

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

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Breaking the conspiracy of power: democracy, public law values and the governance of privatization in the weak african state

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I. Introduction

The market is today considered by international development policy makers to be the most effective mechanism for resolving society's resource allocation problems, thanks to the ascendance of neo-liberalism over the last two or so decades.¹ In Sub-Saharan Africa and Latin America, neo-liberal policies were introduced by the International Monetary Fund (IMF) and the World Bank in the early 1980s as a response to economic problems in these continents.² In particular, the IMF and the World Bank recommended fiscal austerity, privatization, and market liberalization.³ These policies were to form the pillars of what later came to be known as the "Washington Consensus."⁴

In many cases, neo-liberal policies have not lived up to their promise. Among other things, critics have pointed out that these policies have neither sufficiently accounted for nor appreciated the limitations of the market and the need for its regulation in Latin American and Sub-Saharan African countries (hereinafter, SSA countries). In particular, it is argued that neo-liberalism has failed to adequately account for the role of the state in governing the markets created by the privatization process. Francis Fukuyama thus observes that "while privatization involves a reduction in the scope of state functions, it requires functioning markets and a high degree of state capacity to implement."⁵ Unfortunately, many states in

the developing world have never had the requisite institutional capacity to regulate markets. Political scientists consider such states to be "weak."⁶ Furthermore, the Washington-based proponents of neo-liberalism have invariably made no efforts to develop the institutional capacities of such states.⁷ As a result, privatization in many developing countries has led to the creation of markets that are characterized by numerous failures, and which have thus failed to realize the economic goals of ensuring competition and efficient resource allocation.

Even more worrisome, the privatization process – especially the transfer of governmental functions to private entities – is leading to the emergence and consolidation of unregulated private power. In the context of the privatization of governmental functions such as policing and the provision of water, the emerging private power should be of particular concern to public lawyers since it may adversely impact upon the liberties and livelihoods of citizens unless it is properly regulated. Indeed, the case studies reviewed in this paper indicate that this is already happening in some African countries. Worse still, this private power is emerging in an institutional environment in which the state is weak. As we shall see, the state in Africa is weakened by three key factors, namely neo-patrimonialism, development assistance and neo-liberalism, also known as the Washington Consensus, and which is fast-tracking the process of globalization.

The critical question is whether public law,⁸ as an instrument for the realization of democracy, can rescue the state from the evisceration occasioned by these three factors. In my view, public law should establish the institutional frameworks necessary for the regulation of private power so that citizens of African countries can acquire some measure of control over their liberties and livelihoods in the context of the privatization of arguably governmental functions such as policing and the provision of water. Such institutional frameworks are in par-

¹ Neo-liberalism refers to "a broad structure of political beliefs founded on [New Right] ideas about political democracy, individual freedom and the creative potential of unfettered entrepreneurship." Richard Peet, *Neoliberalism or Democratic Development?* 8 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 329 (2001) (Book review).

² JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 53 (2002).

³ Id.

⁴ Id at 74 (Observing that "the Washington Consensus policies are sometimes referred to as "neo-liberal," based on "market fundamentalism," a resuscitation of the laissez-faire policies that were popular in some circles in the nineteenth century.")

⁵ FRANCIS FUKUYAMA, STATE – BUILDING: GOVERNANCE AND WORLD ORDER IN THE TWENTY-FIRST CENTURY 24-25 (London: Profile Books, 2004).

⁶ See Part III *Infra*, for a discussion of the concept of the "weak state."

⁷ Fukuyama, *supra* note ___ at 23 (Noting that "questions of state capacity and state-building were largely absent from policy discussions in the late 1980s to early 1990s.")

⁸ I use the term "public law" to denote constitutional and administrative law.

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tical necessary given that this emerging power is created and operates in largely informal ways and cannot therefore be regulated by existing public law frameworks, which only target formal exercises of public power.

This paper therefore seeks to explore the role of public law in the privatization process in a context in which the state has been, and continues to be, weakened by the logic of neo-patrimonialism, development assistance and neo-liberalism. The need to rescue the state arises from the simple premise that it is increasingly being seen by its citizens to be incapable of safeguarding their interests and is no longer perceived to be legitimate. I advance the argument that in order to promote public-regarding and just outcomes, privatization processes must be accompanied by strongly institutionalized accountability and participation mechanisms targeted at the exercise of power – whether public or private – that affects vital interests of the citizenry. In order to make this argument, I use examples of privatization experiments in African countries in the areas of policing and the provision of water.

In the final analysis, the paper calls for the reform of public law to accompany and democratize the on-going privatization experiments. In particular, the envisaged law reform would establish strongly institutionalized frameworks for the regulation of the private power being created by privatization processes. In this regard, the paper argues that there is a need to constitutionalize the right to fair or considerate administration, which would facilitate constitutional oversight of the exercise of private power.

Part II of this chapter provides the paper's conceptual framework and examines the role of public law in providing a framework for the practice of democracy and controlling the exercise of power. This part argues that Sub-Saharan African countries should reconceptualize their public law frameworks in order to safeguard the liberties and livelihoods of their citizens in the face of the largely informal exercises of immense private power enabled by privatization processes. It emphasizes the need for these countries to embrace public law values – such as participation and accountability – as mechanisms for the regulation of power.

Part III examines the concept of the “weak state” and discusses the critical factors that have contributed to the weakening of the state in African countries, that is, neo-patrimonialism, development assistance and neo-liberalism. As we shall see, these factors facilitate a culture of informality in the formulation and implementation of privatization processes that are characterized by straddling by internal and external actors between the public and private realms, and in the process bypassing of the instruments of the state and subverting state capacity. This part argues that the conspiracy of private power that is built by these factors can only be broken by embracing public law values as part of a process of deeply entrenching mechanisms for the practice of day-to-day democracy in these countries. Part IV consists of case studies of the limitations of privatization undertaken

in weak-state contexts. The case studies – which are the privatization of policing and water provision – demonstrate the considerable influence of the three factors, and indicate that the privatization process has largely resulted in the transfer of significant public power to private hands in a context in which the state has little or no regulatory capacity. By and large, these privatizations have not embraced public law values with the result that democratic ideals have been compromised to the detriment of citizens, whose livelihoods and liberties have thereby been threatened or affected adversely. Part V concludes.

II. Democracy, law, and the control of power

A. The Value of Democracy

Democracy may be defined as a form of government in which the people rule.⁹ While this definition does not resolve a number of questions,¹⁰ nevertheless the value of democracy lies in its potential to offer legitimate and fair public processes and policies. By requiring public participation and accountability in public decision making processes and policies, democracy enhances the likelihood that public processes and policies will lead to the realization of public-regarding outcomes thereby improving the legitimacy of such processes and policies in the eyes of the public.¹¹

Public participation is a critical element of democratic governance since it is essential for the realization of a just society.¹² It is only by participating in public decision making processes that individuals and groups can ensure that their needs are fully met. Participation thus enhances the viability of public policy initiatives and the

⁹ DAVID HELD, *MODELS OF DEMOCRACY* 1 (1996).

¹⁰ For example, who are to be considered the people? What kind of participation is envisaged for them? Is democracy a form of life in which citizens are engaged in self-government or is it simply a means to legitimate the decisions of elected representatives? What conditions are conducive to participation? What is the appropriate field of democratic activity? Does “rule” cover the economy, for instance? *Id.* at 2.

¹¹ Mark Robinson, *Democracy, Participation, and Public Policy: The Politics of Institutional Design*, in *THE DEMOCRATIC DEVELOPMENTAL STATE: POLITICS AND INSTITUTIONAL DESIGN* 150 at 151 (Mark Robinson and Gordon White, eds., 1998) [Hereinafter *DEMOCRATIC DEVELOPMENTAL STATE*] (Discussing institutional innovations designed to broaden the scope and intensity of political participation by citizens who have historically been denied access to the public policy realm.)

¹² D.J. GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* 128 (Oxford: Clarendon Press, 1996) (Observing that “the very idea of democracy turns on citizens participating in the political process.”)

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prospects for their successful implementation.¹³ And where individuals and groups are intimately involved in public decision making processes, they are likely to find such processes to be legitimate.

On the other hand, accountability is critical because it ensures that those who wield power whose exercise may adversely impact upon the vital interests of citizens are accountable for its exercise. Accountability denotes a relationship between “power-wielders and those holding them to account” in which the latter have the right to hold the former “to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”¹⁴ Accountability mechanisms ensure that power is exercised fairly or justly, thereby ensuring that it does not unduly compromise the liberties and livelihoods of the individuals and groups that make up society.

In many ways, therefore, democracy is about the control of the exercise of power in society. The concern is that bodies – typically public ones – that wield immense power should not abuse it to the detriment of the liberties and livelihoods of the citizenry. The power in question may be defined as “the possibility of imposing one’s will upon the behaviour of other persons.”¹⁵ Thus “a person with power may impose his or her will on others by punishing them or threatening them with punishment if they do not cooperate, offering inducements or rewards for cooperation, ‘conditioning’ or persuading them to cooperate, or refusing to cooperate with those who seek a relationship.”¹⁶ Further, while such power may be derived from the property or personality of the powerholder, organization constitutes perhaps “the most important source of power in modern societies.”¹⁷ Indeed, it is the organizational power of public bodies, and increasingly private bodies exercising public functions, that should be of particular concern to democracy. Such bodies wield immense powers, including the power to coerce and punish, the power to distribute or withhold public benefits, and even the right to use physical force.

In today’s globalizing world, organizational power is increasingly wielded by private bodies as a result of privatization processes, and a question arises as to whether such power should be subjected to democratic control. In particular, since law ought to provide a framework for the practice of democracy, should law control such power? On what basis and to what extent should law control such power? The following section grapples with these questions in the context of liberal

theory. It argues that liberal theory, which has formed the ideology underlying constitutional frameworks in Anglophone African countries, does not provide an adequate theoretical framework for the regulation of power in the contracting state. Accordingly, these countries should reconceptualize their public law frameworks in order to safeguard the liberties and livelihoods of their citizens in the face of the largely informal exercises of immense private power enabled by privatization processes.

