

## EDITORIAL

Danwood Mzikenge  
Chirwa

This is the fourth and last edition of the *ESR Review* for 2003.

Privatisation has become a dominant economic policy, supported by international financial institutions, donor agencies and multinational corporations. However, although several studies have been conducted on the topic, few have been approached from a human rights perspective. In this edition, we feature articles that analyse the implications of human rights generally, and socio-economic rights particularly, for the privatisation of basic services.

In her article, Sihaka Tsemo suggests that international human rights bodies are increasingly directing their attention to privatisation. She analyses the implications of the international human rights regime for privatisation and provides a brief update on the work of the Office of the High Commissioner for Human Rights on corporate social responsibility.

Danwood Chirwa explores the links between privatisation of basic services and socio-economic rights. He argues that although privatisation may not be objectionable *per se*, human rights law establishes a normative framework with which privatisation measures, like other public measures, must comply if they are to be acceptable. He explores the state's socio-economic rights obligations in the context of privatisation, as generated by the South African Bill of Rights.

Nico Steytler explores linkages between the competencies of local government and socio-economic rights. He provides an overview of the process prescribed by the Municipal Systems Act 32 of 2000, which a municipality must follow in deciding whether or not to use an external provider. He demonstrates the role that socio-economic rights should play in this process.

Patrick Bond, David MacDonald and Greg Ruiters give an overview of water privatisation in Southern Africa and dis-



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cuss current debates on its implications for poor people's access to water.

Jim Shultz offers a stimulating account of a failed water privatisation initiative in Bolivia, attributing its failure to the fact that it was embarked upon with a total disregard for human rights.

In many domestic jurisdictions, existing legal procedures to ensure that privatisation measures do not result in the denial or violation of socio-economic rights are under-used or not used at all. Elizabeth Drent shows how a limited constitutional and legislative framework in Canada was used to stop privatisation initiatives that had a negative impact on the enjoyment of socio-economic rights.

Mike Nefale and Theunis Roux critique the draft Electricity Industry Restructuring Bill from a human rights perspective.

In the international developments section, Godfrey Odongo analyses the recommendations of the Committee on the Rights of the Child and its newly adopted General Comment No 5 on the subject of privatisation.

Annette Christmas summarises the seminar co-hosted at the University of the Western Cape in early October 2003 by two of the Community Law Centre's projects.

We trust that this edition will be stimulating and will assist in a range of strategies to improve access to socio-economic rights by disadvantaged groups in South Africa and elsewhere.

We would like to thank all contributors to the *Review* for 2003.

### SPECIAL EDITION

#### Privatisation of basic services and socio-economic rights

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Lastly, the Socio-Economic Rights Project would like to congratulate Sandy Liebenberg on her new appointment to the HF Oppenheimer Chair of Human Rights Law at Stellenbosch University with effect from January 2004. The Project wishes her all the best in this challenging position.

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##### ESR Review

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# Privatisation of basic services, democracy and human rights

Sihaka Tsemo

Privatisation has become an integral part of the globalisation process. Although traditionally conceived of as an economic phenomenon, globalisation has significant implications for the social, political and cultural evolution of humankind.

However, the human rights implications of this phenomenon are only just beginning to be critically examined and comprehensively understood.

A vision that considers a triad of liberalisation, privatisation and globalisation as the main development paradigm can be legitimately questioned, especially in the African context where, at long last, a more solid determination to overcome conflict and poverty and to achieve peace, democracy and sustainable development can be discerned.

The formation of the African Union and the adoption of its main programme, the New Partnership for Africa's Development (NEPAD) are a clear sign of this emerging determination.

It is obvious that privatisation has become more important now than ever before. In fact, Africa needs more investments to redress the many problems that confront its people, such as joblessness and deepening poverty. In this regard, private investment can be seen as a means of realising the socio-economic and cultural rights of the people.

Private capital is crucial for developing countries. Indeed, the work

ethics it promises, especially efficiency in management, are very positive. However, as the United Nations Secretary-General, Mr Kofi Annan, has pointed out:

Globalisation has an immense potential to improve people's lives, but it can disrupt - and destroy - them as well. Those who do not accept its pervasive, all-encompassing ways are often left behind.

### Where do human rights stand with respect to privatisation?

Human rights law is neutral on privatisation. It does not prescribe who should provide essential services. However, human rights law does concern itself with two key questions:

- *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? These questions emanate from such civil and political rights as the right to take part in the conduct of public affairs, recognised under article 25(a) of the International Covenant on Civil and Political Rights (ICCPR), and the right to seek, receive and impart information, recognised under article 19 of the ICCPR.*

- *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, accessible, etc? These questions emanate from such economic, social and cultural rights as the rights to water, health, adequate housing and education. Thus, for example, a privatisation initiative that leads to service delivery that is better overall but is static or worse for the poor, can be challenged from a human rights perspective.

Privatisation might work in some cases and not in others. However, some of the human rights concerns that privatisation raises can be summarised as follows:

- the establishment of a two-tiered supply system, with a corporate sector focused on the healthy and wealthy and an under-financed public sector focused on the poor and sick;
- creating a 'brain drain', with better-trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructure;
- an overemphasis on commercial objectives at the expense of social objectives; and
- an increasingly large and powerful private sector that can threaten the role of the government as the primary duty bearer of human rights by subverting regulatory systems through political pressure or the co-option of regulators.

Sight must also not be lost of the potential danger privatisation poses to aspects of democracy, such as accountability, popular participation in public affairs and access to information.

It is also important to note that while private sector failures in service provision are currently the object of focus, there are also public sector failures in the provision of essential services to the poor that must be criticised from a human rights perspective.

### **Privatisation and human rights from the perspective of the OHCHR**

The Office of the High Commissioner for Human Rights (OHCHR) views projects and other initiatives on socio-economic rights as crucial and of the utmost importance. It has always held the view that human rights are universal, indivisible, interdependent and interrelated.

Every woman, every man, every youth and every child has the right to a secure home and community in which to live in peace and dignity. Any discussion and effort that aim to bring to the fore the upliftment of such values must be encouraged.

While admitting that effective and socially responsible private sector participation in essential service delivery might be a real alternative for many governments unable to cope with service provision, the role of the OHCHR is to remind states that they must not abdicate their obligations, under either international or domestic law, in the name of privatisation. In particular:

- states must not be locked into privatisation (eg through bilateral, regional trade and investment agreements and the World Trade

***Though socially responsible private sector participation in essential service delivery may be a real alternative for many governments, states must not abdicate their obligations under international or domestic law in the name of privatisation.***

Organisation's General Agreement on Trade in Services) but must respect and promote a human rights approach to privatisation both at the time the decision to privatise is being made and during the operation of the initiative;

- states should, as far as possible, undertake a human rights assessment of service delivery prior to privatisation and again some time thereafter;
- states and civil society should ensure that companies engaged in service delivery have a sound human rights record and corporate social responsibility strategy; and
- states should ensure that effective monitoring and complaints mechanisms are available - these could range from consumer complaints tribunals and auditing mechanisms to the justiciability of economic, social and cultural rights through the judiciary.

**An update on the OHCHR's work on corporate social responsibility**  
On 13 August 2003, after a four-year consultative and drafting process involving the private sector, aca-

**The Norms require business enterprises to provide adequate reparation to people adversely affected by their activities.**

demic institutions, human rights non-governmental organisations and inter-governmental bodies and states, the Sub-Commission on the Promotion of Human Rights adopted resolution 2003/16 (the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, hereafter the Norms).

The Norms, together with their commentary, form the major product of the work of the Sub-Commission's Working Group on the Working Methods and Activities of Transnational Corporations.

The Norms help to clarify that business enterprises have human rights obligations. In drafting the Norms, the Sub-Commission Working Group stated that it based its work on existing standards. Thus, the Norms state clearly in article 1 that states have the primary responsibility in relation to human rights.

However, the Norms also state with equal clarity that business enterprises have human rights responsibilities.

Among other duties, the Norms stipulate that private enterprises have an obligation to respect national sovereignty and obligations in relation to the rights to equal opportunity and non-discriminatory treatment, security of persons, and in relation to environmental, consumer and labour rights.

The Norms also set out provisions for implementation. They include the possibility of establishing periodic monitoring and verification of business enterprises by the UN and the encouragement of states to set up and reinforce the necessary legal and administrative framework to implement the Norms.

Business enterprises are also required to provide adequate reparation to people adversely affected by their activities.

In terms of resolution 2003/16, the Norms will be transmitted to the Commission on Human Rights for further consideration at its next session in March/April 2004.

