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SIMILAR BUT DIFFERENT: COMPARATIVE PERSPECTIVES ON ACCESS TO WATER IN AUSTRALIA AND SOUTH AFRICA

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One of the challenges that a culture continually faces is to distinguish between the sacred and the profane . . . . Like other parts of nature, water partakes of both realms, the sacred and the profane. It is part garden and part machine, part idol and part tool. If water is not as morally worthy as we human beings, neither is it some inert object that gains value only by human grace. If it is separate and distinct from us, it is also an essential part of something far larger, something of which we too are a part and on which we fully and ultimately depend.[1]

I. INTRODUCTION

Water is a precondition for sustaining life on earth. Despite its self-evident logic, this deceptively simple sentence is loaded in meaning and its consequences are far-reaching for governance efforts the world over.[2] Protecting water resources and ensuring that sufficient quantities of water of an acceptable quality are available for socio-economic and ecological demands arguably poses some of the most daunting challenges in modern times.[3] Unprecedented population growth, concomitant resource exploitation, climate change, and deteriorating socio-economic demands and conditions are severely complicating matters.[4]

The broader water governance paradigm addresses many complex issues, including water resource protection, integrated and transboundary water resource governance, and water infrastructure.[5] Providing people access to water is another crucial aspect of this paradigm that is usually referred to as "water services provision";[6] a term we will also employ for the present analysis unless indicated otherwise. Today, providing people access to water is both a major concern and a complicated enterprise in many developed and developing countries, mainly because of the complexities of hydro-politics.[7] Water services provision is traditionally the primary duty of government, and is typically regulated by means of a legal framework.[8] This article seeks to analyze and juxtapose the legal regimes regulating water services provision in two similar, but at the same time very different, countries - Australia and South Africa.

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1. Eric T. Freyfogle, *Water Rights and the Common Wealth,* 26 ENVTL. L. 27, 50-51 (1996).

2. *See* Damon Barrett & Vinodh Jaichand, *The Right to Water, Privatised Water and Access to Justice: Tackling United Kingdom Water Companies' Practices in Developing Countries,* 23 S. AFR. J. ON HUM. RTS. 543, 543-47 (2007).

3. Lee Godden, *Water Law Reform in Australia and South Africa: Sustainability, Efficiency and Social Justice,* 17 J. ENVTL. L. 181, 185 (2005).

4. *Id.* at 182, 185-86, 204.

5. *See generally* Andrew Allan, *A Comparison between the Water Law Reforms in South Africa and Scotland: Can a Generic National Water Law Model Be Developed from These Examples?,* 43 NAT. RESOURCES J. 419 (2003).

6. *See id.* at 451, 457, 461.

7. *Id.* at 422-27.

8. *See* Barrett & Jaichand, *supra* note 2, at 545. Although, this duty is sometimes outsourced by government to private service providers through the contentious process of privatization. *Id.*

The central objective is to identify and describe the strong and weak points of the two approaches, with the view to evaluating the overall effectiveness and suitability of the strategies and mechanisms employed by both South Africa and Australia to provide their people with access to water. As a point of departure, the article seeks to explain and ground its comparative approach, to set out the focus of the enquiry, and to explain key terms and assumptions. For the purpose of context and background, the article then provides a brief description of the environmental and socio-economic conditions in each country that are relevant to the issue of water services. The penultimate section discusses both countries' constitutional and statutory frameworks regulating water services provision. The article concludes with critical comments and recommendations with respect to prevailing trends and possible regulatory reforms in these two countries.

Our comparative survey raises three general questions: a) is a rights-based constitutional approach necessarily preferable to a pure statutory approach; b) what would the best approach be to recover the costs of water service provision; and c) how does one simultaneously promote sustainable utilization, ensure universal access to water, and guarantee protection of the water resource? While we do not attempt to provide comprehensive answers to these questions, they do fulfill an important guiding function in so far as they cumulatively serve as a leitmotif throughout the survey.

II. GROUNDING THE COMPARATIVE APPROACH

What are the contrasts and similarities between South Africa and Australia that form the foundation for legal comparison? At a general level, the countries share many similarities that have and continue to influence their water provision regimes. For example, they share the same colonial roots, which has significantly influenced their respective socio-political and legal landscapes. Much of the historical foundations of their legal and governance systems are similar;[9] their water provision regimes have been significantly influenced by colonial dogma as a result.[10] They

9. Although South African law for the greater part is derived from Roman-Dutch law (and to a lesser extent European *Ius Commune*), Australian law is mainly based on English common law.

10. *See* Godden, *supra* note 3, at 182. The legacy of colonial rule and the later, but much more destructive, system of apartheid are arguably the main culprits responsible for many of South Africa's current woes in its quest to provide people with adequate access to water. Soon after the advent of South Africa's democracy, the government noted in a policy paper that:

> South Africa's water law comes out of a history of conquest and expansion. The colonial lawmakers tried to use the rules of the well-watered colonising countries of Europe in the dry and variable climate of Southern Africa. They harnessed the law, and the water, in the interests of a dominant class and group which had privileged access to land and economic power.

also have similar climates and are classified as water-scarce or water-stressed countries.[11] As we will show below, they are greatly susceptible to the vagaries of climate change, which will severely affect the availability and provision of water. Both are federal (Australia) or semi-federal (South Africa) states where the provision of basic services, such as water, is the duty of local or state governments; although in South Africa the water provision regime is centrally controlled primarily by means of national legislation, which is not the case in Australia. In these countries, there is also a clear distinction between rural and urban communities, where many rural communities, in particular poor indigenous communities, often have inadequate access to water. Moreover, past racial discriminatory practices have scarred both countries, although, on balance, those in South Africa have been far graver and more prolonged.

There are also stark differences between Australia and South Africa, legal and otherwise. While South Africa is a constitutional democracy with a supreme constitution and Bill of Rights, Australia is based on the Westminster system of parliamentary sovereignty rule, which is a governance dispensation that was explicitly discarded by South Africa following constitutional reforms in the 1990s.[12] The most evident difference between them is, of course, that Australia is a developed country while South Africa is a developing country. As such, South Africa is characterized by low income per capita and a disconcertingly deepening divide between rich and poor, with serious socio-economic developmental issues and governance challenges. This is especially problematic since access to water is only one of many basic entitlements the South African government has to guarantee and realize if it is to succeed in promoting transformative, restorative, and corrective justice in a country characterized by deep intra-generational inequality. Other monumental challenges include providing people access to education, housing, and anti-retroviral medication to combat HIV/AIDS.

If one turns to the specific focus of this article, namely, the two countries' regimes that regulate access to water, the most evident similarities are that the earlier laws and regulatory approaches of both South Africa and Australia were derived from European legal systems, which were premised on the abundant availability of water in the colonizer's home country.[13] This approach took into account neither the prevailing dry climatic conditions, nor the need to provide the colonizers and indigenous communities with equal access to water.[14] Decades of prolonged regulation by means of inappropriate legal arrangements and approaches have resulted in recent comprehensive constitutional and statutory re-

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Kader Asmal, *White Paper on a National Water Policy for South Africa*, 1, http://www.dwaf.gov.za/documents/policies/nwpwp.pdf (last visited Mar. 10, 2012).

11. Godden, *supra* note 3, at 184, 186.

12. South Africa used parliamentary sovereignty as a mechanism to uphold and enforce the ideology of the apartheid system.

13. Godden, *supra* note 3, at 182.

14. *Id.*

forms to address the deficiencies and results of the foregoing in the two countries.[15] Under these laws, much of the responsibility for providing access to water has been gradually shifted away from national and state governments, to a mixed public and privatized water services scheme.[16] In addition, both countries face similar grave environmental and infrastructural challenges, including deteriorating existing water services infrastructure, provision and maintenance of new water services infrastructure, increased scarcity of water resources resulting from both the geographical location of the two countries and the exacerbating impact of climate change, and increased general costs of water services provision.[17]

There are, however, also various differences between them as far as water services provision is concerned. As a developing country, South Africa has many poor and indigent people—mainly as a result of past racial segregation and marginalization policies—who do not have access to water and where they do, they often do not have the means to pay for it. While the South African government has a free basic water policy, it seems to be fighting an uphill battle in providing everyone with free water for basic needs.[18] Because Australia is a developed country, this is less of a concern, despite its own tainted past. While inequalities nevertheless remain between sectors of the Australian community, on balance, these are not as severe as in South Africa.

In South Africa, everyone has a constitutional right of access to sufficient water: a socio-economic right that has been enshrined in the Bill of Rights of the *Constitution of the Republic of South Africa,* 1996 (Constitution), and that subsequently has been given effect to by legislation.[19] The Constitution also provides for an environmental right and explicit environmental and water governance mandates which have been translated into comprehensive national laws.[20] The Australian regime does not provide for a fundamental constitutional environmental right or right of access to water, but obligations and subsequent provisions in this respect are provided for in federal and state laws.[21] Even though it does not follow a constitutional rights-based approach to providing access to water, Australia is promoting universal water service delivery through a statuto-

15. *Id.* at 181.
16. *Id.* at 181, 194, 198.
17. *Id.* at 181-205.
18. *Mazibuko v. City of Johannesburg* 2009 (3) BCLR 239 (CC) at 2 para. 2 (S. Afr.). The Constitutional Court recently confirmed this fact:

> In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water. By the end of 2006, this number had shrunk to 8 million, with 3,3 million of that number having no access to a basic water supply at all. Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden.

19. S. AFR. CONST., 1996.
20. *Id.*
21. Godden, *supra* note 3, at 188-90.

rily-based framework focused on access and sustainability.[22] The South African approach to providing access to water could therefore be described as being constitutional rights-based and premised on a detailed and more centralized national statutory framework. Conversely, Australia's purely statutory approach is truly federal in character, but not without its own unique problems relating to mandates, governance competencies, delineation of regulatory areas with respect to the environment more generally, and water services provision specifically. As we demonstrate below, in the absence of explicit environmental and water governance mandates, Australia has spent considerable time and efforts, mostly by means of litigation, clarifying these mandates and areas of regulatory competence related to water.

III. FOCUS, KEY TERMINOLOGY, AND ASSUMPTIONS

"Access to water" is a very general and potentially broad term, which could pertain to a host of different aspects of water governance. In the context of the broader generic water governance paradigm, at its most general level in the context of water governance, we use "access to water" to mean all those governance efforts which enable people to use water resources for securing their survival. Against this general context, in terms of law more specifically, a discussion of "access to water" could focus on water rights reform in the contexts of ownership, title, and property rights; or the regulation of physical access to rivers, dams and lakes. It could also focus on the regulatory framework that governs access to water for domestic use through water services, which is our present focus. Unless expressly indicated otherwise, the discussion exclusively focuses on water services provision for urban and rural domestic use, regardless of what these domestic uses are. Domestic uses could include water for sanitation, subsistence, religious and cultural practices, farming, irrigation, gardening, and/or recreation. We understand "access" in terms of the standard international interpretation thereof, i.e., water must be physically and economically accessible, providing access must be non-discriminatory, and information regarding water governance must be available and accessible to all interested and affected parties.[23]

We do not concentrate on one specific aspect of water services and we thus use the term "water services" to denote the entire range of services which might be relevant and applicable to providing people access to water, including, but not limited to, water purification facilities, desalination systems, water meters, drains and pipes for transporting water, taps, and pumps. The foregoing focus on access to water and water service provisions means that we do not overtly deliberate on the broader

22. *Id.*

23. Nobonita Chowdhury et al., *The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues*, SCH. OF ORIENTAL & AFR. STUDIES INT'L HUMAN RTS. CLINIC, 6 (Jan. 31, 2011), http://www.ihrb.org/pdf/SOAS-The_Human_Right_to_Water.pdf.

water governance reforms in the two countries. While these reforms are important and some aspects are highlighted which are relevant to the issue of water services provision, others have already extensively canvassed these reforms (notably also in a comparative perspective).[24]

Another focus of this enquiry is on national legal regimes, however, we do not discuss the international legal regime related to access to water. We nevertheless acknowledge that the United Nations recognized the right to access water—at least implicitly—through a range of instruments and forums, and that it continues to inform domestic developments in both countries.[25]

Australia, a typical federal state, provides a diverse example of water management, with each State and Territory having the capacity under the Constitution to regulate water supply.[26] This federal-legislative arrangement has meant that differences in market structure and legislative focus, albeit at times minor, exist between the jurisdictions. This article focuses its examination on one jurisdiction, namely New South Wales (NSW), for the purposes of comparison. NSW is an important example of an Australian water jurisdiction, not only because it is the most populated Australian State, but also because it is a jurisdiction that has a balance of the extremes experienced by other States and Territories such as: drought, remoteness, and private sector participation. Importantly, NSW possesses one of the more evolved legislative structures; having undergone substantial reform following a number of regulatory challenges, and having actively engaged with competition and new technologies.[27] Yet, it

24. *See generally* Allan, *supra* note 5, at 419-87 (comparing South Africa and Scotland); Godden, *supra* note 3, at 181-205 (comparing South Africa and Australian water reforms).

25. *See generally Mazibuko v. City of Johannesburg* 2009 (3) BCLR 239 (CC) at 26 para. 52 (S. Afr.) (relying on the United Nations Committee on Economic, Social and Cultural Rights' General Comment 3 on the Right to Water); Comm. on Economic, Social and Cultural Rights, Rep. on its 29th Sess., Nov. 11-29, 2002, *General Comment No. 15, The Right to Water*, U.N. Doc. E/C.12/2002/11, at 2 (Jan. 20, 2003); The Human Right to Water and Sanitation, G.A. Res. 64/292, ¶ 1, U.N. Doc. A/RES/64/292, at 2 (Jul. 28, 2010) (recognizing the right to access water as an essential human right); Human Rights and Access to Safe Drinking Water and Sanitation, H.R.C. Res. 15/9, ¶ 6, 8(a), U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010) (affirming basic human right to access safe drinking water).

26. TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY 296 (4th ed. 2006); D.E. FISHER, WATER LAW 35 (2000).

27. *See generally Water Industry Competition Act 2006* (N.S.W.) No. 104 (Austl.), *available at* http://www.legislation.nsw.gov.au/maintop/view/inforce/act+104+2006+cd+0+N; *State Owned Corporations Act 1989* (N.S.W.) No. 134 (Austl.), *available at* http://www.legislation.nsw.gov.au/fullhtml/inforce/act+134+1989+cd+0+N?; *Sydney Water Act 1994* (N.S.W.) No. 88 (Austl.), *available at* http://www.legislation.nsw.gov.au/inforcepdf/1994-88.pdf?id=a1f77bd8-14d5-e722-8119-e1abecea1bbb; *Sydney Water Catchment Management Act 1998* (N.S.W.) No. 171 (Austl.), *available at* http://www.legislation.nsw.gov.au/inforcepdf/1998-171.pdf?id=06f54703-d63a-6c8d-c74b-d526abdf7204; *Protection of the Environment Operations Act 1997* (N.S.W.) No. 156 (Austl.), *available at* http://www.legislation.nsw.gov.au/viewtop/inforce/act+156+1997+first+0+N.

still shares a number of common threads with other jurisdictions such as aging water infrastructure, vulnerable communities, water scarcity, and susceptibility to climate change. With respect to South Africa, the focus is on the national legal framework and not on (a) specific province(s) (the South African equivalent for the Australian States) since the primary overarching bulk of law regulating access to water is found at centralized national level.

IV. ENVIRONMENTAL AND HYDRO-POLITICAL CONTEXTS

Any discussion related to water, specifically the provision of access to water, cannot be divorced from the historical, socio-economic, environmental, and political contexts (collectively referred to as "hydro-politics") in a country. This section provides a brief overview of these aspects in South Africa and Australia in terms of which efforts to provide access to water must be understood.

