

## Recent publication

### **JW de Visser & C Mbazira (eds) *Water delivery: Public or private?***

Institute of Constitutional and Administrative Law (Utrecht University) and Community Law Centre (University of the Western Cape) Centre for Environmental Law and Policy Utrecht (2006) 170 pages

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The book contains six chapters, based on presentations at a seminar that was held in Utrecht, the Netherlands, in March 2005. It is entitled 'Water delivery in South Africa and the Netherlands: Public or private?' The Institute of Constitutional and Administrative Law (Utrecht University) and the Community Law Centre (University of the Western Cape) organised the seminar.

Each of the chapters contains its own bibliography. The book lacks a central index, which would have assisted in illustrating the links between the various chapters. Barring a two-page foreword by the editors, the book does not contain a comprehensive introduction to the themes underlying the various chapters, neither does it contain a concluding chapter that draws the parts together. It is up to the reader to draw patterns and conclusions from the various contributions.

From this reviewer's perspective, the chapters share the following themes: a concern for conceptual clarity when discussing and analysing 'privatisation'; a healthy synergy between theory and practice; and a deep concern for the poor and downtrodden. The authors agree that the state ultimately remains the responsible party in ensuring access to water and lament the fact that the South African state seems to be institutionally incapacitated in this regard. An implicit argument in many of the chapters is that a purely instrumental or top-down approach to (water) legislation will not solve South Africa's lingering water crisis.

In the first chapter, 'Safe water: An enquiry into water entitlements and human rights', Bas de Gaay Fortman distinguishes between 'upstream' and 'downstream' human rights in discussing the privatisa-

tion of water delivery. 'Downstream' human rights encompass initiatives to move the protection of human dignity from international standards to the people. 'Upstream' human rights focus on the struggle of people at the grassroots level to realise their rights ostensibly belonging to them under the law. Fortman primarily focuses on upstream efforts and distinguishes between four types of human rights strategies: judicial, case-by-case action; legal literacy programmes; political dissent and protest against policies; and collective action addressing power relations that embody structural injustice. He argues that ultimately 'downstream' and 'upstream' actions must be connected to lead to real change.

Jaap de Visser examines the legal framework, policy developments and legal developments for water delivery in South Africa and the Netherlands in the second chapter, entitled 'Comparing water delivery in South Africa and the Netherlands'. He illustrates that, while the Netherlands has accepted the policy of the 'liberalisation' of network sectors (for example electricity and railways), it has identified water delivery as a public task. De Visser then shows that South African water legislation allows for 'liberalisation' of water services, although it would be subject to stringent procedures in terms of the Municipal Systems Act.<sup>1</sup> He argues that liberalisation of water services leads to more rigorous cost recovery and that municipalities are unable to effectively monitor performance by the service provider. He points out that the Constitutional Court may well strike down water delivery policies as unreasonable where such policies lead to mass cut-offs of the most vulnerable sections of South African society. The situation in the Netherlands is radically different, where unwillingness or inability to pay is not a serious problem and where municipalities are well-equipped and well-skilled. He accepts that liberalisation may well be necessary in South Africa, a water-poor country, where stringent cost recovery methods could assist in conserving water. Massive backlogs may also force South Africa's hand in harnessing private sector involvement in water delivery.

In chapter three, written by Christopher Mbazira and entitled 'Privatisation and the right of access to sufficient water in South Africa: The case of Luhkanji and Amahlati', the author analyses the legal framework for the right to water (international standards, the South African Constitution, legislation and case law) and then examines a privatisation scheme that was undertaken in the Eastern Cape. He argues that national government must adequately subsidise municipalities that have large numbers of indigent people. He criticises the current government policy of 6 000 free liters of water per household per month as being inadequate and argues that water restrictors and prepaid meters violate the Constitution and the Water Services Act. His arguments relating to water restrictors are not persuasive, as indigent people are

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<sup>1</sup> Local Government: Municipal Systems Act 32 of 2000.

still allowed to access the prescribed free amount of water. He acknowledges that municipalities are in a bind: on one hand having to ensure access to socio-economic rights; on the other having to provide sustainable services and having to ensure cost recovery.

Victoria Johnson authored the fourth chapter, 'Outsourcing of basic services: Contract analysis'. Johnson argues that privatisation initiatives are often driven by factors such as efficiency, skills transfer, risk transfer and value for money while dangers associated with such initiatives are loss of accountability, lack of public buy-in, inappropriate risk allocation, and insufficient asset protection. She analyses a number of long-term water service contracts and draws a number of conclusions from this analysis. The contracts are often inaccessible and very lengthy and she argues that contract monitoring would be problematic if the monitoring agents do not have the essential provisions of the contract at their fingertips. She points out that the contracts generally do not provide for skills transfer to municipalities, that risks are often inappropriately transferred, that many contracts purport to restrict the municipality's powers to set tariffs and that some contracts pay lip-service to monitoring obligations. She concludes by offering a number of suggestions on how to improve on the drafting of outsourcing contracts.

The last two chapters are largely empirical and offer relatively little in theoretical analysis. Tobias Smith summarises water management in South Africa as from 1652 and shows how the trend has been in favour of increasing state control over water in chapter five, 'Some for all forever? A policy analysis of the establishment of Johannesburg's new water utility'. He shows how the 'globalisation of local government' started in Western Europe and the United States of America in the 1970s. He then discusses in some detail the transforming of Johannesburg's water management as from 1997. He concludes that a number of gaps exist between the policy and implementation of Johannesburg's privatisation project and that in fact a private operator has *not* been contracted to manage water delivery.

Chapter six, authored by Bert Raven, Jeroen Warner and Cees Leeuwis, entitled 'Beyond the new South African Water Acts: Integrating water and society in the Lower Blyde', analyses contemporary thinking on multi-stakeholder participation (MSP) and integrated water resource management (IWRM) as concretised in South African water legislation. The authors identify stimulants and obstacles in realising MSP and IWRM, specifically in the Lower Blyde River area, in answering the question: 'How does the implementation of the concepts of IWRM and MSP work out in practice?' The picture that emerges is depressing: Conflicts and distrust between well-resourced white communities such as game farms, and poor black communities, have not been constructively addressed, and co-ordination and co-operation on crucial water issues between key actors, such as small and large farm owners, the municipality and the Department of Water Affairs and Forestry, have been

absent or strained. The authors suggest that an authoritative, neutral, mandated process leader on the ground be identified to get the various actors to cross established boundaries.

This collection of papers is a valuable addition to the growing literature on the privatisation of essential services. Access to water is perhaps the most critical component of a dignified life and has particular poignancy in South Africa, where up to 40% of the population may be unemployed and unable to realise socio-economic rights on their own. Many of the chapters contain constructive suggestions on how to improve on water delivery and should be compulsory reading for municipal managers as South Africa's future may well rely on effective municipal provision of services.