Once finally adopted by the UN, the Norms will play an important role in ensuring that private enterprises are socially responsible, including where basic services are privately provided.

 Dr Sihaka Tsemo is the OHCHR Regional Representative for Southern Africa.

*This article is an abridged version of the keynote address delivered by the author at a seminar on privatisation of basic services, democracy and human rights, co-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. See the events section for more details.*

## Socio-economic rights and privatisation of basic services in South Africa

A theoretical framework

Danwood Mzikenge Chirwa

This article explores the implications of human rights, especially socio-economic rights, for privatisation of basic services in the South African context.

In this article, 'privatisation' is used broadly to encompass a wide range of private sector involvements in the delivery of basic services, and is not limited to full divestiture (complete transfer of a public enterprise to a private actor).

### A snapshot of the privatisation of basic services in South Africa

The privatisation debate in South Africa is not new although it has received heightened attention in the post-apartheid era. For example, the privatisation of water and sanitation services in three Eastern Cape municipalities (Queenstown, Stutterheim and Fort Beaufort) in 1992, 1993 and 1994 respectively, was a result of the Normative Economic Model adopted by the apartheid government.

The continuation of the privatisation programme in the post-apartheid era represents a remarkable shift in policy orientation by the African National Congress-led government, from a 'growth through dis-

tribution' formula, which envisaged a central role for the state in redistributing resources, to a 'neo-liberal orientation', endorsing a restricted role for the state in redistribution and such other market principles as cost recovery measures, financial and monetary stringency, and the restructuring of trade and industrial policies.

The reach of privatisation has since extended to radio stations, the telecommunications sector, aviation, the mining industry, transportation, tourism and forestry.

The outsourcing of refuse collection has become the most common practice of privatisation among municipalities.

Between 1996 and 1999, the provision of water and sanitation services was privatised in Nelspruit. In 1999 similar services in Dolphin Coast and Durban were contracted out to multinational companies, SAUR International and Bi-Water respectively, while in 2001 those in Johannesburg were contracted out to Water and Sanitation Services of South Africa.

In 2002 the Igoli programme was adopted as a roadmap for restructuring the delivery of municipal services in Johannesburg. This programme entails privatisation and corporatisation of municipal amenities, including solid waste management.

It is expected that by 2003 Eskom will be broken up into three operational components: generation, transmission and distribution. The plans are to corporatise Eskom and sell 30% of it to private companies. To this end, the draft Electricity Distribution Restructuring Bill was made available for public comment on 24 April 2003.

Privatisation in South Africa is thus already playing a role in how basic services are delivered.

### **The link between privatised basic services and socio-economic rights**

Socio-economic rights aim to ensure access by all human beings to the resources, opportunities and services necessary for an adequate standard of living.

What motivates their recognition as human rights is the realisation that the capacity to enjoy other rights – such as the rights of association, equality, political participation and expression – is intricately linked to access to a basic set of social goods.

The delivery of such basic services as health care, housing, education, water, food, childcare, electricity and sanitation is directly linked to such socio-economic rights as the rights to water, food, health care services, a healthy environment, education and social services.

Many basic services can also be claimed as rights under the right to housing.

In *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*, [2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 37], the Constitutional Court construed the right of access to adequate housing broadly as encompassing the provision of water, sewerage removal, electricity and access to roads.

Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that adequate housing implies:

sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services (General Comment No. 4, para 8(b)).

***The delivery of health care, housing, education, water, food, childcare, electricity and sanitation is directly linked to socio-economic rights such as the rights to water, food, health care services, a healthy environment, education and social services.***

### **The implications of privatisation for access to socio-economic rights**

Advocates of privatisation often contend that it has the potential to enhance operational efficiency, competition, economic growth and development. The achievement of these micro-objectives, the argument goes, can result in the 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.

The other limb of the argument posits that 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. The redistributive potential of privatisation 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.

Others also contend that privatisation may mean that costs spent on monitoring and subsidising state-owned enterprises are saved. These resources

**The overemphasis proponents of privatisation place on commercial objectives can undermine the pursuit of social objectives such as the provision of quality health, water and education services at affordable rates.**

plus the proceeds from the sale of the enterprise can be used for settling foreign debt, balancing the national budget or investing in other priority areas such as education and childcare.

Whether privatisation does, in practice, result in increased access to socio-economic rights or their enhanced enjoyment is debatable. Indeed, opponents of privatisation contend that there is little practical evidence that it does, in fact, result in increased efficiency, economic growth, development or competition.

Where it can be established that enhanced economic performance occurred after privatisation, the difficulty in pinpointing privatisation as the cause of such performance remains.

For the most part, proponents of privatisation lay much emphasis on micro-objectives. The achievement of these does not always translate to more availability, access, quality or acceptability of basic services to all people, especially to the poor.

There are a variety of ways in which privatisation can undermine the enjoyment of socio-economic rights. As Dr Sihaka Tsemo has pointed out elsewhere in this issue, it can result in a two-tiered service supply focussed on the healthy and

wealthy, on one hand, and an under-financed public sector focussing on the poor and sick, on the other. It can also result in a brain drain, with better-trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures.

The overemphasis proponents of privatisation place on commercial objectives can undermine the pursuit of social objectives focussed on the provision of quality health, water and education services for those that cannot afford them at commercial rates.

The upshot of the preceding discussion is that arguments that privatisation has a positive impact on the enjoyment of socio-economic rights are, at best, speculative.

### **'No single road' to realising socio-economic rights**

Human rights law does not consider the state as the sole provider of basic services. Rather, it recognises that private actors can play an important role in the realisation of human rights. In *Grootboom*, for example, the Constitutional Court conceded that:

it is not only the state who is responsible for the provision of houses, but...other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing (para 35).

Moreover, human rights do not require a particular political or economic system within which they can best be realised. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights stipulate that "there is no single road" to the full realisation of these rights.

Successes and failures have been registered in both market and

non-market economies, in both centralised and decentralised political structures (para 6).

Similarly, the CESCR has stated that human rights can be realised within a wide variety of economic and political systems as long as the system recognises the interdependence and indivisibility of the two sets of human rights.

Thus, human rights do not prescribe exhaustive measures to be taken to implement them.

### **The duties of the state in the context of privatisation**

While privatisation as a policy cannot be rejected outright, human rights law establishes a normative framework with which privatisation measures, like other public measures, must comply for them to be acceptable.

Significantly, 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 Constitution of South Africa 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 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.

According to *Grootboom*, the duty to respect enjoins the state to "desist from preventing or impairing" socio-economic rights. The CESCR has stated that this duty 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 service agreements with private parties are structured by the relevant human rights norms.

The duty to protect enjoins the state to exercise due diligence to prevent violations of human rights in the private sphere, to investigate them when they occur, to punish culprits and to provide effective remedies to victims. 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, accessibility, acceptability and quality of health facilities” (General Comment No 14, para 35). In respect of water, the CESCR has stated that it is the duty of the state to prevent third parties from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water” (General Comment No 15, para 24).

In discharging this duty, the state is required to establish an effective regulatory system providing for independent monitoring, genuine public participation and imposition of penalties for non-compliance. The areas of regulation depend on the right implicit in the privatised service. In the context of the right to health, for example, the CESCR has stated that the state has the duty to:

adopt legislation or to take other measures ensuring equal access to health care and health related services provided by third parties; ... to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners

and other health professionals meet appropriate standards of education, skill and ethical codes of conduct (General Comment No 14, para 35).

It is submitted that, in the case of water and electricity, regulation is essential in the areas of pricing and disconnections.

Last, but not least, 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 basics needs of all in our society (are) effectively met” (para 45). “Accessibility must be progressively facilitated” (para 45). A programme that excludes a significant segment of society and fails to respond to those whose needs are most urgent is unreasonable and unconstitutional.

Based on this jurisprudence, the state has a duty to ensure that privatisation does not result in a quality service for the economically privileged but excludes the poor from accessing basic services. The state must take measures to assist those that cannot afford 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 basics services might not result in more access to basic services. Conversely, a privatisation initiative that undermines these principles can be challenged from a human rights perspective.

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## Socio-economic rights and the process of privatising basic municipal services under the Municipal Systems Act

Nico Steytler

The socio-economic rights in the South African Bill of Rights bind all organs of state, including municipalities. These rights also impose positive obligations. Through the delivery of basic services municipalities fulfil some of these obligations. Indeed, the very purpose of municipalities is to be ‘developmental’ – advancing the living conditions of their communities by providing basic services.

