Africa) 25 June 2004]. Muller has subsequently disputed these figures, claiming that he was misinterpreted. Instead he argues that out of the 7 million people who experienced water interruptions in 2003, only 7 percent (490,000 people) of these were for non-payment, while 38.9 percent (2.723 million people) were for repairs and 39.7 percent (2.779 million people) responded that their supply 'just stopped': Mike Muller, 'Parish pump politics: the politics of water supply in South Africa' (2007) 7(1) *Progress in Development Studies*, 41. However, Bond and Dugard, above n 97, 17 challenge this reinterpretation, arguing that it is not unreasonable to believe that some of the 2.779 million people whose water 'just stopped' actually did have their supply disconnected for nonpayment, 'Given the chaotic status of municipal billing...'

Other research also supports a figure of between 1 and 1.5 million disconnections per year. See, eg, Smith and Hanson, above n 80, 1533; McDonald, above n 12, 168; Deedat, 'Viva Prepaids, Viva! Assessing New Technology for Cost Recovery in the Rural Northern Cape' in McDonald and Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 143, 154.

¹¹⁵ See, eg, McDonald, above n 57, above McDonald, above n 12.

¹¹⁶ See, eg, David Hemson et al, 'Still paying the price: Revisiting the cholera epidemic of 2000 – 2001 in South Africa' (Municipal Services Project, 2006); Hamed Deedat and Eddie Cottle, 'Cost Recovery and Prepaid Water Meters and the Cholera Outbreak in KwaZulu-Natal: A case study in Madlebe' in David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002); Farah Khan, 'Health - South Africa: High Water Fees Cited in Cholera Outbreak', *Inter Press Services*

were polluted and unsafe, and households experienced negative health consequences as a result of consuming contaminated water.¹¹⁷ One consequence was cholera, which saw an upsurge in cases after the introduction of cost recovery and credit control policies.¹¹⁸ In one area of KwaZulu-Natal, one such cholera outbreak became one of the worst in Africa.¹¹⁹

Poor communities in areas like Nqutshini, Matshana, Shakashead and Nkobongo in KwaZulu-Natal had been receiving free water since the 1980s until the local government and a private water provider increased their cost recovery efforts in mid-2000.¹²⁰ In Nqutshini and Matshana, a flat rate of R20 per month [USD3.2] was imposed on households seeking to access the communal standpipes.¹²¹ This new charge presented a barrier for many households due to high rates of unemployment.¹²² Some households were forced to turn to natural untreated sources for their water supplies, while others continued to use the standpipe but failed to pay their bills.¹²³ In order to enforce payment, authorities cut the supply of water to all the standpipes in early August.¹²⁴

During the same period, the WSS systems of Shakashead and Nkobongo were contracted out to a private concessionaire and prepaid meters ('PPMs') were installed for the purposes of tariff collection.¹²⁵ Instead of continuing to receive free water,

October 17 2000; Francis, above n 6, 175 (citations omitted).

¹¹⁷ See, eg, Hemson et al, above n 116; Deedat and Cottle, above n 116; Khan, above n 116; Francis, above n 6, 175 (citations omitted).

¹¹⁸ See, eg, *ibid*; Bond and Dugard, above n 92, 8.

¹¹⁹ Hemson et al, above n 116, 4 ('According to the World Health Organization this was the biggest outbreak of cholera in Africa for that reporting period, accounting for 80 percent of all cases worldwide.' [citing World Health Organization (WHO) 2001. Communicable Disease Surveillance and Response (CSR). Cholera outbreaks reporting.]).

¹²⁰ Hemson et al, above n 116, 12-15. See also Bond and Dugard, above n 92, 8.

¹²¹ Hemson et al, above n 116, 12-13. See also Bond and Dugard, above n 92, 8.

¹²² Hemson et al, above n 116, 12.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ Hemson et al, 'Still paying the price: Revisiting the cholera epidemic of 2000 – 2001 in South Africa' (Municipal Services Project, 2006) 12-15. See also Bond and Dugard, above n 92, 8.

residents had to purchase tokens in order to activate their water supply.¹²⁶ Many households could not afford to purchase the necessary tokens and began using untreated natural sources of water.¹²⁷

On 22 August 2000, the first reported case of cholera in the area was diagnosed.¹²⁸ By the end of the month a total of 62 cases had been diagnosed.¹²⁹ Cholera then spread to other parts of the country, infecting a total of 117,147 and killing 265 people.¹³⁰ These tragic results of imposing inflexible cost recovery policies led to a re-examination of the issue of affordability and a new approach of delivering on the constitutional promise of basic water for all.¹³¹ As the then-Director-General of DWAF, put it, '[p]erhaps we were being a little too market-oriented.'¹³²

6.4.2 Free Basic Water

After the cholera outbreak, the need to ensure economic, as well as physical, access had become evident.¹³³ The 1997 White Paper on National Water Policy had envisioned a *lifeline tariff* to provide a reserve of free water for basic human need.¹³⁴ This vision was realised in February 2001 when President Mbeki announced a new national policy of Free Basic Services ('FBS'), which included water.¹³⁵ The Free Basic Water ('FBW') allocation was set at six kilolitres per household per month, which is designed to

¹²⁶ Hemson et al, above n 116, 12-15. See also Bond and Dugard, above n 92, 8.

¹²⁷ Ibid; Heidi Vogt, 'Environmental Justice in South Africa: Water Sanitation, Privatization, and the Legacy of Apartheid' (2003) *Dollars & Sense* 8, 9.

¹²⁸ Hemson et al, above n 116, 16.

¹²⁹ Ibid.

¹³⁰ Hemson et al, 'Still paying the price: Revisiting the cholera epidemic of 2000 – 2001 in South Africa' (Municipal Services Project, 2006) 3. See also Deedat and Cottle, above n 116, 96; Vogt, above n 127, 9.

¹³¹ See, eg, Hemson et al, above n 116, 3; Paulina Calfucoy et al, *Improving Free Basic Water Provision in South Africa - Prepared for the Financial and Fiscal Commission* (La Follette School of Public Affairs University of Wisconsin-Madison, 2009), 7; Bond and Dugard, above n 92, 8-9, Gowlland-Gualtieri, above n 78, 12.

¹³² Mike Muller, *Interview on 'News Maker'*, (2001) cited in Harvey, above n 107, 4.

¹³³ Muller, above n 67, 72.

¹³⁴ DWAF, above n 65, 6.5.3.

¹³⁵ Department of Water Affairs and Forestry (DWAF), *Free Basic Water Implementation Strategy* (Version One 2001) South Africa.

provide a household of eight people with 25 Lpcpd.¹³⁶

Despite its early adoption of a marginal cost recovery approach to all water services, by 2001 the South African government realised that, in the context of the apartheid legacies of widespread unemployment, geographic clusters of poverty and low levels of education, affordability for the poor meant that a lifeline amount needed to be given away for free.¹³⁷ The Minister for Water, Ronnie Kasrils, tells a story of the moment when he realised this fact:

Last year, I visited a newly installed water supply scheme in a typical South African rural village called Lutsheko. The project was well run by a village water committee and had improved the lives of 3,000 people. But when I went down to see the borehole, on the banks of a dried out riverbed, I found a young woman, with a three-week old baby on her back, scooping water out of a hole she had dug in the riverbed. She told me she could not afford to use the taps.¹³⁸

As discussed in Chapters 1 and 2, while the need for water affordability has widespread support,¹³⁹ providing water for free is a more controversial approach.¹⁴⁰ Muller argues that the FBW policy was controversial for going against the conventional wisdom that water, as an economic good, should be paid for.¹⁴¹ Critics saw it as a populist political

¹³⁶ Department of Water Affairs and Forestry (DWAF), *Free Basic Water Implementation Strategy* (Version Two 2002) South Africa, para 3.3; (DWAF), *Strategic framework for water services* (September 2003), para 4.4.1; *Regulation Relating to Compulsory National Standards and Measures to Conserve Water 2001* (South Africa).

¹³⁷ Muller, above n 67.

¹³⁸ Ronnie Kasrils, 'The value and price of water (the women of Lutsheko)' (2001) 43(4) *Water Science and Technology* 51.

¹³⁹ See, eg, James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003), 18-19.

¹⁴⁰ See, eg, Vivien Foster, Andres Gomez-Lobo and Jonathan Halpern, *Designing direct subsidies for the poor - A water and sanitation case study* (World Bank, 2000) 4, who argue that, 'a subsidy that covers the full cost of the service will eliminate incentives for the efficient use of water, and is likely to create a non-payment habit that may be difficult to break at a later date. Therefore, full-scale subsidies should be avoided.' See also Rachel Cardone and Catarine Fonseca, *Financing and Cost Recovery* (International Water and Sanitation Centre, 2003), 31, 47, 88 (where free water is described as the result of unhelpful 'political interference.').

¹⁴¹ Muller, above n 67, 67.

ploy, particularly because it was introduced on the eve of local government elections.¹⁴² The introduction of a free lifeline amount was a progressive policy in this context. The FBW policy thus represents an approach to water services, in which affordability is acknowledged as a central element in South Africa's constitutionally enshrined right to water.¹⁴³

Nevertheless, an ongoing focus on efficiency and financial sustainability has meant that the implementation of the FBW policy has been compromised by a number of regressive elements, including inadequate funding,¹⁴⁴ which has led to a slow rollout in many areas.¹⁴⁵ Other issues have included the introduction of punitive cost recovery and demand management measures,¹⁴⁶ such as water restriction devices (a metal disc with a small hole in the centre, which reduces the diameter of the pipe and restricts the flow of water),¹⁴⁷ PPMs (devices that are programmed to dispense the monthly FBW amount and then to cut off the water supply unless additional water credit tokens are purchased)¹⁴⁸ and lower levels of water service, such as a yardpipe or standpipe rather than a household water connection.¹⁴⁹

The lack of funding provided to support the rollout of FBW has also meant that municipalities have had to cross-subsidise from poor communities themselves, meaning

¹⁴² Ibid.

¹⁴³ *Constitution of the Republic of South Africa 1996*, ch.2, section 27.

¹⁴⁴ Gowlland-Gualtieri, above n 78, 6.

¹⁴⁵ Department of Water Affairs and Forestry (DWAF), *Free Basic Water* (2012)

<http://www.dwaf.gov.za/dir_ws/fbw/#> at April 2012. See also Hemson et al, above n 116, 7.

¹⁴⁶ DWAF, above n 109, 4.5.8. For a discussion of the impact of these measures, see, eg, Xali, "'They are Killing us Alive' A Case Study of the Impact of Cost Recovery on Service Provision in Makhaza Section, Khayelitsha" in McDonald and Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 106; CAWP, APF and PCRC, above n 96, 20; Tissington et al, above n 78, 31.

¹⁴⁷ Alex Loftus, "Free Water" as commodity: The paradoxes of Durban's water service transformations' in David A and Ruiters McDonald, G (ed), *The age of commodity: water privatization in Southern Africa* (2005) 194; Tissington et al, above n 78, 33.

¹⁴⁸ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471; Bond and Dugard, above n 97; *Interview with Jennifer Makoatsane, Applicant in Mazibuko water rights case* (Phiri, South Africa, 5 October 2006).

¹⁴⁹ See, eg, 'City of Johannesburg Metropolitan Municipality Water Services By-Laws' (Provincial Gazette Extraordinary No 179, Notice No 835, 2004) s 3; 'City of Johannesburg Metropolitan Municipality Water Services By-Laws' (Gauteng Provincial Gazette extraordinary no 162, 2008) s 3.

that they have imposed significant tariff increases in the second block of consumption (above the FBW amount) in order to recover the cost of providing the first six kilolitres free.¹⁵⁰ In some areas, such as Durban, this has resulted in water tariffs actually doubling for poor consumers after the introduction of FBW.¹⁵¹ As a result, affordability remains a significant barrier to water access.

Most municipalities also restrict access to the FBS program (which includes FBW) to those who are registered as indigent.¹⁵² This is problematic because the various indigent registers (which vary from municipality to municipality) are highly under-representative of the true numbers of poor households in South Africa.¹⁵³ There are no national criteria for indigent status,¹⁵⁴ but the criteria set by each municipality are typically onerous and exclusionary.¹⁵⁵ Requirements of proof of income and account-holder status exclude many poor tenants, all informal occupiers and many undocumented poor people.¹⁵⁶ People are also required to re-register every 6 months or two years, with the result that many find their registration lapses before they are able to arrange to resubmit all required documentation.¹⁵⁷

6.4.3 Achievements

Despite these challenges to realising equity and participation in the early years of water

¹⁵⁰ Bond and Dugard, above n 97, 21.

¹⁵¹ Ibid, 20-21.

¹⁵² Tissington et al, above n 78, 34. Department of Provision and Local Government (DPLG), *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2005) 2.1 (According to these Guidelines the purpose of an indigent policy is to ensure that those households and citizens who are unable to access or pay for basic services can have access to the packages of services in the FBS programme.).

¹⁵³ Tissington et al, above n 78, 34.

¹⁵⁴ Department of Provision and Local Government (DPLG), *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2005) 2.7.

¹⁵⁵ See, eg, Calfucoy et al, above n 131, 9; ibid 2.7; Francis, above n 6; Tissington et al, above n 78, 4, 34, 37.

¹⁵⁶ This problem was identified in the 2005 DPLG Guidelines, which noted, 'A further approach needs to be adopted by municipalities to ensure that these citizens are not excluded from access to FBS' - ibid 2.2. See also ibid 2.7; Calfucoy et al, above n 131, 9; Bond and Dugard, above n 97, n 69; Tissington et al, above n 78, 37.

¹⁵⁷ Tissington et al, above n 78, 38.

governance reform, there have been some positive developments in the area of participatory water governance, which have had a positive effect on the realisation of the right to water in South Africa. These have included the establishment of the *Raising the Citizens' Voices* programme, beginning with a 2006 pilot project in Cape Town, to support the training and empowerment of South Africans to increase civil society input into water policy development and implementation and to increase the community's capacity to hold local government to account.¹⁵⁸ Several South African municipalities (including the City of Johannesburg) have also taken part in the international *Water Dialogues* and by doing so opened up water policy to a multi-stakeholder review process.¹⁵⁹ Both of these initiatives recognise the centrality of participation to improving water governance and equity in South Africa. Both have also demonstrated positive results and the constructive power of meaningful dialogue and participation,¹⁶⁰ which is promising for the future of water governance in South Africa.

6.5 Public response - the Mazibuko water rights case

The compatibility of the FBW allocation and PPMs with the realisation of the right to water for the poor was the subject of the Constitutional Court's first opportunity to consider the content of the right to water under the South African Constitution, and the relationship of the right to the participatory rights recognised in the Constitution. In *Mazibuko v City of Johannesburg*,¹⁶¹ five poor applicants from the suburb of Phiri, in Soweto, challenged the sufficiency of the City of Johannesburg's free basic water allocation and the forced installation of PPMs into their community.

¹⁵⁸ See Smith, above n 90; *Lessons Series 20: Public Accountability Through 'Citizens' Voice': City of Cape Town Shares Good Practice* (Department of Water Affairs and Forestry (DWAF), The Mvula Trust, Ekurhueni Metropolitan Municipality, and City of Cape Town, 2009).

¹⁵⁹ See, Mary Galvin, *Straight talk to Strengthen Delivery in the Water Services Sector: The Water Dialogues - South Africa Synthesis Report* (The Water Dialogues South Africa, 2009).

¹⁶⁰ Laila Smith, 'The Limits to Public Participation in Strengthening Public Accountability: A Reflection on the 'Citizens' Voice' Initiative in South Africa' (2011) 46(5) *Journal of Asian and African Studies* 504, 509-511; Interview with Kathy Eales, cited in Jennifer Chapman and Antonella Mancini, *The story of an international multistakeholder process* (The Water Dialogues, 2009) 20.

¹⁶¹ *Mazibuko v City of Johannesburg* (2009) 28 ZACC .

6.5.1 Background

To tackle high levels of NRW in Soweto (which were caused by a combination of physical losses from aging infrastructure and low levels of bill payment), Johannesburg Water ('JW') launched Operation Gcin'amanzi (an isiZulu term for 'conserving water') in 2002.¹⁶² Operation Gcin'amanzi included significant capital works to upgrade Soweto's aging water infrastructure and the rollout of PPMs, starting with a pilot project in Phiri, one of Soweto's poorest suburbs.¹⁶³

Despite its claim that 'an exceptionally high premium has been placed on involving the affected communities at every step' of the 'so-called Phiri Prototype,'¹⁶⁴ the policy details of Operation Gcin'amanzi, including the decision to use PPMs as the preferred method of demand management, were decided by JW, in 2003, without any consultation with the people of Soweto.¹⁶⁵ As a result, when the nature of Operation Gcin'amanzi became clear to Phiri residents, many began protesting immediately, through street marches and civil disobedience.¹⁶⁶

At first these protest actions appeared to be successful. Construction work was disrupted and JW were forced to bring in private security to protect their work from sabotage and from residents physically blocking their attempts to dig the trenches and lay new pipes.¹⁶⁷ However, these attempts did not deter JW or encourage dialogue. Instead, JW applied to the court for an interdict to prevent residents from interfering

¹⁶² *Reflecting on a Solid Foundation: Building development local government 2000-2005* (City of Johannesburg, 2006) 116.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 para 106-108; Bond and Dugard, above n 97, 9.

¹⁶⁶ Bond and Dugard, above n 97, 9. Jackie Dugard, 'Civic action and the legal mobilisation: The Phiri water meters case' in J Handmaker and R Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71.

¹⁶⁷ See, eg, Dugard, above n 166, 88; Jackie Dugard, 'Rights, Regulation and Resistance: The Phiri Water Rights Campaign' (2009) 24(3) *South African Journal on Human Rights SAJHR* 593 591, 602; CAWP, APR and PCRC, above n 96, 7; Bond and Dugard, above n 97, 9. Jennifer Makoatsane also described these activities in an interview with the author: *Interview with Jennifer Makoatsane, Applicant in Mazibuko water rights case* (Phiri, South Africa, 5 October 2006).

with the construction work.¹⁶⁸ In the following months, fourteen people were arrested on charges of public violence, incitement, and malicious damage to property, while many more were fined for bypassing their meters.¹⁶⁹

Faced with the alternative of total disconnection, by the end of 2004 most households in Phiri had either accepted PPMs or standpipes.¹⁷⁰ Those with PPMs soon found that their FBW allocation lasted until around the 12-15th of the month.¹⁷¹ Many were unable to afford more credit and had to go without water until the following month when their next allocation became available.¹⁷² Another difficulty with the PPMs was that they provided no real notice that the water was about to be disconnected and no opportunity for households to make representations to JW that there were unable to purchase the additional water necessary to meet their basic needs.¹⁷³

6.5.2 Litigation – Mazibuko v City of Johannesburg

In July 2006, five residents of Phiri launched a legal challenge in the Witwatersrand High Court against the City of Johannesburg, JW, and DWAF, seeking a declaration that the government's policies of capping the FBW allowance and installing PPMs were unlawful and unconstitutional.¹⁷⁴ The applicants were all poor residents of Phiri who had suffered adverse effects from the imposition of prepaid water meters on their households, including being forced to go without water services for days or weeks each month and, in the case of the fifth applicant, Vusumuzi Paki, not having enough water to extinguish a shack fire on his property, with the tragic result that two young children burnt to death inside.¹⁷⁵

¹⁶⁸ See Dugard, above n 166, 88; CAWP, APR and PCRC, above n 96, 7.

¹⁶⁹ Dugard, above n 166, 88; CAWP, APR and PCRC, above n 96, 7.

¹⁷⁰ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 112; Bond and Dugard, above n 97, 9.

¹⁷¹ Bond and Dugard, above n 97, 2.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Yolandi Groenewald, 'Soweto starts its water war', (Mail & Guardian online) 24 July 2006. The residents were Lindiwe Mazibuko, Grace Munyai, Jennifer Makoatsane, Sophia Malekutu and Vusumuzi Paki.

¹⁷⁵ Vusumuzi Paki, *Affidavit in Mazibuko v City of Johannesburg*, In the High Court of South Africa (Witwatersrand Local Division) (2006).

The applicants argued that ‘the disconnection of their water supply and the forced installation of the pre-paid water meters; the introduction and continued use of pre-paid water meters; and the amount of free water they [were] given’, were unconstitutional and unlawful.¹⁷⁶ The applicants sought to ‘review and set aside the City and Johannesburg Water’s decisions, to set the amount of free water at 6 kilolitres per stand; and to introduce pre-paid water meters in Phiri.’¹⁷⁷ If either of those challenges were successful, the applicants asked ‘the Court to order the City and Johannesburg Water to provide [them], and others who are in the same position ..., with 50 litres free water per person per day and the option of water on credit afforded to the wealthier and largely white residents of Johannesburg.’¹⁷⁸

The applicants based their case on sections 27(1)(b), 33(1), 9, and 10 of the Constitution, as well as *The Promotion of Administrative Justice Act 3 of 2000* (PAJA), *The Water Services Act 108 of 1997*, and *The Johannesburg Water Services By-Laws*. Several of their claims related to the content of the right to water, including the definition of sufficiency,¹⁷⁹ and its relationship with the rights to equality¹⁸⁰ and participation.¹⁸¹

The applicants argued that the definition of ‘sufficient water’ under section 27(1)(b) of the Constitution should be the amount of water that is necessary for dignified human existence, which for those households with waterborne sanitation, is at least 50

¹⁷⁶ *Applicants' Heads of Argument, in Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) para 5. The applicants argued that the installation of the prepaid meters was not authorised by the City’s by-laws, because they only provided for the installation of such meters a penalty for contravening the conditions for receiving water service level two, and the applicants had not so breached the conditions of their water service: *ibid* para 165. They also argued that this forced installation of prepaid water meters was a violation of requirement to progressively realise the right to water under s 27(2) of the Constitution; and was an unconstitutional interference with their existing access to water, because it was a deliberately retrogressive measure: *ibid* paras 161.1-161.3, 178.

¹⁷⁷ *Ibid* para 6.

¹⁷⁸ *Ibid* para 7.

¹⁷⁹ *Ibid* para 270.

¹⁸⁰ *Ibid* paras 161.4, 161.5, 226. The arguments around equality focused on s 9 of the Constitution, but will not be the focus of this study.

¹⁸¹ *Ibid* paras 245-247.

Lpcpd.¹⁸² They cited GC 15¹⁸³ and figures provided by WHO¹⁸⁴ and Peter Gleick¹⁸⁵ (a water expert referenced by GC 15) in support of this claim. They were also critical of the fact that the size of poor households was not taken into account in the formulation of the FBW policy.¹⁸⁶

The applicants also made several arguments based on procedural justice, including the fact that the PPMs discontinued water services without the procedural protection afforded by s 4(3) of the WSA¹⁸⁷ - in that the disconnection was unfair and inequitable and executed without notice or any opportunity to make representations regarding capacity to buy more credit).¹⁸⁸ They also argued that the decision to impose PPMs on the Phiri community and the manner of their introduction was a breach of the right to procedural justice contained in section 33(1) of the Constitution,¹⁸⁹ and outlined in section 3 of the PAJA.¹⁹⁰

In answer to the applicant's claims, the City of Johannesburg argued that it was not obliged to provide any water for free and that 'free' water and 'access to' water should not be conflated.¹⁹¹ Central to the City's response was the fact that it was faced with a

¹⁸² Ibid para 287.

¹⁸³ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 12(a).

¹⁸⁴ Guy Howard and Jamie Bartram, *Domestic water quantity, service level and health*, World Health Organisation, WHO/SDE/WSH/03.02 (2003).

¹⁸⁵ Peter Henry Gleick, *Supporting affidavit in Mazibuko v City of Johannesburg*, In the High Court of South Africa (Witwatersrand Local Division) (2005).

¹⁸⁶ *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) para 313, citing Schreiner Answering affidavit A11 p 4004 para 116.

¹⁸⁷ *Water Services Act 1997* (South Africa).

¹⁸⁸ *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) paras 245-247. The applicants also argued that such a disconnection was without authorisation from by-law 9C, which only authorises disconnection for non-payment of arrears.

¹⁸⁹ *Constitution of the Republic of South Africa 1996*, s 33(1).

¹⁹⁰ *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa) s 3.

¹⁹¹ *City of Johannesburg Answering Affidavit in Mazibuko v The City of Johannesburg* High Court of South Africa (Witwatersrand Local Division) (2007) para 25.6-25.8. In this regard, the City pointed out that in providing 6 kilolitres for free, it was doing more for its citizens than most countries around the

significant challenge of managing its finances and that providing a more generous FBW allocation would place an excessive strain on its budget.¹⁹² The City also argued that a significant amount of money had been spent on installing PPMs in Soweto (almost R336 million, or around USD58 million) and the cost of removing them and installing a new system in their place would have a negative affect on the financial sustainability of JW.¹⁹³

The City argued that the PPMs do not disconnect households in a manner prohibited by section 4(3) of the WSA, because the PPMs were always credited with each month's FBW amount and thus access to a 'basic service' was never denied.¹⁹⁴ The City also argued that the installation of the PPMs was a necessary response to the high level of NRW in the deemed consumption areas, which was due 'to leaks, collapsing infrastructure, the culture of non-payment and water wastage.'¹⁹⁵

Despite their arguments against the key points in the applicant's case, the City did change their FBW policy in response to the litigation, by using the indigency register as the mechanism for increasing flexibility,¹⁹⁶ and increasing the per household allocation to 10 kilolitres,¹⁹⁷ with the capacity for this to be increased further in special circumstances.¹⁹⁸ The applicants noted that these were significant improvements, but that two main problems remained. The first was that the FBW amount was still set at 25 Lpcpd, despite the fact that this amount is insufficient to cover the basic needs of poor

world: *ibid* para 13.1.

