Water privatisation and socio-economic rights in South Africa*

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1 INTRODUCTION

Several studies of privatisation have been conducted but have rarely done so from a human rights perspective. The implications of human rights, especially socio-economic rights, for privatisation of basic municipal services therefore remain under-researched. This article seeks to explore this question in the South African context. The focus will be on water privatisation. The point of departure is that the provision of water services is directly connected to the enjoyment of the right of access to water, which is expressly recognised by the South African Constitution as a justiciable right. It follows that water services delivery mechanisms and policies must be structured in terms of human rights principles. The article begins by briefly providing the context in which water privatisation in South Africa is occurring. Then the concept of privatisation is defined. It is argued that this term encompasses many forms of private-sector involvement in service delivery over and above full divestiture. This is followed by a discussion of the key constitutional principles relevant to privatisation of basic services such as water. The last part deals with some of the specific human rights concerns as raised by privatisation generally, and as revealed by experience in South Africa.

2 THE STATUS OF PRIVATISATION IN SOUTH AFRICA

The privatisation debate in South Africa is far from new, although it has received heightened attention in the post-apartheid era. As early as the 1970s the apartheid government had already started experiencing pressure from the business community to privatise state enterprises.[1] However, little progress was made in pursuing the privatisation agenda in the 1970s and the 1980s. A number of reasons could be cited for this. The first was the drawn-out economic recession of the mid-1970s and 1980s.

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1 Thomas WH 'The privatisation drive – After the white paper' in McGregor R and McGregor A (eds) *McGregor's privatisation in South Africa* (1987) at 7, 9–11.

The second was government fears that ill-designed privatisation might have negative cost implications for lower income earners. This would have provided credibility to leftist calls from the anti-apartheid movement for nationalisation of key private enterprises.[2] The third was the lack of pressure (partly due to economic sanctions imposed on South Africa from 1985) from the International Monetary Fund and the World Bank, as experienced by other African countries.[3]

The pressure to privatise mounted towards the end of the apartheid regime as the World Bank and IMF intensified their negotiations with the South African government.[4] The Normative Economic Model adopted by government and released in March 1993 incorporated privatisation, liberalisation, expenditure cuts and strict fiscal discipline as its central pillars. In line with this policy, the delivery of water and sanitation services in three Eastern Cape municipalities, Queenstown, Stutterheim and Fort Beaufort, became the first basic municipal services to be privatised in 1992, 1993 and 1994 respectively. Lyonnaisse Water Southern South Africa, restructured in 1996 as Water and Sanitation Services (WSSA), was the private actor that won the relevant management contracts.[5]

The stance of the African National Congress on privatisation before 1992 was negative and suggestive of an inclination to nationalisation of key industries.[6] A 'Discussion Document on Economic Policy' issued in 1990 had 'growth through redistribution' as its overriding theme, embodying a formula 'in which redistribution acts as a spur to growth and in which the fruits of growth are redistributed to satisfy basic needs'.[7] It was envisaged that the state would play a key role in redistribution. This policy attracted spirited criticism from mainstream economists and the business sector.[8] However, a major shift from a socialist stance to a neo-liberal orientation was not discernible until after 1994. According to Marais, although the ANC had not entirely succumbed to the prerogatives of capital, by 1994 'a strong conservative tilt had emerged' in its economic policies that endorsed a restricted role for the state in redistribution, financial and monetary stringency, and restructuring of trade and industrial policies.[9]

The first policy document released by the democratic government in 1994, the 'Reconstruction and Development Programme (RDP)', affirmed a commitment to reconstructing South African society and redistributing

2 *Ibid*. See also Pape J and McDonald DA 'Introduction' in McDonald DA and Pape J (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002) at 1, 2.

3 Thomas (fn 1 above) at 7, 11.

4 Pape and McDonald (fn 2 above) at 1, 2

5 Ruiters R 'Debt, disconnection and privatisation: The case of Fort Beaufort, Queenstown and Stutterheim' in McDonald DA and Pape J (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002) at 41, 42–43.

6 Marais H *South Africa limits to change the political economy of transformation* (1998) at 146.

7 *Ibid* 146.

8 *Ibid* 149.

9 *Ibid* 156–157.

state resources.[10] This included an earnest commitment to empower people politically and economically through provision of (access to) food, health care, housing, water, electricity, land and sanitation services and provision for tariff restructuring, cross-subsidies and life-line services to the poor with regard to water, sanitation and electricity.[11] The RDP originated from the trade union movement;[12] it can be argued that the RDP's anti-neo-liberal pretensions have much to do with its origin. However, the White Paper on Reconstruction and Development adopted later in the same year revised the RDP significantly, reflecting the uncomfortable compromise between conflicting constituents within the ANC and the business sector, by making a firm commitment to redistribution without divorcing itself from the imperatives of the market ideology.[13]

In 1995 the then Deputy President, Thabo Mbeki, announced a plan for a wide-ranging privatisation programme. However, it was not yet clear that this plan would affect the delivery of basic services. A determined move in this direction was reflected in the 'Growth, Employment and Redistribution' policy adopted in 1996. This policy was formulated specially to accelerate privatisation, encourage foreign investment, bring down inflation, cut the national deficit and reduce poverty by relaxing restrictive labour laws.[14] Other components of this neo-liberal package included fiscal restraint, export orientation, corporatisation, trade liberalism, cost recovery and deregulation of the market. These principles have since received wide implementation in South Africa.[15]

Developments related to privatisation have also taken place in the arena of institutional transformation. The South African government has since 1996 undertaken wide-ranging public sector reforms. One of them has been the expansion of the reach of the state through a range of partnership arrangements, mainly with the private sector but also with civil society organisations as elaborated in various policy documents such as the White Paper on the Transformation of the Public Service, the White Paper on Municipal Partnerships and the Strategic Framework for Delivering Public Services through Public-Private Partnerships.[16] Thus, the trend to privatise has, since 1995, become irresistible. By 2000 the government

10 African National Congress *Reconstruction and development programme* (1994).

11 *Ibid*. See also Rural Development Services Network 'Water pricing for all in South Africa: Policies, pricing and people' in *Discussion document prepared for the 'Water for all Seminar'. Commonwealth People's Centre meeting. Durban. 10 December 1999.*

12 Marais (fn 6 above) at 178.

13 Pieterse E and van Donk M 'Incomplete raptures: the political economy of realising socio-economic rights in South Africa' (2002) 6 *Law Democracy and Development* at 193, 200–201.

14 See 'Growth, Employment and Redistribution: A Macroeconomic Strategy', 14 June 1996, at http://www.polity.org.za/html/govdocs/policy/growth.html. See also COSATU *Accelerating transformation: COSATU's engagement with policy and legislative processes during South Africa's first term of democratic governance*, First Term Report of the COSATU Parliamentary Office (2000) and Greenberg S *Eskom sector restructuring and service delivery in South Africa* (2002) at http://www.aidc.org.za/web/privatisation/privatisationandresistance.html.

