



Cite as: Ferreira and Ferreira-Snyman "The Nature and Scope of Private Participation in the Performance of State Functions in South Africa, and its Potential to Infringe Individual Fundamental Rights: Recent Developments" 2023 (37) Spec Juris 211–237



# The Nature and Scope of Private Participation in the Performance of State Functions in South Africa, and its Potential to Infringe Individual Fundamental Rights: Recent Developments

Gerrit Ferreira\*

*Prof Extraordinary, Faculty of Law, North-West University, Potchefstroom, South Africa*

Anél Ferreira-Snyman\*\*

*Professor of Law, College of Law, University of South Africa, Pretoria, South Africa*

## Abstract

*This article deals with the broader theme of public participation in the performance of State functions, but also refers where applicable, to the privatisation of State functions as an inherent part of public participation. After a brief discussion of the prominent position privatisation currently occupies on the international level (that is in public international law), the South African constitutional and legal framework concerning public participation and privatisation are set out. Against the background of this exposition and with reference to foreign court cases the influence of this phenomenon on individual fundamental rights is discussed. The article concludes with a summary of the various approaches available to a court of law in dealing with this issue.*

\* B Juris, LLB (PUCHO); LLM (RAU); LLD (UNISA); LLD (PUCHO).

\*\* B Juris, LLB, LLM (PUCHO); LLD (UJ).

**Keywords:** Public participation; privatisation; fundamental rights; South African constitution; public international law

## 1 INTRODUCTION

Right at the outset of this article the employment of the term “private participation” in the title and in the following discussion, must be explained. The term “private participation” must be taken at its face value, simply meaning the participation of private persons or institutions in certain activities, in this instance the activities of the State. Private persons, in this sense, are as a collective generally referred to as “the public”, while at the same time, the activities of the State and its organs are usually said to take place in the “public sphere” as opposed to the “private sphere” that represents “private persons” and their activities. As the term “public” may thus, depending on the context, be used to denote both the public (State) authorities and the private sphere, the authors of this contribution have decided to consistently use the term “private participation” when referring to the activities of “private persons” in the “public sphere”. This is to prevent any confusion regarding the dichotomy between the public as a collective of private persons (the broad community) and the public (State) authorities exercising their power over the members of the said community.

Participation by the private sphere in the execution of governmental functions and the running of State enterprises may take many forms. In this regard, reference can be made to the widely accepted “ladder of citizen participation” developed by Arnstein.<sup>1</sup> She characterises the different levels of participation as follows: *manipulation* which reflects participation by the community merely as a pretence; *therapy* which entails unilateral announcements by the administration of already completed projects; *informing* which does not necessarily take the opinion of the community into account; *consultation* which implies no real share by the community in decision-making; *placation* which results in only token changes on the advice of the community; *partnership* in terms of which the community has considerate influence on the decision-making process but the final decision remains with the administration; *delegated power* which leaves the funding of and control over the decision-making process to the administration but grants the community some delegated powers to take certain specified decisions under control of the administration; and finally, *citizen control* which is aimed at self-government where the community takes the decisions and have full control over their actions without any interference by the administration.

The exposition by Arnstein suggests that private participation which leaves full control to the private participants, is probably the most extreme example of private participation. This form of private participation is usually referred to as privatisation. On the other end of the spectrum, the private sector is, to a lesser extent, involved in the participation in public functions (mostly in an advisory capacity with no guarantee that their participation would have any influence on decision-making) by leaving final control in the hands of the State authority.<sup>2</sup>

Private participation in the execution of governmental functions is a contentious issue (especially in the sense of privatisation), not only in South Africa but elsewhere. In recent months, the

1 Arnstein “A Ladder of Citizen Participation” 1969 *JAIIP* 216–224.

2 For the emphasis on the transfer of ownership and control as part of privatisation see OECD “Glossary of Statistical Terms” <https://stats.oecd.org/glossary/detail.asp?ID=3287> (accessed 03-04-2021): “Privatisation refers to transfer of ownership and control of government or state assets, firms and operations to private investors.” Chick and Nelles “Nationalisation and Privatisation: Ownership, Markets and the Scope for Introducing Competition into the Electricity Supply Industry” 2007 *Revue Économique* 277 contrast privatisation with nationalisation by observing as follows: “Nationalisation and privatisation respectively describe the process by which assets and/or enterprises are transferred into public and private ownership. ... Privatisation means the sale to the public of at least 50% of those state-owned industry shares.”

debate on the privatisation of State enterprises in South Africa has gained momentum in view of the extremely poor performance of most of these institutions and their accrual of vast amounts of debt over the past decade.<sup>3</sup> In addition, local municipalities especially fail to provide satisfactory and efficient services to their inhabitants. In fact, a substantial number of municipalities in South Africa are dysfunctional due to corruption, lack of capacity and incompetence.<sup>4</sup> To receive proper services, people regularly demand that municipal services be privatised. Although the ruling party and the trade unions in alliance with it are generally opposed to privatisation,<sup>5</sup> the current poor economic conditions in South Africa, partly as a consequence of the COVID-19 pandemic, forced the government to seriously consider the (at least partial) privatisation of certain State entities and State functions as part of an economic recovery plan.<sup>6</sup> President Ramaphosa, in an address to parliament<sup>7</sup> on the government's economic recovery plan, announced with regard to struggling State-owned enterprises that suitable, strategic partners will be identified (clearly from the private sector) to assist with the recovery of the said entities. He also stated that the infrastructure procurement framework would be adapted to enable public–private partnerships and unlock new funding. In addition, he called on independent power producers to assist in enlarging the capacity of the State to supply electric power.<sup>8</sup>

Many commentators view private participation as a positive development, especially in delivering services to the broad population. In this regard, Mwebe submits that political interference is largely to blame for the poor performance of public enterprises. According to him, privatisation protects private enterprises from political interference, promotes efficient production of goods and services, and induces effective financial management.<sup>9</sup>

It must be pointed out that privatisation of State functions is by no means a modern phenomenon. In fact, in Roman republican times, the authorities in ancient Rome extensively made use of private tax collectors to collect taxes on their behalf. These collectors, however, were notorious

- 
- 3 Quiggin “Privatisation and Nationalisation in the 21st Century” December 2002 (50) *Growth* 66–73 <https://search.informit.com.au/documentSummary;dn=331511545648925;res=IELBUS> (accessed 03-04-2021).
  - 4 See Mkhwanazi “Enoch Godongwana Guns for 43 Dysfunctional Municipalities” *Independent Online (IOL)* 10 August 2022 <https://www.iol.co.za/news/politics/enoch-godongwana-guns-for-43-dysfunctional-municipalities-6971de4b-1439-4bd0-bf31-c541544f3cc9> (accessed 12-08-2022).
  - 5 See Staff Writer “Plan to ‘Privatise’ Eskom is not the Answer: Unions” *Businessstech* 7 July 2022 <https://businessstech.co.za/news/energy/604286/plan-to-privatise-eskom-is-not-the-answer-unions/> (accessed 12-08-2022).
  - 6 For an overview of state-owned enterprises in South Africa see Chilenga *State Owned Enterprises: A Policy Analysis of South African Airways (SAA)* (Masters Dissertation in Social Sciences University of KwaZulu-Natal 2016) chap 3 23–41. See also the analysis of the ANC's current approach to the privatisation of state-owned enterprises by Johnson “The Slow Process of Dispelling ANC Illusions about Privatisation” *Politicsweb* 18 October 2021 <https://www.politicsweb.co.za> (accessed 18-10-2021). He writes his analysis against the background of the ANC government's initiative to solicit private investments of R100 billion in Transnet and its decision to find an equity partner for South African Airways.
  - 7 For the text of the address by President Ramaphosa on 15 October 2020 at a joint sitting of Parliament on South Africa's Economic Reconstruction and Recovery Plan see <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africa's-economic-reconstruction-and-recovery-plan-15oct> (accessed 04-07-2021).
  - 8 In a proposed policy document that was submitted for confirmation to the ANC's policy conference in 2022, the party propagates a radical policy shift from its current position that the state is primarily responsible for economic growth to a position that gives full recognition to the role of the private sector. See Omarjee “ANC Open to Alliance with Private Sector” *Business Day* 26 April 2022 <https://bd.pressreader.com/article/281513639714544> (accessed 21-06-2022).
  - 9 Mwebe *The Impact of Privatisation on Socio-Economic Rights and Services in Africa: The Case of Water Privatisation in South Africa* (LLM Dissertation, University of Pretoria 2004) 11–12.

for exploiting the general public and enriching themselves.<sup>10</sup>

Against this background, it is the purpose of this article to take a closer look at the current situation in South Africa concerning the private participation issue regarding its nature and scope, and to establish what the effect of this phenomenon might be on the infringement of the fundamental rights of individuals. In this regard, international developments are of importance to South Africa as the Constitution prescribes that the South African courts must take the relevant international law and may take foreign law into consideration when interpreting the Bill of Rights.<sup>11</sup> To obtain a full picture concerning private participation, the international law position would be considered briefly with reference to a few examples.

## 2 THE INTERNATIONAL LAW POSITION RELATING TO PRIVATISATION

Privatisation in general, is normally associated with the national law of States, but developments in international law have shown that this phenomenon has established itself firmly in various areas of international activity that were previously exclusively within the jurisdiction of States.<sup>12</sup> These developments in international law confirm the already widely accepted fact that nation States are no longer the only or even primary role players in international law.<sup>13</sup> Perhaps more importantly, these developments may have a directional influence on future developments in

---

10 See for example United Nations of Roma Victrix (UNRV) “Roman Taxes” <https://www.unrv.com/economy/roman-taxes.php> (accessed 15-09-2021): “By 167 BC, the Republic had enriched itself greatly through a series of conquests. Gains such as the silver and gold mines in Hispania created an excellent source of revenue for the state, and a much larger tax base through its provincial residents. By this time, Rome no longer needed to levy a tax against its citizens and looked only to the provinces for collections. ... With expansion, Roman censors found that accurate census taking in the provinces was a difficult task at best. To ease the strain, taxes were assessed as a tithe on entire communities rather than on individuals. Tax assessments in these communities fell under the jurisdiction of Provincial governors and various local magistrates, using rules similar to the old system. ... Tax farmers (*Publicani*) were used to collect these taxes from the provincials. Rome, in eliminating its own burden for this process, would put the collection of taxes up for auction every few years. The *Publicani* would bid for the right to collect in particular regions, and pay the state in advance of this collection. These payments were, in effect, loans to the state and Rome was required to pay interest back to the *Publicani*. As an offset, the *Publicani* had the individual responsibility of converting properties and goods collected into coinage, alleviating this hardship from the treasury. In the end, the collectors would keep anything in excess of what they bid plus the interest due from the treasury; with the risk being that they might not collect as much as they originally bid. ... Tax farming proved to be an incredibly profitable enterprise and served to increase the treasury, as well as line the pockets of the *Publicani*. However, the process was ripe with corruption and scheming. For example, with the profits collected, tax farmers could collude with local magistrates or farmers to buy large quantities of grain at low rates and hold it in reserve until times of shortage. These *Publicani* were also money lenders, or the bankers of the ancient world, and would lend cash to hard-pressed provincials at the exorbitant rates of 4% per month or more.”