B. Law, Liberalism and the Control of Public and Private Power

In the English-speaking world, the role of law in controlling power has considerably been influenced by liberal thinking, according to which law should only be concerned with the abuse of public power. Liberalism establishes a dichotomy between the public sphere and the private sphere. On the one hand, liberalism explicitly recognizes the imbalances in power between public bodies and private individuals, which is then seen to justify the imposition of “higher order duties” of fair and considerate decision making on public bodies. Conversely, liberalism fails to recognize power imbalances in the private domain and largely assumes that individuals are equal and are capable of resolving any instances of abuses of private power among themselves, without the need for governmental intervention.

In today’s world, however, the privatization processes have resulted in the transfer of immense powers to private entities. These entities now considerably influence the liberties and livelihoods of individuals. In the majority of such cases, privatization has resulted in the delegation of what may be termed “public functions”¹⁸ to private entities. And in other cases, while private entities may not necessarily be exercising public functions, they nevertheless wield immense powers that equally impact upon the liberties and livelihoods of individuals. The question is whether law ought to regulate the exercise of private power in both scenarios.

Furthermore, the usefulness of liberalism’s public-private distinction in regulating the exercise of power has been questioned. This is especially the case in the African setting where neo-patrimonialism and development assistance have led to a fusion of the public and the private spheres resulting in very informal exercises of power. These informal exercises of power present a special problem for the control of power in the contracting state.

¹³ Id.

¹⁴ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics* 3 (NYU Institute for International Law and Justice, Working Paper No. 2004/7, 2004)

¹⁵ DAWN OLIVER, *COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE* 34 (London: Butterworths, 1999).

¹⁶ Id at 35.

¹⁷ Id

¹⁸ “Public functions” refer to the core functions that are considered to be the primary responsibility of the State. See Part IIIA, *infra*.

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i. The Limitations of the Liberal Conceptualization and Control of Power

Liberal theory¹⁹ champions “the equal right of each individual to pursue her own conception of the good” since “the ultimate good for men and women is plural and can be realized only by voluntary efforts.”²⁰ For the most part, liberals believe that individuals should be left to their own devices. They therefore make the fundamental assumption that each individual is endowed with the wherewithal to pursue his or her own conception of the good. For liberals, liberty is thus a privilege of those who have resources. In the liberal world, only government has the power to interfere with such individual liberty, and “must strive to remain neutral among competing conceptions of the good.”²¹ Furthermore, government should not regulate to correct power imbalances in the private domain since “no system of government in which property rights and basic liberties are open to revision by temporary political majorities can be regarded as satisfy-

¹⁹ The point of my critique is that liberal theory, in its classical pronouncements, fails to appreciate that private power equally presents a danger to the liberties and livelihoods of individuals. Nevertheless, it should be noted that there are different conceptions of liberal theory: classical liberalism, maximal or modern liberalism, and minimal or neo-liberalism. “Classical liberals” to refer to the original proponents of liberal theory, who sought “to uphold the values of freedom of choice, reason and toleration in the face of tyranny, the absolutist system and religious intolerance.” Liberal theory (or liberalism) challenged clerical power and the church, and the powers of despotic monarchies, with the aim of freeing individuals to pursue their own preferences in religious, economic and political affairs. Classical liberals thought that the constitutional state, private property and the competitive market economy constituted the central mechanisms for coordinating individuals’ interests. “Modern liberals” to refer to pragmatic liberals who question dogmatic adherence to the tenets of classic liberalism in view of existing societal inequalities. Modern liberals are also often referred to as “maximalists.” Finally, “neo-liberals” to refer to contemporary liberals such as Friedrich Hayek who insist on dogmatic adherence to the tenets of classic liberalism. Neo-liberals are also often referred to as “minimalists.” See DAVID HELD, *MODELS OF DEMOCRACY* (1996); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY*; MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* (1972).

²⁰ Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 *YALE LAW JOURNAL* 1537 at 1539 (1983).

²¹ *Id.*

ing liberal requirements.”²² Thus for liberals, it suffices that government is constitutional; it need not be democratic.²³ All is well provided that “governmental power and authority [is] limited by a system of constitutional rules and practices in which individual liberty and the equality of persons under the rule of law are respected.”²⁴

In the English speaking world, law has largely been conceived as an instrument for the preservation of classical liberal values. In particular, the common law and its corollary, the public/private distinction, have been devices for the protection of the liberal order. In the United States, for instance, judges in the early twentieth century were quite hostile to regulatory statutes because they thought that the common law doctrines of property, contract and tort created “a system with enormous integrity and coherence.”²⁵ In their view, statutory protection of workers and consumers constituted “unprincipled interest group transfers.”²⁶ Accordingly, they assessed and interpreted regulatory measures using the principles of private markets and private rights as the baseline.²⁷ Regulatory statutes were to “be construed narrowly – so as to harmonize with, and minimally to disrupt, the principles of common law ordering.”²⁸ The effect was to protect the liberal order while often defeating the objects of regulatory statutes. Cass Sunstein thus remarks that: “Under the guise of statutory interpretation, courts limited the reach of statutes protecting workers, consumers, and other intended beneficiaries of regulation. Silences were filled in, and ambiguities resolved, by reference to common law principles. Often such interpretations grossly distorted the meaning of the relevant statute.”²⁹

From a liberal viewpoint, early twentieth century American judges therefore saw the common law status quo as being “prelegal and neutral” and opposed regulation because it would only disrupt the “natural” ordering of the market.³⁰ The Supreme Court thus extended constitu-

²² JOHN GRAY, *LIBERALISM* 70 (Minneapolis: University of Minnesota Press, 1995) (Observing that “an authoritarian government may therefore do better from a liberal standpoint than a democratic regime, provided that governmental authorities are restricted in their activities by the rule of law.”)

²³ *Id.*

²⁴ *Id.* at 71-72.

²⁵ CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 5 (1990) [Hereinafter *AFTER THE RIGHTS REVOLUTION*].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 6.

³⁰ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *HARVARD LAW REVIEW* 421 at 501 (1987) [Hereinafter *After the New Deal*] (noting that “In the pre-New Deal era, courts sometimes viewed deviations from the common law and the status quo as interference with the natural order, and as imper-

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tional protection to market prices and treated market wages as “an antecedent entitlement for employers.”³¹ For example, the Court reasoned that “minimum wage and maximum hour legislation were an unjustifiable compulsory exaction from the employer.”³² There was no basis for governmental intervention because “the employer had committed no common law wrong in obtaining an agreement on market wages and market hours.”³³ In this common law, *laissez-faire* world, it did not matter that employees may not have had adequate power to effectively bargain with employers.

The public/private distinction reinforced this common law ordering. The idea was to create a clear separation between public law (defined to include constitutional, criminal and regulatory law) and private law (which extended to torts, contracts, property and commercial law).³⁴ The desire was to enforce the liberal principle of neutrality.³⁵ It was thought that the separation would “create a neutral and apolitical system of legal doctrine and legal reasoning free from... the dangerous and unstable redistributive tendencies of democratic politics.”³⁶

Nineteenth century judges and legal thinkers in the United States saw in private law “a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights.”³⁷ Efforts were accordingly made to free the newly emerging business corporation from regulatory public law premises.³⁸ For example, common law doctrines that had previously served to regulate bargains were privatized.³⁹ On the reasoning

that “contract is an entirely private institution in which the state should have no interest,” equitable doctrines such as the rule that equity will not enforce unfair contracts were watered down and the courts permitted parties to contract out of common law duties, which they had held to be inviolable only one generation earlier.⁴⁰ An attempt was also made to eliminate punitive damages in tort law on the basis that since their purpose was to use tort law to regulate conduct, their imposition constituted “a usurpation of the public law functions of the criminal law.”⁴¹

Classical liberal values also determined the conception of law England. For a long time in England, there was a similar preoccupation with traditional common law rights. This was due to “Dicey’s rule of law,” which made these traditional common law rights sacrosanct from interference by the state. As in the United States, the effect was to champion common law interests at the expense of vulnerable groups.

In addition to the principle of parliamentary supremacy, Albert Dicey identified the rule of law as one of the distinguishing characteristics of the English constitution. Dicey’s rule of law encapsulated the “Whig conception of societal ordering, according to which the individual’s private rights, property, personal liberty and freedom of discussion and association ought to be sacrosanct from interference by the state.”⁴² Thus while accepting Parliament’s sovereignty, Dicey thought that the courts ought to protect common law rights.⁴³ Underlying Dicey’s rule of law was the idea that the courts should apply “the ordinary law” of the land.⁴⁴ But that law was preoccupied with traditional, that is common law, rights.⁴⁵

Since Parliament would not enact laws that would infringe upon traditional rights, Dicey thought that the role of the courts was to merely police the boundaries stipulated by Parliament.⁴⁶ That is, the role of the courts was to define the contours of the private sphere by demarcating the area within which governmental bodies could legitimately operate.⁴⁷ He reasoned that Parliament would not enact such laws because “the existence of representative government ensured that the wishes of the people would coincide with those of the sovereign Parliament.”⁴⁸ Further, he reasoned that if Parliament did pass such laws, then the common law would intervene to protect such rights.⁴⁹

missible violations of principles of neutrality and nonpartisanship.”)

³¹ AFTER THE RIGHTS REVOLUTION, *supra* note __ at 20.

³² *Id.*

³³ *Id.*

³⁴ Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 at 1424 (1982).

³⁵ BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 47 (1998).

³⁶ Horwitz, *supra* note __ at 1425.

³⁷ *Id.*

³⁸ Horwitz, *supra* note __ at 1425. See also Robert Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. Pa. L. Rev. 1429 at 1432 (1982) (noting that “During the four decades before 1937 the Supreme Court expressed solicitude for the private property and freedom of contract and erected a now dismantled constitutional bulwark against attempts to regulate the economic sphere.”); NOT FOR SALE: IN DEFENSE OF PUBLIC GOODS xv (Anatole Anton and Milton Fisk, eds., 2000) (noting that “The... liberal economy eliminated guild restrictions on entry to trades, removed obstacles to starting a labor market arising from laws protecting the poor, and freed corporations from responsibility to operate for the common interest.”)

³⁹ Horwitz, *supra* note __ at 1425.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ P.P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 27 (1990) [Hereinafter PUBLIC LAW AND DEMOCRACY].

