

## Privatisation of water in Southern Africa: A human rights perspective

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### Summary

*As is the case elsewhere, privatisation in Southern Africa has since the 1990s extended to the provision of basic services. Controversy surrounds the issue whether the involvement of the private sector in the provision of basic services could enhance the enjoyment of the socio-economic rights relating to those services. This article argues that, while privatisation as a policy per se may not be objectionable, human rights law prescribes standards to which privatisation measures must conform. Southern African countries have certain socio-economic rights obligations emanating from CESC, the African Charter and their domestic constitutions. It is argued that privatisation does not mean a delegation of state obligations in relation to human rights, although the question of privatisation has reinforced the call for the recognition of human rights obligations of private actors as well. Some of the obligations that states have in the context of the privatisation of water are explored.*

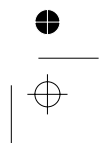
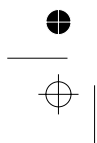
### 1 Introduction

The policy of privatising state enterprises did not gain prominence until the 1980s.<sup>1</sup> While the momentum for privatisation in Europe might have

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<sup>1</sup> P Cook & Y Uchida 'Privatisation and economic growth in developing countries' Centre on Regulation and Competition, Working Paper Series No 7, October 2001, available at <http://idpm.man.ac.uk> (accessed 30 May 2003); K Ascher *The politics of privatisation: Contracting out public services* (1987) 3.



been driven by the liberalisation of markets and budgetary constraints experienced by governments,<sup>2</sup> Southern African countries embarked on privatisation initiatives as a key part of the policy, conditionality on which the approval of aid or loans depended.<sup>3</sup>

Unlike the early 1980s, privatisation has since extended to the provision of basic services in Southern Africa. A 15-year contract for Maputo and five-year management contracts for four other cities in Mozambique were concluded and are now in operation. In Namibia, bulk water commercialisation commenced on 1 April 1998. In Malawi, Mauritius and Zambia, plans to privatise the provision of water were approved in June 1995, February 1998, and May 1995 and June 2000 respectively.<sup>4</sup> In South Africa, the provision of water and sanitation was privatised in Nelspruit between 1996 and 1999. Similar services in Dolphin Coast and Durban were in 1999 contracted to multinational enterprises, SAUR International and Bi-Water respectively, while in 2001, those in Johannesburg were contracted out to Water and Sanitation Services of South Africa. In Zimbabwe, the water privatisation concession was stalled after the corporation involved, Bi-Water, a UK firm, cancelled it owing to the inability of the people to pay for services.<sup>5</sup>

The pressure to privatise the delivery of water is no longer solely exerted by the World Bank and the International Monetary Fund (IMF) (by imposing it as condition of debt relief or aid funds).<sup>6</sup> Multinational corporations, multilateral institutions such as the European Union and the World Trade Organisation, and donor agencies such as Britain's DFID, Germany's GTZ and the United States' USAID have become key supporters of this policy.<sup>7</sup> Recent international and regional forums, such as the African Ministerial Conference on Water held in Nigeria in 2002, and the International Fresh-Water Conference held in Bonn in 2001, also endorsed the idea of privatising water.<sup>8</sup> The newly adopted New Partnership for Africa's Development (NEPAD) has also given privatisation a fresh impetus.<sup>9</sup>

<sup>2</sup> Cook & Uchida (n 1 above) 2.

<sup>3</sup> O Letwin *Privatising the world: A study of international privatisation in theory and practice* (1988) 23.

<sup>4</sup> Rural Development Services Network 'Against the water current: Water and privatisation in the Southern African region' Briefing paper for the EU/SADC Civil Society Conference held in Denmark on 3–5 November 2002, available at <http://www.rdsn.org.za/news/documents.htm> (accessed 30 June 2003).

<sup>5</sup> As above.

<sup>6</sup> See generally P Bond *et al* 'Water privatisation in SADC: The state of the debate' (on file with author).

<sup>7</sup> As above.

<sup>8</sup> Rural Development Services Network (n 4 above).

<sup>9</sup> See AIDC 'Privatisation in South Africa — The facts' *Alternatives* October/November 2002.

This article argues that, unless privatisation policies are structured by human rights principles, they may not result in more or progressive access to relevant basic services, especially by poor people. It further provides a theoretical human rights framework within which privatisation of water should be analysed. The article starts by defining the concept of privatisation and its links to the notions of corporatisation, liberalisation and deregulation, and human rights. Following this, it investigates and critiques arguments in favour of the assertion that privatisation can enhance the enjoyment of human rights. It is argued that evidence supporting an affirmative contribution of privatisation in this regard is scanty and at best speculative. The article proceeds to argue that, although private sector participation in the delivery of basic services *per se* is not objectionable from a human rights perspective, human rights establish a normative framework with which privatisation measures, like other public measures, must comply in order for them to be acceptable. The precise human rights obligations of the state in the context of privatisation are investigated in the last part.

## 2 Conceptual framework

### 2.1 The meaning of privatisation and related concepts

Privatisation is an ambiguous term, but its multiple meanings have attracted little controversy. As a process and broadly defined, it entails the reduction of the role of the government in asset ownership and service delivery and an increase in the role of the private sector in these areas.<sup>10</sup> While privatisation is commonly associated with full divestiture (complete transfer of a public enterprise to a private actor),<sup>11</sup> it may take other forms than an outright sale of assets. Examples of its other forms include partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out specific activities to private actors, management or employee buyout, and discontinuation of a service previously provided by the public sector on the assumption that, if it is necessary, a private actor might engage in its delivery.<sup>12</sup>

<sup>10</sup> DJ Gayle & JN Goodrich 'Exploring the implications of privatisation and deregulation' in DJ Gayle & JN Goodrich (eds) *Privatisation and deregulation in global perspective* (1990) 1 3.

<sup>11</sup> See DA McDonald 'Up against the (crumbling) wall: The privatisation of urban services and environmental justice' in DA McDonald (ed) *Environmental justice in South Africa* (2002) 292 296–297.

<sup>12</sup> See C Vuylsteke 'Techniques of privatisation of state-owned enterprises: Methods and implementation' World Bank Technical Papers (1988) 8; FM Andic 'The case for privatisation: Some methodological issues' in Gayle & Goodrich (n 10 above) 37–39.

