

Progress towards legislative transformation: A critical assessment of the 1956 and 1998 water acts regarding municipal water supply

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Samevatting

Inwoners van Suid-Afrika behoort deurlopend herinner te word dat hulle 'n waterarm land bewoon en dat kennis oor die fisiese omgewing en die aard en omvang van effektiewe openbare bestuur van watervoorsiening van strategiese belang is. Die oppervlakte- en grondwater wat in die rivieropvanggebiede saamvloei is hidrologies en geohidrologies verbind deur die hidrologiese kringloop. Laasgenoemde manifesteer in 'n natuurlike omgewing wat nie net gekenmerk word deur 'n toestand van wye diversiteit en kompleksiteit nie, maar ook deur die behoefte aan goed gestruktureerde openbare dienslewering op veral die plaaslike regeringsfeer.

Teen die einde van April 1994 was die voorsiening van openbare drinkwater en basiese sanitasiedienste aan al die landsinwoners op al die owerheidsfeer- en veral die plaaslike regeringsfeeragendas die hoogste in die openbare diens geskiedenis van Suid-Afrika. Gevolglik is die Regering nie net meer gemoeid met die verskaffing van genoegsame drinkwater alleen nie, maar ook met die fasilitering van die implementering van 'n holistiese en geïntegreerde benadering aangaande die effektiewe, doeltreffende en ekonomiese bestuur van die ontwikkeling, vervoer, opgaar, behandeling en verspreiding van water.

As die enigste bestuurder en bewaarder van die land se waterbronne is die Departement van Waterwese en Bosbou (DWAF) sedert veral die oorgang na 'n demokratiese bestel in 1994 proaktief in die evaluering van bestaande beleidsdokumente sowel as die voortbring van verbeterde wette en uitvoerbare openbare beleid aangaande waterbestuursaspekte in die land. Dit is ook

opmerklik dat primêre nasionale wetgewing aangaande die bestuur van openbare water sedert die 1956 - en die jongste 1998 waterwetgewing transformasie ondergaan het en dat die mees optimale voertuig tot meer effektiewe, doeltreffende en ekonomiese implementering van die nuwe getransformeerde openbare waterverwante wetgewing die 284 munisipaliteite in die land is. Dit is dan ook op hierdie regeringsfeer waar die spreekwoordelike 'motorkar wiel die teerpad tref' en die sukses al dan nie, van nuut geïmplementeerde openbare beleid evalueer kan word. Die fokus van die artikel is om vanuit 'n disiplinêr geïntegreerde perspektief die toepassing van watergewing in Suid-Afrika op munisipale owerheidsfeer krities in oënskou te neem.

Introduction

*'71% of the earth's surface is covered in water. While 98% thereof is undrinkable sea water, only 1,2% constitutes fresh water, which is locked in the polar caps and in glaciers. Consequently, inhabitants have a mere 0,8% to inter alia, drink, irrigate their crops, manufacture steel, cool power stations, bath and transport sewage.'*¹

Bearing the aforementioned statement in mind, all South Africans, especially those involved with the development and management of its water resources in the 21st century, should be aware that South Africa (SA) finds itself in an arid to semi-arid region, with an average rainfall of approximately 500 mm per annum, compared with a world average of 860 mm. The rainfall is unevenly distributed in that 65% of the country receives less than 500 mm of rain annually, which is usually regarded as the minimum for successful dry-land farming, while 21% of the country receives less than 200 mm.² Of the so-called 'fallen rain' only 10% reaches the rivers which constitute the crucial potable water resource of South Africa.

Not only do the rivers and their rainfall catchment areas accumulate, contain and convey the surface runoff of rain, but the surface waters and groundwater are geo-hydrologically intimately interrelated. Groundwater may eventually, via fountains, reach the rivers on the surface or even flow from underground water compartments in underground rivers and seepages.³ See Figure 1 for the nature and extent of the hydrological water cycle which illustrates the highly

1 J Clarke, *Back to earth: South Africa's environmental challenges* (Halfway House, Southern Book Publishers, 1991), p. 97.

2 Department of Water Affairs and Forestry (DWAF), *Management of the water resources of the Republic of South Africa* (Cape Town, CTP Book Printers, 1986), p. 1.3.

3 RF Fuggle & MA Rabie, *Environmental management in South Africa* (Cape Town, Juta & Co, Ltd, 2005), p. 647.

complex environmental links brought about by nature between the physical aspects, as well as the various role-players and stakeholders in the country's quest for effective integrated water resource management. A consequence of this natural and unfavourable physical environment of below average rainfall and vast water catchment areas is the severe scarcity of potable water in South Africa. This is one of the major limiting factors of the African National Congress (ANC)-led Government's quest to transform South African society through new transformed legislation like its Reconstruction and Development Programme (RDP) and *Batho Pele* White Paper on transforming public service delivery.