Municipalities have a broad discretion on how basic municipal services are delivered, including through privatisation. While the latter is not in and of itself inconsistent with the Constitution, its processes and outcomes may have significant effects on the realisation of socio-economic rights. It is thus argued that the process and product of privatising a basic municipal service must comply with the normative framework of socio-economic rights.

### Local government’s socio-economic obligations

The principal socio-economic rights that may be pertinent to the constitutional mandate of local government are the rights of access to ad-

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**Municipalities obligations are limited by the scope of local government's constitutional competencies.**

equate housing, health care services, and sufficient food and water. The overall thrust of these rights is primarily to assist the poor by protecting and advancing their social and economic interests. They represent a commitment of the new constitutional order that seeks to address the apartheid legacy of poverty and inequality.

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.

**Competencies of local government**

The powers of a municipality are confined to its original powers - those matters listed in Schedules 4B and 5B to the Constitution - and the additional powers gained through assignments. A municipality is not competent to move beyond the demarcated areas. Its defined areas of competence thus circumscribe a municipality's socio-economic obligations. The role of municipalities is thus a function of the intersection of municipal competencies and the obligations of socio-economic rights.

**Intersection of local government competencies and socio-economic rights**

While some rights fall squarely within a functional area of a municipal com-

petence, their application in other areas is indirect. The right of access to sufficient water, for example, intersects directly with the functional area of 'potable water supply systems'. The intersection is indirect where a municipality plays an important contributory or supportive role in its realisation, for example, in providing water and sanitation to give effect to the right to housing.

**Developmental local government**

The close connection between local government's competencies and the fulfilment of particular socio-economic rights finds expression in the notion of 'developmental local government' as mandated in the Constitution. In the *White Paper on Local Government* 'developmental local government' is directly linked to the realisation of socio-economic rights, which is concretised in the Systems Act 32 of 2000 (hereafter the Systems Act).

In giving effect to the constitutional mandate of meeting the 'basic needs of the community', developmental local government entails, as a minimum, the provision of 'basic municipal services'. The Municipal Systems Act defines the concept of 'basic municipal services' as:

a municipal service that is necessary to ensure an acceptable and reasonable quality of life and [that], if not provided, would endanger public health or safety or the environment.

**Government policy on free basic services**

At a national level, government has sought to meet the basic needs of communities through the policy of free basic services. Announced before the 5 December 2000 municipal elections, the aim of the policy is

to ensure that there is at least a basic level of municipal services to all households. While local government is charged with the service delivery and implementation role, national government is responsible for providing the financial resources to local government, and provincial governments must monitor the implementation and provide support if necessary. In an evolving policy, the government classified water and electricity as free basic services. In the policy formulations, there is explicit recognition that the free basic services policy flows from government's socio-economic rights obligations.

**Deciding on an appropriate service provider mechanism**

The Systems Act prescribes an elaborate and onerous process that a municipality must follow in deciding whether to use an external provider. The process of externalising a municipal service entails four steps:

**Initial review of service delivery mechanisms**

A municipality must frequently review the appropriateness of its mechanisms for providing a municipal service. In conducting the review the municipality must focus on three areas: the municipality as the service provider, general labour issues, and broad social and economic considerations. Having conducted this review, the municipality may then decide that it is best suited to provide the service. Where it considers the possibility of using an external provider, a further inquiry must be conducted.

**Process when considering an external service provider**

In exploring the use of an external provider, the focus of the inquiry is

on which category of external provider would be the most suitable. To determine this, the municipality must follow lines of inquiry similar to those in the initial review: First, it must ascertain the views of the local community on the question. The second line of inquiry focuses on possible service providers. The third line of inquiry deals with developmental, economic and labour issues, and considering the views of organised labour is mandatory. The Municipal Services Amendment Bill of 2003 has further formalised the inquiry by requiring the conduct of a feasibility study, dealing with the duration, costs and impact of a proposed privatisation decision.

After the second inquiry, the municipality must make a choice between an internal or external provider.

#### **Competitive bidding for private actors**

If the choice falls on an external provider that is a private actor (whether for profit or not), a service delivery agreement may be concluded only after a competitive bidding process prescribed in the Act and other applicable legislation.

#### **Negotiating a service delivery agreement**

Once a municipality has selected an external provider (whether or not competitive bidding was required), a service delivery agreement must be concluded with them.

The Act's point of departure is that the municipality cannot divest itself of its responsibilities for providing that service to the community. As its relationship with the provider is contractual, the content of the agreement must thus reflect the municipality's continuous responsibility for the proper delivery of that service. The

Act provides a framework within which the municipality must negotiate the agreement.

#### **National and provincial government supervision**

The Municipal System Amendment Bill of 2003 seeks to give the national and provincial government a greater, albeit indirect, role in the decision-making process. First, the national and provincial government may, in accordance with an agreement with a municipality, assist it in carrying out a feasibility study when considering externalising a municipal service or in preparing service delivery agreements. Likewise, they may assist in drafting a service delivery agreement. Second, the national Minister is given specific powers to regulate the provision of municipal services, including externalising them. The Minister may make regulations or issue guidelines on critical issues raised by privatisation.

#### **Socio-economic rights and the process of privatising basic municipal services**

Since socio-economic rights underpin some of the basic municipal services that municipalities must provide, deciding on the delivery mechanisms for the basic municipal service must take place within a socio-economic rights framework.

The Systems Act provides a broad framework for service delivery. Many of the provisions are open ended, giving municipalities wide discretion. Where a basic municipal service has a socio-economic rights dimension, it is argued, the discretion is narrowed down and directed towards realising that right. In sum, a socio-economic rights analysis of basic municipal services directs municipalities in a particular way when considering

*If a service relates to the fulfilment of a socio-economic right, requiring, among other things, its free provision to the destitute, the issue of funding becomes vital.*

and deciding on an appropriate service provider.

#### **Initial review of service mechanisms**

In reviewing the delivery mechanisms of a particular service, the first question must be whether it deals with a basic municipal service. Moreover, is there a socio-economic dimension to the particular service? If a service relates to the fulfilment of a socio-economic right, requiring, among other things, its free provision to the destitute, the issue of funding becomes vital. If cross-subsidisation of services is one of the key methods of financing a free basic service, then the appropriateness of providing the service through an internal mechanism becomes apparent.

#### **Considering an external service provider**

The duty to ascertain the views of the community takes on a specific focus where the municipal service to be externalised is a basic one. The socio-economic rights dimension of a basic municipal service would require that the municipality engages with the beneficiaries of that right on the specific question of how externalising that service may impact on its realisation.

The rights dimension is again paramount when the municipality decides between an appropriate in-

***A policy to provide free basic services is no longer at the state's discretion, but is done in fulfilment of the state's obligation to realise socio-economic rights.***

ternal or external provider. With socio-economic rights focusing on the poor and those who cannot help themselves, the critical question is which service provider can best roll out services to the 'unserved' and provide a subsidised service for those who cannot pay.

#### **Competitive bidding**

When competitive bidding precedes the appointment of a private actor as the external provider, the tender process must also be geared towards realising the basic municipal service. The human rights dimension must be outlined in the tender specification and followed up in the bid evaluation criteria.

#### **Negotiating the contents of a service delivery agreement**

Community consultation prior to the conclusion of an agreement externalising a basic municipal service provides an important vehicle for focusing on the socio-economic right dimension of a particular service. The object of the consultation process is to examine how the detail of providing a basic municipal service by an external provider may affect the service received by a community. As

a basic municipal service may have a socio-economic rights dimension, the beneficiaries of such rights must specifically be consulted.

As it remains responsible for service delivery, a municipality must structure the service delivery agreement in the light of its own constitutional obligations. It cannot divest itself of any obligation merely by outsourcing a service, let alone a basic municipal service.

#### **Conclusion**

There is increasing recognition that the function of providing basic municipal services takes place within a human rights paradigm. A policy to provide free basic services is no longer at the state's discretion, but is done in fulfilment of the state's obligation to realise socio-economic rights. At the same time the human rights paradigm structures the provision of basic municipal 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 Constitution's socio-economic rights 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.

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## **Water privatisation in Southern Africa**

The state of the debate

**Patrick Bond, David McDonald and Greg Ruiters**

Privatisation as defined by the World Bank includes private sector involvement in financing, operating and, in some cases, ownership. Aspects of private sector involvement range from contracting out to reducing or discontinuing the provision of a service by government and introducing commercial principles or market criteria.

Privatisation is most often seen as a necessary political choice because of fiscal constraints (reducing public borrowing, taxes and outlays). It seeks to depoliticise services with a view to improving the services and increasing the productivity of assets. Its other unstated aims include reducing trade union power.

