

→ Do human rights make a difference to poor and vulnerable people? Accountability for the right to water in South Africa<sup>1</sup>

LYLA MEHTA

To what extent is accountability key to realising rights? In struggles over access to water, conflicts between market- and rights-based frameworks imply distinct strategies of accountability. The former implies consumers holding service providers to account. In this understanding, citizens are consumers and accountability is exercised through the implied contract, mediated by the market, between customer and water utility, even if the state remains responsible for regulating private service providers to ensure they meet the needs of the poor. Rights-based frameworks, on the other hand, assume that accountability claims will be pursued through and mediated by the state. This confers upon the state the power to both respect and deny rights, the consequences of which are explored below.

In the past decade, the rights discourse has gained currency in international development. A human rights approach to development is seen as moving away from looking at charity or handouts to empowerment and securing firm rights to 'the requirements, freedoms and choices necessary for life and development in dignity' (Hausermann 1998). Despite the fact that support for the human rights movement has been growing considerably and a human rights approach to development is now fairly mainstream, there is a growing acknowledgement that many of the world's poor and marginalised have yet to enjoy the benefits of these rights. There are many possible reasons for this.

First, *sins of omission* may deny citizens access to social and economic rights. It is well known that poor states may not prioritise the provision of education, water and housing for all. Also, many developing countries lack the resources to make good the rights that allow all citizens to live a life of dignity, or the institutional capacity to establish these rights. Conversely, citizens may not be aware of their rights and may not have

the capacity to mobilise around them. Second, *sins of commission* may deprive people of rights. The rights of vulnerable people may knowingly be put at risk or even violated for a variety of reasons. For example, freedom of speech and the right to protest are severely restricted under dictatorships. Moreover, as this chapter demonstrates, states and global players may introduce macroeconomic policies that violate basic rights in the name of development or growth. It is, however, the lack of mechanisms of accountability and poor regulation on the part of states that allow both sins of omission and commission to flourish, preventing economic and social rights from becoming real.

Accountability is usually seen as the means through which the less powerful can hold more powerful actors to account (Goetz and Jenkins 2004). Traditionally, it is governments that are mainly responsible for protecting people's rights, but there is an increasing need to hold private sector and global actors to account for policies and programmes that have a far-reaching impact on the rights and well-being of poor and vulnerable people. Diffuse and unclear rules of accountability for global players and non-state players are problematic when most human rights declarations focus on states as the primary deliverers and protectors of rights.

Rights claiming is a way to demand accountability from powerful players. But, as this chapter demonstrates, accountability is an issue that is still missing from many human rights debates. For the Millennium Development Goals and other processes to be successful, attention must be paid to several contradictions and questions. Do paradoxical outcomes arise from a dual commitment to markets and rights, compromising people's basic rights while making it difficult to enforce accountability mechanisms? Can poor institutional capacity and low resource allocation impede the realisation of economic and social rights? Do the necessary accountability mechanisms exist to hold the powerful to account? Is there an ambiguity about responsibilities and duty bearers when economic and social rights are violated?

This chapter focuses on these issues and questions by examining the right to water in South Africa.<sup>2</sup> In 2002, the UN Economic, Social and Cultural Council gave a lot of prominence to the right to water through its General Comment No. 15, which applies an authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), ratified by 148 states. The Comment, not a legally binding document, stated explicitly that the right to water is a human right and that responsibility for the provision of sufficient, safe, affordable water to everyone, without discrimination, rests with the state. States are thus clearly responsible for progressively realising the right to water.

Here I examine both the ideological currents underpinning the water debate in South Africa and its institutional, administrative and policy environment in order to understand the importance of accountability in realising the right to water. The chapter draws on empirical research conducted in 2002 and 2003. Interviews were conducted with NGO representatives, villagers, academics, policy makers and private sector representatives in Cape Town, Pretoria, Johannesburg and in the Eastern Cape province of South Africa.

## Dancing to the two tunes of rights and markets?

South Africa is the only country that recognises the human right to water at both the constitutional and policy level. Moreover, its Free Basic Water (FBW) policy goes against the grain of conventional wisdom in the water sector, which stresses cost recovery mechanisms and shies away from endorsing the human right to water (Mehta 2003). Since early 2000, the Department for Water Affairs and Forestry has been investigating providing a basic level of water free to all citizens. In February 2001 the government announced that it was going to provide a basic supply of 6,000 litres of safe water per month to all households free of charge (based on an average household size of eight people). The Water Services Act 108 of 1997 states that a basic level of water should be provided to those who cannot pay, and the FBW policy emanates from the legal provisions of the Act. The main source of funding for this initiative is the Municipal Infrastructure Grant, a conditional capital grant for the provision of infrastructure, and the Equitable Share Grant, an unconditional grant from the central government to local authorities intended for operational expenditure. The latter amounts to about R7.5 billion a year (R1 = US\$0.158) and is from national taxes for the provision of basic services.<sup>3</sup>

While the government of South Africa stands alone internationally in endorsing the constitutional right to water, its policies have been informed by several dominant water management frameworks, which include an emphasis on cost recovery as well as a shift in the role of the state from direct provider of water-related goods and services to a more regulatory function, with privatisation seen as the means to overcome the past failure of public systems to provide water to the poor. Government policies draw on a quasi-consensus amongst multilateral and bilateral agencies on issues such as cost recovery, user fees, and demand management, manifested in both poor countries and middle-income settings like South Africa. For example, several authors have