⁴⁵ *Id.*

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.*

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Accordingly, Dicey's model of the rule of law was deliberately constructed as an ideological obstacle in the way of the growth of the administrative state.⁵⁰ According to Dicey, administrative agencies with power to make and interpret their own law did not fit within the model of the rule of law.⁵¹ Allegiance to the rule of law thus entailed opposing the administrative state.⁵² The result was to "privilege the private values of classical liberalism over the public interests advanced by regulatory legislation" in a manner reminiscent of the approach taken by American courts in the earlier part of the century.⁵³ In efforts to safeguard the autonomy of the private sphere, the idea of securing the discharge of regulatory legislation was not considered important.⁵⁴

Confronted with the expanding administrative state in the post- World War II period, English courts thus interpreted the wide discretionary powers conferred by Parliament on the administrative state "strictly against common law presumptions so as to minimize their impact on preexisting private rights."⁵⁵ Based on the Diceyan view of the constitution as an instrument for protecting individual rights and not as an instrument for empowering government to provide services for the benefit of its citizens, the courts saw their task as being to control any excess of state power.⁵⁶ For instance, they imposed onerous procedural requirements on decision-makers whose decisions affected private rights.⁵⁷ Furthermore, only those who possessed private rights were allowed into the system.⁵⁸

Over time, however, the conceptualization of the role of law in controlling private power in both countries has sought to transcend liberal values. This re-

conceptualization of the role of law is premised on the idea that private power is not always benign and may require regulation if the liberties and livelihoods of individuals are to be safeguarded. This paradigm shift has been enabled by a number of factors including the influence of new ideas, effective leadership in the face of societal hardships and the expansion of the franchise.

First, the re-conceptualization of the role of law in controlling power has been influenced by socialist critiques of liberal theory. Socialists maintain that the liberal conception of liberty is bare, and argue that "individual liberty involves having an opportunity for self-realization, and may even presuppose its achievement."⁵⁹ Hegel and his followers thus conceived the idea of "positive freedom" according to which freedom means having the resources, powers or abilities needed for the achievement of self-realization.⁶⁰ As far as they are concerned liberty involves more than having the bare legal right to act and "signifies, primarily and centrally, having the resources and opportunities to act so as to make the best of one's life."⁶¹ Thus for T.H. Green, a "good society" is one which furthers positive freedom in this sense.⁶²

Again, socialists thought that the institution of private property enhanced the liberty of those who had resources but did nothing for those who were not propertyed.⁶³ Further, they thought that liberal theory did not address the initial allocation of resources and the "moral defence of liberty required rectification of past injustices by a renegotiation of established rights."⁶⁴ In their estimation, therefore, "private property and laissez-faire bred inequality as onerous as that of feudalism."⁶⁵

Second, the re-conceptualization of the role of law has been facilitated by effective leadership in the face of societal hardships. The New Deal, a program conceived by Franklin D. Roosevelt Administration in the early 1930s as a response to the Great Depression, constitutes perhaps the most significant illustration of the need to reconstruct the private sphere from time to time in response to societal perceptions of the fairness of market

⁵⁰ David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, in THE PROVINCE OF ADMINISTRATIVE LAW 279 at 281 (Michael Taggart, ed, 1997).

⁵¹ Dyzenhaus, *supra* note __ at 281; PUBLIC LAW AND DEMOCRACY, *supra* note __ at 27. It has been pointed out, however, that Dicey "failed to perceive certain important political developments which occurred in the late nineteenth and early twentieth centuries." *Id.* at 13. One such development was "the existence of a plethora of administrative institutions." *Id.* at 26. Accordingly, Dicey's claim of parliamentary supremacy was exaggerated.

⁵² Dyzenhaus, *supra* note __ at 281.

⁵³ Murray Hunt, *Constitutionalism and the Contractualisation of Government in the United Kingdom*, in THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note __ 21 at 26.

⁵⁴ PUBLIC LAW AND DEMOCRACY, *supra* note __ at 28.

⁵⁵ Hunt, *supra* note __ at 25.

⁵⁶ Carol Harlow and Richard Rawlings, LAW AND ADMINISTRATION 37, 45 (1997).

⁵⁷ Hunt, *supra* note __ at 25.

⁵⁸ See, e.g., Nakkuda Ali v. Jayaratne [1951] A.C. 66; Pudsey Coal Gas Co. v. Corporation of Bradford (1872) L.R. 15 Eq. 167; Boyce v. Paddington Borough Council [1903] 1 Ch. 109; Gregory v. Camden London Borough Council [1966] 1 W.L.R. 899.

⁵⁹ Gray, *supra* note __ at 56.

⁶⁰ *Id.* Some contemporary liberals have criticized this Hegelian conception of positive rights. Thus Isaiah Berlin maintains that liberty and self-realization are two different things, and that it is far from clear in any given case what self-realization involves. And Hayek opines that "positive freedom [equates] liberty with the power to act – an equation inimical to the liberal ideal of equal freedom because 'power cannot by its nature be distributed equally.'" *Id.*

⁶¹ *Id.* at 56.

⁶² T. H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 372 (1931).

⁶³ *Id.* at 64.

⁶⁴ *Id.* at 83-84.

⁶⁵ KIRK F. KOERNER, LIBERALISM AND ITS CRITICS 9 (1985).

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arrangements.⁶⁶ In particular, the New Deal challenged the premises of both the common law ordering and the public/private distinction. This challenge should also be seen in the context of the emergence of Legal Realism, a movement which likewise constituted a revolt against the formalism of the common law structure in the context of growing economic and social hardships.⁶⁷

The New Deal sought to respond to these perceived injustices of the economic system, and failures of unregulated markets. New Dealers, that is the proponents of the New Deal, thought that while the common law excessively protected established property interests, it did not sufficiently protect the interests of the poor, the elderly, the unemployed, consumers of dangerous foods and drugs, traders on securities markets and victims of unfair trade practices.⁶⁸ They therefore rallied for “substantial changes that would recognize new interests as entitlements and redistribute resources,” culminating in President Franklin Roosevelt’s call for recognition and enforcement of social and economic rights in what he termed a “second Bill of Rights.”⁶⁹

⁶⁶ The New Deal was also a response to the perceived failures of unregulated markets. Because the market system had collapsed during the depression, New Dealers thought that economic recovery dictated greater governmental coordination and planning. Indeed, the New Deal’s economic recovery program was very controversial and was fiercely contested in the courts. See footnote 88 and accompanying text. In many cases, for instance, it facilitated the cartelization of industry. For an exhaustive account of the New Deal, see, e.g., ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* (1963); Steve Fraser and Gary Gerstle, *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* (1989).

⁶⁷ See, e.g., Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 13 at 21 (David Kairys, ed., 1990).

⁶⁸ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 at 437 (1987)[Hereinafter *After the New Deal*] (Observing that the term “New Deal” suggests “a reshuffling of the cards, from which a different distribution of benefits and burdens would result.”)

⁶⁹ F. D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VICTORY AND THE THRESHOLD OF PEACE, 1944-45, at 41 (1950). Roosevelt’s second bill of rights included “the right to a useful and remunerative job in the industries or shops or farms or mines of the nation; the right to earn enough to provide adequate food and clothing and recreation; the right of every farmer to raise and sell his products at a return which will give him and his family a decent living; the right of every family to a decent home; the right to adequate medical care and opportunity to achieve and enjoy good health; the right to adequate protection

Above all, the New Deal illustrates the need for democracy in establishing the contours of the private domain. That is, the societal norms determining the contours of the private domain should “be made through democratic processes, rather than through a private law system in which important social decisions are made by judges and private [read common law] rightsholders.”⁷⁰

The expansion of the franchise has also considerably influenced the re-conceptualization of the role of law. In particular, it has led to popular demands for redistributive and welfare programs.⁷¹ In the United Kingdom, for instance, instead of merely protecting “the more traditional catalogue of property, liberty, freedom of contract and other economic rights which were privileged in the Diceyan version,” the courts have increasingly acknowledged the capacity of the common law to develop and now protect “rights-in-legislation” as well.⁷² A transformation has therefore been taking place and some of its manifestations include the judicial recognition of new administrative law principles such as public interest standing, legitimate expectation and proportionality.⁷³ Indeed, the recognition of public interest standing is regarded by many as “a defining moment in the shift from a private law to a public law paradigm of adjudication.”⁷⁴

The upshot of this discussion is that in democratic societies the contours of the private sphere ought to shift with changes in societal values. For example, it has been appreciated in both the United Kingdom and the United States that the legal system may sustain unfair market arrangements from time to time. In the interests of social justice, economic equality and political liberty, it may thus be necessary to reform the legal system every now and again. Accordingly, the recognition of the legal interests and entitlements of vulnerable groups in these societies has formed the impetus for regulatory initiatives that are arguably at odds with the tenets of classical liberalism.

ii. Law and the Preservation of Liberal Values in English-Speaking African Countries

Unfortunately, law in English-speaking African countries largely remains an instrument for the preservation of liberal values. The explanation for this state of affairs is historical. On the eve of independence from Britain, one of the cardinal issues was the need to secure the interests of the white settlers. In what may be termed a “minority rights settlement,” colonial governments sought

from the economic fears of old age, sickness, accident, and unemployment; the right to a good education.” Id.

⁷⁰ Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARVARD LAW REVIEW 1195 (1982).

⁷¹ David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 279 at 281 (Michael Taggart, ed, 1997).

⁷² Hunt, *supra* note __ at 25.

⁷³ Id at 26.

⁷⁴ Id.

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and obtained the commitment of prospective independence governments in countries such as Kenya and Zimbabwe to secure minority rights through constitutional guarantees.⁷⁵ In particular, the minority settlement sought the sanctification of property rights under the “superintendency of an independent and impartial judiciary.”⁷⁶ Accordingly, the judiciary was primarily to serve as a guardian of minority interests.⁷⁷

It should be noted that the successful implementation of this settlement required judges of a particular persuasion, namely, those “imbued in a tradition of restrained legalism and a commitment to power restraint.”⁷⁸ Accordingly, Kenya’s Independence Constitution provided for the appointment of judges from the United Kingdom and other parts of the Commonwealth.⁷⁹ Indeed, judges of English origin dominated the judiciary in the first two decades after independence.⁸⁰ Many of these judges had been trained and worked in the colonial system, and their socialization and training also predisposed them to guard the minority rights in question.⁸¹ The colonial judiciary was thus ultra conservative and saw its role as being limited to the maintenance of the colonial order. In its estimation, it was not the business of the judiciary to address “the broader social needs of the entire population.”⁸² Furthermore, the inclination to conservatism of the independence judges was influenced by the common law and reinforced by Dicey’s rule of law.