¹⁹² *Ibid*.

¹⁹³ Answering affidavit of Gerald Dumas, Managing Director of Johannesburg Water (20 January 2007) para 34, *Mazibuko & Others v City of Johannesburg & Others*: www.law.wits.ac.za.

¹⁹⁴ *City of Johannesburg Answering Affidavit in Mazibuko v The City of Johannesburg* High Court of South Africa (Witwatersrand Local Division) (2007) para 28.10.16-28.10.19.

¹⁹⁵ *Ibid* para 26.2.

¹⁹⁶ *Ibid* para 30.55.4; *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) para 345.

¹⁹⁷ *City of Johannesburg Answering Affidavit in Mazibuko v The City of Johannesburg* High Court of South Africa (Witwatersrand Local Division) (2007) para 26.22.1; *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) para 346.

¹⁹⁸ *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) paras 348, 349.1, 349.2, 349.3 (citations omitted).

urban households living with waterborne sanitation. The second problem was that this policy was only available to those households who register as indigents. At the time of the application, 72 percent of households with PPMs were not registered as indigent (despite the majority qualifying).¹⁹⁹ The City acknowledged this fact and the under-representative nature of the indigency system.²⁰⁰

6.5.3 Lower court judgments

The *Mazibuko* case was heard in December 2007 before Tsoka J in the High Court of South Africa (Witwatersrand Local Division). Tsoka J handed down his judgment on 30 April 2008, ordering the respondents to provide each applicant and other similarly placed residents of Phiri Township with FBW of 50 Lpcpd;²⁰¹ to permit the option of a metered supply installed at the costs of the City;²⁰² and to pay for the costs of the application.²⁰³

Tsoka J found that the obligation under the Constitution to provide access to sufficient water must include economic access to such water.²⁰⁴ He also found that ‘it is obvious that the 25 Lpcpd is insufficient for the residents of Phiri,’²⁰⁵ and accepted Gleick’s evidence that 50 Lpcpd was a more appropriate amount, and was within the financial resources of the City to provide.²⁰⁶

Tsoka J agreed with the applicants that the limitation or discontinuation of water services by the PPMs was a breach of s 4(3) of the WSA.²⁰⁷ Surveying international case law on the issue of disconnections and PPMs, he concluded that ‘[i]t is apparent that in the established democracies, prepayment meters are illegal as they violate the

¹⁹⁹ Singh Supplementary affidavit A13 p 5178 para 9.2.

²⁰⁰ *Applicants' Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) paras 203.1, 344, citing Brits Answering affidavit A3 686 para 30.75, 611 para 25.10.1, incorrectly numbered as 26.10.1.

²⁰¹ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 para 183.5.1

²⁰² *Ibid* para 183.5.2.

²⁰³ *Ibid* para 184.

²⁰⁴ *Ibid* paras 36, 40-42.

²⁰⁵ *Ibid* para 169.

²⁰⁶ *Ibid* para 181 (This took into account the need for waterborne sanitation, the high levels of poverty and unemployment, the high levels of HIV/AIDS and other illnesses, and the large household sizes in Phiri.)

²⁰⁷ *Ibid* para 117.

procedural requirements of fairness by cutting off or discontinuing the supply of water without notice and representation.’²⁰⁸

Tsoka J also accepted the applicants’ claims that the manner in which the PPMs were introduced into Phiri was a violation of their right to participation (or procedural justice) under section 33, in that they were not consulted or advised of their rights to request reasons for the decision or to challenge the decision.²⁰⁹ The judge dismissed the City’s claims that such consultations did take place, finding that the evidence that they submitted in this regard was unreliable.²¹⁰ In reviewing the notice provided to the applicants regarding the installation of the PPMs, Tsoka J found JW’s manner to be ‘both intimidatory and presumptive,’²¹¹ concluding ‘that the actions of the respondents, were not consultative but a publicity drive for the prepayment measuring systems.’²¹²

The City (along with JW and the Minister for Water Affairs and Forestry) appealed the High Court’s judgment in the Supreme Court of Appeal. The appeal was heard before five judges in February 2009 and the Court handed down a unanimous judgment by Streicher JA on 25 March 2009. The Court made similar findings to Tsoka J regarding the City’s obligation to supply a sufficient amount of water free to the applicants and that the disconnection of water supply effected by the PPMs breached the procedural safeguards contained in section 4(3) of the WSA.²¹³ However, in relation to the quantification of what amounted to sufficient water for the applicants and people in similar situations, the Court accepted the evidence of the City’s expert that 42 Lpcpd would be sufficient.²¹⁴ The Court was also more deferential regarding orders made

²⁰⁸ Ibid para 91.

²⁰⁹ Ibid paras 105-106.

²¹⁰ Ibid para 107.

²¹¹ Ibid para 110.

²¹² Ibid para 122.

²¹³ *City of Johannesburg v Mazibuko* (2009) 20(3) ZASCA 592 (SCA) paras 54-55 (Streicher JA found that the operation of the prepaid meters in ‘limiting or discontinuing water services’ in a manner that was not fair and equitable, and did not provide for reasonable notice and the opportunity to make representations, was a breach of s 4(3) of the WSA.).

²¹⁴ Ibid paras 21-24. (This finding was based on allocating 15 litres to sanitation (or 1.5 flushes per person per day) rather than 20, and by deducting several litres from the allocations for bathing and drinking because Phiri was not a tropical or subtropical environment.).

against the City and chose to ‘suspend the order of unlawfulness for a period of two years to enable the City to take such steps as it may be advised to take to legalise the use of prepayment water meters.’²¹⁵

6.5.4 Constitutional Court judgment

Despite being successful on both of their main claims against the City, the Phiri residents appealed the Supreme Court of Appeal’s judgment to the Constitutional Court of South Africa. They were concerned that the two-year suspension of the order of invalidity seemed to imply that the City could simply amend its by-laws in order to make the installation of the PPMs lawful.²¹⁶ They were also concerned by the Supreme Court’s acceptance of the indigency register as the most appropriate means of delivering the FBW allocation of 42 Lpcpd.²¹⁷ The City and JW applied to cross-appeal and the case was heard in September 2009.

The Constitutional Court handed down a unanimous judgment by O’Regan J on 8 October 2009, ruling against the applicants on all grounds.²¹⁸ In summary, the Court disagreed with both lower courts and found that the City’s FBW policy fell ‘within the bounds of reasonableness’ and was therefore ‘not in conflict with either section 27 of the Constitution or with the national legislation regulating water services.’²¹⁹ The Court also found that the installation of PPMs in Phiri was lawful,²²⁰ and accordingly set aside all of the Supreme Court’s orders.²²¹

²¹⁵ Ibid para 60.

²¹⁶ See Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights* (SAJHR) 39, 45. For a critique of the Supreme Court of Appeal’s judgment, see Jackie Dugard and Sandra Liebenberg, 'Muddying the Waters: The Supreme Court of Appeal’s Judgment in the Mazibuko Case' (2009) 10(2) *ESR Review* 11.

²¹⁷ See Dugard and Liebenberg, above n 216.

²¹⁸ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 9.

²¹⁹ Ibid para 9.

²²⁰ Ibid paras 106-112. The Court held that this conclusion was supported by the *Municipal Systems Act*, which gives local governments the right ‘to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.’ *Municipal Systems Act 2000* 32 (South Africa) s 8(2).

²²¹ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 9.

Unlike the lower courts, the Constitutional Court found that the City was not under a constitutional obligation to provide any particular amount of free water to citizens per month.²²² Instead, the Court rejected the applicants' argument that it should determine a quantified amount of water as 'sufficient' within the meaning of section 27 of the Constitution,²²³ stating:

[The right to water] does not require the state upon demand to provide every person with sufficient water ...; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right to access to sufficient water, within available resources.²²⁴

The Court expressed concern that any order that obliged the State to provide a specific amount of water would go beyond both the text of the Constitution and the appropriate role of the judiciary,²²⁵ who are not best placed 'to determine what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.'²²⁶ The Court held that the obligation of progressive realisation could not impose an immediate obligation to provide a fixed quantified content.²²⁷

The Court also rejected the applicants' arguments that the FBW policy was insufficiently flexible, finding instead that the continual changes to the City's Indigent Persons policy reflected the necessary level of flexibility, in that the City was 'continually reconsidering its policy and investigating ways to ensure that the poorest inhabitants of the City gained access ... to water...'²²⁸

The Constitutional Court further dismissed the applicants' equality-based claims,²²⁹ pointing out that consumers with PPMs pay a lower tariff rate than those with credit meters, and they cannot incur arrears, which means they are protected from 'a range of

²²² Ibid para 85.

²²³ Ibid para 68.

²²⁴ Ibid para 50.

²²⁵ Ibid para 57.

²²⁶ Ibid para 61.

²²⁷ Ibid para 60.

²²⁸ Ibid para 94.

²²⁹ Based on ss 9(1), 9(3) of the Constitution.

severe consequences’ such as having to pay interest or having their names listed with a credit bureau as a defaulter.²³⁰ The Court concluded that ‘correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment.’²³¹

In relation to the question of whether PPMs result in an unauthorised discontinuation of water supply by denying consumers reasonable notice and an opportunity to be heard (as required by section 4(3) of the WSA), the Court found that imposing such a requirement on accounts with PPMs would ‘have a result that borders on the absurd,’²³² and that notice was unnecessary, since ‘[a] customer in Johannesburg who has a pre-paid water meter understands that the water meter will provide a certain quantity of water which may be exhausted...’²³³ The Court also held that a water service is merely *suspended* rather than *discontinued* by the operation of the meters and that consumers are not denied basic water services because their free water allocation (which constitutes their ‘basic water services’ as defined by Regulation 3(b)) will still be available the following month.²³⁴

Finally, the Constitutional Court dismissed the applicants’ administrative justice based arguments, finding that the decision to impose PPMs was an executive rather than an administrative action and thus, did not need to comply with the PAJA.²³⁵ Nonetheless, the Court went on to consider the characteristics of the implementation of Operation Gcin’amanzi and concluded that it had been procedurally fair.²³⁶ In this regard, the Court accepted the evidence of the City that it had engaged in significant amounts of public participation and consultation throughout the implementation process.²³⁷

At the conclusion of the case, the applicants had argued that if their application were denied it would make cases such as theirs pointless and render the guarantee of social

²³⁰ *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 152-153.

²³¹ *Ibid* para 156.

²³² *Ibid* para 122.

²³³ *Ibid* para 123.

²³⁴ *Ibid* para 120-122

²³⁵ *Ibid* para 127-131.

²³⁶ *Ibid* para 132-138.

²³⁷ *Ibid* para 133. See also *City of Johannesburg Answering Affidavit in Mazibuko v The City of Johannesburg* High Court of South Africa (Witwatersrand Local Division) (2007) paras 26.4, 30.49.5.

rights under the constitution hollow. In response O'Regan J suggested the case should actually be seen as a victory for community participation in the dialogue over social rights in South Africa.²³⁸ The Court pointed out that, although they had been unsuccessful in their claims, the applicants had been able to force the City and DWAF to provide a detailed account of its policies, thus increasing the transparency and accountability of water governance in South Africa.²³⁹ Furthermore, this process had led the City to reconsider some elements of its water services policies and to increase the amount of free water available to households on the indigent register as a result.²⁴⁰ In relation to the applicants' claim that these changes were spurred by the litigation itself, the Court found that this could only be a positive development and that the 'litigation will in that event have attained at least some of what it sought to achieve.'²⁴¹

Conclusion

The approach to water reform that has been adopted in South Africa, along with the result of the *Mazibuko* case, highlights the tension between the good governance approach (with its focus on efficiency and financial sustainability) and the realisation of the right to water (with its focus on equity and participation). South Africa's ongoing challenges in expanding access to water, and the ultimately unsuccessful result of the *Mazibuko* case for the Phiri community, have also led several commentators to question the value of the right to water.²⁴² However, taking a broader perspective, it can be seen that the recognition and implementation of the right to water is having a positive, albeit

²³⁸ *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 161-163.

²³⁹ *Ibid* para 163.

²⁴⁰ *Ibid* para 163.

²⁴¹ *Ibid* para 97.

²⁴² Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317; Karen Bakker, 'Commons versus commodities: Debating the human right to water' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012) 19; Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012). But see *contra* Jackie Dugard, 'Losing Mazibuko: (re) considering the campaign following judicial defeat' (Paper presented at the *Law's Locations: Textures of Legality in Developing and Transitional Societies*, University of Wisconsin Law School, 23–25 April 2010); Dugard and Langford, above n 216.

gradual, impact on water governance in South Africa.

The shift from a policy of marginal cost recovery to the adoption of FBW is one example of this impact. While the details of the policy do require improvement, it has been a positive first step in increasing access and equality, and a growing number of municipalities have begun adopting more generous allocations.²⁴³ Despite the early decentralisation of WSS services, the adoption of a participatory approach to water governance has lagged further behind, due to financial constraints and the low capacity of many municipal governments to both deliver services and to facilitate public participation in governance. However, recent innovations, including the *Raising the Citizens' Voices* programme, have begun to demonstrate promising results.²⁴⁴

Finally, beyond the courtroom, the *Mazibuko* case itself has also delivered positive results in both increasing equity and participation.²⁴⁵ The case has also highlighted the complexity of the right to water, both in terms of defining its scope and content, and in terms of its relationship to both good governance and participation. These issues will be considered in the following two chapters.

²⁴³ Tissington et al, above n 78, 32; Andrea Szabo, *The Value of Free Water - Analyzing South Africa's Free Basic Water Policy*, Economics Department, University of Minnesota (2009), 4, 12, 25,

²⁴⁴ Smith, above n 90; Smith, above n 160.

²⁴⁵ Dugard and Langford, above n 216.

Chapter 7. The effect of the right to water

This chapter seeks to analyse the two case studies contained Chapters 5 and 6 in order to answer the first two central questions of this thesis. First, what is the effect of the good governance approach to water reform and, particularly, does this approach result in increased access to water for the poor? Second, what is the effect of recognising and implementing the right to water, and particularly, does it affect the ability of the poor to access water? In answering this second question, this chapter will critically examine the outcome of the *Mazibuko* case and consider the arguments of scholars, such as Roithmayr, Bakker and Bond,¹ that the judgment of the Constitutional Court in this case demonstrates that the legal recognition of the right to water will not lead to more equitable approaches to water governance. The issue of participation, along with the question of whether a human rights-based approach does have the potential to contribute to water justice, will then be addressed in Chapter 8.

7.1 What is the effect of the good governance approach?

In her research into the main international organisations working on water supply and sanitation ('WSS') sector development in the Global South, Russell found that many water specialists reported a reluctance to integrate the human right to water into their programming.² These officers reported that one of their main concerns was the belief that the right to water might compromise the economic and sustainability goals of development.³ These reported attitudes highlight the value of considering good governance on its own criteria, because a proper assessment of whether a rights-based approach represents a threat to these economic and sustainability goals is partly

¹ Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317; Karen Bakker, 'Commons versus commodities: Debating the human right to water' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012) 19; Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012).

² Anna F.S. Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1, 12.

³ Ibid.

dependent on whether these goals are actually achieved by the good governance approach.

As discussed in Chapter 2, the good governance approach aims to secure economic gains by increasing investment, efficiency and financial sustainability through the application of market-based water reforms. It is also assumed that these reforms will increase sustainability and access for the poor, by promoting conservation and financing the expansion of infrastructure. This section assesses whether the evidence supports these assumptions, by examining the effects of the good governance approach in both Manila and South Africa, and by reference to further research into its effect on the WSS sector of other countries.

7.1.1 Investment

In Manilla, the MWSS was privatised because the government could no longer afford to make its debt payments and needed private capital to fund the infrastructure investments required to maintain and expand the system.⁴ Although the two successful concessionaires had been expected to invest USD7 billion over the 25-year concession period, during the first five years they invested less than USD100 million of their own funds.⁵ Furthermore, almost all of this investment came from only one concessionaire, Manila Water.⁶

Contract amendments significantly reduced the amount of investment that was required from Maynilad, the other concessionaire. Consequently it made almost no investments in maintenance or upgrades to the WSS system.⁷ Additionally, Maynilad's refusal to pay concession fees forced MWSS to secure new bridging finance in order to continue to meet its debt repayments between 2001 and 2005,⁸ confirming existing research

⁴ See Mark Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000).

⁵ Arthur McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003), app 2 175.

⁶ Ibid.

⁷ Ibid.

⁸ William Kingdom, *Project Information Document - PH-PSD for MWSS Financial Rehab* (World Bank, 2006), 2.

which indicates that private sector participation ('PSP') does not necessarily shift financial risk on to the private sector.⁹

It is more difficult to assess the impact of PSP in South Africa, because although a number of municipalities initially experimented with the use of private concessionaires to run their WSS systems, this approach did not prove popular.¹⁰ The introduction of free basic water ('FBW') in 2001 was a further deterrent, as private operators were reluctant to provide free water to the poor.¹¹ This could be taken as evidence that a rights-based approach is a barrier to investment, as feared by the water specialists interviewed by Russell.¹² However, this conclusion would only be valid if it could be established that PSP does result in significant investment.

In fact, the disappointing investment results in Manila reflect a common pattern where PSP has been introduced.¹³ Although the International Financial Institutions ('IFIs') promoted PSP as a means of attracting the necessary investment into public infrastructure in the late 1990s and early 2000s,¹⁴ returns have proven to be far less than envisioned.¹⁵ As the Asian Development Bank ('ADB') has reported, around USD180 billion per year for the period 2000-2005 was needed to fund new water infrastructure, while 'total private investment in WSS averaged \$3.3 billion per year, i.e., only about 1.8% of the annual investment needs of developing countries.'¹⁶

⁹ See, eg, David Hall and Emanuele Lobina, *Problems with private water concessions: a review of experience* (Public Services International Research Unit, 2003) 9-16; Jude Esguerra, *The Corporate Muddle of Manila's Water Concessions* (in *New Rules, New Roles: Does PSP Benefit the Poor?*, WaterAid and Tearfund, 2003), 30; OECD, *Principles for Private Sector Participation in Infrastructure* (2007) 15.

¹⁰ See, eg, Mike Muller, 'Public-Private Partnerships in Water: A South African Perspective on the Global Debate' (2003) 15(8) *Journal of International Development* 1115.

¹¹ Ibid.

¹² See nn 2-3 and accompanying text.

¹³ WaterAid, *International Financial Institutions (IFI), Conditionality and Privatisation of Water and Sanitation Systems* (WaterAid, 2003), 8.

¹⁴ World Bank, *Can Africa Claim the 21st Century?* (2000) 144.

¹⁵ WaterAid, above n 13, 8.

¹⁶ Herath Gunatilake and Mary Jane F. Carangal-San Jose, *Privatization revisited: lessons from private sector participation in water supply and sanitation in developing countries* (Asian Development Bank, 2008) 11.

In their report on private investment in the water sector across the Global South, Hall and Lobina conclude, '[p]rivate water companies do not bring new sources and volumes of investment finance – they rely heavily on the same sources as are available to the public sector.'¹⁷ In other words, instead of investing private funds in the WSS sector, many private water providers have accessed public financing, subsidies and guarantees.¹⁸

7.1.2 Efficiency

The evidence for efficiency gains under PSP is more mixed. Manila Water did make some significant improvements. The company's productivity ratio improved; going from 8.5 employees per 1,000 connections in 1997 to 3.7 in 2000,¹⁹ by means of a voluntary retirement program.²⁰ The company also changed its organisational culture, and increased efficiency and profitability, while still relying primarily on former MWSS employees.²¹ Reductions in NRW were initially less impressive, moving from 63 to 57 percent in the first five years, despite a target of 30 percent by 2001 being written into the concession agreement ('CA').²² Nonetheless, by 2007 Manila Water had reduced NRW to 22 percent.²³

In contrast, Maynilad's efficiency, as measured by NRW and overhead expenses, decreased after privatisation.²⁴ Maynilad blamed its financial troubles on the Asian

¹⁷ David Hall and Emanuele Lobina, *Pipe dreams: The failure of the private sector to invest in water services in developing countries* (Public Services International Research Unit, (PSIRU) and World Development Movement, (WDM), 2006) 51.

¹⁸ Deborah Moore and Penny Urquhart, *Global Water Scoping Project* (WaterAID, 2004), 18-19.

¹⁹ V.C. Rivera, Group Director, Regulatory and Planning, Manila Water Company, in McIntosh, above n 5, app 2, 171.

²⁰ Ibid.

²¹ See, eg, *Making a Difference - How private enterprise is creating opportunity and improving lives in developing countries* (International Finance Corporation (IFC), 2008), 40-41; *Interview with Senior Officer, Maynilad Water Administrative Department* (Manila, 31 October 2006); *Interview with Olim Gusi, Manila Water employee* (Manila, 26 October 2006).

²² See McIntosh, above n 5.

²³ Rhys Owen, 'Manila Water goes from strength to strength' (2008) 9(3) *Global Water Intelligence*.

²⁴ See Jude Esguerra, *Universal Service Coverage After the Crisis?* (United Nations Research Institute for Social Development, 2005), 10; *Interview with Senior Officer, Maynilad Water Administrative Department* (Manila, 31 October 2006); Xun Wu and Nepomuceno A. Malaluan, 'A tale of two

Financial Crisis and the drought,²⁵ but while these events certainly triggered a downturn, internal management decisions also affected Maynilad's finances.²⁶ From the beginning of the concession period, Maynilad failed to keep its overhead expenses under control.²⁷ The company engaged in numerous related party transactions that significantly increased costs in comparison to Manila Water, which chose to put contracts out to arms-length, competitive tenders.²⁸ Maynilad also neglected to prioritise the task of retraining its employees or building a new corporate culture.²⁹ Instead Wu and Malaluan³⁰ argue that the company brought in international consultants who did not understand the local context and served only to demoralise existing staff. This reliance on foreign consultants also affected costs. In the year 2000, Maynilad's average annual wage was 24 percent higher than that of Manila Water.³¹

Maynilad's poor NRW results, which increased from 63 to 67 percent over the first five years,³² were partly related to its failure to secure the necessary finance to pay for the infrastructure improvements needed to reduce leaks and illegal connections.³³ However, Manila Water's comparative success was also due to their adoption of territory (decentralised) management, which enabled them to reduce leaks and response times, while Maynilad chose to centrally manage its water system.³⁴ This internal management

concessionaires: a natural experiment in water privatisation in Metro Manila' (2008) 45(1) *Urban Studies* 207, 221-224; Raul Fabella, 'Shifting the boundary of the state: the privatization and regulation of water service in metropolitan Manila' (Paper No 123, Centre on Regulation and Competition, Institute for Development Policy, University of Manchester, 2006), 56.

²⁵ Interview with Macra Cruz, Senior Administrator of MWSS (Manila, 30 October 2006); Interview with Mai Flor, Lawyer for Ondeo (Maynilad) (Manila, 24 October 2006).

²⁶ Interview with Cruz, above n 25; Esguerra, above n 9; Wu and Malaluan, above n 24.

²⁷ Esguerra, above n 9, 10.

²⁸ Interview with Senior Officer, Maynilad Water Administrative Department (Manila, 31 October 2006); Wu and Malaluan, above n 24, 218.

²⁹ Ibid.

³⁰ Wu and Malaluan, above n 24, 221.

³¹ Fabella, above n 24, 56.

³² See McIntosh, above n 5, app 2, 175.

³³ Wu and Malaluan, above n 24, 224.

³⁴ Ibid.

decision made it more difficult for Maynilad to monitor NRW, particularly because the company also failed to introduce a reliable report on leakage until 2000.³⁵

Maynilad was also partially responsible for its failure to secure the necessary finance to increase efficiency. Esguerra reports that the company was only willing to use limited recourse financing in its attempts to secure a project loan; meaning that the only collateral for the loan would be the receivables of the project itself.³⁶ In other words, Maynilad was not willing to put any of its own assets on the line to secure the success of the project.

The contrast between Maynilad's performance and Manila Water's achievements from 2002 onwards demonstrates that while PSP has the capacity to deliver investment and efficiency gains, it does not guarantee positive results.³⁷ This conclusion is supported by research from the World Bank, the International Monetary Fund ('IMF') and the ADB, which has demonstrated that the private water sector is not inherently more efficient than the public sector.³⁸ In a 2002 study of Asian and Pacific water companies, the World Bank found that 'efficiency is not significantly different in private companies than in public ones.'³⁹ This was confirmed by a survey in 2005 that also found 'no statistical difference in efficiency scores between public and private providers.'⁴⁰ Similarly, a 2004 IMF study found that '[m]uch of the case for PPPs [public-private partnerships] rests on the relative efficiency of the private sector. While there is extensive literature on the subject, the theory is ambiguous and the evidence is mixed.'⁴¹

³⁵ Wu and Malaluan, above n 24.

³⁶ Esguerra, above n 9, 19.

³⁷ Owen, above n 23, 40-41.

