

**THE IMPACT OF PRIVATISATION ON SOCIO-ECONOMIC RIGHTS AND SERVICES IN
AFRICA: THE CASE OF WATER PRIVATISATION IN SOUTH AFRICA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR
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LIST OF ABBREVIATIONS

ANC	African National Congress
ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against women
CESCR	(UN) Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECOSOC	Economic and Social Council
GNP	Gross National Product
GEAR	Growth Equity and Redistribution
ESCR	Economic Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
MNCs	Multinational Corporations
NGOs	Non-Governmental Organisations
OHCHR	Office Of the High Commissioner for Human Rights
RDP	Reconstruction and Development Programme
SAPs	Structural Adjustment Programmes
SAMWU	South African Municipal Workers Union
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
WTO	World Trade Organisation

DECLARATION

I, **Henry Mwebe**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged.

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DEDICATION

To my family. You inspire me to succeed in life.

CHAPTER 1

INTRODUCTION

1.1 Background to the study

“The shiny new hotels of the waterfront in Cape Town and the building cranes of Sandton in Johannesburg belie the bigger reality of post-apartheid South Africa: crumbling or non-existent infrastructure and poor quality municipal services for the majority of the country’s urban population.¹ Poverty is the new enemy in post-apartheid South Africa, and the government’s policy of cost recovery and privatisation of basic services has created new areas of friction with the country’s poor and marginalized”.²

‘Privatisation’ is a term that is used to convey a variety of ideas. It has been defined to mean ‘denationalisation’, that is, transferring the ownership of a public enterprise to private hands.³ Another idea in vogue is ‘liberalisation and deregulation’, which unleash forces of competition.⁴ The concept of privatisation is, in fact, far wider. It is to be understood, not merely in the structural sense of who owns an enterprise, but in the substantive sense of how far the operations of an enterprise are brought within the discipline of market forces. Thus privatisation covers a wide continuum of possibilities, between denationalisation at one end and market discipline at the other.⁵

A brainchild of the International Monetary Fund (MF) and World Bank, privatisation has become one of the key and dominant instruments in economic reform processes prescribed by financial institutions and other donors. It has been incorporated in various multilateral trade agreements that promise improved efficiency in the delivery of and, ultimately, enhanced access to basic services.⁶ Although it is true that some African countries have benefited from privatising their hitherto unproductive parastatals, it is also true and unfortunate that with most African countries trapped in poverty, disease and corruption, and as the role of the state shrinks under trade and investment agreements with multilateral agencies and Transnational

¹ McDonald, D ‘Up against the crumbling wall; The privatisation of urban services and environmental justice, Privatisation and the environment, Juta & co. Ltd, 2001, 292.

² IRIN News: Cant pay, wont pay: Anti-privatisation march in Johannesburg, 24 January 2002 <www.mindfully.org/Privatisation>(accessed on 05 October 2004).

³ Ramanadham, V ‘ Privatisation in Developing countries, 1989, 4.

⁴ As above.

⁵ As above.

⁶ Chirwa, D ‘Privatisation and Socio-Economic Rights; Making Human Rights work in a globalising world; Human Rights Dialogue (spring 2003), 29.

Corporations (TNCs), so does the provision of socio-economic goods and services and the protection of human rights.

In theory, the proceeds from the privatisation of state enterprises are expected to increase government revenue. An improvement in public finances could occur either by raising revenue from the sale of assets and shares or by reducing the need for operating subsidies and investments capital. More importantly, the new owners or managers are supposed and expected to bring in capital investment, higher technology and know-how, which is ordinarily expected to lead to an increase in production. The improved enterprise will be the source of increased taxation product through the improved turnover and salary distribution.⁷ This is expected to lead to an improvement in the provision and delivery of socio-economic services and utilities like water, electricity, housing, health care, employment opportunities, and a general improvement in infrastructure.

Armed with the above philosophy, South Africa has for over ten years now been privatising its parastatals across all sectors of the economy. The state enterprises that have so far been either wholly or partially privatised include; SABC radio stations sold in march 1997, Telecom sold in may 1997, Sun Air in November 1997, Airports company, June 1998, South African Airways, July 1999; Connex travel, August 1999; Sasria, February 2000; MTN, June 2000; Transwerk perway, September 2000; Safcol, Eskom, Railways, Water services,⁸ *inter alia*. The exercise is ongoing, with many other state enterprises listed for privatisation.⁹ Statistics from the World Bank 1998/99 Report show that by the end of 1997, in value terms, privatisation transactions in South Africa were 2209 million US Dollars.¹⁰

The government embraced privatisation believing that it would lead to the realisation of the aforementioned benefits, thus improving service delivery to the citizenry. It was responding to the need to improve the basic human needs related to infrastructure, especially access to water, sanitation, energy, housing, and a clean environment, which are vital to many aspects of everyday life and a better balanced national and indeed international economy.¹¹ This notwithstanding however, many South Africans to-date still have limited access to these rights and services. The main reason is the society's profound legacy of inequality. Because of

⁷ As above.

⁸ Privatisation Forum <<http://www.finforum.co.za/econanal/2001>> (accessed on 11 October 2004).

⁹ SAMWU; Fight privatisation <<http://flag.blackened.net/revolt>> (accessed on 11 october 2004).

¹⁰ The World Bank, African development indicators 1998/1999, <www.worldbank.org> (accessed on 22 July 2004).

¹¹ Terence R. Lee, Private participation in the provision of water services; The water page <www.thewaterpage.com/ppp-debate1.htm> (accessed on 06 October 2004), 33.

apartheid and the extremely skewed pattern of economic development, South Africa has been labelled the second most unequal country in the world after Brazil.¹² The poorest 20% of the population earn only 3% of the national income, while the national share of the top 20% of the population exceeds 60%. In short, there is limited or non-existent access to infrastructure, education, primary health care, and socio-economic opportunities for the majority of the people. At present, the unemployment rate stands at 32%,¹³ only 27% of South African households have running tap water inside their residences, only 34% have access to flush toilets, and only 37% have their refuse removed by a local authority.¹⁴

Nevertheless, South African social movements and allied technical resource personnel have not given up the campaign for infrastructure and services for all. This was reflected in the promises made to the population in the Reconstruction and Development Programme (RDP), the African National Congress (ANC)'s campaign platform in early 1994. However, by late 1994, World Bank staff and local consultants were undermining those promises by developing initial arguments for the government about household affordability and funding options related to infrastructure and services.¹⁵ The technical advice was explicitly inclined towards privatisation for at least three reasons. Firstly, the Bank ignored the RDP and the Constitutional guarantee of basic services to all citizens. More so, information about relative affordability and the indirect benefits of basic services, for example, public health, environment, and micro/macro-economic multipliers was not incorporated. Finally, in its review of funding options, the Bank did not consider utilising a mode of redistribution of resources from national to local level that the ANC had promised during the 1994 election campaign and that even its own *World Development Report 1994* endorsed, namely, cross-subsidisation through a progressive block tariff that ensures 'lifeline' access to basic services for all.¹⁶

However, within a few years of the Bank's advice on privatisation and funding mechanisms for municipal infrastructure, and as these arguments were being codified as official policy, progressive resistance emerged. In April 1997, South African Municipal Workers Union (SAMWU) initiated a national campaign against the privatisation of essential municipal services, which were emerging from minor Eastern Cape towns and Nelspruit. The Union filed

¹² SAMWU: Water for all in South Africa: Policies, pricing and people. Rural Development services network. Discussion document for the "water for all" seminar, commonwealth peoples' centre meeting, Durban, South Africa, 10 November 1999, 1 < <http://flag.blackened.net/revolt>> (accessed on 11 October 2004).

¹³ Stuart Graham, Unemployment haunts South Africa, 05 March 2004 <www.iafrica.com/business/unemployment> (accessed on 24 October 2004).

¹⁴ SAMWU (n9 above).

¹⁵ Terence R. Lee, (n11 above).

¹⁶ As above.

requests to the Department of Constitutional Development (DCD) to develop alternative local solutions that retains infrastructure-related jobs in municipalities and meets the needs of unserved residents.¹⁷

The government however did not heed the above requests and protests. It followed the Bank's advice and drastically decreased grants and subsidies to local municipalities and city councils and supported the development of financial instruments for privatised delivery. This effectively forced local government to turn towards privatisation of basic services as a means of generating the revenue no longer provided by the central government. Many local government structures began to privatise public water utilities by entering into service and management 'partnerships' with multinational water corporations.¹⁸ The principles adopted by government in relation to service provision from 1994 were that the user must pay the marginal cost of services; that standards be minimal for those who cannot afford to pay the marginal cost; and that privatisation of infrastructure-related services be pursued.¹⁹ Ten years later, this study focuses on how this water privatisation and the aforementioned principles have impacted on socio-economic rights and service delivery.

1.2 Statement of the research problem

Although there have been some benefits accruing from privatisation in Africa generally and South Africa in particular, the exercise has impacted negatively on socio-economic rights and service delivery. With privatisation, the role of the state in the provision of these services has been taken over by private service providers over which states have no direct control or have failed to exercise control. Although it ought to be acknowledged that there has been an increase in the production levels of some goods and utility services, for instance, water and electricity, it is unfortunate that with several people increasingly losing their jobs as public enterprises are privatised, they cannot afford to pay the increased costs of these services. This has been the case with water privatisation in South Africa where the 'full cost recovery' model and the introduction of 'pre-paid metres' have led to disconnections of water to those who are unable to pay, thus reducing access. As a result, since 1994, over 10 million South Africans have had their water disconnected.²⁰ The main problem has been 'profit motives and

¹⁷ As above.

¹⁸ As above.

¹⁹ Williamson J, The progress of policy reform in Latin America, policy analyses in international economics, Washington DC, Institute for international economics 1990 (quoted in SAMWU; Water for all in South Africa, n12 above), 36.

²⁰ Penny Bright, Dale McKinley, Patrick Bond Water privatisation; South African Coalition formed, <www.labournet.net/sawaters> (accessed on 03 October 2004).

cost recovery' on the one hand versus 'poverty, unemployment and inability to pay' on the other. This inevitably impacts negatively on the right of access to sufficient water and also affects the enjoyment of other socio-economic rights and services like food, housing, health care, *inter alia*.

1.3 Focus and objectives of the study

This study generally centres on the debate about the impact of privatisation on socio-economic rights and services. The specific objective of the study is to establish whether the privatisation of water services in South Africa has led to denial of access, either through the lack of availability of a commercialised, cost-recovery service, or denial of access because of high rates and resultant inability to pay. The study analyses the resultant problems and how they can be addressed. It examines whether or not privatisation, which is basically aimed at improving service delivery and bringing countries in line with globalisation principles, has actually achieved that objective.

1.4 Significance of the study

To date, many African countries are religiously privatising public enterprises under the advice and guidance of the World Bank, IMF and other donor agencies. This study is aimed at addressing the impact of privatisation on socio-economic rights and the delivery of basic services. It highlights the need for both states and private service providers to address human rights concerns, particularly the delivery of socio-economic services, before, during, and after the privatisation process. Water has been chosen as a case study because it's a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity, and is a prerequisite for the realisation of other human rights.²¹ Although South Africa has made remarkable progress towards building democratic institutions and respect for human rights, the income inequalities, with a sizeable part of the population living below the poverty line inevitably means that many people, just like in other developing countries, are dependent on government for the provision of basic services like water. Findings of this study will therefore reflect not just what is happening in South Africa, but also other developing countries.

1.5 Hypotheses/ Research questions

This study deals with the following contentious questions:

²¹ UN CESCR General Comment No. 15, 29th Session, 11-29 November 2002, UN Doc E/C.12/2002/11.

- Is there a universal standard for the respect, protection, promotion and fulfilment of socio-economic rights and services?
- Who is responsible for the delivery of socio-economic services during and after privatisation? Do the respective states, the donor agencies, and other non-state actors/ private service providers ever consider what impact it would have on human rights and the delivery of socio-economic services?
- Is the current privatisation of water in South Africa effective and efficient and does it meet constitutional and international human rights standards?
- What can be done: Can the privatisation process be streamlined and a strong monitoring and regulatory mechanism put in place to ensure that privatisation improves, rather than interfere with, or erode the enjoyment of socio-economic rights and services?