Private sector participation in the delivery of water services can take a variety of different forms ranging from a single person fixing water pipes in a small section of a township, to a large multinational corporation providing bulk water supply and bulk sewerage treatment.

The size and types of contracts can also vary from a one-year, fee-for-service, renewable contract to a thirty-year license. Ownership of assets varies, too, with the state retaining ownership in some cases and

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the private company retaining it in others.

Most of the private sector deals in the water sector in Southern Africa - and indeed, in other parts of the world - are public-private partnerships (PPPs), with continued government involvement and oversight in service delivery.

### **The status of water privatisation in Southern Africa**

The privatisation and commercialisation of water and sanitation is becoming widespread in Southern Africa, with especially powerful French companies leading the way and with the region's largest cities (Johannesburg, Cape Town and Maputo) already firmly committed to privatisation and enhanced private sector participation in municipal services.

But many small towns and large urban centres have one or other form of private sector involvement. The company Suez Lyonnaise, for example, started out with service contracts in towns in the former apartheid 'homelands', before it undertook a long-term 25-year contract in Queenstown, and ten-year contracts in Stutterheim and Nkonkobi (formerly called Fort Beaufort) in the mid 1990s. Nkonkobi's contract came under attack in October 2001, when the mayor of the municipality sued for cancellation due to overcharging, lack of transparency and unaffordability.

However, in 2000 the same company won the Johannesburg contract - which is Africa's largest - serving over 600 000 households.

Between 1992 and 1995, Suez Lyonnaise took over three Eastern Cape towns' water and sanitation systems. By 2001 the company (re-

structured in 1996 as Water and Sanitation Services of South Africa, WSSA) could boast that it operated water and sewerage systems for a population in excess of two million people.

Private water schemes are also in operation in Namibia and Mozambique. Processes leading to private sector involvement in the delivery of water are also underway in Angola, Malawi, Mauritius, Tanzania and Zambia.

### **The pro- and anti-privatisation lobbies**

Water is, quite literally, the source of all life. Debates over its treatment and delivery thus merit the intensity and scope of discussions that are now taking place.

Those in favour of privatisation tend to see water as an economic good that must be commodified if it is to be managed properly. They argue that open access to a scarce resource like water will inevitably result in its over-exploitation. Giving water an economic value, the argument proceeds, allows for rational behaviour by self-maximising individuals in a regulated environment.

The anti-privatisation position is that there is a need to see water consumption *mainly* as a basic human right, with important biological, cultural and symbolic values beyond the market. This is not only a different way of understanding the economics of water but it is also symptomatic of an entirely different value system which challenges fundamental neo-classical assumptions about human behaviour.

There are notable institutional and resource differences between the two lobbies. The pro-privatisation lobby has huge financial and human

***Those in favour of privatisation tend to see water as an economic good that must be commodified to be managed properly.***

resources that enable it to conduct research, publish materials and lobby governments in a relatively coordinated fashion around the world. Perhaps the most important manifestation of this lobby is the World Bank and allied organisations, including the Urban Management Programme and the United Nations Development Programme. There are also corporate lobby groups, multilateral and bilateral donor agencies, governments and nongovernmental organisations (NGOs) that are driving the privatisation agenda.

By contrast, the anti-privatisation lobby, which includes academic research groups, public sector unions, NGOs and civic bodies, tends to be less well endowed, although such networks are increasingly becoming coordinated and global in scope.

The anti-privatisation lobby also tends to be less consistent in its lines of argument because of the complexity of the debate on questions of concrete alternatives to PPPs. Many opponents of privatisation are reluctant to return to the bloated and unaccountable bureaucracies of the past. Instead, they seek a radically different form of 'public-public' partnerships and 'public-people' partnerships, where other governmental agencies, communities, labour and other citizens groups play a more active and informed role in service

***As water services tend to be natural monopolies, suppliers are often tempted to underinvest, overcharge consumers, cut off supplies to those who cannot pay, and underperform – hence the imperative of regulation.***

delivery decisions. In the end the debate reaches an impasse, turning largely on the role of the market, the potential for effective state participation and the value to be attached to water itself.

Ultimately, however, it is government officials that make the final decision to use a private company for service delivery, and there is growing evidence of a pro-privatisation bias among senior civil servants and politicians at the national, regional and local government level in South Africa and the Southern African region.

### **The costs, benefits and prices of public and privatised water**

Access to water in Southern Africa is increasingly determined by the extent to which consumers can pay a 'price' – often called the 'tariff' – that covers the full cost of the service.

This includes the initial cost of installing water infrastructure (capital cost) and the expenses associated with operating and maintaining the infrastructure (marginal costs).

If consumers cannot pay this price, then subsidies are required or the consumer faces a cut-off of supply.

Low-income consumers who use small volumes impose higher marginal costs on a typical water system, because of more complex billing requirements (including lack of addresses), difficulties in making payments, more leaks in the infrastructure, and the tendency to consume at peak periods (morning and early evening).

However, the 'long-run marginal cost' of water may be driven higher by big consumers, who waste water and drive up the costs of the system for everyone.

Full cost recovery, in the context of privatisation, is criticised on the grounds that privatised water suppliers have absolutely no incentive to incorporate the broader social costs of not having water.

Critics of privatisation contend that it is only the public sector that has such an incentive to supply a very poor household with water, using a subsidy, since the costs of treating diseases like cholera or diarrhoea can be so high as to pose a danger to the economy and society at large.

Assuming a coherently coordinated government, only a state water supplier with close ties to other state health, environmental, economic and planning agencies can realise the benefits of holistic service delivery.

If contracted out to the many independent suppliers with localised contracts and with their own narrowly defined profit strategies, these benefits will typically not be realised.

### **Does privatisation change the way that cost-recovery occurs?**

A privatised water supplier will, under most operating concessions, have an incentive to 'get the prices right'

by pricing water according to its marginal cost plus a mark-up. Thus, if water conservation is a goal, then the price of water should be put at very high levels for individual households or companies, when they reach high levels of consumption.

This technique (a progressive block tariff) is used across the world. It is currently under attack because it includes a subsidy from the large user to the small user.

Any privatised water supplier will attempt to identify 'inefficiencies' in its pricing system, and cross-subsidies are among the most obvious 'distortions' of price, from cost.

Hence, a privatised water supplier will avoid pricing water in a way that maximises social justice (by giving a free lifeline to all consumers for their first block of consumption, eg 50 litres per person each day), and environmental justice (by forcing larger users to conserve).

### **The role of regulation**

Water services, especially at municipal level, tend to be natural monopolies. As a result, suppliers are often tempted to underinvest, overcharge consumers, cut off supplies to those who cannot pay, and underperform – hence the imperative of regulation.

Today, as powerful private companies increasingly take over utilities across the world, the interactions between different levels and types of governments, different publics, cultures and societies are growing increasingly complex.

Anxieties increase about the abuse of monopoly power and the integrity of regulation, and the possibility for 'captive regulation'.

Concerns about social needs, balanced urban development and private company goals intensify ques-

tions about the economic and social regulation of private providers of public goods.

Regulation has a crucial role in adjudicating quality, quantity of goods and services and price. It may extend to profits, consumer charters, codes of conduct and rules of transparency.

However, regulation has also recently applied to private monopoly firms to cushion them against 'unacceptable' risks to their capital.

From the point of view of private investors who have long-term sunk costs (since infrastructure is long-lasting, capital intensive and immobile and investment is lumpy), the need for regulation is tied to predictability and risk minimisation.

The choice of areas that are regulated and the efficiency of the regulatory framework are therefore critical to facilitating a service delivery system that advances social justice.

 Patrick Bond, David McDonald and Greg Ruiters are Co-Directors of the Municipal Services Project.

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The website of the Municipal Services Project is accessible at [www.queensu.ca/msp](http://www.queensu.ca/msp)

## Privatisation versus human rights

### Lessons from the Bolivian water revolt

Jim Shultz

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.)

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, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, states have agreed that our basic human dignities include not only civil and political rights but also economic, social and cultural rights. Among the latter are included the right to food, shelter, health, education and water.

At the same time, however, a very different set of global rules is under construction aimed at binding the world to a collection of economic policies that often violate human rights. These rules can be found in international trade accords such as the World Trade Organization, the North American Free Trade Area, and the proposed Free Trade Area of the Americas; and in the economic policies issued to poor countries by international financial institutions

such as the World Bank and the International Monetary Fund (IMF).