15 Page and McDonald (fn 4 above) at 1, 2.

16 Pieterse and van Donk (fn 13 above) at 204–5.

was calling for accelerated restructuring[17] and the reach of privatisation extended to a wide range of services.[18]

As far as water privatisation is concerned, following the first water management contracts awarded to WSSA in the early 1990s, the provision of water services in Nelspruit was, in 1999, contracted out to Biwater, a British-based multinational corporation, for 30 years.[19] Also in 1999, the provision of water and sanitation services in Dolphin Coast and Durban was contracted out to multinational companies SAUR International and Bi-Water respectively.[20] In 2001, management contracts to provide similar services were won by WSSA in respect of Johannesburg.[21] It must be noted that these privatisation initiatives have not involved full divestiture (transfer) of state assets to private service providers. Rather, they were public-private partnerships whereby the state retains some degree of control over the service. It is also important to highlight that there have been wide ranging small-scale privatisations in the area of water. Outsourcing the functions connected with water provision, such as meter reading, pipe laying, water testing and water cut-offs, have increased.[22] Significantly, the enactment of the Municipal Systems Act 32 of 2000 has witnessed a shift in policy direction by the government from more overt forms of private sector involvement in the provision of municipal services to corporatisation. Thus, the cities of Cape Town, Pretoria, Johannesburg

17 See Ministry of Public Enterprises Republic of South Africa 'An accelerated agenda towards the restructuring of state owned enterprises policy framework' (August 2000).

18 Since 1995 six SABC radio stations were sold, Sun Air (later liquidated) and national forests were privatised, and stakes in South African Airways, Telkom and Transnet (to mention just a few examples) have been sold. See ABSA 'Privatisation in South Africa' (2001) *Fourth Quarter Economic Perspective* at 1; PGI (2002) 12, *Privatisation Review* (Special Issue) at 1. Since 1997, 18 state-owned enterprises have been sold. Stakes in the four biggest state enterprises – Transnet, Telkom, Eskom and Denel – have been sold or earmarked for sale. See AIDC 'Privatisation in South Africa – The facts' *Alternatives Journal* Oct/Nov 2002; CALS 'Comment on the draft Electricity Distribution Industry Restructuring Bill' 23 May 2003; Ayugu MA 'Debating "privatisation" of network utilities in South Africa: Theories, fables, facts, other' Paper presented at *Tips Annual Forum* (2001). Privatisation of basic services has also taken the form of widespread outsourcing of refuse collection by municipalities. See Qotole M and Xali M 'Selling privatisation to the poor: The Billy Hattingh "community based refuse removal scheme" in Khayelitsha' in The commercialisation of waste management in South Africa (2001) 3 *Municipal Services Project Occasional Papers* at 7.

19 Smith *et al* 'Public money, private failure: Testing the limits of market based solutions for water delivery in Nelspruit' in McDonald D and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) at 130; Ruiters G and Bond P 'Contradictions in municipal transformation from apartheid to democracy: The battle over local water privatisation in South Africa' Background paper, Municipal Services Project, available at: http://qsilver.queensu.ca/~mspadmin/.

20 Ruiters R (fn 5 above) at 43.

21 Rural Development Services Network 'Against the water current: Water and privatisation in the Southern African Region' (2002) *Briefing paper for the EU/SADC Civil Society Conference held in Denmark*, November, at 3-5, available at http://www.rdsn.org.za/news/documents.htm.

22 McDonald D and Ruiters G 'Theorising water privatisation in Southern Africa' in McDonald D and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) at 13, 28.

and Durban have, since the beginning of the new millennium, embarked on transforming the government entities involved in the provision of water into corporatised entities. In this article, corporatisation is treated as a form of privatisation for reasons that will be given below.

3 DEFINING PRIVATISATION

This article adopts a broad definition of privatisation, considering it as a process involving the reduction of the role of the government in asset ownership and service delivery and a corresponding increase in the role of the private sector.[23] While commonly associated with full divestiture (complete transfer of a public enterprise to a private actor),[24] privatisation embraces a wide range of methods of private sector involvement in service delivery, including partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out of specific activities to private actors, management or employee buy-out, and discontinuation of a service previously provided by the public sector on the assumption that, if it is necessary, a private actor might engage in its delivery.[25]

A more tacit form of privatisation is what has come to be called 'corporatisation'. As mentioned earlier, municipalities in South Africa are increasingly resorting to corporatisation as a model of water provision alternative to or simultaneously with public-private partnerships. The principal objective of corporatising a public service is to let it function as a business.[26] While ownership, control and management of the assets remain in the public sector,[27] a corporatised entity operates on a commercial basis.[28] Furthermore, corporatised entities often engage in outsourcing of some of their services[29] and, sometimes, corporatisation can be a stepping-stone to full-scale privatisation or, at least, pave the way for the involvement of private actors.[30] Thus, most of the human rights concerns

23 Gayle DJ and Goodrich JN 'Exploring the implications of privatisation and deregulation' in Gayle DJ and Goodrich JN *Privatisation and deregulation in global perspective* (1990) at 1, 3.

24 McDonald DA 'Up against the (crumbling) wall: The privatisation of urban services and environmental justice' in McDonald DA (ed) *Environmental justice in South Africa* (2002) at 292, 296–297.

25 *Ibid.* See also Thomas (fn 1 above) 13; Vuylsteke C 'Techniques of privatisation of state-owned enterprises: Methods and implementation' in *Washington DC: The World Bank* (1988) at 8; Andic FM 'The case for privatisation: Some methodological issues' *Privatisation and deregulation in global perspective* (1990) at 37–39.

26 Bond P, Ruiters G and McDonald D 'Water privatisation in Southern Africa: The state of the debate' (2003) 4 *ESR Review* (4).

27 Smith L 'The corporatisation of water' in McDonald and Smith L (eds) *Privatising Cape Town: Service delivery and policy reforms since 1996*: Municipal Services Project 7 (2002) at 35, 43; McDonald DA 'Privatisation and the new ideologies of service delivery' in McDonald DA and Smith L *op cit* at 3, 11.

28 *Ibid.*

29 Smith L 'The murky waters of second wave Neoliberalism: Corporatisation as a service delivery model in Cape Town' in McDonald DA and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) at 44.

30 McDonald and Ruiters (fn 22 above) at 18.

raised by other forms of privatisation are similar to those that arise in the context of corporatisation.