1.6 Literature survey

Privatisation, a critical component of structural adjustment, is a major subject in the economic vocabulary and programs, and accordingly, plenty of literature has flourished on the subject. Recent studies, statements, and publications, including within the World Bank Group and bilateral public and private agencies, give a view of the wide spectrum of privatisation worldwide.²² Review of the literature on this topic reveals that many of the authors, especially those from developed countries, have largely been in praise of privatisation and the development it has created in developing countries. Other authors, mainly from developing countries have generally criticised the whole scheme as not being suitable for developing countries.²³

At global level, George Mathews Chunakara argues that when states are urged to privatise, the privatised entities are expected to create more work and increase production. He also argues that although the shift may increase production, when work moves to developing countries, the shift does not automatically bring western levels of employment and prosperity to the host countries. What it does bring are very profitable high-tech transnational companies, which are shielded by the state from social responsibility.²⁴

22 Oumah Makalou, Privatisation in Africa: A Critical Analysis. The 9th International Anti-corruption conference. Paper presented at the International anti-corruption conference, Centre of Studies and Research for Democracy, Economics & Social Development, Mali <www.transparency.org>(accessed on 24 July 2004).

23 As above.

24 George Mathews Chunakara, Globalisation and its impact on human rights, 2000, 4 <www.business-humanrights.org/Categories/Issues/Globalisation/> (accessed on 26 May 2004).

At national level, David McDonald, John Pape and Bond P, have written extensively about the privatisation of municipal services, including water. Their publications include: The theory and practice of cost recovery; The crisis of service delivery in south Africa; Privatization and environmental justice in south African cities; No money, no service, *inter alia*. Their publications and papers however have largely been critical. Using the South African water privatisation experience as a case study, this study examines both the positive and negative impacts of privatisation on socio-economic rights and services. It discusses the privatisation process vertically, linking the global and national perspectives. The study is focused on an analysis of the extent to which South Africa after privatising its water delivery has complied with its constitutional obligations and international standards on the respect, promotion, protection and fulfilment of the right of access to water.

1.7 Methodology

This research is library based and reliance is made of library materials like textbooks, reports, laws, regulations, privatisation contracts, and papers presented on the subject. Hard and electronic sources accessed on the Internet shall also be utilised.

1.8 Limitations and scope

This study begins with a general overview of privatisation and its interrelationship with socio-economic rights, followed by the legal framework. At the centre of the study is an analysis of the impacts of water privatisation on human rights and service delivery in South Africa. Throughout the study, reference is made to private service providers/ non-state actors, who take over the traditional role of the state to provide basic services after privatisation. An evaluation, recommendations and a conclusion will then be made on how the privatisation process can be streamlined and the monitoring and regulatory mechanism strengthened to ensure that privatisation improves, rather than interfere with, or erode the delivery and enjoyment of socio-economic rights and services.

1.9 Summary of chapters

This study is divided into five chapters. Chapter one will set out the content of the research, identify the problem and outline the methodology. Chapter two gives a general coverage of privatisation and its inter-relationship with socio-economic rights and services. Chapter three covers the international and regional legal regime governing the protection, respect, promotion and fulfilment of socio-economic rights. It also covers the obligations of both the state and non-state actors. Chapter four will analyse the water privatisation exercise in South Africa, and how

it has impacted on the enjoyment of the right of access to water. Based on the findings in chapter four, chapter five will evaluate the privatisation process and determine whether it complies with international and constitutional human rights obligations, followed by recommendations and a conclusion.

CHAPTER 2

AN OVERVIEW OF PRIVATISATION AND ITS INTER-RELATIONSHIP WITH SOCIO-ECONOMIC RIGHTS AND SERVICES

2.1 Introduction

“It is widely felt that the public sector in many developing countries is too large, and that privatisation would benefit both the users of individual services and the economy in general. However, enthusiasm for private enterprise solutions is not always matched by the requisite financial and economic technology. The sort of schemes appropriate for a country like China, with its highly planned public sector economy, and Jordan, with its dominant private sector, are unlikely to be the same. Privatisation without reference to these differences will be an economic, administrative and organisational chaos rather than a panacea”.

Ramanadham V, *Privatisation in Developing Countries*,
Routledge publishers, London and New York, 1989, 4.

This chapter is a general overview of privatisation and its interrelationship with socio-economic rights and services and addresses four questions: What privatisation procedures and methods have been used in Africa? Why privatise? What has been the role of the International Monetary Fund (IMF), the World Bank and other donor agencies in designing and advising on the implementation of privatisation and other structural adjustment economic policies? And finally, what is the interrelationship between privatisation and socio-economic rights and services?

2.2 Privatisation: The process, methods and procedures

As defined in the opening paragraph to this study, privatisation is a term that is used to convey a variety of ideas. It covers a wide continuum of possibilities, between denationalisation at one end and market discipline at the other.²⁵ Accordingly, any involvement of the private sector in the running of public enterprises, whether wholly or partial, and at whatever level, amounts to privatisation.

The waves of privatisation have recently swept across Africa with many African states, under the guidance of the World Bank, IMF and other donor agencies, out competing each other to implement the policy. It has basically cut across all sectors of the economy, leading to a direct

²⁵ Ramanadham, V, (n3 above) 4.

impact on the population. The World Bank African Development Indicators 1998/1999 show the distribution of privatisation transactions by sector as follows:

Transactions by Sector 1993-1997	
Sector	Number of transactions
Agriculture, Agro-industry & Fisheries	509
Financial	90
Manufacturing & Industry	701
Services, Tourism & Real Estate	520
Trade	232
Other	529

Source: African Development Indicators 1998/1999, The World Bank, p. 274

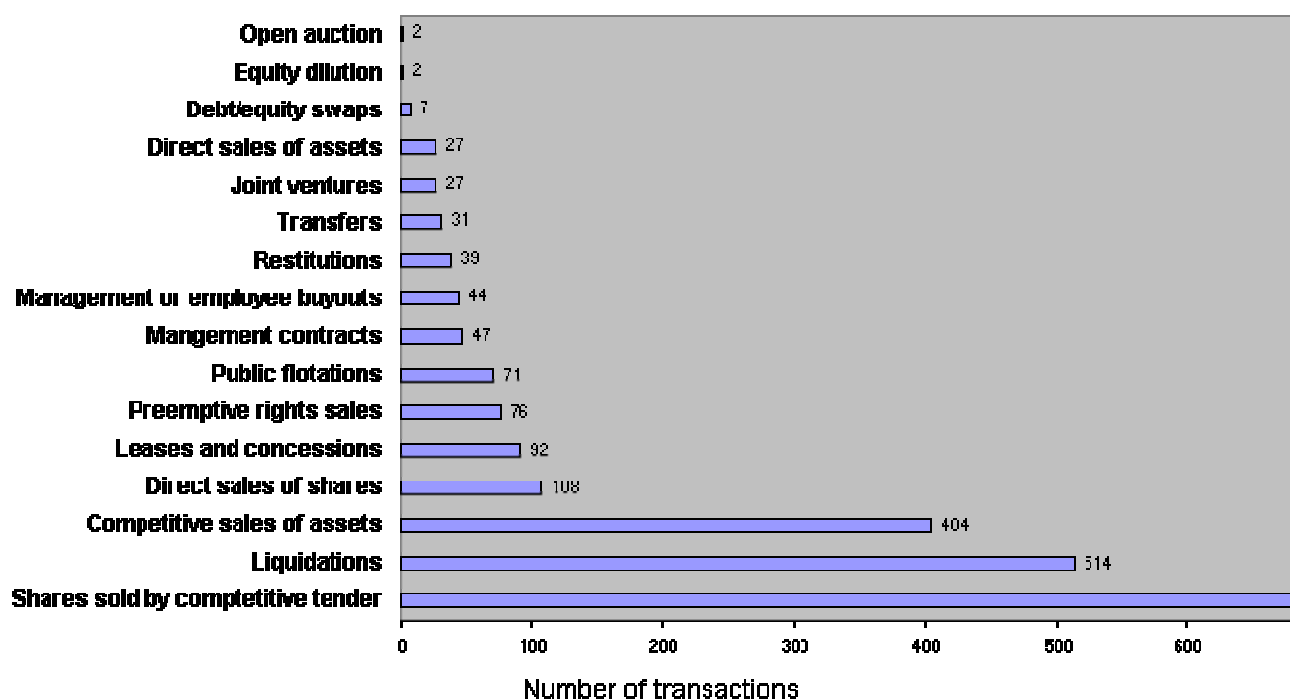
The privatisation process involves many methods and procedures. They include liquidation, the sale of shares by competitive tender, competitive sales of assets, direct sales of shares, leases and concessions, pre-emption rights sales, public flotation, management contracts,²⁶ management or employee buy-out, restitution, transfers to trustee and transfer without remuneration, joint ventures, direct sales of assets, debt/ equity swaps, equity dilution, and finally, open auction.²⁷ The water privatisation in South Africa for instance has mainly been by way of 'out-sourcing'. Outsourcing is a form of divestment of a management function to a third party. An outsourcing transaction is usually for a fixed period of time at the end of which it again goes out of tender.²⁸ The chart bellow shows the privatisation methods that have been used in Africa.

²⁶ As will be noted in chapter four, the outsourcing of water in South Africa, and the outlined water delivery contracts fall under Management contracts.

²⁷ Oliver Campbell- White and Anita Bhatia, Privatisation in Africa, The World Bank, 1998, <www.worldbank.org> (accessed on 28 July 2004), 74.

²⁸ Andre Van Niekerk; Outsourcing and transfers of undertaking < www.caselaw.co.za/viewresult > (accessed on 25 October 2004), 38.

Privatisation Methods Applied in Sub Sahara Africa, 1988-1996



Source: *Oliver Campbell- White and Anita Bhatia, Privatisation in Africa, The World Bank, 1998, 74.*

2.3 Regulatory mechanism

The requirement for regulation emanates from the need to protect national interests especially in sectors that impact on human rights and provision of basic services. This involves regulation of ownership, organisational and operational measures. Having an efficient regulatory mechanism in place ensures efficiency and compliance with human rights norms.

2.4 Arguments for privatisation

Experiences from many developing countries have shown that privatisation reduces political interference. There is a relationship between public ownership and political interference and much of the blame for the poor performance of the public enterprises can be attributed to continual political interference, politicisation of key decisions regarding personnel administration and lack of managerial autonomy.²⁹ In many cases, public enterprises have become a vehicle for political patronage, corruption, nepotism, misappropriation of public funds, and indeed an instrument for furthering the political and material interests of the ruling parties. Privatisation insulates the enterprise from inefficient political influences. Although there are some examples of public enterprises working effectively, the problem is that governments find it difficult to

²⁹ Terence R. Lee, (n11 above).

commit to good behaviour. The end result is that many countries have found it difficult to reform public utilities, choosing instead to privatise them.³⁰

Another reason is the need to change property rights. Public ownership attenuates property rights, reducing incentives to minimise costs. Under private property, rights are transferable and sellers of the rights can capture the capitalisation of efficiency gains. The owners have incentives for continuously seeking improvements in efficiency and controlling management to ensure efficiency in the production of goods and services.³¹

Furthermore, it is very difficult to solve the principal-agent problem that exists between the state as an owner and the managers of the state owned enterprises without privatisation. When utilities are in the state sector, their managers face little market competition and lack incentives to operate efficiently. Privatisation also leads to effective financial management. Public utilities obtain financing through the state. Private companies on the other hand have to raise resources in the capital market. This means that they are subject to the discipline imposed by the private capital market and the market for corporate control.³²

It is these reasons that the IMF, World Bank and other donor agencies usually advance when advising states to privatise. As a background to an understanding and appreciation of the role played by these organisations, their activities and objectives are briefly discussed below.

2.5 The World Bank and International Monetary Fund (IMF) as architects of privatisation

2.5.1 The World Bank

The World Bank is one of the United Nations' specialized agencies, and is made up of 184 member countries.³³ The World Bank Group's mission is to fight poverty and improve the living standards of people in the developing world. It is a development Bank that provides loans, policy advice, technical assistance and knowledge sharing services to low and middle income countries to reduce poverty. The Bank promotes growth to create jobs and to empower poor people to take advantage of these opportunities.³⁴

³⁰ As above.