A. SOUTH AFRICA

Providing people with access to water in South Africa is a daunting challenge for various reasons,[28] and it must be considered from a specific historical context. During most of its past, South Africa's water governance regime has exclusively favored a small, yet politically powerful white minority, which benefited from virtually unrestricted use of water resources and water services.[29] During the early 1900s the government heavily invested in water services infrastructure to boost agriculture. During the later years of economic and political isolation from the rest of the world providing almost unrestricted access to water for industrial and agricultural use was an important factor in South Africa's efforts to become industrially and economically independent and self-sufficient. It was also during the post-Second World War era that South Africa developed much of its water infrastructure, albeit mainly in former "white" areas, cities, and towns. Non-white South Africans were relocated to the notorious "independent homelands" and concentrated in "townships"

28. *See also* Allan, *supra* note 5, at 426 (noting the following additional considerations which compound the scarcity of water in South Africa: high reliance on irrigation for agricultural land; high rates of evaporation and consequently salination; the occurrence of alien invasive species which reduces stream flow; and the fact that most of South Africa's rivers are transboundary, which means that the country heavily relies on water governance practices in foreign jurisdictions as far as acceptable quality and quantity of its own water is concerned).

29. DEP'T OF WATER AFFAIRS AND FORESTRY, WHITE PAPER ON WATER SUPPLY AND SANITATION POLICY 4-5 (1994), *available at* http://www.dwaf.gov.za/Documents/Policies/WSSP.pdf (giving a succinct historical account). *See generally* C. G. HALL & A. P. BURGER, HALL ON WATER RIGHTS IN SOUTH AFRICA (3rd ed. 1957) (a rare and interesting account).

which surrounded bigger cities.[30] Investment and development of water services infrastructure in these "black" areas were wholly insufficient.

Against this background, it must be considered that water is an extremely scarce resource in South Africa, which is classified as a "water-stressed" country.[31] South Africa faces a grim future where the demand for water will soon surpass supply of the resource.[32] For example, a recent study estimates that water availability in 2030 will be 1186 m^3/capita—a number that is surprisingly lower than, for example, the much drier Namibia's 7419 m^3/capita in the same year.[33] While this figure admittedly is influenced by South Africa's much larger estimated population, (42.2 million compared to Namibia's 2.4 million in 2030), it does suggest that providing an increasing population with access to water in these water-stressed conditions, now and in the future is a daunting challenge.

Resource scarcity, poverty, HIV/Aids and other diseases, unemployment, general social decay, and socio-economic inequalities[34] add to the complexities and difficulties of water service provisions in the country. In its policy on water services that forms the foundation of the current statutory regime, the government estimated that between 12 and 14 million people in South Africa have inadequate access to water, while approximately 20 million have inadequate access to sanitation.[35] With little gains in poverty alleviation and improvement of the living standard of South Africans, and coupled with a marked recent increase in the influx of des-

30. *Soweto, Heartbeat of the Nation,* SOUTHAFRICA.INFO, http://www.southafrica.info/travel/cities/soweto.htm (last visited Mar. 10, 2012) (describing Soweto (South Western Townships) as one of South Africa's most well-know townships and part of the greater Johannesburg metropolitan area).

31. HUBERT THOMPSON, WATER LAW: A PRACTICAL APPROACH TO RESOURCE MANAGEMENT AND THE PROVISION OF SERVICES 7 (2005) (indicating that "[o]f the 149 countries in the world for which data is available, South Africa was at the end of the 20th century the 26th most stressed in terms of water availability.").

32. N.A. King, G. Maree & A. Muir, *Freshwater Systems, in* ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 435 (H.A. Strydom & N.D. King eds., 2nd ed. 2009); J.A. Day, *Rivers and Wetlands, in* ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 842-44 (H.A. Strydom & N.D. King eds., 2nd ed. 2009).

33. DEP'T OF ENVTL. AFFAIRS, ENVIRONMENTAL SUSTAINABILITY INDICATORS: TECHNICAL REPORT 2009, 51 (2009), *available at* http://soer.deat.gov.za/newsDetailPage.aspx?m=66&amid=8171.

34. Ros Hirschowitz & Mark Orkin, *Inequality in South Africa: Findings from the 1994 October Household Survey,* 41 SOC. INDICATORS RES. 119, 120-21 (1997). Also stating:

> Inequality in South Africa is based on denial of access among the vast majority to amenities, standards and services. South Africans have been denied equal access not only to basic resources such as water and sanitation . . . but also to social investments such as education . . . and health care . . . . It is not the underdevelopment of the country as a whole that characterises it, but rather the skewed and uneven distribution of access to resources that enable people to lead productive lives.

35. Asmal, *supra* note 10, at 1.

titute foreigners from neighboring countries seeking better fortunes in South Africa, this estimation could very well be too optimistic.

The deep divide between rich and poor remains one of the most defining characteristics of South African society. While a small privileged minority has sufficient access to water, the majority of the population—including the poor, unemployed, and generally marginalized sectors of the population—has no or insufficient access to water.[36] South Africa's Gini co-efficient is one of the worst in the world; a fact that necessitates "government interventions through demand or supply side management . . . to address the gaps in service delivery and access to water . . . while at the same time being mindful of the increasing poverty gap"[37] and deteriorating environmental conditions. Unequal access to water is, however, not only race and income based. In South Africa's patriarchal society, water inequality is also based on gender; usually woman are responsible for the household and suffer the most because they have to travel great distances to collect water especially those women living in remote rural areas.[38] The Constitutional Court recently stated in this respect that:

> Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps.[39]

Additionally, economic development and growth from increased industrialization, mining activities, agriculture, and tourism, which are all mainstays of the South African economy, have increased the strain on limited, existing water resources. Water pollution, especially as a result of industrial activities, is a growing concern in South Africa; increasingly,

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36. THOMPSON, *supra* note 31, at 9. A determination in 1997 found that almost all Indian and white households (98%) had taps inside their dwellings compared to 76% of coloured households and only 27% of African households. Hirschowitz & Orkin, *supra* note 34, at 124. African households in urban areas were more likely to have taps inside the dwelling (54%) compared with households in non-urban areas (8%). *Id.* The most prominent reason for this vivid disparity is attributed to historical racial discriminatory laws and policies that denied the majority of the South African population (mainly Black people) access to socio-economic services, most notably, water services. While income inequality would obviously lead to unequal access to water, an even more obvious consideration also plays a role in this respect: providing access to water costs money, and poorer countries like South Africa with various other developmental priorities would find it more difficult to provide this access in the wake of limited resources. S. Liebenberg & B. Goldblatt, *The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution,* 23 SAJHR 335, 335-36 (2007).

37. J.P. LANDMAN ET AL., BREAKING THE GRIP OF POVERTY AND INEQUALITY IN SOUTH AFRICA 2004-2014 1, 3-4 (2003); King, Maree & Muir *supra* note 32, at 439; Liebenberg & Goldblatt, *supra* note 23, at 336.

38. THOMPSON, *supra* note 31, at 9.

39. *Mazibuko v. City of Johannesburg* 2009 (3) BCLR 239 (CC) at 2 para. 2 (S. Afr.).

the few available water resources are polluted to such an extent that water is becoming wholly unfit for use.[40]

Sustainable success in water service provision is conditioned on the availability of funds and cost recovery related to providing people with access to water.[41] Funding and cost recovery are essential for establishing water services infrastructure, upgrading and maintaining existing infrastructure, and creating and maintaining infrastructure aimed at providing acceptable water quality through purification, desalination, and even water importation from foreign countries.[42] Currently, insufficient funds are being spent on building new and maintaining existing water services infrastructure; this lack of funding is aggravated by increasing urbanization and urban sprawl. In many instances, government finds it impossible to recover costs for water service delivery, either because water users cannot pay for these services, or the responsible authorities are incapable to recover these costs due to a lack of human and financial capacity and resources.[43]

The foregoing must be considered in light of mounting concerns about deteriorating service delivery by municipalities in South Africa that negatively affect the government's ability to provide people with access to water. Municipalities are the main authorities responsible for water services provision, but increasingly, they are unable to do so because of the lack of financial and human resources, corruption, political meddling, and internal struggles.[44] Generally, the result is that water services provision costs are not adequately recovered, water purification works and water provision networks are not properly maintained and upgraded, and new infrastructure is not installed. As a result, many people, especially those living in informal settlements as opposed to formal towns, still rely

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40. King, Maree & Muir, *supra* note 32, at 449. Many years of unregulated mining activities are now resulting in unprecedented pollution of water resources especially in the form of acid mine drainage. J.D. Wells et al., *Terrestrial Minerals, in* ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 551 (H.A. Strydom & N.D. King eds., 2nd ed. 2009).

41. THOMPSON, *supra* note 31, at 699-700. Sub-components of these water services and related costs include operational and maintenance costs, administrative and human resource costs, depreciation costs, replacement and refurbishment of infrastructure, and indirect costs such as social and environmental costs. *Id.*

42. *Id.* at 7, 10, 13. Much of South Africa's water is currently imported from neighboring countries such as Lesotho through the Lesotho Highlands Water Scheme, for example. *See* LESOTHO HIGHLANDS WATER PROJECT, http://www.lhwp.org.ls/ (last visited Mar. 10, 2012).

43. THOMPSON, *supra* note 31, at 699. The complexities of cost recovery have been extensively deliberated in South African courts and will be discussed later in this article.

44. *See* Allestair Wensley, Grant Mackintosh, & Eddie Delport, *A Vulnerability-Based Municipal Strategic Self-Assessment Tool Enabling Sustainable Water Service Delivery by Local Government,* ON THE WATER FRONT 21, 21 (2011); *see generally* GOOD GOVERNANCE LEARNING NETWORK, RECOGNISING COMMUNITY VOICE AND DISSATISFACTION: A CIVIL SOCIETY PERSPECTIVE ON LOCAL GOVERNANCE IN SOUTH AFRICA 7 (2011), *available at* http://www.eisa.org.za/PDF/sou2011ggln.pdf (last visited Mar. 10, 2012).

on the bucket system for sanitation and have to collect water by traveling great distances.[45]

B. AUSTRALIA

With some exceptions, the situation in Australia more or less mirrors the South African scenario with the greatest challenges again being water scarcity and adequate access to water.[46] Notably, while Australia does not face the same socio-economic development challenges as South Africa, its climate and geography place similar pressures on its water services.[47] In terms of supply, as the world's driest inhabited continent, Australia faces substantial challenges in meeting its water needs.[48] The 2006 Australia State of the Environment Report defines the Australian water supply as "characterized by extremely variable rainfall and river flow regimes"; this variable supply is being increasingly depleted by drought and the ever-increasing demand for water.[49] This tendency for extremes has been dramatically illustrated over the past decade as the continent has experienced record drought, flood, and cyclonic activity.[50]

Australia, despite its massive water infrastructure, still faces significant challenges in meeting the water needs of its population. Many Australian cities have been subject to water restrictions over recent years, and billions of dollars of investment have been required to upgrade ageing national infrastructure to improve water storage and reticulation.[51] This raises pertinent questions as to whether consumers can afford to pay for

45. THOMPSON, *supra* note 31, at 9.

46. Godden, *supra* note 3, at 186. Godden points out in this respect that "the similarities . . . of the environmental context for water resource management are readily apparent. However, the stresses of population growth and differential access to water are more pressing in South Africa, while Australian concerns have focussed on the need for continued economic development while addressing environmental degradation." *Id.*

47. *Id.* at 184-86.

48. *Living with Drought*, BUREAU OF METEOROLOGY, http://www.bom.gov.au/climate/drought/livedrought.shtml (last visited Mar. 10, 2012).

49. AUSTRALIAN STATE OF ENV'T COMM., STATE OF THE ENVIRONMENT 2006 59 (2006) (during the recent drought, dam levels in many regions reached lows of between 20 to 30% capacity with some communities experiencing extremes below these levels); NAT'L WATER COMM'N, AUSTRALIAN WATER SUPPLY SEASONAL OUTLOOK (Oct. 2006), *available at* http://www.nwc.gov.au/resources/documents/Australia-water-supply-seasonal-outlook-PUB-.pdf (last visited Mar. 10, 2012); WATER CORP., *Water Storage in our Dams* http://www.watercorporation.com.au/D/dams_storage.cfm (last visited Mar. 10, 2012).

50. COMMONWEALTH OF AUSTRALIA, A NATIONAL PLAN FOR WATER SECURITY (2007), http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf (last visited Mar. 10, 2012); QUEENSLAND FLOODS COMM'N OF INQUIRY, *Interim Report* 24-25 (2011), *available at* http://www.floodcommission.qld.gov.au/publications/interim-report (last visited Mar. 10, 2012).

51. NAT. WATER COMM'N, *National Review of Water Restrictions in Australia*, http://www.nwc.gov.au/www/html/524-national-review-of-water-restrictions-in-australia.asp (last visited Mar. 10, 2012); NAT. WATER COMM'N, *Water Infrastructure: A National Challenge*, http://www.nwc.gov.au/www/html/485-water-infrastructure-a-national-challenge---12-december-2007.asp (last visited Mar. 10, 2012).

such upgrades. Rural and remote indigenous communities also present challenges for water provision[52] because of physical isolation, poor water quality, presence of salinity in many areas,[53] and the need to respect traditional indigenous lifestyles.

In addition to these challenges, climate change will have a severe impact on water resources and access to these sources. For example, El Nino and the opposing La Nina phenomena, whose frequency is likely to increase with the presence of climate change, heavily influence Australia's extreme weather and rainfall patterns.[54] The 2007 Intergovernmental Panel on Climate Change Report ("IPCC Report") noted that Australia is very likely to experience warming over the next century comparable to the overall increase in "global mean warming."[55] The IPCC Report also found that, because of global warming, precipitation in southern Australia is likely to decrease in winter and spring and is likely to decrease in southwestern Australia during the winter months.[56] The Australian Greenhouse Office asserts that Australian average temperatures have risen by 0.7 Centigrade over the past century, while rainfall has increased in northern parts of the country and decreased in most southern regions over the past fifty years.[57] The Greenhouse Office also notes that, because of these climate and precipitation changes, there has been a significant decrease in runoff demonstrated by "a 50% drop in water supply to

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52. *Review of the 1994 Water Report (2001)*, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, http://www.hreoc.gov.au/racial_discrimination/report/water_report/index.html (last visited Mar. 10, 2012).

53. *See Australian Dryland Salinity Assessment 2000*, DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION AND CMTYS., http://www.anra.gov.au/topics/salinity/pubs/national/salinity_aus.html (last updated June 15, 2009); *see also, Salinity*, DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION AND CMTYS., http://www.environment.gov.au/land/pressures/salinity/index.html (last updated Oct.15, 2008). The Australian Dryland Salinity Assessment estimated that 5.7 million hectares were affected by salinity and that this number could increase to 17 million hectares in 2050.

54. Austl. Greenhouse Office, *Climate Change: An Australian Guide to the Science and Potential Impacts*, CORANGAMITE CATCHMENT MGMT. AUTH. 68, 87 (2003), www.ccma.vic.gov.au/soilhealth/climate_change_literature_review/documents/organisations/ago/science-guide.pdf; *see also Climate Variability and El Nino*, BUREAU OF METEOROLOGY, http://www.bom.gov.au/climate/glossary/elnino/elnino.shtml (last visited Mar. 10, 2012); *State of the Environment Report 2006: 7.1 Water Availability and Use*, DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION AND CMTYS., http://www.environment.gov.au/soe/2006/publications/report/inland-waters-1.html (last updated November 22, 2010).

55. J. H. CHRISTIANSEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 896 (S. Solomon et al. eds., 2007).

56. *Id.* at 896-98; *see also* ROSS GARNAUT, *Final Report*, THE GARNAUT CLIMATE CHANGE REVIEW, FINAL REPORT 135-37 (2008), *available at* http://www.garnautreview.org.au/index.htm (last visited Feb. 4, 2012); Austl. Greenhouse Office, *supra* note 53, at 3.

57. Austl. Greenhouse Office, *supra* note 54, at 3.

the reservoirs supplying Perth since the 1970s and near-record low water levels in storages in much of south-eastern Australia in 2002-03 due to low rainfall and high temperatures in the south-east since 1996."[58] Current projections also indicate that the southern portion of the Murray-Darling basin is likely to be drier by 2030.[59] Climate change, therefore, has the distinct potential to adversely impact Australia's fragile climate and variable precipitation patterns and further diminish the nation's already limited water resources.