³⁸ See Bethan Emmett, *In the Public Interest - Health, Education, and Water and Sanitation for All* (Oxfam and WaterAid, 2006), 61-62.

³⁹ Antonio Estache and Martin A. Rossi, 'How different is the efficiency of public and private water companies in Asia?' (2002) 16(1) *World Bank Economic Review* 139, 139.

⁴⁰ Antonio Estache, Sergio Perelman and Lourdes Trujillo, *Infrastructure performance and reform in developing and transition economies: Evidence from a survey of productivity measures* (in World Bank Policy Research Paper, World Bank, 2005) 21. A recent study of the distributional impact of privatisation found that most privatisation programs worsened the distribution of assets and incomes, at least in the short run: Nancy Birdsall and John Nellis, 'Winners and losers: Assessing the distributional impact of privatization' (2003) 31(10) *World Development* 1617.

⁴¹ *Public-Private Partnerships* (International Monetary Fund (IMF), 2004).

In 2008, an ADB report also stated that ‘[s]tudies ... do not provide conclusive evidence of higher productivity or technical efficiency among PSP water utilities.’⁴²

The ADB hypothesises that the ‘inherent difficulties in creating adequate competition in the WSS sector’ may also account for the lack of efficiency gains under PSP.⁴³ McIntosh also theorises that this lack of competition limits the incentive for private providers to make significant improvements in efficiency. He argues that there was very little in the Manila CA to encourage improvements in efficiency,⁴⁴ and implies that corruption may partly explain the poor results of both concessionaires in the early years, because removing leaks would have highlighted high levels of illegal use (which can provide good returns under the table for private operators).⁴⁵

In wealthier South African municipalities like Durban (eThekweni)⁴⁶ and Johannesburg,⁴⁷ market-based reforms have been mostly successful in increasing efficiency.⁴⁸ When Johannesburg Water was contracted out to a private operator in 2001 it was running at a loss and experiencing a high level of debt.⁴⁹ Over the course of the five-year contract period, the private contractor was able to significantly increase the efficiency of the utility to the point where it was profitable once more.⁵⁰ However, as in Manila, these results have been mixed, with Cape Town experiencing problems with the

⁴² Gunatilake and Carangal–San Jose, above n 16, 13.

⁴³ Gunatilake and Carangal–San Jose, above n 16.

⁴⁴ McIntosh, above n 5, app 2, 175.

⁴⁵ Ibid.

⁴⁶ Alex Loftus, “‘Free Water’ as commodity: The paradoxes of Durban’s water service transformations’ in David A and Ruiters McDonald, G (ed), *The age of commodity: water privatization in Southern Africa* (2005); 59, n 30

⁴⁷ Carina van Rooyen et al, *The Water Dialogues: Johannesburg Case Study* (The Water Dialogues South Africa, 2009) 73-75, 80; Laila Smith, *Neither Public nor Private: Unpacking the Johannesburg Water Corporatisation Model* (in Programme Paper Number 27, United Nations Research Institute for Social Development Social Policy and Development, 2006), 5.

⁴⁸ Note, however, that (as will be discussed below) these gains have been achieved at the expense of equity, access and participation.

⁴⁹ See Rooyen et al, above n 47, 10-11; Smith, above n 47, 7.

⁵⁰ Rooyen et al, above n 47, 80.

outsourcing of its WSS services as a result of poor regulatory oversight,⁵¹ and poor communication with the community.⁵²

Furthermore, these municipalities are not the norm and for many in South Africa the main challenges to efficiency are the need for more investment and capacity development.⁵³ Rather than tackling these issues, the good governance approach seems to have contributed to these barriers in uniformly poor municipalities by reducing funding despite the fact that these municipalities have little capacity to cross-subsidise.⁵⁴ The manner that decentralisation was undertaken in South Africa, with the devolution of responsibility being coupled with fiscal discipline, has created a funding shortfall and exacerbated the skills shortage in many municipalities.⁵⁵ The market-based reform of placing a higher price on water has also not assisted, because uniformly poor municipalities do not have a large enough customer base with the capacity to pay the full or marginal cost of water.⁵⁶

7.1.3 Financial sustainability

Proponents of PSP have argued that the private sector is better placed to raise tariffs to financially sustainable levels because it can depoliticise water bills by putting tariff decisions at arm's length from the government.⁵⁷ However, Manila's experience with PSP provides limited support for this theory.

⁵¹ Karen Goldberg, *The Water Dialogues: Cape Town Case Study* (2009), 54.

⁵² Laila Smith and Susan Hanson, 'Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery' (2003) 40(8) *Urban Studies* 1517.

⁵³ See, eg, Kate Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation provision across 15 municipalities* (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008), 57-61.

⁵⁴ Ibid.

⁵⁵ See Section 6.3.2 above.

⁵⁶ See, eg, Laila Smith, Shauna Mottiar and Fiona White, *Testing the limits of market-based solutions to the delivery of essential services: the Nelspruit Concession* (Centre for Policy Studies, 2003); Tissington et al, above n 53, 5, 61.

⁵⁷ James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003), 31-32.

Instead of creating the space for tariffs to be increased, the Philippine government specifically designed the PSP process so that tariffs would decrease at the outset.⁵⁸ This was problematic for a number of reasons. First, for wealthy and middle-class households, tariffs were already low, which placed unnecessary pressure on demand and contributed to the dire financial state of MWSS. Second, it meant that the CA provided an incentive for the concessionaires to actively increase consumer demand in order to increase profits.⁵⁹ Third, it created the reality, or perception, of dive bidding, which has been the cause of most of the media and civil society controversy over tariff increases under privatisation.⁶⁰ Finally, it clearly demonstrated that tariffs are a political issue regardless of whether PSP has been adopted. Water bills will continue to influence public opinion about the cost of living and, by extension, the government, and the government will continue to have a political incentive to exercise control over tariffs.

The ongoing controversy over tariff increases has also obscured the issue that universally low tariffs in Manila historically acted as a barrier to accessibility for the urban poor, because the poor were not connected to the public system and tariff subsidies reduce the funds available for service expansions. A higher tariff from the outset of privatisation (coupled with appropriately targeted subsidies for the poor) would have enabled the concessionaires to fund a faster expansion of connections across Metro Manila, and the CA could have required that these expansions target the poor.⁶¹

A higher tariff would have also provided a greater incentive for middle- and upper-class households to conserve water, reducing the need to establish new water sources for the city.⁶² These demand management signals, coupled with a stronger focus on reducing NRW, would have been a positive response to Manila's water crisis. McIntosh argues that 'the combined effect of these two interventions would almost double the water available for consumption in Manila.'⁶³ The significance of this for poor urban

⁵⁸ Dumol, above n 4, 42.

⁵⁹ McIntosh, above n 5, app 2, 175.

⁶⁰ The significance of dive bidding is discussed in Section 5.3.3 above.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

households is that obtaining new sources of water is more expensive than relying on existing sources and the need for new sources of water has contributed to delayed service expansion.

Nonetheless, under pressure from the concessionaires, the government did renegotiate the CA, and from 2000 tariffs started to increase. The result of these increases for the poor has been mixed. In the case of Maynilad, increased tariffs in the first decade of privatisation were primarily wasted on inefficient management and related party transactions, rather than being invested into the WSS system.⁶⁴ In contrast, Manila Water used the revenue to increase both efficiency and investments, and this translated into service improvements and increased access for the poor (discussed below).⁶⁵ In 2007, the company announced an investment program of USD4.6 billion over the next 15 years, although only 20 percent of this was invested in the first five years.⁶⁶ As a result of these demonstrated improvements, Manila Water also claims that it has been able to shift public attitudes towards cost recovery.⁶⁷ However, as discussed below, some aspects of the cost recovery focus have created financial barriers to access for the poor and not enough has been done to address these affordability issues.

As discussed above, market-based reforms, including PSP in Johannesburg, have also had some success in improving the financial sustainability of several WSS systems in South Africa.⁶⁸ However, in municipalities with less capacity to cross-subsidise, market-based reforms have been far less successful.⁶⁹

7.1.4 Environmental sustainability

Although the good governance measures adopted in Manila and South Africa have had some success in improving efficiency and financial sustainability, there is little evidence to support the claim that they increase conservation. Instead, the experiences of Manila and Johannesburg both indicate that market-based reforms are broadly at odds with environmental sustainability, because they create an incentive for water providers to

⁶⁴ See, eg, Esguerra, above n 24, 10; Wu and Malaluan, above n 24, 221; McIntosh, above n 5, app 2 175.

⁶⁵ Owen, above n 23.

⁶⁶ Ibid.

⁶⁷ Owen, 'Manila Water goes from strength to strength' (2008) 9(3) *Global Water Intelligence*

⁶⁸ See nn 46-47 and accompanying text.

⁶⁹ See, eg, Smith, Mottiar and White, above n 56; Tissington et al, above n 53, 5, 61.

increase water sales to the upper end of the market (from wealthy consumers and industry).⁷⁰ For example, the City of Johannesburg has expressed a reluctance to raise tariffs for the upper-blocks of consumption due to a concern that it would decrease demand from wealthy consumers and result in an over-all loss of revenue.⁷¹

The exception to this pattern is that market-based reforms can increase the attention paid to NRW.⁷² In the case of NRW from leakage, this is an uncomplicated benefit. The financing of improved infrastructure, as took place in Operation Gcin'amanzi,⁷³ reduces water wastage and results in increased conservation while often lowering the cost of bulk water.⁷⁴ However, when the NRW in question is due to unpaid bills from poor consumers who cannot afford to pay for sufficient water, then water conservation is being achieved at the expense of those who are least able to afford it. This is what has happened in South Africa, where demand management and punitive credit control measures, including flow restrictors⁷⁵ and PPMs,⁷⁶ have targeted poor consumers and resulted in households being left with insufficient water to meet their basic needs.⁷⁷ A similar approach has been adopted by Manila Water, which ensures zero NRW in its *Water for the Poor* program areas by forcing those consumers to pay for all water, even if it is lost to leaks or water theft.⁷⁸ This indicates that relying on a financial incentive for conservation creates a tension with social justice and human rights goals, while

⁷⁰ See, eg, McIntosh, above n 5, app 2, 175.

⁷¹ Smith, above n 47, 21, 29.

⁷² See, eg, Bill Kingdom, Roland Liemberger and Philippe Marin, 'The Challenge of Reducing Non-Revenue Water (NRW) in Developing Countries: How the Private Sector Can Help: A Look at Performance-Based Service Contracting' (Water Supply and Sanitation Board Discussion Paper Series, Vol 8, World Bank, 2006) <<http://siteresources.worldbank.org/INTWSS/Resources/WSS8fin4.pdf>> at 26 September 2011. Although see *contra* McIntosh, above n 5, app 2, 175, who argues that that concessionaires failed to reduce NRW in the first five years of the concession period, because they were illegally profiting from selling this water to SSWPs under the table.

⁷³ Rooyen et al, above n 47, 73; Smith, above n 47, 20.

⁷⁴ Kingdom, above n 72, 4-5.

⁷⁵ See, eg, Loftus, above n 48, 8-12; Tissington et al, above n 53, 33-34, 53.

⁷⁶ See *Mazibuko v City of Johannesburg* (2009) 28 ZACC; Tissington et al, above n 53, 33-34.

⁷⁷ Patrick Bond and Jackie Dugard, 'The Case of Johannesburg Water: what really happened at the pre-paid parish pump' (2008) 12(1) *Law, Democracy and Development* 1, 10; Tissington et al, above n 53, 54.

⁷⁸ Esguerra, above n 24, 20.

failing to result in conservation from the excessive use occurring at the upper end of the market.

7.1.5 Expanding access to the poor

Finally, the evidence is also mixed in relation to the link between good governance reforms and expanding access to water for the poor. When successful, measures to increase both efficiency and financial sustainability have helped to finance service expansion and, thus, enabled unserved and underserved sections of the community better physical access to the public water system.⁷⁹ However, these same measures have also created economic barriers to access⁸⁰ and have often prevented poor consumers from maintaining access to water.⁸¹ Furthermore, both of the case studies indicate that, under a market-oriented system, access for the poor will only be prioritised when it is financially beneficial for the provider, unless further pressure is applied to guarantee access.⁸²

The service coverage targets set out in the Metro Manila CA were based on gradually increasing the percentage of the population residing in each municipality or city with access to piped water.⁸³ The aim of the contracts was to achieve near-universal coverage over the first decade of the 25-year concessions.⁸⁴ However, service targets were not met.⁸⁵ Between 1997 and 2000, Manila Water declared modest gains in connection

⁷⁹ See nn 86-87, 98 and accompanying text, below.

⁸⁰ See nn 91-94 and accompanying text, below.

⁸¹ Ibid. See also Jackie Dugard, 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy' (2010) 42(2) *Review of Radical Political Economics* 175; Patrick Bond, *When Commodification Annuls the Human Right to Water* (School of Development Studies, University of KwaZulu-Natal, 2005).

⁸² PPIAF and ADB, 'The Design of the Manila Concessions and Implications for the Poor' (Paper presented at the *PPIAF/ADB Conference on Infrastructure Development – Private Solutions for the Poor: The Asian Perspective*, Manila, 28-30 October 2002); Smith and Hanson, above n 52; Smith, Mottiar and White, above n 56.

⁸³ V.C. Rivera, Group Director, Regulatory and Planning, Manila Water Company, in McIntosh, above n 5, app 2, 170.

⁸⁴ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) sch 2.

⁸⁵ See McIntosh, above n 5, app 2, 175.

levels, and claimed to have increased coverage from 65 to 88 percent of the population.⁸⁶ Since then, the company claims to have made significant progress against coverage targets, reaching 99 percent in 2011.⁸⁷

McIntosh is sceptical of the calculations behind these figures, arguing that connection rates assume 9.2 persons per connection while the year 2000 census statistics indicate 4.6 persons per household in Manila.⁸⁸ According to his calculations, connection rates actually went backwards during the first five years of the concession, and the 98 percent coverage targets contained in the CA, which were supposed to be reached by 2007,⁸⁹ translate to a coverage rate of only around 50 percent.⁹⁰

The imposition of a high connection fee has also created a financial barrier to access for many poor households in Manila. The connection fee was set at over USD100 in 1997 and has been adjusted in line with the consumer price index ever since.⁹¹ Concessionaires have the discretion to implement cross-subsidies in order to make these fees more affordable, but have chosen not to, with the result that they remain beyond the means of many poor households.⁹² The CA also requires both concessionaires to allow for low-income customers to stagger the payment of the connection fee over a period of five years⁹³ but both companies have only given consumers the option of staggering of payments over a period between a few months and two years.⁹⁴

⁸⁶ V.C. Rivera, Group Director, Regulatory and Planning, Manila Water Company, in McIntosh, above n 5, app 2, 171.

⁸⁷ Marianne Go, 'Metro water firms reduce system losses', *The Philippine Star* (Manila) 14 January 2011.

⁸⁸ McIntosh, above n 5, app 2, 175.

⁸⁹ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) sch 2; Esguerra, above n 24, 1; Wu and Malaluan, above n 24, 215.

⁹⁰ McIntosh, above n 5, app 2, 175.

⁹¹ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997), s 9.5. See also Shane Rosenthal, *The Manila water concessions and their impact on the urban poor* (Yale School of Forestry and Environmental Studies, 2001) 4 (The average monthly income in Manila was USD260, and this figure represents several times the monthly income of poor households in Manila, who earn less than the average income.).

⁹² McIntosh, above n 5, app 2, 175; Esguerra, above n 24, 16.

⁹³ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) s 9.5.

In 2006, Manila Water sought to address this issue by applying for World Bank funding to subsidise the cost of connection fees for low-income households.⁹⁵ As of May 2012, about 10,000 households have benefited from the scheme.⁹⁶ While this is an innovative source of financing and has resulted in increased access to water, the reliance on ODA for connections rather than cross-subsidies or government funding is not a sustainable solution to attain universal coverage.

The primary method adopted by Manila Water to circumvent the barrier posed by the high connection fee has been to encourage poor consumers to share connections under its *Water for the Poor* program. While this program has been highly successful in increasing access to water for the poor, including many residing in informal settlements who were previously discriminated against by MWSS, it has also resulted in highly inequitable tariffs. Around 100 households share a connection under Manila Water's program, and these households are charged at the highest bulk water rate. As a result, they pay between 4-5 times as much for their water bills, despite using 1/5 of the amount of water than the average household with an individual connection.⁹⁷

South Africa's experience with cost recovery has demonstrated similar challenges with expanding access through the right balance of financial sustainability and affordability. This balance was not achieved through the rigid market-based reforms adopted in between 1996 and 2001. As mentioned in Chapter 6, these reforms expanded access to seven million people, but resulted in at least that same number (if not many more) having their water disconnected for non-payment.⁹⁸

⁹⁴ See Esguerra, above n 24, above (Esguerra reports that poor consumers are only being given a few months to pay their connection fees, and cites a personal communication from Virgilio Rivera, East Zone Manager for Regulatory Affairs, for this information) 23; Interview with Cruz, above n 25, above (Cruz reports that poor consumers are given some leniency in the payment of their connection fees: 'In some instances, depending on the affordability of the public, it is between one and two years – on top of their water bills.').

⁹⁵ Global Partnership on Output-Based Aid, *Manila Water Supply* (2012) <<http://www.gpoba.org/gpoba/project/P106775>> at 24 May 2012.

⁹⁶ Manila Water, *Corporate Social Responsibility* (2012) <http://www.manilawater.com/section.php?section_id=4&category_id=23> at 23 May 2012.

⁹⁷ McIntosh, above n 5, app 2, 176.

⁹⁸ See Chapter 6, n 113, above.

It is in this context that concerns around the impact of recognising and implementing the right to water should be considered. In South Africa, the recognition and implementation of the right to water has encouraged the government to reassess its initial focus on financial sustainability and to emphasise the issue of affordability through the rollout of the FBW policy. The capping of this free water to a lifeline amount, and the decision by many municipalities to limit access to those on indigency registers, also demonstrates an attempt to target the demand management aspects of cost recovery policies, even if the detail of both of these policies, in terms of the sufficiency of the FBW amount and the accessibility of the indigency registers, could be improved.

7.2 Interpreting the content of the right to water

As discussed in Chapter 3, the right to water recognises that everyone has the right to *sufficient, safe, affordable and physically accessible* water services. The case study on water governance reform in South Africa indicates that the interpretation given to this content will play a significant role in determining the ultimate effect of recognising and implementing the right to water, particularly for the poor. A range of scholars have responded to the *Mazibuko* judgment by questioning the value of a human right to water, and to argue that litigating the right to water risks reinforcing rather than disrupting the status quo.⁹⁹

However, the broader facts around the case also indicate that the process of interpreting the content of the right to water is a dynamic one. There has been an ongoing dialogue over the content of the right to water in South Africa (with the *Mazibuko* case being a prominent example of this debate). The effect of recognising and implementing the right to water in South Africa will evolve as this dialogue continually reshapes the political expectations around water policy and redefines what can be considered legitimate as a result.

⁹⁹ See, eg, Roithmayr, above n 1; Bakker, above n 1, 19; Bond, above n 1. See also Section 8.4 for a further discussion of these issues.

7.2.1 Sufficient

Given that South Africa's constitutional recognition of the right to access water specifically requires that this water be *sufficient*, it might have been anticipated that this would have resulted in water policies designed to ensure access to a minimum *sufficient* amount of water. In comparison to Manila this has partly been true. The FBW policy has been promoted as a means of ensuring that everyone can access basic water supplies regardless of financial capacity. Additionally, the 25 Lpcpd provided under the policy is higher than the estimated 12 Lpcpd consumed by people living in Manila's informal settlements who do not have a connection to the WSS system.¹⁰⁰

Despite this progress, poor households in South Africa have not yet been guaranteed access to a sufficient amount of water. First, as of April 2012 there were still 2,685,496 people in South Africa's informal settlements who did not have access to basic water services.¹⁰¹ Second, the FBW policy has been designed and implemented in a manner that has focused more on efficiency than on the right to water, and this has resulted in many poor people being restricted to an amount of water that is insufficient to meet their basic needs.¹⁰²

Bond and Dugard point out that the government has never given any evidence that the six kilolitres household monthly allocation (which works out to a daily individual allocation of 25 litres in the assumed average household of eight people) is a sufficient amount of water to meet basic needs.¹⁰³ Instead, as Loftus has also argued,¹⁰⁴ the basis

¹⁰⁰ See Arthur C. McIntosh, 'Hiking tariffs to help the poor' (ADB Review - News from the Asian Development Bank, ADB, 2003); *The Philippine Water Situation* (The Water Dialogues, nda).

¹⁰¹ Department of Water Affairs (South Africa), *Water Backlog Eradication* <http://www.dwaf.gov.za/dir_ws/wsnis/default.asp?nStn=pg_Reports&SAID=255&SASID=997&curPerspectiveID=2> at 18 January 2013.

¹⁰² Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation provision across 15 municipalities* (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008), 31-33; Rose Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power' (2005) 18(1) *Georgetown International Environmental Law Review* 149, 181; David A. McDonald, 'No Money, No Service: South Africa's Attempts to Recover Costs for Water and Power are Harming its Poorest Citizens' (2002) (Spring) *Alternatives Journal* 16; Loftus, above n 48, 10-12.

¹⁰³ Patrick Bond and Jackie Dugard, 'Water, human rights and social conflict: South African experiences'

for this allocation was cost-efficiency.¹⁰⁵ The FBW policy was based on a pilot project in Durban, where the Council gave away 220 litre drums of water to each shack daily because it was cheaper to give this amount of water away than to administer the collection of tariffs.¹⁰⁶

The Minister for Water justified the FBW policy on this cost-efficiency basis, claiming '[i]t would save money because local authorities would not be saddled with the problem of administering large numbers of small accounts.'¹⁰⁷ The former director general of DWAF has also argued that a significant benefit of the FBW approach is the fact that it has conferred the necessary political legitimacy to enable 'water supply organisations to recover their costs and achieve the economic objective of financial sustainability.'¹⁰⁸

A more generous figure of 50 Lpcpd is the amount recognised by WHO as the minimum necessary to lead a healthy life,¹⁰⁹ while the UN Special Rapporteur on the right to water recommends 100 Lpcpd.¹¹⁰ Twenty-five Lpcpd is a particularly small allocation for people living with waterborne sanitation as it can require almost half this amount to flush a toilet.¹¹¹

The second regressive aspect of the FBW policy is that it is calculated on a per household basis. A per household allocation discriminates against the poor, who tend to live in larger households and to have additional people living in backyard shacks on the

(2008) 10(1) *Law, Social Justice and Global Development*, 9.

¹⁰⁴ Loftus, above n 48, 4-5.

¹⁰⁵ Bond and Dugard, above n 103, 8.

¹⁰⁶ Ibid; Loftus, above n 48, 4-5.

¹⁰⁷ Business Day, 11 February 2000, cited in Bond and Dugard, above n 77, 21.

¹⁰⁸ Mike Muller, 'Free basic water – a sustainable instrument for a sustainable future in South Africa' (2008) 20 *Environment and Urbanization* 67, 67.

¹⁰⁹ WHO, *The Right to Water* (2003).

¹¹⁰ Catarina de Albuquerque, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, 15th sess HRC, A/HRC/15/31 (2010), para 19.

¹¹¹ The average toilet uses between 10-15 litres of water per flush, and toilets in poor households in South Africa tend to be the least efficient models. See, eg, David Still et al, *Services: The status and use of water efficient devices in South Africa* (2010)

<http://www.interactmedia.co.za/index.php?option=com_content&view=article&id=878:services-the-status-and-use-of-water-efficient-devices-in-south-africa&Itemid=209> at 25 March 2012 ; *Mazibuko v City of Johannesburg* (2008) 4 All SA 471, para 169.

same property (or ‘stand’).¹¹² The government’s hypothetical average household of eight persons fails to correspond to this small but significant number of South Africans.¹¹³ As Tsoka J pointed out, these additional residents, like informal households with no municipal accounts, are effectively excluded from the FBW allocation.¹¹⁴ In 2003, DWAF recognised the issue of ‘large households and multiple households sharing one connection’ as one of the ‘key challenges’ in the implementation of FBW.¹¹⁵ However, thus far, they have failed to enact any national policies to mediate the inequitable outcome created by this per household allocation.¹¹⁶

The final regressive aspect of the FBW policy is that instead of being implemented as a minimum floor, many municipalities have imposed it as a ceiling on the water consumption of poor or indigent households. The implementation of the FBW policy included the introduction of various methods of constraining water access to the monthly six kilolitre household allocation, including the compulsory installation of flow restrictors¹¹⁷ and PPMs,¹¹⁸ which were specifically designed to limit household water consumption.

¹¹² See, eg, *Mazibuko v City of Johannesburg* (2008) 4 All SA 471, para 168-169 (where Judge Tsoka notes that it is common cause that the average household in Phiri contains a minimum of 16 persons and that each account covers more than one household due to the presence of backyard shacks on each stand); Tissington et al, above n 53, 32 (reporting that this situation of poor households comprising of more than eight people and additional households living backyard shacks on the same municipal account was the norm across the 15 municipalities that they surveyed); Bond and Dugard, above n 103, 9.