11 See s 39(1).

12 Also, in a regional context the use of public–private partnership is strongly encouraged. Within the African Union, for example, the 11th African Private Sector Forum Declaration of 8 November 2019 explicitly promotes co-operation between the public and private sectors for the transformation of African economies by way of so-called public–private agreements. See paras 7 and 13–17 of the Declaration <https://au.int/en/documents/20191108/11th-african-private-sector-forum-declaration> (accessed 09-04-2021).

13 See the valuable exposition of Nijman *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004).

South African law in terms of the constitutional provisions referred to above.<sup>14</sup>

As a starting point, *Doctors for Life International v Speaker of the National Assembly*<sup>15</sup> should be cited. In that case, the Court found that South Africa's obligations under the International Covenant on Civil and Political Rights, 1966 form the basis for public participation insofar as this treaty guarantees both the right and the opportunity to take part in the conduct of public affairs and requires that positive steps be taken to ensure that citizens have an opportunity to exercise their right to political participation.<sup>16</sup> The Court further emphasised that the right to political participation in the Covenant is not limited to the right to vote, but includes the right to direct participation.<sup>17</sup>

To illustrate the scope and global importance of privatisation in modern society, reference could be made to a few randomly selected examples in international law. Peters points out that a distinction should be made between privatisation *under* international law and privatisation *of* international law.<sup>18</sup> The former denotes the situation where States "have radically and often under pressure by international and regional financial institutions divested themselves of infrastructure and handed over tasks and services to the private sector." The latter comprises the situation where "global markets, global corporations, and global supply chains have begun to shape not only the substance of international law but also its structure (in terms of legal subjects and legal sources/instruments)." Peters emphasises that privatisation *under* international law and privatisation *of* international law are nevertheless strongly linked insofar as the rising of the private sector, the concomitant shrinking of States and the growing engagement between international organisations and the private sector have had a profound influence on the nature and transformation of international legal persons and international law-making processes.<sup>19</sup>

In terms of Peters' terminology, this part of the article primarily focuses on privatisation *under* international law. A few examples will suffice to illustrate this phenomenon. The first, which has recently become extremely important, is the outsourcing of military power. Cameron cites,<sup>20</sup>

---

14 See s 233. It determines that when interpreting any legislation, every South African court must prefer any reasonable interpretation of South African legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In addition, s 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. International law that is binding on South Africa includes both treaty law to which South Africa is a party (s 231 of the Constitution) and customary international law which is part and parcel of South African law (s 232 of the Constitution).

15 2006 6 SA 416 (CC).

16 Paragraph 91.

17 Paragraph 98.

18 See the outline of the lectures delivered by Peters on 7, 8 and 9 March 2017 at the Lauterpacht Centre for International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany on the topic "Privatisation *under* and *of* Public International Law" [www.mpil.de/files/pdf5/0\\_Handout\\_Lauterpacht\\_07032.pdf](http://www.mpil.de/files/pdf5/0_Handout_Lauterpacht_07032.pdf) 1-2 on 1 (accessed 21-01-2021).

19 Peters *Privatisation* 1.

20 Cameron "The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law (2017) 1.

as a prominent example,<sup>21</sup> the proliferation of private military and security companies in the past number of years, and more specifically, the extensive recent use of them by major military powers in conflicts around the world. One of the recent examples is the Wagner Group, a private military army operating internationally with the apparent approval of the Russian authorities in, amongst others, Iraq, Afghanistan, Mozambique, Mali and Ukraine.<sup>22</sup> In his analysis of the Group's involvement in Mali, Faulkner describes the Group as a "quasi-state actor":<sup>23</sup>

[W]agner is almost certainly connected to the Russian government. The group's founder, Yevgeny Prigozhin, is a shadowy Russian oligarch with direct ties to Putin. The relationship has led many to label Wagner a quasi-state actor offering the Russian government "quasi-deniability" in conducting military activities abroad.<sup>24</sup>

A further example is the involvement of the South African Dyck Advisory Group against the infiltration of al-Shabab insurgents in Mozambique.<sup>25</sup> The Dyck Advisory Group (DAG) describes itself on its website as "the result of years of experience in leading operations in the fields of Demining, Explosive Hazard Management, Specialised Security, Canine Services and Counter Poaching."<sup>26</sup> However, according to media reports, the Dyck Advisory Group did not only act in an advisory capacity but actively took part in armed skirmishes alongside the

- 
- 21 See also Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law" 2004 *Columbia Journal of Transnational Law* 522 described the extent of military privatization as follows: "One of the most interesting developments in warfare over the last decade has been the emergence of a global trade in hired military services, better known as the 'privatized military industry.' The businesses in this industry, known as 'privatized military firms' ('PMFs'), range from small consulting firms, comprised of retired generals, to transnational corporations that lease out wings of fighter jets or battalions of commandos. These firms presently operate in over fifty countries. They have been the determinate actors in a number of conflicts, helping to win wars in Angola, Croatia, Ethiopia, Eritrea, and Sierra Leone. Even the U.S. military has become one of the prime clients of the industry. Indeed, from 1994-2002, the U.S. Defense Department entered into over 3,000 contracts with U.S.-based firms, estimated at a contract value of more than US\$300 billion."
- 22 See for example Fasanotti "Order from Chaos. Russia's Wagner Group in Africa: Influence, Commercial Concessions, Rights Violations, and Counterinsurgency Failure" *Brookings* 8 February 2022 <https://www.brookings.edu/blog/order-from-chaos/2022/02/08/russias-wagner-group-in-africa-influence-commercial-concessions-rights-violations-and-counterinsurgency-failure/> (accessed 08-06-2022). See also Scorpio "Russia's Shadow Presence in Africa: Wagner Group Mercenaries in at Least 20 Countries Aim to Turn Continent into Strategic Hub" *Daily Maverick* 15 November 2019 <https://www.dailymaverick.co.za/article/2019-11-15-russias-shadow-presence-in-africa-wagner-group-mercenaries-in-at-least-20-countries-aim-to-turn-continent-into-strategic-hub/> (accessed 15-02-2021; Lawrence "Russia's 'Wagner Group' Doing its Dirty Work?" *Gatestone Institute: International Policy Council* 12 February 2020 <https://www.gatestoneinstitute.org/1557/russia-wagner-group> (accessed 15-02-2021).
- 23 Faulkner "Rising Instability in Mali Raises Fears About Role of Private Russian Military Group" *The Conversation* 10 January 2022 <https://theconversation.com/rising-instability-in-mali-raises-fears-about-role-of-private-russian-military-group-17463> (accessed 12-01-2022). See also Doxsee "Massacres, Executions, and Falsified Graves: The Wagner Group's Mounting Humanitarian Cost in Mali" 11 May 2022 Center for Strategic and International Studies (CSIS) [csis.org/analysis/massacres-executions-and-falsified-graves-wagner-groups-mounting-humanitarian-cost-mali](https://www.csis.org/analysis/massacres-executions-and-falsified-graves-wagner-groups-mounting-humanitarian-cost-mali) (accessed 17-05-2022).
- 24 There are clear indications that the Wagner Group is currently actively involved in the war between Russia and Ukraine in support of Russia's military efforts in the eastern part of Ukraine. See for example Phillips "Ukraine War: What is the Wagner Group of 'Secret' Russian Mercenaries?" *Sky News* 31 March 2022 <https://news.sky.com/story/ukraine-war-what-is-the-wagner-group-of-secret-russian-mercenaries-12562034> (accessed 07-06-2022).
- 25 See DefenceWeb "Private Military Contractors Appear to be Active in Mozambique" 15 April 2020 <https://www.defenceweb.co.za/featured/private-military-contractors-appear-to-be-active-in-mozambique/> (accessed 31-08-2021).
- 26 See [www.dyckadvisorygroup.com](http://www.dyckadvisorygroup.com) (accessed 31-08-2021).

Mozambique army against the infiltrators affiliated with the Islamic State organisation.<sup>27</sup>

Kovač investigates the specific problem of legal issues arising from the inclusion of private military companies (PMCs) in UN peacekeeping.<sup>28</sup> The author's main conclusion is that

the current international legal framework and practice favour the option of PMC state-secondment to that of direct hiring of a PMC by the UN. The latter option will, if ever applied, require a progressive development of enforcement rules relating to individual international criminal responsibility for wrongful acts.<sup>29</sup>

Another current example of privatisation on the international level is the increasing privatisation of outer space activities. Because of the tightening of national budgets, States are increasingly involving private enterprises in space activities such as exploration and transportation.<sup>30</sup> The importance of these public–private partnerships was specifically made evident amid the current tensions between Russia and the USA because of the former's invasion of Ukraine. Although Russia announced that it would no longer sell rocket engines to the United States, in retaliation to sanctions placed on it for invading Ukraine, this step does not, for now at least, have a substantial impact since NASA could still send cargo and astronauts to the International Space Station by using its commercial private partner, SpaceX.<sup>31</sup> NASA has also already selected four companies to develop private space stations which will replace the International Space Station once it reaches the end of its lifespan around 2030.<sup>32</sup> It is also to be expected that the space debris problem will have to be addressed by States through partnerships with the private space sector, as illustrated by the European Space Agency's contract with ClearSpace (worth €86.2 million) to remove orbital space debris as of 2025.<sup>33</sup>

It is interesting to note that the current war between Russia and Ukraine can be linked to the use of outer space by the private sector. Borowitz points out that satellites in space owned by private companies played an important role in the war insofar as commercial satellite data made

27 See Wessels "Colonel Dyck and the Fight for Northern Mozambique" *Rhino Review* 20 July 2020 <https://rhinoreview.org/colonel-dyck-and-the-fight-for-northern-mozambique/> (accessed 28-08-2021).

28 Kovač "Legal Issues Arising from the Possible Inclusion of Private Military Companies in UN Peacekeeping" 2009 *Max Planck Yearbook of United Nations Law* 307–374.