The unique cultural and isolated geographic location of many of Australia's indigenous communities also poses challenges for water supply efforts. Water services to indigenous peoples have traditionally lagged behind services to non-indigenous fellow citizens.[60] The Federal Government, during the 1990s, engaged in a number of initiatives to substantially expand and improve water services to remote communities during this time.[61] Despite these efforts and improvements, indigenous communities still face significant challenges with respect to water access. The 2008 Native Title Report found that indigenous communities have generally been excluded from both the water reform process and from engaging in water markets.[62] It also noted that there remains substantial uncertainty over water rights, in particular those rights linked to native title.[63] The Report of the Independent Inquiry into Secure and Sustainable Urban Water Supply and Sewerage Services for Non-Metropolitan NSW highlighted similar concerns, noting that:

> Largely as a result of a lack of skilled operators and again infrastructure, drinking water standards in many discrete Aboriginal communities are poor and do not meet the basic standards set by state and national health guidelines. The operation, maintenance and monitoring of water and sewage systems has been inadequate and the health of the communities is at risk.[64]

While remote indigenous communities present a major water supply challenge for Australia's governments, as was illustrated above, they are not the only water users confronted by the realities of hydro-politics. For

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58. *Id.*

59. Australia's Urban Water Sector, *Productivity Commission Inquiry Report*, AUSTL. PRODUCTIVITY COMM'N 105-06 (August 31, 2011), http://www.pc.gov.au/__data/assets/pdf_file/0017/113192/urban-water-volume1.pdf.

60. Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, AUSTL. HUMAN RIGHTS COMMISSION, 170 (2009), http://www.pc.gov.au/__data/assets/pdf_file/0017/113192/urban-water-volume1.pdf.

61. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N *supra*, note 52.

62. Aboriginal & Torres Strait Islander Soc. Justice Comm'r, *supra* note 60, at 171.

63. *Id.*

64. Ian Armstrong & Colin Gellatly, *Report of the Independent Inquiry into Secure and Sustainable Urban Water Supply and Sewerage Services for Non-Metropolitan NSW*, NEW S. WALES DEP'T OF PRIMARY INDUS., 96 (Dec. 2008), http://www.water.nsw.gov.au/ArticleDocuments/36/utilities_local_sustainable_urban_water_and_sewerage_for_non_metropolitan_nsw_report.pdf.aspx.

example, disconnection and flow restriction is another means through which access to water is regulated to Australian households.[65] While the rates of disconnection and restriction across the Australian community are generally low, they have been found to reach up to 1.6 percent in a given utility area.[66] The price of water and wastewater services in Australia has also increased on average by 48 percent in the period from 2005 to 2010, significantly above the Consumer Price Index at the time (13 percent).[67] These increases have placed added pressure on low-income households and created a greater risk of non-payment.[68] While the Productivity Commission has asserted that these pressures do not pose a great risk to the cost of living as other utility price increases,[69] the continued threat of disconnection should be viewed as a matter of concern in the context of providing access to water.

V. THE REGULATORY FRAMEWORKS

Clearly, whilst the causes and extent of the foregoing challenges differ in the two countries, likeminded responses are required to meet the water needs of both populations. This section reviews these legal regulatory responses by focusing on key policy, constitutional and statutory provisions of the legal frameworks of South Africa and Australia that relate to the provision of water services. One of the primary objectives of this part is also to focus on the manner in which these policies and laws are implemented. In the case of South Africa, the regulatory approach is analysed by focusing on recent jurisprudence emanating from South Africa's courts. For the Australian scenario, the discussion will centre on water supply legislation, the ongoing reform process and the capacity of legislatively provided 'sustainability' and access provisions to deliver universal supply outcomes. For the sake of chronology and structural flow, the discussion commences with the South African scenario where after it proceeds to analyse the Australian legal framework.

A. SOUTH AFRICA

1. Policy Framework

Like all post-apartheid laws in South Africa, water services legislation is based on extensive policy provisions. The principal policy instrument

65. *See* Australia's Urban Water Sector, *supra* note 59, at 226.

66. *See, e.g., National Performance Report 2009-2010: Urban Water Utilities*, WATER SERVS. ASS'N OF AUSTL., 266 (2009), https://www.wsaa.asn.au/FreeDownloads/National%20Performance%20Reports/2009-10%20Urban%20National%20Performance%20Report%20%20Part%20B.pdf; *see also* Australia's Urban Water Sector, *supra* note 58, at 213.

67. Australia's Urban Water Sector, *supra* note 59, at 223.

68. *See id.* at 221-34.

69. *See id.*, at 228.

in this respect is the 1994 *White Paper on Sanitation and Water Supply.*[70] The policy is based on several principles which "assume a context of universal human rights and the equality of all persons regardless of race, gender, creed or culture",[71] and it forms the foundational premise of South Africa's existing regulatory framework related to water services. The principles are therefore instructive to understanding this regulatory framework and include, among others: basic water services must be provided as a fundamental human right; the principle "some for all forever" instead of "all for some forever" will apply; water has economic value and the way in which water services are provided must reflect the growing scarcity of good quality water in South Africa; the user must pay for water services; and environmental integrity is an important consideration in providing access to water.[72] Two observations become evident: a) the policy indicates a dramatically different direction in South Africa's approach to providing access to water when compared to the past dispensation described earlier; and b) it describes the ideal of water services provision by including ambitious objectives which could be highly problematic and difficult to achieve in practice.

2. Constitutional Provisions

In South Africa, water services reforms, in addition to a change in policies, must also be considered against constitutional reforms. The *Constitution of the Republic of South Africa, 1996* has fundamentally altered the socio-political and legal landscape in South Africa in all respects.[73] It is the "supreme law of the Republic"; and "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[74] It contains a Bill of Rights which is the "cornerstone of democracy in South Africa" and which "enshrines the rights of all people ... and affirms the democratic values of human dignity, equality and freedom."[75] There is an obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights."[76] These provisions emphasize that constitutional democracy, which is based on the rule of law and a rights-based approach to a wide spectrum of human developmental issues and needs, are paramount in post-apartheid South Africa. This is no different in the context of water services provision.

The most important right in this context is provided by section 27 which states, among others, that "everyone has the right to have access to sufficient water," and "[t]he state must take reasonable legislative and

70. DEP'T OF WATER AFFAIRS AND FORESTRY, *supra* note 29.
71. *Id.* at 8.
72. *Id.*
73. S. AFR. CONST., 1996 (replacing the Constitution of the Republic of South Africa 200 of 1993; the so-called Interim Constitution, S. AFR. (INTERIM) CONST., 1993.).
74. *Id.* § 1-2.
75. *Id.* § 2-7-1.
76. *Id.* § 2-7-2.

other measures, within its available resources, to achieve the progressive realisation" of this right.[77] Section 27 is an example of a second generation type, or socio-economic right which guarantees people the right to claim access to basic entitlements such as water, while concomitantly placing an obligation on government to respect, protect, promote, and progressively fulfill the right through laws and any other measures insofar as resources are available and these resources allow progressive realization.[78] The right clearly does not guarantee that people may claim water as such; neither does it impose a blanket and unqualified obligation on government to provide water. This is in line with the basic construct and nature of all other socio-economic rights in South Africa.[79] The idea that the right to access to water is not absolute is further underlined by the limitation clause of the Bill of Rights which states that all the "rights in the Bill of Rights may be limited only in terms of law of general application [and] to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."[80] Section 27 is therefore a qualified socio-economic right since government must only progressively (not immediately) provide *access* to water (not water as such) through reasonable legislative and other measures within its available resources; it is thus more aspirational than it is immediately achievable in actual practice and reality.

Apart from these "limited" entitlements and concomitant obligations stemming from qualified socio-economic rights, the state must additionally, by virtue of section 7 of the Constitution, "respect, protect, promote and fulfil the rights in the Bill of Rights."[81] The state will therefore be precluded from law or conduct that infringes the enjoyment of certain rights (duty to respect);[82] it must take measures to protect vulnerable people from violation of their rights (duty to protect); and it must fulfill socio-economic rights by, for example, providing people access to a socio-economic entitlement such as water where they currently lack such access.[83]

Section 27, like other socio-economic rights, such as access to housing, social assistance, and health care services is intended to facilitate

77. *Id.* § 27.

78. *See generally* Louis J. Kotzé, *Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-economic Rights in South Africa*, 1(2) J. HUM. RTS. & ENV'T. 135-160 (2010) [hereinafter *Phiri*]; *see* Louis J. Kotzé, *Access to Water in South Africa: Constitutional Perspectives from a Developing Country*, 1 FINNISH ENVTL. L. REV. 70-106 (2009) [hereinafter *Perspectives*] (discussing the details of Section 27 of the South African Constitution).

79. *See, e.g.*, S. AFR. CONST., 1996 §§ 26-27 (providing the right to access housing, and the right to health care and social security).

80. *Id.* § 36.

81. *Id.* § 7.

82. *See id.* § 27. In the context of s 27, the state will not respect this right if it takes away existing access to water, by way of, for example, a pre-payment meter.

83. S. LIEBENBERG, THE INTERPRETATION OF SOCIO-ECONOMIC RIGHTS 33-6 to 33-7 (M. Chaskalson et al. eds., 2nd ed. 2003).

transformation. In this sense, socio-economic rights aim to correct certain (mostly historically-rooted) wrongs by being transformative; i.e. these rights, together with various other constitutional provisions, require "collective power to be used to advance ideals of freedom, equality, dignity and social justice."[84] Section 27 is thus closely intertwined with other fundamental rights, including the rights to equality, human dignity, and life;[85] and one could consider its fulfillment a prerequisite for the latter most basic of fundamental human rights to be realized and protected.

The Bill of Rights also provides everyone with an environmental right. The right is formulated as follows:

> Everyone has the right
>
> a. to an environment that is not harmful to their health or well-being; and
>
> b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
>
> i. prevent pollution and ecological degradation;
>
> ii. promote conservation; and
>
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development [86]

Water is part of the environment and therefore falls under the scope of section 24.[87] Providing people with access to water will affect the water resource in many ways; it is clear that there is a direct link and reciprocal interplay between the quality and quantity of the water resource and the ability to provide access to this resource.[88] In South Africa, therefore, in addition to having the right of access to water, everyone has the right of access to an environmental resource (water) that must not be harmful to their health or well-being, and they have the right to have this water re-

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84. D. BRAND, INTRODUCTION TO SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTION 1 (D. Brand & C. Heyns eds., 2005). *See also* Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights in South Africa*, 6(4) ESR REVIEW 3-7 (2005); Pierre De Vos, *Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 SAJHR 258, 260-263 (2001); Liebenberg & Goldblatt, *supra* note 25 (discussing the transformative role of socio-economic rights and the relationship of the latter with the constitutional right to equality (§9)).

85. *See* S. AFR. CONST., 1996 §§ 9-11.

86. *Id.* § 24.

87. National Environmental Management Act 107 of 1998 § 1 (S. Afr.) Water forms part of the environment for the purpose of law, by virtue of the definition of "environment" in § 1 of South Africa's environmental framework law, the National Environmental Management Act.

88. *See, e.g.*, Ashwin R. Seetal & Gavin Quibell, *Water Rights Reform in South Africa*, WATER RIGHTS REFORM: LESSONS FOR INSTITUTIONAL DESIGN 153-54 (Bryan Randolph Bruns et al. eds., 2005).

source protected.[89] This would imply that water must be of a specific quantity and quality fit for consumption and use. Additionally, everyone has a right to have the water resource protected for current and future generations by means of laws and other measures (including, *inter alia*, administrative and other governance functions) that protect the resource form pollution and conserve the resource while simultaneously allowing justifiable socio-economic development.[90] Water and access to water is a prerequisite for sustaining life, equality, and human dignity, but the water must be of an acceptable quality fit for use; the minimum constitutional requirement being that its use must not harm health and well-being. As Godden[91] correctly notes:

> [W]ithin South Africa, the water law reforms are clearly predicated on explicit distributive justice goals that define sustainability as a mixture of ecological and human needs. Environmental protection, while significant, is couched in terms of retaining the integrity of water not only as an end in itself, but as a support for the future development of the country in pursuing a range of social and economic reform agendas.

One thus observes a fine interplay and interconnectivity between environmental and socio-economic considerations in the Constitution; an aspect which is particularly significant for the statutory framework discussed hereafter.

3. Statutory Framework

i. National Water Act 36 of 1998

The National Water Act 36 of 1998 (NWA) is important for water services insofar as it protects water resources and regulates the availability, quantity, and quality of water for human and environmental use.[92] In other words, it aims to provide sufficient quantities of water of a specific quality, which is a prerequisite for "access." Generally speaking, it aims to give effect to section 24 of the Constitution as far as the ecological aspects of water are concerned. It has several objectives, including, among others, meeting the basic human needs of present and future generations; promoting equitable access to water; redressing the results of past racial

89. The phrase "their health" arguably implies that only the health of humans is at stake here and not environmental health and ecological integrity.

90. What the law considers "justifiable" is unclear and there is no guidance on this issue. In the water services context, the erection of a water treatment plant to supply water to a destitute community may very well be legally justifiable, even if the costs are exorbitant. Or, an ecosystem may be destroyed by building a dam if this would contribute to justifiable socio-economic development. What is clear in any event, is that "justifiability" should be determined on a case-by-case basis and that it is quite possible that socio-economic development would be more important and thus "justifiable" than ecological concerns.

91. Godden, *supra* note 3, at 202.

92. National Water Act No. 36 of 1998 (S. Afr.).

and gender discrimination; promoting the efficient, sustainable and beneficial use of water in the public interest; facilitating social and economic development; providing for growing demand for water use; protecting aquatic and associated ecosystems and their biological diversity; and reducing and preventing pollution and degradation of water resources.[93]

Given these broad, and admittedly ambitious, objectives the NWA can evidently not be separated from the Water Services Act 108 of 1997 (WSA) discussed below.[94] The overlap and interplay between the right of access to water and the environmental right in the previous section also illustrates a very direct interrelationship between the NWA and the WSA. There would, after all, be no point in the WSA existing and regulating access to water if the NWA fails to provide water of a sufficient quantity and quality for distribution and use. Another link between the NWA and the WSA is the reliance of the NWA in achieving its objectives on the concept of "reserve". The "reserve" is defined as:

> the quantity and quality of water required:
>
> a) to satisfy basic human needs by securing a basic water supply, as prescribed under the Water Services Act, 1997 (Act No. 108 of 1997), for people who are now or who will, in the reasonably near future, be-
>
> i) relying upon;
>
> ii) taking water from; or
>
> iii) being supplied from, the relevant water resource; and
>
> b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource.[95]

The reserve is significant because it is the standard measure and consideration of highest importance when decisions are made about water allocation; i.e.; the quantity to be allocated for human use on the one hand and ecological use on the other. Also in terms of section 18 of the NWA, all actions and decisions in terms of the Act must be in accordance with the reserve, and all authorities acting in terms of the NWA

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93. *Id.* § 2.

94. Water Services Act No. 108 of 1997 (S. Afr.).

95. National Water Act No. 36 of 1998 § 1 (S. Afr.). The reserve clearly consists of a reserve for human needs and a reserve for ecological needs. Godden states that:

> The human needs reserve reflects the Constitutional entrenchment of human rights at the level of natural resource legislation by making provision for 'essential' individual requirements such as water for drinking, for food preparation and for personal hygiene. The ecological reserve provides water required to protect and maintain the aquatic ecosystems of the water resource.

The ecological reserve could also be described as aiming to protect the ecological and ecosystem integrity of water resources against over-consumption. Godden, *supra* note 3, at 198-99.

must give effect to the reserve.[96] When authorities perform a duty or function under the NWA, especially with respect to water allocation, they must do so in full recognition, respect and consideration of the need to provide humans with sufficient basic water as per the WSA, while simultaneously securing sustainable use of the resource for present and future purposes through the NWA's provisions.[97] Notably the reserve also aims to balance human and ecological demands on water resources by considering water quantity and quality in water allocation decisions. In terms of the reserve determination then, humans will be entitled to a certain quantity and quality of water, conditional on the need to have water of a sufficient quantity and quality left for ecological needs. Thus expressed, the reserve recognises that human needs (even human survival) can only be satisfied as long as enough water of an acceptable quality is available to do so (otherwise expressed as "sustainable use").[98] In this way, the reserve seeks to cement sustainability as the strategic foundation of South African water law and governance.