The privatisation of the public water system of Cochabamba in Bolivia and the civic revolt that ended it is not only an inspiring story of local people taking courageous action, but also a cautionary tale of how global economic rules can sometimes reduce international human rights law into nothing but pretty words on paper.

#### **A deliberate step backwards in realising the right to affordable water**

International human rights law recognises that states, especially the poorest, cannot realise economic, social and cultural rights overnight. Rather, it requires these rights to be realised 'progressively'. Governments are required to take 'clear and deliberate, concrete and targeted steps' towards meeting their obligations and are expressly prohibited from taking any 'deliberate steps backwards'.

It is argued that the privatisation of Cochabamba's water was a deliberate step backwards in terms of making water affordable for the city's poorest people. The Bechtel Corporation (Bechtel), after taking over the water system, increased water prices by between 40% and 50%, and in some cases by more than double. Families were literally forced to choose between feeding their children and paying their water bills. This privatisation project was a violation of their right to affordable water.

*For poor governments, faced with a choice between honouring human rights accords and complying with the commands of international economic institutions, the choice is sadly clear.*

### **Allocating responsibility for the violation of the right to water**

It is submitted that Bechtel, the Bolivian government and the World Bank, the three main actors in the water debacle, each contributed to the violation of the right to water.

Bechtel violated this right by raising prices far beyond what poor families could ever afford. The price increases were effected partly to finance an enormous 16% profit rate, which the corporation managed to include in its 40-year contract.

The Bolivian government violated its people's socio-economic right to affordable water by negotiating and signing the Bechtel contract without regard to its international human rights obligations, and by approving the giant price hikes.

Later, when the Bechtel contract came under fire, the government violated a range of the people's basic civil and political rights. When Bolivians sought to exercise their right to assemble and demonstrate peacefully against the privatisation deal, the government sent armed troops into the streets to break the protests. More than 170 people were injured and a 17-year-old boy, Victor Hugo

Daza, was shot in the face and killed. Protest leaders were arrested in their homes in the middle of the night and flown to a remote jail in Bolivia's jungle. In the era of economic globalisation, these are the lengths to which poor governments feel compelled to go in order to protect the interests of foreign corporations.

The World Bank implicitly violated the Cochabambinos' right to affordable water by coercing Bolivia into water privatisation to begin with (though the Bank argues that it opposed the ultimate deal because it included a dam project that the Bank did not favour). In 1996, the Bank's officials told Cochabamba's mayor that privatisation of the city's water was a condition of assistance for water development.

Again, the Bank's officials told the Bolivian President in 1997 that privatising Cochabamba's water was a condition of the country receiving \$600 million in international debt relief.

It is argued that the Bank knew or, at least, should have known that the privatisation of Cochabamba's water would have a dramatically negative effect on prices for the poor. Corporations do not come to poor countries like Bolivia to provide charity. They come to seek a profit (and in Bechtel's case, an excessively high one). Bolivia's government was notoriously both incapable and uninterested in negotiating a deal that would protect the poor and it was not surprising that the contract signed by the government failed to do this. The World Bank only made matters worse in 1999 when it told the government, in the midst of its negotiations with Bechtel, that "no public subsidies should be given to ameliorate the increase in water tar-

iffs in Cochabamba", a policy that virtually guaranteed higher rates for the poor. In short, the World Bank backed Bolivia into a corner where dramatically higher water prices and a violation of the right to water was a predictable result.

Today the same three actors are engaged in a new dance with one another that could once again threaten the right to affordable water in Cochabamba. Bechtel is suing the government of Bolivia for \$25 million, a portion of the profit the corporation had hoped to make but didn't. The case is being heard by a secret trade court operated by the World Bank (the International Centre for the Settlement of Investment Disputes).

The process is so secret that members of the public and the media are neither permitted to attend, nor even to know when meetings are held, where, who testifies and what they say. If the Bank's panel grants Bechtel's demand, those costs will fall directly on Cochabamba water users and will force a dramatic increase in water prices once again.

### **Economic globalisation v human rights: Shifting the balance**

For poor governments, faced with a choice between honouring human rights accords and complying with the commands of international economic institutions, the choice is sadly clear. If they violate human rights, governments may face complaints or at worst international investigation. In contrast, the World Bank and IMF can cut off millions of dollars in aid. Decisions by international trade courts can extract hard cash.

Such actions reduce the resources that governments have available to

fulfil the socio-economic rights of their people.

Nevertheless, even if outgunned by economic accords and the World Bank/IMF commands, international human rights accords are vital. They give profound global legitimacy to the notion that all human beings are endowed by birth with certain fundamental rights.

However, the real defence of those rights lies not only with legal process, but also, and more importantly, with the willingness of people and communities to take action to demand those rights.

The Bolivian water revolt captured world attention as a tale of a humble people rising powerfully to win back their right to water. In doing so, they faced down soldiers, bullets, tear gas, a declaration of martial law, and one of the most powerful corporations in the world.

It is also a compelling tale of how the citizen defence of human rights went global, something that will become even more crucial as these rights come under increasing pressure from the countervailing winds of economic globalisation.

### **An insider's account of the Bolivian revolt**

In the early months of 2000, when Bechtel took over Cochabamba's water system, the Democracy Centre sent news of the events in Bolivia worldwide through its e-mail newsletter.

These dispatches were then published in newspapers and magazines across the US, Canada and in the UK. Project Censored named the Centre's reporting as the top story of the year.

These articles inspired additional reporting by major media such as the

*New Yorker*, the US Public Broadcasting System Network and the British Broadcasting Corporation.

The next task was to investigate and expose the role of the two main international actors that had pushed Bolivia into the crisis - Bechtel Corporation and the World Bank. Bechtel, a Californian engineering giant, had come to Bolivia under an assumed name, Aguas del Tunari. Few people knew that it was actually Bechtel that owned a 55% controlling interest in the Cochabamba water company.

The Democracy Centre researched the Bechtel/Bolivia connection and publicised it worldwide, furnishing readers with the personal e-mail of Bechtel's CEO, Riley Bechtel. Within hours he received hundreds of messages from all over the world demanding his company's withdrawal from Bolivia.

The Democracy Centre also documented the role of the World Bank in coercing Bolivia to privatise its water. The Cochabamba water protests took place during the same week that thousands of people in the US were preparing to travel to Washington for protests against World Bank and IMF economic policies.

As the Democracy Centre's dispatches spread, the water revolt quickly became a popular example of the negative effects of the World Bank's push for privatising water and other services. Days after the water revolt ended its most visible leader, Oscar Olivera, was invited to Washington, to retell the Cochabamba story to thousands of people.

### **Conclusion**

The world needs rules to protect human rights and also to guide the actions of the new global economy. The important issue is what will those rules value most - the right of the poor to water they can afford, or the right of a corporation to maximise its return on investment - human rights or investor rights?

The answer to that question lies in our willingness and our effectiveness to demand that human rights come first. The Cochabamba water revolt provides a model for how we can do that: a combination of street pressure, solid analysis, and creative strategies for removing the anonymity of the corporations and institutions responsible, and for turning a local issue into an international story.

"Many people say it is impossible to fight against these policies", says Leny Olivera, a Cochabamba university student who was actively involved in the water protests. "But we showed that you can, not just in Bolivia but also in the world. The humble people are the majority and are more powerful than multinational corporations." Bolivia, that little-thought-of country in the Andes, gives us an inspiration about what is possible.

 Jim Shultz is Executive Director of the Democracy Centre in Cochabamba, Bolivia and author of *The Democracy Owners' Manual*, Rutgers University Press.

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## Privatisation of basic services in Canada

### Some recent experiences

#### Elizabeth Drent

The past decade in Canada has seen several major initiatives to privatise services previously administered by the state. The extent of privatisation has not been as extreme as in some other Western democracies, such as the United Kingdom. Nonetheless, provinces have privatised such important services as social assistance, public transportation and electricity. The success of these projects, and the prospects for further involvement of the private sector in service delivery across the country, are presently the subject of vigorous debate in Canada.

This article reviews three high-profile cases of privatisation in Canada and addresses the legal strategies employed to oppose them. The cases involve the microbiological testing of water, hydro-electricity, and certain aspects of health care.

#### Privatisation of water testing in Ontario

In 1995, a new Conservative Party government was elected in the province of Ontario. Included among its early initiatives was the discontinuation of routine microbiological testing of municipal water systems by government laboratories. In consequence, municipalities contracted out water testing to private laboratories. No new regulatory regime accompanied privatisation; instead, existing non-binding guidelines on water safety continued to apply.