³¹ As above.

³² As above.

³³ About the World Bank <www.worldbank.org> (accessed on 02 August 2004).

³⁴ As above.

The World Bank Group consists of five closely associated institutions, all owned by member countries that carry ultimate decision-making powers. They are: The International Bank for Reconstruction and Development (IBRD), The International Development Association (IDA), The International Finance Corporation (IFC), The Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).³⁵ Each institution plays a distinct role in the mission to fight poverty and improve living standards for people in the developing world. The term 'World Bank Group' encompasses all five institutions. The term 'World Bank' refers specifically to two of the five, that is, The International Bank for Reconstruction and Development (IBRD) and The International Development Association (IDA).³⁶

2.5.2 The International Monetary Fund

The IMF is an international organization of 184 member countries. It was established to promote international monetary cooperation, exchange stability, and orderly exchange arrangements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments adjustment.³⁷ Since the IMF was established its purposes have remained unchanged, but its operations, which involve surveillance, financial assistance, and technical assistance, have changed depending on the changing needs of the member countries in an evolving world economy.³⁸

2.5.3 Public responses to IMF/ World Bank policies

The foregoing outline of the activities of the IMF and World Bank shows that the main objective of these organisations is the realisation of economic development in developing countries worldwide. However, both institutions have been accused of imposing structural adjustment programmes onto these countries. All over Africa, the public has shown dissatisfaction at the implications of their policies and activities. Casson summarised these public reactions when he stated that:

³⁵ As above.

³⁶ As above.

³⁷ IMF <www.imf.org> (accessed on 02 August 2004).

³⁸ As above.

“Public sentiments on the streets of Washington were highly charged during the annual meeting of the World Bank and IMF late last month. A number of civil society groups from Africa were against the creeping privatisation of essential services like water and electricity in their countries”.³⁹

However, with many of the developing countries engulfed by poverty, they have no option but to comply with the requirements and demands of these institutions. In some countries, people have held public protests, but with limited success. A case in point is Zambia, where on 14 December 2002, Zambian trade unionists demonstrated their opposition to the pressure from the IMF to force the sale of the state-owned National Commercial Bank.⁴⁰ The IMF threatened Zambia with losing one billion dollars worth of debt relief if it did not go ahead to privatise the Bank, the country's biggest.⁴¹

A review of IMF loan policies in forty random countries reveals that during 2000, IMF loan agreements in 12 countries included conditions imposing water privatisation.⁴² In general, it is mainly the poorest and debt-ridden countries that are being subjected to these conditions, even at the cost of local democracy. Rodrick describes this as unfortunate:

"Policy making at the international level has to create space for national development efforts that are divergent in their philosophy and content. Forcing all countries into a single, neoliberal developmental model would be unwise – in light of the potential political backlash from national groups – even if there were serious grounds to believe that the model is economically advantageous”.⁴³

In South Africa, the role of these organisations in shaping local government policy and their ideological influence in terms of promoting privatisation has been profound.⁴⁴ The World Bank has also teamed up with the United Nations Development Programme (UNDP) in form of the Urban Management Programme, which promotes private sector involvement in services in the region. The UNDP also established the ‘Public-Private Partnerships for the urban environment’. The World Trade Organisation (WTO) is involved as well in terms of having

³⁹ Jim Casson, Public outcry at privatisation of essential services, September 2003, <www.southcentre.org/info/southbulletin> (accessed on 26 July 2004), 7.

⁴⁰ Zambia demo over IMF privatisation pressure < www.union-network.org/unifinance.ns> (accessed on 02 August 2004).

⁴¹ As above.

⁴² IMF forces African Countries to privatise water < www.afrol.com/News2001> (accessed on 02 August 2004).

⁴³ Dani Rodrik, The New Global Economy and Developing Countries: Making Openness Work<www.southcentre.org> (accessed on 27 July 2004), 16.

⁴⁴ As above.

South Africa ratify the General Agreement on Trades and Services (GATS) framework, which, critics have argued, paves the way for multinational corporations to take over public services.⁴⁵ The 'full cost recovery' principle, which has been used in water privatisation, was originally introduced as a World Bank condition for obtaining credit, and it remains an absolute condition among the Bank, the IMF and other aid agencies such as USAID, Britain's DFID, Germany's GTZ and the European Union (EU).⁴⁶

Thus, these institutions are what can literally be described as 'world economic policemen' for their direct involvement, interference and supervision of countries' economic activities. Unfortunately, the recipient countries, being hard pressed by poverty usually ignore the need for relationships with such international financial institutions to be conducted in a way that protects the integrity of domestic policy formulation and promotes human rights, the interests of the local population, and the economy.⁴⁷

2.6 The interrelationship between privatisation and socio-economic rights and services

Human rights law does not prescribe who should provide essential services. It is concerned with two key questions:⁴⁸ The first question relates to the process of privatisation – the 'how'. Was the tendering process transparent? Was there public discussion on the privatisation process? Was there adequate dissemination of information? Was there public consultation on the standard of service delivery, whether publicly or privately provided? The second question concerns the implementation of service delivery agreements and their outcomes. For example, is service delivery discriminatory? Are customers being cut off from the service without due process? Is service delivery adequate, affordable, acceptable, adaptable, available and accessible?⁴⁹

Inevitably, the privatisation of public enterprises has implications for the delivery and enjoyment of socio-economic rights and services. As already discussed above, on a positive note, privatisation has the potential to enhance operational efficiency, competition, economic growth and development. The achievement of these micro-objectives can result in the

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ Third World Network; Why South Africa should say "NO" to IMF policies, <www.twinside.org.sq> (accessed on 02 August 2004).

⁴⁸ Sihaka Tsemo, Privatisation of basic services, democracy and human rights, ESR Review, Economic and Social Rights in South Africa, a Quarterly publication by the Community Law Centre, University of the Western Cape, Vol 4, No.4 November 2003, 2.

⁴⁹ As above.

production of more quantity of the privatised service of a competitive quality at lower costs, hence more access to and the better enjoyment of socio-economic rights.⁵⁰

Furthermore, privatisation has a redistributive thrust that is consistent with the ends of socio-economic rights. In South Africa for example, privatisation is regarded as an important resource for black empowerment. This redistributive potential can be realised by inviting and encouraging employees of an enterprise, or previously disadvantaged individuals and groups, to buy shares or participate in the privatised enterprise.⁵¹ More so, privatisation may mean that costs spent on monitoring and subsidising state owned enterprises are saved. These resources plus the proceeds from the sale of the enterprises can be used for settling the foreign debt, balancing the national budget or investing in other priority areas such as education and childcare.⁵²

The above notwithstanding, there are a variety of ways in which privatisation can undermine the enjoyment of socio-economic rights. In the first instance, it can result in a two-tiered service supply focused on the healthy and wealthy on one hand, and an under financed public sector focusing on the poor and sick on the other. It can also result in brain drain, with better-trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures.⁵³ More so, the emphasis the proponents of privatisation place on commercial objectives can undermine the pursuit of social objectives focused on the provision of quality health, water and education services for those that can not afford them at commercial rates.⁵⁴

Accordingly, it is important that the process of privatisation is pursued in compliance with democratic norms. The state is not relieved of its human rights responsibilities by privatising the provision of basic services. It has a key regulatory and monitoring role and a clear constitutional duty to realise socio-economic rights. As noted above, human rights law is not concerned with 'who' provides the services. Instead, it is concerned with 'how' they are provided.⁵⁵ In designing upgrading programs, and particularly when scaling up there is a

⁵⁰ Chirwa D, Socio-Economic Rights and privatisation of basic services in South Africa, A theoretical framework, ESR Review, (n48 above), 5.

⁵¹ As above.

⁵² As above.

⁵³ Sihaka Tsemo (n48above) (quoted by Chirwa D in n50 above) 6.

⁵⁴ Chirwa D, (n50 above) 6.

⁵⁵ Victoria Johnson and Chirwa, D 'Report on the seminar on privatisation of basic services, democracy and human rights, Hosted by the Socio-Economic Rights Project and the Local Government Project of the Community Law Centre on 2–3 October 2003, at the University of the Western Cape <www.communitylawcentre.org.za> (accessed on 10 August 2004), 1.

need to have an understanding of the socio-economic situation of the communities that will be affected.⁵⁶

2.7 Conclusion

The foregoing analysis shows that privatisation and socio-economic rights and services are inter-related. With the involvement of private service providers, issues of 'who is responsible' for the protection of human rights and provision of socio-economic services arise. The next chapter will discuss both the state and non-state actors' obligations and the legal framework against which compliance can be evaluated.

56 World Bank; Socio-economic issues, Urban services to the poor <[www. Worldbank.org/urban/upgrading](http://www.Worldbank.org/urban/upgrading)> (accessed on 10 August 2004).

CHAPTER 3

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK GOVERNING SOCIO-ECONOMIC RIGHTS AND SERVICE DELIVERY

3.1 Introduction

This chapter gives an overview of socio-economic rights and addresses the current international and regional legal regime governing their protection, respect, promotion and fulfilment. It also covers the obligations of states and non-state actors as provided for under various human rights instruments and international law. This will act as a yardstick for analysing and evaluating whether the current water privatisation in South Africa is effective and efficient and whether it meets constitutional and international human rights standards.

3.2 Understanding socio-economic rights: Their birth and evolution

“Two hundred years ago...all of the essentials of life could be found outside of the organised sector...Two hundred years later, most individuals are dependent on organised society for their needs...Corn cannot be grown on the sidewalk, nor can homes be built without materials and land. These radically changed circumstances have led inevitably to international human rights law placing a burden on states to ensure the physical survival and well being of their people”⁵⁷

Through millions of years, people sought their own sustenance without thought of assistance from a political entity. Human migration and evolution were shaped by the individual struggle for basic needs like food, shelter and clothing. Viewed in the long sweep of history, it is remarkable how radically human circumstances have changed in the recent past. However, public attitudes and public policies have not changed to keep pace with this legal evolution.⁵⁸ Nevertheless, over the past half a century, the world has successfully established an international regime of human rights law. In accords such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),⁵⁹ and the Convention

⁵⁷ Charles A. Reich, *The New Property after 25 years*, 24 U.S.F.L Rev.223, 228-29 (1990), (quoted by Robert E. Robertson in the *Human Rights Quarterly*, a comprehensive and international journal of the social sciences, humanities and Law, vol. 16, No. 4 Nov. 1994, The John Hopkins University Press), 693.

⁵⁸ Robert E. Robertson in the *Human Rights Quarterly*, a comprehensive and international journal of the social sciences, humanities and Law, (as above), 693.

⁵⁹ Adopted on 18 December 1979 under UN General Assembly Resolution No.34/180.

on the Rights of the Child (CRC)⁶⁰, states have agreed that our basic human dignities include not only civil and political rights, but also economic, social and cultural rights.⁶¹

The UDHR provides for socio-economic rights like the right to property,⁶² social security⁶³, work⁶⁴ and health⁶⁵ and an adequate standard of living.⁶⁶ The ICESCR is the major international treaty for their protection⁶⁷ and recognises the right to work and to just and favourable conditions of work,⁶⁸ to form and join trade unions and to strike,⁶⁹ social security,⁷⁰ special protection for the family, mothers, and children,⁷¹ an adequate standard of living including food, clothing and housing,⁷² physical and mental health,⁷³ and education.⁷⁴

However, despite the fact that socio-economic rights are solidly embedded in all these instruments, there remains considerable disagreement about their precise meaning and the resultant state obligations. To some scholars however, their importance *vis a vis* civil and political rights cannot be doubted. De Vos has stated:

‘We vote once every five years, perhaps, but we have to eat every day’.⁷⁵

⁶⁰ Articles 3, 26, 27 and 28, CRC, adopted on 20 November 1990, under General Assembly Resolution No.44/25.

⁶¹ Jim Shultz, Privatisation versus Human Rights, Lessons from the Bolivian water revolt, ESR Review, (n47 above),13.

⁶² Article 17 (1) & (2), UDHR.

⁶³ Article 22.

⁶⁴ Article 23.

⁶⁵ Article 25.

⁶⁶ Article 26.

⁶⁷ South Africa signed the Covenant in 1994, but has not yet ratified it.