At a more practical level the NWA aims to facilitate water resource protection by means of a host of statutory provisions such as pollution prevention measures;[99] elaborate water authorisation procedures and requirements;[100] water pricing strategies, taxes and user charges;[101] monitoring, assessment and information systems;[102] and enforcement measures.[103] Collectively, these provisions, especially when interpreted in the context of the reserve, must ensure that the objectives of section 24 of the Constitution are fulfilled as far as the protection of water resources are concerned. This would be the only approach that would secure, as far as possible, sufficient water for the qualified socio-economic right and concomitant obligations stemming from section 27 of the Constitution to be realised; the successful realisation, which is mostly dependent on the provisions of the WSA, will be discussed hereafter.

ii. Water Services Act 108 of 1997

The WSA is the main statutory instrument in South Africa's regulatory arsenal for providing access to water. While the NWA, generally speaking, deals with ecological aspects, the WSA addresses socio-

96. National Water Act No. 36 of 1998 § 18 (S. Afr.).

97. *See* Allan, *supra* note 5, at 440. Allan describes the reserve as a "buffer" that aims "to protect two of the fundamental subjects of the act [NWA]- public [or socio-economic] interest and the environment."

98. Godden, *supra* note 3, at 199-201. Reliance on the reserve for resource allocation is evidently also crucial for achieving a more integrated approach to water governance. Holistic consideration of human and ecological needs, also with respect to the quantity and quality of water, would achieve integration.

99. National Water Act No. 36 of 1998 § 19 (S. Afr.).

100. *Id.* at ch. 4.

101. *Id.* at ch. 5.

102. *Id.* at ch. 14.

103. *Id.* at ch. 16.

economic aspects of water governance in South Africa.[104] It aims to provide for, *inter alia*: the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water not harmful to human health or well-being; the setting of national standards and norms and standards for tariffs in respect of water services; a regulatory framework for water services institutions; the monitoring of water services; financial assistance to water services institutions; the accountability of water services providers; and the promotion of effective water resource management and conservation.[105] The Act reiterates the constitutional right of access to water in section 3 and even further extends this right to include basic sanitation.[106] "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."[107] The minimum standard for basic water supply is 25 litres of potable water per person per day, or 6 kilolitres per household per month, free of charge.[108] The consumer must pay any quantity exceeding this basic, free amount. Increasingly, providers are using prepayment water meters as a means of recovering costs.

As water services authorities, local government, (more commonly known as municipalities), have the primary responsibility in South Africa for ensuring access to water and for providing water services. This competence is firstly determined by Schedule 4 Part B of the Constitution which states that "[w]ater and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems" is the functional area of local government; a position which is reiterated by the WSA.[109] In terms of section 11 of the WSA, there is a duty on the

104. Space and focus do not allow a detailed discussion of this law. *See* THOMPSON, *supra* note 31, at 693-758.

105. Water Services Act No. 108 of 1997 § 2 (S. Afr.).

106. S. AFR. CONST., 1996, § 27. Access to sanitation is not specifically mentioned in s 27 of the Constitution, but rather implied.

107. Water Services Act No. 108 of 1997 § 1 (S. Afr.).

108. *See* GN R509 of 8 Jun. 2001 (S. Afr.).

109. Water Services Act No. 108 of 1997 §§ 6, 11 (S. Afr.) read with the provisions of the Local Government Transition Act 209 of 1993 (S. Afr.) and the Local Government: Municipal Structures Act 117 of 1998 (S. Afr.). Interestingly, Schedule 4 Part A of the Constitution provides that the "environment", "nature conservation", and "pollution control" are functional areas of concurrent national and provincial competence. This would mean that national and provincial government would be responsible for regulating the ecological aspects of water, which specifically exclude the provision of water services, which is a functional area of local government. Thus, the fulfilment of the constitutional right (s 24) and concomitant statutory obligations (NWA) with respect to the ecological aspects of water protection would mostly fall outside local government's duties; a situation which could lead to fragmentation of governance efforts and an obstacle to an integrated water governance approach. It has, after all been illustrated earlier that integrated water resource management requires a simultaneous and equal consideration of socio-economic and environmental considerations; also by virtue of the reserve determination. Fragmenting the authorities and spheres of government that decide on these issues, places additional obstacles in the way of a sustainable integrated approach. *See* C. Bos-

water services authorities "to progressively ensure efficient, affordable, economical and sustainable access to water services."[110] This duty is subject to, among others: "the availability of resources"; "the need for an equitable allocation of resources to all consumers" and "the need to regulate access to water services in an equitable way"; "the duty of consumers to pay reasonable charges"; "the duty to conserve water resources"; and "the right of the relevant water services authority to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services."[111] In addition, "a water services authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction,"[112] and it "may impose reasonable limitations on the use of water services."[113] All of these conditions have the potential to limit the responsibility of a water services authority under reasonable circumstances to provide access to water, and they closely mirror the restrictive and limited application of the qualified socio-economic right of access to water in section 27. It is thus evident that the fulfilment of the constitutional right of access to water will depend, also by virtue of the WSA, on considerations of reasonableness. Whether circumstances such as, *inter alia*, lack of human and financial resources, inability to recover costs for service delivery, and lack of water resources could validly and reasonably be raised as reasons for not providing access to water, raises important questions in a constitutional and rights-based context. Some of these concerns were at the heart of recent decisions by South African courts discussed in the following section.

The WSA explicitly provides for the possibility to privatize the provision of water services. While it is entirely possible and usual to perform the functions of a water services provider itself, a municipality as a water services authority may also choose to "enter into a written contract with a water services provider; or form a joint venture with another water services institution to provide water services."[114] Section 1 of the WSA defines "water services provider" as "any person [including natural and juristic persons for the purpose of South African law] who provides water

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man C, L.J. Kotzé & W. Du Plessis, *The Failure of the Constitution to Ensure Integrated Environmental Management from a Co-operative Governance Perspective*, 19 SA PUB. L. 411-21 (2004); Anel Du Plessis, *Some Comments on the Sweet and Bitter of the National Environmental Law Framework for 'Local Environmental Governance'*, 24 SA PUB. L. 57-97 (2009).

110. Water Services Act No. 108 of 1997 § 11(1) (S. Afr.).

111. *Id.* § 11(2).

112. *Id.* § 11(4).

113. *Id.* § 11(6).

114. *Id.* § 19; *see also id.* §§ 6, 22, 27. In South Africa, various forms of water service privatization can be distinguished in this context, including, corporatization, public-public partnerships, public-private partnerships, public-community partnerships, municipal debt issuance, service contracts, management contracts, lease contracts, concessions, build-operator-transfer arrangements, and full privatization. For a detailed discussion, *see* THOMPSON, *supra* note 31, at 727-28.

services to consumers or to another water services institution."[115] This is a very wide definition, which could include private water companies. Section 11(3) of the WSA, which provides municipalities with wide discretion to give effect to their duty to provide water services, reinforces the possibility of making use of privatized water service provision.[116] They must consider, among others, alternative ways of providing access to water services, the need for regional efficiency, the need to achieve benefit of scale, the need for low costs, and the requirements of equity. It may thus very well be that a municipality will rather opt for a privatization scheme where, in its view, it is a better alternative, it would be more efficient and beneficial, more cost effective, and would achieve greater equity. Moreover, as has been argued earlier, the constitutional and statutory duty with respect to water services only relates to the duty to provide "access" to water, not water *per se*. Insofar as privatised water services can provide "access," and so long as privatized provision complies with all the requirements of the WSA, the NWA, and the Constitution among others, it would arguably also not be unconstitutional.[117] Also, in South Africa socio-economic rights must be realised by means of "reasonable legislative and other measures."[118] While socio-economic rights, such as the right of access to water, mostly impose obligations on the state, it would be possible for the state to fulfil these obligations in conjunction with the private sector by arguing that it can lawfully and constitutionally do so to the extent that privatization is deemed to be part of "reasonable *other* measures" (in addition to legislative measures). Unfortunately, in South Africa privatization is not without its problems as the next section illustrates.

4. The Law in Action

In South Africa, courts are those institutions best suited to rule on the normative meaning of fundamental rights, including the right of access to water.[119] The work of the judiciary is also a vivid illustration of the application of law in practice and how law actually sets about to achieve what it was intended to achieve. Because of its rights-based approach to providing access to water and since the advent of its new constitutional democ-

115. Water Services Act No. 108 of 1997 § 1 (S. Afr.).

116. *See id.* § 11(3).

117. This is of course not to say that privatisation of water services would be preferable to public sector provision; especially if one considers that many constitutional duties and remedies are only applicable to the public sector and not the private sector. While this article does not specifically explore the merits of privatisation, it should be noted here that while privatisation has many benefits, it may also be an additional obstacle that stands between people and the fulfilment of constitutional guarantees and protection of their rights. *See, e.g.*, Barrett & Jaichand, *supra* note 2, at 543-62.

118. *See* S. AFR. CONST., 1996 §§ 24, 26, 27.

119. *See* Anél Du Plessis, *A Government in Deep Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights*, 19 REV. EUR. CMTY. & INT'L ENVTL. LAW 316, 318 (2010).

racy, South African courts have had the opportunity to build and further develop a rich body of jurisprudence relating to the normative interpretation and meaning of the right of access to water and its accompanying statutory provisions and obligations.[120] These judgments provide insightful examples of the manner in and the extent to which the South African regulatory framework has in fact been able to provide everyone access to water.

The first case that dealt with access to water was *Manqele v Durban Transitional Metropolitan Council* (*Manqele*).[121] The applicant's water supply to her home was disconnected by the municipality (the water services provider) consequent on her failure to pay for these services. She subsequently sought a declaratory order from the High Court that the discontinuation was unlawful and invalid, and she sought an order, *inter alia*, directing the municipality to maintain basic water services.[122] Her claim was based on the right of access to water provided by section 3 of the WSA.[123] At the time no specific regulations existed that prescribed the minimum standard of water services provision. In light of this fact, the court found that the right upon which the applicant relied was incomplete, therefore rendering it unenforceable.[124] It also remarked in passing that despite the provision of six kilolitres of water free of charge, the applicant chose not to limit herself to this quantity, and, therefore, had to pay for the additional use. In the court's view this justified the discontinuation of the water services.

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120. For a discussion of these judgments, *see, e.g.*, *Perspectives*, *supra* note 78, at 70-106; *see also Phiri*, *supra* note 78, at 135-60.

121. *Manqele v. Durban Transitional Metro. Council* 2002 (6) SA 423 (D) (S. Afr.) (*Manqele*).

122. *Id.* at paras. 424H-424I.

123. For reasons unknown, other than a cursory reference to the constitutional provisions by the applicant's legal counsel in oral arguments before the court, nothing in the applicant's papers or arguments indicated that she sought to specifically rely on her constitutional entitlements to access to water in terms of section 27 of the Constitution.

124. The court found in this respect that:

> [I]n the absence of regulations defining the extent of the right of access to a basic water supply, I have no guidance from the Legislature or executive to enable me to interpret the content of the right embodied in s 3 of the Act. The interpretation that the applicant wishes me to place upon s 3 of the Act, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, requires me to pronounce upon and enforce upon the respondent the quantity of water that the applicant is entitled to have access to, the quality of such water and acceptable parameters for 'access' to such basic water supply. These are policy matters which fall outside the purview of my role and function, and are inextricably linked to the availability of resources. Given the fact that the prescribed minimum basic water supply has not yet been promulgated, notwithstanding the commencement of the Water Services Act . . . it would seem that such resources are not yet available on the scale required to give national content to s 3 of the Act.

Manqele, 2002 (6) SA 423 (D) at paras. 427C-427F.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (*Bon Vista*), the applicants' water supply had been disconnected by the municipality following their non-payment for water services provision.[125] The applicants sought an order for the reconnection of the water supply based on their constitutional right of access to water in terms of section 27 of the Constitution and the WSA (as opposed to the applicant's sole reliance on the WSA in *Manqele*).[126] The court considered the provision of water services to be a "basic and essential service.... The absence of these services could have serious health consequences, both for the applicants and for the other residents of the city."[127] It found that the right of access to water imposes duties on government (the municipality).[128] These duties entailed that government "must refrain from action which would serve to deprive individuals of their rights."[129] Moreover, "a violation of the duty to respect a right arises when the State, through legislative or administrative conduct, deprives people of the access they enjoy to socio-economic rights."[130] It was clear from the facts of the case that the applicants already had existing access to water services and the discontinuation of services by the municipality was therefore in breach of its "constitutional duty to respect the right of access to water."[131] Any violation of this constitutional duty could only be valid if it could be justified.[132] In the court's view, the municipality was unable to justify or prove the reasons for the discontinuation in line with the requirements of the WSA, and the applicants "had shown at least a *prima facie* right to a continuing supply of water".[133] Therefore, "[t]hat right was being infringed in that they had been deprived of access to water, and the deprivation was continuing. . . They had no other satisfactory remedy."[134] The court accordingly granted an order to the effect that the municipality had to restore the water supply.[135]

Jurisprudential developments with respect to the right of access to water have recently culminated in the now infamous Constitutional Court ruling in *Mazibuko and Others v. City of Johannesburg* (*Mazibuko*).[136] The central issue before the Court was the interpretation of section 27 of the Constitution, namely the right of access to water.[137] The case was insti-

125. *Residents of Bon Vista Mansions v. S. Metro. Local Council* 2002 (6) BCLR 625 (W) (S. Afr.).
126. *Id.* at paras. 11, 21.
127. *Id.* at para. 10.
128. *Id.* at para. 12.
129. *Id.* at para. 16.
130. *Id.* at para. 19.
131. *Id.* at para. 20.
132. *Id.*
133. *Id.* at para. 34.
134. *Id.*
135. *Id.* at para. 35.
136. *Mazibuko v. City of Johannesburg* 2010 (3) BCLR 239 (CC) (S. Afr.) (*Mazibuko*).
137. *Id.* at para. 1.

tuted by Lindiwe Mazibuko and other poor, destitute residents (the applicants) living in the Phiri township near Johannesburg,[138] after their water services provider (the City of Johannesburg and the respondent *in casu*) decided to install prepayment water meters to recover costs for any water that consumers used in excess of the City's free basic water supply of 25 liters per person per day or 6 kilolitres per household per month.[139] The applicants claimed that the prepayment meters violated their constitutional right of access to water (section 27) and that the City's free basic water supply was, quantitatively speaking, insufficient.[140] The case commenced in the High Court,[141] was appealed to the Supreme Court of Appeal,[142] and ended up in the Constitutional Court in 2009.[143] The High Court declared that the prepayment water system was unconstitutional and unlawful, and it consequently ordered the City to provide the residents of Phiri with a free basic water supply of 50 liters per person per day and the *option* of a metered supply installed at the cost of the City.[144] The City appealed this decision to the Supreme Court of Appeal, which replaced the order of the High Court with one declaring that 42 liters of water per person per day would constitute sufficient water in terms of section 27(1) of the Constitution.[145] This decision was finally appealed to the Constitutional Court where the applicants argued that the Supreme Court of Appeal was incorrect in its decision that the adequate quantity of water required by section 27 of the Constitution was 42 liters instead of 50 liters, and sought a reinstatement of the High Court Order.[146] The Constitutional Court dismissed the applicants' appeal and held that a court cannot prescribe to government how much water it must supply to people; a court can only decide on whether government's water provision policies and laws are reasonable or not.[147] It determined that the City's free water policies and laws were reasonable and that the installation of the prepayment water meters was neither unfair nor discriminatory.[148]

This judgment, although having the potential to raise eyebrows, is very much in line with earlier precedents that the Constitutional Court itself set in *Government of the Republic of South Africa and Others v. Grootboom and Others* (Grootboom),[149] and *Minister of Health and Oth-*

138. *Id.* at para. 4. Phiri is part of Soweto which was created under the previous apartheid regime as an exclusive "black residential area" in terms of the regime's policies of segregation and racial discriminatory policies. *Id.* at para. 10.

139. *Id.* at paras.15-16.

140. *Id.* at para. 25.