Within five years of this restructuring, questions were raised about

the role it may have played in a deadly outbreak of E. coli infection. This outbreak, the result of contaminated wells that were not identified or simply ignored by authorities, resulted in some 2 300 people falling ill and in the death of seven.

In early May 2000, heavy rainfall caused flooding in the small community of Walkerton. Water contaminated with E. coli bacteria entered the system through one of the community's three wells. Residents of the town became exposed to the contamination on May 12. For the previous ten days, one well had been operating without a chlorinator. It was also common practice for employees of the Public Utilities Commission (PUC) to either falsify test results or fail to test the water altogether.

On May 17, the private testing laboratory reported to the PUC that water samples had high levels of E. coli bacteria. However, the results were not reported to the Ministry of the Environment or local health officials because the PUC's general manager was concerned that the irregularities in chlorination procedures would become public knowledge. Once people began to fall ill, he also denied that there was a problem with the water when asked by local medical authorities. A 'boil water' advisory was only issued several days later, after the local hospital had performed its own tests on the water.

The provincial government set up a public inquiry with the mandate to examine the events in Walkerton, in-

cluding the role, if any, played by government policies. The operating practices of the PUC were found to have contributed to the disaster. However, the report placed the greater part of blame on the government, particularly the Ministry of the Environment. It concluded that the Ministry's inspection program ought to have detected the deficiencies in the Walkerton PUC, including the inadequate training and supervision. The extent of budget reductions in the Ministry had made this much less likely.

A key element of the breakdown of adequate water monitoring, according to the inquiry, occurred with the privatisation of water testing in 1996. The government had failed to enact regulations to protect public safety by ensuring quality of testing, proper reporting of results, auditing and inspection of facilities by the government, and the staffing of private laboratories by qualified personnel. According to the inquiry, this failure to enact an adequate regulatory scheme resulted, in part, from the anti-regulatory attitude of that particular government.

The province subsequently took steps to implement improved water management practices. Approximately \$CDN 57 million was spent on various initiatives in Walkerton, including investments to improve the water system and the settlement of a class action lawsuit started by Walkerton residents. Comprehensive legislation was passed concerning water management, giving what had previously only been a guideline the force of law.

#### Privatisation of hydroelectricity

Attempts to privatise hydroelectricity have not yet had the same dramatic impact on public health as

the water-testing example. Nonetheless, the blackouts and runaway bills associated with the privatisation of electricity in some US states have recently become part of the Canadian experience too.

Ontario Hydro, the province's electrical utility company, was publicly owned from its creation in 1906. The Conservative government's initiative to restructure and privatise it sparked a fierce debate in the legislature and the media. Legislation dividing the utility into three entities (generation, transmission and retail, and a market operator) was passed and became law in 1998 (Electricity Act, RSO 1998, c-15).

In late 2001, the province announced an initial public offering (IPO) of shares in Hydro One, the new entity involved in transmission and energy distribution. Trade unions brought an application in the Ontario Superior Court for a declaration that the IPO contravened the Electricity Act, because the legislation did not authorise the disposition of the shares in issue.

The Court agreed with this argument and granted the declaration requested (*Payne et al v Wilson et al*, [2002], OJ No 1450, Ont. SCJ). It reasoned that an objective as important as privatisation of the province's utility company should have been clearly set out in the Act as one of the purposes of the legislation. Its absence suggested that privatisation could not have been the legislator's intention. Other provisions of the Act, statements of the responsible Minister in the legislature when the legislation was introduced, and a government White Paper tabled concurrently with the Act, were all consistent with that interpretation.

Subsequently, the government passed legislation that did clearly al-

low for privatisation of the utility. It also appealed the decision of the Superior Court to the Ontario Court of Appeal. However, the appellate court refused to be drawn into the privatisation debate, ruling that the issue was moot in light of the new legislation (*Payne et al v Wilson et al*, 4 July 2002, Docket No C38122, Ont. CA).

The unions had achieved their purpose, however: with public opinion strongly against selling the utility, the government announced soon thereafter that the IPO was cancelled. Meanwhile, the opening of the market to competition from private electricity providers in the same year resulted in skyrocketing prices. In the face of strong public discontent, the government froze rates at pre-competition levels only six months after the market was opened.

Strategic litigation to stall or halt the process of privatisation of electricity has also been undertaken in British Columbia, Canada's westernmost province. There, the provincial Liberal government split the electricity utility, BC Hydro, into three constituent parts. A contract was concluded with a Bermuda-based management company to operate the customer service component.

In September 2002, a class action lawsuit was filed with the provincial Supreme Court on behalf of residents of British Columbia, alleging breach of fiduciary duty, breach of contract and unjust enrichment of the defendant, BC Hydro, as a result of the privatisation initiative. The suit is in the early stages and has not yet been certified as a class action or heard by the court. In their statement of claim, the plaintiffs argue that as the 'owners' of the province's water, the main power source, and Hydro customers, BC residents had contrib-

**Opening the market to competition from private electricity providers led to skyrocketing prices and following public discontent, the government froze rates at pre-competition levels only six months after the market was opened.**

uted to the payment of BC Hydro's debt, funded development of facilities and borne business risk, in addition to incurring the indirect costs of environmental degradation and reduced land value due to damming. They allege that BC Hydro owes the province's residents a fiduciary duty, stemming from the customer-provider relationship, and from legislation regulating electricity provision. Further, they argue that BC Hydro would enrich itself unjustly by the sale of its assets to private owners.

### Health care

The Canada Health Act, (RSC 1985, c-6), sets out five principles with which provincial health insurance schemes must comply in order to receive federal funding: public administration, comprehensiveness, universality, portability and accessibility. Although some provinces have attempted to introduce a parallel fee-paying system for certain services, the federal government has taken the position that the Act prohibits the levying of additional fees for services otherwise available under the provincial health insurance scheme. This approach has assisted in forestalling the development of a separate, private health care system.

**While litigation strategies based on socio-economic rights arguments have limited availability in Canada, the creative use of other legal arguments has drawn the public's attention to the problems that can result from privatisation of basic services.**

However, reduced federal funding in the 1990s constrained public providers and led to the incremental privatisation of aspects of service delivery in several provinces.

In 2001, the federal government appointed a Commission of Inquiry into the Future of Health Care in Canada. The Commission reported that Canadians did not want to move towards a privatised or partially privatised health care system. However, it cautioned strongly that confidence in public health care would wane, and willingness to explore alternatives would increase, if action were not taken to address the shortcomings of the current system.

Although some of the Commission's recommendations, including substantial funding increases, have already been implemented, privatisation of aspects of health care delivery continues.

In response, unions and public interest groups have brought various legal challenges. The British Columbia Supreme Court recently rejected a challenge by health care workers alleging that the government's plan to privatise certain health care services violated their equality rights and their right to freedom of association,

protected under the Canadian Charter of Rights and Freedoms (*The Health Services and Support Facilities Subsector Bargaining Association et al v Her Majesty the Queen et al*, 2003 BCSC 1379).

Meanwhile, unions representing health care workers and public interest groups recently initiated an action in the Ontario Superior Court challenging the authority of the provincial Minister of Health to approve plans to operate two hospitals on the basis of public-private partnerships (*Ontario Council of Hospital Unions et al v Ontario [Minister of Health]*, Court File No. 586/03).

The applicants argue that plans to privatise hospital management would violate the Public Hospitals Act (RSO 1990, c-40). The case has not yet been heard.

Several organisations have started an action in the Federal Court of Canada, claiming that the national Minister of Health's failure to comply with the principles and requirements of the Canada Health Act (CHA) is resulting in the incremental privatisation of health care by the provinces (*Canadian Union of Public Employees v Canada [Minister of Health]*, Court File No T-709-03 [FCTD]).

The applicants allege that, by providing insufficient information about the compliance of provincial insurance schemes with CHA principles, the Minister is not meeting the Act's requirements regarding reporting to Parliament.

Further, it is alleged that she has failed to ensure accountability with respect to administration of the health care system by not investigating complaints. The case has also not yet been heard.

Some commentators have speculated that an argument might successfully be made that the Canadian

Charter of Rights and Freedoms guarantees a right to accessible health care.

Although the Charter contains no protection for socio-economic rights per se, a right to health might be found in section 7, which guarantees the protection of life, liberty and security of the person.

Although the jurisprudential support for this argument is limited, the recent decision of the Supreme Court of Canada in *Gosselin v Quebec* (Neutral citation 2002 SCC 84) may signal the court's openness to this kind of argument in the future. (See also *Chaoulli c. Québec [Procureur general]* [2002] JQ No 759 [Cour d'appel]).