29 Kovač *Legal Issues* 374.

30 Luxembourg Space Agency 29 September 2019 <https://space-agency.public.lu/en/space-resources/commercial-use-space-resources.html> (accessed 10-08-2022). Also see Babcock 2019 *Syracuse Law Review* 198 who points out that "[p]rivate investment in space, not foreseen when the international framework regulating activities in space was put in place, has grown, while government investment in space has 'shrunk'."

31 Wattles "Russian Space Chief Says Russia will no Longer Sell Rocket Engines to the US" *CNN Business* 3 March 2022 <https://edition.cnn.com/2022/03/03/tech/russia-rocket-engines-ula-spacex-scn/index.html> (accessed 10-08-2022); Grush "Russia Says it will no Longer Sell Rocket Engines to the United States" *The Verge* 3 March 2022 <https://www.theverge.com/2022/3/3/22959691/russia-roscoms-rocket-engines-ula-northrop-grumman-rd-180-181> (accessed 10-08-2022).

32 Dinner "NASA, Private Companies Count on Market Demand for Future Space Stations after ISS" August 2022 <https://www.space.com/nasa-commercial-space-station-rely-on-market-demand> (accessed 10-08-2022).

33 See The European Space Agency "No 26–2020: Call for Media: ESA and ClearSpace SA Sign Contract for World's First Debris Removal Mission" [https://www.esa.int/Newsroom/Press\\_Releases/Call\\_for\\_Media\\_ESA\\_and\\_ClearSpace\\_SA\\_sign\\_contract\\_for\\_worlds\\_first\\_debris\\_removal\\_mission](https://www.esa.int/Newsroom/Press_Releases/Call_for_Media_ESA_and_ClearSpace_SA_sign_contract_for_worlds_first_debris_removal_mission) (accessed 10-08-2022). It is interesting to note that the Vice-Commander of the United States Space Force's Space Operations Command, Major General DeAnna Burt, expressed the view that orbital debris removal should be undertaken by the private sector, because government-led efforts could create concerns that the technology would also be used as weapons to disable active satellites. According to her, "[w]hen you say the military is going to develop a capability to pick up trash or pick up debris, it's automatically seen as dual use." See Foust, "Space Force backs development of commercial orbital debris removal systems" *SpaceNews*, 15 September 2021 <https://spacenews.com/space-force-backs-development-of-commercial-orbital-debris-removal-systems/> (accessed 10-08-2022).

a decisive difference in informing military planning and the public view of the war.<sup>34</sup>

Although States have remained the primary actors in regulating the use of outer space, the extent to which private companies would become involved in the exploration and use of space, was not envisaged at the time of the conclusion of the outer space treaties.<sup>35</sup> In fact, private companies are clearly at present performing many of the space activities that were traditionally within the exclusive domain of States. However, as Oduntan points out, “it is unclear whether these developments sit easy with the principles of international space law in particular and international relations in general.”<sup>36</sup>

The developments that Oduntan refers to mainly include private companies offering space tourism activities, their planned establishment of human settlements in space, and private space mining operations.<sup>37</sup> In the absence of clear international rules on the privatisation of outer space activities, States have started to adopt national legislation to fill the void. Several States (including the USA, Luxembourg, the UAE, and Japan) have, for example, enacted legislation to regulate the private appropriation of space resources, although the legality of space mining activities is not settled in international law.<sup>38</sup> It is, therefore, imperative that unambiguous international rules should be adopted to provide legal certainty on the rights and obligations of private entities operating in the outer space arena.

From the above brief exposition, it is evident that participation by private actors on the international level, which was traditionally reserved for States, is already a reality. Against this background, the discussion is now turned to private participation in the South African context.

### 3 THE SOUTH AFRICAN CONSTITUTIONAL DISPENSATION AND EXAMPLES OF PRIVATE PARTICIPATION

It must be noted that the possibility or not for the functioning of some form of private participation in a particular instance depends to a large extent on the applicable constitutional dispensation. With reference to what he describes as the various forms of constitutionalism, Gracia<sup>39</sup> explains as follows: Neo-constitutionalism or contemporary constitutionalism, according to him, “distrusts popular participation”.<sup>40</sup> Popular constitutionalism, in turn, promotes “citizen participation in collective decisions to the fullest, as the democratic legitimacy of these decisions depends on the degree of participation they emanate from.”<sup>41</sup> Not all commentators seem to agree with this view, especially as far as the protection and maintenance of democracy are concerned. Tarnoff, for example, views private participation as a threat to democracy and observes as follows with

34 Borowitz “War in Ukraine Highlights the Growing Strategic Importance of Private Satellite Companies – Especially in Times of Conflict” *The Conversation* 15 August 2022 <https://theconversation.com/war-in-ukraine-highlights-the-growing-strategic-importance-of-satellite-companies-especially-in-times-of-conflict-188425> (accessed 16-08-2022).

35 Reinstein “Owning Outer Space” 1999 *Northwestern Journal of International Law and Business* 98 states that “[t]he notion that our future in space is reserved to the superpowers, or even to governments, has passed. Probate commercial space investment, unforeseen at the inception of the Outer Space Treaty’s dominion, has grown apace, while government investment has shrunk.”

36 Oduntan “Aspects of the International Legal Regime Concerning Privatization and Commercialization of Space Activities” 2016 *Georgetown Journal of International Affairs* 79.

37 Oduntan *Privatization* 79.

38 For a detailed discussion see Ferreira-Snyman “Challenges to the Prohibition on Sovereignty in Outer Space – A New Frontier for Space Governance” 2021 *PELJ* 2–49.

39 Gracia “Popular Constitutionalism and Forms of Democracy” 2019 *Mexican Law Review* 3–25.

40 Gracia *Constitutionalism* 8.

41 Gracia *Constitutionalism* 10.

reference to the situation in the United States of America under the Trump administration:<sup>42</sup>

Between Trump and tech, never before have so many powerful people been so intent on transforming government into a business. But government isn't a business; it's a different kind of machine. At its worst, it can be repressive and corrupt and autocratic. At its best, it can be an invaluable tool for developing and sustaining a democratic society.<sup>43</sup> Among other things, this includes ensuring that everyone receives the resources they need to exercise the freedoms on which democracy depends. When we privatize public services, we don't just risk replacing them with less efficient alternatives – we risk damaging democracy itself.

However, it needs to be pointed out that insofar as Tarnoff suggests that private participation could be damaging to democracy, the same could be said of a State's monopoly over the provision of services and the ownership of State-owned enterprises. In our view, the out-of-hand rejection of private participation runs contrary to participatory democracy<sup>44</sup> which is generally accepted as a necessary mechanism to promote democracy. The Constitutional Court in *MEC for Education KZN v Pillay*<sup>45</sup> explicitly stated that “there is no doubt that consultation and public participation in local decision making are good and deserve to be applauded. They promote and deepen democracy.”

Some forms of constitutionalism referred to by Gracia might even favour private participation to such an extent that the traditional dichotomy between the legislature, the executive and the judiciary would be totally wiped out. He cites critical constitutionalism and popular constitutionalism as examples and submits that they are dynamic and constantly changing. According to him, these approaches require that “citizens should participate in the process of making and defining the law, and judicial control of the laws should be done away with and replaced by citizen control.”<sup>46</sup> The new Latin American constitutionalism, as it manifests itself in, for example, the current Mexican constitutional dispensation, is generally in favour

42 Tarnoff “How Privatization Could Spell the End of Democracy” *The Guardian* 21 June 2017 <https://theguardian.com/technology/2017/jun/21/privatizing-public-services-trump-democracy> (accessed 17-11-2021).

43 As far as the privatisation of state institutions responsible for the use of force (police and military) is concerned, an opposite view is held by Wulf “The Privatization of Violence: A Challenge to State-Building and the Monopoly on Force” 2011 *The Brown Journal of World Affairs* 137–149. He comes to the following conclusion on 146–147: “The privately organized alternative power centers — military and security companies — might improve the security of foreign troops, diplomats, and expatriates in the short term. In the long term, this policy undercuts developing countries’ monopoly on force, thereby diminishing their authority. Furthermore, this policy is usually conducted at the expense of the security of the local population, which cannot afford to hire PMCs [private military companies] and PSCs [private security companies] for its personal protection. Empirical evidence suggests that the privatization of military and police cannot easily be reversed. Privatizing security services diminishes a state monopoly on force. This policy contradicts the concept of creating efficient state institutions. Only when such firms are tightly and systematically regulated and controlled — an impossible task given the weak state structures in most post conflict countries — can the state responsibly delegate security services to private actors. In present circumstances, such companies are rivals or opponents of state authorities, although they often offer services to organizations looking for protection, including states. Neither national regulation nor international law provide adequate legal basis upon which to exercise oversight of PMCs and PSCs and their employees. Regulations are urgently needed. Unless regulations are introduced, only clients, shareholders, and owners can hold the companies accountable, and these groups will continue to offer their services to anyone willing to pay.”

44 We, the authors align ourselves with the definition of participatory democracy <https://www.yourdictionary.com/participatory-democracy> (accessed 04-02-2022): “Kind of democracy not limiting participation of citizens to voting, but striving to create opportunities for everybody to make meaningful contributions to decisionmaking.”

45 2008 1 SA 474 (CC) para 82.