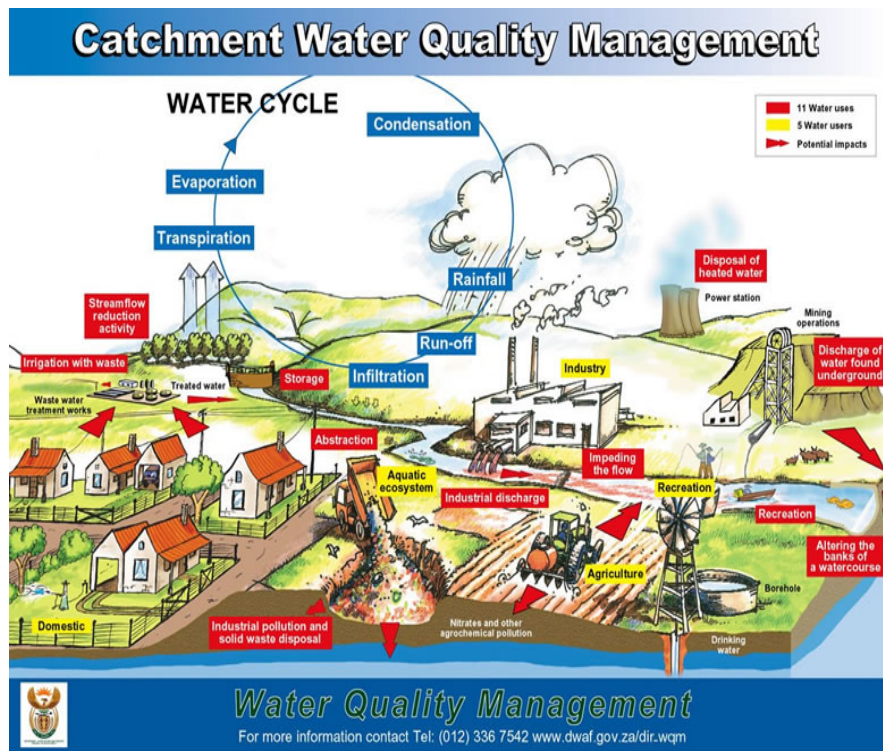


Figure 1: A typical hydrological water cycle in an urbanised and industrialised municipal area⁴

In the history of South Africa, the supply of potable water and basic sanitation services to all the inhabitants has never been higher on the national, provincial and especially the local government sphere agendas than at the end

⁴ DWAF, "Hydrological water cycle", August 2008 (available at <http://dwaf.ac.za/>, as accessed on 18 August 2008), p. 11.

of April 1994.⁵ Government is no longer concerned only with the adequate supply of potable water. The attention is now focused on the implementation of a holistic and integrated approach regarding the effective, efficient, and economical management of the development, transport, storage, treatment and distribution of water to consumers and users of such a valuable resource. Furthermore, much care is being given to the release of treated used water into the rainfall catchment areas.

As the sole custodian of South Africa's potable water resources since 1998, the Department of Water Affairs and Forestry (hereafter referred to as DWAF) has been proactive in establishing research and management procedures to protect the country's water resources. The question that arises is whether DWAF, before democracy, acknowledged that the previous Water Act 54 of 1956 (hereafter referred to as WA) failed to keep up with the ever-changing international arena and trends regarding water supply management, modern technology, urbanisation, democracy, changing societal needs and the new political dispensation in the country? With the imminent advent of change (transformation), DWAF repealed the WA and the National Water Act 36 of 1998 (hereafter referred to as NWA) was promulgated.

In this article the nature and extent of DWAF's primary water-related legislation regarding the supply of water in the local government sphere of a developing South Africa, and especially the order of transformation encapsulated in the NWA compared with the order of discrimination of the WA, will be highlighted and critically analysed. The outcomes of this analysis are considered of utmost significance for the current and future municipal managers and officials who are tasked with the effective, efficient and economical public management and delivery of potable water services in the demarcated municipal areas of the country.

Relevant legislation regarding Municipal water supply

In this section the historical development related to water legislation, as well as the current legislation required to re-structure and empower municipalities to facilitate the improvement of basic water supply in their respective municipal areas, will be discussed.

⁵ K Wall, "Water – unifier of a city", JWN Tempelhoff (ed), *African water histories: Trans-disciplinary discourses* (Vanderbijlpark, Creda Printers, 2005), p . 111.

Legislation prior to April 1994

The primary water laws of significance in South Africa (such as the Cape Colony) were the Right of Passage of Water Act 24 of 1876 (which provided access over land to another person entitled to use water from a source) and the Water Act of 1899 (regulation of entitlements). The legislatures attempted to codify guidelines to deal with typical administration and water conservation problems encountered in matters relating to public water through the Irrigation Acts 32 of 1906 and 27 of 1908.⁶ In 1910 the country's colonies and republics were constituted as a Union.⁷ The Conservation of Waters Act 8 of 1912 was promulgated to codify the water laws of the respective territories. However, the Act soon became inadequate because it failed to cope with the social and industrial progress of the developing country. In 1950, a commission of inquiry into water law was appointed. The latter investigation led to the promulgation of the Water Act 54 of 1956 (WA) on 13 July 1956. Most of the principles of the Irrigation and Conservation of Waters Act 8 of 1912 were re-enacted in the WA.⁸

The WA dealt with the control, conservation and use of water in South Africa.⁹ Some of the basic principles of the WA were the acknowledgement of landownership and its concomitant water-use entitlements based on the traditional riparian water rights principle, as well as a differentiation between public and private water.¹⁰

One can see that the legislation in South Africa underwent a continuous process of change. Thus, for example, the WA was updated in 1972, 1975, 1984, 1986, 1987, 1988, 1990, 1991, 1993, 1995 and 1997 before it was rewritten in 1998.¹¹

Legislation since April 1994

In April 1994 the ANC won the first democratic election in South Africa and

6 H Thompson, *Water law: A practical approach to resource management & the provision of services* (Cape Town, Juta & Co, Ltd, 2006), p. 51.

7 H Giliomee & B Mbenga, *Nuwe Geskiedenis van Suid-Afrika* (Cape Town, Tafelberg, 2007), pp. 231-232.

8 H Thompson, *Water law...*, pp. 51, 61-62.

9 Union of South Africa, *Water Act 54* (Pretoria, Government Printer, 1956).

10 E van der Schyff & W du Plessis, "Securing the equitable and effective management of shared watercourses through the Public Trust Doctrine" (Paper, ELA Conference, Cape Town, November 2007).

11 PJ Aucamp, "n Dekade van demokrasie: omgewingsbestuur in 'n veranderende wêreld", (*Suid-Afrikaanse Tydskrif vir Natuurwetenskap en Tegnologie* 24, 1 & 2, 2005), p. 24.

became the government-of-the-day. It immediately emphasised that its RDP, as part of its political manifesto and foundation of all its new public policies, would be implemented and every effort be made to improve public service delivery in all three spheres of government. One of the four pillars of the RDP is ‘meeting basic needs’ of which access to basic water supply and sanitation services for all citizens of South Africa was made a priority.¹² Consequently, the former Minister of DWAF (Prof Kader Asmal), during May 1994, initiated a process to review all water-related legislation. The overall objective of this process was to change the South African water dispensation so that socio-economic demands and environmental management requirements would be met in as effective, efficient and economical a manner as possible, and equal access for all South Africans would be provided.¹³ See Table 1 for some examples of transformed government policies and legislation (in date sequence) in especially the water affairs environment of the country.