⁶⁸ Article 7, ICESCR, adopted by the General Assembly of the United Nations on 16 December 1966.

⁶⁹ Article 8.

⁷⁰ Article 9.

⁷¹ Article 10.

⁷² Article 11.

⁷³ Article 12.

⁷⁴ Article 13.

⁷⁵ De Vos, P; Pious Wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 constitution, South African Journal of Human Rights, 1997, 67.

Generally, these rights are often seen as ‘positive’ rights⁷⁶ and rather than simply protecting members of society from the heavy hand of state power, the idea of socio-economic rights is that the state must be obliged to do whatever it can to secure for all members of society a basic set of social goods; education, health care, food, water, shelter, access to land and housing⁷⁷, *inter alia*.

From the point of view of politics and economics however, there is considerable argument about the wisdom of requiring the state to deliver a list of socio-economic goods to the populace. For lawyers, the principal difficulty with socio-economic rights lies in their justiciability, that is, the extent to which they can or cannot be enforced by a court. The idea behind a justiciable Bill of Rights is that decisions affecting certain rights and liberties should be reviewed by an institution standing outside the political sphere, namely, the judiciary.⁷⁸ Attempts to make these rights part of a Bill of Rights are usually met by the argument that they are not suited to judicial enforcement. Because they are positive rights, it has been argued that their application requires the courts to direct the way in which the government distributes the state’s resources and are therefore beyond the proper scope of a judicial function. It is argued that the judiciary is usually an elite and undemocratically appointed branch of the state and therefore lacks the democratic legitimacy necessary to decide the essentially political question of how to divide social resources between factions, groups, and communities in society.⁷⁹

In line with the above argument is the traditional conception of social and economic rights which characterises this category of rights as social objectives agreed upon by states, but not enforceable by citizens. According to this approach, these rights may be made the subject of expert review and comment, assessing whether states are living up to their ‘aspirations’, but not of rights claims adjudicated by courts or other bodies.⁸⁰ Until recently, it was the traditional paradigm of social and economic rights, which prevailed within the U.N treaty monitoring system. The system was conceived as a dialogue between governments and a committee of appointed experts without any formal recognition of a role for NGO’s or constituencies whose rights were at stake.⁸¹ Fortunately, this approach has since changed with both international and regional instruments, and monitoring mechanisms emphasising the indivisibility and

⁷⁶ Michelo Hasungule, Socio-Economic rights in the African Regional Human Rights System, paper presented at the Centre for Human Rights, University of Pretoria, 10 June 2004 (not published, with author on file), 5.

⁷⁷ As above.

⁷⁸ Johan De Waal, Curie I and Erasmus G; The Bill of Rights Handbook 2001, 4th ed. Juta & co. Ltd, 433.

⁷⁹ As above.

⁸⁰ As above .

⁸¹ As above.

equality of all human rights and stressing the need for full participation and cooperation of all stakeholders in the efforts for their realisation.

3.3 International standards

Although it is a key principle of international human rights law that all human rights, civil and political, as well as economic, social and cultural rights, are closely interrelated and of equal status,⁸² practical experience has shown that it is erroneous to assume that if one set of rights is implemented, the other will follow automatically. For example, in the United States of America, the protection of civil and political rights has not automatically led to the realisation of economic and social rights. Other governments have in the past insisted that economic and social rights must be implemented first (for example, USSR), but this has also not resulted in any automatic protection of civil and political rights.⁸³

Accordingly, whether in litigation, public advocacy or academic discourse, those working in the area of social and economic rights have relied extensively on international human rights law, and particularly on the ICESCR to elucidate the content and meaning of rights.⁸⁴ Even where social and economic rights are explicitly protected in domestic law, the paucity of domestic jurisprudence and judicial unfamiliarity with these rights means that courts, NGO's, academics and politicians will continue to turn to international human rights law for guidance. Of particular importance are the views of the U.N Committee on Economic, Social and Cultural Rights (CESCR), which is charged with overseeing the compliance of state parties with the covenant.⁸⁵ The CESCR releases 'Concluding Observations' after each periodic review of State parties to the covenant (approximately every five years apart). It also adopts 'General Comments', on particular aspects of the Covenant. Some of the comments adopted so far include: article 22; international technical assistance measures,⁸⁶ article 2; the nature of the obligations of state parties,⁸⁷ article 11(1); the right to adequate housing,⁸⁸ article 11; the right

⁸² Philip Alston, Economic and Social Rights in the International Arena, ESR Review, (n47 above), Vol 1, No. 2 July 1998, 2.

⁸³ As above.

⁸⁴ Bruce Porter, Socio-Economic Rights Advocacy- Using International Law, Notes from Canada, ESR Review, (n48 above), Vol 2, No. 1 July 1999, 1.

⁸⁵ As above.

⁸⁶ General Comment No. 2 (Fourth session, 1990, UN doc. E/1990/23.

⁸⁷ General Comment No. 3 (Fifth session, 1990) UN doc.E/1991/23.

⁸⁸ General Comment No. 4 (Sixth session, 1991) UN doc.E/1992/23.

to adequate food,⁸⁹ article 13; the right to education,⁹⁰ article 12; the right to health,⁹¹ and General comment number 15 about the right to water. The aim of these General Comments is not merely to provide the committee with tools for evaluation, but to assist states and other bodies in the promotion and implementation of the rights.

3.4 State Obligations

The obligations imposed on states by the ICESCR are at three levels: the primary level, secondary level, and the tertiary level.⁹² At the primary level, the states are under duty to 'respect', to 'protect' at the secondary level, and to 'promote' and 'fulfil' at the tertiary level. These levels give rise to both negative and positive obligations.⁹³ The duty to respect entails a negative obligation not to infringe on peoples' exercise of their rights. The duty to protect obliges the state to take measures to ensure that bearers of rights do not suffer unwarranted interference with their rights from private or non-state parties, or at least to provide effective remedies should that occur. The duty to promote relates to the requirement to create an environment in which people know their rights. The duty to fulfil requires the state to ensure that those who lack access to the goods and services in question gain such access, by facilitating this or, where people are unable to gain such access, providing the goods or services.⁹⁴

Article 2(1) of the ICESCR requires states to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of their resources, with a view to achieving progressively the full realisation of the rights in the covenant by all appropriate means, including particularly the adoption of legislative measures. This provision imposes an obligation on states 'to move as expeditiously and effectively as possible' towards realising the listed objectives.⁹⁵ The Committee has interpreted this in its

⁸⁹ General comment No. 12 (Twentieth session, 1999) UN doc E/2000/22.

⁹⁰ General comment No. 13 (Twenty-first session, 1999) UN doc.E/2000/22.

⁹¹ General comment No. 14 (Twenty-second session, 2000) UN doc.E/C.12/2000/4.

⁹² Mbazira C, 'The enforcement of socio-economic rights in the African Human Rights system: Drawing inspiration from the ICESCR and South Africa's evolving jurisprudence, LL.M thesis, university OF THE western Cape, 2003,11.

⁹³ As above.

⁹⁴ Brand D and Heyns C, Socio-Economic Rights in South Africa (2004), (not published, forthcoming), 3.

⁹⁵ Johan De Waal, Curie I and Erasmus G (n78 above), 436.

General Comment No. 3, by giving content to the words ‘progressive realisation within available resources’:⁹⁶

“The obligation ‘to achieve progressively the full realisation of the rights’ requires states to move as expeditiously as possible towards the realisation of the rights. This however should not be interpreted as implying that the states can defer indefinitely efforts to ensure full realisation of the rights.⁹⁷ The concept constitutes recognition of the fact that the realisation of the rights will generally not be achieved in a short time.⁹⁸ But realisation over time does not mean depriving the obligations of all meaningful content.⁹⁹ Deliberate retrogressive measures need the most careful consideration and would need to be fully justified by reference to the totality of the rights to be provided for”.¹⁰⁰

Furthermore, the committee has stated that each of the rights in the ICESCR establishes a core minimum obligation incumbent on the state to ensure satisfaction of that right at the very least minimum. That if the covenant were to be read in such a way as not to establish a minimum core, it would largely be deprived of its *raison d’être*.¹⁰¹ But in order for a state party to be able to attribute its failure to resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁰² But even where resources are demonstrably inadequate, the obligation remains for the state to strive to ensure the possible enjoyment of the rights under the prevailing circumstances. The minimum threshold approach does not entail the division of rights according to their priority, rather each right should be realised to the extent that provides for the basic needs of every member of society.¹⁰³

The CESCR has summarised the above guidelines into the following general guiding principles:¹⁰⁴

- i. The fact that the full realisation of socio-economic rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and

⁹⁶ General Comment No. 3 (n87 above).

⁹⁷ As above.

⁹⁸ General Comment No.3, (n87 above) para 91.

⁹⁹ As above.

¹⁰⁰ As above.

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ Craven (1995) 140 (quoted by Mbazira C, n92 above, 23).

¹⁰⁴ General Comment No.3, (n87 above).

other steps as soon as possible. The burden is on the state to show that it is making progress towards the full realisation of the right.¹⁰⁵

- ii. While the requirement that a state take appropriate steps towards the realisation of the rights confers a considerable margin of discretion on states, there is nevertheless an obligation to justify the appropriateness of the measures adopted. The determination whether a state has taken all appropriate measures remains the one for the committee to make.¹⁰⁶
- iii. Resource scarcity does not relieve states of what the committee on Economic, Social and Cultural Rights terms 'core minimum obligations'.¹⁰⁷ Violations of socio-economic rights will occur when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations. These core minimum obligations apply unless the state can show that its resources are 'demonstrably inadequate' to allow it to fulfil its duties. However, even when resources are scarce the obligation remains on the state to 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.¹⁰⁸
- iv. It is important to distinguish the inability from the unwillingness of a state to comply with its obligations. The fact that obligations are to be realised progressively does not mean that the state may postpone its obligations to some distant or unspecified time in the future. A state claiming that it is unable to carry out its obligations because of resource scarcity is under a burden of proving that this is the case.¹⁰⁹

Of particular relevance to this study however, it should be noted that although the ICESCR does not expressly make provision for the right to water, the CESCR has backed its legal existence by stating that:

"Article 11, paragraph 1, of the covenant specifies a number of rights emanating from, and indispensable for the realisation of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since its one of the most fundamental conditions of survival".¹¹⁰

¹⁰⁵ Maastricht Guidelines on violations of Economic, Social and Cultural Rights, reprinted in (1998) 20 Human Rights Quarterly 691, para 8.

¹⁰⁶ As above.

¹⁰⁷ As above, para 10.

¹⁰⁸ As above para 9.

¹⁰⁹ As above, para 13.

¹¹⁰ UN General Comment No. 15, 29th Session, UN Doc.E/C.12/2002/11.

The CESCR has stated that the right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies'. By contrast, the entitlements include the right to a system of water supply and management that provides equal opportunity for people to enjoy the right to water.¹¹¹ In addition, the CESCR has outlined the elements of the right to water: it must be adequate for human dignity, life and health. That the adequacy of water should not be interpreted narrowly by mere reference to volumetric quantities; water should be treated as a social and cultural good, and not primarily as an economic good. The factors that have to be considered when determining adequacy have been defined to include availability, quality and accessibility. Accessibility has four overlapping dimensions; physical accessibility, economic accessibility, non-discrimination and information accessibility.¹¹²

The obligation of the state to respect the right to water requires that the state refrains from interfering directly or indirectly with the enjoyment of this right. This includes refraining from engaging in any practice or activity that denies equal access to adequate water, arbitrarily interfering with traditional or customary arrangements for water allocation, or unlawfully diminishing or polluting water.¹¹³

The obligation to protect requires states to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. Where water services are operated or controlled by third parties, state parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses, an effective regulatory system must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.¹¹⁴

Finally, the obligation to fulfil requires state parties to adopt the necessary measures directed towards the full realisation of the right to water. This includes ensuring that water is affordable, adopting comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations, and ensuring that everyone has access to adequate sanitation.¹¹⁵

¹¹¹ As above.

¹¹² As above.

¹¹³ As above, Para 21.

¹¹⁴ As above Para 23.

¹¹⁵ As above, Para 25.