Privatisation policies, including corporatisation, are implemented together with such market-based policies as financial ring-fencing, performance-based management, removal of subsidies and the introduction of full cost-recovery measures.[31] In this article, such policies are collectively referred to as commercialisation policies as all are aimed at ensuring that a service is run on a commercial basis. Financial ring-fencing is aimed at ensuring that the full costs of running the service are easily identified.[32] It involves creating an accounting system for a particular service separate from other services. In the process, hidden cross-subsidies within an integrated system of service delivery are removed.[33] The introduction of performance-based salaries for managers acts as an incentive for the latter to ensure high marginal returns.[34] The implications of all these policies for human rights, especially the right to water, are examined below.

4 HUMAN RIGHTS PRINCIPLES

4.1 The protection of the right to water

The right to water is a typical example of a socio-economic right. These rights aim to ensure access by all human beings to the resources, opportunities and services necessary for an adequate standard of living.[35] 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 integrally linked to access to a basic set of social goods.[36] In the South African context, these rights are 'key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential'.[37] They can also play a significant role in the eradication of poverty and bridging socio-economic inequalities in society.[38]

The South African Constitution departs radically from traditional constitutions by entrenching a range of socio-economic rights side by side with civil and political rights in its Bill of Rights as justifiable rights.[39] Of

31 McDonald (fn 27) at 11.

32 McDonald and Ruiters (fn 22 above) at 18.

33 *Ibid.*

34 *Ibid.*

35 Liebenberg S and Pillay K (eds) *Socio-Economic Rights in South Africa* (2000) at 16.

36 De Waal J, Currie I and Erasmus G *'The Bill of Rights Handbook'* (2001) at 432.

37 Per Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others* (hereafter *Grootboom*) 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) par 23.

38 International Council on Human Rights Policy (2003) 17-19.

39 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South African Constitution (In re Certification)* 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC). Since then judicial enforcement of these rights has generated a number of cases, including *Soobramoney v Minister of Health, KwaZulu-Natal* (hereafter *Soobramoney*) 1997 (12) BCLR 1696 (CC); 1998 (1) SA 765 (CC); *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (7) BCLR 652 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (hereafter *TAC*) and *Grootboom* (fn 37 above).

particular importance to note is that, in terms of section 27(1)(c), 'everyone has the right to have access to . . . sufficient food and water'.

The right protected, it must be observed, is one of 'access to water' and not 'to water'. The Constitutional Court in *Grootboom* held that there was a difference between 'the right of access to adequate housing' and 'the right to adequate housing'. Firstly, it was held that the former recognises that housing entails more than the physical structure:[40] it also requires 'available land, appropriate services such as the provision of water and the removal of sewage and the financing of these including the building of the house itself'.[41] Secondly, 'access to' suggests that the state has an obligation to empower private individuals and organisations to provide housing.[42] As the Court aptly put it, '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'.[43] By implication, it can be said that the right of access to water guarantees not only access to water but access to all services connected with its provision. Furthermore, it imposes an obligation on the state to empower private persons to provide water. This can be regarded as an implicit recognition of the fact that the state may not be the sole provider of services like water. Comparative human rights jurisprudence appears to support the view that private sector involvement in the provision of basic services in and of itself may not be objectionable, unless it is shown that a particular human rights principle has been violated or is threatened.[44]

In view of the foregoing, it is clear that service delivery options concerning water and policies connected therewith, impact both directly and indirectly on the enjoyment of the right of access to water. Given the

40 *Grootboom* (fn 37 above) at par 35.

41 *Ibid.*

42 Liebenberg S 'The Interpretation of Socio-Economic Rights' in Chaskalson M *et al* (eds) *Constitutional Law of South Africa* (2004) at 33–1, 33–22.

43 *Grootboom* (fn 37 above) at par 35.

44 For example, the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights ('the Covenant') reaffirmed that 'the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question'. See General Comment No 3 (1990) The nature of state parties' obligations (art 2(1) of the Covenant) par 8. Similarly, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights state in par 6 that '[t]he achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures'. In an Indian case, Jeevan Reddy J commented with regard to the directive principle in the Indian Constitution on free and compulsory primary education that this did not mean that obligation can be performed only through state schools; it could also be achieved 'by permitting, recognising and aiding voluntary non-governmental organisations, which are prepared to impart free education to children'. See *Krishnan v State of Andhra Pradesh* 1993 (4) LRC 231, 301.

supreme status that human rights enjoy under the South African Constitution, and while privatisation as a policy cannot be rejected outright, it must, like other public measures, comply with principles of human rights to be acceptable.[45]

4.2 The State's obligations

The Constitution imposes specific obligations on the state to 'respect, protect, promote and fulfil' the right of access to water.[46] Furthermore, the State has the obligation to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.[47]

The duty to 'respect' a right places 'at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing' that right.[48] The duty to 'protect' calls on the state to take positive action to protect its citizens from violation of the right by private actors.[49] The duty to 'promote' enjoins the state to ensure that individuals are able to exercise that right through promoting tolerance and raising awareness.[50] The duty to 'fulfil' entails an obligation to facilitate the actual realisation of the right[51] – that is, the adoption of positive measures that enable individuals and communities to enjoy the right in question.[52] Additionally, the duty to 'fulfil' includes an obligation to provide the right when individuals or groups are unable to realise it by their own means. The implications of these duties for privatisation will be elaborated on later.

Clearly, therefore, the duties to protect, promote and fulfil are positive in nature. Compliance by the state with these duties will be measured by the standard of reasonableness laid down in *Grootboom*. This test requires that a programme of implementation must be a comprehensive and co-ordinated one that 'clearly allocates responsibilities and tasks to the different spheres of government and ensures that appropriate financial and human resources are available'.[53] Secondly, the measures must be directed towards the progressive realisation of the right within the state's available means.[54] Thirdly, they must be reasonable 'both in their conception and their implementation'.[55] Fourthly, they must be 'balanced and

45 Chirwa DM 'Privatisation of water in Southern Africa: A human rights perspective' (2004) 4 *African Human Rights Law Journal* (2) (forthcoming).

46 S 7(2) of the Constitution.

47 S 27(2) of the Constitution.

48 Par 34 (emphasis added).

49 See *Carmichelle v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) par 44.

50 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (hereafter *SERAC*) Communication No 55 of 1996 par 46.

51 General Comment No 13 'The right to education' (1999) (art 13 of the Covenant) adopted by CESCR at its 21st session at par 47.

52 *Ibid.* General Comment No 14 'The right to the highest attainable standard of health' (art 12 of the Covenant) at par 37; General Comment No 12 'The right to adequate food' (art 11 of the Covenant) adopted by CESCR on 12 May 1999 at par 15.

53 *Grootboom* (fn 37 above) at par 39.

54 *Ibid* par 41.