Privatisation is intricately linked to other market principles, such as liberalisation and deregulation.<sup>13</sup> Indeed, it has been argued that this policy has a greater chance of success in a market-friendly environment.<sup>14</sup> Deregulation entails the reduction or elimination of specific governmental rules and regulations that apply to private business, including removal of regulations that prevented the private sector from competing with a nationalised monopoly.<sup>15</sup> Generally, corporate interest groups support at least some socio-economic regulations, especially where they provide competitive advantage for specific firms (for example through certification, permit and licensing systems that restrict entry into business).<sup>16</sup> However, deregulation is mostly preferred in the arena of social responsibility. For example, corporations prefer corporate self-regulation through corporate codes, social audits and industry codes to binding human rights obligations or legislative procedures.<sup>17</sup>

Closely related to and often used in conjunction with deregulation is the principle of liberalisation, which involves measures aimed at opening up the market for competition. Such measures include tariff removals or reduction, removal of subsidies, and introduction of cost-recovery measures. The implications of human rights for the privatisation of basic services cannot be discussed in isolation from these principles.

The link between privatisation and the concept of corporatisation is significant. This link is increasingly being employed in the delivery of basic services in Southern Africa, parallel to or simultaneously with privatisation.<sup>18</sup> Corporatisation is a method of institutional reform that incorporates many principles inherent in privatisation, such as performance-based management and full cost recovery.<sup>19</sup> The principal objective of corporatising a public service is to let it function as a business.<sup>20</sup> What distinguishes it from privatisation is that ownership, control and management of the assets and other utilities remain firmly in

<sup>13</sup> According to Vuylsteke, 'privatisation is often only an element of a broader economic policy (or reform) that may include deregulation and liberalisation as well'. See Vuylsteke (n 12 above) 1.

<sup>14</sup> S Kikeri *et al* *Privatisation: The lessons of experience* (1992) 4–5.

<sup>15</sup> Gayle & Goodrich (n 10 above) 82.

<sup>16</sup> n 15 above, 5.

<sup>17</sup> See eg Institute of Directors *King Report on Corporate Governance for South Africa 2001*, available at <http://www.iodsa.co.za/loD%20Draft%20King%20Report.pdf> (accessed 30 June 2003).

<sup>18</sup> In South Africa, eg, the draft Electricity Distribution Restructuring Bill establishes six regional electricity distributors that will operate as commercial entities. In Namibia, the Namibian Water Corporation is a publicly owned corporation.

<sup>19</sup> DA McDonald 'Privatisation and the new ideologies of service delivery' in DA McDonald & L Smith (eds) *Privatising Cape Town: Service delivery and policy reforms since 1996* (2002) 3 11.

<sup>20</sup> Bond (n 6 above).

the public sector.<sup>21</sup> Thus, human rights obligations of a corporatised entity are easier to pinpoint than in the case of privatisation. However, since a corporatised entity is also bound by similar market principles applicable to privatisation, this article has implications for corporatisation as well.

## 2.2 The link between water privatisation and human rights

Policies on water provision are directly linked to the enjoyment of such rights as the rights to water, housing, life and health. These rights are conventionally referred to as economic, social and cultural rights. They aim to ensure access by all human beings to those resources, opportunities and services necessary for an adequate standard of living.<sup>22</sup> What motivates their recognition as human rights is the realisation that the capacity to enjoy other rights, such as the rights of association, equality, political participation and expression, is intricately linked to access to a basic set of social goods.<sup>23</sup> Economic, social and cultural rights are particularly relevant to vulnerable and disadvantaged groups of people,<sup>24</sup> because of the important role they can play in the eradication of poverty and in bridging socio-economic inequalities in society.<sup>25</sup>

Most Southern African countries (including Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe) are parties to the African Charter on Human and Peoples' Rights (African Charter or Charter). The African Charter departs radically from traditional international and regional human rights instruments by giving express recognition to a range of economic, social and cultural rights, along with civil and political rights, as justiciable rights.<sup>26</sup> Although the right to water is absent in the Charter, the rights to health, life, family protection, and economic, social and cultural development are expressly recognised. The right to water can be implied in these rights. This construction is consistent with the

<sup>21</sup> L Smith 'The corporatisation of water' in McDonald & Smith (n 19 above) 35 43; McDonald (n 19 above) 11.

<sup>22</sup> S Liebenberg & K Pillay (eds) *Socio-economic rights in South Africa* (2000) 16.

<sup>23</sup> J de Waal *et al* *The Bill of Rights handbook* (2000) 398.

<sup>24</sup> See also Liebenberg & Pillay (n 22 above) 16.

<sup>25</sup> International Council on Human Rights Policy *Duties sans frontières: Human rights and global social justice* (2003) 17–19.

<sup>26</sup> See generally J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa' (1995) 26 *California Western International Law Journal* 10; C Odinkalu 'Analysis of paralysis or paralysis of analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327; SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177.

approach of interpretation adopted by the African Commission on Human and Peoples' Rights (African Commission), which monitors the implementation of the African Charter, in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC case).<sup>27</sup> In this case, the African Commission found violations of the rights to housing and food, which are not expressly recognised by the African Charter, by holding that they were implicitly entrenched in the rights to property, family protection and health, and the rights to life, health and economic, social and cultural development respectively.

With the exception of Botswana, South Africa, Swaziland and Mozambique, most Southern African countries are also parties to the International Covenant on Economic, Social and Cultural Rights (CESCR). Like the African Charter, CESCR does not recognise the right to water. However, the Committee on Economic, Social and Cultural Rights (Committee on ESCR), which monitors the implementation of CESCR, has stated that this right is implicitly recognised in the rights to an adequate standard of living, food, housing, health, life and human dignity.<sup>28</sup> Furthermore, the Committee on ESCR has construed the right to adequate housing broadly to imply 'sustainable access' to, among other things, 'safe drinking water'.<sup>29</sup>

It is noteworthy that Southern African constitutions adopted after 1990 are increasingly recognising economic, social and cultural rights as justiciable rights.<sup>30</sup> South Africa has been internationally acclaimed for not only guaranteeing these rights in its 1996 Constitution, but also leading the way in developing constitutional jurisprudence on these rights.<sup>31</sup> Although not as detailed as the South African Constitution, the 1990 Constitution of Mozambique also contains a range of socio-economic rights, including the rights to property, work, inheritance, education and health. The 1994 and 1992 Constitutions of Malawi and Namibia, respectively, have a combination of a few enforceable socio-economic rights in their respective Bills of Rights and unenforceable directive principles of state policy which, with the presence of a range of civil and political rights, provide a good frame-work for the protection of socio-economic rights.<sup>32</sup> These Constitutions represent a remarkable

<sup>27</sup> Communication 155/96, Fifteenth Annual Activity Report (2001–2002).