46 Gracia *Constitutionalism* 10–11.

of private participation insofar as it “broadens the mechanisms of participatory democracy.”<sup>47</sup>

It seems as if private participation has become a phenomenon in most modern States. More than twenty years ago, in 1998, Clapp had already pointed towards this global trend by observing that

market-based non-state actors are not merely playing a role in the negotiation and maintenance of public, state-based regimes, but are also in many cases establishing “private regimes” or taking a significant role in the development of hybrid public-private regimes.<sup>48</sup>

During the late seventies and eighties of the previous century, planned and systematic privatisation have, for example, been the hallmark of the Thatcher government’s reign in the United Kingdom. The approach followed by the Thatcher government has earned itself the description of Thatcherism, the aim of which was, according to Green, to “roll back the frontiers of the State.”<sup>49</sup>

In South Africa, the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly*<sup>50</sup> described participatory consultation as an inherent element of customary law and is a tradition which is widely employed by the government in giving content to democracy. According to *Bafokeng Land Buyers Association v Royal Bafokeng Nation*<sup>51</sup> it also forms part of the right to procedurally fair administrative action in terms of section 33 of the Constitution of the Republic of South Africa, 1996. Therefore, any decision to institute a process of participatory consultation constitutes administrative action and is consequently subject not only to section 33 of the Constitution, but also to the provisions of the Promotion of Administrative Justice Act.<sup>52</sup>

The South African Constitution and related parliamentary legislation explicitly and by implication favour at least limited forms of private participation in governmental decision-making. A brief survey of the relevant legislative framework reveals the following: The South African Constitution in general, displays a very positive approach towards private participation without necessarily prescribing the exact form it should take. The preamble to the Constitution as a point of departure, *inter alia*, stipulates that the people of South Africa adopt this Constitution so as to lay the foundations for a democratic and open society in which government is based on the will of the people. One of the basic values and principles governing public administration in South Africa is formulated in section 195(e) of the Constitution and provides that the people’s needs must be responded to, and they must be encouraged to participate in policy-making. Sections 19(2) and 19(3)(a) contain a fundamental right that grants every citizen the right to participate by voting in free, fair and regular elections for any legislative body established in terms of the Constitution. According to section 56(d), the National Assembly or any of its committees may receive petitions, representations or submissions from any interested parties or institutions. Similar provisions in terms of sections 69(d) and 115(d) respectively, are applicable to the National Council of Provinces and the provincial legislatures or any of their committees. Furthermore, on the national level the National Assembly, according to section 57(1)(b), must make its internal rules and orders with due regard to representative and participatory democracy, accountability, transparency and public involvement. The same provision in terms of section 70(1)(b) applies to the National Council of Provinces and in terms of section 116(1)(b) to

47 Gracia *Constitutionalism* 12.

48 Clapp “The Privatization of Global Environmental Governance: ISO 14000 and the Developing World” 1998 *Global Governance* 297.

49 Green “Thatcherism: An Historical Perspective” 1999 *Transactions of the Historical Society* 19.

50 2006 6 SA 416 (CC) para 101.

51 2018 5 SA 566 (NWM) para 42.

52 Act 3 of 2000.

the provincial legislatures. In addition, according to section 59(1)(a), the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees. The National Council of Provinces is also subjected to a similar provision in terms of section 72(1)(a), and the provincial legislatures in terms of section 118(1)(a). Should a person or committee wish to introduce a Bill aimed at amending the Constitution in the National Assembly, the particulars of the proposed amendment must, in terms of section 74(5)(a), be published in the National Government Gazette for public comment which must in accordance with section 74(6) be tabled in the National Assembly.

On the local government level (which is often described as the government closest to the people because they must provide services that have a profound impact on the daily lives of their communities), section 152(1)(e) of the Constitution determines that a municipality must encourage the involvement of communities and community organisations in the matters of local government. Any draft national or provincial legislation that affects the status, powers or functions of local government must, in terms of section 154(2), be published for public comment before it is introduced in Parliament or a provincial legislature. According to section 160(4)(b), no by-law may be passed by a Municipal Council unless the proposed by-law has been published for public comment.

With regard to the administration of justice, the Constitution in section 180(c) provides that national legislation may regulate the participation of people other than judicial officers in court decisions.

Sections 204 and 208 respectively, contain similar provisions relating to the national defence force and the national police service insofar as they require that a civilian secretariat must be established for both the defence force and the police service to function under the direction of the responsible Cabinet members. Section 210(b) specifically concerns the intelligence services (including any intelligence division of the defence force and police service) and stipulates that national legislation must provide for the civilian monitoring of the activities of those services.

As has already been said, the Constitution does not prescribe the exact form or binding nature that the instances of private participation referred to above, must take. It is nevertheless fair to state that the instances of private participation allowed by the Constitution, seem to be primarily advisory in nature, with the final decision remaining in the hands of the relevant State authorities. A notable exception is probably the so-called public-private partnerships that are sometimes authorised in national legislation to enable private participation at especially local government level. In this instance, the legal responsibilities regarding the issue at hand are clearly regulated in a formal agreement between the partners, and the nature of the involvement of the private sector is much more than merely advisory. Regarding the legal position on the local government level in South Africa, the legislature introduced this concept in the Local Government: Municipal Finance Management Act<sup>53</sup> and defined it in the Municipal Public-Private Partnerships Regulations<sup>54</sup> promulgated in terms of the said Act.<sup>55</sup> The Regulations define a public-private partnership in rather detailed terms as

---

53 See s 120 of Act 56 of 2003.

54 See clause 1 of R309 in GG 27431, 1 April 2005

55 See s 168 of Act 56 of 2003.

a commercial transaction between a municipality and a private party in terms of which the private party: (a) performs a municipal function for or on behalf of the municipality or: (b) acquires the management or use of a municipal property for its own commercial purposes and: (c) assumes substantial financial, technical and operational risks in connection with the performance of the municipal function, the management or use of the municipal property, or both. The private party receives a benefit from performing the municipal function or from utilising the municipal property or from both, by way of: (i) a consideration to be paid or given by the municipality or a municipal entity under the sole or shared control of the municipality; (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; (iii) or a combination of these benefits.<sup>56</sup>

It should be evident from the exposition thus far that the line between the privatisation and the delegation of State functions could be blurred in certain instances. Privatisation by a government of a State-owned enterprise often constitutes only a disguised delegation, and delegation of State power is often a hidden form of privatisation.<sup>57</sup> In this regard, the dichotomy between decentralisation and deconcentration as forms of delegation must be kept in mind. The primary difference between these two phenomena centres around the scope of control retained by State authorities after the said delegation: the broader the State authority's scope of control, (as is the case of decentralisation in comparison to deconcentration), the greater the possibility that a mere delegation was introduced; and the narrower the scope of control, the greater the possibility that full privatisation took place in a particular instance.<sup>58</sup>

Apart from public-private agreements, legislation sometimes makes provision for service delivery agreements. Service delivery agreements are a form of public-private agreements.<sup>59</sup> Rautenbach<sup>60</sup> discusses the question of whether the constitutional recognition of traditional authorities and the legal possibility to conclude service delivery agreements between them and municipal authorities amounts to a delegation of functions in the form of decentralisation. She concludes that although the institution of traditional leadership seems to conform to the requirements of the concept of decentralisation, it does not comply with important objectives of decentralisation, for example, the promotion of democracy, legitimacy, responsiveness and efficiency, and private participation. As has been alluded to in the preceding paragraph, decentralisation presupposes rather extensive control over the institution to which the particular functions were delegated. Section 76(b) of the Local Government: Municipal Systems Act creates the possibility for municipalities to enter into a service delivery agreement with traditional authorities while retaining extensive control over the exercise of the delegated functions. The extent of control retained by the municipality is evident from section 81(1) of the said Act.

In contrast to the South African Constitution, other constitutions, for example, the Colombian Constitution of 1991, contain very pertinent provisions on the issue of private participation.<sup>61</sup> Article 48 of the latter Constitution determines that social security may be provided by public or private entities in accordance with the law. Article 49 *inter alia* places the responsibility

56 For a discussion of this description see Van der Berg "Public-Private Partnerships in Local Disaster Management: A Panacea to All Local Disaster Management Ills?" 2015 *PELJ* 1006.

57 See Metzger "Privatization as Delegation" 2003 *Columbia Law Review* 1367–1502.

58 See for example, Bizet "Deconcentration versus Decentralisation of Administration in France: A Centre-Periphery Dilemma" 2002 *Canadian Journal of Regional Science* 475–490.

59 Van der Berg *Partnerships* 996 in n 56 defines a public-private partnership (PPP) as follows: "A PPP is generally defined as a relationship established (by virtue of a contractual agreement) between the public sector and the private sector wherein the private sector delivers public services."

60 Rautenbach "Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Africa" in Fombad and Steytler (eds) *Constitutional Adjudication in Africa* (2019) 513.

61 See Schneiderman "Constitutional Approaches to Privatisation: An Inquiry into the Magnitude of Neo-liberal Constitutionalism" 2000 *Law and Contemporary Problems* 83–109 on 97.

upon the State to deliver health services, but also to establish policies for the provision of health services by private entities and to exercise control over them. Of particular interest is Article 60 which requires the State to promote access to property in accordance with the law. The Article furthermore provides that when the State sells its interest in a particular enterprise, it is obliged to promote the democratisation of the ownership of its shares and must offer its workers and/or their labour organisations special terms to enable them to accede to the said proprietary shares, as regulated by law. In terms of Article 150(9), the government is authorised to sell national assets on condition that parliament (the Congress) is periodically informed by the government of any such actions.

In line with the constitutional provisions, the South African government emphasises the importance of private participation in its various applicable policy documents. For example, in section 5 of the Public Participation Framework for the South African Legislative Sector,<sup>62</sup> reference is made to the “global shift towards greater public participation”, and it is emphatically stated that “in practice public participation has increasingly become a feature of modern democracies.”<sup>63</sup> The National Policy Framework for Public Participation<sup>64</sup> accepts as a basic assumption that private participation (the document utilises the term public participation) constitutes “a fundamental right of all people to participate in the governance system.”<sup>65</sup> This is perhaps something of an overstatement. The South African Constitution does not contain an explicit fundamental right concerning the right to private participation in governmental affairs. One can at best view the right to vote as a limited form of private participation in the sense that citizens are guaranteed the right to regularly participate in the free and fair election of their legislative representatives.

Private participation in the form of consultation between the State authorities and the population also found its way into the so-called Batho Pele principles which mean “people first”, an initiative that was launched by the authorities in 1997 to transform the public service and improve service delivery. Batho Pele consists of the following eight principles of which the first one, consultation with citizens about their needs, strongly implies the inputs of individual citizens in administrative decision-making. The rest of the principles can briefly be summarised as follows: all citizens should know what standard of service to expect; redress should take place when standards are not met; all citizens should have equal access to services; all citizens should be treated courteously; all citizens are entitled to full and accurate information; openness and transparency should be the hallmark of administrative decision-making; and lastly, all services provided should offer value for money.<sup>66</sup> For these principles to be realised effectively, the voice of the people should be heard in terms of whatever procedures are prescribed.

The South African constitutional provisions and related governmental policy as briefly outlined above, find practical application in national legislation. One of the best examples is the legislation dealing with local government. The Local Government: Municipal Systems Act in its preamble describes a fundamental aspect of the new local government system as “the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management.”<sup>67</sup> Section 4(2)(c) thus places a duty on the municipal council to encourage the involvement of the local community in the affairs of local government, section 4(2)(e) makes consultation of

62 To be found at <https://www.sals.gov.za/docs/pubs/pdf=pdf> (accessed 28-09-2021).

63 See 22–24.

64 Issued by the Department of Provincial and Local Government of the Republic of South Africa and to be found at <https://pmg.org.za/files/docs/070625pppolicy> 25 June 2007 (accessed 28-10-2021).