¹¹³ The presence of large households and backyard shacks, and the inadequacy of the FBW allocation in these situations, is widely documented in the literature on water access in South Africa. See, eg, *ibid*; Paulina Calfucoy et al, *Improving Free Basic Water Provision in South Africa - Prepared for the Financial and Fiscal Commission* (La Follette School of Public Affairs University of Wisconsin-Madison, 2009), 15; Alix Gowlland-Gualtieri, *South Africa's water law and policy framework - implications for the right to water* (in IELRC Working Paper, International Environmental Law Research Centre, 2007), 7.

¹¹⁴ See *Mazibuko v City of Johannesburg* (2008) 4 All SA 471, para 168.

¹¹⁵ Department of Water Affairs and Forestry (DWAF), *Strategic framework for water services* (September 2003) para 4.4.1

¹¹⁶ Department of Water Affairs and Forestry (DWAF), *Free Basic Water* (2012) <http://www.dwaf.gov.za/dir_ws/fbw/#> at April 2012 .

¹¹⁷ See, eg, Loftus, above n 48, 8-12; Tissington et al, above n 53, 33-34, 53.

¹¹⁸ See *Mazibuko v City of Johannesburg* (2009) 28 ZACC ; Tissington et al, above n 53, 33-34.

Muller describes the FBW policy as a demand management device that was necessary to prevent the poor from adopting the ‘water-intensive suburban lifestyle of South Africa’s minority population at the upper end of the household income scale.’¹¹⁹ He also rejects arguments for a larger FBW allocation (above 25 Lpcpd) because this would provide ‘more water than is required for basic health needs and ... [benefit] predominately urban consumers rather than the poorer rural communities, which have limited infrastructure capacity.’¹²⁰ The weakness of this argument lies in the fact that more than 25 Lpcpd is required to meet basic needs, especially for urban users due to the absence of alternative sources of water and the fact that their houses often have waterborne sanitation. Differentiating on the basis of need is not the same as privileging urban users.

The needs of poor rural households (and households living in informal settlements in peri urban areas) are very real and must be addressed. However, there is a difference between meeting everyone’s basic needs before progressively realising more privileged levels of consumption, and constraining one group to below basic levels in order to meet the basic needs of another. Another approach would be to cross-subsidise from the upper levels of consumption (from those household who are actually living Muller’s ‘water-intensive suburban lifestyle’).¹²¹ Alternatively, in the case of universally poor municipalities, it might be necessary to increase national government subsidies.

Section 27(1)(b) provides for the right to *access sufficient* water,¹²² and the applicants in the *Mazibuko* case had argued that the word ‘access’ must include economic access, meaning that water is not accessible unless it is affordable. They further argued that ‘sufficiency’ must be defined in a context sensitive manner that takes into account the specific circumstances of the individuals in question. These specific circumstances in relation to the Phiri community included a need to account for the fact that they had waterborne sanitation and needed an additional allocation of 15-20 Lpcpd to flush their toilets.

¹¹⁹ Muller, above n 108, 69.

¹²⁰ Ibid 76.

¹²¹ Ibid 69.

¹²² *Constitution of the Republic of South Africa 1996*, s 27(1)(b).

In response to these arguments, the Constitutional Court found that the Constitution does not permit the quantification of what amounts to adequate water.¹²³ However, Liebenberg has argued that the words ‘access’ and ‘sufficient’ in s 27(1) require judicial interpretation, ideally to give substantive content on which future applicants could rely.¹²⁴ Although the Court expressed a concern not to create a directly enforceable right to a specific amount of water, it could still have given substantive content to the right contained in s 27(1)(b) and then asked whether the City’s policies were reasonable in the light of their impact on the specific circumstances of the applicants (and other similarly placed households).

Intepreting the substantive content of the right to water would not have had to result in a freestanding right of direct access. Bilchitz deals with this issue by arguing that it is necessary to delineate *conditional rights* - those rights which exist and must be recognised, but whose realisation may not be possible under current conditions – from *unconditional rights* – those rights that attract immediate enforcement.¹²⁵ He argues that, even when they cannot be immediately translated into obligations, giving substantive content to rights ‘has the virtue of placing these interests in clear view, and, practically, still requiring justification for the failure to realise them.’¹²⁶

The Court’s reasonableness review set a deferential standard in holding the City to account for upholding the values and purpose of the Constitution. The City was not required to justify its decision to limit the applicants to 25 Lpcpd of free water (despite the acknowledged fact that more than half of this allocation was required just to flush the toilet).¹²⁷ Nor was it required to prove that it was affordable for the applicants (and other similarly placed households) to purchase any additional water above this amount to meet their basic needs. It is notable, in this regard, that the City’s own expert

¹²³ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 68.

¹²⁴ Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010), 467 also argues that the ‘Court fails to given any independent significance to the right of access to sufficient water in section 27(1)(b). Instead the right is subsumed within the overarching qualification of reasonableness in section 27(2).’

¹²⁵ David Bilchitz, *Poverty and Fundamental Rights* (2007) 78-83.

¹²⁶ *Ibid* 222.

¹²⁷ See Liebenberg, above n 124, 471.

evidence, produced for the Supreme Court proceedings, had found that the applicants required a minimum of 42 Lpcpd.¹²⁸

The Court was critical of the applicants' sufficiency-based arguments for being too similar to giving the right a 'minimum core.'¹²⁹ However, the applicants had actually argued that the Court should assess the reasonableness of Operation Gcin'amanzi in relation to a substantive determination of what the requirement for 'access to sufficient water' entailed. As Liebenberg argues, this meant that their claim was 'framed within the paradigm of reasonableness review developed by the Court for assessing positive socio-economic rights claims.'¹³⁰ This approach was specifically contemplated by the Court in the *Grootboom* where Justice Yacoob stated that '[t]here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.'¹³¹

The Court's related concerns over institutional competence seems to conflate the issue of enforcing an *obligation* to deliver a quantified amount with defining the *content* of the right to water contained in s 27(1).¹³² The Court could have defined the meaning and content of the right to water for the applicants (which Liebenberg argues was their Constitutional responsibility)¹³³ without imposing an overly specific obligation on the legislature and executive.¹³⁴ The State could have been ordered to revise its policies, as it saw fit, in order to give effect to the right as defined.

Another feature of the Court's decision to adopt such a deferential approach was that it appeared to accept the current FBW allocation as an acceptable baseline for the application of the standard of progressive realisation. This seemed to be the context under which the Court accepted the City's arguments that expanding FBW access to 50

¹²⁸ *City of Johannesburg v Mazibuko* (2009) 20(3) ZASCA 592 (SCA) paras 21-24.

¹²⁹ *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 52-56.

¹³⁰ See Liebenberg, above n 124, 467.

¹³¹ *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC) para 33.

¹³² *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 60-68.

¹³³ Liebenberg, above n 124, 468.

¹³⁴ See Liebenberg, above n 124, 470.

Lpcpd would compromise its capacity to expand access to the 100,000 people living in informal settlements, who still lacked basic water services.¹³⁵

There are two problems with this approach. First, it highlights the impact of not giving a context-sensitive content to the right to sufficient water contained in section 27(1)(b). Had this been done, it could have been established that the minimum standard for people in the applicants' situation (that is, those households with waterborne sanitation and no alternative sources of water) was necessarily higher than the current base level of 25 Lpcpd.

Second, as Liebenberg points out,

the City did not explain why it was necessary to achieve the constitutional objective of improving the position of those with reduced or no access to water by worsening the position of the Phiri residents who also constitute an impoverished community. In effect, the poor are being asked to bear the resource burden of meeting the City's constitutional obligations towards those for whom it had made no or minimal provision in respect of the delivery of water services.¹³⁶

Wilson and Dugard also argue that although they had access to housing at the end of apartheid, the people in Phiri were just as poor as those living in informal settlements.¹³⁷ Although the City argued that it needed to maintain a tight handle on its budget, it never explicitly asserted that it could not afford to meet the basic needs of the residents in Phiri without sacrificing its program to address basic service backlogs in the rest of the community.¹³⁸ Furthermore, the City provided no evidence that it was not able to cross-

¹³⁵ *City of Johannesburg Answering Affidavit in Mazibuko v The City of Johannesburg* High Court of South Africa (Witwatersrand Local Division) (2007) para 21.4.

¹³⁶ Liebenberg (above n 124, 476).

¹³⁷ See Stuart Wilson and Jackie Dugard, 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 3 *Stellenbosch Law Review* 664, 677 (there 'was no difference in income or socio-economic status between the Phiri residents and people living in informal settlements.').

¹³⁸ Wilson and Dugard, *ibid*, 677 n 48 ('In the High Court leg of the case, *Mazibuko v City of Johannesburg* 2008 4 All SA 471 (W) para 51, Tsoka J noted that Mogale City, a poorer municipality than the City of Johannesburg, provided ten kilolitres of FBW per household per month, in comparison to the City's provision of six kilolitres. Indeed, the applicants placed on record an econometric analysis of water tariffs and FBW allocations in South Africa's main metropolitan areas that revealed that other metropolitan municipalities provided more FBW and had more pro-poor water tariffs than

subsidise through the imposition of higher tariffs at the upper end of water consumption.¹³⁹ In fact, Smith argues that institutional bottlenecks rather than financial issues were the cause of the delay in addressing the service backlogs in question.¹⁴⁰

This overly narrow definition of basic needs also highlights the risks raised in Section 3.3.2(c) of adopting a 'basic survival needs' approach to the minimum core, both in terms of the potential for under-inclusiveness and the creation of false competition between two groups of poor communities – in this case represented by those in informal settlements and the community in Phiri.

South Africa's experiences with interpreting the content of the right to water demonstrate the complexity of quantifying what sufficiency means. A context-sensitive standard can be difficult to define and even more difficult to litigate. The facts of the *Mazibuko* case demonstrate the risks of under-inclusiveness that can result from a survival-based (or efficiency-based) approach to quantifying sufficiency, and the value of applying a more generous standard based on the amount of water required to live with dignity (which would include a sufficient quantity to drink, prepare food, bathe and flush the toilet).¹⁴¹ However, this case also indicates that the benefits of adopting a more generous standard will necessarily be balanced against the need to ensure financial sustainability.

7.2.2 Water quality

The right to water also requires that water be safe. This is not a unique feature of the human rights approach, as water quality is also a focus of good governance reforms. Despite this, there have been water quality concerns in both South Africa and Manila. In Manila, these appear to have been related to inadequate investment in maintenance,¹⁴²

Johannesburg.'))

¹³⁹ See Liebenberg (above n 124, 472.

¹⁴⁰ Smith, above n 47, 25.

¹⁴¹ See Edgar Pieterse, 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796, 802 (citations omitted). See also Section 3.3.2(c) above for a discussion of this approach.

¹⁴² There was a cholera outbreak in Tondo in 2003, which was the result of a wastewater contaminating the main waterline due to poor quality infrastructure: See Alliance of Progressive Labor, *Maynilad to blame for Tondo deaths due to water contamination* (2003); Willie T Ong, 'Public health and the clash of

while in South Africa both inadequate maintenance and the low levels of technical capacity in some municipalities have raised quality concerns.¹⁴³

However, the main threat to water safety in both Manila¹⁴⁴ and South Africa¹⁴⁵ has come from cost recovery policies that have forced households to turn to SSWPs or untreated water sources in order to meet their basic needs. While the imposition of these cost recovery measures has been driven by an understandable desire to ensure the financial sustainability of the WSS systems in question, when people are forced to resort to unsafe water it ultimately leads to higher State expenses in relation to health care and lost productivity.¹⁴⁶ Therefore, the imposition of unaffordable connection fees or water tariffs is not ultimately a pragmatic economic strategy for the State.

7.2.3 Affordable

The right to water requires that water be *affordable* in order to be economically accessible. This requirement sits at tension with the cost recovery imperatives of the good governance approach and, as discussed above, both South Africa and Manila have struggled to find a balance between these competing values. South Africa's experience seems to demonstrate that the recognition of the right to water will not immediately result in affordability becoming the dominant policy focus. However, it has clearly placed the issue of affordability on the policy agenda and, as the right to water has been implemented, there has been a discernible shift in the weight being given to this issue. In contrast, the issue of affordability has received less consideration in Manila.

The low priority given to the issue of affordability in Manila can be seen in the imposition of high connections fees (discussed above), and in the imposition of the highest bulk tariff rate on customers with shared connections (a feature of Manila Water's *Water for Poor* project) and on SSWPs, which service a large percentage of the

cultures: the Philippine cholera epidemics' in Milton J, Kerrie Lewis and L MacPherson (eds), *Public Health in Asia and the Pacific: Historical and comparative perspectives* (2008) 206, 218-219.

¹⁴³ Tissington et al, above n 53, 61-64.

¹⁴⁴ See, eg, McIntosh, above n 100.

¹⁴⁵ Tissington et al, above n 53, 64; David Hemson et al, 'Still paying the price: Revisiting the cholera epidemic of 2000 – 2001 in South Africa' (Municipal Services Project, 2006).

¹⁴⁶ See Section 3.2.1(b) above; Hemson et al, above n 145.

poor community.¹⁴⁷ The decision by the concessionaire not to use its discretion to place these households on to the lowest block rate is clearly motivated by profit and this is a concerning feature of PSP. The government is equally complicit in this arrangement, since it has the power to regulate the application of these tariff policies and has chosen not to do so.

The recognition of the right to water in the South African Constitution seems to have been a motivating factor in the government's decision to adopt the FBW policy in 2001. While there are flaws in this policy, it has been a positive development and has ensured access to a very basic amount of water for a significant number of South Africa's poor households. There is also evidence that the constitutional recognition of the right to water has given poor communities a sense of entitlement to access sufficient and affordable water services,¹⁴⁸ and that this has created political pressure on the government to adopt policies in line with these expectations. This capacity of human rights to reshape political expectations and to redefine what is seen as legitimate, is significant, even if difficult to measure.

Nevertheless, while the introduction of FBW in South Africa has partially addressed the issue of affordability, the regressive aspects of this policy (discussed above) have limited its capacity to resolve the issue. For those households that require more than 6 kilolitres a month, affordability is dictated by the tariffs charged for the second block of consumption (the block immediately after the FBW allocation). Despite this, Tissington et al found that the issue of affordability for this second block was not a consideration for either DWAF or the majority of municipalities,¹⁴⁹ and that no research had been done to see how much households in South Africa are paying for WSS services, and whether this is an affordable amount.¹⁵⁰ Evidence seems to point to the contrary

¹⁴⁷ See, eg, *The Experience of Small-Scale Water Providers in Serving the Poor in Metro Manila - Increasing Access* (Ausaid, 2004).

¹⁴⁸ See, eg, *Mazibuko v City of Johannesburg* (2009) 28 ZACC ; Peter Alexander, 'Rebellion of the poor: South Africa's service delivery protests - a preliminary analysis' (2010) 37(123) *Review of African Political Economy* 25; Jackie Dugard, 'Urban Basic Services in South Africa: Rights, Reality and Resistance' in M Langford et al (eds), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2013, forthcoming).

¹⁴⁹ Tissington et al, above n 53, 44.

¹⁵⁰ Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation*

conclusion since between 2003 and 2008 tariffs increased by 70 percent and have climbed steadily since.¹⁵¹ These steep price increases in the second consumption block have led to an increase in household debt and disconnections in many areas (even after the introduction of FBW).¹⁵²

Whether it is possible to challenge tariff structures for violating the right to water contained in section 27(1) of the Constitution is unclear. While the *Mazibuko* case did not raise the specific issue of affordability, it did challenge the sufficiency of the FBW allocation and the Constitution Court rejected the applicants' claims that it should be increased to 50 Lpcpd. Whether they would have been more successful if they had explicitly raised the need for tariff structures to ensure over-all affordability of a sufficient amount of water is an open question, but it is likely that this would also have been considered too prescriptive an issue for the Court to determine.

Nonetheless, there does appear to be increasing political pressure to increase the FBW allocation to 50 Lpcpd (or 12 kilolitres per household, per month), and a number of municipalities have done this already (or increased it to at least 9 kilolitres).¹⁵³ Additionally, despite the fact that the *Mazibuko* judgment was in their favour, the City of Johannesburg did increase the FBW allowance to 50 Lpcpd (for those on the indigency register) in response to the case.¹⁵⁴

In contrast, affordability is not a key consideration of the good governance approach and, as such, does not seem to be on the policy radar in Manila. It should be acknowledged that increased affordability has resulted from the reforms in Manila,

provision across 15 municipalities (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008).

¹⁵¹ See Wyndham Hartley, 'South Africa: Water Tariffs Set to Rise to Reduce Need for Borrowing', *Business Day* (Cape Town) 5 May 2010 <<http://allafrica.com/stories/201005050084.html>> at 26 March 2012; Tissington et al, above n 53, 41.

¹⁵² Bond and Dugard, above n 103, 9.

¹⁵³ See, eg, Calfucoy et al, above n 113, 28; eThekweni Municipality, *Policies and Practices of the eThekweni Municipality Water and Sanitation Unit* (2011); 'The price of free water in South Africa' (2009) 10(8) *Global Water Intelligence*.

¹⁵⁴ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights* (SAJHR) 39, 58.

which have assisted millions of poor people to connect to the more affordable public system. Nonetheless, the recognition of a right to water would bring the issue of affordability more sharply into focus and, perhaps, create some pressure to discount connection fees and ensure that poor communities have access to individual connections or to the lowest block tariff rate despite sharing a connection with other households.

7.2.4 Physically accessible

Both the right to water and the good governance approach focus on increasing physical access to water, but these approaches differ in terms of the level of scrutiny applied to the kind of access being provided. Providers in both Manila and South Africa have experimented with lower standards of service in order to more affordably expand services into poor communities. However, the right to water provides a clearer framework for critiquing the standard of service being provided to poor communities, and the inequitable result of differentiating on the basis of social class.

For example, there has been some debate as to whether it is acceptable that the lower levels of service ('LOS') provided in Johannesburg do not provide an in-house connection.¹⁵⁵ According to the City, this approach enables them to prioritise the provision of a basic level of service to all residents before progressively realising a higher LOS.¹⁵⁶ However, Smith reports that '[t]hese levels of service were not determined through any form of public consultation,'¹⁵⁷ which has resulted a perception by many community members that the imposition of LOS 2 'is unfair and inappropriate.'¹⁵⁸

The City has determined that permanent informal settlements and all new low cost housing will be provided with a LOS 2.¹⁵⁹ Households are able to upgrade to LOS 3, but they are required to pay a connection fee of R1,445.65 (USD166),¹⁶⁰ and for many poor households this amount is unaffordable. Smith argues that this 'approach ... helps to

¹⁵⁵ Rooyen et al, above n 47, 67-72.

¹⁵⁶ See Smith, above n 47, 24.

¹⁵⁷ Ibid.

¹⁵⁸ Rooyen et al, above n 47, 70.

¹⁵⁹ See Rooyen et al, above n 47, above 70-71; Smith, above n 47, 25.

¹⁶⁰ Johannesburg Water, *Amendment of Tariff Charges for Water Services and Sewerage and Sanitation Services: 2012/13* (2012) 20.

perpetuate inequality as people living in shacks in remote settlements have historically been denied the opportunity to earn the incomes that would make a higher quality of home and services affordable.’¹⁶¹

Rooyen et al report that members of the Gauteng provincial government have also begun to question the acceptability of LOS 2.¹⁶² In 2009, the Gauteng Housing MEC, Norvula Mokonyane, opposed ‘outside toilets due to safety, dignity and weather issues, and to the “fetch and carry” that would have to be done also by children, the elderly and the sick.’¹⁶³

These debates around the appropriateness of LOS 2 reflect the shifting international attitudes, discussed in Section 3.2.2, towards what physical accessibility requires under the right to water.¹⁶⁴ Although universal access to an in-house connection may be an unrealistic standard for South Africa at the moment, Smith’s concerns that the present level of service divisions serve to further entrench inequality is something that ought to be considered. This also raises the issue of ensuring equity and non-discrimination in the provision of water services (which will be discussed below).

Manila Water’s *Water for the Poor* program also provides a lower level of service to poor communities in order to accelerate the process of connecting them to the WSS system. The benefits of this program are significant and have understandably received considerable attention.¹⁶⁵ However, the inequitable results of these lower levels of service, in terms of forcing these consumers on to the highest block tariff rate, making them to pay an additional surcharge to community water managers, and providing substandard physical infrastructure (which raises water quality concerns) has received far less attention. For example, as the experience of South Africa demonstrates a legal right to water may give poor communities (and civil society) a stronger position from

¹⁶¹ Smith, above n 47, 25

¹⁶² Rooyen et al, above n 47, 71.

¹⁶³ Ibid (citation omitted).

¹⁶⁴ See, eg, Richard Connor et al, 'Chapter 5: Water management, institutions and capacity development' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 4: Managing Water under Uncertainty and Risk* (2012) 133, 142.

¹⁶⁵ See, eg, Maria Lourdes Baclagon, *Water for the Poor Communities (TPSB) - Philippines* (United Nations Economic and Social Commission for Asia and the Pacific, 2004); PPIAF and ADB, above n 82.

which to challenge the details of programs either politically or via litigation, which even if unsuccessful (such as in Mazibuko) can create opportunities for participating in public policy debates.¹⁶⁶

7.3 Implementing the right to water

As discussed in Chapter 3, the right to water imposes an obligation of progressive realisation, but also includes a number of obligations of immediate effect, including the presumption against retrogressive action and the obligation of non-discrimination. The concept of progressive realisation recognises the challenges posed by the reality of resource constraints. Obligations of immediate effect recognise that some obligations place less demands on the budget or, are so fundamental, that they ought to be prioritised regardless of financial capacity. The challenge of both adhering to and enforcing these standards has been evident in South Africa.

7.3.1 Progressive realisation

South Africa has made steady progress on gradually expanding physical access to basic water services in its efforts to achieve universal access.¹⁶⁷ Although there has been criticism of the slow speed of this progress and the inadequate levels of funding to support its achievement,¹⁶⁸ there has been continual improvement in relation to this goal and this appears to be a positive application of the progressive realisation standard.

The progressive realisation of sufficiency has not reflected a similar commitment. The daily individual allocation of 25 Lpcpd in the 2001 FBW policy¹⁶⁹ reflects the short-term goal set out in the RDP.¹⁷⁰ In its 2003 FBW policy document, the government made it clear that the RDP's more generous medium-term goal of 50-60 Lpcpd was

¹⁶⁶ See, eg, Dugard and Langford, at n 154.

¹⁶⁷ Department of Water Affairs (South Africa), *Water Backlog Eradication* <http://www.dwaf.gov.za/dir_ws/wsnis/default.asp?nStn=pg_Reports&SAID=255&SASID=997&curPerspectiveID=2> at 18 January 2013.

¹⁶⁸ See, eg, Tissington et al, above n 53, 25-31.

¹⁶⁹ Department of Water Affairs and Forestry (DWAF), *Free Basic Water Implementation Strategy* (Version One 2001) South Africa.

¹⁷⁰ African National Congress (ANC), *Reconstruction and Development Programme* (1994) South Africa, para 2.6.6.

being put off for the future.¹⁷¹ However, a decade later (and almost two decades since the adoption of the RDP) no move has been made to increase the national subsidy to enable an increase in this basic allocation of water.¹⁷² As a result, although some well-resourced municipalities have taken the initiative to increase the allocation to indigent households, six kilolitres per household per month has become the maximum for poor municipalities (where it is provided at all).¹⁷³

Muller argues that it is appropriate that the FBW allocation should be kept at its current level until all households have received access to this basic level of service.¹⁷⁴ However, given reports that service delivery backlogs are being caused more by structural problems and institutional bottlenecks than financial constraints,¹⁷⁵ the evidence does not support linking these two goals. Furthermore, as discussed above, sufficiency must be determined in a context-sensitive manner and constraining everyone to this very basic amount does not respond to this reality.

7.3.2 Presumption against retrogressive measures

One of the obligations of immediate effect described by CESCR in *General Comment No.3* is the presumption against retrogressive measures.¹⁷⁶ The applicants in the *Mazibuko* case argued that, in relation to the right to water, this obligation meant that the State should not be permitted to either reduce the standard of water that they were currently receiving or impose disconnections for nonpayment.

Before the introduction of Operation Gcin'amanzi, the applicants, and the rest of the Phiri community, had been receiving an unlimited water supply and were being charged a flat rate for this water. Furthermore, many of them were not paying their water bills, meaning that they were effectively receiving this water for free. The need for the City to change this status quo, in the context of significant NRW and the serious budgetary

¹⁷¹ (DWAF), *Strategic framework for water services* (September 2003) para 4.4.1.

¹⁷² Department of Water Affairs and Forestry (DWAF), *Free Basic Water* (2012) <http://www.dwaf.gov.za/dir_ws/fbw/#> at April 2012 .

¹⁷³ Ibid. See also Tissington et al, above n 53, 32.

¹⁷⁴ Muller, above n 108.

¹⁷⁵ Smith, above n 47, 25; Tissington et al, above n 53, 28-29.

¹⁷⁶ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002), para 19.

challenges that it was facing, was understandable and the Court found that it was reasonable for them to alter the level of access available to the applicants in light of these considerations. This finding demonstrates that the recognition of the right to water still enables water governance to find a balanced approach to ensuring both financial sustainability and affordable access.