<sup>28</sup> General Comment No 15 'The right to water (arts 11 and 12 of the Covenant)' adopted by the Committee on ESCR at its 29th session, 11–29 November 2002 para 3.

<sup>29</sup> General Comment No 4 'The right to adequate housing (art 11(1) of the Covenant)' adopted by the Committee on ESCR at its 6th session, 13 December 1991 para 8(b).

<sup>30</sup> See generally C Heyns (ed) *Human Rights Law in Africa* (2004).

<sup>31</sup> See S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 59.

<sup>32</sup> See DM Chirwa 'Minister of Health & Others v Treatment Action Campaign & Others: Its implications for the combat against HIV/AIDS and the protection of economic, social

shift away from the traditional view that economic, social and cultural rights are different from civil and political rights in nature, requiring different enforcement mechanisms.<sup>33</sup>

Policies adopted by African countries, including privatisation measures, must conform to these human rights standards for them to be accepted.

### 3 Implications of privatisation for the enjoyment of human rights

#### 3.1 The case for the position that privatisation can enhance the enjoyment of socio-economic rights

The objectives that drive privatisation are diverse and often not easily reconcilable. A decision on whether a privatisation initiative is successful or not will therefore depend on the specific objectives it was set to achieve. Invariably, such a decision will turn on the power plays amongst different interest groups advocating particular objectives.<sup>34</sup>

Despite the multiplicity of objectives and their apparent contradictions, proponents of privatisation maintain that privatisation of basic services can have a positive impact on access to or the enjoyment of human rights. Firstly, they argue that a well-formulated and implemented policy of privatisation has the potential to enhance operational efficiency, economic growth and development.<sup>35</sup> The public sector, the argument goes, has limited capital. Its investment options and lending policies are also undermined by short-term political

and cultural rights in Africa' (2003) 9(1) *East African Journal of Peace and Human Rights* 174 178.

<sup>33</sup> The alleged differences between these sets of rights have been examined and critiqued in a number of works, including S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999) ch 41; S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 55; C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 44; D Beetham *Democracy and human rights* (1999) 115–135; P de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67; M Craven 'The International Covenant on Economic, Social and Cultural Rights' in R Hanski & M Suksi (eds) *An introduction to international protection of human rights* (1999) 101–102; E de Wet *The constitutional enforcement of economic and social rights: The meaning of the German constitutional model for South Africa* (1996) 40–41; DM Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

<sup>34</sup> Y Aharoni 'On measuring the success of privatisation' in R Ramamurti & R Vernon (eds) *Privatisation and control of state-owned enterprises* (1991) 73.

<sup>35</sup> Letwin (n 3 above) 32; D Leach & F Vorhies 'Privatisation and natural monopoly' in F Vorhies (ed) *Privatisation and economic justice* (1990) 23; Kikeri *et al* (n 14 above) 24.

expediency. By contrast, the private sector boasts of a huge capital base, which can support expansion of service delivery. This advantage, coupled with the urge to provide attractive returns on capital that will appeal to investors over a long period of time and the need to gratify customers, can result in increased efficiency in the private sector, higher production, improved output quality and reduced prices.<sup>36</sup> Proponents of this line of argument proceed to argue that the private sector has more efficient staff than the public sector.<sup>37</sup> Managers in the private sector can be motivated to cultivate a risk-taking culture by offering lucrative rewards for the production of greater marginal returns. With the detachment from political control, managers in the private sectors are better placed to implement cost effective and the most efficient means of providing services tailored to suit the demands and needs of customers.<sup>38</sup> It is also often argued that privatisation increases competition in the delivery of basic services.<sup>39</sup> Competition is conducive to lower costs of the services rendered. In short, the increased efficiency, enhanced competition and larger investment that privatisation promises can lead to a higher production of the privatised service of a competitive quality at a lower cost. The result, so the argument goes, would be increased access to and the better enjoyment of the relevant socio-economic rights.

Secondly, proponents of privatisation argue that privatisation is conducive to a better and healthier environment. The latter is critical for the enjoyment of human rights. One limb of this argument posits that private sector participation in the delivery of basic services can promote innovation. The discipline of the financial market place generates interest in new technologies and products that are healthier or environmentally friendlier, in order to secure a competitive advantage over other participants in the industry. Such motivation is absent in the case of state-owned enterprises.<sup>40</sup>

The other limb of the argument posits that service delivery by the public sector often hides subsidies and other latent distortions. Proponents of privatisation see privatisation as a means of exposing and removing such distortions.<sup>41</sup> Subsidisation, it is argued, 'promotes wasteful consumption of environmentally sensitive services such as water, electricity and refuse collection'.<sup>42</sup> It is therefore argued that their

<sup>36</sup> As above.

<sup>37</sup> Aharoni (n 34 above) 75.

<sup>38</sup> Gayle & Goodrich (n 10 above) 7; Letwin (n 3 above) 31.

<sup>39</sup> Letwin (n 3 above) 45.

<sup>40</sup> McDonald *et al* 'Water privatisation in SADC: The status of the debate' (unpublished paper on file with author).

<sup>41</sup> Letwin (n 3 above) 43.

<sup>42</sup> D McDonald 'The theory and practice of cost recovery in South Africa' in D McDonald & J Pape (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002) 17 25.



removal and the introduction of cost recovery measures provide an incentive to use such services responsibly and in a manner that is not deleterious to the environment.<sup>43</sup>

Thirdly, proponents of privatisation contend that it has a redistributive thrust that is consistent with the *raison d'être* of socio-economic rights. This potential can be realised in two ways. The first is by inviting and encouraging employees of the enterprise and/or previously disadvantaged individuals or groups to buy shares in the privatised enterprise.<sup>44</sup> The second is by involving previously disadvantaged people in the provision of basic services. In South Africa, for example, the government regards privatisation as an important resource for black empowerment.<sup>45</sup> These opportunities promote 'popular capitalism', which can help to alleviate poverty and bridge societal inequalities.