65 See 15.

66 To be found at <https://www.etu.org.za/toolbox/docs/govern/bathopele.html> (accessed 28-10-2021).

67 Act 32 of 2000.

the local community in respect of service delivery compulsory, and sections 5(1)(a)(i) and 5(1)(a)(ii) grant the members of the local community the right to contribute to the decision-making processes of the municipality by submitting written or oral recommendations, representations, and complaints. In addition, section 16(1) obliges municipalities to develop a culture of community participation by ensuring that a system of participatory governance complements a formal representative government. Moreover, according to sections 16(1)(a) and 16(1)(b) respectively, a municipality must encourage and create conditions for the local community that are conducive to their participation in the affairs of the municipality and must contribute to building the capacity of the local community to enable them to participate in the affairs of the municipality. Sections 17(1) and 17(2) determine that a municipality must establish appropriate mechanisms, processes, and procedures according to which participation must take place. These must include the consideration by the municipality of petitions and public comments, as well as the holding of public meetings, public hearings and consultative sessions with locally recognised community organisations. Section 18 stipulates that a municipality must communicate the available mechanisms, processes and procedures for participation to the local community.

Another example concerns policing. In many States, as in South Africa, policing is a contentious issue insofar as the police are often accused of misuse of authority resulting in a rift between the police service and the community. In order to forge a closer relationship between the service and the community, chapter 7 of the South African Police Service Act<sup>68</sup> makes provision for community police forums as well as area and provincial boards so as to establish and maintain a partnership between the Service and the community through regular liaison, promote communication between them, improve the rendering of police services to the community, improve transparency in the Service and accountability of the Service to the community, and promote joint problem identification and problem-solving by the Service and the community.<sup>69</sup> The involvement of the public sector through the local community and community-based organisations in these structures set up by the Police Service Act, is unfortunately not without criticism. Burger comments as follows on the current functioning of community police forums:<sup>70</sup>

South Africa's Community Police Forums (CPFs) were set up in the mid-1990s primarily to provide civilian oversight and improve police accountability and legitimacy. The forums represent both the community and the police within a particular precinct. However CPFs are increasingly involved in supporting police operations, which is very different from what was initially intended. This poses serious risks by making it difficult for them to objectively hold the police to account. With soaring violent crime rates and police abuses, South Africa cannot afford to lose any police oversight systems.

It is evident that private sector participation in this instance did not deliver the desired effects. It is rather ironic that one of the reasons for this situation, as Burger indicates, is the ever-increasing establishment of private neighbourhood watches and farm watches set up under the auspices and in support of Community Police Forums in a bid to allow civilians to play a more active role in preventing crime. The operational role of the Forums has thus been growing exponentially and is still evolving. Burger reaches the conclusion that “[w]ith civilians directly involved in policing, their ability to remain objective and hold the police to account will become

---

68 Act 68 of 1995.

69 See s 18(1).

70 Burger “Are South Africa’s Community Police Forums Losing Their Impartiality?” *ISS Today*, 1 November 2021 <https://issafrica.org/iss-today/are-south-africas-community-police-forums-losing-their-impartiality> (accessed 02-11-2021).

more difficult.”<sup>71</sup>

Closely linked to private participation in the exercise of police functions is private participation in the prosecution of perpetrators. A prime example is the involvement in the prosecution of perpetrators of the private prosecution unit of Afriforum (a private community organisation) in those instances where the South African prosecuting authority declined to prosecute and issued a *nolle prosequi* certificate to that effect.<sup>72</sup>

It is noteworthy that State authorities sometimes *mero motu* initiate the participation of private citizens (albeit only in an advisory capacity and without any legal obligation on the authorities to do so) when an important decision, for example, the appointment of a new Chief Justice for the country, has to be taken. President Cyril Ramaphosa recently invited all South Africans to put forward their suggestions for a new Chief Justice for South Africa to replace Chief Justice Mogoeng Mogoeng who retired, and to submit any objections to the candidates so nominated. The reaction was not quite what one would have expected. Only 148 people accepted the invitation, and a total of 25 persons were nominated of which only eight satisfied the prescribed criteria.<sup>73</sup> The unsatisfactory reaction to the President’s invitation to participate in such an important decision may, in our view, be attributed to the fact that although the decision to appoint a new Chief Justice is a major decision to be taken by the President, it is rather far removed from the daily toil and trouble experienced by the average South African and, therefore, not something that would particularly attract their attention and urge them to participate in the decision-making process.

A peculiar, recent development which indirectly leads to private participation in State activities at especially local government level (or rather a duplication of State functions that is described as self-determination without any government involvement in terms of *inter alia* the granting of official permission), is promoted by civil organisations such as Afriforum and Solidarity. An interesting viewpoint related to private participation concerns the so-called implied amendment (“*versweë verandering*”) of the South African Constitution. In an article in 2018 on this issue, Malan comes to the conclusion<sup>74</sup> that at the end of the next decade, the various levels of constitutional government and public service will still exist, but in an ever-continuing weakened form insofar as pockets of private authority will be present and exercised alongside the existence and application of State authority, the former consisting of societies who will take care of their own interests while enforcing ever-increasing self-government. In 2019, Buys, chairperson of the Solidarity movement, in his opening address of the annual congress of the organisation, explained their plan of action in terms of which approximately 30 identified areas in South Africa with large concentrations of Afrikaners (referred to as anchor towns and cities), will be assisted to take charge of their own destiny, so to speak, by providing for their own living spaces and corresponding services such as security, educational and health facilities. The idea is to rather deliberately promote and practically advance the forming of cultural cantons similar to the Swiss model within the parameters of the South African Constitution. The eventual aim is greater self-determination and independent cultural decision-making, in other words ever-increasing privatisation and self-governance and ever-decreasing dependence on the State for

71 Burger *Police Forums*.

72 The Criminal Procedure Act 51 of 1977 in ss 7–16 authorises and regulates prosecution by a private person. For examples of private prosecutions by the Afriforum Private Prosecuting Unit see the website of Afriforum <https://afriforum.co.za/en/tag/private-prosecuting-unjit/> (accessed 15-08-2022).

73 Makinana “Hlophe, Mkhwebane, Zondo, Maya: Presidency Confirms Candidates to Become SA’s Next Chief Justice” *Times Live*, 4 October 2021 <https://www.timeslive.co.za/politics/2021-10-04-hlophe-mkhwebane-zondo-maya-presidency-confirms-candidates-to-become-sas-next-chief-justice/> (accessed 07-10-2021).

74 Malan “Die Versweë Verandering van die Suid-Afrikaanse Konstitusie” 2018 *Tydskrif vir Geesteswetenskappe* 387. For a detailed exposition of his views see Malan *There is no Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (2019) especially ch 5 and ch 9.

rendering services.<sup>75</sup> It seems to us that what is attempted by Afriforum and Solidarity is an implicit realisation of the provisions of section 235 of the Constitution that recognises the right of the South African people as a whole to self-determination. Section 235 further determines that the recognition of this right includes any community sharing a common cultural and language heritage within a territorial entity in the Republic or in any other way determined by national legislation. At first glance, it should be clear that the development planned by Afriforum and Solidarity does not comply with the provisions of section 235 of the Constitution. In fact, section 235 explicitly states that the right to self-determination relates to the South African people as a whole (which, it is believed, means that the total population must agree to this form of self-determination for a specific cultural group), and national legislation is necessary to give effect to the form of self-determination foreseen by section 235. It is an open question whether the authorities would allow the deliberate and even spontaneous and ever-increasing establishment of pockets of self-determination envisaged by Afriforum and Solidarity without invoking the provisions of section 235. It reminds too much of South Africa's apartheid past. It is not based on a State-authorized programme to privatise certain State functions but is grounded in a popular and spontaneous development within a particular cultural group.

Based on the above exposition of the South African Constitution, governmental policies, and relevant national legislation pertaining to private participation, it can be said that the current legal framework is, broadly speaking, not prohibitive of private participation. In fact, in some instances, private participation is strongly advocated, albeit mostly in the form of the mere consideration of submissions made by the private sector. In addition, the discussion thus far identifies the following scenarios: First, in most instances, private participation is implemented as part of a definite policy of government embodied in specific legislation in line with the broad provisions contained in the Constitution.<sup>76</sup> Second, in other instances, private participation seems to be part of a spontaneous process by particularly minority groups to duplicate governmental services for themselves in order to establish or retain a certain degree of independence ("self-determination") in certain areas, or because of government's failure or inability to provide the necessary services to the population. Third, governmental authorities may of their own volition opt for private participation when high-level decisions of particular importance to the population must be taken.

#### 4 PRIVATE PARTICIPATION AND ITS INFLUENCE ON INDIVIDUAL FUNDAMENTAL RIGHTS

Fombad identifies the following six elements as core features of constitutionalism:<sup>77</sup> recognition and protection of fundamental rights and freedoms; separation of powers; an independent judiciary; review of the constitutionality of legislation; control over the amendment of the constitution; and institutions that support democracy.<sup>78</sup> Without tracing the historical development of the idea of constitutionalism in detail, it is accepted that its present-day meaning, broadly speaking,

75 For a shortened version of his speech in Afrikaans see Buys "Uitkoms vir Ons 'Droewe' Land" *Beeld (By)* 10 August 2019, 4–5.

76 This is especially true of the former Eastern Bloc states after the fall of communism in 1989 when these states embarked upon a systematic programme of privatisation. See for example Bóóc "A Short Review of the History of the Hungarian Privatization" 2005 *Acta Juridica Hungarica* 115–136.

77 Fombad "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects" 2011 *Buffalo Law Review* 1014.

78 See also Venter *Constitutionalism and Religion* (2015) 81–82. He lists the following formal (structural) elements based on the rule of law/*Rechtsstaat*/constitutional state: legally (constitutionally) regulated division of the authority of the state between institutions and persons; independence of the judiciary; binding legal regulation of mutual relations between organs of state and of relations between individuals and the state; fixed procedures for legislation, administration and adjudication; ability of the state to maintain public order; and specific protection of fundamental rights.

underpins a form of limited government.<sup>79</sup> Against this background, the question arises whether the implementation of private participation in a constitutional system might adversely impact the fundamental rights of individuals, thereby rendering the practical application of private participation unconstitutional.