3.5 Obligations of non-state actors/ Private service providers

Traditionally, the state carries the obligation to protect, promote, respect and fulfil human rights. This reasoning has been largely responsible for the failure to apply human rights in relationships between private parties. However, limiting the application of human rights to vertical relationships is no longer sufficient to ensure their protection.¹¹⁶ Non-state actors such as multi-national corporations have committed, and continue to commit massive violations of human rights. Such developments, among others, provide a basis for the extension of the application of human rights to private actors.¹¹⁷ However, a serious constraint to the effective horizontal application of human rights has been the failure to establish the precise nature of the obligations of non-state actors, particularly in the realm of socio-economic rights.¹¹⁸

The 'state action' paradigm could serve as a useful basis for distinguishing the level of responsibility of non-state actors for socio-economic rights. This test has been used to determine whether a given private actor should be held liable for human rights violations. Thus, a plaintiff would not succeed in suing a non-state actor unless he or she has established that the conduct of the non-state actor amounted to state action or was linked to the state.¹¹⁹ Thus, private actors exercising the functions of the state would be held liable for human rights violations.¹²⁰

As noted above however, the duty of asserting responsibility for human rights violations for non-state actor responsibility inevitably remains that of the state, and all human rights instruments contain explicit obligations for states to take effective measures to prevent violations of human rights. Through the effective discharge of the states duty to protect human rights, TNCs may be indirectly held accountable for human rights violations.¹²¹ This

¹¹⁶ Chirwa D, Non- state actors' responsibility for socio-economic rights, The nature of their obligations under the south African Constitution, ESR Review, (n48 above), 2.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ McCorquodale "Feeling the heat of HUMAN rights Branding: bringing Transnational Corporations within the human rights fence" (2001) Human rights and Human welfare 26, <www.du.gsis/hrhw/volumes/2001> (accessed on 27 October 2004) 1.

has been confirmed by the Inter-American Court on human rights in the case of *Velasquez Rodriguez v Honduras*¹²² where court held that:

“An illegal act which violates human rights and which is initially not directly imputable to a state can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”.

‘Due diligence’ has therefore been interpreted to require such reasonable measures of prevention of human rights violation that a well administered government could be expected to exercise under similar circumstances. The state has a duty to prevent, investigate, punish and remedy human rights violations committed by private actors.¹²³

Furthermore, the Maastricht Guidelines on violations of socio-economic rights recognise the state responsibility to ensure that private entities or individuals, including TNCs over which they exercise jurisdiction, do not deprive individuals of their rights.¹²⁴ States are responsible for violations of socio-economic rights that result from the failure to exercise due diligence in controlling the behaviour of non-state actors.¹²⁵ In practice, the CESCR has affirmed this position in its state reporting procedure, thus confirming that the realm of state responsibility extends not only to the acts of the state but also to third parties over whom the state should have control.¹²⁶

Various human rights treaty monitoring bodies worldwide have considered the question of state responsibility for corporate violations. There exist decisions of the Human Rights Committee,¹²⁷ the European court on Human Rights,¹²⁸ and the Inter-American commission¹²⁹ affirming the responsibility of individual states to ensure that corporate conduct does not violate human rights. In SERAC, the African Commission held that:

¹²² Inter American Court of Human Rights (Ser. C) No. 4 (1988) 28 ILM (1989) para 172.

¹²³ Shelton “State responsibility for covert and indirect forms of violence” in Mahoney & Mahoney (eds) (1993) 272.

¹²⁴ Maastricht Guidelines, (n105 above), para 18.

¹²⁵ As above.

¹²⁶ Craven (1995) 112(quoted by Odhiambo Odongo, Making non-state actors accountable for violations of socio-economic rights: a case study of Transnational Corporations in the African context, LL.M thesis, university of the western Cape, 2002, 31).

¹²⁷ Hopu and Bessert v France, UN Doc.CCPR/C/60/D/549/1993.

¹²⁸ Guerra & Anor v Italy, ECHR Reports on Judgements and decisions 1998-1, NO. 64.

¹²⁹ IACHR, Report of the situation of human rights in Ecuador, OAS Doc.OEA/Ser.L/V/11.96 (1997).

“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties”.¹³⁰

However, the main constraint with regard to the direct obligation of non-state actors is the absence of mechanisms towards such enforcement (with the exception of the nominal procedure under international criminal law and the emerging trends in domestic courts to assert corporate responsibility).¹³¹

3.6 Regional standards

3.6.1 The African Charter on Human and Peoples’ Rights

Economic, social and cultural rights have become part and parcel of international human rights law, not only at the universal, but also at the regional level. In Africa, the most important instrument protecting human rights is the African Charter. The charter makes provision for the full realisation of socio-economic rights and places an immediate duty on the state to begin to realise them.¹³² It does not draw a distinction between civil and political rights, and economic, social and cultural rights, but treats them as inter-related, inter-dependent and indivisible.¹³³ It incorporates a wide range of socio-economic rights including: the right to property,¹³⁴ right to work under favourable conditions and equal pay for equal work,¹³⁵ right to health,¹³⁶ and the right to education. The African Commission is tasked with overseeing the implementation and enforcement of the Charter. It considers reports from member countries and complaints from individuals and groups alleging violations of the Charter.¹³⁷

¹³⁰ As above, para 57.

¹³¹ Odhiambo Odongo, Making non-state actors accountable for violations of socio-economic rights: a case study of Transnational Corporations in the African context, LL.M thesis, University of the Western Cape, 2002, 32.

¹³² Amadi S, The African Charter on Human and Peoples’ Rights, Realising its potential, Economic and Social Rights in the International Arena, ESR Review, (n23 above), Vol 3, No. 1 July 2002, 4.

¹³³ Preamble of the African Charter, Para 8.

¹³⁴ Article 14.

¹³⁵ Article 15.

¹³⁶ Article 16.

¹³⁷ Amadi S (n132 above).

The Commission's jurisprudence shows its commitment to guard against violations of socio-economic rights. A landmark case is the SERAC¹³⁸ decision, which brings into light within a human rights treaty monitoring framework, the challenges of TNCs accountability for violations of socio-economic rights. This matter involved alleged violations of a range of socio-economic rights including health, a clean and healthy environment and housing. The Commission basing its decision on the state's duties to respect, protect, promote and fulfil all human rights found Nigeria in violation of the above rights. However, a let down in the SERAC decision is its failure to explicitly discuss the notion of direct private actor responsibility especially in view of the grave violations of socio-economic rights highlighted by the case.¹³⁹ The decision nevertheless demonstrates the importance of the host state's liability for the human rights obligations of non-state actors.¹⁴⁰

Furthermore, to improve the commission's effectiveness, a protocol has been introduced for the establishment of an African Court on human and peoples' rights. Unlike the Commission, this Court is empowered to make binding and enforceable decisions. However, individuals and NGO's can only be able to bring complaints against an offending state when such a country has explicitly agreed to its jurisdiction.¹⁴¹ Nevertheless, this is a welcome trend in ensuring human rights enforcement.

3.7 Conclusion

The aim of recognising socio-economic rights is to ensure that all human beings have access to the resources, opportunities and services needed for an adequate standard of living. It ought to be acknowledged that poverty constitutes the most formidable threat to human rights. Socio-economic rights deal with the material welfare of people, and as a result, the realisation of socio-economic rights is central to the success of any attempt to establish a society based on human rights.¹⁴² The Government and, in certain circumstances, private individuals and bodies, can be held accountable if they do not respect, protect, promote and fulfil these

¹³⁸ The Social and Economic Rights Action Centre & Anor v Nigeria, Communication No.155/96, decided at the African Commission's ordinary session held from 1 to 27 October 2001.

¹³⁹ Odhiambo Odongo, (n131 above), 39.

¹⁴⁰ As above.

¹⁴¹ As above, 5.

¹⁴² Brand D and Heyns C, (n94 above) 3.

rights.¹⁴³ Against this yardstick, the next chapter will give an in-depth analysis of water privatisation in South Africa.

¹⁴³ Sandra Liebenberg & Karrisha Pillay, *Socio-Economic Rights in South Africa*, A resource book published by the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, South Africa, 2000, 12.

CHAPTER 4

THE PRIVATISATION OF WATER IN SOUTH AFRICA AND ITS IMPACT ON SOCIO-ECONOMIC RIGHTS AND SERVICE DELIVERY

4.1 Introduction

“Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. Water, and water facilities and services, must be affordable for all”.

UN Committee on Economic, Social and Cultural Rights, November 2002.

The previous chapters have given an understanding of privatisation and socio-economic rights and their enforcement at the international and regional level. This chapter focuses on water privatisation in South Africa and how it has impacted on socio-economic rights, particularly the right of access to water. The first part of the chapter looks at South Africa’s socio-political background, and sets the stage for an understanding of why privatisation was proposed as a model for institutional change. The national legal framework and regulatory mechanisms are outlined. The second part of the chapter looks at how the water privatisation exercise has been implemented, and closes with an analysis of its impacts.

4.2 Background information; Socio-political history

“ We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society ...”.¹⁴⁴

South Africa’s history is tainted with apartheid. This 60-year history of apartheid has left a legacy of high levels of inequality in the delivery of public services. Separate racially based local authorities were designed to reflect and reinforce residential and economic separation. Black urbanisation was regulated, and peripheral townships were denied industrial, commercial and retail development. The townships lacked essential services, and infrastructure was poorly maintained.¹⁴⁵ During the 1980’s, overloaded black authorities could not cope with growing service demands, and were discredited by mismanagement and corruption. By contrast, white municipalities had smaller populations to serve and could rely on tax revenues from large concentrations of economic activity and wealth. The mid 1990’s

¹⁴⁴ Nelson Mandela, ‘Address on the occasion of the ANC’s Bill of Rights Conference’: A Bill of Rights for a Democratic South Africa December, 1991, <www.doj.gov.za> (accessed on 21 September 2004).

¹⁴⁵ Laila Smith, Shauna Mottiar, and Fiona White, Service delivery alternatives, the water concession in Nelspruit, South Africa, Discussion paper, Centre for policy studies, Johannesburg, June 2003, 5. (not published, on file with authors).

can be characterised as a difficult period of transition during which the state was restructured politically, administratively and jurisdictionally.¹⁴⁶ Since its inception in 1994, the post-apartheid national government has accepted that the inequalities prevalent in urban and rural areas have been structurally created and that a structured and all-encompassing approach is required to improve these conditions.¹⁴⁷

4.3 National legal and regulatory framework

The constitution places a duty on all three spheres of government to realise the right of access to water by acting in partnership with one another. While the national government has an obligation to establish a national framework to ensure the realisation of this right, local government must play the critical role of ensuring the delivery of water to all.¹⁴⁸ As noted in the preceding chapter, the right to water can be seen to place two interrelated but distinct duties on the state: The state must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for all sections of the population. Secondly, it must ensure that all people have economic access to water. This implies that the cost of accessing water should be pegged at a level that would ensure that all people are able to gain access to water without having to forego access to other basic needs.¹⁴⁹ As has already been shown in the previous chapter, these obligations are derived from both the ICESCR and the General Comment number 15 of the CESCR, which specifically deals with the right to water.

Since 1996, four Acts have been adopted which lay down national standards for service provision and provide local authorities with a framework for setting up alternative service arrangements. These are:

4.3.1 The 1996 Constitution

¹⁴⁶ As above.

¹⁴⁷ DCD: A new approach to water and sanitation services in Nelspruit <www.local.gov.za/DCD/Ledsummary/nelspruit > (accessed on 06 October 2004).

¹⁴⁸ Jaap de Visser, Edward Cottle & Johan Mettler, The free basic water supply policy; how effective is it in realising the right? ESR Review, (n48 above), vol.3 No. 1 July 2002, 18.

¹⁴⁹ As above.