However, the imposition of disconnections is a more extreme measure. As Tsoka J notes in his judgment, there has been a global trend of banning water disconnections¹⁷⁷ and in the context of Phiri, the operation of the PPMs resulted in the applicants not having access to water for about two weeks every month.¹⁷⁸ However, the Constitutional Court adopted a different approach and found that PPMs suspended rather than discontinued the applicants' water supply and, thus, did not result in a breach of s 4(3) of the WSA (which prohibits disconnections unless they are carried out with certain procedural protections).¹⁷⁹

The Court's characterisation of the word 'discontinue' as meaning 'permanent discontinuation,' seems to ignore the word 'limit' in section 4(3).¹⁸⁰ Even if the operation of a prepaid meter does not 'discontinue' a consumer's water service, it clearly 'limits' it. Pierre de Vos argues that the implication of this interpretation is to render section 4(3) virtually meaningless,¹⁸¹ and that the Court expressly ignored the word 'limit' contained in the legislation 'in order to justify its endorsement of the neo-liberal water policies of the City of Johannesburg [that] would often deny poor people access to adequate water...'¹⁸²

The characterisation adopted by the Court is in striking contrast to the manner in which this same issue was considered in the *UK in R v Director General of Water Services (1998)*.¹⁸³ In that case Harrison J argued:

¹⁷⁷ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 para 91.

¹⁷⁸ *Ibid* para 84.

¹⁷⁹ *Water Services Act 1997* (South Africa) s 4(3).

¹⁸⁰ *Ibid*.

¹⁸¹ Pierre de Vos, 'Water is Life (but Life is Cheap)' *Constitutionally Speaking Blog*.

¹⁸² *Ibid*.

¹⁸³ Tsoka J cited this decision in his judgment at first instance: *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 para 90.

I can see no material difference between the supply being cut off by the automatic operation of the undertaker's BPU [PPM] and it being cut off by the undertaker's employees. [...] In both cases the supply is cut off by the undertaker as a result of a failure to pay.¹⁸⁴

The UK Parliament's response to this case was to pass the *Water Industry Act 1999*, which contains a complete ban on disconnections for non-payment.¹⁸⁵

7.3.3 Non-discrimination and equality

The right to water also carries with it an immediate obligation to ensure non-discrimination in access to water services.¹⁸⁶ As discussed above, the imposition of an unaffordable connection fee in Manila has had a clear discriminatory affect by creating a barrier to access for the poor and there has been little political pressure to address this issue. In contrast, the recognition of the right to water in South Africa has highlighted these kinds of issues and has created political pressure to provide targeted programs to ensure affordable access.

Nevertheless, Tissington et al argued that within South Africa there still exists 'an underlying antagonistic and paternalistic attitude towards the poor within a prevailing cost-recovery preoccupation.'¹⁸⁷ Bond and Dugard describe this as a class bias against the poor, and point to the deliberate policy of constraining poor people's access to the often-inadequate FBW allocation as evidence of this problem.¹⁸⁸

The introduction of the FBW policy and the adoption of indigent or social policies to provide additional assistance to the poor have both been intended to address some of the discriminatory legacy of apartheid policies by facilitating access to water for the poor. However, these policies have also been introduced in ways that have reinforced the discrimination and stigma experienced by the poor under State policies. For example,

¹⁸⁴ *R v Director General of Water Services* (1999) Env LR 114 (QBD) 130.

¹⁸⁵ *Ibid* s 1. See also Explanatory Notes, para 7.

¹⁸⁶ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) paras 12-16.

¹⁸⁷ Tissington et al, above n 53, 72.

¹⁸⁸ Bond and Dugard, above n 77, 20.

FBW has also been used as a justification for the continued imposition of punitive credit control and demand management measures on the poor.¹⁸⁹

Researchers report that the many different indigent registers have been controlled through the application of inconsistent, onerous and exclusionary criteria, with the result that the number of registered indigents is highly under-representative of those who actually qualify for and need FBW.¹⁹⁰ For example, in 2008 there were 108,000 households registered as indigent in the City of Johannesburg, despite the fact that an estimated 500,000 formally qualified as indigent.¹⁹¹ This accounts for just over 20 percent of qualifying households and demonstrates that the indigent register, as it is currently managed, is not an effective means of allocating benefits.¹⁹² As a result, Tissington et al report that ‘the most vulnerable societal groupings (women, child-headed households, and the unemployed) frequently are not aware of the indigent policy or register and/or do not register for fear of attracting adverse official attention.’¹⁹³

Many municipalities also administer their indigent registers in a manner than serves to stigmatise those who have registered.¹⁹⁴ Some employ inspectors who may visit indigent households to record any changes in conditions and potentially decide to discontinue the indigent subsidy, while others impose criminal sanctions for providing

¹⁸⁹ See, eg, Calfucoy et al, above n 113, 9; Tissington et al, above n 53, 38.

¹⁹⁰ See, eg, Bond and Dugard, above n 77, 25, n.69; Calfucoy et al, above n 113, 9; Tissington et al, above n 53, 36.

¹⁹¹ Bond and Dugard, above n 77, 25, n.69, citing the answering affidavit of Rashid Seedat, Director of the Central Strategy Unit within the Office of the Executive Mayor of Johannesburg (22 January 2007) in *Mazibuko & Others v City of Johannesburg & Others*: <www.law.wits.ac.za/cals>, para 31.4.2. A similar situation existed in Phiri in 2004, where only 30,000 out of an eligible 150,000 households were registered for the ‘special cases’ policy (the City’s indigency policy): *Applicants’ Heads of Argument*, in *Mazibuko v City of Johannesburg*, High Court of South Africa (Witwatersrand Local Division) (2007) para 107.

¹⁹² Tissington et al, above n 53, 37 (In a survey of 15 municipalities across South Africa not one municipality indicated that the number of registered indigents was representative of the number of poor people who formally qualify for FBS.).

¹⁹³ Tissington et al, above n 53, 38.

¹⁹⁴ See, eg, Bond and Dugard, above n 77, 25, n.69; Calfucoy et al, above n 113, 10; Tissington et al, above n 53, 38. Judge Tsoka also notes that ‘People are reluctant to register as indigent for fear of social stigma’ in *Mazibuko v City of Johannesburg* (2008) 4 All SA 471, para 146.

false information, coupled with disqualification from further participation and a liability to immediately repay all subsidies received.¹⁹⁵ The imposition of flow restrictors or PPMs is also common and this further penalises and stigmatises indigent households.¹⁹⁶

In her recent report into stigma and the right to water, the UN Special Rapporteur on the right to water emphasised the importance of grounding policy approaches on human dignity and equality in order to avoid stigmatising or discriminating against individuals or groups.¹⁹⁷ The Special Rapporteur also emphasised the importance of ensuring ‘meaningful participation’ and empowerment to combat stigma and to ensure that groups are aware of their rights.¹⁹⁸

Despite the problematic imposition of the higher than normal tariffs, it is relevant to note that Manila Water’s *Water for the Poor* program has been successful in good part because it has included the meaningful participation of the community and has included a number of empowering elements (such as employment generating activities and self-governance) that have helped to build social capital in these communities.¹⁹⁹ The significance of this participation will be discussed further in Chapter 8.

In the *Mazibuko* case, the applicants argued that by selectively imposing credit-control measures, Operation Gcin’amanzi echoes apartheid era policies by conveying the paternalistic message that their poor, black community are not as capable as white consumers of regulating their own affairs.²⁰⁰ This argument was accepted by Tsoka J, who found:

To argue, as the respondents do, that the applicants will not be able to afford water on credit and therefore it is "good" for applicants to go on prepayment meters is patronising. That patronisation sustained apartheid: its foundational basis was

¹⁹⁵ Tissington et al, above n 53, 38.

¹⁹⁶ See, eg, Calfucoy et al, above n 113, 9; Tissington et al, above n 53, 38.

¹⁹⁷ Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, A/HRC/21/42 (2012), paras 44, 48-51.

¹⁹⁸ Ibid, paras 60-63.

¹⁹⁹ See, eg, Baclagon, above n 165.

²⁰⁰ See *Applicants' Submissions*, in *Mazibuko v The City of Johannesburg*, ZACC (2009), para 308.4.

discrimination based on colour and decisions taken on behalf of the majority of the people of the country as "big brother felt it was good for them".²⁰¹

However, the Constitutional Court disagreed and found that the PPMs were actually beneficial for the applicants because they prevented them from the risk of having to face the 'range of severe consequences' that could befall them if they failed to pay a credit-based water bill on time.²⁰²

This finding seems to ignore the range of severe consequences that did befall the applicants as a direct result of having prepaid meters installed. These included not having the benefit of the procedural safeguards afforded to households with credit meters, and thus being forced to endure the threats to health and human dignity of having to go without water services for days or weeks each month because they are unable to make representations regarding their lack of capacity to pay for services. In the case of the fifth applicant, Vusumuzi Paki, these consequences also included not having enough water to extinguish a shack fire on his property, with the tragic result that two young children burnt to death inside.²⁰³

The applicants in the *Mazibuko* case had hoped that their action would compel the Constitutional Court to give a substantive interpretation of the right to water and that such an interpretation would necessitate an analysis of the structural inequality that continues to exist in South African society.²⁰⁴ As Bond and Dugard argue, 'the South African Constitution compels the kind of interpretation of rights [...that necessitate] an analysis of power.'²⁰⁵ Instead the judgment's deferential approach acted to reinforce the status quo.

Wilson and Dugard are particularly critical of the fact that '[t]he needs of the twenty percent of residents, whom the court acknowledges will have insufficient water in the applicants' case, form no part of the analysis.'²⁰⁶ In the *Grootboom* judgment,²⁰⁷ the

²⁰¹ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 para 153.

²⁰² *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 156.

²⁰³ Vusumuzi Paki, *Affidavit in Mazibuko v City of Johannesburg*, In the High Court of South Africa (Witwatersrand Local Division) (2006).

²⁰⁴ Dugard and Langford, above n 154, 51.

²⁰⁵ Bond and Dugard, above n 103, 1.

²⁰⁶ Wilson and Dugard, above n 137, 677.

Court set down a test for whether a government program is reasonable in the context of achieving socioeconomic rights, which includes the following:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. *To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.* Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, *the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test* [emphasis added].

Assessing the reasonableness of the City's FBW allocation by reference to the average household rather than the twenty percent for whom it results in insufficient water, does seem to 'leave out of account the degree and extent of the denial of the right they endeavour to realise.' This seems to indicate that the Court had concluded that the applicants (and other similarly situated households) did not qualify for this consideration because they were not the 'most desperate,' despite their evident vulnerability.²⁰⁸

Theoretically, the recognition of the right to water should ensure that water governance is non-discriminatory, but this has been compromised in South Africa by both cost recovery imperatives and entrenched social inequality. Nonetheless, social transformation is a long-term project and there is some evidence, in both the ongoing development of South Africa's water policies and the political demands being made by the poor themselves, that the recognition of the right to water is both legitimising the rights of the poor and having an equalising influence in South African society.

Conclusion

This chapter argues that good governance reform can make a positive impact on access to water for the poor by helping to increase both financial sustainability and efficiency

²⁰⁷ *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC) para 44.

²⁰⁸ See Wilson and Dugard, above n 137, 676-677.

of the WSS system. The potential for these positive effects is evidenced by the achievements of Manila Water, which connected millions of households to the Manila water system and reduced NRW from 63 to 22 percent in the first decade of the concession period. However, the case studies examined in this thesis, and particularly the financial collapse of Maynilad, also demonstrate that the market-based reforms dictated by the good governance approach provide no guarantee of these economic improvements, which indicates that a more flexible approach is warranted. Furthermore, the case studies in both Manila and Johannesburg demonstrate that these economic values are overly emphasised by the good governance approach at the expense of ensuring both conservation and equitable access.

South Africa's experience demonstrates that rather than representing a threat to good governance reform, the recognition and implementation of the right to water can help to make it more flexible, balanced and context-sensitive by highlighting the need to ensure affordability, sufficiency and non-discrimination. South Africa's experiences also demonstrate the complexity and challenges of progressively realising socioeconomic rights. The limitations of scarce resources and the competing considerations of financial sustainability and conservation create a tension with the need to continually expand physical access to water and to ensure that this access is safe, sufficient, affordable and non-discriminatory. This is a tension that will need to be managed in order to effectively address the crisis of access to water that threatens the lives and human rights of so many poor people in the Global South.

South Africa's experience also demonstrates that the recognition of the right to water can open a dialogue over the appropriate approach to water governance and can help to legitimize the voices and concerns of the poor within this dialogue. While the *Mazibuko* case did not result in a favourable judgment, the applicants in the case felt that it provided them with a valuable platform from which to participate in public policy debate. This can be contrasted with the experiences of civil society in Manila, whose attempts to litigate in the public interest was often blocked by their lack of standing.

Liebenberg argues that the Constitution was designed to encourage the economic and social transformation of South African society, particularly through the inclusion of

socioeconomic and participatory rights.²⁰⁹ However, this project of social transformation needs the commitment of both the government and the Constitutional Court, and the deferential approach adopted by the Court in the *Mazibuko* case limits the extent to which rights-litigation can challenge the current status quo. Whether this is an inherent weakness in so-called ‘rights talk’ and rights-litigation is an issue that will be discussed further in Chapter 8, which will consider the value of participation in water governance from the perspective of both good governance and human rights.

²⁰⁹ Liebenberg, above n 124.

Chapter 8. The value of participation

As discussed in Chapter 4, in recent years there has been a growing recognition of the value of participation in terms of its capacity to contribute to the efficiency and sustainability goals of good governance-style development, by increasing the community's sense of ownership over water policies and their sense of responsibility for water conservation.¹ Participation is also valued for its capacity to increase equity in policy and project outcomes, by enabling the community to influence the content and implementation of water policies and projects, and to hold the State to account for adhering to agreed outcomes.² This capacity to contribute to both efficiency and equity is often described as the 'instrumental' contribution of participation, meaning that it is valued for the outcomes that it is assumed to produce.

Participation is also increasingly being recognised for its intrinsic value to individuals and communities, because people attach a separate value to the process of participation itself, partly for its capacity to both empower and legitimate them as active participants in their communities.³ This legitimising effect is also relevant to projects and policies, as it argues that if decisions affecting people's lives are to be legitimate then they must make space for those people to meaningfully participate in the decision-making process.⁴

In relation to water governance, this is relevant because participation is valuable both for its capacity to improve water governance outcomes, in terms of efficiency, financial sustainability and equity, and because people value their right to participate in water governance. Emphasising this latter intrinsic value may also help to increase the priority accorded to participation, because the instrumental benefits of participation are often discounted due to perceptions that they are insufficiently supported by evidence or

¹ See Section 4.1.2, particularly 4.1.2(a), above.

² See nn Section 4.1.2(b) above.

³ See Section 4.1.3 above.

⁴ See Jona Razzaque, 'Public participation in water governance' in Joseph W. Dellapenna and Joyeeta Gupta (eds), *The evolution of the law and politics of water* (2009), 354-355; Joseph W Dellapenna, 'The Berlin Rules on Water Resources' (Report of the 71st Conference, International Law Association, 2004), art 18.

because participatory processes come into conflict with other methods of increasing efficiency or financial sustainability.⁵ For example, Russell's research into the attitudes of WSS specialists in relation to incorporating the right to water into their water programming found these specialists expressed concern that adopting 'rights-based strategies, which in theory involve community consultation and participation in water projects, can be expensive and slow down progress in meeting development targets.'⁶

Good governance theory does recognise that participation has the capacity to increase community ownership and empowerment, maximise social welfare, reduce corruption, and increase responsiveness.⁷ However, this has not always translated into a full commitment to participatory water governance. For example, Manila's experience with private sector participation ('PSP') demonstrated some commitment to participation in relation to the implementation of the *Water for the Poor* program. However, it also demonstrated that PSP can raise new barriers to participation, particularly in relation to transparency and accountability.⁸

This gap between theory and practice is also evident in South Africa's rights-based approach to water governance. Despite the constitutional commitment to both a right to water and a right of participation, Tissington et al found that over-all the implementation of water policy in South Africa has been marked by a lack of consultation and participation.⁹ They argue that water policy has instead been treated as a technical matter, relegated to the domain of specialists.¹⁰

⁵ See Maria Aycrigg, 'Participation and the World Bank: success, constraints, and responses' (Paper presented at the *International Conference on Upscaling and Mainstreaming Participation: of Primary Stakeholders: Lessons Learned and Ways Forward*, Washington DC, November 1998), particularly 17, 19, 27.

⁶ Anna F.S. Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1, 12 (citations omitted).

⁷ See Section 2.5 above. See also William J. Cosgrove and Frank R. Rijsberman, *World Water Vision* (World Water Council, 2000), 64.

⁸ See Section 5.5 above.

⁹ Kate Tissington et al, *Water service fault lines: An assessment of South Africa's water and sanitation provision across 15 municipalities* (Centre for Applied Legal Studies (CALS), Centre on House Rights and Evictions (COHRE), and Norwegian Centre for Human Rights (NCHR), 2008), 5.9, 68-71.

¹⁰ Ibid 69.

As mentioned in Chapter 4, there are four broad phases of the policy cycle in which participation can take place, (1) policy identification; (2) policy development; (3) policy implementation; and (4) monitoring and evaluation. Participation at each of the first three stages is important in order to ensure that community needs are taken into consideration in both the development and implementation of policy. Finally, public participation and transparency in the monitoring and evaluation stage is necessary to hold governments and service providers to account in meeting their obligations to the community. This chapter will examine the experiences of Manila and South Africa in relation to community participation in each of these phases of the water governance policy cycle, with a view to determining the role of participation within both the good governance and the 'right to water' approaches to water governance, and to understanding the value of participation to securing access to water for the poor and marginalised. Litigation as a form of participation will then be considered, with a view to evaluating the concerns of those scholars who argue that the result of the *Mazibuko* case demonstrates that the recognition of the right to water is not a useful path to securing water justice.

8.1 Participation in policy identification and development

Direct participation in the policy identification and development stages can take the form of community consultations; information sharing; or involving community members in a partnership or committee that actively develops policy. In relation to participation through representative democracy, protecting participation in these early policy stages may also involve ensuring transparency and open and fair elections. The application of the subsidiarity principle (which prescribes that policy and management decisions should be made at the lowest effective level)¹¹ can also help to bring government decision-making processes closer to the local community and increase the likelihood that government representatives will understand local conditions and needs.

¹¹ See 'Bonn Recommendations for Action' (*International Conference on Freshwater*, Bonn, 2001) rec

8.1.1 Manila

The initial process of privatisation accompanying Manila's water reform was conducted without any public consultation and very little transparency. This restriction of public participation is a common feature of PSP, particularly when it is the result of International financial institution ('IFI') conditionality (discussed in Chapter 2), which limits the ability of governments to decide on the best service delivery model and the key principles that will inform it. This restricts the public's capacity to influence these policy decisions both at the stage of selecting whether to adopt them and in relation to determining how they will be developed.

In Manila's case, no conditionalities were imposed on the Philippine government, but it still chose to avoid public scrutiny and not to involve the public in the development of the PSP policy. Instead, as Dumol reports, the government made a point of rushing the entire privatisation process through before the Congressional elections.¹²

8.1.2 South Africa

In South Africa, the right to participation is given legislative protection primarily through the *Promotion of Administrative Justice Act* ('PAJA').¹³ But this Act does not apply to executive actions,¹⁴ which means that the right of direct participation in South Africa does not apply to the first two phases of the policy cycle. This places more pressure on the second two phases to redress some of the power imbalance that can result from the exclusion of the community from these initial decisions. It also highlights the need for representative democracy in South Africa to enable the community to exercise some power over government representatives and, indirectly, over their policy choices.

Fourie and de Plessis observe that South Africa is still a developing democracy and has a way to go in developing a stronger culture of political participation and debate.¹⁵ They

¹² Mark Dumol, *The Manila Water Concession - A Key Government Official's Diary of the World's Largest Water Privatization* (in *Directions in Development*, 20766, World Bank, 2000) 27.

¹³ *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa).

¹⁴ *Minister of Health v New Clicks SA (Pty) Ltd* (2006) 2 SA 311 (ZACC) paras 447-449, 461.

¹⁵ Lynette Fourie and Neelje de Plessis, 'The function of electoral communication in a developing

argue that one barrier to developing this culture has been the political dominance of the ANC, which has been effective at ensuring a 'relatively stable transition to democracy, ... [but] is not an ideal situation for the sustainable functioning of a democracy.'¹⁶

Benit-Gbaffou analyses the impact of this ANC political dominance on local level political participation in Johannesburg,¹⁷ referring to the case of Trevor Ngwane, a former ANC councillor in Soweto: 'after having publicly expressed his opposition to the municipal strategy of commodification of water, he had no choice but to leave the party.'¹⁸

This issue is highly relevant for the *Mazibuko* case, because it highlights the political context in which Operation Gcin'amanzi was introduced. Ngwane went on to co-found the AFP, the organisation that was central to public opposition to the introduction of PPMs and supported the applicants in the *Mazibuko* case.¹⁹

8.2 Participation in the implementation stage

If community participation has been absent from the first two stages of the policy cycle then it is difficult for the intensity of participation to reach the level of Arnstein's *citizen power*,²⁰ because there is a limit to the power that can be conferred to the community when the key elements of policy have already been decided. Nevertheless, enabling the community to take an active part in the implementation of policy can still allow for adjustments to reflect local conditions and for the community to take some ownership of the policy. As discussed in Chapter 4, this kind of participation can be empowering by enabling people to increase their social capital.²¹

democracy: the case of South Africa' (2011) 11(4) *Journal of Public Affairs* 255.

¹⁶ Ibid 255.

¹⁷ Claire Benit-Gbaffou, 'Party politics, civil society and local democracy - Reflections from Johannesburg' (2011) 43 *Geoforum* 178.

¹⁸ Ibid 182.

¹⁹ See, eg, Carina van Rooyen et al, *The Water Dialogues: Johannesburg Case Study* (The Water Dialogues South Africa, 2009), 63.

²⁰ See Sherry R. Arnstein, 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216, 4 (discussed in Section 4.4.1 above).

²¹ See Siddiqur Osmani, 'Participatory governance: An overview of issues and evidence' in UNDESA

8.2.1 Manila

The absence of public participation in the initial privatisation process set the tone for the implementation stage of the policy cycle in Manila. The CA was allowed to define the limitations of participation and the community was given a very limited role under this agreement. Rather than acknowledging the community interest in the management of the water system, the RO, the government and the concessionaires excluded the public from all significant decisions. For example, the decisions to increase tariffs were made without even the basic public consultation period envisioned by the CA and mandated by section 9 of the *1987 Administrative Code*.²²

Under Manila's PSP arrangements, the community have very little access to information on the performance of the concessionaires. They were not privy to the contract renegotiations that allowed the concessionaires to delay service expansion targets and simultaneously increase tariffs. When civil society has tried to represent the public interest by promoting transparency and accountability, they have been hampered by their lack of access to information. Maynilad did not produce an annual report until it was reprivatised in 2007.²³ The independence of information that is available has also been compromised, because the five-year audit reports are produced by consultants working for the concessionaires, rather than an independent authority.²⁴

The contractual renegotiations demonstrated a tendency of both the concessionaires and the government to exclude community members from participating in decisions that directly affect their access to water services.²⁵ It could be argued that some of these

(ed), *Participatory governance and the millennium development goals (MDGs)* (2008) 1, 1, 7.

²² *Administrative Code 1987* (Philippines) s 9.

²³ Arthur McIntosh, *Asian water supplies - reaching the urban poor* (ADB, 2003), app 2, 175. It is unclear as to whether this situation has changed since 2003. The information is not available on Maynilad's website and the Regulatory Office's site has not been updated since 2005.

²⁴ Ibid.

²⁵ See *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court); *Center for Popular Empowerment v Maynilad Water Services Inc* (2005) WRC/WUC Case No.05-062c (Unreported) (NWRB); *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division); *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System*

decisions involve technical expertise and consideration of commercial realities. However, this exclusion undermines the claims that good governance (and PSP) encourages participation and the attendant benefits of community ownership, social welfare, and responsiveness.²⁶

Mary Ann Manahan, a researcher with Focus on the Global South, sums this up well:

And one of the key lessons in the privatisation fiasco that we are experiencing in Metro Manila is that, whether it is public or private, they're both prone and vulnerable to corruption and mismanagement. ... Manila Water's corporate management might be better than Maynilad, but nevertheless the shield of invisibility against corruption is shattered, because it isn't true that they're less politicised and less corrupt. In fact, they can influence government more easily than, for example, an individual like me, because they have power. And they have managed to *shrink the public and policy space* – you know, the democratic space – for pushing for such reforms. And they made pushing, particularly more difficult for us, now that they're the ones distributing water in Metro Manila [emphasis added].²⁷

This 'shrinking of the democratic space' is relevant both to the relationship between community participation and the right to water, and to the good governance approach to water reform. Due to the absence of a legal right to water and of the related right of participation, civil society in Manila has struggled to engage with the water governance process and this has made it very difficult for them to promote the rights of the poor to access water services.

At another level, however, PSP has actually increased participation for a sizeable minority of Manila's urban poor communities, who have been serviced by Manila Water's *Water for the Poor* program. This program enables formerly unserved poor communities to directly manage their own water services,²⁸ and participants in the

(MWSS) (2007) G.R. No 173044 (Unreported) (Supreme Court). See also Section 5.5 above for a discussion of these cases.