The World Economic Forum identifies three different responsibilities every government has towards its citizens. Without getting caught up in an in-depth discussion of the various philosophical theories relating to the role of the State, the three responsibilities referred to by Slaughter can be listed as follows.<sup>80</sup> The first and oldest responsibility of a government is to protect the citizens of the State against violence provided that the necessary taxes are paid by the individual to the government to give effect to this duty. The second responsibility of a government is to provide the citizens of the State with those goods and services that individuals cannot provide for themselves. This does not only entail the provisions of infrastructure such as roads, bridges and ports, but also in the current era, the means to effect virtual travel such as broadband. The gradual development of the State into a social welfare State led to the expansion of the role of the government as a provider insofar as the government often softens the inability of citizens to provide for themselves, particularly in the case of vulnerable groups, including the youth, the aged, the sick, the disabled and the unemployed, due to economic forces beyond their control. The third responsibility of a government is to invest in education on behalf of the citizens of the State. Slaughter explains this responsibility of the government as follows:<sup>81</sup>

A government that believes in the talent and potential of its citizens and devote a large portion of its tax revenues to investing in its citizens to help them reach that potential is an attractive vision. It avoids the slowness and bureaucracy of direct government provision of services, although efficient government units can certainly compete. It recognizes that citizens are quicker and more creative at responding to change and coming up with new solutions.

It must be pointed out, however, that the scope of governmental services rendered to citizens varies from State to State. In the case of the so-called welfare State, extensive services are provided to its citizens. Examples of these are the following: a social security system to protect the vulnerable members of society, such as regular monthly cash payments to the unemployed; benefits in kind, such as free healthcare; and price subsidies to assist citizens in obtaining commodities deemed socially desirable such as housing.<sup>82</sup> In a free-market system, these services might not be so readily available to the individual. Although South Africa can broadly be described as following a free-market system, it nevertheless maintains a system of social grants aimed at protecting approximately 17 million individuals against the most devastating consequences of unemployment and poverty.<sup>83</sup> In performing State functions like these, the South African Constitution is silent on the question of whether private participation may be employed to assist the authorities in delivering an effective service. The Constitution does, however, contain the following provision: Should one of the executive organs of the State in any sphere of government for whatever reason, not be able to provide the services prescribed

79 See Wheeler “The Foundations of Constitutionalism” 1975 *Loyola of Los Angeles Law Review* 509: “Ancient constitutionalism dealt with an all embracing state. Modern constitutionalism, however, from its birth in the 17th century, had been associated with limited government.”

80 Slaughter “3 Responsibilities Every Government Has Towards Its Citizens” 13 February 2017 <https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/> (accessed 01-11-2021).

81 Slaughter *Responsibilities*.

82 See Le Grand and Robinson “Privatisation and the Welfare State: An Introduction” in Le Grand and Robinson (eds) *Privatisation and the Welfare State* (1984) 2.

83 See Ferreira “Factsheet: Social Grants in South Africa – Separating Myth from Reality” *Africa Check*, 28 February 2017 <https://africacheck.org/factsheets/separating-myth-from-reality-a-guide-to-social-grants-in-south-africa/> (accessed 06-10-2021).

by legislation, it may delegate such power or function to any other executive organ of State on condition that the delegation is consistent with the applicable legislation. An executive organ of State in any sphere of government may furthermore exercise any power or perform any function for any other executive organ of State on an agency or delegation basis.<sup>84</sup> Although this constitutional provision is silent on the delegation of State functions to the private sector, it is suggested that in view of the general acceptance of private participation in the Constitution, governmental policy and national legislation, the said provision could not be interpreted to prohibit private participation in general.

It is broadly accepted that only the executive and not the legislative and judicial functions of the State may be subjected to private participation.<sup>85</sup> As a general rule, this proposition is probably a true reflection of the legal position in most States. Legislative and executive functions of the State, when performed on a high level are often of little direct concern to individuals. However, it is mostly the executive functions of the State on lower levels that concern the day-to-day lives of the broad population. As such, the question arises to what extent, if any, the privatisation of State functions may have an influence on the fundamental rights of the individual. The current South African case law is not clear on this issue, and before a discussion of the case law that might be relevant is embarked upon, brief reference must first be made to foreign case law in line with section 39(1)(c) of the Constitution that allows for foreign law to be considered when interpreting the Bill of Rights.

Resnik<sup>86</sup> discusses the privatisation of State functions with reference to issues such as globalisation<sup>87</sup> and constitutionalisation. In her analysis, she refers to Israeli<sup>88</sup> and Indian<sup>89</sup> court decisions in an effort to establish whether a so-called constitutional right against privatisation can be identified. The Israeli case dealt with the constitutionality of the privatisation of prisons in Israel. The court found that establishing a private prison is “a violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself.”<sup>90</sup>

The court continued as follows:

In Israel the power to punish someone who has been convicted under the law and to imprison him in order that he may serve his sentence is ... one of the most significant powers of the state ... This power ... is an expression of a broader principle of the system of government in Israel, according to which the state ... has exclusive authority to resort to the use of organized force in general and to enforce the criminal law in particular ...<sup>91</sup>

The court furthermore emphasised that in addition to the violation of the right to personal liberty, the establishment of a private prison also violates the constitutional right to human

84 See ss 238(a) and (b) of the Constitution of the Republic of South Africa, 1996.

85 Parrest “Constitutional Boundaries of Transfer of Public Functions to Private Sector in Estonia” 2009 *Juridica International* 46.

86 Resnik “Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century” 2013 *International Journal of Constitutional Law* 162–199.

87 The link between privatisation and globalisation is generally accepted. Resnik *Icons* 164 explains as follows: “Indeed, the large literature offering varying assessments ... of privatization and globalization reads them (jointly and severally) as eroding the sovereignty of states while embedded in and produced through states.”

88 *The Human Rights Division, The Academic Center for Law and Business v Minister of Finance* HCJ 2605/05 (19 November 2009). For an English translation see <https://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-of-finance.pdf> (accessed 21-01-2021).

89 *Sundar v Chattisgarh* (2011) 7 SCC 547.

90 *The Human Rights Division, The Academic Center for Law and Business v Minister of Finance* para 33.

91 *The Human Rights Division, The Academic Center for Law and Business v Minister of Finance* para 25.

dignity.<sup>92</sup> The court motivated its opposition to privately managed prisons as follows:

Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purpose of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose namely the desire of the private corporation operating the prison to make a financial profit.<sup>93</sup>

Resnik explains the basis upon which the Israeli court, according to her, indeed recognised a constitutional right against privatisation as follows:<sup>94</sup>

[T]he court reasoned that detainees had the right to have the state itself furnish directly the unique service of depriving people of their liberty and dignity. To borrow an Arendtian formulation, the right to have rights became a right to have only the state take away those rights.

She interprets the consequence of the court's approach as follows:

The court styled its ruling as predicated on inmates' personal rights rather than on a structural analysis of what constituted the "hard core" of sovereign powers" that could not be delegated "to private enterprises," even as the decision implicitly identified incarceration as just such a government function.<sup>95</sup>

This statement is, however, debatable, as the court explicitly stated in paragraph 25 (quoted here above) that to punish a person by imprisonment is "one of the most significant powers of the state" and that "the state has exclusive authority to resort to the use of organised force in general and to enforce the criminal law in particular". Insofar as privatisation could be viewed as a form of delegation, any exclusive and specific authority should remain with the State and should not be delegated. It would thus seem that the court based its decision against privatisation on the fact that it not only violated the fundamental rights of the individual but also amounted to an unconstitutional waiver of the State's exclusive powers.

The position in South Africa regarding the privatisation of prisons is regulated in the Correctional Services Act.<sup>96</sup> The Act refers to joint venture prisons and determines that the Minister of Correctional Services may enter into a contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established. The contract period for the operation of the prison may not exceed 25 years.<sup>97</sup> The State authorities, however, retain considerable control over the operation of the prison insofar as the Act provides that the party contracted to operate the prison (the contractor) must detain all prisoners in safe custody whilst ensuring their human dignity. In addition, the contractor may make prison rules only with the prior consent of the Commissioner of Correctional Services.<sup>98</sup> The Act furthermore requires

92 *The Human Rights Division, The Academic Center for Law and Business v Minister of Finance* para 34. It is interesting to note that President Joe Biden of the United States of America in January 2021 issued an executive order directing the Attorney-General not to renew contracts in terms of which the private sector operated criminal detention facilities on behalf of the Department of Justice. He emphasised that "the federal government should not use private facilities for any detention" and emphasised his administration's policy to eliminate private prisons and all forms of for-profit incarceration. See the expert brief by Lauren-Brooke Eisen "Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts" Brennan Center for Justice <https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts> (accessed 10-06-2022).

93 *The Human Rights Division, The Academic Center for Law and Business v Minister of Finance* para 36.

94 Resnik *Icons* 192.

95 See also the analysis of Medina "Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization" 2010 (8) *International Journal of Constitutional Law* 690–713.

96 Act 111 of 1998.

97 See s 103.

98 See s 104.

the appointment of a Controller for every joint venture prison.<sup>99</sup> It is the duty of the Controller to monitor the daily operation of the joint venture prison and report to the Commissioner of Correctional Services.<sup>100</sup> If the Director appointed to govern the prison has lost effective control of a joint venture prison, the Commissioner of Correctional Services may replace the custody officials with correctional officials to the extent that they deem necessary.<sup>101</sup>

In the Indian case referred to above, the Supreme Court of the State of Chattisgarh rejected the establishment of what can be described as a privatised security force to suppress a Maoist insurgency.<sup>102</sup> The members of the said police force were tribal youngsters, mostly uneducated and untrained. The Court argued that the establishment of such a special police force not only infringed the constitutional rights of those appointed as special police officers, but also violated the rights of others in society. According to the Court, the selection of under-educated and untrained youngsters to be members of the special police force diminished their right to dignity. Because their training was not on the same level as that of other police officers, their right to equality was violated.<sup>103</sup> Their appointment not only put their own lives in jeopardy, but also those of the members of society, thereby infringing on the latter's right to liberty.<sup>104</sup> In its argumentation, the Court referred to principles that are "fundamental to governance"<sup>105</sup> and stated explicitly that

our constitution ... demands that the power vested in the State ... be only used for the welfare of the people — all the people, both rich and poor —, thereby assuring conditions of human dignity ...<sup>106</sup>

The Court against this background, identified the so-called "primary task of the State" as "the provision of security to all its citizens, without violating human dignity."<sup>107</sup> and characterised the actions of the State of Chattisgarh as "an abdication of constitutional responsibility to provide appropriate security to citizens ...".<sup>108</sup> Although the Court did not specifically employ the term "core functions of the state", it would not be irrational to deduce from the language used by the judges ("principles fundamental to governance" and "primary task of the State") that this is exactly what they had in mind.