Fourthly, proponents of privatisation also argue that it can result in reduced fiscal deficits and national debt. Through privatisation, time and resources spent on monitoring and subsidising state-owned enterprises could be saved. The saved resources, plus the proceeds from sale, can be used for settling foreign debt, balancing the national budget or investing in other priority areas such as education and child care.<sup>46</sup>

Lastly, privatisation is favoured by some on the ground as it has the potential to contract the public sector to a much more manageable entity.<sup>47</sup> As a result, improved efficiency is possible in the public sector, including organs dealing with law and enforcement such as the judiciary, parliament, the police, prisons and public human rights institutions. Efficiency in these organs might lead to an efficient and effective human rights protection regime.

These arguments compel proponents of privatisation to conclude that the latter can enhance the enjoyment of human rights.

### 3.2 A rebuttal

Whether privatisation does in practice result in enhanced enjoyment of human rights generally, and increased access to socio-economic rights particularly, is debatable. Evidence of the positive impact of privatisation on economic growth and efficiency is inadequate and at most

<sup>43</sup> As above.

<sup>44</sup> Letwin (n 3 above) 47; Gayle & Goodrich (n 10 above) 7.

<sup>45</sup> See Ministry of Public Enterprises Republic of South Africa 'An accelerated agenda towards the restructuring of state-owned enterprises policy framework' August 2000.

<sup>46</sup> K Bayliss 'Privatisation and poverty: The distributional impact of utility privatisation' Centre on Regulation and Competition, Working Paper Series No 16, January 2002, available at <http://idpm.man.ac.uk> (accessed 30 June 2003); Aharoni (n 34 above) 80.

<sup>47</sup> Aharoni (n 34 above) 78.

conflicting.<sup>48</sup> Indeed, opponents of privatisation contend that there is little practical evidence establishing that privatisation does in fact result in increased efficiency, economic growth, development and competition. Gayle and Goodrich, for example, have argued that privatisation in Britain, the former West Germany, Chile and Honduras in the 1980s did not result in better economic performance by private firms.<sup>49</sup> Likewise, Cook and Uchida's study on the impact of privatisation on economic growth in developing countries concludes in the negative.<sup>50</sup>

Where it can be established that enhanced economic performance occurred after privatisation, the difficulty in pinpointing privatisation as the cause of such performance remains. Many other factors, such as the introduction of competition and the liberalisation of the market without privatisation, might lead to economic growth.<sup>51</sup> Significantly, economic growth in itself does not mean greater access by poor communities to basic needs. For example, structural adjustment programmes introduced by the IMF and the World Bank policies that were implemented by most of the Southern African countries were reported to have improved economic growth. However, these policies worsened the levels of poverty of the majority of people in these countries.<sup>52</sup>

The potential for privatisation to increase competition is undermined by the availability of investors.<sup>53</sup> Then, too, water is a most basic good and there is in each of the countries mentioned earlier only one provider at a given time. As a result, people do not have a choice other than to purchase water from the available provider. The privatisation of water in Southern Africa has seen the demise of public monopolies, but has led to the emergence of private sector monopolies in water provision.

Opponents of privatisation also contend that although managers in the private sector are accountable to their shareholders, such accountability is largely in terms of profits. The search for profits motivates private actors to invest in areas that can bring huge turnovers.

<sup>48</sup> Some studies by the IMF indicate a positive impact of privatisation on economic, growth, efficiency, competition and quality of the services. See Cook & Uchida (n 1 above). See generally also Kikeri *et al* (n 14 above). Positive impacts of privatisation on access, quality and efficiency have also been noted in Peru. See M Torero & A Pasco-Font 'The social impact of privatisation and the regulation of utilities in Peru', United Nations University, World Institute for Development Economic Research, Discussion Paper No 2001/17, June 2001.

<sup>49</sup> Gayle & Goodrich (n 10 above) 8.

<sup>50</sup> Cook & Uchida (n 1 above).

<sup>51</sup> Letwin (n 3 above) 35–37.

<sup>52</sup> See K Cheru 'Economic, social and cultural rights: The Highly Indebted Poor Countries (HIPC) Initiative: A human rights assessment of the Poverty Reduction Strategy Papers (PRSP)' Report submitted by the independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights particularly economic, social and cultural rights, E/CN.4/2001/56.

<sup>53</sup> Bayliss (n 46 above).

Investors are therefore less prepared to buy enterprises that make losses. In Zimbabwe, for example, Bi-Water withdrew from a privatisation project of water supply because the users were too poor to afford the services.<sup>54</sup> Furthermore, in the quest to maximise profits, private actors tend to be selective about beneficiaries and the investment they make. Private service providers prefer to invest in water services that will service industrial users than poor people.<sup>55</sup> They also exercise more leniency to corporations with respect to disconnections than poor people.<sup>56</sup> These observations call into question the potential for privatisation to extend service delivery to disadvantaged communities and to provide quality services in sufficient amounts as required by socio-economic rights.<sup>57</sup>

That privatisation is beneficial to health and the environment is equally questionable. Evidence establishing that the activities of private actors are often harmful to the environment and that many private actors have violated environmental and health regulations with impunity through the improper exercise of their economic power, for example, through corruption of the responsible government officials is in abundance.<sup>58</sup> As regards the potential of private actors to invest in new technologies that are environmentally friendly, this possibility is undermined by short-term contracts of service delivery and competitive bidding, which result in losses in institutional memory necessary for innovations.<sup>59</sup> Contrary to the assertion that private actors are bastions of innovation, available evidence suggests that public institutions have historically invested invaluablely in new technologies and innovation without the promise of profits.<sup>60</sup>

Some of the arguments in favour of privatisation are potentially in conflict with human rights. For example, the implementation of cost recovery measures and the removal of subsidies, which go with privatisation, may constitute a denial of human rights, especially those of the poor. State intervention in the form of subsidies and kindred measures are critical to increasing or sustaining access by poor communities to socio-economic rights and to the enjoyment of other human rights. Even in the United States, where socio-economic rights are not

<sup>54</sup> As above.

<sup>55</sup> As above (making reference to electricity).

<sup>56</sup> As above.

