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# Book Review

# Water delivery: Public or private?

WJ de Lange[1]

## 1. Preface

This book is a compilation of six papers dealing with access to water resources in the Dutch and South African contexts. All papers were presented at a seminar entitled "Water delivery in South Africa and the Netherlands: Public or Private?" held in Utrecht, the Netherlands in March 2005. The seminar was jointly organised by the Community Law Centre of the University of the Western Cape and the Institute of Constitutional and Administrative Law at Utrecht University.

Private sector involvement in the provision of traditional public goods and services is becoming a common sight in many parts of the world with basic service provision, such as water, electricity and transport, forming part of this trend. Such "privatisation" ranges from the outright sale of public assets to outsourcing service delivery functions. Efficiency gains are usually put forward as the main motivation for outsourcing or privatisation. However, some view this thrust towards the privatisation of public goods and services as evasion of state responsibility and a violation of the constitutionally protected right to safe water. It is also argued that the legitimacy of the state is put at risk if a balance between efficiency and equity with regard to service delivery is not found. A thrust towards privatisation also promotes the commodification of such basic services, and given that such services are guaranteed within the human rights network of both countries (and international law), the degree to which private service providers could engage in such service delivery, remains controversial.

Each paper is summarised below.

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**2. "Safe water"**
Bas de Gaay Fortman

De Gaay explains from a political-science perspective some of the complexities regarding human rights, entitlements, access to and acquisition of water. De Gaay argues for the contextualisation of generic international safety standards to local areas in order to make them more practicable. He argues that access to water is driven by entitlement, while a right is not an entitlement to a handout and that rights have nothing to do with free handouts from government for this reason a rational private decision-maker would rather opt for entitlement without a right rather than a right without entitlement. He also argues that privatisation does not discharge government from its social responsibility to guarantee access to and delivery of water.

De Gaay notes, however, that human rights should not be over-emphasised and that care must be taken not to detach humans from nature, since human dignity requires the conservation of nature, with a functional ecosystem being a basic human need.

**3. "Comparing water delivery in South Africa and the Netherlands"**
Jaap de Visser

De Visser follows on De Gaay by contextualising the Netherlands and South Africa in terms of devolving international law relating to water resource management. Both water management regimes are neatly summarised. He notes that that network services in general (water, electricity and communication) are prone to monopoly if not regulated through competition, it being assumed that competition is to the advantage of the user. De Visser also defines the concepts of liberalisation, privatisation and restructuring within the context of water resource management.

Liberalisation is defined as the introduction of competition with the aim to gain in pressure generated by competition in price and quality. Privatisation is defined as the selling of public assets to the private sector. Restructuring in the Dutch context refers to providing a public service independent from the state but not selling it to the private sector.

In short, the Dutch are in favour of liberalisation of most network services with government allowing competition in various ways. Ownership remains with the state while the state also regulates competition, leaving enough space however to reap the benefit of competition in terms of efficiency and quality gains. Water services are liberated through outsourcing services management

and operation (ownership remains with the state). Benchmarking in terms of financial and quality criteria is used as an element of competition while supervision is provided by private watchdogs with local expertise. De Visser argues that regulation and supervision is more important than ownership in the Dutch context. The Dutch have no infrastructure-related backlogs and no non-payment problems. Also, their regulating capacity is adequate.

De Visser continues with a neat summary of the legal framework of the South African context. He makes it clear that South Africa faces huge infrastructure backlogs, non-payment problems (mainly as a result of wide-spread poverty), water scarcity (which negatively impacts on the ability to supply water) and shortcomings in regulatory capacity.

It is made clear that the South African government will not be able to meet the above-mentioned challenges and is to a certain extent dependent on the private sector, suggesting scope for liberalisation. However, in the South African context, liberalisation would promote cost recovery with water being commodified and supplied on the basis of "ability to pay" rather than need. Water service authorities often lack capacity and to resort to liberalisation too quickly when the answer actually lies in political interventions. A reconsideration of the role of the courts in enforcing socio-economic rights is proposed.

**4. "Privatisation and the right of access to sufficient water in South Africa: The case of Luhkanji and Amahlati"**
Christopher Mbazira

Mbazira presents two South African cases were the local water service providers (municipalities) tried to deliver water as an entitlement through liberalisation of water services. As result of capacity problems, the municipalities outsourced some services. However, the private service providers experienced non-payment problems and took steps resulting in public concern.

Mbazira concludes that liberalisation of water service delivery with the emphasis on cost-recovery has negative impacts on access to water.