From the decisions in the Israeli and Indian cases, it becomes clear that the validity of privatisation could be determined by applying different yardsticks. The first approach could be to disallow the privatisation of any core functions of the State. As to what constitutes a core

---

99 See s 105.

100 See s 106.

101 See s 112.

102 *Sundar v Chattisgarh* paras 43–74.

103 See *Sundar v Chattisgarh* paras 60–61.

104 Resnik *Icons* 167 summarises the Court's decision as follows: "The state had thus failed to fulfill its 'positive obligations' to 'protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity.' The Indian court chastised Chattisgarh for permitting global corporate development of its natural resources and thereby exacerbating wealth disparities that fuelled unrest. Chattisgarh's 'policy of privatization' had 'incapacitated itself, actually and ideologically, from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed.' The court also expressed its 'deepest dismay' that the Union of India had neglected its constitutional duties to oversee state-based policing. India's obligation to secure the safety of its citizenry (by 'appropriately trained ... and properly equipped' professional police) could not be 'divested or discharged through the creation of temporary cadres with varying degrees of state control.'"

105 *Sundar v Chattisgarh* para 13.

106 *Sundar v Chattisgarh* para 18.

107 *Sundar v Chattisgarh* para 20.

108 *Sundar v Chattisgarh* para 73.

State function is debateable. It is suggested that one of the primary factors that has to be taken into account is embodied in the question whether the private sector could effectively perform the same function without violating the fundamental rights of the individual. The United Nations Development Programme (UNDP) identifies six core functions of government, namely executive decision-making and co-ordination at the centre of government, public revenue and expenditure management, government employment and public administration, the security sector, local governance, and aid management.<sup>109</sup> These so-called functions of government could rather be described as areas of governance and are too vaguely and broadly formulated to be of any real assistance in deciding whether a particular State function or State-owned entity could be privatised.

The second approach could be to disallow any privatisation if it concerns a positive constitutional obligation of the State. However, this approach could also be viewed as too broad. The South African Constitution in section 7(2), following international human rights documents, places a positive obligation on the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. It could be argued that the State is constitutionally bound to accept responsibility for these obligations and that any privatisation of State functions may boil down to an unconstitutional delegation of its responsibilities. It must also be observed that the unconstitutional waiver of the core functions of the State in favour of the private sector, would, in most cases, probably give rise to the violation of one or more of the fundamental rights of the State's citizens.

It should be evident that privatisation, in some way or other, may influence the fundamental rights of citizens because it may have a direct bearing on the duty upon States to respect, protect, promote, and fulfil these rights.<sup>110</sup> McBeth discusses the privatisation of State services flowing from socio-economic rights and the consequent influence on the constitutional duty of the State to provide these services. He reaches the conclusion that the State could never totally absolve itself from its constitutional duties by way of privatisation and explains as follows:<sup>111</sup>

The conclusion as to the nature of a private service provider's human rights obligations is therefore that it is obliged, within its sphere of operation and influence, not to violate human rights, to prevent others within its control and influence from violating human rights, and to take action (or refrain from taking action) to prevent a regression of the existing level of realisation of the relevant right. While these private obligations mirror the state's obligations to respect, protect and promote human rights, they differ in content in recognition of the different role played by non-state entities. Thus the character of the state's human rights obligations in relation to social service provision cannot be transferred entirely from the state to a private operator, even where the service provision itself is transferred, nor can those obligations be duplicated in their entirety. For this reason, while a private service provider must take responsibility for the realisation of human rights within its field of operation, the state retains concurrent responsibility for the realisation of the same rights within its jurisdiction as a whole and will be held responsible under international law for a failure to enforce the human rights obligations of private operators.

The privatisation of the policing functions of the executive, particularly, is a controversial issue. The current position in South Africa is that the total number of security officials employed by private security firms countrywide far outweighs the total number of South African Police

109 See McBeth "Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?" 2004 *Melbourne Journal of International Law* 133–154.

110 In this respect the preamble of the Universal Declaration of Human Rights (1948) "[p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

111 McBeth 2004 *Melbourne JIL* 154.

Service members. The 2018/2019 Report of the Private Security Industry Regulatory Authority estimates that

as many as 2.36 million security officers are registered in South Africa – with 498,435 currently employed by just over 9000 registered and active security businesses. This means that there are as many as 2.5 security guards for each police officer in the country.<sup>112</sup>

Although the private security industry is not constituted in terms of a formal delegation or waiver of the policing functions of the State, in many respects its activities indeed amount to a parallel exercise of policing functions, not *of* the State but *in* the State. In terms of the approach in this article, it constitutes a form of privatisation. As with our reference above to Afriforum’s declared aims to establish from its own volition pockets of self-determination, the question also arises here, theoretically at least, as to whether these developments (if allowed to continue unabated) might not eventually constitute an unconstitutional usurping by the private sector of one of the core functions of the State. As has been pointed out, such developments could not be justified in terms of section 235 of the South African Constitution.<sup>113</sup> This provision has not yet authoritatively been interpreted by the Constitutional Court, and the exact meaning and scope are not certain. It can, however, be stated emphatically that the practical implementation of section 235 (if ever) would never be allowed to constitute some form of apartheid between the various races living in South Africa. The current debate in more conservative political circles on some form of autonomy for the Western Cape Province, which is governed by the Democratic Alliance, would, therefore, in our view fail to produce any concrete results.<sup>114</sup>

The judicial functions of the State have also not escaped privatisation. Resnik refers to the widely employed concept of alternative dispute resolution, for example, arbitration and mediation.<sup>115</sup> An illustrative example in this respect is the 2008 directive<sup>116</sup> by the European Council that the Member States of the European Union must establish mediation processes to resolve cross-border disputes between States, thus, it could be argued, limiting the right to a fair hearing before a court of law as provided for in the European Convention on Human Rights.<sup>117</sup>

The European Union has recently taken legislative steps to privatise certain aspects of the judiciary in the sense that a search engine (in this instance particularly Google) must now weigh the relevant fundamental rights against each other when considering a request by an individual to remove from the internet specific personal information that no longer serves any legitimate purpose being displayed on the platform.<sup>118</sup> After an in-depth analysis of this process, Haber

---

112 Staff Writer “The Number of Police Officers vs Security Guards in South Africa” *Businessstech* 13 July 2019 <https://bussinesstech.co.za/news/government/325093/the-number-of-police-officers-vs-security-guards-in-south-africa/> (accessed 14-01-2021).

113 The Constitution of the Republic of South Africa, 1996 in s 235 makes provision for what can be referred to as cultural self-determination by providing as follows: “The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.”

114 See for example Guppy “The Growing Case for an Independent Western Cape” *The Spectator* 12 September 2020 <https://www.spectator.co.uk/article/the-growing-case-for-an-independent-western-cape> (accessed 06-12-2021).

115 Resnik *Icons* 185–186.

116 *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> (accessed 14-01-2021).

117 See Art 6 of the European Convention on Human Rights [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (accessed 14-01-2021).

118 See Haber “Privatization of the Judiciary” 2016 *Seattle University Law Review* 134–139.

comes to the following conclusion:<sup>119</sup>

This new form of privatization is truly unique in modern society. Unlike other forms of judiciary privatizations, this judiciary is tasked with safeguarding only certain fundamental rights. It shifts decisions about these fundamental rights from the public sphere. Not only is such privatization unique in the sense of the type of rights that it handles, but it also almost entirely removes democratic safeguards like oversight and transparency. When search engines like Google reach a decision, there are only a handful of cases, out of millions of URLs, that the state will re-examine under an appeal process. Rule of law does not apply here, nor do any procedural safeguards. This article argues that such privatization should not occur. While economic considerations could suggest otherwise, there is no room for privatizing the judiciary when dealing with fundamental rights. Public officials should be handling such requests, not search engines. If the EU insists on using search engines as a judiciary, they must also restrain their judicial power and provide adequate safeguards for society. In any such mechanism, policymakers must ensure proper transparency and oversight on search engines' removal procedure and decisions. The implications of privatization of the judiciary extend far beyond the EU. They represent how states are coping with the threats that the digital era brings. Perhaps the roles of intermediaries online are changing, which may necessitate a reframing of their legal duties and responsibilities. By the same token, the threats that the digital era brings may also necessitate a reframing of the roles of the state and governance in this new digital era. What the digital era should not change is the protection of fundamental rights under the rule of law. If it does, the concept of democracy might also be forgotten.

With regard to specifically the legislative functions of the State, it is interesting to note that the South African Constitution places a high premium on private participation in the legislative process.<sup>120</sup> The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly*<sup>121</sup> ruled explicitly that the legislature must ensure that the public be afforded a reasonable opportunity to participate effectively in the law-making process.<sup>122</sup> In addition the Court required<sup>123</sup> that all interested parties should be informed about the issues and have an adequate say. In *Matatiele Municipality v President of the RSA*<sup>124</sup> the Constitutional Court further elaborated on the issue of private participation and directed that private participation must provide reasonable and meaningful opportunities for the public to be involved. A reasonable opportunity is described in *Moutse Demarcation Forum v President of the Republic of South Africa*<sup>125</sup> as an opportunity capable of influencing the decision to be taken. However, the Constitutional Court in *Merafong Demarcation Forum v President of the RSA*<sup>126</sup> made it clear that private participation does not mean that the legislature is bound by the views expressed by the community. The Constitutional Court in *Mogale v Speaker of the National Assembly*<sup>127</sup> nevertheless determined that the legislature should keep proper records of the public participation process.

As with many developments in law, the advantages and disadvantages of privatisation (which, as has been indicated above, includes public participation) are hotly debated. The impression

119 Haber *Privatization* 171–172.

120 See ss 59(1)(a), 72(1)(a), and 152(1)(e) of the Constitution of the Republic of South Africa, 1996 for the provisions allowing for private participation on national, provincial and local government levels respectively.

121 2006 (6) SA 416 (CC) para 129.

122 See the analysis of Jansen “Beyond Voting, Democracy Needs Ongoing Public Participation” *Voices360* 13 November 2019 [voices360.com/politics/beyond-voting-democracy-needs-ongoing-public-participation-37128154](http://voices360.com/politics/beyond-voting-democracy-needs-ongoing-public-participation-37128154) (accessed 04-02-2020).

123 Paragraphs 128–129.

124 2007 1 BCLR 47 (CC) paras 50 and 66.

125 2011 11 BCLR 1158 (CC) para 62.

126 2008 5 SA 171 (CC) paras 50 and 282.