55 *Ibid* par 42.

flexible' and make appropriate provision for 'short term, medium and long term needs'.[56] A programme that 'excludes a significant segment of society cannot be said to be reasonable'.[57] Fifthly, the programme must respond to those 'whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril'.[58] A measure that is statistically successful but fails to respond to the needs of those most desperate may not pass the test.[59] Privatisation policies must meet the standard of reasonableness in order to be constitutionally acceptable.

4.3 A rights-based approach to the provision of water services

In addition to the state complying with the duties mentioned above, the formulation and implementation of privatisation policies relating to water should be underpinned by four key human rights principles.[60] These principles embody what has come to be known as the human rights approach to development. This approach is based on the premise that the human person is the ultimate subject of human development.[61] It is therefore imperative that development measures or policies aimed at alleviating poverty must place human rights at the fore.[62]

The first is the principle of equality and non-discrimination. This is a central principle on which the South African Constitution[63] and international human rights law generally[64] are founded. Apart from taking measures to eliminate discrimination, this principle enjoins states to formulate and implement legislative and other measures aimed at the protection of the most vulnerable, the poor and socially excluded groups against discrimination by state and private actors.[65] Affirmative measures are consistent with this principle.[66] The second is the indivisibility and interdependence of

56 *Ibid* par 43.
57 *Ibid.*
58 *Ibid* par 44.
59 *Ibid.*
60 The Office of the High Commissioner for Human Rights 'Human rights, poverty reduction and sustainable development: Health, food and water' in *A background paper for the World Summit on Sustainable Development* (2002).
61 See Art 2(1) of the Declaration on the Right to Development, adopted by the UN General Assembly Resolution 41/128 4 December 1986. On the rights-based approach to development see The Office of the High Commissioner for Human Rights (fn 60 above).
62 The Office of the High Commissioner for Human Rights has stated with regard to trade liberalisation policies that '[i]n setting comprehensive objectives for trade liberalisation that go beyond commercial objectives, a human rights approach examines the effect of trade liberalisation on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals'. See 'Economic, social and cultural rights: Liberalisation of trade in services and human rights' *Report of the High Commissioner* (2002) at par 8.
63 See ss 1 and 9 of the Constitution.
64 See eg pars 1 and 5 of the Preamble to, and art 1 of the Universal Declaration of Human Rights, adopted by the UN GA Resolution 217 (III) of 10 December 1948.
65 See generally CCPR General Comment 18/37 [Non-discrimination], adopted by the Human Rights Committee (HRC) on 9 November 1989 par 10.
66 According to the HRC, 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or

[continued on next page]

all rights. This requires recognition of civil and political rights as well as economic, social and cultural rights.[67] As indicated earlier, the South African Constitution fully subscribes to the concept of indivisibility of rights by recognising socio-economic rights as justiciable rights. The third principle is one of accountability of both policy-makers and other actors whose actions or omissions have implications for the enjoyment of rights.[68] Development policies must entrench legal and administrative measures to guarantee democratic accountability.[69] Last, but not least, is the principle of participation. International human rights law requires that policies must be devised, implemented and monitored in a manner that allows for popular participation. Regular presidential, parliamentary and local government elections, though part of that accountability, are not enough. All people, including the poor, must be allowed to participate in key decisions affecting their lives.[70] This entails a right of access to information and transparency on the part of public officials.

It is imperative that privatisation policy complies with the above principles. Not only must its formulation be governed by these principles; the content of the policy, and its monitoring and accountability measures must be consistent with human rights.[71]

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help to perpetuate discrimination prohibited by the [ICCPR] . . . Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant' General Comment 18/37 (fn 65 above) par 10.

67 This is implicit in the recognition of the duty to adopt measures to achieve the progressive realisation of socio-economic rights. In *Grootboom*, the Constitutional Court construed 'progressive realisation' to mean that it was the goal of the Constitution that 'the basic needs of all in our society be effectively met' and therefore that 'the State must take steps to achieve this goal'. This means that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'. Furthermore, '[h]ousing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses' (at pars 44–45).

68 According to the CESCR, 'rights and obligations demand accountability: unless supported by a system of accountability, they become no more than window dressing' Statement on poverty, UN Doc E/C12/2001 par 14.

69 The principle of accountability is entrenched in ss 1, 41(1) and 95 of the Constitution. In *Rail Commuters Action Group and Others v Transnet Ltd and Others* Case CCT 56/03 (unreported) par 75, the Constitutional Court stated that the value of accountability is 'relevant to a consideration of the "spirit, purport and objects of the Bill of Rights"'.

70 Participation rights such as the right to information and administrative justice are recognised in ss 16 and 33 of the Constitution. In *TAC*, (fn 39 above) at par 123, it was held that for a public programme to meet the constitutional requirement of reasonableness, 'its contents must be made known appropriately'.

71 Hunt P 'The international human rights treaty obligations of states parties in the context of service provision' Submission to the UN Committee on the Rights of the Child: The private sector as service provider and its role in implementing child rights 20 September 2002.

5 THE IMPLICATIONS OF HUMAN RIGHTS (ESPECIALLY THE RIGHT OF ACCESS TO WATER) FOR PRIVATISATION

5.1 The process of privatisation

Before the enactment of the Local Government: Municipal Systems Act 32 of 2000 (hereafter 'Systems Act'), there was no prescribed process of allowing private involvement in service delivery or for governing the choice of service delivery options. As a result, earlier water privatisation initiatives raised many concerns, including the fact that they were undertaken without local communities' participation and that the contracts with private providers had not been open to public inspection.[72] One consequence was that the municipalities assumed more onerous obligations from the contracts than the multinational companies involved.[73] For example, Greg Ruiters has argued that the service agreements with private service providers in the Eastern Cape incorporated considerable hidden costs to be borne by the municipalities and shifted many risks to the municipalities concerned.[74]

The Systems Act, as amended in 2003,[75] addresses most of these concerns. It makes provision for a stringent process to be followed before an external service provider can be contracted to provide a basic municipal service. 'Basic municipal service' is defined to mean 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'.[76] Water services obviously qualify as basic municipal services.

In terms of the Systems Act, a municipality has discretion to provide a municipal service through an internal mechanism or an external mechanism.[77] The latter may be another municipality, an organ of state, a community based organisation (CBO), a non-governmental organisation (NGO) or a private service provider.[78] Prior to exploring whether to provide a service through an external mechanism,[79] a municipality must give notice to the local community of its intention to do so.[80] Once the municipality decides to assess different service delivery options, it is required to consider, among other things, the views of the local community and those of organised labour.[81] Before a municipality enters into a service agreement for a basic municipal service, it must establish a mechanism and programme for community involvement and information dissemination regarding the

72 Ruiters G 'The political economy of public-private contracts: Urban water in two Eastern Cape Towns' in McDonald D and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) at 148, 152-159.