The minority rights settlement was secured by the construction of a constitutional system of presidentialism that enabled the all-powerful president to protect minority interests, which increasingly coincided with those of the new African political elite. Equally, it is presidentialism that facilitated the growth of neo-patrimonialism.⁸³

⁷⁵ See, e.g., G. Kamau Kuria and J.B. Ojwang, *Judges and the Rule of Law in the Framework of Politics: The Kenya Case*, PUBLIC LAW 254 (1979).

⁷⁶ *Id.* at 261.

⁷⁷ *Id.* at 266.

⁷⁸ J.B. OJWANG, *CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE* 156 (Nairobi: ACTS Press, 1990).

⁷⁹ Independence Constitution, *supra* note 182, § 172(3)(i). This provision required a candidate for appointment to the Supreme Court (subsequently renamed the High Court) to have been “a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court.”

⁸⁰ Kuria and Ojwang, *supra* note ___ at 268 (Noting that as at 1979, eighteen of the thirty one superior court judges were of English origin).

⁸¹ *Id.* at 269.

⁸² *Id.* at 260.

⁸³ See B. O. NWABUEZE, *PRESIDENTIALISM IN COMMONWEALTH AFRICA* (New York: St. Martin’s Press, 1974).

African constitutional scholars have questioned the suitability of the law’s concern with preserving liberal values in the African context, which is characterized by marked social and economic disparities. J.B. Ojwang, for instance, observes that “the dominant notions of legal rights and of justiciability, are rather skewed and mainly reflect the experience of the industrialized countries of the West; and all attempts to relate such notions to the Third World have been decidedly oblivious of the conditions of *the growth process of rights*.”⁸⁴ In his view, “Africa has not evolved a line of juristic thought that captures the African vision of rights” and continues to be characterized by “the traditional framework of rights,” which “is dependent upon an elitist judicial process, upon the conservative doctrine of Anglo-American law, and is necessarily restrictive.”⁸⁵

The fixation of existing African public law with the preservation of liberal values is particularly worrisome in the context of privatization, as the logic of neo-patrimonialism has led to the emergence of unaccountable private power, often exercised by multinational corporations. The situation is exacerbated by neo-liberalism and development assistance, which champion the private rights of these corporations but resist national attempts to impose obligations on them. As a result, privatization processes have in many cases exacerbated the dire material conditions of the citizens of SSA countries. The private entities that have assumed the provision of public services, a good number of which are multinationals, are largely excused from public law obligations as a result of which their adverse impacts on the liberties and livelihoods of citizens have been ignored. Accordingly, the law has invariably retained the public/private distinction and refuses to recognize that these private entities exercise immense powers that affect significant interests of citizens.

It is for this reason that these countries must therefore reconceptualize their public law frameworks to facilitate the effective control of the exercise of private power, especially by multinational corporations. In particular, public law must now recognize that despite being private on the outside, this power is public on the inside. Hence public law must seek to regulate the informal processes that facilitate the creation of this power. Administrative law’s promise to create “domestic forums, flows of information, and political processes necessary for an effective and creative citizenship,”⁸⁶ should be seen in this regard. In this context, it is also useful to examine privatization from the perspective of human rights. Indeed, human

⁸⁴ J.B. Ojwang, *Laying a Basis for Rights 2* (Inaugural Lecture, University of Nairobi, July 9, 1992).

⁸⁵ *Id.* at 21, 29 (Emphasis in original) (Arguing for “[a] development-conscious approach to legal theory” that would incorporate the African “material reality.”)

⁸⁶ ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* xi (New York: New York University Press, 2004).

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rights scholars have decried privatization's primary concerns with raising revenue for the state, reducing government interference in the economy and introducing more competition.⁸⁷ In their view, "this economic approach to privatization has not taken into consideration the potential human rights implications that flow from it."⁸⁸ Further, they argue that the state has a two-pronged duty to impose limits and conditions on privatization. In the first place, it is the duty of the state to undertake a "human rights assessment" when it is deciding to privatize a service.⁸⁹ In particular, the process of making this decision should be "accompanied by full transparency and an adequate dissemination of information" so that civil society can meaningfully take part in the process.⁹⁰ Secondly, once the decision to privatize has been made, it is the duty of the state "to impose certain conditions on the private bodies delivering the service."⁹¹

While this human rights paradigm rightly recognizes the need for public participation in the making of privatization decisions, it fails to appreciate the fact that the state may be weak or unwilling to regulate the private bodies entrusted with delivering public services. Nevertheless, the essential point is that private power may also adversely impact upon the liberties and livelihoods of citizens and its exercise ought to comport with societal values. While such values may differ from one society to another, a claim can be made that there are certain values that are shared by democratic societies, especially as far as the control of power is concerned. The recent public law scholarship on the need for privatization to adhere to public law values should be seen in this context.

iii. The Idea of Public Law Values

Essentially, law seeks to protect individuals and groups thereof against the exercise of power, that is, "actions and decisions that might interfere with their vital interests – in their livelihoods, their access to benefits and so on."⁹² It does so by insisting that the exercise of power should be democratic. That is, the exercise of power should be participatory and accountable. And in doing so, law promotes a number of values that Dawn Oliver argues are "widely accepted as self-evidently basic and pervasive in any democratic system."⁹³ These key values – which she argues constitute moral tenets of how life in a democratic society ought to be for individuals and groups thereof – are: autonomy or freedom of action,

dignity, equal respect, status and security.⁹⁴ According to Oliver, autonomy denotes the freedom of individuals to make their own decisions "free from arbitrary or capricious obstacles."⁹⁵ Dignity entails "opportunities to participate in and influence decisions that may affect a person adversely."⁹⁶ Respect is manifested in participatory decision-making and "involves being treated with consideration as a fellow citizen and having one's interests taken seriously and weighed in the balance when a possibly adverse decision is under consideration."⁹⁷ By status she means a sense of belonging to society, that is, "a person's reputation, position and standing in civil society."⁹⁸ Finally, security refers to "the ability to trust and rely upon others with whom one deals."⁹⁹

The expectation is that the wielders of power will take these values into account whenever they exercise their power. Furthermore, these values are more likely to be protected where the exercise of power is democratic – that is, participatory and accountable – than where it is not democratic. As Robert Dahl has noted, while democracy may not be a sufficient condition for achieving these values, which in many ways reflect human beings' fundamental interests, it is nevertheless an essential means to their realization.¹⁰⁰ In a democratic society, the law therefore ought to uphold the dignity, autonomy, respect, status and security of individuals and groups thereof against the abuse of power.

These values also find expression in international human rights instruments. Indeed, they should be considered as part and parcel of the emerging right of citizens to democratic governance.¹⁰¹ Thomas Franck thus argues that there is now "a right to democratic governance" by which he means a "normative expectation of the community of states... that those who seek the validation of their empowerment patently govern with the consent of the governed."¹⁰² In explicating this right, he singles out the right of all citizens to take part in government, which he describes as "rapidly evolving toward that determinacy

⁹⁴ *Id.*

⁹⁵ *Id.* at 268.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 88 (New Haven: Yale University Press, 1989).

¹⁰¹ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 46 (1992); Thomas M. Franck, *The Democratic Entitlement*, 29 *UNIVERSITY OF RICHMOND LAW REVIEW* 1 (1994); *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (Gregory H. Fox and Brad R. Roth, eds., 2000).

¹⁰² Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 46 (1992).

⁸⁷ See, e.g., Felipe Gómez Isa, *Globalisation, Privatisation and Human Rights*, in *PRIVATISATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION* 9 at 14 (Koen De Feyter & Felipe Gómez Isa, eds, Antwerp: Intersentia, 2005).

⁸⁸ *Id.* at 14-15.

⁸⁹ *Id.* at 18.

⁹⁰ *Id.*

⁹¹ *Id.* at 20.

⁹² Oliver, *supra* note __ at 2.

⁹³ *Id.* at 56.

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which is essential to being perceived as legitimate.¹⁰³ It should in particular be noted that the right to take part in government entails not only the right to vote but also to participate in the conduct of public affairs.¹⁰⁴ The idea is to “[create] the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work.”¹⁰⁵

More immediately, however, these values find expression in principles that public lawyers have come to refer to as “public law values.” In other words, adherence to the said values is expressed in certain legal standards that the exercise of power ought to conform to. The so-called public law values can all be subsumed in the phrase “considerate decision-making.” The idea is that a body exercising power is under a duty of considerate decision making, which mandates legality, fairness, rationality, accountability, participation, and fulfilling legitimate expectations.¹⁰⁶

While these duties have been imposed on public or governmental bodies without any controversy in several countries, the idea of imposing them on private bodies exercising public or governmental functions or purely private bodies exercising *de facto* power remains contested.

iv. Controlling the Exercise of Power by Private Bodies

Governments around the world are “contracting” as they privatize and thereby transfer the performance of many of their traditional functions to private entities. The kinds of privatizations involved here include contracting out and public-private partnerships. Public lawyers are concerned that these privatizations are neither participatory nor accountable, and that the delegation of public functions to private entities is producing a “democracy deficit,” since they invariably bypass traditional accountability mechanisms, which are in any case no longer sufficient.

¹⁰⁷ This deficit is exacerbated by globalization processes, which “encourage forms of governance involving new uses of the private sector to achieve public ends.”¹⁰⁸

¹⁰³ *Id.* at 63.

¹⁰⁴ *Id.* (Citing articles 21 and 25 of the Universal Declaration of Human Rights).

¹⁰⁵ *Id.* at 79.

¹⁰⁶ Oliver, *supra* note __ at 81.

¹⁰⁷ Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 *IND. J. GLOBAL LEG. STUD.* 379 at 384 (2001). [Hereinafter *The Limits of Globalization*].