<sup>57</sup> Socio-economic rights entail the principles of availability, accessibility, quality and acceptability. See below.

<sup>58</sup> See AX Fellmeth 'Wiwa v Royal Dutch Petroleum Co: A new standard for the enforcement of international law in US Courts' (2002) 5 *Yale Human Rights and Development Law Journal* 241; C Scott 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in Eide *et al* (n 33 above) 563.

<sup>59</sup> Bond *et al* (n 6 above).

<sup>60</sup> As above.

constitutionally protected, welfare provision has been considered by federal courts to form an essential element of a democratic society. In *Goldberg v Kelly*,<sup>61</sup> for example, it was conceded: 'For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.' By meeting these basic means, the judgment proceeded, welfare 'can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community'. The relevance of welfare policies and other measures aimed at assisting the poor to access basic services in Southern Africa is particularly obvious, given the high levels of poverty in these countries.

With regard to the potential to redistribute resources, the contribution of privatisation in this regard is sharply limited by the drive to attract foreign investment. And in most cases, privatisation results in massive job losses.<sup>62</sup> Key participants in the provision of basic services and those that reap a disproportionate share of the benefits of privatisation are multinational companies, not local businesses or people. This is the case in Southern Africa where such multinational corporations as Bi-Water, Saur International, IPE-Aguas de Portugal, and Suez-Lyonnaise have won the contracts to provide water.<sup>63</sup> There is therefore a negligible redistributive potential that privatisation of water can offer.

In addition, while proceeds from the sale of public enterprises can be of use in balancing the national budget, such benefit can be a short-term one. In some instances a long-term contribution of an enterprise to the national budget can outweigh the contribution of the proceeds realised from its sale.

The United Nations (UN) High Commissioner for Human Rights has summarised some of the ways in which privatisation can undermine the enjoyment of socio-economic rights as follows:<sup>64</sup>

- the establishment of a two-tiered service supply in a corporate segment focused on the healthy and wealthy and an under-financed public sector focusing on the poor and sick;
- brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures;

<sup>61</sup> 397 US 254 (1970).

<sup>62</sup> Aharoni (n 34 above) 80; VV Ramanadham 'Privatisation: Constraints and impacts' in VV Ramanadham (ed) *Constraints and impacts of privatisation* (1993) 1 54.

<sup>63</sup> Bond *et al* (n 6 above).

<sup>64</sup> UN High Commissioner for Human Rights 'Economic, social and cultural rights: Liberalisation of trade in services and human rights' Report of the High Commissioner E/CN.4/Sub.2/2002/9, 25 June 2002.

- an overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates; and
- an increasingly large and powerful private sector that can threaten the role of the government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators.

The upshot of the preceding discussion is that arguments that privatisation has a positive impact on the enjoyment of human rights are, at best, speculative. For the most part, the little practical evidence in support of the affirmative focuses on micro-economic objectives. Apart from noting that such evidence is inconsistent, I have argued that the achievement of these objectives does not automatically guarantee availability, accessibility, quality and acceptability of basic services to all people, especially vulnerable groups. In fact, the fear that privatisation of basic services can result in limited access to economic, social and cultural rights by poor communities in the Southern African context appears to be well founded.

#### 4 The position of human rights regarding privatisation

Given the diversity of objectives privatisation seeks to achieve, it is important to answer the question whether privatisation itself can be resisted on the ground that it can negatively affect the enjoyment of human rights generally or socio-economic rights particularly.

As noted earlier, the central feature of privatisation is private sector participation in service delivery. It is noteworthy that human rights do not recognise the obligation of the state to be the sole provider of basic services.<sup>65</sup> On the contrary, it is permissible within the human rights regime for private actors to play a role in the realisation of human rights.<sup>66</sup> In the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom), the Constitutional Court conceded that:<sup>67</sup>

<sup>65</sup> As above.

<sup>66</sup> Liebenberg argues: 'The state should be entitled to rely on private mechanisms of delivery in appropriate circumstances.' She cites the provision of education by private institutions and adult education by NGOs as examples of private sector contribution to service delivery. See Liebenberg (1999) (n 33 above) 41-1 41-35.

<sup>67</sup> 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para 35.

It is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.

Similarly, in the Indian case of *Krishnan v State of Andhra Pradesh*, Jeevan Reddy J commented on the position of private actors in relation to the directive principle in the Indian Constitution on free and compulsory primary education for children until they reach the age of 14 years as follows:<sup>68</sup>

This does not, however, mean that this obligation can be performed only through state schools. It can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, as they too have a role to play. They meet the demand of that segment of the population who may not wish to have their children educated in state-run schools.

It is clear, therefore, that private sector involvement *per se* in the provision of basic goods and services is not unacceptable from a human rights perspective.

What is more, human rights law does not require a particular political or economic system within which human rights can best be realised.<sup>69</sup> The Committee on ESCR has flagged this standpoint in the following words:<sup>70</sup>

[T]he undertaking 'to take steps . . . by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot be accurately described as being predicated exclusively upon the need for, or the desirability for a socialist or capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

<sup>68</sup> (1993) 4 LRC 231 301. See also *Jain v State of Karnataka* (1992) 3 SCC 666 para 17.

<sup>69</sup> See P Hunt 'The international human rights treaty obligations of states parties in the context of service provision' Submission to the UN Committee on the Rights of the Child on the private sector as service provider and its role in implementing child rights, 20 September 2002, Office of the High Commissioner for Human Rights, Geneva.

<sup>70</sup> General Comment No 3 'The nature of state parties' obligations (art 2(1) of the Covenant)' adopted by the Committee on ESCR at its 5th session, 14 December 1990, para 8.

This position finds similar expression in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. According to paragraph 6:<sup>71</sup>

The achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures.

Not requiring a particular political economic system for the realisation of human rights is a significant affirmation of the principle that all human rights are interrelated, interdependent and mutually supporting. It serves to underscore that human rights are not by-products of any political or economic system, but that they are 'trumps' over collective goals.<sup>72</sup> Any such system is bound by human rights.

In short, human rights law does not prescribe exhaustive measures to be taken to implement or give effect to human rights. Private actors have played and will continue to play an important role in the realisation of human rights.