73 *Ibid*.

74 *Ibid*.

75 Act 44 of 2003.

76 S 1 of the Systems Act.

77 *Ibid* s 76(a).

78 *Ibid* s 76(b).

79 *Ibid* s 78(2)(b).

80 *Ibid* s 78(3)(a).

81 *Ibid* s 78(3)(b).

service delivery agreement.[82] Furthermore, it must communicate the contents of the proposed service agreement to the local community through the media.[83] Once the agreement is reached and signed, the municipality must make copies available at its offices for public inspection and give notice to the media of the particulars of the service that will be provided under the agreement, the name of the provider and the place where and the period for which the copies will be available for public inspection.[84] These provisions create a laudable procedure for involving local communities in the privatisation process and ensuring accountability.

The basis for choosing either an internal or external mechanism is laid down in section 78(4) of the Act. This section states that, in doing so, a municipality must take into account the requirements of section 73(2) '*in achieving the best outcome*'.[85] Section 73(2) requires municipal services to be equitable and accessible, financially and environmentally sustainable, and reviewed regularly with a view to upgrading, extension and improvement and provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time. Section 73(2) can therefore be interpreted to imply that a private service provider or corporatisation can be considered as an option only if it has potential to produce the best outcome in terms of these objectives. Although the list does not mention the right to water explicitly, the principles of accessibility and sustainability, which are central components of the right to water,[86] are included.

As to how a municipality would ensure that a given option will secure the best outcome, section 78(3)(b) and (c) of the Act require it to undertake an assessment of the different options available and a feasibility study. While these provisions are critical to giving effect to the principle of progressive realisation of socio-economic rights, it is important to highlight that the factors to be considered in the study do not include a human rights impact assessment. This omission is significant because water provision is directly linked to the enjoyment of the right of access to water. It is therefore important for the assessment of the different service delivery options and the feasibility study to include an assessment of the possible direct and indirect impact of the proposed service delivery options on the enjoyment of the right to water as well as other rights.

The Act furthermore requires that, where a proposed external service provider is a person or entity other than a municipal entity or an organ of state, there must be competitive bidding.[87] The Act sets out quite sound principles to govern the bidding process, including the requirements that it must be competitive, fair, transparent and cost-effective.[88] However, the

82 *Ibid* s 80(2).

83 *Ibid*.

84 *Ibid* s 84(3).

85 *Ibid* emphasis added.

86 See General Comment No 15 'The right to water' (arts 11 and 12 of the Covenant), adopted by CESCR at its 29th session, 11-29 November 2002, E/C.12/2002.11 par 12.

87 S 83 of the Systems Act.

88 *Ibid* s 83(1).

Act does not stipulate that preference must be given to those providers with clean human rights records or sound corporate social responsibility policies. Concerns about the human rights infringements of multinational corporations around the world have led some states to promote good corporate practices advancing and promoting human rights.[89] In South Africa, the notion of corporate social responsibility is reinforced by section 8 of the Constitution, which provides that the Bill of Rights binds both the state and natural and legal persons. The bidding and privatisation process is one instance where the state could promote the idea of corporate social responsibility.

The Act requires a municipality to negotiate the final terms and conditions of the service agreement after the prospective service provider has been selected.[90] It does not specifically require the municipality to ensure that the terms and conditions reflect the provisions of the Act or the relevant provisions of the Constitution and other laws concerning water.[91] Having noted this anomaly, section 81(1) of the Act states that a municipality remains responsible for ensuring that a service is provided to the local community in terms of the provisions of this Act. This can be interpreted to imply that the municipality must, when negotiating, ensure that the agreement reflects the provisions of the Act.

It can therefore be concluded that the Systems Act addresses most of the human rights concerns around the process of privatising the provision of water services. It makes adequate provision for the participation of local communities in the privatisation process and a rigorous procedure to be followed before a given service delivery option can be taken. But a few weaknesses remain, including the fact that there is no provision for the incorporation of a human rights impact assessment when conducting a feasibility study and assessment of possible service delivery options; the Act does not expressly promote the notion of corporate social responsibility; and it does not expressly require municipalities to consider their human rights obligations when negotiating service agreements with external service providers or choosing a service delivery option.

5.2 Monitoring and accountability

A key concern raised by privatisation relates to the accountability of the private actors involved or the corporatised entities. The state can be held

89 For example, the US government under the Clinton administration adopted Model Business Principles in 1995, which sought to encourage corporations to adopt codes of conduct based on those principles. These included commitments to guarantee workplace health and safety, responsible environmental protection and practices, and fair employment practices. See the US Department of Commerce, International Trade Administration, 'Model Business Principles', http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/guide/usmodel.htm.

90 S 84(1) of the Systems Act.

91 The CESCR has stated that a state would be in violation of the duty to respect socio-economic rights if it fails to take into account its legal obligations when entering into bilateral or multilateral agreements with other states, international organisations and other entities such as multinational corporations. See General Comment No 14 (fn 52 above) at par 50.

accountable to the public through democratic procedures such as those of the Human Rights Commissions, the Auditor-General, the Ombudsman and Parliament. By contrast, private service providers are generally not accountable to the public through these procedures.[92] Similarly, the accountability of corporatised entities is far removed from the normal framework applicable to public institutions and the civil service because these entities operate like corporations. In addition, the Constitutional Court has increasingly developed the state's obligations in relation to socio-economic rights so that it is now possible to enforce these rights against the state in a court of law.[93] This is not the case with the human rights obligations of private actors. While the Constitution recognises that private actors may be bound by human rights, their precise obligations are far from clear.[94] This presents difficulties in pinpointing and enforcing the human rights obligations of private service providers in the context of privatisation. The problem is exacerbated by the fact that the relationship between a private service provider and the state is governed by contract. It is therefore difficult to hold a private actor accountable for obligations arising outside of the contract.

Furthermore, the principle of deregulation, which is implemented together with privatisation,[95] requires that governmental control over private actors be reduced to let them compete fairly.[96] If not checked, this has the potential to reduce the accountability of service providers both to consumers and the state. Where a state retains a regulatory role, monitoring private service providers requires not only considerable financial and human resources but also political will. This is particularly the case with long concessions because, as time passes by, the service provider gains better knowledge about the service than the state and becomes the custodian of all the information about the service's delivery on which the regulators have to rely.[97] It has been suggested that effective monitoring of

92 On the limitations of these procedures regarding the acts of private actors, see Hatchard J 'Privatisation and accountability: Developing appropriate institutions in Commonwealth Africa' in Addo MK (ed) *Human rights standards and the responsibility of transnational corporations* (1999).

93 For a detailed critical discussion of the Constitutional Court's jurisprudence on socio-economic rights, see Liebenberg S 'South Africa's Evolving Jurisprudence on Socio-Economic Rights' (2002) 6 *Law, Democracy and Development at* 159; Liebenberg (fn 42 above).