¹⁰⁸ *The Limits of Globalization*, *supra* note __ at 382. The democracy deficit is exacerbated by the fact that the international institutions, such as the World Bank, the International Monetary Fund, and the World Trade Organization, fueling globalization are themselves undemocratic. The mechanisms to ensure the democratic accountability of these institutions are woefully inadequate, and accordingly there is a clamor for

There is an apprehension that in doing so, globalization processes are eroding “the capacity of elected governments to take decisions affecting their own citizens.”¹⁰⁹

In English-speaking countries, which have Westminster-derived governmental arrangements, there is a genuine concern that one of the main instruments of governmental accountability – namely, the responsibility of ministers of state to Parliament – is no longer able “to ensure democratic control of a large, active and increasingly complex executive branch of government.”¹¹⁰ In the traditional Westminster understanding, accountability basically refers to parliamentary control. The idea is that “administrators [through ministers of state] should be continuously responsive to the concerns of members of Parliament, as they are incorporated in legislation or expressed from time to time in connection with particular policies or actions.”¹¹¹

The Westminster conception of accountability is thus incomplete, to the extent that it envisages accountability as merely constituting “responsibility [to Parliament] for the acts of others.”¹¹² In any case, the responsiveness expected from administrators does not require active parliamentary supervision.¹¹³ It is assumed that there is a reasonable likelihood that instances of maladministration will come to the attention of members of parliament.¹¹⁴

Given the complexity of modern government, and the fact that the great bulk of the activities of government are carried out by public and private bureaucracies, the effectiveness of the Westminster conception of accountability is doubtful. As Edward Rubin has argued, “[Parliamentary] control is only partial; administrators make the vast majority of government decisions, including many of the most important ones, on their own. In short, the representatives are only partially responsive to the voters, due to the inherent limitations of the representative process, and their control over the government is only partial, due to the inherent limitations of the administrative process. Any control that the people themselves exercise over governmental operations is thus doubly attenuated by the intervening representatives and admin-

greater democracy in international governance. See, e.g., Stewart, *supra* note 61 at 22-25; Stiglitz, *supra* note 21.

¹⁰⁹ Robin Luckham, *Are There Alternatives to Liberal Democracy?* in *DEMOCRATIC DEVELOPMENTAL STATE*, *supra* note __ 306 at 307.

¹¹⁰ Bruce Stone, *Administrative Accountability in the ‘Westminster’ Democracies: Towards a New Conceptual Framework*, 8 *GOVERNANCE* 505 (1995).

¹¹¹ *Id.* at 511.

¹¹² A.C.L. DAVIES, *ACCOUNTABILITY: A PUBLIC LAW ANALYSIS OF GOVERNMENT BY CONTRACT* 75 (2001).

¹¹³ Stone, *supra* note __ at 511.

¹¹⁴ *Id.*

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istrators and far removed from anything that could plausibly be described as self-government.¹¹⁵

Privatization represents one instance where bureaucrats are likely to make the important decisions. In the absence of effective public controls, it is likely that there will be corruption and the outcomes will not be public regarding. Accordingly, political instruments to ensure the participation of citizens in the design, award and implementation of privatization initiatives are required. And given the deficiencies of the Westminster accountability model, it can be expected that the exercise of power by the private entities favored with the responsibility of performing public functions may not be democratic.

For these reasons, public lawyers have called for a new approach to the control of the exercise of power. The emerging view is that the exercise of power, whether public or private, and which affects vital interests, should accord with the principles of considerate decision-making, such as accountability, participation, fairness and rationality. In this regard, Alfred C. Aman, Jr. argues that public/private partnerships should be viewed as an extension of the state, since "the delegation of public functions to private actors represents new ways for states to carry out their responsibilities."¹¹⁶ From this perspective, markets constitute a form of regulation, and "public law values... remain relevant, even though private actors now carry out various tasks that can be appropriately called governmental." In his view, the challenge for administrative law then is to determine "how best to conceptualize public/private relationships not only to assure fairness for those affected by these decisions, but information that will enable [citizens] to assess how best to determine whether these new arrangements are working and are workable from a democratic viewpoint."¹¹⁷

Mechanisms to control the exercise of power by private entities exercising public functions may be political or judicial. Political mechanisms include mechanisms to facilitate public participation in the privatization process. These include obligations on governmental bodies to hold public hearings in advance of designing and awarding contracts.¹¹⁸ Any interested members of the public may present their views at such hearings and question the government's policy choices. But public participation in the privatization process is unlikely to be effective if the

public does not have access to information.¹¹⁹ Thus it is necessary to require the concerned government agencies to provide basic contractual details such as the expected performance standards and price.

A second strategy involves the use of "consumer councils, and systems for registering consumer views with a view to acting on them either under the contract, or when it comes up for renewal."¹²⁰ Even better, privatization contracts could give the intended beneficiaries third-party rights of action.¹²¹ For example, such third-party rights of action would greatly help a patient who is about to be evicted from the service provider's government funded hospital, allegedly in breach of the terms between the provider and the government.¹²² Third-party rights of action could also reduce the dangers of discretionary governmental powers.¹²³ Furthermore, the contracts themselves could be designed to function as accountability mechanisms.¹²⁴ For example, the contracts could require the private entities to adhere to public law values in the course of their dealings with intended beneficiaries or the general public.¹²⁵

It may be also useful to appoint Ombudsmen to handle complaints against the exercise of private power. Thus in the United Kingdom there is an ombudsman in the fields of insurance, banking, building societies and financial services.¹²⁶

The question of the judicial review of the exercise of power by private entities performing public functions has presented a more complicated problem. Under what circumstances should courts review the decisions of private entities? Essentially, judicial review seeks to control public power to ensure that government does not unduly interfere with the private sphere, which as we have seen is deemed to be inviolable by classical liberals. Should courts adopt the same approach when private entities exercise public power? There is a real danger that where government "chooses to constitute the delivery of a particular service by way of contractual arrangements with private bodies," courts will deem such

¹¹⁵ Edward L. Rubin, *Getting Past Democracy*, 14, University of Pennsylvania Law school, Public Law and Legal Theory Research Paper Series, No. 1-4 (2000).

¹¹⁶ *The Limits of Globalization*, supra note __ at 382.

¹¹⁷ Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable through Administrative Law*, 28 FORDHAM URB. L. J. 1477 at 1498 (2001).

¹¹⁸ See, e.g., Bruce Stone, *Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework*, 8 GOVERNANCE 505 at 519 (1995).

¹¹⁹ Aronson, supra note __ at 60.

¹²⁰ Id.

¹²¹ Freeman, supra note __ at 156.

¹²² Aronson, supra note __ at 65 (Observing that "A simple legislative reform could ensure the patient's access to the courts... to enforce the contract, or to sue for its breach.")

¹²³ Id (Noting that the funding government agency "may not be guaranteed independence from its Minister, and it may be too disposed to waive insistence on the strict letter of the contract.")

¹²⁴ Freeman, supra note __ at 158.

¹²⁵ Id at 202 (Giving the example that "Contracts could... require private [nursing] homes to observe minimal administrative procedures such as notice and hearing requirements, which might help eradicate the most arbitrary decisions and slow the pace of others.")

¹²⁶ Gordon Borrie, *The Regulation of Public and Private Power*, PUBLIC LAW 552 at 564 (1989).

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activity to be “beyond the reach of public law” and as “regulated by the private law of contract only.”¹²⁷

Given that some private bodies now wield “institutional power capable of affecting rights and interests” they ought to be subject to judicial review.¹²⁸ And in determining whether to extend their supervisory jurisdiction to such private bodies, courts should look into factors such as the nature of interests affected by their decisions, how seriously those decisions impact on those interests, whether the affected interests have any real choice but to submit to the bodies’ jurisdiction, and the nature of the context in which the bodies operate.¹²⁹ On the other hand, the mere fact that a private body possesses public power “should not lead inexorably to the conclusion that all principles of a public nature should be equally applicable to such bodies.”¹³⁰ The point is that privatization and government by contract “require a nuanced approach in order to determine which of the public law principles should be held to apply to a body which appears somewhere along the line of the institutional spectrum of public power.”¹³¹

So that although judicial review may not be a particularly effective tool for the regulation of private power,¹³² it nevertheless remains a significant tool for the vindication of public law values in the contracting state. That is, the exercise of power, whether public or private, and which affects vital interests, should accord with the principles of good administration.¹³³ In this regard, Dawn Oliver has argued that there is now in England a “broad common law duty of considerate decision-making, the exact content of which will depend upon the circumstances, but which spans the public/private divide.”¹³⁴ The corollary of that duty is “a right of those affected by decisions taken by powerful bodies to have the effects of a decision upon them considered and taken into account fairly and rationally before the decision is made.”¹³⁵ In Dawn Oliver’s

view, “duties of fairness and rationality in decision-making” are common to both public and private law, and their existence should not “depend upon the question whether the body in question is public or private or performing public or governmental functions.”¹³⁶ This view is supported by Sir Stephen Sedley, who asserts that “the law’s chief concern about the use of power is not who is exercising it but what the power is and whom it affects.” Accordingly, what is required in light of the contracting state is an adaptation of the tools for the achievement of public law values.¹³⁷

This is likely to be a difficult task, especially in a context in which the state is itself weak.¹³⁸ In such a context, a particular challenge for public law is to expand the “governance space” by establishing institutional frameworks for the participation of citizens in public decision making. By doing so, public law may enable citizens to break the conspiracy of power that is facilitated by the secretive nature of the symbiotic interaction of neo-patrimonialism, development assistance and neo-liberalism.

III. The Weak State and the Exercise of Power

The potential for the abuse of the private power created by privatization is particularly high in situations where the state is weak. This is especially true of SSA countries where the state has been, and continues to be weakened by three key factors, namely neo-patrimonialism, development assistance, and neo-liberalism. This part examines the concept of the weak State, and explains how the three factors above have weakened the institutional capacity of states in Sub-Saharan Africa. It argues that the combined effect of these factors has been an undesirable rise in informal and unregulated exercises of private power. As we shall see in Part IV, this power is increasingly compromising the liberties and livelihoods of the citizens of these States. Hence the need for SSA countries to embrace public law values, if they are to safeguard the vital interests of their citizens. But first it is necessary to understand the idea of the weak State.

A. The Idea of the Weak State

A weak state may be defined as one which lacks the institutional capacity to perform certain core functions that are considered to be the primary responsibility of the State.¹³⁹ These core functions of the State are the

¹²⁷ Hunt, *supra* note ___ at 34.

¹²⁸ *Id.* at 32-33.

¹²⁹ *Id.* at 32.

¹³⁰ Craig, *supra* note ___ at 211.