The constitution entrenches a justiciable Bill of Rights, which provides that everyone has the right of access to sufficient water.¹⁵⁰ But like all other socio-economic rights in the constitution, this right is qualified by an internal limitation. Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. These two concepts of ‘reasonableness’ and ‘progressive realisation’ were extensively interpreted by the constitutional court in the case of *Government of the RSA V Grootboom*¹⁵¹. Court indicated it would not dictate to government which particular policy choices it should adopt. Instead, it developed a standard of ‘reasonableness’ to test whether government was complying with its constitutional commitment to realise socio-economic rights. A number of criteria as outlined below were set for evaluating the reasonableness of government's acts or omissions:¹⁵²

- i. The key question is whether the measures adopted by the state are ‘reasonable’. This means that a court will not tell the state it could have adopted a more favourable policy or spent public money better. Rather, the state will have to show that the measures it has adopted are reasonable, given its positive duties under the constitution to realise access to socio-economic rights.
- ii. The state must establish comprehensive and coherent programmes, which are capable of realisation of the right. A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.
- iii. When deciding on the reasonableness of a programme, the court will pay special attention to the question of whether the needs of the most vulnerable sections of society have been addressed.
- iv. It is not enough to merely design reasonable policies and legislation. The relevant programmes must also be reasonably implemented.
- v. Progressive realisation means that the state has a duty to examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, to take steps to lower them over time. The court also accepted that the state must have to fully justify any deliberately retrogressive measures that reduce peoples’ access to socio-economic rights.
- vi. Finally, the availability of resources would be an important factor in assessing the reasonableness of the measures adopted by the state.

Although South Africa has not ratified the ICESCR, the principles set by court in this matter are a replica of those in the covenant concerning ‘progressive realisation’. But it is disappointing that the court rejected an argument that the socio-economic rights clauses in the constitution

¹⁵⁰ Section 27, 1996 constitution, Act 108 of 1996.

¹⁵¹ 2000 (11) BCLR 1169 (CC).

¹⁵² Sandra Liebenberg, The courts and socio-economic rights, Carving out a role, ESR Review, (n48 above), Vol 3, No. 3 July 2002, 6.

imposed a minimum core duty on government to provide a basic level of services to the poor. This would make it easier for poor people to prove that these rights had been violated. Government should not be able to evade this core duty by invoking resource constraints and the latitude of 'progressive realisation'.¹⁵³

4.3.2 The Water Services Act

This Act¹⁵⁴ is the main legislation concerning water delivery in South Africa and was promulgated as the framework legislation for the right of access to sufficient water. It gives the national government the legislative and executive authority to oversee the effective performance of municipalities in their functions as a Water Service Authority. It imposes obligations on government as well as private water providers, and confirms the ideological conception that whereas it may be impossible to impose human rights obligations on private actors at the international level, this course is possible at the domestic level.¹⁵⁵ However, the private actors may not bear all the obligations incumbent on the state. They may not for instance, unless it is a contractual undertaking, be expected to invest their resources to progressively realise the right.¹⁵⁶

An important provision for this study is section 4(3), which provides procedures that have to be followed before water is disconnected. This section has been the subject of judicial interpretation in *Manqele v Durban transitional metropolitan council*.¹⁵⁷ The applicant had her water disconnected on the ground of non-payment. She sought an order directing the respondents to maintain basic water services to her premises. The respondent argued that after using the six free kilolitres of water, all consumers were required to pay for water consumed in excess of this basic. In dismissing the application, court held that:

“...it is clear that the Water Services Act was directed at achieving the right embodied in the constitution. The difficulty, however, is that in the absence of regulations defining the extent of the right to basic water supply, i have no guidance from the legislature or executive to interpret the extent of the right embodied in s.3”.

¹⁵³ As above.

¹⁵⁴ Act No. 108 of 1997.

¹⁵⁵ Mbaziira C, Outsourcing and the right of access to sufficient water in Luhkanji and Amahlati: The legal implications, Paper presented at a workshop on out-sourcing/ Privatisation of basic services at the local Government Level in South Africa: Democracy, Human Rights Norms and Good Governance Principles, Community Law Centre, University of the Western Cape, 22nd October 2004, 20 (not published; on file with author; referenced with authors permission).

¹⁵⁶ Act No. 108 of 1997.

¹⁵⁷ 2002 (6) SA 423 (D).

It is clear that the judge misunderstood the applicant's contention. The applicant was not calling upon the court to define the minimum basic supply. The contention was to the effect that once the respondents had put in place policy, which set the minimum of basic water supply, they were precluded from interfering with the enjoyment of that minimum supply.¹⁵⁸ All that the judge was called upon to consider was whether the respondent's retrogressive measures were lawful.¹⁵⁹

However, the case of *Bon Vista Mansions v South Metropolitan Local Council*¹⁶⁰ represents a departure from the approach in the *Manqele* case. In *Bon Vista*, water had been disconnected on the ground of non-payment. The Court acknowledged the inherent urgency of the matter and stated that:

“...it involved a basic service, namely, the provision of water, which in turn also involves the provision of sewerage services. The absence of these services could have serious health consequences, both for the applicants and for the residents of the city”.

The court read section 27(2) together with section 7 of the constitution, against the background of international law, to define the duty of the respondents to respect the right of access to water as follows:

“On the facts of this case, the applicants had access to water before the council disconnected the supply. The act of disconnecting the supply was prima facie in breach of the council's constitutional duty to respect the right of access to water.”¹⁶¹

The Act also imposes an obligation on all water services authorities ‘to progressively ensure efficient, affordable, economical and sustainable access to water services by all water consumers or potential consumers in its area of jurisdiction. The extension of the obligation to cover potential consumers means that even in the absence of any contractual relationship, potential consumers may compel the authority to provide them with water on the basis of the legislative obligation.’¹⁶²

¹⁵⁸ Mbazira C, (n155 above).

¹⁵⁹ As above.

¹⁶⁰ 2002 (6) BCLR 625 (W).

¹⁶¹ As above.

¹⁶² Mbazira C, (n155 above).

Furthermore, Water Services provider Contract Regulations¹⁶³ have been promulgated requiring that the contract set forth the manner and means by which any relevant portion of the water services development plan will be implemented. This is very important because it binds the contract service provider to the terms of the water plan. However, this has practical difficulties. Some of the undertakings in the water plan may impose obligations of which only a government institution is able to discharge, for instance undertakings that require capital inputs without a prospect of realising profit.¹⁶⁴ The regulations also require that the contract set out the obligations of the water services authority that are necessary for the achievement of any performance targets. This goes to confirm the fact that there are certain obligations that remain the primary responsibility of the water services authority, making it accountable to the consumers in all cases.¹⁶⁵

4.3.3 The Local Government Municipal Systems Act

This Act protects the poor by controlling the price of essential services such as water. It sets out to ensure that poor households have access to basic services. The act identifies the sequence of events local authorities must follow in setting up service delivery alternatives. It emphasises public consultation with labour and communities prior to contracting an external provider.¹⁶⁶

It should be noted that while municipalities are, along with the national and provincial governments, bound by the obligations imposed by the socio-economic rights, their obligation to take positive steps is limited by the scope of local government's constitutional competencies. The powers of a municipality are confined to its original powers listed in schedules 4B and 5B to the constitution; and the additional powers gained through assignments.¹⁶⁷ A municipality is not competent to move beyond the demarcated areas. However, since even after privatisation the municipality remains responsible for service delivery, it must structure the service delivery agreement in the light of its own constitutional obligations. It cannot divest itself of any obligation by outsourcing a service.¹⁶⁸

4.3.4 The National Water Act

¹⁶³ Reg 3(a).

¹⁶⁴ Reg 6.

¹⁶⁵ Mbazira, C, (n155 above), 20.

¹⁶⁶ Section 78(3), Act 68 of 2000.

¹⁶⁷ Nico Steytler, Socio-economic rights and the process of privatising basic municipal services under the municipal systems Act, ESR Review, (n48 above), Vol 4, No. 4 November 2003, 8.

¹⁶⁸ As above.

This endorses the concept of tradeable rights for water use, including the use of effluent discharge. Under this Act,¹⁶⁹ the allocation of water depends on the principles of sustainability, along with a range of mechanisms for protection of natural water resources. The mechanisms include better management practices such as Cleaner Production, Cleaner Technologies, recycling of water and waste minimisation. The Act supports demand management through tariff, water pricing and conservation measures.

In a nutshell, the constitution and the aforementioned Acts and Regulations provide a legal framework for the protection of the right of access to sufficient water. Although the constitutional court has so far failed to define the content of socio-economic rights in the constitution, it has defined the nature of state obligations engendered by these rights. This framework defines benchmarks for the realisation of the right to basic water services and protects consumers from unlawful disconnections and limitation of water services.¹⁷⁰

4.4 The Water privatisation process and areas affected

“South African scientists have documented what organisations have warned about for years; water privatisation in African countries means denying access to safe drinking water to the poor. In South Africa alone, there have been 10 million water cuts since commercialisation started in 1994”.¹⁷¹

Private sector participation in the delivery of water services can take a variety of different forms; from one person fixing water pipes in a small section of a township to a large multi-national corporation providing bulk water supply and bulk sewerage treatment. The size and types of contracts can vary as well, from a one-year-for-fee service renewable contract, to a thirty-year licence. Ownership of assets also varies, with the state retaining ownership in some cases and the private company in others.¹⁷²

As has already been pointed out in this study, the privatisation of water can be traced to as early as 1994 when the government introduced its policy on water contrary to the RDP's commitment to lifeline supply. This gave the municipalities and the private companies they had

¹⁶⁹ Act 36 of 1998.

¹⁷⁰ Mbazira, C (n155 above), 21.

¹⁷¹ Afrol News, 4 November, 2003: South Africa; 10 million water cuts after South Africa's water privatisation <<http://www.afrol.com>> (accessed on 04 October 2004).

¹⁷² Patrick Bond, David McDonald and Greig Ruiters, “Water privatisation in SADC: The state of the Debate, ESR Review, vol. 4 No.4, 2003 (n48 above) 10-13.

contracted to manage water service provision the authority to provide water only if there was a full cost recovery of operating, maintenance and replacement costs. The Growth, Equity and Redistribution (GEAR) policy in 1996 located the policies of water and other basic needs within a neo-liberal macro-economic policy framework.¹⁷³ To-date, many cities and municipalities have privatised their water services. The different forms this has taken include out-sourcing the operation, management and maintenance of the water system, laying of new pipes and making new connections, meter installation and reading, debt collection and carrying out disconnections.¹⁷⁴

The privatisation of water has inevitably been unpopular and has generated a lot of conflict, opposition and protests from civil society groups and trade unions. A case in point is SAMWU's campaign against the high-profile privatisation of Nelspruit water services, which was temporarily successful, as the ANC Youth League, Communist Party and Trade Union leaders managed to delay the sale well into 1998.

But just as SAMWU, NGOs and social movements stepped up their efforts in protesting against privatisation, the World Bank and government were finalising many of the central details on how to implement the policy. In May 1997, the South African Cabinet approved in principle two contradictory policies, one from the Water Minister stating the aim of supplying a free lifeline water service to all households, and the other from the Minister of Constitutional Development promoting cost-recovery policies for household water supplies. The contradiction was still not resolved in September 1997, when the Municipal Infrastructure Investment Framework was released to the public.¹⁷⁵ In the fourth quarter of 1997, nearly all municipalities began widespread cut-offs of basic services to non-payers. In the Eastern Cape town of Stutterheim, for example, of nearly 5,000 households, 10 percent suffered water cuts during the last quarter of 1997, and of these, only 35% found sufficient resources to pay their bills and restore their service.¹⁷⁶

In early 2000, the Department of Water Affairs in the province of KwaZulu Natal, introduced cost recovery on water. Rural households that were accustomed to free water at communal standpipes were charged a registration fee for a yard tap and/or a monthly rate for water usage. The registration fee and volumetric charges proved too expensive for low-income households

¹⁷³ Penny Bright, et al (n20 above).

¹⁷⁴ Mbazira C, (n155 above), 22.

¹⁷⁵ Penny Bright, et al (n20 above).

¹⁷⁶ As above.

struggling to survive on unpredictable incomes and meagre state pensions. Paying for water would mean giving up other essential goods and services.¹⁷⁷

In several other parts of the country, private companies were contracted by the municipalities to provide the management and delivery of water services. For instance, between 1992 and 1995, Water and Sanitation Services South Africa (WSSA) took over three Eastern Cape towns' water and sanitation systems in what were called 'delegated management contracts'. To their credit, by 2001, the company could boast another three million Johannesburg water-users, about half a million connections, water and wastewater networks of about 8,000 km in length, and at least 1,500 more workers, pushing the total number of people served to over 5.2 Million or 13% of South Africa's population.¹⁷⁸ WSSA had promised to manage the highly politicised relationship with customers and unions, implement effective consumer management, and ensure that customers were willing and able to pay for services, while maximising revenue collection.¹⁷⁹ However, as noted earlier in this study, the majority of the poor consumers could not afford paying the cost of the improved services, and accordingly suffered widespread disconnections.