Table 1: Examples of water-related legislation in SA since April 1994

Year:	Act:	Summarised purpose and/or goal:
1994 (Nov.)	White Paper on Water Supply and Sanitation Policy.	This document is dedicated to the millions of SA’s citizens who struggle daily with the burden of not having the most basic of services. ¹⁴
1995 (Oct.)	Development Facilitation Act 67 of 1995.	Encouraging efficient and integrated land development, by promoting the integration of the social, economic, institutional and physical aspects of development. ¹⁵

12 DWAF, “A history of the first decade of water service delivery in South Africa, 1994 to 2004” (Pretoria, June, 2004), p. 4.

13 GJ Pienaar & E van der Schyff, “The history, development and allocation of water rights in South Africa”, JWN Tempelhoff (ed), *African water histories: Trans-disciplinary discourses* (Vanderbijlpark, Creda Printers, 2005), p. 263.

14 Republic of South Africa (RSA), *White Paper on Water Supply and Sanitation Policy* (Pretoria, Government Printer, 1994).

15 G van der Waldt, *Municipal management: Serving the people* (Cape Town, Juta & Co, Ltd, 2007), p. 97.

1995 (Nov.)	National Sanitation White Paper.	It recognises that all South Africans have equal rights to a healthy environment and that this should be addressed. Unfortunately DWAF cannot do it alone. Assistance from other role-players is needed in an integrated approach to management of additional aspects from the economic, social and physical environments. ¹⁶
1995 (Nov.)	White Paper on the Transformation of Public Service.	To establish a policy framework to guide the introduction and implementation of new policies and legislation aimed at transforming the South African public service. ¹⁷
1996 (Nov.)	Local Government Transition Second Amendment Act 97 of 1996.	This Act requires all municipalities to prepare integrated development plans (IDPs) as part of the municipal government planning process. ¹⁸
1996 (Oct.)	Constitution of the Republic of South Africa Act 108 of 1996.	This is the supreme law of the Republic, which embraces the human rights principles and sets forth the right of access to water as part of a lengthy list of social and economic rights. These include, <i>inter alia</i> , the right to a healthy environment, housing, health care, food, social security, education and culture. ¹⁹
1996 (Apr.)	‘Water law principles.’	A set of principles submitted by various role-players and stakeholders which guided DWAF in drafting a new water act. ²⁰
1997 (Oct.)	Local Government Green Paper.	This puts forward a vision for a developmental local government system in SA. ²¹
1997 (Oct.)	White Paper on Transforming Public Service Delivery (better known as the <i>Batho Pele</i> White Paper).	This seeks to introduce a fresh approach to service delivery: an approach which puts pressure on systems, procedures, attitudes and behaviour within the Public Service and reorients them in the customer’s favour, an approach which puts the people first. ²²

16 RSA, *National Sanitation White Paper* (Pretoria, Government Printer, 1995).

17 RSA, *White Paper on the Transformation of Public Service* (Pretoria, Government Printer, 1995).

18 G van der Waldt, *Municipal management...*, p. 97.

19 RSA, *Constitution Act 108* (Pretoria, Government Printer, 1996), Sections 24, 26, 27, 29 and 31.

20 RF Fuggle & MA Rabie, *Environmental management...*, p. 834.

21 RSA, *Green Paper on Local Government* (Pretoria, Government Printer, 1997).

22 RSA, *White Paper on Transforming Public Service Delivery* (Pretoria, Government Printer, 1997).

1997 (Dec.)	Water Services Act 108 of 1997.	To provide for, <i>inter alia</i> , the rights of access to basic water supply and basic sanitation, the setting of national standards and of norms and standards for tariffs, water services development plans, establishment of water boards, monitoring of water services, and financial assistance to water services institutions. ²³
1998 (Mar.)	Local Government White Paper.	This establishes the basis for a new developmental local government system, which is committed to working with citizens, groups and communities to create sustainable human settlements which provide for a decent quality of life and meet the social, economic and material needs of communities in a holistic way. ²⁴
1998 (Jul.)	Local Government: Municipal Demarcation Act 27 of 1998.	To provide for criteria and procedures for the determination of municipal boundaries by an independent authority. ²⁵
1998 (Aug.)	National Water Act 36 of 1998.	The Act recognises that water in SA is a scarce and unevenly distributed national resource which belongs to all its inhabitants and that the National Government is responsible for the nation's water resources and their use. This should be attained in a sustainable manner by means of, <i>inter alia</i> , integrated water catchment management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate. ²⁶
1998 (Nov.)	National Environmental Management Act 107 of 1998.	To provide for co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for coordinating environmental functions exercised by organs of state. ²⁷

²³ RSA, *Water Services Act 108* (Pretoria, Government Printer, 1997).

²⁴ RSA, *Local Government White Paper* (Pretoria, Government Printer, 1998).

²⁵ RSA, *Local Government: Municipal Demarcation Act 27* (Pretoria, Government Printer, 1998).

²⁶ RSA, *National Water Act 36* (Pretoria, Government Printer, 1998).

²⁷ RSA, *National Environmental Management Act 107* (Pretoria, Government Printer, 1998).