141. *Mazibuko v. City of Johannesburg* 2008 JOL 21829 (W) (S. Afr.).

142. *City of Johannesburg v. Mazibuko* 2009 (8) BCLR 791 (SCA) (S. Afr.).

143. *Mazibuko v. City of Johannesburg* 2010 (3) BCLR 239 (CC) (S. Afr.).

144. *City of Johannesburg v. Mazibuko* 2009 (8) BCLR 791 at para. 39.

145. *Id.* at para. 62.

146. *Mazibuko*, 2010 (3) BCLR 239 at para. 31.

147. *See id.* at para. 160.

148. *Id.* at para. 154.

149. *Gov't of the Republic of S. Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.). *See Also* P. DE VOS, THE RIGHT TO HOUSING, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 85, 85-106 (Danie Brand & Christof Heyns eds., 2005).

ers v. Treatment Action Campaign and Others (TAC), where it considered the rights of access to adequate housing and access to health care services, respectively.[150] In line with precedent, the Court was forced not to focus on the right *per se*, but rather on the obligation on government to progressively realize the right in question; in other words, any constitutional challenge must test whether the state's actions have met the constitutional standard of reasonableness in the state's efforts to realise the right.[151] A court will typically only intervene where this standard has not been met; it will not intervene in those instances where the state has failed to provide a specific quantity of a socio-economic entitlement such as water.[152] This test is known as "reasonableness review" and entails that in the absence of minimum core obligations (a notion which the Constitutional Court has consistently rejected), it would only be required of a court to determine whether the legislative and other measures taken by government to realize a positive obligation in terms of socio-economic rights are reasonable.[153] In the case of *Mazibuko*, the Constitutional Court concluded that the legislative and other measures taken by government were reasonable.[154]

Privatization of water services was never an explicit issue before any of the South African courts. Yet, as Larson points out, the neoliberal market policies adopted by South Africa in the 1990's are a subtle leitmotif in the country's water jurisprudence, and it is evidence of an explicit legislative and political agenda to privatize water services country-wide.[155] In line with this progressive but determined drive to privatize water services provision, the City of Johannesburg privatized its own water services provision by creating Johannesburg Water, a fully corporatized entity operating under private laws, of which it was the sole owner and shareholder.[156] Johannesburg Water, in turn, contracted with Suez Environment to help it become a self-sufficient and financially viable independent entity.[157] One of the ways to increase its operational efficiency was a drive towards full cost-recovery for water services through the installation of the prepayment water meters.[158]

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150. *Minister of Health v. Treatment Action Campaign* 2002 (5) BCLR 1033 (CC) (S. Afr.). *See also* C. NGWENA & R. COOK, RIGHTS CONCERNING HEALTH in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 107, 107-151 (Danie Brand & Christof Heyns eds., 2005).

151. *Mazibuko,* 2010 (3) BCLR 239 at paras. 161-62 (S. Afr.).

152. *Id.*

153. 'Reasonableness review' does not stand isolated from criticism. See LIEBENBERG, *supra* note 83, at 33-38, 33-41.

154. *Mazibuko,* 2010 (3) BCLR 239 at para. 9.

155. *See generally,* ELIZABETH A. LARSON, AT THE INTERSECTION OF NEOLIBERAL DEVELOPMENT, SCARCE RESOURCES AND HUMAN RIGHTS: ENFORCING THE RIGHT TO WATER IN SOUTH AFRICA (2010), *avaialble at* http://digitalcommons.macalester.edu/intlstudies_honors/10/ (last visited Mar. 10, 2012).

156. *Id.* at 17.

157. *Id.*

158. *Id.* at 18 (arguing that the introduction of the prepayment water meters was based on market environmentalism which has grave consequences for water users).

The Constitutional Court in *Mazibuko* accepted that Johannesburg Water, was "contracted to the City to provide water to residents of the City"[159] and that it was a "water services provider" as described under the WSA above. Yet, in determining which obligations section 27 placed on whom, the Court stated that:

> This case does not raise the obligations of private individuals or organisations. Johannesburg Water is wholly owned and controlled by the City of Johannesburg and is therefore, for the purposes of this case, an *organ of state. It does raise the question of what obligations the right of access to sufficient water imposes upon the State.*[160]

In other words, the Constitutional Court considered Johannesburg Water to be a public entity and thus a part of government. Although not clearly stated, the Court probably argued that Johannesburg Water was a public entity because it was publically owned, regardless of the fact that it was privately operated (privatized). Such an interpretation is in line with the Constitution's definition of "organ of state," which it considers to include:

> a. any department of state or administration in the national, provincial or local sphere of government; or
>
> b. *any other* functionary or *institution*
>
> i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> ii. *exercising a public power or performing a public function in terms of any legislation.*[161]

The provision of water services is a public function exercised in terms of legislation (the WSA). This allowed the Court to impose the obligations emanating from section 27 of the Constitution on Johannesburg Water as a state entity, even though it was a privatized water services supplier. Because Johannesburg Water was a public entity and not a private one, it had to respect, protect, promote, and fulfill the rights in the Bill of Rights like any other organ of state. This idea is confirmed by section 8(1) of the Constitution, which states that: "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[162] If Johannesburg Water were considered a private entity, section 8(2) of the Constitution would have applied, which states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the

159. *Mazibuko,* 2010 (3) BCLR 239 at para. 21.
160. *Id.* at para. 46 (emphasis added).
161. S. AFR. CONST., 1996 § 239 (emphasis added).
162. *Id.* § 8(1).

right and the nature of any duty imposed by the right."[163] As indicated above, the nature of socio-economic rights is such that they typically impose (positive and negative) obligations on the state and its entities. In the case of private entities, socio-economic rights only prohibit these entities from interfering with or diminishing socio-economic rights by imposing negative obligations.[164] By denoting Johannesburg Water as a public entity, the courts in the *Mazibuko* trilogy followed a more expansive approach by imposing a wide range of positive *and* negative obligations on this privatized water provider (instead of only negative obligations). Ironically, the final decision of the Constitutional Court made it clear that even an increase in the number and scope of these obligations does not necessarily mean that access will be improved in a economic and financial sense.

It probably would have been impossible for the courts to view Johannesburg Water as a private entity for the purpose of water provision in any event, especially considering the definition of organ of state in section 8 of the Constitution and the fact that it is not a private company. One can only speculate as to the consequences such an interpretation would have had. Imposing only negative obligations on Johannesburg Water might have entailed that Johannesburg Water would not have been allowed to install the prepayment water meters as this would have interfered or diminished the enjoyment of the right of access to water (especially in light of the *Bon Vista* decision). The focus would not necessarily have been on realizing all the obligations traditionally associated with socio-economic rights (positive and negative), but rather more narrowly on whether there has been an infringement of existing rights (negative). This would have obviated the necessity to embark on the reasonableness review; a review that cost Mazibuko and her fellow applicants dearly. In retrospect, this differentiation is probably academic since it is clear that the Constitutional Court's decision supports the privatization of water services. Also insofar as this practice forms part of what the Court considered the City of Johannesburg's reasonable legislative and other measures to realize its obligations in terms of section 27. Until the *status quo* of access to water in South Africa is successfully challenged on other grounds, the situation thus remains that people have access to a limited quantity of free water for basic needs, where-after they will be expected to pay for any additional amount of water that will, in line with the privatization drive, increasingly be supplied by private water services providers. One must nevertheless optimistically hope that, as Larson points out:

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163. *Id.* § 8(2).

164. *See Governing Body of the Juma Musjid Primary Sch. v. Essay* (8) BCLR 761 (CC) at para. 58 (S. Afr.) (the Constitutional Court considered that the purpose of s 8(2) of the Constitution is not to impose a positive obligation on private persons to fulfill the rights in the Bill of Rights by, for example, providing people with access to water, although this case dealt with education. That obligation rests on the state. Instead, the purpose of s 8(2) is to impose negative obligations on private persons not to interfere with or diminish the enjoyment of rights).

> The loss [in Mazibuko] itself can be used strategically to show the gap between constitutional ideals and the real conditions of poverty, and perhaps to push the legislature towards adopting legislation to bridge these gaps and end inequalities.[165]

Clear and detailed policies and legislation with respect to privatized water services provision are currently lacking and *Mazibuko* highlights the need to adopt these as soon as possible. The practice of privatizing water services seems set to stay in South Africa and these policies and laws must have as their primary goal to guide privatization to the extent that it can be used to fulfill constitutional ideals within the challenging context of developing country realities.

B. AUSTRALIA

Australian water resources are managed via a myriad of state and federal government mechanisms. Generally speaking, state regulation is focused on utilities and water supply,[166] while federal initiatives are focused on water resource management and setting national standards and targets.[167] In light of this separation, Australia, unlike South Africa, has numerous legislative and policy instruments focused on water supply. The division of responsibility is a result of the powers allocated to the States and the Commonwealth under the Constitution and their subsequent interpretation by the High Court. However, this shared approach is a relatively recent phenomenon, stemming from a number of High Court decisions in the 1980s led by *Tasmania v Commonwealth* ("Tasmanian Dams"),[168] which saw a reinterpretation and expansion of Federal environmental powers. For the purpose of comparison, this part considers the scope of legislative powers related to water resources and supply and provides an overview of Federal and State water policy and legislation, paying particular attention to NSW. It then considers the circumstances in which access to water and the provision of water services have been advanced by legislative and judicial means in the absence of a constitutional right to access to water.

1. Constitutional Framework

Environmental and water governance are areas heavily influenced by the complexities of the Australian federal state system, especially with

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165. LARSON, *supra* note 155, at 67.

166. *See generally, Water Industry Competition Act 2006* (NSW) (Austl.); *Sydney Water Catchment Management Act 1998* (NSW) (Austl.); *Protection of the Environment Operations Act 1997* (NSW) (Austl.); *Sydney Water Act 1994* (NSW) (Austl.); *State Owned Corporations Act 1989* (NSW) (Austl.).

167. *Water Act 2007* (Cth) (Austl.); NATIONAL WATER COMMISSION, INTERGOVERNMENTAL AGREEMENT ON A NATIONAL WATER INITIATIVE, http://www.nwc.gov.au/__data/assets/pdf_file/0019/18208/Intergovernmental-Agreement-on-a-national-water-initiative2.pdf (last visited Oct. 13, 2011).

168. *Tasmania v. Commonwealth* (*Tasmanian Dams case*) (1983) 158 CLR 1 (Austl.).

respect to the division of governance competencies, responsibilities, and allocation of powers. These are all constitutional matters, and unlike the South Africa legal system, which provides for a clear division of legislative and executive authorities and areas of competence with respect to the environment and water services, the matter of which level of government could do what under which circumstances in Australia has evolved only in recent years.

Since federation the States have held legislative responsibility for water supply and water resources. When the Commonwealth was formed on January 1, 1901, five Imperial colonies with five separate Constitutions were brought together under one federal structure.[169] The States under this structure passed a proportion of their power to the newly formed Commonwealth Government, retaining power in the remaining areas of legislative responsibility.[170] Section 51 of the Constitution prescribes the areas that the Commonwealth has power to legislate.[171] Section 51, however, contains no mention of the environment, water resources, or supply, and therefore these areas remained a State responsibility following Federation.[172] The two Australian territories, the Northern Territory and Australian Capital Territory ("ACT"), enjoy a different and less autonomous relationship with the Federal Government with the Commonwealth, retaining legislative authority over the jurisdictions.[173] However, water related legislation has also traditionally been a Territory responsibility.[174] Because of the States and Territories retaining their responsibility for water supply and the localised nature of water catchments, vast bodies of State and Territory based bureaucracy, legislation, and regulation developed over time to protect and manage their water and supply structures.[175] However, since the 1980s there has been a gradual transfer of potential legislative power to the Commonwealth, following a number of High Court decisions led by the landmark decision of *Tasmanian Dams.*[176] These cases have opened the door for Federal environ-

169. *See* BLACKSHIELD & WILLIAMS, *supra* note 26, at 241.

170. AUSTRALIAN CONSTITUTION ss 106-109; *Amalgamated Soc'y of Eng'rs v Adelaide Steamship Co.* (1920) 28 CLR 129, 135 (Austl.); BLACKSHIELD & WILLIAMS, *supra* note 26, at 296-97.

171. AUSTRALIAN CONSTITUTION s 51. These areas include: trade and commerce; taxation; quarantine; fisheries in Australian waters beyond territorial limits; currency, coinage and legal tender; and weights and measures, *id.*at ss 51(i), (ii), (ix), (x), (xii), (xv).

172. GERRY BATES, ENVIRONMENTAL LAW IN AUSTRALIA 55-56 (5th ed., 2002).

173. AUSTRALIAN CONSTITUTION s 122. The Constitution gives the Federal Government the power to "make laws for the government" of the Territories, *id.* The provision has been interpreted as conveying broad and unlimited power, which means that whilst the Territories may enact their own legislation, it can be overridden by the Commonwealth, *Re Governor, Goulburn Correctional Centre; Ex Parte Eastman* (1999) 200 CLR 322, 370 (Austl.).

174. FISHER, *supra* note 26, at 5; *See, e.g., Water Act 1992* (NT) (Austl.); *Power and Water Corporation Act 1987* (NT) pt II (Austl.); *Utilities Act 2000* (ACT) divs 2.3, 8.3 (Austl.); *Territory Owned Corporations Act 1990* (ACT) (Austl.).

175. FISHER, *supra* note 26, at 132-33.

176. *Tasmanian Dams, supra* note 168.

mental regulation and led to increased Commonwealth involvement in areas of water management and reform. In order to understand the division between State and Federal powers, it is necessary to briefly consider these developments.

Tasmanian Dams upheld the validity of federal legislation[177] aimed at halting the construction of a hydro-electric dam on the Franklin River and protecting the area in light of its World Heritage status.[178] In considering the validity of the legislation, the High Court was required to determine whether the legislation was supported by the appropriate constitutional "heads of power," including sections 51(xx) and 51(xxix).[179] Specifically, with respect to section 51(xxix) and Australia's obligations under the World Heritage Convention,[180] the majority of the Court adopted a broad interpretation of the scope of the external affairs power, asserting that once a *bona fide* treaty was entered into, the Commonwealth Parliament had the ability to legislate to "implement treaty obligations, subject to implied and express constitutional prohibitions."[181] Consequently, the Court found the Commonwealth to have the power to validly enact legislation of "international concern" or legislation implementing the "purposes" of any specific treaty obligation under the external affairs provision thereby dramatically expanding the scope of its legislative power in the international context.[182] The Commonwealth has used these constitutional powers to justify the promulgation of an array of environmental legislation including the *Environment Protection and Biodiversity Conservation Act 1999* (Austl.),[183] which contains provisions for the protection

177. *Id.* at 324-25.

178. *Id.* at 6-7 (Gibbs CJ, Mason, Murphy, Brennan and Deane JJ) (holding that s 10(4) of the World Heritage Properties Conservation Act 1983 was valid and that such restrictions could be imposed on a corporation under s 51(xx) of the Australian Constitution). *See* BLACKSHIELD & WILLIAMS, *supra* note 26, at 838-39.

179. *Tasmanian Dams, supra* note 168. The Constitution provides the Federal Government with legislative responsibility with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" and "external affairs." AUSTRALIAN CONSTITUTION ss 51(xx), (xxix).

180. Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 UST 37, 11 ILM 1358. For example, the World Heritage Convention states each signatory recognizes "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage. . . ." *Id.* at art. 4.

181. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 (Austl.) (adopting this approach, supported by the Majority of Gibbs CJ, Mason, Murphy, Brennan and Deane JJ). However, Brennan and Deane JJ did not hold the World Heritage Properties Conservation Act 1983 valid in this instance. *See* SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, TRICK OR TREATY? COMMONWEALTH POWER TO MAKE AND IMPLEMENT TREATIES 69 (1995), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_ inquiries/pre1996/treaty/report/c05.htm (last reviewed May 26, 2003); *Tasmanian Dams Case*, 158 CLR at 10; BLACKSHIELD & WILLIAMS, *supra* note 26, at 912-16.