²⁶ See Cosgrove and Rijsberman, above n 7, 64.

²⁷ Interview with Mary Ann Manahan, Advocacy Coordinator at Focus on the Global South (Manila, 31 October 2006).

²⁸ Jude Esguerra, *Universal Service Coverage After the Crisis?* (United Nations Research Institute for Social Development, 2005).

program report that this process has had an empowering effect within communities by enabling poor people to build social capital, develop new skills, and expand access to water within their own communities.²⁹

Nevertheless, these projects are not provided with any formal protection, meaning that the concessionaires can undermine community control and investment at any point.³⁰ Esguerra reports that there have already been issues where community-based water co-operatives have been bypassed by the provision of new individual connections to households within the project area.³¹ While all households should have the option of obtaining individual connections, this raises many issues for the co-operatives that have invested considerable funds in building and maintaining shared connections. These issues have not, to date, been addressed and the concessionaires have no incentive to do so.³²

A further criticism of the *Water for the Poor* program has been the financial arrangements that have made it appealing to Manila Water in the first place (discussed in Sections 5.4.3(b) and 7.1.5).³³ The ADB has noted that it is these unique features, which guarantee profits for Manila Water, that have motivated them to create and expand the program.³⁴

²⁹ Interview with residents of informal settlements (Manila, 27 October 2006); Interview with residents of informal settlements (Manila, 3 November 2006). See, also, Maria Lourdes Baclagon, *Water for the Poor Communities (TPSB) - Philippines* (United Nations Economic and Social Commission for Asia and the Pacific, 2004), 22.

³⁰ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997), Art 5.3 (exclusivity). See also Esguerra, *Universal Service Coverage After the Crisis?* (United Nations Research Institute for Social Development, 2005) 17.

³¹ Interview with Jude Esguerra, economist at the Institute for Popular Democracy (Manila, 25 October 2006).

³² Ibid.

³³ See Baclagon, above n 29.

³⁴ PPIAF and ADB, 'The Design of the Manila Concessions and Implications for the Poor' (Paper presented at the PPIAF/ADB Conference on Infrastructure Development – Private Solutions for the Poor: The Asian Perspective, Manila, 28-30 October 2002) 3-4.

This raises questions about the link that good governance draws between participation, community ownership and principles of cost recovery.³⁵ Manila's experience seems to indicate that good governance primarily enhances a commercial, user-pays approach to participation. This consumer-style of participation seems to be limited in terms of Arnstein's ladder of intensity,³⁶ in that very limited power is being transferred to these communities. It is also problematic that participation is only being prioritised in circumstances where it will increase private profit, meaning there is no framework for enhancing access to water for the very poorest households.

On the other hand, the success of this program does lend support to the arguments that full cost recovery can increase participation and access to water for the poor.³⁷ As mentioned in Section 3.3.2(b), slum dwellers across the Global South are frequently denied access to public water systems under both public and private management.³⁸ This discrimination is a significant part of the water crisis facing poor communities and has been a fairly intractable problem to overcome.³⁹ If a commercial incentive has provided one of the few successful examples in overcoming such marginalisation and discrimination, it may warrant further consideration.

8.2.2 South Africa

Smith and Tissington et al argue that the tension between the cost recovery imperatives of South African municipalities and the low capacity of many poor South Africans to pay for water services have created a climate in which municipalities have resorted to a paternalistic and authoritarian style of water governance, particularly in relation to the introduction of credit control and demand management devices.⁴⁰ This top-down

³⁵ See Cosgrove and Rijsberman, above n 7, 64. See also Section 2.4 above.

³⁶ See Arnstein, above n 20, 4.

³⁷ See, eg, Cosgrove and Rijsberman, above n 7, 41; McIntosh, above n 23, 113.

³⁸ See, eg, Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, A/HRC/21/42 (2012); UNHABITAT, 'Chapter 3: Water and Human Settlements in an Urbanizing World' in UNESCO and WWAP (eds), *The United Nations World Water Development Report 2: Water a shared responsibility* (2006) 89 96-102.

³⁹ Ibid.

⁴⁰ Laila Smith, 'Conflict versus cooperation between the state and civil society: A water-demand management comparison between Cape Town and Johannesburg, South Africa' in Bernard Barraque (ed),

approach to water governance has served to exclude the interests and experiences of the poor and marginalised, and to disempower them in the process.⁴¹

This authoritarian approach has been particularly problematic in relation to the imposition of credit control policies, which have had a detrimental impact on access to water for the poor.⁴² It is notable, in this regard, that Tissington et al found that the one municipality that reported increasing communication rather than imposing credit control policies had a high rate of bill payment;⁴³ demonstrating that consultation is not only rights-affirming, but can also be an effective method of securing cooperation and financial sustainability. This mutually beneficial impact of increasing meaningful community engagement has also been affirmed through the recent *Raising the Citizens' Voices* project that has been implemented in a number of South African municipalities (discussed in Chapter 6).⁴⁴

Operation Gcin'amanzi was created without any public consultation, and its implementation phase adopted a formalistic process of consultation and participation that failed to meaningfully engage with the community.⁴⁵ Rooyen et al argue that the ANC-APF political conflict (mentioned above) influenced the way that JW handled the implementation process of Operation Gcin'amanzi,⁴⁶ because JW believed that good

Urban Water Conflicts (2011) 147; Tissington et al, above n 9, 72.

⁴¹ Tissington et al, above n 9, 69.

⁴² See Part 7.3.3 above.

⁴³ Tissington et al, above n 9, 50 ('One municipality in our study, Lepelle-Nkumpi, stands out for not engaging in credit control enforcement at all – instead municipal officials go door to door instructing users to pay their accounts, and they report a high level of compliance among households that can pay for services. This sensitive approach to non-payment in poor areas might not be replicable in larger municipalities, but our research suggests that alternative methodologies need to be explored.').

⁴⁴ See Laila Smith, "Raising Citizens Voice in the Regulation of Water Services": Building the foundations for local regulation in South Africa' (Paper presented at the *Fifth World Water Forum*, Istanbul, Turkey, 2009). See also Laila Smith, 'The Limits to Public Participation in Strengthening Public Accountability: A Reflection on the 'Citizens' Voice' Initiative in South Africa' (2011) 46(5) *Journal of Asian and African Studies* 504.

⁴⁵ Rooyen et al, above n 19, 60-64, 79-81; Smith, above n 40; *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 paras 122.

⁴⁶ Rooyen et al, above n 19, 63.

faith consultation with the AFP was unrealistic.⁴⁷ Smith also notes that the APF's dogmatic ideological approach 'helped to delegitimize them as a true "representative" of civil society,'⁴⁸ thus reinforcing JW and the City's antagonistic approach to community opposition.⁴⁹

Rooyen et al acknowledge that JW did focus on getting 'community buy-in' for Operation Gcin'amanzi, by holding numerous information sessions with ward councillors and, through them, various stakeholder groupings.⁵⁰ However, they are critical of this formal approach to public participation, arguing:

Focusing on ward councillors and ward committees link up with a notion of formal democracy, but does not acknowledge the need for substantive democracy, especially in the light of the weak functioning of ward committees in many parts of the country.⁵¹

Rooyen et al found that a crucial weakness in using the ward councillors as mediators was the fact that the Phiri 'ward councillor is perceived as quite distant from the community and is seen as either ignorant and/or arrogant with regards to the communities' feelings, perceptions and needs.'⁵² According to Smith, these stakeholder workshops were also only attended by a total of 138 people, or less than 5% of the Phiri community.⁵³

The style of participation adopted by JW has also been critiqued for its focus on disseminating information rather than engaging in meaningful community participation,⁵⁴ with Smith arguing that JW's 'marketing techniques should not be confused with genuine public participation processes.'⁵⁵

⁴⁷ Ibid 63-64.

⁴⁸ Smith, above n 40, 163.

⁴⁹ Ibid.

⁵⁰ Rooyen et al, above n 19, 60.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Smith, above n 40, 153.

⁵⁴ Laila Smith, *Neither Public nor Private: Unpacking the Johannesburg Water Corporatisation Model* (in Programme Paper Number 27, United Nations Research Institute for Social Development Social Policy and Development, 2006) 41.

⁵⁵ Ibid 28.

These different understandings of participation were reflected in the *Mazibuko* case. As discussed in Chapter 6, the High Court and the Constitutional Court differed in their findings of whether the implementation process constituted an ‘administrative action’ and whether it could be considered sufficiently ‘participatory.’

Tsoka J characterised the implementation of Operation Gcin’amanzi as an administrative process and found it was, therefore, subject to the participatory requirements in the PAJA.⁵⁶ He was also particularly critical of the City’s consultative process, describing it as a ‘publicity drive’ for a policy decision that was already a *fait accompli*.⁵⁷ He also found the City’s approach towards the community was ‘misleading, intimidatory and presumptive.’⁵⁸

However, the Constitutional Court made very different findings to those of Tsoka J. First, the Court disagreed with Tsoka J’s characterisation of the implementation process, and concluded that Operation Gcin’amanzi was an executive action and, thus, not subject to the PAJA.⁵⁹

Liebenberg is critical of this conclusion, arguing that Operation Gcin’amanzi constituted ‘policy formulation in a narrow rather than a broad sense’ and was, thus, an exercise of administrative rather than executive powers.⁶⁰ She further asserts that the effect of the Court’s overly broad construction of the executive powers of a municipal council is ‘to reduce the scope for public participation in decisions which affect the enjoyment of constitutionally guaranteed socio-economic rights.’⁶¹ This is problematic given the fact that the purpose of both section 33 and the PAJA is to make government action more transparent and accountable. By classifying decisions that have such a direct effect on the rights of the public, as executive rather than administrative, the Court effectively drew a curtain around significant areas of public policy.

⁵⁶ *Mazibuko v City of Johannesburg* (2008) 4 All SA 471 paras 105-112.

⁵⁷ *Ibid* para 122.

⁵⁸ *Ibid* para 122.

⁵⁹ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 127-131.

⁶⁰ Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 475.

⁶¹ *Ibid*.

Despite its finding that the PAJA did not apply, the Court went on to consider the question of whether the implementation process had been sufficiently participatory. In answering this question in the affirmative, the Court indicated that it considered the more formal, ‘information sharing’ style of participation adopted by the City to be sufficient. In keeping with the deferential approach of the rest of the judgment, the Court appeared to be unwilling to expand on the substantive content of the right of participation by asking, as Tsoka J did, whether the City’s approach constituted *meaningful engagement* with the community. This finding reflects Nyati argument that the Constitutional Court has adopted a minimalist approach to its assessment of the obligation to facilitate public participation, and that this has meant that the requirement that legislative bodies engagement *meaningfully* with the community has not been enforced.⁶²

Smith argues that ‘[t]he most unfortunate outcome of the Constitutional Court decision in relation to Phiri is that it ignored the Johannesburg High Court questions as to whether consultation with the public where ‘recipients are informed of the new policy’ is sufficient to be called meaningful participation.’⁶³ She also notes that it was precisely this failure to meaningfully engage with the community that forced the Phiri residents to resort to litigation in order to have their concerns addressed (an issue that will be examined further below).⁶⁴

Other South African municipalities have chosen to adopt a more participatory approach to water governance through the *Raising the Citizens’ Voices* initiative, which establishes new forums for increasing communication and seeks to modify conduct (on both sides) through meaningful and constructive dialogue.⁶⁵ Despite encountering challenges, this initiative has been successful in many of these goals.⁶⁶ A crucial feature of this approach is that it has the potential to create mutually acceptable and, thus, more

⁶² Ibid.

⁶³ Smith, above n 40, 166.

⁶⁴ Ibid.

⁶⁵ See Smith (2009), above n 44; Smith (2011), above n 44.

⁶⁶ Ibid.

sustainable solutions by seeking to balance the needs for both efficiency and equity in water policy.⁶⁷

8.3 Participation in the monitoring and evaluation stage (accountability)

The final stage of the policy cycle is monitoring and evaluation. Participation at this stage allows the community to hold the government (and service providers) to account for any failures in the implementation of water policy – failures of either design or execution that have had negative results for the community, particularly if those negative results involve a breach of rights. Genuine accountability requires transparency and that the public has easy access to the information it needs to hold the State and service providers to account. Additionally, the community also needs access to accountability-enforcing mechanisms through which to assert power over these more powerful actors. This can take the form of an effective regulator who is empowered to act in the public interest, or access to arbitration or judicial processes.

Good governance theory asserts the fundamental importance of all of these principles – transparency, accountability and the rule of law. However, its application in practice has not always underscored this commitment. In theory, the recognition of a legal right to water should provide an additional mechanism for ensuring enforceability of legal obligations and policy commitments, and that community members can invoke litigation as a mechanism to hold the government to account for any breaches of the right. This is what happened in the *Mazibuko* case, but there has been some debate as to whether the outcome of the case exposes the weakness of the right to water as a tool for advocacy and accountability. These issues will be discussed below.

8.3.1 Manila

Under the good governance approach adopted in Manila, it has been almost impossible for the public to hold the concessionaires to account for their failure to provide adequate services or to comply with the CA. When civil society tried to challenge regulatory decisions, contract amendments, or tariff increases that were made without the required

⁶⁷ Ibid.

public participation, the court held that they were not a party to the contract despite their obvious interest and, therefore, had no say in how it was to be applied or amended.⁶⁸ When Maynilad raised its tariffs and postponed its service targets (thus denying hundreds of thousands of residents access to piped water) the community was not consulted.⁶⁹ When community members tried to argue in court that these tariff increases and postponed targets were breaches of the CA, their claims were dismissed for want of standing.⁷⁰

With the general public's participatory role being limited by closed-door negotiations and privity of contract, it has been necessary to rely on the RO to protect the public interest. However, peculiarities in the set-up of the RO have meant that it has not always been able to perform this role very effectively. To be effective, a regulator must be independent and there must be clear mechanisms for ensuring its strength and capacity, but this was not adequately provided for in Manila.⁷¹ Due to the constrained timeframe set aside to privatise MWSS, it was also not possible to 'properly equip the RO with the technical and human capital needed for adequate regulation.'⁷² These factors have meant that the RO's capacity to ensure transparency and accountability, and to protect the interests of the community has been hampered by a lack of independence and weak capacity.

⁶⁸ See, eg, *Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)* (2007) G.R. No 173044 (Unreported) (Supreme Court); *Petition for Certiorari and Prohibition with a Prayer for Issuance of Preliminary Injunction and Application for a Temporary Restraining Order Freedom from Debt Coalition v Metropolitan Waterworks and Sewerage System (MWSS)*, Supreme Court of Manila (2006); *Center for Popular Empowerment v Maynilad Water Services Inc* (2005) WRC/WUC Case No.05-062c (Unreported) (NWRB); Interview with Manahan, above n 27.

⁶⁹ See, eg, *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court).

⁷⁰ Ibid.

⁷¹ Metropolitan Waterworks and Sewerage System (MWSS), *Concession Agreement* (MWSS, 1997) art 11.

⁷² Raul Fabella, 'Shifting the boundary of the state: the privatization and regulation of water service in metropolitan Manila' (Paper No 123, Centre on Regulation and Competition, Institute for Development Policy, University of Manchester, 2006) 28.

The RO was partially able to overcome its lack of experience and capacity by hiring a number of local and foreign consultants to both provide expert advice on specific issues and train personnel.⁷³ However, while consultants were brought in for one-off tasks, such as the 2002 rate-rebasing exercise,⁷⁴ and training has assisted in building staff capacity, the RO's low staff numbers⁷⁵ and generally low level of expertise has meant that everyday monitoring and compliance has not been assured.⁷⁶ Instead, Carino reports that the RO's reports tend to simply echo those compiled and submitted by the concessionaires, because it does not have the capacity to verify the information it receives.⁷⁷

The RO has also not been very successful in overcoming the problems created by its lack of independence. The MWSS Board of Trustees, which oversees the RO, is directly accountable to the President of the Philippines, who also appoints its members. Fabella argues that this lack of autonomy has meant that Presidential preferences have remained the ultimate determiner of tariff adjustment decisions and water governance continues to be a politicised issue.⁷⁸ He argues that many members of the Board are 'ex officio members as cabinet secretaries and their pliability to presidential revealed preference may determine their future career path in government or in other government corporation [sic]'.⁷⁹ He points out that on several occasions when the concessionaires have disagreed with the decisions of the RO they have been able to have the President overturn those decisions.⁸⁰ The example that he uses is the machinations that led to the

⁷³ Ibid 31-32.

⁷⁴ See Ibid 32 (In 2001 the Regulatory Office hired the UPecon Foundation, a private foundation based in the UP School of Economics, 'to form a rate rebasing team to evaluate the rate rebasing claims of the concessionaires and advise the RO on future courses of action.').

⁷⁵ See Sherry R. Arnstein, 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216, 4.

⁷⁶ Ledivia V Carino, *Regulatory Governance in the Philippines: A profile* (in Working Paper Series, Paper No.44, Institute for Development, Policy & Management, University of Manchester, 2002) 69.

⁷⁷ Ibid 69.

⁷⁸ Fabella, above n 72, 30-31.

⁷⁹ Ibid 30.

⁸⁰ Ibid 30-31.

adoption of Amendment No. 1, but the negotiations that took place over Maynilad's rehabilitation could also be used to illustrate this point.⁸¹

Fabella also argues that regulation was made far more difficult by the fact that the Filipino partners within both concessionaires were companies that have considerable political and financial influence in the Philippines.⁸² Benpres Holdings Inc. (Maynilad's initial Filipino partner) is a very large domestic company that, amongst other things, owns a media empire (ABS-CBN), and is capable of significant political influence both during and outside of election time.⁸³ It was this financial and political influence that Benpres was able to successfully use in the rehabilitation process in order to convince the government to 'bail out' the company and relieve it of its debts. As Fabella puts it, '[s]ize and clout are accepted buffers against regulatory risks especially in weak states.'⁸⁴

This demonstrated lack of regulatory independence has led critics to argue that privatisation has allowed the government to pressure the regulator to make politically convenient decisions, often to the detriment of consumers.⁸⁵ They are also critical of the weakness of the regulator and the fact that it has advocated for the concessionaires at certain points, rather than protecting consumers.⁸⁶ It is clear that the concessionaires have been able to use their political influence to their own advantage by renegotiating crucial terms of their contract and undermining community interest along the way.⁸⁷

⁸¹ Ibid 30-31; Interview with Esguerra, above n 31.

⁸² Fabella, above n 72, 48.

⁸³ Ibid 49.

⁸⁴ Ibid 49.

⁸⁵ This issue is particularly highlighted by the 'public utility' debate, under which the regulator was pressured to change positions and hold that the concessionaires were 'mere agents and contractors' of MWSS. Had they upheld their view that the concessionaires were public utilities, as implied by s 12 of the MWSS Charter, then Manila Water would have had to return PhP281 million to the public by way of tariff reductions or investments in the water system. See Freedom from Debt Coalition, *Recalibrating the Meter: A ten year overview of the MWSS Privatization Deal* (2008); *ibid* 38-42. See also, generally, Carino, above n 76, 69.

⁸⁶ Ibid; Jude Esguerra, *The Corporate Muddle of Manila's Water Concessions* (in New Rules, New Roles: Does PSP Benefit the Poor?, WaterAID and Tearfund, 2003) 25-28.

⁸⁷ Ibid.

Additionally, the remaining political entanglement between the government and the regulator has meant that service and expansion targets continue to be postponed in order to keep tariffs at politically acceptable levels, which favours the interests of those with water connections over those of unserved households (who tend to be poorer).⁸⁸

Bantay Tubig ('Citizens' Network for Adequate, Potable and Affordable Water') is critical of the fact that:

there are no effective mechanisms for the exercise of consumer power in this crucial public utility. [...] There is no consumer representation on the MWSS Board. There is no formal mechanism for making information accessible to the public and the media. Public hearings conducted by the MWSS RO do not give weight to consumer input and grievances.⁸⁹

In response to these problems, civil society has been calling for the establishment of a truly independent body to regulate the water utility sector.⁹⁰ However, so far these calls have been unsuccessful and some scholars argue that it would be very difficult for the government to establish an independent RO without amending the CA and it is unlikely to secure the agreement of both concessionaires to make such a change.⁹¹

8.3.2 South Africa

In South Africa the PAJA provides a range of accountability-enforcing mechanisms that are designed to empower the community to request that the government provide reasons for its decisions or reconsider them entirely. However, these mechanisms are only effective if they are adhered to and if the policy in question is deemed to be

⁸⁸ Esguerra, above n 28, 26.

⁸⁹ *Manifesto* (2002) Bantay Tubig, Citizens' Network for Adequate, Potable and Affordable Water <http://www.apl.org.ph/ps/110602_Draft_Bantay_Tubig_Manifesto.htm> at 6 December 2012.

⁹⁰ Carino, above n 76, 70; *Interview with Bubut Palattao, Advocacy Coordinator at Freedom from Debt Coalition* (Manila, 1 November 2006); Philippine Star, 'No improvement after 5 years of MWSS privatization - solon', *Philippine Star* (Manila) 11 April 2002; *Manifesto* (2002) Bantay Tubig, Citizens' Network for Adequate, Potable and Affordable Water <http://www.apl.org.ph/ps/110602_Draft_Bantay_Tubig_Manifesto.htm> at 6 December 2012.

⁹¹ Carino, above n 76, 70; *Interview with Bubut Palattao, Advocacy Coordinator at Freedom from Debt Coalition* (Manila, 1 November 2006); Philippine Star, 'No improvement after 5 years of MWSS privatization - solon', *Philippine Star* (Manila) 11 April 2002.

‘administrative’ rather than ‘executive’ in character. As discussed above, the decision of the Constitutional Court to accept the City’s characterisation of Operation Gcin’amanzi as entirely executive in character meant that the Phiri community were afforded no legislatively protected means of participation in the implementation process.

Another accountability-enforcing mechanism in South Africa is the requirement under section 4(3) of the *Water Service Act* (‘WSA’)⁹² that water disconnections will not be carried out without first providing an opportunity for households to challenge the decision or to provide evidence that they are unable to pay their water bill. This right to procedural justice has been undermined by the imposition of prepaid water meters (‘PPMs’) in some areas of South Africa, because they can discontinue a household’s water service without providing any opportunity for that household to make representations regarding their (lack of) capacity to afford additional water.

This automatic disconnection also serves to shield service providers and the government from the consequences of cost recovery on the poor. Considering the challenges that many municipalities have faced in attempting to improve payment rates and, particularly, considering the highly contested nature of their efforts to enforce debt collection, it is understandable that such a hands-off approach to credit control is appealing.⁹³ When households are restricted by default to the free basic water (‘FBW’) amount, municipalities do not have to spend any time or money on reading meters, billing or debt collection.

However, this technological, hands-off approach also means that municipalities can avoid dealing with the fact that households are being left with inadequate amounts of water to meet their basic needs.⁹⁴ By closing off the important channel of communication provided by the procedural justice requirements in section 4(3) of the WSA, this technological approach also risks damaging the relationship between the

⁹² *Water Services Act 1997* (South Africa) s 4(3).

⁹³ See, eg, Smith, above n 40; Laila Smith and Susan Hanson, ‘Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery’ (2003) 40(8) *Urban Studies* 1517; David A. McDonald and John Pape (eds), *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002); Tissington et al, above n 9, 40-45.

⁹⁴ Tissington et al, above n 9, 54; Patrick Bond and Jackie Dugard, ‘The Case of Johannesburg Water: what really happened at the pre-paid parish pump’ (2008) 12(1) *Law, Democracy and Development* 1.

service providers and the community. This could have negative consequences for the community's perception of the legitimacy of the actions of the service provider and their willingness to comply with the rules of service. The widespread vandalism and destruction of the PPMs in Phiri are, perhaps, indicative of the potential results of such an approach.⁹⁵

As discussed in earlier chapters, the Constitutional Court disagreed with the applicants' contention that the PPMs breached section 4(3) of the WSA by discontinuing or limiting their access to water services without first providing them with an opportunity to be heard. The Court's conclusions were surprising for a number of reasons. First, the Constitutional Court's finding that imposing a right to be heard prior to the disconnection of water by a PPM would 'have a result that borders on the absurd'⁹⁶ seems to reinforce the applicants' contention that PPMs were incompatible with the legislative guarantees of procedural fairness contained in the WSA.⁹⁷

Second, the differentiation between prepaid customers and credit customers seems illogical. The Court argued that no notice was required because a prepaid customer 'understands that the water meter will provide a certain quantity of water which may be exhausted...'⁹⁸ However, a customer with a credit meter also understands that their water will be discontinued if they fail to pay their bill.⁹⁹ It is not clear why one group of

⁹⁵ See, eg, Jackie Dugard, 'Rights, Regulation and Resistance: The Phiri Water Rights Campaign' (2009) 24(3) *South African Journal on Human Rights SAJHR* 593.

⁹⁶ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 122.

⁹⁷ See Liebenberg, above n 60, 474 (O'Regan J's argument that this 'would give rise to absurd results ... begs the question. If pre-paid meters are practically incompatible with legislative guarantees of procedural fairness, then they do not constitute a lawful device for limiting or discontinuing a person's water supply.').

⁹⁸ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 123.