1998 (Dec.)	Local Government: Municipal Structures Act 117 of 1998.	To provide for the definition and establishment of municipalities in accordance with the requirements relating to categories and types of municipalities and provide for an appropriate division of functions and powers between the categories of municipalities. ²⁸
2000 (Nov.)	Local Government: Municipal Systems Act 32 of 2000.	To enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all. ²⁹
2001	IDP Guide Packs	Department of Provincial and Local Government has produced guide packs to assist municipalities with the integrated development planning process needed to produce IDPs. ³⁰
2003 (Sep.)	Strategic Framework for Water Services.	To map out a vision for how the water sector as a whole will work in providing water services.
2004 (Feb.)	Local Government: Municipal Finance Management Act 56 of 2003.	To secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. ³¹
2005 (Aug.)	Intergovernmental Relations Framework Act 13 of 2005.	To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations. ³²

From Table 1 it is noticeable that the change in government since April 1994 has produced an overall and extensive revisit of existing executive public

28 RSA, *Local Government: Municipal Structures Act 117* (Pretoria, Government Printer, 1998).

29 RSA, *Local Government: Municipal Systems Act 32* (Pretoria, Government Printer, 2000).

30 G van der Waldt, *Municipal management...*, p. 99.

31 RSA, *Local Government: Municipal Finance Management Act 56* (Pretoria, Government Printer, 2003).

32 RSA, *Intergovernmental Relations Framework Act 13* (Pretoria, Government Printer, 2005).

policies in the new government's quest to improve the level of development of the country as a whole.

Nature and extent of the new restructured local government sphere

Before the nature and extent regarding the transformation of the national water Acts are analysed, the new municipal structures and major public policies in place in the South African democratic local government sphere will be highlighted.

Background

The local government sphere elections on 5 December 2000 ushered in a new system of local governance in South Africa. The newly structured and empowered local government sphere has been granted some degree of autonomy and expanded responsibilities (a shift to developmental local government).³³ Prior to this date the municipalities were characterised by racial segregation, unequal allocation of resources and unequal delivery of basic services. Communities from previously disadvantaged areas had been subjected to discrimination and degrading living conditions. The legal and administrative structures inherited by the current Government did not serve the broad population of all the municipalities. Public participation – now a constitutional requirement – was non-existent.³⁴ Consequently, all decision-making concerned with service delivery was taken on behalf of the majority. In order to ensure that real integrated economic development and improved basic services are delivered effectively and efficiently to the under-served communities, the municipal boundaries have been re-demarcated, newly merged municipalities with new organisational structures and policies have been formed and organisational arrangements incorporated for more accessible and transparent citizen participation.³⁵

The main objectives of an early 21st century municipality in South Africa are to give effect to the provisions of the Constitution and priority to the basic needs of the local community which it is expected to serve, to promote the development of the local community, and to ensure that all members thereof have access to the minimum level of basic municipal services.³⁶ In the developing South African context the

following demarcated and categorised municipalities have been identified:

- Six Category A municipalities (metropolitan municipalities) (e.g. City of Tshwane Metropolitan Municipality);
- 231 Category B local municipalities (e.g. Polokwane Local Municipality); and
- 47 Category C district municipalities (e.g. Capricorn District Municipality of which the Polokwane Local Municipality is a part).³⁷

A transformed local government sphere

The Department of Local Government's (DPLG) revived public policy process resulted in the introduction of the Local Government Green Paper in September 1997, the Local Government White Paper in March 1998, the Local Government: Municipal Structures Act 117 in December 1998 (defining a clear set of powers and functions for District and Local Municipalities, in establishing strong city governments with boundaries that generally encompass the functional region of the major urban centres) and the Municipal Systems Act 32 in 2000. The last-mentioned Act formalises the process by which municipalities structure and select appropriate arrangements for actually delivering public services, modernising their administration and through more effective intergovernmental relations establish a new relationship between government and the citizens in line with the transformed overall governance ethos in 2000.³⁸ These restructuring actions paved the way for the development of municipalities that could fully assume their water service delivery responsibilities in a more effective, efficient and economical manner.

Stipulations in the NWA require municipalities (referred to as WSAs) to also prepare water services development plans for their respective areas of jurisdiction. This must be done as part of a more effective local governance process of preparing their integrated development plans (IDPs) in terms of the Local

33 H Fast & B Engelbrecht, "Local government transformation: A guide for health workers" (Kwik-Skwiz 18, April 1999), p. 2.

34 M Motshekga, "Lessons to be learned from the 19th century on governance, which could enhance our current leadership in the development of local government sector".

35 DL Craythorne, *Municipal administration: The handbook* (Cape Town, Juta & Co, Ltd, 2006), pp. 51-54.

36 DL Craythorne, *Municipal administration ...*, p. 159.

37 RSA, *Local Government: Municipal Demarcation Act 27*.

38 C Thornhill (Ed), LP Malan, MJ Odendaal, FM Mathebula, HG van Dijk, & D Sello, *An overview of intergovernmental relations in Africa (SADC)* (Pretoria, SAFPUM Publishers, 2002).

Government: Municipal Systems Act 32 of 2000.³⁹ Municipalities must comply with the compulsory national standards prescribed by the Minister of DPLG.

The NWA also formalises the policy of Free Basic Water (FBW) access rights contained in the Water Services Act 108 of 1997 in the innovative provisioning by local government institutions of a national water reserve – for basic human need and ecological integrity – that overrides existing riparian rights.⁴⁰ The FBW policy targets the water needs of the most impoverished citizens by guaranteeing each household a free minimum quantity of six kilolitres of potable water per month. These regulations are based on the assumption that each individual person needs 25 litres of water per day. The amount of free water is the same for every household, irrespective of wealth and number of persons comprising it. The FBW policy is perceived as a vehicle for expedient delivery of potable water by the South African Government within the context of the Constitution and the fundamental rights to basic public services.⁴¹

Based on the aforementioned requirements it by 2002 became clear that the 1994 White Paper on Water Supply and Sanitation Services had become outdated. The Strategic Framework for Water Services was drafted and approved by Cabinet in September 2003. This framework maps out a vision of how the water sector as a whole should operate to provide water services, and addresses the full spectrum of water supply and sanitation services by all relevant institutions. Examples of basic public service delivery targets in the Strategic Framework for Water Services are:

- hygiene education and the wise use of water to be taught in all schools by 2005;
- all schools have adequate and safe water supply and sanitation services by 2005;
- all bucket toilets are eradicated by 2006;
- all clinics have adequate and safe water supply and sanitation services by 2007;
- all people in SA have access to a functioning basic water supply facility by 2008;
- all assets of water services schemes transferred to municipalities by 2008; and

³⁹ RSA, *Local Government: Municipal systems Act 32*.