182. *Koowarta*, 158 CLR at 6; BLACKSHIELD & WILLIAMS, *supra* note 26, at 912-16 (this position was affirmed in *Richardson v. Forestry Commission* (1988) 164 CLR 261 (Austl.) and *Queensland v. Commonwealth* (1989) 167 CLR 232 (Austl.).

183. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (Austl.).

of inland waters, the *Renewable Energy (Electricity) Act 2000* (Austl.),[184] which implements some of Australia's climate change and renewable energy obligations and, more important for present purposes, the *Water Act 2007* (Austl.), which makes provision for the management of the Murray-Darling Basin and for other water matters of national significance.[185]

Importantly, *Tasmanian Dams* also considered the operation of the "Corporations power," section 51(xx) with respect to the Tasmanian Hydro-Electric Commission and its intended functions related to the sale of electricity.[186] Section 51 (xx) grants the Commonwealth power to legislate with respect to "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth."[187] In interpreting this section, the High Court determined a 'corporation' to be a 'trading corporation' when a substantial proportion of its activities were trading activities.[188] Consequently, it found the Tasmanian Hydro-Electric Commission to be a trading corporation under section 51(xx) since one of its principal activities was the sale of electricity.[189] Therefore, the Commonwealth had the power to enact legislation to prevent the construction of a dam (albeit a process in and of itself not a trading activity), as the dam, once completed, was to be used for a trading activity (i.e. the sale of electricity).[190]

In sum, this judgment has important ramifications for the Federal management of water resources as it enables the Commonwealth to legislate with respect to all structures and entities used in the creation and sale of water based services. Moreover, as this is specifically defined to cover foreign corporations, section 51(xx) also extends power to the Commonwealth to regulate foreign private water companies involved in the Australian water market.[191]

The approach of the High Court in *Tasmanian Dams* was mirrored in a number of other influential decisions, including *Queensland v Commonwealth (Daintree Rainforest)*[192] and *Richardson v Forestry Commission (Tasmanian Forests).*[193] Following these decisions there has been little doubt over the Federal capacity to legislate with respect to matters of environmental concern and the Federal Government has increasingly acceded to this role taking a leadership role in water resource management and urban water reform.

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184. *Renewable Energy (Electricity) Act 2000* (Cth) (Austl.).
185. *Water Act, 2007* (Cth) (Austl.).
186. *Koowarta*, 158 CLR. at 102.
187. *Commonwealth of Australia Constitution Act 2003* (Cth) s 51(xx) (Austl.).
188. *Koowarta*, 158 CLR at 8.
189. *Id.* at 8, 102.
190. Murray Wilcox, *The Dam Case - Implications for the Future*, 11 HABITAT 32, 33 (1983); BATES, *supra* note 170, at 66.
191. *See* AUSTRALIAN CONSTITUTION s 51(xx); BATES, *supra* note 172, at 65-66.
192. *Queensland v. Commonwealth* (1989) 167 CLR 232 (Austl.).
193. *Richardson v. Forestry Comm'n* (1988) 77 ALR 237 (Austl.); BLACKSHIELD & WILLIAMS, *supra* note 26, at 912-16.

2. Federal Water Regulation

Since the early 1980s, and the abovementioned constitutional developments, the Commonwealth has increasingly taken a leading role in environmental and water related legislation. In 2007, the Federal Government enacted the *Water Act 2007*.[194] The Act enables the Commonwealth to engage in basin management with the States for water resources classified as being in the national interest, with particular focus on the Murray-Darling Basin.[195] The objects of the Act justify this involvement in order to give effect to "relevant international agreements,"[196] clearly linking itself to Australia's international obligations.[197] The Act allows for the creation and accreditation of the water resource plans prepared by the basin states, namely NSW, Queensland, South Australia, Victoria, and South Australia.[198] The Act also empowers the Minister to levy "regulated water charges" which may apply to irrigation networks, bulk water charges, water planning and management activities, access to water services infrastructure, and water extraction.[199] The water charges must contribute to achieving the "water charging objectives and principles" set out in Schedule 2 of the Act, which includes "promot[ing] the economically efficient and sustainable use of water resources . . . water assets, and government resources devoted to the management of water resources."[200] These provisions are an effort by the Federal Government to include sustainability within their water management practices and an attempt to balance the competing consumptive and conservation priorities in over extracted basins such as Murray-Darling.

In addition to the *Water Act* 2007, the Federal Government also began to play an increasing leadership role in the area of water management by adopting a number of federally led programs. These include the National Water Initiative,[201] Australia's "blueprint for water reform," which contains a series of actions the State, Territory, and Federal Government agreed to take in order to improve water management, pricing, and trading across the country.[202] The National Water Initiative is administered by the National Water Commission, which in turn is a product of State and Federal inter-governmental action and cooperation. The National Water Commission advises the Commonwealth and the Council for Australian Governments (COAG) on the implementation of the National Water

194. *Water Act 2007* (Cth) (Austl.).
195. *Id.* s 3(a).
196. *Id.* s 3(b).
197. AUSTRALIAN CONSTITUTION ss 51(i), (v), (viii), (xi), (xv), (xx), (xxix), (xxxix), 122; *Water Act, 2007* (Cth) s 9 (Austl.).
198. JULIET LACEY, WATER REGULATION: THE LAWS OF AUSTRALIA 115-6 (2008).
199. *Water Act 2007* (Cth) s 91(1) (Austl.); *see also* LACEY, *supra* note 198, at 120-21.
200. *Water Act 2007* (Cth) sch 2, pt 2(a) (Austl.); *see also* LACEY, *supra* note 198, at 120.
201. *National Water Initiative*, AUSTL. GOV'T NAT'L WATER COMM'N, http://www.nwc.gov.au/reform/nwi (last visited Mar. 10, 2012).
202. LACEY, *supra* note 198, at 36-39, 115-21.

Initiative and has a number of auditing functions under the *Water Act* 2007.[203] In terms of water supply, the National Water Initiative and the Commission are partly focused on urban water supply reform. The National Water Initiative establishes a framework which aims to:

> i) provide healthy, safe and reliable water supplies;
>
> ii) increase water use efficiency in domestic and commercial settings;
>
> iii) encourage the re-use and recycling of wastewater where cost effective;
>
> iv) facilitate water trading between and within the urban and rural sectors;
>
> v) encourage innovation in water supply sourcing, treatment, storage and discharge; and
>
> vi) achieve improved pricing for *metropolitan* water.[204]

According to the National Water Commission, achieving these objectives requires action focused on demand management, the expansion of reuse and recycling technologies, and integrated resource planning and pricing.[205] While the reform process is ongoing, the National Water Initiative and the Commission are making progress towards achieving these objectives.[206] In addition, the COAG produced the 2009 National Urban Water Planning Principles, which focus on establishing a supply and demand balance in water markets to help achieve these goals.[207] Principle 6 is particularly important because it commits to placing sustainable limits upon urban water supplies.[208] The principles also relate to supply augmentation and demand management and encourage the adoption of new technologies such as recycling, desalination, and water efficiency measures.[209] This approach is clearly designed to improve supply structures and to place a greater emphasis on sustainable utilization.

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203. *Id.* at 47-48, 115-21.

204. *Commitments*, AUSTL. GOV'T NAT'L WATER COMM'N, http://www.nwc.gov.au/home/water-governancearrangements-in-australia/australian-capital-territory/water-quality-management/drinking-water-management30/drinking-water-management/national-water-initiative-commitments.

205. *Australia Water Reform*, AUSTL. GOV'T NAT'L WATER COMM'N, 222 (2009), http://www.nwc.gov.au/__data/assets/pdf_file/0016/8440/2009_BA_chapter_11_urban_water.pdf.

206. *Id.*

207. *National Urban Water Planning Principles*, AUSTL. GOV'T DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION & COMMUNITIES, http://www.environment.gov.au/water/policy-programs/urban-reform/nuw-planning-principles.html (last visited Mar. 10, 2012).

208. *Id.*

209. *Australia's Urban Water Sector Draft Report*, AUSTL. GOV'T PRODUCTIVITY COMM'N, 102-106 (2011), http://uat.pc.gov.au/__data/assets/pdf_file/0006/107745/urban-water-draft.pdf.

3. State Water Regulation in NSW

Access to water in NSW is mostly accomplished through privatised structures and practices. The Sydney Catchment Authority and the State Water Corporation are the two bulk water suppliers that distribute water. As the names suggest, the Sydney Catchment Authority is responsible for the bulk storage and supply of water for the Sydney metropolitan area, and the State Water Corporation provides the bulk storage and supply of water to the rest of the State. These water suppliers provide bulk water to water utilities and local councils who are, in turn, responsible for distributing water to individual consumers.[210] Both the Sydney Catchment Authority and the State Water Corporation are corporatized entities.[211] The largest of these water providers in New South Wales (NSW) is Sydney Water Corporation, which is responsible for servicing the Sydney, Blue Mountains and Illawarra regions; an area containing approximately four million people.[212] Sydney Water Corporation specifically provides, manages and operates the systems and services for providing water, sewerage and waste disposal services in its area of operation as determined by its operating licence provided for by the Water Administration Ministerial Corporation.[213] The operating licence sets out the following: targets for leakage reduction and mains break response times; targets for reducing potable water use and the introduction of water efficiency audits at sewage treatment plants; an examination of costs, benefits and challenges of individual metering for multi-unit dwellings; priority sewerage program completion and connection eligibility requirements; evaluation and audit of asset management; indicators of environmental performance, customer service and service quality and system performance; requirements for an ISO certified environmental management system; and risk-based auditing regimes.[214]

Sydney Water Corporation is a statutory corporation wholly owned by the New South Wales State Government and is accountable to the

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210. Marsden Jacob Associates, *Securing Australia's Urban Water Supply: Research Notes for Selected Case Studies*, AUSTL. GOV'T DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION & COMMUNITIES, 7 (2006), http://www.environment.gov.au/water/publications/urban/pubs/urban-water-research.pdf.

211. ROSEMARY LYSTER ET AL., ENVIRONMENTAL AND PLANNING LAW IN NEW SOUTH WALES 263-66 (2nd ed., 2009).

212. The second largest water supplier in NSW is Hunter Water. *Sydney Water Corporation Operational Audit 2002/2003*, INDEP. PRICING AND REGULATORY TRIBUNAL OF NEW SOUTH WALES, http://www.ipart.nsw.gov.au/files/df70101b-83b3-4f08-923a-9f2400aff853/CP-12.pdf.

213. FISHER, *supra* note 26, at 262-63. The Water Administration Ministerial Corporation was established under the New South Wales Water Management Act 2000. *Water Management Act 2000* (NSW) s 371(1) (Austl.).

214. *Sydney Water Operating Licence 2010-2015*, SYDNEY WATER CORP., http://www.sydneywater.com.au/Publications/LegislationActs/OperatingLicence.pdf#Page=1 (last visited Mar. 10, 2012).

Minister for Water and two other shareholder ministers.[215] As such it is also subject to legislative and governance oversight in terms of the *Protection of the Environment Operations Act* 1997 (NSW), the *State Owned Corporations Act 1989* (NSW), and the *Sydney Water Act 1994* (NSW).[216]

This operating structure reflects the adoption of a 'corporatized' approach, which imposes private sector operational practices on the Sydney Water Corporation while maintaining its public ownership.[217] Most significantly, Sydney Water's performance under the operating licence is audited annually by the Independent Pricing and Regulatory Tribunal (IPART).[218] IPART, through its role in granting Sydney Water's operating licence, also functions as the regulator of the operating licence, a role it also carries out with respect to gas, electricity and public transport services in NSW.[219] The Tribunal was established by the State Government in 1992 with the express purpose of "[r]egulating prices and reviewing pricing policies of government monopoly services, including declared public water utilities for water services" such as water supply.[220]

Importantly, IPART holds responsibility for setting maximum prices chargeable by metropolitan water agencies (for instance Sydney Water and Hunter Water) for the supply of monopoly water and sanitation services. IPART determined the current prices charged by Sydney Water for the period July 2008 to June 2012 in line with the previous practice of considering a number of pricing factors including water scarcity, population growth, operating costs and maintenance requirements.[221] Consumers in NSW dissatisfied with their water services, with respect to metering or billing for example, can apply to the Energy and Water Ombudsman for a resolution of the dispute.[222] The Ombudsman's annual reports outline consumer complaints and key issues that impacted the market over the

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215. Andrew Jane & Brian Dollery, *Public Sector Reform in Australia: An Evaluation of the Corporatisation of Sydney Water, 1995 to 2002*, 65(4) AUSTL. J. PUB. SECTOR ADMIN. 54, 54 (2006).

216. *Legislation and Governance*, SYDNEY WATER CORP., *http://www.sydneywater.com.au/Publications/Legislation.cfm* (last visited Mar. 10, 2012).

217. ROSEMARY LYSTER, CORPORATISATION AND PRIVATISATION: INVOKING THE ECOFEMINIST VOICE (Queensland Univ. of Tech., 1999) (paper presented at the *Feminist Legal Academic Workshop*).

218. *Id.*

219. *See In the Pipeline*, INDEP. PRICING AND REGULATORY TRIBUNAL OF NEW SOUTH WALES, 1-4 (Aug. 2011), http://www.ipart.nsw.gov.au/Home/Industries/Water/Fact_Sheets_Information_Papers/Water_Newsletter_-_In_the_Pipeline_-_2_August_2011.

220. *Governing Legislation*, INDEP. PRICING AND REGULATORY TRIBUNAL OF NEW SOUTH WALES, http://www.ipart.nsw.gov.au/Home/About_Us/Governing_Legislation (last visited Mar. 10, 2012).

221. LYSTER, *supra* note 209, at 273; *Water Pricing*, INDEP. PRICING AND REGULATORY TRIBUNAL OF NEW SOUTH WALES, http://www.ipart.nsw.gov.au/Home/Industries/Water/Water_Pricing (last visited Mar. 10, 2012).

222. Clare Petre, *Energy and Water Ombudsman: A Valuable Alternative for Consumers*, 44 L. SOC'Y J. 37, 37 (2006).

reporting period.[223] This service applies to all customers of Sydney Water, Hunter Water, Shoalhaven Water, and State Water.[224]

As discussed earlier, disconnection and flow restriction are still practices that occur within Australian water supply. Presently there are no specific provisions within NSW legislation that prohibit consumer water restriction or disconnection. Instead of a specific provision, each water supplier is responsible for determining its water supply and disconnection procedures.[225] Broadly, these procedures are designed to assist those unable to meet their utility payments to access appropriate assistance including payment vouchers through the Payment Assistance Scheme (PAS) which are distributed by a number of peak charity groups, the No Interest Loans Scheme also administered through community organisations, and other initiatives such as pensioner and washing machine rebates.[226] Whilst the level of consumer disconnection in NSW must be classified as low, the lack of formal prohibition means that the practice, as previously mentioned, continues to occur. This is troublesome because disconnection is one of the primary means through which people could be denied their right to access water supply that is adequate to their basic needs and the lack of such a prohibition is clearly a weakness in NSW's water access framework.

Since the 1998 water contamination crisis, which resulted in Guardia and Cryptosporidium parasites being present in Sydney's water supply (also called the 'boil water alert'), the management of Sydney Water has changed significantly.[227] As a result of an official inquiry into the crisis,[228] the State Government enacted the *Water Legislation Amendment (Drinking Water and Corporate Structure) Act* 1998 (NSW), which in effect restructured Sydney Water and granted wider powers to the responsible Minister, disestablished Sydney Water as a company, and reestablished it as a statutory, state owned corporation.[229] Significantly, this decreased the degree of autonomy enjoyed by the agency and moved it back into closer contact with the public sector and public sector operating

223. *Annual Report 09/10,* ENERGY AND WATER OMBUDSMAN NSW, http://www.ewon.com.au/ewon/assets/File/Publications/Annual_Reports/EWON_AR0910.pdf (last visited Mar. 10, 2012).

224. *Id.* at 11.

225. *Suppliers in NSW,* ENERGY & WATER OMBUDSMAN NSW, http://www.ewon.com.au/index.cfm/suppliers/suppliers-in-nsw (last visited Mar. 10, 2012).

226. *Financial Assistance,* SYDNEY WATER CORP., http://www.sydneywater.com.au/CustomerServices/CommunityAssistance/FinancialAssistance (last visited Mar. 10, 2012).