127 CCT 73/22 para 28.

could be created that the privatisation of State functions is a rather straight-forward phenomenon which simply involves a replacement of a particular State organ performing certain services to the individual by a private institution providing similar or the same services. However, the issue is not that simple.<sup>128</sup> After presenting a broad overview of some forms of privatisation Le Grand and Robinson rightly conclude as follows:

[P]rivatisation can take many forms. A simple interpretation, such as the replacement of the state by the market, will not suffice. The kind of state intervention to be replaced must be specified; so too must be the type of non-state institution that will replace it. For this reason, it is not easy to argue about the merits and de-merits of privatisation in the abstract; the arguments will vary according to the types of state and private activities involved.

An extraordinary (but also controversial) development concerning the performance of municipal functions by private persons, has recently been introduced in a judgment by the North-West division of the South African High Court.<sup>129</sup> The relevant issue for the purposes of this article boils down to the following essential facts: The municipality concerned is the Kgetlengrivier Municipality which has, over the past years, been indicted several times for serious failures to provide essential services to its inhabitants. In the current case (of which only the official record of the order of the court has been published) the court, on 18 December 2020, issued an order requested by the Kgetlengrivier Concerned Residents against the Kgetlengrivier Municipality. The order instructed the Municipality to hand over control of the municipal water works and the sewage plant to the Concerned Residents should the Municipality fail to supply potable water to the towns of Koster and Swartruggens and rectify the spillage of raw sewage, all within ten working days from the date of the order. The court found that the Municipality was in breach of its constitutional obligations insofar as its officials allowed the spilling of raw sewage into the Koster and Eland rivers. The Municipality failed to fulfil the conditions contained in the order of the court, and the Concerned Residents subsequently took over control of the water works and the sewage plant, and in terms of the order appointed a qualified company to operate the sewage works. The court ordered that all reasonable costs be paid by the relevant provincial and local authorities. Within days the problems were rectified.

In his discussion of the case, Brink, a member of parliament, confirms the rather extraordinary nature of the order of the court “because it contemplates an entity other than the state assuming responsibility for service delivery.”<sup>130</sup> It is argued that it seems fair to make the following preliminary observation: Where a municipality has a history of constant failure to deliver essential services despite several court orders against it, the court may, as a last resort introduce privatisation in the form of an order that instructs the municipality concerned to hand over control over certain municipal functions to the inhabitants of the municipality (or preferably to an independent, private institution), and to allow them to exercise those functions unhindered. This process could in our view be described as a form of forced privatisation.

As could be expected, the Municipality did not accept the court’s decision. Eventually, after a protracted process of discussions and threats of legal action between the parties, the Municipality obtained a court order which instructed the Kgetlengrivier Concerned Residents to without any

---

128 See Le Grand and Robinson *Privatisation* 1–14.

129 *Kgetlengrivier Concerned Citizens v The Kgetlengrivier Local Municipality* (UM 271/2020) [2020] ZANWHC 95 (18 December 2020).

130 Brink “Small Town Judgment Has Big Constitutional Implications for Service Delivery” *Politicsweb*, 11 January 2021 <https://www.politicsweb.co.za> (accessed 11-01-2021).

delay hand back control over the water purification plant to the Municipality.<sup>131</sup>

State-owned enterprises may also or partially or wholly be sold to the private sector, in which case a part of or the total ownership of the enterprise is transferred to the private sector. However, legislation may still provide for some form of control over these institutions to protect the interests of the general public in the continued provision of a particular (especially an essential) service. A case in point is South African Airways (SAA) which, according to pronouncements by Pravin Gordhan, Minister of Public Enterprises, concluded negotiations with a strategic equity partner for the Airways in an attempt to save it from total financial collapse.<sup>132</sup> The partner consists of a consortium of businesses which are 51 per cent black-owned and which, in turn, will hold a 51 per cent stake in SAA with the South African government retaining the remaining 49 per cent. In order to protect important objectives of the South African government, such as South Africa's transformation agenda, it has been agreed between the prospective partners that notwithstanding the South African government's minority share in SAA, the chairperson of the board will be a South African as well as the majority of the executive team.

Similar developments would in all probability, be the only way out of threatening bankruptcy for other State entities such as Eskom (provision of electricity), Prasa (passenger rail agency), Transnet (goods transport network), the South African Post Office (postal services), and Denel (weapons manufacturer). It must, however, also be noted that since the Minister's announcement no further progress on the SAA issue has been reported. This does not augur well for the identification of strategic partners, the conclusion of the necessary public-private agreements, and the prompt, practical implementation thereof, with regard to the other State-owned enterprises whose survival largely depends on the involvement of the private sector.<sup>133</sup>

## 5 CONCLUSION

Private participation is a phenomenon that can be traced back to Roman times. Although usually associated with municipal law, the examples referred to in this contribution confirm that this phenomenon has firmly taken root in various areas of international law, thus re-iterating the already generally accepted idea that nation States are no longer the only or even primary role players in international law. In addition, it illustrates the ever-increasing phenomenon of private participation on different levels, even insofar as the international relations between States are concerned.

Private participation, particularly in South Africa, is not explicitly prohibited in either the Constitution or parliamentary legislation. However, it is not an exaggeration to refer to public participation as an emerging trend in international law and in many domestic constitutional systems. Unfortunately, very few State constitutions contain specific provisions regarding the permissibility of private participation in State functions and the form it should take. Consequently, the legal position on the admissibility, nature, form, and scope of public participation in most constitutional systems is one of uncertainty. Therefore, as a first recommendation, it is suggested

131 "MEC Mmoloki Cwaile Welcomes Court Ruling on Kgetlengriver" <https://www.gov.za/speeches/mec-mmoloki-cwaile-welcomes-court-ruling-kgetlengriver-19-may-2021-0000> (accessed 10-06-2021).

132 See the media statement by the Minister of Public Enterprises on 11 June 2021 "Minister Pravin Gordhan Announces Preferred Strategic Equity Partner for SAA SOC LTD" <https://www.gov.za/speeches-minister-pravin-gordhan-announces-preferred-strategic-equity-partner-saa-soc-ltd-11-jun> (accessed 10-11-2021).

133 In a report prepared by Nestor Advisors Ltd for the African Development Bank and the National Planning Commission of South Africa "The Role of State-Owned Enterprises in Achieving Economic Transformation and Inclusive Growth Paper 3/4: Institutional Governance Review" <https://www.nationalplanningcommission.org.za/assets/Documents/The/role/of/state/owned/enterprises/in/achieving/economic/transformation/and/inclusive/growth/Paper/3/Institutional/Governance/Review.pdf> (accessed 04-02-2022), recommendation 7(c) in Appendix III on 70 reads: "The State should provide SOEs with clear uniform rules for public-private partnerships aimed at leveraging private capital to fulfil public infrastructure needs."

that in the case of those systems with a written supreme constitution containing a bill of rights, a clear provision on whether especially the privatisation of State functions would be allowable, should be inserted in the supreme constitution. Privatisation undoubtedly could have a profound influence on the fundamental rights of individuals in the sense that it could, depending on the circumstances of a particular case, amount to a limitation on the fundamental rights of the individual. In addition, the nature, form, and scope of public participation, if allowable, should also be clarified constitutionally. Parliamentary legislation may, of course, be enacted to achieve the same objectives.

It is furthermore suggested that the preferable form and scope of public participation should make provision for the meaningful participation of both the public and private sectors. However, a proper balance must be struck. Over-involvement of the private sector in the provision of State services and the running of State-owned enterprises is just as unacceptable as the total exclusion of the private sector from participating in such activities. Achieving a realistic balance would serve democracy and prevent monopolies and anti-competitive behaviour. In this regard, public-private agreements could play a definitive role. The natural tension between the public and private sectors due to the presence of State authority very often results in an unhealthy relationship between *us* against *them*. The State can only function at maximum efficiency if both these sectors work together for the benefit of all people living within its borders. One of the best ways to achieve this objective is to allow private participation in the performance of State functions and in the running of State-owned entities, thereby creating a truly participatory democracy.

In deciding on the form and scope of private participation, it would thus be necessary to define its limits. To achieve this objective, the so-called core functions of the State should be identified as these functions should ideally not be subjected to privatisation. The legislature could take this task upon itself, but it is suggested that it would be preferable to leave it to the Constitutional Court to finally identify on a case-by-case basis the core functions of the State. One of the most difficult factors to discount in this process is the difference in objectives of the public and private sectors respectively. The State primarily focusses on service delivery in the public interest, while private companies aim at generating maximum profit. The tensions that might be created are obvious. In instances where these tensions are particularly evident, it is suggested that the State retains sufficient control to ensure the protection of the interests of the broader community. Efficient service delivery by the State should not be sacrificed for maximum profit for the private sector.

To establish the constitutionality of private participation, constitutional systems with a bill of rights contained in their constitutions would focus on two questions, namely, first, whether the particular instance of private participation is in violation of one or more fundamental rights of individuals, and second, whether private participation amounts to a waiver of one of the core functions of the State. Should any one of these questions be answered in the affirmative, it is suggested that the private participation in question would be unconstitutional. However, if the constitutional system is one that is based on the sovereignty of parliament, the question concerning the possible violation of fundamental rights would not come into play, and the constitutionality or not of private participation would primarily centre around the question of whether a core function of the State has been transferred to the private sector without any form of State control over the exercise of that particular function.

As has been shown above, private participation could take place spontaneously (usually under the pretence of exercising cultural rights) and without any definite contribution by State authorities. This approach could potentially lead to tension between State authorities and private groups. Insofar as such developments could be construed as an attempt to create a parallel but informal

“State” or “government”, it is clearly linked to the idea of self-determination. Most States would probably not tolerate such a development indefinitely. It confirms the need for clear legal regulation of the scope and form of private participation. On the other hand, in terms of the most recent judicial developments, it would seem that privatisation may under certain conditions be enforced by our courts.

It can be stated as a general proposition that labour unions in South Africa will mostly resist the large-scale privatisation of State functions or enterprises for fear of job losses. A definite precondition for a successful privatisation policy is to get the unions to accept the policy of (limited) privatisation. As in the United Kingdom under the Thatcher administration, this might necessitate legislative limitations on the powers of labour unions. This would probably mean protracted and difficult discussions and negotiations between the relevant State authorities and the unions.

In conclusion, it must be emphasised that the issue of private participation, especially in the form of privatisation, is becoming a too prominent and serious issue to be dealt with in a haphazard manner. To ensure certainty for all role players (State and private sector) and to create a real participatory democracy, it should be clearly regulated with regard to permissibility, form and scope.