⁴⁰ S Stein, "Water sector reforms in Southern Africa: Some case studies", A Turton and R Henwood (eds), *Hydropolitics in the developing world: A Southern African perspective*, Chapter 9.

⁴¹ RSA, *Reconstruction and Development Programme White Paper* (Pretoria, Government Printer, 1994).

- an end to the sanitation backlog by 2010.⁴²

The Strategic Framework for Water Services confirms that DWAF is the custodian of the country's water resources and overall leader of the water sector.

However, the Department will no longer be directly involved in operating any water services infrastructure or fund any new infrastructure. It will, however, continue to set the policy frameworks, and oversee and regulate the activities of all water service institutions in South Africa.⁴³ This decision is worrisome in the light of the numerous reported cases of polluted water services delivered during 2007 and the severe outbreaks of diarrhoea and subsequent deaths which have been registered.⁴⁴ In the light of the above one can not but agree that South Africa's current system of local government is not functioning well for several reasons: lack of political will and clear delineation of functions, poorly trained municipal employees and ensuing community protests.⁴⁵

Analysis of the nature and extent of the 1956 and 1998 Water Acts regarding transformation

In the following discussion of the 1956 and 1998 Water Acts of South Africa regarding water supply services at the local government sphere, the nature and extent of the two Acts will be described as well as analysed with reference to the manifestation of change and differences between them.

The Water Act 54 of 1956 (WA)

The nature of the WA's regulating of potable water supply by and to municipalities will be described according to general background aspects, typical legislative characteristics, structures, constraints and general conclusions. These will then at the end of the analysis be used as a basis for comparison.

42 DWAF, "Case study on Masibambane Water Services Sector support programme", (Pretoria, November, 2003).

43 DWAF, "A history of the first decade...", p.18.

44 [WWW.mg.co.za/article/2007-11-09](http://www.mg.co.za/article/2007-11-09), "Over 500 suffering from diarrhoea in Delmas", (*Mail & Guardian*, 2007), 9 November 2007; [WWW.mg.co.za/article/2008-05-31](http://www.mg.co.za/article/2008-05-31), "Poor hygiene blamed for E Cape diarrhoea deaths", (*Mail & Guardian*, 2008), 31 May 2008; Anon., "Lyk dryf dae in water", (*Potchefstroom Herald*, 2008), 23 May 2008.

45 M Motshekga, "Lessons to be learned from the 19th century...", (Paper, Local Government SETA, Boksburg, March 2008), p. 5.

Background

The Irrigation and Conservation of Waters Act 8 of 1912 was the first water law in South Africa after the country became a Union in 1910. It was regarded as a codification of the Roman-Dutch *dominus fluminis* principle (the state being the owner of the water flowing in a river), as well as the English land law system of riparian landownership.⁴⁶ The Act did not provide for legal principles to deal with the dry weather, limited water and the increasing social and industrial needs of the developing country. In 1950, a commission of inquiry into water law was appointed. The latter investigation led to the promulgation of the Water Act 54 of 1956 (WA) on 13 July 1956.⁴⁷

The name of the then Department of Irrigation was changed to the Department of Water Affairs (DWA) to reflect the broadened scope of its functions. Most of the principles of the Irrigation and Conservation Waters Act 8 of 1912 were however re-enacted in the WA. In April 1993 the Department's name changed again to the Department of Water Affairs and Forestry (DWAF).⁴⁸

Legislative characteristics

The WA dealt with the control, conservation and use of water in South Africa. Some basic principles of the WA were the acknowledgement of landownership and its concomitant water-use entitlements based on the traditional riparian water rights principle, as well as a differentiation between public and private water. Public water belonged to the State (*dominus fluminis* = owner of the water flowing in a river). The public water was further differentiated into the normal flow and surplus water flow of the river. Private water was all the water found on the land of privately owned ground of which the owner had the sole and exclusive use and enjoyment.⁴⁹ The WA enabled access to public water to a minority dominant group of people that had privileged access to land and therefore economic power. Water as a basic human right was not recognised.⁵⁰

At the time of the drafting of the WA as well as its implementation, the South African population was smaller and geographically more widely

46 H Thompson, *Water law...*, p. 35.

47 E van der Schyff & W du Plessis, "Securing the equitable...", (Paper, ELA Conference, Cape Town, November 2007).

48 Interview, Mr Schalk Bruwer (Law Directorate, DWAF) / Dr EJ Nealer (Researcher), 27 August 2008.

49 H Thompson, *Water law...*, p. 90.

50 DWAF, "Guide to the National Water Act", (Pretoria, Anon), p. 9.

dispersed (establishment of self-governing homelands and territories) with much less pressure on the physical environment and the water resources. Agriculture was the most important focus of the water policy prior to 1998. This led to the discriminatory benefit of farmers and landowners. The WA also focused more on water use and the development and building of dams than on water protection, conservation and demand management.⁵¹

Implementation structures

The implementation of the aforementioned public policy placed additional public water administration demands on the country's water resources and the Government's attempts to address the ever-increasing needs for potable water in the developing South Africa in a more effective, efficient and economical manner. The water-use rights were administered and regulated by mechanisms determining and obtaining entitlements and permission to construct, alter, enlarge or use a water works to enable a person to exercise a water entitlement to the use of surface water identified in flowing rivers and streams (public water).

Entitlements to the use of public water by riparian landowners were in numerous instances indefinable in terms of units of measurement and reliability. Entitlements to extract and store water were dependent on whether the water in the water resource concerned was private or public. If public, it had to be established whether it was normal flow or surplus surface water flow.