**5. "Outsourcing of basic services: Contract analysis"**
Victoria Johnson

Johnson investigates the legitimacy of public private partnerships (PPPs) in the South African context by means of a legal analysis. Key drivers (capital

investment; efficiency; skills transfer; risk transfer and value for money) and dangers (legitimacy; public buy-in; user protection; inappropriate risk allocation; continuity and asset protection) to viable PPP are identified and the analysis uses these as comparative criteria for fifteen outsourcing contracts.

Johnson starts with general comments applicable to all fifteen contracts. She states that the relative difficulty and inaccessibility of the contracts pose an obstacle to transparency and practical implementation. The rest of the paper compares the contracts in terms of the key drivers and dangers in outsourcing contracts, as mentioned in the introduction.

Johnson concludes that a simplification process is crucial to improving transparency and public participation. The issue of risk transfer in outsourcing contracts must be handled in a more scientific way. Monitoring should be improved because this improves accountability and ultimately legitimacy. She warns against a situation where the public sector becomes incapable of delivering services and becomes totally dependant on the private sector and asserts that skills transfer is important in this regard.

**6. "Some for all forever? A policy analysis of the establishment of Johannesburg's new water utility"**
Tobias Schmitz

Schmitz discusses the process of restructuring water services management in Johannesburg, South Africa. Specific reference is made to choices and trade-offs between privatisation and expected efficiency gains vs. retaining state control and a higher level of accountability. Schmitz agrees with de Visser by noting that with regard to privatisation control over regulation and supervision is more important than ownership. Ownership is regarded to be important only insofar it affects control. He differs from de Visser in defining privatisation as a range of methods by which public goods are produced by the private sector.

Schmitz notes that the 1998 National Water Act effectively nationalised South African bulk fresh water, which had historically been largely privately controlled. However, the Municipal Systems Act of 2000 enables municipalities to enter into PPPs with water service providers, indicating a thrust towards privatisation – this could be seen as somewhat contradictive.

Schmitz provides a neat summary of the history of South African water law and the Johannesburg water management context by placing it against the background of a global shift towards increased private sector involvement in

the production of public goods. Johannesburg certainly needed such a shift since the level of service provision had fallen into despair mainly because of non-payment problems. The city proposed the "iGoli 2000" plan to better the situation; however, it was a case of too little too late. A new water management authority, "Johannesburg Water" (JHBW), which incorporates the five municipalities that previously serviced the Johannesburg metro, was created in 2001. JHBW contracted Johannesburg Water Management Company (JWMC) for water services and management. Two PPP contracts were signed between JHBW and JWMC with JHBW holding legal but not financial autonomy. New administrative structures, such as the "Contract Management Unit" (CMO) and the "Shared Services Council" (SSC), were created to support the above-mentioned PPP. The main goal of the CMO is the translation of government policy objectives into performance indicators and service targets for the private sector. The SSC acts as a watchdog to regulate water-related income flows to municipalities.

Schmitz concludes that in the case of JHBW, government held back on complete privatisation of water service delivery.

**7. "Beyond the new South African water acts: Integrating water and society in the Lower Blyde"**
Bert Raven; Jeroen Warner and Cees Leeuwis

Raven et al. provide an overview of the South African water management context in the pre- and post-1998 eras. They depart from a water scarcity situation with conflicting policy goals of efficient but equitable water use as the main challenge for water service authorities and service providers.

Multi-stakeholder participation (MSP) and integrated water resource management (IWRM) are proposed to path a balance between a political authority and a complete free-market-based allocation and management system. To this end, Raven et al. review IWRM and MSP in a general sense but also contextualise it to the Lower-Blyde River in South Africa.

They go to length in describing the case study in the Lower-Blyde area, explaining the challenges in accommodating previously disadvantaged individuals in the context of efficient but equitable management of a scarce resource. (It must be noted that the case study mentioned in this paper is by no means unique in South Africa.)

Raven et al. conclude that IWRM and MSP did not meet all expectations. For example, the progressive legal framework of MSP will not succeed unless

legislative principles are translated into tangible and practical entitlements to which restructuring efforts are aimed at benefiting. The danger of regarding legislation and implementation as synonyms is emphasised, since service providers may use regulations without practical translations as opportunities not to implement and enforce the transformative process.

## 8. Postscript

To summarise, the book is a compilation of paper contributions regarding access to water from a human right perspective using examples of benefits and costs associated with public and private water service delivery. The book may prove insightful to public policy makers, especially in long-term water resources management.

However, upon reading the book the expectation is created that the final chapter will provide some "lessons learned from the Netherlands experience". It is, however, a pity that such "lessons" are not provided and the last chapter actually focuses on specific cases within South Africa. It is also unfortunate that the technical editing of some of the chapters is not up to standard. More effort could have gone into the elegance and flow of the chapters.