## 5 The obligations of states in the context of privatisation

While, as a policy, privatisation cannot be rejected outright, human rights law establishes a normative framework with which privatisation measures, like other public measures, must comply to be acceptable. Significantly, since states are contracting parties to international and regional human rights treaties, they are principally responsible for their implementation. The often-cited Vienna Declaration and Programme of Action (1993) in respect of the principle of the interdependence of all human rights states: 'Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.'<sup>73</sup> More recently, the preamble to the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms has stressed that 'the prime responsibility and duty to promote and protect human rights lie with the state'.<sup>74</sup> It is therefore clear that the duty to respect, protect, promote and fulfil human rights remains on the state, including when water

<sup>71</sup> The Limburg Principles were adopted by a group of distinguished experts in international law on 2–6 June 1986 in Maastricht, The Netherlands. Although not binding, they have been very influential to the understanding of the content and nature of obligations generated by socio-economic rights.

<sup>72</sup> R Dworkin 'Rights as trumps' in J Waldron (ed) *Theories of rights* (1992) 153–167.

<sup>73</sup> See Part 1, art 1.

<sup>74</sup> UN General Assembly Resolution 53/144 of 9 December 1998 para 7.

provision is privatised. Thus, the UN High Commissioner for Human Rights has stated that states 'have responsibilities to ensure that the loss of autonomy does not disproportionately reduce the capacity to set and implement national development policy' and human rights.<sup>75</sup> This part explores some of the precise obligations that states are required to discharge in the context of privatisation.

### 5.1 The duty not to limit access

States have the primary duty to respect human rights, including the right to water. This duty binds the state to refrain from interfering in the enjoyment of all fundamental rights.<sup>76</sup> The state is enjoined 'to respect right-holders, their freedoms, autonomy, resources, and liberty of their action'.<sup>77</sup> Liebenberg argues that the duty to refrain from 'preventing and impairing' access to a relevant socio-economic right is broad enough to include policies that result in denial of access by poor communities to the right, rather than simply an interference with their existing access to the right.<sup>78</sup>

The Committee on ESCR has stated that failure by the state to take into account its legal obligations when entering into bilateral or multilateral agreements with other states, international organisations and other entities such as multinational corporations, may constitute a violation of the duty to respect human rights.<sup>79</sup> This implies that, by privatising the provision of basic services and goods, the state remains responsible for ensuring the enjoyment by all people the rights relevant to the privatised service. Agreements with private service providers must therefore be structured by the relevant human rights norms. Consistent with the Committee on ESCR's statement, the UN High Commissioner for Human Rights has stated:<sup>80</sup>

In setting comprehensive objectives for trade liberalisation that go beyond commercial objectives, a human rights approach examines the effect of trade liberalisation on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals.

In other words, the state is enjoined to ensure that the advancement of human rights is a paramount objective that the privatisation of water must achieve. This viewpoint is premised on the principle that the

<sup>75</sup> See UN High Commissioner for Human Rights (n 54 above) para 9.

<sup>76</sup> *SERAC* case (n 27 above) para 45.

<sup>77</sup> n 76 above, para 45.

<sup>78</sup> S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (forthcoming).

<sup>79</sup> General Comment No 14 'The right to the highest attainable standard of health (art 12 of the Covenant)' adopted by the Committee on ESCR at its 22nd session, 2000, para 50.

<sup>80</sup> n 79 above, para 8.



human person is the ultimate subject of human development.<sup>81</sup> It is therefore imperative that development measures or policies aimed at alleviating poverty must place human rights at the fore. This principle is also consistent with the notion that economic, social and cultural rights must be realised progressively. Any retrogressive measures taken by the state would constitute a violation of these rights.<sup>82</sup>

A human rights approach to privatisation would therefore require the state to consider four key principles when embarking on and implementing privatisation:

- Equality and non-discrimination. This is a central principle on which international human rights law is founded. Apart from taking measures to eliminate discrimination, it enjoins states to formulate and implement legislative and other measures aimed at the effective protection of the most vulnerable, the poor and socially excluded groups against discrimination by state actors and private actors. Affirmative measures are consistent with this principle.<sup>83</sup>
- Indivisibility and interdependence of all rights. This principle requires recognition of both civil and political rights, and economic, social and cultural rights. It is not enough for policies to comply with civil and political rights. They must also lead to more access to or the better enjoyment of socio-economic rights.
- Accountability of policy makers and private service providers.<sup>84</sup> Development policies must entrench legal and administrative measures to guarantee democratic accountability.
- Public participation.<sup>85</sup> International human rights law requires that policies must be devised, implemented and monitored in a manner that allows for popular participation. To this end, regular presidential, parliamentary and local government elections are part of that accountability. However, they are not enough. All people, including

<sup>81</sup> See art 2(1) of the Declaration on the Right to Development, adopted by the UN General Assembly Resolution 41/128, 4 December 1986.

<sup>82</sup> See General Comment No 3 (n 70 above).

<sup>83</sup> According to the Human Rights Committee (HRC), 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [CCPR] . . . Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.' See General Comment No 18/37 [non-discrimination], adopted by the HRC on 9 November 1998.

<sup>84</sup> According to the Committee on ESCR: 'Rights and obligations demand accountability: Unless supported by a system of accountability, they become no more than window dressing.' See the Committee on ESCR's Statement on Poverty, UN Doc E/C 12/2001 para 14.

<sup>85</sup> S Tsemo 'Privatisation of basic services, democracy and human rights' (2003) 4 *ESR Review* 2.

the poor, must be allowed to participate in key decisions affecting their lives.

It is imperative that privatisation, being a developmental policy and/or one designed to alleviate poverty, complies with the above principles. Not only must processes of its formulation be governed by these principles, the content of the policy, and its monitoring and accountability measures must be consistent with human rights.<sup>86</sup>

In order to ensure that a water privatisation initiative will result in more access to (rather than denials of) human rights, Paul Hunt and Amnesty International have rightly argued that states should carry out a human rights impact assessment before embarking on privatisation.<sup>87</sup> If the assessment reveals that denials or restrictions of the access to the right to water is likely to occur, then privatisation should not be undertaken.