¹³¹ *Id.*

¹³² *Id.* (Noting that (1) judicial review rarely provides systemic relief; (2) judicial proceedings “pose no real threat to the respondent, which is usually free, on its redetermination of the substantive issue, to come to the same result but in a way which is impervious to judicial criticism”; and (3) “review in the wake of privatization and outsourcing carries the additional problem that the complainant is typically conceived as a consumer with a consumer complaint, which is not the business of judicial review.”)

¹³³ Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review?*, in *JUDICIAL REVIEW AND THE CONSTITUTION* 3 at 25-26 (Christopher Forsyth, ed, 2000).

¹³⁴ Dawn Oliver, *Common Values in Public and Private Law and the Public/Private Divide*, *PUBLIC LAW* 630 at 638 (1997).

¹³⁵ *Id.*

¹³⁶ Oliver, *COMMON VALUES*, *supra* note ___ at 88.

¹³⁷ Borrie, *supra* note ___ at 564 (observing that “As power shifts from the public sector to the private sector [it is] desirable that instruments of control and accountability forged to ensure that the public sector behaves itself are considered for appropriate adaptation to the private sector.”)

¹³⁸ Freeman, *supra* note ___ at 207-208.

¹³⁹ Christopher Clapham, *The Challenge to the State in a Globalized World*, 33 *DEVELOPMENT AND CHANGE* 775 at 776 (2002).

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provision of security (that is, domestic law and order and protection against external threats), welfare (that is, meeting the basic needs of its citizens by investing in health, education and other social services), and representation (that is, acting on behalf of its citizens in international forums).¹⁴⁰ This conceptualization of the functions of the State is informed by "a Weberian/Hobbesian understanding of what a modern state is supposed to look like."¹⁴¹ From this perspective, a state is stronger or weaker "according to how [it] closely approximates the ideal type of centralized and fully rationalized Weberian bureaucracy."¹⁴²

Further, it should be noted that state weakness is not just a question of capacity; it is often a question of will as well.¹⁴³ This is especially the case in Sub-Saharan African where regime survival often dictates that the institutions of the State should remain ineffective. It is not "in the interest of African political elites to work for the proper institutionalization of the State apparatus" since the state is most useful "when it is least institutionalized."¹⁴⁴

In addition, weak states are often illegitimate since they are unable to justify their existence in the eyes of the citizenry. In other words, citizens grant the State the right to rule over them on condition that the state performs the above functions.¹⁴⁵ But where the State does not do so, citizens are likely to see the State as being illegitimate since it is not protecting their vital interests.¹⁴⁶

B. Why are African States Weak?

A question arises as to why African states, in particular, are weak. Three key symbiotic factors explain why African states are weak, namely neo-patrimonialism, development assistance, and neo-liberalism.

Neo-patrimonialism refers to "the construction of reciprocal relationships of an essentially personal kind between leaders and their followers, within the formal hierarchy of the state."¹⁴⁷ Neo-patrimonialism thrives best in presidential systems of government, which enable the president to "treat all matters of state as his personal affair... and [thus] subject to his arbitrary power."¹⁴⁸ Neo-patrimonialism works in the following manner. The powerful president and *his* cronies deploy their power to gain and maintain the political support of individuals that they consider to be instrumental to regime survival.¹⁴⁹ That is, they induce such individuals to support their regimes by offering them personal benefits which are extracted from state resources.¹⁵⁰ Under a neo-patrimonial system, "politics [becomes] a patronage operation, governed by the need for control on the part of the ruler, and the need for access to state benefits on the part of the subordinates and those whom they may be claiming or seeking to represent."¹⁵¹

Neo-patrimonialism leads to state weakness principally because it abhors the establishment of effective state institutions, as these would greatly undermine the dispensation of patronage. Informalism is the rule of the game. Thus while the state appears to possess "all the trappings of a Weberian rational-legal system with a clear distinction between the public and the private... this official order is constantly subverted by a patrimonial logic, in which officeholders almost systematically appropriate public resources for their own uses."¹⁵² In reality therefore, the public sector in a neo-patrimonial system is appropriated by private interests and as a result there is widespread "straddling between positions and practices of power and economic accumulation."¹⁵³ Since the neo-patrimonial system can only work where the state apparatus is not properly institutionalized, it is in the interests of ruling elites to perpetuate the weakness of the state apparatus.¹⁵⁴ Indeed, the ruling elites are often apprehensive that the institutionalization of the state apparatus may lead to elements of the state bureaucracy develop-

¹⁴⁰ Louise Andersen, *International Engagement in Failed States: Choices and Trade-offs*, Danish Institute for International Studies (DIIS), Working Paper No. 2005/20 at 10 (2005) [Hereinafter *International Engagement in Failed States*]; Jennifer Milliken and Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 DEVELOPMENT AND CHANGE 753 at 756 (2002).

¹⁴¹ Louise Andersen, *Security Sector Reform in Fragile States*, DIIS Working Paper No. 2006/15 at 4 (2006) [Hereinafter *Security Sector Reform*].

¹⁴² Ivo Bicanic, et al, *State, Public Goods and Reform*, Global Development Network, at 16 (2003) <www.gdnet.org>.

¹⁴³ Stewart Patrick, *Weak States and Global Threats: Assessing Evidence of "Spillovers"*, Center for Global Development, Working Paper No. 73 at 7 (2006).

¹⁴⁴ Patrick Chabal & Jean-Pascal Daloz, *AFRICA WORKS: DISORDER AS POLITICAL INSTRUMENT 14* (Oxford: James Currey, 1999)

¹⁴⁵ Milliken and Krause, supra note __ at 758.

¹⁴⁶ Andersen, *Security Sector Reform*, supra note __ at 5.

¹⁴⁷ Clapham, supra note __ at 780.

¹⁴⁸ Andersen, *International Engagement in Failed States*, supra note __ at 5.

¹⁴⁹ Clapham, supra note __ at 781.

¹⁵⁰ Id.

¹⁵¹ Andersen, *International Engagement in Failed States*, supra note __ at 5.

¹⁵² NICOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979-1999* at 51-52 (Cambridge University Press, 2001).

¹⁵³ Chabal & Jean-Daloz, supra note __ at 9; Beatrice Hibou, *From Privatising the Economy to Privatising the State: An Analysis of the Continual Formation of the State*, in *PRIVATISING THE STATE 1* at 16 (Beatrice Hibou, ed., New York: Columbia University Press, 2004)(Translated from the French by Jonathan Derrick).

¹⁵⁴ Chabal and Daloz, supra note __ at 14.

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ing their own independent agendas, thereby threatening regime survival.¹⁵⁵

For its part, development assistance has led to the weakness of African states by reinforcing the neo-patrimonial tendencies of African governments and undermining institution building.¹⁵⁶ In the first place, the preference of international development agencies such as the World Bank and the IMF for undemocratic technocratic decision-making in the formulation and implementation of neo-liberal policies such as privatization and market liberalization played into the hands of African governments, which were keen to maintain the flow of patronage resources. Market liberalization and privatization threatened these governments' patronage networks, and this explains why they only agreed to reform to the extent that they could either protect existing patronage networks or construct new ones.¹⁵⁷ In this endeavour, these governments were greatly assisted by the lack of democracy in the reform process, which allowed them to manipulate it to serve their parochial interests. By helping African governments perpetuate neo-patrimonial practices, development assistance thus perpetuates state weakness.

Secondly, development assistance has undermined the development of institutional capacity in African states. As aid conditionalities increasingly failed to realize their objectives, international development agencies sought to be more intimately involved in governmental decision-making.¹⁵⁸ In many cases, these agencies have established ad hoc parallel institutions to carry out the desired reforms such as privatization and are thus involved in day-to-day decision making.¹⁵⁹ Their excuse for creating such parallel institutions is that the procedures and systems of African governments are inefficient and corrupt.¹⁶⁰ As a result, development assistance has greatly undermined the development of state institutional capacity in African countries, thereby perpetuating state weakness.

In addition, the parallel institutions created by development agencies bypass national accountability mechanisms.¹⁶¹ Thus while donors make sure to establish mechanisms so that such parallel institutions can be accountable to them, no efforts are made to ensure their

accountability to the citizens of the affected countries. What results is an external mode of governance, in which African states are "steadily converted into hollow facades, behind which international agencies and actors are running the economy, mostly in collusion with the local elite-turned-entrepreneurs."¹⁶²

Development assistance has therefore had the paradoxical impact of sustaining weak governments in power while simultaneously emasculating their institutions.¹⁶³

Finally, neo-liberalism has weakened African states by reducing their strength and generating a demand for new types of state capabilities that were either weak or non-existent.¹⁶⁴ As Fukuyama has observed, the austerity required by the stabilization and structural adjustment policies dictated by neo-liberalism led to the cutting of state capacity.¹⁶⁵ Thus government investment in things such as public health and education declined dramatically.¹⁶⁶ In addition, privatization has led to the creation of markets characterized by numerous failures and which therefore require governmental regulation; but the regulatory capacity of many African states is virtually non-existent. Accordingly, perceptions of governmental illegitimacy have grown among the citizenry, as governments are increasingly seen as being incapable of providing essential services, while the markets created as a result of privatization extract monopoly rents from society and compromise the liberties and livelihoods of citizens.

These three factors have operated in tandem. Development assistance has been the handmaiden for the implementation of neo-liberal policies, which African governments have manipulated quite successfully in efforts to preserve the flow of patronage resources. Their combined effect has been to greatly undermine the institutional capacities of African states. As a result, these states are today incapable of controlling the exercise of the private power that is being created by the privatization process. The privatizations of policing and water provision illustrate the contribution of the said factors in the creation of unregulated private power. Furthermore, these privatizations have benefited African political elites, multinational companies and donor countries at the expense of the impoverished and insecure citizens of SSA countries.

IV. The Limitation of Privatisation in Weak States

¹⁵⁵ William Reno, *The Privatisation of Sovereignty and the Survival of Weak States*, in *PRIVATISING THE STATE*, supra note __ 95 at 98.

¹⁵⁶ van de Walle, supra note __ at 59.

¹⁵⁷ MERILEE S. GRINDLE, *CHALLENGING THE STATE: CRISIS AND INNOVATION IN LATIN AMERICA AND AFRICA* 47 (1996).

¹⁵⁸ Van de Walle at 204.

¹⁵⁹ Id at 61.