## Conclusions

Privatisation initiatives over the past few years in Canada have drawn attention to the potentially catastrophic implications of state withdrawal from the provision of basic services without putting adequate measures in place to ensure public safety and accessibility.

Notwithstanding the Walkerton and Ontario Hydro debacles, however, provincial governments have continued the process of privatising previously state-administered services. In response, unions and public interest groups have employed various tactics to raise public awareness of the implications of privatisation.

While litigation strategies based on socio-economic rights arguments have limited availability in Canada, the creative use of other legal arguments has been effective in drawing the attention of the public to the problems that can result from privatisation of basic services.

 Elizabeth Drent is a CIDA intern in the Local Government Project, Community Law Centre.

## Promoting access to affordable electricity

### Comments on the draft Electricity Distribution Industry Restructuring Bill

Mike Nefale and Theunis Roux

The draft Electricity Distribution Industry Restructuring Bill (the draft Bill) was published for public comment on 24 April 2003. It provides for the restructuring of the Electricity Distribution Industry (EDI) through the establishment of six Regional Electricity Distributors (REDS).

Until now responsibility for electricity distribution in South Africa has been spread across a range of distributors, with some consumers receiving electricity directly from Eskom and others receiving it from their municipality. The draft Bill envisages that the REDS will take over the distribution function of both Eskom and the municipalities, thereby eliminating the dual delivery system.

This article explores the constitutional context within which the EDI restructuring process is taking place in South Africa, and the lessons that can be learned from similar processes elsewhere in the world. We also comment on certain provisions relating to service delivery and access to premises in the draft Bill.

#### The right to affordable electricity

Policy formulation in the electricity sector cannot proceed without regard for the Constitution.

The 1996 Constitution of South Africa does not contain an express right of access to electricity. However, this right can be implied in the

right to housing. In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (Grootboom), the Constitutional Court held that the right to housing entails more than bricks and mortar. According to the Court, this right may also entail provision of such services as "water sewerage, electricity and roads" (para 37). This interpretation is supported by the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. The CESCR has construed the right to housing broadly to include the right of "sustainable access" to "energy for cooking, heating and lighting" (para 8(b) of General Comment 4, 1991, on the right to adequate housing). Furthermore, the CESCR has underlined in its various General Comments that economic accessibility or affordability is one of the essential elements of the rights to such basic services as water, housing, food, education and health.

In the South African context, all policy choices made by government in relation to the EDI restructuring process must also be analysed against the backdrop of the right to equality recognised under section 9 of the Constitution. Given South Africa's legacy of unequal municipal service provision, this right would re-

*The CESCR has underlined in its various General Comments that economic accessibility or affordability is one of the essential elements of the rights to such basic services as water, housing, food, education and health.*

quire that the provision of electricity be underpinned by the twin principles of equity (in the sense that everyone receives an equal standard of service provision) and fairness (in the sense that there should be no discrimination between groups on any ground, including the grounds listed in section 9(3)). In addition, section 9(2) enjoins the state to take "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". In relation to the EDI restructuring process, this means that government must ensure not only that there is no adverse impact on poor (mostly black) consumers, but also that positive measures are taken to make electricity more affordable.

Section 6(5) of the Eskom Conversion Act 13 of 2001 provides that, in the process of converting Eskom to a public company, regard should be had to the possible impact of such conversion on poor consumers. The *White Paper on the Energy Policy of the Republic of South Africa, 1998*, also states that "energy should be available to all citizens at an affordable cost". According to the Depart-

***The economic and political prerequisites for successful deregulation may not exist in less developed countries.***

ment of Minerals and Energy in its 2000-01 *Annual Report*, the aim of the Electricity Basic Services Support Tariff is "to alleviate the negative impact of poverty on our communities" (p 99). Together, these legislative and policy commitments suggest that the restructuring of the electricity distribution industry is already taking place against the background of an implied right to affordable electricity.

Electricity is a basic necessity and access to it has a wide range of positive developmental benefits for communities. Increased usage of electricity improves the level of welfare, decreases health expenditures and improves opportunities for low-income families, and women in particular. Poor communities should have access to electricity, and should be enabled to afford it without sacrificing other basic necessities.

### **Learning from international experience**

Experience of the impact of EDI restructuring initiatives elsewhere in the world indicates that they may lead to a reduction in the cost of electricity, given certain conditions.

According to Michael Trebilcock, deregulation of the electricity generation and retailing sector, and re-regulation of the transmission and distribution sectors by the introduction of price caps in the United Kingdom and New Zealand, led to "av-

erage real electricity prices [falling] by 13% by the beginning of 1997 compared to 1990" and about 25% from 1985 to 1995 respectively.

However, none of these reductions in price was attributable exclusively to EDI restructuring of the kind contemplated in the draft Bill. These results are also not necessarily replicable in less developed countries, where the economic and political prerequisites for successful deregulation may not exist. Trebilcock gives four economic prerequisites for successful deregulation:

- a healthy private sector;
- efficient regulatory structures
- macro-economic stability; and
- a lack of corruption.

The political prerequisites are the 'desirability' of deregulation (on the part of policy-makers) and 'feasibility' (in terms of the need to overcome opposition from stakeholders, including labour and consumers).

Applying these lessons to South Africa, it is apparent that the major challenges to the EDI restructuring process are not the economic prerequisites, which are largely in place, but the political prerequisites, most notably opposition to the restructuring initiative from organised labour and consumers.

It was the Congress of South Africa's Trade Union's (COSATU) initial objection to the privatisation of Eskom that resulted in the insertion of section 6(5) of the Eskom Conversion Act mentioned above during the Act's enactment by Parliament. On the consumers' side, the role of the Soweto Electricity Crisis Committee in opposing increased electricity charges and the installation of pre-paid meters in Soweto has received much recent publicity.

The problem of thin capital mar-

kets is also very real in South Africa. Although there is no ideological reluctance on the part of government to attract foreign investment into deregulated industries, the current reticence on the part of international investors to invest in such industries is well known. Together, these factors suggest that the EDI restructuring process needs to be well managed politically. It also needs to be well timed in the sense that a final commitment to it should be delayed until government is confident that domestic and international capital markets will be able to support the level of competition required.

### **The need for municipal control over REDS**

Chapter 6 of the draft Bill provides for municipalities to contract out the provision of electricity to REDS through a service delivery agreement.

The role of municipalities will change over time from direct service delivery to overseeing the distribution of electricity by the REDS. This change in role is not, on the face of it, incompatible with the rights and duties of municipalities as set out in sections 4, 6, 7 and 95 of the Local Government: Municipal Systems Act 32 of 2000.

However, a more deliberate attempt to integrate municipalities' responsibilities under the draft Bill with their obligations under the Systems Act would improve the Bill. For example, to the extent that municipalities will no longer be responsible for distributing electricity, it is uncertain whether the provisions for customer care and management in section 95 of the Systems Act will apply.

As section 95 is currently worded, it appears to apply only to the charging of fees for municipal services di-

rectly supplied by municipalities. The principles in this section should not be abandoned merely because the distribution of electricity is to be handed over to the REDS.

If properly implemented, the service delivery agreements contemplated in Chapter 6 of the draft Bill may allow municipalities to assert effective democratic control over the REDS, and thereby to ensure efficient and affordable service delivery. Without effective municipal control of the REDS, the EDI restructuring process may lead to increased prices, the tightening of cost recovery measures, and deteriorating standards of service delivery.

### **Access to premises**

Clause 40(1) of the draft Bill gives the REDS and municipalities the right to enter private property in order to read, inspect, install or repair any meter, or service connection, or to stop the provision of any service. However, the Bill does not make any reference to the service providers' liability for damage caused to the premises.

This is unfortunate because the recognition of service providers' liability for damage is an important guarantee to consumers that their property will not be unnecessarily damaged in the course of electricity installation or disconnection work.

Furthermore, clause 40(1) does not impose any obligation on the REDS or municipalities to notify the occupier of the premises of their intention to access the premises.

Whether outsourced or not, all actions undertaken in relation to the supply of a basic service such as electricity amount to administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. Section 3 of this Act requires administrators to adopt fair procedures before taking any action "which materially and adversely affects the rights or legitimate expectations of any person".

An occupier of premises has a right to know when and why the premises are being visited.

The amendment of clause 40(1) along these lines would make electricity consumers more inclined to permit authorised representatives onto their premises for the purposes of reading meters, which may in turn improve the accuracy of the billing system.