## 5.2 The duty to regulate and monitor private service providers

The state's duty to protect is very important in the context of privatisation. This duty summons the state to take positive action to protect its citizens from damaging acts that may be perpetrated by private actors. The Committee on ESCR has interpreted this obligation to include the duty not only to prevent violations of these rights by private actors, but also to control and regulate them. In respect of the right to water, for example, the Committee on ESCR has stated that the state has an obligation to prevent third parties from 'compromising equal, affordable, and physical access to sufficient, safe and acceptable water'.<sup>88</sup> The Committee has also stated with reference to the right to food that states have the duty to 'ensure that activities of the private business sector and civil society are in conformity with' this right.<sup>89</sup> According to the Committee, 'failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others' amounts to a violation by states of the right to food.<sup>90</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) contain a similar interpretation of the obligations of states in relation to economic, social and cultural rights:<sup>91</sup>

<sup>86</sup> See Hunt (n 69 above).

<sup>87</sup> Amnesty International *Human rights principles regarding the delivery of essential services* (2003) (forthcoming).

<sup>88</sup> General Comment No 15 (n 28 above) para 24.

<sup>89</sup> General Comment No 12 'The right to adequate food (art 11 of the Covenant)' adopted by the Committee on ESCR at its 20th session, 12 May 1999 para 27.

<sup>90</sup> n 89 above, para 19.

<sup>91</sup> See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by international experts in economic, social and cultural rights in Maastricht on 22–26 January 1997.

The obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.

In the context of the right to health, the Committee on ESCR has provided an insight into the possible areas of regulation and control of private service providers. The state is enjoined, among other things,<sup>92</sup>

to adopt legislation or to take other measures ensuring equal access to health care and health related services provided by third parties; . . . to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.

The duty to protect requires that vulnerable groups be given special protection. In relation to people with disabilities, for example, the Committee on ESCR has stated:<sup>93</sup>

In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities.

The state discharges the duty to protect through 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations' to enable individuals to freely realise their rights and freedoms.<sup>94</sup> It has to establish 'an effective regulatory system' providing for 'independent monitoring, genuine public participation and imposition of penalties for non-compliance'.<sup>95</sup> Adoption of legislation is not exhaustive of the state's duty to protect citizens from violations by third parties. In accordance with the principle of economic accessibility, the Committee on ESCR has stated, for example, that 'tenants should be protected by appropriate means against unreasonable rent levels or rent increases'.<sup>96</sup>

The duty to protect citizens from violations of human rights, including a range of socio-economic rights by private actors, was enforced in the *SERAC* case.<sup>97</sup> The plaintiffs complained, among other

<sup>92</sup> General Comment No 14 (n 79 above) para 35.

<sup>93</sup> General Comment No 5 'Persons with disabilities' adopted by the Committee on ESCR at its 11th session, 9 December 1994 para 11.

<sup>94</sup> *SERAC* case (n 27 above) para 46.

<sup>95</sup> General Comment No 15 (note 28 above) para 24. With respect to the right to education, the state has an obligation to ensure that 'private educational institutions conform to the "minimum educational standards" required by article 13'. See General Comment No 13 'Right to education (art 13 of the Covenant)' adopted by the Committee on ESCR at its 21st session, 15 November to 3 December 1999 para 59.

<sup>96</sup> General Comment No 4 (n 29 above) para 8(c).

<sup>97</sup> n 27 above. For a review of the case, see DM Chirwa 'Toward revitalising economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*' (2002) 10 *Human Rights Legal Brief* 14;

things, that the state-owned Nigerian National Company and Shell Petroleum Development Corporation had been depositing toxic wastes into the local environment and waterways in Ogoniland in Nigeria without putting in place necessary facilities to prevent the wastes from spilling into villages. As a result, water, soil and oil contamination brought about serious short-term and long-term health problems, such as skin infections, gastrointestinal and reproductive complications. Further allegations were made relating to repressive measures such as the destruction of food sources, homes and villages by the military aimed at quelling opposition to the oil companies' activities. The Ogoni communities were neither consulted in the decisions that affected the development of their land, nor did they benefit materially from the oil exploration. The African Commission found the Nigerian government in violation of the rights to health, a satisfactory environment, free disposal of wealth and natural resources, shelter and housing, food and life, for its own acts and omissions and for those of the oil companies. It found that the government had breached the duty to protect the people from damaging acts of the oil companies by failing to control and regulate the activities of these companies and allowing them to deny or violate these rights with impunity.<sup>98</sup>

An important area requiring the state's protection relates to disconnections. Not only must the state ensure that the procedure for disconnections is fair and reasonable, it must also protect those people who cannot afford water on their own from arbitrary disconnections. The Water Services Act 108 of 1997 of South Africa represents a commendable legislative measure of discharging this duty by the state. According to section 4(1) of the Act, a service provider<sup>99</sup> must set conditions under which water services are to be provided. These terms include the circumstances under which water services may be limited or discontinued, and procedures for limiting or discontinuing water services. Section 4(3) stipulates that procedures for the limitation or discontinuance of water service must:

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DM Chirwa 'A fresh commitment to implementing economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*' (2002) 3 *ESR Review* 19.

<sup>98</sup> Other cases in which this duty was enforced include *Yanomani v Brazil* Resolution No 12/85, reported in *Annual Report of the Inter-American Commission on Human Rights* 1985; *Guerra & Another v Italy*, judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-1 No 64; Communication 549/1993, *Hopu & Bessert v France*, CCPR/C/60/D/549/1993, 29 December 1997.

<sup>99</sup> In terms of sec 1(xxiii), 'water services provider' means 'any person who provides water services to consumers or to another water services institution but does not include a water services intermediary'. The latter means 'any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract'. See sec 1(xxii).

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

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,<sup>100</sup> Budlender AJ held that the effect of these provisions, when read in the light of sections 27(1) (on the right of access to sufficient food and water) and 7 (mentioned above) of the Constitution, is that disconnection of an existing water supply to consumers by a local authority is a *prima facie* breach of its constitutional duty to respect the right of existing access to water.<sup>101</sup> Accordingly, where a disconnection might result in denial of access to basic water services for non-payment, the service might not be disconnected where the consumer satisfies the court that he or she was unable to pay for basic services.

In the United Kingdom, the Water Services Act of 1999 abolished disconnections or limitation of basic water services on grounds of non-payment of water bills, after many years of attempts to implement fair procedures that would protect the poor from disconnections. In terms of this Act, the premises for which water may not be disconnected for non-payment include private dwelling houses, children's and residential care homes, prisons and other detention centres, educational institutions such as schools, hospitals and nursing homes, and premises occupied by the emergency services. Such pieces of legislation are particularly important in the Southern African context where many people cannot afford commercial charges for water.