Another multinational company involved in water management is the British based *Biwater*, which was contracted in 1990 by the Nelspruit Local Authority to provide water services for 30 years. Amidst opposition from the population, the local Authority argued that the idea of privatisation or public-private partnerships is not a strategy that is peculiar to Nelspruit, but is in accordance with the national government's economic strategy, (GEAR), and is a requirement for local authorities as contained in the White Paper on Local Government.¹⁸⁰

In Cape Town too, there has been a significant paradigmatic shift in policy over the past five years, from that of a state funded and state run service delivery model to policies that are market oriented in nature, such as full cost-recovery and corporatization. Rather than being seen as a service provider, local government in Cape Town is increasingly being seen as a service 'ensurer', overseeing and regulating service delivery by the private sector or by creating stand-alone 'corporate units'.¹⁸¹

¹⁷⁷ David McDonald: No money no service; South Africa's poorest citizens lose out under attempts to recover service costs for water and power; *Alternatives Journal* 28:2 spring 2002, 16.

¹⁷⁸ Greg Reuters; Debt, Disconnection and Privatisation, the case of Fort Beaufort, Quenstown and Stutterheim, in *Cost Recovery & the crisis of service delivery in South Africa*, edited by David MacDonald & John Pape, 42.

¹⁷⁹ As above.

¹⁸⁰ As above.

¹⁸¹ As above.

The above practice of multinational corporations taking over water management and delivery has extended to virtually all the provinces in the country. The inability of a section of the population to pay for these services implies that the privatisation of water has impacted negatively on the populace. Accordingly, this discussion will now outline these negative effects.

4.5 Impacts of privatisation on socio-economic rights and service delivery

4.5.1 Negative impacts

The first and most immediate consequence has been reduced access to water. As noted earlier, this contravenes section 27(1) (b) of the constitution, which provides for access to sufficient water. The reasons for the lowered access to water after privatisation are twofold. First, the 'full cost recovery' model means disconnecting water to those not paying water bills. This means that the disconnected households lose even the access to the six free kilolitres. The policy of 'cost-recovery' has seen the price of water rising, hitting poor communities the hardest.¹⁸² Additionally, over 2 million people have been evicted from their homes, often as a part of the associated legal process to recover debts from defaulters. Those poor communities without previous access to clean water have either suffered the same fate once infrastructure was provided or have simply had to make do with sourcing water from polluted streams and boreholes. Unfortunately, in some cases, attempts to seek court's intervention have not yielded any tangible results, for example, in the *Manquele case*¹⁸³ where *the* High Court found that the city council had a right to disconnect the water supply of the applicant because she chose not to limit herself to the water supply provided to her free of charge. The irony is that by completely disconnecting the applicant's water supply, she was deprived even of the free basic amount.¹⁸⁴

Another immediate consequence has been the outbreak of diseases. The worst example of the health consequences of less access to clean drinking water was the outbreak of cholera in 2000. There was a direct connection between the installation of prepaid meters and the unprecedented spread of cholera in KwaZulu Natal, one of South Africa's poorest regions. Over 120,000 people got infected and 290 died during the outbreak. Research showed that in the most affected areas, very many people had returned to the use of unsafe water sources,

¹⁸² Penny Bright, et al (n20 above).

¹⁸³ 2002 (6) SA 423 (D).

¹⁸⁴ Jaap de Visser, Edward Cottle & Johan mettler, (n148 above), 22.

as they could not afford safe water.¹⁸⁵ Treating the epidemic cost more than providing free water.¹⁸⁶

Mores so, research into HIV/AIDS and housing conducted last year at the Orange Farm settlement on the outskirts of Johannesburg, pointed to the high water needs of people living with AIDS. 'Somebody in the last stages of the disease needs constant water because of diarrhoea. If there is no water and sanitation, it compounds problems'.¹⁸⁷ These examples clearly show how a violation of the right of access to water impacts negatively on the enjoyment of other rights like the rights to life and health as provided for under sections 11 and 27(1) (a) of the constitution respectively.

It is imperative at this stage to emphasise what has already been noted in the preceding discussion that the effects of privatisation bear most radically on the poorest in the community. The inflexibility and hostility which often characterise non-payment for public utilities has, over the same period, been replaced by an emphasis on pre-payment meters and 'self-disconnection'.¹⁸⁸ Pre-payment metering is greatly advantageous to companies as the problem of poorer customers is avoided, there is a continuous revenue stream in advance payments, less of a 'political' problem in confronting disconnections, and a better form of debt recovery. The Pre-payment Metering System is a system where a customer purchases water before using it. A pre-payment meter is located at the customer's premises. The customer purchases a water voucher and has to display the meter and credit status.¹⁸⁹ Once the water purchased is used up, there is automatic self-disconnection. There is no billing or meter reading required. Unfortunately, in townships where about 70 percent of the community are unemployed, people cannot afford to pay in advance. This has led to consumption below the level consistent with health, safety and participation in normal community life.¹⁹⁰ However, whereas municipal disconnections are a visible physical process (and sometimes violent), self-disconnection is invisible and masks the extent to which people go without water supply.¹⁹¹

¹⁸⁵ IRIN News: Cant pay, wont pay: Anti-privatisation march in Johanesburg (n2 above).

¹⁸⁶ As above.

¹⁸⁷ As above.

¹⁸⁸ Terence R. Lee, (n11 above).

¹⁸⁹ Zesco projects, pre-paid metering systems <www.zesco.co.zm/pre-payment-metering.html> (accessed on 27 October 2004).

¹⁹⁰ As above.

¹⁹¹ Patrick Bond, et al (n172 above), 53.

More so, there has also been a campaign to end what some administrators see as a 'culture of non-payment', begun under apartheid when black South Africans refused to pay for services in protest. However, it should be noted that this is a 'culture of poverty', and not wilfully refusing to pay. In the townships there are many indigents with no jobs.¹⁹² Furthermore, there have been instances of inadequate billing and poor communication with consumers.¹⁹³

While government had intended to contractually oblige the outsourced water management companies to deliver affordable and quality services, in practice, there has been invariably an increase in some service rates.¹⁹⁴ With privatisation, water has ceased to be a public good that is accessible and affordable to all South Africans. Instead, it has become a market commodity to be bought and sold on a for-profit basis. Although, there is provision of 6 free kilolitres of water per month per household, which is nevertheless insufficient, it should be noted that many poor South Africans live in rural areas not covered by the metered water grid and thus don't benefit from this allocation of free water.¹⁹⁵

Accordingly, the collective impact of water privatisation on the majority of South Africans has been severe. Inadequate hygiene and 'self-serve' sanitation systems have led to continuous exposure, especially for children, to various preventable diseases. There has also been an increase in environmental pollution and degradation arising from uncontrolled effluent discharges and scarcity of water for food production.¹⁹⁶ Noting that many workers have lost jobs due to privatisation, since in most cases the new owners or managers of these enterprises employ new staff, almost 90% of the township residents live on less than R600 per month. These poor households consist of at least six people, about half being children, pensioners or sick persons.¹⁹⁷ These inevitably cannot pay for the basic services. This affects the human dignity of these communities, as the right of access to water can only be enjoyed by only those who can afford to pay for it.¹⁹⁸

In a nutshell, the privatisation of water has infringed the enjoyment of other rights like food, health and life, raised tariffs, led to job losses, and reduced subsidies all of which hurt the

¹⁹² As above.

¹⁹³ As above.

¹⁹⁴ Ravi Naidoo, Privatisation does not benefit the poor; Article prepared for the Sowetan, <www.cosatu.org.za/speeches/200> (accessed on 04 October 2004).

¹⁹⁵ As above.

¹⁹⁶ As above.

¹⁹⁷ Patrick Bond, et al (n172 above), 54.

¹⁹⁸ Penny Bright, et al,(n20 above).

poor. Profit maximisation, the goal of private sector companies, works against larger societal goals.¹⁹⁹

4.5.2 Benefits of water privatisation

Though minimal and limited in scope, water privatisation has had some positive impacts. In the first instance, privatisation has led to an increase and improvement in the quality of water infrastructure.²⁰⁰ Secondly, cost recovery has helped in generating revenue for future service development. Since apartheid, basic municipal services among poorer families have been expanded impressively. More than three million South African households have gained clean drinking water, and two and a half million have joined the national water grid.²⁰¹ Furthermore, most of the multinational companies involved in the management and delivery of water services are complying with a government directive to provide 6,000 litres of free water to households per month.²⁰²

These few benefits of water privatisation are however overshadowed by the numerous negative impacts enumerated above. With most of the people trapped in poverty, and practically dependent on government for the provision of all the basic socio-economic services, the privatisation of water in South Africa remains a serious human rights issue.

4.6 Conclusion

The preceding analysis shows that the privatisation of water has resulted in a breach of the states constitutional and human rights obligations. The state has failed to exercise its duties to protect, promote, respect and fulfil the right to water. South Africa's water privatisation experience clearly brings out the shrinking traditional role of the state in the provision of socio-economic services. The privatisation of water services forces a reconsideration and readjustment of this role. In water resources, all the experiences show that privatisation does not just stop with the transfer of assets, but requires continued managerial actions within the public sector.²⁰³ More so, cost recovery, debt, disconnections and the intrusion of foreign

¹⁹⁹ Terence R. Lee, (n11 above), 11.
²⁰⁰ As above.

²⁰¹ IRIN News: Cant pay, wont pay: Anti-privatisation march in Johannesburg, (n2 above).

²⁰² As above.

²⁰³ As above.

private companies in local urban services have qualitatively changed the nature of municipal politics and denuded notions of citizenship.²⁰⁴

Cost recovery in South Africa has undermined even its own economic rationale, with the cholera outbreak in KwaZulu Natal, for example costing the state more in medical bills and emergency water supplies than it would have cost to provide free water. The cholera epidemic is only the tip of the iceberg. It has been estimated that the cost of dealing with all diarrhoea-related illnesses in South Africa (much of which is a direct result of poor water and sanitation services and no doubt exacerbated by widespread water cut-offs) is in the order of \$ 0.5 billion per year in direct medical costs and \$ 3.6 billion per year in lost economic production, more than the total amount that would be needed to provide free water infrastructure to everyone in the country.²⁰⁵ And what of the estimated 43,000 people, mostly poor black children under the age of five, who die each year from diarrhoeal diseases in south Africa? What kind of value is placed on their lives and the lives of those left behind to deal with the tragedy? This most intangible of costs may prove to be the rock upon which the ship of water privatisation eventually runs aground. For with the acceptance of water as a commodity comes the idea of what to do with water as a basic human right.²⁰⁶ In other words, if only the monetary value is used as the sole guiding principle for water extraction, treatment and distribution, on what grounds are moral decisions made about how much water is enough and who is consuming too much? Just because someone can afford to pay the cost of filling their swimming pool or washing their cars every day, should they have the right to do so when others are struggling to survive with no water at all? And with most regions of South Africa facing severe water shortages if current consumption patterns continue, the question of 'who gets how much' becomes all the more important.²⁰⁷ In the end, it requires a much more radical decomodification of resources like water to ensure a fairer distribution of these public goods and to build a policy framework on something other than the principle of 'you get what you can pay for'.²⁰⁸

²⁰⁴ As above.

²⁰⁵ Homenthree Moodley, Investigating total economic burden; South Africa's diarrhoeal disease burden in 1995 (Johanesburg: Group for Environmental monitoring, 2000). (quoted by David A McDonald, n1 above).

²⁰⁶ As above.

²⁰⁷ Bryan Davies and Jenny Day, Vanishing waters (Cape Town; University of Cape Town Press, 1998), (quoted by David A McDonald, n1 above).

²⁰⁸ As above.

CHAPTER 5

EVALUATION, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This study has vertically run through the privatisation process from the global perspective to the national level. Although it focuses on water privatisation in South Africa and its impact on socio-economic rights and service delivery, the discussion gives an overview of what happens at both regional and international level and further outlines the dominant influence of the IMF and World Bank. This chapter uses the rights based approach to evaluate the privatisation process based on the findings in the previous chapter and gives recommendations on how the process can be improved to curtail the negative impacts. The chapter concludes with a finding that privatisation as a policy is good, but 'what' and 'when' to privatise, and the implementation and regulatory mechanisms need to be streamlined to ensure conformity with constitutional and human rights standards.