94 On the applicability of the Bill of Rights to private actors, see Woolman S 'Application' in Chaskalson M *et al Constitutional Law of South Africa* at 10–57, 10–65; Cheadle H and Davis D 'Structure of the Bill of Rights' in Cheadle MH *et al South African Constitutional Law: The Bill of Rights* (2002) at 1; Chirwa DM 'Obligations of non-state actors in relation to socio-economic rights: The South African Constitution' (2003) 7 *Mediterranean Journal of Human Rights* at 29.

95 See Vuylsteke (fn 25 above) at 1.

96 Gayle and Goodrich (fn 23) at 5.

97 Ruiters G (Speech delivered at seminar on Privatisation of Basic Services, Democracy and Human Rights, University of the Western Cape, 2-3 October 2003) as reported in Johnson V and Chirwa DM *Report on the Seminar on Privatisation of Basic Services, Democracy and Human Rights* (2003) http://www.communitylawcentre.org.za/privatisation/documents2003/SeminarReportFinal1.doc.

private service providers can be very expensive. The World Bank has noted that, according to US studies, 'the total transaction costs involved in introducing private sector participation, including articulating a regulatory framework, conducting competitive bidding etc . . . make up between 5 to 10% of total project costs'.[98]

The experience of the few water privatisation initiatives in South Africa thus far has highlighted the reality of these accountability concerns. According to Laïla Smith and others, the local authority in Nelspruit failed to effectively monitor the water concession there for various reasons, including lack of capacity and other service delivery challenges.[99] The Compliance Monitoring Unit set up by the city council to oversee the performance of the private service provider has not been successful and at one point stopped functioning for six months.[100] A similar story has been told of the privatisation initiatives in the Eastern Cape.[101] According to Greg Ruiters, most councillors supposed to monitor and regulate outsourced contracts lack the capacity to do so.[102] He argues that very few of them have either seen or understood the contracts they are supposed to monitor,[103] while the contracts themselves contain clauses that are vague and unenforceable.[104]

Perhaps the lack of a national framework for regulating private providers of basic municipal services is partly responsible for these accountability problems. As argued earlier, the state has a duty to protect citizens from violations of human rights by private actors. The state discharges this duty through 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations' to enable individuals to realise their rights and freedoms.[105] The state must establish 'an effective regulatory system' providing for 'independent monitoring, genuine public participation and imposition of penalties for non-compliance'.[106] While the Systems Act prescribes a good process for choosing service delivery options, it does not provide for a specific regulatory system once the initial procedures have been complied with. This is a significant let-down, given that concerns raised by privatisation do not end with the initial processes of allowing private service providers to participate in service provision. The monitoring and accountability framework set down by the Act focuses on municipalities, requiring members of Provincial Executive Councils to monitor the activities of municipalities[107] and empowering the Minister to require municipalities to submit specified

98 Ruiters (fn 22 above) at 160.
99 Smith (fn 29 above) at 137–8.
100 *Ibid* 138.
101 Ruiters (fn 22 above) at 159–160.
102 *Ibid* 159.
103 *Ibid*.
104 *Ibid* 160.
105 *SERAC* (fn 50 above) at par 46.
106 General Comment No 15, The right to water (arts 11 and 12 of the Covenant), adopted by CESCR at its 29th session, 11-29 November 2002, E/C.12/2002.11 par 24.
107 S 105 of the Systems Act.

information concerning their affairs.[108] This framework is very general and cannot address the accountability problems highlighted above.

The Draft White Paper on Water Services[109] proposes an improved regulatory framework for service providers in that, while retaining the general monitoring role of national and provincial government, it imposes specific reporting obligations on service providers and water services authorities. It recommends that water service providers must report regularly to water services authorities on performance in relation to their business plans and the service delivery agreement.[110] The water services authorities are in turn required to report annually on progress in relation to their water services development plans.[111] Each water services authority is required to monitor the performance of water services providers within its area of jurisdiction to ensure compliance with national norms and with their contract.[112] While there is a requirement that all contracts with water service providers must comply with national norms and standards, it is not clear what 'national norms and standards' means.[113] It is submitted that this term must be construed to include the Bill of Rights and all relevant legislation concerning water. The Draft White Paper also recommends that consumer organisations must be directly represented in the National Water Advisory Council.[114] A regulatory framework along these lines may help to alleviate the problems of accountability encountered in the privatisation context.

5.3 Accessibility

5.3.1 *Introductory remarks*

As observed earlier, the right to water guarantees access by all to water and all the services connected with it. The CESCR has stated that '[w]ater should be treated as a social and cultural good, and not primarily as an economic good'.[115] Not only must the water supply for each person be 'sufficient and continuous for personal and domestic uses',[116] the water 'must be safe and free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health'.[117] The CESCR has also stated that water and water facilities and services must be accessible to everyone without discrimination, both physically (in the sense that they must be within safe physical reach for all) and economically (in the sense that they must be affordable to all).[118] Although South Africa

108 S 107 of the Systems Act.

109 See Department of Water Affairs and Forestry 'Water is life, sanitation is dignity: Draft for public comment' (2002) at http://www.info.gov.za/documents/whitepapers/index.htm.

110 *Ibid* 52.

111 *Ibid*.

112 *Ibid* 54.

113 *Ibid*.

114 *Ibid* 52.

115 General Comment No 15 (fn 106 above) at par 11.

116 These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene General Comment No 15, *ibid* par 12(a).

117 *Ibid* par 12(a) and (b).

118 *Ibid* par 12(c).

has not yet ratified the ICESCR on which these pronouncements of the CESCR are based, the Constitutional Court has found the jurisprudence of the CESCR persuasive in interpreting provisions of the South African Constitution.[119]

Privatisation and the policies connected with it have raised the concern that they might limit the right of access to water. This is so because, if water is to be provided on a commercial basis, many people might not be able to afford it. The report of the UN High Commissioner on Human Rights has speculated that liberalisation (of which privatisation is a constituent policy) can result in:

- a two-tiered service supply, with a corporate segment focused on the healthy and wealthy and an under-financed public sector focussing on the poor and sick;
- a brain drain, with better trained personnel being drawn towards the private sector because of higher pay scales and better infrastructure;
- an overemphasis on commercial objectives at the expense of social objectives such as the provision of quality health, water and education services for those that cannot afford them at commercial rates.[120]

In the following sections the specific areas where water privatisation policies may conflict with human rights, especially the right of access to water, are looked at.