### **Conclusion**

Unless attention is given to how the EDI restructuring process will resolve (rather than exacerbate) existing problems relating to the affordability of electricity, international and local experiences suggest that the South African EDI restructuring initiative is unlikely to succeed.

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This article is based on a submission made by the Law and Transformation Programme to the Department of Minerals and Energy on the draft EDI Restructuring Bill.

## **The private sector as service provider and its role in implementing child rights**

The views of the UN Committee on Child Rights

**Godfrey Odhiambo-Odongo**

At its 31st Session held in September and October 2002 the Committee on the Rights of the Child (the Committee) devoted its day of general discussion to the theme, 'The private sector as service provider and its role in implementing child rights'. The Committee monitors the implementation of the Convention on the Rights of the Child (CRC). It hosts a day of general discussion periodically focussing on a specific article of the CRC or a child rights theme "in order to enhance understanding of the contents and implications of the Convention".

The recommendations adopted by the Committee at the end of the discussions can therefore serve as important aides to the interpretation of the provisions of the CRC and the obligations they generate.

The main objectives of the day of discussion were to:

- explore the scope of action of private actors and its negative and positive impact on the full realisation of the rights of the child;

***The best interests of the child should be a primary consideration in all actions concerning children, whether undertaken by public or private actors.***

- specify the obligations of state parties and private actors in the context of privatisation;
- assess the implications of private sector involvement in service provision on governance issues, particularly on participation, accountability, transparency and independence; and
- identify possible models of implementation of the obligations.

As with previous thematic discussions, the Committee invited representatives of the UN organs, bodies and specialised agencies, and such other competent bodies as non-governmental organisations (NGOs), research and academic organisations and individual experts to contribute to the discussion.

In addition, representatives of the private sector, including international financial institutions were invited to participate. A variety of background papers by NGOs, academic institutions, independent experts and UN agencies were submitted.

**The Committee's recommendations**

Based on the plenary discussion and the findings of the working groups, the Committee adopted a range of recommendations to state parties and private service providers on both

general and specific legal obligations.

**Legal obligations**

The Committee emphasised that state parties were primarily responsible for compliance with the CRC by all persons within their jurisdiction.

State parties are not relieved of the obligations imposed on them by the CRC when the provision of services is delegated to non-state actors. In particular, the Committee stated that the obligations of state parties under article 4 of the CRC remain even when states rely on non-state service providers. These obligations are to:

undertake all legislative, administrative and other measures for the implementation of the rights in the Convention and to devote the maximum amount of available resources to the realisation of economic, social and cultural rights of the child.

The Committee re-emphasised that the best interests of the child should be a primary consideration in all actions concerning children, whether undertaken by public or private actors.

Consequently, state parties are enjoined to set standards in conformity with the CRC and to ensure compliance by appropriate monitoring of institutions, services and facilities, including those of a private nature.

It stated that state parties have the obligation to ensure that privatisation does not threaten accessibility to services based on criteria prohibited under the principle of non-discrimination.

Furthermore, the Committee noted that the responsibilities to respect and ensure the rights of chil-

dren extend beyond the state and include individuals, parents, legal guardians and other non-state actors.

**Recommendations to state parties**

Having outlined in general terms the legal obligations that arise from the CRC in the context of privatisation, the Committee made a range of recommendations to state parties, including to:

- establish a permanent monitoring mechanism aimed at ensuring that non-state service providers respect the CRC. In particular, governments must ensure that beneficiaries, particularly children, have access to an independent monitoring body and, where appropriate, judicial recourse;
- provide a supportive and protective environment which enables non-state actors - whether non-profit or for-profit - providing services to children to do so in full compliance with the CRC;
- undertake a comprehensive and transparent assessment of the political, financial and economic implications and the possible limitation of the rights of beneficiaries when considering contracting out services to a non-state provider (whether for-profit or non-profit); and
- ensure independent monitoring of the implementation and the transparency of the process.

**Recommendations to non-state service providers**

The Committee called upon all non-state service providers to respect the provisions of the CRC especially when conceptualising, implementing

and evaluating their programmes and when subcontracting to other non-state service providers. In particular, the four general principles of non-discrimination, the best interests of the child, the right to life, survival and development, and child participation, must be respected. Furthermore, the Committee encouraged non-state service providers to develop self-regulatory mechanisms, which would include a system of checks and balances. It also encouraged these actors to engage in a continuing process of dialogue and consultation with the communities they serve and other stakeholders in order to enhance transparency and accountability.

### General Comment No 5

At its 34<sup>th</sup> Session (19 September-3 October 2003), the Committee adopted General Comment No 5 on the general measures of implementation of the CRC. Paragraphs 42-44 of the General Comment directly address the subject of privatisation.

General Comments have been found to be persuasive in interpreting constitutional and regional human rights provisions. In South Africa, the Constitutional Court has considered the General Comments issued by the Committee on Economic, Social and Cultural Rights (CESCR) when interpreting the socio-economic rights provisions in the South African Constitution. Similarly, the African Commission had recourse to the CESCR's General Comments when construing the provisions of the African Charter on Human and Peoples Rights in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication No 55 of 1996).

In order to fully capture the nature and scope of the obligations of state parties under the CRC, the General Comment must be read as a whole. Referring to the day of general discussion, the Committee defines the term 'private sector providers' broadly to encompass businesses, non-governmental organisations and other private associations, both for-profit and not-for-profit.

Essentially, paragraphs 42-44 of the General Comment reiterate the Committee's recommendations mentioned above.

Among other things, while acknowledging that "enabling the private sector to provide services, run institutions and so on does not in any way lessen the State's obligation to ensure for all children in its jurisdiction the full recognition and realisation of all the rights in the Convention", it emphasises that in any decentralisation or privatisation process, the government remains clearly responsible for ensuring respect of the CRC. This obligation includes ensuring that non-state providers operate in accordance with the provisions of the CRC. It is important to note that the primary responsibility of the state in this regard extends to all levels of government (paragraph 40).

The need to establish a permanent monitoring mechanism aimed at ensuring that all state and non-state

***If service provision is structured by human rights principles, it is possible to guarantee sustainable and progressive access to the basic services by all.***

service providers respect the CRC is also reiterated.

### Conclusion

It is clear that international human rights monitoring bodies are taking the issue of privatisation of basic services more seriously. The Committee on the Rights of the Child must therefore be commended for being the first to dedicate its attention to this important issue. Other monitoring bodies are urged to focus on this issue as well.

If service provision is structured by human rights principles, it is possible to guarantee sustainable and progressive access to the basic services by all.

 Godfrey Odhiambo-Odongo is an intern in the Children's Rights Project of the Community Law Centre and a doctoral candidate at UWC.

General Comment No 5 can be downloaded from  
[www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)

The recommendations of the Committee on the Rights of the Child on the private sector as service provider and its role in implementing child rights can be downloaded from  
[www.unhchr.ch/html/menu2/6/crc/doc/days\\_service.pdf](http://www.unhchr.ch/html/menu2/6/crc/doc/days_service.pdf)

## Seminar on privatisation of basic services, democracy and human rights

Annette Christmas

On 2-3 October 2003, the Socio-Economic Rights Project and the Local Government Project of the Community Law Centre, University of the Western Cape, hosted a seminar entitled "Privatisation of basic services, democracy and human rights". The seminar drew international and local participants from the government sector, the NGO community, social movements, trade unions and the academic community.

The objectives of the seminar were:

- to share international and South African perspectives and experiences on the privatisation of basic services;
- to explore the links between privatisation, human rights and democratic norms;
- to explore the implications of human rights and democratic norms for law and policy reform relating to the privatisation of basic services; and

- to identify areas for further research.

Presentations focussed on the meaning of the concept of privatisation and current debates around it, its implications for human rights and democratisation, current experiences of privatisation in Africa and Canada, and case studies of the privatisation of water and sanitation, and electricity in South Africa.

It emerged from the seminar that privatisation of basic services has huge implications for human rights and democratic norms. In most cases, service agreements with non-state providers are concluded without due regard to these norms. However, existing legal procedures to ensure that privatisation does not result in denials or violations of human rights are often not utilised or are under-utilised.

It was agreed that more research must be conducted into the implications of privatisation for hu-

man rights and democratic norms. Social movements, NGOs and human rights organisations were urged to use the existing constitutional and legislative framework in South Africa more fully to ensure that privatisation of basic services does not undermine democratic norms and human rights. Government representatives were also urged to take human rights principles more seriously in making policy decisions on using private service providers and during the implementation of the service agreements with them.

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The report of the seminar will be posted on:  
[www.communitylawcentre.org](http://www.communitylawcentre.org)

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