227. The cause of the contamination outbreak was found to be the Prospect Treatment Plant. The plant was owned and operated privately by Australian Water Services. *See,* CHRISTOPHER SHEIL, WATER'S FALL: RUNNING THE RISKS WITH ECONOMIC RATIONALISM (2000).

228. *See* PETER MCCLELLAN, SYDNEY WATER INQUIRY (1998) [hereinafter *The McClellan Report*].

229. LYSTER, *supra* note 211, at 31-34; JANE & DOLLERY, *supra* note 215, at 57.

practices.[230] In addition to these measures, the State Government also introduced the Sydney *Water Catchment Management Act* 1998 (NSW) and the *State Environmental Planning Policy No 58 (Protecting Sydney's Water Supply)*, which along with the *Water Legislation Amendment (Drinking Water and Corporate Structure) Act* 1998 (NSW), changed the structure of Sydney's water supply and Sydney Water and granted the Minister additional powers to intervene in the operations of the Corporation. Moreover, the *Public Health Act* 1991 (NSW) was also amended to include a new Part 2A on "Safety of Drinking Water" which grants the Chief Health Officer powers to prepare advice concerning drinking water safety.[231] Importantly, the *Water Legislation Amendment (Drinking Water and Corporate Structure) Act* 1998 (NSW) changed the definition of water supplier to "any person who treats or supplies water" on behalf of a water supply authority.[232] Clearly, this amendment expands the category of entities capable of being defined as water suppliers in NSW and enables a fully privatised water company to operate in this role.[233]

Water is supplied in areas other than metropolitan Sydney through a number of other entities. The other primary water provider in NSW is the Hunter Water Corporation which serves the local government areas of Newcastle, Maitland, Cessnock and Lake Macquarie, an area containing approximately 527,557 water consumers.[234] In other centres, water is supplied through water supply authorities whose operations are regulated by the *Water Management Act* 2000 (NSW).[235] The water supply authorities in NSW include Gosford City Council, Wyong Council, Broken Hill Water Board, Cobar Water Board, Upper Parramatta River Catchment Trust and Australian Inland Energy Water Infrastructure.[236] In circumstances where there is no water supply authority for a region, local councils have the power to act as the local water utility and supply those within their municipality with water and sanitation services.[237]

Non-urban indigenous communities in NSW receive their water supply under the Aboriginal Water Supply and Sewerage Programme. The programme is managed by the NSW's 121 Aboriginal Land Councils which are responsible for the supply of services within a Land Council area.[238] The Land Councils are supported by a number of State Govern-

230. *Id.* at 33-34.
231. *Id.* at 268.
232. *Water Legislation Amendment (Drinking Water and Corporate Structure) Act 1998* (NSW) s 101(3) (Austl.); LYSTER, *supra* 209, at 268.
233. *Id.*
234. *Our Organisation.*, HUNTER WATER CORP., http://www.hunterwater.com.au/About-Us/Our-Organisation/Our-Organisation.aspx (last visited Mar. 10, 2012).
235. *Water Management Act 2000* (NSW) ch 6 pt 2 (Austl.).
236. LYSTER, *supra* note 211, at 271.
237. *Id.*
238. Ian Armstrong & Colin Gellatly, *Report of the Independent Inquiry into Secure and Sustainable Urban Water Supply and Sewerage Services for Non-Metropolitan NSW*, DEPARTMENT OF PRIMARY INDUSTRIES - OFFICE OF WATER, 95 (December

ment agencies and the Aboriginal Communities Development Programme.[239] Despite these initiatives, water supply in these communities remains problematic with maintenance and service provision, as opposed to infrastructure, causing the key concerns.[240] In 2008 and 2009, the NSW government committed another A$205 million over 25 years under the Aboriginal Water Supply Sewerage Programme to provide additional technical and maintenance support to "permanently inhabited," "discrete communities" responsible for their own water and sanitation supply.[241]

Despite being involved in the State's treatment plants and a new desalination plant, the private sector is not involved in the direct provision of water and sanitation services. However, in 2005, IPART reviewed the operation of Sydney Water and recommended that, while no major industry restructure was required at that time, the water and sanitation services sector should in general engage more effectively with 'competitive procurement practices,' allow open access to infrastructure, and remove the legal and regulatory barriers limiting the access of the private sector to the market.[242]

These recommendations indicate a willingness on the part of the NSW regulator to move the water market towards greater levels of private sector participation. Indicating an intention to move in this direction, the State Government enacted the *Water Industry Competition Act*[243] in 2006 in order to assist the State in meeting its objectives with respect to private sector participation.[244] The Act establishes a licensing scheme for private sector involvement in the water and sanitation services sector and an access regime for 'certain monopoly infrastructure'.[245] The Act provides for the creation of two forms of licences: the infrastructure focused network operator's licence for activities related to the construction, operation and/or maintenance of water infrastructure; and a retail supplier's licence enabling the supply of water and sanitation services through existing infrastructure.[246] These licences allow for the entrance of new water suppliers to the market and are subject to a number of mandatory conditions provided for in the *Water Industry Competition (General) Regulations*

2008), http://www.water.nsw.gov.au%2FArticleDocuments%2F36%2Futilities_local_sustainable_urban_water_and_sewerage_for_non_metropolitan_nsw_report.pdf.

239. *Id.* at 95-96.

240. *Id.* at 96-97.

241. *Id.* at 97 (Advice of the Department of Water and Energy).

242. Marsden Jacob Associates, *supra* note 209, at 8 (Independent Pricing and Review Tribunal, Investigation into Water and Wastewater Service Provision in the Greater Sydney Region).

243. *Water Industry Competition Act 2006* (NSW) (Austl.).

244. LYSTER, *supra* note 211, at 275-76.

245. *Id.*

246. *Overview of the Licensing Regime Under the Water Industry Competition Act 2006*, INDEP. PRICING AND REGULATORY TRIBUNAL OF NEW SOUTH WALES, 2 (2009), http://www.ipart.nsw.gov.au/water/private-sector-licensing/documents/overviewoflicensingregime-formatted_001.pdf (last visited Mar. 10, 2012).

2008 (NSW).[247] Part 3 of the Act provides for the granting of 'coverage declarations' which enables an access seeker with the right to negotiate with a service provider and apply for a determination by IPART if the negotiations fail. Once agreement is reached, an access undertaking that sets out the access details must be signed by the parties and a copy of the agreement must be lodged with IPART for approval.[248] In terms of consumer protection, the *Water Industry Competition Act* also sets out a dispute resolution mechanism, featuring an Ombudsman for disputes arising between private suppliers and consumers.[249] Concerns, however, have been raised that the Act, and its associated regulations,[250] do not replicate a number of the existing features of Sydney Water's operating licence, including IPART surveillance, energy use and waste minimisation obligations and sustainability reporting, and therefore reduces consumer protection.[251] Lyster and Ahuja assert that, despite these concerns, it is clear the *Water Industry Competition Act* and *Regulations* have the capacity to "adequately regulate the activities of the private sector providers" provided the appropriate individual licence conditions are imposed and additional regulations are made when necessary.[252] Thus, while the *Water Industry Competition Act* is still in its infancy, it should at present be viewed as an example of how governments can regulate private sector participation in the water market and as an indicator of the future direction of NSW water supply. The NSW example also shows that with proper public oversight, involvement, and regulation, privatised water services evidently could be feasible under certain conditions.

4. Water Access Framework

Australia, like South Africa, is a signatory to a number of the major international instruments recognizing the right to water.[253] In 2011, Aus-

247. ROSEMARY LYSTER & VISHAL AHUJA, GOING WITH THE FLOW: PRIVATE SECTOR PARTICIPATION IN THE NSW WATER INDUSTRY 7-18 (2009).

248. INDEP. PRICING AND REGULATORY TRIBUNAL, *supra* note 244, at 3.

249. LYSTER, *supra* note 209, at 276; LYSTER & AHUJA, *supra* 245, at 15.

250. *Water Industry Competition (General) Regulations 2008* (NSW) (Austl.).

251. LYSTER & AHUJA, *supra* note 247, at 7-12.

252. *Id.*

253. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/64/RES/217(III) (Dec. 10, 1948) (Australia played a role, along with United States of America, United Kingdom, USSR, China, France, Lebanon and Chile, in drafting the Declaration); *see also* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 36/131, U.N. Doc. A/RES/36/131 (Dec. 14, 1981); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2337(XXII), U.N. Doc. A/RES/2337(XXII) (Dec. 18, 1967); Michael McHugh, *Does Australia need a Bill of Rights?*, NEW SOUTH WALES BAR ASSOCIATION, (Aug. 8, 2007), http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf. Australia however abstained from voting with respect to the recent United National resolution recognising access to water and sanitation as a human right. General Assembly Resolution Recognising the Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Jul. 28, 2010).

tralia's ambassador to the United Nations commented on Australia's recognition and commitment to the right to access to water saying that:

> Australia understands something about water. We are the driest inhabited continent on earth, have one of the lowest rainfalls and about three-quarters of our land is arid or semi-arid. . . . we understand the importance of water to survival and people's livelihoods, and the importance of water and sanitation to people's health, the sustainability of communities, particularly remote and indigenous communities, and to the environment. . . . We do recognise that access to water and sanitation is fundamental to the realisation of people's human rights, as enshrined in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[254]

Australian laws however, unlike South Africa's, do not provide constitutionally for a right to access to water. More widely, the Australian Constitution may only provide limited human rights protections.[255]

As far as the protection and enforcement of fundamental human rights are concerned, Australia follows a piecemeal approach whereby the enforcement of rights is dependent upon various legislative, judicial and constitutional approaches. The Constitution itself contains a number of limited individual rights including freedom of religion,[256] the right to vote[257] and the right to trial by jury.[258] These rights are, however, limited in nature; a point highlighted by Williams:[259]

> The protection the Constitution gives to human rights is deficient. Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian constitution and other like instruments such as the Canadian Charter of Rights and Freedoms, makes this clear. As well as failing to protect many basic rights, the constitution fails to guarantee that all Australians are entitled to the rights it does offer. Several important 'Gaps' exist.'

Despite this limitation, a number of human rights protection measures have been found to exist through less formal means.[260] For example,

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254. Gary Quinlan, *The Principle Challenges Related to the Realisation of the Human Right to Safe and Clean Drinking Water and Sanitation, and their Impact on the MDGs*, AUSTRALIAN PERMANENT MISSION TO THE UNITED NATIONS, http://www.unny.mission.gov.au/unny/Water_27_07_11.html (last visited Mar. 10, 2012).

255. *See* Hilary Charlesworth, *Human Rights in Australian Law*, 13 PUB. L. REV. 155, 155 (2002); McHugh, *supra* note 251, at 5-6. At the State and Territory level in Australia, two jurisdictions have adopted human rights legislation. *Human Rights Act 2004* (ACT) (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl.).

256. AUSTRALIAN CONSTITUTION s 116.

257. *Id.* at s 10.

258. *Id.* at s 80.

259. GEORGE WILLIAMS, THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR 45 (2004); *see also* Charlesworth, *supra* 255, at 155.

260. McHugh, *supra* note 253, at 5-13.

the High Court interpreted the Constitution to contain a number of implied rights and freedoms, such as the implied freedom of communication,[261] which has created a number of judicially enforceable limits on the Commonwealth's (and potentially the State's) exercise of legislative power.[262] This right is, however, a first generation or political right; therefore it does not provide any inherent protection with respect to access to water (a socio-economic right) as was demonstrated during the South African analysis. In additional to implied rights, the judiciary has also supported the evolution of human rights through 'constitutional review and the interpretation of legislation'.[263] In *Coco v. The Queen*,[264] the High Court in considering the legality of a secretly installed listening device asserted, "the courts should not impute to the legislature an intention to interfere with fundamental rights."[265] Australian Courts therefore will not interpret legislation in a manner inconsistent with "fundamental rights," providing a means through which such rights could be promoted across all areas of legislative activity. However, the courts have not yet applied this approach in the water context.[266]

In terms of environmental rights, and more specifically the right to access water, protection in this area is generally of a statutory nature and not a constitutional one. An example of such a statutory approach is found in the *Water Act 2007*, which provides for the protection of "critical human water needs" in the context of water basin management.[267] The Act defines "critical human water needs" as the "minimum amount of water, that can only reasonably be provided from Basin water resources" for core human consumptive and non-consumptive purposes,[268] and therefore it provides a limited recognition of the right to access water in this context.[269] With respect to statutory protection of consumers against water disconnection, the *Australian Utilities Act 2000* (AUA)[270] requires a utility to provide, connect, and supply the service in accordance with the terms of an agreed consumer contract[271] and allows for the discharge of consumer debt where the payment would "cause substantial hardship"[272] and the continuation of service in circumstances where a residential consumer

261. *See, e.g., Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 (Austl.).
262. BLACKSHIELD & WILLIAMS, *supra* note 26, at 757.
263. McHugh, *supra* 253, at 5-6.
264. *Coco v. The Queen* (1994) 179 CLR 427 (Austl.).
265. *Id.*, at 437.
266. *See Al-Kateb v. Godwin* (2004) 219 CLR 562 (Austl.) (applying fundamental rights approach to case of "administrative detention of unlawful non-citizens."); BEN SAUL, AUSTRALIAN ADMINISTRATIVE LAW: THE HUMAN RIGHTS DIMENSION 14-15 (2008).
267. *Water Act 2007* (Cth) s 86A(2) (Austl.).
268. *Id.*
269. *See Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A (Austl.).
270. *Australian Utilities Act 2000* (AUA) (Austl.).
271. *Id.* at s 83.
272. *Id.* at s 180.

has failed to meet the required payments.[273] The AUA's recognition of the need to provide residential consumers with water supply in all circumstances, irrespective of their ability to pay, demonstrates a belief within the Australian Capital Territory Government that all consumers have the right to be connected to adequate water supplies and therefore it may be viewed as a statutory protection of the right to water. However, as mentioned above in the context of NSW, these consumer protection measures do not exist in each state and therefore the obligation has not been imposed on utilities at the national level.[274]

More broadly, there are also a number of water related legislative instruments that require water services providers and government agencies to apply the principle of ecologically sustainable development ("ESD") within their operations. Australian legislators adopted a policy of ESD[275] that requires policy makers, regulators and the regulated community to address economic, social and environmental considerations simultaneously in an endeavor to integrate all these considerations in environmental governance efforts.[276]

In terms of providing for an access focused approach to water supply, ESD has the capacity to insert a social and ecological focus within the legislative framework, enabling the relevant actors in the process to consider, protect, and promote water affordability, availability, and quality. An example of this approach is found in the *Sydney Water Act 1994* (NSW) whose objectives commit the utility "to protect the environment by conducting its operations in compliance with the principles of ecologically sustainable development" which includes the conservation of biological diversity, the precautionary principle, intergenerational and intragenerational equity, and the improved pricing of environmental resources, including the polluter pays principle.[277] In addition to this commitment, Sydney Water's 2010-2015 operating license requires the development of a five-year environmental management plan 'endorsing' the principle.[278] Similar commitments to the principles of ESD can be found in section 4 of the *Sydney Water Catchment Management Act 1998* (NSW), section 3 of the *Water Management Act 2000* (NSW) and section 3 of the *Protection of the Environment Operations Act 1997* (NSW).[279] More broadly, the sustainability approach is also evidenced in

273. *Id.* at s 179.

274. *See Water Act 2007* (Cth) s 86A(2) (Austl.).

275. *Intergovernmental Agreement on the Environment*, AUSTRALIAN GOV'T - DEP'T OF SUSTAINABILITY, ENV'T, WATER, POPULATION AND CMTYS., http://www.environment.gov.au/about/esd/publications/igae/index.html (last visited Mar. 10, 2012).

276. BATES, *supra* note 172, at 127.

277. *Sydney Water Act 1994* (NSW) s 21(1)(b) (Austl.); *Protection of the Environment Administration Act 1991* (NSW) s 6(2) (Austl.).

278. *Operating License 2010-2015*, SYDNEY WATER CORP., 28 (Oct. 28, 2011), http://www.sydneywater.com.au/Publications/LegislationActs/OperatingLicence.pdf.