Riparian land was a significant concept since, historically, only the owners thereof were entitled to the water of a public stream. It did not matter how small or big the property was and subdivision of the land did not affect its status as riparian land. The riparian landowner had the exclusive right in respect of water running over his/her land. However, he/she was disallowed from using water to the detriment of other owners with similar rights. Non-riparian owners could procure rights in respect of private streams in the form of servitudes (a right that a person has over the property belonging to another to dam or store water on or lead water over that property). These rights were incorporeal rights (a benefit granted to someone without profit for the grantor).⁵²

⁵¹ DWAF, "Guide to the National Water Act", p. 9.

⁵² H Thompson, *Water law...*, pp. 31-32.

Water courts could be established in terms of the WA. Six water courts were established, each with jurisdiction over a certain geographical area (Sec 34(1)(c) WA). The Minister of DWA could at any time apply to or institute a suit in a water court relating to a matter in which a water court had the power to take any action or to do anything, if it was in the public interest.⁵³

The WA gave local authorities the power to provide and maintain water supply schemes. A local authority owning land had the same entitlements to public and private water as other persons owning land. Through its elected town councils they were responsible for, *inter alia*, the provision and maintenance of water, electricity, and public roads.

Constraints

Many public administration problems were experienced in interpreting and applying the basic principles of the WA and coming to terms with the undemocratic, discriminating and centralised approach where Government alone made all the water affairs decisions. For example, in some instances, it was difficult to determine whether a specific river was a private system, a public stream, a tributary of another public stream or a source of a public stream. For example, was the water abstracted from the alluvial sand next to a river (riverbank) abstracted from the river? If yes, the water was public water. If no, it was private water. It was also possible that a mixture of public and private water could be abstracted or that the water could flow underground in the alluvial sands and geological bedrock of the river. It can therefore be deduced that some water disputes could have been expensive and technically difficult to resolve.

Another major problem-area identified during the implementation of the WA by DWA was that too many other national, provincial and local authorities were empowered with control over water resources which usually was not in unison with that of the Department and that a poor understanding of the South African hydrology prevailed when the water law was developed.⁵⁴ The WA dealt mainly with flowing surface water which excluded wetlands and groundwater from the responsibility of the Department. Another important detrimental effect of the Act was that no provision was made for the more effective and efficient conservation of water catchments in their entirety (by means of a

⁵³ Union of South Africa, *Water Act 54...*, .

⁵⁴ RF Fuggle & MA Rabie, *Environmental management ...*, p. 834.

holistically integrated water management process). The rapid urbanisation and industrialisation in the country during the first half of the 20th century also placed unforeseen demands on the country's water resources and subsequently could not be accommodated by the traditional riparian rights principle of the Act.

The WA also classified private and public water separately according to the apartheid riparian principle, interlinking an incursive colonial system of landownership with water resources dealt with under separate specific rules. This applied to both ground (private) and surface water (semi-private) resources.⁵⁵ Normal and 'surplus' surface water flows were defined with surplus, for example, flood water, allocated according to the capacity of individual riparian owners to retain the resource.⁵⁶ Another feature of the WA was the issuance of water licensing in perpetuity. Prior to the promulgation and implementation of the NWA, the riparian land principle facilitated agricultural development specifically for the white farmers. This is illustrated by the statutory Irrigation Boards being placed under the administration of the then Department of Agriculture. Following the democratic reforms after 1994, the DWAF has the mandate to limit and control land-use that could impact on water availability and to allocate water rights for fixed periods that may not exceed 40 years.⁵⁷

During the implementation of the WA, four national states (Transkei, Bophuthatswana, Venda and Ciskei), as well as six self-governing territories (Lebowa, KaNgwane, KwaNdebele, Gazankulu, KwaZulu and QwaQwa) were created which were legally and politically independent from the remainder of the country and could arrange their matters as they wished. Water resource management was not a priority in these areas because the focus was more on water service delivery for basic human needs.⁵⁸

Outcome

The problematic and discriminatory effects of the WA described above could not be tolerated in the changing and highly politicised South African environment. This led to the promulgation of the NWA which added to the

55 S Stein, "Water sector reforms...", Chapter 9.

56 Geo-Data Institute, "Water resource based institutional structures in the IWRMS study nations: South Africa, Swaziland, Zimbabwe" (University of Southampton, 2002).

57 RSA, *National Water Act 36*.

58 H Thompson, *Water law...*, pp. 124-125.

effective liberation of the country from a separatist governmental dispensation to one where water is perceived, governed and managed as a national and natural resource belonging to all the citizens of the country.

The National Water Act 36 of 1998 (NWA)

Following on the above description of the nature and extent of the WA, the description of the subsequent NWA will identify aspects which will be indicative of the order of transformation encompassed in the NWA.

Background

One of the more difficult and pressing challenges inherited by the new democratic government in South Africa was the provision of adequate water services to all its inhabitants. Prior to 1994, an estimated 30-40 per cent of the country's population (approximately 14 to 18 million people) was without adequate water supply services and about 21 million people were without adequate sanitation.⁵⁹ Furthermore, in the rural areas where water supply existed, the quality of the drinking water was often of a poor quality and could not be considered safe for human utilisation and consumption.

In comparison with the WA discussed in the previous section, the objective of the NWA is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account factors such as:

- meeting the basic needs of present and future generations;
- promoting equitable access to water;
- promoting the efficient, sustainable and beneficial use of water in the public interest;
- facilitating social and economic development and protecting aquatic and associated ecosystems and their biological diversity.⁶⁰

The authors of this article are of the opinion that the legislators of the Act should have also included the highly specialised geo-hydrological activities of identifying, surveying and mapping (demarcating) the nature and extent of a

⁵⁹ LH Van der Merwe, "Climbing South Africa's water services ladder: Safe drinking-water through regulatory governance", *Water Sewage and Effluent*, 23(5), 2003, pp. 50-51.