⁹⁹ Indeed a similar argument was made by Streicher JA in his judgment for the Supreme Court of Appeal *City of Johannesburg v Mazibuko* (2009) 20(3) ZASCA 592 (SCA) para 55 ('On that basis one can argue that water services are not discontinued to a consumer to whom water is provided on credit when the water supply is cut-off due to non-payment. The only difference being that in the case of prepayment meters the customer can himself restore the supply whereas in the case of credit meters the co-operation of the supplier is required. In my view a cut-off of water services by a prepayment meter when the credit runs out clearly amounts to a discontinuation of the services (see *R v Director General of Water Services* [1999] Environmental Law Reports 114 (QB)).').

consumers should be denied access to procedural safeguards merely because of the technology being used to deliver their water supply.¹⁰⁰

Finally, this conclusion seems to disregard the participatory benefits afforded by the procedural safeguards. Not only do these safeguards give households a chance to prevent their water being disconnected, they also open a channel of communication that ensures that the government and water providers are not insulated from the knowledge that tariffs have been set at an unaffordable rate for many households (and that the FBW allocation is insufficient to meet their basic needs).

8.4 Litigation as a form of participation

Despite its rejection of the specific participatory rights claims of the applicants, at the end of the judgment the Court makes an important point that the *Mazibuko* case was a successful expression of community participation in the *dialogue* over social rights in South Africa. The Court also points out that through the process of litigation the applicants were able to secure many of the policy changes that they were seeking.

However, several scholars have questioned whether the *Mazibuko* case should be understood as a successful result for the applicants, given that the Court dismissed each and every one of their claims.¹⁰¹ They argue further that by reinforcing the status quo,¹⁰² and the neoliberal approach to water governance in South Africa, the case actually demonstrates the weaknesses of adopting a rights-based approach to securing water justice.¹⁰³

¹⁰⁰ Liebenberg, above n 60, 473-474 ('The implication of this interpretation is that the fundamental guarantees of procedural fairness provided for in the Water Services Act depend on the technical mechanism through which your water supply is measured. Rights of procedural fairness are only accorded for those with credit meters.').

¹⁰¹ Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317; Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012).

¹⁰² See, eg, Stuart Wilson and Jackie Dugard, 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 3 *Stellenbosch Law Review* 664.

¹⁰³ Ibid.

These perspectives on both the value and the limitations of litigation will be analysed below.

8.4.1 The value of litigation

The capacity to litigate can be a valuable means of protecting both socioeconomic rights and procedural rights, such as the rights to water and to participation. There are a variety of reasons for this. First, litigation is a form of participation that allows minority groups to challenge the power of the majority in order to ensure that a threshold level of equality is protected. Second, litigation provides a powerful forum in which individuals and communities can participate in the dialogue over rights and policy, and potentially benefit from the unique interpretive expertise of judges in the process. Finally, litigation allows individuals and communities to hold the State to account for any failures to respect, protect or fulfil rights, including socioeconomic rights, that are recognised by legislation or the Constitution, thus, fulfilling a significant participatory role in the ‘monitoring and evaluation’ stage of the policy cycle.

In a similar way, the realisation of socioeconomic rights can reinforce democracy, because they enable people to meet their basic needs and enable them to participate effectively in political life.¹⁰⁴ It is difficult, if not impossible, to be a full participant in political life if one is struggling with basic issues of survival.

The judicial enforcement of both socioeconomic and procedural rights can, thus, assist in securing a minimal level of equality for all, by safeguarding a certain base level of rights from the power of the majority. The need for this counter-majoritarian role of judicial review has been most commonly discussed in relation to a top-down, representative system of governance.¹⁰⁵ Where participation is limited to little more than voting for an elected representative there is always the risk that, once power has been secured, the majority will choose to disregard the rights of the minority. This has

¹⁰⁴ See, Liebenberg, above n 60, 32; Thenuis Roux, 'Democracy' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd ed, 2006), 10-57-10-58.

¹⁰⁵ See, eg, David Bilchitz, *Poverty and Fundamental Rights* (2007), 104 ('The problem for democracy arises as a result of the fact that once a majority has acquired power [in a representative system of government], it can tend to marginalize minorities in such a way that minorities are effectively unable to express their views and compete for power on equal terms.').

been one of the traditional justifications for the counter-majoritarian force of human rights protection.¹⁰⁶ This argument is strengthened further by the fact that representative democracy is highly susceptible to the lobbying power of well-connected interest groups.

In their work on empowered participatory governance processes, Fung and Wright describe the need for a *countervailing power*, which they define as ‘a variety of mechanisms that reduce, and perhaps even neutralize, the power-advantages of ordinarily powerful actors.’¹⁰⁷ One of the values of the judicial enforcement of rights is that it can act as such a countervailing power. In this regard, litigation can offer a safeguard against the power of the majority by redressing power inequities and imbalances through asserting a certain minimal level of equality through the protection of fundamental rights.

Aside from providing a source of countervailing power, the adjudication of the right to water is also useful due to certain advantages that judicial review brings to the interpretation of rights. The first of these advantages is expertise. Judges have considerable training and experience in the interpretation of rights and in assessing the compatibility of legislation and policy with the promotion and protection of these rights.¹⁰⁸ This means that the judicial interpretation of rights brings a valuable perspective to the dialogue over the meaning and content of the right within society. Additionally, the format of litigation provides the time and space for all the evidence relating to a specific rights-claim to be carefully considered.¹⁰⁹ Finally, courts are uniquely placed to provide relief to individuals or groups suffering from human rights violations in the form of judicial remedies that can be tailored to the unique

¹⁰⁶ Ibid.

¹⁰⁷ Archon Fung and Erik Olin Wright, 'Countervailing Power in Empowered Participatory Governance' in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (2003) 260.

¹⁰⁸ See, eg, Bilchitz, above n 105, 122.

¹⁰⁹ See, eg, Sandra Liebenberg, 'South Africa - Adjudicating social rights under a transformative constitution' in Malcolm Langford (ed), *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 74 (“courts and litigation ... have certain [institutional] advantages. For example, judges are well placed to consider in a reasoned, impartial manner the impact of policies and legislation on the constitutional rights of particularly vulnerable groups.”); Bilchitz, above n 105, 120.

circumstances of the case in question.¹¹⁰ Liebenberg argues that this capacity of litigants to ‘invoke the power of the courts to order “just and equitable” remedies ... is one of the key features distinguishing adjudication from other deliberative forums in democratic societies.’¹¹¹

8.4.2 The limitations of litigation

Despite the advantages mentioned above, litigation remains an option of last resort, because it is expensive and a time-consuming means of seeking accountability, especially for poor litigants.¹¹² This reality has led scholars to question whether litigation is a waste of time and resources.¹¹³ These scholars point out that socioeconomic rights litigation often fails to transform into real change and the implementation of judicial decisions is anything but guaranteed.¹¹⁴ Due to these challenges, it is asserted that litigation may be the wrong strategy to adopt in pursuing social justice aims, particularly if it involves diverting resources from activities viewed as more effective – such as public protests and political lobbying.¹¹⁵

¹¹⁰ See, Liebenberg, above n 109, 74 (Courts “are able to provide both individualized and systemic remedies that are carefully tailored to redress the particular circumstances of a rights violation.”).

¹¹¹ Ibid 66.

¹¹² See, eg, Liebenberg, above n 109, 479-480; Malcolm Langford, 'The justiciability of social rights: from practice to theory' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 3, 38.

¹¹³ See, for example, Michael J. Dennis and David P. Stewart, 'Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health?' (2004) 98(3) *American Journal of International Law* 462, 474-475; James L. Cavallaro and Emily J. Schaffer, 'Less as more: Rethinking supranational litigation of economic, social and cultural rights in the Americas' (2005) 56(2) *Hastings Law Journal* 217, at 235-251; Dennis M. Davis, 'Socioeconomic rights: Do they deliver the goods?' (2008) 6(3&4) *International Journal of Constitutional Law* 687. For a critical discussion of this issue see Langford, above n 112, 37-45; Malcolm Langford, 'Closing the gap? - An introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27(1) *Nordisk Tidsskrift for Mennekerettigheter* 1, 16-18.

¹¹⁴ Ibid.

¹¹⁵ See Edgar Pieterse, 'Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796; Liebenberg, above n 60, 480: ‘The resources and energy that are diverted to litigation can frequently produce more sustainable benefits when invested in building strong community organisations and development projects.’

Bakan argues that litigation can risk reinforcing the legitimacy of unjust laws or systems due to the tendency of courts to uphold the status quo.¹¹⁶ Scholars point out that this tendency and the impact of the legal culture on the claims of disadvantaged groups or social movements can also serve to reduce participation.¹¹⁷ Here it is argued the use of rights language can de-radicalise social movements and their claims by requiring them to reframe their demands in ways that will be accepted by the law, thus reducing their power to seek radical change that might challenge the status quo.¹¹⁸ Young makes a similar argument against the concept of a minimum core, contending that such an approach 'empties the democratic process of its necessary content, preventing citizens from entering into vital debates about the minimum substance of social and economic protection.'¹¹⁹

Brand also argues that the adjudication of socioeconomic rights can reduce participation by seeming to provide the final word on the subject and thereby shutting down future debate.¹²⁰ He argues that this can happen for a variety reasons, including 'the finality with which courts usually present their decision; ... the presentation by courts of their engagement with contested social issues as value-neutral...'¹²¹; and the 'language and rhetorical strategies' used in judgments to 'describe social issues as incapable of

¹¹⁶ Joel Bakan, *Just words: Constitutional rights and social wrongs* (1997) 31.

¹¹⁷ See Danie Brand, 'Writing the law democratically: A reply to Theunis Roux' in Stu Woolman and Michael Bishop (eds), *Constitutional Conversations* (2008) 97, 102-103; Jackie Dugard, 'Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice' (2008) 24 *South African Journal on Human Rights (SAJHR)* 214; Henk Botha, 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights*; Liebenberg, above n 60, 33-34.

¹¹⁸ See, eg, Brand, above n 117, 102; Bakan, above n 116; Liebenberg, above n 60, 33-34.

¹¹⁹ Katherine G. Young, 'The minimum core of economic and social rights: a concept in search of content' (2008) 33 *Yale Journal of International Law* 113, 160.

¹²⁰ See Danie Brand, 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed), *Theories of social and economic justice* (2005) 17.

¹²¹ Ibid; Brand, above n 117, 102-103, citing T Ross 'The rhetoric of poverty: Their immorality, our helplessness' (1991) 79 *Georgetown Law Journal* 1499 1502-1509.

political engagement (as, for example, too technically complex for political engagement...).' ¹²²

Bond and Dugard argue that this could be avoided if courts were willing to adopt a human rights model that grappled directly with the structural inequalities that disempower people from accessing or claiming their rights.¹²³ Brand also argues that one way for the courts to achieve this end would be to avoid 'in their socio-economic rights judgments the use and consequent confirmation of rhetorical strategies of depoliticisation commonly used in the political discourse around the interpretation of need and poverty.'¹²⁴ He also encourages the courts to enhance opportunities for poor people's political participation through the use of 'inventive remedies,' such as structural interdicts that require compulsory mediation between the applicants and the State to negotiate new policy outcomes that better accommodate their claims.¹²⁵

Nonetheless, as Langford argues,¹²⁶ it is important to take a nuanced approach to assessing the success of litigation as a strategy. Two arguments, which were of particular relevance to the applicants in the *Mazibuko* case (and which are that the effects of litigation must be assessed beyond the courtroom¹²⁷ and any critique of litigation must take into account the viability of alternative action.¹²⁸ As will be discussed in more detail below,¹²⁹ the applicants were able to secure most of the policy changes that they were seeking through litigation, despite the judgment not being in their favour. They had also turned to litigation only after intensive social mobilisation activities had been unsuccessful.

¹²² Ibid; Brand, above n 117, 102-103, citing T Ross 'The rhetoric of poverty: Their immorality, our helplessness' (1991) 79 *Georgetown Law Journal* 1499 1502-1509.

¹²³ See, eg, Patrick Bond and Jackie Dugard, 'Water, human rights and social conflict: South African experiences' (2008) 10(1) *Law, Social Justice and Global Development*.

¹²⁴ Brand, above n 120.

¹²⁵ Ibid.

¹²⁶ Langford, above n 112, 39-43.

¹²⁷ Ibid, 39-42.

¹²⁸ Ibid 42.

¹²⁹ See below nn 164-177 and accompanying text.

Despite this, these limitations of litigation do have several implications. First, they reinforce the fact that litigation is just one of a variety of processes through which the community ought to be able to participate in the development, implementation and review of policy. Ideally, a range of participatory and accountability-enforcing mechanisms will be available earlier in the policy cycle so that the community can influence policy and hold the State to account without having to resort to litigation.

Second, these limitations highlight the need for litigation to be as accessible as possible in order to counteract the barriers of cost and education that already prevent access by the poor. As the UN Special Rapporteur on the Right to Water has emphasised, '[a]ccess to justice must not only be provided for in the law, but be ensured in practice.'¹³⁰

A third implication of these limitations is that they highlight the need for judgments to be as clear and substantive as possible in order to provide clarity to applicants and policy makers (thus, reducing the need for further litigation on similar issues). Finally, as Brand suggests, these limitations highlight the need for litigation to reinforce participation, by both carefully scrutinising the State's respect for participatory rights and procedural justice, and by building participation-reinforcing mechanisms into judgments.

One example of such a participation-reinforcing mechanism is the structural interdicts that have been employed by the Constitutional Court of South Africa. The Court describes these structural interdicts as a remedy that leaves 'a margin of discretion to the government and the applicants to devise a concrete plan to give effect to the constitutional obligations broadly described in the initial order.'¹³¹ The Court employed this remedy in the case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*,¹³² which concerned an attempt by the City of Johannesburg to evict a group of residents from their inner city residences due to health and safety concerns.¹³³ At the conclusion of the hearing, the Court issued an interim order

¹³⁰ Albuquerque, above n 38, para 77.

¹³¹ Liebenberg, above n 109, 434.

¹³² *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 5 BCLR 475 (ZACC).

¹³³ For a full discussion of this case, see Liebenberg, above n 60, 293-303.

requiring the parties to ‘engage with each other meaningfully’ in order to resolve the dispute and to report back to the Court within two months.¹³⁴ The resulting agreement between the City and the occupiers comprehensively dealt with the concerns of both parties and was endorsed by the Court in its final judgment.¹³⁵ The Court also highlighted the way in which this process had reinforced the related nature of the procedural and substantive aspects of justice and equity.¹³⁶ While such a remedy would not be suitable to every socioeconomic rights claim, it does provide a significant example of how judicial review can be used to enhance public participation.

8.4.3 Public interest litigation in Manila

Despite the lack of legal protection for the right to water and the limited rights of participation, civil society has been able to use public interest litigation to place water justice issues on the public agenda and to secure a small number of tangible gains in Manila.¹³⁷ The *Administrative Code of 1987*¹³⁸ protects the public’s right to be consulted prior to the approval of water tariff increases and, when this right was not respected, civil society groups were successful in delaying the resulting tariff increase.¹³⁹

Furthermore, by challenging the details of the Debt Capital and Restructuring Agreement in court, civil society groups were able to place the details of this deal on the

¹³⁴ *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 5 BCLR 475 (ZACC) para 5.

¹³⁵ For a further discussion of the use of the structural interdict to require ‘meaningful engagement,’ see Lilian Chenwi, ‘A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others’ (2009) 2 *Constitutional Court Review* 371; Liebenberg, above n 60, 418-423.

¹³⁶ *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 5 BCLR 475 (ZACC) para 12.

¹³⁷ See Chapter 5.5 above.

¹³⁸ *Administrative Code 1987* (Philippines) s 9.

¹³⁹ *Maynilad Water Services Inc v National Water Resources Board* (2007) CA-G.R. SP No 92743 (Unreported) (Court of Appeals Manila 15th Division); Tech Torres, ‘CA Upholds NWRB’s authority to stop water rate hike’, *Inquirer* (Manila) 31 May 2007; ‘Court junks water rate hike due to CPE et al’s petition’, *Sunstar* (Manila) 1 June 2007 <<http://sunstar.com.ph/static/man/2007/06/01/news/court.junks.water.rate.hike.html>> at 5 March 2008. The case is still pending (Email from Mary Ann Manahan to Cristy Clark, 9 August 2013; Maynilad 2010 Annual Report: Witnessing Progress (Maynilad Water Services, Inc, 2011) 71).

public record.¹⁴⁰ They were also able to table evidence of the true value of the Benpres shares being purchased by the government. Although their attempts to pursue this case were dismissed for want of standing, the government did end up renegotiating the amendment and, significantly, adopting the valuation tabled by the applicants in the case.¹⁴¹

The recognition of the right to water and, of more expansive participatory rights, would have given civil society groups greater leverage in seeking to ensure that the government and the concessionaires prioritised access to water for the poor. Nonetheless, even working within the limitations of administrative law, they were able to strategically use litigation as a powerful platform to broadcast their concerns and to ensure that these issues received greater consideration by the government, the concessionaires and the media.

8.4.4 Mazibuko

Applicants in South Africa have a much stronger framework through which to litigate to promote access to water, due to the existence of the constitutionally protected right to water¹⁴² and the participatory rights contained in the PAJA.¹⁴³ As the *Mazibuko* judgment demonstrates, this human rights recognition does not guarantee that any particular claim will be successful. In this respect, the *Mazibuko* case highlights many of the limitations of litigation raised above. Nevertheless, it also demonstrates some of the values of litigation, in terms of its capacity to amplify the voices of poor and marginalised groups,¹⁴⁴ and to secure tangible gains outside of the judicial process.¹⁴⁵

¹⁴⁰ *Action For Economic Reforms v Hon Judge Daway* (2005) G.R. No. 167418 (Unreported) (Republic of the Philippines Supreme Court); Interview with Palattao, above n 90.

¹⁴¹ *Petition for Certiorari (with Application for Preliminary Injunction and Motion for Consolidation)*, *Action for Economic Reforms v Hon Judge Daway* G.R. No. 167418, (2005) para 24.

¹⁴² *Constitution of the Republic of South Africa 1996*, s 27.

¹⁴³ *Promotion of Administrative Justice Act (PAJA) 2000* (South Africa), ss 3, 4.

¹⁴⁴ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights (SAJHR)* 39, 58.

¹⁴⁵ *Ibid.*

In terms of reflecting the limitations of litigation, the *Mazibuko* judgment reflected several of the ‘participation-reducing’ tendencies highlighted by Brand.¹⁴⁶ The Court’s ‘abstract, decontextualised approach to interpreting the right to water’¹⁴⁷ and its deferential approach to scrutinising the City’s policies made the issues raised by the case to appear value-neutral. Instead of acknowledging the specific impacts of Operation Gcin’amanzi on the lives and rights of the applicants,¹⁴⁸ the Court focused on the technical complexity of the City’s policy dilemmas.¹⁴⁹ That the City’s challenges were significant is not in dispute. However, it is problematic that the judgment does not give a similar level of consideration to impact of these policies on the applicants’ right to access adequate water. As Brand has argued,¹⁵⁰ this emphasis on technical issues over the community’s experience risks creating the impression that the development of these policies was too complex to allow for a meaningful contribution by applicants.

Bond and Dugard also argue that the *Mazibuko* case ‘highlights the overall bias of water policy towards neoliberal characteristics’¹⁵¹ and ‘important ideological fault lines between a progressive rights-based approach to water delivery on the one hand and a

¹⁴⁶ Brand, above n 117, 102-103, citing T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Georgetown Law Journal* 1499 1502-1509; Brand, above n 120.

¹⁴⁷ Liebenberg, above n 60, 478-480.

¹⁴⁸ See Ibid; Wilson and Dugard, n 102, 675.

¹⁴⁹ See *Mazibuko v City of Johannesburg* (2009) 28 ZACC paras 84 (where the administrative burden of establishing the number of people living on a particular stand is discussed), 89 (where the cost and administrative burden of establishing a universal per person allowance is discussed), 91 (where the administrative difficulties of the Special Cases policy (indigency register) is discussed), 94 (where the administrative and financial burden faced by the City in attempting to provide water for the poor is discussed), 99-102 (where the City’s evidence in relation to the complexity of providing a universal versus targeted FBW policy is discussed), 123 (where the administrative impossibility of allowing for an opportunity to make representations under a prepayment system is discussed), 141 (where the costs of subsidizing water and sanitation are discussed), 149 (where the costs incurred by the City in relation to the past deemed consumption system in Soweto as discussed), 155 (where the cost of installing credit or prepaid meters in discussed). Wilson and Dugard also make this point regarding the Court’s focus on the burdens of the City rather than the experience of the applicants, in Wilson and Dugard, n 102, 675.

¹⁵⁰ Brand, above n 117, 102-103, citing T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Georgetown Law Journal* 1499 1502-1509; Brand, above n 120.

¹⁵¹ Bond and Dugard, above n 94, 3. See also Pierre de Vos, ‘Water is Life (but Life is Cheap)’ *Constitutionally Speaking Blog*.

cost-recovery imperative on the other hand...'¹⁵² Arguably, it is possible to find a balance between these two approaches, but the Constitutional Court's judgment does appear to emphasise the cost-recovery imperatives of the City, while according little weight to the structural inequalities that were reinforced by these policies.¹⁵³

De Vos also argues that the 'judgment seems to be based on an assumption that people do not pay for water because they are bad or dishonest people: they want something for free when they need to (and can) pay for the water.'¹⁵⁴ This goes back to Brand's arguments that one of the risks of adjudicating socio-economic rights is that the Court will depoliticise poverty by treating it as an apolitical, unsolvable problem or by viewing the applicants as the 'undeserving poor.'¹⁵⁵

Finally, the Court declined to provide a clear and substantive interpretation of the right to water, thus reducing the potential for the case to provide clear guidance to policy makers. Instead, the Court applied what Liebenberg describes as an 'extremely deferential and normatively thin concept of reasonableness review.'¹⁵⁶ Wilson, Dugard and Liebenberg argue that without this level of clarity, the outcome of litigation is too unpredictable to encourage its use by the poor and marginalised.¹⁵⁷ A lack of clarity also

¹⁵² Bond and Dugard, above n 94, 3.

¹⁵³ For a similar critique of the *Mazibuko* judgment, see Bond and Dugard, 'The Case of Johannesburg Water: what really happened at the pre-paid parish pump' (2008) 12(1) *Law, Democracy and Development* 1, 4.

¹⁵⁴ de Vos, above n 151.

¹⁵⁵ See, Brand, above n 120; Brand, above n 117, 103-104, citing T Ross 'The rhetoric of poverty: Their immorality, our helplessness' (1991) 79 *Georgetown Law Journal* 1499 1502-1509 ('One of the key ways in which courts can erode this capacity is through the depoliticisation of poverty and by using, in their judgment, "descriptions of the impoverished as somehow themselves responsible for their plight; or descriptions of problems of poverty as attributable to natural causes outside the control of the state or society. What these rhetorical tropes have in common ... is that they are used to mask complicity and justify inaction in the face of poverty.'').

¹⁵⁶ Liebenberg, above n 60, 480.

¹⁵⁷ See, eg, Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford et al (eds), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (forthcoming, 2012) ('the flexibility of the reasonableness standard makes success in any socio-economic rights claim difficult to predict. This means that the inevitability risk-averse poor litigant will hesitate before turning to the Court for relief. As a consequence, the number of

provides little guidance to policy makers on the content of the rights they are seeking to realise.

In dismissing the applicants' arguments that it should interpret the right to water in a manner that would provide it with a substantive content, the Court states that leaving this process of rights determination to the legislature and executive, is 'desirable as a matter of democratic accountability [because] it is their programmes and promises that are subjected to democratic popular choice.'¹⁵⁸ However, social justice litigation is generally undertaken precisely due to a failure of the democratic process to account for the impact of these programmes and promises on the most vulnerable members of society. This very fact is recognised later in the judgment where the Court notes that 'the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.'¹⁵⁹

Despite the criticisms levelled at the judgment, the applicants in the *Mazibuko* case and the AFP (who supported their action) do not regret their decision to litigate.¹⁶⁰ Instead they have pointed out that the litigation was not initiated in isolation, but was grounded in a much broader campaign against the application of neoliberal policies to the delivery of basic social services in South Africa.¹⁶¹ The decision to litigate was made when their attempts at direct action through public protest and civil disobedience had been

socio-economic rights claims brought by poor litigants will likely continue to be very low in future.');

Liebenberg, above n 60, 479 ('the Court downplays the difficulties of holding the State accountable in the absence of judicial guidelines on the values and purposes which the various socio-economic rights seek to promote.').

¹⁵⁸ *Mazibuko v City of Johannesburg* (2009) 28 ZACC para 61.

¹⁵⁹ *Ibid* para 71.

¹⁶⁰ Jackie Dugard, 'Losing Mazibuko: (re) considering the campaign following judicial defeat' (Paper presented at the *Law's Locations: Textures of Legality in Developing and Transitional Societies*, University of Wisconsin Law School, 23–25 April 2010) (Quoted with permission from the author).

¹⁶¹ *Ibid*. See also Jackie Dugard, 'Civic action and the legal mobilisation: The Phiri water meters case' in J Handmaker and R Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71, for a more in-depth account of these strategies and the way in which they were combined with the decision to litigate.

critically undermined by the government through the use of private security forces and widespread arrests.¹⁶²

As Langford points out, any 'critique of litigation as a vehicle for social change is only sustainable if there are viable alternatives or if litigation makes the situation worse in the absence of alternatives.'¹⁶³ This can be the case where litigation takes the place of, or is incompatible with, other strategies like mass community mobilisation. However, litigation is often used as a last resort and in these situations such criticism is perhaps misguided.