279. *See also Threatened Species Conservation Act 1995* (NSW) ss 44, 97 (Austl.); *Waste Recycling and Processing Corporations Act 2001* (NSW) s 59 pt. 1, § 3 (Austl.);

legislation such as the *Water Industry Competition Act* and its aim to increase market efficiency and the use of water saving technologies in NSW and the ongoing urban water reform process.[280]

Clearly, considering the absence of a constitutional provision, the success of Australia in meeting the water needs of a substantial portion of its population must be credited therefore to its statutory framework. Anti-disconnection provisions, where they exist, are an effective means of ensuring that households and individuals are not denied basic access. However, given that their role is limited to maintaining the *status quo* they do not provide a specific incentive for service expansion or improvement. Sustainability provisions also have the capacity to improve service delivery by balancing social and environmental factors in the decision-making process. Moreover, the linkage between consumptive needs and environmental considerations returns a degree of focus to the watershed and its capacity to meet demand. The broad adoption of ESD in Australia, and specifically the example of NSW, provides a guide to government decision-making, and the water industry and acts as an important outlet for Australia's international commitment to promoting the right to access to water.

VI. A SYNTHESIZING COMPARISON

On balance, it seems as if Australia proves more successful in its efforts to provide access to water than South Africa. Admittedly, Australia is a wealthy country. It never experienced political and socio-economic challenges of the breadth and scope South Africa endured. However, despite its wealth there remain small segments of the country that do not receive adequate water supply. The success of Australia's water access regime must also be judged by its ability to meet the water needs of those individuals. Also, the number of people that do not have access to water in South Africa is much higher than in Australia. Poverty is the order of the day in South Africa, and the availability of funds for establishing, maintaining, and upgrading water services infrastructure is severely lacking. Simultaneously, vast backlogs exist in providing people access to water, especially because of apartheid. The following sections expand on these themes and further critically explore some of the successes, failures, and consequences of the two countries' regulatory approaches highlighted above.

Sydney Harbour Foreshore Authority Act 1998 (NSW) s 15 (Austl.). ESD has been considered judicially outside the water context in a number of cases. *BGP Properties Pty Ltd v. Lake Macquarie City Council* [2004] NSWLEC 399 (Austl.); *Gray v. Minister for Planning* (2006) 152 LGERA 258 (Austl.); *Walker v. Minister for Planning* [2007] NSWLEC 741 (Austl.).

280. *Water Industry Competition Act 2006* (NSW) pt 3 s 21 (Austl.).

A. THE MERITS OF A CONSTITUTIONAL RIGHTS-BASED APPROACH

The starkest difference between the Australian and South African regimes in providing access to water lies in the fact that the regime in South Africa, unlike Australia, is predicated on a constitutional rights-based approach. Both countries recognize the fundamental importance of protecting the ecological aspects and integrity of water resources, as this is the only way to ensure that human needs (mostly socio-economic) would be sustainably satisfied. Unlike Australia, in South Africa, human and ecological needs are expressed as constitutional fundamental rights (sections 24 and 27) given effect by myriad statutory provisions. The rights-based approach is a potentially powerful tool in the hands of the government to "intervene in social and economic [re]ordering, via natural resources management."[281] At the same time, the rights-based approach serves as a powerful tool to achieve transformative, restorative, and redistributive justice as far as the provision of access to material conditions of human welfare is concerned. But how effective is the rights-based approach in safeguarding environmental interests and satisfying socio-economic demands? The effectiveness of this approach was partly tested in *Mazibuko.* The judgment neither improved access to water, nor did it result in any concrete and substantial improvements in the health and well-being of those people who do not have access to water.[282] This would mean *Mazibuko* confirmed that rights, especially socio-economic rights, play an important symbolic role in a government's approach to looking after its people, yet often do not directly lead to tangible results.[283] As Allan notes, "the [South African] human rights to the environment and to water constitute more of a symbolic statement of intent than a practical effort to provide these facilities. It must be seen as part of a more general process to increase access to justice and improve environmental conditions."[284]

While rights (especially substantive ones as opposed to procedural rights) frequently make little difference in practical terms, it should nevertheless be remembered that their allure lies in the ideals they set, regardless of how broad and unattainable they may seem in the short term. One could therefore conclude that while a rights-based approach is important from an abstract symbolic point of view, it is not always more successful in providing access to water in real terms. Accordingly, Australia is not necessarily worse off for not having a constitutionally enshrined right to access to water. Like South Africa, Australian legislation recognizes the existence of an international right to access to water, and has

281. Godden, *supra* note 3, at 203.
282. *Phiri, supra* note 78, at 138-39, 160.
283. *Id.* (explaining that in some instances, rights are qualified and formulated to be purposefully restrictive, and subject to limitation, and can even be used to deny people increased access to water).
284. Allan, *supra* note 5, at 482-83.

endorsed this right and shaped its policies and laws accordingly.[285] Its governance approach to access to water is thus fundamentally cast in rights-language, albeit not constitutional rights language. Moreover, its equivalent to South Africa's rights based approach is provided for in legislation which seems to be sufficient insofar as these laws ensure comprehensive obligations and successful implementation of statutory entitlements.

This also shows that rights can be meaningless if they are not accompanied by comprehensive legislation and other measures stating which and in what way rights should be enforced, applied, and operationalized. The Australian scenario suggests that extensive laws are important to provide proper regulation of any specific regulatory domain, including that of access to water. Having a detailed statutory framework and implementing it correctly makes the difference. South Africa's extensive modern laws regulating access to water still fail to properly answer to the needs of disenfranchised and poor people who do not have access to water, despite having been found to be 'reasonable' by the Constitutional Court in *Mazibuko*. 'Reasonable' laws and policies are not, by necessity, effective, and are therefore not enough: they must also be able to realize the objectives they have been designed to achieve. In sum then, what seems to be important is that water provision should preferably be predicated on some form of a rights-based foundation. Such a foundation should pursue the grander ideal of providing access to water, which includes the basic entitlement of people to have access to water. More importantly, this ideal should be implemented through comprehensive legislation and other governance mechanisms that could make a practical difference.

B. SUSTAINABILITY

Another question is the extent to which ecological considerations must prevail in the face of complex and seemingly mounting socio-economic environmental challenges. In South Africa, the Constitutional Court decision in *Mazibuko* suggested that it would be prudent to provide people with only a limited amount of free water because it would be unreasonable to demand that water authorities provide people with immediate access to water over and above the 6 kilolitres per household they currently receive free of charge. Had the Constitutional Court answered the plea of Phiri's poor in the way that most expected it would by confirming an increased quantity of free water per person, the effect might very well have been that socio-economic concerns outweighed ecological considerations. This arguably could have affected long-term sustainability, and would have ignored adherence to the dictates of the reserve and the need to holistically view constitutional *environmental and socio-economic* entitlements.[286] Sustainability is therefore a major con-

285. See *supra* Section V(b)(iv).
286. *See Phiri, supra* note 78, at 138-39, 160.

cern for any water governance regime, and efforts that seek to provide access to water and sustainability should always be the central objective of these regimes. Sustainability in the water governance context could mean, *inter alia*, the ability to satisfy the socio-economic demands of present and future generations while concomitantly placing equal emphasis on conserving the ecological integrity of the water resource. In South Africa, this conception of sustainability is expressed by means of the "reserve" in the water context. Sustainability is also explained by a holistic consideration and marriage between constitutional environmental rights and socio-economic rights. The South African Constitution does not provide for a hierarchy of rights.[287] Therefore, environmental rights and considerations should not be able to trump socio-economic rights and considerations (and *vice versa*) in constitutional context. Sustainability is only likely to be achieved in the instance where environmental rights and socio-economic rights are afforded equal weight. In South Africa, the NWA and section 24 of the Constitution embody the ecological aspects of water, while the WSA and section 27 of the Constitution deal with socio-economic considerations. Despite the separation of these issues "in law" because of two separate rights and statutes; this does not mean that a fragmented, and ultimately unsustainable, result should also necessarily be the unavoidable outcome. What is important is that the cumulative objectives of these rights and statutes be fully realized in a holistic and balanced way during their implementation. This would provide people with sufficient access to water, conditional on the availablility of sufficient quantities of water of an acceptable quality, also for future generations. Sustainability, and not environmental or socio-economic demands and priorities separately viewed, should be the guiding and overriding consideration.[288]

If the centrality of sustainability to providing access to water is accepted, what specific manifestation should sustainability then assume? In other words, should these countries follow an anthropocentric or ecocentric approach to sustainability? The approach that a country chooses will be manifestly determined by the socio-economic and environmental conditions (hydropolitics) that exist in that country.

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287. Robyn Stein, *South Africa's New Democratic Water Legislation: National Government's Role as Public Trustee in Dam Building and Management Activities*, 18 J. ENERGY & NAT. RESOURCES L. 284, 288 (2000) (noting that, "[t]he founding provisions of the Constitution direct that the governing approach to the interpretation of the Constitution and the Bill of Rights is that they should be treated in a holistic rather than a piecemeal fashion. As such, the Constitution's clauses and sub-clauses should not be read in isolation from the overall structure of the document and the moral and political values that it is expressly designed to promote. In this spirit, the Bill of Rights does not erect a hierarchy of rights. The socio-economic rights contained in the Bill of Rights enjoy equal status with all other fundamental rights.").

288. *But see* Allan, *supra* 5, at 443 (explaining that ". . . it may be that the environment in fact enjoys greater protection than the people of South Africa, because the ecological reserve is not linked to access.").

For example, in South Africa where deep socio-economic disparities prevail and where access to water is determined by race, income, gender and location, among other factors, the water services regime would be based on the central principle of equity: equity in terms of access to water services; equity in access to water resources; and equity in access to the benefits from water resource use.[289] One of the main objectives of this regime would then be to achieve transformative, redistributive, and corrective justice by means of equity, and it would necessarily be human-focused or anthropocentric. However, while anthropocentrism would be a key factor in a sustainable approach to providing access to water resources, regardless of the severity of socio-economic conditions in a country, there should also be an equal inclusion of ecological considerations.

The Australian approach of ecologically sustainable development provides a useful model for "effective integration of economic and environmental considerations in the decision making process."[290] In NSW, linkage to market efficiency measures demonstrates its scope to guide utilities and access regimes towards meeting their social and environmental objectives. Moreover, in light of Australia's variable rainfall and history of water shortages, the concept of sustainability acknowledges the inherent limitations on water supply and the need to operate within these ecological parameters. In NSW, as in other parts of Australia, this awareness has led to a greater consideration on how to use current resources more effectively and the introduction of new technologies (technocentrism). Perhaps the greatest weakness of the ESD approach is its potential to give priority to economic and social concerns over those of an environmental nature. However, when appropriately applied, this marriage of ecocentrism, anthrocentrism and technocentrism has the capacity to provide viable outcomes through its inclusion of all key stakeholders. Access to water by its very nature involves human intervention in the environment, and human survival relies upon an adequate supply of this natural resource. Given these interactions, a single-phased approach is likely to fail in balancing these competing considerations. Australia's approach, while generally successful, can be considered limited in scope. While access and social considerations can clearly be inferred from the legislative approach, there is no direct acknowledgement of the right to universal service, and therefore, at times these considerations may not always be on equal footing with the other elements of ESD. A form of sustainability that encompasses ecological, human rights and socio-economic considerations clearly provides more viable means of balancing the needs of the community with those of the watershed.

289. Allan, *supra* note 5, at 439.
290. *Intergovernmental Agreement on the Environment*, *supra* note 275.

C. THE PURPOSE OF THE REGULATORY REGIMES

We illustrated above that Australia and South Africa show similarities as far as their colonial and racial discriminatory pasts are concerned. We also argued that these historical realities have proved crucial in driving more recent constitutional and statutory reforms. In South Africa, however, access to water, or rather the lack thereof, is unfortunately also tainted with the severe scars of apartheid, racial exclusion, socio-economic oppression, deprivation, marginalization, and gender discrimination. It is therefore not surprising that the overall focus and central tenet of the South African water services regime is about corrective, transformative and restorative justice. This focus is clearly illustrated by the wording and objectives of the country's water policies, the types of water-related issues before its courts (mostly about access), and the wording and objectives of statutory measures related to water services. In South Africa therefore, it is not only about providing access to water generally; it is also about the ability of government and the extent to which it is able to do so to an impoverished and marginalized population, with the view to correcting past injustices and ensuring present and future socio-economic justice. We argued above that sustainability is a fundamental concern in this respect, and that socio-economic justice could only be achieved if environmental justice that also considers ecological integrity of the water resource forms the guiding principle of governance efforts. The Australian experience shows that water provision without the restorative, corrective, and transformative justice consideration being the predominant method, is arguably easier than the more 'loaded' South African approach. Accordingly, a less 'loaded' approach is 'easier' to the extent that it is one where more resources are directed to address specific issues; it could be more streamlined and more cost effective; it could place fewer bureaucratic demands on government; and its resources and it could ultimately be more able to effectively achieve its goals.

These insights suggest that current water policies and laws should be designed in a way and implemented in a manner that does not create future socio-economic and environmental injustices in the water services context. Simultaneously, adequate attention must be afforded to address present issues of unequal access. These are all expressed by the principles of intra-generational equity, inter-generational equity, the precautionary approach and the preventive principles, which are all temporal aspects of sustainability. They raise several pertinent questions which center around this temporal aspect in the context of water governance including, but not limited to: what are the most viable options to ensure cost recovery for water services provision; are prepayment water meters viable options in the latter respect; to what extent, and in what way must any regulatory approach ensure sustainability; what would be the best design of the regulatory approach in terms of its devolution of powers, mandates and tasks; and to what extent does privatization of water services achieve this goal, and could it be a regulatory option in this respect?

D. PRIVATIZATION OF WATER

It is evident that both Australia and South Africa employ privatization to some degree as an effort to provide people with access to water. While this article explicitly did not focus on the issue of privatization and its benefits and shortcomings in these countries' contexts, a preliminary observation is merited here, especially with respect to the relationship between the rights-based approach to providing water services and privatization. Privatization could have numerous advantages in providing people access to water, yet it is doubtful whether it would be successful without strict and comprehensive regulation, safeguards, and checks and balances.

In *Mazibuko,* water services provision was privatized, but despite this fact, basically none of the challenges typically associated with providing water services were avoided or overcome. This raises interesting questions for future enquiry: do fundamental rights provide adequate protection for water users against private water services providers; is it possible to extend state constitutional obligations to provide access to water to private water services providers; and to what extent should statutory provisions compliment constitutional provisions to regulate privatization of water services?

Australia, and in particular NSW, has sought the middle ground with respect to privatization by adopting corporatization, public private partnerships, and private sector outsourcing rather than whole scale privatization. This means that legislation must be capable of regulating both the public and private sectors and be able to prevent 'gaps' occurring within the system. Past contamination crises demonstrate the potential for failure and the need for legislators to continually adapt to the changing market. Moreover, in the current fragmented approach, private firms can lack public accountability because consumers are at times unaware of the entities from which they derive their water supply. The NSW approach of legislating in favor of access and sustainability and regulating charges has proven to be generally successful in dealing with both public and private participants since it applies to the process of supplying water rather than the nature of the participant. Moreover, the connection of social, environmental, and economic considerations provides a comprehensive linkage of the central water supply elements in which the private sector can play a part. However, again despite the strength of this framework a shift from 'social' considerations to a direct acknowledgement of the right to access adequate water supplies would bring human rights considerations more directly into play with ecosystem and economic considerations going forward.

VII. CONCLUSION

A perfect system and approach for providing access to water that satisfies all needs, interests, and divergent considerations will likely remain elusive in any jurisdiction. This is so because such a system will have to

provide water where there is none; pay for itself where there is no money to do so; and most of all, be perfectly sustainable.[291] Neither Australia nor South Africa has such a perfect system and realistically speaking, they probably never will. Both countries can only strive to provide as many people with adequate water of an acceptable quality to the extent that such an effort respects ecological limits and takes into account the historical sins of the fathers; the future needs of their children; the realities of sustainability; and the limits of laws, rights, and governance.

291. Allan, *supra* note 5, at 486 (explaining the deficiencies of the national model system).