⁶⁰ RSA, *National Water Act 36*.

specific water resource before it can be protected, used, developed, conserved, managed and controlled.

Legislative characteristics

With what has been mentioned in mind, four basic principles can be identified as underlying the water resource management strategy set out under the NWA. Firstly, the Act rests on the principle of the unity of the hydrological water cycle (see Fig. 1 in Introduction). It does not make a distinction between surface and groundwater and subsumes all water resources including watercourses, surface water, estuaries and aquifers, recognising that they are all associated with each other.

The Act further emphasises the fact that water management strategies must be based on the principle of integrated management in order to achieve sustainability, equity and efficiency.⁶¹ According to DWAF, integrated water resource management is a process for the co-ordinated planning and management of water, land and environmental resources. The process takes into account the amount of available water (surface and groundwater), water use, water quality, environmental and social issues as an integrated whole to ensure sustainable, equitable and efficient use.⁶² A key aspect of integrated water resource management is the participation of all role-players and stakeholders in decision making where decisions are decentralised. Role-players are the custodians of the water resources, water resource developers, regulators, water services providers, and water users, affected and interested persons. They are, therefore, all persons and bodies involved in making public decisions on water affairs. Stakeholders, on the other hand, are those persons and bodies that have an interest in or are affected by public decisions. The role-players include the stakeholders.⁶³

A second principle that buttresses the NWA is that South Africa's water resources are managed through a public trust between the National Government of South Africa and its citizens, which is created to replace private ownership of water. Public trusteeship means the Minister of DWAF has authority over

61 Commission on Sustainable Development [hereafter CSD], Resolution 13/1: "Policy options and practical measures to expedite implementation in water, sanitation and human settlements", Report on the thirteenth session, 30 April 2004 and 11-22 April 2005, UN Doc. E/2005/29 and E/CN.17/2005/12 (2005).

62 DWAF, "Integrated catchment management", (Pretoria, 2008), p. 15.

63 DWAF, "A history of the first decade...., 2004.

water throughout the country. Water is a natural resource that belongs to all the people. As a public trustee of the nation's water resources, the Minister is responsible for the public interest and must ensure that all water in the country is managed for the benefit of all its inhabitants, including future generations.⁶⁴

Thirdly, the NWA bases the comprehensive protection of all water resources on the need to protect basic human and ecological needs. For this purpose, it creates the so-called 'Reserve', which is meant to fulfil the constitutional right of all South Africa's citizens of access to water. The Reserve consists first of a basic humans need reserve, which provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene and secondly of an ecological reserve, which relates to the water required to protect the aquatic ecosystems of the water resource. This is the only right to water found in the NWA and it has priority over all other water uses. Consequently, the amount of water required for the reserve must be ensured before water resources are allocated to other water users.⁶⁵

Lastly, the NWA dissociates water rights and land ownership. It replaces the previous riparian system of allocation under the WA which linked water rights to land ownership, with a compulsory licensing system (regulated by the implementation of the NWA) to achieve more equitable water redistribution to the whole population. The dissociation of water use claims and land ownership is necessary in ensuring that those citizens not owning or controlling land have equal access to and use of water. An existing lawful water use, with any conditions attached, is recognised, but may continue only to the extent that it is not limited, prohibited or terminated by the NWA. A licence is not required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued, it becomes the source of authority for the water use. If a licence is not granted the use is no longer permissible.⁶⁶

From the aforementioned discussion it can be stated that since 1994, South Africa has taken a major leap towards macro-transformation of its water affairs and local government legislation. In 1998 it adopted a progressive law and policy framework regarding public water, which is based upon the

64 E van der Schyff & W du Plessis, "Securing the equitable..."

65 H Thompson, *Water law ...*, p. 294.

66 RSA, *National Water Act 36*.

constitutional recognition of the right of access to water. Internationally, South Africa is also one of few countries that acknowledge water as a human right.⁶⁷

Implementation structures

Contemporary water reforms place equity and sustainability at the centre of integrated water resource management with attempts to redress the historic legalised exclusion of the majority of South Africans. In this regard, the political landscape of water is largely synonymous with challenges surrounding the issue of land reform. The Constitution binds all three spheres of government to realise the right of access to water. The Minister is assisted by DWAF to fulfil the role of public trustee by setting goals and monitoring and assessing the nature and extent of the country's water resources. DPLG is together with the provincial government institutions of all nine provinces responsible for the effective performance by municipalities of their functions, which include the provision of potable water and sanitation services. The municipalities must comply with the compulsory national water supply standards prescribed by the Minister of DWAF. A recurrent theme within the legal framework of water is the duty of consultation with the participation of local communities, with reference to the Bill of Rights laid down by the Constitution. The Bill of Rights places a duty on the State to respect, protect, promote and fulfil the right to water. This means that the State must not take any steps that interfere with people's access to water (for example cut water supplies to poor households for non-payment of bills). The responsibility for implementation of the FBW policy thus rests with municipalities who are responsible for the delivery of basic services on the grassroots level. FBW services must be financed from the local government equitable share which is a constitutionally required portion of the annual national budget allocated to municipalities, as well as through cross-subsidisation between users within a system of supply or water services authority areas where appropriate.⁶⁸

67 M Muller & J Lane, "The National Water & Sanitation programme in South Africa: Turning the right to water into reality", *Water & Sanitation Programme-Africa Region*, Johannesburg, 2 November 2002.