5.2 Evaluation of Privatisation

This study has shown that although the impacts of privatisation have mainly been negative, there are a few positive effects as well. The main issue however is who enjoys the benefits; and who suffers the negative impacts. There are many parties involved in the privatisation cycle; with the state, donor institutions and private multinational companies on one part, and the general public on the other hand. Privatisation is basically aimed at improvement in both the quality and quantity of service delivery for the population. The irony however, and the finding of this study is that the group of people who are mainly affected by privatisation are never given an opportunity to participate in the exercise by way of consultation before and during the privatisation process. It should be noted that privatisation is not just about selling government enterprises; it is also about selling the merits of privatisation to a sceptical public, by involving the public in the privatisation process and highlighting the advantages of the policy to the population.²⁰⁹

Furthermore, when putting up state enterprises for privatisation, no differentiation is made between essential and non-essential service enterprises. As privatisation involves the transfer of management from the state to private hands, it can have important ramifications for human rights when the services being privatised are essential services. The primary

²⁰⁹ Sharon Beder, 'The myths that drive privatisation', April 3 2004, < www.theage.com.au/articles/2004/04/29 > (accessed on 11 October 2004).

consideration comes from the observation that after privatisation the price of the service rises, making it significantly less affordable, and in many cases even unaffordable, to the poor. The privatisation exercise also in some cases leads to loss of jobs. In such a situation, the state has an obligation to maintain access to critical services by, for example, setting a regulatory mechanism for tariff increases, or by cross-subsidising the service so that no individual or group is denied access to essential services.²¹⁰

More so, the IMF, World Bank and other donor agencies are central and dominant throughout the whole process. As outlined in the previous chapter, water privatisation in South Africa was a brainchild of these institutions. In instances where privatisation has been unsuccessful, these institutions deny liability and often advance the argument that failures of its programmes are connected with the quality of government or 'government failure'.²¹¹ The underlying argument is that privatisation and state sector reforms are dependent on suitable regulation and that a country, which is not able to create a credible, efficiency enhancing regulatory regime is unlikely to regulate its state-owned infrastructure well.

In addition to the above, it is imperative to look at the issue of regulation. It is the finding of this study that this is one of the most important aspects of the privatisation process that is oftentimes ignored. Of course, there are regulatory bodies and laws in place. The main problem however is the enforcement of these regulations. South Africa for example has a strong legal framework and regulatory mechanism, for instance the provisions in the constitution and Water Services Act, but its unfortunate that it has not been complied with to check the activities of the private service providers.

Furthermore, it is noted that states usually ignore the international, regional and national normative framework concerning the protection, respect, promotion and fulfilment of human rights obligations and provision of socio-economic services during the privatisation process. By privatising the delivery of basic services, the state is not relieved of its obligation to ensure to all its citizens the socio-economic rights recognised in the constitution. Section 7(2) of the South African constitution provides that the state has the duties to respect, protect, promote and fulfil human rights (including socio-economic rights). The state has a duty to ensure that the advancement of human rights is a paramount objective that privatisation should seek to

²¹⁰ K.Bayliss, Privatisation and poverty: The distributional impact of utility privatisation; centre on regulation and competition, working paper series number 16, January 2002 <www.idpm.man.ac.uk> (accessed on 06 October 2004).

²¹¹ Shirley, M. (1999) 'Bureaucrats in Business: The Roles of Privatisation versus Corporatisation in State-Owned Enterprise reform', *World Development* 27:1, 115 <www.elj.warwick.ac.uk/global> (accessed on 11 October 2004).

advance. This duty emanates from the principle that the human person is the ultimate subject of human development. It is therefore imperative that developmental measures place human rights at the fore.²¹²

All the state duties have been discussed in detail in the previous two chapters, and were given judicial interpretation in *Grootboom*. Concerning privatisation, it is important here to add on a more specific note what the CESCR has said in respect of these duties. The CESCR has stated that the duty to respect may be violated if the state fails to consider its legal obligations when entering into bilateral or multilateral agreements with other states or other entities such as multinational corporations. By implication, the state has a duty to ensure that the service agreements with the private parties are structured by the relevant human rights norms. Concerning the duty to protect, in General Comment number 14 paragraph 35, the CESCR has stated in relation to health that the state has the obligation to ‘ensure that privatisation does not constitute a threat to the availability, acceptability, accessibility and quality of health services. In respect of water, the CESCR has stated in General Comment number 15, paragraph 24 that it is the duty of the state to prevent third parties from equal, affordable, and physical access to sufficient, safe and acceptable water. Finally, regarding the duty to fulfil, the state has a duty to ensure that everyone has access to the privatised services. In *Grootboom*, it was stated that the state has the duty to take steps to ensure that ‘the basic needs of all in our society are effectively met, and accessibility must be progressively facilitated’.

In the South African context, it ought to be noted that although the country has not ratified the ICESCR, its constitution, other domestic legislations and courts jurisprudence make provision for adequate protection to these rights. However, the problem in South Africa, just like in many other countries is non-compliance by the state. Having a well-written constitution and other laws and regulations is useless if the provisions therein are not implemented.

5.3 Recommendations

The recommendations made herein below are mainly based on the South African experience. However, they are meant to address issues that usually arise in the general privatisation exercise, and concern all the stakeholders in the privatisation process.

- In the South African context, privatisation of basic services is not benefiting the poor. Due to this reality, the current policy to privatise basic service delivery needs to be changed. Considering the vast historical gap between the rich and the poor, and the fact that the majority of the population are dependent on the state for service delivery, privatisation should only be carried out in non-basic service sectors. Services like water

²¹² Chirwa D (n50 above), 6.

delivery should be left to the state until such a time in future when the aforesaid income gap will have been reduced. True, one needs to acknowledge that the public sector too must be restructured. However, in the case of South Africa, the restructuring should aim to 'extend the State' to the population, and not the market, in providing accessible and affordable services. Non compliance by the state can lead to a multiplicity of claims for violations under section 27(2) of the constitution that obliges the state to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of socio-economic rights.

- Any restructuring of public sector basic service delivery needs to be preceded by credible cost-benefit analyses of its impact on the poor. Accordingly, before privatisation, there is need to conduct a thorough and proper assessment of the human rights impact of the privatisation process. The intent should be to improve the human rights situation of the society. This assessment should be conducted in a fair and transparent manner, with full consultation with the affected communities, private companies and other relevant stakeholders, including workers. The Office Of the High Commissioner for Human Rights (OHCHR), too, recommends that states undertake human rights impact assessments before making major shifts in policy.²¹³
- In countries like South Africa where service provision is decentralised and is the duty of the provinces and municipalities, a comparative database needs to be established of tariff structures of comparable municipalities in respect of similar service components so as to ensure that the cost of the service is uniform. Such cost should be affordable as provided in paragraph 25, General Comment 15 of the CESCR.
- South Africa should ratify the ICESCR. Although the jurisprudence of the constitutional court shows that the court has adopted some of the principles enshrined in the covenant, ratification will make it easier for the courts to interpret and apply these principles and obligations. This will also enable victims of violations of socio-economic rights to make claims based on the obligations in the covenant. However, before it is ratified, courts should vigilantly apply section 39 (1) (b & c) of the constitution, which provides that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law. The constitutional court in *S v Makwanyane*²¹⁴

²¹³ E/CN.4/Sub.2/2002/9, Commission on human rights, sub-commission on the promotion and protection of human rights, 54th session, June 2002.

²¹⁴ 995 (3) SA 391 (CC).

interpreted this section and stated that courts should consider both binding and non-binding international law.

- Contract monitoring should take place on a comprehensive basis. It should not only mean compliance with service standards being monitored but also issues such as the validity of insurance policies, guarantees being updated and the implementation of labour legislation. A monitoring matrix which spells out these parameters is therefore of considerable value.²¹⁵ The state should also require the privatised entity to report in a transparent manner. Regulators who require information about the pricing and costing of privatised entities must be provided full access. Privatised companies cannot absolve themselves from such reporting requirements citing commercial confidentiality.²¹⁶ States should also ensure that service users have access to an independent monitoring body and, where appropriate, judicial recourse. The CESCR has reiterated the need for regulation in paragraph 23, General Comment 15 by stating that 'an effective regulatory system must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance'.
- The process of privatisation must be open, fair and transparent. It must be free of corruption. Corruption distorts economic choices and leads to misallocation of resources. It prevents interested parties, such as citizens or their representatives an effective say in the process, or in the desirability of the outcome. The state has an obligation to evaluate the bids in a fair and transparent manner, and perform due diligence of bidding parties.²¹⁷
- The history of apartheid South Africa and the historically abysmal context of service delivery to townships matter in shaping an understanding of how to resolve the non-payment problem. A starting point is to involve communities more widely in the service delivery process so that they can better understand how service delivery works, what it means to be a responsible customer and how to make their provider accountable.

²¹⁵ Evaluation report of the water and sanitation contract between Lukhanji local municipality and water and sanitation services south Africa (WSSA), 5 November 2003, commissioned by the Municipal infrastructure investment unit (MIIU), 53.

²¹⁶ Transparency tool kit <www.transparency.org> (accessed on 11 October 2004).

²¹⁷ World Bank's Rapid Response Unit's toolkit <www.rru.worldbank.org> (accessed on 11 October 2004).

These steps are part of building a democracy and must be steered more conscientiously by the local authority and its political representatives.²¹⁸

- Finally, although the interpretation by the constitutional court of socio-economic rights is good, as shown in the case of *Gootboom*²¹⁹, it is limited by the fact that court has not recognised the minimum core concept. The court should adjust its stance on the minimum core obligation and accept the argument that the socio-economic rights clauses in the constitution impose a minimum core duty on government to provide a basic level of services to the poor. The constitutional court should note that the minimum core is already provided for in some statutes, for instance the Water Services Act²²⁰ which sets a minimum of six kilolitres of water per month per household.

5.4 Conclusion

It cannot be doubted that privatisation as an economic policy is good, and to-date, there is an increasing trend supported by international financial institutions and private sector entities, to encourage governments to sell their assets. It is generally accepted that the transfer of public companies to private ownership can bring substantial welfare gains. Recent empirical research by the World Bank in which twelve cases of privatisation were comprehensively analysed in four middle-income and developed countries indicates that privatisation did bring substantial welfare gains amounting to permanent increase in national income.²²¹ However, the practical benefits of privatisation are strongest in the tradeable goods industries operating in competitive markets. In these industries, free from substantial market failures, market liberalisation and restructuring can be counted on to supply the benefits of competition and contestability, which reduce the need for the more detailed and intrusive forms of regulation.²²² The record of benefits accruing from the privatisation of basic services however has been inadequate and poor. In such cases, market based approaches have increased costs, denied access to the poor, and plunged some countries into unsupportable debt burdens.²²³

²¹⁸ As above, 27.

²¹⁹ 2000 (11) BCLR 1169 (CC)

²²⁰ Act No. 108 of 1997.

²²¹ Terence R. lee et al (n11 above), 11.

²²² As above.

²²³ Transparency tool kit (n216 above).

The state has a duty to ensure that privatisation does not result in quality services for the economically privileged but then exclude the poor from accessing basic services. The state must take measures to assist those that cannot affect the services and to ensure that privatisation actually leads to better accessibility to the services by all. Unless guided by human rights principles, privatisation of basic services might not result in more access to basic services.²²⁴ The human rights paradigm structures the provision of basic services even where the state is no longer the provider of a service. The changing of its role from a 'provider' to an 'ensurer' of services does not deflect the binding nature of the constitutional socio-economic obligations. While it does not prevent the privatisation of services, the Bill of Rights provides a framework in terms of which the difficult choices of an appropriate service provider can be made.²²⁵ When the state withdraws from the provision of basic services, it should put adequate measures in place to ensure public safety, accessibility and conformity with international, regional, national and constitutional human rights obligations.

²²⁴ Chirwa D, (n50 above), 7.

²²⁵ Nico Steytler, (n167 above), 10.

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