5.3.2 *Disconnections*

Many commentators have observed that the implementation of privatisation and other commercialisation policies relating to water in South Africa have resulted in tariff increases for water services and an increasing number of disconnections of these services. For example, it has been alleged that about 800–1000 disconnections per day were taking place in Durban in early 2003, affecting about 25 000 people a week.[121] Another study has revealed that, in 1999–2001, 159 886 households in Cape Town and Tygerberg experienced water cut-offs because of non-payment.[122]

A pertinent question is whether disconnections of water for personal and domestic use must be allowed. The Water Services Act 108 of 1997 places some restrictions on the right of a service provider to discontinue water services on grounds of non-payment. According to section 4(1) of

119 For example, the court has adopted the meaning of 'progressive realisation' and 'available resources' as defined by the CESCR in the interpretation of the socio-economic rights provisions in the 1996 Constitution. See *Grootboom* (fn 39 above) at pars 45–46. However, the Court has refused to adopt the notion of minimum core obligations: see Chirwa DM 'The right of access to essential medicine in international law: Its implications for the obligations of states and non-state actors' (2003) 19 *South African Journal on Human Rights* at 541, 546.

120 UN High Commissioner for Human Rights (2002) 3.

121 Loftus A '"Free water" as commodity: The paradoxes of Durban water service transformations' in McDonald D and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) at 189, 194.

122 Smith (fn 29 above) at 168, 180.

this Act, a service provider[123] must set conditions under which water services are to be provided. These include the circumstances under which water services may be limited or discontinued and procedures for limiting or discontinuing water services. Section 4(3) stipulates that procedures for the limitation or discontinuance of water services must:

(a) be fair and equitable;

(b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless –

  (i) other consumers would be prejudiced;

  (ii) there is an emergency situation; or

  (iii) the consumer has interfered with a limited or discontinued service; and

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water service authority, that he or she is unable to pay for basic services.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*[124] Budlender AJ held that the effect of these provisions, read in the light of sections 27(1) and 7 of the Constitution, is that disconnection of an existing water supply to consumers by a local authority is a *prima facie* breach of its constitutional duty to respect the right of access to water. These legislative restrictions on disconnections of water services for non-payment are critical in ensuring that poor communities have continued access to water services, whether the latter are provided publicly or privately or both.[125] It is doubtful, however, whether local authorities always follow the procedure in the Water Services Act, given that most disconnections are likely to affect people who may be genuinely unable to pay.

A related issue is the practice of municipalities to discontinue a service because of an outstanding bill on another service (collateral service disconnections). This practice is legally based on section 102 of the Systems Act, which provides that a municipality may consolidate the accounts of persons liable to the municipality; credit a payment by such person against any account of that person; and implement any of the debt collection or credit control measures in relation to any of those accounts. It is

123 In terms of s 1(xxiii) 'water services provider' means 'any person who provides water services to consumers or to another water services institution but does not include a water services intermediary'. The latter means 'any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract': s 1(xxii).

124 2002 (6) BCLR 625 (W).

125 Notably, similar provisions have been adopted in Britain. S 63A of the British Water Industry Act as amended in 1999 makes it an offence for a water provider to use a limiting device in relation to certain premises specified in the Act with the intention of enforcing payment of charges due in respect of the supply of water to the premises. These premises include private dwelling houses, children's homes, residential care homes, prisons and detention centres, schools and premises used for children's day care.

arguable that this practice has the effect of denying poor communities access to basic water services in violation of the right of access to water. In *Hartzenberg and Others v Nelson Mandela Metropolitan (Despatch Administrative Unit)*,[126] a challenge was made against the discontinuance of prepaid electricity by a municipality due to arrears on water accounts. The case turned on the interpretation of section 19 of the Standard Electricity Supply By-law (Province of the Cape of Good Hope, 1987) and sections 96, 97(1)(g) and 102 of the Municipal Systems Act. It was held that these sections did not sanction such discontinuance. Even if they did sanction it, however, there is scope for arguing that the legislation could be unconstitutional. Jaap de Visser and others have argued persuasively that 'the deprivation of a basic supply of water removes the inherent dignity of people' as 'it strips an individual of the possibility of living a dignified life and poses serious health risks'.[127] They thus argued that 'the centrality of dignity in the Constitutional Courts approach to realising socio-economic rights militates against disconnection of water in response to non-payment of other municipal accounts, such as electricity and property rates accounts'.[128]

5.3.3 *Prepaid meters*

The issue of prepaid meters is critical in the context of privatisation. Service providers are motivated to maximise debt collection because they operate in a business environment. In order to achieve this objective, and especially in the South African environment where non-payment for services is particularly prevalent in black communities, municipalities have increasingly resorted to using prepaid meters as a credit control mechanism.[129] These meters have the effect of discontinuing a service automatically after the credit expires. As Sean Flynn and the present author have argued elsewhere, prepaid meters effectively get round the procedures for discontinuing a service laid down in the Water Services Act and can therefore be seen as a violation of both that Act and the right of access to water.[130]

In Britain, in *R v Director General of Water Services Ex parte Lancashire CC*,[131] the Queens Bench Division was faced with the task of interpreting similar provisions in the Water Industry Act of 1991. Six different local authorities applied for judicial review of the refusal of the Director-General of Water Services to require the relevant water undertaker, in terms of the Water Industry Act, to remove, and not install any further, pre-payment water devices known as 'budget payment units' (BPUs) in domestic premises in

126 [2003] JOL 10625 (SE).

127 De Visser J *et al* 'Realising the right of access to water: Pipe dream or watershed' (2003) 7 *Law, Democracy and Development* at 27, 48.

128 *Ibid.*

129 See eg Smith (fn 29 above) at 139.

130 Flynn S and Chirwa DM 'The constitutional implications of commercialising water in South Africa' in McDonald D and Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005)

131 [1999] Env. L.R. 114.

each of the applicants' areas. It was argued on behalf of the respondent that the closure of the valve on a BPU when not recharged by the customer did not amount to a cutting off of supply within the meaning of the Act.[132] It was further argued that even if such closure amounted to a disconnection, the disconnection of water supply was not carried out by the undertaker and therefore that there was no violation of the Act by the undertaker.[133]

Harrison J was not persuaded by these arguments. He held that the automatic operation of the closure of the valve disconnects the water supply to the premises within the meaning of the legislation.[134] He also found the argument that the customer is the person who disconnects water supply, on the basis that it is the customer's choice to have a BPU and the customer who fails to recharge it, superficially attractive but not logically correct.[135] The learned judge concluded that there was no difference between a water supply being cut off by the automatic operation of the undertaker's BPU and manual operation by the undertaker's workers, for in both cases the supply is cut off by the undertaker as a result of the customer's failure to pay.[136] It was therefore held that the use of BPUs contravened the Act because they cut water supply without observing the notice requirements or procedural provisions protecting individuals who could not afford to pay or who disputed their bills.