68 DWAF "Strategic Framework...", 2003.

Constraints

There have been concerns over the pace of establishing new policy executing institutions by DWAF, which reflects negatively on the Department's ability to effectively, efficiently and economically implement the NWA.⁶⁹ Thus, for example, the NWA requires that 19 Catchment Management Agencies (CMAs) be established as localised institutions to discharge the mandate of effective water resources management. The Act also calls for the establishment of Water User Associations (WUAs) and the transformation of the Irrigation Boards established in terms of the WA as repealed by the NWA. The most important objective of the WUAs is to ensure that transformation does take effect even at the lowest level of water management to benefit all concerned citizens.⁷⁰ The DWAF's management should revisit the restructuring, delegation, re-aligning of the institutional arrangements and communication media of all its geographically dispersed water management institutions and secondary units to ensure effective, efficient and economical water service delivery at the local government sphere. In conclusion one can see that the NWA has abolished the separatist ideals of privileged access to public water. It promotes water use in the interest of the public and the achievement of equitable and sustainable economic, social and physical development. In Table 2 below a summary is provided of the most prominent differences in characteristics, objectives and practical policy implementation between the WA and the NWA:

Table 2: Summary of most prominent differences

Water Act 54 of 1956 (WA)	National Water Act 36 of 1998 (NWA)
<i>Purpose & objectives:</i>	<i>Purpose & objectives:</i>
The control, conservation and use of water for domestic, agricultural, town and industrial purposes.	An enabling law to ensure that all water resources of SA are protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner.
Individual rights to water and its subsequent privileges acknowledged by the Government.	Individual rights toned down in favour of the public interest.

⁶⁹ DWAF, "Institutional Re-Alignment Project: Draft 1" (Pretoria, July, 2008).

⁷⁰ DWAF, "Institutional Re-Alignment...".

Acknowledgement by the Government of private landownership leading to the award, administration and maintenance of databases on the concomitant water-use entitlements based on the traditional riparian water rights.	Basic landownership and riparian principles illegal. Water belongs to all the inhabitants of the country.
The regulating and management of the WA only concerned with the public water which could be seen flowing in rivers.	All water (flowing, standing, marshes, fountains and groundwater) are now included under the concept 'water resources of the state'.
Legislative principles:	Legislative principles:
Landowners benefiting from the riparian principle have exclusive water-use rights and subsequent privileges and enjoyment.	No exclusive water-use rights to anyone. All inhabitants are equal with zero tolerance for discrimination.
Differentiation of the country's water into public and private water and the subsequent division of public water into normal and surplus flow water.	No distinction between private and public water. All water perceived as a natural and national resource kept in trust by the State and belonging to all inhabitants.
Implementation structures:	Implementation structures:
State = <i>dominus fluminis</i> (indisputable owner of the water flowing in a river). For the benefit of only a few privileged riparian landowners.	State = <i>dominus fluminis</i> of all surface and groundwater in the country. State is the Public Trustee for the benefit of all the inhabitants of the country.
No free basic potable water to households.	Since February 2001: formal adoption of Free Basic Water policy – minimum of six kilolitres free potable water per household – irrespective of wealth and number of persons comprising it.
Did not see the need for identification and management of geographical areas according to rainfall catchment areas.	Understanding of the need to manage the country's potable water supply in a holistic and integrated manner through the identification and management of rainfall catchment areas (rivers) demarcated according to DWAF's identified surface water drainage regions.

Implementation of the WA under the command of the previous National Party government did not see the need for liberating and transforming the government's public service delivery.	Focus on liberating the country and putting transformation high-up on the agenda of public service delivery.
<i>Problem areas:</i>	<i>Problem areas:</i>
Organisationally closed and inaccessible service rendered by Department of Water Affairs to only a selected group of consumers who did not have to understand the place and role of the hydrological water cycle in public water management.	Understanding of the place and role of the hydrological water cycle in water management for the benefit of the uninformed citizen.
Department of Water Affairs served only a selected group of consumers to whom they provided optimal participation, opportunities and relevant information.	Obtain and maintain optimal transparency on and access to water related information, as well as the participation of all role-players and stakeholders from the serviced communities.
The previous government did not focus on the facilitation of more effective environmental management and conservation.	Comprehensive protection and conservation of all water resources based on the basic human and ecological needs.
The WA was a product of inheritance which the South African Government utilised to service the minority of the country effectively.	A new product of a new government determined to transform South African society.
WA did not stipulate municipalities to act as WSAs or WSPs.	Structuring and management of WSAs and WSPs at the local government sphere.
<i>Contribution to change:</i>	<i>Contribution to change:</i>
Municipalities governed by the WA were not structured and empowered to facilitate and manage the supply of potable water to all its citizens.	Municipalities are empowered to take a leading role in the more effective, efficient and economical supply and management of potable water.

<p>The WA embraced and serviced only a selected population group.</p>	<p>This Act is an impressive legislative product of transformation in a dynamic public water supply environment in a developing country.</p>
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From Table 2 above the NWA can be perceived as a product of legislative transformation which will form the basis of the Government's enhancement of the basic potable water services supplied by the restructured local government municipalities of South Africa.

Conclusion

Research has shown that on the physical terrain of potable water supply, South Africa and its governmental executive role-players and stakeholders face challenges due to reliance on approximately 500 mm annual rainfall.

Historically, the change of government in 1994 has also generated the necessary impetus and vision towards transforming the previous governmental structures and public policies since the 1956 Water Act. This has enabled the ruling political party to implement the RDP manifesto more effectively, thereby attempting to ensure an improved and developing South African society by, amongst others, the development of a model-like Water Act in 1998.

Currently, one of the most important governmental vehicles to bring about more effective, efficient and economical public services delivery in South Africa are the 284 municipalities in the newly structured local government sphere. This is possible because they are the closest to the people. However, assistance is required from all role-players such as the private sector, community-based organisations and the stakeholders in the various communities regarding all water-related issues.

Fortunately, DWAF is the country's leading national government sphere public water policymaker, regulator, implementer, controller and sole custodian of potable water resources. The Department, which has revisited all its legislation and brought about a transformation in line with the political guidance from the ANC-led government, has been proactive in establishing urgent research and has implemented improved water management acts,

guidelines and procedures. This has been undertaken to protect, utilise, develop, conserve, manage and control the country's limited water resources in an effective, efficient and economical manner. The Department can be considered a transformed and leading water management institution tasked to bring about transformational results in South African society by means of the NWA.