The success of litigation must also be assessed in relation to outcomes that go beyond the courtroom. In the case of *Mazibuko*, the AFP reports that the litigation process strengthened their movement by reinvigorating and energising their struggles against the commercialisation of basic services.¹⁶⁴ McKinley, a co-founder of the APF, stated that *Mazibuko* 'provided something to organise around; hope and recognition after having been [targeted and mistreated] by the police – it became the centre of mobilisation and reinvigorated the struggle, as well as catalysing political discussions and refining strategy.'¹⁶⁵ Dugard and Langford argue that these *enabling* effects of litigation should be more specifically acknowledged when assessing the success of public interest litigation.¹⁶⁶ In relation to these enabling effects, they also highlight the value of litigation as a form of participation by pointing out that it 'provided a voice to [the applicants] and the community of Phiri, where the political realm had failed them.'¹⁶⁷

¹⁶² Dugard, above n 161, 88; Yolandi Groenewald, 'Soweto starts its water war', (Mail & Guardian online) 24 July 2006.

¹⁶³ Langford, above n 112, 42.

¹⁶⁴ See Dugard and Langford, above n 144, 57.

¹⁶⁵ Interview with Dale McKinley (10 July 2009), cited in Dugard, 'Civic action and the legal mobilisation: The Phiri water meters case' in Handmaker and Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71, 94.

¹⁶⁶ Dugard and Langford, above n 144.

¹⁶⁷ Ibid 58.

Furthermore, despite the ultimately unsuccessful verdict, Dugard and Langford report that the legal mobilisation around *Mazibuko* resulted in significant material benefits.¹⁶⁸ In the intervening five years that it played out, the litigation process helped to significantly delay the roll-out of prepaid water meters across South Africa.¹⁶⁹ More significantly, the politicising effect of the case resulted in the City reviewing its water policies in such a way that, in the end, the applicants were able to secure virtually all of the changes that they had sought.¹⁷⁰ By 2011, the City had raised its FBW allocation to provide 50 Lpcpd to those people on the indigency register.¹⁷¹ The new generation of PPMs have also been adjusted so that rather than cutting off water supply after the FBW allocation has been exhausted, they will allow the water to come out as a trickle until further credit is purchase/made available.¹⁷² Finally, 'the City has undertaken that [...] it will not prosecute anyone for bypassing their PPM or standpipe.'¹⁷³

These tangible wins for the applicants demonstrate the power of using litigation and the language of human rights as part of a larger political mobilisation strategy. The City has also acknowledged this power: Smith quotes one official as acknowledging that 'the court case has forced us to do the research homework that we should have done before the start of the Gcin'amanzi project.'¹⁷⁴

Direct action in Phiri had been unsuccessful at encouraging the city to engage with the concerns of the community, and the more accessible political strategies of protest and civil disobedience had been effectively countered and rendered illegitimate by the State's response. In this context, litigation enabled the applicants (and the social movement that supported them) to re-legitimise their struggle and secure recognition of their claims through legal channels of communication. The case thus provided a high-profile platform for the AFP to broadcast its agenda both nationally and internationally

¹⁶⁸ Ibid 58.

¹⁶⁹ Dugard and Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights (SAJHR)* 39 57.

¹⁷⁰ Ibid 58.

¹⁷¹ Ibid 58.

¹⁷² Ibid 58.

¹⁷³ Ibid 58.

¹⁷⁴ Smith, above n 40, 164.

through the media and a variety of other channels.¹⁷⁵ It also provided the movement with access to detailed information about the City's water policy that had previously been denied to them.¹⁷⁶ In recognition of this enabling power of litigation, the APF, an organisation that had been traditionally sceptical of rights, formed a 'Law and Organising' programme in order to continue making strategic use of rights-based litigation in their struggles for socio-economic justice.¹⁷⁷

These outcomes demonstrate the importance of taking a nuanced approach to the value of rights and their assertion via litigation. It is clear that as a mechanism for mobilisation and progressive change they have both value and limitations. But the value of rights-based litigation should be assessed in light of the fact that it is only necessary when other rights-protecting mechanisms have failed earlier down the line. Generally speaking, people will only litigate when there has already been a violation of their rights or when the content of the right requires clarification. A comprehensive protection of the right to water must include mechanisms for protecting and realising the right before policies are made and implemented which would reinforce the need for and value of community participation at all stages in the policy cycle.

Conclusion

As has been shown, participation in the water governance process can enable the poor and marginalised (and their representatives in civil society) to promote policies and processes that better reflect their experiences and better respond to their needs. It can also promote community ownership over the water governance process, potentially enhancing both the accountability of the State and the responsible management of water by the community. While participation may not be a panacea to all of the problems presented by the crisis of water access, it does have a role to play in encouraging the integration of the needs and experiences of the poor and marginalised. In this respect,

¹⁷⁵ The *Mazibuko* case received a considerable amount of attention both within South Africa and internationally from the media, as well as from a wide variety of civil society organisations and academics. See Dugard and Langford, above n 144, 59 (where the authors discuss the platform that the case provided).

¹⁷⁶ Ibid.

¹⁷⁷ Ibid 58-59.

participation can contribute to ensuring that water governance results in increased access to water for all.

For participation to be truly effective, the case studies have demonstrated that participation must be protected as a right and integrated into all stages of the water policy cycle. In this respect, participation must go beyond mere tokenism and create meaningful ‘citizen power’.¹⁷⁸ However, as the water governance reforms in Manila and South Africa have demonstrated, even limited forms of participation can make a tangible difference by helping to build social capital and increase the expectations and demands of the community.¹⁷⁹ Effective participation can also play a role in encouraging the responsible management of a scarce but essential resource.

¹⁷⁸ Arnstein, above n 20, 4. See also Liebenberg, above n 60, 32 (‘This requires more than a formal opportunity to participate, but that all in society, particularly disadvantaged groups, have the substantive means of participating effectively.’)

¹⁷⁹ See, eg, Osmani, above n 21, 9-10.

Chapter 9. Conclusions

This study has investigated the implications of recognising and implementing the right to water in the context of the global water crisis. More particularly, it has examined how the recognition and implementation of the right to water might address the crisis of water *access* facing the urban poor in the Global South. Central to the question of access is an analysis of two approaches to the management of water which this thesis explores, namely the implementation or realisation of a right to water, with its focus on equity and participation, and the good governance approach to water reform, with its focus on efficiency and financial sustainability. In examining these approaches, this study addressed a number of fundamental questions. First, how effective is the more accepted, dominant good governance approach in tackling the global water crisis? Second, what potential and actual impact – both positive and negative – does the recognition and implementation of the right to water have on the governance approach and, particularly, on enhancing the capacity of the poor to access water? Finally, what is the value of participation to the good governance approach to water reform and to the realisation of the right to water?

The study concludes that the right to water can help to address the crisis of access by increasing the emphasis on service delivery for the poor, particularly by empowering them to participate in water governance. It is through this participation that poor and marginalised communities can help to develop and implement water policies that better respond to their needs and to their entitlement to safe and affordable water services.

9.1 Findings

9.1.1 Effectiveness of the good governance approach to water reform

This thesis has argued that the current approach to addressing the water crisis is primarily located within the good governance approach to development. Although this approach acknowledges the importance of the rule of law, participation, transparency, efficiency, and financial sustainability in the management of water, in practice it is the latter two economic values that have been prioritised. By analysing the application of this approach to the reform of Manila's water governance (and, to a lesser extent, South Africa's) this study has demonstrated that good governance reforms, including the

application of cost recovery principles, are capable of increasing the efficiency and financial sustainability of water services, and that this can result in increased access to water for the poor and marginalised.¹

However, the case studies have also demonstrated that problems of regulatory capacity, and the difficulty of ensuring accountability within a liberalised approach to water governance (such as corporatisation and private sector participation ('PSP')), cannot guarantee consistently positive results. In Manila, these problems included a lack of transparency in the privatisation process and the concession agreement ('CA') renegotiations, and the inadequate enforcement mechanisms available to the public and to civil society. As a result, it was difficult for the community to hold the State or service providers to account for their failures to adhere to the terms of the CA in relation to service expansions, tariff adjustments or allowable profit margins. In South Africa, the good governance focus on fiscal discipline also undermined the capacity of many municipalities to either employ sufficiently qualified staff or to develop the capacity of current employees. This funding shortage also limited the capacity of poor municipalities to finance affordable access to water, because they did not have enough wealthy consumers from whom to cross-subsidise.

The findings from both case studies show that the good governance approach places insufficient emphasis on equity in water governance, and that this has reduced its capacity to secure positive gains for the poor and marginalised.² Examples of this unbalanced approach include the lack of priority given to expanding services in Manila when the concessionaires were permitted to repeatedly delay service expansions to poor

¹ See Section 7.1 above. See also James Winpenny, *Financing Water for All: Report of the World Panel on Financing Water Infrastructure* (World Water Council, 2003).

² See Chapter 7 above. See also UNDP, Human Development Report - Beyond scarcity: Power, poverty and the global water crisis (2006); Bethan Emmett, In the Public Interest - Health, Education, and Water and Sanitation for All (Oxfam and WaterAid, 2006); Karen Bakker, 'The 'commons' versus the 'commodity': Alter-globalization, anti-privatization and the human right to water in the global south' (2007) *Antipode* 430; Maude Barlow, *Blue covenant : the global water crisis and the coming battle for the right to water* (2007); Adam Davidson-Harden, Anil Naidoo and Andy Harden, 'The geopolitics of the water justice movement' (2007) (11) *Peace Conflict & Development*; Patrick Bond, *When Commodification Annuls the Human Right to Water* (School of Development Studies, University of KwaZulu-Natal, 2005).

areas, and the fact that Manila Water has been allowed to charge poor consumers in informal settlements the highest block tariff rate, despite their low household consumption. Additional problematic outcomes were the economic barriers to access created by the imposition of marginal cost recovery and punitive credit control policies in South Africa, and of unaffordable connection fees in Manila. These outcomes reinforce the concerns raised by UNDP around the impact of a market-based approach to water reform on affordability given that two out of every three people who lack access to clean water live on less than \$2 a day.³

Finally, this study found that despite the theory of good governance recognising the value of participation, it has not been sufficiently integrated in practice. Examples of this problem in Manila include the exclusion of the public from the process of privatisation; the lack of accountability mechanisms available to the public to hold the concessionaires to account for poor service; and the repeated failures to comply with the public consultation requirements prior to tariff increases. In South Africa, the capacity of decentralisation to increase community participation has been undermined by the lack of priority given to facilitating community input into the water governance process. Operation Gcin'amanzi provided a clear example of this issue as its underlying policy was designed without any consultation and, at the point of implementation, there was no meaningful engagement with the recipient community.

The limited participation that has been established in Manila Water's *Water for the Poor* program has served to increase access to water for a significant number of people in informal settlements, and empowered them to maintain this access and to extend it to others in their communities. Nevertheless, this participatory approach has been driven by a commercial agenda and is bound up in the discriminatory imposition of the highest block tariff rates on these poor communities. The reliance on these high tariffs also creates a risk that the poorest of the poor are being excluded from these projects.⁴ This commercially driven participation has also involved no real transfer of power to the recipient communities. As a result, the community associations managing these water

³ UNDP, above n 2, 7.

⁴ See Hulya Dagdeviren and Simon A. Robertson, 'Access to Water in the Slums of the Developing World' (Working Paper Number 57, International Policy Centre for Inclusive Growth, 2009), 14.

projects have no legal protection and can be bypassed at any point by the concessionaires.

A subsidiary finding of this study is that the good governance approach has also placed insufficient emphasis on environmental sustainability – a goal that is largely at odds with an overriding emphasis on financial sustainability. Examples of this tension include the fact that neither the concessionaires in Manila nor the majority of municipalities in South Africa have an incentive to encourage high volume consumers to reduce their water usage because these consumers tend to pay more for their water, which increases profits for commercialised water service providers. In South Africa, this has meant that the majority of municipalities have focused all of their demand management policies on poor consumers. The one exception to this pattern is the Municipality of Cape Town where acute water scarcity has led the council to successfully encourage water conservation across both wealthy and poor consumers.⁵

9.1.2 Potential and actual impact of the right to water

This study also found that the recognition and implementation of the right to water may have the capacity to increase the emphasis given to both equity and participation within water governance and, by doing so, improve access to water for the poor and marginalised. The case study in South Africa provides several examples of this, including the adoption of the free basic water ('FBW') policy, the government commitment to expanding service connections through public investment, and the fact that individuals have a justiciable claim to hold the government to account for any failure to respect, protect, or promote the constitutionally recognised right to water. These outcomes can be contrasted with the findings in the Manila case study, where the absence of a legal right to water left the community and their civil society representatives with little capacity to influence the development of water policy or to hold the State or private service providers to account for failing to prioritise access and affordability.

⁵ Laila Smith, 'Conflict versus cooperation between the state and civil society: A water-demand management comparison between Cape Town and Johannesburg, South Africa' in Bernard Barraque (ed), *Urban Water Conflicts* (2011) 147, 156-157.

This study has also found that the implementation of the right to water requires changes to current approaches to water governance reform, and that some of these changes are incompatible with the economic and sustainability goals of development. However, it is argued that the careful navigation of this tension can lead to a healthier balance between efficiency (economics) and equity (human rights) – a balance that is largely missing from the current good governance approach.

The challenge for achieving this more balanced approach to water governance is to find new demand management approaches that more appropriately target excess water usage by industry, industrial agriculture and wealthy households, rather than limiting basic access for the poor. In this context, the right to water reasserts the primacy of basic water services, which are essential to sustaining life, over the use of water for economic purposes.

The limitations of the right to water, including rights-based litigation, demonstrated by the South Africa case study and, in particular, the *Mazibuko* judgment suggest that implementing the right to water has the potential to reinforce rather than disrupt current approaches to water reform.⁶ However, analysing the broader impact of the right to water in South Africa leads to a more nuanced conclusion. This broader impact includes the demonstrable gains in water access for the poor and marginalised across South Africa,⁷ and the specific gains of the applicants in the *Mazibuko* case achieved outside the courtroom (such as an increase in the FBW allocation and changes to the operation of the prepaid water meters).⁸ This indicates that although there have been limitations to

⁶ See Patrick Bond, 'The Right to the City and the Eco-social Commoning of Water: Discursive and political lessons from South Africa' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012); Daria Roithmayr, 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317; Bakker, above n 2.

⁷ Department of Water Affairs and Forestry (DWAF), *Free Basic Water Implementation Strategy* (Version One 2001) South Africa; Department of Water Affairs (South Africa), *Water Backlog Eradication* <http://www.dwaf.gov.za/dir_ws/wsnis/default.asp?nStn=pg_Reports&SAID=255&SASID=997&curPerspectiveID=2> at 18 January 2013.

⁸ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights* (SAJHR) 39, 57-59.

its capacity to achieve social change, the right to water is a valuable instrument for communities and civil society to utilise in support of water justice.

9.1.3 The value of participation

Another implication of the demonstrable limitations exposed in South Africa's approach to water governance, and the *Mazibuko* judgment in particular, is the importance of twinning a right of participation with the right to water. As Smith notes in relation to South Africa, 'the state's achievements in addressing distributive equity by accelerating coverage to low-income households is undermined by the neglect of participation procedures (procedural equity) that have clout.'⁹

As highlighted in Section 8.4.4, it is significant that one official from the City of Johannesburg reported that 'the court case has forced us to do the research homework that we should have done before the start of the Gcin'amanzi project.'¹⁰ A more participatory approach to water governance can help to ensure that this 'homework' is completed before water policies are finalised and implemented, and potentially before the need to litigate arises.

Recent participation-enhancing initiatives in several South African municipalities, such as the *Raising the Citizens Voices* program, have also begun to demonstrate positive outcomes and to indicate that a more participatory style of water governance is beginning to emerge. This development offers the promise of further empowering poor and marginalised communities to assert their entitlement to safe, sufficient, accessible, and affordable water services.

Despite its weaknesses, the participatory governance approach adopted in Manila Water's *Water for the Poor* program has also demonstrated positive results both in empowering poor communities and in enhancing their access to water. This is particularly significant in light of the widespread discrimination against providing access to water services to informal settlements and the logistical challenges that often prevent this access (including irregular layouts, lack of security of tenure and high

⁹ Laila Smith, 'The Limits to Public Participation in Strengthening Public Accountability: A Reflection on the 'Citizens' Voice' Initiative in South Africa' (2011) 46(5) *Journal of Asian and African Studies* 504, 505.

¹⁰ Smith, above n 5, 164.

levels of mobility).¹¹ It is, however, important not to romanticise community-management, particularly in the absence of other guarantees of equality (such as a legal right to water). As Dagdeviren and Robertson warn, 'even within informal settlements there are social hierarchies ... [and] community-based water provision can also be exclusionary and discriminatory, failing to serve the interests of all in the community.'¹²

9.2 Implications of the findings

Russell has stated that '[a]mongst practitioners working in the international organizations' water programs ... the international right to water [is] not seen as relevant or applicable to their daily work.'¹³ These organisations, including UNDP, the World Bank, the United Nations Children's Fund, and the World Health Organization, are highly influential in shaping current approaches to water governance reform. It is, therefore, significant that their current preferred approach – good governance – is failing to adequately address two of the three central aspects of the water crisis, namely access and conservation. Moreover, although these organisations are correct in that integration of the right to water may compromise the economic and sustainability goals of current approaches to water reform, this compromise is necessary to realising more equitable outcomes, including the fundamentally important goal of providing universal access to water.

Thus the implications of this study regarding the relationship between the rights to water and to participation are significant for both those working in water governance reform and those campaigning to secure water justice for the poor and marginalised. While the South Africa experience demonstrates that the legal recognition of the right to water and the integration of this right into water programming will result in increased access for the poor and marginalised, it is also apparent that these gains could be

¹¹ See, eg, Dagdeviren and Robertson, above n 4; Florencia Almansi et al, *Everyday water struggles in Buenos Aires: the problem of land tenure in the expansion of potable water and sanitation service to informal settlements* (in *New Rules, New Roles: Does PSP Benefit the Poor?*, WaterAID, TearFund, 2003)

¹² Dagdeviren and Robertson, above n 4, 14.

¹³ Anna F.S. Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1, 6.

enhanced through a stronger commitment to enabling the community to participate in a meaningful way in the water governance process.

Adopting more participatory styles of water governance requires capacity development and additional time and resources. However, it may ultimately result in water policies that reflect a better compromise between community and government priorities, and which are considered to be more legitimate as a result. The disruptive effects of community backlash against policies that are perceived as illegitimate was demonstrated in Phiri, where the construction works for Operation Gcin'amanzi were delayed for several months by protest activity. The significant wave of so-called 'service delivery protests' that have erupted throughout South Africa over the last few years,¹⁴ represent a further rejection of the lack of community participation that has been accommodated in current approaches to service delivery.¹⁵ According to Freidman:

There is a great difference between "service delivery" and "public service". The first entails officials ... deciding what people need and then dumping it on them. ... Public service, by contrast, ... stems from the core democratic idea that government works for citizens and that it cannot do this unless it listens to them.¹⁶

Similarly, the International Law Association argues that '[i]n contemporary society, legitimacy largely depends on the consent of the governed, and hence on the sense that the governed have a voice through direct participation...'¹⁷

The articulation of the need for water governance to be participatory in order to be legitimate is relevant to the good governance approach to water reform because it reinforces the accepted idea that participation increases the sense of community ownership over water policy. Tackling the water crisis will require that governments, industry and households all accept greater responsibility for water conservation and

¹⁴ See, eg, Peter Alexander, 'Rebellion of the poor: South Africa's service delivery protests - a preliminary analysis' (2010) 37(123) *Review of African Political Economy* 25; Smith, above n 5, 167.

¹⁵ Steven Friedman, 'People are demanding public service, not service delivery', *Business Day Live* (South Africa) 29 July 2009.

¹⁶ Ibid.

¹⁷ Joseph W Dellapenna, 'The Berlin Rules on Water Resources' (Report of the 71st Conference, International Law Association, 2004) art 18.

management. Changing past attitudes to water consumption will be very difficult to achieve if new policies are seen as illegitimate due to a lack of community involvement. Furthermore, participation can strengthen community oversight and accountability, empowering communities to prevent water pollution, wastage and corruption.

The need for legitimacy also highlights the gap between the *formal* participation that is generally supported by market-based reforms and the *meaningful* participation that people are coming to expect from democratic governments. The challenge is for a more meaningful approach to participation to be better integrated into both the reforms and the resulting water governance processes. Recognising participation as a right should help to accelerate this process.

The integration of the right of participation would also be beneficial to making the realisation of the right to water more effective. Without community participation in water governance, there is a risk that the realisation of the right to water will be implemented from above, rather than being claimed from below. Not only does this risk disempowering communities in relation to their use and management of an essential resource, it also limits their capacity to participate in the dialogue over the content of the right to water and reduces the likelihood that the content will reflect their needs and experiences.

What is needed, therefore, is a new approach to implementing and realising the right to water through the adoption of water governance systems that are genuinely participatory in nature and are framed in such a way as to guarantee community control over water governance while simultaneously emphasising sustainable management. Bakker has argued that '[t]he most progressive politics ... will seek new expressions of eco-social ... justice that move us away from anthropocentric, individualistic notions of human rights.'¹⁸ This may require a rejection of private sector participation in favour of a recognition that the right to water is a collective right and responsibility, similar to the approach being trialled in Uruguay, Bolivia and Ecuador, where the right to water has

¹⁸ Karen Bakker, 'Commons versus commodities: Debating the human right to water' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, governance and social struggles* (2012) 19, 38.

been framed in such a way as to guarantee community control over water governance, while simultaneously emphasising sustainable management.¹⁹

It remains to be seen whether this approach can effectively balance efficiency, access and conservation, by promoting a greater social responsibility for water. Nonetheless, the experience of Porto Alegre in Brazil, where participatory governance is coupled with environmental education, has resulted in near universal access,²⁰ as well as improvements in both productivity²¹ and sustainability.²² While this is a promising sign, this more collective conception of human rights may not be applicable in all cases. In the end, it is clear that the right to water must be adapted to local contexts and interpreted to suit new approaches to water governance that transcend the market-centric good governance model. The twinning of the *right* to water with a community *responsibility* for its sustainable management may be the ideal way of addressing all three aspects of the water crisis – access, sustainability and productivity.

¹⁹ *Constitution of the Oriental Republic of Uruguay 1967, con las modificaciones plebiscitarias el 26 de noviembre del 1989, el 26 noviembre del 1994, el 8 de diciembre del 1996 y el 31 de octubre del 2004; Constitution of the Republic of Bolivia 2009; Constitución Política del Ecuador 2008; Juan Pablo Martines, 'Keepers of Water, Ecuador' in Beverly Bell et al (eds), *Changing the Flow: Water Movements in Latin America* (2009) 27.*

²⁰ See, eg, Hélio Maltz, 'Porto Alegre's water: public and for all' in Brid Brennan et al (eds), *Reclaiming Public Water* (2007).

²¹ Ibid.

²² See, eg, Rualdo Menegat, 'Participatory democracy and sustainable development: integrated urban environmental management in Porto Alegre, Brazil' (2002) 14(2) *Environment and Urbanization* 181, 197-206.

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7. Interviews and emails

Email from Mary Ann Manahan to Cristy Clark, 9 August 2013

Interview with Alberto Villareal, Right to Water Campaigner, Friends of the Earth Ecuador (Hong Kong, 16 December 2005)

Interview with Bubut Palattao, Advocacy Coordinator at Freedom from Debt Coalition (Manila, 1 November 2006)

Interview with Dale McKinley, Organiser with the Coalition Against Water Privatisation and the Anti-Privatisation Forum (Johannesburg, 30 September 2006)

Interview with Jabulani Vincent, member of the Anti-Privatisation Forum and resident of Phiri (Johannesburg, 5 October 2006)

Interview with Jennifer Makoatsane, Applicant in Mazibuko water rights case (Phiri, South Africa, 5 October 2006)

Interview with Jude Esguerra, economist at the Institute for Popular Democracy (Manila, 25 October 2006)

Interview with Macra Cruz, Senior Administrator of MWSS (Manila, 30 October 2006)

Interview with Mai Flor, Lawyer for Ondo (Maynilad) (Manila, 24 October 2006)

Interview with Mary Ann Manahan, Advocacy Coordinator at Focus on the Global South (Manila, 31 October 2006)

Interview with Mike Muller, former Director-General of the Department of Water Affairs and Forestry (Johannesburg, 4 October 2006)

Interview with Olim Gusi, Manila Water employee (Manila, 26 October 2006)

Interview with residents of informal settlement (Manila, 27 October 2006)

Interview with residents of informal settlements (Manila, 3 November 2006)

Interview with Richard (Bricks) Mokolo, Chair of APF and organiser from the Orange Farm Water Crisis Committee (Orange Farm, 3 October 2006)

Interview with Senior Officer, Maynilad Water Administrative Department (Manila, 31 October 2006)

Interview with Silumko Radebe, National organiser for the Anti-Privatisation Forum (Johannesburg, 4 October 2006)