The use of prepaid meters in South Africa could be challenged on similar grounds, especially where these meters are installed for people who cannot afford to pay for water services for their personal and domestic use.[137]

5.3.4 *Full cost recovery measures*

As mentioned earlier, due to privatisation and other commercialisation policies, access to water in South Africa is increasingly determined by consumer tariffs that seek to recover the full cost of the service.[138] This cost includes the initial cost of installing the infrastructure (capital cost) and the expenses associated with operating and maintaining the infrastructure (marginal costs).[139] In order to recover the full cost of rendering water services, the accounting system for the latter is separated from other services, so that cross-subsidies from the other services are removed.[140]

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132 *Ibid* 126–127.

133 *Ibid* 128.

134 *Ibid* 127–128.

135 *Ibid* 129.

136 *Ibid* 130.

137 The Centre of Applied Legal Studies is currently challenging the use of prepaid meters in court.

138 Flynn and Chirwa (fn 130 above) 59, 65.

139 See also Bond (fn 26 above) at 12. A range of policy and legislative measures supports the practice of cost recovery in South Africa. The White Paper on Water Policy adopted in 1997 explained that users would be charged the full cost of providing access to water, including infrastructural development and catchment management activities. An earlier White Paper argued that it is 'not equitable for any community to expect not to have to pay for the recurring costs of their services' DWAF (1994) 23.

140 See part 3 above.

As Sean Flynn and the present author have argued elsewhere, the constitutional implications of such pricing policies must be analysed in the context of South Africa's history.[141] David McDonald and John Pape have rightly observed that white South Africans and the industrial sector benefited enormously from heavily subsidised municipal services during the apartheid era.[142] These consumers continue to benefit from the racially skewed investment policies in the sense that the cost of installing the necessary water supply infrastructure has been written off to a large extent.[143] By contrast, previously disadvantaged groups did not benefit similarly from the former policies of subsidising municipal services.[144] Furthermore, the water infrastructure inherited by these communities is inadequate and in need of higher maintenance and upgrading costs.[145] Thus, charging each community the full cost of service delivery leads to higher rates in areas most disadvantaged by apartheid, thereby perpetuating the effects of unfair discrimination in the past.[146]

In *City Council of Pretoria v Walker*[147] the Constitutional Court endorsed the idea that that cross-subsidisation *per se* and differentiation in tariffs for services may not be unconstitutional in appropriate cases.[148] It was held that special measures taken to ensure that disadvantaged communities enjoy access to basic services are necessary. However, selective enforcement of payment for tariffs (not forming part of the special measures) was held to be a violation of the non-discrimination clause.

Section 10(1) of the Water Services Act 108 of 1997 empowers the Minister to prescribe norms and standards in respect of tariffs for water services. These norms and standards permit differentiation among geographical areas, categories of water users or individual water users.[149] Similarly, section 97(1)(c) of the Systems Act requires a credit control and debt collection policy to make provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents. These provisions are consistent with comments made by the CESCR regarding service pricing. According to the CESCR, '[a]ny payment for water services must be based on the principle of equity, ensuring that these services whether publicly or privately provided are affordable for all including socially disadvantaged groups. Equity demands that poorer

141 Flynn and Chirwa (fn 130 above) at 59, 65.

142 Pape and McDonald (fn 2 above) at 20–22.

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 Some prepaid meters in rural KwaZulu-Natal, eg, charge multiple times the price per litre of water as charged in the previously advantaged suburbs of Richard's Bay. See Cottle E and Deedat H 'The Cholera Outbreak, Braamfontein and Woodstock' (2002) at 79.

147 1998 (3) BCLR 257 (CC).

148 The court stated that '[t]here may be cases where it is not unfair to charge according to different rates for the same services; it seems to me to be inconsistent with the equality jurisprudence developed by this Court to hold that all cross-subsidisation is precluded by s 8(2) [the non-discrimination clause of the 1993 Constitution]' (at par 42).

149 S 10(1)(a) of the Water Services Act.

households should not be disproportionately burdened with water expenses as compared to richer households'.[150]

The free water policy announced in the run up to the December 2000 municipal elections seeks to give effect to these provisions and the right of access to water guaranteed in the Constitution. In terms of this policy every household is entitled to at least six kilolitres of water per month, or 25 litres per person per day.[151] Many commentators have argued that the amount of free water is inadequate and that the implementation of this policy has not been uniform among municipalities.[152] It has further been suggested that those living in informal structures do not benefit from this policy.[153] Of particular concern is the fact that after the first block of free water, the charges for the next blocks rise steeply, thereby reducing the potential of the free water policy to enhance poor people's access to water.[154] Overall, however, this policy can be viewed as a positive step in the progressive realisation of the right of access to water.

Unfortunately, apart from the free water policy, there is no national policy ensuring that areas disadvantaged by past discrimination pay lower rates than formerly white areas.[155]

6 CONCLUSION

There is a strong link between the enjoyment of the right of access to water and privatisation and other commercialisation policies concerning the delivery of water services. While the Constitution does not require the state to be the sole provider of basic services such as water, the provision of this service and policies connected with it must be consistent with human rights principles generally and the right of access to water particularly. This article has shown that the experience of privatisation (including corporatisation, ring-fencing, cost recovery measures and deregulation) has raised various human rights concerns about the accountability of the parties involved, the participation of communities in decisions that affect their day-to-day lives and access by poor communities to water services. In many ways the government has responded positively, but some concerns remain.

It is recommended that the Systems Act, which sets out a commendable procedure for choosing service delivery options, must provide for the incorporation of a human rights impact assessment when conducting a feasibility study and assessment of possible service delivery options. Secondly, the Act must promote corporate social responsibility by giving service providers with good human rights records preferential treatment when considering their bids. Thirdly, the Act must require municipalities

150 General Comment No 15 (fn 106 above) at par 27.
151 Reg 3 of Government Notice R509 of 8 June 2001.
152 De Visser *et al* (fn 127 above) at 43; Flynn and Chirwa (fn 130 above) at 59, 71–3.
153 Flynn and Chirwa (fn 130 above) at 59, 71–3.
154 McDonald (fn 27 above) at 28.
155 Flynn and Chirwa (fn 130 above) at 59, 66.

to consider their human rights obligations fully when negotiating service agreements with external service providers or choosing a service delivery option. Fourthly, the Act must incorporate a monitoring and regulatory framework for privatisation and corporatisation. The reporting requirements placed on service providers and water services authorities proposed by the Draft White Paper on Water Services could serve as a model in this regard. Above all, South Africa's history cannot be ignored in any policy relating to the provision of basic services. It is critical that pricing policies and disconnection policies are designed so as not to overburden poor communities that were already disadvantaged in the past and that the state take positive measures to assist these communities in accessing water services.

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