¹⁶⁰ J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid* 3-4 (NYU School of Law, Institute for International Law and Justice, Working Paper 2006/3, 2006).

¹⁶¹ Id at 30.

¹⁶² Peter Lock, *Africa, Military Downsizing and the Growth in the Security Industry*, in *PEACE, PROFIT OR PLUNDER? THE PRIVATISATION OF SECURITY IN WAR-TORN AFRICAN SOCIETIES* 11 at 19 (Jakkie Cilliers & Peggy Mason, eds. *Peace, Profit and Plunder?: The Privatisation in Security in War-torn African Societies*, 1999) [Hereinafter *PEACE, PROFIT OR PLUNDER*]

¹⁶³ van de Walle at 230.

¹⁶⁴ Fukuyama, supra note __ at 20.

¹⁶⁵ Id.

¹⁶⁶ Id at 22.

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A. The Privatization of Security

Whereas the privatization of security was not on neo-liberalism's original to-do list, it has gained prominence in recent times.¹⁶⁷ Among the developed countries, the impetus to privatize security in developing countries has been provided by the prevalence of weak or fragile states.¹⁶⁸ The emerging wisdom is that "security and development are inextricably linked."¹⁶⁹ In particular, they are concerned that insecurity in developing countries "hinders economic growth and imposes substantial human, political and economic costs on societies."¹⁷⁰ And in a globalizing world, they are apprehensive that they will bear the brunt of the instability and conflict in developing countries.¹⁷¹ Accordingly, developed countries have sought to "achieve security at home" by assisting developing countries to reform their security sector, which is defined broadly to include all state and non-state security institutions or providers, and justice and law enforcement institutions.¹⁷² Privatization is seen as one key means of reforming the security sector in developing countries.

It should be noted, however, that the primary motivations for privatization in the security sector in African countries have been internal. First, failure of the State to protect the citizenry in the wake of rising crime has created a vacuum that non-state actors quickly moved in to fill.¹⁷³ In most African countries, the public police simply lack the resources to provide the citizenry with adequate security. This lack of resources has been attributed to various factors. For instance, it is argued that the public police concentrate on their primary task of regime maintenance at the expense of the security needs of citizens.¹⁷⁴ In addition, the logic of regime maintenance dictates that the public police should be deprived of

resources, since they could threaten the political order of the day if they had the resources to do their job well.¹⁷⁵

The second motivation has been the need to provide effective security for multinational corporations involved in activities such as mining and development agencies especially in war torn countries.¹⁷⁶ Indeed, in some countries the Government has made it compulsory for foreign investors to provide their own security.¹⁷⁷ In the main, these investors have turned to private security companies, many of which are part of global companies such as *Group4Falk* and *ArmorGroup*.¹⁷⁸ There are also private military companies such as Sandline, Military Professional Resources, Incorporated (MPRI) and Executive Outcomes, which have been instrumental in restoring order in countries undergoing civil war, such as Sierra Leone.

An interesting characteristic of this mode of privatization is the "network of personal and financial connections between the heads of state/government members, multinational corporations and private security companies."¹⁷⁹ According to *Africa Confidential*, for example, a former head of Executive Outcomes established a joint-venture security consultancy company with the son of Kenya's president in 1995.¹⁸⁰ And in Uganda, Executive Outcomes established a subsidiary known as Saracen Uganda with the president's brother.¹⁸¹ These examples lead Jakkie Cilliers to conclude that "political power, nepotism, economic interests and security profits coincide in a common thread that seems to pervade much of Africa."¹⁸² In addition, these networks are informal and are "often removed from public or governmental scrutiny."¹⁸³

Irrespective of whether its motivation is internal or external, the privatization of security is problematic in a number of respects. First, the primary aim of the security policies influenced by donors is to safeguard the interests

¹⁶⁷ See, e.g., Locke, supra note ___ at 25 (Observing that "The growth of the private security industry (PSI) gathered speed in the early 1980s and has accompanied the triumphant march of neo-liberalism.")

¹⁶⁸ Andersen, *Security Sector Reform*, supra note ___ at 3.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id at 1(Observing that "Concerns over issues as diverse as terrorism, organized crime, mass violation of human rights, poverty, violent conflicts and migration are increasingly framed in a discourse of state weakness, state fragility or state failure – and weak, failed and fragile states are perceived by USA, the EU member states, and the international organizations they finance, as major threats to both human and international security.")

¹⁷² Id at 7.

¹⁷³ Andrew Goldsmith, *Policing Weak States: Citizen Safety and State Responsibility*, 13 *POLICING AND SOCIETY* 3 at 4 (2003).

¹⁷⁴ Id at 8.

¹⁷⁵ ALICE HILLS, *POLICING AFRICA: INTERNAL SECURITY AND THE LIMITS OF LIBERALIZATION* 41 (Boulder: Lynne Rienner Publishers, 2000).

¹⁷⁶ Cilliers, *Private Security in War-torn African States, in PEACE, PROFIT OR PLUNDER*, supra note ___ 1at 6 (Observing that the reality of weak African states creates an environment within which foreign companies must provide not only their own infrastructure... but also private security forces capable of protecting their property and employees.")

¹⁷⁷ Benoit Dupont, et al, *The Governance of Security in Weak and Failing States*, 3 *CRIMINAL JUSTICE* 331 at 340 (2003)

¹⁷⁸ Bruce Baker, *Protection from Crime: What is on Offer for Africans?* 25 (Journal of Contemporary African Studies, Volume 22, Number 2, May 2004, pp. 165-188)

¹⁷⁹ Cilliers, supra note ___ at 3.

¹⁸⁰ *Militias and Market Forces*, *AFRICA CONFIDENTIAL*, 38(21), 23 October 1998, cited in Cilliers, supra note ___ at 3.

¹⁸¹ Cilliers, supra note ___ at 4.

¹⁸² Id.

¹⁸³ Id at 7.

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of international capital. While in theory the donors talk of the need to ensure national ownership of security policies, in practice they tend to "impose their own solutions and structures rather than supporting 'home-grown processes.'"¹⁸⁴ As a result the security needs of ordinary citizens take a back seat, as their concerns "are very rarely included in the formulation of security policies."¹⁸⁵

Secondly, in many cases the modes of private security are not only inappropriate but also unaccountable as a result of which the security of citizens is hugely compromised. The services of private security providers tend to be inappropriate since most of them "mobilize paramilitary modes of action and expertise, more suited to states of war and counterinsurgency than to conflict resolution and peacemaking."¹⁸⁶ And even where they are able to establish peace in war-torn countries, such peace tends to be transient since the affected communities are never involved in the provision of security.¹⁸⁷

Thirdly, private security exacerbates inequality and undermines the legitimacy of the state.¹⁸⁸ Since the supply of private security is driven by the quest for profits, it has largely ignored the security needs of the poor, who do not even have access to public policing given the limited resources at the disposal of SSA governments. And because the security needs of the poor are largely unmet, they wonder whether they should politically engage "with a state that fails to offer such a basic service as personal security."¹⁸⁹

The lack of accountability of private security providers raises perhaps the greatest concern, especially in view of the informal networks of political power, nepotism and economic interests in which they thrive. There is thus a need to regulate private security providers as they pose a threat to the liberties of citizens that is not any less than that posed by the public police. In the latter case, however, there exist – even if only in theory – constitutional safeguards and public accountability mechanisms to protect the liberties of citizens. Indeed, it is arguable that the provision of security, which includes maintaining social order and controlling crime, is a "paradigmatic governmental function" irrespective of whether the entity providing it is a public or a private entity.¹⁹⁰ Private security providers should thus be subject to constitutional safeguards not only because they are performing a public function, but also because their actions may adversely impact upon vital interests of the citizenry,

namely their civil liberties and access to a much-needed service.¹⁹¹

Despite these concerns, however, most Sub-Saharan African states are yet to establish legislative and institutional frameworks for the regulation of the private security industry.

B. The Privatization of Water

The impact of neo-liberalism has been far more pronounced in the privatization of public utilities. From the very beginning, structural adjustment programs, which constituted the mechanism for the implementation of neo-liberal policies in SSA countries, were premised on the belief that the poor performance of public enterprises was a significant factor behind the stagnation and decline of African economies.¹⁹² In the water sector, public enterprises have for instance been blamed for the high leakage levels, aging infrastructure, weak billing and revenue collection mechanisms, and uneconomic tariff structures.¹⁹³ To enhance their development, the World Bank and the International Monetary Fund now required African countries to increase the role of the market, a process that in particular mandated reducing the size of the public sector including privatizing public enterprises, and removing government regulations and controls.¹⁹⁴ But water privatization has presented a unique problem, given the monopoly characteristics of water provision and water's status as a merit good and a basic right of all human beings. Indeed, it is these same reasons that justified public ownership of water utilities. The argument was that the private sector cannot provide such public goods "because, once they are produced, they benefit the public at large and cannot be sold or used up by individuals."¹⁹⁵ Nevertheless, neo-liberal ideas have since the 1990s had a profound influence on international development policy debates in the water sector. In particular, "managing water as an economic good is [now perceived as] an important way of achieving efficient and

¹⁸⁴ Andersen, *Security Sector Reform*, supra note ___ at 13.

¹⁸⁵ Id.

¹⁸⁶ Dupont, et al, supra note ___ at 340.

¹⁸⁷ Id.

¹⁸⁸ Baker, supra note ___ at 32.

¹⁸⁹ Id.

¹⁹⁰ David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 at 1168 (1999).

¹⁹¹ See, e.g., J.M. Migai Akech, *Public Law Values and the Politics of Criminal (In)Justice: Creating a Democratic Framework for Policing in Kenya*, 5 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 225 at 247-250 (2005).

¹⁹² See, e.g., World Bank, *ADJUSTMENT IN AFRICA: REFORMS, RESULTS AND THE ROAD AHEAD* (1994)

¹⁹³ Kate Bayliss, *Utility Privatisation in Sub-Saharan Africa: A Case Study of Water*, 41 JOURNAL OF MODERN AFRICAN STUDIES 507 at 509 (2003).

¹⁹⁴ E.A. Brett, *States, Markets and Private Power: Problems and Possibilities*, in *PRIVATIZATION IN LESS DEVELOPED COUNTRIES* 47 at 49 (Paul Cook & Colin Kirkpatrick, eds, New York: St. Martin's Press, 1988).