Other areas requiring the state's protection include pricing and quality of water being provided. Not all consumers should be charged at the same rate for water. To do so might result in perpetuation of inequalities or the poor being overburdened by the costs of providing water. The Committee on ESCR has stated that:<sup>102</sup>

Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

<sup>100</sup> 2002 6 BCLR 625 (W).

<sup>101</sup> n 100 above, para 27.

<sup>102</sup> General Comment No 15 (n 28 above) para 27.

In respect of water, Elizabeth Drent has argued that lack of effective monitoring mechanisms of a privatisation initiative in Canada of water testing resulted in the death and sickness of many consumers due to water contamination.<sup>103</sup>

### 5.3 The duty to provide

The state has a further duty to fulfil human rights. This duty encompasses the duty to promote,<sup>104</sup> which enjoins the state to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance and raising awareness.<sup>105</sup> The duty to promote is therefore essential to ensuring effective public participation and access by the public to information. The duty to fulfil entails an obligation to facilitate the actual realisation of the right.<sup>106</sup> This obligation requires the adoption of positive measures that enable and assist individuals and communities to enjoy the right in question.<sup>107</sup> Additionally, the duty to fulfil includes an obligation to provide the right when individuals or groups are unable to realise the right by their own means. This obligation includes the duty to ensure that water is affordable. To achieve this objective, the state is required to adopt such measures as the use of a range of appropriate low-cost techniques and technologies; appropriate pricing policies such as free or low-cost water; income supplements.<sup>108</sup> The state is enjoined to adopt comprehensive and integrated strategies and programmes to ensure that there is 'sufficient and safe water for present and future generations'.<sup>109</sup>

The right to water requires that everyone must have access to 'sufficient and continuous for personal and domestic use'.<sup>110</sup> Although the state may plead resource constraints for its failure to guarantee sufficient and continuous access to basic water, the state still has the obligation to 'ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent

<sup>103</sup> E Drent 'Privatisation of basic services in Canada: Some recent experiences' (2003) 4 *ESR Review*, 16.

<sup>104</sup> The duty to fulfil entails the obligations to 'facilitate, promote and provide'. General Comment No 15 (n 28 above) para 25.

<sup>105</sup> *SERAC* case (n 27 above) para 46.

<sup>106</sup> General Comment No 13 (n 95 above) para 47.

<sup>107</sup> As above; General Comment No 14 (n 79 above) para 37; General Comment No 12 (n 89 above) para 15.

<sup>108</sup> General Comment No 15 (n 28 above) para 27. A similar obligation in relation to the right to health enjoins the state to 'ensure provision of health care, including immunisation and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions'. General Comment No 12 (n 89 above) para 36.

<sup>109</sup> General Comment No 15 (n 93 above) para 28.

<sup>110</sup> n 109 above, para 12(a).

disease'.<sup>111</sup> The exact amount of this minimum core is impossible to pinpoint, since sanitary conditions and water demands vary from one place to another. However, the World Health Organisation's guidelines state that at least 50 litres per person per day (lcd) is needed to reach a 'low' level of concern over health impacts. 100 lcd is the minimum needed to provide a sufficient quantity for 'all basic personal and food hygiene' as well as 'laundry and bathing' assuming efficient patterns of use.<sup>112</sup> Recent research by the South African Municipal Workers Union has concluded that the amount of water needed to meet environmental health concerns is between 63 and 120 lcd, an estimate that does 'not include water used for subsistence gardening or the operation of small businesses — practices which are often essential for the survival of the poor'.<sup>113</sup>

The state must therefore put measures in place to ensure that poor people have access to minimum levels of water for personal and domestic use. Such measures could include free basic water policies such as the South African one, subsidies and similar measures.

It is clear, therefore, that, as the ultimate bearer of socio-economic rights obligations, the state has the duty to ensure that privatisation does not compromise accessibility, availability, quality and acceptability of basic services. Most importantly, it must not result in the denial of access by vulnerable and poor people to socio-economic rights. Regulatory mechanisms and assistance measures must be put in place for the state to discharge its obligations.

## 6 Conclusion

In conclusion, privatisation of basic services is a policy that, from a human rights perspective, cannot be rejected outright. Human rights law allows the state a margin of appreciation regarding measures to give effect to human rights. Some have argued that privatisation could be a measure that can enhance access to socio-economic rights. Practical evidence establishing this contribution is inconsistent and contradictory. In fact, there is some evidence suggesting that privatisation of basic services in the Southern African context where many people are poor and cannot afford water charges using their own means, has the potential to limit or has circumscribed access by people to

<sup>111</sup> n 109 above, para 37(a).

<sup>112</sup> J Bartram & G Howard 'Domestic water quantity, service level and health' 2002 WHO/SDE/WSH/03 02.

<sup>113</sup> See joint submission by Congress of South African Trade Unions and the South African Municipal Workers' Union on the Draft White Paper on Water Services, presented to the Department of Water Affairs and Forestry in 2003.

socio-economic rights. A human rights approach to privatisation of water, however, requires that privatisation should have the advancement of human rights as its primary objective. It further demands that the privatisation initiative should be structured by the principles of indivisibility of all human rights, non-discrimination, participation and accountability.

This paper has shown that human rights law holds the state as the principal bearer of duties implicit in socio-economic rights, even in the event of privatisation. Among other things, the state has the duty not to interfere with existing access to water. Thus, the state must not embark on privatisation if it is clear that it will result in the denial of access to water. It must also ensure that all its obligations arising from economic, social and cultural rights are fully taken into account when entering into contracts with private service deliverers. The state also has the obligation to protect citizens from acts of private actors. In the context of privatisation, this entails adopting measures to regulate and control the conduct of private service deliverers. The duty to fulfil requires that the state should take measures aimed at ensuring access by everyone to socio-economic rights. This duty includes the obligation to take special measures in favour of disadvantaged groups such as subsidies, cross-subsidies and other intervention measures.

Unless guided by human rights principles, privatisation of water in Southern Africa might not result in greater access to water by the people, especially the poor. Conversely, a privatisation policy that undermines human rights principles can be challenged using a human rights framework.