¹⁹⁵ Jessica Budds & Gordon Mcgranahan, *Privatization and the Provision of Urban Water and Sanitation in Africa, Asia and Latin America* 10 (International Institute for Environment and Development, Human Settlements Discussion Paper No. 1, 2003).

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equitable use, and of encouraging conservation and protection of water resources.¹⁹⁶

Given the nature of water privatization in Sub-Saharan African countries, however, it is doubtful whether the promise of private provision has been, or will ever be, realized. As with other privatizations, development assistance has been instrumental in getting SSA countries to privatize water and sanitation services. This is because development assistance funding invariably carries conditions that mandate water privatization.¹⁹⁷ In other words the disbursement of development assistance funds is made conditional on SSA countries undertaking water privatization. As critics have pointed out, however, such "extreme financial pressures are not conducive to well-conceived and consultative privatization processes."¹⁹⁸ In addition, critics maintain that "Applying pressure by withholding development finance is a means of pursuing the interests of donor countries' own private sectors rather than those of the recipients."¹⁹⁹

It is therefore not surprising that the water and sanitation market in SSA is dominated by multinational companies, such as Suez, Veolia, Thames Water and Saur.²⁰⁰ These multinational companies "seek and receive support from international financial institutions (IFIs), aid agencies, and the EU, for creating, securing and developing market opportunities."²⁰¹ In addition to creating market opportunities for the water multinationals by making privatization a conditionality for development assistance, the donor countries and IFIs assist these companies to negotiate for favourable market conditions.²⁰² These include getting the governments of SSA countries to guarantee profits for the multinationals.²⁰³

The problem with privatization under these circumstances is that the indebted governments of SSA countries are often not only in a great hurry since they need development funding urgently but also ill-prepared as they "typically have far less experience in negotiating contracts and addressing regulatory issues than the

companies they must negotiate with."²⁰⁴ Accordingly, water privatization has been characterized by a gross imbalance of power, which "effectively overrides local political processes," thereby "undermining democracy and the capacity of local polities to resolve their own water and sanitation issues."²⁰⁵ Furthermore, water privatization may be providing the basis for new forms of corruption.²⁰⁶ These realities should be a cause for great concern considering that water and sanitation services approximate natural monopolies, and the benefits of privatization cannot therefore be realized if the resulting markets are neither constructed properly nor regulated effectively.

What, then, are some of the effects of water privatization under these circumstances? First, most water privatization contracts in SSA countries are "management and lease contracts, which are short term, and do not involve investment responsibility."²⁰⁷ This is because multinational companies are reluctant to take up privatization options such as concessions, which would impose more responsibilities upon them such as capital investment, due to their perception that investing heavily in SSA

²⁰⁴ Budds & Mcgranahan, *supra* note __ at 31.

²⁰⁵ Budds & Mcgranahan, *supra* note __ at 31; Yaron, *supra* note __ at 55 (Noting that "One of the less obvious aspects of the privatization of water services by large transnational corporations is the displacement of control from local decision-makers to foreign institutions.")

²⁰⁶ Budds & Mcgranahan, *supra* note __ 47; Emanuele Lobina & David Hall, *Problems with Water Concessions: A Review of Experience* 19. <Available at www.psir.org> (Observing that "Allegations of corruption have been made in many... cases of water privatization" and that "For a private water company, the incentive to engage in corruption of public officials is not only to bypass competition... but also to seek more favourable contract terms and laxer regulation or monitoring.")

²⁰⁷ Budds & Mcgranahan, *supra* note __ at 39. A new mode of privatization, which is termed "commercialization" has also been initiated in some SSA countries. Here, while water operations remain in public hands, they are to be handled by a body that is functionally separated from the public sector in some respects. This option is currently being pursued in countries such as Kenya and Nigeria. This option is confronted by the same problems as the other options. Indeed, there is some suspicion that this option is only pursued in countries where there has been a marked resistance to water privatization in the hope of eventually overcoming such resistance and adopting the conventional modes of privatization. See Virginia Roaf, *After Privatization: What Next? An Assessment of Recent World Bank Strategies for Urban Water and Sanitation Services* (Heinrich Böll Stiftung, Global Issue Papers, No.28, 2006); Joseph Onjala, *Good Intentions, Structural Pitfalls: Early Lessons from Urban Water Commercialisation Attempts in Kenya* (Copenhagen Centre for Development Research, Working Paper No. 02.2, 2002).

¹⁹⁶ World Meteorological Organization, *International Conference on Water and the Environment: Development Issues for the 21st Century: The Dublin Statement and Report of the Conference* (Geneva: World Meteorological Organization, 1992).

¹⁹⁷ Budds & Mcgranahan, *supra* note __ at 16.

¹⁹⁸ *Id.* at 22.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 38.

²⁰¹ David Hall, *Corporate Actors: A Global Review of Multinational Corporations in the Water and Electricity Sectors*, PUBLIC SERVICES YEARBOOK 179 at 183 (2005/6); Gil Yaron, *The Final Frontier: A Working Paper on the Big 10 Global Water Corporations and the Privatization and Corporatization of the World's Last Public Resource* 69 (Polaris Institute and the Council of Canadians, 2000).

²⁰² Hall, *supra* note __ at 183.

²⁰³ *Id.*

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countries is “too risky.”²⁰⁸ This also explains why the contracts are drawn up in US dollars to protect the multinationals from the devaluation of local currencies.²⁰⁹ As a result, water privatization has not only led to increased tariffs thus making water even more unaffordable for the majority of citizens, but also failed to rehabilitate the aging infrastructure.

Secondly, SSA countries have been forced to privatize even where there is no sufficient interest from the private sector to ensure competitive bidding. In Dar es Salaam, for instance, only one tender was acceptable, the others having been withdrawn or considered inappropriate.²¹⁰ The promise of privatization can hardly be realized in such cases, especially given that it is not uncommon for the successful private operators to have underbid the competition or renegotiate the terms of the contract to favour them once they have won the tender.²¹¹ Ideally, the governments of SSA countries should not privatize in such circumstances, but their hands are forced by donor pressure.²¹²

Thirdly, there has been little or no meaningful public participation in the privatization process despite much emphasis on participation in the policy statements of donor agencies.²¹³ The little consultation that does take place only seeks to inform the public about decisions that have already been made.²¹⁴ The privatization documents, including the contracts, are regarded as confidential upon the insistence of the private operators.²¹⁵ Even the elected representatives of the people are denied access to these documents.²¹⁶ The net effect is that there is no accountability since the supposed beneficiaries of water privatization are not allowed to seek redress, for instance, for sub-standard work.²¹⁷ Further, the environment of secrecy that characterizes such privatization encourages corruption since “the situation is thrown wide open to opportunistic behaviour from the private sector.”²¹⁸ It can therefore be expected that African political elites, multinational corporations and donor countries will be the main beneficiaries of water privatization initiatives.

Fourthly, water privatization has compromised the goal of sustainable resource management. The corporatization of water, which requires the private operators to increase

water consumption in order to increase profits, tends to undermine water conservation efforts.²¹⁹

In addition, water privatization contracts have not been enforced in several cases due to weak regulatory capacity. For example, water became unaffordable for many in Guinea because of weak regulatory capacity.²²⁰ The regulator had not been able to detect that the private operator had been applying wrong pricing formulae which resulted in overvalued tariffs. And in Gabon, critical contractual mechanisms for effective regulation had not been established some five years after the commencement of the contract.²²¹ It should also be noted that the power imbalance between water corporations and SSA governments have made the latter either “unable or highly reluctant to challenge the actions of water corporations.”²²²

Water privatization in SSA has therefore occurred in the absence of effective regulatory frameworks and without much concern for equity considerations. In the absence of effective regulation, the assumption that the imposition of market forces on a necessity such as water would improve access to water for all citizens now looks ludicrously simplistic.²²³ Yet effective regulation is resisted by neo-liberal forces, development assistance and neo-patrimonialism, despite much rhetoric to the contrary.

V. Conclusion

Because of the convergence of parochial interests created by neo-patrimonialism and development assistance in the implementation of neo-liberal policies, privatization processes in SSA countries are leading to the emergence and consolidation of unregulated private power. Much of this power is created and operates in largely informal ways, outside the purview of public law, which in any case is inadequate as it is primarily concerned with regulating formal exercises of public power. In addition, this informality is facilitated by the weakness of the State, which is cultivated by internal and external political and economic actors, who straddle the public-private divide. Thus while neo-patrimonialism serves to keep the State weak, development assistance not only sustains this weak State but also eviscerates its institutions.

What results is a conspiracy of power, whose exercise is adversely affecting the livelihoods of the citizens of SSA countries and also threatening their liberties.

Public law reform promises to break this conspiracy. But in order for this promise to be realized, SSA countries need to constitutionalize the right to fair administration.

²⁰⁸ Id at 40.

²⁰⁹ Id.

²¹⁰ Actionaid, *Turning off the Taps: Donor Conditionality and Water Privatisation in Dar es Salaam, Tanzania* 6 (2004).

²¹¹ Budds & Mcgranahan, *supra* note ___ at 23.

²¹² See Actionaid, *supra* note ___

²¹³ Actionaid, *supra* note ___ at 9; Gideon Burrows, *New Rules, New Roles: Does PSP Benefit the Poor? Summaries of the Case Studies* 5 (WaterAid & Teafund, 2003).

²¹⁴ Actionaid, *supra* note ___ at 9.

²¹⁵ Lobina & Hall, *supra* note ___ at 18.

²¹⁶ Id.

²¹⁷ Burrows, *supra* note ___ at 6.

²¹⁸ Id.

²¹⁹ Yaron, *supra* note ___ at 10, 59 (Noting that “while many water corporations are actively engaged in the purification, diversion, desalination and export of water, none are considering the most fiscally and environmentally responsible option – conservation.”)

²²⁰ Bayliss, *supra* note ___ at 522.

²²¹ Id at 523.

²²² Yaron, *supra* note ___ at 52.

²²³ Roaf, *supra* note ___ at 10.



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Further, it is vital that SSA countries reform their administrative law frameworks, by establishing public participation and accountability mechanisms that will enable their citizens to access information on privatization. In particular, such mechanisms should set up political processes for citizens to participate in, and hold to account, privatization endeavours and the private actors whose exercise of power affects their significant interests.